

**LANDLORD AND TENANT:
RESPONSIBILITY FOR
STATE AND CONDITION
OF PROPERTY**



LAW COMMISSION
LAW COM No 238

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The Law Commission

(LAW COM No 238)

LANDLORD AND TENANT: RESPONSIBILITY FOR STATE AND CONDITION OF PROPERTY

**Item 5 of the Sixth Programme of Law Reform:
Landlord and Tenant**

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The terms of this report were agreed on 13 December 1995 when the Honourable Mr Justice Brooke was Chairman.

THE LAW COMMISSION

LANDLORD AND TENANT: RESPONSIBILITY FOR STATE AND CONDITION OF PROPERTY

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THE LAW COMMISSION

Item 5 of the Sixth Programme of Law Reform: Landlord and Tenant

THE LAW OF LANDLORD AND TENANT: RESPONSIBILITY FOR STATE AND CONDITION OF PROPERTY

To the Right Honourable the Lord Mackay of Clashfern, Lord High Chancellor of Great Britain

PART I INTRODUCTION

Introduction

- 1.1 An unemployed council house tenant in Pontypridd found that his council house was virtually uninhabitable because of condensation. This was attributable to a defect in the design of the property. The tenant's furniture, carpets, curtains and decorations were ruined by the damp. Although the landlord was under an implied statutory obligation to repair the structure and exterior of the premises, it was not liable for the tenant's loss, nor could it be compelled to remedy the defect. This was because the design defect did not constitute in law a "disrepair" for which it was responsible under its implied obligation.¹
- 1.2 A tenant of a property in Nunhead, Peckham, found that her flat was infested with cockroaches. She had to throw away a great deal of food, and her carpets and furniture were damaged. The infestation was terminated - five years after it had begun - when the local authority, under powers conferred by the Public Health Act 1936, required the landlords to take steps to put an end to it. In proceedings brought by the tenant, it was held that she had no remedy against her landlord for the inconvenience and loss which she had suffered. If there had been grounds for her claim, her damages would have been assessed at £10,000.²
- 1.3 Had either of these situations occurred forty years earlier, the tenant would almost certainly have had at least a claim in damages for his loss.³ This was because of a statutory obligation imposed upon landlords to keep dwellings let at modest rents reasonably fit for human habitation. The legislation that would have given that remedy is still on the statute book - what is now section 8 of the Landlord and Tenant Act

¹ *Quick v Taff Ely Borough Council* [1986] QB 809; see below, para 5.15. Because he was a council tenant, the plaintiff may have had no remedy under the provisions of the law on public health that regulate unfit properties: see below, para 4.48.

² *Habinteg Housing Association v James* (1994) 27 HLR 299; see below, para 4.55.

³ See below, paras 4.11 - 4.12; 4.20 - 4.27. Specific performance of a landlord's obligations to repair or maintain would probably not have been decreed in the 1950s, but could be so now: see below, para 9.14.

1985⁴ - though it has come to have little if any application because it is tied to rent limits that have remained virtually unchanged since 1957.⁵ In the second of the two cases outlined above, Staughton LJ, commenting on the unsatisfactory outcome, said—

We are told that the Law Commission has been considering such a problem. It is to be hoped that they will recommend a solution. What is more, it is to be hoped that if they do, Parliament will carry it out. Judges and lawyers are sometimes reproached when the law does not produce the right result. There are occasions when the reproach should be directed elsewhere.⁶

1.4 In our Sixth Programme of Law Reform,⁷ we recommended that no further work should be carried out in the field of landlord and tenant “in view of the backlog of unimplemented reports”, though we would be the first to acknowledge that much new and important work remains to be done. This report is therefore likely to be our last on landlord and tenant law, at least under the Sixth Programme. In it, we make recommendations for the reform of certain aspects of the law which governs the obligations of parties to a lease to repair and maintain the property which is let.

1.5 The two cases which we have described above indicate that there are serious shortcomings in the law which governs the repair and maintenance of leasehold property. In this report we explain how the law presently regulates these matters and we make proposals for reform. The effect of our two principal recommendations if implemented, will be as follows.

- (i) On the grant of a lease, the parties to it will have to consider how the responsibility for the repair of the property let is to be allocated between them and then make express provision accordingly. If they do not, the burden will fall on the landlord.
- (ii) On the lease of any house for habitation for a period of less than seven years, it will be an implied term of that lease that the landlord will ensure that the property is and will be kept throughout the lease fit for human habitation.

We make two other recommendations. The first is that both landlords and tenants should have the right to seek the discretionary remedy of specific performance to

⁴ See below, para 4.2.

⁵ See below, para 4.3.

⁶ *Habinteg Housing Association v James*, above, at p 306.

⁷ (1995) Law Com No 234, p 30.

enforce the other party's repairing obligations in the lease. The second is that those who are in lawful occupation or possession of property belonging to another should be subject to a code of basic obligations as to the manner in which they treat those premises.

- 1.6 This is the third occasion on which the Commission has considered possible reforms to the law on repairing liability in leases. The recommendations in the first of our two previous reports, *Civil Liability of Vendors and Lessors for Defective Premises*,⁸ were enacted in part by section 4 of the Defective Premises Act 1972.⁹ Our second report, *Obligations of Landlords and Tenants*, has not been implemented.¹⁰ In it, we proposed that there should be implied into any lease of a dwelling let for less than seven years, an overriding landlord's covenant to repair the structure and exterior of the dwelling, and in other leases, a series of variable repairing covenants.¹¹

Defects in the present law

- 1.7 In March 1992, we issued a consultation paper, *Landlord and Tenant: Responsibility for State and Condition of Property*.¹² In it we identified a number of unsatisfactory features of the law regulating the responsibilities of landlord and tenant for the repair and maintenance of leased premises (other than agricultural holdings).¹³ We noted four principal defects in the law.¹⁴

- 1.8 The first defect was the absence of a satisfactory standard which has to be met by leased premises.¹⁵ We explain in Part II of this report that a duty to repair is a limited obligation and does not include, for example, improvements. Even where, under the provisions of a lease, a landlord is fully responsible for repairs to the premises which are let, he is under no obligation to ensure that they are fit for their intended purpose.

⁸ (1970) Law Com No 40.

⁹ Under this section, landlords who are under a repairing obligation or who have a right to do repairs to premises let are under a general duty of care in relation to the risk of injury or damage resulting from a failure to perform the obligation or to exercise the right: see below, para 5.22. Our other recommendation - that landlords should be under a general duty of care in respect of defects which might result in injury to persons or damage to property and which were actually known to them at the date on which the property was let - was not implemented.

¹⁰ (1975) Law Com No 67.

¹¹ *Ibid*, paras 136 - 152.

¹² Consultation Paper No 123.

¹³ Agricultural holdings were expressly excluded from the ambit of our paper: *ibid*, para 1.13. It should be noted that in this report we make one recommendation that will apply to agricultural holdings: see below, para 9.31.

¹⁴ *Ibid*, para 1.2.

¹⁵ *Ibid*, paras 3.3 - 3.19.

“[D]isrepair is related to the physical condition of whatever has to be repaired, and not to questions of lack of amenity or inefficiency”.¹⁶

1.9 The second defect that we identified was the absence of any legal requirement that the responsibility for the repair of the property should be specifically allocated.¹⁷ In particular, neither party may be under any express or implied obligation to carry out repairs.¹⁸

1.10 Even where this not the case, responsibility for repair may rest where it may not have been intended to lie. In particular the parties’ respective responsibilities (if any) for the repair of common parts and of other property retained by the landlord, have in practice proved to be troublesome. Some of these problems may be solved on an ad hoc basis by the implication of terms, but this cannot be regarded as a satisfactory alternative to clearly defined rules, especially as the circumstances in which such an implication can be made are limited.¹⁹ The position has been alleviated by statute in relation to leases of dwelling-houses for terms of less than seven years,²⁰ but not in other cases.

1.11 Although there are express statutory provisions which allocate the responsibility for repairs between landlord and tenant,²¹ the one which could achieve the greatest improvement in the quality of housing - the implied obligation that properties let for human habitation at a low rent should be fit - is in practice redundant.²²

1.12 The third defect was that the remedies for the enforcement of express or implied repairing obligations were not always effective to ensure that the necessary repairs were carried out.²³ We identified a number of examples of this, of which the most striking

¹⁶ *Quick v Taff Ely Borough Council* [1986] QB 809, 818, per Dillon LJ.

¹⁷ Consultation Paper No 123, paras 3.20 - 3.29.

¹⁸ See *Demetriou v Robert Andrew (Estate Agencies) Ltd* (1990) 62 P & CR 536, 544- 545; below, para 3.16.

¹⁹ See below, paras 3.11 - 3.17.

²⁰ See Landlord and Tenant Act 1985, s 11(1A)(inserted by the Housing Act 1988, s 116(1)), which extends the landlord’s duty of repair to other parts of the building in which he has an estate or interest. The sub-section also extends his obligation to keep in repair installations to cover those which directly or indirectly serve the dwelling-house and which either form part of the building in which the landlord has an estate or interest or are owned by him or are under his control. See below, para 5.4.

²¹ Landlord and Tenant Act 1985, ss 8 - 15; set out in Appendix B. For a detailed consideration of these provisions, see below, Parts IV and V.

²² See below, para 4.3.

²³ Consultation Paper No 123, paras 3.30 - 3.34.

concerned the availability of the remedy of specific performance.²⁴ Although a court has both a statutory²⁵ and an inherent²⁶ jurisdiction to decree specific performance of a *landlord's* repairing obligations in proceedings brought by the tenant, a landlord is said to have no corresponding right against the tenant.²⁷

- 1.13 The fourth defect that we noted was that the accretion of rules, both common law and statutory, had led to the creation of a body of law that lacked clarity and where there was often an overlap of remedies.²⁸ We drew particular attention in this regard to the ancient and arcane law of waste which, when applicable, imposes tortious liability on a tenant. This overlaps to some extent with the tenant's implied obligation to use the property in a tenantlike manner. It is not certain whether a tenant can be liable for waste where he is under an express contractual obligation to repair.²⁹ While we would not pretend that the law of waste is a matter of great day-to-day importance, it is one of the functions of this Commission to modernise the law and remove anomalies, and our examination was prompted by that consideration. Furthermore, as we explain, there are certain types of relationship where the law of waste may at present provide the only means of redress against an occupier of the land.³⁰

Referral by the Department of the Environment

- 1.14 In June 1989, the Department of the Environment issued a consultation paper on the implied repairing obligations under the Landlord and Tenant Act 1985.³¹ This paper posed questions about what might be done in relation to the implied statutory covenant that a house should be fit for human habitation.³² As we have already explained,³³ this covenant is presently implied into leases which are let at rents so low that it seldom if ever arises. Of the 12 replies to the paper, 8 considered that the rent limits should be prospectively scrapped altogether, while 2 considered that they should

²⁴ See below, Part IX.

²⁵ Landlord and Tenant Act 1985, s 17; below, para 9.14.

²⁶ *Jeune v Queens Cross Properties Ltd* [1974] Ch 97; *Francis v Cowcliffe Ltd* (1976) 33 P & CR 368; *Tustian v Johnston* [1993] 2 All ER 673, 680; *Joyce v Liverpool City Council* [1995] 3 WLR 439; see below, paras 9.12 - 9.13.

²⁷ *Hill v Barclay* (1810) 16 Ves 402, 405; 33 ER 1037, 1038. See below, para 9.18.

²⁸ Consultation Paper No 123, paras 3.35 - 3.37.

²⁹ See below, para 10.16.

³⁰ See below, para 10.32.

³¹ *Repairing Obligations under the Landlord and Tenant Act 1985*. The circulation of this consultation paper was limited to a number of interested bodies.

³² Landlord and Tenant Act 1985, s 8. For full consideration of this covenant, see below, para 4.2.

³³ Above, para 1.3. The matter is considered more fully below, paras 4.11 - 4.13.

merely be raised.³⁴ Three-quarters of those who responded considered that the test of unfitness should be the same in relation to the implied covenant of fitness as it is for the purposes of public law, where it is employed to determine whether an improvement grant, a repair notice or closing or demolition order should be made.³⁵ At present, the two standards are different, the latter requiring a more precisely defined standard of fitness.³⁶ In the consultation paper, the Department commented that—

[i]t might appear that changing the limits would enable larger numbers of tenants to commence litigation on unfitness than previously. In fact, an amended section would give new rights which overlap considerably with those which the Courts have said existing tenants already enjoy under section 99 of the Public Health Act 1936.³⁷ The main effect of the change would therefore be to shift some cases from the Magistrates' to the County Courts.

1.15 In November 1989, both that consultation paper and the responses to it were referred to the Law Commission by the Department of the Environment as part of our general review of the law on repairing obligations. Many of the factors that prompted the Department's comparatively limited consultation were the same as those which had persuaded the Commission to embark on a wider consideration of repairing responsibilities. In particular, there was concern prompted by the decision of the Court of Appeal in *Quick v Taff Ely Borough Council*.³⁸ In that case, which we have already mentioned at the beginning of this report,³⁹ a landlord who had let a house for occupation, was held not to be in breach of the implied statutory covenant to repair the structure and exterior of the premises.⁴⁰ This was so, even though those premises were not fit for human habitation because of an inherent defect in its design.

³⁴ There was no comment from the other two respondents.

³⁵ See below, para 4.33.

³⁶ The former is governed by Landlord and Tenant Act 1985, s 10, and the latter by Housing Act 1985, s 604 (as substituted by Local Government and Housing Act 1989, s 165(1)(e); Sched 9, Pt V, para 83). See below, paras 4.26 and 4.37 respectively.

³⁷ Now Environmental Protection Act 1990, s 82. For reasons which we explain, we consider that the protection afforded by s 82 in cases of statutory nuisance is narrower than that offered by a covenant to keep premises fit for human habitation: see below, para 4.54.

³⁸ [1986] QB 809; considered below, para 5.15.

³⁹ See above, para 1.1.

⁴⁰ See Landlord and Tenant Act 1985, s 11; considered in Part V of this report.

Options for reform

1.16 In the consultation paper we offered three possible options for consideration. The first was to make no change.⁴¹ Our provisional view on this was that “at least some of the matters of concern which we have identified do justify action”.⁴²

1.17 The second option was to propose a new approach which linked the need to maintain leased property with the purpose for which the property was let. Under this option, there would be a duty to maintain the premises for the purposes for which they were let.⁴³ This obligation would be imposed on the landlord, but (subject to certain exceptions⁴⁴) could be transferred in whole or part to the tenant by agreement between the parties.⁴⁵ The imposition of such a general duty to maintain would of course obviate the need for a separate statutory provision relating to fitness for human habitation.⁴⁶

1.18 The third option was to suggest a series of individual reforms from which our consultants could select those which they considered appropriate. The reforms suggested included—

- (i) a possible redefinition of what constituted “repair”;⁴⁷
- (ii) the extension of the present statutory obligation⁴⁸ that property should be fit for human habitation to leases defined by length rather than, as at present, by annual rental;⁴⁹
- (iii) the extension of duties of repair to other property of the landlord—
 - (a) over which the tenant had an easement; or
 - (b) the state of which affected the repair of the premises let;⁵⁰

⁴¹ Consultation Paper No 123, paras 5.2 - 5.4.

⁴² *Ibid*, para 5.4.

⁴³ *Ibid*, paras 5.6 *et seq.*

⁴⁴ Which were in essence those cases where a landlord is, under the present law, required by statute to carry out repairs.

⁴⁵ Consultation Paper No 123, paras 5.18 - 5.28.

⁴⁶ *Ibid*, para 5.17.

⁴⁷ *Ibid*, paras 5.37 - 5.55.

⁴⁸ See Landlord and Tenant Act 1985, s 8, considered in detail below, para 4.2.

⁴⁹ Consultation Paper No 123, paras 5.53 - 5.55.

⁵⁰ *Ibid*, paras 5.56 - 5.57.

- (iv) the abolition of the doctrine of waste in relation to leases;⁵¹ and
- (v) the improvement of remedies for enforcing repairing obligations, such as making specific performance of repairing obligations applicable to leases of all types of property, whether business or residential, by either landlord or tenant.⁵²

The response on consultation

1.19 We received 70 responses to our Consultation Paper from a broad range of interested persons, particularly those who were professionally involved in landlord and tenant matters. A list of respondents appears in Appendix C. There were also several articles and notes commenting on the proposals.⁵³ We are very grateful to all those who responded, many of whom replied in considerable detail. One general point that was raised by a number of our respondents emphasised that there was a difference between residential and commercial lettings. Many respondents acknowledged the need to amend the law for short residential leases, but considered that the regulation of commercial lettings should continue to be a matter of contract between the parties.

1.20 Very few of our respondents considered that the present law was not in need of at least some amendment. We have therefore rejected the first option of leaving the law unchanged. The second option of introducing a new duty to maintain property for the purpose for which it was let had a number of distinguished supporters but was rejected by the great majority of those who replied. The main grounds for objection were—

- (i) the cost implications of the new duty;
- (ii) the effect on the property market, because the imposition of onerous obligations of repair and maintenance might discourage investment;
- (iii) that the imposition of such a duty would be an inappropriately interventionist intrusion into the relations of landlord and tenant;
- (iv) that the proposed duty to maintain would be no more certain than the present law, and might in fact be less so; and

⁵¹ *Ibid*, paras 5.58 - 5.59.

⁵² *Ibid*, paras 5.60 - 5.62.

⁵³ See Denton Hall Burgin & Warrens, "Repairing Inherent Defects - Proposals for Change" (1992) 7 Corporate Briefing 279; Herbert Smith, "Repairing Covenants - Consultation on Reform Proposals" (1992) In-House Lawyer, October, 32; (1992) 6 Commercial Leases, Pt 7, 1; Sandi Murdoch, "Law Commission: Consultation Paper on Repairing Obligations" [1992] 27 EG 128; "This 'Ole House (or Office Block)"(1992) 142 NLJ 591; A Day and E Bennett, "Landlord and Tenant: Practical Solutions to Repair of Premises" (1994) 46 CSW, Pt 5, 77; P F Smith, "Repairing Obligations: A Case Against Radical Reform" [1994] Conv 186.

- (v) the considerable difficulties that there might be in integrating the duty into existing law and practice.⁵⁴

1.21 In the light of these responses we have rejected the second option. However, one point of some importance arose from comments made upon this option by a number of our respondents. It was generally acknowledged that modern leases usually make express provision for repairs. However it was also suggested that where there was no such provision, there should be an implied repairing covenant on the part of the landlord to fill the void. We have gratefully accepted this suggestion and have developed it as the basis for one of our principal recommendations.⁵⁵

1.22 The great majority of those who responded favoured the third option of a series of individual reforms. We do not propose to comment individually on the responses to each of the possible reforms that were suggested for consideration in the Consultation Paper. Instead, we have identified those proposals that both commanded wide support (and aroused no significant dissent) on consultation and which could form a coherent package of reforms that would encourage the proper repair and maintenance of leasehold property. In addition to the proposal mentioned in the preceding paragraph, they are as set out below.

1.23 In the Consultation Paper,⁵⁶ we suggested that the rent limits on the implied obligation by the landlord to keep residential premises fit for human habitation⁵⁷ should be scrapped. All of our respondents who commented on the issue agreed that the rent limits were hopelessly out of date and that the obligation was now ineffective. While a few suggested that the rent limits should be raised, the great majority of them favoured their abrogation. This confirmed the results of the Department of the Environment's own consultation.⁵⁸ On the assumption that rent limits should be abandoned, there were a variety of different opinions as to which leases should then be subject to the obligation of fitness. A handful of respondents considered that it should apply to *all* residential leases. Most considered that it should only apply to "short" leases, though there was a fairly even division of opinion as to whether "short" should mean seven or 21 years. It was generally accepted by those who commented

⁵⁴ For example, those statutes which regulate the affairs of landlords and tenants and which make reference to "repairs", have been drafted with the balance between landlord and tenant in mind. To substitute a duty to maintain for an obligation to repair could seriously distort that relationship. Similarly, there could be serious implications for rent review clauses, which are highly sensitive to variations in repairing liabilities: see D N Clarke & J E Adams, *Rent Reviews and Variable Rents* (3rd ed 1990) pp 371 - 376.

⁵⁵ See below, para 7.10.

⁵⁶ No 123, paras 5.53 - 5.55; 6.11(d).

⁵⁷ Landlord and Tenant Act 1985, s 8.

⁵⁸ See above, paras 1.14 - 1.15.

on the issue, that the definition of fitness in the Housing Act 1985⁵⁹ that is utilised for public law purposes⁶⁰ should be equally applicable to the implied fitness covenant.

1.24 In our Consultation Paper we explained how most statutory provisions relating to repair were binding on the Crown, but that there were significant exceptions.⁶¹ In particular, the implied repairing covenants by landlords of residential premises let for less than seven years⁶² did not.⁶³ We suggested that all legislation relating to repairing obligations in leases should bind the Crown and all our respondents who commented on this proposal agreed with us.

1.25 We proposed that specific performance should become the primary remedy for the enforcement of repairing obligations by both landlord and tenant.⁶⁴ This view was not fully accepted on consultation. In general, our respondents considered that the remedy should remain discretionary, but that it should be made available to landlords.

1.26 Our proposals for the abolition of the tort of waste in its application between landlord and tenant⁶⁵ commanded support from virtually all of those who commented on it. There was also support for the view that where a tenant held over after the termination of a lease and the lease was not extended by agreement or statute, the tenant (but not the landlord) should remain liable on his obligations under the lease to repair and maintain.⁶⁶ As we explain below,⁶⁷ we have come to the conclusion that, at this stage, it would not be appropriate to provide for the extension of a tenant's repairing obligations in this way. We prefer to see the abolition of both waste and the implied obligation of "tenantlike user",⁶⁸ and to couple their abrogation with the introduction

⁵⁹ Section 604 (as substituted by Local Government and Housing Act 1989, s 165(1)(e); Sched 9, Pt V, para 83).

⁶⁰ *Ie*, in relation to improvement grants, repair notices and closing and demolition orders.

⁶¹ Consultation Paper No 123, paras 3.29, 5.63, 5.64.

⁶² Landlord and Tenant Act 1985, s 11; considered below, para 5.1.

⁶³ It must also be the case that the obligation to keep dwellings fit for human habitation, implied by Landlord and Tenant Act 1985, s 8, does not bind the Crown, because it is contained in the same statute.

⁶⁴ Consultation Paper, para 5.61. At present, the remedy may not be available to a landlord; see above, para 1.12. There are also doubts about its availability to some tenants. The matter is considered fully in Part IX of this report.

⁶⁵ See the Consultation Paper, paras 5.58 - 5.59, 6.12.

⁶⁶ We had suggested two alternatives: (i) that the repairing obligations of both parties should continue; or (ii) that only the tenant's responsibilities should continue: *ibid*, para 5.59.

⁶⁷ Para 10.3.

⁶⁸ For this obligation, see below, para 10.26.

of limited but clearly defined duties to take proper care of premises by those who lawfully occupy them rather than to impose any positive obligation to repair.⁶⁹

Approach to reform

- 1.27 In our approach to reform we have been guided by a number of objectives. First, our overriding concern is to encourage repair, at least in those circumstances where it is appropriate. There is a public interest in seeing that there is an adequate stock of usable rented property, properly repaired and maintained.⁷⁰ We have therefore looked for ways in which to encourage the parties to a lease to address the issue of repair and to provide them with more effective ways of enforcing repairing obligations. Secondly, we consider that it is also in the public interest that residential property should be reasonably fit to live in, and we make proposals to ensure that in relation to future lettings it is. Thirdly, we have been mindful of the distinction, that was stressed by our respondents,⁷¹ between residential and commercial lettings. In relation to the latter, we take the view that the parties should, so far as possible, be free to make their own bargains. Our recommendations reflect that objective. Finally, we think that those who are in lawful occupation or possession of property that belongs to another⁷² should bear certain fundamental responsibilities for its state and condition, however ephemeral their rights to remain on that property may be and whatever arrangements there may or may not be for the repair and maintenance of the property. Those responsibilities should in our view be clearly and unequivocally defined.

Acknowledgements

- 1.28 We are extremely grateful not only to those who so kindly gave of their valuable time to respond to our Consultation Paper but also to those who replied to inquiries which we have made in the course of preparing this report. We make individual acknowledgements in the course of the report. We would like to thank Sir Wilfrid Bourne KCB QC, who kindly undertook the analysis of responses to the Consultation Paper. We are also grateful to the Department of the Environment which assisted us in the course of our work and commented helpfully on our ideas.

Structure of this report

- 1.29 In Part II of this report, we explain what in law is meant by the term “repair”. In Parts III - V, we examine the circumstances in which an obligation to repair or maintain premises will be implied under the present law either in accordance with general contractual principles or by statute. Part III is concerned with implied repairing obligations at common law. In Part IV we examine both the contractual and public

⁶⁹ See Part X of this report.

⁷⁰ Cf The Future of Private Housing Renewal Programmes: A Consultation Document (Department of the Environment, June 1993) Part 2, “Public Interest in Private Housing”.

⁷¹ See above, para 1.19.

⁷² Whether under some form of tenancy or as licensees.

law remedies that are available to a tenant whose property is not fit for human habitation. In Part V, we examine two obligations implied by statute by which a landlord may be required to repair the premises leased or take reasonable care for the safety of those who use them. In Part VI, we summarise the criticisms of the present law on implied repairing obligations. In Parts VII and VIII, we make recommendations for the reform of the law on implied repairing obligations. In Part VII, we propose the introduction of two implied repairing covenants in leases other than short residential tenancies, that would operate in default of other provision.⁷³ In Part VIII, we recommend the creation of a new implied obligation that landlords who let residential premises on short leases should be subject to an implied obligation to keep such properties fit for human habitation.⁷⁴ In Part IX, we outline the circumstances in which repairing obligations in a lease can and cannot be specifically enforced, and make recommendations for extending the availability of the remedy.⁷⁵ In Part X, we review the law of waste in its application to leases and licences, and propose its replacement by certain implied statutory terms.⁷⁶ In Part XI, we summarise our conclusions. A Draft Bill to give effect to our recommendations is found in Appendix A. Certain statutory provisions to which we refer are reproduced in Appendix B. Appendix C contains a list of those who responded to the Consultation Paper.

⁷³ See below, para 7.10.

⁷⁴ See below, para 8.35.

⁷⁵ See below, para 9.31.

⁷⁶ See below, para 10.35.

PART II THE MEANING OF “REPAIR”

Introduction

- 2.1 The concept of “repair” is of course germane to the scope of this report and it is a concept to which we make reference throughout. In this Part we therefore explain what is meant in law by “repair” and how its meaning may be affected by the use of additional or qualifying words.¹ We also explain the circumstances in which a covenantor’s obligation to repair arises only when he is notified of the disrepair, and we outline the statutory limitations on the recovery of damages for breach of a repairing covenant. Finally, we consider whether any changes are needed in the legal definition of repair in the light of responses to our consultation paper.² We conclude that they are not.

“Repair”

- 2.2 “Repair” it has been said “is an ordinary English word” and one which therefore takes its meaning from the context in which it is used.³ In the absence of an express or implied covenant in the lease, the circumstances in which a landlord or a tenant is under any obligation to the other to carry out repairs to the property let are very limited.⁴ The particular meaning of “repair” is therefore likely to arise in the context of such a covenant. If so,

the correct approach is to look at the particular building, to look at the state in which it is in *at the date of the lease*,⁵ to look at the precise terms of the lease, and to come to a conclusion as to whether, on a fair interpretation of those terms in relation to that state, the requisite work can fairly be termed repair. However large the covenant it must not be looked at in vacuo.⁶

¹ See generally Rosy Thornton, *Property Disrepair and Dilapidations* (1992) Chapter 3.

² See Landlord and Tenant: Responsibility for State and Condition of Property, Consultation Paper No 123, paras 5.37 - 5.52; 6.11; above, para 1.19.

³ *Post Office v Aquarius Properties Ltd* [1985] 2 EGLR 105, 107, *per Hoffmann J*.

⁴ See below, Parts III and X respectively.

⁵ “...a general covenant to repair must be construed to have reference to the condition of the premises at the time when the covenant begins to operate”: *Walker v Hatton* (1842) 10 M & W 249, 258; 152 ER 462, 466, *per Parke B*. See too *Smedley v Chumley and Hawke Ltd* (1981) 44 P & CR 50.

⁶ *Brew Brothers Ltd v Snax (Ross) Ltd* [1970] 1 QB 612, 640, *per Sachs LJ*.

However, there are some well-known principles which are applied in determining whether the work that is required can be regarded as repair.⁷

“Repair” is not “renewal”

2.3 First, “repair” is to be distinguished from “renewal”.

Repair is the restoration by renewal or replacement of subsidiary parts of a whole. Renewal, as distinguished from repair, is reconstruction of the entirety, meaning by the entirety not necessarily the whole but substantially the whole subject-matter under discussion.⁸

There is therefore no obligation under a covenant to repair “to make a new and different thing”.⁹ This principle is not easy to reconcile with the ancient rule¹⁰ that where a tenant has covenanted to repair the premises, he must rebuild them if they are accidentally destroyed, for example, by fire.¹¹

“Repair” is not “improvement”

2.4 Secondly, at a less extreme level, an obligation to repair is not an obligation to improve, for “neither a landlord nor a tenant is bound to provide the other with a better house than there was to start with”.¹² However, this distinction is less easily drawn.¹³ It will commonly be the case that repairs can be effected only by making

⁷ In addition to the distinctions that are explained below, it has been held that a covenant “to cleanse” is not a covenant to repair: *Starokate Ltd v Burry* [1983] 1 EGLR 56. Nor is a covenant to lay out insurance money on the reinstatement of the premises: *Farimani v Gates* [1984] 2 EGLR 66.

⁸ *Lurcott v Wakely & Wheeler* [1911] 1 KB 905, 924, *per* Buckley LJ. See too *A & J Inglis v John Buttery & Co* (1878) 3 App Cas 552, 579; *Anstruther-Gough-Calthorpe v McOscar* [1924] 1 KB 716, 734; *Greg v Planque* [1936] 1 KB 669, 677.

⁹ *Lister v Lane & Nesham* [1893] 2 QB 212, 217, *per* Lord Esher MR.

¹⁰ See *Bullock v Dommitt* (1796) 6 TR 650; 101 ER 752, where the earlier authorities are mentioned.

¹¹ There is no such obligation where the repair is occasioned by war damage: see Landlord and Tenant (War Damage) Act 1939, s 1, reversing the effect of *Redmond v Dainton* [1920] 2 KB 256 (lessee liable to repair house seriously damaged by German bomb in 1918).

¹² *Quick v Taff Ely Borough Council* [1986] QB 809, 821, *per* Lawton LJ.

¹³ Compare *Mullaney v Maybourne Grange (Croydon) Management Co Ltd* [1986] 1 EGLR 70 (replacement of unsatisfactory wooden-framed windows with double-glazed units was improvement not repair) and *Wainwright v Leeds City Council* [1984] 1 EGLR 67 (no obligation to install a damp course in an old terraced house which had never had one) with *Elmcroft Developments Ltd v Tankersley-Sawyer* [1984] 1 EGLR 67 (obligation on landlord to replace defective slate damp course with silicone injection course in “a self-contained flat in a high-class fashionable area in the centre of London”).

some improvement in the state of the property.¹⁴ The question is ultimately one of degree.¹⁵

Inherent defects

- 2.5 Thirdly, a duty to repair may sometimes require the covenantor to correct an inherent defect in the property.¹⁶ If such a defect causes no damage but merely a lack of amenity, then there is no obligation to remedy it under a covenant to repair,¹⁷ because “a state of disrepair... connotes a deterioration from some previous physical condition.”¹⁸ But if the inherent defect is itself the cause of the disrepair and the only practicable method of reparation is by remedying it, then the correction of the defect may fall within the obligation to repair.¹⁹ Again the test is one of degree. Will the work result in something fundamentally different from that which was demised?

Identifying “repair”

- 2.6 The result of these factors is reflected in the tests that have been formulated for determining whether work falls within the scope of a covenant to repair. In *McDougall v Easington District Council*,²⁰ Mustill LJ suggested that:

three different tests may be discerned, which may be applied separately or concurrently as the circumstances of the individual case may demand, but all to be approached in the light of the nature and age of the premises, their condition when the tenant went into occupation, and the other express terms of the tenancy:

¹⁴ *Quick v Taff Ely Borough Council* [1986] QB 809, 823; *Sutton (Hastoe) Housing Association v Williams* [1988] 1 EGLR 56, 58. It should be noted that where there is an obligation to repair, damage that is consequential upon the carrying out any repairs, such as damage to decorative state of the property, must be made good: *McGreal v Wake* (1984) 269 EG 1254; *Bradley v Chorley Borough Council* [1985] 2 EGLR 49.

¹⁵ *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* [1980] QB 12, 21 - 22.

¹⁶ *Ravenseft Properties Ltd v Davstone (Holdings) Ltd*, above.

¹⁷ *Quick v Taff Ely Borough Council*, above; *Post Office v Aquarius Properties Ltd* [1987] 1 All ER 1055 (CA).

¹⁸ *Post Office v Aquarius Properties Ltd*, above, at p 1065, per Slade LJ.

¹⁹ *Ravenseft Properties Ltd v Davstone (Holdings) Ltd*, above (insertion of expansion joints); *Stent v Monmouth District Council* (1987) 54 P & CR 193 (replacement of door); *Secretary of State for the Environment v Euston Centre Investments Ltd (No 2)* [1994] EGCS 167 (removal of asbestos).

²⁰ (1989) 58 P & CR 201, 207 (on appeal from Mr Assistant Recorder Fryer-Spedding). For a similar but more elaborate formulation, see *Holding and Management Ltd v Property Holding and Investment Trust Plc* [1990] 1 All ER 938, 945, per Nicholls LJ (a passage omitted from the report in [1989] 1 WLR 1313, 1321).

- (i) Whether the alterations went to the whole or substantially the whole of the structure or only to a subsidiary part;²¹
- (ii) Whether the effect of the alterations was to produce a building of a wholly different character than that which had been let;²²
- (iii) What was the cost of the works in relation to the previous value of the building, and what was their effect on the value and lifespan of the building?²³

Qualifying words

2.7 There is a considerable body of authority as to the meaning of the word “repair” when used in conjunction with other words.²⁴ Where the covenant imposes some obligation beyond that of repair, a court will, if possible, “give the full meaning to each word of the covenant”.²⁵ However, it has been accepted that that general rule frequently cannot be “applied in its full force to documents such as leases, where a torrential style of drafting has been traditional for many years,” so that a court will not “insist upon giving each word in a series a distinct meaning”.²⁶ This is no more than a softening of the general rule. It remains the case that additional words can add to or affect the meaning of the word “repair”.²⁷ Thus in a lease granted for 150 years, a covenant by the tenant to keep the premises in repair “and where necessary, to rebuild, reconstruct

²¹ See the discussion by Ralph Gibson LJ in *Post Office v Aquarius Properties Ltd* [1987] 1 All ER 1055, 1064.

²² As in *McDougall v Easington District Council* itself, where design faults were corrected by the replacement of both the elevations and roofs of the properties in question. See too *Halliard Property Co Ltd v Nicholas Clarke Investments Ltd* [1984] 1 EGLR 45 (replacement of “jerry built” structure amounting to one-third of the premises with a new construction, properly built in accordance with building regulations).

²³ See, eg *Elite Investments Ltd v T I Bainbridge Silencers Ltd* [1986] 2 EGLR 43; *New England Properties v Portsmouth New Shops* (1993) 67 P & CR 141.

²⁴ For an extended discussion, see *Crédit Suisse v Beegas Nominees Ltd* [1994] 4 All ER 803, 817 - 822.

²⁵ *Lurcott v Wakely & Wheeler* [1911] 1 KB 905, 915, per Fletcher Moulton LJ. See too *Anstruther-Gough-Calthorpe v McOscar* [1924] 1 KB 716, 731; *Crédit Suisse v Beegas Nominees Ltd*, above, at pp 820, 821.

²⁶ *Norwich Union Life Insurance Society v British Railways Board* [1987] 2 EGLR 137, 138, per Hoffmann J.

²⁷ *Crédit Suisse v Beegas Nominees Ltd*, above, at p 820.

or replace the same” was taken to mean exactly what it said, and was not confined to rebuilding, reconstructing or replacing subsidiary parts of the premises.²⁸

- 2.8 A covenant that requires a tenant merely “to repair” the property is satisfied by keeping it in substantial repair, that is “as nearly as may be in the state in which it was at the time of the demise by the timely expenditure of money and care”.²⁹ Covenants that require a tenant to keep the premises in “good”, “habitable” or “tenantable” repair have the same meaning, namely,

such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it.³⁰

The meaning of a covenant to “keep in repair”

- 2.9 A covenant to “keep” the premises in good repair imposes a double requirement. First, the covenantor must put the premises into repair even if, at the commencement of the term, they are in a state of disrepair.³¹ Secondly, he must ensure that they should not at any stage fall into disrepair.

When the covenantor must be notified of disrepair

- 2.10 Until recently, it was often said that a covenant to repair imposed on the covenantor an obligation to repair only when he was put on notice of the breach of covenant.³² He would be in breach of covenant only if he failed to remedy it within a reasonable time.³³ To this rule there was an exception where the property that required repair was in the possession or control of the covenantor.³⁴ In such cases the requirement of

²⁸ *Norwich Union Life Insurance Society v British Railways Board*, above. See too *Crédit Suisse v Beegas Nominees Ltd*, above, where the recladding of a building was held to fall within a covenant “to maintain repair amend and renew... and otherwise keep in good and tenantable repair” the structure of the building.

²⁹ *Gutteridge v Munday* (1834) 7 Car & P 129, 133; 173 ER 57, 59, *per* Tindal CJ. See too *Ladbroke Hotels Ltd v Sandhu* [1995] 39 EG 152, 154. The covenantor cannot reduce his liabilities by relying on changes in the character of the neighbourhood or in the type of tenant who will take the premises: see *Anstruther-Gough-Calthorpe v McOscar* [1924] 1 KB 716 (where the neighbourhood had changed for the worse) and *Jaquin v Holland* [1960] 1 WLR 258 (where there was increased demand for properties of that character, so that the property could have been let in virtually any state).

³⁰ *Proudfoot v Hart* (1890) 25 QBD 42, 55, *per* Lopes LJ. This is still the test: *Crédit Suisse v Beegas Nominees Ltd* [1994] 4 All ER 803, 821.

³¹ *Payne v Haine* (1847) 16 M & W 541, 545; 153 ER 1304, 1306; *Proudfoot v Hart*, above, at p 50. See too *Crédit Suisse v Beegas Nominees Ltd*, above, at pp 821, 822.

³² *Cf O'Brien v Robinson* [1973] AC 912, 928.

³³ *Calabar Properties Ltd v Sticher* [1984] 1 WLR 287, 298.

³⁴ See *Bishop v Consolidated London Properties* (1933) 102 LJKB 257; *Loria v Hammer* [1989] 2 EGLR 249.

notice was inapplicable,³⁵ because the covenantor had “a constant opportunity of observing the state of repair”.³⁶

2.11 However, the Court of Appeal has recently reviewed the authorities and has reformulated the law in the opposite manner, at least as regards covenants to *keep* in repair.³⁷ According to Nourse LJ:

The general rule is that a covenant to keep premises in repair obliges the covenantor to keep them in repair at all times, so that there is a breach of the obligation immediately a defect occurs. There is an exception where the obligation is the landlord's and the defect occurs in the demised premises themselves, in which case he is in breach of his obligation only when he has information about the existence of the defect such as would put a reasonable landlord on inquiry as to whether works of repair are needed and he has failed to carry out the necessary works with reasonable expedition thereafter.³⁸

2.12 There is much force in this analysis and there is no obvious reason why it should not apply to covenants to repair as well as those to keep in repair.³⁹ It is not easy to think of any other case where a party to a contract is in breach of his obligations only when he has been notified of that breach and has failed to remedy it within a reasonable time. The justification for the exception given by the Court of Appeal is that, if the premises are in the possession of the tenant, the landlord is unlikely to be able to discover the existence of the breach of covenant as soon as it arises. This is so even if he has a right to enter and inspect the premises, for he would be acting unreasonably were he to exercise that right with excessive frequency. It should be noted that where

³⁵ *Melles & Co v Holme* [1918] 2 KB 100; see below, para 4.28.

³⁶ *McCarrick v Liverpool Corporation* [1947] AC 219, 226, *per* Lord Porter. See too Lord Simonds at p 229.

³⁷ *British Telecommunications plc v Sun Life Assurance Society plc* [1995] 3 WLR 622. In that case the landlord had leased the sixth and seventh floors of an office block in Croydon. It covenanted with the tenant to keep in repair both the demised premises and all walls of the building. The case arose out of a bulge in the brick cladding of the external walls of the building at fifth floor level. The tenant alleged that the landlord was in breach as soon as the bulge appeared (in the summer of 1986) and not merely after it had had a reasonable period to remedy it (repairs were commenced in February 1988).

³⁸ [1995] 3 WLR 622, 629.

³⁹ The Court of Appeal expressed no view on this matter, noting that covenants merely “to repair” were a rarity in modern leases: [1995] 3 WLR 622, 629 - 630. The Court also left open the question whether a covenantor would be liable where the disrepair arose as a result of an occurrence outside his control (instancing damage to a roof caused by a neighbour's tree). However, Nourse LJ, although not finally deciding the matter, was clearly inclined to make an exception from the general rule for such cases: *ibid*, at p 629. There is however a respectable case for saying that the covenantor should be strictly liable regardless of notice even in that case. He has undertaken responsibility for repair, and on normal contractual principles it is he should bear the risk of its occurrence and not the covenantee.

the exception applies, a landlord is not liable in the absence of notice, even for a latent defect that was in existence at the time when the property was let.⁴⁰ We comment further on this exception later in this report.⁴¹

- 2.13 It should be noted that where the general rule applies and the covenantor's obligation to repair is absolute, the covenantee should still notify him of the disrepair - at least where he is apparently unaware of it. The covenantee is under a duty to mitigate any loss which he suffers from the breach. If by telling the covenantor, that loss would have been reduced because the disrepair would have been remedied sooner, his damages will be reduced commensurately.⁴²

Limitations on the recovery of damages for breach of a repairing covenant

- 2.14 Certain special rules are applicable to the damages that may be recovered for breach of an obligation to repair. First, there is a statutory limitation on the amount that a landlord can recover for breach of a covenant to keep or put in repair.⁴³ We explain this later.⁴⁴ Secondly, although as a matter of deliberate policy "a contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party",⁴⁵ this rule is subject to exception in cases where a breach of contract causes physical inconvenience and discomfort.⁴⁶ The breach of a repairing covenant obviously falls within that exception, so that damages for distress and inconvenience can be awarded in appropriate cases.⁴⁷ Such awards will normally be comparatively modest.⁴⁸ It will of course usually be the breach by the landlord of his repairing obligations that attracts such an award in favour of the tenant.⁴⁹ It is improbable (though certainly not impossible) that the breach of a tenant's repairing covenant could lead to the landlord suffering inconvenience and distress.

⁴⁰ *Uniproducts (Manchester) Ltd v Rose Furnishers Ltd* [1956] 1 WLR 45, 50 (express covenant); *O'Brien v Robinson* [1973] AC 912 (implied statutory covenant to keep in repair).

⁴¹ See below, para 4.28.

⁴² *Minchburn Ltd v Peck* [1988] 1 EGLR 53, 55.

⁴³ Landlord and Tenant Act 1927, s 18.

⁴⁴ See below, para 9.36.

⁴⁵ *Watts v Morrow* [1991] 1 WLR 1421, 1445, *per* Bingham LJ.

⁴⁶ *Ibid.*

⁴⁷ *Galabar Properties Ltd v Sticher* [1984] 1 WLR 287; *Personal Representatives of Chiodi v De Marney* [1988] 2 EGLR 64.

⁴⁸ *Watts v Morrow*, above.

⁴⁹ See, eg *Hussein v Mehlman* [1992] 2 EGLR 87.

Is any reform needed?

- 2.15 In our consultation paper, we suggested a number of possible adjustments that might be made to the definition of “repair”,⁵⁰ as for example, to include certain improvements. It is unnecessary to examine this issue in any detail. Although it was widely accepted by our consultants that the present understanding of what constituted a repair gave rise to disputes, there was sufficient authority to enable proper advice to be given in most cases. Furthermore, wherever the line was drawn between repair and improvement, it would be a cause of dispute. Our respondents on the whole preferred the devil which they knew. They considered that any new definition would inevitably be productive of litigation and uncertainty. Although it was suggested to us that we might codify the present definition of repair in statutory form, we doubt that it would achieve much, particularly as there are a number of modern judicial statements which are likely to provide as much guidance as any statutory definition could but without its inherent inflexibility.⁵¹ **We therefore make no recommendation to change or codify the definition of what constitutes a “repair” but consider that its meaning should continue to be left to judicial decision.**

⁵⁰ Consultation Paper No 123, paras 5.37 - 5.52; 6.11.

⁵¹ See above, para 2.6.

PART III

IMPLIED TERMS: THE PRESENT LAW

Introduction

- 3.1 In this Part we consider the circumstances in which, as a matter of common law, a landlord may be held liable to the tenant for the state and condition of the property which he has let. In particular, we explain when a term will be implied into a lease that one of the parties will carry out repairs. We conclude with a critical comment on the state of the present law.

Landlords' obligations as to the state and condition of property let

The general rule: no liability in contract or tort

- 3.2 The circumstances in which a landlord will and will not be liable in contract or tort to the tenant for the state and condition of the property that he lets is summarised in the following paragraphs.

CONTRACTUAL LIABILITY

- 3.3 In general, a landlord will be contractually liable to the tenant only where he has expressly undertaken an obligation to repair or maintain the property.¹ "It is well established that, in the absence of agreement to the contrary, the law imposes no obligations on a landlord to keep the demised premises in repair."² It has long been the law that there is no term implied by law that the premises should be fit for the purpose for which they are let, and that "it is much better to leave the parties in every case to protect their interests themselves, by proper stipulations..."³

LIABILITY IN NEGLIGENCE

- 3.4 In the absence of any express or implied obligation to repair or maintain the premises, or of any right to enter them to carry out maintenance or repairs, and subject to one exception, the landlord owes no duty of care to the tenant, his family or his lawful visitors.⁴

¹ *Chappell v Gregory* (1863) 34 Beav 250, 253; 55 ER 631, 632.

² *Sleafer v Lambeth Borough Council* [1960] 1 QB 43, 62, *per* Willmer LJ. See too *Tennant Radiant Heat Ltd v Warrington Development Corporation* [1988] 1 EGLR 41, 43.

³ *Hart v Windsor* (1843) 12 M & W 68, 88; 152 ER 1114, 1122, *per* Parke B. See too *Francis v Cockrell* (1870) LR 5 QB 501, 506. For a different interpretation of this and other authorities which are taken to establish this principle, see Glanville Williams, "The Duties of Non-Occupiers in Respect of Dangerous Premises" (1941) 5 MLR 194.

⁴ *Cavalier v Pope* [1906] AC 428; *McNerny v Lambeth London Borough Council* [1989] 1 EGLR 81. If, under the tenancy, the landlord is under an obligation to maintain or repair the premises, he owes a duty to take such care as is reasonable in the circumstances to see that those who might reasonably be expected to be affected by defects in the state of the premises are reasonably safe from personal injury or from damage to their property caused by a relevant defect: Defective Premises Act 1972, s 4(1). The landlord is treated as being under an obligation to repair or maintain if he has an express or implied right under the tenancy to enter the premises to carry out any description of maintenance or repair: *ibid*, s 4(4). The

A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term; for fraud apart, there is no law against letting a tumble-down house.⁵

Despite other developments in the law of negligence, this remains the law.⁶ The one exception is where the landlord has been responsible for the design and construction of the house.⁷ He is then under a duty to take reasonable care that the property is "free from defect likely to cause injury to any person whom he ought reasonably to have in contemplation as likely to be affected by such defect".⁸ Although the tenant's knowledge of the flaw will normally negate the landlord's liability in negligence, this will not be the case if, having regard to what is reasonable, the tenant is not free to remove or avoid the danger.⁹

LIABILITY IN NUISANCE

3.5 There may be occasions where the habitability of the property leased is affected by a nuisance for which the landlord is liable. However, this will generally be the case only where that nuisance emanates from property retained by the landlord, as where—

- (i) a tenant's flat was infested by cockroaches that came up the service ducts from the common parts;¹⁰ and
- (ii) a tenant's goods were water-damaged when a roof collapsed under the weight of accumulated rainwater that did not drain away due to blocked outlets which were under the landlord's control.¹¹

decision in *Cavalier v Pope* itself would not be different if it fell for decision today, because although the landlord had undertaken to carry out repairs, it was by an express agreement with the tenant and was not under the terms of the tenancy as s 4 requires. We consider s 4 in more detail below: see para 5.22.

⁵ *Robbins v Jones* (1863) 15 CB (NS) 221, 240; 143 ER 768, 776, *per* Erle CJ.

⁶ *Rimmer v Liverpool City Council* [1985] QB 1; *McNemy v Lambeth London Borough Council*, above, at p 83. For criticism, see P F Smith, "Confined to the Contract" [1989] Conv 216.

⁷ *Rimmer v Liverpool City Council*, above.

⁸ *Targett v Torfaen Borough Council* [1992] 3 All ER 27, 34, *per* Leggatt LJ.

⁹ *Targett v Torfaen Borough Council*, above.

¹⁰ *Sharpe v Manchester City Council* (1977) 5 HLR 71. There will be no liability if the nuisance arises in some other way. In *Habinteg Housing Association v James* (1994) 27 HLR 299, above, para 1.2, a housing association was held not to be liable for a cockroach infestation of an estate of which it was landlord. The origins of the infestation were uncertain and the landlord's rights of access for repairing purposes did not amount to constructive possession of the estate for the purposes of the law of nuisance.

¹¹ *Tennant Radiant Heat Ltd v Warrington Development Corporation* [1988] 1 EGLR 41.

3.6 It should be noted that, in the absence of any express agreement between the parties, a *tenant* is under no duty to keep the premises in repair. He is required only to use the premises in a tenantlike manner - "to do the little jobs about the place which a reasonable tenant would do" and not to damage the premises wilfully or negligently.¹² We consider the extent of the tenant's obligations in this regard more fully below.¹³

Exceptions to the general rules

3.7 These general principles are subject to a number of exceptions,¹⁴ of which four are relevant for present purposes and are discussed in the following paragraphs. These are—

- (i) certain implied repairing obligations that are imposed by statute on the landlord;
- (ii) the implied contractual obligation by a landlord that furnished accommodation should be fit for human habitation at the time when it is let;
- (iii) the implied contractual obligation by a landlord that he will take reasonable care to maintain essential rights of access and user in multi-occupational dwellings¹⁵ and housing estates; and
- (iv) repairing obligations on the part of either the landlord or the tenant that are implied into a contract of letting in order to give it business efficacy.

IMPLIED STATUTORY OBLIGATIONS

3.8 There are certain implied statutory obligations of repair. Three of these provisions¹⁶ are considered in detail below.¹⁷ There are also specific provisions which apply to long leases—

- (i) of flats;¹⁸ or

¹² *Warren v Keen* [1954] 1 QB 15, 20, *per* Denning LJ.

¹³ See para 10.26.

¹⁴ See *Woodfall's Law of Landlord and Tenant* (28th ed 1989) para 13.002 for a summary of all the exceptions.

¹⁵ Such as flats.

¹⁶ Landlord and Tenant Act 1985, ss 8 and 11; Defective Premises Act 1972, s 4.

¹⁷ Paras 4.2 - 5.28.

¹⁸ There is a power under the Landlord and Tenant Act 1987, s 35, for a party to a long lease of a flat to apply to the court for an order varying the lease where the lease fails to make satisfactory provision with respect to (*inter alia*):-

- (ii) which have been granted as a result of the exercise by public sector tenants of their right to buy.¹⁹

FURNISHED ACCOMMODATION

3.9 At common law, it is an implied term of a letting of *furnished* accommodation that the property will be reasonably fit for human habitation on the day that the lease commences.²⁰ A tenant will be entitled to treat the lease as repudiated if this term is breached.²¹ The obligation applies only at the start of the lease. There is no implied term that the property will be kept fit throughout the duration of the lease.²² It was thought that “to extend such a warranty to the whole term would be most unreasonable”.²³ This implied condition has most commonly been invoked where there was something about the property that was a danger to health, such as defective drains,²⁴ an infestation of insects,²⁵ or the recent presence on the property of a person with an infectious disease.²⁶ Indeed there is some authority which suggests that mere disrepair of the premises will not without more constitute a breach of this implied term.²⁷ This type of implied term is simply a legal incident of a contract to let

- (i) the repair or maintenance of the flat (or of any installations which are reasonably necessary to ensure that occupiers of the flat enjoy a reasonable standard of accommodation);
- (ii) the building containing the flat; or
- (iii) any land or building which is let to the tenant under the lease or in respect of which rights are conferred on him under it.

¹⁹ Unless the county court authorises their exclusion or modification, there are certain implied covenants on the part of the landlord as to the repair of both the structure and the exterior of the dwelling-house, and the property over which the tenant has rights; and as to the maintenance of services provided by the landlord (Housing Act 1985, s 139, Sched 6, para 14). Covenants as to decoration and repair are also implied on the part of the tenant (*ibid*, para 16). See Consultation Paper No 123, paras 2.34 - 2.35.

²⁰ *Smith v Marrable* (1843) 11 M & W 5; 152 ER 693, as explained in *Wilson v Finch Hatton* (1877) 2 ExD 336.

²¹ *Wilson v Finch Hatton*, above.

²² *Sarson v Roberts* [1895] 2 QB 395.

²³ *Ibid*, p 398, *per* A L Smith LJ.

²⁴ *Ibid*.

²⁵ *Smith v Marrable*, above; *Campbell v Lord Wenlock* (1866) 4 F & F 716; 176 ER 760.

²⁶ *Bird v Lord Greville* (1884) Cab & El 317 (measles); *Collins v Hopkins* [1923] 2 KB 617 (“pulmonary consumption”).

²⁷ *Maclean v Currie* (1884) Cab & El 361 (landlord not liable where the plasterwork was in a dangerous state and part of a ceiling had collapsed. Stephen J considered that the principle was inapplicable to defects of this character).

furnished property. The cases on the implied term have not been confined to lettings at low rents, but include several in which a property was let for “the season”.²⁸

ESSENTIAL RIGHTS OF ACCESS AND USER IN MULTI-OCCUPATIONAL DWELLINGS AND HOUSING ESTATES

- 3.10 Where there is a letting of a multi-occupational dwelling, such as a block of flats, the law implies an obligation that the landlord should take reasonable care to maintain the common parts retained by the landlords over which the tenants have essential rights of access or user.²⁹ It appears that this principle may apply not just to buildings which are in multiple occupation, but to housing estates. In one case, where a house on an estate was let by a local authority, it was held to be an implied term of the letting that the landlord should repair the access path to the property.³⁰ The implication of any obligation to repair is likely to be confined to those rights that are essential to the user of the property.³¹ In other cases, the usual rule applies: it is the owner of the dominant tenement (and not the owner of the servient) who must bear the cost of repairing and maintaining the easement.³²

IMPLIED CONTRACTUAL TERMS

- 3.11 The circumstances may be such that a court will imply a term into the lease that the landlord shall be responsible for certain repairs to the premises. In such a case, “what the court is being in effect asked to do is to rectify a particular - often very detailed - contract by inserting in it a term which the parties have not expressed.”³³ We consider below the circumstances in which such an implication will be made.

²⁸ Eg *Campbell v Lord Wenlock* (1866) 4 F & F 716; 176 ER 760; *Wilson v Finch Hatton* (1877) 2 ExD 336.

²⁹ *Liverpool City Council v Irwin* [1977] AC 239 (rights to use stairs, lifts and rubbish chutes). In leases of dwelling-houses granted for a term of less than seven years that form part only of a building, there is now an implied statutory obligation on the landlord to keep in repair the structure, exterior and installations in any part of the building in which the lessor has an estate or interest: Landlord and Tenant Act 1985, s 11(1A) (added by Housing Act 1988, s 116(1)). See below, para 5.4.

³⁰ *King v South Northamptonshire District Council* (1992) 64 P & CR 35.

³¹ *Duke of Westminster v Guild* [1985] QB 688 (no obligation on landlord to keep in repair a drain passing over land retained by him from the property let). See Paul Jackson, “Leases, Easements and Positive Obligations” [1985] Conv 66.

³² “The law does not impose on a servient owner any liability to keep the servient property in repair for the benefit of the owner of an easement”: *Liverpool City Council v Irwin*, above, p 259, per Lord Cross of Chelsea. See, eg *Stokes v Mixconcrete (Holdings) Ltd* (1978) 38 P & CR 488.

³³ *Liverpool City Council v Irwin*, above, at p 258, per Lord Cross of Chelsea.

Implied terms

- 3.12 There are two types of terms which may be implied into a contract.³⁴ First, there are those which are an incident of a particular type of agreement, such as the terms which are implied into a contract for the sale of goods, or the so-called “open contract rules” which apply to conveyancing contracts. As we have seen, there are no such general terms as to repair or fitness implied into leases³⁵ except in certain particular categories of lettings, such as those of furnished premises³⁶ and of dwellings in multiple occupation.³⁷ Secondly, a term may be implied if it is necessary to give business efficacy to a particular contract.³⁸ A court will make an implication of this kind in relation to a lease on the same basis as it will in relation to any other contract.³⁹ The test is not whether it is *reasonable* to imply such a term, but whether it is *necessary* to give effect to the presumed intentions of both the parties.⁴⁰ The general rule is however clear: “it has never been held in any general way that it is necessary to imply a repairing covenant on the part of the landlord to give business efficacy to the contract”⁴¹.
- 3.13 In determining whether a court will imply some repairing obligation on the part of the landlord in cases where that implication is necessary to give the lease business efficacy,⁴² it is possible to distil a number of guiding principles from the authorities, of which two are of some importance.⁴³
- 3.14 First, where the terms of the lease are apparently intended to provide a comprehensive code of the respective rights and obligations of the parties, the court will be slow to imply any further terms.⁴⁴ “The more comprehensive the code the less room there is

³⁴ *Ibid*, at pp 257, 258.

³⁵ See above, paras 3.3 - 3.6.

³⁶ See above, para 3.9.

³⁷ See above, para 3.10.

³⁸ See above, para 3.11.

³⁹ *Barrett v Lounova (1982) Ltd* [1990] 1 QB 348, 356; *Hafton Properties Ltd v Camp* [1994] 1 EGLR 67, 69.

⁴⁰ *Liverpool City Council v Irwin* [1977] AC 239, 254, 262, 266. It is the presumed intentions of both and not merely one of the parties that are relevant: *Duke of Westminster v Guild* [1985] QB 688, 699.

⁴¹ *Tenant Radiant Heat Ltd v Warrington Development Corporation* [1988] 1 EGLR 41, 43, *per* Dillon LJ.

⁴² See *Duke of Westminster v Guild*, above, at pp 697 - 699.

⁴³ For a valuable summary, see *Hafton Properties Ltd v Camp*, above, at p 69.

⁴⁴ *Gordon v Selico Co Ltd* [1986] 1 EGLR 71, 77, 78; *Duke of Westminster v Guild*, above, at pp 699, 700.

for the implication of a term.”⁴⁵ Thus in one case, the lease provided that a service company rather than the landlord would carry out repairs. The rights and obligations of the landlord, the tenant and the service company were laid down in some detail, and the court declined to imply into the lease a term that the landlord would carry out the repairs should the service company fail to do so.⁴⁶ In the converse situation, where the agreement is on its face incomplete, the court will be much readier to imply terms.⁴⁷

3.15 Secondly, if the lease imposes an obligation on one of the parties, that may “in some instances” imply a correlative obligation on the other.⁴⁸ The authorities provide some guidance:

- (i) Where there is an unqualified obligation to pay a specified amount in respect of repairs or maintenance, a court will readily imply an obligation on the part of the landlord to carry out such work.⁴⁹
- (ii) The same may be true where the tenant is obliged to pay the cost of carrying out particular work at specified intervals.⁵⁰
- (iii) The position is less clear when the tenant’s obligation of payment is conditional on the performance of the service whether that service is provided at his request or otherwise.⁵¹ In such circumstances, a court may be far less ready to imply a positive obligation on the landlord to carry out the work.
- (iv) The mere fact that the landlord reserves a right to enter to inspect the state of repair of the premises or does in practice carry out any repairs

⁴⁵ *Hafton Properties Ltd v Camp*, above, at p 69, *per* Judge Fox-Andrews QC.

⁴⁶ *Hafton Properties Ltd v Camp*, above.

⁴⁷ See, eg *Liverpool City Council v Irwin*, above (implied term that the landlords would take reasonable care to repair and maintain the common parts of tower blocks).

⁴⁸ See *Duke of Westminster v Guild* [1985] QB 688, 697, *per* Slade LJ.

⁴⁹ Cf *Barnes v City of London Real Property Co* [1918] 2 Ch 18, 32 - 33 (provision of cleaning).

⁵⁰ See *Edmonton Corporation v W M Knowles & Son Ltd* (1961) 60 LGR 124 (obligation on landlord implied from the tenant’s covenant to pay the cost of painting the exterior of the premises every third year of the term).

⁵¹ See *Duke of Westminster v Guild* [1985] QB 688, 697.

does not mean that an obligation will be implied that he *must* carry out such repairs.⁵²

- 3.16 Even with these guidelines, it is not easy to predict when an implication will be made on the basis of correlative duties. In *Barrett v Lounova (1982) Ltd*,⁵³ a case that has attracted both praise and criticism,⁵⁴ it was held that where a tenant was obliged under the terms of the lease to carry out all internal repairs, there was a correlative obligation on the landlord to repair the exterior. There were two steps in the court's reasoning. First, it considered that "sooner or later the covenant imposed on the tenant in respect of the inside can no longer be complied with unless the outside has been kept in repair".⁵⁵ Secondly, "an obligation to keep the outside in a proper state of repair must be imposed on someone" and that in the circumstances that could only be the landlord.⁵⁶ This second step is open to question as a matter of authority.⁵⁷ It has in fact since been held quite explicitly that "it is a phenomenon, certainly known at common law, that there may be situations in which there is no repairing obligation imposed either expressly or impliedly on anyone in relation to a lease".⁵⁸

Implied terms: conclusions

- 3.17 The state of the present law as to when a court will imply an obligation in a lease to carry out repairs is thoroughly unsatisfactory. There is a presumption against the implication of a repairing obligation in a lease because it is not considered to be necessary to give business efficacy to the agreement. The corollary of this is that it is quite possible for there to be a lease which does not allocate the responsibility for repairs to either party. A lease under which neither party is required to repair some

⁵² *Sleafer v Lambeth Borough Council* [1960] 1 QB 43; *Duke of Westminster v Guild*, above, at p 697. The existence of such a right may carry with it certain obligations as to repair however: see below, para 5.22.

⁵³ [1990] 1 QB 348 (CA).

⁵⁴ Compare *Woodfall's Law of Landlord and Tenant* (28th ed 1989) para 13.007 (criticising the decision as a matter of law) with Peter F Smith, "A Fallen Idol?" [1988] Conv 448 (welcoming the decision as a "move away from applying a rigid doctrine, which precluded consideration of the merits, to a more flexible approach, where policy considerations should come into play in doubtful or marginal cases"; *ibid*, at p 452).

⁵⁵ [1990] 1 QB 348, 358, *per* Kerr LJ.

⁵⁶ *Ibid*.

⁵⁷ See above, para 3.12. It is noteworthy that in *Crédit Suisse v Beegas Nominees Ltd* [1994] 4 All ER 803, 818, 819, Lindsay J explained *Barrett v Lounova (1982) Ltd* in terms of the first reason given by Kerr LJ for the decision rather than the second.

⁵⁸ *Demetriou v Robert Andrews (Estate Agencies) Ltd* (1990) 62 P & CR 536, 544 - 545, *per* Stuart-Smith LJ. This conclusion was part of the ratio of the case and was reached after consideration of *Barrett v Lounova (1982) Ltd*. See too *Tenant Radiant Heat Ltd v Warrington Development Corporation* [1988] 1 EGLR 41, 43. It has long been implicit that neither party may be under an obligation to repair the property: see *eg Sleafer v Lambeth Borough Council* [1960] 1 QB 43.

part of the premises is always a possibility because there is nothing in law to require the parties to address the issue of repairs when negotiating the terms of a lease. Against this background, it comes as little surprise that the authorities offer no coherent principles as to when repairing obligations will be implied and that the grounds for making any such implication are both uncertain and unpredictable. Although the courts have shown a willingness to develop the law in the absence of any legislation,⁵⁹ such developments are necessarily piecemeal.

⁵⁹ See *Liverpool City Council v Irwin* [1976] QB 319, 332 (Lord Denning MR, CA); [1977] AC 239, 263 (Lord Salmon, HL).

PART IV

FITNESS FOR HUMAN HABITATION

Introduction

- 4.1 In this section, we examine the circumstances in which a landlord may be liable for letting a house that is unfit for human habitation. We begin with civil remedies and an examination of the statutory condition as to fitness for human habitation that is implied into certain leases at very low rents by what is now section 8 of the Landlord and Tenant Act 1985.¹ Secondly, we consider those provisions of the legislation on public health and environmental protection which provide public law remedies in certain circumstances in cases of unfit housing.²

Fitness for human habitation: the obligation

- 4.2 By section 8(1) of the Landlord and Tenant Act 1985,³ there is implied in certain contracts “for the letting of a house⁴ for human habitation”, notwithstanding any stipulation to the contrary, both a condition that the house is fit for human habitation at the commencement of the tenancy and an undertaking that the house will be kept by the landlord fit for human habitation during the tenancy. The obligation is not an absolute one. The landlord is required to ensure that the house is “reasonably suitable for occupation”,⁵ and to fulfil that requirement he must “carry out such work upon the premises during the continuance of the tenancy as might from time to time be needed to keep them reasonably fit for human habitation”.⁶
- 4.3 The apparent breadth of this provision is however severely qualified by two conditions:

- (i) The section applies only where the rent does not exceed £80 per annum in London and £52 per annum elsewhere.⁷ These rent limits have

¹ Examined below, paras 4.2 - 4.30. For the text of the section, see Appendix B.

² See below, paras 4.31 - 4.54.

³ Re-enacting earlier legislation: see below, para 4.7. For the text of s 8, see Appendix B.

⁴ “House” is defined to “include a part of a house” (thereby reversing the view that “when a house is stated to be unfit for human habitation it is the whole house that is being so described”: *Estate and Trust Agencies (1927) Ltd v Singapore Improvement Trust* [1937] AC 898, 915, *per* Lord Maugham) and “any yard, garden, outhouses and appurtenances belonging to the house or usually enjoyed with it”: Landlord and Tenant Act 1985, s 8(6).

⁵ Landlord and Tenant Act 1985, s 10. The requirement of reasonableness mirrors the term implied at common law into lettings of furnished premises that they be “reasonably fit for human occupation”: *Wilson v Finch Hatton* (1877) 2 ExD 336, 343, *per* Kelly CB; above, para 3.9.

⁶ *O’Brien v Robinson* [1973] AC 912 at p 927, *per* Lord Diplock.

⁷ Landlord and Tenant Act 1985, ss 8(3)(a), (4).

remained unchanged since 1957.⁸ Even a decade ago, it was said that this provision “must have remarkably little application.”⁹ More recently, the rent limits were described as “far below the normal rents for a council house or flat”.¹⁰ There can be few if any lettings in the country to which this section now applies.¹¹

- (ii) The section does not apply where a house is let for a term of three years or more¹² upon terms that the tenant puts the premises into a condition reasonably fit for human habitation.¹³

There is also another more limited qualification on the applicability of the section: it does not bind the Crown.¹⁴

4.4 Although the implied term is statutory, its legal nature is contractual¹⁵ and its effect is “the same as those of an obligation created by a repairing covenant in a lease”.¹⁶ It has long been settled that, where the property is not fit for human habitation, the tenant may sue the landlord for damages.¹⁷ It is probably the case that the tenant may also treat a breach of the obligation as going to the root of the contract of letting, terminate the agreement, and sue for damages.¹⁸

⁸ Housing Act 1957, s 6 (as amended).

⁹ *Quick v Taff Ely Borough Council* [1986] QB 809, 817, per Dillon LJ. In that case, the section did not apply to the plaintiff “because his rent is too high, even though he is an unemployed tenant of a small council house”: *ibid.* In *R v Cardiff City Council ex p Cross* (1982) 6 HLR 1, 13, Dunn LJ commented that the rents were “fixed so low that the section may be of little practical application”.

¹⁰ *McNerny v Lambeth London Borough Council* [1989] 1 EGLR 81, 84, per Dillon LJ.

¹¹ A respondent to our Consultation Paper who has wide experience of landlord and tenant matters, described s 8 as a “dead letter”. We have recent evidence that a Rent Assessment Committee reduced a fair rent from £49 to £42 per week for a house which was not fit for human habitation and where the local authority had in consequence served a repair notice on the landlord.

¹² The lease not being determinable at the option of either party before the expiration of three years.

¹³ Landlord and Tenant Act 1985, s 8(5).

¹⁴ *Department of Transport v Egoroff* [1986] 1 EGLR 89.

¹⁵ *McCarrick v Liverpool Corporation* [1947] AC 219, 223, 227, 230.

¹⁶ *O’Brien v Robinson* [1973] AC 912, 927, per Lord Diplock.

¹⁷ *Walker v Hobbs & Co* (1889) 23 QBD 458. The court rejected the argument that, as the implied term as to fitness was by the statute a “condition”, the tenant’s only remedy was to leave the premises and refuse to pay the rent.

¹⁸ See *Hussein v Mehman* [1992] 2 EGLR 87 (a case on Landlord and Tenant Act 1985, s 11, rather than s 8, but the same principles apply).

4.5 The section also applies in the case of certain agricultural workers who occupy a house as part of their remuneration. If the provisions of section 8 are inapplicable *only* because the house is not *let* to such a worker, the term as to fitness for human habitation is implied into his contract of employment in the same way as it would have been if the property had been let to him.¹⁹ Given the low rent limits, such cases must now be very rare.

4.6 Before we examine the detailed requirements of the section, some account of its history and development must be given both to explain Parliament's intentions in introducing a requirement of fitness for human habitation and how that intention has ceased to be met. We will show in Part VIII of this report that the lack of fitness for human habitation of rented housing remains a serious problem, particularly in the case of private-sector lettings.

Fitness for human habitation: historical background

The origins of the legislation

4.7 The origins of the implied obligation of fitness for human habitation are to be found in the legislation to improve working class housing.²⁰ The provision was first included in the Housing of the Working Classes Act 1885²¹ which was enacted in response to the report of a Royal Commission.²² The Act provided that:

In any contract... for letting for habitation by persons of the working classes a house or part of a house, there shall be implied a condition that the house is at the commencement of the holding in all respects reasonably fit for human habitation.²³

The Act defined "letting for habitation by persons of the working classes" as a letting at an annual rental not exceeding £20 in London, £13 in Liverpool, £10 in Manchester or Birmingham, £8 elsewhere in England and Wales, and £4 in Scotland or Ireland.²⁴

¹⁹ *Ibid*, s 9.

²⁰ For a full account of the social, political and economic background, see Enid Gauldie, *Cruel Habitations. A History of Working-Class Housing 1780 - 1918* (1974), Chapters 21 - 25. For an account of the legal background, see W A West, "Statutory Repairing Covenants under the Housing Acts" (1962) 26 Conv (NS) 132; J I Reynolds, "Statutory Covenants of Fitness and Repair: Social Legislation and the Judges" (1974) 37 MLR 377; and W R Cornish and G de N Clark, *Law and Society in England 1750 - 1950* (1989), pp 151 - 166; 179 - 184.

²¹ 48 & 49 Vict c 72.

²² Enid Gauldie, *op cit*, Chapter 24.

²³ Section 12.

²⁴ *Ibid*, by reference to Poor Rate Assessment and Collection Act 1869 (32 & 33 Vict c 41), s 3.

The purpose of the legislation

- 4.8 The intention of the legislature in enacting this provision was stated by the then Prime Minister, the Marquess of Salisbury, on the Second Reading Debate on the Bill in the House of Lords:

At present, under the law, a man who lets a furnished house is compelled to enter into a contract that the house is healthy; but, by a curious peculiarity of the law, that does not extend to an unfurnished house. By the provisions of this Bill that anomaly will be removed and the evil will be met... I look to this clause more than to any other to diminish the death-rate that is caused by insanitary dwellings.²⁵

The legislation was intended to deal specifically with the two evils which he identified as:

evils of a strictly sanitary character - namely, those evils which arise out of material causes, the bad structure of the houses, bad drainage, insufficiency of water, and so forth; and the evils which arise from overcrowding, due to excess of population in one particular place.²⁶

- 4.9 What these passages make clear is that, to deal with the twin evils of insanitary and overcrowded housing, the provision was intended to reverse the effect of the common law rule that there was no implied term that unfurnished premises should be fit for the purposes for which they were let.²⁷ It is also apparent - both from the Prime Minister's remarks and from the rent limits - that the Act must have encompassed a substantial proportion of leased accommodation. When in 1909 the rent limits were doubled,²⁸ John Burns MP,²⁹ observed that as a result, "with the exception of London, nearly all the working classes of the Kingdom will be included".³⁰

²⁵ *Hansard* (HL) 16 July 1885, vol 299, col 892.

²⁶ *Ibid*, col 890.

²⁷ *Hart v Windsor* (1843) 12 M & W 68; 152 ER 1114; see above para 3.9.

²⁸ Housing, Town Planning, etc Act 1909, s 14.

²⁹ President of the Local Government Board.

³⁰ *Hansard* (HC) 1 November 1909, vol 12, col 1488.

The development of the legislation

4.10 The provision as to fitness for human habitation was re-enacted either as it stood³¹ or in amended form³² on a number of occasions. Changes that were made to the applicable rent limits and to the meaning of fitness for human habitation are of some importance and are treated in detail below.³³ In chronological order, the other principal statutory amendments were as follows:

- (i) Contracting out of the implied obligation was prohibited.³⁴
- (ii) The obligation that the house should be fit, which, when first introduced in 1885, applied only to the state of the property at the time when it was let, was extended so that the landlord was required to keep the house fit for human habitation for the duration of the holding.³⁵
- (iii) An exception was created, so that the obligation did not apply where the property was let for not less than three years upon the terms that it should be put by the tenant into a condition reasonably fit for occupation, and the lease was not determinable at the option of either party before the expiration of the term.³⁶
- (iv) The implied term as to fitness was extended to agricultural workers who occupied their houses under a contract of employment as part of their remuneration. If the implied term would have applied to that house had it been let, it was implied into the worker's contract of employment.³⁷

³¹ As in the Housing of the Working Classes Act 1890, s 75.

³² See Housing, Town Planning, etc Act 1909, ss 14, 15; Housing Act 1925, ss 1, 2; Housing Act 1936, ss 2, 3; Housing Act 1957, ss 6, 7; Landlord and Tenant Act 1985, ss 8, 9.

³³ Paras 4.11 - 4.27.

³⁴ Housing of the Working Classes Act 1903, s 12.

³⁵ Housing, Town Planning etc Act 1909, s 15(1). It seems that the original draft of the 1885 Bill may not have been limited to the state of the property at the time it was let, but was to apply throughout the letting. It appears to have been cut down during the course of its passage through Parliament: see *Hansard* (HC) 10 August 1885, vol 300, col 1590 (Sir Richard Assheton Cross MP).

³⁶ Housing, Town Planning etc Act 1909, s 14. There were objections to this exception in Parliament on the basis that it would provide a loophole for evading the terms of the Act: see the comments of W H Dickinson MP, *Hansard* (HC) 1 November 1909, vol 12, cols 1487 - 8.

³⁷ Agriculture Act 1920, s 32.

The present legislation incorporates all of these amendments.³⁸

Rent limits and “persons of the working classes”

4.11 When the implied term as to fitness was first introduced in 1885, and in its first re-enactment in 1890, it was applicable to lettings “for habitation by persons of the working classes”.³⁹ As we have explained above,⁴⁰ this was defined to mean lettings made below specified annual rental limits.⁴¹ In subsequent re-enactments, reference to the “working classes” was abandoned and the applicability of the implied term fell to be determined solely by reference to rental limits.⁴² Those rental limits were raised periodically, and to begin with the increases appear to have kept pace with inflation.⁴³ This did not however continue. The upper limit⁴⁴ of £20 in 1885 was raised to £40 in 1909,⁴⁵ but then remained unchanged until 1957 when it was increased to £80.⁴⁶ That is still the figure.⁴⁷

4.12 The significance of these figures can be demonstrated by comparing them with other factors. First, they may be considered against the change in the Retail Price Index over

³⁸ See above, para 4.2.

³⁹ Housing of the Working Classes Act 1885, s 12; Housing of the Working Classes Act 1890, s 75. As we pointed out in our Report on the Consolidation of the Housing Acts (1985) Law Com No 144; Scot Law Com No 94, p 8, “[o]riginally all housing legislation was confined in its operation to working class housing”.

⁴⁰ Para 4.7.

⁴¹ See the comments of the Home Secretary, Sir Richard Assheton Cross MP, in the course of the Second Reading of the 1885 Bill: *Hansard* (HC) 10 August 1885, vol 300, col 1590. It appears that, as originally drafted, the provision was not confined to houses for the working classes: *ibid*.

⁴² See Housing, Town Planning, etc Act 1909, s 14, in which the rent limits alone were first employed (but see the marginal note to s 15 of that Act). Under a subsequent statute, Housing, Town Planning, etc Act 1919, s 25(1), local authorities were empowered to serve a repair notice “if the owner of any house suitable for occupation by persons of the working classes” failed to keep the premises “in all respects reasonably fit for human habitation”. In *Arlidge v Tottenham Urban District Council* [1922] 2 KB 719, the Divisional Court held that in deciding whether a property was one “suitable for occupation by persons of the working classes,” the rental limits that applied to the implied covenant for fitness in leases under Housing, Town Planning, etc Act 1909 were to be ignored. The provisions of the 1919 Act were not confined to tenanted premises.

⁴³ See above, para 4.9.

⁴⁴ Which has always been for properties in London.

⁴⁵ Housing, Town Planning, etc Act 1909, s 14.

⁴⁶ Housing Act 1957, s 6(1). Cf Settled Land Act 1925, s 57; explained below, para 4.13, n 54.

⁴⁷ The present legislation is found in the Landlord and Tenant Act 1985 which was not an amending but merely a consolidating Act: see *Hansard* (HL) 21 May 1985, vol 464, cols 163 - 165.

the same period.⁴⁸ The equivalent value of £1 in 1885 was £3.60 in 1957 and £44.51 in 1995. On that basis the fourfold increase in the rental limit between 1885 and 1957 was slightly higher than the change in the Retail Price Index over the same period. However, by 1995, the upper rental limit for the implied fitness standard should have risen from £80 to £890 per annum. Even at that figure, few rented properties would now fall within the ambit of the legislation. Secondly, and perhaps more pertinently, the upper rental limits may be compared with average rentals in England and Wales.⁴⁹ These figures, which are shown in the table below, confirm that the implied fitness obligation applied to a very significant proportion of rented homes from the time of its introduction in 1885 until some time after the rental limits were last raised in 1957. If the *upper* rental levels for the implied obligation of fitness were to be restored to a position equivalent to those which applied in 1957, they would have to be well in excess of £3000 per annum.

Average Rents (England & Wales):	Upper Rental Limit for Implied Repairing Obligation (London)
1885: £9 per annum	£20 per annum
1912: £10-16-0 per annum	£40 per annum
1958/9: £49 per annum (council house rents)	£80 per annum
1994/5: £2055 per annum (council house rents); £3120 per annum (private sector rents)	£80 per annum

Comparison at different dates of average rents for houses in England and Wales with the upper limits at which the implied obligation of fitness applied.

4.13 It is not easy to account for Parliament's failure to increase the rental limits.⁵⁰ It is probably explained by a number of factors (rather than by any particular one). These include the extension of local authority housing, the decline in private sector lettings engendered by the Rent Acts,⁵¹ and the rise in owner occupation. Two possible reasons for Parliament's inaction do however merit specific comment.

⁴⁸ We are very grateful to the Bank of England for supplying us with this information.

⁴⁹ We are very grateful to the Department of the Environment for supplying us with this information.

⁵⁰ Both the Housing Act 1957 and the Landlord and Tenant Act 1985 were consolidating enactments. In consequence the Parliamentary debates provide no answer.

⁵¹ These Acts have their origin in the Increase of Rent and Mortgage Interest (War Restrictions) Act 1915.

- 4.14 The first lies in the fact that, in 1961, Parliament introduced an implied repairing obligation into leases granted for less than seven years.⁵² That provision is now section 11 of the Landlord and Tenant Act 1985, and we consider it in detail in Part V of this report. It may have been thought that all cases of unfitness would fall to be remedied under this section. It was only when *Quick v Taff Ely Borough Council*⁵³ was decided in 1985, that it became apparent that a property might be unfit for human habitation without the landlord being in breach of his implied obligations to repair under section 11.
- 4.15 The second reason may be because the implied term as to fitness for human habitation came to be perceived as something outdated. Its origins as a term applicable to “persons of the working classes” may not have been entirely forgotten.⁵⁴
- 4.16 The term “working classes”, although it still survives in certain statutory provisions,⁵⁵ fell out of regular use as a legal expression in the early years of the century⁵⁶ because it had “a far wider, and far less certain, signification than it used to possess”.⁵⁷ By 1947 the expression was considered to be “quite inappropriate” as there was “no such separate class as the working classes”.⁵⁸ When, in recent years, the courts have been called upon to give meaning to the phrase, they have generally taken it to connote “people in the lower income range”.⁵⁹

⁵² Housing Act 1961, ss 32, 33.

⁵³ [1986] QB 809: see above, para 1.1, where the facts are set out.

⁵⁴ Cf Settled Land Act 1925, s 57, which appears to equate “small dwellings” (which are defined by the Act - in terms that have become anomalous - as meaning “dwelling-houses of a rateable value not exceeding one hundred pounds per annum”: *ibid*, s 117(1)(xxv)) with “dwellings for the working classes”. See *Re Paddington Estate* [1940] Ch 43, 45.

⁵⁵ See, eg Settled Land Act 1925, ss 57(2), 107(2). For the legislative history of the phrase “working classes” see *Westminster City Council v Duke of Westminster* [1991] 4 All ER 136, 143, 144; and Robert G Lee, “The Demise of the Working Classes” [1980] Conv 281.

⁵⁶ But see Housing Act 1936, ss 4, 9.

⁵⁷ *Belcher v Reading Corporation* [1950] Ch 380, 392, *per* Romer J.

⁵⁸ *H E Green & Sons v Minister of Health (No 2)* [1948] 1 KB 34, 38, *per* Denning J. See too *Guinness Trust (London Fund) Founded 1890, Registered 1902 v Green* [1955] 1 WLR 872, 875, where Denning LJ observed that “fifty years ago the phrase was well understood to mean people who worked with their hands, whether on the land or on the railways or in mines.”

⁵⁹ *Guinness Trust (London Fund) Founded 1890, Registered 1902 v Green*, above, at p 875, *per* Denning LJ. See too *Re Niyazi's Will Trusts* [1978] 1 WLR 910, 915; *Chorley Borough Council v Barratt Developments (North West) Ltd* [1979] 3 All ER 634, 639; *Westminster City Council v Duke of Westminster*, above, at pp 144, 145 ([Jeremiah] Harman J). For a rather different view, see *Re Sanders Will Trusts* [1954] Ch 265, 271, where [Charles] Harman J opined that “the working class, if it means anything, may, I suppose, mean persons who occupy council houses”.

4.17 The view that the implied fitness standard may have been regarded as largely obsolete once the particular social evils of lack of proper sanitation and overcrowding for which it was enacted⁶⁰ had been contained, derives support from certain judicial observations. Thus the legislation was considered to be applicable to “letting of premises of a particular class and occupied by poor people unable to defend themselves,”⁶¹ and was “directed against slums, overcrowding and buildings in which people are herded together in conditions unsuitable for human habitation”.⁶² Even in 1942, Lord Wright considered that the words of the Act were meant to be “wide and elastic, because they are to be applied to the needs and circumstances of poor people living in confined quarters”.⁶³

4.18 Although the introduction of the implied fitness covenant had been prompted by the twin evils of inadequate sanitation and overcrowding,⁶⁴ it had also been intended to correct the anomaly that, although there was an implied fitness requirement in relation to lettings of furnished premises,⁶⁵ no similar obligation applied to unfurnished dwellings.⁶⁶ In Part VIII of this report, we shall show from housing statistics that, if modern standards of fitness for human habitation are applied, a strong case exists for re-introducing an effective implied fitness term in residential properties let on short leases. In theory, it would be open to the judiciary to imply such a term into leases of unfurnished property⁶⁷ by analogy with the implied common law term in relation to furnished premises. However, in *McNerny v Lambeth London Borough Council*⁶⁸ the Court of Appeal although admitting the logic of such a course, expressly declined to take it, precisely because of the existence of the implied statutory fitness covenant. Dillon LJ noted that Parliament had “conspicuously refrained from updating the [rent] limits in the 1985 Housing and Landlord and Tenant Acts”.⁶⁹ It was, he said, “for

⁶⁰ See above, para 4.8.

⁶¹ *Dobson v Horsley* [1915] 1 KB 634, 641, *per* Phillimore LJ.

⁶² *Jones v Geen* [1925] 1 KB 659, 668, *per* Salter J.

⁶³ *Summers v Salford Corporation* [1943] AC 283, 294.

⁶⁴ See above, para 4.8.

⁶⁵ For this implied term, see above, para 3.9. That implied term is only that the property should be fit at the time when the lease is granted. It is not that the property should be *kept* fit: *ibid.* Furthermore, it may be confined to matters that are a danger to health: *ibid.*

⁶⁶ See above, paras 4.8, 4.9.

⁶⁷ See the remarks of Lord Denning MR in the Court of Appeal in *Liverpool City Council v Irwin* [1976] QB 319, 332 (the court would be willing to imply a particular obligation to repair even though the Law Commission had recommended the introduction of such a term by statute).

⁶⁸ [1989] 1 EGLR 81, 84.

⁶⁹ *Ibid.*

Parliament and not for the courts to introduce such a development into the law”.⁷⁰ Quite apart from the constitutional objections to the implication of a term of this kind by the courts, there is another reason why the matter should be left in Parliament’s hands. Any judicial decision is regarded as declaratory of the law. It is therefore retrospective in effect because it applies to leases that are already in existence. This could have profound implications as to the burden of costs falling on the landlord. The advantage of a legislative solution is that it may be prospective only and its effects can be provided for.

- 4.19 In many (but not all) cases where a property is unfit for human habitation, the tenant has other remedies that will lead to the remedying of the unfitness.⁷¹ However, even though such alternative remedies exist, the absence of any effective contractual remedy in cases of unfitness has striking consequences. We explain below that there may be cases where a property is unfit for human habitation even though there is no “disrepair” as such.⁷² Thus, in one case, a landlord had complied with his implied statutory obligation⁷³ to keep in repair the structure and exterior of the property. Nonetheless, the premises were still unfit for human habitation due to an inherent design defect.⁷⁴ In such a case, the tenant is left without any compensation for injuries or damage to property that he may suffer in consequence of the unfitness.

The meaning of “fitness for human habitation”

Introduction

- 4.20 When the implied term of fitness for human habitation was first introduced in 1885, the term “fit for human habitation” was not defined.⁷⁵ The meaning of those words was therefore a matter for judicial decision alone, at least in the context of the implied term.⁷⁶ It was only in the Housing Act 1936 that an attempt was made at some form of statutory definition.⁷⁷

⁷⁰ *Ibid.*

⁷¹ See below, paras 4.31 - 4.54.

⁷² Para 5.15.

⁷³ See Landlord and Tenant Act 1985, s 11; below, para 5.1.

⁷⁴ *Quick v Taff Ely Borough Council* [1986] QB 809; below, para 5.15.

⁷⁵ For the origin of this term, see below para 4.31.

⁷⁶ For the position in relation to public health, see below, para 4.24.

⁷⁷ See below, para 4.25.

Judicial interpretation

4.21 Before the introduction of statutory criteria for determining whether or not a property was fit for human habitation, the issue was treated as one of fact⁷⁸ to be determined according to the standard of the “ordinary, reasonable, man”.⁷⁹ A property might be unfit for human habitation not just because of structural defects or internal physical conditions, but because of “external causes, such as want of ventilation, noxious effluvia, etc”.⁸⁰ In the earlier decisions, the standard was held to be satisfied quite readily. It was “a humble standard” and it “only required that the place must be decently fit for human beings to live in.”⁸¹ “Unfit for human habitation” was “a very strong expression, and vastly different from ‘not up to modern or model requirements’”.⁸² Nor did it equate to “good and tenantable repair”.⁸³ Some decisions were remarkably harsh. A plague of rats was thought by the Divisional Court not to make a house unfit, though the correctness of this decision must be open to serious doubt.⁸⁴

4.22 However, a rather broader view came to be taken, largely under the influence of Lord Atkin. In his opinion,

if the state of repair of a house is such that by ordinary user damage may naturally be caused to the occupier, either in respect of personal injury to life or limb or injury to health, then the house is not in all respects reasonably fit for human habitation.⁸⁵

⁷⁸ *Hall v Manchester Corporation* (1915) 84 LJCh 732, 742; *Daly v Elstree Rural District Council* [1948] 2 All ER 13, 15.

⁷⁹ *Hall v Manchester Corporation*, above, at p 743, per Lord Parker of Waddington; *R v Southwark London Borough Council, ex p Cordwell* (1993) 26 HLR 107, 117.

⁸⁰ *Hall v Manchester Corporation*, above, at p 740, per Lord Atkinson. “The Victorians assumed a direct correlation between insanitary conditions and ill health, accepting the prevailing theory that disease was transmitted by miasmata or noxious vapours - crudely, that smells generated disease. This led to a particular preoccupation with ventilation...”: Dr Richard Moore, “The Development and Role of Standards for the Older Housing Stock” in *Unhealthy Housing: Prevention and Remedies* (Institution of Environmental Health Officers, The Legal Research Institute, University of Warwick, 1987), p 2.

⁸¹ *Jones v Geen* [1925] 1 KB 659, 668, per Salter J.

⁸² *Hall v Manchester Corporation*, above, at p 738, per Lord Dunedin.

⁸³ *Jones v Geen*, above, at p 669.

⁸⁴ *Stanton v Southwick* [1920] 2 KB 642. The county court judge had thought otherwise. Speaking of the *Stanton* case in *Summers v Salford Corporation* [1943] AC 283, 295, Lord Wright commented that “[w]hen I try to put myself in the position of the tenant of that house, I cannot do other than agree with the county court judge”.

⁸⁵ *Morgan v Liverpool Corporation* [1927] 2 KB 131, 145, per Atkin LJ. In *Estate and Trust Agencies (1927) Ltd v Singapore Improvement Trust* [1937] AC 898, a decision on a public health provision in the Singapore Improvement Ordinance 1927, the Privy Council attempted to list the matters “which generally render a house unfit for human habitation,

4.23 This definition was subsequently approved by the House of Lords in *Summers v Salford Corporation*.⁸⁶ In that case, a defective sash cord on the only window in the bedroom of a small house was held in the circumstances to make the property not reasonably fit for human habitation. Lord Atkin⁸⁷ equated the requirement of reasonable fitness for human habitation with “habitable repair,” which had been defined in earlier authority as—

such a state, as to repair, that the premises might be used and dwelt in not only with safety, but with reasonable comfort,⁸⁸ by the class of persons by whom, and for the sort of purposes for which, they were to be occupied.⁸⁹

Subsequent decisions have added little to Lord Atkin’s approach,⁹⁰ not least because of the introduction of statutory criteria for identifying unfitness.

Statutory criteria

4.24 The development of statutory criteria for determining whether property was fit for human habitation had its origins not in the tenant’s implied statutory rights against his landlord but in legislation concerned with public health. The Housing Act 1925 imposed on local authorities a duty to inspect dwellings in their area with a view to ascertaining whether any were “in a state so dangerous or injurious to health as to be unfit for human habitation”.⁹¹ In regulations made under that Act,⁹² there was a list of matters which were to be considered in making a determination.⁹³

such as a structure which is unsafe, a verminous condition of the materials, a pestiferous atmosphere, a state of things dangerous to health, or such a rotten or decayed condition of the building that rebuilding will be cheaper than extensive repair” (at p 916, *per* Lord Maugham).

⁸⁶ [1943] AC 283.

⁸⁷ *Ibid*, at p 289.

⁸⁸ Lord Atkin considered that “too much emphasis should not be laid on ‘comfort’”: *ibid*, at pp 283, 290.

⁸⁹ *Proudfoot v Hart* (1890) 25 QBD 42, 50, *per* Lord Esher MR, quoting from the judgment of Alderson B in *Belcher v M’Intosh* (1839) 2 Moo & R 186, 189; 174 ER 257, 258.

⁹⁰ It was applied by Auld J in *R v Southwark London Borough Council, ex p Cordwell* (1993) 26 HLR 107, 117 (affirmed on appeal without reference to this point: (1994) 27 HLR 594). Cf *Salford City Council v McNally* [1976] AC 379, 394.

⁹¹ Section 8.

⁹² Housing Consolidated Regulations 1925, SR & O 1925, No 866, reg 28.

⁹³ These included (i) the arrangements to prevent contamination of the water supply; (ii) closet accommodation; (iii) drainage; (iv) arrangements as to light, free circulation of air, dampness and cleanliness; (v) the paving, drainage, and sanitary condition of any yard or out-house; (vi) the arrangements for the deposit of refuse and ashes; and (vii) the existence of sleeping accommodation below ground level.

4.25 In the Housing Act 1936,⁹⁴ it was provided that in determining whether a house was fit for human habitation regard was to be had “to the extent, if any, to which by reason of disrepair or sanitary defects the house fell short of” any local byelaws or local Acts dealing with the construction of new buildings and streets or with the general standard of housing accommodation for working classes in the district. It is clear from the definition given by the Act of “sanitary defects”⁹⁵ that this approach was derived from the regulations made under the Housing Act 1925.

4.26 The scheme of the 1936 Act was to tie the fitness standard, primarily if not exclusively, to local byelaws and Acts,⁹⁶ and many local authorities did indeed make appropriate byelaws.⁹⁷ This approach was superseded in 1954, with the introduction of a statutory list of factors that were to be applied to determine whether a house was unfit.⁹⁸ These criteria were thereafter to be applied in place of any local byelaws.⁹⁹ A house was unfit if it was “so far defective” in relation to one of the listed factors that it was not “reasonably suitable for occupation in that condition”.¹⁰⁰ The listed factors were—

- (a) repair;
- (b) stability;
- (c) freedom from damp;
- (d) natural lighting;
- (e) ventilation;
- (f) water supply;
- (g) drainage and sanitary conveniences; and
- (h) facilities for storage, preparation and cooking of food and for the disposal of waste water.

⁹⁴ Section 188(4).

⁹⁵ They included “lack of air space or ventilation, darkness, dampness, absence of adequate and readily accessible water supply or sanitary accommodation or of other conveniences, and inadequate paving or drainage of courts, yards or passages”: s 188(1).

⁹⁶ See *Critchell v Lambeth Borough Council* [1957] 2 QB 535, 539.

⁹⁷ See, eg *London Hospital Governors v Jacobs (No 2)* [1957] 2 QB 528 (Metropolitan Borough of Stepney regulations).

⁹⁸ Housing Repairs and Rents Act 1954, s 9(1).

⁹⁹ *Ibid*, s 9(3). See *London Hospital Governors v Jacobs (No 2)*, above; *Critchell v Lambeth Borough Council*, above.

¹⁰⁰ Housing Repairs and Rents Act 1954, s 9(1).

4.27 These criteria were re-enacted without change in the Housing Act 1957.¹⁰¹ Two amendments were made to the list of factors in 1969. “Internal arrangement” was added and “storage” was dropped.¹⁰² It is in that amended form that the criteria for determining fitness now stand.¹⁰³ As we explain below,¹⁰⁴ although these same criteria were also applied in the field of public health until 1 April, 1990,¹⁰⁵ that is no longer the case. A new and more objective set of factors is now employed for both these purposes and for the obtaining of improvement grants.¹⁰⁶

Two restrictions on a landlord’s liability for unfit premises

Notice to the landlord

4.28 There are two judicially imposed restrictions on a landlord’s implied obligation as to fitness.¹⁰⁷ First, it has been explained that a covenantor’s liability on a covenant to keep in repair is normally strict.¹⁰⁸ However, that general rule is subject to the exception, applicable here, that a landlord is not liable for breach of a covenant to repair the property subject to the lease unless the defect is brought to his notice¹⁰⁹ and he has failed to remedy it within a reasonable time.¹¹⁰ The implied obligation, although

¹⁰¹ Section 4. As explained above, the criteria were made by reference to a house being “reasonably suitable for occupation”. In the legislation prior to 1957, the landlord’s implied obligation had been to ensure that the house was “in all respects *reasonably* fit for human habitation”: see, eg Housing Act 1936, s 2(1)(emphasis added). However, in the Housing Act 1957, because of the introduction of reasonable suitability into the criteria for determining whether a house was fit, the landlord’s primary obligation was amended commensurately and became one to ensure that the house was “fit for human habitation”: s 6(2).

¹⁰² Housing Act 1969, s 71.

¹⁰³ Landlord and Tenant Act 1985, s 10; see Appendix B. The factors are, therefore, repair, stability, freedom from damp, natural lighting, ventilation, water supply, drainage and sanitary conveniences, and facilities for preparation and cooking of food and for the disposal of waste water.

¹⁰⁴ See below, para 4.33.

¹⁰⁵ See Housing Act 1985, s 604 (as first enacted).

¹⁰⁶ See Local Government and Housing Act 1989, s 165(1)(e); Sched 9, Pt V, para 83, substituting a new Housing Act 1985, s 604; below, para 4.33.

¹⁰⁷ A third limitation was formerly of some importance. Because the implied obligation of fitness was a contractual one, the landlord was only liable to the tenant for any loss, damage or injury suffered by him. There was no liability to his family or visitors: see, eg *Ryall v Kidwell & Son* [1914] 3 KB 135. This unintended deficiency in the legislation was rectified by Occupiers Liability Act 1957, s 4, which has since been replaced by Defective Premises Act 1972, s 4. See below, para 5.22.

¹⁰⁸ See above, para 2.10.

¹⁰⁹ In *McGreal v Wake* [1984] 1 EGLR 42, 43, Donaldson MR observed that “the golden rule is ‘Tell your landlord about the defects’”.

¹¹⁰ See, eg *Makin v Watkinson* (1870) LR 6 Exch 25; *Morris v Liverpool City Council* [1988] 1 EGLR 47. For the reasons for the rule, see *Murphy v Hurley* [1922] 1 AC 369, 375. In *Calabar Properties Ltd v Sticher* [1984] 1 WLR 287, 298, Griffiths LJ explained that “a

imposed by statute, takes effect as a contractual term, and is therefore subject to this rule.¹¹¹ The requirement of notice to the landlord applies not merely to defects of which the tenant is aware,¹¹² but also to latent defects of which the tenant has no knowledge.¹¹³ It is not necessary that the landlord should be informed by the tenant. If knowledge of the unfitness comes to the attention of the landlord from a responsible source,¹¹⁴ he is under an obligation to take appropriate action even if the tenant is not himself aware of the defect.¹¹⁵ Nor need he have actual knowledge of the defect. It suffices that he has information that is such as to place a reasonable landlord on inquiry, even if that information does not come in the form of a complaint¹¹⁶ or does not specify the precise degree of non-repair.¹¹⁷ It should be noted that a landlord who covenants to keep premises in repair or, as in the case of the implied covenant, fit for human habitation, is liable for the breach of that obligation without notice, if the cause of the disrepair or unfitness is located on property retained by or under the control of the landlord.¹¹⁸ In such a case the landlord “has means of access and therefore means of knowing of the defect”,¹¹⁹ and the general rule of strict liability therefore applies.¹²⁰

4.29 The rule that the landlord will not be liable unless he knows or is put upon notice of the defect has not escaped criticism, because it “penalises the conscientious landlord and rewards the absentee”.¹²¹ However, it has also been justified because “it reflects

landlord is not in breach of his covenant to repair until he had been given notice of the want of repair and a reasonable time has elapsed in which the repair could have been carried out”. However, the defect may be such that the landlord is expected to act at once to eliminate the hazard created by it: see *Griffin v Pillet* [1926] 1 KB 17, 22.

¹¹¹ *McCarrick v Liverpool Corporation* [1947] AC 219.

¹¹² As in *McCarrick v Liverpool Corporation*, above (defective back steps).

¹¹³ As in *O'Brien v Robinson* [1973] AC 912 (where a bedroom ceiling collapsed). That was a case on what is now Landlord and Tenant Act 1985, s 11 (rather than s 8), but where the same principles were held to apply.

¹¹⁴ See *Dinefwr Borough Council v Jones* [1987] 2 EGLR 58, 59; *Hall v Howard* (1988) 57 P & CR 226, 230.

¹¹⁵ See *O'Brien v Robinson*, above, at p 926.

¹¹⁶ *O'Brien v Robinson*, above, at p 930; *Hall v Howard*, above at p 230.

¹¹⁷ *Griffin v Pillet* [1926] 1 KB 17, 21. Cf *Al Hassani v Merrigan* [1988] 1 EGLR 93, 94.

¹¹⁸ See *Melles & Co v Holme* [1918] 2 KB 100, 104; *McCarrick v Liverpool Corporation*, above, at pp 226, 229.

¹¹⁹ *McCarrick v Liverpool Corporation*, above, at p 229, *per* Lord Simonds.

¹²⁰ See above, para 2.10.

¹²¹ *McGreal v Wake* [1984] 1 EGLR 42, 43, *per* Donaldson MR. For a detailed critique, see J I Reynolds, “Statutory Covenants of Fitness and Repair: Social Legislation and the Judges” (1974) 37 MLR 377, 386 - 395. It has been suggested that it was Parliament’s intention that the liability under the implied covenant for fitness should be strict and not merely an

the common-sense proposition that a person cannot take steps to remedy a defect of which he knows nothing".¹²² We explain below that the effect of the requirement to give notice of disrepair as a pre-condition of liability has been substantially reduced by the provisions of the Defective Premises Act 1972.¹²³

Unfitness must be remediable at reasonable expense

4.30 The second limitation was imported from the legislation on public health. Until 1 April 1990, a local authority had power to serve a closing order in respect of a house that was unfit for human habitation and could not be made fit at reasonable expense.¹²⁴ Landlords have often welcomed such closing orders because they provided a legitimate means of evicting tenants who were otherwise protected under the Rent Acts.¹²⁵ In *Buswell v Goodwin*,¹²⁶ the Court of Appeal held by analogy with public health provisions, that the landlord's implied obligation as to fitness was restricted to "cases where the house is capable of being made fit for human habitation at a reasonable expense".¹²⁷ To hold otherwise would require a landlord to "keep a ruinous house fit for habitation at whatever the cost".¹²⁸ This particular limitation is controversial and has been both criticised¹²⁹ and defended.¹³⁰ At first sight the decision

obligation to remedy the unfitness on notice: W A West, "Statutory Repairing Covenants under the Housing Acts" (1962) 26 Conv (NS) 132, 146.

¹²² *Hussein v Mehlman* [1992] 2 EGLR 87, 92, per Stephen Sedley QC.

¹²³ Section 4(4); see below, para 5.26.

¹²⁴ Housing Act 1985, s 264, replacing earlier legislation. A new s 264 has been substituted by the Local Government and Housing Act 1989, s 165(1)(b); Sched 9, Pt II, para 14. See below, para 4.31.

¹²⁵ See *Hillbank Properties Ltd v Hackney London Borough Council* [1978] QB 998 at 1003, 1010; *Kenny v Kingston-upon-Thames Royal London Borough Council* [1985] 1 EGLR 26.

¹²⁶ [1971] 1 WLR 92.

¹²⁷ *Ibid*, at p 97, per Widgery LJ.

¹²⁸ *Ibid*.

¹²⁹ See, eg J I Reynolds, "Statutory Covenants of Fitness and Repair: Social Legislation and the Judges" (1974) 37 MLR 377, 384. Some of the criticism has been misplaced. In "The Intention of the Legislature" (1971) 87 LQR 471, 472, Professor W A West - whose views J I Reynolds endorses - suggested that "the legislature intended to impose no less than an absolute obligation on the landlord". His thesis was that prior to the Housing Act 1957, the landlord's obligation was to ensure that the house should "in all respects be reasonably fit for human habitation": see, eg Housing Act 1936, s 2. Under the Housing Act 1957, s 6(2), Parliament had removed the requirement of reasonableness altogether so that the obligation was that the property should be "fit for human habitation". However, this analysis ignored the fact that the requirement of reasonableness had simply been incorporated into the criteria of fitness. A house was required to be "reasonably suitable for occupation": Housing Act 1957, s 4(1). See above, para 4.27.

¹³⁰ See M J Robinson, "Social Legislation and the Judges: a Note by Way of Rejoinder" (1976) 39 MLR 43, explaining correctly the statutory history.

appears to enable a landlord to take advantage of his own wrongdoing. However, a landlord who allows a property to fall into such a state of disrepair that it is fit only for demolition does so at his peril. Such conduct on his part would probably amount to a repudiatory breach of the contract of letting, and the tenant would therefore be able to terminate the tenancy and sue for substantial damages.¹³¹

Fitness for human habitation: public health legislation

4.31 There has long been a concern in the interests of public health that houses should be fit for human habitation whether or not they are tenanted. The governing legislation falls into two categories. First, local authorities have powers to order the repair, closing or demolition of a property that is not fit for human habitation. These powers appear to have originated in the Artizans [*sic*] and Labourers Dwellings Act 1868,¹³² and are now found in the Housing Act 1985 as amended.¹³³ Secondly, local authorities are empowered to take action in respect of both statutory nuisances and defective premises. Furthermore, as regards statutory nuisances, there is also a power for magistrates to act on the complaint of a “person aggrieved”. These powers have an even longer history. The Nuisances Removal and Diseases Prevention Act 1855¹³⁴ gave Justices of the Peace the power to make a closing order if a nuisance rendered a house or building unfit for human habitation - the first statutory use of the phrase. The present legislation is found in the Building Act 1984¹³⁵ and the Environmental Protection Act 1990.¹³⁶

4.32 Before examining these two categories, something must be said about their interrelationship. Where a local authority discovers that a property is not fit for human habitation, it will often be able to choose which of these two régimes it wishes to pursue.¹³⁷ However, this will not always be so, for although they overlap they are in no sense conterminous. “While a house which is by its condition ‘prejudicial to health’ is likely to be ‘unfit for human habitation’, the converse is not necessarily the case. In dealing with each Act it is better to use its own terminology.”¹³⁸ The different Acts

¹³¹ *Hussein v Mehlman* [1992] 2 EGLR 87.

¹³² 31 & 32 Vict c 130, ss 5 - 7.

¹³³ Sections 189, 264 and 265, amended by Housing Act 1988, s 130(1), (3); Sched 15, para 1; and by Local Government and Housing Act 1989, s 165(1)(a); Sched 9, Pt I, para 1; s 165(1)(b); Sched 9, Pt II, para 14.

¹³⁴ 18 & 19 Vict c 121, s 13.

¹³⁵ Section 76.

¹³⁶ Sections 79 - 82.

¹³⁷ See *Nottingham City District Council v Newton* [1974] 1 WLR 923, 926.

¹³⁸ *Salford City Council v McNally* [1976] AC 379, 389, *per* Lord Wilberforce.

“are dealing with different matters and setting different standards”.¹³⁹ It has been held in relation to each of the régimes that once the pre-conditions for its application exist, a local authority is under a “mandatory” duty to perform its obligation under the relevant statute.¹⁴⁰ In a case where a local authority could proceed under either régime, the duty “is not as mandatory as it appears,”¹⁴¹ for it has a choice as to which it will pursue.¹⁴² What it cannot do is to pursue neither.

Repair, closing and demolition orders under the Housing Act 1985

4.33 Under the Housing Act 1985 (in its amended form), where a local authority is satisfied that a dwelling house or a house in multiple occupation is unfit for human habitation it is under a mandatory duty¹⁴³ to take one of three statutory options. It must make a repair order,¹⁴⁴ a closing order, or a demolition order.¹⁴⁵ It does “not have the further option of doing nothing”.¹⁴⁶

4.34 Even if a dwelling-house is not unfit for human habitation, if the local authority is satisfied either—

- (i) that it is in such a state of disrepair that substantial repairs are necessary to bring it up to a reasonable standard, having regard to its age, character and locality; or
- (ii) that, on a representation by an occupying tenant (or otherwise), the property is in such a state of disrepair that its condition is such as to interfere materially with the personal comfort of that tenant,

¹³⁹ *Ibid*, at p 388.

¹⁴⁰ See below, paras 4.33 (Housing Act 1985) and 4.47, 4.49 (Environmental Protection Act 1990).

¹⁴¹ *Nottingham City District Council v Newton* [1974] 1 WLR 923, 927, *per* Lord Widgery CJ.

¹⁴² *Ibid*.

¹⁴³ See *R v Kerrier District Council, ex p Guppys (Bridport) Ltd* (1976) 32 P & CR 411. For the meaning of “mandatory” in this context, see above, para 4.32.

¹⁴⁴ It may give approval for a renovation grant in such a case, as happens in practice in 54% of cases of unfitness: see *Monitoring the New Housing Fitness Standard*, (Department of the Environment, 1993), Chapter 6, Table 6.1.

¹⁴⁵ See below, para 4.45.

¹⁴⁶ *R v Southwark London Borough Council, ex p Cordwell* (1993) 26 HLR 107, 117, *per* Auld J (affirmed on appeal: (1994) 27 HLR 594).

it may serve a repair notice on the person having control of the house.¹⁴⁷ The person on whom the notice is served is required to execute the works specified in the notice within a reasonable time.¹⁴⁸ In the event of non-compliance, the local authority can undertake the work itself and recover the cost of so doing from the person on whom the notice was served.¹⁴⁹

4.35 This power was first introduced by the Housing Act 1969.¹⁵⁰ One of the reasons behind it was, that landlords allowed properties to fall into such a state of disrepair that they were not fit for human habitation. Once a property had been condemned as unfit, a landlord could evict the protected tenant, repair the property and sell it at a considerable profit.¹⁵¹

4.36 Before examining the options that are available in cases of unfitness, it is necessary to examine the fitness standard that has been applicable for these purposes since 1 April 1990.¹⁵² As we explain below,¹⁵³ it differs significantly from the standard that applies to cases under the covenant of fitness implied by section 8 of the Landlord and Tenant Act 1985.

The fitness standard

4.37 The present fitness standard was introduced by the Local Government and Housing Act 1989.¹⁵⁴ It is in two parts. The first is a general standard that is applicable to a “dwelling-house”.¹⁵⁵ Such a property will not be fit for human habitation if, in the

¹⁴⁷ Housing Act 1985, s 190(1) (as amended); see Appendix B. For the factors that may be taken into account by the local authority in exercising its discretion, see *Kenny v Kingston-upon-Thames Royal London Borough Council* [1985] 1 EGLR 26.

¹⁴⁸ *Ibid*, s 190(2) (as amended); see Appendix B.

¹⁴⁹ Housing Act 1985, s 193 (as amended).

¹⁵⁰ Section 72, amending Housing Act 1957, s 9.

¹⁵¹ See *Hillbank Properties Ltd v Hackney London Borough Council* [1978] QB 998, 1010 - 1011.

¹⁵² For a valuable account of the development of the fitness standard in the field of public law, see Dr Richard Moore, “The Development and Role of Standards for the Older Housing Stock” in *Unhealthy Housing: Prevention and Remedies* (Institution of Environmental Health Officers, The Legal Research Institute, University of Warwick, 1987).

¹⁵³ See below, paras 4.39 - 4.44.

¹⁵⁴ Section 165(1)(e); Sched 9, Pt V, para 83, substituting a new Housing Act 1985, s 604; see Appendix B. The Department of the Environment has undertaken a study in order to monitor the new fitness standard: *Monitoring the New Housing Fitness Standard* (Department of the Environment, 1993). This is a source of much valuable information as to the manner in which the fitness standard is enforced and operates in practice.

¹⁵⁵ Housing Act 1985, s 604(1) as substituted. The subsection expressly applies not only to a dwelling-house but to a house in multiple occupation as well: s 604(3). A “dwelling-house” may be either a house or a flat. Where a building is divided vertically (such as terraced housing), the units into which it is divided may be houses. A building that is divided

opinion of the local authority, it is not reasonably suitable for occupation because it fails to meet one or more of the following requirements—

- (a) it is structurally stable;
- (b) it is free from serious disrepair;
- (c) it is free from dampness prejudicial to the health of the occupants (if any);
- (d) it has adequate provision for lighting, heating and ventilation;
- (e) it has an adequate piped supply of wholesome water;
- (f) there are satisfactory facilities in the dwelling-house for the preparation and cooking of food, including a sink with a satisfactory supply of hot and cold water;
- (g) it has a suitably located water-closet for the exclusive use of the occupants (if any);
- (h) it has for the exclusive use of the occupants (if any), a suitably located fixed bath or shower and wash-hand basin each of which is provided with a satisfactory supply of hot and cold water; and
- (i) it has an effective system for the draining of foul, waste and surface water.

4.38 The second part is specifically concerned with flats.¹⁵⁶ Where the dwelling-house is a flat,¹⁵⁷ then even if it satisfies those nine requirements, it is unfit for human habitation if it is not reasonably suitable for occupation because, in the opinion of the local authority, the building or a part of the building outside the flat fails to meet one or more of the following requirements—

- (a) the building or part is structurally stable;
- (b) it is free from serious disrepair;
- (c) it is free from dampness;
- (d) it has adequate provision for ventilation; and
- (e) it has an effective system for the draining of foul, waste and surface water.

horizontally cannot be a house but may consist of dwelling-houses which are flats: *ibid*, ss 183(2); 623(1) (as amended by Local Government and Housing Act 1989, s 165(1)(e); Sched 9, Pt V, para 90). A dwelling-house which is not a house is a flat: Housing Act 1985, s 183(3). A house in multiple occupation means a house which is occupied by persons who do not form a single household: *ibid*, s 345.

¹⁵⁶ *Ibid*, s 604(2). For the definition of “flat”, see the preceding note.

¹⁵⁷ Which is taken to include a flat in multiple occupation: *ibid*, s 604(4).

The Department of the Environment has provided detailed guidance notes on the application of the requirements.¹⁵⁸ Both lists of requirements can be amended by the Secretary of State by statutory instrument.¹⁵⁹

Differences between the new and old standards

- 4.39 The list of requirements differs significantly from those which apply to the implied covenant in leases that premises should be fit for human habitation.¹⁶⁰ Five of these differences call for comment.
- 4.40 First, where the dwelling is a flat, provision is made for the fitness of the rest of the building. This is not so under the implied covenant.
- 4.41 Secondly, one of the factors that is applicable under the implied covenant - internal arrangement¹⁶¹ - has been abandoned.¹⁶²
- 4.42 Thirdly, new requirements have been introduced, most notably in relation to heating, artificial lighting and proper internal washing and bathroom facilities.
- 4.43 Fourthly, there is a greater degree of detail in the requirements than in those applicable to the implied fitness covenant. This reflects the aim which prompted the introduction of the new fitness standard, namely that it should be more objective. The intention was to achieve a more uniform application of the standard in the exercise of enforcement powers by local authorities and to ensure equal access to mandatory renovation grants.¹⁶³ It should be noted that the test is still not entirely objective. The authority must be satisfied in relation to each failure of the statutory requirements in turn, that the dwelling house is, as a result of it, not reasonably suitable for human habitation. The authority cannot regard the failures cumulatively. This has been criticised,¹⁶⁴ and it has been suggested that either the reference to reasonable suitability

¹⁵⁸ Circular 6/90, Annex A, "Guidance Notes on the Standard of Fitness for Human Habitation"; reprinted in *Encyclopaedia of Housing Law and Practice*, 4-1742 - 4-1769.

¹⁵⁹ Housing Act 1985, s 604(5).

¹⁶⁰ Landlord and Tenant Act 1985, s 10; see paras 4.26 - 4.27 above.

¹⁶¹ Introduced by Housing Act 1969, s 71.

¹⁶² Local environmental health officers, whose views were sought on behalf of the Department of the Environment, considered that this requirement should be reinstated: *Monitoring the New Housing Fitness Standard*, paras 5.44 - 5.49.

¹⁶³ *Ibid*, paras 1.02, 9.01. For the award of mandatory renovation grants in cases of unfitness, see below, para 8.27.

¹⁶⁴ *Ibid*, paras 5.02 - 5.08.

for human habitation should be abandoned or that in determining reasonable suitability, regard should be had to the defects cumulatively.¹⁶⁵

4.44 Finally, the requirements that make up the standard can be varied by statutory instrument. Other factors have indeed been suggested for possible inclusion in the standard.¹⁶⁶ These include—

- (a) the re-introduction of internal arrangement;
- (b) thermal insulation;
- (c) sound insulation;
- (d) hazards outside the dwelling or building;¹⁶⁷ and
- (e) fire precautions.

Repair, closing and demolition orders

4.45 Where a local housing authority is satisfied that a dwelling-house or house in multiple occupation is unfit for human habitation, it must serve—

- (i) a repair notice on the person having control of the property;¹⁶⁸ or
- (ii) a closing order;¹⁶⁹ or
- (iii) a demolition order;¹⁷⁰

¹⁶⁵ *Ibid*, paras 11.11 - 11.12.

¹⁶⁶ *Ibid*, paras 5.44 - 5.62.

¹⁶⁷ Such as crumbling sea cliffs: *ibid*, para 5.56 (raised by officers in Torbay).

¹⁶⁸ Housing Act 1985, s 189(1), as amended by Housing Act 1988, s 130(1),(3), Sched 15, para 1; and Local Government and Housing Act 1989, s 165(1)(a); Sched 9, Pt 1, para 1. There are equivalent provisions for service of such notices on the appropriate person in relation to flats and houses in multiple occupation: s 189(1A),(1B)(as inserted). For these provisions, see Appendix B.

¹⁶⁹ Housing Act 1985, s 264(1), as substituted by the Local Government and Housing Act 1989, s 165(1)(b); Sched 9, Pt II, para 14. Where the building consists of one or more flats of which some or all are unfit for human habitation, the local authority can make a closing order in respect of the whole or part of the building: Housing Act 1985, s 264(2) (as substituted). For these provisions, see Appendix B.

¹⁷⁰ Housing Act 1985, s 265(1), as substituted by the Local Government and Housing Act 1989, s 165(1)(b); Sched 9, Pt II, para 14. Where the building consists of one or more flats of which some or all are unfit for human habitation, the local authority can make a demolition order in respect of the building: Housing Act 1985, s 265(2) (as substituted). For these provisions, see Appendix B.

if it is satisfied that serving such a notice is the most satisfactory course of action.¹⁷¹ In determining whether or not this is so, the local authority is required to have regard to such guidance as may from time to time be given by the Secretary of State.¹⁷² Under the current guidance,¹⁷³ local authorities must consider both the cost and the longer term socio-environmental implications.¹⁷⁴ The effect of this guidance is that a local authority is “not to consider the fate of an unfit dwelling in isolation (except in case of certain detached, rural properties), but should take into account the effect of the various possible courses of action upon the block, street, district, or even village where it lies”.¹⁷⁵ It has been said that this socio-environmental part of the local housing authority’s appraisal is “an inherently imprecise exercise”.¹⁷⁶ Because it is “primarily a matter of judgment for the authority, experienced as it is in housing matters”, its decision will not be open to challenge before a court unless it has “ignored an obviously important matter or taken into account and given weight to an obviously irrelevant matter”.¹⁷⁷

4.46 The approach that local housing authorities must now adopt is in marked contrast to that which applied prior to 1 April, 1990. In deciding which of the three orders to make, the determinant was then whether the dwelling-house was capable of being rendered fit at reasonable expense.¹⁷⁸ This was to be evaluated objectively, without regard to any particular circumstances affecting the person who was in control of the premises.¹⁷⁹

¹⁷¹ There are of course sanctions for non-compliance in each case. If a repair or demolition order is not carried out, the local authority may carry it out instead and recover their expenditure. A fine can be imposed if a closing order is not complied with. See Housing Act 1985, ss 193 - 198A (as amended).

¹⁷² Housing Act 1985, s 604A(1) (inserted by the Local Government and Housing Act 1989, s 165(1); Sched 9, Pt V, para 84).

¹⁷³ Given in the Department of the Environment’s Circular 6/90, Annex F, “Code of Guidance for Dealing with Unfit Premises”: reprinted in *Encyclopaedia of Housing Law and Practice*, 4-1782 - 4-1790.

¹⁷⁴ A formula is provided to assist in this evaluation: *ibid*, para 11. On the difficulties in carrying out what Balcombe LJ described as “effectively two assessments, one economic, the other socio-environmental”, see *R v Southwark London Borough Council, ex p Cordwell* (1994) 27 HLR 594, 598.

¹⁷⁵ Rosy Thornton, *Property Disrepair and Dilapidations* (1992) p 164.

¹⁷⁶ *R v Southwark London Borough Council, ex p Cordwell* (1993) 26 HLR 107, 124, *per* Auld J (affirmed on appeal: (1994) 27 HLR 594).

¹⁷⁷ *Ibid*.

¹⁷⁸ Housing Act 1985, s 189(1) (as originally enacted).

¹⁷⁹ *Johnson v Leicester Corporation* [1934] 1 KB 638, 646; *Leslie Maurice & Co Ltd v Willesden Corporation* [1953] 2 QB 1, 5.

4.47 Research undertaken on the operation of the new fitness standard under the amended Housing Act 1985 has revealed that 65 per cent of inspections by local authority officers arose out of renovation grant applications, 19 per cent out of complaints and 11 per cent on the initiative of the authority.¹⁸⁰ The recommended course of action was—

- (i) the approval of a renovation grant in 54 per cent of cases;
- (ii) the service of a repair notice (of some kind) in 23 per cent of cases;¹⁸¹ and
- (iii) a closing or demolition order in 3 per cent of cases.¹⁸²

No enforcement against a local authority

4.48 The existence of these statutory powers does of course provide an indirect means of ensuring that rented property is fit for human habitation even though, as will usually be the case, the implied term as to fitness does not apply because of the rent limits. In most cases, a tenant will be able to complain to the local authority and commonly does. If the property is indeed unfit, the local authority must serve on the landlord one of the three orders explained above.¹⁸³ However, there is one situation where the tenant cannot avail himself of this course. In *R v Cardiff City Council, ex p Cross*,¹⁸⁴ it was held that these statutory powers were inapplicable where the landlord was itself the local authority. It was “impossible to contemplate” that Parliament could have intended the statutory powers to apply to such properties.¹⁸⁵ The Court of Appeal acknowledged that this was anomalous, and that “certain council tenants are placed in a different and to some extent less advantageous, position in relation to houses unfit for human habitation”.¹⁸⁶

¹⁸⁰ *Monitoring the New Housing Fitness Standard*, Chapter 4, Table 4.2.

¹⁸¹ Not all of these involved properties which were unfit. The figure includes orders under Housing Act 1985, s 190 (where the property, although not unfit, is in such a state of disrepair that substantial repairs are needed to bring it up to a reasonable standard). It also includes proceedings for statutory nuisance under Part III of the Environmental Protection Act 1990.

¹⁸² *Monitoring the New Housing Fitness Standard*, Chapter 6, Table 6.1.

¹⁸³ Para 4.45.

¹⁸⁴ (1981) 1 HLR 54 (Woolf J); (1982) 6 HLR 1 (CA).

¹⁸⁵ (1982) 6 HLR 1, 10, *per* Lord Lane CJ.

¹⁸⁶ (1982) 6 HLR 1, 13, *per* Dunn LJ. It should be noted that secure tenants, whose landlord is a local housing authority, have a statutory right to have repairs carried out on application where the landlord is liable to carry out repairs under an express or implied repairing covenant: see Housing Act 1985, s 96 (substituted by Leasehold Reform, Housing and Urban Development Act 1993, s 121). Provision has been made for the payment of compensation if the repairs are not carried out within a specified period (which is sometimes 1 day and never more than 7 days): see *The Secure Tenants of Local Housing Authorities*

Statutory nuisances

“Prejudicial to health or a nuisance”

4.49 A local authority is under a duty both to inspect its area in order to detect statutory nuisances, and to take such steps as are practicable to investigate any complaint of such a nuisance.¹⁸⁷ The Environmental Protection Act 1990 lists the eight matters which constitute “statutory nuisances”,¹⁸⁸ and these include “any premises in such a state as to be prejudicial to health or a nuisance”.¹⁸⁹ The meaning of the words “prejudicial to health¹⁹⁰ or a nuisance” has been the cause of some uncertainty.¹⁹¹ The two expressions are to be read disjunctively,¹⁹² and a local authority therefore has powers to act¹⁹³ if the premises are in a state that is *either* prejudicial to health *or* a nuisance.

4.50 For these purposes a nuisance means “either a private or public nuisance as understood at common law”,¹⁹⁴ and it “cannot arise if what has taken place affects only the person or persons occupying the premises where the nuisance is said to have taken place”.¹⁹⁵ The obvious example of what would constitute a nuisance for these purposes is where premises on a highway are in such a dangerous state that they may collapse into the road.¹⁹⁶ There is no clear modern guidance as to when premises will be “prejudicial to health”, though it has been suggested that the expression means “something which produces a threat to health in the sense of a threat of disease,

(Right to Repair) Regulations 1994, SI 1994 No 133. For consideration of these Regulations, see P F Smith, *West’s Law of Dilapidations* (10th ed 1995) pp 200 - 202.

¹⁸⁷ Environmental Protection Act 1990, s 79(1); see Appendix B. See generally, Rosy Thornton, *Property Disrepair and Dilapidations* (1992), Chapter 11.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Ibid*, s 79(1)(a).

¹⁹⁰ Defined as meaning “injurious, or likely to cause injury, to health”: *ibid*, s 79(7); Building Act 1984, s 126.

¹⁹¹ In *Wivenhoe Port Ltd v Colchester Borough Council* [1985] JPL 175, 178, Mr Recorder Butler QC commented that the court found itself “swimming in a sea of uncertainty”.

¹⁹² *Salford City Council v McNally* [1976] AC 379, 389.

¹⁹³ See below, para 4.51.

¹⁹⁴ *National Coal Board v Thorne* [1976] 1 WLR 543, 548, *per* Watkins J.

¹⁹⁵ *Ibid*, at pp 547, 548. Compare however *Wivenhoe Port Ltd v Colchester Borough Council* [1985] JPL 175, 178, where it was suggested that “nuisance” did not encompass all public and private nuisances, but was confined to those which interfered materially with the personal comfort of the residents, in the sense that they materially affected their well-being. Such a definition would exclude a nuisance that affected merely a person’s property, though the reasons for this limitation are not apparent.

¹⁹⁶ See, *eg* *Mint v Good* [1951] 1 KB 517 (public nuisance). See generally P F Smith, *West’s Law of Dilapidations* (10th ed 1995) pp 249 - 255.

vermin or the like”.¹⁹⁷ Prejudice to health is most commonly found in cases where premises are suffering from the effects of serious dampness, whether due to water penetration¹⁹⁸ or condensation.¹⁹⁹ It has been held that the presence on a property of inert material - such as broken glass, building waste and scrap iron - which poses a risk of physical injury rather than illness, is not “prejudicial to health”.²⁰⁰ If this is correct, there is in this respect a striking contrast with the circumstances which may make a property unfit for human habitation. It has been explained that premises may not be fit if their state is such that there is risk of physical injury.²⁰¹

Enforcement

4.51 There are three ways in which the abatement of a statutory nuisance may be brought about. Each involves the service of a notice, which except in two situations, must be upon the “person responsible”, that is, “the person to whose act, default or sufferance the nuisance is attributable”.²⁰² The two exceptions are—

- (i) where the nuisance arises from a defect of a structural character, when service is on the owner of the premises; and
- (ii) where the person responsible cannot be found or the nuisance has not yet occurred, when service is on the owner or occupier of the premises.²⁰³

¹⁹⁷ *Coventry City Council v Cartwright* [1975] 1 WLR 845, 849, *per* Lord Widgery CJ. See too *National Coal Board v Thorne*, above, at p 548. For a local authority’s specific powers in relation to verminous premises, see Public Health Act 1936, s 83, below, para 4.55.

¹⁹⁸ As in *Salford City Council v McNally* [1976] AC 379; *Coventry City Council v Quinn* [1981] 1 WLR 1325; *Botross v Hammersmith and Fulham London Borough Council* (1994) 27 HLR 179.

¹⁹⁹ As in *Coventry City Council v Doyle* [1981] 1 WLR 1325; *Birmingham City District Council v Kelly* [1986] 2 EGLR 239.

²⁰⁰ *Coventry City Council v Cartwright*, above. Cf *Salford City Council v McNally* [1976] AC 379, 389.

²⁰¹ See above, paras 4.22 - 4.23.

²⁰² Environmental Protection Act 1990, s 79(7). Such a person need be under no obligation, contractual or otherwise, to take steps to abate the nuisance: *Clayton v Sale Urban District Council* [1926] 1 KB 415. But, where the person alleged to be responsible is a landlord, the fact that he is not in breach of his obligations under the lease “may be persuasive” in determining whether the nuisance is one for which he is responsible. It will not however be conclusive: *Birmingham City District Council v Kelly* [1986] 2 EGLR 239, 241, *per* Woolf LJ.

²⁰³ See Environmental Protection Act 1990, ss 80(2), 82(4).

The three methods of abatement are as follows.

4.52 First, where a local authority is satisfied that a statutory nuisance exists, or is likely to occur or recur in its area, it is required²⁰⁴ to serve a notice requiring all or any of the following:

- (i) the abatement of the nuisance or prohibiting or restricting its occurrence or recurrence;
- (ii) the execution of such works, and the taking of such other steps, as may be necessary for any of those purposes.²⁰⁵

Failure to comply with such a notice is a criminal offence punishable by a fine.²⁰⁶ A compensation order can also be made where such an offence is committed.²⁰⁷

4.53 Secondly, there may be cases where premises are in a state that is prejudicial to health or a nuisance and where the local authority considers that unreasonable delay would result if the summary procedure by abatement notice under the Environmental Protection Act 1990 were followed. In such circumstances, it may serve a notice on the person responsible stating that it intends to remedy the defective state and specifying what the defects are that will be remedied.²⁰⁸

4.54 Thirdly, the power to abate statutory nuisances is not given to local authorities alone. A magistrates' court, on a complaint by any person aggrieved by the existence of a statutory nuisance,²⁰⁹ may make an order for either or both of the purposes for which

²⁰⁴ The duty is mandatory in the sense explained above in para 4.32: see *Nottingham City District Council v Newton* [1974] 1 WLR 923, 927.

²⁰⁵ Environmental Protection Act 1990, s 80(1); see Appendix B.

²⁰⁶ *Ibid*, ss 80(4) - (6). It is a defence to the proceedings that the best practicable means were used to prevent, or to counteract the effects of, the nuisance: *ibid*, s 80(7).

²⁰⁷ Powers of Criminal Courts Act 1973, s 35 (as amended). The maximum limit for compensation that can be ordered by a magistrates' court is at present £5,000: Magistrates' Courts Act 1980, s 40 (as amended).

²⁰⁸ Building Act 1984, s 76(1); see Appendix B.

²⁰⁹ There must be a personal link between the danger to health and the person exposed to danger: *Birmingham District Council v McMahon* (1987) 19 HLR 452, 456. In that case it was held that, where a block of flats was affected by damp and mould, individual tenants could normally bring proceedings only in respect of their own flats and not as regards the block as a whole. The policy consideration that underlay this finding was made explicit by the Divisional Court: "the making of an order in relation to an entire block could heavily strain a local authority's finances and disrupt its housing department's programme for years to come": *ibid*, p 456, *per* Kennedy J. The court did visualise that there might be exceptional cases where either the prejudice to health was not confined to any one constituent unit in the block or the evidence of nuisance was so compelling, that an order relating to the whole block was appropriate.

the local authority could have served a notice.²¹⁰ The person aggrieved must first have given notice to the person responsible for the nuisance of his intention to bring such proceedings.²¹¹ Non-compliance with any order is a criminal offence²¹² punishable with a fine.²¹³ An order for compensation can also be made on conviction.²¹⁴ The availability of this summary procedure to persons aggrieved means that there is a remedy in public law by a tenant of a local authority against his landlord.²¹⁵ It has been explained above²¹⁶ that the statutory powers of enforcement in cases under the Housing Act 1985 where a property is unfit for human habitation cannot be employed against a local authority landlord. However, this remedy for the abatement of a statutory nuisance under the Environmental Protection Act 1990 is available only in cases where the premises are in a state that is either prejudicial to health or a nuisance. There may be cases where a property is unfit for human habitation, as for example, on grounds of safety, where the defect is not considered to be prejudicial to health or a nuisance.²¹⁷

Other public health legislation

4.55 It should be noted that there are in fact other statutory powers that a local authority may invoke in cases where a property is for some reason unfit. If, for example, premises are infested with vermin,²¹⁸ an authority may require the owner of the

²¹⁰ Environmental Protection Act 1990, ss 82(1), (2); see Appendix B. For such individual enforcement, see Rosy Thornton, *Property Disrepair and Dilapidations* (1992), p 185.

²¹¹ *Ibid*, s 82(6), reversing *Sandwell Metropolitan Borough Council v Bujok* [1990] 1 WLR 1350 (HL).

²¹² *Botross v Hammersmith and Fulham London Borough Council* (1994) 27 HLR 179.

²¹³ Environmental Protection Act 1990, s 82(8). It is again a defence that the best practicable means were used to prevent, or to counteract the effects of, the nuisance: *ibid*, s 82(9).

²¹⁴ Under Powers of Criminal Courts Act 1973, s 35 (as amended); *Herbert v Lambeth London Borough Council* (1991) 24 HLR 299. For a recent example, see *Cooke v Liverpool City Council* Legal Action, March 1995, 10 (Liverpool City Magistrates' Court), where a local authority was ordered to pay £3,000 in compensation to one of its tenants in respect of a statutory nuisance occasioned by dampness.

²¹⁵ See *R v Epping (Waltham Abbey) Justices ex p Burlinson* [1948] 1 KB 79. However, where the defendant is a local authority, the justices should "bear in mind the fact that [such an authority]... has very heavy housing responsibilities and the procedure... must not be used as a method of obtaining for particular tenants benefits which they were well aware did not exist when they took the tenancies in question and which if they were provided could put those tenants in a favoured position in relation to other tenants who are also being housed by the authority": *Birmingham City District Council v Kelly* [1986] 2 EGLR 239, 241, 242, *per* Woolf LJ.

²¹⁶ Para 4.48.

²¹⁷ See above, paras 4.22 - 4.23.

²¹⁸ Which includes insects: Public Health Act 1936, s 90(1).

property to take steps to destroy that vermin.²¹⁹ Thus in one case, parts of a housing estate were infested with cockroaches. The local authority, acting under these powers, compelled the landlords to exterminate the insects.²²⁰ However, as we have pointed out, a tenant who had suffered substantial loss as a consequence of the infestation, had no remedy against the landlord.²²¹

Limitation on public remedies: no compensation in the absence of a criminal conviction

4.56 There is one obvious and significant limitation on the public law powers to intervene in cases of properties that are unfit or a statutory nuisance. Such remedies are directed at ensuring that the unfitness is remedied or the nuisance abated. There is no power to compensate a tenant to whom the property was let for any loss that he may have suffered except in one situation. In cases of non-compliance with an order made by a local authority or magistrate, the party on whom it was served may be guilty of a criminal offence.²²² In such circumstances, the courts have power to make a compensation order,²²³ and in practice often do.²²⁴ Some guidance as to the approach that the courts should take in such a case has been provided by the Divisional Court.²²⁵ The Court accepted that a compensation order may be given even where there is no civil liability, though the absence of such liability should be taken into account when exercising the power to award compensation. However, compensation orders should generally be made only in straightforward cases where “no great amount is at stake”.²²⁶ Given the statutory ceiling on such awards the restriction to comparatively small claims is inevitable.²²⁷ What is not clear is whether, where an award of compensation is made in a case of disrepair, it should be intended to cover the cost of making good the disrepair, to compensate the tenant for his distress and inconvenience, or both.

²¹⁹ *Ibid*, s 83 (as amended).

²²⁰ See *Habinteg Housing Association v James* (1994) 27 HLR 299.

²²¹ See above, para 1.2.

²²² See, eg Housing Act 1985, ss 195, 198A, 270(5), 277; Environmental Protection Act 1990, ss 80(4) - (6), 82(8).

²²³ See Powers of Criminal Courts Act 1973, s 35 (as amended).

²²⁴ See above, para 4.54, n 214.

²²⁵ *Herbert v Lambeth London Borough Council* (1991) 24 HLR 299, 304, 305.

²²⁶ *Ibid*, at p 304, *per* Woolf LJ. The court considered that it was inappropriate to employ the jurisdiction to award substantial compensation in cases involving some form of personal injury.

²²⁷ Presently £5,000. See above, para 4.52, n 207.

Conclusions

4.57 It will be apparent from this statement of the law that, in the absence of an express covenant in the lease that the premises should be kept fit for human habitation, a tenant of residential premises let for a term of less than seven years no longer has an effective civil remedy for dealing with unfitness unless it is attributable to disrepair.²²⁸ Recourse has to be had to public law remedies which may not always be available or indeed appropriate to meet the particular problem. In Part VI, we summarise the criticisms of the present law. Before we do so, we explain in the next Part two important statutory repairing obligations.

²²⁸ For implied statutory repairing obligations, see Part V of this report.

PART V IMPLIED STATUTORY REPAIRING OBLIGATIONS

Introduction

- 5.1 In this Part we examine two further implied statutory repairing obligations that may be imposed on a landlord. First, there are certain repairing obligations implied into leases of a dwelling-house for a term of less than seven years by what is now section 11 of the Landlord and Tenant Act 1985.¹ Secondly, where the landlord has a right to enter to repair or maintain the premises, he is under a duty to take reasonable care under section 4(4) of the Defective Premises Act 1972² to ensure that those who might reasonably be expected to be affected by defects in the state of the premises are reasonably safe from personal injury or from damage to their property. As we explain, this does, in effect, impose an obligation to repair upon the landlord.³

Landlord's obligations under a short lease of a dwelling-house

The obligations

- 5.2 By section 11(1) of the Landlord and Tenant Act 1985,⁴ it is implied into certain leases of dwelling-houses⁵ that the lessor covenants both to keep in repair the structure and exterior of the dwelling-house,⁶ and to keep in repair and proper working order⁷ the installations in the dwelling-house for—
- (i) the supply of water, gas and electricity and for sanitation;⁸ and
 - (ii) space heating and heating water.

¹ Examined below, paras 5.1 - 5.20. For the text of the section, see Appendix B.

² Examined below, paras 5.22 - 5.28. For the text of the subsection, see Appendix B.

³ See below, para 5.26.

⁴ See Appendix B.

⁵ For leases to which the section applies, see below, para 5.9.

⁶ Including drains, gutters and external pipes. The meaning of "structure and exterior" is considered below, para 5.18.

⁷ This means in good *mechanical* condition: *Wycombe Area Health Authority v Barnett* (1982) 5 HLR 84, 90. In that case, a landlord who had failed to lag water pipes, was held not to be in breach of the implied covenant.

⁸ Including basins, sinks, baths and sanitary conveniences, but not other fixtures, fittings and appliances for making use of the supply of water, gas or electricity.

The lessor (or any persons authorised by him in writing) may enter the premises at reasonable times of the day and on giving 24 hours' notice in writing to the occupier, in order to view their condition and state of repair.⁹

Extension to other parts of the building

5.3 In *Campden Hill Towers Ltd v Gardner*,¹⁰ the Court of Appeal gave a restrictive interpretation to what is now Landlord and Tenant Act 1985, s 11(1). First, it held that where the dwelling-house - typically a flat - formed part of a larger building, the obligation to repair the structure and exterior did not apply to the structure and exterior of the whole building, but only to that of the particular part included in the lease. Thus the roof of a block of flats would not form part of the structure and exterior of a ground floor flat, but might do so as regards a top floor flat.¹¹ Secondly, the court held that the obligation to keep installations in repair and proper working order applied only to installations within the physical confines of the flat. It would not cover, for example, a boiler in the basement, which supplied hot water to all the flats in the block.

5.4 Provision has now been made to extend the implied covenant in section 11(1) to cases where the dwelling-house forms part only of a building,¹² thereby reversing the effect of *Campden Hill Towers Ltd v Gardner*:

- (i) The obligation to repair the structure and exterior now applies to any part of the building in which the landlord has an estate or interest.
- (ii) The obligations in relation to installations apply to those which directly or indirectly serve the dwelling-house and which either form part of the building in which the landlord has an estate or interest or are owned by him or are under his control.

These obligations apply only where the disrepair is such as to affect the tenant's enjoyment of the dwelling-house or of any common parts¹³ which he is entitled to use.¹⁴

⁹ Landlord and Tenant Act 1985, s 11(6).

¹⁰ [1977] QB 823.

¹¹ See *Douglas-Scott v Scorgie* [1984] 1 WLR 716. Cf *Rapid Results College Ltd v Angell* [1986] 1 EGLR 53.

¹² See Landlord and Tenant Act 1985, s 11(1A) (inserted by Housing Act 1988, s 116(1)).

¹³ Defined as including "the structure and exterior of that building or part and any common facilities within it": Landlord and Tenant Act 1987, s 60(1).

¹⁴ Landlord and Tenant Act 1985, s 11(1B) (inserted by Housing Act 1988, s 116(1)).

5.5 There may be cases where the landlord does not have an estate or interest in the other parts of the building at all, or where, although he does, he may have leased them without reserving a right of access to them so as to undertake repairs that affect other parts of the building. It is therefore a defence to any action against the landlord for failure to comply with these obligations—

- (i) that he has insufficient right in the part of the building or installation concerned to enable him to carry out the necessary work; and
- (ii) that he used all reasonable endeavours to obtain such rights as would be adequate to enable him to carry out the work but was unsuccessful.¹⁵

5.6 It should be noted however that the landlord may be able to obtain an access order under the Access to Neighbouring Land Act 1992¹⁶ to enable him to carry out the necessary work, provided that he can satisfy the conditions prescribed by that Act. Whether a landlord would now be expected to seek such an access order if those conditions could be satisfied, in order to comply with his obligation to use “all reasonable endeavours”, is undetermined.¹⁷

Exceptions to the landlord’s implied obligations

5.7 There are three exceptions to the landlord’s implied covenant under section 11(1).¹⁸ First, he is not required to carry out works or repairs for which the lessee is liable either by virtue of his duty to use the premises in a tenantlike manner¹⁹ or under an express covenant that imposes the same obligation.²⁰ The section, “in stopping a landlord from being a bad landlord in the matter of repairs, is not an invitation to the tenant to be a bad tenant”.²¹ Secondly, it does not require him to reinstate the premises in the case of destruction or damage by fire, tempest, flood or other inevitable accident. Such reinstatement falls within the scope of a covenant to repair.²²

¹⁵ *Ibid*, s 11(3A) (inserted by Housing Act 1988, s 116(2)).

¹⁶ See s 1.

¹⁷ See P F Smith, *West’s Law of Dilapidations* (10th ed 1995) p 189.

¹⁸ Landlord and Tenant Act 1985, s 11(2).

¹⁹ For this duty, see below para 10.26.

²⁰ Cf *Wycombe Area Health Authority v Barnett* (1982) 5 HLR 84, where an unlagged pipe burst in very cold weather. The landlord was held not to be in breach of its obligation to keep installations in repair and proper working order. The tenant was held not to have broken her implied obligation to act in a tenantlike manner by failing to lag the pipes or drain the tank whilst away for a few days.

²¹ Mr Henry Brooke MP, Minister for Housing and Local Government, *Hansard* (HC) 27 March 1961, vol 637, col 975.

²² See above, para 2.3.

But for this exception therefore, the landlord might be required by the implied covenant to rebuild the premises in such circumstances. Thirdly, there is no obligation to keep in repair or maintain anything which the lessee is entitled to remove from the dwelling-house. This is a reference to what are known as “tenants’ fixtures”. A tenant is entitled to remove certain categories of fixtures that he has attached to the premises during the currency of the lease. Although these fixtures become the property of the landlord, the tenant is entitled to sever them before or within a reasonable period after the expiry of the lease.²³ A tenant of a dwelling-house would be entitled to remove domestic and ornamental fixtures.²⁴

Obligations cannot be excluded

- 5.8 The Landlord and Tenant Act 1985 imposes restrictions on a landlord’s ability to contract out of the implied covenant in section 11. Unless it has been authorised by the county court, any agreement is void if it either purports to exclude or limit the obligations of the landlord or the immunities of the tenant, or it in some way authorises any forfeiture, or imposes any penalty, disability or obligation on a tenant who seeks to enforce or rely upon those obligations or immunities.²⁵ The county court is empowered to sanction an exclusion or modification of the provisions of section 11 of the Act if it appears to the court to be reasonable to do so in the circumstances.²⁶ It is also provided that any covenant in a lease which purports to impose on the tenant obligations of repair that fall on the landlord under the Act²⁷ is ineffective.²⁸ It has been said that the practical effect of this latter restriction is that—

to the extent that [section 11] has imposed on the landlord certain implied obligations to repair, those obligations must be subtracted from the tenant’s express obligations under the lease to see what residual obligation the tenant has

²³ See generally *New Zealand Government Property Corporation v HM & S Ltd* [1982] QB 1145.

²⁴ See, eg *Spyer v Phillipson* [1931] 2 Ch 183. Trade fixtures are also removable at common law, but these are less likely to be in issue where the property let is a dwelling. Subject to any contrary agreement between the parties, tenants of agricultural holdings can remove *any* fixtures “of whatever description” and “whether for the purposes of agriculture or not” that they have attached to the land, provided the tenant gives the landlord notice of his intention to remove them, and the landlord does not serve on him a counter-notice electing to purchase them: see Agricultural Holdings Act 1986, s 10. A tenant under an agricultural tenancy has a similar right to remove fixtures. The landlord has no equivalent right to purchase them but the tenant may lose his right to remove such fixtures if he accepts compensation for them as an improvement: see Agricultural Tenancies Act 1995, s 8(2).

²⁵ Landlord and Tenant Act 1985, s 12(1); see Appendix B.

²⁶ *Ibid*, s 12(2).

²⁷ Ie, under the provisions of s 11(1) (see above, para 5.1) except to the extent that they are modified by s 11(2) (see above, para 5.7).

²⁸ *Ibid*, s 11(4). For the extended meaning of a covenant “to repair” for these purposes, see s 11(5).

for repair, redecoration and the like after the landlord has fulfilled his statutory repairing obligations.²⁹

Leases to which the covenant applies

5.9 Subject to certain specific exceptions, the implied repairing covenant under section 11 applies to a lease of a dwelling-house granted for a term of less than seven years.³⁰ For these purposes, a lease of a dwelling-house means “a lease by which a building or part of a building is let wholly or mainly as a private residence”.³¹

5.10 The Act specifically exempts certain leases from the operation of section 11(1).³² Of these the most important are—

- (a) new business tenancies within Part II of the Landlord and Tenant Act 1954;³³
- (b) leases of dwellings which are either agricultural holdings under the Agricultural Holdings Act 1986³⁴ or agricultural tenancies under the Agricultural Tenancies Act 1995;³⁵
- (c) leases to certain bodies such as local authorities, new town corporations and registered housing associations;³⁶
- (d) leases to the Crown (unless under the management of the Crown Estate Commissioners);³⁷ and

²⁹ *Irvine v Moran* [1991] 1 EGLR 261, 262, per Mr Recorder Thayne Forbes QC, sitting as a Deputy High Court Judge. In that case a covenant by the tenant to decorate the exterior of the house was “eliminated” by what is now Landlord and Tenant Act 1985, s 12.

³⁰ Landlord and Tenant Act 1985, s 13(1); see Appendix B. The Act contains anti-avoidance provisions. First, if the landlord purports to grant a lease for more than seven years, any part of the term which falls before the grant is disregarded: s 13(2)(a). Secondly, a lease which is determinable at the option of the lessor before the expiration of seven years from its commencement falls within s 11(1): 13(2)(b). However, a lease which gives the tenant the option for renewal which, when taken with the original term, amounts to more than seven years, is outside s 11(1): 13(2)(c).

³¹ Landlord and Tenant Act 1985, s 16. The fact that the property comprised in the lease will be used for residential purposes does not necessarily bring the letting within section 11(1). In *Demetriou v Robert Andrews (Estate Agencies) Ltd* (1990) 62 P & CR 536, it was held that the grant of a lease of three floors of a property with a view to its being sublet for residential accommodation was not a letting “wholly or mainly as a private dwelling”.

³² Section 14; see Appendix B.

³³ Landlord and Tenant Act 1985, s 13(3).

³⁴ *Ibid*, s 14(3) (as amended by Agricultural Holdings Act 1986).

³⁵ *Ibid*, s 14(3) (as amended by Agricultural Tenancies Act 1995).

³⁶ *Ibid*, s 14(4). Such bodies “are not in the same vulnerable position as a private individual tenant”: P F Smith, *West’s Law of Dilapidations* (10th ed 1995) p 185.

³⁷ Landlord and Tenant Act 1985, s 14(5)(a).

(e) leases to government departments.³⁸

In addition to these statutory limitations on the landlord's implied covenant, it has been held that the Landlord and Tenant Act 1985 does not bind the Crown.³⁹

The history of the legislation

5.11 The implied covenant to repair was first enacted in the Housing Act 1961.⁴⁰ In the debate on Second Reading of the Bill, Mr Henry Brooke MP, the then Minister for Housing and Local Government, indicated that there were two reasons for introducing the implied obligation into short leases. The first was negative: "to put a stop to the practice of a few unscrupulous landlords in attempting to impose unreasonable repairing obligations on their tenants".⁴¹ It was, he thought, "unreasonable to require a tenant to undertake major repairs unless he is given sufficient security of tenure to enable him to enjoy the results of the money that he has spent."⁴² The second reason was however positive:

For reasons of public policy, the Government are anxious to see that necessary repairs get done. To say simply that short-term tenants cannot be made responsible for repairs might mean that no one would be legally responsible... [A] number of... tenancy agreements are unsatisfactory because they make no proper provision for repairs at all.⁴³

It was therefore appropriate "to put definite obligations on the landlord."⁴⁴ We will suggest below that the policy that justified the enactment of what is now section 11 of the Landlord and Tenant Act 1985 has wider implications.⁴⁵

Scope of the landlord's obligation

5.12 The implied statutory covenant to repair is, in practice, frequently invoked and has undoubtedly done much to encourage repair. We were told by an expert in the field of landlord and tenant law that the existence of section 11 was "of enormous social

³⁸ *Ibid*, s 14(5)(b).

³⁹ *Department of Transport v Egoroff* [1986] 1 EGLR 89.

⁴⁰ Sections 32, 33.

⁴¹ *Hansard* (HC) 27 March 1961, vol 637, col 974. It would of course be manifestly unjust to require a tenant holding under a short lease to spend large sums on repairing property which he might then have to vacate.

⁴² *Hansard* (HC) 27 March 1961, vol 637, col 974.

⁴³ *Ibid*.

⁴⁴ *Ibid*, col 975.

⁴⁵ See para 5.16.

importance”,⁴⁶ not least because of the willingness of courts to decree specific performance of the landlord’s obligations.⁴⁷ Actions to enforce it are a commonplace and appear routinely in the daily lists of some county courts.⁴⁸ Indeed, it has recently been held that a district judge may order specific performance of such a covenant when sitting as a small claims arbitrator.⁴⁹ It comes as no surprise that, in some areas, actions are frequently brought under section 11 against a local authority landlord.⁵⁰ The tenant cannot in such a case complain to the local authority in the hope that it will serve a repair notice under the Housing Act 1985,⁵¹ because the authority cannot serve such a notice on itself.⁵²

5.13 The obligation implied under section 11(1)(b) of the Landlord and Tenant Act 1985 is one both to *put* and *keep* in repair those matters which fall within the scope of the covenant.⁵³ It has been described as “not very onerous”.⁵⁴ The Act directs that, in determining the standard of repair required, “regard shall be had to the age, character and prospective life of the dwelling-house and the locality in which it is situated”.⁵⁵ That is of course a codification of the common law obligation to repair⁵⁶ except that it requires an additional factor to be taken into account, namely the prospective life of the property. “If the prospective life of the dwelling-house... is short, then it is perfectly proper, sensible and reasonable to adjust the landlord’s obligations accordingly...”.⁵⁷

⁴⁶ HH Judge Colyer QC, for whose advice we are much indebted.

⁴⁷ We consider the availability of specific performance in Part IX of this report.

⁴⁸ For a graphic account of how such actions are handled, see *Joyce v Liverpool City Council* [1995] 3 WLR 439, 444 - 446.

⁴⁹ *Ibid.* For this jurisdiction, see CCR O 19. See further below, para 9.11.

⁵⁰ Cf *Joyce v Liverpool City Council*, above, at p 445, giving an account of judicial experience in Liverpool.

⁵¹ See above, paras 4.33 - 4.47.

⁵² See above, para 4.48.

⁵³ *Liverpool City Council v Irwin* [1977] AC 239, 269; *Hussein v Mehlman* [1992] 2 EGLR 87, 91.

⁵⁴ *Newham London Borough v Patel* (1978) 13 HLR 77, 84, *per* Ormrod LJ. This proposition is borne out by the limitations applicable to the implied obligation: see below, paras 5.14 - 5.17. It is also graphically illustrated by *Wycombe Area Health Authority v Barnett* (1982) 5 HLR 84, where it was held that the landlord’s obligation to keep installations in repair and proper working order did not require him to lag water pipes to prevent them freezing up. Cf *Hussein v Mehlman*, above at p 91.

⁵⁵ Section 11(3).

⁵⁶ See *Proudfoot v Hart* (1890) 25 QBD 42, 55; above, para 2.8.

⁵⁷ *Newham London Borough v Patel*, above, at p 85, *per* Ormrod LJ. In that case, a local authority had let a property which it intended to redevelop at a very low rent. The tenant had declined the alternative housing offered to him and the authority sought to evict him.

Obligation takes effect as a repairing covenant

5.14 The term implied by section 11(1) “has the legal characteristics of a repairing covenant by a landlord in a lease”.⁵⁸ This has three noteworthy consequences, of which two significantly limit the ambit of the obligation. The first is that, in accordance with the rule applicable to express repairing covenants,⁵⁹ the landlord is not in breach of his obligation until the disrepair has been brought to his notice and he has had a reasonable opportunity to rectify it.⁶⁰ This requirement, although settled by House of Lords authority, has been the subject of subsequent criticism in the Court of Appeal⁶¹ on two grounds—

- (i) it encourages landlords not to inspect the property which they have let,⁶² and
- (ii) it weakens the protection which a tenant might reasonably expect to obtain from a covenant to *keep* the premises in repair.⁶³

As we explain below,⁶⁴ the obligations imposed on a landlord by section 4 of the Defective Premises Act 1972 have considerably blunted the force of these criticisms.

5.15 The second consequence is that the obligation is one of *repair*. It has already been explained that this is a comparatively limited obligation.⁶⁵ In particular, where the property which has been let, is subject to an inherent defect, the work necessary to remedy that defect will not fall within the landlord’s obligation if it does not cause disrepair to the structure, exterior or installations. In the leading modern case, *Quick v Taff Ely Borough Council*,⁶⁶ it was held that an inherent defect in the design of the property that made it unfit for human habitation did not place the landlord in breach

The tenant counterclaimed for breach of the implied repairing covenant. In those circumstances, it was held that the authority were not in breach of the covenant. Cf *McClellan v Liverpool City Council* [1987] 2 EGLR 56.

⁵⁸ *O’Brien v Robinson* [1973] AC 912, 927, per Lord Diplock.

⁵⁹ See above, para 4.28.

⁶⁰ *O’Brien v Robinson*, above; *McGreal v Wake* [1984] 1 EGLR 42; *Al Hassani v Merrigan* [1988] 1 EGLR 93.

⁶¹ See *McGreal v Wake*, above, at p 43.

⁶² See above, para 4.29.

⁶³ For the covenant to keep in repair, see above, para 2.9.

⁶⁴ See para 5.26.

⁶⁵ See above, paras 2.3 - 2.6.

⁶⁶ [1986] QB 809; applied in *McNerny v Lambeth London Borough Council* [1989] 1 EGLR 81. See above, para 1.1.

of its implied obligation under what is now section 11(1) of the Landlord and Tenant Act 1985, because it did not cause disrepair to the structure and exterior of the premises.⁶⁷

5.16 It has been said that the object of the implied covenant is “to place upon the lessor the obligation to maintain the fabric of the building in a safe and habitable condition”.⁶⁸ However, it is clear from the *Quick* case that a landlord may comply with that obligation and yet the property may still be unfit for human habitation.⁶⁹ Although in such a situation, the tenant may have recourse to public law remedies, these will not always be available to him, and even where they are, will not normally lead to the payment of compensation to him for any loss that he may have suffered by reason of the unfitness.⁷⁰ The difficulty has arisen of course because the correction of an inherent defect does not always fall within the ambit of the landlord’s repairing obligations under section 11. Yet the policy reasons that prompted the enactment of what is now section 11, namely—

- (i) the injustice of requiring tenants under short leases to bear the cost of structural and external repairs; and
- (ii) the public interest in ensuring that proper provision should be made to ensure that such repairs were done;⁷¹

apply with equal force to short leases of properties that are unfit by reason of an inherent defect. First, the cost of remedying such defects may be just as substantial as the cost of executing structural repairs.⁷² Secondly, there is little point in making provision for repair if it does not ensure that the property is fit to live in.

5.17 The third consequence of the status of the implied obligation under section 11(1) as a contractual term, is that the tenant may treat the lease as repudiated if breach of the

⁶⁷ See too *Palmer v Sandwell Metropolitan Borough Council* [1987] 2 EGLR 79, 81. Cf *Staves v Leeds City Council* [1992] 2 EGLR 37, where condensation occasioned by a design flaw caused such damage to the internal plasterwork - which was conceded to be part of the structure of the property - that it had to be replaced, the landlords were held to be in breach of the implied covenant to repair.

⁶⁸ *Hussein v Mehlman* [1992] 2 EGLR 87, 90, per Stephen Sedley QC, sitting as an Assistant Recorder.

⁶⁹ In *Hussein v Mehlman*, above, at p 91, Stephen Sedley QC, sitting as an Assistant Recorder, held that the fact that a repair notice had been served under Housing Act 1985, s 189, did not mean that the landlord was in breach of his obligations under the implied repairing covenant in Landlord and Tenant Act 1985, s 11(1).

⁷⁰ See above, para 4.56.

⁷¹ Above, para 5.11.

⁷² Cf *Ravenseft Properties Ltd v Davstone (Holdings) Ltd* [1980] QB 12.

covenant is such as to render the premises uninhabitable.⁷³ In such circumstances, not only will the tenant put an end to his obligations under the lease thereafter, but the landlord will be liable in damages, including general damages for structural disrepair.⁷⁴

Liability for the structure and the exterior

5.18 There has been much discussion as to what falls within the landlord's obligation to repair the structure and exterior of the dwelling-house under section 11(1)(a). First, the authorities on what constitutes the "structure" are not wholly consistent. It has been held that—

the structure of the dwelling-house consists of those elements of the overall dwelling-house which give it its essential appearance, stability and shape. The expression does not extend to the many and various ways in which the dwelling house will be fitted out, equipped, decorated and generally made to be habitable.⁷⁵

The structure need not be load bearing and, in some cases at least, it will include the windows of the property.⁷⁶ It must be part of the dwelling-house itself, which means that a separate garage is not part of the structure.⁷⁷ There is a conflict of authority as to whether internal plasterwork is to be regarded as part of the structure,⁷⁸ or merely as being "in the nature of a decorative finish",⁷⁹ though the former is more consistent with the policy of the Act.⁸⁰

⁷³ *Hussein v Mehlman* [1992] 2 EGLR 87. See too *Re Olympia & York Canary Wharf Ltd (No 2)* [1993] BCC 159, 166; Susan Bright, "Repudiating a Lease - Contract Rules" [1993] Conv 71; Charles Harpum, "Leases as Contracts" [1993] CLJ 212.

⁷⁴ *Hussein v Mehlman*, above, at p 92.

⁷⁵ *Irvine v Moran* [1991] 1 EGLR 261, 262, per Mr Recorder Thayne Forbes QC, sitting as a Deputy High Court Judge.

⁷⁶ *Ibid*, at pp 262, 263; *Quick v Taff Ely Borough Council* [1986] QB 809. These cases are not conclusive. The windows would be part of the "exterior" even if they were not part of the "structure" and so within the ambit of s 11. In other contexts, it has been held that the windows may be part of the structure but only where they constitute a significant part of that structure: *Boswell v Crucible Steel Co* [1925] 1 KB 119. An example given in *Holiday Fellowship Ltd v Viscount Hereford* [1959] 1 WLR 211, 216, was of the old Crystal Palace. In that case, the Court of Appeal considered that windows set into a wall would not normally be regarded as part of the structure.

⁷⁷ *Irvine v Moran*, above, at p 262. It was also held there that the gates to the premises were not part of the dwelling-house.

⁷⁸ It was conceded to be in both *Quick v Taff Ely Borough Council*, above; and *Staves v Leeds City Council* [1992] 2 EGLR 37.

⁷⁹ *Irvine v Moran*, above, at p 262, per Thayne Forbes QC.

⁸⁰ It would be unreasonable to expect a tenant under a short lease either to live with bare walls or to have to incur the expense of plastering them himself.

as being “in the nature of a decorative finish”,⁷⁹ though the former is more consistent with the policy of the Act.⁸⁰

5.19 Secondly, the “exterior” may include the means of access to the premises, such as steps leading up to the house.⁸¹ However, it has been held not to include the paving slabs in the back yard of the property,⁸² steps in the back garden⁸³ or a rear access path to the property that was not included within the lease.⁸⁴

5.20 The scope of the implied obligation to repair is more limited than that of the implied covenant for fitness in section 8 of the Landlord and Tenant Act 1985. The latter applies—

- (a) to the “house” (including any part of it) and not merely to the structure and exterior of it; and
- (b) to “any yard, garden, outhouses and appurtenances belonging to the house or usually enjoyed with it”.⁸⁵

Landlord’s duty of care

Background

5.21 At common law, a landlord was liable only to the tenant for breach of a repairing covenant. If a stranger to the contract - such as a member of the tenant’s family - was injured because of the failure to repair, the landlord incurred no liability.⁸⁶ The matter

⁷⁹ *Irvine v Moran*, above, at p 262, *per* Thayne Forbes QC.

⁸⁰ It would be unreasonable to expect a tenant under a short lease either to live with bare walls or to have to incur the expense of plastering them himself.

⁸¹ *Brown v Liverpool Corporation* [1969] 3 All ER 1345.

⁸² *Hopwood v Cannock Chase District Council* [1975] 1 WLR 373.

⁸³ *McAuley v Bristol City Council* [1992] QB 134.

⁸⁴ *King v South Northamptonshire District Council* (1991) 64 P & CR 35.

⁸⁵ Section 8(6); see above, para 4.2, n 4.

⁸⁶ *Cavalier v Pope* [1906] AC 428 (express contract to repair: no liability to tenant’s wife); *Ryall v Kidwell & Son* [1914] 3 KB 135 (implied statutory covenant to keep the property fit for human habitation: no liability to tenant’s daughter).

is now regulated by section 4 of the Defective Premises Act 1972,⁸⁷ and its effect is in most cases⁸⁸ to reverse the common law rule.⁸⁹

The obligation

5.22 Section 4(1) of the Defective Premises Act 1972⁹⁰ imposes on landlords a duty of care where, under the terms of a tenancy,⁹¹ they are under an obligation to the tenant for the maintenance or repair of the premises.⁹² That duty is owed to “all persons who might reasonably be expected to be affected by defects in the state of the premises”. It is a duty “to take such care as is reasonable in all the circumstances” to see that such persons “are reasonably safe from personal injury or from damage to their property caused by a relevant defect”. The landlord’s duty is owed if he “knows (whether as the result of being notified by the tenant or otherwise) or if he ought in all the circumstances to have known of the relevant defect”.⁹³ A “relevant defect” is a defect in the state of the premises which arises from, or continues because of, an act or omission by the landlord which is either a failure by him to carry out his obligation to the tenant for the maintenance or repair of the premises or would have been if he had notice of the defect.⁹⁴ The defect must exist at or after the time when—

- (i) the tenancy commences; or
- (ii) the tenancy agreement is entered into; or
- (iii) possession is taken of the premises in contemplation of the letting;

⁸⁷ This replaced Occupiers’ Liability Act 1957, s 4, which was in certain respects inadequate: see Civil Liability for Defective Premises (1970) Law Com No 40, paras 56 - 59. For a critical commentary on s 4 of the 1972 Act, see J R Spencer, “The Defective Premises Act 1972 - Defective Law and Defective Law Reform”, Part III, [1975] CLJ 48, 62 - 78.

⁸⁸ But not all: see below, para 5.22, n 92.

⁸⁹ It should be noted that *Cavalier v Pope*, above, remains good law on the other point which it decided, namely that a landlord is under no liability as such for letting an unfurnished house that is in a dangerous state: see above, para 3.4; and *Rimmer v Liverpool City Council* [1985] QB 1, 10.

⁹⁰ See Appendix B.

⁹¹ For these purposes, “tenancy” includes an agreement for a lease or a tenancy agreement, as well as a tenancy at will or sufferance: Defective Premises Act 1972, s 6(1). It also includes a right of occupation given by contract or any enactment that does not amount to a tenancy: *ibid*, s 4(6).

⁹² There is no such duty where the landlord undertakes to carry out repairs independently of the lease, as in *Cavalier v Pope* [1906] AC 428 itself. In that case, the tenant had threatened to leave unless repairs were done. The promise was given but the repairs were not executed.

⁹³ Defective Premises Act 1972, s 4(2).

⁹⁴ *Ibid*, s 4(3).

whichever is the earliest.⁹⁵

5.23 The duty of care imposed under section 4(1) is significantly extended by section 4(4). This provides that where the premises are let under a tenancy which expressly or impliedly gives the landlord the right to enter the premises “to carry out any description of maintenance or repair” of them,⁹⁶ he is deemed to owe the duty of care laid down in section 4(1) in the same way as if he were under an *obligation* to carry out such work. That duty of care is owed “from the time when he first is, or by notice or otherwise can put himself, in a position to exercise the right”. It lasts as long as he can exercise the right. There is no duty owed to the tenant in respect of defects in the state of the premises attributable to the tenant’s failure to carry out obligations of repair imposed expressly upon him by the tenancy.

5.24 Section 4 does not directly impose any obligation of repair on the landlord, though that is in practice its effect as we explain below.⁹⁷ Instead, it imposes a duty of care that is dependent upon and defined by reference to either an obligation to repair or a right to enter the premises to carry out repairs. Before any duty can arise therefore, the defect in issue must be one which falls within the scope of the repairing obligation or in respect of which the landlord has a right to enter. The “statutory protection for those in occupation of defective premises is geared to the landlord’s obligation to repair the premises. It goes no wider than the repair covenant.”⁹⁸ The landlord is not treated as if he were subject to an obligation in relation to “all or any description of maintenance or repair”.⁹⁹

5.25 The obligation to repair or the right to enter may be expressly conferred by the lease,¹⁰⁰ it may arise as an implied term of that lease,¹⁰¹ or it may be implied into the lease by statute.¹⁰² Obvious examples of statutory obligations to repair or maintain are

⁹⁵ *Ibid.*

⁹⁶ The right to enter will not be presumed, but must be proved: *McAuley v Bristol City Council* [1992] QB 134, 150.

⁹⁷ See para 5.26.

⁹⁸ *McNerry v Lambeth London Borough Council* [1989] 1 EGLR 81, 83, *per* Dillon LJ.

⁹⁹ *McAuley v Bristol City Council* [1992] QB 134, 145, *per* Ralph Gibson LJ. See too *Rimmer v Liverpool City Council* [1985] QB 1, 10.

¹⁰⁰ As in *Smith v Bradford Metropolitan Council* (1982) 44 P & CR 171.

¹⁰¹ As in *McAuley v Bristol City Council*, above (implied term in weekly tenancy for landlord to enter to remedy defects which might expose the tenant or any visitor to the premises to risk.)

¹⁰² Defective Premises Act 1972, s 4(5).

the covenants for fitness and repair, already considered, that are implied under sections 8 and 11 of the Landlord and Tenant Act 1985.¹⁰³

The extension of a landlord's obligations to repair

5.26 Section 4 of the Defective Premises Act 1972 undoubtedly extends the repairing obligations of landlords, albeit obliquely.¹⁰⁴ Although the section was primarily intended to protect third parties, it is clear that the duty of care which it imposes is owed to tenants as well.¹⁰⁵ First, the effect of the section is to convert a mere *right to enter* to carry out repairs into a *duty* to execute them in so far as they are necessary to ensure the safety of those who might be injured by reason of the disrepair.¹⁰⁶ This is subject to the proviso, already explained,¹⁰⁷ that no duty is owed to the tenant himself if the disrepair has arisen because of his failure to carry out a repairing obligation expressly imposed upon him by the tenancy.¹⁰⁸ Secondly, the landlord's duty arises not only where he *knows* of the defect,¹⁰⁹ but also where he *ought in all the circumstances to have known* of it.¹¹⁰ This does of course significantly qualify the rule that a landlord's obligation to carry out repairs on the premises leased arises only when the defect is brought to his notice and he has had a reasonable time in which to remedy it.¹¹¹ If, by reason of his obligation or right to repair the premises, the landlord should have discovered a defect that might be the cause of personal injury to the tenant or others on the premises, he will be in breach of his duty of care. Thus, for example, if it is reasonably foreseeable that, because of the construction of the property, the floors may rot due to dampness, the landlord is expected to make arrangements to inspect the premises. If he does not do so, he will be liable for any personal injury or damage to property that results.¹¹² It follows that a landlord who has a right or duty to repair will be liable for any injury to a person or to property where he was negligent in not

¹⁰³ See *Rimmer v Liverpool City Council*, above, p 11; *McNerry v Lambeth London Borough Council*, above, p 83.

¹⁰⁴ See Consultation Paper No 123, para 2.52.

¹⁰⁵ See, eg *Smith v Bradford Metropolitan Council* (1982) 44 P & CR 171; *Barrett v Lounova (1982) Ltd* [1990] 1 QB 348, 359. Section 4(1) states that the duty is owed to "all persons who might reasonably be expected to be affected by defects in the state of the premises" (emphasis added). That clearly includes the tenant, because s 4(4) excludes him from the ambit of the duty in one situation, explained above, para 5.23.

¹⁰⁶ *Smith v Bradford Metropolitan Council*, above, at p 174.

¹⁰⁷ Above, para 5.23.

¹⁰⁸ Defective Premises Act 1972, s 4(4); above, para 5.23.

¹⁰⁹ Whether as the result of notification by the tenant or otherwise.

¹¹⁰ Defective Premises Act 1972, s 4(2).

¹¹¹ See above, para 4.28.

¹¹² *Clarke v Taff Ely Borough Council* (1980) 10 HLR 44.

discovering the defect that caused the harm, even though he was given no notice of that defect.¹¹³ However he is not a guarantor of the safety of the premises so as to make him liable for a latent defect of which he had no reason to know.

The property to which the duty of care applies

- 5.27 The obligation under section 4(1) applies to the “premises” which “are let under a tenancy”. It has been held that this means the entirety of the property comprised in the lease.¹¹⁴ If, therefore, the obligation or right of repair applies to the whole of the premises let, then so too will the duty of care. There is no obligation in respect of premises which are not the subject of the letting.¹¹⁵ This means that where a landlord is under an obligation to keep in repair property other than that demised,¹¹⁶ the duty imposed under the Act has no application to that property.¹¹⁷

Limited to safety of persons and property

- 5.28 Although section 4 of the Defective Premises Act 1972 does extend the scope of a landlord’s obligations to repair, the duty imposed is concerned only to ensure the *safety* of persons from personal injury and their property from damage. It arises only where there is some hazard that makes the property *unsafe* rather than *unfit*. The duty would not therefore extend to matters such as an infestation of cockroaches, which would not cause personal injury (but might be a threat to health). Nor would it cover dampness on the premises which ruined furnishings, fabrics and clothes.

Conclusions

- 5.29 We summarise the effect of these implied statutory repairing obligations in Part VI, in the wider context of our discussion both of implied terms generally and of the remedies that exist where a property is unfit for human habitation. We draw conclusions from this analysis which form the basis for the proposals for reform which we make in Parts VII and VIII.

¹¹³ The outcome of *McCarrick v Liverpool Corporation* [1947] AC 219 would now be different. In that case the landlord had not been notified of the defective steps which injured the plaintiff. He was not therefore liable under the implied fitness covenant even though the defect was one which he ought to have discovered.

¹¹⁴ “...the premises let - the letting - the subject of the tenancy - all of it; the whole letting, land and buildings”: *Smith v Bradford Metropolitan Council* (1982) 44 P & CR 171, 176, *per* Stephenson LJ. In that case, the part of the premises that was out of repair was a “so-called patio”, which Donaldson LJ preferred to describe as “an area of very crazy paving”: *ibid*, at p 177.

¹¹⁵ *King v South Northamptonshire District Council* (1991) 64 P & CR 35, 40.

¹¹⁶ See, eg Landlord and Tenant Act 1985, s 11(1A); above, para 5.4.

¹¹⁷ This may not matter. The landlord is likely to owe the common duty of care to any of the tenant’s visitors using the common parts under Occupiers Liability Act 1957, s 2: see P F Smith, *West’s Law of Dilapidations* (10th ed 1995) p 256. It should also be noted that when a landlord has repairing obligations in a lease relating to property not included in the demise, that other property will commonly be in his possession or under his control. It has already been explained that the obligation to repair such property does not depend upon the landlord receiving notice of the defect: see above, paras 2.11, 4.28.

PART VI STATUTORY REPAIRING OBLIGATIONS: A CRITICAL SUMMARY

Introduction

- 6.1 It will be apparent from the account given in Parts IV and V of this report that the law which governs the circumstances in which a landlord is under an implied statutory obligation to repair or maintain property which he has let is complex. There is nothing resembling a coherent and comprehensive code of liability. In this Part we summarise the principal features of the present law and draw attention to its main defects. We also explain what we have discovered from our inquiries as to how the various remedies that exist to remedy unfitness and disrepair are used in practice.

Implied obligations as to fitness

- 6.2 The implied obligation that residential property, let at a low rent, should be fit for human habitation when let and kept in that state throughout the term, that is presently found in section 8 of the Landlord and Tenant Act 1985,¹ was originally intended to give many tenants of unfurnished property similar rights as to the fitness of the property let as were enjoyed at common law by tenants of furnished property.²
- 6.3 This statutory obligation was intended to apply to a considerable proportion of rented living accommodation and for many years it did so. This was because until 1957, the rental limits were adjusted from time to time to keep them broadly in line with inflation. Since 1957, the rental limits have remained virtually unchanged, and in consequence, there are now few (if any) tenancies to which the implied obligation is applicable.³
- 6.4 Because Parliament has declined to raise the rental limits, the courts have been unwilling to imply any terms as to fitness in leases of unfurnished property analogous to those implied at common law in relation to furnished dwellings (as they otherwise might have done).⁴
- 6.5 It is unclear why lettings of unfurnished property are not required to be fit for human habitation, when for over a hundred and fifty years it has been the law that furnished accommodation must be fit albeit only at the time when it is let.

¹ See above, paras 4.2 - 4.5.

² See above, paras 4.8 - 4.9.

³ See above, paras 4.11 - 4.12.

⁴ See above, para 4.18.

Criteria for fitness

- 6.6 The criteria for determining whether a property is fit for human habitation for the purposes of the implied statutory obligation are directed to ensuring that the property is not a hazard to health and is safe to live in.⁵
- 6.7 Those criteria, which have been subject only to minor amendment since their introduction in 1954, differ from those applicable—
- (i) at common law to premises which are let furnished;⁶ and
 - (ii) under public health legislation, when a local authority considers whether, and if so how to act in relation to a property that is unfit for human habitation.⁷

The former may be narrower than those applicable to the implied statutory fitness covenant because they appear to be confined to hazards to health. The latter, which have been applicable since April 1990, are broader and more accurately reflect modern expectations as to fitness than do those which apply under the implied statutory covenant.

- 6.8 There is no obvious justification for having *three* distinct sets of criteria for determining whether property is fit for human habitation. It is true that the implied terms as to fitness, at common law and under the Landlord and Tenant Act 1985 respectively, provide a means of compensation for loss by means of an award of damages, whereas the public law remedies do not. However, the underlying objective of all three is to ensure that premises are in fact fit for human habitation.

Public law remedies in cases of unfitness

- 6.9 In the absence of effective contractual remedies in cases of unfitness, tenants have to have recourse to remedies under public health and environmental legislation.
- 6.10 Where a tenant complains to his local authority, it may either—
- (i) serve a repair notice, or a closing or demolition order on the landlord;⁸ or

⁵ See Landlord and Tenant Act 1985, s 10; above, paras 4.26 - 4.27.

⁶ See above, para 3.9.

⁷ See Housing Act 1985, s 604 (as substituted); above, para 4.37.

⁸ Under Housing Act 1985, ss 189, 264 and 265 (as amended); see above, paras 4.45 - 4.46.

- (ii) require the landlord to abate a statutory nuisance.⁹

6.11 Although both courses of action are often used as an effective means of ensuring that premises are made fit, under neither can the tenant recover for any loss that he may have suffered (however substantial) as a result of the unfitness, unless the landlord's failure to comply with an order leads to a conviction. In such a case, the court may order compensation.¹⁰

6.12 Where the landlord is itself the local authority, the procedure of repair notice, closing or demolition order is not available to the tenant.¹¹

6.13 In the case of a statutory nuisance, a tenant can apply to a magistrate who can then order the abatement of the nuisance.¹² A local authority tenant can therefore obtain a remedy against his landlord in such a case. However, not all causes of unfitness for human habitation will amount to statutory nuisances, as where a property is unsafe to the occupants but to no one else.¹³ In cases where that is so, a local authority tenant will have no remedy of any kind unless the landlord is under a repairing obligation in relation to the matter in question.

Implied obligation to repair in short leases

6.14 There is an obligation, implied by section 11 of the Landlord and Tenant Act 1985 into leases of dwelling-houses granted for less than seven years, that the landlord will keep the structure and exterior of the premises in repair and their installations in repair and proper working order.¹⁴ These obligations have been extended to cases where the dwelling-house forms part only of a building, to bring within the ambit of the covenant *any* part of structure and exterior of the building and any installations that serve the dwelling-house but which are in some other part of the building.¹⁵

6.15 The legislation was enacted—

- (i) because of the injustice of requiring tenants with short leases to meet the cost of repairs except in relation to the interior of the premises; and

⁹ Under Environmental Protection Act 1990, ss 79 and 80; Building Act 1984, s 76; above paras 4.47, 4.49 - 4.54.

¹⁰ See above, para 4.56.

¹¹ See above, para 4.48.

¹² See Environmental Protection Act 1990, s 82; above, para 4.54.

¹³ See above, para 4.50.

¹⁴ See above, para 5.1.

¹⁵ See above, para 5.4.

- (ii) on grounds of public policy, to ensure that in the case of short leases proper provision was always made for repairs to the structure, exterior and installations.¹⁶

6.16 The major limitation on the legislation is that the landlord's obligation is confined to *repairs*. It does not encompass the correction of inherent defects where those defects do not cause disrepair within the scope of the implied covenant.¹⁷ To expect a short term residential tenant either to endure or, at his own expense, to correct such inherent defects is as unreasonable and unjust as requiring him to carry out repairs to the structure, exterior and installations - the inequity that Parliament sought to remedy in what is now section 11 of the Landlord and Tenant Act 1985. Furthermore, it is as desirable in the public interest that there should be an obligation on one of the parties to a lease to correct inherent defects in property as it is to ensure that one of them is bound to carry out repairs to the structure, exterior and installations. There is little point in ensuring that a property is in repair if it is nonetheless uninhabitable.¹⁸

Landlord's duty to take reasonable care where he has a right or duty to repair

6.17 Where a landlord has either—

- (i) a duty under the lease to carry out the maintenance or repair of the premises; or
- (ii) an express or implied right under the lease to enter the premises to carry out any maintenance or repair;

he owes a duty to take reasonable care for the safety of both those who might reasonably be affected by defects in the state of the property and their property.¹⁹ The landlord's liability is limited to defects that fall within the ambit of—

- (i) his duty to repair or maintain; or
- (ii) his right to enter to carry out repairs or maintenance.²⁰

6.18 This statutory duty of care has the effect of extending a landlord's repairing obligations. First, it converts a mere right to enter premises to carry out repairs or maintenance into a duty to do so. Secondly, the duty arises not only where the

¹⁶ See above, para 5.11.

¹⁷ See above, para 5.15.

¹⁸ See above, para 5.16.

¹⁹ Defective Premises Act 1972, s 4; above, paras 5.22 - 5.25.

²⁰ See above, para 5.24.

landlord is put on notice of the need for reparation but where he ought to have known of it.²¹ This significantly qualifies the common law rule that a landlord's obligations of repair arise only when he receives notice of the disrepair.²²

- 6.19 The statutory duty of care is concerned only with the safety of persons and property. There is no duty in respect of matters that do not make the property unsafe but merely unfit.²³

Regional practices

- 6.20 We have made enquiries of a number of County Courts and of certain Circuit Judges and practitioners with particular experience of practice in landlord and tenant and housing cases.²⁴ We have not been surprised to learn that there is a wide divergence of practice in different parts of the country as to the manner in which proceedings for repairs and unfitness in residential leasehold properties are brought. In some parts of the country, proceedings for specific performance for breach of the implied obligation to repair under section 11 of the Landlord and Tenant Act 1985, are common.²⁵ In others, such actions are rare and tenants claim instead damages for breach of the landlord's implied obligations, sometimes by way of counterclaim to an action for unpaid rent.²⁶ In some areas, proceedings under section 82 of the Environmental Protection Act 1990 before the magistrates are preferred.²⁷

Conclusions

- 6.21 As the summary of the law which we have given plainly indicates, the present law regulating repair and unfitness cannot be regarded as satisfactory. It consists of a patchwork of civil and public law remedies that overlap in some respects whilst at the same time providing no remedy at all where one might be expected to lie. The absence of an implied term as to fitness for human habitation has prompted recourse to two other forms of relief, neither of which provides a wholly satisfactory solution:

²¹ See above, para 5.26.

²² For the common law rule, see above, para 4.28.

²³ See above, para 5.28.

²⁴ We wish to record our gratitude to HH Judge Paul Baker QC, HH Judge John Colyer QC, District Judge Berkson, Ms Wendy Backhouse, David Bennett, David Watkinson (on behalf of the housing law barristers at 2, Garden Court), and the Chief Clerks of Birmingham, Evesham, Lambeth, Manchester, Newcastle-upon-Tyne, St Albans, Shrewsbury, Skipton, Spalding and Stafford County Courts who kindly responded to our requests for information as to local practices in relation to proceedings in housing repair cases.

²⁵ Eg Liverpool. In Lambeth, the preferred remedy is a mandatory injunction.

²⁶ Eg Newcastle-upon-Tyne and Shrewsbury.

²⁷ Eg Birmingham.

- (i) Public law remedies to deal with unfit premises are intended to provide a means by which local authorities can enforce their housing strategies and not as a means of vindicating individual rights. That is likely to be reflected increasingly in the manner in which such remedies will be exercised in future.²⁸
- (ii) Proceedings to abate statutory nuisances are intended to achieve their stated purpose. Although they can be initiated by individuals, their primary function is to terminate the nuisance and not to compensate those individuals for pecuniary loss or to confer other advantages on such persons.²⁹

6.22 In Part VIII of this report, we explain why we consider that tenants should have the advantage of a civil remedy against their landlords where the premises in which they live are unfit for human habitation. We also explain why we consider that the availability of such remedies would complement and not compromise the task of local authorities in pursuing their housing strategies. Our proposals for reform are intended to create a more coherent and principled code for regulating the responsibilities of the parties to a lease.

²⁸ See Part VIII of this report.

²⁹ See above, para 4.54.

PART VII IMPLIED TERMS: PROPOSALS FOR REFORM

Introduction

- 7.1 In Parts VII and VIII of this report, we make recommendations for the reform of the law on implied repairing obligations in leases. In Part VIII, our concern is solely with short residential leases. In this Part, by contrast, our concern is with virtually all other leases *except* short residential leases.¹ We recommend that, in the tenancies with which we are concerned, there should be an implied statutory default provision for repairs which the parties could vary or exclude.² This obligation would apply not only to the premises comprised within the lease, but also, where the lease was of part only of a building, to any common or other relevant parts of that building that were under the landlord's control.

Defects in the present law

- 7.2 In the previous Part we examined critically the circumstances in which a court will imply a repairing obligation in a lease. We explained that—

- (i) there is a presumption against the implication of any repairing obligation in a lease;³
- (ii) there may therefore be cases where neither party is obliged to repair all or some part of the premises that are leased;⁴
- (iii) repairing obligations of some kind *are* implied in relation to certain types of property such as furnished accommodation and multi-occupational dwellings and estates;⁵ and
- (iv) in other cases, it is a matter of determining whether the implication of a repairing obligation is necessary to give business efficacy to the lease.⁶

- 7.3 The present law is open to four main objections. First, to determine whether or not there is an implied repairing obligation in a lease requires court proceedings. Secondly,

¹ We also exclude from our recommendations agricultural leases and leases granted orally.

² See below, para 7.10.

³ See above, para 3.12.

⁴ See above, para 3.16.

⁵ See above, paras 3.9, 3.10.

⁶ See above, para 3.12.

the circumstances in which a court will imply a repairing obligation are uncertain and unpredictable. Thirdly, because of the presumption against implied repairing obligations, the law does not encourage repair. Finally, there is little logic as to the particular instances in which obligations are implied as a matter of law that premises should either be fit or be kept in repair.

Objectives of reform

7.4 In formulating proposals for reform, we have been guided by the following objectives. First, when parties are negotiating a lease, they should be obliged to address the issue of responsibility for repairs. Our intention is that, in every lease, either the landlord or the tenant should be responsible for the repair of—

- (i) the premises let;
- (ii) any common parts; and
- (iii) any other premises owned by the landlord that may impinge on the enjoyment of the property leased;

unless the parties have expressly decided that this should not be so. This follows from our overriding policy consideration that it is in the public interest that the stock of leasehold property should be properly maintained. It should no longer be possible for the situation to arise in which neither party is responsible for repairing some part of the property due to an oversight, but only as a result of a conscious decision.

7.5 Secondly, the repairing obligations in every lease should be certain. The possibility that there may be an implied term as to repair to give business efficacy to the lease or because the property let is of a particular kind (such as a letting of furnished accommodation), should be excluded. Any reform should seek to obviate the need to take court proceedings to determine whether there is an implied repairing obligation.

7.6 Thirdly, the parties should be free either to allocate the responsibility for repairs between themselves⁷ or (if they so choose) to exclude it in whole or part. The freedom to allocate repairing obligations should be excluded only where, by statute, Parliament has imposed a mandatory obligation on one party to a lease to repair the premises.⁸ Although we are anxious to encourage repair, we acknowledge that there may be cases where the parties quite reasonably decide that neither of them shall have repairing obligations in respect of all or part of the property. It may be, for example, that the landlord intends to redevelop the premises on the termination of the lease.

⁷ Or make provision for some third party, such as a management company, to undertake the task.

⁸ Eg under the Housing Act 1985, s 139, Sched 6, para 14; see above 3.8.

Proposals for reform

Introduction

- 7.7 In the light of these considerations, we propose that there should be a statutory repairing obligation that applies by way of default where and to the extent that the parties have not made provision for repairs.⁹ This would take the form of two implied covenants that could be freely excluded or modified. The first would relate to the premises let and the second to the common parts and to any other property under the landlord's control which might affect the enjoyment of the premises let. The purpose of these default covenants would not be to impose on the parties any minimum standard of repair,¹⁰ but to encourage parties who are negotiating the terms of a lease to consider the issue of repairs and then to make express provision in the lease for them. For reasons that we explain below,¹¹ leases of dwelling-houses granted for a term of less than seven years (and certain other leases) are excluded from our proposals.
- 7.8 When, in our recommendations we refer to the parties to a lease, we do not mean just the landlord and the tenant. Neither may be responsible for repairs. It is not uncommon to employ a management company to attend to repairs and maintenance. This company would also normally be a party to the lease. In such a case, the usual arrangement is that either the landlord undertakes to pay the company a management fee, or the tenant agrees to pay it a service charge.
- 7.9 We anticipate that in many leases, particularly of business premises, the implied default covenant will be expressly excluded, almost as a matter of course. This will not disappoint us. The parties will know that if they exclude the covenant, there is no possibility of the court implying any obligations of any kind as to repair to fill any *lacunae*. The repairing obligations set out in the lease will necessarily be a full statement of the parties' responsibilities. As this fact should be known to the parties' legal advisers, care is likely to be taken to ensure that the repairing arrangements are comprehensive. The default covenant will have achieved its objective.

⁹ Although we did not make any proposals in these terms in Consultation Paper No 123, a number of those who commented on our suggestion for a duty to maintain leasehold property for the purpose for which was let - including The Law Society - put forward the idea of such a default covenant.

¹⁰ As it is, by contrast, in the case where statutory obligations as to fitness and repair are implied by Landlord and Tenant Act 1985, ss 8 and 11 respectively.

¹¹ See para 7.13.

Implied obligation in relation to the premises let

7.10

(a) **We recommend that there should be implied into every lease, other than—**

- (i) **a lease of a dwelling-house for a term of less than seven years;¹²**
- (ii) **a lease of an agricultural holding;¹³**
- (iii) **a farm business tenancy;¹⁴ or**
- (iv) **an oral lease;¹⁵**

a covenant that the landlord shall keep the premises in repair.¹⁶
(Draft Bill, Cls 1(1); 2(1).)

(b) **The standard of repair should be that which is appropriate having regard to the age, character and prospective life of the premises and to their locality.¹⁷** (Draft Bill, Cl 1(3).)

(c) **The covenant should apply both to the whole of the premises let and to each and every part of them.** (Draft Bill, Cl 1(1).)

(d) **The covenant would not apply where—**

- (i) **there was an express repairing obligation in relation to all of the relevant part of the premises either in the lease itself or in an agreement by the parties; or**
- (ii) **the parties had made an express agreement¹⁸ that excluded the operation of the implied statutory covenant; or**

¹² See below, para 7.13.

¹³ Within the meaning of the Agricultural Holdings Act 1986, s 1; see below, para 7.14.

¹⁴ Within the meaning of the Agricultural Tenancies Act 1995, s 1; see below, para 7.14.

¹⁵ See below, para 7.15.

¹⁶ For the meaning of a covenant to keep in repair, see above, para 2.9.

¹⁷ This follows the model of Landlord and Tenant Act 1985, s 11(3). See above, para 5.13.

¹⁸ See below, para 7.20.

- (iii) a repairing obligation was either imposed on one of the parties by any other statute,¹⁹ or would have been if it had not been effectively excluded.²⁰ (Draft Bill, Cls 2(2), (3).)

For these purposes, a “repairing obligation” would mean an obligation both to repair the premises or to keep them in repair, and to make and keep them fit for human habitation. (Draft Bill, Cl 2(6).)

- (e) The parties would be free to modify the covenant by express agreement.²¹ (Draft Bill, Cl. 2(4).)

7.11 In addition to these primary provisions, we make a number of subsidiary recommendations:

- (a) To avoid the possible trap that parties may not appreciate the significance of an implied covenant to *keep in repair*,²² we recommend that its meaning should be defined so as to make it clear that the obligation is both to *put* the premises in repair at the commencement of the term and to *keep* it in repair for the duration of the lease. (Draft Cls 1(6)(a); 15(1).)
- (b) Where the covenant to keep in repair is implied, the landlord should have a right to enter the premises on giving 24 hours’ notice in writing to the occupier, to enable him or his authorised agent to inspect the condition and the state of repair of the premises.²³ (Draft Bill, Cl 3(1).)
- (c) By way of exception to the implied repairing covenant, the landlord should not be required to undertake any of the following matters:²⁴

¹⁹ Eg under the Housing Act 1985, s 139, Sched 6, para 14; see above 3.8.

²⁰ *Ibid.*

²¹ See below, para 7.21.

²² See above, para 2.9.

²³ This follows the model of the Landlord and Tenant Act 1985, s 11(6).

²⁴ These replicate the exceptions to the Landlord and Tenant Act 1985, s 11(2); see above, para 5.7.

- (i) **any work of repairs that the tenant is obliged to carry out under his implied covenant to take proper care of the premises;**²⁵
- (ii) **the rebuilding or reinstatement of the premises in whole or in part if they are destroyed by any form of inevitable accident; and**
- (iii) **the repair of any tenant's fixtures.** (Draft Bill, Cl 1(4).)

7.12 It will be apparent that this implied default covenant closely follows the well-known model of the repairing covenant implied by section 11 of the Landlord and Tenant Act 1985 in leases of a dwelling-house granted for a term of less than seven years, the details of which we have already explained.²⁶ In the following paragraphs we explain more fully the details of this proposed default covenant.

Leases to which the default covenant would not apply

SHORT LEASES OF RESIDENTIAL ACCOMMODATION

7.13 The implied default covenant would have no application to any leases of a dwelling-house granted for a term of less than seven years within the provisions of sections 11 to 15 of the Landlord and Tenant Act 1985, which we have explained in Part V of this report. We exclude these leases because there is, or will be if the proposals in this report are enacted, a coherent code for the repair and maintenance of property comprised in such leases. This will consist of—

- (i) sections 11 to 15 of the Landlord and Tenant Act 1985;
- (ii) an implied covenant on the part of the landlord that the premises should be fit for human habitation which we propose in Part VIII of this report; and
- (iii) an implied covenant by the tenant to take proper care of the property let that we recommend in Part X of this report.

Given the existence of such a code of obligations, the implication of any general covenant to repair would be otiose and would be likely to lead to both confusion and complexity. Furthermore, those leases of dwelling-houses granted for less than seven years which Parliament has expressly exempted from the provisions of section 11

²⁵ For our proposals for an implied covenant that a tenant should take proper care of the premises, see below, para 10.37; and Draft Bill, Cl 9(1). If the tenant has entered into an express covenant to the same effect as the implied covenant to take proper care, the implied repairing covenant will of course be inapplicable: see above, para 7.10(d)(i).

²⁶ See above, para 5.1.

would also fall within the exception to our proposed default covenant.²⁷ It would in our view be inappropriate to make the default covenant applicable when Parliament has expressly excluded the operation of a more limited repairing obligation.

AGRICULTURAL HOLDINGS AND FARM BUSINESS TENANCIES

- 7.14 The covenant is not intended to apply to agricultural holdings, farm business tenancies or oral leases, nor to certain special categories of leases which are excluded from statutory repairing obligations that would otherwise apply. The exceptions for agricultural tenancies arise because we have deliberately excluded them from our review of the law on implied terms.²⁸ Although in general a tenancy of an agricultural holding cannot be granted after 1 September 1995,²⁹ there are some exceptions that would otherwise fall within our proposals,³⁰ and it is therefore necessary to exclude them expressly.

ORAL LEASES

- 7.15 Oral leases give rise to special considerations. They can only be granted for a term not exceeding three years, at the best rent that can reasonably be obtained,³¹ and without taking a fine.³² We exclude them from our proposals for three reasons. First, we doubt that an implied repairing obligation is likely to be necessary in most cases. As we have explained,³³ short leases of residential accommodation are excluded from the default covenant. Any business premises of any magnitude will be let by means of a written agreement and usually on legal advice. We suspect that oral leases are used mainly for small business premises and property such as lock-up garages. Secondly, we fear that our proposals could have undesirable consequences. Where L orally grants T a short lease, the parties are unlikely either to take legal advice or to address in detail the terms of the tenancy.³⁴ Thirdly, if our proposals were to apply to oral leases, we would either have to provide that any exclusion or modification should be in writing - which

²⁷ See Landlord and Tenant Act 1985, s 14; above para 5.10.

²⁸ See above, para 1.7, n 13.

²⁹ Agricultural Tenancies Act 1995, s 4(1).

³⁰ For agricultural holdings that may be granted after 1 September 1995, see *ibid*, s 4. Our proposals will apply only to new tenancies granted after the Act giving effect to them is brought into force: see Draft Bill Cl 17(3), explained below, para 7.31. Not all new agricultural tenancies would be new tenancies for these purposes.

³¹ A nominal or peppercorn rent would not suffice.

³² Law of Property Act 1925, s 54(2). The usual form of a fine is a premium: *ibid*, s 205(1)(xxiii).

³³ See above, para 7.13.

³⁴ The sort of case that we are concerned about is where, for example, L orally grants T a three year lease of an old workshop which L intends to demolish and rebuild at the end of the lease.

in practice would not happen - or risk evidential disputes about the exact terms of the oral lease.

Standard of repair

7.16 As we have explained above, the default covenant is a covenant *to keep in repair* and not merely a covenant *to repair*.³⁵ However, it can be excluded by a covenant *either* to repair *or* to keep in repair. This follows from the stated aim of the default covenant which is not to impose on the parties to a lease any particular standard of repair, but to encourage them to consider and make *some* provision for repair.³⁶ It is no doubt possible (but very unlikely) that a lease might not contain a covenant to repair at all, but merely a covenant to renew the premises (perhaps because the lease was granted for a particularly long term). In those circumstances, the default covenant would apply, because a covenant to renew is not a covenant to repair or keep in repair.³⁷

7.17 Where the parties do make alternative provision for repairs, the default covenant will be excluded whatever the standard of repair that they may stipulate. Thus, even if the parties were to agree to some very basic standard of repair (such as that the premises be kept merely wind and water tight), the default covenant would be inapplicable. We recognise that such a limited obligation might well be appropriate for certain types of premises of basic construction, or where the property was to be redeveloped at the end of a short lease. Again this reflects the aim of the default covenant that has been explained above.³⁸

Applicability to the whole and to each and every part

7.18 The default covenant applies not just to the *whole* of the premises let but to *each and every part* of them. If, therefore, the parties make express provision for the repair of one part of the leased premises but not another, the default covenant will fill the void in relation to that other part unless it has been expressly excluded.

Exclusion and modification

7.19 The default covenant will be inapplicable where and to the extent that the parties make *express* alternative provision for repairs *in the lease*.³⁹ There are two aspects to this. First, the repairing obligations must be undertaken expressly. One of the main objectives of the default covenant is to exclude the implication of repairing obligations

³⁵ See above, paras 7.10(a) and 7.11(a).

³⁶ See above, para 7.7.

³⁷ See above, para 2.3.

³⁸ See para 7.7.

³⁹ See above, para 7.10(d)(i).

under traditional contractual principles.⁴⁰ Secondly, the repairing obligations must be undertaken as a term of the lease. This does not mean that the repairing obligations of the parties need be set in stone when the lease is executed. Any subsequent variation of the terms of the lease that was binding on the parties would suffice.

7.20 Subject to any statutory provisions which impose mandatory obligations of repair on any party,⁴¹ the parties will be at liberty to exclude or modify the default covenant.⁴² **We recommend that any exclusion or modification should be made in writing, either in the lease itself or in some collateral agreement made before or after the grant of the lease.** (Draft Bill, Cl 2(5).) The degree of formality required,⁴³ will be determined by the general law.

7.21 Modification will of course include provisions which-

- (i) limit or amend any of the landlord's obligations under the covenant; or
- (ii) transfer them (subject or not to amendment) to the tenant or to any other person, such as a management company; or
- (iii) apportion the cost of compliance with the covenant between the parties to the lease, as where the tenant undertakes to pay a service charge to meet the cost of any works.

How the implied obligation would work

7.22 In the following paragraphs we give two examples to illustrate how this default covenant would work in practice. In each case, L is the landlord and T is the tenant.

EXAMPLE 1

7.23 L grants T a ten year lease of a house and grounds which include a garage. Under the lease, L undertakes responsibility for the repair of the structure and exterior of the house, and T covenants that she will keep the interior in repair. Nothing is said about the garage. The proposed default covenant is therefore excluded as regards the house (because the parties have made express provision for repairs)⁴⁴ but not in relation to the garage. The obligation to repair it will therefore fall on L under the default covenant. This is because the parties failed to make provision for repairs in relation to each and every part of the premises comprised within the lease.

⁴⁰ For which, see above, para 3.11.

⁴¹ See above, para 7.10(d)(iii).

⁴² See above, paras 7.10(d)(ii) and (e).

⁴³ Ie, whether it should be made in writing or by deed.

⁴⁴ See above, para 7.10(d)(i).

EXAMPLE 2

7.24 L, the freehold owner of an office block, grants T by deed the lease of a suite of offices in the block. M Ltd, a management company is also a party to the lease. Under the terms of the lease, M Ltd undertakes to keep the exterior of the offices in repair and L covenants to pay M Ltd a management fee for so doing.⁴⁵ Under the terms of the lease, T undertakes to pay L the costs of keeping the interior in repair. As regards the exterior, the default covenant is excluded because there is an express provision by which one of the parties to the lease has undertaken responsibility for the repairs.⁴⁶ The default covenant applies to the internal repairs, but is modified by express agreement.⁴⁷

Implied obligation in relation to common and other parts

7.25 It is not enough that the implied repairing obligations should be confined to the premises leased. It can be equally important to the tenant that common parts of the building or other parts of the premises under the landlord's control should be kept in repair.⁴⁸ The second implied covenant is intended to achieve this result. Once again, we take as our model the provisions of section 11 of the Landlord and Tenant Act 1985 (as amended).⁴⁹ Obviously the covenant will not apply to all leases, but only to those of part of a building. We set out below our recommendations as to the circumstances in which the default covenant would be implied, the obligation that would be imposed on the landlord, and particular defences that would be available to him.

7.26 **We recommend that a repairing covenant on the part of the landlord should be implied where—**

- (a) **the premises which are leased form part only of a building; and**
- (b) **the landlord has for the time being any estate or interest either—**
 - (i) **in some part of that building; or**
 - (ii) **in some property which is subject to an easement or a licence in favour of the tenant;**

⁴⁵ In practice, the management company would also undertake to maintain the common parts. We make similar proposals for an implied covenant in relation to common parts below, para 7.25.

⁴⁶ See above, para 7.10(d)(i).

⁴⁷ See above, para 7.21.

⁴⁸ See above, para 5.4.

⁴⁹ Sections 11(1A), (1B) and (3A); above, paras 5.4, 5.5.

which does not form part of the premises included in the lease. (Draft Bill, Cl 1(2).) Such premises are described in the Draft Bill for convenience as “associated premises”.⁵⁰

7.27 **We recommend that the landlord should be under an implied obligation to keep each and every part of such associated premises in repair to such standard as may be appropriate having regard to such of the following matters as may be relevant, namely, the age, character and prospective life of the premises in question and to the locality in which they are situated.** (Draft Bill, Cl 1(3).) If, for example, the external door to the common stair well becomes rotted, the landlord would be expected to repair or replace it to the standard that was appropriate for that type of property. Not every one of the factors listed will be relevant in any given case. For example, in the case where the associated premises comprised an alleyway leading into a common courtyard, the locality would probably be the most important factor in determining the appropriate standard of repair.

7.28 Even though the landlord may own the associated premises, he may not have a right to enter upon them to carry out the repairs that are necessary to meet his obligations under the default covenant. We therefore propose that there should in such circumstances be a defence available to him, that is modelled on section 11(3A) of the Landlord and Tenant Act 1985.⁵¹ **We recommend that it should be a defence to the action on the implied covenant that the landlord had used all reasonable endeavours to obtain the rights necessary to carry out the work required, but had been unable to secure them.** (Draft Bill, Cl 3(2).)

7.29 **We recommend that there should be no obligation on the landlord to carry out any repairs under this default covenant unless the disrepair is such as to affect the tenant’s enjoyment of—**

- (i) **the property leased to him;**
- (ii) **any common parts⁵² of the building of which that property forms part; or**
- (iii) **any easement or licence over other property of the landlord.**⁵³
(Draft Bill, Cl 1(5).)

⁵⁰ Clause 1(2).

⁵¹ See above, para 5.5.

⁵² Common parts are defined to include the structure and exterior of the building and any common facilities within it: Draft Bill, Cl 15(1).

⁵³ See above, para 7.26.

This provision is modelled on section 11(1B) of the Landlord and Tenant Act 1985.⁵⁴

7.30 **We recommend that the leases to which the covenant would not apply,⁵⁵ the circumstances in which it could be excluded or modified,⁵⁶ and the matters that would be outside its scope,⁵⁷ would all be the same as for the first implied default covenant.** These have already been explained.

Commencement

7.31 It would of course be wholly inappropriate that our proposals should apply to leases that were already in existence when they are brought into force. **We therefore propose that the recommendations in this Part should apply only to new tenancies.** (Draft Bill, Cl 17(3).) For these purposes, we propose to follow the model of the Landlord and Tenant (Covenants) Act 1995.⁵⁸ **Our recommendations will therefore apply only to leases which are granted on or after the date on which the Act implementing this report comes into force otherwise than in pursuance of—**

- (a) **an agreement entered into before that date; or**
- (b) **an order of a court made before that date.** (Draft Bill, Cl 17(3).)

For these purposes, where a lease is granted pursuant to an option or a right of pre-emption which was itself granted before the Act came into force, it will be regarded as falling within (a), above.⁵⁹ (Draft Bill, Cl 17(4).)

⁵⁴ See above, para 5.4.

⁵⁵ See above, para 7.10(a).

⁵⁶ See above, paras 7.10(d) and (e).

⁵⁷ See above, para 7.11(c).

⁵⁸ Section 1(3).

⁵⁹ Cf Landlord and Tenant (Covenants) Act 1995, ss 1(5), (6).

PART VIII FITNESS FOR HUMAN HABITATION: PROPOSALS FOR REFORM

Introduction

- 8.1 In Part IV of this report, we explained how the implied statutory obligation that properties let at a low rent should be kept fit for human habitation¹ has ceased to have any effect because the rent limits have been allowed to remain unchanged.² In Part VI, we summarised why the present law on implied terms as to fitness was thoroughly unsatisfactory.³ In this Part we recommend that the implied obligation as to fitness should be made effective once again for the type of tenant it was intended to benefit. We explain why such a change is highly desirable given the present incidence of unfitness in leasehold property. We examine the cost implications for such a proposal and its implications for local authorities. We begin however with some facts about the unfitness of rented property.

The incidence of leasehold property that is unfit for human habitation

- 8.2 The *English House Condition Survey 1991*⁴ and the *1993 Welsh House Condition Survey*⁵ provide valuable information as to the fitness for human habitation of leasehold properties, both as regards the type of landlord and the age and character of the property. In the three tables below, we set out the relevant figures that are derived from these two surveys.⁶ The tables are intended to show the interrelationship between unfitness and—

- (i) type of tenure;⁷
- (ii) age of property; and
- (iii) value of property.

¹ Landlord and Tenant Act 1985, s 8.

² See above, paras 4.11 - 4.18.

³ See above, paras 6.2 - 6.8.

⁴ Department of the Environment (1993) (“EHCS”).

⁵ Welsh Office (1994) (“WHCS”).

⁶ See respectively EHCS, paras 2.19 - 2.24; Part 7; and Table A7.1 (p 203); WHCS, Parts 3 and 6; and Tables A1; A2.1; A2.2; and A2.3 (pp 65 - 68).

⁷ Ie, whether the property is owner occupied, private rented, or let by a local authority or a housing association.

8.3 The first table⁸ gives the percentage of unfit property by tenure in England and Wales respectively.⁹ Unfitness has for these purposes been judged according to the most recent criteria laid down by the Local Government and Housing Act 1989,¹⁰ which have been explained in Part IV of this report.¹¹ The second table¹² lists the percentages of property according to both age and type of tenure. The figures available for Wales do not distinguish between owner occupied and private rented property (which are grouped together as “private sector”) or local authority and housing association property, which are categorised as “social housing”. The third table¹³ applies only to property in Wales. It lists the percentages of unfit property according to the Council Tax Valuation Bands.¹⁴ It therefore provides an indication of the relationship between the incidence of unfitness and the value of property. Such information is not yet available for England, because the English survey was undertaken prior to the introduction of Council Tax by the Local Government Finance Act 1992.

⁸ Below, para 8.4.

⁹ The figures derive or are extrapolated from EHCS, Table A7.1; WHCS, Tables A1; A2.1; A2.2; and A2.3.

¹⁰ Section 165(1)(e); Sched 9, Pt V, para 83, substituting a new Housing Act 1985, s 604. See EHCS, paras 7.1 - 7.3; WHCS, para 10.4.3.

¹¹ See above, para 4.37.

¹² Below, para 8.5.

¹³ Below, para 8.6.

¹⁴ See WHCS, para 6.4; and Part 11, p 56.

8.4 *Table 1: Unfit Housing by Tenure (occupied premises only)*

(A) ENGLAND

Tenure	Percentage unfit	Property of that tenure as a percentage of all occupied property
Owner occupied	5.5	68.1
Private rented	20.5	8.5
Local authority	6.9	20.2
Housing association	6.7	3.2
All tenures	7.6	100

(B) WALES

Tenure	Percentage unfit	Property of that tenure as a percentage of all occupied property
Owner occupied	11.9	69.5
Private rented	25.6	6.2
Local authority ¹⁵	15.8	21.2
Housing association	6.0	3.1
All tenures	13.4	100

¹⁵ Including properties let by the Development Board for Rural Wales ("DBRW").

8.5 Table 2: Percentage of Unfit Property by Age (all tenures)

(A) ENGLAND

Tenure	Pre-1919	1919 - 1944	1945 - 1964	Post-1964
Owner occupied	11.4	6.6	3.2	1.2
Private rented	26.7	19.2	7.0	6.1
Local authority	16.6	9.7	7.3	3.4
Housing association	11.9	12.9	11.7	1.9
All tenures	15.5	8.4	5.3	2.2

(B) WALES

Tenure	Pre-1919	1919 - 1944	1945 - 1964	Post-1964
Private sector ¹⁶	20.6	13.1	9.0	4.5
Social housing ¹⁷	15.2	29.0	15.1	9.1
All tenures	20.3	16.9	11.6	6.0

(C) PERCENTAGE OF UNFIT PROPERTIES PRE-1919 AND POST-1918

Country	Pre-1919	Post-1918
England	15.5	4.8
Wales	20.3	10.0
England and Wales	16.4	5.1

¹⁶ I.e, owner occupied and private rented.

¹⁷ I.e, local authority, DBRW and housing association.

8.6 *Table 3: Percentage of Unfit Properties According to Council Tax Valuation Bands (Wales only)*

Band	Value of band	Percentage of unfit property
A	Not exceeding £30,000	19.2
B	£30,000 - £39,000	16.4
C	£39,000 - £51,000	12.8
D	£51,000 - £66,000	9.6
E	£66,000 - £90,000	6.8
F	£90,000 - £120,000	5.6
G & H	Over £120,000	2.8

8.7 Two important facts emerge very clearly from these tables. The first is that the amount of property that is unfit for human habitation remains very substantial. In particular, of all private rented properties, more than one-fifth of those in England and more than one-quarter of those in Wales are unfit.

8.8 The second fact is that unfitness is concentrated disproportionately in property that is—

- (i) privately rented; and/or
- (ii) older housing stock, particularly premises that were constructed prior to 1919; and/or
- (iii) of low value.

Although the high incidence of unfitness is surprising, its distribution (which the figures given plainly demonstrate) is much less so. The persons who are most affected by unfit property tend to be those of comparatively modest means¹⁸ who rent older property of lower value from private landlords.

¹⁸ For confirmation of this, see Philip Leather, Sheila Mackintosh and Sue Rolfe, *Papering Over the Cracks* (National Housing Forum, 1994) p 35, figure 3.6. Chapter 3 contains a graphic picture of unfit housing in this country.

8.9 In the light of both the figures on unfitness and the analysis of the law that we have given in Parts IV and VI of this report, it is reasonable to surmise that the tenants who most require the protection of the law are those who rent their homes on some form of periodic tenancy and who therefore have no capital stake in the premises. Given the lack of that financial stake, it is unreasonable to impose on such tenants the burden of repair or of making the house fit to be lived in. Although our concern is primarily with those who rent in the private sector, any protection must also extend to those in social housing.¹⁹ In general, property let by local authorities and housing associations is well maintained (as the tables above demonstrate). However, as we have explained above,²⁰ local authority tenants lack the protection of the fitness provisions of the Housing Act 1985 that are available to all other tenants.²¹ In the light of these figures we consider the case for reform.

The case for reform

Why a civil remedy is needed

8.10 The premise on which our proposals for reform rest is that tenants of residential properties held under short term leases should have civil remedies against their landlords if those properties are not fit for human habitation. The availability of civil remedies for tenants was a creation of the common law in the 1840s.²² These remedies lay only in relation to furnished lettings. Parliament chose to extend their availability in 1885 with the deliberate intention of filling the *lacuna* left by the common law. That implied statutory term as to fitness was intended to apply to a substantial proportion of rented accommodation, namely that property which was let to persons in the lower income range.²³ In 1961, Parliament once again extended the private law remedies of those holding under short leases by introducing an implied repairing obligation on the part of the landlord.²⁴ As we have explained, this provision plays a significant role in encouraging repair.²⁵ For over a century and a half therefore, it has been the law that certain tenants should have a civil remedy against their landlords in cases of unfitness, quite apart from any public law powers that might be given to local authorities in regard to such properties.

¹⁹ As of 31 March 1994, of the rented sector 55.8% were local authority lettings, 11.98% were housing association lettings, and 32.22% were private sector lettings. We are grateful to the Department of the Environment for this information.

²⁰ See above, para 4.48.

²¹ This point was in fact made strongly to us by two of our respondents on consultation.

²² *Smith v Marrable* (1843) 11 M & W 5; 152 ER 693; above, para 3.9.

²³ See above, paras 4.7 - 4.9.

²⁴ See above, para 5.11.

²⁵ See above, para 5.12.

8.11 What has gone wrong is of course that the implied obligation of fitness has been allowed to wither on the vine because the rent limits have been left unaltered for nearly 40 years. As we explained in Part VI of this report, there is an obvious case for rectifying the unsatisfactory position that has been created in consequence *as a matter of law reform*. In particular, it is anomalous that there should be—

- (i) an effective implied term of fitness in relation to furnished premises but not as regards unfurnished properties; and
- (ii) an obligation on landlords to repair the exterior, structure and installations in short leases of dwellings because of the injustice of expecting a tenant to meet the costs of such repairs and yet to expect that tenant to bear the often even greater burden of rectifying unfitness not occasioned by disrepair.

8.12 These anomalies would not matter if the instances in which they arose were comparatively rare. Given the extent of unfitness that we have outlined above,²⁶ this is plainly not the case. It is all too likely that the decisions which we cited at the beginning of this report,²⁷ which provide graphic, if anecdotal evidence of the injustices to which the absence of effective remedies in cases of unfitness gives rise, are not unique. Nor would these legal anomalies be a cause of concern if alternative remedies existed in public law to provide both a means of compensation²⁸ and of compelling the landlord to carry out the necessary works. But public law remedies are not intended for the vindication of individual rights. We have already explained how compensation is not normally obtainable when such remedies are employed,²⁹ and how such remedies are, in any event, not always available.³⁰ We shall explain below³¹ how public law remedies are likely to be employed increasingly to achieve the strategic aims of local housing authorities. The consequence is likely to be that there will be less opportunity for such authorities to use them to benefit individual complainants unless the property in question is one which falls within those strategic aims. Civil and public law remedies should operate in parallel to achieve their different, if at times, overlapping, objectives.

²⁶ See above, paras 8.2 - 8.9.

²⁷ See paras 1.1 - 1.3.

²⁸ Whether for any loss that they may suffer flowing from the state of the property or from meeting the costs of remedying the disrepair or unfitness themselves

²⁹ See above, para 4.56.

³⁰ See above, para 4.48.

³¹ Paragraph 8.30.

Extending section 8 of the Landlord and Tenant Act 1985: possible options

8.13 There are four possible courses of action that can be taken in relation to the covenant by a landlord implied by section 8 of the Landlord and Tenant Act 1985 to keep residential property fit for human habitation. The first option is to repeal the section on the basis that, given the present rent limits, it has ceased to have any application. We reject this on four grounds:

- (i) For reasons that have been explained in the previous Part of this report, the alternative remedies under the Housing Act 1985 and the Environmental Protection Act 1990 are not as comprehensive as those under the implied covenant. Furthermore, local authority tenants have no remedy at all under the Housing Act 1985 in relation to unfit property.
- (ii) Given the absence of adequate alternative remedies, the incidence of unfitness in the rented sector provides a compelling reason for strengthening rather than repealing the implied covenant.
- (iii) In both the consultation conducted by the Department of the Environment in 1989³² and by ourselves in our Consultation Paper,³³ there was no suggestion from any respondent that the implied covenant should be repealed. Virtually all those who commented on this issue considered that the implied covenant should in some way or another be restored to effectiveness.
- (iv) These factors are not, in our view, outweighed by the issues of how such a revived obligation could be financed. Those issues are plainly of the greatest importance and we address them below.³⁴

8.14 The second option is to retain section 8 unamended, subject to the existing rent limits. This is little different in effect from repeal and we reject it for the same reasons.

8.15 The third option is to raise the rent limits within which section 8 operates. This enjoyed some support in the two consultations which we have mentioned above, but considerably less than the option of abolishing rental limits altogether. We reject it principally because the implied obligation would be likely to suffer the fate of the present one unless it had some in-built mechanism to ensure that the rent limits were

³² See above, para 1.14.

³³ See above, para 1.23.

³⁴ Paragraph 8.18.

automatically raised according to a formula that was appropriate.³⁵ There could also be difficulties in setting the initial rental limits. That would itself involve policy questions as to proportion of rented property that it was thought appropriate to include within the covenant.

8.16 The fourth option, which we favour, is the one which was accepted by most respondents to the two consultations mentioned above.³⁶ This is to abandon the rent limits and to adopt instead an approach based on the length of the lease. We explained in Part I of this report³⁷ that although a handful of those who replied would have imposed no limits on the leases to which the covenant should apply, most respondents favoured an upper limit of either seven or 21 years (upon which point opinion was fairly evenly divided). We have decided to recommend that the covenant should be implied only in leases of less than seven years' duration. We have reached this conclusion because, in our view, it is short term tenants, particularly those who hold under periodic tenancies, who deserve protection.³⁸ We do not consider that it is appropriate that those who hold under a lease which, at least when it was granted, had a clear capital value³⁹ should expect their landlords either to repair or to maintain the fitness of the premises in the absence of express agreement between the parties. Persons who have a significant financial stake in the property ought to take responsibility for it. This reflects the same thinking that prompted the enactment of the implied repairing obligation that is imposed on landlords of residential property let for less than seven years.⁴⁰ The application of the unfitness covenant to much the same sector of residential lettings⁴¹ will create a coherent and rational code of law governing those tenancies where these obligations are actually required. It will also mark a reversion to the intentions of Parliament when the implied statutory obligation of fitness was first introduced in 1885.⁴² Before explaining our proposal in detail, we address three powerful and interrelated objections to any reform of this kind.

³⁵ There could be considerable difficulty in providing an appropriate formula. Rents have not increased in line with inflation but on a quite different basis: see above, paras 4.12, 4.13. They have also been distorted, first by the operation of the Rent Acts, and then by the subsequent freeing of the market by the Housing Act 1988: cf *Spath Holme Ltd v Greater Manchester and Lancashire Rent Assessment Committee* [1995] 49 EG 128 (CA).

³⁶ Paragraph 8.13.

³⁷ See above, para 1.23.

³⁸ See above, para 6.16.

³⁹ As any lease for seven years or more is likely to have.

⁴⁰ Landlord and Tenant Act 1985, s 11; see above, para 5.11.

⁴¹ For reasons explained below, para 8.41, the sectors are not precisely conterminous.

⁴² See above, para 4.8.

Objections to reform

Introduction

- 8.17 The first objection to the possible extension of the obligation of fitness in the way in which we have outlined it is one which we have raised ourselves. It is the obvious issue of its cost in general. The second objection has been raised with us in our discussions with the Department of the Environment. It concerns the possible impact of our proposals on local authorities in their capacity as landlords. Actions brought by individual tenants could have the result of impeding the authority's strategic plans for carrying out housing improvement programmes because they would have to devote resources to meeting such claims and paying the associated legal fees. The third objection, also raised by the Department of the Environment, is that our proposals might cut across the Government's policies for the more targeted employment of improvement grants. We examine each of these objections in turn.

Paying for an extended obligation of fitness

- 8.18 Obviously, our proposals will have to be paid for in some way by somebody. The cost of making premises fit for human habitation when they are not in that state is significant. The most recent figures that we have are taken from the *1993 Welsh House Condition Survey*.⁴³ These show that in Wales the mean cost of making a property fit in the second quarter of 1993 was £3,740 and that the median cost was £2,290.⁴⁴ We fully acknowledge both this cost and that it will impose financial burdens on landlords and tenants, but we consider that the cost is justified by the injustice which we seek to remedy.⁴⁵ However, we are very mindful of it and are anxious to ensure that it is introduced in ways that will be realistic.
- 8.19 First, our proposals, if implemented, would be prospective and not retrospective. The implied obligation of fitness would apply only to tenancies granted after the coming into force of the Act.⁴⁶ As we have explained,⁴⁷ our proposed definition of such tenancies would be comparatively narrow and would exclude (for example) tenancies granted after the Act came into force but in pursuance of an agreement made, or an option or right of first refusal granted before that time. We visualise the gradual introduction of the implied fitness standard over a period of perhaps many years, with

⁴³ Welsh Office, 1994. See above, para 8.2.

⁴⁴ WHCS, para 5.1. The equivalent figures for England in 1991, were £3,301 (mean cost) and £1,248 (median cost): see EHCS, pp 63, 64.

⁴⁵ See above, paras 8.10 - 8.12.

⁴⁶ See above, para 7.31, where the provisions are explained.

⁴⁷ See above, para 7.31.

the cost spread accordingly. It is a long term strategy.⁴⁸ This matter is of some importance with regard to local authorities, whose special position we consider below.⁴⁹ For the last few years, new lettings by local authorities in England and Wales have run consistently at just over 6 per cent of their total housing stock.⁵⁰ At that rate, it would take more than 15 years (and probably much longer) for all tenancies to become subject to the new covenant.⁵¹

8.20 Secondly, and following from this, the basic requirement that rented residential property should be fit for human habitation is not an unreasonable one to impose on private sector landlords in the unregulated financial environment that has applied to lettings made by them since the Housing Act 1988 came into force in 1989. Such landlords are free to charge any rent that the market will bear in regard to new lettings.⁵² We consider that the fitness of such premises should be a pre-condition of the product that they bring to the market.⁵³ Under our proposals, landlords who granted new leases of residential accommodation for less than seven years would do so in the knowledge that the premises would have to be both fit at the time of the grant of the lease and be kept in that state for the duration of the term. This would no doubt be reflected in the rent.

8.21 Thirdly, our proposals on fitness are subject to certain restrictions. In particular, we do not propose to abrogate the rules, explained in Part IV of this report, that a

⁴⁸ Cf The Future of Private Housing Renewal Programmes in England (Department of the Environment 1995), para 2.2: "Both cost and logistics preclude the immediate repair of all unfit houses".

⁴⁹ See para 8.22.

⁵⁰ We are very grateful to the Department of the Environment, the Welsh Office and Tai Cymru Housing for Wales for this information.

⁵¹ The situation in the private rented sector is quite different. Most new lettings are short term and take the form of assured shortholds under Housing Act 1988, s 20, so that the tenant does not acquire security of tenure: *ibid*, s 21. Although there is no maximum duration for assured shorthold tenancies (despite their name), such terms are seldom granted for as long as five years. Although there are no reliable figures available for the private rented sector, the Department of the Environment estimates that over the last three years, new lettings have accounted for 30 - 40 per cent of the total property let in that sector, and that in the year 1993 - 94, 39 per cent of all private sector tenants had occupied their premises for less than one year.

⁵² Subject to certain powers conferred on rent assessment committees either to set a market rent or to reduce a rent that is significantly higher than a market rent: see Housing Act 1988, ss 14 and 22 respectively. As part of its strategy to deregulate private renting, the Department of the Environment suggested the repeal of the latter provision: Consultation Paper: The Legislative Framework for Private Renting (1995) para 2.12. However, in the light of responses to consultation, this suggestion has been abandoned: Written Answer, *Hansard* (HC) 28 November 1995, vol 267, col 563.

⁵³ We are not aware of any empirical evidence on the level of unfitness in lettings made under the 1988 Act in comparison with those still governed by the Rent Act 1977, but we would expect that the level of unfitness to be greater in relation to the latter.

landlord is under no liability for loss caused by unfitness of which he has no notice,⁵⁴ and that his liability is limited to cases where the premises can be made fit a reasonable expense.⁵⁵ As regards the former, we have explained that the rule is significantly qualified as a result of section 4 of the Defective Premises Act 1972.⁵⁶ If by reason of his obligation or right to repair the premises, the landlord should have discovered something which might cause personal injury to the tenant or to some third party on the property, he will be in breach of the duty of care imposed by section 4(4) of that Act. We consider that it is inappropriate to extend the landlord's duty beyond that to make him, in effect, a guarantor that the premises are free from latent defects.⁵⁷ As regards the latter, the landlord's obligation under the implied fitness covenant has always been to provide property that is *reasonably* fit for human habitation.⁵⁸ The judicial gloss on that requirement, by which such fitness can be demanded only if it can be provided at reasonable expense, acts as a safeguard to prevent the imposition of an unrealistic burden on landlords.

The effect on local authorities

THE SPECIAL STATUS OF LOCAL AUTHORITIES

8.22 We have given very careful consideration to the position of local authorities as landlords in the light of the points made to us by the Department of the Environment. Parliament has recognised in a number of ways that such authorities are in a different position from other landlords. Neither the Rent Act 1977 nor the Housing Act 1988 has any application to tenancies granted by local authorities.⁵⁹ Instead, Parliament has created a special régime for council tenants under what are now the provisions of Part IV of the Housing Act 1985,⁶⁰ which confer on them security of tenure, rights of succession to the tenancy and other rights. Unlike private sector landlords, local authorities are not in a position to charge their tenants a full market rent for the

⁵⁴ See above, para 4.28.

⁵⁵ *Buswell v Goodwin* [1971] 1 WLR 92. See above, para 4.30.

⁵⁶ See above, para 5.26.

⁵⁷ *Ibid.*

⁵⁸ See above, paras 4.26 and 4.30.

⁵⁹ See Rent Act 1977, s 14; Housing Act 1988, s 1(2); Sched I, para 12.

⁶⁰ Replacing (in amended form) legislation first enacted in the Housing Act 1980.

accommodation provided.⁶¹ They are also under a statutory duty to house persons who are homeless.⁶²

8.23 The role of local authorities as landlords of social housing is diminishing. Construction of new houses by them has virtually ceased, having fallen from 131,015 in 1975 - 76 to 441 in 1994 - 95.⁶³ Furthermore, the amount of local authority housing as a proportion of the housing stock has fallen steadily and now represents just 18 per cent,⁶⁴ with the purchase by tenants of their properties under the "right to buy" provisions of Part V of the Housing Act 1985⁶⁵ as the main reason hitherto for this diminution.⁶⁶ This trend is likely to continue as a result of the Government's programme of Large Scale Voluntary Transfers, by which existing council housing is being transferred to landlords in the private sector.⁶⁷

8.24 The position of local authority tenants in relation to any disrepair or unfitness in the premises let to them is rather different from that of other tenants. First, where the landlord is under an express or implied repairing obligation, regulations made under the Housing Act 1985 give such tenants a right to have any repairs carried out within a short period with modest compensation in the event of delay.⁶⁸ Secondly, the implied

⁶¹ Local authorities set their own rent, and may make "such reasonable charges as they may determine": Housing Act 1985, s 24(1). Although they are required to have regard to rents on assured tenancies in the private sector when setting their rents (see *ibid*, ss 24(3), (4), inserted by Local Government and Housing Act 1989, s 162), in practice local authorities set their rents very much lower. Thus in 1994 -5, these averaged £36 per week, compared with an average of more than £75 per week for market rents: see the Department of the Environment's White Paper, *Our Future Homes* (1995) Cm 2901, pp 26 - 27. In fixing the subsidy for local authorities, the Department calculates the "guideline rent" for the individual authority. The average guideline rent for England in 1994 - 95 was £31.55 per week, and in 1995 - 96, it is set at £33.77 per week.

⁶² See Housing Act 1985, Part III.

⁶³ Written Answer, *Hansard* (HC) 23 October 1995, vol 264, col 409. The figures are for both local authorities and new towns in England.

⁶⁴ See *Our Future Homes* (1995) Cm 2901, p 6. Social rented housing as a whole (ie, local authority and housing association together) has fallen from 31% of the total number of homes in 1979 to 22% today: *ibid*, p 13.

⁶⁵ As amended by the Leasehold Reform, Housing and Urban Development Act 1993, Part II.

⁶⁶ Between June 1983 and June 1995, 1.1 million local authority homes were sold for owner occupation: Written Answer, *Hansard* (HC) vol 267, col 40.

⁶⁷ See the Department of the Environment's Consultation Paper, *More Choice in the Social Rented Sector* (July 1995). We note from this paper that it is proposed that such landlords - who will commonly be housing associations - will be required to keep their housing fit for human habitation as do housing associations already under the "Tenants' Guarantee" issued by the Housing Corporation pursuant to Housing Act 1985, s 36A (inserted by Housing Act 1988, s 49): *ibid*, para 5.33. See Housing Corporation Circular 36/94.

⁶⁸ See Housing Act 1985, s 96 (as substituted by Leasehold Reform, Housing and Urban Development Act 1993, s 121); and The Secure Tenants of Local Housing Authorities (Right to Repair) Regulations 1994, SI 1994 No 133; above para 4.48, n 186.

repairing obligation in leases of dwellings granted for less than seven years⁶⁹ is applicable to local authority tenancies and, at least in some parts of the country, widely used by tenants. As we explain below,⁷⁰ it appears that actions brought to enforce this obligation are usually effective to ensure that the repairs are done. However, the associated legal costs for the authority are acknowledged to be considerable,⁷¹ though the raising of the small claims limit in the County Court to £3,000 on 8 January, 1996⁷² may go some way to alleviate this. Thirdly, the implied term as to fitness for human habitation always applied to local authority lettings, though in practice the rent limits long ago excluded its application. Fourthly, the provisions of the Housing Act 1985 which authorise or require local authorities to take steps in relation to unfit property, whether by making a renovation grant, or by serving a repair notice or a closing or demolition order,⁷³ do not apply to local authorities.⁷⁴ Finally, local authority tenants can and do bring proceedings for the abatement of statutory nuisances under section 82 of the Environmental Protection Act 1990. However, the courts will examine such applications with care, as they are mindful of the effect that an abatement order may have on the limited resources of a local authority.⁷⁵

SHOULD LETTINGS BY LOCAL AUTHORITIES BE EXCLUDED FROM THE IMPLIED FITNESS OBLIGATION?

8.25 The objections raised by the Department of the Environment to the application of our proposed obligation of fitness to local authorities⁷⁶ are formidable and we do not deny their force. Nor can we ignore the fact that local authorities, unlike private landlords, are not in a position to recoup in rents the additional expenditure that the obligation would impose on them.⁷⁷ We accept that there may be grounds for exempting certain types of letting from the implied fitness obligation to accommodate other countervailing objectives.⁷⁸ However, it is the statutory duty of the Law Commission

⁶⁹ Landlord and Tenant Act 1985, s 11.

⁷⁰ Paragraph 9.22.

⁷¹ See *Joyce v Liverpool City Council* [1995] 3 WLR 439, 442.

⁷² See below, para 9.11, n 42.

⁷³ See above, para 4.33. It should be noted that a local authority cannot itself be the recipient of a renovation grant: Local Government and Housing Act 1989, s 101(3). For renovation grants, see below, para 8.27.

⁷⁴ As we have explained, this has been the subject of some critical comment; above, para 4.48.

⁷⁵ See, eg *Birmingham District Council v McMahon* (1987) 19 HLR 452, 456.

⁷⁶ See above, para 8.17.

⁷⁷ Cf *Quick v Taff Ely Borough Council* [1986] QB 809, 816.

⁷⁸ See below, para 8.47.

to make proposals for the reform of the law where we consider that reform is needed. Those who have to consider our recommendations will no doubt take into account a wider range of issues, including in particular political ones, which we cannot properly address. As a matter of law reform, we can see no case for a blanket exclusion of local authority lettings from our proposed obligation of fitness. This is particularly the case given that the new obligation of fitness will be introduced gradually, over a period of many years.⁷⁹ A requirement that accommodation should be fit for human habitation is regarded by most people as a fundamental and basic one. In our view it should in principle be enjoyed by *all* residential tenants holding under short leases as of right, subject to certain very limited exceptions of a pragmatic kind.

The impact of civil remedies on renovation grants

INTRODUCTION

- 8.26 The second objection raised by the Department of the Environment concerns the effect that the reintroduction of an obligation of fitness might have on the making of mandatory renovation grants, and how it might cut across the development by local authorities of targeted strategies in relation to the use of such grants. We explain below the present position in relation to such grants and the way in which it is likely to change in the near future. Even if the present position were to remain, we doubt that our proposals would in fact create the situation which concerns the Department. In any event, the changes that are likely to be made to the system of grants will produce a situation in which the need for effective civil remedies to ensure that property held on short leases is fit for human habitation will in our view be imperative.

THE PRESENT LAW: MANDATORY RENOVATION GRANTS IN CASES OF UNFITNESS

- 8.27 Part VIII of the Local Government and Housing Act 1989 makes provision for renovation grants in certain circumstances. It is unnecessary to explain these provisions in any detail.⁸⁰ Renovation grants may be either discretionary or, where certain criteria are satisfied, mandatory. In particular, grants are mandatory where the premises are unfit for human habitation.⁸¹ In practice virtually all renovation grants are mandatory. 90 per cent of renovation grants are made where premises are unfit for human habitation and these are focused on poor households.⁸² Even where such grants are made, they are subject to means testing where the applicant is an owner occupier

⁷⁹ See above, para 8.19.

⁸⁰ For a clear explanation of the provisions, see the pamphlet published by the Department of the Environment and the Welsh Office, *House Renovation Grants* (1990).

⁸¹ Local Government and Housing Act 1989, ss 112(2); 113. Unfitness is judged by the local housing authority according to the test in the substituted Housing Act 1985, s 604, explained above, para 4.37.

⁸² *The Future of Private Housing Renewal Programmes: A Consultative Document* (Department of the Environment 1993), para 3.1.

or a tenant.⁸³ Where the applicant is a landlord, regard is had, amongst other factors, to the increase in rental that is likely to flow from the improvements.⁸⁴

8.28 By no means every landlord and every tenant is eligible to apply for a renovation grant. A tenant can apply if he *either* holds under a lease granted for a term of five years or more (in which case he is treated as an owner occupier) *or* under a lease for a term of less than five years under which he is obliged to carry out repairs to the premises.⁸⁵ Tenants in the latter category will be rare. This is because, as we have explained in Part V of this report, where the tenant holds under a lease of less than seven years, the landlord is under an implied obligation to repair the structure, exterior and installations.⁸⁶ This obligation can only be excluded with the approval of the county court.⁸⁷ A landlord can apply for a grant only if he intends to let the property for at least five years.⁸⁸ In practice, only a comparatively few private sector landlords are in receipt of renovation grants.⁸⁹

THE SHORTCOMINGS OF THE PRESENT SYSTEM AND PROPOSALS FOR CHANGES TO IT

8.29 It is apparent that “the level of demand for mandatory grants... in many areas substantially exceeds the resources available”.⁹⁰ The Department of the Environment has noted that this “domination of mandatory grants has contributed to a number of unintended consequences”.⁹¹ In particular, it has prevented local authorities from developing strategies and from concentrating resources on particular areas designated for renewal. The present system “tends to encourage pepper-potting of assistance whether or not this is the most appropriate course”.⁹²

⁸³ Local Government and Housing Act 1989, s 109.

⁸⁴ *Ibid*, s 110(2).

⁸⁵ *Ibid*, ss 104(1), (2), (5).

⁸⁶ Landlord and Tenant Act 1985, s 11.

⁸⁷ *Ibid*, s 12.

⁸⁸ Local Government and Housing Act 1989, s 106(4).

⁸⁹ In the year 1991 - 92, 1540 grants, - some 7% of the total grants made - were to such landlords: Philip Leather, Sheila Mackintosh and Sue Rolfe, *Papering Over the Cracks* (National Housing Forum, 1994) p 45.

⁹⁰ “Renovation grants and the condition of older housing”, Policy Options, Supplement to Housing Research Findings No 104 (Joseph Rowntree Foundation, 1994).

⁹¹ The Future of Private Housing Renewal Programmes in England (1995), para 3.4.

⁹² *Ibid*.

8.30 As a response to “the unrealistic expectations” created by the right to mandatory renovation grants,⁹³ the Department offered a number of proposals for consideration on consultation, including that:

- (i) renovation grants in cases of unfitness to owner occupiers and tenants with repairing obligations should cease to be mandatory and should instead be discretionary;⁹⁴
- (ii) renovation grants to landlords would be withdrawn, though discretionary grants would be available in cases “where the absence of grants might frustrate other policies”;⁹⁵ and
- (iii) a “deferred action” option should be introduced so that where property is unfit, an owner, who cannot pay for the defects to be rectified because he is unable to obtain a grant, may not be compelled to take immediate action⁹⁶ if it is not essential to remedy the matter or if it does not have priority.⁹⁷

The first and third of these options have in fact been incorporated in the Housing Grants, Construction and Regeneration Bill that is presently before Parliament.⁹⁸ The second has not. We understand from the Department that it did not receive wide support on consultation. The objective of these proposals is of course to enable local housing authorities to target grants in accordance with clear strategies.

⁹³ *Ibid*, para 2.3.

⁹⁴ *Ibid*, para 3.1.

⁹⁵ *Ibid*, para 3.2.

⁹⁶ As he would be at present, see above, para 4.45.

⁹⁷ The Future of Private Housing Renewal Programmes in England, above, para 6.2.

⁹⁸ The Bill received its First Reading on 1 February 1996 as this Report was about to go to press. Part I of the Bill is concerned with grants for the renewal of private sector housing. Those provisions which are relevant to this Report are as follows. First, discretionary renovation grants would replace mandatory ones, whether the applicant for a grant was an owner occupier, a tenant or a landlord: see cl 12. Secondly, there are a number of provisions in the Bill which would enable local authorities to target grants according to particular strategies: see, eg cl 5(2). Thirdly, local authorities would be given a power to serve a deferred action notice where a dwelling was unfit for human habitation if they were satisfied that this was the most satisfactory course of action: cl 81. This notice would state that the premises were unfit, what needed to be done to make them fit, and what courses of action were available to the local authority if they remained unfit. (References are to the Bill as printed.)

WOULD THE PROPOSALS FOR AN IMPLIED FITNESS OBLIGATION CONFLICT WITH THE POLICY OBJECTIVES OF RENOVATION GRANTS?

- 8.31 Even if the present law governing renovation grants remained unchanged, we doubt that our proposals for a revived obligation of fitness would have much impact on the demand for renovation grants because, as we have explained, few are in practice granted to landlords, and comparatively few tenants are eligible to receive them.
- 8.32 If the availability of renovation grants changes in the way that is outlined above,⁹⁹ then our proposals would not conflict in any way with the Department of the Environment's stated object of targeting renovation grants more effectively. Once such grants become discretionary, there can be no perceived *right* to one in cases of unfitness and local authorities will have the freedom to devise their own strategies. If an authority refused an application for a grant because the case did not fall within such a strategy, it is difficult to see how such a decision could in law be successfully challenged. This is particularly so given that the reason why it is intended that grants should be made discretionary is precisely to enable such strategies to be developed and pursued. For this reason, we do not share the concern expressed to us by the Department of the Environment that, if a landlord were in breach of his implied obligation of fitness, a decision by the local housing authority to defer action would in some way "condone" that breach. The breach of covenant is *res inter alios acta*, a matter of contractual obligation between the landlord and the tenant to which the local authority is a stranger. We would point out that if renovation grants are made discretionary in all cases, a local authority might, without any logical contradiction, serve a repair notice on a landlord¹⁰⁰ and, at the same time, refuse him a renovation grant. This situation can already occur in cases where, for example, unfit property is let by a landlord who is not eligible to receive a renovation grant. We note that a local authority is not obliged to give reasons for refusing an application for a *discretionary* improvement grant.¹⁰¹ Furthermore, it is perfectly entitled to formulate a policy for allocating such grants provided that it does not fetter its discretion and is prepared to consider every case on its merits.¹⁰²
- 8.33 If renovation grants become wholly discretionary,¹⁰³ the case for reviving the implied obligation that property let on short leases should be fit for human habitation becomes commensurately stronger. Although local authorities are under a statutory duty to

⁹⁹ Paragraph 8.30.

¹⁰⁰ Under Housing Act 1985, s 189.

¹⁰¹ *R v Bristol City Council, ex p Bailey* (1994) 27 HLR 307.

¹⁰² *Ibid.*

¹⁰³ As will be the case if the Housing Grants, Construction and Regeneration Bill is enacted in the form in which it has been introduced.

survey their areas to identify unfitness,¹⁰⁴ in practice few have the resources to undertake this task comprehensively.¹⁰⁵ Effective alternative civil remedies should therefore be in place to enable tenants under short leases to secure the reparation of property that is unfit. As we explain in Part IX of this report, our proposed obligation to keep the premises fit would be specifically enforceable, subject of course to the court's discretion to refuse the remedy in cases where it would be inappropriate or inequitable to decree it.¹⁰⁶ We have therefore concluded that the case for reform outweighs the arguments against it.

Proposals for reform

Introduction

- 8.34 We set out in the following paragraphs our proposals for a new implied covenant by a landlord that he will ensure both at the time when the premises are let and throughout the term that the premises are fit for human habitation. It will apply to certain leases granted for a term of less than seven years, we also recommend that the fitness standard should be defined in terms that are similar to those employed for the purposes of local authority enforcement in section 604 of the Housing Act 1985 (as amended).

The implied covenant

THE GENERAL RULE

- 8.35 **Our principal recommendation is that, subject to certain exceptions which we explain below,¹⁰⁷ there should be implied into a lease of a dwelling-house which is for a term of less than seven years a covenant by the lessor—**

- (a) **that the dwelling-house is fit for human habitation at the commencement of the lease; and**
- (b) **that the lessor will keep it fit for human habitation during the lease.**¹⁰⁸ (Draft Bill, Cls 5(1), (3).)

¹⁰⁴ Housing Act 1985, s 605, as substituted by Local Government and Housing Act 1989, s 165(1)(e), Pt V, para 85.

¹⁰⁵ See Philip Leather, Sheila Mackintosh and Sue Rolfe, *Papering Over the Cracks* (National Housing Forum, 1994) p 43.

¹⁰⁶ See below, para 9.33.

¹⁰⁷ Paragraph 8.43.

¹⁰⁸ The covenant would be implied whether the dwelling-house was to be occupied under the lease in question or under some inferior lease: see Draft Bill, Cl 5(2)(a). In other words, it would be the head lessor who was ultimately responsible for the fitness of the property. The covenant would also be implied where other property was included within the lease, including one or more other dwelling-houses: Draft Bill, Cl 5(2)(b). If, for example, a landlord leased a number of properties to a company which intended to sub-let them for human habitation, the covenant would be implied in the headlease.

The obligation imposed by the covenant, that the property should both be fit at the commencement of the term and be kept fit for its duration, is the same as that which is presently found in section 8 of the Landlord and Tenant Act 1985. Its effect has been explained in Part IV of this report. We make recommendations below as to the definition of fitness for these purposes.¹⁰⁹ We do however propose to introduce certain restrictions on the scope of the covenant in certain ways.

RESTRICTIONS ON THE IMPLIED COVENANT

8.36 The first three restrictions which we propose are modelled directly on those that apply to the obligation to repair implied into leases of less than seven years by section 11 of the Landlord and Tenant Act 1985.¹¹⁰ **We recommend that the implied obligation of fitness should not require the lessor—**

- (a) **to carry out any works or repairs for which the tenant is liable by virtue either of the implied obligation which we propose in Part X of this report to take proper care of the premises¹¹¹ or under some express covenant having the same effect;**
- (b) **to rebuild or reinstate the house if it is destroyed by fire, tempest, flood or other inevitable accident; and**
- (c) **to keep in repair or maintain any tenants' fixtures.** (Draft Bill, Cl 5(4).)

8.37 **We also recommend that the landlord should not be liable on the implied covenant in two circumstances—**

- (a) **where the principal cause of the unfitness is some breach of covenant by the lessee; or**
- (b) **where the unfitness was caused by disrepair for which the landlord was not responsible because of the exclusion or modification of his liability to repair under section 11 of the Landlord and Tenant Act 1985.** (Draft Bill, Cl 5(5).)

8.38 The first of these exceptions to the landlord's liability might arise in a case where, for example, a tenant kept a large number of animals on the premises in contravention of

¹⁰⁹ See para 8.54.

¹¹⁰ See s 11(2); above, para 5.7.

¹¹¹ See below, para 10.37. Under that implied obligation, the tenant will not normally have to carry out *repairs* unless he has to make good damage or alterations to the property for which he is responsible.

a covenant against keeping animals or pets. Breach of a user covenant might also lead to unfitness. The second exception would arise where the exclusion of the landlord's obligation to repair under section 11 of the Landlord and Tenant Act 1985 had been sanctioned by the county court.¹¹² If the parties have agreed to reallocate repairing liabilities in this formal way, it would be wholly inappropriate to reintroduce them via the implied obligation of fitness.

- 8.39 Our final restriction on the landlord's liability is one that already exists in relation to section 8 of the Landlord and Tenant Act 1985. It is that the landlord's obligation under the implied fitness covenant should be limited to the case where the property can be made fit at reasonable expense.¹¹³ We propose that this limitation should be made statutory. **We therefore recommend that a landlord should not be liable under the implied covenant if the property cannot be made fit for human habitation at reasonable expense.** (Draft Bill, Cl 5(5).)

AN EXCEPTION THAT WOULD NO LONGER APPLY

- 8.40 At present, the implied fitness obligation does not apply where a house is let for a term of three years or more on terms that the tenant should put the premises into a condition that is reasonably fit for human habitation.¹¹⁴ This provision was first introduced in 1909 and was regarded with some concern at the time.¹¹⁵ Given both the short period of three years and the substantial average cost of making a property fit when it is not in that state,¹¹⁶ this exception now looks particularly unreasonable. We consider that if landlords wish tenants to make property fit for human habitation they should be willing to grant them leases of seven years or more so as to be outside the implied fitness obligation. **We therefore recommend that it should no longer be possible to exclude the obligation of fitness by granting a tenant a lease for three years or more on the terms that he makes the property fit.**

The premises to which the obligation would apply

- 8.41 Following the model of section 8 of the Landlord and Tenant Act 1985, **we recommend that the implied obligation should apply to any lease under which a dwelling-house is let wholly or mainly for human habitation.** (Draft Bill, Cl 5(1).) **We further recommend that a dwelling-house should be defined to include all or any part of the building and any yard, garden, outhouse or appurtenance belonging to the building or usually enjoyed with it.** (Draft Bill, Cls 7(4), 15(1).) Once again this follows the definition that is found in the present

¹¹² Landlord and Tenant Act 1985, s 12. See above, para 5.8.

¹¹³ *Buswell v Goodwin* [1971] 1 WLR 92. See above, paras 4.30 and 8.21.

¹¹⁴ Landlord and Tenant Act 1985, s 8(5).

¹¹⁵ See above, para 4.10, n 36.

¹¹⁶ See above, para 8.18.

legislation.¹¹⁷ There are good reasons why the definition should not be limited merely to the actual living accommodation. The state of external water closets and dangerous pavings or steps might all make the premises unfit for human habitation.¹¹⁸ The obligation will therefore remain wider in its ambit than the implied obligation to repair contained in section 11 of the Landlord and Tenant Act 1985.¹¹⁹

The leases to which the obligation would apply

- 8.42 For reasons that we have already explained,¹²⁰ **we recommend that the implied obligation should apply to a lease of a dwelling-house which is for a term of less than seven years.** (Draft Bill, Cl 5(1).) **In determining whether a lease is one to which the implied obligation applies, we recommend that the anti-avoidance provisions that apply to the implied obligation to repair in leases granted for a term of less than seven years should apply.**¹²¹ (Draft Bill, Cls 5(6), (7).) **We further recommend that the obligation would also apply¹²² to agricultural workers who occupy other than as tenants a “tied cottage” as a term of their employment.** (Draft Bill, Cls 6(2), (3).) For these purposes, such licences would, in effect, be treated as if they were tenancies granted for a term of less than seven years.

Leases which would be outside the obligation

AGRICULTURAL HOLDINGS AND FARM BUSINESS TENANCIES

- 8.43 We consider that there should be three categories of leases which would be outside the scope of the implied fitness covenant. Only the third of these is of real significance. The first follows from our general policy of excluding agricultural tenancies and farm business tenancies from the ambit of our recommendations.¹²³ **We recommend that the implied obligation of fitness should not apply to a lease which is a tenancy of an agricultural holding or a farm business tenancy.** (Draft Bill, Cl 6(1).)

¹¹⁷ Landlord and Tenant Act 1985, s 8(6). Cf above, para 5.20.

¹¹⁸ Such matters are of course outside the ambit of Landlord and Tenant Act 1985, s 11: see above, para 5.19.

¹¹⁹ See Part V of this report.

¹²⁰ See above, para 8.16.

¹²¹ See Landlord and Tenant Act 1985, s 13(2). See above, para 5.9, n 30.

¹²² As does the present implied fitness covenant: see Landlord and Tenant Act 1985, s 9. See above, para 4.10.

¹²³ See above, para 1.7.

LEASES TO LOCAL AUTHORITIES, THE CROWN AND SIMILAR BODIES

- 8.44 The implied repairing obligation in section 11 of the Landlord and Tenant Act 1985¹²⁴ does not apply to leases granted to certain bodies such as local authorities, new town corporations and registered housing associations, nor to the Crown or government departments.¹²⁵ These bodies are listed in section 14(4) and (5) of that Act. The purpose of the implied fitness covenant is of course to protect individual tenants under short leases who cannot reasonably be expected to meet the costs of making the premises fit. Where residential accommodation is let to a body such as a local authority, the allocation of responsibility for repairs and fitness should be a matter for negotiation between the parties. Any such letting will invariably be made with a view to a sub-letting of the premises to individual tenants. The implied fitness covenant *will* apply to such a sub-letting. **We therefore recommend that the implied fitness obligation should not apply to leases to those bodies listed in section 14(4) and 14(5) of the Landlord and Tenant Act 1985.** (Draft Bill, Cl 6(1).)

LAND HELD OR ACQUIRED FOR DEVELOPMENT

- 8.45 The third exception is more substantial. It sometimes happens that property is held by a body with a view to its being redeveloped. Such property can often be used to provide much-needed temporary housing until redevelopment commences.¹²⁶ This has already been recognised in a number of ways by Parliament. Three examples may be given—

- (i) Where a local authority¹²⁷ grants a tenancy of a dwelling-house, it will not be a secure tenancy within the provisions of the Housing Act 1985,¹²⁸ if it is on land “which has been acquired for development”¹²⁹ and “is used by the landlord, pending development of the land,¹³⁰ as temporary housing accommodation”.¹³¹

¹²⁴ See Part V of this report.

¹²⁵ See above para 5.10.

¹²⁶ “It is undesirable that land should be sterilised and removed from the housing work [*sic*] pending development. It is desirable to encourage its use for housing, provided that that does not impede the development”: *Hyde Housing Association Ltd v Harrison* [1991] 1 EGLR 51, 52, *per* Fox LJ.

¹²⁷ Or one of the other bodies listed in Housing Act 1985, s 80(1) (as amended).

¹²⁸ Sections 79 - 81.

¹²⁹ It is not necessary that the land should have been acquired for development *by the landlord*: see *Hyde Housing Association Ltd v Harrison* [1991] 1 EGLR 51.

¹³⁰ If development is no longer pending, this provision ceases to apply: *Lillieshall Road Housing Co-Operative Ltd v Brennan* (1991) 24 HLR 195.

¹³¹ Housing Act 1985, Sched 1, para 3(1). “Temporary” may be quite long term: see *Attley v Cherwell District Council* (1989) 21 HLR 613 (lease for 10 years).

- (ii) Where a local authority would be required to make a closing or demolition order in respect of an unfit dwelling,¹³² they may instead purchase it, if it appears to them to be capable of providing accommodation of a standard that is adequate for the time being.¹³³
- (iii) Where a local authority has declared an area to be a clearance area,¹³⁴ they may postpone demolition of any dwelling-houses on the land if, again, those houses appear to them to be capable of providing accommodation of a standard that is adequate for the time being.¹³⁵

8.46 In relation to the second and third of these examples, the implied obligation of fitness under section 8 of the Landlord and Tenant Act 1985 has no application.¹³⁶ However, should the state of such premises constitute a statutory nuisance, it has been held by the House of Lords¹³⁷ that any persons who occupy such accommodation may seek an abatement order under section 82 of the Environmental Protection Act 1990 from a magistrate.¹³⁸ This is so even though the premises may be “adequate for the time being”.¹³⁹

8.47 Although we have recognised that the requirement that property should be fit for human habitation is a basic standard that should be enjoyed as of right by all residential tenants holding under short leases,¹⁴⁰ we have concluded, following discussions with the Department of the Environment, that there is one situation where that requirement is outweighed by other factors.¹⁴¹ The importance of utilising housing to meet the pressing need for temporary accommodation, particularly for those who would otherwise be homeless, has long been accepted by Parliament as a reason for

¹³² For such orders, see above, para 4.45.

¹³³ Housing Act 1985, s 300 (as amended).

¹³⁴ See *ibid*, s 289.

¹³⁵ *Ibid*, s 301 (as amended).

¹³⁶ *Ibid*, s 302(c).

¹³⁷ *Salford City Council v McNally* [1976] AC 379.

¹³⁸ See above, para 4.54.

¹³⁹ *Salford City Council v McNally*, above.

¹⁴⁰ See above, para 8.25.

¹⁴¹ We considered a number of other possible exceptions to the fitness standard, such as shortlife property. On examination of them however, we concluded that no exception was needed. In this context, we would like to express our gratitude to the Department of Transport, Empty Homes Agency, Tower Hamlets London Borough Council, Derby City Council, Leeds City Council, Westminster City Council and the National Federation of Housing Association for their kind assistance.

exempting leasehold property from the statutory régime of fitness that might otherwise apply to it.¹⁴² As we have seen, the occupants of such property may still seek redress if the state of the premises constitutes a statutory nuisance. We have decided therefore that there should be a limited exception to the implied obligation of fitness to cover such cases.

8.48 We do not consider that the exception should apply to every landowner who has land which he has either acquired for development or which he intends to develop. It is important that there should be some control to ensure that the bodies involved will exercise their powers responsibly and will not seek to exploit the exception as a means of escaping from the implied fitness obligation. We also wish to underline the fact that this exception is limited to cases where development is intended. We propose therefore to limit the ambit of the exception to leases granted by those authorities which possess powers of compulsory acquisition,¹⁴³ many but by no means all of which will be public bodies. It will not be necessary however for the body to acquire the land *by compulsory purchase*, or indeed that the land should have been specifically *acquired* for development. It is enough that it is *held* for development. We do not of course visualise that all bodies which have powers of compulsory acquisition would wish to lease housing on a temporary basis pending development.

8.49 **We therefore recommend that the implied obligation of fitness should not apply to a lease of a dwelling-house if that house—**

- (a) **is on land which at the time of the grant of that lease was either held or had been acquired¹⁴⁴ for development by an authority possessing compulsory purchase powers;**
- (b) **is being used by the landlord to provide temporary housing accommodation pending development of the land; and**
- (c) **is of a standard that is adequate for the time being.**¹⁴⁵ (Draft Bill, Cl 6(1)(d), referring to Cl 4.)

¹⁴² We note that Housing Act 1985, ss 300 and 301 (above, para 8.45) have been on the statute book in a similar form since 1949 (Housing Act 1949, s 3) and 1954 (Housing Repairs and Rents Acts 1954, s 3) respectively.

¹⁴³ An authority or undertaker will have powers of compulsory acquisition by reason of the prerogative, or by public or private Act of Parliament.

¹⁴⁴ Whether compulsorily or by agreement.

¹⁴⁵ Ie, the same standard as that which applies under Housing Act 1985, ss 300, 301.

8.50 **For these purposes—**

- (i) an “authority possessing compulsory purchase powers” means any person or body of persons (including a government department) which is either authorised to acquire an interest in land compulsorily, or (as in the case of certain bodies) could be authorised to do so;¹⁴⁶ and
- (ii) “development” has the same meaning as in section 55(1) of the Town and Country Planning Act 1990, namely the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land. (Draft Bill, Cl 6(1)(d), referring to Cl 4.)

8.51 We would emphasise that the exception will apply only if all three of the pre-conditions listed above¹⁴⁷ are satisfied. The first condition - that the lease must be granted on land held or acquired for development by an authority possessing compulsory purchase powers - applies at the time of the *grant* of the lease. By contrast, the second and third conditions apply *throughout* the lease. An example will demonstrate how this will operate. If a local authority, which held a particular house for development, leased it to a tenant as temporary accommodation, and then assigned its reversion to, say, a housing association, the implied fitness obligation would remain inapplicable, *provided* that the purpose of the letting was still to provide temporary accommodation pending development *and* the property remained of a standard that is adequate for the time being. If at any stage the landlord abandoned its plans to develop the land, or the property ceased to be adequate for the time being, the exception would cease to apply. The lease would then become subject to the implied obligation of fitness.

8.52 At present, there is no equivalent exception for land held for development from the application of the landlord’s covenant to repair that is implied into leases of less than seven years under section 11 of the Landlord and Tenant Act 1985.¹⁴⁸ The same policy considerations that have persuaded us of the need for this exception as regards the covenant for fitness apply equally to the implied covenant to repair. **We therefore recommend that there should be a further exception to the implied covenant to repair in section 11 of the Landlord and Tenant Act 1985 for land held or**

¹⁴⁶ A local authority falls within this description. It does not have compulsory purchase powers as such, but can be authorised to acquire land by compulsory purchase by the Minister: Local Government Act 1972, s 121(1).

¹⁴⁷ See para 8.49.

¹⁴⁸ See Part V of this report. As we explain there, the parties can of course exclude s 11 by application to the court under s 12.

acquired for development. This should be in the same terms as the exception which we have proposed for the implied obligation of fitness. (Draft Bill, Cl 4.)

Landlord's right of entry

- 8.53 Where the implied covenant of fitness under section 8 of the Landlord and Tenant Act 1985 applies, the landlord has a right to enter the premises to view their state and condition.¹⁴⁹ We propose that there should be a similar right in relation to the proposed implied covenant of fitness. **We therefore recommend that in any lease to which the proposed implied covenant of fitness applies, the landlord should have the right to enter and view the state and condition of the premises at reasonable times of the day, on giving to the occupier 24 hours' notice in writing.** (Draft Bill, Cl 8(1).)

The fitness standard

- 8.54 We have explained above,¹⁵⁰ that the fitness standard that applies to the covenant implied under section 8 of the Landlord and Tenant Act 1985¹⁵¹ differs from that which is now employed for the purposes of local authority enforcement under the Housing Act 1985.¹⁵² We consider that the latter standard should apply to our proposed obligation because it represents a more modern definition of fitness than does the former. **We therefore recommend that in determining whether a dwelling-house is fit for human habitation for the purposes of the implied obligation of fitness, the criteria should be the same as those applied in section 604 of the Housing Act 1985 (as amended).**¹⁵³ (Draft Bill, Cls 7(1) - (3)).

- 8.55 Following the model of section 604 of the Housing Act 1985 further, we also propose the creation of additional requirements as to fitness where the premises leased form merely part of a building. Section 604(2) lists five further requirements that must be

¹⁴⁹ Section 8(2).

¹⁵⁰ See paras 4.24 - 4.27; 4.37 - 4.44; and 6.6 - 6.8.

¹⁵¹ See Landlord and Tenant Act 1985, s 10.

¹⁵² Section 604 (as substituted by Local Government and Housing Act 1989, s 165(1)(e); Sched 9, Pt V, para 83).

¹⁵³ The requirements are as follows: (a) it is structurally stable; (b) it is free from serious disrepair; (c) it is free from dampness prejudicial to the health of the occupants (if any); (d) it has adequate provision for lighting, heating and ventilation; (e) it has an adequate piped supply of wholesome water; (f) there are satisfactory facilities in the dwelling-house for the preparation and cooking of food, including a sink with a satisfactory supply of hot and cold water; (g) it has a suitably located water-closet for the exclusive use of the occupants (if any); (h) it has for the exclusive use of the occupants (if any), a suitably located fixed bath or shower and wash-hand basin each of which is provided with a satisfactory supply of hot and cold water; and (i) it has an effective system for the draining of foul, waste and surface water. See above, para 4.38. The Draft Bill contains certain necessary modifications to the wording of s 604 to cover the case where facilities are shared: Cl 7(3) .

satisfied if a dwelling-house is a flat.¹⁵⁴ **We recommend that where the dwelling-house let forms part of a building, the criteria for fitness should include the additional requirements listed in section 604(2) of the Housing Act 1985.** (Draft Bill, Cls 7(4), (5).)

8.56 In this latter case, where the dwelling-house is just part of a building, there may be situations where the landlord needs to carry out works of repair on premises other than those let in order to comply with the fitness standard, but where he does not have a sufficient right to enable him to undertake the necessary work. **We recommend that if the premises have already been let by him when the need for the works arises, it shall be a defence to an action on the implied fitness covenant that he had used all reasonable endeavours to obtain such rights as would have enabled him to carry out the repairs, but had been unable to obtain them.** (Draft Bill, Cl 8(2).) This recommendation is of course modelled on section 11(3A) of the Landlord and Tenant Act 1985, which provides a defence to an action brought on the implied covenant to repair under section 11(1A) of that Act in analogous circumstances.¹⁵⁵

8.57 We do not propose that a landlord should have the benefit of this defence if the premises are unfit *at the time when they are let* because such repairs are needed to other parts of the building. We wish to discourage landlords from letting properties which are unfit at the outset of the tenancy.

8.58 The factors that are regarded as relevant for determining whether premises are fit for human habitation have been revised from time to time. **We recommend that the Secretary of State should have power to amend the criteria for fitness by statutory instrument.** (Draft Bill, Cls 7(6), (7).) We do not visualise that the fitness standard for the implied covenant should necessarily be kept the same as that which applies under the Housing Act 1985¹⁵⁶ for the purposes of renovation grants, repairing notices, closing and demolition orders.¹⁵⁷ Different considerations may apply to such issues and we do not consider that it should be necessary for the Secretary of State to amend the former when he amends the latter and *vice versa*.

¹⁵⁴ The requirements are: (a) the building or part is structurally stable; (b) it is free from serious disrepair; (c) it is free from dampness; (d) it has adequate provision for ventilation; and (e) it has an effective system for the draining of foul, waste and surface water. See above, para 4.38.

¹⁵⁵ See above, para 5.5.

¹⁵⁶ Section 604 (as amended).

¹⁵⁷ For the Secretary of State's power to amend the fitness criteria listed in Housing Act 1985, s 604, see *ibid*, s 604(5).

Commencement

8.59

We recommend that the proposals contained in this Part should apply only to new tenancies. (Draft Bill, C1 17 (3) and (4).) We have explained in the previous Part what is meant by a new tenancy.¹⁵⁸

¹⁵⁸ See above, para 7.31.

PART IX SPECIFIC ENFORCEMENT OF REPAIRING COVENANTS

Introduction

- 9.1 In this Part, we examine the availability of the remedy of specific performance as a means of enforcing repairing covenants in leases and make recommendations for its extension. Although our particular concern is the apparent inability of a landlord under the present law to obtain the specific performance of a tenant's repairing obligations, we also point to certain doubts about the availability of specific performance to a tenant. We go on to explain why, in the light of these recommendations, we do not consider that it is necessary to change the present law which restricts the quantum of damages which tenants may be required to pay for failure to comply with a repairing covenant.¹ We also make recommendations as to the applicability of both the proposals in this report and certain provisions of the Landlord and Tenant Act 1985 to the Crown.

Specific performance: the present law

The nature of specific performance

- 9.2 Specific performance is an equitable remedy. It is therefore never granted as of right, but always as a matter of discretion. However, that discretion is exercised according to well-known and long-established principles.² Four of these principles are relevant to the availability of specific performance in relation to repairing covenants. What is significant for present purposes is that the strength of each of these principles has been considerably eroded and it cannot be assumed that any of them will necessarily be applied in all or even some cases.

ADEQUACY OF DAMAGES

- 9.3 The first principle is that specific performance will not be decreed if damages are an adequate remedy:

the Court gives specific performance instead of damages only when it can by that means do more perfect and complete justice.³

¹ Landlord and Tenant Act 1927, s 18(1); below, para 9.36.

² For an account of these principles, see Gareth Jones and William Goodhart, *Specific Performance* (1986) Chapter 2.

³ *Wilson v Northampton and Banbury Junction Railway Co* (1874) LR 9 Ch App 279, 284, per Lord Selborne LC.

Although this limitation has long been asserted⁴ and often applied, it is of questionable authority as a matter of history.⁵ Furthermore, even though the courts continue to consider the adequacy of damages,⁶ there are signs that they may be adopting a more flexible and purposive approach to the circumstances in which they will decree specific performance.⁷ Indeed, it has been suggested that,

English courts are now ready to accept as United States courts have long accepted that the overriding principle is that specific performance should be decreed if it is the *appropriate* remedy.⁸

- 9.4 The relevance of the principle that specific performance will not normally be decreed where damages would be an adequate remedy is obvious as regards repairing obligations in leases. If the party in default fails to meet his repairing obligations, the other party may be able to carry out the repairs himself. If that is so, damages will often be an adequate remedy.⁹ However, if he is to undertake the necessary work, the innocent party must have a right of access to the property that is in disrepair. This will be so either because the premises are in his possession or because he has an express or implied right of entry to carry out the work.

⁴ See, eg the remarks of Lord Redesdale LC (Ireland) in *Harnett v Yeilding* (1805) 2 Sch & Lef 549, 553; 9 RR 98, 100.

⁵ Specific performance pre-dates the modern action of damages (which originated in one type of action on the case, *assumpsit*). Where, in the absence of an effective common law remedy, the Chancellor had been accustomed to enforce specifically contracts of a particular type, most notably contracts for the sale of land, that jurisdiction was retained. This was so even though the development of *assumpsit* meant that damages could be had at common law: see Charles M Gray, "The Boundaries of the Equitable Function" 20 Am J Leg Hist 192, 209 (1976). Once this is appreciated, it ceases to be necessary to have recourse to fictions as to the "uniqueness of land" in order to justify the specific enforceability of contracts relating to the disposition of interests in land. They are specifically enforceable because they have been so since the fourteenth century. In many such contracts nowadays damages *would* be a perfectly adequate remedy for non-performance.

⁶ See, eg *Ford Sellar Morris Developments Ltd v Grant Seward Ltd* [1989] 2 EGLR 40, 41 - 42.

⁷ See below, para 9.8.

⁸ Gareth Jones, "Specific Performance of a Contract of Services?" [1987] CLJ 21, 23. The main reason today for retaining damages as the primary remedy is that it encourages a plaintiff to mitigate his loss. A claimant seeking specific performance is under no such obligation. See Andrew Burrows, *Remedies for Torts and Breach of Contract* (2nd ed 1994) pp 350 - 353, where these issues are considered more fully.

⁹ But see *Jeune v Queens Cross Properties Ltd* [1974] Ch 97, 99, where Pennycuik V-C observed that a mandatory order requiring the defendant to carry out the work was "a much more convenient order than an award of damages leaving it to the individual plaintiffs to do the work". It should be noted that in that case, the repairs were required to a collapsed balcony that was in the landlord's control.

9.5 As a general rule, a landlord has no right to enter the premises he has let in the absence of such a right.¹⁰ A tenant has exclusive possession and in consequence “there is no right in a reversioner to go and do necessary repairs” because to do so would be “a plain invasion of the rights of property”.¹¹ Similarly, in the absence of an access order under the Access to Neighbouring Land Act 1992,¹² a tenant has no rights of access to any property that the landlord retains in his possession or control except for the common parts. However, even as regards these, the tenant’s rights of access are of course limited to those specific purposes for which the common parts are intended. He might therefore commit a trespass if he took it upon himself to carry out repairs to those parts, by (say) having a defective lift put into working order. There is one modern authority which suggests that the court will imply a licence in favour of a tenant to undertake such works where the landlord is in default, at least in some circumstances.¹³ However, in that case, no consideration was given to the decisions, explained above, which establish that a landlord has no implied right of entry should the tenant default on his repairing obligations. In any event, even if the innocent party could lawfully carry out the repairs there might be practical objections. He might (for example) lack the funds to carry out works on the scale that was required.

9.6 Where the innocent party cannot carry out the works, there will be a greater likelihood that damages will not adequately compensate him. If a heating system or a lift breaks down, an elderly or disabled person may be severely affected. Damages will be no remedy for so serious an interference with his enjoyment.¹⁴

“MUTUALITY” OF REMEDY

9.7 The second relevant constraint on the availability of specific performance is the so-called principle of “mutuality”. This was explained by Buckley LJ in the leading modern case, *Price v Strange*:¹⁵

¹⁰ A right to enter is unlikely to be implied unless the landlord is under an obligation to carry out repairs to the premises or has a right to do so: see *Edmonton Corporation v W M Knowles & Sons Ltd* (1961) 60 LGR 124, 127.

¹¹ *Stocker v Planet Building Society* (1879) 27 WR 877, 878, per James LJ. See too *Regional Properties Ltd v City of London Real Property Co Ltd* [1981] 1 EGLR 33, 34. There is ancient authority that a landlord was entitled to enter to see if the tenant had committed the tort of waste: *Hunt v Dowman* (1618) Cro Jac 478; 79 ER 407. If the tenant refused the landlord access, he was liable in damages on an action on the case even if the tenant had not in fact committed waste. We consider the tort of waste in Part X.

¹² Section 1. That Act implemented, with amendments, the recommendations in Rights of Access to Neighbouring Land (1985) Law Com No 151.

¹³ *Loria v Hammer* [1989] 2 EGLR 249, 259.

¹⁴ Cf *Parker v Camden London Borough Council* [1986] Ch 162; *Francis v Cowcliffe Ltd* (1976) 33 P & CR 368.

¹⁵ [1978] Ch 337, 360.

It is easy to understand that as the equitable jurisdiction to enforce specific performance of contractual obligations developed it should have become an accepted rule that equity would not compel one party to perform his obligations specifically in accordance with the terms of the contract unless it could also ensure that any unperformed obligations of the other party would also be performed specifically.

It is questionable whether there is any “requirement” of mutuality at all, or whether it is merely a factor that a court may take into account when exercising its discretion.¹⁶ The latter interpretation certainly seems preferable.¹⁷ The existence of “mutuality” is relevant, if at all, at the date on which specific performance is decreed and not (as was formerly thought) at the time when the contract was entered into.¹⁸ The significance of mutuality to the grant of specific relief in cases involving repairing covenants is, as we explain below,¹⁹ that although in appropriate circumstances a tenant may obtain specific performance of a landlord’s repairing obligations, the converse is not true.

SUPERVISION

9.8 The third limiting principle is that specific performance will be refused if the enforcement of the decree would require the court’s supervision.²⁰ It is unnecessary to chart the rather convoluted history of this limitation on specific performance, because there can be little doubt that there has been a marked shift in the approach taken by the courts over the course of the last century.²¹ In 1892 a court declined to decree specific performance of a covenant in a lease by the landlord to employ a resident porter, who was to be “constantly in attendance” to carry out various services for the tenants of a block of flats.²² However, by 1985 a court was at least willing to

¹⁶ See Gareth Jones and William Goodhart, *Specific Performance* (1986), pp 22 - 23.

¹⁷ See *Price v Strange*, above, at p 354, where Goff LJ considered that “want of mutuality raises a question of the court’s discretion to be exercised according to everything that has happened up to the decree”. The misapplication of the supposed principle of “mutuality” has been the cause of considerable mischief in the development of certain aspects of the law: see, eg Charles Harpum, “Selling Without Title: A Vendor’s Duty of Disclosure?” (1992) 108 LQR 280, 301 - 313.

¹⁸ *Price v Strange*, above.

¹⁹ Paras 9.11, 9.12 and 9.18.

²⁰ *Ryan v Mutual Tontine Westminster Chambers Association* [1893] 1 Ch 116, 123, 125, 128.

²¹ A leading advocate of a more flexible approach to specific performance was Megarry V-C: see *C H Giles & Co Ltd v Morris* [1972] 1 WLR 307, 318; *Tito v Waddell (No 2)* [1977] Ch 106, 321 - 323.

²² *Ryan v Mutual Tontine Westminster Chambers Association*, above.

order specific performance of a covenant to appoint such a porter.²³ This change of approach has recently received the endorsement of the Court of Appeal.²⁴ In decreeing specific performance for the first time of a covenant to keep retail premises open for trade during business hours, the Court held that “the so-called rule that contracts involving the continuous performance of services would not be specifically enforced was plainly not absolute and without exception”.²⁵

9.9 The approach which the courts have adopted to the specific enforcement of building contracts is particularly instructive. At the beginning of this century, the Court of Appeal laid to rest the doubts that had once existed²⁶ as to when specific performance would be decreed of a building contract.²⁷ Although the general rule was that a court would not decree specific performance of such a contract,²⁸ it would do so if—

- (i) the work to be done was sufficiently defined by the contract;
- (ii) the plaintiff had a substantial interest in having the contract performed that would not be adequately compensated by an award of damages; and

²³ *Posner v Scott-Lewis* [1987] Ch 25. The decision can be justified even on a restrictive view of the availability of specific performance. “In these days, when the security and amenities of residential flats are a matter of the utmost concern to their inhabitants, it is ludicrous to conclude that damages would be an adequate and an appropriate remedy for latter-day Mr Ryans”: Gareth Jones, “Specific Performance of a Contract of Services?” [1987] CLJ 21, 22.

²⁴ *Co-Operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd*, *The Times*, December 29, 1995.

²⁵ *Per* Leggatt LJ. Roch LJ concurred. The Court considered that damages would not be an adequate remedy. Millett LJ dissented on the basis that such an order could be oppressive if it were granted for any length of time.

²⁶ Compare *City of London v Nash* (1747) 3 Atk 512; 26 ER 1095 (where Lord Hardwicke LC had been willing in principle to decree specific performance of a covenant to build contained in a building lease), with *Lucas v Commerford* (1790) 3 Bro CC 166; 29 ER 469 (where Lord Thurlow LC was not). For Lord Loughborough LC the essential question was whether the obligation was defined with sufficient certainty: *Mosely v Virgin* (1796) 3 Ves 184, 185; 30 ER 959, 960.

²⁷ See *Wolverhampton Corporation v Emmons* [1901] 1 QB 515, 524 - 5, where Romer LJ set out the guiding principles.

²⁸ This is still the starting point. As Hoffmann J explained in *Ford Sellar Morris Developments Ltd v Grant Seward Ltd* [1989] 2 EGLR 40, 41 - 42, “[i]t is unusual for an order to be made for specific performance of obligations under a building contract, the reasons being, first, that it is usually difficult to formulate an order with specific precision so as to make it clear to the defendant exactly what he is required to do and, second, that in most cases damages would be an adequate remedy. However, there is no doubt of the jurisdiction to make such an order”.

- (iii) the defendant had obtained possession of the land on which the work was to be done,²⁹ so that he was in a position to carry it out.³⁰

Plainly therefore, some degree of supervision by the court is no bar to a decree of specific performance provided that the obligation is defined with sufficient certainty.³¹

NO PERFORMANCE OF PART

- 9.10 The final relevant restriction on specific relief is that although a court can, by injunction, restrain the breach of one specific term of a contract, it will not normally decree specific performance of part only of a contract.³² As Sugden LC explained,

if I am called upon to execute the contract, I must myself specifically execute every portion of it; I cannot give a partial execution of the contract.³³

The relevance of this principle to leasehold covenants is obvious. A particular covenant is only one part of the bargain between the parties and to enforce it specifically is indeed the sort of “partial execution” that is proscribed. However, the principle that either all obligations must be performed or none is inherently objectionable³⁴ and cannot be pressed too far. It is subject to a number of significant exceptions, it can be readily circumvented by the grant of a mandatory injunction instead,³⁵ and in any event, some doubt has been expressed as to whether it exists at all.³⁶

Enforcement of repairing covenants - general principles

- 9.11 If a building contract is specifically enforceable in certain circumstances,³⁷ it might be expected that a repairing covenant in a lease would be equally so if the same pre-

²⁹ Romer LJ actually said that the defendant should have obtained possession *by the contract*, but this limitation has since been rejected: *Carpenters Estates Ltd v Davies* [1940] Ch 160.

³⁰ The fact that the defendant is in possession may also mean that the plaintiff cannot employ another person to do it without committing a trespass: see *Jeune v Queens Cross Properties Ltd* [1974] Ch 97, 101. Query whether this will be an issue in all cases: see below, para 9.12.

³¹ Cf below, para 9.19.

³² See Gareth Jones and William Goodhart, *Specific Performance* (1986) pp 35 - 38.

³³ *Gervais v Edwards* (1842) 2 Dr & War 80, 83; 59 RR 647, 650 (Ireland).

³⁴ For a critique, see Andrew Burrows, *Remedies for Torts and Breach of Contract* (2nd ed 1994) p 379.

³⁵ See below, para 9.17.

³⁶ See Gareth Jones and William Goodhart, *op cit* p 36.

³⁷ See above, para 9.9.

conditions were satisfied, subject of course to any necessary modifications.³⁸ The position can be summarised as follows. First, there is an inherent jurisdiction to decree specific performance of a landlord's repairing covenants provided that the rules on building contracts are satisfied.³⁹ Although this jurisdiction is apparently well-established, there are certain doubts about it which we explain below.⁴⁰ Secondly, there is a statutory jurisdiction to decree specific performance in an action brought by a tenant of a dwelling to enforce a landlord's repairing covenant.⁴¹ The use of this statutory jurisdiction has become such a commonplace that district judges may now decree specific performance of repairing obligations in claims referred to arbitration under the small claims procedure laid down in the County Court Rules.⁴² Thirdly, where the court could decree specific performance, it may instead award a mandatory injunction, even (in exceptional circumstances) in interlocutory proceedings.⁴³ Finally, on the authorities as they stand, a court will not decree specific performance of, or issue a mandatory injunction to enforce, a tenant's covenant to repair at the behest of a landlord.⁴⁴

Repairing covenants - specific performance against the landlord

SPECIFIC PERFORMANCE: INHERENT JURISDICTION

9.12 It was established in *Jeune v Queens Cross Properties Ltd*⁴⁵ that a tenant might obtain specific performance of a landlord's repairing obligations, provided that the three requirements for the specific enforcement of building contracts⁴⁶ were satisfied.

³⁸ Compare *Price v Strange* [1978] Ch 337, 359, where Goff LJ assumed that contracts to repair were subject to the same considerations as contracts to build.

³⁹ Below, para 9.12.

⁴⁰ Paragraph 9.13.

⁴¹ Landlord and Tenant Act 1985, s 17; below, para 9.14.

⁴² Order 19: see *Joyce v Liverpool City Council* [1995] 3 WLR 439. The outcome is not without its problems. Under the arbitration procedure, legal aid is not available and in those circumstances "tenants who are denied the support of legal representation may not have the stomach to persist even with a small claim": "Low value repairs claims" (ed Sandi Murdoch) [1995] 29 EG 118. The limit on small claims (including actions seeking specific performance or an injunction) was raised to £3,000 on 8 January, 1996: County Court (Amendment No 3) Rules 1995, SI 1995 No 2838 (L 15), r 3. On making an order for such relief in small claims proceedings, the district judge may award an additional sum to cover the cost of legal advice and assistance up to a maximum sum of £260: County Court (Amendment No 4) Rules 1995, SI 1995 No 3277(L 18), r 2. The sum allowed in respect of the fees of an expert (such as surveyor) have been raised from £122.50 to £200: *ibid*, r 3. These changes have been made following representations prompted by the decision in *Joyce v Liverpool City Council*.

⁴³ See below, para 9.16. No interlocutory decree of specific performance can be made.

⁴⁴ See below, para 9.18.

⁴⁵ [1974] Ch 97; Pennycuik V-C.

⁴⁶ See above, para 9.9.

Pennycuick V-C acknowledged but did not specifically address the issue of mutuality of remedy.⁴⁷ This was relevant because of a landlord's inability to obtain specific performance of a tenant's covenant to repair.⁴⁸ The decision therefore created an imbalance as to the availability of the remedy. In that case, a particular consideration that weighed with the court was that the property affected by the disrepair - a balcony which had collapsed - was not included in the lease. The tenant was not therefore in any position to do the work.⁴⁹ It is less clear that a tenant could obtain specific performance if the disrepair was on the demised premises themselves. Although the landlord would have a right of entry in such circumstances to carry out his obligations, he would not satisfy the pre-condition to specific performance laid down in the cases on building contracts,⁵⁰ that the defendant should have obtained *possession* of the land on which the work was to be done.

9.13 Apart from any possible doubts about the issue of mutuality, there is a further objection to the inherent jurisdiction that was not canvassed in *Jeune v Queens Cross Properties Ltd*,⁵¹ but which was raised subsequently by Goulding J at first instance in *Gordon v Selico Co Ltd*.⁵² This was the principle, explained above,⁵³ that "the jurisdiction of a court of equity is to enforce specifically the performance of contracts, not of particular stipulations therein".⁵⁴ Goulding J felt able to overcome this difficulty only because of the existence of the statutory jurisdiction to decree specific performance of a landlord's repairing obligations under what is now section 17 of the

⁴⁷ [1974] Ch 97, 100.

⁴⁸ See below, para 9.18.

⁴⁹ See too *Francis v Cowcliffe Ltd* (1976) 33 P & CR 368, where the disrepair related to a lift in the common parts; and *Parker v Camden London Borough Council* [1986] Ch 162, where the boiler for a block of flats had ceased to function.

⁵⁰ See above, para 9.9.

⁵¹ Above.

⁵² [1985] 2 EGLR 79 (on appeal, [1986] 1 EGLR 71).

⁵³ Paragraph 9.10.

⁵⁴ *Gordon v Selico Co Ltd*, above at p 84, *per* Goulding J. When the case went on appeal, the Court of Appeal appears to have endorsed his reservations about the inherent jurisdiction: see [1986] 1 EGLR 71, 75.

Landlord and Tenant Act 1985, which we explain below.⁵⁵ The matter remains one of some importance because the statutory provisions are limited to dwellings.⁵⁶

SPECIFIC PERFORMANCE: STATUTORY JURISDICTION

9.14 Section 17(1) of the Landlord and Tenant Act 1985⁵⁷ confers a statutory power on the court to decree specific performance of a landlord's repairing covenant. Although the power can be exercised "notwithstanding any equitable rule restricting the scope of the remedy, whether on the basis of a lack of mutuality or otherwise", it is in other respects somewhat limited. It applies only—

- (i) to a lease of a dwelling house;
- (ii) to proceedings brought by the tenant⁵⁸ (and not by the landlord); and
- (iii) in respect of an alleged breach by the landlord⁵⁹ of a repairing covenant⁶⁰ relating to any part of the premises in which the dwelling is comprised (whether or not the breach relates to a part of the premises let to the tenant).⁶¹

For these purposes, a repairing covenant is widely defined to mean a covenant to "repair, maintain, renew, construct or replace any property".⁶² Despite the breadth of this definition (and in particular, the fact that it includes a covenant to "maintain" any

⁵⁵ Paragraph 9.14.

⁵⁶ See *Tustian v Johnston* [1993] 2 All ER 673, 680 - 1. In that case, the issue concerned an agricultural tenancy. On the authority of *Jeune v Queens Cross Properties Ltd*, above, Knox J was prepared to assume without deciding that the inherent jurisdiction to decree specific performance might apply to a tenant of an agricultural tenancy. See too *Hammond v Allen* [1994] 1 All ER 307, 314, where Owen J observed that "the court may grant such relief. I do not say it will, since it is said to be 'a jurisdiction which should be carefully exercised'".

⁵⁷ Replacing (with amendments) Housing Act 1974, s 125.

⁵⁸ Including a statutory tenant: Landlord and Tenant Act 1985, s 17(2)(a).

⁵⁹ Defined so as to include any person against whom the tenant has a right to enforce the repairing covenant: *ibid*, s 17(2)(c). This might therefore include a lessee of the reversion or a mortgagee in possession of the reversion.

⁶⁰ The requirement that there should be a *breach* of the covenant before there is any power to order specific performance is a departure from the normal equitable rule by which a court can decree specific performance even though there has been no breach of the contract to be enforced: *Hasham v Zenab* [1960] AC 316. In that case, Lord Tucker explained that "[i]n equity all that is required is to show circumstances which will justify the intervention by a court of equity": p 329. In practice, this is unlikely to constitute a material restriction on the availability of the remedy.

⁶¹ Landlord and Tenant Act 1985, s 17(1).

⁶² *Ibid*, s 17(2)(d).

property), it was apparently assumed to be inapplicable to a covenant to maintain a lift in a block of flats.⁶³ The reason for this is not apparent, and we would doubt the correctness of the assumption.

SPECIFIC ENFORCEMENT BY MANDATORY INJUNCTION

9.15 The courts will, in certain cases, order the performance of an obligation to repair or maintain by means of a mandatory injunction rather than by a decree of specific performance. It is not always easy to discern why a mandatory injunction has been thought to be the more appropriate remedy in a particular case.⁶⁴ As regards any final judgment, it appears to be assumed that the remedies are interchangeable. If, therefore, the covenant is specifically enforceable, whether under general equitable principles or under section 17 of the Landlord and Tenant Act 1985, a mandatory injunction may be granted instead.⁶⁵ There are however at least two circumstances in which a mandatory injunction to enforce an obligation to maintain or repair may be granted where a decree of specific performance would not lie or might be open to challenge.

9.16 The first is in interlocutory proceedings. Specific performance is available only as a final decree and not as an interlocutory remedy. By contrast, an interlocutory mandatory injunction can be ordered, albeit only in “very rare cases”.⁶⁶ For example, an interlocutory mandatory injunction was ordered, requiring the landlord to use its best endeavours to put a lift into good working order, pending trial of various issues between the parties.⁶⁷

9.17 The second situation in which a mandatory injunction might be a more appropriate remedy than specific performance is where the obligation to repair or maintain falls

⁶³ See *Francis v Cowcliffe Ltd* (1976) 33 P & CR 368, 374, where specific performance of the covenant to maintain was decreed by applying the principles in *Jeune v Queens Cross Properties Ltd* [1974] Ch 97.

⁶⁴ In *Parker v Camden London Borough Council* [1986] Ch 162, 173, Donaldson MR observed that “[t]here can be no doubt that a mandatory injunction in the form of an order for specific performance is an appropriate remedy for a breach of a landlord’s repairing covenant”. We were informed that in Lambeth County Court, mandatory injunctions were the usual means of enforcing landlords’ repairing obligations in housing cases.

⁶⁵ See, eg *Barrett v Lounova (1982) Ltd* [1990] 1 QB 348.

⁶⁶ *Parker v Camden London Borough Council*, above, at p 173, per Donaldson MR; *Loria v Hammer* [1989] 2 EGLR 249, 258. In *Parker*, elderly tenants in local authority sheltered accommodation were without heat or hot water because the boilers had broken down. These were not repaired as a result of a strike by municipal workers. The local authority was thereby in breach of its repairing obligations under the leases. These events occurred during a spell of severe winter weather and there was a very real threat to the health of the tenants. In interlocutory proceedings, the local authority was ordered to permit an inspection to be made by an expert to determine what work was required to repair the boilers. This was the first step to ensuring that they complied with their repairing obligations.

⁶⁷ *Peninsular Maritime Ltd v Padseal Ltd* [1981] 2 EGLR 43.

outside the ambit of section 17 of the Landlord and Tenant Act 1985, typically because the lease is not of a dwelling. It has already been explained that it might be an objection to a decree of specific performance of a repairing covenant that the remedy does not lie for the enforcement of part only of a contract.⁶⁸ The use of a mandatory injunction avoids this difficulty.

Repairing covenants: no specific performance in favour of a landlord

9.18 In *Hill v Barclay*,⁶⁹ Lord Eldon LC had to consider whether a tenant could obtain relief against forfeiture for failing to repair. At that date, there was no statutory jurisdiction to grant relief as there is now,⁷⁰ and the matter lay within the court's inherent jurisdiction. He refused relief, mainly because a landlord could not compel a tenant to perform his covenants by means of a decree of specific performance. The landlord's only remedy was an award of damages. If the tenant still refused to perform the covenant, the landlord would have to seek a further award of damages. In these circumstances, Lord Eldon considered that it would not be appropriate to give a tenant relief against forfeiture for breach of a repairing covenant.⁷¹ It is noteworthy that Lord Eldon reached his conclusion that "the Landlord cannot compel the Tenant to repair"⁷² because of the absence of mutuality between the parties. As the landlord could not obtain specific relief against the tenant, the tenant should be barred from such relief - in the form of relief against forfeiture - against the landlord.⁷³

9.19 That reasoning, based as it is upon lack of mutuality, looks unconvincing today for two main reasons. First, a tenant who has broken a repairing covenant can now obtain relief against forfeiture. He must be given an opportunity to remedy the breach within a reasonable time before the landlord can forfeit the lease,⁷⁴ and may serve a counter-notice on the landlord which will restrict the circumstances in which the latter can

⁶⁸ See above, para 9.10.

⁶⁹ (1810) 16 Ves 402; 33 ER 1037.

⁷⁰ See Law of Property Act 1925, s 146; Leasehold Property (Repairs) Act 1938, s 1.

⁷¹ See 16 Ves 402, 405; 33 ER 1037, 1038.

⁷² *Ibid.*

⁷³ *Hill v Barclay* was just one of a number of cases in the nineteenth century in which the extent to which a court of equity would give relief against forfeiture for breach of covenants other than the covenant to pay rent was considered. For this debate, see the comments of Lord Wilberforce in *Shiloh Spinners Ltd v Harding* [1973] AC 691, 722-724; and Charles Harpum, "Coming to Equity in Breach of Contract" in *Equity and Contemporary Developments* (1990, ed S Goldstein) 829, 844-854.

⁷⁴ Law of Property Act 1925, s 146(1).

forfeit the lease.⁷⁵ Even if the lease is then forfeited, the tenant may seek relief.⁷⁶ Furthermore, a court will not now refuse relief against forfeiture on the basis that it is impossible to supervise the work that has to be done:

what the court has to do is to satisfy itself, *ex post facto*, that the covenanted work has been done, and it has ample machinery, through certificates, or by enquiry, to do precisely this.⁷⁷

Secondly, as we have explained, a tenant may obtain specific relief against the landlord where the *landlord* is in breach of his repairing obligations.⁷⁸

9.20 There is no clear modern authority in which the availability of specific performance or of a mandatory injunction to enforce a tenant's repairing obligations has been fully considered. It was however suggested by Oliver J in 1979 that there was "a grave doubt" whether a landlord could obtain specific performance of a tenant's repairing covenant, and that "the textbooks are unanimous in rejecting such a remedy".⁷⁹ However, he conceded that this view was based on what was probably no more than "a mere dictum" in *Hill v Barclay*,⁸⁰ and that the authority of that case had been much weakened by *Jeune v Queens Cross Properties Ltd*.⁸¹ We doubt whether the unanimous view of textbooks is a good reason for retaining a rule of law or equity if there are compelling arguments of logic and policy against it.⁸² The effect of these doubts as to the availability of specific performance in proceedings against a tenant for breach of a repairing covenant is, predictably, that the remedy is never sought.

⁷⁵ Leasehold Property (Repairs) Act 1938, s 1.

⁷⁶ For forfeiture proceedings in cases of breach of a repairing covenant by the tenant, see the Leasehold Property (Repairs) Act 1938, explained below, para 9.28. In our report *Landlord and Tenant Law: Termination of Tenancies Bill (1994) Law Com No 221*, we proposed a revised scheme, that was modelled on the 1938 Act: see p 30 and cl 12 of the Draft Bill attached to the report.

⁷⁷ *Shiloh Spinners Ltd v Harding* [1973] AC 691, 724, *per* Lord Wilberforce. See too *Tito v Waddell (No 2)* [1977] Ch 106, 321 - 2. Similar considerations apply to the specific enforcement of repairing obligations: see *Peninsular Maritime Ltd v Padseal Ltd* [1981] 2 EGLR 43, where an interlocutory mandatory injunction was granted to enforce a covenant to reinstate a lift if it broke down. Stephenson LJ considered that the court would have little difficulty in determining whether there had been compliance: "If the lift works, the order will be complied with...": *ibid*, at p 46.

⁷⁸ See above, paras 9.12 - 9.14.

⁷⁹ *Regional Properties Ltd v City of London Real Property Co Ltd* [1981] 1 EGLR 33, 34. His remarks were obiter.

⁸⁰ (1810) 16 Ves 402; 33 ER 1037; above para 9.18.

⁸¹ [1974] Ch 97; above para 9.12.

⁸² A leading landlord and tenant silk has told us informally that he considers that *Hill v Barclay* would probably be decided differently today.

Can an extension of the availability of specific performance be justified?

9.21 We have stated the underlying objective of this report to be the public interest in seeing that the stock of rented property is properly repaired and maintained, thereby increasing its lifespan.⁸³ All other things being equal, the remedy of specific performance is better suited to achieving that objective than is an award of damages, because the latter may not secure the timely repair of the premises.⁸⁴ However, a concern has been expressed as to whether, in cost-benefit terms, the remedy provides the most effective means of administering justice. That concern has been explained in the following way:

It is based, not upon the weighing of relative advantage and disadvantage to the parties, but rather on the weighing of the advantage of doing justice by granting specific relief against the general cost to society of having justice administered. By way of contrast to specific relief, damage awards do hold certain advantages. A money judgment is final, and enforcement is left to the administrative rather than the judicial machinery of the court. The cost of enforcement is largely borne by the parties. A decree for specific performance does involve a substantially higher risk that further judicial resources will be required. The more complex or extended the performance, the more likely further proceedings will be needed to ascertain whether the defendant has complied with his or her obligations. The fear of extended and complex litigation and the need for repeated requests for judicial intervention may be seen as a legitimate concern.⁸⁵

However, the same author admits that the calculation of the increased cost incurred by ordering specific performance is extremely difficult and that there are other factors to be taken into account.⁸⁶

9.22 We have given careful consideration to this issue and have attempted to discover from our enquiries made in relation to housing disrepairs⁸⁷ whether it is in practice a point of substance. Although the frequency or otherwise of specific performance actions varies widely in different parts of the country,⁸⁸ we were advised by housing law practitioners that, in cases brought for breach of landlords' repairing covenants where the repairs had not been carried out, specific performance was the remedy that was

⁸³ See above, para 1.27.

⁸⁴ See below, para 9.27.

⁸⁵ Robert J Sharpe, *Injunctions and Specific Performance* (Toronto, 2nd ed, 1992) p 7-23, para 7.480.

⁸⁶ *Ibid*, para 7.490.

⁸⁷ See above, para 6.20.

⁸⁸ *Ibid*.

invariably sought.⁸⁹ Although the law reports contain some anecdotal evidence of non-compliance with decrees for the specific enforcement of repairing obligations in leases,⁹⁰ we were told that such cases were in practice very rare,⁹¹ and that the threat of committal proceedings usually secured compliance. The court did not supervise the repair work that was decreed, but would simply check that it had been carried out in accordance with its order. We were also keen to discover whether there was any evidence of the development of local practices by courts and legal practitioners in relation to the conduct of specific performance proceedings. We learned that in general there was not, though to this the position in Liverpool constituted a notable exception.⁹² There, practitioners have developed a practice for dealing with such cases where the defendant is a local authority and admits liability.⁹³ In Liverpool,

it is virtually if not entirely unknown for a plaintiff in a case of this character to recover as damages the costs of carrying out the necessary remedial work on the basis that he will have it executed himself.⁹⁴

We note that the alternative to specific performance proceedings of repairing obligations may be repeated actions for damages instead, a consequence that is likely to be as costly as any further proceedings that might be needed to work out a decree of specific performance.⁹⁵

⁸⁹ We were also informed that actions for damages remained common, and in some parts of the country (eg Manchester) were more frequent than proceedings for specific performance.

⁹⁰ See, eg *Barrett v Lounova (1982) Ltd* [1990] 1 QB 348, 354.

⁹¹ One specialist practitioner put the figure at 1% of cases.

⁹² In the course of our enquires, we were repeatedly told that Liverpool was regarded as a special case, apparently because of the existence of one major landlord, the local authority.

⁹³ For the "Liverpool Order" see *Joyce v Liverpool City Council* [1995] 3 WLR 439, 444 - 446. In correspondence with us, HH Judge Colyer QC commended this form of order and suggested that it could usefully be adopted as a non-prescribed form in the County Court Practice. The "Liverpool Order" involves two stages. First, the breaches of the repairing covenant that have occurred are either agreed by the parties themselves or determined by the court in the absence of such agreement. The court then makes an order detailing the works that must be carried out to remedy the breaches and the defendant gives an undertaking to execute them within a specified period (usually 56 days). Damages are then assessed for the loss that has been suffered thus far by the plaintiff. Normally, that sum will constitute the final assessment of damages. The second stage only arises if the defendant fails to carry out his undertaking. In those circumstances, further damages will be awarded for the cost to the tenant of carrying out the repairs. In most cases, there will be no need for the second stage, but the threat of it will be clear to the defendant from the outset.

⁹⁴ *Joyce v Liverpool City Council*, above at p 445, per Bingham MR, quoting Judge Marshall Evans QC of Liverpool County Court.

⁹⁵ In elaborate and complex cases in the High Court, a Chancery Master may be entrusted with giving directions for the execution of the decree: see *Gordon v Selico Co Ltd* [1986] 1 EGLR 71, 78.

Specific enforcement of repairing obligations: the case for reform

Defects in the present law

- 9.23 The present law on the specific enforcement of repairing obligations is difficult to justify both logically and as a matter of policy. The defects in the present law are summarised in the following paragraphs.
- 9.24 First, the statutory jurisdiction to decree specific performance of repairing obligations is confined to enforcement by tenants of landlords' repairing covenants in leases of dwellings.⁹⁶ Because of the wording of the statute, no challenge to this jurisdiction will lie on the basis of any of the equitable rules that might otherwise restrict the scope of the remedy. In practice, the remedy is often sought in housing cases.⁹⁷
- 9.25 Secondly, in relation to leases of other types of property, the court has an inherent jurisdiction to decree specific performance of a landlord's repairing obligations at the behest of a tenant.⁹⁸ This remedy is open to potential challenge, particularly on the basis that it contravenes the rule against the partial performance of contracts,⁹⁹ but conceivably on the ground of want of mutuality as well.¹⁰⁰ Although the use of the remedy has been envisaged in relation to agricultural tenancies,¹⁰¹ we know of no case in which it has been awarded. Furthermore, from the enquiries which we have made of practitioners and judges, it seems that it is *never* sought in cases involving business tenancies.
- 9.26 Thirdly, on the authorities as they stand, it appears that a court will not decree specific performance of a tenant's repairing obligations in proceedings brought by the landlord.¹⁰² This leaves the landlord with two alternatives, each of which is unsatisfactory. First, he may bring proceedings to recover damages, but these may need to be repeated if he is unable to execute the repairs himself and the tenant persists in his refusal to carry them out. Secondly, he may take steps to forfeit a lease by serving a notice on the tenant to carry out the repairs within a reasonable time. While such a procedure may prove effective, the service of such a notice is generally

⁹⁶ Above, para 9.14.

⁹⁷ See above, paras 5.12 and 6.20.

⁹⁸ Above, para 9.12.

⁹⁹ Above, para 9.13.

¹⁰⁰ Above, para 9.12.

¹⁰¹ See *Tustian v Johnston* [1993] 2 All ER 673, 680 - 1; *Hammond v Allen* [1994] 1 All ER 307, 314.

¹⁰² Above, para 9.18.

regarded as a hostile course of action and one which landlords are often unwilling to take.¹⁰³

The advantages of specific performance

9.27 As a matter of policy, we consider that the wider availability of specific performance to enforce repairing obligations in leases will more effectively ensure the repair and maintenance of the stock of rented property. First, the remedy requires the defendant to carry out the work, and the plaintiff is not forced to rely on the inadequate second best of one or more actions for damages¹⁰⁴ with the repairs still not done. The courts are now well used to dealing with the specific enforcement of repairing covenants from their experience in cases under section 17 of the Landlord and Tenant Act 1985.¹⁰⁵ They have found ways of overcoming any difficulties in defining with sufficient precision the work that has to be done and in ensuring compliance with their orders. Secondly, the remedy is backed by the powerful sanction of proceedings for contempt, though this seldom needs to be invoked. There appears to us to be no obvious reason to limit the remedy to leases of dwellings, nor to actions brought by tenants. Full repairing leases (under which the tenant is responsible for all repairs) are not uncommon in the commercial sector. The result of the present law in relation to such leases is that—

- (i) the tenant cannot be compelled to carry out the repairs even if damages would not adequately compensate the landlord; but
- (ii) in the event of such a default, the landlord has no right to enter and carry them out himself in the absence of express provision.

9.28 In this context, there is one particular concern which must be addressed. At present, the Leasehold Property (Repairs) Act 1938¹⁰⁶ provides that a landlord may only bring proceedings against a tenant for *damages* for breach of a repairing covenant if he serves a notice on the tenant that specifies the breach and requires him both to remedy and to make compensation for that breach within a reasonable time.¹⁰⁷ When such a notice is served, the tenant may serve a counter-notice on the landlord, as a consequence of which the latter can take no further proceedings without the leave of the court.¹⁰⁸ It has been explained that the particular mischief at which the 1938 Act was directed—

¹⁰³ See, eg *Ford Sellar Morris Developments Ltd v Grant Seward Ltd* [1989] 2 EGLR 40, 41.

¹⁰⁴ Damages cannot exceed the diminution in value of the reversion caused by the breach of covenant: Landlord and Tenant Act 1927, s 18(1). See below, para 9.36.

¹⁰⁵ See above, para 9.14.

¹⁰⁶ As extended by Landlord and Tenant Act 1954, s 51.

¹⁰⁷ Leasehold Property (Repairs) Act 1938, ss 1(1); 1(2); Law of Property Act 1925, s 146.

¹⁰⁸ Leasehold Property (Repairs) Act 1938, s 1(3).

was that an unscrupulous landlord would buy the reversion of a lease which had little value as a reversion and harass the tenant with schedules of dilapidations not with a view to ensuring that the property was kept in proper repair for the protection of the reversion, but to put pressure on the tenant, who might be a person of limited means, and who might not be in a position to obtain or accustomed to obtaining proper advice as to his liabilities, to the point at which he would accept an offer for the surrender of his lease.¹⁰⁹

9.29 Some leases contain a clause by which, if the tenant fails to carry out his repairing obligations under the lease, the landlord may enter, execute the works, and then recover the costs from the tenant. After a period of doubt, it has now been held by the Court of Appeal that an action brought by the landlord against the tenant to recover those costs is outside the ambit of the Leasehold Property (Repairs) Act 1938.¹¹⁰ The landlord does not therefore require the leave of the court to bring such proceedings.¹¹¹

9.30 If the right to seek specific performance is expressly conferred on landlords by statute, should they be required to follow the procedure laid down in the 1938 Act in the same way as they would if they were seeking forfeiture or claiming damages against the tenant? If specific performance were to be extended by judicial decision to actions brought by landlords to enforce tenants' repairing obligations,¹¹² such proceedings would plainly not fall within the 1938 Act as a matter of construction. Nor as a matter of principle do we consider that they should. Specific performance is an equitable discretionary remedy and subject to the usual equitable defences such as laches, or inequitable conduct on the part of the claimant. These constraints are in our view flexible enough to enable the courts to meet the kind of oppressive conduct which the 1938 Act was intended to address. It is also worth emphasising that the tenants who are the most vulnerable to the sort of pressures that prompted the 1938 Act, namely those who have tenancies of residential properties for terms of less than seven years, are generally under no obligation to carry out repairs to the structure, exterior and

¹⁰⁹ *Hamilton v Martell Securities Ltd* [1984] Ch 266, 278, per Vinelott J, following dicta in *Sidnell v Wilson* [1966] 2 QB 67, 76 (Lord Denning MR).

¹¹⁰ *Jervis v Harris* [1996] 1 All ER 303, overruling *Swallow Securities Ltd v Brand* (1981) 45 P & CR 328 (where McNeill J had held that the Act applied), and approving *Hamilton v Martell Securities Ltd*, above; *Colchester Estates (Cardiff) v Carlton Industries plc* [1986] Ch 80; and *Elite Investments Ltd v T I Bainbridge Silencers Ltd* [1986] 2 EGLR 43.

¹¹¹ The Court of Appeal's decision was based upon the *wording* of the Act. The tenant's obligation to reimburse the landlord was not a liability in damages for breach of a repairing covenant. In *Hamilton v Martell Securities Ltd*, above, at p 278, Vinelott J expressed the view that such a claim was also outside the *mischief* of the Act. The sort of unscrupulous landlord whose activities the Act was intended to curb, was unlikely "to put his hand in his pocket to carry out the repairs".

¹¹² See above, para 9.20.

installations, which are the landlord's responsibility.¹¹³ That was not the case when that Act was passed.¹¹⁴

Proposals for reform

9.31 In the light of these considerations, we consider that specific performance should be available as a means of enforcing repairing obligations in all leases and tenancies, whether they are of dwellings, or of commercial, agricultural or any other type of premises. The remedy would be available to landlords and tenants alike. As an equitable remedy, it would not be the only or even necessarily the usual method of enforcing repairing obligations, but should be decreed when a court, in the exercise of its discretion, considered it to be the most appropriate remedy to secure the required result.¹¹⁵ This approach, which breaks away from an over-rigid consideration of whether damages are an adequate remedy, appears to be the one that is already adopted when a court considers whether to decree specific performance of a landlord's repairing covenants. The present constraints on the availability of the remedy, such as objections on the ground of mutuality,¹¹⁶ the need for the court's supervision or partial performance, would not apply to the statutory remedy. However, because specific performance would be decreed only if it was appropriate,¹¹⁷ a court would refuse it if, for example, the landlord sought the remedy towards the end of the term but intended to demolish the premises on the termination of the lease.¹¹⁸ This new provision would replace section 17 of the Landlord and Tenant Act 1985.

9.32 **We therefore recommend that:**

- (a) **a court should have power to decree specific performance of a repairing obligation¹¹⁹ in any lease or tenancy (including statutory tenancies);**
- (b) **the remedy should be available—**

¹¹³ Landlord and Tenant Act 1985, s 11; above, para 5.1.

¹¹⁴ Cf above, para 5.11.

¹¹⁵ This reflects the views of many of those who responded to Consultation Paper No 123.

¹¹⁶ Which would of course evaporate in any event if the remedy was available to both landlords and tenants.

¹¹⁷ Just as is now the case in actions brought under Landlord and Tenant Act 1985, s 17.

¹¹⁸ Cf Landlord and Tenant Act 1927, s 18(1). This is no more than an application of the maxim that equity does nothing in vain. See too the preceding paragraph.

¹¹⁹ Specific performance would be available whether or not the obligation was in the lease: Draft Bill, Cl 13(2). Thus a repairing covenant contained in a side letter would be specifically enforceable.

- (i) to a landlord, a tenant or any other party to the lease, in respect of a breach of a repairing obligation by another party;
 - (ii) notwithstanding any equitable rule restricting the scope of the remedy, such as the rule against partial performance; and
- (c) the remedy should not be granted as of right, but in the court's discretion whenever the court thinks fit, and subject of course to the usual equitable defences. (Draft Bill, Cl 13(1).)

For the purposes of this provision, a repairing obligation would be widely defined (in the same terms as it is at present in section 17(2) of the Landlord and Tenant Act 1985) as a covenant to repair, maintain, renew, construct or replace any property. (Draft Bill, Cl 13(6).)

9.33 One of the underlying problems which this report has attempted to address is that a property may be unfit for human habitation even where the landlord has complied with his implied covenant¹²⁰ to repair the structure, exterior and installations. In the previous Part of this report, we therefore recommended that the implied covenant by a landlord of premises let at a very low rent to keep the premises fit for human habitation,¹²¹ should be extended to leases granted for a term of less than seven years.¹²² We have also explained that one of the main reasons why the implied covenant by a landlord to repair the structure, exterior and installations of a dwelling let for less seven years has proved to be so effective, is because of the availability of the remedy of specific performance.¹²³ In order to make the extended covenant of fitness for human habitation similarly effective, we consider that the remedy of specific performance should be available for its enforcement. Again, we would emphasise that the remedy is both an equitable and a discretionary one that should be decreed only where it is appropriate. We envisage that there could be cases where the effect of a decree would be to cause disproportionate hardship to a landlord, and where it would be entirely proper to leave the tenant to his remedy in damages. **We therefore recommend that a tenant should be able to seek specific performance in respect of a breach of an obligation by the landlord—**

¹²⁰ Landlord and Tenant Act 1985, s 11.

¹²¹ Landlord and Tenant Act 1985, s 8.

¹²² See above, para 8.35.

¹²³ See above, para 5.12.

- (a) that the premises should be fit for human habitation at the commencement of the lease; and
- (b) that they should be kept fit during the tenancy. (Draft Bill, Cl 13 (6).)

Commencement

9.34 We recommend that our proposals on the specific performance of covenants to repair and keep fit, when implemented, should be applicable to all leases (including leases of agricultural holdings and farm business tenancies), whenever granted, from the date on which the Act comes into force.¹²⁴ They would apply only to proceedings commenced on or after that date. (Draft Bill, Cl 17(5).) In practice, the enforcement of a landlord's covenant to keep the premises fit is only likely to arise in relation to tenancies which are granted after the commencement of the Act.¹²⁵ This is because the existing fitness covenant is unlikely to have any application today, given the smallness of the rent limits.¹²⁶

Other matters

- 9.35 We have given consideration to whether there is any case for the reform of the rules—
- (i) which limit the amount of damages that a landlord can recover for breach of a repairing covenant by a tenant;¹²⁷ and
 - (ii) which preclude a landlord from entering premises to carry out repairs where the tenant has failed to do so but where there is no express or implied right of entry for that purpose.¹²⁸

For the reasons that we set out below, we consider that no change is required to the law.

Damages

9.36 Damages for breach of a repairing covenant by a tenant are assessed according to the diminution in the value of the landlord's reversion caused by that breach.¹²⁹ Indeed,

¹²⁴ Which will be three months after the Act is passed: Draft Bill, Cl 17(2).

¹²⁵ Draft Bill, Cl 17(3). For such leases, see above, para 7.31.

¹²⁶ See above, para 4.3.

¹²⁷ Landlord and Tenant Act 1927, s 18(1).

¹²⁸ See above, para 9.5.

¹²⁹ *Doe d Worcester Trustees v Rowlands* (1841) 9 C & P 734, 739; 173 ER 1030, 1033; *Conquest v Ebbetts* [1896] AC 490, 493; *Hanson v Newman* [1934] Ch 298, 305. The diminution of the value of the reversion is the difference between the value of the reversion if the premises in the state of disrepair and what it would have been had the tenant complied with the

it is provided by section 18(1) of the Landlord and Tenant Act 1927, that an award cannot exceed that amount.¹³⁰ In cases where damages are to be assessed at the end of the term, the courts take the cost of carrying out repairs as a guide to the diminution to the reversion,¹³¹ provided that such repairs have been or will be carried out,¹³² and perhaps even in other circumstances.¹³³ However, where damages are to be assessed during the currency of the lease, the cost of executing the repairs is a much less certain guide to the diminution of the reversion (even if the landlord does in fact undertake the work). The unexpired term of the lease will necessarily have a significant impact on the quantum. The longer the term, the less will the value of the reversion be diminished by any disrepair.¹³⁴

9.37 Section 18 of the Landlord and Tenant Act 1927 was passed to ensure that a landlord's claim for dilapidations was "restricted to the actual loss" which he had suffered.¹³⁵ It meant that a tenant could not be required to pay a sum of dilapidations if the landlord intended to demolish the property. Since its enactment, the law of damages has evolved and, in particular, the principles upon which a court is willing to award damages on a "cost of cure" basis have been clarified. In *Ruxley Electronics and Constructions Ltd v Forsyth*,¹³⁶ the House of Lords held that a plaintiff could recover as damages the cost of rectifying a breach of contract provided that it was reasonable for him to do so. The House emphasised that the object of an award of

repairing covenant: *Smiley v Townsend* [1950] 2 KB 311.

¹³⁰ That section also imposes a further limitation. No damages are recoverable on the termination of the lease if at that time, or shortly afterwards, the premises are either to be demolished or altered structurally in such a way as to render the repairs valueless.

¹³¹ See *Culworth Estates Ltd v Society of Licensed Victuallers* [1991] 2 EGLR 54, 56; *Crown Estate Commissioners v Town Investments Ltd* [1992] 1 EGLR 61, 63; *Shortlands Investments Ltd v Cargill Plc* [1995] 1 EGLR 51, 56. Cf Andrew Burrows, *Remedies for Torts and Breach of Contract* (2nd ed 1994) p 150 - 151.

¹³² *Haviland v Long* [1952] 2 QB 80. It is immaterial whether the repairs are done by the landlord or the incoming tenant: *ibid*. However, "[i]n cases where it is plain that the repairs are not going to be done..., the cost of them is little or no guide to the diminution in value of the reversion, which may be nominal": *Smiley v Townsend* [1950] 2 KB 311, 322, *per* Denning LJ. Where the premises are going to be substantially improved after the termination of the lease, it may be difficult for the landlord to prove that his reversion has suffered any loss by reason of the breach of the repairing covenant: see *Mather v Barclays Bank Plc* [1987] 2 EGLR 254; and for comment, D N Clarke, "Tenant's Liability for Non-Repair" (1988) 104 LQR 372.

¹³³ In *Shortlands Investment Ltd v Cargill Plc*, above, Judge Bowsler QC, sitting as Official Referee, held that the landlord could recover the cost of repairs because although the incoming tenant was not bound to make good the disrepair, he would use the state of the premises as a bargaining counter and "would demand a sum of money relative to the disrepair": [1995] 1 EGLR 51, 56.

¹³⁴ *Conquest v Ebbetts* [1896] AC 490, 493, 494.

¹³⁵ Major Owen MP, *Hansard* (HC) 23 February 1927, vol 202, col 1771.

¹³⁶ [1995] 3 WLR 118.

damages was to compensate the plaintiff for his actual loss.¹³⁷ Although the House did not finally decide that such an award would be given only if the plaintiff intended to expend the sum on remedying the breach, “[i]ntention, or lack of it, to reinstate can have relevance only to reasonableness and hence to the extent of the loss which has been sustained”.¹³⁸

9.38 In the light of these principles, it is questionable whether the limitations on the measure of damages contained in section 18 of the Landlord and Tenant Act 1927 differ in any material respect from those applicable at common law. In our Consultation Paper¹³⁹ - which did of course pre-date the clarification of the common law in the *Ruxley* case - we did not seek the views of consultants as to whether we should repeal section 18, but on another issue which we discuss in the next paragraph. After careful consideration, we have decided not to recommend repeal at this stage, but to see how the law governing damages for reinstatement develops over the next few years. If it becomes apparent that section 18 is no more than declaratory of what the common law has now become (as we suspect it will), the section can then be repealed.

9.39 In our Consultation Paper,¹⁴⁰ what we did invite comments on was whether, in order to encourage repair, the measure of damages for breach of a repairing covenant by a tenant during the course of the term might always be the cost of carrying out the work, even if this was *greater* than the diminution in the value of the reversion. We considered that this should be subject to a concomitant right of a tenant to seek the imposition of a condition on such an award of damages that it be spent on the work. On consultation, there was some support for the suggestion that damages should be assessed during the term on a cost of work basis.¹⁴¹ However, what we considered to be the necessary safeguard - the power of the court to make such an award conditional on the work being carried out - did not find favour. To have the former without the latter would plainly not achieve our objective of encouraging repair: a higher award of damages can be justified only if the repair work is actually done. The objective will be better achieved if the courts are given power to decree specific performance of tenants’ repairing obligations as we have recommended. **We have decided therefore to make no recommendations at this stage to change the existing principles which govern the assessment of damages.**

¹³⁷ *Ibid*, at pp 120, 122, 132.

¹³⁸ *Ibid*, at p 126, *per* Lord Jauncey of Tullichettle.

¹³⁹ No 123.

¹⁴⁰ No 123, para 5.62.

¹⁴¹ The support came mainly from those representing the interests of landlords.

Rights to enter

9.40 We have explained above that a landlord cannot enter to carry out repairs which the tenant fails to execute, however necessary they may be, in the absence of any express, implied or statutory right to enter for that purpose.¹⁴² We have also noted that the law in this regard may not be wholly rational, in that a tenant may be held to have an implied licence to go on to his landlord's property to carry out repairs which his landlord has failed to execute.¹⁴³ However, although we raised the issue of rights of entry in our Consultation Paper,¹⁴⁴ we did not make any recommendations in regard to them. In view of our proposals to extend the availability of specific performance to enable landlords to enforce tenants' repairing obligations, **we do not consider that it is necessary to make any recommendations in relation to such rights of entry.**

Repairing obligations and the Crown

9.41 We have explained that neither the implied obligation of fitness under section 8 of the Landlord and Tenant Act 1985, nor the implied repairing obligation under section 11 of that Act apply to the Crown.¹⁴⁵ We can see no obvious reason why the following should not apply to the Crown—

- (a) the implied obligation as to repair contained in section 11 of the 1985 Act;
- (b) the default repairing covenants that we have proposed in Part VII of this report;
- (c) the implied obligation of fitness that we have recommended in Part VIII of this report;
- (d) the recommendations that we make as to the availability of the remedy of specific performance in this Part IX; and
- (e) the recommendations that we make for the abolition of the tort of waste and the creation of a new obligation on tenants and others to take reasonable care of the premises which they occupy in Part X of this report.

¹⁴² Paragraph 9.5.

¹⁴³ *Loria v Hammer* [1989] 2 EGLR 249; above, para 9.5.

¹⁴⁴ No 123, paras 3.33 - 3.34.

¹⁴⁵ *Department of Transport v Egoroff* [1986] 1 EGLR 89. See above, paras 4.3, 5.10.

Furthermore, as we have explained, those who responded to our Consultation Paper¹⁴⁶ took the same view.¹⁴⁷ We have not specifically consulted those affected by any such change.

9.42 In the light of this, and subject to any matters which may be raised in the consultation which is customarily undertaken within Whitehall, **we recommend that both the proposals made in this report and sections 11 - 16 of the Landlord and Tenant Act 1985 should bind the Crown.** (Draft Bill, Cl 14.) This proposal would be prospective only. Except for our proposals on specific performance,¹⁴⁸ it would only apply to tenancies granted by the Crown after this Act came into force.¹⁴⁹

¹⁴⁶ No 123, Landlord and Tenant: Responsibility for the State and Condition of Property.

¹⁴⁷ See above, para 1.24.

¹⁴⁸ See above, para 9.34.

¹⁴⁹ For such tenancies, see above, para 7.31.

PART X WASTE

Introduction

10.1 In our Consultation Paper, we provisionally recommended that the law of waste, the nature of which we explain below, should be abolished so far as it applies between landlord and tenant.¹ We explained that waste could be seen “as supplementing inadequate contractual provisions, whether express or implied.”² We considered that “once those provisions have been reviewed, and reformed where necessary, there should be no need for this back-up, which serves to complicate the law by providing a second and separate code of obligations covering the same situation”.³

10.2 That analysis was made primarily against the background of our proposal to introduce a duty to maintain which, as we explained in Part I of this report, we have abandoned in the light of consultation. We did however visualise that the abolition of waste might also form one of a series of individual reforms, even if the duty to maintain were not accepted. We explained that the doctrine of waste might continue to have a role in the case where a tenant held over after the expiry of the lease in circumstances in which the lease had not been extended by agreement or by statute.⁴ To meet that situation, we offered two possible solutions:

- (i) *all* the lease provisions as to the duty to maintain might continue; or
- (ii) such duties to maintain as had been cast upon the tenant should continue to bind him, but that the landlord should be under no liability. We justified this one-sidedness on the basis that it “would recognise that the tenant was wrongfully continuing in possession”.⁵

On consultation there was support for the abolition of waste⁶ and of the second of these alternatives, the continuation of a tenant’s liabilities to maintain under a lease where he was holding over.

¹ Consultation Paper No 123, paras 5.58 - 5.59; 6.12.

² *Ibid*, para 5.58.

³ *Ibid*.

⁴ *Ibid*, para 5.59. In practice many leases will or may be extended by statute: see in relation to business and residential tenancies, Landlord and Tenant Act 1954, s 24; Rent Act 1977, s 3(1); Housing Act 1988, ss 5(3)(e); 6. Agricultural tenancies (to which similar provisions apply) are outside the scope of this Part.

⁵ Consultation Paper No 123, para 5.59.

⁶ Seventeen respondents commented on our proposal to abolish waste. None were opposed to it. All but one of them supported it.

- 10.3 We have considered this matter in some detail, and we now take a different view of the way in which the law should be reformed. For reasons that we explain in this Part we agree that the law of waste should be abolished. However, we do not feel that we can at this stage recommend that a tenant should continue to be liable on any covenants under the lease to maintain the property if he holds over.
- 10.4 First, it would be illogical to deal with just one aspect of holding over. There are other obligations that a tenant might have undertaken in the lease that are as important as covenants to repair or maintain, such as covenants to insure and user covenants. To single out repairing obligations for special treatment would inevitably lead to anomalies. The law governing holding over is in many respects both arcane and illogical. If it is to be reformed, it should be reformed as a totality.
- 10.5 Secondly, not all forms of holding over are wrongful. If a tenant holds over with the landlord's assent while the parties negotiate the terms of a new lease,⁷ the tenant is likely nowadays to be regarded as a tenant at will,⁸ even if he pays rent.⁹ In those circumstances, his continued occupation of the property is not in any real sense "wrongful",¹⁰ but equally, he does not hold under a lease or periodic tenancy which by its terms may prescribe the repairing obligations of the parties.¹¹
- 10.6 Thirdly, there may be cases other than those of a tenant who is holding over, where the law of waste has a role to play. Scarman LJ once described the two "classic circumstances" in which a tenancy at will arises as being those of "holding over or holding pending a negotiation".¹² If a person is allowed into occupation while the terms of a lease are negotiated, there may be a need to impose some obligations on the occupier as to the manner in which he treats the premises. Another situation where waste may possibly apply is in relation to licences.¹³

⁷ Cf *Cardiothoracic Institute v Shrewdcrest Ltd* [1986] 1 WLR 368.

⁸ Ie, a tenant who occupies land with the consent of the landowner, but where either party may terminate the tenancy at any time: see below, para 10.23.

⁹ *Javad v Aqil* [1991] 1 WLR 1007. In *Longrigg, Burrough & Trounson v Smith* [1979] 2 EGLR 42, 43, Ormrod LJ commented that "[t]he old common law presumption of a tenancy from the payment and acceptance of rent dies very hard. But I think the authorities make it quite clear that... this presumption is unsound and no longer holds".

¹⁰ Particularly if the delays in finalising a new lease are attributable to the landlord.

¹¹ In those now rare cases where the court does infer a periodic tenancy from payment of rent by a tenant holding over, the implication is that "there is a tenancy from year to year on the terms of the old lease so far as they are consistent with such a tenancy": *Dougal v McCarthy* [1893] 1 QB 736, 740, *per* Lord Esher MR. See too *Wedd v Porter* [1916] 2 KB 91, 98; *Cole v Kelly* [1920] 2 KB 106, 132. These terms will include repairing obligations: see, eg *Wyatt v Cole* (1877) 36 LT 613.

¹² *Hagee (London) Ltd v A B Erikson and Larson* [1976] QB 209, 217.

¹³ See below, para 10.25.

10.7 Fourthly, there is an ill-defined obligation of “tenantlike user” imposed upon tenants under a term of years or periodic tenancy.¹⁴ Its incidents, the circumstances in which it applies, and its relationship with the tort of waste, are all remarkably unclear.

10.8 We consider that it is desirable that the basic obligations of tenants and licensees as to the manner in which they treat the property that they occupy should be defined regardless of whether such persons are responsible for repairs.¹⁵ In this Part we therefore examine the tort of waste in its application to leases, tenancies at will and sufferance and licences. We also consider the implied obligation of a tenant to use the premises let in a tenantlike manner. We make recommendations for the abolition of both the tort of waste and the implied obligation in relation to all tenancies and licences (except those relating to agricultural land) and for their replacement by a new implied statutory covenant defining those basic obligations. In adopting this course, we are reviving in modified form certain proposals that we made in 1975 in our report, *Obligations of Landlords and Tenants*.¹⁶

Waste

The nature of waste

10.9 “Waste is a somewhat archaic subject, now seldom mentioned”.¹⁷ In relation to leases it is rarely necessary to have recourse to it because actions for disrepair are usually brought on express or implied repairing covenants.¹⁸ Blackstone defined waste as “a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder”, or more broadly, “whatever does a lasting damage to the freehold or inheritance”.¹⁹ Even that may not be broad enough. “The test... seems to be whether the act which the lessor says is an act of waste by the lessee is an act which alters the nature of the thing demised.”²⁰

¹⁴ See below, para 10.26.

¹⁵ We are conscious that it is in a sense illogical that we consider the implied obligations of licensees but we do not address the responsibilities of licensors. However, as the doctrine of waste may apply to licensees, there is a danger that we would be creating an anomaly of a different kind if we disregarded such occupiers in our recommendations.

¹⁶ Law Com No 67; see above, para 1.6.

¹⁷ *Mancetter Developments Ltd v Garmanson Ltd* [1986] QB 1212, 1218, per Dillon LJ.

¹⁸ *Ibid.*

¹⁹ 2 *Commentaries*, p 281. This definition, which still appears in *Woodfall, Landlord and Tenant*, 13.108, is regarded as authoritative: see *Mancetter Developments Ltd v Garmanson Ltd*, above, at p 1218.

²⁰ *West Ham Central Charity Board v East London Waterworks Co* [1900] 1 Ch 624, 635, per Buckley J. It is a question of fact whether the act in issue does change the nature of the property let. A court will have regard to the user of the land permitted by the lease: *Hyman v Rose* [1912] AC 623, 632.

10.10 However, although waste is technically committed when *any* change is made to the inheritance, the law will not in every case provide a remedy.²¹ In what proved to be a watershed decision in 1833,²² Denman CJ explained that “if the value be very small, the consequences of waste do not attach”.²³ He went on to lay down the principle that no act could be waste unless it was “injurious to the inheritance”²⁴ in one of three ways—

- (i) it diminished the value of the estate; or
- (ii) it increased the burden on the property; or
- (iii) it impaired the evidence of title.²⁵

10.11 It has been said that “the law of waste developed piecemeal, mainly on the basis of prohibitions with unsystematic legislative assistance”.²⁶ Waste was known at common law, but applied only to estates created at law, such as a tenancy by dower. As leases for years or lives were created consensually, it was for the lessor to make express provision for waste. For “he that might and would not provide for himself, the common law would not provide”.²⁷ It was however extended to tenants for years and

²¹ See M E Bathurst, “The Strict Common Law Rules of Waste and Their Apparent Modification” (1948) 13 Conv (NS) 278; D C M Yardley, “Ameliorating Waste in England and the United States” (1956) 19 MLR 150.

²² *Doe d Grubb v Earl of Burlington* (1833) 5 B & Ad 507; 110 ER 878.

²³ (1833) 5 B & Ad 507, 516; 110 ER 878, 881. This was true in both courts of law and courts of equity. The practice at common law was, that if the jury returned a verdict for the plaintiff but assessed damages for some small sum (“twelve pence” according to Blackstone, 3 *Commentaries*, p 228), judgment was actually entered for the defendant. Equity followed the law and equitable relief (in the form of an injunction) would be refused in such cases: see *Barry v Barry* (1820) 1 Jac & W 651, 654; 37 ER 516, 517; *Doherty v Allman* (1878) 3 App Cas 709, 725, 733.

²⁴ (1833) 5 B & Ad 507, 517; 110 ER 878, 882. See too *Barret v Barret* (1628) Het 34, 35; 124 ER 321, 322; and *Jones v Chappell* (1875) LR 20 Eq 539, 541, where Jessel MR said that “in order to prove waste you must prove an injury to the inheritance”.

²⁵ It was the risk of impairment of the evidence of title that underlay the rule that the ploughing up of pasture for cultivation was waste: see *Simmons v Norton* (1831) 7 Bing 640; 131 ER 247. It was explained in that case that it was waste for another reason : it would take many years to restore such land once ploughed to its original state.

²⁶ S F C Milsom, *Novae Narrationes* (1963) 80 Selden Society, exc. Sir Edward Coke provided an outline the history of the action: see 2 *Institutes*, p 145. In *Woodhouse v Walker* (1880) 5 QBD 404, Lush J gave a more elaborate account of it.

²⁷ Coke, 2 *Institutes*, p 145; See *Countess of Shrewsbury’s Case* (1600) 5 Co Rep 13b; 77 ER 68.

for lives as a result of the Statute of Marlborough²⁸ 1267.²⁹ Although procedure was by writ of prohibition in the early days of the action, this was replaced by writ of summons in 1285.³⁰ During the sixteenth and seventeenth centuries, this was superseded in turn by the action on the case for waste.³¹ This had many practical advantages over the old action.³²

10.12 Waste is a tort.³³ At one time the remedies available against the tortfeasor were draconian. The Statute of Gloucester 1278³⁴ provided that a party who was guilty of waste should forfeit “the Thing he hath wasted, and moreover shall recompense thrice so much as the Waste shall be taxed at”.³⁵ This early example of punitive damages remained on the statute book until its eventual repeal in 1879.³⁶ The action proved to be ineffective as a means of recovering from the tenant the property wasted, and in practice, only damages were sought. When the action on the case came to be employed in preference to the old writ of waste, recovery of the term by the landlord was not possible in any event.³⁷ Damages are now assessed according to the usual measure in tort proceedings. The tortious nature of waste remains of some importance.

²⁸ Or “Marlbridge”: Coke, *op cit.*

²⁹ Chapter 23 of this statute provided that “fermors, during their terms, shall not make waste”. According to Coke, a “fermor” was someone who held land by a lease for a life or lives, or for a term of years, whether or not by deed: 2 *Institutes*, p 145.

³⁰ Second Statute of Westminster 1285, c 14.

³¹ See, eg *Jeremy v Lowgar* (1596) Cro Eliz 461*; 78 ER 714.

³² See Serjeant Edward Vaughan Williams’s notes to *Greene v Cole* (1670) 2 Wms Saund 252; 85 ER 1037, where a detailed account is given of the development and characteristics of the action on the case for waste. The old writ of waste was eventually abolished by the Real Property Limitation Act 1833 (3 & 4 Will IV, c 27, s 36).

³³ *Defries v Milne* [1913] 1 Ch 98; *Mancetter Developments Ltd v Garmanson Ltd* [1986] QB 1212.

³⁴ Chapter 5.

³⁵ The action of waste was, as Blackstone described it, “a mixed action; partly real, so far as it recovers land, and partly personal, so far as it recovers damages. For it is brought for both those purposes...”: 3 *Commentaries*, p 228.

³⁶ Civil Procedure Repeal Act (42 & 43 Vict, c 59.).

³⁷ See Serjeant Williams’s notes to *Greene v Cole* (1670) 2 Wms Saund 252; 85 ER 1037, 1038. This was because specific relief could not be given in an action on the case.

- 10.13 First, the right to sue for it cannot be assigned.³⁸ Nor will the right to sue pass on an assignment of the landlord's reversion as does a right to sue for a pre-existing breach of covenant in a lease granted before 1996.³⁹
- 10.14 Secondly, waste lies against the tenant not just for his own acts, but for those of any other person. "It is common learning, that every lessee of land... is liable in an action of waste to his lessor, for all waste done on the land in lease, by whomsoever it may be committed."⁴⁰ In such a case, the lessee does of course have his remedy in trespass against the wrongdoer.⁴¹
- 10.15 Thirdly, a director of a company who procures or brings about the commission of a tort by the company "may be personally liable in damages to the injured party for the tort although the tort was the act of the company".⁴² By contrast, a director of a company incurs no personal liability if, when acting within the scope of his authority, he procures or causes a breach of a contract between the company and some third party.⁴³
- 10.16 A lease often contains repairing covenants on the part of the tenant. If he is in breach of his repairing obligations, the landlord should in principle have the choice of suing the tenant either in tort for waste or in contract on the covenant.⁴⁴ That he can do so was in fact settled as long ago as 1776 in *Kinlyside v Thornton*,⁴⁵ where De Grey CJ asked rhetorically, "[b]ecause the landlord, by the special covenant, acquires a new

³⁸ *Defries v Milne*, above.

³⁹ Law of Property Act 1925, s 141; *Re King* [1963] Ch 459. In leases granted after 1995, the right to sue for breaches of covenant committed prior to the assignment of the reversion does not pass to the assignee unless there has been an express assignment: Landlord and Tenant (Covenants) Act 1995, s 23.

⁴⁰ *Attersoll v Stevens* (1808) 1 Taunt 183, 198; 127 ER 802, 808 - 809, *per* Heath J.

⁴¹ See Coke, 2 *Institutes*, p 146.

⁴² *Mancetter Developments Ltd v Garmanson Ltd* [1986] QB 1212, 1217, *per* Dillon LJ. See *Rainham Chemical Works Ltd v Belvedere Fish Guano Co Ltd* [1921] 2 AC 465, 476; *Performing Right Society Ltd v Cyril Theatrical Syndicate Ltd* [1924] 1 KB 1, 14.

⁴³ *Said v Butt* [1920] 3 KB 497, 506.

⁴⁴ There are of course many instances where a plaintiff has the choice of suing the defendant in either tort or contract: see, eg *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384 (liability of solicitor).

⁴⁵ (1776) 2 W Bl 1111, 1113; 96 ER 657.

remedy, does he therefore lose his old?" That decision was followed⁴⁶ and later cited with apparent approval both by the Court of Appeal⁴⁷ and in the House of Lords.⁴⁸ More recently however, the landlord's right to pursue his alternative remedies has been called into question. In *Mancetter Developments Ltd v Garmanson Ltd*,⁴⁹ Kerr LJ doubted whether the law went "so far as to permit an alternative claim in contract or tort in the majority of such cases".⁵⁰ The law cannot be regarded as finally settled therefore.

Types of waste

10.17 There are two principal types of waste, voluntary and permissive. Blackstone described the former as "a crime of commission, as by pulling down a house", and the latter as "a matter of omission only, as by suffering it to fall for want of necessary reparations."⁵¹ Examples of voluntary waste include—

- (i) any form of destruction of the property, such as the removal of soil,⁵² the demolition of a building,⁵³ or the dismantling of internal walls and the removal of fixtures and fittings;⁵⁴

⁴⁶ See *Marker v Kenrick* (1853) 13 CB 188, 198; 138 ER 1169, 1173, where Jervis CJ commented that "*Kinlyside v Thornton* decided expressly that a lessor may sue for waste in an action upon the case, although the lease contains a covenant upon which the lessor might maintain an action for the same wrong." Maule J observed that the case showed the "lessor may have either remedy": 13 CB at 199; 138 ER at 1174.

⁴⁷ *Defries v Milne* [1913] 1 Ch 98, 108. See too *Marsden v Edward Heyes Ltd* [1927] 2 KB 1, 7 - 8, where Atkin LJ considered the converse situation: "It may be that voluntary waste is the subject-matter of an action of tort, but no doubt the tenant would also be liable upon an obligation express or implied in the contract of tenancy".

⁴⁸ *Regis Property Co Ltd v Dudley* [1959] AC 370, 407.

⁴⁹ [1986] QB 1212, 1223.

⁵⁰ The earlier authorities were neither cited nor considered. Nor is it apparent that Dillon LJ (the other judge in the majority) agreed with Kerr LJ: see *ibid* at p 1220.

⁵¹ 2 *Commentaries*, p 281.

⁵² *Attersoll v Stevens* (1808) 1 Taunt 183; 127 ER 802; *Whitham v Kershaw* (1885) 16 QBD 613.

⁵³ *Coke on Littleton*, 53a.

⁵⁴ *Marsden v Edward Heyes Ltd* [1927] 2 KB 1. See too the Irish case of *North v Guinan* (1829) Beat 342, where Hart LC held that a leasehold house could not be partitioned, because to do so would involve the commission of waste: "the tenant is guilty of waste if he pulls down doors, windows, wainscot, or in any way alters the material form and features of the demised premises": *ibid* at p 343.

- (ii) alterations to the property, such as changing the nature of the cultivation of the land,⁵⁵ building on agricultural land⁵⁶ or turning it into a cemetery,⁵⁷ or employing as a rubbish dump land which had been leased for use as a reservoir;⁵⁸ and
- (iii) failing to make good damage caused by the removal of tenants' fixtures on the termination of a lease.⁵⁹

10.18 One particular type of voluntary waste of a rather singular kind is ameliorating waste. Because it is waste to alter in any way the nature of the property leased,⁶⁰ a tenant who improves the land technically commits waste.⁶¹ However, where the tenant's conduct has improved the value of the land,⁶² he will not be liable for waste. It is clear that any objections to improvements on the ground that they will alter the evidence of title have for over a century been regarded as obsolete, not least because of the availability of accurate maps.⁶³

10.19 Authorities on a tenant's liability for permissive waste are not easy to find, not least because of uncertainties as to when it is applicable. It is also remarkably difficult to ascertain the content of this liability. If the tenant is liable should he allow the property to fall down, that implies that he is under a positive obligation to take steps to prevent such an occurrence. However it is far from clear how far he can be regarded as being under a positive duty to repair or maintain the property. In *Warren v Keen*,⁶⁴ Denning LJ expressed the view that "[a]part from express contract, a tenant owes no duty to the landlord to keep the premises in repair. The only duty of the tenant is to use the

⁵⁵ *Martin v Coggan* (1824) 1 Hog 120 (Ireland); *Simmons v Norton* (1831) 7 Bing 640; 131 ER 247(ploughing up ancient pasture).

⁵⁶ *Lord Grey de Wilton v Saxon* (1801) 6 Ves 106; 31 ER 961.

⁵⁷ *Hunt v Browne* (1837) Sau & Sc 178 (Ireland).

⁵⁸ *West Ham Central Charity Board v East London Waterworks Co* [1900]1 Ch 624.

⁵⁹ *Mancetter Developments Ltd v Garmanson Ltd* [1986] QB 1212.

⁶⁰ See above, para 10.9.

⁶¹ *Doherty v Allman* (1878) 3 App Cas 709, 723.

⁶² And has not therefore diminished the value of the land or increased the burdens upon it: see above, para 10.10.

⁶³ *Doherty v Allman*, above, at pp 725 - 726, 735. This case, which is the leading authority on ameliorating waste, is of some interest for another reason. The House of Lords had before it (as early as 1878) photographic evidence of the state of the property that the tenant was proposing to improve: see p 717.

⁶⁴ [1954] 1 QB 15, 20.

premises in a husbandlike, or what is the same thing, a tenantlike manner”.⁶⁵ The uncertainties as to the precise scope of permissive waste are reflected in the authorities, examined below,⁶⁶ in which the courts considered when, if at all, particular types of tenant could be liable for its commission. In one decision, the court went so far as to hold that “an action on the case does not lie against a tenant for permissive waste”.⁶⁷ Certainly courts of equity took no heed of permissive waste and equitable relief has never been granted in such cases.⁶⁸

10.20 It is easier to state what conduct will *not* amount to the commission of permissive waste than what will. Thus it is not permissive waste—

- (i) to allow a property to fall down if it was derelict at the time when the lease was granted;⁶⁹ or
- (ii) to use the premises reasonably for the purposes for which they were intended even if as a consequence the premises collapse;⁷⁰ or
- (iii) to leave land uncultivated;⁷¹ or
- (iv) if the property is destroyed or damaged by some natural disaster or occurrence.⁷²

10.21 However, if the destruction of the premises is the consequence of the tenant’s negligence, that would amount to permissive waste.⁷³ Like all forms of waste, permissive waste necessarily involves a substantial (and not merely a trivial) injury to the reversioner’s interest. The interrelationship between permissive waste and a

⁶⁵ For this obligation, see below, para 10.26.

⁶⁶ Paragraphs 10.22 - 10.24.

⁶⁷ *Herne v Benbow* (1813) 4 Taunt 764, 765; 128 ER 531, 532, *per curiam*.

⁶⁸ *Powys v Blagrave* (1852) 4 De GM & G 448, 458; 43 ER 582, 586.

⁶⁹ *Coke on Littleton*, 53a.

⁷⁰ *Saner v Bilton* (1878) 7 ChD 815; *Manchester Bonded Warehouse Company Ltd v Carr* (1880) 5 CPD 507. Fair wear and tear would appear to be outside the ambit of liability for permissive waste because a tenant is excused from its consequences under his implied obligation of tenantlike user, as we explain below, para 10.28.

⁷¹ *Hutton v Warren* (1836) 1 M & W 466, 472; 150 ER 517, 520.

⁷² Blackstone, 2 *Commentaries*, 281. See *Simmons v Norton* (1831) 7 Bing 640, 648; 131 ER 247, 250 (where Tindal CJ instanced the destruction of a meadow by an “eruption of moss” or by enemies who “had landed and dug it up”).

⁷³ Blackstone, 2 *Commentaries*, 281.

tenant's obligation of "tenantlike user" (which we explain below⁷⁴) has never been satisfactorily explained.

Liability for different types of waste

TENANTS FOR YEARS AND PERIODIC TENANTS

- 10.22 A tenant for years or a periodic tenant is of course liable for voluntary waste.⁷⁵ His liability for permissive waste is a great deal less certain. Although Parke B had no doubt of it, at least as regards a tenant for years,⁷⁶ others have not shared that view.⁷⁷ Thus there is authority that permissive waste *never* lies against *any* tenant in the absence of an obligation to repair.⁷⁸ As regards periodic tenants, there must be considerable doubt as to whether they are liable for permissive waste, which does of course impose on them obligations of repair. It has therefore been held that while a tenant from year to year is bound "to use the premises in a husband-like manner", he is not required to do more than that.⁷⁹ More recently, it has been accepted that the same is true for a weekly tenant.⁸⁰ The uncertainty manifested by the authorities no doubt reflects the unease both about the very concept of permissive waste, with its implications of a positive obligation to maintain the premises, and (if it exists at all) about its interrelationship with the lessee's obligation of tenantlike user.⁸¹

TENANTS AT WILL

- 10.23 A tenancy at will arises when a tenant occupies land with the consent of the landowner, but where either party may terminate the tenancy at any time.⁸² A tenant

⁷⁴ Paragraph 10.26.

⁷⁵ Statute of Marlborough 1267, c 23; above, para 10.11. For the liability of a periodic tenant for voluntary waste, see *Marsden v Edward Heyes Ltd* [1927] 2 KB 1, 6; *Warren v Keen* [1954] 1 QB 15, 21.

⁷⁶ See *Yellowly v Gower* (1855) 11 Ex 274, 294; 156 ER 833, 842; followed in *Davies v Davies*, (1888) 38 ChD 499, 503. See too *Woodhouse v Walker* (1880) 5 QBD 404, 407.

⁷⁷ For reviews of the authorities, see Serjeant Williams's notes to *Pomfret v Ricroft* (1669) 1 Wms Saund 321, 323; 85 ER 454, 463; and *Re Cartwright* (1889) 41 ChD 532.

⁷⁸ *Herne v Benbow* (1813) 4 Taunt 764, 765; 128 ER 531, 532.

⁷⁹ *Horsefall v Mather* (1815) Holt 7, 9; 171 ER 141, 142; *per* Gibbs CJ. See to like effect: *Auworth v Johnson* (1832) 5 C & P 239; 172 ER 955; *Torriano v Young* (1833) 6 C & P 8, 12; 172 ER 1123, 1125.

⁸⁰ *Mint v Good* [1951] 1 KB 517, 522 (where Somervell LJ that "it would have been absurd... to contemplate that a man who was only a weekly tenant should be called upon to do repairs"); *Warren v Keen* [1954] 1 QB 15, 21. If a yearly tenant is not liable for permissive waste then clearly a weekly tenant should not be.

⁸¹ Considered below, para 10.26.

⁸² "A tenancy at will can only arise with the consent, express or implied of the landlord": *Wheeler v Mercer* [1957] AC 416, 427, *per* Lord Morton of Henryton. There must some form of "positive assent" by the landlord: *ibid*, at p 423, *per* Viscount Simonds.

at will is not liable for permissive waste⁸³ unless he is under an express or implied contractual obligation to repair the premises.⁸⁴ It is usually considered that a tenant at will is not liable in the tort of waste. If he commits voluntary waste, his tenancy is thereby terminated. He becomes a trespasser and can be held liable accordingly.⁸⁵ Although this analysis has been accepted in the present century,⁸⁶ doubts have been expressed as to its correctness.⁸⁷ There is much force in these doubts. It is curious that a tenancy at will should automatically terminate when the tenant commits an act of waste, regardless of the landlord's wishes. As we explain in the next paragraph, in the case where there is a mere tenancy at sufferance - which is even more exiguous than a tenancy at will - the landlord may elect whether or not to determine the tenancy should the tenant commit an act of waste. If waste does automatically determine a tenancy at will, the former tenant becomes an adverse possessor whose trespass may in time ripen into ownership, even though the landlord is quite unaware of his change of status. This particular problem did not formerly arise, because prior to 1980 a tenant at will was treated as an adverse possessor from the time that the tenancy at will commenced.⁸⁸ This ancient rule (if rule it be) has the potential for serious mischief.

TENANTS AT SUFFERANCE

10.24 A tenancy at sufferance arises where a tenant under a lease holds over after its determination and where the landlord neither agrees nor disagrees to his so doing.⁸⁹ It creates no tenure in fact. Such a "tenant" is in law an adverse possessor and time runs against the "landlord" from the time that the tenancy at sufferance commences.⁹⁰ The authorities suggest that where a tenant at sufferance commits voluntary waste, the landlord can elect whether to treat him as a trespasser, or waive the trespass and

⁸³ *Gibson v Wells* (1805) 1 Bos & Pul NR 290; 127 ER 473; *Harnett v Maitland* (1847) 16 M & W 257, 259, 262; 153 ER 1184, 1185, 1186.

⁸⁴ *Blackmore v White* [1899] 1 QB 293, 300.

⁸⁵ *Countess of Shrewsbury's Case* (1600) 5 Co Rep 13b; 77 ER 68. See too *Walgrave v Somerset* (1587) Goulds 72; 75 ER 1002.

⁸⁶ See *Warren v Keen* [1954] 1 QB 15, 21.

⁸⁷ "There is no modern case in which a tenancy has been held to have been determined in this manner, and this aspect of the law of waste is so feudal in its concepts as to make it doubtful whether a tenancy does so determine under the modern law of landlord and tenant": *Halsbury's Laws of England* (4th ed) vol 27(1) p 329, para 348n.

⁸⁸ For the rather complicated history, see Sir Robert Megarry and Sir William Wade, *The Law of Real Property* (5th ed 1984) p 1039.

⁸⁹ "...a tenant at sufferance entreth by lawfull lease, and holdeth over by wrong": *Coke on Littleton*, 57b.

⁹⁰ Sir Robert Megarry and Sir William Wade, *The Law of Real Property*, above, p 1039.

proceed against him for the tort of waste.⁹¹ A tenant at sufferance is not liable for permissive waste.

LICENSEES

10.25 It is by no means certain whether a licensee can commit waste.⁹² If waste is still to be regarded as the creature of statute, then licensees are probably outside its ambit.⁹³ However, it has been suggested that “liability for waste is not restricted to tenants, but extends to every occupier of land who is not a trespasser”.⁹⁴ The same author points out that “it is in relation to licensees and other informal occupiers that the action⁹⁵ is likely to be of greatest utility, since in most tenancies the matter will be covered by express or implied contractual obligations on the part of the tenant”.⁹⁶ Both the logic and good sense of this view are apparent, but the law of waste is not notable for its rationality. It is also dangerous to extrapolate by analogy from leases to licences.⁹⁷ There is no clear authority in point. The most that can be said is that the law of waste has been applied in a case where the status of the occupier was uncertain and may have been that of a licensee.⁹⁸

Obligation of tenantlike user

10.26 In addition to the tort of waste, there is an implied obligation on a tenant to use the premises in a “husbandlike” or “tenantlike” manner.⁹⁹ It has mainly been in issue in

⁹¹ *West v Treude* (1630) Cro Car 187; 79 ER 764; *Burchall v Hornsby* (1808) 1 Camp 360; 170 ER 985. On any basis, this outcome is very odd. If the landlord waives the trespass, the tenant becomes a tenant at will. As we explained in the previous paragraph, a tenant at will who commits waste becomes a trespasser.

⁹² Cf I J Dawson & R A Pearce, *Licences Relating to the Occupation or Use of Land* (1979) p 63.

⁹³ The Statute of Marlborough 1267, c 23, extended the common law action for waste (see above, para 10.11) to “fermors”, ie those who held under leases for life, lives or years: 2 *Coke's Institutes*, p 145.

⁹⁴ Rosy Thornton, *Property Disrepair and Dilapidations* (1992) p 24.

⁹⁵ Ie, of waste.

⁹⁶ Rosy Thornton, *op cit*, p 24.

⁹⁷ The danger can be illustrated by the decision in *Wettern Electric Ltd v Welsh Development Agency* [1983] QB 796, where the court was willing to imply a term into a contractual licence that the premises were fit for the purposes of the licensee. This was so even though, as Judge Newey QC acknowledged, no such implication would be made in a lease: see *Hart v Windsor* (1843) 12 M & W 68; 152 ER 1114.

⁹⁸ See *Mancetter Developments v Garmanson Ltd* [1986] QB 1212.

⁹⁹ See *Powley v Walker* (1793) 5 TR 373; 101 ER 208, 209; *Horsefall v Mather* (1815) Holt NP 7, 9; 171 ER 141, 142; *Auworth v Johnson* (1832) 5 C & P 239; 172 ER 955. For a valuable summary of the law, see Rosy Thornton, *Property Disrepair and Dilapidations* (1992) pp 20 - 22.

relation to periodic tenants, such as tenants from year to year and weekly tenants.¹⁰⁰ The ambit of this obligation is remarkably uncertain, and it may vary according to the type of periodic tenancy.¹⁰¹

10.27 It has been suggested that a tenant from year to year is obliged to “use and cultivate the lands in a husbandlike manner, according to the custom of the country” (where the land is agricultural) and “to keep the buildings wind and water tight”.¹⁰² Doubts have been expressed as to the correctness of the view that this obligation might impose positive obligations of repair on a tenant from year to year, except in a case where he has himself damaged the property and must make good the consequent disrepair.¹⁰³

10.28 In *Warren v Keen*,¹⁰⁴ the Court of Appeal held that a weekly tenant was not liable for breach of his obligation of tenantlike user where plaster had perished, rendering had cracked and window sills had ceased to be weatherproof simply through the passage of time and fair wear and tear. In a passage that is now always regarded as authoritative, Denning LJ found himself best able to explain the nature of the obligation by means of examples.¹⁰⁵

The tenant must take proper care of the place. He must, if he is going away for the winter, turn off the water and empty the boiler.¹⁰⁶ He must clean the chimneys, when necessary, and also the windows. He must unstop the sink when it is blocked by his waste. In short, he must do the little jobs about the place which a reasonable tenant would do. In addition, he must, of course, not damage the house, wilfully or negligently; and must see that his family and guests do not damage it: and if they do, he must repair it. But apart from such

¹⁰⁰ We know of no authority in which the implied obligation has been held to apply to a licensee.

¹⁰¹ See R E Megarry, (1954) 70 LQR 9.

¹⁰² *Wedd v Porter* [1916] 2 KB 91, 100, *per* Swinfen Eady LJ. See too Pickford LJ at p 103; *Onslow v —* (1809) 16 Ves 173; 33 ER 949, 950.

¹⁰³ *Warren v Keen* [1954] 1 QB 15, 18 - 21. See too *Marsden v Edward Heyes Ltd* [1927] 2 KB 1, 6, where Bankes LJ tentatively suggested that where a tenant had committed waste, his obligation under the implied covenant might be “to restore them to the state they would be in if he had committed no waste”.

¹⁰⁴ Above.

¹⁰⁵ [1954] 1 QB 15, 20.

¹⁰⁶ Cf *Wycombe Area Health Authority v Barnett* (1982) 5 HLR 84, 90 - 91, where it was held that a monthly tenant was not in breach of her duty of tenantlike user because she had failed to lag the pipes and had not turned off the water or kept the house heated when she was away for two nights in February.

things, if the house falls into disrepair through fair wear and tear¹⁰⁷ or lapse of time, or for any reason not caused by him, then the tenant is not liable to repair it.¹⁰⁸

10.29 In a later case,¹⁰⁹ Lord Denning (as he had since become), emphasised that the obligations not to commit waste and to use the premises in a tenantlike manner were *not* ones of repair. “They are obligations as to his conduct, and user of the premises, and so long as they are fulfilled as they ought to be, no question of repair arises.” He also considered that the obligation of tenantlike user applied even if there was a covenant by the tenant to repair the premises.¹¹⁰ The point cannot be regarded as settled however, because there is authority for the contrary view.¹¹¹

The case for reform

Introduction

10.30 The case for reform of the law governing waste and the implied obligation of tenantlike user is essentially two-fold. First, the law is inherently unsatisfactory and uncertain for the reasons which we summarise in the next paragraph. Secondly, we accept that these principles are not often invoked and are of little relevance to leases because the parties will in many instances make express provision for the conduct of the tenant and the repair of the property. However, they may be of some importance in relation to more informal relationships such as tenancies at will and sufferance and licences. In such cases waste and the implied obligation of tenantlike user may provide the only form of redress available to the landlord or licensor.¹¹² We explain this point more fully below.¹¹³

¹⁰⁷ “Reasonable wear and tear means the reasonable use of the house by the tenant and the ordinary operation of natural forces”: *Haskell v Marlow* [1928] 2 KB 45, 59, *per* Talbot J.

¹⁰⁸ See too *Marsden v Edward Heyes Ltd* [1927] 2 KB 1, 6, where Bankes LJ, although declining to define the scope of the implied obligation, suggested that a tenant might perhaps be required to “deliver up premises as they were demised to him, fair wear and tear excepted”.

¹⁰⁹ *Regis Property Co Ltd v Dudley* [1959] AC 370, 407.

¹¹⁰ *Ibid.* A decision that is sometimes cited in support of Lord Denning’s opinion, *White v Nicholson* (1842) 4 M & G 95; 134 ER 40; is by no means clear on the point.

¹¹¹ See *Standen v Christmas* (1847) 10 QB 135, 141; 116 ER 53, 56, a case which Lord Denning considered to have been incorrectly decided.

¹¹² See Rosy Thornton, *Property Disrepair and Dilapidations* (1992) p 24.

¹¹³ Paragraph 10.32.

Defects in the present law

10.31 The principal defects in the present law may be summarised as follows:

- (i) There is some uncertainty as to when liability for the tort of permissive waste arises. In particular, it is unclear whether the potential existence of such liability can ever have the effect of imposing positive obligations of repair on the tenant in the absence of an express or implied repairing covenant on his part.
- (ii) It is not entirely free from doubt whether a landlord can sue for waste where the lease contains an express repairing covenant.
- (iii) It is illogical that a tenant at will who commits waste thereupon becomes a trespasser and is liable as such and not for the tort of waste. It is uncertain whether, in such circumstances, the tenant could plead his own act of waste to establish that he had become a trespasser and was therefore capable of acquiring title to the land by adverse possession.
- (iv) It is uncertain whether a licensee can be liable for the tort of waste.
- (v) The precise interrelationship between the tort of waste and a tenant's implied obligation of tenantlike user has never been fully elucidated.
- (vi) The content of the tenant's implied obligation of tenantlike user is remarkably uncertain.
- (vii) It is not settled whether the obligation is a variable one that depends upon the form of tenure.
- (viii) It is unclear whether the implied obligation is ousted by an express repairing covenant in the tenancy.

The need to make provision for informal relationships

10.32 The case for reform rests on the fact that there may be informal relationships in which there is no certain means of ensuring that the occupier acts in a responsible manner in relation to the property. Where the relationship between the parties is not contractual, as will be the case with a tenancy at sufferance and may be so as regards a tenancy at will¹¹⁴ or a licence, the device of implying a contractual term is not available to a court to provide a means of imposing such a minimal and obvious obligation. Both licences and tenancies at will have been or are on occasions employed

¹¹⁴ A tenancy at will may be contractual: see *Javad v Aqil* [1991] 1 WLR 1007.

as a means of circumventing legislative attempts to confer security of tenure on tenants.¹¹⁵

Proposals for reform

Objectives of reform

10.33 We can see little point in retaining the present law, which blends in an uncertain amalgam principles of both tort¹¹⁶ and contract law. Any reform must provide one cause of action that applies to leases, periodic tenancies, tenancies at will and sufferance, and licences alike. That cause of action must be available whether the occupation in question is contractual or not. Consistently with our general approach to the relationship of landlord and tenant in this report, the obligations which we propose should operate by way of a default so that the parties are free to modify or exclude them. There must be certainty not only as to the relationships to which these obligations apply, but also as to their content.

10.34 In formulating our recommendations we have revisited earlier proposals made by the Commission on this subject.¹¹⁷ Our proposals are in two parts. First, we recommend the abolition of the application of the law of waste to tenancies and licences. Secondly, we propose by way of replacement, the creation of an implied obligation on the part of tenants and licensees to take reasonable care of the property which they occupy.

Recommendations

ABOLITION OF THE APPLICATION OF THE LAW OF WASTE TO TENANCIES AND LICENCES

10.35 **We recommend that the law of waste should no longer apply to—**

- (a) **a tenant holding under a lease;**
- (b) **a tenant at will;**
- (c) **a tenant at sufferance; or**
- (d) **a licensee of land.** (Draft Bill, Cl 11(1).)

We expressly recommend that the law of waste should not *apply* to these particular relationships. The effect of this recommendation, if implemented, will be twofold.

¹¹⁵ The attempt to use licences as a means of evading the provisions of the Rent Act 1977 received a major setback in *Street v Mountford* [1985] AC 809. By contrast, tenancies at will have proved to be an effective means of taking business premises outside the ambit of Part II of the Landlord and Tenant Act 1954: *Javad v Aqil*, above.

¹¹⁶ And two torts at that - waste and trespass.

¹¹⁷ Obligations of Landlords and Tenants (1975) Law Com No 67, para 139, and the attached Landlord and Tenant (Implied Covenants) Bill, cl 12.

First, no action of waste will lie against tenants and licensees. Secondly, it will no longer be the case (if indeed it is so at present) that a tenant at will who commits waste will automatically become a trespasser or that where a tenant at sufferance commits waste, the landlord may elect either to treat the tenant as a trespasser or proceed against him for waste.¹¹⁸

10.36 **Our recommendations do not affect the application of the tort of waste as it applies to any other relationships¹¹⁹ and in particular to any person who occupies any property as a beneficiary under the terms of any will or trust.¹²⁰**

We do not consider that it would be appropriate without full examination and consultation to abolish the law of waste in its entirety. There is no equivalent to the obligation of tenantlike user that applies between life tenant and remainderman. This would make it much more difficult to fashion an appropriate alternative remedy for the remainderman. There may of course be cases where both the tort of waste and our proposed new statutory implied duty to take proper care of the premises would apply. If, for example, a leasehold was held on trust for a life tenant, who then committed acts of voluntary waste, that life tenant might be liable to the remainderman under the trust for the tort of waste and for breach of the implied statutory obligation to take care of the premises to the landlord. In each case it is a different reversion that is damaged by the act.

THE CREATION OF A NEW IMPLIED COVENANT OR DUTY

10.37 **To replace both the law of waste and the implied covenant of tenantlike user, we recommend the creation of an implied statutory covenant or duty by which any tenant or licensee would undertake—**

- (a) **to take proper care of the premises which had been let to him or of which he was in occupation or possession;**
- (b) **to make good any damage wilfully done or caused to the premises by him, or by any other person lawfully in occupation or possession of or visiting the premises; and**
- (c) **not to carry out any alterations or other works the actual or probable result of which is to destroy or alter the character of the premises or any part of the premises to the detriment of the interest of the landlord or licensor. (Draft Bill, Cls 9(1); 10(1), (2).)**

¹¹⁸ See above, paras 10.23, 10.24.

¹¹⁹ For example, a mortgagee in possession. Mortgage terms are excluded from our proposals: see Draft Bill, Cl. 15.

¹²⁰ For accounts of the law of waste as it applies to life tenants, see Sir Robert Megarry and Sir William Wade, *The Law of Real Property* (5th ed 1984) pp 95 - 98; E H Burn, *Cheshire and Burn's Modern Law of Real Property* (15th ed 1994) pp 269 - 273.

The covenant of tenantlike user that is presently implied at common law would be abolished. (Draft Bill, Cl 11(2).)

10.38 **Where the premises included in the tenancy or licence consist of part only of a building, we further recommend that the covenant or duty to take proper care in paragraph (a) of the previous paragraph should apply equally to any common parts of the building.** (Draft Bill, Cls 9(2); 10(3).)

10.39 These implied obligations would take effect as an implied statutory covenant or condition on the part of a tenant under a lease and a contractual licensee¹²¹ and as a statutory duty as regards a tenant at will or sufferance or a bare licensee.¹²² The objective of these very basic obligations is to capture the essence of what the law of waste and the implied covenant of tenantlike user are together intended to achieve and to restate them in clarified unitary form. The implied covenant or duty imposes positive obligations of *repair* on the tenant or licensee only where wilful damage occurs for which he is responsible or where he does something which changes the character of the premises. Otherwise, the obligation is one of carrying out basic and routine maintenance.

EXCLUDING THE COVENANT OR DUTY

10.40 As we have indicated above,¹²³ we intend that the parties to a tenancy¹²⁴ or licence should be free to exclude or modify the implied covenant or duty. However, as the objective of the implied obligation is different from the implied default covenant to repair that we have recommended in Part VII of this report,¹²⁵ the means by which it may be excluded or modified are not the same. The purpose of the implied default covenant is to encourage parties to make their own arrangements for the repair of the property comprised in the lease. The objective of the present obligation is, by contrast, to ensure that a person who is in lawful possession or occupation of property assumes certain very basic responsibilities for the reasonable care of it. Furthermore, we envisage that this obligation is likely to be of the greatest relevance in the most informal of relationships.¹²⁶ We intend that it should apply whether the relationship arises by means of an instrument made in writing or without any formality.¹²⁷ We do

¹²¹ Draft Bill, Cls 9(1); 10(5).

¹²² See Draft Bill, Cls 10(1), (4).

¹²³ Paragraph 10.33.

¹²⁴ Whether for a term of years, at will or at sufferance.

¹²⁵ See above, paras 7.4 - 7.6.

¹²⁶ The implied repairing covenant applies only to leases that are granted in writing or by deed and not to those granted orally: see above, para 7.15.

¹²⁷ In the case of a tenancy at sufferance at least, it may arise without any agreement as such between the parties.

not propose that it should be excluded merely because the person in occupation or possession enters into an enforceable undertaking to carry out all or some repairs to or to maintain the premises. In such a case, the landlord or licensor will be free to choose whether he wishes to enforce the express or the implied obligation.¹²⁸

10.41 In the light of these considerations **we recommend that the parties should be free to exclude or modify the implied covenant or duty by express agreement. They may do this whether or not the relationship from which the occupation or possession of the tenant or licensee derives arose by written instrument, by oral agreement or by implication from the circumstances. The agreement may be made before or subsequent to the creation of the tenancy or licence. (Draft Bill, Cls 9(3), (4); 10(6), (7).) The formal requirements for excluding or modifying the covenant or duty should be as follows:—**

- (a) **Where the relationship was created by some written instrument, it will be capable of exclusion or modification only by an express agreement in writing.**
- (b) **In all other cases, it may be excluded by express oral agreement. (Draft Bill, Cls 9(3), 10(7).)**

It should be noted that in a case where it is alleged that the covenant or duty has been excluded by oral agreement, the onus of proving that this is so will rest on the party asserting it. Given the very basic nature of the covenant or duty that we propose, such an onus is not likely to be discharged lightly.

REMEDIES

10.42 In the case where the obligation is implied into a lease or a contractual licence, the usual contractual remedies for breach of covenant or contract will exist, including a right to claim damages and, in the case of a lease which contains a right of re-entry for breach of covenant, a right to take steps to forfeit that lease. In so far as the obligation requires a tenant under a lease to undertake any work of repair, the landlord would of course be able to seek specific performance of the implied covenant (subject of course to the court's discretion) under the proposals which we make in Part IX of this report.¹²⁹

10.43 Cases of tenancies at will or sufferance and bare licences are more difficult. Although tenancies at will may be created for valuable consideration, this is probably still the exception rather than the rule. To overcome the problem, **we recommend that in**

¹²⁸ As we have explained in para 10.29 above, this may be the law at present as regards the implied obligation of tenantlike user.

¹²⁹ See above, para 9.32.

relation to tenancies at will or sufferance and bare licences, the tenant or licensee shall, for the purposes of assessing damages for breach of the implied statutory duty, be deemed to have entered into a covenant with the licensor or landlord for valuable consideration, in the terms of the duty in question. (Draft Bill, Cl. 10(4).) This will make it clear that damages are to be assessed on a contractual basis in the same way as with leases and contractual licences. Clearly as regards relationships as ephemeral as tenancies at will¹³⁰ and sufferance and bare licences, the equitable remedy of specific performance is wholly inappropriate. In any event, it is only as regards a claim for damages (and for no other purpose) that the obligation is deemed to have been entered into as a covenant for valuable consideration.

COMMENCEMENT

10.44 **We recommend that these proposals should apply only to leases, tenancies at will or sufferance, and licences which are granted, created or arise after the commencement of the Act.** (Draft Bill, Cl 17(3).) We have already explained how our proposed commencement provisions will apply in relation to leases which are granted after the Act comes into force pursuant to some prior agreement, court order, option or right of pre-emption.¹³¹ These provisions will be applicable in the same way to both licences and tenancies at will, though in practice we suspect that few (if any) of these are likely to arise in consequence of such prior agreements or orders. Tenancies at sufferance arise *only* where the landlord has not assented to the tenant holding over after the expiry of his lease. The tenancies at sufferance affected by our proposals are those where the tenant holds over when his lease has terminated after the commencement of the Act.

¹³⁰ Even those granted for valuable consideration.

¹³¹ See above, para 7.31.

PART XI SUMMARY OF RECOMMENDATIONS

- 11.1 In this Part we summarise our principal recommendations, referring where appropriate to the paragraphs of the report where the recommendations are set out and to the relevant provisions of the draft Bill at Appendix A. Except in relation to the proposals in relation to specific performance in Part IX of this Report, tenancies of agricultural holdings and farm business tenancies are excluded from our recommendations. (Paragraph 1.7, n 13; Draft Bill Cls 2(1); 6(1); 12.)

PART II - THE MEANING OF “REPAIR”

- 11.2 We make no recommendation to change or codify the definition of what constitutes a “repair” but consider that its meaning should continue to be left to judicial decision. (Paragraph 2.15.)

PART VII - IMPLIED TERMS

First implied covenant

- 11.3 We recommend that there should be implied into every lease, other than—
- (a) a lease of a dwelling-house for a term of less than seven years within the provisions of sections 11 to 15 of the Landlord and Tenant Act 1985;
 - (b) a lease of an agricultural holding;
 - (c) a farm business tenancy; or
 - (d) an oral lease;

a covenant that the landlord shall keep the premises in repair. (Paragraph 7.10; Draft Bill, Cls 1(1); 2(1).)

- 11.4 The standard of repair should be that which is appropriate having regard to the age, character and prospective life of the premises and to their locality. (Paragraph 7.10; Draft Bill, Cl 1(3).)
- 11.5 The covenant would apply both to the whole of the premises let and to each and every part of them. (Paragraph 7.10; Draft Bill, Cl 1(1).)

Second implied covenant

- 11.6 We recommend that a repairing covenant on the part of the landlord should be implied into any lease (other than those excluded in paragraph 11.3) where—
- (a) the premises which are leased form part only of a building; and

- (b) the landlord has for the time being an estate or interest either—
 - (i) in some part of that building; or
 - (ii) in some property which is subject to an easement or a licence in favour of the tenant;

which does not form part of the premises included in the lease (“associated premises”). (Paragraphs 7.26, 7.30; Draft Bill, Cl 1(2).)

11.7 We recommend that the landlord should be under an implied obligation to keep each and every part of such associated premises in repair to such standard as may be appropriate having regard to such of the following matters as may be relevant, namely the age, character and prospective life of the premises in question and to the locality in which they are situated. (Paragraph 7.27; Draft Bill, Cl 1(3).)

11.8 We recommend that it should be a defence to the action on the second implied covenant that the landlord had used all reasonable endeavours to obtain the rights necessary to carry out the work required, but had been unable to secure them. (Paragraph 7.28; Draft Bill, Cl 3(2).)

11.9 We recommend that there should be no obligation on the landlord to carry out any repairs under the second implied covenant unless the disrepair is such as to affect the tenant’s enjoyment of—

- (i) the property leased to him;
- (ii) the common parts of the building of which that property forms part; or
- (iii) any easement or licence over other property of the landlord. (Paragraph 7.29; Draft Bill, Cl 1(5).)

Provisions applicable to both covenants

11.10 Neither covenant should apply where—

- (i) there was an express repairing obligation in relation to all of the relevant premises either in the lease itself or in an agreement by the parties; or
- (ii) the parties had made an express agreement that excluded its operation; or
- (iii) a repairing obligation was either imposed on one of the parties by any other statute, or would have been if it had not been effectively excluded. (Paragraphs 7.10, 7.30; Draft Bill, Cls 2(2), (3).)

For these purposes, a “repairing obligation” would mean an obligation both to repair the premises or to keep them in repair, and to make and to keep them fit for human habitation. (Paragraphs 7.10, 7.30; Draft Bill, Cl 2(6).)

11.11 The parties would be free to modify either covenant by express agreement. (Paragraphs 7.10, 7.30; Draft Bill, Cl 2(4).)

11.12 Any exclusion or modification would have to be made in writing, either in the lease itself or in some collateral agreement made before or after the grant of the lease. (Paragraphs 7.20, 7.30; Draft Bill, Cl 2(5).)

11.13 We make the following subsidiary recommendations:—

(a) To avoid the possible trap that parties may not appreciate the significance of an implied covenant to *keep in repair*, we recommend that its meaning should be defined so as to make it clear that the obligation is both to *put* the premises in repair at the commencement of the term and to *keep* it in repair for the duration of the lease. (Draft Bill, Cls1(6)(a), 15(1).)

(b) Where the covenant to keep in repair is implied, the landlord should have a right to enter the premises on giving 24 hours’ notice in writing to the occupier, to enable him or his authorised agent to inspect the condition and the state of repair of the premises. (Draft Bill, Cl 3(1).)

(c) By way of exception to the implied repairing covenant, the landlord should not be required to undertake any of the following matters:

(i) any work of repairs that the tenant is obliged to carry out under his implied covenant to take proper care of the premises;

(ii) the rebuilding or reinstatement of the premises in whole or in part if they are destroyed by inevitable accident; and

(iii) the repair of any tenant’s fixtures. (Draft Bill, Cl 1(4).)

(Paragraphs 7.11, 7.30.)

Commencement

11.14 We propose that the recommendations in this Part should apply only to new tenancies. Our recommendations will apply only to leases which are granted on or after the date on which the Act implementing this report comes into force otherwise than in pursuance of—

(a) an agreement entered into before that date; or

- (b) an order of a court made before that date. (Paragraph 7.31; Draft Bill, Cl 17(3).)

11.15 For these purposes, where a lease is granted pursuant to an option or a right of pre-emption which was itself granted before the Act came into force, it will be regarded as falling within (a), above. (Paragraph 7.31; Draft Bill, Cl 17(4).)

PART VIII - FITNESS FOR HUMAN HABITATION

The general rule

11.16 Subject to certain exceptions which we explain in paragraph 11.24, we recommend that there should be implied into a lease of a dwelling-house which is for a term of less than seven years a covenant by the lessor—

- (a) that the dwelling-house is fit for human habitation at the commencement of the lease; and
- (b) that the lessor will keep it fit for human habitation during the lease. (Paragraph 8.35; Draft Bill, Cls 5(1), (3).)

11.17 We recommend that the implied obligation of fitness should not require the lessor—

- (a) to carry out any works or repairs for which the tenant is liable by virtue either of the implied obligation to take proper care of the premises (explained in paragraph 11.41) or under some express covenant having the same effect;
- (b) to rebuild or reinstate the house if it is destroyed by inevitable accident; and
- (c) to keep in repair or maintain any tenants' fixtures. (Paragraph 8.36; Draft Bill, Cl 5(4).)

11.18 We also recommend that the landlord should not be liable on the implied covenant in two circumstances—

- (a) where the principal cause of the unfitness is some breach of covenant by the lessee; or
- (b) where the unfitness was caused by disrepair for which the landlord was not responsible because of the exclusion or modification of his liability under section 11 of the Landlord and Tenant Act 1985 to repair. (Paragraph 8.37; Draft Bill, Cl 5(5).)

11.19 We recommend that a landlord should not be liable under the implied covenant if the property cannot be made fit for human habitation at reasonable expense. (Paragraph 8.39; Draft Bill, Cl 5(5).)

11.20 We recommend that it should no longer be possible to exclude the obligation of fitness by granting a tenant a lease for three years or more on the terms that he makes the property fit. (Paragraph 8.40.)

The premises to which the obligation would apply

11.21 We recommend that the implied obligation should apply to any lease under which a dwelling-house is let wholly or mainly for human habitation. (Paragraph 8.41; Draft Bill, Cl 5(1).) For these purposes a dwelling-house should be defined to include all or any part of a building and any yard, garden, outhouse or appurtenance belonging to the building or usually enjoyed with it. (Paragraph 8.41; Draft Bill, Cls 7(4), 15(1).)

The leases to which the obligation would apply

11.22 We recommend that the implied obligation should apply to a lease of such premises for a term of less than seven years. (Paragraph 8.42; Draft Bill, Cl 5(1).) In determining whether a lease is one to which the implied obligation applies, we recommend that the anti-avoidance provisions that apply to the implied obligation to repair in leases granted for a term of less than seven years should apply. (Paragraph 8.42; Draft Bill, Cls 5(6), (7).)

11.23 We further recommend that the obligation would also apply to agricultural workers who occupy other than as tenants a “tied cottage” as a term of their employment. (Paragraph 8.42; Draft Bill, Cls 6(2), (3).)

11.24 We recommend that the implied fitness obligation should not apply to—

- (a) a lease which is tenancy of an agricultural holding or a farm business tenancy; (Paragraph 8.43; Draft Bill, Cl 6(1).)
- (b) leases to those bodies listed in section 14(4) and 14(5) of the Landlord and Tenant Act 1985; (Paragraph 8.44; Draft Bill, Cl 6(1).) or
- (c) a lease of a dwelling-house if that house—
 - (i) is on land which at the time of the grant of that lease is either held or has been acquired (whether compulsorily or by agreement) for development by an authority which possesses powers of compulsory acquisition;
 - (ii) is being used by that authority to provide temporary housing accommodation pending development of the land; and

- (iii) is of a standard that is adequate for the time being. (Paragraph 8.49; Draft Bill, Cl 6(1), referring to Cl 4.)

11.25 For these purposes—

- (i) an “authority possessing compulsory purchase powers” means any person or body or persons (including a government department) which is either authorised to acquire an interest land compulsorily, or could be authorised to do so; and
- (ii) “development” has the same meaning as in section 55(1) of the Town and Country Planning Act 1990, namely the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land. (Paragraph 8.50; Draft Bill, Cl 6(1), referring to Cl 4.)

11.26 We recommend that there should be a further exception to the implied covenant to repair in section 11 of the Landlord and Tenant Act 1985 for land held or acquired for development. This should be in the same terms as the exception which we have proposed for the implied obligation of fitness. (Paragraph 8.52; Draft Bill, Cl 4.)

Landlord’s right of entry

11.27 We recommend that in any lease to which the proposed implied covenant of fitness applies, the landlord should have the right to enter and view the state and condition of the premises at reasonable times of the day, on giving to the occupier 24 hours’ notice in writing. (Paragraph 8.53; Draft Bill, Cl 8(1).)

The fitness standard

11.28 We recommend that in determining whether a dwelling-house is fit for human habitation for the purposes of the implied obligation of fitness, the criteria should be the same as those applied in section 604 of the Housing Act 1985 (as amended). (Paragraph 8.54; Draft Bill, Cls 7(1) - (3).)

11.29 We recommend that where the dwelling-house let forms part of a building, the criteria for fitness should include the additional requirements listed in section 604(2) of the Housing Act 1985. (Paragraph 8.55; Draft Bill, Cls 7(4), (5).)

11.30 We recommend that if the premises have already been let by the landlord when the need for the works arises, it shall be a defence to an action on the implied fitness covenant that he had used all reasonable endeavours to obtain such rights as would have enabled him to carry out the repairs, but had been unable to obtain them. (Paragraph 8.56; Draft Bill, Cl 8(2).)

11.31 We recommend that the Secretary of State should have power to amend the criteria for fitness by statutory instrument. (Paragraph 8.58; Draft Bill, Cls 7(6), (7).)

11.32 **Commencement**

We recommend that the proposal contained in this part should apply only to new tenancies (paragraph 8.59; Draft bill (Cl 17(3) and (4).)

PART IX - SPECIFIC ENFORCEMENT OF REPAIRING COVENANTS

11.33 We recommend that:

- (a) a court should have power to decree specific performance of a repairing obligation in any lease or tenancy (including statutory tenancies);
- (b) the remedy should be available—
 - (i) to a landlord, a tenant or any other party to the lease in respect of a breach of a repairing obligation by another party;
 - (ii) notwithstanding any equitable rule restricting the scope of the remedy, such as the rule against partial performance; and
- (c) the remedy should not be granted as of right, but in the court's discretion whenever the court thinks fit, and subject of course to the usual equitable defences. (Paragraph 9.32; Draft Bill, Cl 13(1).)

11.34 For these purposes, a repairing obligation would be widely defined (in the same terms as it is at present in section 17(2) of the Landlord and Tenant Act 1985) as a covenant to repair, maintain, renew, construct or replace any property. (Paragraph 9.32; Draft Bill, Cl 13(6).)

11.35 We further recommend that a tenant should be able to seek specific performance in respect of a breach of an obligation by the landlord—

- (a) that the premises should be fit for human habitation at the commencement of the lease; and
- (b) that they should be kept fit during the tenancy. (Paragraph 9.33; Draft Bill, Cl 13(6).)

Commencement

11.36 We recommend that our proposals on the specific performance of covenants to repair and keep fit, when implemented, should be applicable to all leases (including leases of agricultural holdings and farm business tenancies), whenever granted, from the date

on which the Act comes into force. They would however apply only to proceedings commenced on or after that date. (Paragraph 9.34; Draft Bill, Cl 17(5).)

Other matters

11.37 We have decided to make no recommendations to change the existing principles which govern—

- (a) the assessment of damages for breach by a tenant of a repairing covenant in a lease (though we intend to keep under review the possible repeal of section 18 of the Landlord and Tenant Act 1927); (Paragraph 9.39.) or
- (b) a landlord's rights to enter the premises to carry out repairs where the tenant fails to do so. (Paragraph 9.40.)

Repairing obligations and the Crown

11.38 We recommend that both the proposals made in this report and sections 11 - 16 of the Landlord and Tenant Act 1985 should bind the Crown. (Paragraph 9.42; Draft Bill, Cl 14.)

PART X -WASTE

Abolition of the application of the law of waste to tenancies and licences

11.39 We recommend that the law of waste should no longer apply to—

- (a) a tenant holding under a lease;
- (b) a tenant at will;
- (c) a tenant at sufferance; or
- (d) a licensee of land. (Paragraph 10.35; Draft Bill, Cl 11(1).)

11.40 Our recommendations do not affect the application of the tort of waste as it applies to any other relationship and in particular to any person who occupies any property as a beneficiary under the terms of any will or trust. (Paragraph 10.36.)

The creation of a new implied covenant or duty

11.41 To replace both the law of waste and the implied covenant of tenantlike user, we recommend the creation of an implied statutory covenant or duty by which any tenant or licensee would undertake—

- (a) to take proper care of the premises which had been let to him or of which he was in occupation or possession;

- (b) to make good any damage wilfully done or caused to the premises by him, or by any other person lawfully in occupation or possession of or visiting the premises; and
- (c) not to carry out any alterations or other works the actual or probable result of which is to destroy or alter the character of the premises or any part of the premises to the detriment of the interest of the landlord or licensor. (Paragraph 10.37; Draft Bill, Cls 9(1); 10(1), (2).)

The covenant of tenantlike user that is presently implied at common law should be abolished. (Paragraph 10.37; Draft Bill, Cl 11(2).)

11.42 Where the premises included in the tenancy or licence consist of part only of a building, we further recommend that the covenant or duty to take proper care in paragraph (a) should apply equally to any common parts of the building. (Paragraph 10.38; Draft Bill, Cls 9(2); 10(3).)

11.43 We recommend that the parties should be free to exclude or modify the implied covenant or duty by express agreement. They may do this whether or not the relationship from which the occupation or possession of the tenant or licensee derives arose by written instrument, by oral agreement or by implication from the circumstances. The agreement may be made before or subsequent to the creation of the tenancy or licence. (Paragraph 10.41; Draft Bill, Cls 9(3), (4); 10(6), (7).)

11.44 The formal requirements for excluding or modifying the covenant or duty should be as follows:—

- (a) Where the relationship was created by some written instrument, it will be capable of exclusion or modification only by an express agreement in writing.
- (b) In all other cases, it may be excluded by express oral agreement. (Paragraph 10.41; Draft Bill, Cls 9(4), 10(7).)

11.45 We recommend that in relation to tenancies at will or sufferance and bare licences, the tenant or licensee shall, for the purposes of assessing damages for breach of the implied statutory duty, be deemed to have entered into a covenant with the licensor or landlord for valuable consideration, in the terms of the duty in question. (Paragraph 10.43; Draft Bill, Cl. 10(4).)

Commencement

11.46 We recommend that these proposals should apply only to leases, tenancies at will or

sufferance, and licences which are granted, created or arise after the commencement of the Act. (Paragraph 10.44; Draft Bill, Cl 17(3).)

(Signed) HENRY BROOKE, *Chairman*
ANDREW BURROWS
DIANA FABER
CHARLES HARPUM
STEPHEN SILBER

MICHAEL SAYERS, *Secretary*

13 December 1995

APPENDIX A

Draft Landlord and Tenant Bill

ARRANGEMENT OF CLAUSES

Implied repairing covenants: general rule

- Clause
1. Implied covenant by lessor to keep premises in repair where no other provision applies.
 2. Exclusion of section 1 in case of certain leases or where other provision applies.
 3. Access by lessor to demised premises or other property.

Implied repairing covenants in short residential leases

4. Exception for development land.

Fitness for human habitation

5. Implied covenant as to fitness for human habitation.
6. Exclusion or modification of section 5 in case of certain leases.
7. Meaning of “fit for human habitation”.
8. Access by lessor to dwelling-house or other property.

Obligations of lessees and other occupiers

9. Care of premises by lessee.
10. Care of premises by persons occupying land otherwise than under a lease.
11. Abolition for tenants etc. of doctrine of waste and obligation of tenant-like user.
12. Sections 9 to 11 not applicable to agricultural tenancies etc.

Specific performance

13. Specific performance available for enforcement of all repairing obligations.

Application to the Crown

14. Application to Crown of this Act and provisions of Landlord and Tenant Act 1985.

Supplemental

15. Interpretation.
16. Consequential amendments and repeals.
17. Short title, commencement and extent.

SCHEDULES:

- Schedule 1—Consequential amendments.
- Schedule 2—Repeals.

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An Act to make provision with respect to the imposition on landlords, and enforcement, of obligations as to the repair of leasehold premises and their fitness for human habitation; to replace the law of waste as regards tenants and licensees with statutory duties requiring such persons to take proper care of the premises held by them; and for connected purposes. A.D. 1996.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

5 *Implied repairing covenants: general rule*

1.—(1) Subject to section 2 (which excepts certain categories of leases, including those making express provision as regards responsibility for repairs), there is implied in every lease a covenant by the lessor to keep in repair the whole and every part of the premises demised by the lease. Implied covenant by lessor to keep premises in repair where no other provision applies.

10 (2) If the premises demised by any lease consist of or include part only of a building, then (subject to section 2) there is implied in the lease a covenant by the lessor to keep in repair the whole and every part of any associated premises in which the lessor has for the time being any estate or interest; and for this purpose "associated premises" means—

- 15 (a) any part of the building not comprised in the demised premises;
 or
 (b) any other property which is subject to an easement or licence in favour of the lessee (as such).

20 (3) In determining the standard of repair required in relation to the relevant premises or any part of them by the covenant implied by subsection (1) or (2), regard shall be had to the age, character and prospective life of the premises in question and the locality in which they are situated (or, in the case of any associated premises, to such of those matters as are applicable).

EXPLANATORY NOTES

Clause 1

1. This clause implements one of the principal recommendations of the Report. It creates two new implied repairing covenants. These covenants will be contractual in nature and apply to all leases other than those specified in clause 2. Their objective is to encourage the parties to a lease to address the issue of repair. They do not impose a particular standard of repair (see paragraphs 7.7 and 7.16 of the Report). The parties will be free to modify or exclude the implied covenants but the possibility of their application will ensure that —

- (i) the situation in which no one is responsible for the repair of leasehold property will arise only by deliberate decision; and
- (ii) there will be no scope for the implication of repairing obligations into leases according to the common law principles (see paragraphs 3.11 - 3.17 and 7.9 of the Report).

Subsection (1)

2. This subsection implements the recommendation in paragraph 7.10 of the Report. It provides that subject to clause 2 the lessor is responsible for keeping each and every part of the premises let in repair. 'Keep', 'lease' and 'lessor' are defined in clause 15(1). The meaning of 'repair' is explained in paragraphs 2.2 - 2.8 of the Report.

Subsection (2)

3. This subsection implements the recommendation in paragraph 7.26 of the Report. It is modelled on Landlord and Tenant 1985, s 11(1A). It provides that, subject to clause 2, where the premises let are, or include, part of a building, the lessor is to keep in repair each and every part of such 'associated premises' in which he has, for the time being, any estate or interest (see paragraph 7.25 of the Report). The obligation is however restricted by subsection (5), which limits the lessor's obligation to disrepair which affects lessee's enjoyment, and by clause 3(2), which provides a defence for a lessor who is unable to acquire adequate rights of access to carry out requisite repairs. The implied covenant will apply only if and for so long as the lessor has any estate or interest in the associated premises. The 'associated premises' are defined in the subsection as any other part of the building not included in the lease and any property (such as a driveway, drain or sewer) subject to an easement or licence in favour of the lessee (as such). The extent of these premises may vary from time to time. 'Keep', 'lease', 'lessor' and 'lessee' are defined in clause 15(1). The meaning of 'repair' is explained in paragraphs 2.2 - 2.8 of the Report.

Subsection (3)

4. This subsection implements the recommendations in paragraphs 7.10(b) and 7.27 of the Report. It specifies the matters to be taken into consideration in determining the appropriate standard of repair under subsections (1) and (2). It is modelled on Landlord and Tenant Act 1985, s 11(3) (see Appendix B and paragraph 5.13 of the Report). Where the covenant relates to associated premises, it is likely that only some of the matters listed in the subsection will be relevant.

(4) The covenant implied by subsection (1) or (2) shall not be taken to require the lessor—

- (a) to carry out repairs for which the lessee is liable by virtue of any of the covenants implied by section 9;
- (b) to rebuild or reinstate the relevant premises or any part of them in the case of destruction or damage by fire, or by tempest, flood or other inevitable accident; or
- (c) to keep in repair anything which the lessee is entitled to remove from those premises.

(5) The covenant implied by subsection (2) shall not be taken to require the lessor to carry out any repairs unless the disrepair is such as to affect the lessee's enjoyment of—

- (a) the demised premises;
- (b) any common parts of the building containing the demised premises which the lessee, as such, is entitled to use; or
- (c) any such easement or licence as is mentioned in subsection (2)(b).

(6) In this section and section 2 "the relevant premises", in relation to a lease, means—

- (a) in connection with the operation of subsection (1), the premises demised by the lease, and
- (b) in connection with the operation of subsection (2), any associated premises within the meaning of that subsection in which at the material time the lessor has any estate or interest.

Exclusion of section 1 in case of certain leases or where other provision applies. 1985 c. 70.

2.—(1) Subsections (1) and (2) of section 1 do not apply to—

- (a) a short residential lease, that is a lease of a dwelling-house (within the meaning of sections 11 to 15 of the Landlord and Tenant Act 1985) granted for a term of less than seven years (as determined in accordance with section 13(2) of that Act);
- (b) an agricultural tenancy or a farm business tenancy; or
- (c) an oral lease.

(2) Subsection (1) or (as the case may be) subsection (2) of section 1 does not apply to a lease—

- (a) if an express repairing obligation in relation to all of the relevant premises is imposed by a provision of the lease or of an agreement made by the parties to it; or
- (b) if the covenant implied by that subsection is expressly excluded in relation to all of those premises by any such provision; or
- (c) if a repairing obligation in relation to all or any part of the relevant premises—
 - (i) is implied in the lease by or by virtue of any other enactment, or
 - (ii) would be so implied but for the fact that it has been lawfully excluded.

(3) Subsection (1) or (as the case may be) subsection (2) of section 1 does not apply in relation to a particular part of the relevant premises in

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Subsection (4)

5. This subsection excludes from the operation of the new implied covenants certain repairs which are properly the responsibility of the lessee (see the recommendations in paragraphs 7.11(c) and 7.30 of the Report). These exceptions are modelled on Landlord and Tenant Act 1985, s 11(2) (see Appendix B and paragraph 5.7 of the Report) subject to necessary updating in the case of paragraph (a) as the duty of tenantlike user has been replaced by implied covenants to take care of premises (clauses 9 and 11(2)). ‘The relevant premises’ are defined in clause 1(6). ‘Keep’, ‘lessor’ and ‘lessee’ are defined in clause 15(1). As regards the reference to ‘section 9’, see clause 15(3).

Subsection (5)

6. This subsection implements the recommendation in paragraph 7.29 of the Report. It is modelled on Landlord and Tenant Act 1985 s 11(1B) (see Appendix B) and restricts the lessor’s obligation under subsection (2) (*lessor’s covenant to keep associated premises in repair*) to disrepairs which affect the lessee’s enjoyment of:

- (i) the premises let;
 - (ii) the common parts of the building of which those premises form part and which the lessee, as such, is entitled to use; and
 - (iii) any easement or licence in favour of the lessee (as such) over any other property.
- ‘Common parts’, ‘lessor’ and ‘lessee’ are defined in clause 15(1).

Subsection (6)

7. For the purposes of clauses 1 and 2 this subsection defines ‘relevant premises’ to mean:

- (i) the demised premises in relation to the covenant implied by subsection (1); and
- (ii) the parts of the associated premises (if any) in which the lessor has an estate or interest at the material time in relation to the covenant implied by subsection (2).

‘Associated premises’ are defined in subsection (2).

Clause 2

1. This clause defines when clause 1 will not apply to a lease. It implements recommendations in paragraphs 7.10 and 7.30 of the Report.

Subsection (1)

2. This subsection implements the recommendations in paragraphs 7.10(a) and 7.30 of the Report. It specifies the three categories of lease to which clause 1 does not apply:

- (i) leases to which section 11 of the Landlord and Tenant Act 1985 applies, or would have applied if it had not been properly excluded under section 12 of that Act (see Appendix B and paragraphs 5.2 - 5.5 and 5.8 of the Report);
- (ii) tenancies of agricultural holdings and farm business tenancies (as defined in clause 15); and
- (iii) oral leases.

These exceptions and the reasons for them are explained in paragraphs 7.13 - 7.15 of the Report.

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Subsection (2)

3. Subsection (2)(a) and (b) implements the recommendations in paragraphs 7.10(d)(i), (ii) and 7.30 of the Report. It provides for the total exclusion of either or both (as the case may be) of the covenants implied by clause 1 where the lease or a collateral agreement contains:

- (i) an express repairing obligation in respect of the whole of the premises which are the subject of the implied covenant (subsection (2)(a): see paragraphs 7.4, 7.7 - 7.9 and 7.19 - 7.20 of the Report); or
- (ii) an express exclusion of the implied covenant in respect of those premises (see subsection (2)(b) and paragraphs 7.6 - 7.7 and 7.9 of the Report).

Any collateral agreement must be in writing (see subsection (5)).

4. Subsection (2)(c) implements the recommendations in paragraphs 7.10(d)(iii) and 7.30 of the Report. A covenant implied by clause 1 will be wholly excluded where an implied statutory repairing obligation applies in relation to the whole or some part of the relevant premises. It will also be inapplicable where such a statutory repairing obligation has been lawfully excluded. Examples of such implied obligations are found in Housing Act 1985, s 139, Sched 6, para 14 (see paragraph 3.8(ii) of the Report) and The Housing (Preservation of Right to Buy) Regulations 1989, SI 1989 No 368 reg 14).

5. 'Repairing obligation' is defined in subsection (6) (see paragraphs 7.16 - 7.17 of the Report and note the definition of 'keep' in clause 15(1)). '[T]he relevant premises' are defined in clause 1(6). 'Lease' is defined in clause 15(1). Clause 7 defines fitness for human habitation for the purposes of clause 5.

Subsection (3)

6. This subsection also implements the recommendations made in paragraphs 7.10(d)(i), (ii) and 7.30 of the Report. It provides for the exclusion of the covenants implied by clause 1(1) and (2) in relation to any part (as opposed to the whole) of the premises let or, as the case may be, of the associated premises if:

- (i) an express repairing obligation is imposed by the lease or a collateral agreement in relation to that part; or
- (ii) the lease or a collateral agreement expressly provide that either or both the implied covenants are not to apply to that part.

In such cases the implied covenant will continue to apply to the remainder of the relevant premises (see paragraph 7.18 of the Report). Any collateral agreement must be in writing (see subsection (5)).

the case of a lease—

- (a) if an express repairing obligation in relation to that part is imposed by a provision of the lease or of an agreement made by the parties to it; or
- 5 (b) if the covenant implied by that subsection is expressly excluded in relation to that part by any such provision.

(4) Where subsection (1) or (as the case may be) subsection (2) of section 1 does apply in relation to all or any part of the relevant premises in the case of a lease, the operation of the covenant implied by that
10 subsection in relation to those premises or that part may be modified if, and to the extent that, express provision to that effect is made by the lease or by an agreement made by the parties to it.

(5) An agreement made by the parties to a lease for the purposes of any of subsections (2) to (4)—

- 15 (a) may be made before or after the grant of the lease; but
- (b) must be made in writing.

(6) In this section “repairing obligation” means—

- (a) an obligation to repair or keep in repair (to any standard); or
- 20 (b) an obligation to keep fit for human habitation however expressed (including such an obligation owed by virtue of section 5);

and section 1(6) applies for the purposes of this section.

3.—(1) Where section 1(1) applies to a lease (to any extent), there is implied in the lease a covenant by the lessee that the lessor or a person authorised by him in writing may, at reasonable times of the day and on
25 giving 24 hours’ notice in writing to the occupier, enter the demised premises for the purpose of viewing the condition and state of repair of any part of those premises in relation to which the covenant implied by section 1(1) has effect.

Access by lessor to demised premises or other property.

(2) Where—

- 30 (a) section 1(2) applies to a lease (to any extent), and
- (b) in order to comply with the covenant implied by that provision the lessor needs to carry out repairs on premises other than the demised premises, and
- 35 (c) the lessor does not have a sufficient right in those other premises to enable him to carry out the required repairs,

then, in any proceedings relating to a breach of that covenant in respect of the lessor’s failure to carry out those repairs, it shall be a defence for the lessor to prove that he used all reasonable endeavours to obtain, but was
40 unable to obtain, such rights as would be adequate to enable him to carry out the repairs.

Implied repairing covenants in short residential leases

4. The following subsections shall be added at the end of section 14 of the Landlord and Tenant Act 1985 (leases to which section 11 of that Act does not apply)—

Exception for development land.

- 45 “(6) Where a lease of a dwelling-house is granted by an authority

1985 c. 70.

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7. For the meaning of ‘repairing obligation’, see paragraph 5 above. ‘Relevant premises’ are defined in clause 1(6). ‘Lease’ is defined in clause 15(1).

Subsection (4)

8. This subsection implements the recommendations in paragraphs 7.10(e) and 7.30 of the Report. Where the new implied covenants apply, the parties may, by express provision either in the lease or a collateral agreement, modify (as opposed to exclude) their application (see paragraphs 7.20 - 7.21 of the Report). Any collateral agreement must be written (see subsection (5)). ‘Relevant premises’ are defined in clause 1(6). ‘Lease’ is defined in clause 15(1).

Subsection (5)

9. This subsection implements the recommendation in paragraph 7.20 of the Report. Any exclusion or modification of the implied covenants by the parties to a lease must be in writing. The implied covenants do not apply to oral leases (subsection (1)(c)). ‘Lease’ is defined in clause 15(1).

Subsection (6)

10. This subsection defines ‘repairing obligation’ for the purpose of clause 2: see paragraph 7.10(d)(i) of the Report. The words ‘to any standard’ make it clear that the statutory obligations can be excluded by any express obligation to repair, irrespective of the standard that is stipulated. An obligation to keep fit for human habitation implies that the parties have agreed to a standard of repair and it will therefore oust the implied covenants (subsection (6)(b)). For the meaning of ‘keep’, see clause 15(1). ‘Repair’ is explained in paragraphs 2.2 - 2.8 of the Report.

Clause 3

Subsection (1)

1. This subsection implements the recommendation in paragraph 7.11(b) of the Report. It is modelled on Landlord and Tenant Act 1985, s 11(6) (see Appendix B). Where the covenant implied by clause 1(1) (*lessor’s covenant to keep the demised premises in repair*) applies, this subsection implies a covenant by the lessee to permit the lessor to enter the demised premises to view the condition and state of repair of the premises to which the lessor’s covenant applies. This ‘right’ supplements the common law licence to enter to carry out any works which the lessor has covenanted to do (*Saner v Bilton* (1878) 7 ChD 815). ‘Lease’, ‘lessor’ and ‘lessee’ are defined in clause 15(1).

Subsection (2)

2. This subsection implements the recommendation in paragraph 7.28 of the Report. It provides a defence to an action for breach of the covenant implied by clause 1(2) (*lessor’s covenant to keep associated premises in repair*) where the lessor is unable to obtain sufficient rights to carry out the necessary repairs, despite using all reasonable endeavours. The defence is modelled on Landlord and Tenant Act 1985, s 11(3A) (see Appendix B and paragraphs 5.5 and 5.6 of the Report). Compare clause 8(2). ‘Lease’ and ‘lessor’ are defined in clause 15(1).

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Clause 4

1. This clause implements the recommendation in paragraph 8.52 of the Report. It creates a further exception to the application of section 11 of the Landlord and Tenant Act 1985 (*repairing obligations in short leases*: see Appendix B and paragraphs 5.2 - 5.20 of the Report). The object of the exception is to enable premises intended for redevelopment to be used as temporary housing accommodation. The reasons for the exception are explained in paragraphs 8.45-8.48 of the Report in the context of an identical exception to the operation of clause 5 (*obligation of fitness for human habitation*).

2. The new section 14(6) of the 1985 Act provides that section 11 of that Act (see paragraph 1 above) will not apply to leases of dwelling-houses which—

- (i) are let to provide temporary housing accommodation pending development; and
- (ii) are of an adequate standard for the time being.

This exception to section 11 will cease to apply if at any stage during the currency of the lease either of those conditions is no longer satisfied (see paragraph 8.51 of the Report).

3. To come within the exception—

- (a) the lease must have been granted by a landlord which was a person or body of persons who possessed compulsory purchase powers; and
- (b) the dwelling-house was on land, which at the time of the grant, was held or acquired for development by that landlord.

However, the benefit of the exception will not be lost if the authority which granted the lease assigns its reversion to a landlord which does not have compulsory purchase powers (see paragraph 8.51 of the Report).

4. 'Lease of a dwelling-house' is defined in Landlord and Tenant Act 1985, s 16(b). 'Adequate' (new section 14(6)(c)) is not defined, but see paragraph 8.49(c) n 142 of the Report and also Housing Act 1985 s 302(b) (*provision of adequate housing pending demolition*). For explanation of the new subsection (7) of section 14 of the Landlord and Tenant Act 1985, see paragraph 8.50 of the Report. Bodies which 'could be' authorised to acquire land compulsorily include local authorities who require the consent of the Secretary of State to do so (Local Government Act 1972, s 122). 'Development' is defined by reference to Town and Country Planning Act 1990, s 55(1) (see paragraph 8.50(ii) of the Report).

possessing compulsory purchase powers and at the time of the grant—

(a) the dwelling-house is on land which the authority holds or has acquired (whether compulsorily or by agreement) for development, and 5

(b) the purpose of the letting is to provide temporary housing accommodation pending development of the land,

section 11 does not apply to the lease so long as the following conditions are satisfied, namely the dwelling-house is being let for that purpose (whether by the authority or not) and it provides 10 accommodation of a standard which is adequate for the time being.

(7) In subsection (6)—

“authority possessing compulsory purchase powers” means any person or body of persons (including a government department) who is or are for the time being, or could be, 15 authorised to acquire an estate or interest in land compulsorily; and

1990 c. 8.

“development” has the same meaning as in the Town and Country Planning Act 1990.”

Fitness for human habitation 20

Implied covenant as to fitness for human habitation.

5.—(1) Subject to section 6 (which excepts certain categories of leases), this section applies to any lease under which a dwelling-house—

(a) is let wholly or mainly for human habitation; and

(b) is so let for a term of less than seven years.

(2) For the purposes of subsection (1) it is immaterial— 25

(a) whether the dwelling-house is or is to be occupied under the lease or under an inferior lease derived out of it; or

(b) that the lease also demises other property (which may consist of or include one or more other dwelling-houses).

(3) In a lease to which this section applies there is implied a covenant 30 by the lessor—

(a) that the dwelling-house is fit for human habitation at the time of the grant; and

(b) that the lessor will thereafter keep it fit for human habitation.

(4) The implied covenant shall not be taken to require the lessor— 35

(a) to carry out works or repairs for which the lessee is liable by virtue of any of the covenants implied by section 9 or by virtue of any express covenant (whether contained in the lease or not) which, so far as material, imposes substantially the same obligation as is imposed by any such implied covenant; or 40

(b) to rebuild or reinstate the dwelling-house in the case of destruction or damage by fire, or by tempest, flood or other inevitable accident; or

(c) to keep in repair or maintain anything which the lessee is entitled to remove from the dwelling-house. 45

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Clause 5

This clause implements one of the principal recommendations of the Report. Subject to limited exceptions, residential property let for a term of less than seven years must be fit for human habitation. The new covenant will be contractual in nature and will apply irrespective of the rent payable. Clause 5 replaces section 8 of the Landlord and Tenant Act 1985 which has ceased to have any practical application (see Appendix B and paragraphs 4.2 - 4.4 of the Report).

Subsections (1), (2) and (3)

1. These subsections implement the recommendations in paragraphs 8.35, 8.41 and 8.42 of the Report. They imply into the leases specified in subsection (1) a covenant by the lessor that the dwelling-house is fit for human habitation at the grant of the lease and will be kept fit whilst the lease subsists. This covenant is based on Landlord and Tenant Act 1985, s 8(1).

2. 'Lease', 'lessor', and 'dwelling-house' are defined in clause 15(1). See clause 6(1) as to the leases to which the covenant does not apply. Where clause 5 does apply, the 'lease' may be a head lease and may demise other property (subsection (2)) and the 'dwelling-house' may be, in whole or part, a part of a larger building (see clause 7(4)). For the meaning of 'grant', see the notes to subsection (7) below. '[W]holly or mainly for human habitation' is not defined but is derived from sections 8(1) and 16(b) of the Landlord and Tenant Act 1985. Whether or not a lease is for a term of less than seven years is to be determined in accordance with subsection (7). Fitness for human habitation is to be determined in accordance with clause 7 (subsection (8)).

Subsection (4)

3. This subsection implements the recommendation in paragraph 8.36 of the Report. It is similar to clause 1(4). It excludes from the application of the lessor's covenant those works which are properly the responsibility of the lessee. It is modelled on Landlord and Tenant Act 1985, s 11(2) (see Appendix B and paragraph 5.7 of the Report). The scope of the exception in paragraph (a) is defined by the new implied covenants to take care of premises (clause 9). As they may be excluded (clause 9(3)), the exception also includes an express covenant having substantially the same effect as the implied covenants would have done had they applied. 'Lessor', 'lessee', 'lease' and 'dwelling-house' are defined in clause 15(1). For the meaning of 'express covenant', see clause 15(2).

(5) The implied covenant shall also not be taken to impose on the lessor any liability in respect of the dwelling-house being unfit for human habitation if that unfitness is wholly or mainly attributable to—

(a) the lessee's own breach of covenant, or

5 (b) disrepair which the lessor is not obliged to make good because of the exclusion or modification under section 12 of the Landlord and Tenant Act 1985 of his obligations under section 11 of that Act (repairing obligations in short leases),

1985 c. 70.

or if that unfitness is incapable of being remedied by the lessor at
10 reasonable expense.

(6) Any provision of a lease or of any agreement relating to a lease (whether made before or after the grant of the lease) is void in so far as it purports—

15 (a) to exclude or limit the obligations of the lessor under the implied covenant; or

(b) to authorise any forfeiture or impose on the lessee any penalty, disability or obligation in the event of his enforcing or relying upon those obligations.

(7) In determining whether a lease falls within subsection (1)(b)—

20 (a) any part of the term falling before the grant shall be left out of account and the lease shall be treated as a lease for a term commencing with the grant;

(b) a lease which is determinable at the option of the lessor before the expiry of seven years from the commencement of the term shall be treated as a lease for a term of less than seven years; and

25 (c) a lease (other than one to which paragraph (b) applies) shall not be treated as a lease for a term of less than seven years if it confers on the lessee an option for renewal for a term which, together with the original term, amounts to seven years or more.

30 (8) References in this section to a dwelling-house being fit, or unfit, for human habitation shall be construed in accordance with section 7.

(9) Sections 8 to 10 of the Landlord and Tenant Act 1985 (which impose implied terms as to fitness for human habitation and are superseded by this section and sections 6 to 8 below) shall cease to have
35 effect.

6.—(1) Section 5 does not apply to—

(a) an agricultural tenancy or a farm business tenancy;

40 (b) a lease granted to a body mentioned in section 14(4) of the Landlord and Tenant Act 1985 (local authorities and other public bodies);

(c) a lease granted to Her Majesty, a government department or any person as mentioned in section 14(5) of that Act; or

45 (d) a lease of a dwelling-house (within the meaning of this Act) granted by such an authority and in such circumstances as are mentioned in section 14(6) of that Act (as amended by section 4 of this Act) and in relation to which the conditions specified in that provision are for the time being satisfied.

Exclusion or modification of section 5 in case of certain leases.

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Subsection (5)

4. This subsection implements the recommendations in paragraphs 8.37 and 8.39 of the Report. Subject to subsection (6) it creates three further limitations on the implied covenant of fitness for human habitation (see paragraphs 8.38 - 8.39 of the Report). The lessor is not responsible for unfitness which is wholly or mainly attributable to:

- (i) the lessee's breach of covenant (see clause 15(2));
- (ii) disrepair which the lessor is not required to remedy because the covenant to repair implied by section 11(1) of the Landlord and Tenant Act 1985 has been modified or excluded under section 12 of that Act (see Appendix B and paragraph 5.8 of the Report); or
- (iii) matters which cannot be remedied at reasonable expense (codifying the rule in *Buswell v Goodwin* [1971] 1 WLR 92: see paragraphs 4.30 and 8.21 of the Report).

Subsection (6)

7. This subsection is an anti-avoidance provision modelled on Landlord and Tenant Act 1985, s 12(1) (see Appendix B). The covenant implied by clause 5 is not one which can be excluded by the parties. 'Lease', 'lessor' and 'lessee' are defined in clause 15(1). For the expression 'the grant of the lease', see the note to subsection (7) below.

Subsection (7)

8. This subsection implements one of the recommendations in paragraph 8.42 of the Report and follows the model of Landlord and Tenant Act 1985, s 13(2) (see Appendix B and paragraph 5.9, n 30). It is an anti-avoidance provision and defines when a lease is to be regarded as a term of less than seven years (see subsection (1)(b) above). 'Lease' is defined in clause 15(1). It includes an agreement for lease. 'Grant' is therefore not restricted to legal estates (*Brikom Investments Ltd v Seaford* [1981] 1 WLR 863, 867). 'Lessor' and 'Lessee' are also defined in clause 15(1).

Subsection (8)

9. This subsection repeals the present statutory obligation of fitness for human habitation (Landlord and Tenant Act 1985, ss 8 - 10 (see Appendix B and paragraphs 4.2 - 4.5 and 4.26 - 4.27 of the Report). See clauses 17(3) and (4) for the leases to which the repealed provisions will continue to apply.

Clause 6

Subsection (1)

1. This subsection implements the recommendations in paragraphs 8.43, 8.44, 8.49 and 8.50 of the Report. It specifies that clause 5(1) does not apply to:

- (i) leases which are agricultural tenancies or farm business tenancies (see paragraph 8.43 of the Report);
- (ii) leases which are granted to a body listed in Landlord and Tenant Act 1985, s 14(4) and (5) (see Appendix B and paragraph 8.44 of the Report);

(2) Where under the contract of employment of a worker employed in agriculture the worker is provided, as part of his remuneration, with a dwelling-house for his occupation—

- (a) there is implied as part of the contract of employment, despite any stipulation to the contrary, a term having the same effect as the covenant that would be implied by section 5(3) if the dwelling-house were let by a lease to which section 5 applies; and 5
- (b) the provisions of that section apply accordingly, with the substitution of “employer” and “employee” for “lessor” and “lessee” and such other modifications as may be necessary. 10

(3) Subsection (2) does not affect any obligation of a person other than the employer with respect to the repair of any such dwelling-house, or any remedy for enforcing such an obligation.

Meaning of “fit for human habitation”.

7.—(1) Subject to subsection (4), a dwelling-house is fit for human habitation for the purposes of section 5 unless— 15

- (a) it fails to meet one or more of the requirements set out in subsection (2); and
- (b) by reason of that failure, it is not reasonably suitable for occupation. 20

(2) Those requirements are—

- (a) the dwelling-house is structurally stable;
- (b) it is free from serious disrepair;
- (c) it is free from dampness prejudicial to the health of the occupants (if any); 25
- (d) it has adequate provision for lighting, heating and ventilation;
- (e) it has an adequate piped supply of wholesome water;
- (f) there are satisfactory and suitably located facilities for the preparation and cooking of food by the occupants (if any), including a sink with a satisfactory supply of hot and cold water; 30
- (g) there is a suitably located water-closet for the use of the occupants (if any);
- (h) there is a suitably located fixed bath or shower and wash-basin for the use of the occupants (if any), each of which is provided with a satisfactory supply of hot and cold water; and 35
- (i) the dwelling-house has an effective system for the draining of foul, waste and surface water.

(3) Where the occupants of the dwelling-house have (or would have) to share with others the use of any facilities falling within paragraph (f), (g) or (h) of subsection (2), that paragraph shall not be taken to be satisfied unless, having regard to the number of persons who are likely to use them, there are adequate facilities of that nature available for the use of those persons. 40

(4) Where a dwelling-house consists of or includes part only of a building, the dwelling-house is unfit for human habitation for the purposes of section 5 (whether or not it satisfies the requirements set out in 45

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- (iii) leases of a dwelling-house which are, for the time being, within the exception to the application of Landlord and Tenant Act 1985, s 11, created by clause 4 (*temporary housing accommodation on development land*: see the note to clause 4 and paragraph 8.48 of the Report). This exception does not affect liability for statutory nuisance (Environmental Protection Act 1990 s 79: see Appendix B and paragraphs 4.49 - 4.54 and 8.47 of the Report).

'Agricultural tenancy', 'farm business tenancy', 'dwelling-house' and 'lease' are defined in clause 15(1).

Subsections (2) and (3)

2. These subsections implement the recommendation in paragraph 8.42 of the Report. They extend the application of clause 5 to the case where an agricultural worker is supplied with housing as part of his remuneration and is therefore a licensee rather than a tenant of the property. In relation to that accommodation, subsection (2) implies a term into his contract of employment to the same effect as the covenant which would have been implied by clause 5(3) had it been let to him. Subsection (3) provides that the obligations imposed on the employer by subsection (2) do not affect the repairing obligations of any third party, such as the employer's landlord. These subsections replace Landlord and Tenant Act 1985, s 9 (see Appendix B and paragraph 4.5 of the Report).

Clause 7

1. This clause replaces section 10 of the Landlord and Tenant Act 1985 (see Appendix B and paragraphs 4.26 and 4.27 of the Report). It introduces a modern definition of fitness for human habitation for the purposes of clause 5 and makes provision for further changes to that definition to be made by statutory instrument.

Subsections (1), (2) and (3)

2. These subsections implement the recommendation in paragraph 8.54 of the Report. They specify the criteria for assessing the fitness for human habitation of a dwelling-house to which clause 5 applies. The criteria are based on section 604(1) of the Housing Act 1985 (see Appendix B and paragraph 4.37 of the Report). Those listed in subsection (2)(f) - (h) have been adapted from the equivalent paragraphs in section 604(1) so that they are also applicable to dwelling-houses whose facilities are either shared or situated outside the dwelling-house (see paragraph 8.54, n 153 of the Report). 'Dwelling-house' is defined by clause 15(1).

Subsections (4) and (5)

3. These subsections implement the recommendations in paragraph 8.55 of the Report and are modelled on section 604(2) of the Housing Act 1985 (see Appendix B and paragraph 4.38 of the Report). They specify the additional criteria which must be satisfied where the whole or part of the dwelling-house (as defined in clause 15(1)) forms part of a larger building.

subsection (2)) if—

- (a) the building or a part of the building not comprised in the dwelling-house fails to meet one or more of the requirements set out in subsection (5); and
- 5 (b) by reason of that failure, the dwelling-house is not reasonably suitable for occupation.

(5) Those requirements are—

- (a) the building or part is structurally stable;
- (b) it is free from serious disrepair;
- 10 (c) it is free from dampness;
- (d) it has adequate provision for ventilation; and
- (e) it has an effective system for the draining of foul, waste and surface water.

(6) The Secretary of State may by order make such amendments of any
15 of subsections (2), (3) and (5) as he considers appropriate.

(7) An order under subsection (6)—

- (a) may contain such transitional and supplementary provisions as the Secretary of State considers appropriate; and
- 20 (b) shall be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

8.—(1) In a lease to which section 5 applies there is implied a covenant by the lessee that the lessor or a person authorised by him in writing may, at reasonable times of the day and on giving 24 hours' notice in writing to the occupier, enter the dwelling-house for the purpose
25 of viewing its condition and state of repair.

Access by lessor to dwelling-house or other property.

(2) Where—

- (a) by virtue of section 7(4) a dwelling-house is not fit for human habitation for the purposes of section 5, and
- (b) in order to remedy the unfitness the lessor needs to carry out works or repairs on premises other than the dwelling-house, and
- 30 (c) the lessor does not have a sufficient right in those other premises to enable him to carry out the required works or repairs,

then, in any proceedings relating to a breach of the lessor's obligation under section 5(3)(b) in respect of the unfitness, it shall be a defence for
35 the lessor to prove that he used all reasonable endeavours to obtain, but was unable to obtain, such rights as would be adequate to enable him to carry out the works and repairs.

Obligations of lessees and other occupiers

9.—(1) In every lease there are implied the following covenants by the
40 lessee—

Care of premises by lessee.

- (a) to take proper care of the premises demised by the lease;
- (b) to make good any damage wilfully done or caused to the demised premises by the lessee, by any sub-lessee of his or by any other person lawfully on the premises; and

EXPLANATORY NOTES

Subsections (6) and (7)

4. These subsections implement the recommendation in paragraph 8.58 of the Report. They confer a power on the Secretary of State to amend by statutory instrument the criteria that must be satisfied before a dwelling-house is regarded as fit for human habitation. A similar power is conferred on the Secretary of State by Housing Act 1985 s 604(5) (see Appendix B).

Clause 8

Subsection (1)

1. This subsection implements the recommendation in paragraph 8.53 of the Report. It is similar to clause 3(1). Where clause 5 applies, subsection (1) implies into the lease a covenant by the lessee that the lessor shall have the right to enter the premises to view both the condition and the state of repair of the dwelling-house. This provision is to broadly the same effect as section 8(2) of the Landlord and Tenant Act 1985 (see Appendix B). It is however modelled on section 11(6) of that Act (see Appendix B). 'Lease', 'lessor', 'lessee' and 'dwelling-house' are defined in clause 15(1).

Subsection (2)

2. This subsection implements the recommendation in paragraph 8.56 of the Report. It is similar to clause 3(2). It confers a defence on a lessor against an action brought for breach of the implied covenant in clause 5(3)(b) to keep the premises fit for human habitation, where the dwelling-house has failed to satisfy the requirements of clause 7(4) (*fitness where the dwelling-house forms part of a building*). The defence is modelled on Landlord and Tenant Act 1985, s 11(3A) and is not available to an action under clause 5(2)(a) (*covenant that premises are fit for human habitation at the grant of the lease*: see paragraph 8.57 of the Report). 'Lessor' and 'dwelling-house' are defined in clause 15(1). 'Fitness for human habitation' is defined in clause 7.

Clause 9

1. Subject to clause 12, this clause replaces a lessee's common law duties not to commit voluntary waste and to use premises in a tenantlike manner (see paragraphs 10.9 - 10.22, 10.26 - 10.29 and 10.39 of the Report) with three new contractual obligations which achieve a similar effect but which are expressed in clear modern terms and in a unitary form.

Subsection (1)

1. This subsection implements the recommendation in paragraph 10.37 of the Report. It implies into every lease the covenants specified in paragraphs (a) - (c). Paragraphs (a) and (b) are drawn from Denning LJ's definition of the duty of tenantlike user in *Warren v Keen* [1954] 1 QB 15, 20 (quoted in paragraph 10.28 of the Report). Paragraph (c) is intended to cover what would now be the grounds for an action in tort for voluntary waste. 'Lease', 'lessee' and 'lessor' are defined in clause 15(1).

- (c) not to carry out any alterations or other works the actual or probable result of which is to destroy or alter the character of the demised premises or any part of them to the detriment of the lessor's interest in them.

(2) Where the premises demised by any lease consist of or include part only of a building, there is implied in the lease a covenant by the lessee to take proper care of any common parts of the building which, as lessee, he is entitled to use. 5

(3) Any of the covenants implied by this section may be excluded or modified if, and to the extent that, express provision to that effect is made by the lease or by an agreement made by the parties to it; and the preceding provisions of this section accordingly have effect subject to this subsection. 10

(4) An agreement made by the parties to a lease for the purposes of subsection (3)— 15

- (a) may be made before or after the grant of the lease; but
 (b) must be in writing unless the lease is an oral lease.

Care of premises
 by persons
 occupying land
 otherwise than
 under a lease.

10.—(1) Any person in occupation or possession of land as—

- (a) a tenant at will,
 (b) a tenant at sufferance, or
 (c) a licensee, 20

shall owe the duties mentioned in subsection (2) to the landlord or (as the case may be) the licensor.

(2) The duties referred to in subsection (1) are—

- (a) to take proper care of the premises comprised in the tenancy or licence; 25
 (b) to make good any damage wilfully done or caused to the premises—
 (i) by the tenant or licensee,
 (ii) by any person to whom he has granted a right to occupy the premises, or 30
 (iii) by any other person lawfully on the premises; and

- (c) not to carry out any alterations or other works the actual or probable result of which is to destroy or alter the character of the premises or any part of them to the detriment of the interest in them of the landlord or licensor. 35

(3) Any person falling within subsection (1)(a), (b) or (c) shall, where the premises comprised in the tenancy or licence consist of or include part only of a building, owe to the landlord or (as the case may be) the licensor a duty to take proper care of any common parts of the building which, as tenant or licensee, he is entitled to use. 40

(4) Where any of the duties set out in subsections (2) and (3) is owed by—

- (a) a tenant at will,

EXPLANATORY NOTES

Subsection (2)

2. This subsection implements the recommendation in paragraph 10.38 of the Report. It provides that where the property let is or includes only part of a building, the lessee covenants to take proper care of the common parts of that building which he is entitled to use. The covenant does not affect any of the lessor's other rights, such as the right to take proceedings for trespass or nuisance. The obligations which the performance of the duty of 'proper care' under this subsection entails may differ from those which are required to comply with the duty of 'proper care' under subsection (1). This is because the lessee's rights to carry out any maintenance or repair to the common parts are likely to be more limited. The effect of subsection (2) will be to require the lessee to exercise any rights over the common parts in a proper manner. 'Lease', 'lessee' and 'common parts' are defined in clause 15(1).

Subsections (3) and (4)

3. These subsections implement the recommendation in paragraph 10.41 of the Report and provide that the parties to a lease may exclude or modify, in whole or in part, the covenants implied by subsections (1) or (2) by express provision in the lease or in a collateral agreement. Any such collateral agreement must be in writing, unless the lease to which it relates is oral (subsection (4)). Unlike the covenants implied by clause 1, these implied covenants will not be excluded merely because the lease contains express covenants to the same effect (see paragraph 10.40 of the Report and compare clauses 2(2)(a) and (3)(a)). As to modification, the same principles apply as they do in relation to clause 2(4) (see paragraph 7.21 of the Report) save that modification is not permitted in some instances (see Schedule 1, paras 1 - 3). 'Lease' is defined in clause 15(1).

Clause 10

1. This clause implements in relation to tenancies at will, tenancies at sufferance and licences the recommendations in paragraphs 10.37, 10.38, 10.41, 10.43 and 10.44 of the Report. 'Tenant at will' and 'tenant at sufferance' are explained in paragraphs 10.23 and 10.24 of the Report. Licences are considered in paragraph 10.25 of the Report.

Subsection (1)

2. This subsection provides that any person in occupation or in possession of land as tenant at will, tenant at sufferance or licensee will owe to the landlord or licensor (as the case may be) the duties implied by subsection (2). These duties take effect as an implied term in the case of a contractual licensee but otherwise as statutory duties (see subsections (4) and (5) below and paragraph 10.39 of the Report). They may be excluded or modified (see subsection (6)).

Subsections (2) and (3)

3. These subsections define the duties owed by the persons specified in subsection (1). These duties are in the same terms, subject to necessary modification, as the covenants implied by clause 9(1) and (2).

- (b) a tenant at sufferance, or
- (c) a bare licensee,

the landlord or licensor may bring an action for damages against the tenant or licensee in respect of any breach by him of that duty; and the damages payable by the tenant or licensee in respect of any such breach shall be assessed as if he had entered into a covenant with the landlord or licensor, for valuable consideration, in the terms of that duty.

(5) Where any of those duties is owed by a contractual licensee, it shall be an implied term of his licence that he complies with that duty.

(6) Any of those duties may be excluded or modified if, and to the extent that, express provision to that effect is made by the tenancy or licence or by an agreement made by the parties to it; and the preceding provisions of this section accordingly have effect subject to this subsection.

(7) An agreement made by the parties to a tenancy or licence for the purposes of subsection (6)—

- (a) may be made before or after the grant or creation of the tenancy or licence; and
- (b) must be in writing where the tenancy or licence was granted by an instrument in writing.

11.—(1) The law of waste so far as applicable to—

- (a) a lessee holding under a lease,
- (b) a tenant at will,
- (c) a tenant at sufferance, or
- (d) a licensee of land,

is hereby abolished.

(2) The rule of law by virtue of which a lessee holding under a lease is subject to an implied obligation to use the demised premises in a tenant-like or husbandlike manner is also hereby abolished.

Abolition for tenants etc. of doctrine of waste and obligation of tenant-like user.

12. Nothing in sections 9 to 11 applies in relation to an agricultural tenancy or a farm business tenancy.

Sections 9 to 11 not applicable to agricultural tenancies etc.

Specific performance

13.—(1) Where in any proceedings one party to a lease alleges that another party to the lease is in breach of a repairing obligation imposed by the lease or by an agreement made by the parties to it, the court may, if it thinks fit, order specific performance of the obligation notwithstanding any equitable rule restricting the scope of the remedy.

Specific performance available for enforcement of all repairing obligations.

(2) Subsection (1) applies whether or not the obligation relates to any premises demised by the lease, and whether any such agreement was made before or after the grant of the lease.

EXPLANATORY NOTES

Subsection (4) and (5)

4. These subsections implement the recommendation in paragraph 10.43 of the Report and provide that, in relation to tenancies at will, tenancies at sufferance and bare licences, damages for breach of a duty owed under subsections (1) or (3) will be assessed on a contractual basis even though the basis of the relationship may not be contractual. As to tenancies at will and at sufferance, see paragraph 1 above. For the purpose of this clause, the expression 'bare licences' comprises all non-contractual licences.

Subsections (6) and (7)

5. These subsections provide for the exclusion or modification of the duties owed under subsection (1). They are to the same effect, with necessary modifications, as clauses 9(3) and (4).

Clause 11

1. Subsection (1) abolishes the law of waste (see paragraphs 10.9-10.25 of the Report) in relation to the persons specified but not otherwise. This implements the recommendation in paragraph 10.35 of the Report. Subsection (2) abolishes the common law duty of tenantlike user (see paragraphs 10.26 - 10.29 of the Report) in relation to lessees. 'Lease' and 'lessee' are defined in clause 15(1).

Clause 12

1. The law of waste and the duty of tenantlike user will continue to apply to agricultural tenancies and farm business tenancies (as defined in clause 15(1)). This category will include those tenancies at will and contractual licences which are deemed to be agreements for the letting of land for a tenancy from year to year (Agricultural Holdings Act 1986, s 2(2)). See paragraph 1.7, n 13 of the Report.

Clause 13

1. This clause is modelled on and replaces section 17 of the Landlord and Tenant Act 1985 (*specific performance of landlord's repairing obligations in leases of dwellings*: see Appendix B). It enables the court to award specific performance of all leasehold repairing obligations irrespective of the nature of the property let, and whether the obligation has been undertaken by the landlord or the tenant. It implements the recommendation in paragraph 9.32 of the Report. See clause 14 as to application to the Crown.

Subsections (1) and (2)

2. These subsections provide that in proceedings between the parties to a lease the court may, if it thinks fit, order specific performance of a repairing obligation in the lease or a collateral agreement, whether or not the property to be repaired is included within the lease, and, irrespective of the nature of the property let (see paragraph 9.31 of the Report). As is presently the case under

(3) Where a person is not a party to a lease but is entitled to the benefit, or is subject to the burden, of a repairing obligation falling within subsection (1), that subsection shall apply, as respects the enforcement of that obligation, as if he were a party to the lease.

(4) Subsections (1) and (2) apply to the statutory tenant and his landlord under a statutory tenancy as they apply to the parties to a lease, except that in relation to a statutory tenancy the reference in subsection (2) to any premises demised by the lease is to be read as a reference to any premises comprised in that tenancy. 5

(5) In subsection (4)— 10

1977 c. 42.
1976 c. 80.

(a) “statutory tenancy” and “statutory tenant” mean a statutory tenancy or a statutory tenant within the meaning of the Rent Act 1977 or the Rent (Agriculture) Act 1976; and

(b) “landlord”, in relation to a statutory tenant, means the person who, but for the statutory tenancy, would be entitled to possession of the premises subject to it. 15

(6) In this section “repairing obligation” means—

(a) an obligation to repair (or keep or deliver up in repair), maintain, renew, construct or replace any property (including such an obligation owed by virtue of section 1); or 20

(b) an obligation to keep fit for human habitation however expressed (including such an obligation owed by virtue of section 5).

1985 c. 70.

(7) Section 17 of the Landlord and Tenant Act 1985 (which provides that a court may order specific performance of a landlord’s obligation to repair residential property and which is superseded by this section) shall cease to have effect. 25

Application to the Crown

Application to Crown of this Act and provisions of Landlord and Tenant Act 1985.

14.—(1) This Act binds the Crown.

(2) At the end of section 13 of the Landlord and Tenant Act 1985 (leases to which section 11 of that Act applies: general rule) there shall be added— 30

“(4) This section and the other provisions of sections 11 to 16 bind the Crown.”

1947 c. 44.

(3) Subsection (1) above shall not, so far as it applies to section 13 of this Act, be taken to affect the operation of paragraph (a) of the proviso to section 21(1) of the Crown Proceedings Act 1947 (which provides that, in proceedings against the Crown, a court shall not make an order for specific performance, but may make a declaration instead). 35

Supplemental

Interpretation.

15.—(1) In this Act (unless the context otherwise requires)— 40

1986 c. 5.

“agricultural tenancy” means a tenancy of an agricultural holding within the meaning of the Agricultural Holdings Act 1986 and in relation to which that Act applies;

“common parts”, in relation to a building, include the structure and exterior of the building and any common facilities within it; 45

EXPLANATORY NOTES

Landlord and Tenant Act 1985, s 17 (see paragraph 1 above), any equitable bar to the availability of the remedy, such as adequacy of damages, want of mutuality, inability to supervise the necessary work or the rule against partial performance of a contract, is to be disregarded (see paragraphs 9.3 - 9.10 of the Report where the relevant rules are considered). This does not affect a court's right to refuse the remedy in the exercise of its discretion nor a defendant's right to raise any equitable defence, such as laches or inequitable conduct by the claimant. 'Lease' is defined in clause 15(1). 'Repairing obligation' is defined in subsection (6). See also subsection (3) below.

Subsection (3)

3. In some cases persons who are not a party to the lease may be subject to the burden, or have the benefit, of a repairing covenant (see, for example, Landlord and Tenant (Covenants) Act 1995, s 15). Specific performance of that covenant may be decreed in favour of, or against, such persons as if they were parties to the lease. 'Lease' is defined in clause 15(1). 'Repairing obligation' is defined in subsection (6).

Subsection (4)

4. This subsection extends the effect of subsection (1) to statutory tenancies. It is modelled on Landlord and Tenant Act 1985 s 17(2)(a) and (b)). 'Statutory tenant', 'statutory tenancy' and 'landlord' in relation to a statutory tenancy, are defined in subsection (5). 'Lease' is defined in clause 15(1).

Subsection (5)

5. This subsection is modelled on Landlord and Tenant Act 1985, s 37. For statutory tenants and tenancies under the Rent Act 1977, see sections 2 and 3 of that Act. For statutory tenants and tenancies under the Rent (Agriculture) Act 1976, see sections 4 and 5 of that Act.

Subsection (6)

6. This subsection implements the recommendation in paragraph 9.32 of the Report. Subsection (6)(a) broadly follows Landlord and Tenant Act 1985, s 17(2)(d)). Subsection (6)(b) implements the recommendation in paragraph 9.33 that specific performance should be available to enforce covenants of fitness for human habitation in the same way as it is in relation to covenants to repair.

Subsection (7)

7. This subsection repeals section 17 of the Landlord and Tenant Act 1985 (specific performance of landlord's repairing obligations: see Appendix B and paragraph 9.14 of the Report), which clause 13 replaces.

Clause 14

1. This clause implements the recommendation in paragraph 9.42 of the Report. Subsections (1) and (2) apply both this Act and sections 11 - 16 of the Landlord and Tenant Act 1985 (*repairing*

“dwelling-house” includes any yard, garden, outhouses and appurtenances belonging to or usually enjoyed with it;

“farm business tenancy” means a farm business tenancy within the meaning of the Agricultural Tenancies Act 1995;

1995 c. 8.

5 “keep”, in relation to repair or fitness for human habitation, includes put into repair or render fit for human habitation, as the case may be;

“lease” means any lease or other tenancy and includes—

(a) a sub-tenancy, and

10 (b) an agreement for a tenancy,

but does not include a tenancy at will or at sufferance or a mortgage term;

15 “lessee” and “lessor”, in relation to a lease, mean the person for the time being entitled to the term of the lease and the person so entitled to the reversion expectant on that term respectively.

(2) In this Act, and in any enactment amended by this Act, “express covenant” includes express term, condition or obligation.

20 (3) In this Act (apart from section 9), and in any enactment amended by this Act, any reference (express or implied) to the covenants or any of the covenants implied by virtue of that section—

(a) shall (subject to paragraph (b)) be read as referring to the covenants or any of the covenants so implied as they have effect without any exclusion or modification under subsection (3) of that section; and

25 (b) where the reference is to a person’s liability by virtue of any of the covenants so implied, shall be read as including a reference to his liability by virtue of any such covenant as modified under that subsection.

30 **16.—**(1) The amendments specified in Schedule 1 are amended in accordance with that Schedule, the amendments being consequential on the provisions of this Act.

Consequential amendments and repeals.

(2) The enactments specified in Schedule 2 are repealed to the extent specified.

35 (3) The Secretary of State may by order provide for any enactment or instrument specified in the order to have effect, in relation to leases of any description specified in the order, with such modifications so specified as appear to him to be necessary or expedient in consequence of any provision of this Act.

40 (4) An order under subsection (3) shall be made by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

17.—(1) This Act may be cited as the Landlord and Tenant Act 1996.

Short title, commencement and extent.

(2) This Act shall come into force at the end of the period of three months beginning with the day on which it is passed.

EXPLANATORY NOTES

obligations in short lease and related provisions: see Appendix B and paragraphs 5.2 - 5.10 of the Report) to the Crown. Subsection (3) provides that clause 13 does not affect the rule that the court may not order specific performance against the Crown (Crown Proceedings Act 1947, s 21(1)).

Clause 15

Subsection (1)

1. This subsection defines several of the key expressions used in the Bill. An ‘agricultural tenancy’ is a tenancy subject to the Agricultural Holdings Act 1986. The only part of the Bill which affects these tenancies is clause 13 (specific performance). An ‘agricultural holding’ is defined by Agricultural Holdings Act 1986, s 1. See clause 12. ‘Farm business tenancy’ is defined in Agricultural Tenancies Act 1995, s 1. The only part of the Bill which affects these tenancies is clause 13 (*specific performance*). ‘Keep’ is defined to include ‘put’ and ‘render’. This implements the recommendation in paragraph 7.11(a) of the Report (see also paragraph 2.9). ‘Lease’ does not include mortgage terms (see Law of Property Act 1925 ss 85 and 86 (*modes of mortgaging freeholds and leaseholds*)). Statutory tenancies (for example, under the Rent Act 1977) do not confer any estate or property on the tenant. They are neither ‘leases’ nor ‘licences’ for the purposes of the Bill.

Subsection (3)

2. This subsection explains the references to the covenants implied by ‘section 9’ of the Bill. The effect of subsection (3)(b) is that where the Bill refers to a lessee’s liability by virtue of the covenant(s) implied by ‘section 9’ and the implied covenant has been modified in accordance with clause 9(4), the reference is to be read as referring to the lessee’s liability as modified (see clauses 1(4) and 5(4), and also, Landlord and Tenant Act 1985, s 11(2)(a) as amended by the Bill (Sched 1 para 8). Where the reference is to the implied covenants rather than a lessee’s liability by virtue of the covenant(s), subsection (3)(a) provides that the reference is to the covenants as they apply in unmodified form (see the provisions amended by paragraphs 1 - 3 of schedule 1). In these instances the implied covenants may not be modified or excluded. As to the meaning of modification, see the note to clause 9(3).

Clause 16

1. Subsections (1) and (2) make certain consequential amendments and repeals. Subsections (3) and (4) empower the Secretary of State to make by order such amendments as he considers necessary or expedient to any enactment or instrument as a consequence of the provisions of the Bill in relation to the leases of a type specified in the order. There are several instances in which the terms of a tenancy are prescribed, in varying degrees of detail, by statute (see, for example, Housing Act 1988, s 5(3)(e) and 24(3); Housing Act 1985, s 86 and Sched 6 para 5; Reserve and Auxiliary Forces (Protection of Civil Interests) Act 1951, s 30; Landlord and Tenant Act 1954, s 35; Leasehold Reform Act 1967, s 15(1), Landlord and Tenant Act 1987, s 15; Leasehold Reform, Housing and Urban Development Act 1993, s 57). This power will enable the Secretary of State to make specific provision regarding the application of the Bill to such leases.

(3) Subject to subsection (5), nothing in this Act applies to any lease, tenancy at will or at sufferance or licence granted or created—

(a) before the date on which this Act comes into force, or

(b) on or after that date in pursuance of an agreement entered into, or an order of a court made, before that date;

5

and accordingly any amendment or repeal made by this Act does not affect the operation of the enactment amended or repealed in relation to any such lease, tenancy or licence.

(4) Where a lease granted on or after the date on which this Act comes into force is so granted in pursuance of an option granted before that date, 10 the lease shall be regarded for the purposes of subsection (3) as granted in pursuance of an agreement entered into before that date, whether or not the option was exercised before that date; and for this purpose “option” includes right of first refusal.

(5) In section 13, subsections (1) to (6) apply to proceedings 15 commenced on or after the date on which this Act comes into force, whenever the lease or statutory tenancy in question was granted or created.

(6) This Act extends to England and Wales only.

EXPLANATORY NOTES

Clause 17

Subsection (2)

1. The Act is to come into force three months after it is passed.

Subsections (3) and (4)

2. These subsections implement the recommendations in paragraphs 7.31, 8.59 and 10.44 of the Report. They provide that, except in relation to clause 13 (specific performance: see subsection (5)) the Act will apply to all leases, tenancies at will, tenancies at sufferance and licences created on or after the day it comes into force, unless they were created pursuant to an agreement or a court order made before that date. 'Lease' is defined in clause 15(1).

Subsection (5)

3. This subsection implements the recommendation in paragraph 9.34 of the Report. Clause 13 is to apply to any proceedings commenced after the Act comes into force irrespective of when the lease was granted. 'Lease' is defined in clause 15(1) and 'statutory tenancy' is defined in clause 13(5).

SCHEDULES

SCHEDULE 1

Section 16(1).

CONSEQUENTIAL AMENDMENTS

Crown Lands Act 1702 (c. 1)

5 1. Section 5 of the Crown Lands Act 1702 (restriction on grant of leases) shall apply to a lease to which section 9 of this Act applies as if the reference to the tenant being liable to punishment for waste were a reference to his being bound by the covenants implied by section 9 or by express covenants (whether contained in the lease or not) imposing substantially the same obligations.

10 *Ecclesiastical Leasing Act 1858 (c. 57)*

2.—(1) Section 9 of the Ecclesiastical Leasing Act 1858 (restriction on grant of leases) shall be amended as follows.

(2) Omit the words from “, and the lessee” onwards.

(3) At the end of that section add—

15 “This section does not, however, authorise the making or grant of such a lease unless in addition the lessee—

(a) in the case of a lease to which section 9 of the Landlord and Tenant Act 1996 applies, is to be bound by the covenants implied by that section or by express covenants (whether contained in the lease or not) imposing substantially the same obligations; or

20 (b) in the case of any other lease, is not to be exempted from punishment for waste.”

Settled Land Act 1925 (c. 18)

25 3.—(1) Section 42 of the Settled Land Act 1925 (leases by tenants for life) shall be amended as follows.

(2) In subsection (5), omit the words from “, and whereby” to “waste,”.

(3) After that subsection insert—

30 “(6) Subsection (5) above does not, however, authorise the making of such a lease unless in addition the lessee—

(a) in the case of a lease to which section 9 of the Landlord and Tenant Act 1996 applies, is to be bound by the covenants implied by that section or by express covenants (whether contained in the lease or not) imposing substantially the same obligations; or

35 (b) in the case of any other lease, is not to be exempted from punishment for waste.”

Repair of Benefice Buildings Measure 1972 (No. 2)

40 4. In section 13 of the Repair of Benefice Buildings Measure 1972, for subsection (1) substitute—

“(1) The incumbent shall, as such, have the same obligations in relation to a parsonage house as he would have by virtue of section 9 of the Landlord and

EXPLANATORY NOTES

Schedule 1

Paragraphs 1-3

1. These paragraphs consequentially amend the Crown Lands Act 1702, s 5; the Ecclesiastical Leasing Act 1858, s 9 and the Settled Land Act 1925, s 42. At present, any lease of land to which these sections apply must make the tenant liable for waste (see note to clause 11(1)).

2. The effect of the amendment is in each case to substitute a new requirement that the lessee must be subject either to the implied covenants to take care of the premises (see clause 9) in unmodified form (see clause 15(3)) or, if and to the extent that such covenants are excluded (see clause 9(3)), to an express covenant to the same effect. The new requirement preserves the effect of the old law.

Paragraph 4

3. By section 13(1) of the Repair of Benefice Buildings Measure 1972 (No. 2) an incumbent has a duty to take proper care of a parsonage house. This is a duty that is equivalent to that of a tenant to use premises in a tenantlike manner (see paragraphs 10.26-10.29 of the Report). The reference to the duty of tenantlike user will cease to be appropriate when that duty is abolished (see clause 11(2)) and will be replaced by the implied covenant to take proper care of the premises (clause 9). This paragraph substitutes a reference to the new implied covenant for the old duty.

SCH. 1 Tenant Act 1996 in the event of its being let to him under a lease to which that section applies.”

Rent (Agriculture) Act 1976 (c. 80)

5. In Part I of Schedule 4 to the Rent (Agriculture) Act 1976 (grounds for possession in case of protected occupancy or statutory tenancy), in paragraph 1 of Case V, for “acts of waste by, or the neglect or default of,” substitute “the neglect or default of”. 5

Rent Act 1977 (c. 42)

6. In Part I of Schedule 15 to the Rent Act 1977 (grounds for possession in the case of protected or statutory tenancies), in Case 3, for— 10

(a) “acts of waste by, or the neglect or default of,” and

(b) “any act of waste by, or the neglect or default of,”

substitute “the neglect or default of” in each place.

Housing Act 1985 (c. 68)

7.—(1) The Housing Act 1985 shall be amended as follows. 15

(2) In section 302 of that Act (management and repair of temporary housing accommodation), for paragraph (c) substitute—

“(c) section 5 of the Landlord and Tenant Act 1996 (implied covenant as to fitness for habitation) does not apply to any lease of the residential building or flat in the building.” 20

(3) In Part I of Schedule 2 to that Act (grounds for possession in case of secure tenancies), in Ground 3, for—

(a) “acts of waste by, or the neglect or default of,” and

(b) “an act of waste by, or the neglect or default of,”

substitute “the neglect or default of” in each place. 25

Landlord and Tenant Act 1985 (c. 70)

8. In section 11 of the Landlord and Tenant Act 1985 (repairing obligations in short leases), in subsection (2)(a), for the words from “his duty” onwards substitute “any of the covenants implied by section 9 of the Landlord and Tenant Act 1996 (covenants to take care of premises) or by virtue of any express covenant (whether contained in the lease or not) which, so far as material, imposes substantially the same obligation as is imposed by any such implied covenant,”. 30

Housing Act 1988 (c. 50)

9. In Part II of Schedule 2 to the Housing Act 1988 (grounds for possession in case of assured tenancies), in Ground 13, for— 35

(a) “acts of waste by, or the neglect or default of,” and

(b) “an act of waste by, or the neglect or default of,”

substitute “the neglect or default of” in each place.

EXPLANATORY NOTES

Paragraphs 5 and 6

4. Under the Rent (Agriculture) Act 1976, Sched 4, Case V and Rent Act 1977, Sched 15, Case 3, the court may make an order for the possession of the property in favour of the landlord where the condition of the dwelling-house has, in the opinion of the court, deteriorated owing to acts of waste by, or the neglect or default of, the tenant or any person residing or lodging with him or any sub-tenant of his. The abolition of the law of waste in relation to lessees (clause 11(1)) means that the reference to waste will no longer be appropriate where a tenancy which is subject to the 1976 Act or the 1977 Act is also subject to the Bill (see Housing Act 1988, s 34(1)(b)-(d) and (4)). The reference to waste has therefore been deleted. No additional provision is necessary because in relation to deterioration attributable to a breach of the new implied covenant to take care of premises (clause 9) the landlord may rely on the fact that the tenant has broken or not performed an obligation of the tenancy (Rent (Agriculture) Act 1976, Sched 4, Case III and Rent Act 1977, Sched 15, Case 1).

5. The Rent (Agriculture) Act 1976 also applies to certain licences (*ibid* s 2(1)). The grounds for possession apply to them as to tenancies. No special provision is necessary.

Paragraph 7

6. Sub-paragraph (2) inserts in Housing Act 1985, s 302, a reference to the new implied covenant of fitness for human habitation (clause 5) in place of the reference to section 8 of the Landlord and Tenant Act 1985 (see Appendix B and paragraphs 4.2 and 8.47 of the Report).

7. Sub-paragraph (3) deletes the reference to 'waste' from Housing Act 1985, Sched 2, Ground 3, which is in similar terms to Case V of Schedule 4 to the Rent (Agriculture) Act 1976 (see note 4 above) except that it also applies to the deterioration of common parts (as defined in section 116 of the 1985 Act). In relation to those licences to which Ground 3 applies (Housing Act 1985, s 79(3)) see note 5 above.

Paragraph 8

8. The landlord's implied repairing covenant under section 11 of the Landlord and Tenant Act 1985 (see Appendix B and paragraph 5.2 of the Report) does not extend to works or repairs for which the tenant is liable under his duty to use the premises in a tenant-like manner (*ibid* s 11(2)(a): as to tenant-like manner, see paragraphs 10.26 - 10.29 of the Report). This duty is to be abolished (clause 11(2)) and replaced by the implied covenant to take care of premises (clause 9). This paragraph substitutes a reference to the new implied covenant or, as the implied covenant may be excluded (clause 9(3)), an express covenant to substantially the same effect in relation to the matters within the scope of the implied covenant, for the reference to the old duty. The new implied covenant may be modified (clauses 9(3) and 15(3)).

Paragraph 9

9. Paragraph 9 amends Housing Act 1988, Sched 2, Ground 13 to the same effect as paragraph 7(3) amends Housing Act 1985, Sched 2, Ground 3. In relation to those licences to which Ground 13 applies (Housing Act 1988, s 24(1)) see note 5 above.

SCHEDULE 2
REPEALS

Section 16(2).

Chapter	Short title	Extent of repeal
5	1858 c. 57. Ecclesiastical Leasing Act 1858.	In section 9, the words from “, and the lessee” onwards.
	1925 c. 18. Settled Land Act 1925.	In section 42(5), the words from “, and whereby” to “waste,”.
10	1985 c. 70. Landlord and Tenant Act 1985.	Sections 8 to 10. Section 17. In section 32(1), the words from “section 17” onwards.
15		In section 39, the entry relating to “fit for human habitation”.
20	1989 c. 42. Local Government and Housing Act 1989.	In Schedule 9, in paragraph 31, sub-paragraph (b) and the “and” immediately preceding it.

APPENDIX B

Extracts from the principal statutes referred to in the report

RELEVANT EXTRACTS FROM THE FOLLOWING STATUTORY PROVISIONS:

Building Act 1984, section 76

Environmental Protection Act 1990, sections 79, 80, 82

Housing Act 1985, sections 189, 190, 264, 265, 604

Defective Premises Act 1972, section 4

Landlord and Tenant Act 1927, section 18

Landlord and Tenant Act 1985, sections 8-14, 17

BUILDING ACT 1984

Defective premises

76.—(1) If it appears to a local authority that—

- (a) any premises are in such a state (in this section referred to as a “defective state”) as to be prejudicial to health or a nuisance, and
- (b) unreasonable delay in remedying the defective state would be occasioned by following the procedure prescribed by section 80 of the Environmental Protection Act 1990,

the local authority may serve on the person on whom it would have been appropriate to serve an abatement notice under the said section 93 [*sic*] (if the local authority had proceeded under that section) a notice stating that the local authority intend to remedy the defective state and specifying the defects that they intend to remedy.

(2) Subject to subsection (3) below, the local authority may, after the expiration of nine days after service of a notice under subsection (1) above, execute such works as may be necessary to remedy the defective state, and recover the expenses reasonably incurred in so doing from the person on whom the notice was served.

...

ENVIRONMENTAL PROTECTION ACT 1990

Statutory nuisances and inspections therefor

79.—(1) Subject to subsections (1A) to (6A) below, the following matters constitute “statutory nuisances” for the purposes of this Part, that is to say—

- (a) any premises in such a state as to be prejudicial to health or a nuisance;
- (b) smoke emitted from premises so as to be prejudicial to health or a nuisance;
- (c) fumes or gases emitted from premises so as to be prejudicial to health

or a nuisance;

- (d) any dust, steam, smell or other effluvia arising on industrial, trade or business premises and being prejudicial to health or a nuisance;
- (e) any accumulation or deposit which is prejudicial to health or a nuisance;
- (f) any animal kept in such a place or manner as to be prejudicial to health or a nuisance;
- (g) noise emitted from premises so as to be prejudicial to health or a nuisance;
- (ga) noise that is prejudicial to health or a nuisance and is emitted from or caused by a vehicle, machinery or equipment in a street...;
- (h) any other matter declared by any enactment to be a statutory nuisance;

and it shall be the duty of every local authority to cause its area to be inspected from time to time to detect any statutory nuisances which ought to be dealt with under section 80 below or sections 80 and 80A below and, where a complaint of a statutory nuisance is made to it by a person living within its area, to take such steps as are reasonably practicable to investigate the complaint.

(1A) No matter shall constitute a statutory nuisance to the extent that it consists of, or is caused by, any land being in a contaminated state.

(1B) Land is in a “contaminated state” for the purposes of subsection (1A) above if, and only if, it is in such a condition, by reason of substances in, on or under the land, that—

- (a) harm is being caused or there is a possibility of harm being caused ; or
- (b) pollution of controlled waters is, or is likely to be, caused;

and in this subsection “harm”, “pollution of controlled waters” and “substance” have the same meaning as in Part IIA of this Act.

...

(4) Subsection (1)(c) above does not apply in relation to premises other than private dwellings.

...

(7) In this Part—

...

“local authority” means, subject to subsection (8) below,—

- (a) in Greater London, a London borough council, the Common Council of the City of London and, as respects the Temples, the Sub-Treasurer

of the Inner Temple and the Under-Treasurer of the Middle Temple respectively;

- (b) ... outside Greater London, a district council;...
- (bb) in Wales, a county council, or county borough council;
- (c) the Council of the Isles of Scilly;

...

“person responsible”—

- (a) in relation to a statutory nuisance, means the person to whose act, default or sufferance the nuisance is attributable;
- (b) in relation to a vehicle, includes the person in whose name the vehicle is for the time being registered under the Vehicle Excise and Registration Act 1994 and any other person who is for the time being the driver of the vehicle;
- (c) in relation to machinery or equipment, includes any person who is for the time being the operator of the machinery or equipment;

“prejudicial to health” means injurious, or likely to cause injury, to health;

“premises” includes land and, subject to subsection (12) and... section 81A(9) below, any vessel;

“private dwelling” means any building, or part of a building, used or intended to be used, as a dwelling;

...

Summary proceedings for statutory nuisances

80.—(1) Where a local authority is satisfied that a statutory nuisance exists, or is likely to occur or recur, in the area of the authority, the local authority shall serve a notice (“an abatement notice”) imposing all or any of the following requirements—

- (a) requiring the abatement of the nuisance or prohibiting or restricting its occurrence or recurrence;
- (b) requiring the execution of such works, and the taking of such other steps, as may be necessary for any of those purposes,

and the notice shall specify the time or times within which the requirements of the notice are to be complied with.

(2) Subject to section 80A(1) below, the abatement notice shall be served—

- (a) except in a case falling within paragraph (b) or (c) below, on the person responsible for the nuisance;
- (b) where the nuisance arises from any defect of a structural character, on the owner of the premises;
- (c) where the person responsible for the nuisance cannot be found or the nuisance has not yet occurred, on the owner or occupier of the

premises.

(3) A person served with an abatement notice may appeal against the notice to a magistrates' court... within the period of twenty-one days beginning with the date on which he was served with the notice.

(4) If a person on whom an abatement notice is served, without reasonable excuse, contravenes or fails to comply with any requirement or prohibition imposed by the notice, he shall be guilty of an offence.

(5) Except in a case falling within subsection (6) below, a person who commits an offence under subsection (4) above shall be liable on summary conviction to a fine not exceeding level 5 on the standard scale together with a further fine of an amount equal to one-tenth of that level for each day on which the offence continues after the conviction.

(6) A person who commits an offence under subsection (4) above on industrial, trade or business premises shall be liable on summary conviction to a fine not exceeding £20,000.

(7) Subject to subsection (8) below, in any proceedings for an offence under subsection (4) above in respect of a statutory nuisance it shall be a defence to prove that the best practicable means were used to prevent, or to counteract the effects of, the nuisance.

(8) The defence under subsection (7) above is not available—

- (a) in the case of a nuisance falling within paragraph (a), (d), (e), (f) or (g) of section 79(1) above except where the nuisance arises on industrial, trade or business premises;

...

Summary proceedings by persons aggrieved by statutory nuisances

82.—(1) A magistrates' court may act under this section on a complaint... made by any person on the ground that he is aggrieved by the existence of a statutory nuisance.

(2) If the magistrates' court... is satisfied that the alleged nuisance exists, or that although abated it is likely to recur on the same premises or, in the case of a nuisance within section 79(1)(ga) above, in the same street..., the court... shall make an order for either or both of the following purposes—

- (a) requiring the defendant... to abate the nuisance, within a time specified in the order, and to execute any works necessary for that purpose;
- (b) prohibiting a recurrence of the nuisance, and requiring the defendant...

within a time specified in the order, to execute any works necessary to prevent the recurrence;
and... may also impose on the defendant a fine not exceeding level 5 on the standard scale.

(3) If the magistrates' court... is satisfied that the alleged nuisance exists and is such as, in the opinion of the court..., to render premises unfit for human habitation, an order under subsection (2) above may prohibit the use of the premises for human habitation until the premises are, to the satisfaction of the court..., rendered fit for that purpose.

- (4) Proceedings for an order under subsection (2) above shall be brought—
- (a) except in a case falling within paragraph (b) (c) or (d) below, against the person responsible for the nuisance;
 - (b) where the nuisance arises from any defect of a structural character, against the owner of the premises;
 - (c) where the person responsible for the nuisance cannot be found, against the owner or occupier of the premises;
 - (d) in the case of a statutory nuisance within section 79(1)(ga) above caused by noise emitted from or caused by an unattended vehicle or unattended machinery or equipment, against the person responsible for the vehicle, machinery or equipment.

...

(8) A person who, without reasonable excuse, contravenes any requirement or prohibition imposed by an order under subsection (2) above shall be guilty of an offence and liable on summary conviction to a fine not exceeding level 5 on the standard scale together with a further fine of an amount equal to one-tenth of that level for each day on which the offence continues after the conviction.

(9) Subject to subsection (10) below, in any proceedings for an offence under subsection (8) above in respect of a statutory nuisance it shall be a defence to prove that the best practicable means were used to prevent, or to counteract the effects of, the nuisance.

- (10) The defence under subsection (9) above is not available—
- (a) in the case of a nuisance falling within paragraph (a), (d), (e), (f) or (g) of section 79(1) above except where the nuisance arises on industrial, trade or business premises;

...

and

- (d) in the case of a nuisance which is such as to render the premises unfit for human habitation.

...

HOUSING ACT 1985

Repair notice in respect of unfit house

189.—(1) Subject to subsection (1A) where the local housing authority are satisfied that a dwelling-house or house in multiple occupation is unfit for human habitation, they shall serve a repair notice on the person having control of the dwelling-house or house in multiple occupation if they are satisfied, in accordance with section 604A, that serving a notice under this subsection is the most satisfactory course of action.

(1A) Where the local housing authority are satisfied that either a dwelling-house which is a flat or a flat in multiple occupation is unfit for human habitation by virtue of section 604(2) they shall serve a repair notice on the person having control of the part of the building in question if they are satisfied, in accordance with section 604A, that serving a notice under this subsection is the most satisfactory course of action.

(1B) In the case of a house in multiple occupation, a repair notice may be served on the person managing the house instead of on the person having control; and where a notice is so served, then, subject to section 191, the person managing the house shall be regarded as the person having control of it for the purposes of the provisions of this Part following that section.

(2) A repair notice under this section shall—

- (a) require the person on whom it is served to execute the works specified in the notice (which may be works of repair or improvement or both) and to begin those works not later than such reasonable date, being not earlier than the twenty-eighth day after the notice is served as is specified in the notice and to complete those works within such reasonable time as is so specified, and
- (b) state that in the opinion of the authority the works specified in the notice will render the dwelling-house or, as the case may be, house in multiple occupation fit for human habitation.

(3) The authority, in addition to serving the notice

- (a) on the person having control of the dwelling-house or part of the building concerned, or
- (b) on the person having control of or, as the case may be, on the person managing the house in multiple occupation which is concerned shall

serve a copy of the notice on any other person having an interest in the dwelling-house part of the building or house concerned whether as freeholder, mortgagee, or lessee...

(4) The notice becomes operative, if no appeal is brought, on the expiration of 21 days from the date of the service of the notice and is final and conclusive as to matters which could have been raised on an appeal.

(5) A repair notice under this section which has become operative is a local land charge.

(6) This section has effect subject to the provisions of section 190A.

Repair notice in respect of house in state of disrepair but not unfit

190.—(1) Subject to subsection (1B) where the local authority—

(a) are satisfied that a dwelling-house or house in multiple occupation is in such a state of disrepair that, although not unfit for human habitation, substantial repairs are necessary to bring it up to a reasonable standard, having regard to its age, character and locality, or

(b) are satisfied whether on a representation made by an occupying tenant or otherwise that a dwelling-house or house in multiple occupation is in such a state of disrepair that, although not unfit for human habitation, its condition is such as to interfere materially with the personal comfort of the occupying tenant or, in the case of a house in multiple occupation, the persons occupying it (whether as tenants or licensees),

they may serve a repair notice on the person having control of the dwelling-house or house in multiple occupation.

(1A) Subject to subsection (1B) where the local housing authority-

(a) are satisfied that a building containing a flat including a flat in multiple occupation is in such a state of disrepair that, although the flat is not unfit for human habitation, substantial repairs are necessary to a part of the building outside the flat to bring the flat up to a reasonable standard, having regard to its age, character and locality, or

(b) are satisfied, whether on a representation made by an occupying tenant or otherwise, that a building containing a flat is in such a state of disrepair that, although the flat is not unfit for human habitation, the condition of a part of the building outside the flat is such as to interfere materially with the personal comfort of the occupying tenant or, in the case of a flat in multiple occupation, the persons occupying it (whether as tenants or licensees),

they may serve a repair notice on the person having control of the part of the building concerned.

(1B) The authority may not serve a notice under subsection (1) or subsection (1A) unless—

- (a) there is an occupying tenant of the dwelling-house or flat concerned; or
- (b) the dwelling-house or building concerned falls within a renewal area within the meaning of Part VII of the Local Government and Housing Act 1989.

(1C) In the case of a house in multiple occupation, a notice under subsection (1) or subsection (1A) may be served on the person managing the house instead of on the person having control of it; and where a notice is so served, then, subject to section 191, the person managing the house shall be regarded as the person having control of it for the purposes of the provisions of this Part following that section.

(2) A repair notice under this section shall require the person on whom it is served, to execute the works specified in the notice, not being works of internal decorative repair, and—

- (a) to begin those works not later than such reasonable date, being not earlier than the twenty-eighth day after the notice is served as is specified in the notice; and
- (b) to complete those works within such reasonable time as is so specified.

Power to make closing order

264.—(1) Where the local housing authority are satisfied that a dwelling-house or house in multiple occupation is unfit for human habitation and that, in accordance with section 604A, taking action under this subsection is the most satisfactory course of action, they shall make a closing order with respect to the dwelling-house or house in multiple occupation.

(2) Where the local housing authority are satisfied that, in a building containing one or more flats, some or all of the flats are unfit for human habitation and that, in accordance with section 604A, taking action under this subsection is the most satisfactory course of action, they shall make a closing order with respect to the whole or part of the building.

(3) In deciding for the purposes of subsection (2)—

- (a) whether to make a closing order with respect to the whole or part of the building; or
 - (b) in respect of which part of the building to make a closing order;
- the authority shall have regard to such guidance as may from time to time be given by the Secretary of State under section 604A.

(4) This section has effect subject to section 300(1) (power to purchase for temporary housing use houses liable to be demolished or closed).

Power to make demolition order

265.—(1) Where the local housing authority are satisfied that—

- (a) a dwelling-house which is not a flat, or
- (b) a house in multiple occupation which is not a flat in multiple occupation,

is unfit for human habitation and that, in accordance with section 604A, taking action under this subsection is the most satisfactory course of action, they shall make a demolition order with respect to the dwelling-house or house concerned.

(2) Where the local housing authority are satisfied that, in a building containing one or more flats, some or all of the flats are unfit for human habitation and that, in accordance with section 604A, taking action under this subsection is the most satisfactory course of action, they shall make a demolition order with respect to the building.

(3) This section has effect subject to sections 300(1) (power to purchase for temporary housing use houses liable to be demolished or closed) and 304(1) (listed buildings and buildings protected by notice pending listing).

Fitness for human habitation

604.—(1) Subject to subsection (2) below, a dwelling-house is fit for human habitation for the purposes of this Act unless, in the opinion of the local housing authority, it fails to meet one or more of the requirements in paragraphs (a) to (i) below and, by reason of that failure, is not reasonably suitable for occupation,—

- (a) it is structurally stable;
- (b) it is free from serious disrepair;
- (c) it is free from dampness prejudicial to the health of the occupants (if any);
- (d) it has adequate provision for lighting, heating and ventilation;
- (e) it has an adequate piped supply of wholesome water;
- (f) there are satisfactory facilities in the dwelling-house for the preparation and cooking of food, including a sink with a satisfactory supply of hot and cold water;
- (g) it has a suitably located water-closet for the exclusive use of the occupants (if any);
- (h) it has, for the exclusive use of the occupants (if any), a suitably located fixed bath or shower and wash-hand basin each of which is provided with a satisfactory supply of hot and cold water; and
- (i) it has an effective system for the draining of foul, waste and surface water;

and any reference to a dwelling-house being unfit for human habitation shall be construed accordingly.

(2) Whether or not a dwelling-house which is a flat satisfies the requirements in subsection (1), it is unfit for human habitation for the purposes of this Act if, in the opinion of the local housing authority, the building or a part of the building outside the flat fails to meet one or more of the requirements in paragraphs (a) to (e) below and, by reason of that failure, the flat is not reasonably suitable for occupation,—

- (a) the building or part is structurally stable;
- (b) it is free from serious disrepair;
- (c) it is free from dampness;
- (d) it has adequate provision for ventilation; and
- (e) it has an effective system for the draining of foul, waste and surface water.

(3) Subsection (1) applies in relation to a house in multiple occupation with the substitution of a reference to the house for any reference to a dwelling-house.

(4) Subsection (2) applies in relation to a flat in multiple occupation with the substitution for any reference to a dwelling-house which is a flat of a reference to the flat in multiple occupation.

(5) The Secretary of State may by order amend the provisions of subsection (1) or subsection (2) in such manner and to such extent as he considers appropriate; and any such order—

- (a) may contain such transitional and supplementary provisions as the Secretary of State considers expedient; and
- (b) shall be made by statutory instrument which shall be subject to annulment in pursuance of a resolution of either House of Parliament.

DEFECTIVE PREMISES ACT 1972

Landlord's duty of care in virtue of obligation or right to repair premises demised

4.—(1) Where premises are let under a tenancy which puts on the landlord an obligation to the tenant for the maintenance or repair of the premises, the landlord owes to all persons who might reasonably be expected to be affected by defects in the state of the premises a duty to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury or from damage to their property caused by a relevant defect.

(2) The said duty is owed if the landlord knows (whether as the result of being notified by the tenant or otherwise) or if he ought in all the circumstances to have known of the relevant defect.

(3) In this section "relevant defect" means a defect in the state of the premises

existing at or after the material time and arising from, or continuing because of, an act or omission by the landlord which constitutes or would if he had had notice of the defect, have constituted a failure by him to carry out his obligation to the tenant for the maintenance or repair of the premises; and for the purposes of the foregoing provision “the material time” means—

- (a) where the tenancy commenced before this Act, the commencement of this Act; and
- (b) in all other cases, the earliest of the following times, that is to say—
 - (i) the time when the tenancy commences;
 - (ii) the time when the tenancy agreement is entered into;
 - (iii) the time when possession is taken of the premises in contemplation of the letting.

(4) Where premises are let under a tenancy which expressly or impliedly gives the landlord the right to enter the premises to carry out any description of maintenance or repair of the premises, then, as from the time when he first is, or by notice or otherwise can put himself, in a position to exercise the right and so long as he is or can put himself in that position, he shall be treated for the purposes of subsections (1) to (3) above (but for no other purpose) as if he were under an obligation to the tenant for that description of maintenance or repair of the premises; but the landlord shall not owe the tenant any duty by virtue of this subsection in respect of any defect in the state of the premises arising from, or continuing because of, a failure to carry out an obligation expressly imposed on the tenant by the tenancy.

(5) For the purposes of this section obligations imposed or rights given by any enactment in virtue of a tenancy shall be treated as imposed or given by the tenancy.

(6) This section applies to a right of occupation given by contract or any enactment and not amounting to a tenancy as if the right were a tenancy, and “tenancy” and cognate expressions shall be construed accordingly.

LANDLORD AND TENANT ACT 1927

Provisions as covenants to repair

18.—(1) Damages for a breach of a covenant or agreement to keep or put premises in repair during the currency of a lease, or to leave or put premises in repair at the termination of a lease, whether such covenant or agreement is expressed or implied, and whether general or specific, shall in no case exceed the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach of such covenant or agreement as aforesaid; and in particular no damage shall be recovered for a breach of any such covenant or agreement to leave or put premises in repair at the termination of a lease, if it is shown that the premises, in whatever state of repair they might be, would at or shortly after the termination of the

tenancy have been or be pulled down, or such structural alterations made therein as would render valueless the repairs covered by the covenant or agreement.

LANDLORD AND TENANT ACT 1985

Implied terms as to fitness for human habitation

8.—(1) In a contract to which this section applies for the letting of a house for human habitation there is implied, notwithstanding any stipulation to the contrary—

- (a) a condition that the house is fit for human habitation at the commencement of the tenancy, and
- (b) an undertaking that the house will be kept by the landlord fit for human habitation during the tenancy.

(2) The landlord, or a person authorised by him in writing, may at reasonable times of the day, on giving 24 hours' notice in writing, to the tenant or occupier, enter premises to which this section applies for the purpose of viewing their state and condition.

(3) This section applies to a contract if—

- (a) the rent does not exceed the figure applicable in accordance with subsection (4), and
- (b) the letting is not on such terms as to the tenant's responsibility as are mentioned in subsection (5).

(4) The rent limit for the application of this section is shown by the following Table, by reference to the date of making of the contract and the situation of the premises:

TABLE

<i>Date of making of contract</i>	<i>Rent limit</i>
Before 31st July 1923.	In London: £40. Elsewhere: £26 or £16 (see Note 1).
On or after 31st July 1923 and before 6th July 1957.	In London: £40. Elsewhere: £26.
On or after 6th July 1957.	In London: £80. Elsewhere: £52.

NOTES

1. The applicable figure for contracts made before 31st July 1923 is £26 in the case of premises situated in a borough or urban district which at the date of the contract had according to the last published census a population of 50,000 or more. In the case of a house situated elsewhere, the figure is £16.

2. The references to "London" are, in relation to contracts made before 1st April 1965, to the administrative county of London and, in relation to contracts made on or that date to Greater London exclusive of the outer London boroughs.

(5) This section does not apply where a house is let for a term of three years or more (the lease not being determinable at the option of either party before the expiration of three years) upon terms that the tenant puts the premises into a condition reasonably fit for human habitation.

(6) In this section "house" includes—

- (a) a part of a house, and
- (b) any yard, garden, outhouses and appurtenances belonging to the house or usually enjoyed with it.

Application of s 8 to certain houses occupied by agricultural workers

9.—(1) Where under the contract of employment of a worker employed in agriculture the provision of a house for his occupation forms part of his remuneration and the provisions of section 8 (implied terms as to fitness for human habitation) are inapplicable by reason only of the house not being let to him—

- (a) there are implied as part of the contract of employment, notwithstanding any stipulation to the contrary, the like condition and undertaking as would be implied under that section if the house were so let, and
- (b) the provisions of that section apply accordingly, with the substitution of "employer" for "landlord" and such other modifications as may be necessary.

(2) This section does not affect any obligation of a person other than the employer to repair a house to which this section applies, or any remedy for enforcing such an obligation.

(3) In this section "house" includes—

- (a) a part of a house, and
- (b) any yard, garden, outhouses and appurtenances belonging to the house or usually enjoyed with it.

Fitness for human habitation

10.— In determining for the purposes of this Act whether a house is unfit for human habitation, regard shall be had to its condition in respect of the following matters—

- repair,
- stability,
- freedom from damp,
- internal arrangement,
- natural lighting,
- ventilation,
- water supply,
- drainage and sanitary conveniences,

facilities for preparation and cooking of food and for the disposal of waste water; and the house shall be regarded as unfit for human habitation if, and only if, it is so far defective in one or more of those matters that it is not reasonably suitable for occupation in that condition.

Repairing obligations in short leases

11.—(1) In a lease to which this section applies (as to which, see sections 13 and 14) there is implied a covenant by the lessor—

- (a) to keep in repair the structure and exterior of the dwelling-house (including drains, gutters and external pipes),
- (b) to keep in repair and proper working order the installations in the dwelling-house for the supply of water, gas and electricity and for sanitation (including basins, sinks, baths and sanitary conveniences, but not other fixtures fittings and appliances for making use of the supply of water, gas or electricity), and
- (c) to keep in repair and proper working order the installations in the dwelling-house for space heating and heating water.

(1A) If a lease to which this section applies is a lease of a dwelling-house which forms part only of a building, then, subject to subsection (1B), the covenant implied by subsection (1) shall have effect as if—

- (a) the reference in paragraph (a) of that subsection to the dwelling-house included a reference to any part of the building in which the lessor has an estate or interest; and
- (b) any reference in paragraphs (b) and (c) of that subsection to an installation in the dwelling-house included a reference to an installation which, directly or indirectly, serves the dwelling-house and which either—
 - (i) forms part of any part of a building in which the lessor has an estate or interest; or
 - (ii) is owned by the lessor or under his control.

(1B) Nothing in subsection (1A) shall be construed as requiring the lessor to carry out any works or repairs unless the disrepair (or failure to maintain in working order) is such as to affect the lessee's enjoyment of the dwelling-house or of any common parts, as defined in section 60(1) of the Landlord and Tenant Act 1987, which the lessee, as such, is entitled to use.

(2) The covenant implied by subsection (1) ("the lessor's repairing covenant") shall not be construed as requiring the lessor—

- (a) to carry out works or repairs for which the lessee is liable by virtue of his duty to use the premises in a tenant-like manner, or would be so liable but for an express covenant on his part,
- (b) to rebuild or reinstate the premises in the case of destruction or damage by fire, or by tempest, flood or other inevitable accident, or
- (c) to keep in repair or maintain anything which the lessee is entitled to remove from the dwelling-house.

(3) In determining the standard of repair required by the lessor's repairing covenant, regard shall be had to the age, character and prospective life of the dwelling-house and the locality in which it is situated.

(3A) In any case where—

- (a) the lessor's repairing covenant has effect as mentioned in subsection (1A), and
- (b) in order to comply with the covenant the lessor needs to carry out works or repairs otherwise than in, or to an installation in, the dwelling-house, and
- (c) the lessor does not have a sufficient right in the part of the building or the installation concerned to enable him to carry out the required works or repairs,

then, in any proceedings relating to a failure to comply with the lessor's repairing covenant, so far as it requires the lessor to carry out the works or repairs in question, it shall be a defence for the lessor to prove that he used all reasonable endeavours to obtain, but was unable to obtain, such rights as would be adequate to enable him to carry out the works or repairs.

(4) A covenant by the lessee for the repair of the premises is of no effect so far as it relates to the matters mentioned in subsection (1)(a) to (c), except so far as it imposes on the lessee any of the requirements mentioned in subsection (2)(a) or (c).

(5) The reference in subsection (4) to a covenant by the lessee for the repair of the premises includes a covenant—

- (a) to put in repair or deliver up in repair,
- (b) to paint, point or render,
- (c) to pay money in lieu of repairs by the lessee, or

- (d) to pay money on account of repairs by the lessor.

(6) In a lease in which the lessor's repairing covenant is implied there is also implied a covenant by the lessee that the lessor, or any person authorised by him in writing, may at reasonable times of the day and on giving 24 hours' notice in writing to the occupier, enter the premises comprised in the lease for the purpose of viewing their condition and state of repair.

Restriction on contracting out of s 11

12.—(1) A covenant or agreement, whether contained in a lease to which section 11 applies or in an agreement collateral to such a lease, is void in so far as it purports—

- (a) to exclude or limit the obligations of the lessor or the immunities of the lessee under that section, or
- (b) to authorise any forfeiture or impose on the lessee any penalty, disability or obligation in the event of his enforcing or relying upon those obligations or immunities,

unless the inclusion of the provision was authorised by the county court.

(2) The county court may, by order made with the consent of the parties authorise the inclusion in a lease, or in an agreement collateral to a lease, of provisions excluding or modifying in relation to the lease, the provisions of section 11 with respect to the repairing obligations of the parties if it appears to the court that it is reasonable to do so, having regard to all the circumstances of the case, including the other terms and conditions of the lease.

Leases to which s 11 applies: general rule

13.—(1) Section 11 (repairing obligations) applies to a lease of a dwelling-house granted on or after 24th October 1961 for a term of less than seven years.

(2) In determining whether a lease is one to which section 11 applies—

- (a) any part of the term which falls before the grant shall be left out of account and the lease shall be treated as a lease for a term commencing with the grant,
- (b) a lease which is determinable at the option of the lessor before the expiration of seven years from the commencement of the term shall be treated as a lease for a term of less than seven years, and
- (c) a lease (other than a lease to which paragraph (b) applies) shall not be treated as a lease for a term of less than seven years if it confers on the lessee an option for renewal for a term which, together with the original term, amounts to seven years or more.

- (3) This section has effect subject to—
section 14 (leases to which section 11 applies: exceptions), and
section 32(2) (provisions not applying to tenancies within Part II of the
Landlord and Tenant Act 1954).

Leases to which s 11 applies: exceptions

14.—(1) Section 11 (repairing obligations) does not apply to a new lease granted to an existing tenant, or to a former tenant still in possession, if the previous lease was not a lease to which section 11 applied (and, in the case of a lease granted before 24th October 1961, would not have been if it had been granted on or after that date).

- (2) In subsection (1)—

“existing tenant” means a person who is when, or immediately before, the new lease is granted, the lessee under another lease of the dwelling-house;

“former tenant still in possession” means a person who—

- (a) was the lessee under another lease of the dwelling-house which terminated at some time before the new lease was granted, and
(b) between the termination of that other lease and the grant of the new lease was continuously in possession of the dwelling-house or of the rents and profits of the dwelling-house; and

“the previous lease” means the other lease referred to in the above definitions.

(3) Section 11 does not apply to a lease of a dwelling-house which is a tenancy of an agricultural holding within the meaning of the Agricultural Holdings Act 1986 and in relation to which that Act applies or to a farm business tenancy within the meaning of the Agricultural Tenancies Act 1995.

- (4) Section 11 does not apply to a lease granted on or after 3rd October 1980 to—
a local authority,
a new town corporation,
an urban development corporation,
the Development Board for Rural Wales,
a registered housing association,
a co-operative housing association, or
an educational institution or other body specified, or of a class specified, by regulations under section 8 of the Rent Act 1977 or paragraph 8 of Schedule 1 to the Housing Act 1988 (bodies making student lettings).
a housing action trust established under Part III of the Housing Act 1988.

- (5) Section 11 does not apply to a lease granted on or after 3rd October 1980 to—
(a) Her Majesty in right of the Crown (unless the lease is under the management of the Crown Estate Commissioners), or
(b) a government department or a person holding in trust for Her Majesty for the purposes of a government department.

Specific performance of landlord's repairing obligations

17.—(1) In proceedings in which a tenant of a dwelling alleges a breach on the part of his landlord of a repairing covenant relating to any part of the premises in which the dwelling is comprised, the court may order specific performance of the covenant whether or not the breach relates to a part of the premises let to the tenant and notwithstanding any equitable rule restricting the scope of the remedy, whether on the basis of a lack of mutuality or otherwise.

(2) In this section—

- (a) “tenant” includes a statutory tenant,
- (b) in relation to a statutory tenant the reference to the premises let to him is to the premises of which he is a statutory tenant,
- (c) “landlord”, in relation to a tenant, includes any person against whom the tenant has a right to enforce a repairing covenant, and
- (d) “repairing covenant” means a covenant to repair, maintain, renew, construct or replace any property.

APPENDIX C

List of persons and organisations who commented on Consultation Paper No 123

ORGANISATIONS WHO RESPONDED TO OUR CONSULTATION PAPER

Abbey National plc
Bar Council Law Reform Committee
Bath City Council
Bidwells
Birmingham City Council Environmental Services Department
Birmingham Law Society
Boodle Hatfield
The Boots Company PLC
British Bankers Association
British Gas plc
British Legal Association
British Property Federation
British Railways Board
British Retail Consortium
Chancery Bar Association
City of London Law Society
City of Westminster Housing Department
Council of Her Majesty's Circuit Judges
Council of Mortgage Lenders
Country Landowners Association
Crown Estate
Denton Hall Burgin & Warrens
Department of the Environment
Duchy of Lancaster
ESN Property Management Co. Ltd
Grand Metropolitan Estates Limited
Grosvenor Estate
Holborn Law Society
Housing Law Barristers at Two Garden Court Chambers
Institute of Legal Executives
Institute of Rent Officers
Jacques & Lewis
Jones Lang Wootton
The Law Society
Leith Mansions Leaseholders Association
Lovell White Durrant
MEPC Investments Ltd
National Association of Estate Agents

National House Building Council
National Trust
Northern Chancery Bar Association
Norton Rose
Norwich Union Insurance Group
Religious Society of Friends
Royal Institution of Chartered Surveyors
Shelter
Slough Estates plc
Society of Licensed Conveyancers
Standard Life Assurance Company
Welsh Office
Winckworth & Pemberton

INDIVIDUALS WHO REPLIED TO OUR CONSULTATION PAPER

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J C Edgecumbe, FRICS
R Goldberg, Solicitor
Professor M Hollis
K Lewison QC
N Madge, Solicitor
Professor J E Martin
H L Miller, Solicitor
Mrs S E Murdoch
G Osborn-King, Solicitor
H Price
D M S Schayek, Solicitor
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