The Law Commission

(LAW COM. No. 142)

CODIFICATION OF THE LAW OF LANDLORD AND TENANT

FORFEITURE OF TENANCIES

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

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

LONDON
HER MAJESTY'S STATIONERY OFFICE

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.

The Commissioners are—

The Honourable Mr. Justice Ralph Gibson, *Chairman*

Mr. Trevor M. Aldridge

Mr. Brian J. Davenport Q.C.

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FORFEITURE OF TENANCIES

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THE LAW COMMISSION

Item VIII of the First Programme

CODIFICATION OF THE LAW OF LANDLORD AND TENANT

FORFEITURE OF TENANCIES

To the Right Honourable the Lord Hailsham of Saint Marylebone, CH, Lord High Chancellor of Great Britain

PART I

GENERAL INTRODUCTION

1.1 This report is submitted in the context of Item VIII of our First Programme: Codification of the Law of Landlord and Tenant. In 1967 the Commission decided that it would first make three separate reports on those aspects of the law which seemed particularly in need of reform. The first of these reports, *Obligations of Landlords and Tenants*,[1] was published on 11 June 1975. The second, *Covenants Restricting Dispositions, Alterations and Change of User*,[2] is to be published contemporaneously with the present report. The present report completes this series. Like the second, it is submitted without draft clauses designed to implement its recommendations. The reasons for omitting draft clauses have been discussed in the second report and in the Nineteenth Annual Report for 1983–1984.[3] Drafting clauses would require much work by the Law Commission team and parliamentary draftsmen, not only in converting the proposals into statutory form, but also in fitting the changes into a large number of different statutory contexts. We are aware that at least some of the proposals may be thought controversial. Hence, we decided to submit the report without clauses in the hope that it contains sufficient detail for effective further consultation and discussion. If it is decided that the proposals provide the foundation for reforms which are both desirable and capable of implementation, the further work of drafting a Bill, and of detailed consultation upon that Bill, would then be justified.

The scope of the report

1.2 The report is concerned with the right of a landlord or a tenant to terminate a tenancy when the other has been at fault in breaking its terms.[4] We use the word "fault" for convenience to indicate breach of, or failure to

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[1]Law Com. No. 67.
[2]Law Com. No. 141.
[3]Law Com. No. 140.
[4]The report also deals with a small number of cases in which the tenancy incorporates a condition enabling the landlord to terminate it on the happening of an event which does not connote fault on the part of the tenant: see Part XIV of this report. This is consequential on our proposal (paras 3.3–3.10) to abolish altogether the present doctrine of re-entry.

comply with, terms in a tenancy agreement. Such breach or failure may, of course, occur without any blameworthiness on the landlord's or tenant's part, as in the case of insolvency through misfortune.

1.3 Where it is the tenant who is at fault, the tenancy agreement almost always contains a forfeiture clause giving the landlord a right to terminate the tenancy. But successive modifications have been superimposed upon the ancient principles of the law of forfeiture in such a way as to produce a body of rules which, besides being unnecessarily complicated, is no longer coherent and may give rise to injustice. We recommend its replacement by a new system.

1.4 Where the fault is that of the landlord, the tenant almost invariably has now no means of terminating the tenancy, because tenancy agreements rarely if ever contain a right to terminate, although such a right would be effective if included. We recommend that the tenant should in future have a right to terminate which is broadly analogous to that enjoyed by the landlord in the converse case.

The working paper

1.5 The subject matter of this report was considered by a Landlord and Tenant Working Party[5] and in 1968 the Law Commission published, for consultation, a working paper[6] (referred to hereafter as "the working paper"), which contained the provisional proposals with notes of the Working Party and a commentary added by the Law Commission. We are grateful to the Working Party for the valuable help which they gave, and to all those who commented on the working paper and subsequently on particular aspects of this report.[7] The scope of the working paper was wider than that of this report, in that it dealt with termination generally, including frustration and notice, and was not confined to termination for fault.

Meaning of "tenancy"

1.6 In this report we use the word "tenancy" to mean a lease, underlease and any other tenancy, whether formal or informal and whether legal or equitable. The word thus includes an equitable tenancy arising by virtue of an agreement for a tenancy (under the doctrine in *Walsh* v. *Lonsdale*[8]), but not a statutory tenancy under the Rent Acts (which, despite its name, is not a tenancy and amounts only to a personal status of irremovability).

Report does not affect statutory security of tenure

1.7 It is important to emphasise that the recommendations made in this report about the landlord's right to terminate are not intended to affect (any more than does the present law of forfeiture) the special statutory provisions which give security of tenure to certain tenants in particular circumstances. The most important of these are contained in the Rent Act 1977, the Rent

[5]A list of members of the Working Party at the relevant time is in Appendix B.
[6]Working Paper No. 16: Working Party's Provisional Proposals Relating to Termination of Tenancies.
[7]A list is in Appendix C.
[8](1882) 21 Ch. D. 9.

(Agriculture) Act 1976 and the Housing Act 1980.[9] These enactments operate either by imposing restrictions upon a landlord's right to terminate a contractual tenancy or by providing for a statutory tenancy to arise in the place of a contractual tenancy which has been terminated. The security of tenure for which they provide would not be affected by implementation of the recommendations in this report.

The two schemes for reform

1.8 The report describes two separate schemes for reform. The first contains the new system of law for termination by landlords in place of the existing system of forfeiture. The second contains a new system for termination of tenancies by tenants. There is an important difference between the two schemes for reform. The existing law of forfeiture is obviously defective: it is more complicated than it needs to be to carry into effect the main substance and purpose of the existing law. The needless complication adds to the costs incurred by people caught up in the working of the law. The defects can be remedied by a scheme which will simplify both the substance and the working of the existing law, and thereby save time and costs both in business dealings and in legal proceedings, without, we believe, any interference with the reasonable expectations of either landlords or tenants. The scheme for tenant's termination orders, on the other hand, would introduce a new right which in general tenants have never enjoyed. Tenants have had no such right, presumably, because even if they had the bargaining power to insist that it be included in tenancy agreements they have not been concerned to do so and, in other cases, (constituting no doubt the general run) they have been unable to insist even had they thought of it and desired to have it. The scheme providing for a right for termination by tenants would introduce some change in the present relationship between landlords and tenants. For reasons explained below we would not expect such a right to be used frequently, but it would significantly improve the position of tenants in some cases. It is our view that that change would be fair and cause no untoward harm to landlords who act reasonably.

1.9 The scheme for reform of forfeiture is independent of and could be implemented separately from the scheme for tenants' termination orders. Separate implementation could be justified on the ground that the reform of forfeiture is primarily intended to improve the working of the law without major changes in the rights of landlord or tenants. It seems to us, however, that there is much to be said for implementing both schemes together.

1.10 The scheme for tenants' termination rights raises a related question of some difficulty: the question of damages for loss caused by termination of a tenancy. Under the present law, a landlord who forfeits a tenancy for breach of covenant can get a judgment for any damages caused by that breach (e.g. for the cost of undone repairs) but he cannot claim damages for any loss suffered by reason of the termination of the tenancy, e.g. because the rental value of the premises has gone down or because he is unable to let the premises

[9] As to the 1980 Act, see especially Part I, Chapter II (Security of Tenure and Rights of Secure Tenants). Other statutory provisions serving a similar purpose on a smaller scale are to be found elsewhere: see, for example, the Landlord and Tenant (War Damage) Act 1939 and the Landlord and Tenant (War Damage) (Amendment) Act 1941; the Landlord and Tenant Act 1954, s.16; and the Leasehold Reform Act 1967, Schedule 3, para. 4.

for a period of time. It would be open to a landlord to require a covenant from a tenant to pay such damages but it is our understanding that such terms do not appear in tenancies. Further, upon forfeiture, the landlord recovers the land with any improvements carried out by the tenant and premature termination of a tenancy will often secure for the landlord the benefit of a rental value increased by inflation. In other words, the landlord in most cases probably suffers little if any loss as a result of the termination of the tenancy.

1.11 If tenants are to be given a right to terminate a tenancy because of a breach of covenant by the landlord grave enough to justify termination, the further question arises whether such a right would be fully effective without a right to damages, not only for the breach of covenant, but also for the loss of the tenancy itself. There are cases, we believe, in which a right to terminate would be of use to a tenant suffering from serious and persistent breaches of covenant on the part of a landlord even though the tenant could not claim in addition damages for loss of the tenancy. We would, therefore, support enactment of a scheme giving a right to termination to tenants even if a right to such damages were not included. However, there would be many more cases in which the tenant could not afford to terminate, however serious and persistent the breaches of covenant, unless he could also claim and recover the capital expended by him in acquiring the tenancy or in improving the premises. Creation of the right to damages for loss of the tenancy would thus make the right to terminate more effective in a wider range of cases but even in those cases the tenant could only afford to obtain termination if he could be sure of getting the money ordered to be paid as damages. The certainty of recovery might exist because of the known assets of the landlord but it is probably rare for landlords with large assets to subject themselves to the losses caused by persistent breaches of covenant. If there was no obvious sufficiency of assets a tenant would not terminate a tenancy having a capital value unless the procedure could sufficiently secure payment of his claim. For these reasons it seems to us that a tenant's right of termination, even coupled with a right to damages for loss of tenancy, would in probability be used in only a small number of cases but it is our view that the law would be improved if the rights of tenants were extended in this way and that such extension would not unfairly harm landlords.

1.12 There is one further complication. If a tenant's right of termination is to be supported by a right to damages for loss of the tenancy, does fairness, or the keeping of equality in legal right between landlord and tenants, require the creation of a similar right to damages in favour of landlords? A right for landlords to damages for loss suffered through the ending of a tenancy would, we think, be used more frequently than a similar right in favour of tenants. It is true that while inflation persists the premature termination of a tenancy for a term of years will frequently cause profit to the landlord rather than loss and, if he can relet promptly, there would often be no damages to claim. It is, however, probable that in most cases there is a period in which the premises are unlet and the new right to damages would enable landlords to claim any loss caused thereby which would not be made up by improved rents over the remaining period of the terminated tenancy. Further, in cases where premises are let for a term of years and there ceases to be any beneficial use for the premises by the tenants or by any other user, for example in blighted industrial areas, the present position is (as we understand it) that landlords do not forfeit

leases on any available ground, because it pays them to keep the lease in existence so long as the tenant can pay the rent. If the law were changed, so that upon termination for breach the landlord could claim for future loss of rent, there would probably be increased pressure upon tenants to agree to terms of surrender which would include compensation for future loss of rent. As stated above, under the present law, a landlord could require the inclusion in a tenancy agreement of such a right and, if it were included, it would be effective. So far as we know, such a right is rarely, if ever, included in tenancy agreements. If such a right were created by statute it would, presumably, be on terms that it could not be excluded by contrary agreement. We are not aware of any sufficient reasons to introduce at the present time into the law a right which many landlords could introduce by agreement if they were persuaded of its necessity in their own interests. It seems to us that introduction of a tenant's termination order scheme, coupled with a right to damages for loss of the tenancy, does not require, on any ground of fairness or equality of right, introduction of a similar right to damages in favour of landlords.

1.13 The working paper in 1968 contained a proposal for making termination orders available to tenants. There was no general opposition to that proposal on consultation. The working paper proposals did not include the creation of a right to damages in favour of tenants or of landlords for loss caused by termination of a tenancy, but we stated some time ago our intention to include a right to damages in the tenants' termination scheme.[10] Knowing that consultation would be carried out on the proposals in this report, we decided that there was no point in any further consultation by us upon the question of damages for loss of tenancy either for tenants or for landlords. In the first case, the likely effect of including such a right for tenants seemed to be sufficiently clear to justify inclusion of it in the scheme on the basis that it can, if found wanting, be excluded hereafter. In the other, a termination right in favour of landlords, the consequences of creating such a right are difficult to assess, but we do not see at the moment any general case for its introduction sufficient to justify our carrying out further consultation upon it at this stage.

The scheme of the report

1.14 The remainder of this report is divided into two main sections:
Parts I and II summarise the present law of forfeiture, analyse its shortcomings and conclude with a brief outline of the scheme put forward to replace it and of the analogous scheme for termination by the tenant.

Parts IV to XXI deal in more detail with the two schemes just mentioned.

[10]Fifteenth Annual Report 1979–1980: Law Com. No. 107 para. 2.36.

THE PRESENT LAW OF FORFEITURE, ITS DEFECTS AND AN OUTLINE OF PROPOSED SCHEMES

PART II

THE PRESENT LAW OF FORFEITURE

The Grounds of Forfeiture

2.1 The right of a landlord to forfeit a tenancy may arise in several different ways, of which the most important is on breach of covenant.

(a) Breach of covenant

2.2 If, as a term of his tenancy, a tenant agrees with his landlord (expressly or impliedly) that he will do or refrain from doing certain things (for example, that he will pay rent or keep the property in repair, or that he will not change its use), he is said to enter into a covenant[1] and a failure to comply with it is a *breach of covenant*. A breach of covenant will always give rise to a claim in damages, but a tenant's breach of covenant does not entitle the landlord to take action to forfeit the tenancy unless the tenancy itself embodies an express provision allowing him to do so. This provision is usually called a forfeiture clause, and a tenancy created by a formal document will in practice almost always contain one.

(b) Breach of condition

2.3 Tenancies may also be granted upon *condition*. This means that the tenancy, though granted for a *specified* period (or until ended by notice), is made terminable within that period (or before the notice is given) on the happening of some particular event. If the event occurs, that by itself entitles the landlord to forfeit the tenancy: there is no need for a forfeiture clause.

2.4 The event may be an entirely neutral one,[2] or it may be an act or omission on the part of the tenant. So although a condition does not of itself impose any directly enforceable obligation it may, by attaching the penalty of forfeiture to the tenant's failure to do or to refrain from certain things, be used to impose an obligation indirectly. Thus a landlord who wished to impose upon his tenant an obligation to insure could do so either by taking from him an ordinary covenant to insure or by granting the tenancy "upon condition that" he insured. But it is more usual to impose such obligations by means of a covenant coupled with a forfeiture clause, because a breach of condition, unlike a breach of covenant, does not entitle the landlord to damages as well as (or instead of) forfeiture.

2.5 The only present day example of a condition being commonly included amoungst the terms of a tenancy occurs when the landlord wants power to end the tenancy prematurely if the tenant becomes bankrupt. This power is usually

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[1]Strictly speaking an obligation of this kind is not a "covenant" unless it is undertaken by deed, but the term is commonly used to describe all such obligations undertaken in any tenancy (whether formal or informal) and we use it in this comprehensive sense.

[2]For example, the grant of planning permission for a particular use.

obtained through a variation in the wording of the forfeiture clause which is included in any case in order to permit forfeiture for breach of covenant. The variation simply provides that forfeiture may also take place if the tenant becomes bankrupt (or on the happening of associated or similar events, such as the tenant entering into an arrangement or composition for the benefit of creditors). Although it seems clear that the effect of this variation is technically to impose a condition, it is not a typical condition in the classical sense because conditions of the latter kind are imposed independently of any forfeiture clause and give rise (as we have seen) to an automatic right of forfeiture. No doubt this is why section 146 of the Law of Property Act 1925 (of which we shall have more to say later) calls it *"a condition for forfeiture* on ...bankruptcy"[3] or *"a condition of forfeiture on...* bankruptcy".[4]

2.6 Conditions must be distinguished from *limitations*. There is unfortunately some confusion of terminology in this area of the law, but the distinction plainly exists. As we have noted, a condition is said to exist when a landlord grants a tenancy for a specified period (or until ended by notice) but includes a provision making it terminable if the event in question should occur during that period (or before notice is given). In the case of a limitation, however, the event is built into the primary formula which fixes the period for which the tenancy is limited to last. If this is done, the occurrence of the event will bring the tenancy to an end automatically because its period has expired. There is no question of forfeiture.[5] So whereas, in the case of a condition, the happening of the event leaves the landlord with a choice as to whether the tenancy should be ended through forfeiture or allowed to continue, in the case of a limitation its occurrence serves of itself to end the tenancy and so leave him no choice.[6] In other respects limitations resemble conditions: the event in question may or may not involve an act or omission on the part of the tenant[7] and, whether it does or not, will give rise to no claim for damages.

(c) **Denial to title**

2.7 A tenant who denies or disclaims his landlord's title to the property comprised in the tenancy is automatically made liable to forfeiture. This has been described as an "outmoded doctrine"[8] and it derives from the feudal principle that repudiation of the lord destroys the tenure. Nowadays it is said

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[3]Subsection (9) (emphasis added).

[4]Subsection (10) (emphasis added).

[5]But subs. (7) of s.146 of the Law of Property Act 1925 applies the provisions of that section, which give relief *against* forfeiture, to certain kinds of limitation, by deeming the events in question to be breaches of covenant: see para. 2.38 below.

[6]Thus a tenancy granted upon condition that planning permission for a specified change of use is not given would be terminable at the landlord's option on the giving of the permission. But a tenancy granted until such permission is given would end automatically.

[7]It has been suggested, however, that the courts will apply the principle that a person may not take advantage of his own wrong so as to prevent the *tenant* from asserting that the tenancy has terminated through an act or omission of his; that the tenancy therefore cannot be allowed to end automatically in such an event; and that it must therefore be merely voidable at the *landlord's* option: F.R. Crane, *Automatic Determination of Leases?* (1963) 27 Conv. (N.S.) 111.

[8]R. E. Megarry and H. W. R. Wade, *The Law of Real Property* (5th ed., 1984), p.670.

that a tenant makes himself liable to forfeiture if he alleges[9] that the title to the land is in himself, or in anyone other than the landlord, or if he assists someone to set up a title against the landlord.

Nature and operation of forfeiture

2.8 Although it is sometimes said that the coming into existence of one of the grounds for forfeiture amounts of itself to "a forfeiture" of the tenancy, it is clear that the tenancy is not actually forfeited unless and until the landlord takes unequivocal action to forfeit it. This action takes the form of "re-entry". Re-entry may take place in either one of two ways, which for convenience we call "actual" and "constructive".

2.9 A landlord who practises actual re-entry normally does so by entering physically upon the property let;[10] but the re-entry must be peaceable, and if any violence is used or threatened (whether it is violence to the person or to property) the landlord may be criminally liable.[11] Secondly, it is not lawful to adopt this method at all if the premises are let as a dwelling and there is someone lawfully residing in them or in part of them.[12]

2.10 But a landlord may also re-enter by a means which we think it convenient to call "constructive": by commencing an action for possession. The service[13] of the writ (or summons) operates in law as a re-entry.

2.11 The tenant may obtain relief against forfeiture[14] and, if he does, the forfeiture which has taken place is apparently undone. Subject to that, however, the forfeiture occurs as soon as the actual re-entry is effected or (in the case of constructive re-entry) as soon as the writ or summons is served. This has important consequences because, subject again to the possibility that the tenant will obtain relief, it means that the tenant is no longer bound by the covenants in the tenancy.[15] In particular, he is no longer bound to pay the rent; but if he continues in possession he will be liable for "mesne profits" which are technically payable as damages for trespass. Where the rent payable under the tenancy represents the fair rental value of the property, the mesne profits will be payable at the same rate; but if the fair rental value is higher or lower than the rent the mesne profits will be different.[16]

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[9]If the tenancy is for a term of years, the allegation will give rise to forfeiture only if it is in writing: *Doe* d. *Graves* v. *Wells* (1839) 10 Ad. & El. 427.

[10]Occasionally actual re-entry may take place in other ways, as where the premises are in the possession of a sub-tenant and the landlord "re-enters" by re-letting them to him: *Baylis* v. *Le Gros* (1858) 4 C.B (N.S.) 537. But it is otherwise if the landlord re-lets to a stranger to whose entry the sub-tenant objects: *Parker* v. *Jones* [1910] 2 K.B. 32.

[11]Criminal Law Act 1977, s.6, replacing in this respect the Forcible Entry Acts.

[12]Protection from Eviction Act 1977, s.2, replacing s.31 of the Rent Act 1965.

[13]*Canas Property Co. Ltd.* v. *K. L. Television Services Ltd.* [1970] 2 Q.B. 433 (C.A.).

[14]See paras. 2.16-2.63 below.

[15]See, e.g., *Jones* v. *Carter* (1846) 15 M. & W. 718; *Wheeler* v. *Keeble* [1920] 1 Ch. 57. And see para. 3.6 below.

[16]*Clifton Securities Ltd.* v. *Huntley* [1948] 2 All E.R. 283, at p.284.

Waiver

2.12 Even though a ground for forfeiture exists, the landlord may deprive himself by "waiver" of the right to forfeit the tenancy. A landlord is said to waive a ground for forfeiture if, being aware of the facts which constitute it,[17] he nonetheless does some unequivocal act recognising the *continued existence* of the tenancy.

2.13 It is important to note the words italicised. For waiver to occur it is not necessary that the act should manifest an *intention* to waive. Nor is it necessary that the landlord should have such an intention.[18] All that is necessary is that the act should recognise that the tenancy still exists. Thus if the landlord, with knowledge of a ground for forfeiture, demands or accepts rent accrued due since the ground arose, he waives his right to forfeit on that ground.

2.14 Thus in *Central Estates (Belgravia) Ltd.* v. *Woolgar* (No. 2)[19] the landlords' managing agents, learning that the tenant had been convicted of keeping a brothel at the premises, served notice on him (under section 146 of the Law of Property Act 1925) preliminary to claiming forfeiture of the tenancy. A memorandum was circulated amoungst the agents' staff informing them of the decision to forfeit the tenancy and instructing them not to demand or accept rent from the tenant. But this instruction did not reach one of the clerks, who did demand the rent and subsequently gave a receipt for it. Although the tenant knew, when he paid the rent, that the landlords' intention to forfeit remained unchanged, it was held their right to do so had been waived. Even an acceptance of rent which is expressly "without prejudice" will effect a waiver.[20]

2.15 But once the landlord has shown a final determination to forfeit the tenancy, as by commencing an action for possession, no subsequent act will operate as a waiver.[21] And waiver, if it does take place, operates only in respect of existing breaches of covenant or condition of which the landlord is aware: it does not extend to unknown or future breaches, whether or not they are breaches of the same covenant or condition.[22] It is important to note, too, that if the breach is a "continuing" one—as for example in the case of a covenant to repair or to use the premises in a particular way, which is broken anew on every day for which want of repair or misuse continues—there is a continually recurring ground for forfeiture and the landlord will normally be able to take advantage of it if it continues beyond the date of the waiver.[23]

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[17]For a recent case dealing with such awareness, see *Official Custodian for Charities* v. *Parway Estates Developments Ltd.* [1984] 3 W.L.R. 525 (C.A.).

[18]Although in *Creery* v. *Summersell & Flowerdew & Co. Ltd.* [1949] Ch. 751, at p.761, Harman J. (as he then was) said that the basic question was always "*quo animo* was the act done", and although the case is sometimes still cited for that proposition, the Court of Appeal made it quite clear, in *Central Estates (Belgravia) Ltd.* v. *Woolgar (No.2)* [1972] 1 W.L.R. 1048, that the intentions of the parties are wholly irrelevant. The position may be otherwise, however, in relation to statutory tenancies within the Rent Act 1977: *Trustees of Henry Smith's Charity* v. *Willson* [1933] 1 All E.R. 73 (C.A.).

[19][1972] 1 W.L.R. 1048 (C.A.).

[20]*Davenport* v. *R.* (1877) 3 App. Cas. 115: *Segal Securities Ltd.* v. *Thoseby* [1963] 1 Q.B. 887.

[21]*Grimwood* v. *Moss* (1872) L.R. 7 C.P. 360. But acceptance of rent may be evidence of an intention to create a new tenancy: *Evans* v. *Wyatt* (1880) 43 L.T. 176.

[22]And see Law of Property Act 1925, s.148.

[23]For a recent example, see *Cooper* v. *Henderson* (1982) 263 E.G. 592 (C.A.).

Relief against forfeiture

2.16 Even if a ground for forfeiture exists, and has not been waived, it by no means follows that the landlord will be successful in an attempt to recover the preperty let. Both equity and statute law have intervened, in various ways and at various times, so as to provide tenants with relief against forfeiture and allow them to keep their tenancies. Forms of relief vary according to the circumstances, but the main division is between cases where the landlord seeks forfeiture for non-payment of rent and cases where he seeks it for other reasons, and so we deal with these separately.

2.17 It is not easy to state the present law about relief in a way which is both brief and accurate. The substantive rights of the parties vary in some respects according to whether proceedings are brought in the High Court or in a county court. There are uncertainties and anomalies. And the law is in part statutory and in part non-statutory, the statutory part being contained in a number of different enactments, some of which are old and even (in parts) obsolete. The main enactments which are directly relevant are:

(1) Forfeiture for non-payment of rent:
Common Law Procedure Act 1852, sections 210-212
Law of Property Act 1925, section 146(4)
Supreme Court Act 1981, section 38
County Courts Act 1984, sections 138-140[24]

(2) Forfeiture on other grounds:
Law of Property Act 1925, sections 146 and 147
Landlord and Tenant Act 1927, section 18(2) and (3)[25]
Leasehold Property (Repairs) Act 1938

These enactments are all set out, in chronological order, in Appendix A to this report. What follows is not intended as a comprehensive statement of the law. It is an outline, in which particular attention is drawn to some of the difficulties and complexities.

(a) **Forfeiture for non-payment of rent**

(i) *Historical*

2.18 From an early date the Courts of Chancery gave relief against forfeiture for non-payment of rent. They considered that the landlord's right to forfeit the tenancy on this ground was really no more than "security" for the payment, so they allowed the tenant to keep his tenancy provided that he paid the arrears of rent and the landlord's expenses and provided that relief was "just and equitable".

2.19 This old jurisdiction still remains,[26] and section 38 of the Supreme Court Act 1981 (formerly section 46 of the Judicature Act 1925) though it

[24]These consolidating provisions subsume, without substantive amendment, provisions formerly in County Courts Act 1959, s.191, and Administration of Justice Act 1965, s.23.

[25]Although subs. (1) of s.18 is not relevant to forfeiture, the section is to be read as a whole and is therefore set out in full in Appendix A.

[26]*Howard* v. *Fanshawe* [1895] 2 Ch. 581; *Lovelock* v. *Margo* [1963] 2 Q.B. 786; *Thatcher* v. *C.H. Pearce & Sons (Contractors) Ltd.* [1968] 1 W.L.R. 748. See also *Abbey National Building Society* v. *Maybeech Ltd.* [1984] 3 W.L.R. 793.

applies only to actions for forfeiture brought in the High Court, confirms that it exists and that it extends beyond the old Court of Chancery. But successive statutes have served to modify this jurisdiction in certain circumstances and to extend it in others, and the two systems must now be considered together.

(ii) *The need for a formal demand*

2.20 Even though the terms of the tenancy include a covenant to pay rent and a forfeiture clause, the landlord is not entitled to forfeit for non-payment of rent until he has made a formal demand for rent. But this rule is subject to two exceptions.

2.21 First, a formal demand is unnecessary if a half year's rent is in arrear and any goods to be found on the premises available for distress[27] are not sufficient to satisfy all the arrears which are due. This is clear, at least, if the landlord takes proceedings in a county court, because section 139(1) of the County Courts Act 1984 is unequivocal. In the High Court, however, the matter is governed by section 210 of the Common Law Procedure Act 1852, and that provision is more ambiguous because it seems to state the rule twice over and to omit the requirement as to lack of goods for distress from the first statement. Neither of these provisions applies unless there are proceedings, so it would seem that they do not assist a landlord who wishes to practice peaceable re-entry.

2.22 The second exception relates to cases where the terms of the tenancy itself exempt the landlord from making a formal demand. Since the conditions for making such a demand are stringent—it must, for example, be made at the demised premises before sunset and must continue until sunset—every well drawn tenancy does in fact contain such an exemption. It is normally included in the forfeiture clause and provides that forfeiture may take place if the rent is unpaid for a specified period whether formally demanded or not.

(iii) *Payment before trial*

2.23 Assuming that the landlord has made his formal demand or is absolved from doing so, the tenant still has a right to avoid forfeiture by paying all arrears and costs before trial; and if he does this any court proceedings will stop. For actions in the High Court the authority for this proposition is section 212 of the Common Law Procedure Act 1852, and it has been held, as a matter of construction, that the section applies only if a half year's rent is in arrears.[28] No such limitation is to be found in section 138(2) of the County Courts Act 1984, which governs actions in the county court.

2.24 There are other differences between the two provisions. Section 212 permits the money either to be paid or tendered to the landlord (or his

[27]Distress is a means of recovering money due through the seizure and realisation of the tenant's goods. It is not often used today for the recovery of rent.

[28]*Standard Pattern Co. Ltd.* v. *Ivey* [1962] Ch. 432. This is because the section is so drafted as to refer back to s.210. It also appears from this case that if a half year's rent is not in arrear discretionary relief may be sought from the High Court according to the principle stated in s.46 of the Judicature Act 1925 (now replaced by s.38 of the Supreme Court Act 1981).

representatives) or to be paid into court, and allows this to be done at any time, whereas section 138(2) requires it to be paid into court at least five clear days before the return day. Subsection (6) of section 138 expressly disapplies subsection (2) in cases where the landlord is proceeding on other grounds as well as for non-payment of rent, but section 212 is not disapplied in such cases. Whereas section 138(2) operates simply to stop court proceedings by the landlord, it has been held that section 212 allows relief to be given even when the landlord has re-entered peaceably and is not bringing any action.[29]

(iv) *Other relief for the tenant*

2.25 Even if the tenant fails to pay the arrears and costs before trial, he may still claim relief against forfeiture.

2.26 So far as the High Court is concerned, the jurisdiction to grant relief in these circumstances remains that which was developed by the old Courts of Chancery and which now applies throughout the High Court.[30] Statute has served only to impose a limitation upon its exercise. The second limb of section 210 of the Common Law Procedure Act 1852 provides that if the landlord has obtained judgment for possession, the tenant must seek relief within six months of execution of the judgment. Of course this limitation does not apply where the landlord, having re-entered peaceably, has brought no action: in those circumstances there is no set time limit, though unjustifiable delay may operate to bar relief.[31] What is less clear is whether the limitation applies only to cases where the rent is six months in arrear. It seems to be implicit in the reasoning of Wilberforce J. in *Standard Pattern Co. Ltd.* v. *Ivey*,[32] in which it was decided that section 212 is confined to such cases, [33] that section 210 is similarly confined, but textbooks do not clearly confirm this.[34] Relief in the High Court is discretionary and will be granted where it is "just and equitable".

2.27 The situation in the county court is different in a number of ways. It is based upon the making of suspended orders. Where an action by the landlord comes to trial, and the court is satisfied that he is entitled to forfeit, section 138(3) of the County Courts Act 1984 requires it to order that possession shall be given at the expiry of a specified period, unless within that period the tenant pays into court all arrears and costs. The period must not be less than four weeks from the date of the order, and subsection (4) of section 138 makes provision for it to be extended at any time before possession of the land is recovered in pursuance of the order. Then subsections (5) and (7) provide that if the tenant makes the payment within the period fixed by the order (as extended, if extended), the tenancy continues: otherwise the tenant is "so long as the order remains unreversed ... barred from all relief". Subsection (10)(a)

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[29]*Howard* v. *Fanshawe* [1895] 2 Ch. 581.

[30]Paras. 2.18 and 2.19 above.

[31]*Thatcher* v. *C.H. Pearce & Sons (Contractors) Ltd.* [1968] 1 W.L.R. 748. Section 46 of the Judicature Act 1925 (now replaced by s.38 of the Supreme court Act 1981) seems not to apply where there has been peaceable re-entry, but relief appears to be available on the same principles.

[32][1962] Ch. 432.

[33]See para 2.23 above.

[34]Compare, e.g. R. E. Megarry and H. W. R. Wade, *The Law of Real Property* (5th ed., 1984), p.676; *Woodfall's Law of Landlord and Tenant* (28th ed., 1978), p.881, para. 1–1957, and *Hill and Redman's Law of Landlord and Tenant* (16th ed., 1976), p.485, footnote *(f)*.

adds, however, that if the landlord claims forfeiture on some other ground as well as for non-payment of rent, none of these provisions is to affect the power of the court to make any order which it could otherwise make. Section 139(2) of the 1984 Act goes on to deal with cases where the landlord has re-entered peaceably and so is not bringing any action for possession. In that situation the county court may grant relief to the tenant if, but only if, he applies for it within six months of the re-entry.

2.28 Two recent cases have thrown into prominence one particular difference between the jurisdiction of the High Court and that of the county court. Both began as county court cases. In both, the court made an order for the payment of arrears by the tenant, the tenant failed to comply within the time limit and the landlord took possession, the tenant being in consequence "barred from all relief". In both cases the tenant then sought relief from the High Court in exercise of its wider powers to grant it.[35] In the first case, *Di Palma* v. *Victoria Square Property Co. Ltd.*,[36] the Court held that it had no power to grant relief, though it would have liked to do so. In the second, *Jones* v. *Barnett*,[37] the High Court declined to follow this decision and granted relief. More will be said later about these cases,[38] but an obvious point may be made at once: it cannot be right that a tenant in a county court case should be able to obtain in the High Court relief which he cannot obtain in the county court.

(v) *Derivative interests*

2.29 It remains to consider briefly a question which arises only if the tenant himself does not obtain relief: whether relief can be granted to sub-tenants and mortgagees who derive title from him. The question arises because if the tenancy ends through forfeiture these derivative interests end with it—unless some form of relief is available.

2.30 In the High Court, relief is available from two sources. There is, first, the old jurisdiction of the Courts of Chancery (which seems to have extended to the granting of relief to sub-tenants and mortgagees[39]), which is reinforced by section 38 of the Supreme Court Act 1981 (formerly section 46 of the Judicature Act 1925), but made subject to a six months' limitation by section 210 of the Common Law Procedure Act 1852. The situation is much the same as that described in paragraph 2.26 above. If relief is sought at a time when the head tenancy has already been determined, the original tenant under that tenancy, and the last assignee of it, must be brought before the court, because relief involves the revival of the head tenancy and the reimposition of liability upon those persons.[40]

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[35]Para. 2.26 above.
[36][1984] 3 W.L.R. 761.
[37][1984] 3 W.L.R. 333.
[38]Paras. 9.29 and 9.30 below.
[39]See *Doe* d. *Wyatt* v. *Byron* (1845) 1 C.B. 623. See also *Abbey National Building Society* v. *Maybeech Ltd.* [1984] 3 W.L.R. 793 and cases there cited.
[40]*Hare* v. *Elms* [1893] 1 Q.B. 604; and see, e.g. *Hill and Redman's Law of Landlord and Tenant* (16th ed., 1976) p.486, para. 398. The presence of these people is not required, however, if their absence can be satisfactorily explained: *Humphreys* v. *Morten* [1905] 1 Ch. 739. See also *Abbey National Building Society* v. *Maybeech Ltd.* [1984] 3 W.L.R. 793.

2.31 The second source of relief in the High Court, and the only source in the county court, is provided by subsection (4) of section 146 of the Law of Property Act 1925 (the only part of that section which applies to forfeiture for non-payment of rent). Here relief always takes the form of a new tenancy granted to the applicant, and so there is no need for the original tenant or the last assignee to be before the court,[41] but the application must be made before the landlord has regained possession.[42] The court has a wide discretion as to the granting of relief,[43] but it will be exercised on the same principles as those which apply to an application under the old equitable jurisdiction.[44]

(b) Forfeiture other than for non-payment of rent

(i) *Historical*

2.32 The jurisdiction of the Courts of Chancery to relieve against forfeiture for non-payment of rent was extensive, as we have seen; but their jurisdiction to grant relief in the case of other breaches of covenant or condition was much more narrow.[45] Relief in these cases is now governed almost entirely by statute, but it seems that the old jurisdiction still survives, such as it is, and will apply in cases where the statutory code does not,[46] including cases where the relationship of landlord and tenant does not exist.[47] With cases of the latter kind this report is not, of course, concerned.

2.33 The general statutory provisions relevant to the topic are contained in section 146 of the Law of Property Act 1925, and we deal with these under the next four sub-headings. We then deal with certain special provisions which apply when the landlord seeks to forfeit on the ground of the tenant's failure to repair.

(ii) *General provisions about notice*

2.34 Subsection (1) of section 146 provides:

> "A right of re-entry or forfeiture under any proviso or stipulation in a lease for breach of any covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice–
>
> (a) specifying the particular breach complained of; and
>
> (b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and
>
> (c) in any case, requiring the lessee to make compensation in money for the breach;

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[41] *Belgravia Insurance Co. Ltd.* v. *Meah* [1964] 1 Q.B. 436 (C.A.), at p.446.

[42] *Rogers* v. *Rice* [1892] 2 Ch. 170 (C.A.).

[43] As to the class in whose favour it can be exercised, see paras. 10.23 and 10.25 below.

[44] *Belgravia Insurance Co. Ltd.* v. *Meah* [1964] 1 Q.B. 436 (C.A.).

[45] For a review, see *Shiloh Spinners Ltd.* v. *Harding* [1973] A.C. 691.

[46] See, e.g., *Woodfall's Law of Landlord and Tenant* (28th ed., 1978), p.862, para. 1–1926. It seems that the old jurisdiction may sometimes exist even where the statutory code does apply: *Abbey National Building Society* v. *Maybeech Ltd.* [1984] 3 W.L.R. 793. But contrast *Official Custodian for Charities* v. *Parway Estates Developments Ltd.* [1984] 3 W.L.R. 525 (C.A.).

[47] *Shiloh Spinners* v. *Harding* [1973] A.C. 691. See further paras. 16.6–16.16 below.

and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach."

2.35 Relief against forfeiture for reasons other than non-payment of rent differs from relief against forfeiture for non-payment of rent,[48] in that (as we shall note[49]) it cannot be sought after the landlord has actually re-entered (whether he does so in lieu of proceedings or as the result of a court order). One of the functions of the notice, therefore, is to give the tenant an opportunity to seek relief in good time. But of course it does more than that because it may enable the tenant, through compliance with its terms, to forestall further action by the landlord altogether.

2.36 It is appropriate here to note briefly some points which are relevant to section 146(1). Most of them will be examined in greater detail later in this report.

2.37 First, the words "by action or otherwise" which appear in the subsection make it clear that it extends to cases where the landlord wishes to forfeit by means of peaceable re-entry: such re-entry will be void if the subsection has not been complied with.[50]

2.38 Second, although the wording of the subsection itself[51] covers only breaches of covenant or condition, it extends (as does section 146 as a whole) to certain cases involving limitations.[52] Subsection (7) provides:

"For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach."

2.39 Third, although the subsection requires compensation to be sought "in any case", it has been held that a landlord need not ask for it if he does not want it.[53]

2.40 Fourth, it is to be noted that the landlord must require the breach to be remedied if, but only if, it is "capable of remedy". This introduces the concept of the "irremediable breach". In certain categories of case, the courts have decided that breaches are in fact incapable of remedy. One such category is that where the breach consists in the tenant having put the property to an immoral or illegal use, as where it has been used as a brothel[54] or for unlawful gambling,[55] or where the tenant has run catering premises in breach of the

[48]Paras. 2.26 and 2.27 above.
[49]Para. 2.43 below.
[50]*Re Riggs, ex parte Lovell* [1901] 2 K.B. 16.
[51]See para. 2.34 above.
[52]The nature of a limitation is explained in para. 2.6 above.
[53]*Lock* v. *Pearce* [1893] 2 Ch. 271.
[54]*Rugby School (Governors)* v. *Tannahill* [1935] 1 K.B. 87 (C.A.); *Egerton* v. *Esplanade Hotels, London, Ltd.* [1947] 2 All E.R. 88.
[55]*Hoffman* v. *Fineberg* [1949] Ch. 245.

licensing laws[56] or the food and drugs regulations[57] or permitted obscene articles to be kept there for publication.[58] In such cases the tenant's activities are said to have cast a stigma on the property. Another category is that where the breach is a "once and for all breach", because it is said that such breaches, once they have happened, cannot be put right. Thus a sub-letting in breach of covenant is an irremediable breach even though it may have happened by mistake and even though the sub-tenancy can be ended.[59] If a breach is irremediable it follows that the landlord need not require it to be remedied, and it follows also that there is nothing the tenant can do to stop the landlord proceeding with an action for possession; but it does *not* necessarily follow that the tenant will be unable to obtain relief.[60]

2.41 Fifth, it may be noted that the subsection allows the landlord to proceed (by actual re-entry in those cases in which it is permitted, or by constructive re-entry through court proceedings) only if the tenant fails within a reasonable time "to remedy the breach, if it is capable of remedy". If the breach is irremediable, it has been held that the landlord must still give the tenant time to consider his position:[61] in one case two days was held too short a period,[62] and in another a fortnight was held sufficient.[63] If the breach is remediable, the period of time in which it is reasonable to remedy it will depend on the facts. If the landlord misjudges this period and proceeds too soon his action will fail (or his actual re-entry will be ineffective, as the case may be).

(iii) *General provisions about relief for the tenant*

2.42 If the landlord duly serves on the tenant a notice under section 146(1) and the tenant cannot or does not forestall future action by complying with its terms, relief may still be available to the tenant under subsection (2) of section 146.

2.43 This applies while the landlord "is proceeding" to enforce the forfeiture by action or otherwise. So relief is not available after the landlord has actually re-entered (whether he has done so under a court order or, in those cases where peaceable re-entry is still effective, peaceably without one).[64] Subject to that, the tenant may apply for relief either in the action (if any) being brought by the landlord or in an action of his own. The court has a discretion as to the granting of relief and may do so on terms as to costs, damages, compensation, etc. If relief is granted, the effect is as if the tenancy had never been forfeited.[65] If the premises are held by joint tenants, all must apply for relief.[66]

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[56]*Bickerton's Aerodromes* v. *Young* (1958) 108 L.J. 217.
[57]*Ali* v. *Booth* (1966) 110 Sol. J. 708 (C.A.).
[58]*Dunraven Securities Ltd.* v. *Holloway* (1982) 264 E.G. 709 (C.A.).
[59]*Scala House and District Property Co. Ltd.* v. *Forbes* [1974] Q.B. 575 (C.A.).
[60]See further para. 2.45 below.
[61]*Horsey Estate Ltd.* v. *Steiger* [1899] 2 Q.B. 79 (C.A.), at p.91.
[62]*Horsey Estate Ltd.* v. *Steiger* [1899] 2 Q.B. 79 (C.A.), at p.92.
[63]*Civil Service Co-operative Society* v. *McGrigor's Trustee* [1923] 2 Ch. 347.
[64]But it seems that relief may sometimes be available, even in these circumstances, under the court's inherent equitable jurisdiction: *Abbey National Building Society* v. *Maybeech Ltd.* [1984] 3 W.L.R. 793.
[65]*Dendy* v. *Evans* [1910] 1 K.B. 263 (C.A.).
[66]*Fairclough & Sons Ltd.* v. *Berliner* [1931] 1 Ch. 60.

2.44 By subsection (3), the landlord is entitled to recover his reasonable costs and expenses from the tenant if relief is granted (or if the landlord waives the breach at the tenant's request).

2.45 There are no fixed principles according to which relief will be granted or refused.[67] It is almost certain to be granted if the tenant makes good the breach and is able and willing to fulfil his obligations in the future. But the fact that the breach is "irremediable"[68] does not necessarily mean that no relief will be available: it may still be granted if the circumstances are thought to justify it, though the court takes a particularly strict view about breaches involving immoral[69] or illegal[70] user.

(iv) *General provisions about derivative interests*

2.46 If the tenant does not obtain relief, relief may be available to the holders of interests deriving from his tenancy (including sub-tenants and their and his mortgagees) under subsection (4) of section 146. This has already been outlined in the context of relief against forfeiture for non-payment of rent[71] (to which it also applies). Relief is not available after the landlord has re-taken actual possession,[72] and takes the form of a new tenancy granted to the applicant.

(v) *Exceptions to the general provisions*

2.47 There are certain cases in which the provisions of section 146, summarised under the last three sub-headings, do not apply, or do not apply in full. In these cases, therefore, the landlord may forfeit the tenancy without serving a preliminary notice on the tenant, and the tenant cannot apply for relief.

2.48 *Denial of title.*—First, it has been held[73] that the section does not apply at all if the landlord seeks to forfeit on the ground of denial of title by the tenant:[74] the section applies only to forfeiture "under any proviso or stipulation in a lease", and denial of title amounts to breach of a condition which is implied and so not actually contained in the tenancy document.

2.49 *Non-payment of rent.*—Section 146 provides,[75] as we have already noted, that with the sole exception of the provision about derivative

[67] *Hyman* v. *Rose* [1912] A.C. 623.

[68] See para. 2.40 above.

[69] See, e.g., *Borthwick-Norton* v. *Romney Warwick Estates Ltd.* [1950] 1 All E.R. 798 (C.A.). See also *G.M.S. Syndicate Ltd.* v. *Gary Elliot Ltd.* [1981] 1 All E.R. 619, *per* Nourse J. at p.624: "It is the established practice of the Court not to grant relief in cases where the breach involves immoral user, save in very exceptional circumstances such as those which were considered in *Central Estates (Belgravia) Ltd.* v. *Woolgar (No. 2)* [1972] 1 W.L.R. 1048 (C.A.)".

[70] See, e.g., *Hoffmann* v. *Fineberg* [1949] Ch. 245.

[71] Para. 2.30 above.

[72] It seems form *Abbey National Building Society* v. *Maybeech Ltd.* [1984] 3 W.L.R. 793 that the court's ancient equitable jurisdiction to grant relief entended in some circumstances to cases not involving non-payment of rent (e.g., to cases involving the non-payment of other sums of money), and that derivative interest holders may still be granted relief under this jurisdiction even after possession has been re-taken.

[73] *Warner* v. *Sampson* [1958] 1 Q.B. 404 (reversed on other grounds, [1959] 1 Q.B. 297).

[74] Para. 2.7 above.

[75] Subsection (11).

interests,[76] its provisions do not apply where forfeiture is sought on the ground on non-payment of rent.

2.50 *Assignments, etc., before 1926.*—The section does not apply to "a covenant or condition against assigning, underletting, parting with the possession, or disposing of the land leased where the breach occurred before the commencement of [the 1925] Act".[77] This exception was made for historical reasons into which we need not go and the passage of time has now made it obsolete.

2.51 *Mining tenancies: inspection.*—The section does not apply, "[i]n the case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines or other things, or to enter or inspect the mine or the workings thereof".[78] The justification for this exception is said to lie in the fact that the amount of rent payable under a mining tenancy is usually made to depend upon the amounts of mineral which the mine produces, so that the covenant in question is of particular importance.

2.52 *Bankruptcy: complete exception in special cases.*—The provisions of section 146 do not apply to a condition of forfeiture on the tenant's bankruptcy,[79] or the taking in execution of his interest under the tenancy, if the property let falls into any one of five special categories.[80]

These categories are:

"(a) Agricultural or pastoral land;

(b) Mines or minerals;

(c) A house used or intended to be used as a public-house or beershop;

(d) A house let as a dwelling-house, with the use of any furniture, books, works of art, or other chattels not being in the nature of fixtures;

(e) Any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor, or to any person holding under him."

2.53 *Bankruptcy: Partial exception in all other cases.*—If the same situation exists, but the property let does not fall into any of these special categories, there is a complex provision[81] the effect of which may be summarised as follows. The protection of section 146 applies for one year from the date of the bankruptcy.[82] If the tenant's interest is not sold within that year, the protection

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[76]Paras. 2.31 and 2.46 above.

[77]Subsection (8)(i). But section 1 of the Law of Property (Amendment) Act 1929 provides that nothing in subss.(8), (9) or (10) of s.146 of the 1925 Act is to affect the provisions of subs. (4) of s.146, which deals with relief for those holding derivative interests (paras. 2.31 and 2.46).

[78]Subsection 8(ii). But see footnote 77 to para. 2.50 above.

[79]"Bankruptcy" includes liquidation by arrangement and, in relation to a corporation, means its winding up: Law of Property Act 1925, s.205(1)(i).

[80]Subsection (9). But see footnote 77 to para. 2.50 above.

[81]Subsection (10). And see footnote 77 to para. 2.50 above.

[82]Or taking in execution; and see footnote 79 to para. 2.52 above.

ceases and the section applies no longer. But if the tenant's interest is sold during the year, the protection continues indefinitely for the benefit of the new tenant. The effect is to encourage sale within the year (in those cases in which sale is not precluded by the terms of the tenancy), and to enable a sale within that period to be made at a price which is not depressed by the purchaser's fear of having to face an action for possession by the landlord without statutory protection.

2.54 There are no other exceptions to section 146. In particular, it cannot be excluded by agreement and "has effect notwithstanding any stipulation to the contrary".[83]

(vi) *Special provisions about repairing obligations*

2.55 The legislature has shown particular concern about cases in which the tenant may lose his tenancy through forfeiture because he has broken an obligation to repair. Three enactments have to be considered. All of them are built upon the notice provisions of section 146(1) of the Law of Property Act 1925.[84]

2.56 The first is section 18(2) of the Landlord and Tenant Act 1927. This is designed, broadly, to make certain that the notice served under section 146(1) is actually received by the tenant. Normally the notice is served effectively if the general provisions governing the service of notices under the 1925 Act are complied with,[85] and it is enough to send it by registered or recorded delivery[86] post, as long as it is not returned undelivered by the Post Office. But when the breach is of an obligation to repair, section 18(2) requires the landlord to prove that the service of the notice was actually known to the tenant (or to a sub-tenant holding under a sub-tenancy, which reserved only a nominal reversion to the tenant, or to the person who last paid the rent).[87] Section 18(2) also provides, in effect, that the reasonable time which must be allowed for the repairs to be carried out[88] is to run from the date when service became *known* to the tenant (or other persons mentioned above).

2.57 The two remaining enactments come into operation after notice under section 146(1) has been served.

2.58 Section 147 of the Law of Property Act 1925 applies when the notice relates to *internal decorative repairs* to a house or other building. It enables the tenant to apply to the court for relief and the court may, if satisfied that the notice is unreasonable, relieve the tenant wholly or partly from liability for the repairs. The court's power, therefore, is to grant relief not merely from forfeiture but from the need to do the repairs at all. In reaching its decision the court

[83]Subsection (12).
[84]Paras. 2.34–2.41 above.
[85]Law of Property Act 1925, s.196.
[86]Recorded Delivery Service Act 1962, s.1.
[87]Sending it by registered or recorded delivery post is only *prima facie* proof of knowledge on the part of the addressee.
[88]Para. 2.41 above.

must have regard to all the circumstances including in particular the length of time for which the tenancy has still to run.[89]

2.59 Section 147 does not apply:[90]

"(i) Where the liability arises under an express covenant or agreement to put the property in a decorative state of repair and the covenant or agreement has never been performed;

(ii) to any matter necessary or proper—

(a) for putting or keeping the property in a sanitary condition, or

(b) for the maintenance or preservation of the structure;

(iii) to any statutory liability to keep a house in all respects reasonably fit for human habitation;

(iv) to any covenant or stipulation to yield up the house or other building in a specified state of repair at the end of the term."

2.60 The Leasehold Property (Repairs) Act 1938[91] is not confined to internal decorative repair but applies (subject to exceptions mentioned later) in the case of a breach of any covenant or agreement to keep or put in repair[92] during the currency of the tenancy all or any part of the property let. It does not apply unless the tenancy was granted for a term of 7 years or more, of which 3 at least have still to run at the time when the landlord serves notice under section 146(1).[93] Nor does it apply if the tenancy is of an agricultural holding within the meaning of the Agricultural Holdings Act 1948.[94] Nor does it apply if and in so far as the breach is of an obligation to put premises in repair which is to be performed upon the tenant taking possession or within a reasonable time afterwards.[95]

2.61 If the notice served by the landlord under section 146(1) relates to a breach to which the 1938 Act applies, the tenant may serve a counter notice within 28 days, and if he does so the landlord may not proceed, by action or otherwise, to enforce forfeiture unless he obtains the leave of the court.[96] The landlord's original notice is not valid unless it contains a statement telling the tenant of his right to serve this counter notice.[97] In granting or refusing leave, the court may impose such terms and conditions on the landlord or the tenant as it thinks fit.[98] The landlord's right, under section 146(3) of the Law of

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[89]Section 147(1).
[90]Subsection (2).
[91]The effect of the Act was altered in certain respects by s.51 of the Landlord and Tenant Act 1954, and the summary given in the text is of the Act as amended by that section.
[92]In deciding whether a covenant or agreement relates to "repair" the court will look at the substance of the breach: *Starrokate Ltd.* v. *Burry* (1982) 265 E.G. 871 (C.A.), where it was also suggested that if a notice under s.146(1) failed to comply with the 1938 Act and related partly to repair and partly to other matters it might be severable.
[93]Sections 1(1) and 7(1).
[94]Section 7(1).
[95]Section 3.
[96]Section 1(1) and (3).
[97]Section 1(4).
[98]Section 1(6).

Property Act 1925,[99] to recover expenses, does not arise unless he applies for leave to proceed, and on such an application the court may nullify or limit it.[100]

2.62 The Act of 1938 also provides[101] that the court is not to give the landlord leave to proceed unless he proves[102] one or more of a number of specified things. These are as follows:

> "(a) that the immediate remedying of the breach in question is requisite for preventing substantial diminution in the value of his reversion, or that the value thereof has been substantially diminished by the breach;
>
> (b) that the immediate remedying of the breach is required for giving effect in relation to the premises to the purposes of any enactment, or of any byelaw or other provision having effect under an enactment, or for giving effect to any order of a court or requirement of any authority under any enactment or any such byelaw or other provision as aforesaid;
>
> (c) in a case in which the lessee is not in occupation of the whole of the premises as respects which the covenant or agreement is proposed to be enforced, that the immediate remedying of the breach is required in the interests of the occupier of those premises or of part thereof;
>
> (d) that the breach can be immediately remedied at an expense that is relatively small in comparison with the much greater expense that would probably be occasioned by postponement of the necessary work; or
>
> (e) special circumstances which in the opinion of the court, render it just and equitable that leave should be given."

2.63 It will be noted that, in so far as the subject matter of the 1938 Act overlaps with that of section 147 of the Law of Property Act 1925, individual tenants are provided with two alternative ways of seeking modification of their legal liabilities.

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[99]Para. 2.44 above.
[100]Section 2 of the 1938 Act.
[101]Section 1(5) (as amended by the Landlord and Tenant Act 1954 s.51(2)(c)).
[102]"Proving" in this connection means making out a *prima facie* or arguable case: *Land Securities P.L.C.* v. *Receiver for the Metropolitan Police District* [1983] 1 W.L.R. 439.

PART III

DEFECTS IN THE PRESENT LAW AND AN OUTLINE OF OUR RECOMMENDATIONS

3.1 This part of the report first identifies in general terms the serious defects in the present law. Second, it outlines in advance the main elements of the schemes for landlords' termination orders and tenants' termination orders, which would replace the present defective system with a more logical structure.

Defects in the present law: with reference to termination by the landlord

3.2 Termination by the landlord for fault on the part of the tenant is, as we have noted, governed by the present law of forfeiture. In our view this is complex and confused; its many features fit together awkwardly; and it contains a number of uncertainties, anomalies and injustices. The existence of these shortcomings is to a large extent apparent from the summary contained in the preceding part of the report. We shall deal separately with two major sources of difficulty and then note briefly a number of other problems.

(a) **The doctrine of re-entry**

3.3 Under the doctrine of re-entry, a landlord forfeits a tenancy by re-entry upon the property let, and the tenancy terminates on the date on which the re-entry takes place. This doctrine made good sense at a time when actual re-entry could nearly always be practised and when it nearly always resulted in the tenant departing from the property with no prospect of relief. But that time is long past and the doctrine has been overlaid by a system which, in most cases, requires court proceedings to be brought and gives the prospect of relief to the tenant. In this context it no longer makes sense and is, on the contrary, at the heart of many difficulties.

3.4 The increasing need for court proceedings has led to the increasing importance of "constructive re-entry"—that is to say, re-entry which is not actual but which is taken to occur when a writ or summons is served upon a tenant.[1] This change has robbed the doctrine of most of its logical justification. When the landlord could, by means of actual re-entry, conclusively regain possession of his property, it was logical that the tenancy should end on the date of re-entry. But the date on which a writ or summons is served upon a tenant who will nonetheless remain in possession for an indefinite period (and who, if he obtains relief, will not have to leave at all) has no comparable significance and there is no logical reason why it should mark the ending of the tenancy.

3.5 Moreover, the fact that the tenancy notionally ends when the proceedings are served has meant that the proceedings themselves must take an artificial form. They cannot take the form of proceedings to end the tenancy because it is already ended (unless the tenant obtains relief); so they must be framed merely as proceedings for "possession". This has often been the subject of adverse comment. In *Peachey Property Corporation Ltd* v. *Robinson*,[2] Winn L. J.

[1] Paras. 2.8–2.10 above.
[2] [1967] 2 Q.B. 543, at p. 551.

said:

> "Historically, and really by nothing but an historical accident, the court procedure for enforcing a forfeiture of a lease ... has resulted ... in a judgment declaring a right to recover possession, when all that is meant in reality is that there is a valid right of forfeiture and that the term created by the lease has been ... brought to an end ...".

3.6 However, the difficulties of the doctrine which are of most practical importance stem from the fact that, since the tenancy terminates at the time of re-entry, the obligations which it imposes upon the tenant terminate also at that time.[3] So although the tenant may remain in possession for several months afterwards, he is not obliged to pay rent or to perform any of his other covenants—*unless* he is subsequently granted relief, in which case the tenancy is taken never to have ended at all and his liability revives retrospectively. This appears to be wrong in more ways than one. First, we think that a tenant who in reality continues to retain possession of a property by virtue of a tenancy should always be bound to carry out the terms of that tenancy. And second, we think it wrong that, during the period between the time of re-entry and the time when the question of relief is finally settled, the status of the tenancy should be unknown and, in particular, that the landlord, so far from being entitled to claim the rent agreed, should have great difficulty in obtaining any income from the property at all.[4]

3.7 All these difficulties would disappear if the doctrine of re-entry were abolished and replaced by a scheme under which (apart from termination by consent) court proceedings were always necessary to end a tenancy and the tenancy continued in full force unless and until the court ordered its termination.[5] Such a scheme was proposed in the working paper and was supported by a majority of those who commented on it. We put forward such a scheme in this report. It would in addition have other advantages.

3.8 First, it would serve in effect to extend the principle of section 2 of the Protection from Eviction Act 1977[6] (which makes actual re-entry unlawful if

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[3] *Wheeler* v. *Keeble (1914) Ltd.* [1920] 1 Ch. 57. But the tenant can still enforce covenants entered into by the landlord: *Peninsular Maritime Ltd.* v. *Padseal Ltd.* (1981) 259 E.G. 860 (C.A.). In other respects, too, the status of the tenancy is equivocal. The tenant still has a right to seek modification of his covenants under Law of Property Act 1925, s.84: *Driscoll* v. *Church Commissioners for England* [1957] 1 Q.B. 330 (C.A.). And the tenancy still continues for the purposes of Landlord and Tenant Act 1954, Part II: *Meadows* v. *Clerical Medical and General Life Assurance Society* [1981] Ch. 70. But the tenant cannot, as against a purchaser of his tenancy, show a good title to it: *Pips (Leisure Productions) Ltd.* v. *Walton* (1980) 260 E.G. 601.

[4] As explained in para. 2.11 above, the tenant is liable to make payments representing mesne profits. But there is the problem of deciding upon the amount of these: as para. 2.11 explains, mesne profits represent a current market rent, which may differ from the rent payable under the tenancy. There is also the uncertainty mentioned in the text, as to whether mesne profits or rent will at the end of the day prove to have been payable during the period in question. Finally, there is the general danger to the landlord of accepting anything which might be said to represent rent during the period after the relevant breach of obligation: see para. 2.15 above and footnote 21 thereto.

These problems are to some extent mitigated, though not solved, by recent powers of the court, in an action for possession of land, to order interim payments for its use and occupation: R.S.C., 0.29 II; C.C.R., O. 13, r. 12.

[5] Compare the scheme of Housing Act 1980, s.32, in relation to secure tenancies.

[6] Para. 2.9 above.

there is anyone lawfully residing in the premises) to all cases. This seems to be right: the loss of his tenancy is usually a serious matter for a tenant whether he is in occupation or not, and we do not think it should ever occur except by consent or with the authority of the court.[7]

3.9 Second, it would rationalise the law in a fundamental way. Most of the difficulties which we have described are due to the superimposition on the doctrine of re-entry of the tenant's right to seek relief. The landlord's primary right to end the tenancy by re-entry still remains, and the right to claim relief is merely tacked on to it as a kind of appendage. But the truth is that once the tenant has power to resist the ending of the tenancy the landlord no longer has a "right" to end it. A logical system cannot emerge until this is recognised and the landlord's so-called right to terminate is merged with the tenant's right to resist termination so as to produce one single rule: that the court has a primary discretion as to whether the tenancy should terminate or not. The scheme would achieve that effect.

3.10 Finally, the new scheme provides opportunity for overdue changes to be made in the law of waiver. The artificialities of this part of the law have been the subject of strong criticism. Abolition of the doctrine is therefore recommended.[8]

(b) **The two systems: one for non-payment of rent, the other for other cases**

3.11 A factor which adds considerably to both the volume and the complexity of the present law is that it provides, in relation to relief against forfeiture, for two almost entirely separate regimes, one for cases involving non-payment of rent and the other for all other cases.[9] We think that this is unnecessary and that removal of the distinction between the two types of case will achieve an important simplification of the law.

3.12 The present distinction stems, as we have noted, from the difference in attitude displayed by the old Courts of Chancery towards the two types of case. So far as rent was concerned, they saw the forfeiture clause merely as a form of security designed primarily to provide a means of enforcing payment: if its presence did enable the landlord to extract payment, it was thought to have served its purpose and would not be enforced. But so far as other obligations were concerned, the old courts thought that the forfeiture clause meant what it said and should be enforced accordingly: they would seldom grant relief even if the default could be put right.

3.13 Of course this latter attitude has now been made largely obsolete by legislation,[10] and relief against forfeiture is much more readily available in non-rent cases. But by the time this happened the old courts' attitude towards rent cases had itself been largely enshrined in separate legislative provisions[11] and

[7]Subject only to the limited exception relating to abandoned premises recommended in Part XI of this report.
[8]Para. 3.25 below; and see Part VI of this report.
[9]Paras. 2.16–2.46 above.
[10]Paras. 2.32–2.63 above.
[11]Particularly the Common Law Procedure Act 1852: see paras. 2.21–2.30 above.

so the two systems of relief continue to exist side by side although each now operates in practice to produce very similar results, and those differences remaining, as described above, ought not to be preserved.

(c) Some defects which the proposed scheme would remove

3.14 The rule that a landlord cannot forfeit for breach of covenant unless the tenancy contains a forfeiture clause serves merely to add unnecessary verbiage to tenancy documents.

3.15 The implied condition against denial of title is anomalous: the fact that the tenant cannot claim relief against forfeiture is clearly wrong; but we think the implied condition is itself outdated.

3.16 The law about relief against forfeiture (which must in principle be reproduced in our scheme though in a different form[12]) has many shortcomings quite apart from the dichotomy between cases of non-payment of rent and other cases, to which we have already referred.[13] There are uncertainties (including the fact that the courts' ancient equitable jurisdiction to grant relief exists, though to an extent not altogether certain, side by side with their statutory powers), and unwarranted differences exist in the parties' rights according to whether proceedings are taken in the High Court or in a county court.

3.17 The law about formal demand for rent is obsolete.

3.18 The exceptional cases in which the tenant is prevented by statute from claiming relief are a source of potential unfairness and need not be reproduced in a new scheme.

3.19 The general requirement whereby preliminary notice must be served on the tenant in all cases (except those involving non-payment of rent) causes difficulties and uncertainties; and although there is a strong case for retaining a special notice regime for cases involving lack of repair, there is no justification for the two separate regimes which exist under the present law.

3.20 The fact that a breach of covenant, once remedied, cannot be the subject of forfeiture proceedings may be unfair to the landlord, particularly because it prevents a tenancy being ended for persistent breaches (for example, of the covenant to pay rent).

3.21 Conversely the doctrine of "stigma", which leads to relief being refused almost automatically in the case of certain breaches, may be unfair to the tenant.

3.22 The rules about relief for sub-tenants and other holders of derivative interests are in several ways inadequate and require thorough revision. In

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[12]Para. 3.9 above.
[13]Paras. 3.11–3.13 above.

particular, they lack any means whereby the landlord can preserve such interests voluntarily if he wishes to do so.

3.23 The court's present inability to grant relief to fewer than all of a number of joint tenants is a source of potential unfairness.

Defects in the present law with reference to termination by the tenant

3.24 As regards termination by the tenant for fault on the part of the landlord, the defect of the present law is that because tenancies do not provide for it (though in theory they could do so) it is in practice impossible; and there is of course no body of law, akin to the present law of forfeiture, which would deal with its incidents and consequences. In Parts XVII–XXI we make recommendations designed to supply these deficiencies.

An outline of our recommendations

3.25 There follows a brief outline of the termination schemes recommended in detail in the remaining parts of the report. The proposal is that in future a tenancy should be capable of premature termination for fault only by means of an order[14] which we shall call a termination order and which the court would grant or refuse according to a discretion exercisable within guidelines.

(a) **Landlords' termination orders**

3.26 We deal first with our scheme for termination sought by the landlord for fault on the part of the tenant. The sub-headings which follow are exactly the same as the headings of those parts of the report which are comprised in Parts IV to XVI, and they thus provide a system of cross-references to the fuller treatment and more detailed recommendations which appear there.

(i) *Preliminary*

3.27 The general intention of the scheme is to sweep away the present law of forfeiture statutory and non-statutory and, with it, the doctrine of re-entry, and to replace them with a scheme under which there is to be no distinction between termination for non-payment of rent and termination for other reasons, and under which the tenancy is to continue in force until the date on which the court orders that it should terminate.

3.28 It does not necessarily follow, however, that court proceedings would be more frequent than they are now, still less that a full court hearing would be inevitable in all cases. There is to be an exception in the case of premises which have been abandoned. It would also be possible for a tenant who had no hope of preserving the tenancy, or did not wish to do so, to surrender it before proceedings began. It is envisaged that summary judgment would also be obtainable in appropriate circumstances.

3.29 The scheme is to apply to existing tenancies as well as to those granted in the future. Transitional provisions are dealt with later, in paragraphs 3.69–3.71.

[14]Subject only to the exception relating to abandoned premises dealt with in Part XI of the report (and see paras. 3.60–3.62 below).

(ii) *Grounds for a termination order: "termination order events"*

3.30 The grounds on which termination proceedings can be brought ("termination order events") are to comprise:

(1) Breaches of covenant by the tenant.
(2) "Disguised breaches of covenant"—that is, broadly, breaches by the tenant of obligations imposed on him otherwise than by covenant.[15]
(3) "Insolvency events"—that is, events which have to do with the tenant's insolvency and on which the tenancy has been made terminable by the landlord.

3.31 In the case of tenancies granted in future, breaches of covenant are to be termination order events without the need for any special provision such as the forfeiture clause required under the present law. But this is not to apply to existing tenancies, and there are to be special provisions for future tenancies granted under existing obligations.

3.32 The rules whereby rent is to be formally demanded (which are out-dated and which the parties nearly always agree to by-pass) are to be abolished. In future, a landlord is to be entitled to take termination proceedings wherever rent is overdue for 21 days (or for such other period as the parties may prescribe).

3.33 There is no longer to be any implied condition about denial of title. Such denial is therefore not to be a termination order event unless prohibited by an express term of the tenancy.

3.34 Section 146(8), (9) and (10) of the Law of Property Act 1925 provide that, in the case of certain particular grounds for forfeiture, the tenant's normal right to seek relief is not available. These exceptions are not reproduced in the scheme: the grounds in question are all to be termination order events in respect of which the court has a primary discretion (taking the place of relief under the present law) as to whether the tenancy shall end or not. Exceptions of this kind may produce unfairness and are unnecessary under the scheme.

(iii) *Waiver*

3.35 Under the present law a landlord loses his right to end a tenancy on a particular ground if, after he knows of the ground, he does anything which acknowledges the continued existence of the tenancy (for example, by merely accepting rent accrued due since the ground arose). This is artificial but is grounded in the doctrine of re-entry. With the abolition of that doctrine, the scheme can incorporate a more logical rule: that the landlord loses his right in these circumstances only if his conduct is such that a reasonable tenant would believe, and the actual tenant does in fact believe, that he will not seek a termination order.

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[15]Our proposals about disguised breaches of covenant (which are fully explained in paras. 5.10–5.18 below) are intended mainly to prevent a landlord from circumventing our termination order scheme by making the tenancy terminable on the happening of an event which connotes fault on the part of the tenant but does not amount to a breach of covenant.

(iv) *Breaches should remain grounds for termination proceedings even though "remedied"*

3.36 Breaches of obligation by the tenant are to remain grounds for termination even though they may have been "remedied". This rule represents a change in the present law and is aimed, for example, at the tenant who, although he eventually pays his rent, is persistently late in doing so.

(v) *Starting proceedings: time limits and notices*

3.37 The present law of waiver serves in practice (though in a haphazard way) to ensure that the landlord takes action fairly soon after a ground for forfeiture arises; but the new rule outlined above will not have the same effect. Under the scheme, therefore, there is to be a simple six months' time limit: a landlord's right to take termination proceedings founded on a particular termination order event should continue for only six months after he first has knowledge of that event. But if the event is a continuing breach of covenant—that is to say, a breach which (by reason of the wording of the covenant) recurs afresh on every day for which the wrongful state of affairs continues—and it continues after the landlord is first aware of it, the six month period should run from the date on which the breach was last continuing.

3.38 There is to be no general requirement, such as now exists under section 146(1) of the Law of Property Act 1925, for the landlord to serve notice upon the tenant before starting termination proceedings. This requirement is a source of difficulties under the present law, and is unnecessary in the context of the scheme.

3.39 However, in certain cases involving want of repair the giving of notice is still to be compulsory and, if the tenant serves a counter-notice, the landlord is not to start termination proceedings without leave of the court. Although this feature of the scheme follows the present law in making special provision for repairing breaches, it sweeps away the two distinct statutory regimes which now exist and substitutes a single and comprehensive set of rules.

3.40 Further, there is to be in other cases an optional notice procedure which the landlord can use whenever he wants. If his primary wish is to have the tenant's breach put right, he may serve on him a notice giving details of the breach and specifying the remedial action required, and this normally operates to extend the six month period so that it ends six months after the service of the *notice*. There is thus an incentive for this procedure to be used in appropriate cases, and the scheme incorporates other features designed to discourage a landlord from starting termination proceedings prematurely.[16]

(vi) *The court's powers at the hearing: preliminary matters*

3.41 The court is to have three basic choices: to make an absolute order, which terminates the tenancy unconditionally on a date specified in the order; to make a remedial order, which operates to terminate it only if the tenant fails to take prescribed remedial action by a date specified; or to decline to make an order of either kind. These alternatives are explained in more detail below.

[16]See paras. 3.52 and 3.54 below.

3.42 In addition to dealing with the landlord's main claim for a termination order, the court is to have power to grant other orders:

(a) The landlord's existing right, under section 146(3) of the Law of Property Act 1925, to an order for the payment by the tenant of the immediate costs incurred by the landlord in reference to the tenant's breach, is to be preserved. But the present law contains several anomalies which are to be eliminated.

(b) Under the scheme the tenancy continues unless and until the court orders it to terminate, and this means that rent remains payable. (Under the present law mesne profits, not rent, are due after re-entry.) The court's powers are therefore to include a power to order the tenant to pay rent up to the date of termination. Mesne profits would become payable only if the tenant failed to give possession on that date. (A special power is recommended, however, for the court to vary the rent and the other terms of the tenancy during any period of "respite" allowed to the tenant).

(c) The court is also to have power, if it grants a remedial order or refuses a termination order altogether, to impose terms in the form of other ancillary orders (for example, for an injunction or the payment of damages).

The choices open to the court.

3.43 An *absolute* order is to terminate the tenancy unconditionally on a date specified. Normally the date is to be so fixed as to allow the tenant any respite which is reasonable, and the order is to require him to give possession on that date.

3.44 A *remedial* order is to terminate the tenancy on a date specified *unless* the tenant takes prescribed remedial action by that time. The date specified is to be one which allows the tenant a reasonable time to carry out the remedial action (though it could be fixed so as to allow him some additional respite if the court saw fit) and the order would require the giving of possession on that date. But the court is to have power subsequently to substitute a later date if circumstances justify it. The remedial action could include:

making any payment to the landlord or any other person (including a payment of rent arrears, or of costs or damages);

in the case of a continuing breach of covenant, discontinuing it;

in the case of any termination order event, taking action appropriate to rectify the consequences of the event;

in the case of an insolvency event, making an assignment of the tenancy which is permitted according to its terms;

in the case of a termination order event which consists in the assignment or partial assignment of the tenancy, making a reassignment to the former tenant; and

in the case of any termination order event, finding a satisfactory surety or replacement surety.

3.45 The ending of a tenancy through a termination order (whether absolute or remedial) would not prejudice any statutory security of tenure which the tenant might have.

Guidelines for the court's decision: absolute order

3.46 Under our scheme the basic rule is that an absolute order should be made only

> Where the court is satisfied, by reason of the serious character of any termination order events occurring during the tenure of the present tenant, or by reason of their frequency, or by a combination of both factors, that he is so unsatisfactory a tenant that he ought not in all the circumstances to remain tenant of the property.

3.47 This is intended to ensure that, although the court must concentrate its attention upon the breaches which the tenant has actually committed, they are relevant for this purpose only in so far as they indicate that the tenant is so unsatisfactory that he should not be allowed to remain a tenant. This test is thus designed to change the tendency of the present law to look backwards rather than forwards. It is designed also to militate against the doctrine of "stigma" under which certain kinds of breach (generally those involving immorality or illegality) are assumed almost automatically to cast a stigma on the property and thus to preclude the possibility of relief for the tenant. Each case is to be judged on its merits and according to the test propounded.

3.48 Provided that there is at least one event on which the landlord can found valid termination proceedings under the rules summarised earlier, he can rely also, in seeking an absolute order under this head (but for no other purpose), on other termination order events. These are to comprise all the events which may have occurred while the present tenant was tenant, including events in respect of which the six months' time limit is now past, events on which the landlord has waived his right to found termination proceedings, and events involving want of repair even though he is unable to found proceedings on them because of the new regime for compulsory notice in repairing cases. Evidence of these matters would be admissible under the existing law, albeit for slightly different purposes. We see no reason why proceedings should be either more numerous or more lengthy under our scheme than they are now.

3.49 There are three other cases in which an absolute order is to be made. They amount to exceptions to the basic rule stated above and are designed to modify it where modification is necessary in particular circumstances.

3.50 The first is designed mainly to guard against the possibility that an absolute order might be avoided, and a profitable misuse of the property prolonged, by a last minute assignment of the tenancy.

3.51 The second makes special provision for cases where the termination order event on which the proceedings are founded is itself an assignment of the tenancy in breach of covenant or is an insolvency event (which will usually involve automatic vesting in the trustee in bankruptcy and to which special considerations in any case apply). In these cases the test is to be whether any

remedial action which the court could order would be adequate and satisfactory to the landlord.

3.52 The third arises if the court, though it would otherwise wish to make a remedial order rather than an absolute one, is not satisfied that the tenant is willing, and is likely to be able, to carry out the remedial action which would be required of him. If the landlord has given the tenant time (whether by means of notice or otherwise) to take remedial action before the hearing, and he has not done so, the court is to take this into account in considering his willingness and likely ability to take the remedial action which it would require.

Guidelines for the court's decision: remedial order or no order

3.53 Because of the stringency of the requirements for the making of an absolute order it is probable that, in most cases where a termination order event is proved, the court will make a remedial order. This, therefore, is likely to be the normal type of order. A decision to make no order at all is to be taken if, but only if, remedial action has already been taken; or it is impossible or unnecessary; or it ought not in all the circumstances to be required.

Costs in general

3.54 Costs incurred in reference to a termination order event have already been dealt with (in paragraph 3.42 above). The court is to have a complete discretion as to the award of other costs. And it should have a specific power to make the landlord pay the tenant's costs if satisfied (broadly) that the tenant would have taken appropriate remedial action before the hearing if the landlord had given him a sufficient opportunity to do so.

(vii) *Derivative interests*

3.55 As a rule the ending of a tenancy by a termination order must involve the automatic termination of any sub-tenancies, mortgages or other interests which derive from it (as it does under the existing law of forfeiture).

3.56 But the existing exception in section 137 of the Rent Act 1977 is to be preserved.

3.57 And there are to be entirely new powers for a landlord voluntarily to preserve derivative interests if he wishes to do so.

3.58 As under the present law, relief is to be available for the holders of derivative interests not preserved in either of these ways, but the existing rules are in some respects defective and should be changed.

(a) There is to be a new and comprehensive definition of those eligible for relief ("the derivative class").

(b) The court is to have new powers to preserve the existing interests of members of the derivative class, as distinct from ordering the grant of new interests to them.

(c) The court's existing powers to order the grant of new tenancies are to be extended, and several difficulties under the present law (for

example, the anomalous position which arises when a new lease is granted to a former mortgagee) are to be resolved.

3.59 In order to ensure that the derivative class have an opportunity to seek relief, the landlord is to have new powers to obtain details of its members and to serve "warning notices" upon them. At the hearing of the landlord's termination proceedings, the court is to ascertain whether there are any members of the derivative class and, if so, to consider their position.

(viii) *Abandoned premises*

3.60 The existing law gives the landlord certain remedies where the premises let have been abandoned by the tenant, but these are either obsolescent or dependent upon the doctrine of re-entry. Accordingly the scheme is to incorporate two new provisions.

3.61 The first is that if the landlord reasonably believes the premises to have been abandoned, he is to have the right to secure and preserve them, absolved from any liability in trespass which he might otherwise incur.

3.62 The second is that if the landlord reasonably believes the premises to have been abandoned *and* there is at least one termination order event in respect of which he would be entitled to seek a termination order, he is to have a right to serve notices which operate, if no response is made within six months, to terminate the tenancy without the need for court proceedings. These notices are to be served (if necessary, by substituted service) on the tenant and any members of the derivative class of whom the landlord knows. If any response were made, the landlord would be obliged to take termination order proceedings in the normal way.

(ix) *Joint tenants*

3.63 The present rule that relief in respect of a tenancy held jointly can be granted only to all the joint tenants is potentially unfair and is not to be reproduced in the scheme which is, instead, to incorporate the following two provisions.

3.64 If a landlord applies for a termination order against a number of joint tenants, and one or more of them is or are willing to submit to an absolute order, the court is nonetheless to have power, on the application of the remainder, to refuse such an order. But if a tenancy is preserved in this way, the applicant tenant or tenants are to become the sole tenant or tenants; and in reaching its decision the court is to consider whether this would cause unjustifiable prejudice to the landlord.

3.65 If, on the termination of a tenancy, a derivative interest is held jointly by a number of people, not all of whom apply for relief, the court is nonetheless to have power to grant it to those who do apply—but, again, only after considering whether this would cause unjustifiable prejudice to the landlord.

(x) *"Neutral" conditions: a consequential recommendation*

3.66 With the abolition of the doctrine of re-entry, it becomes necessary to deal with those rare cases where, under the present law, the landlord has the power to end a tenancy by re-entry on the happening of an event which does not connote fault on the part of the tenant (for example, the grant of planning permission). Under the scheme, therefore, notice is to replace re-entry in these cases and the landlord is to have power to end the tenancy by one month's written notice to the tenant. Those elements of the scheme which are concerned with waiver and with the six months' time limit are to apply in these circumstances.

(xi) *Court jurisdiction, Crown application and drafting*

3.67 The county court is to have jurisdiction in all questions arising out of the scheme in cases where the rateable value of the property does not exceed £2,000 (and this figure is to be increased in line with any general increases made in county court jurisdiction based on rateable values). This will serve to simplify the present situation.

3.68 There is thought to be no reason why our recommendations should not, in general, bind the Crown, but this is a matter for consultation.

(xii) *Transitional*

3.69 The legislation implementing the scheme is to come into force on a date to be appointed by the Lord Chancellor ("the operative date").

3.70 After the operative date the scheme is to apply to the exclusion of the law of forfeiture, except where the landlord had a ground for forfeiture and had taken action on it before that date.

3.71 Termination order events occurring before the operative date are not to be capable of founding termination proceedings if the landlord has, before that date, become disqualified (through waiver under the old law, or through the remedying of a remediable breach of covenant) from forfeiting the tenancy because of them. In relation to events of which the landlord has knowledge prior to the operative date, the six months' period is not to start running until the operative date.

(b) **Tenants' termination orders**

3.72 We now turn to the scheme for termination sought by the tenant for fault on the part of the landlord. The sub-headings which follow correspond with the headings of those parts of the report which are comprised in Parts XVII to XXI, so that, again, they provide a system of cross-references to the more detailed treatment and recommendations which appear there.

(i) *Introductory: a new right for the tenant to seek termination*

3.73 The whole of this scheme amounts to new law because, although there is nothing in theory to prevent the parties from incorporating in a tenancy a provision making it terminable by the tenant for fault on the part of the landlord, this is never done in practice.

3.74 Having examined the other remedies available to tenants, it seems to us that the law would be improved if such a right were available to tenants and that this right should be provided by a scheme which is in most respects—but subject to important variations—analogous to the scheme for landlord's termination orders.

(ii) *Tenants' termination orders: opening recommendations*

3.75 This scheme, like the other, is to apply to tenancies already in existence, as well as to future ones. Transitional provisions are mentioned later, in para. 3.93.

3.76 Under this scheme, there is to be only one kind of termination order event: breaches of covenant by the landlord. These are to entitle the tenant to bring termination proceedings despite any stipulation to the contrary.

3.77 The provision about waiver is to be exactly analogous; and so is the provision about remediable breaches, which are to remain grounds for termination proceedings even though remedied, thus allowing the tenant to take action on the basis of persistent breaches by the landlord (for example, of his obligation to repair).

3.78 This scheme is to incorporate a similar provision for a six months' time limit and an analogous provision for optional notice (allowing the six month period to be extended) is also to apply. Preliminary notice is in no case to be compulsory (so that the compulsory notice regime which is to apply to cases where the tenant is in breach of his repairing obligations has no counterpart in this scheme).

(iii) *Tenants' termination orders: the court's powers at the hearing*

Preliminary matters

3.79 The court is to have the same three basic choices: to make an absolute termination order, to make a remedial one or to refuse a termination order altogether.

3.80 In addition to dealing with the tenant's main claim for a termination order the court is to have similar powers to order the landlord to pay costs incurred by the tenant in reference to the termination order event, and to impose terms on the refusal of a termination order or on the making of a remedial order.

3.81 For a tenant whose tenancy ends through a termination order obtained by him the scheme also contains another right: to claim damages from the landlord whose breach of covenant has caused the termination. The damages would be calculated as if the tenancy were a contract which could be terminated through a repudiatory breach on the part of the landlord, and as if it were so terminated at the date on which the termination order brings it to an end. Subject to the rules about remoteness of damage, this would enable the tenant

to recover, in addition to any damages for breach of covenant, any damage suffered through the loss of the tenancy. The scheme for tenants' termination orders would, in our view, serve a useful purpose without the additional right to damages but it would be impossible for most tenants, holding a term of years, to use a right to claim termination if the right to damages were not provided, because the tenant would lose the value of the tenancy which would not be covered by any award of damages for breach of covenant.

The choices open to the court

3.82 An *absolute* order is to terminate the tenancy unconditionally on a date specified, and the date is to be one which the court considers reasonable in all the circumstances.

3.83 A *remedial* order is to terminate the tenancy on a date specified *unless* the landlord takes prescribed remedial action by that time. As in the case of landlords' termination orders, the date is to be so fixed as to allow a reasonable time for this action to be completed; but the court is to have the same power to vary the order by substituting a later date. The remedial action prescribed could include:

making any payment to the tenant or any other person (and the payment might, for example, be of sums due under the terms of the tenancy, or of costs, or of damages);

in the case of a continuing breach of covenant, discontinuing the breach; and

in the case of any termination order event, taking action appropriate to rectify the consequences of the event.

Guidelines for the court's decision: absolute order

3.84 The basic rule is exactly analogous: an absolute order should be made only

where the court is satisfied, by reason of the serious character of any termination order events occurring while the current landlord has been the landlord, or by reason of their frequency, or by a combination of both factors, that he is so unsatisfactory a landlord that the tenant ought not in all the circumstances to remain bound by the tenancy.

3.85 There are to be two other cases in which an absolute order is to be made.

3.86 The first is designed mainly to guard against the possibility that a bad landlord might avoid an absolute order by making a last minute transfer of the reversion to an associated person or company.

3.87 The second arises if the court, though it would otherwise wish to make a remedial order, is not satisfied that the landlord is willing, and is likely to be able, to take the remedial action which it would require. In considering this,

the court is to take into acount the fact (if such it is) that the tenant has already given the landlord time to take remedial action and he has not done so.

Guidelines for the court's decision: remedial order or no order

3.88 The circumstances in which the court is to make a remedial order, or to refuse a termination order altogether, are exactly analogous.

Costs in general

3.89 The provisions relating to costs are the same.

(iv) *Tenants' termination orders: derivative interests*

3.90 As to derivative interests, the provisions of this scheme are different. As is the case under the scheme for landlords' termination orders, the obtaining of a termination order would have to involve the termination of all interests deriving from the tenancy. But because we regard the tenant as having a large measure of responsibility for such interests we provide, in this scheme, that the tenancy is not to be ended at his instance unless the court is satisfied:

(i) that all derivative interest holders who are sub-tenants will be adequately compensated for any losses arising through termination, and that any objections they may have are not sufficient to outweigh the desirability of termination taking place, or

(ii) that they have consented to termination.

In regard to derivative interest holders who are mortgagees, requirement (i) above is to be modified so as to require merely that they should receive the amount of the debt or the value of the security (whichever is the less). Compensation for all derivative interest holders is likely to come initially from the tenant: the extent to which he can recover it from the landlord is to be determined, broadly, by applying the existing rules about remoteness of damage for breach of contract.

(v) *Tenants' termination orders: concluding recommendations*

3.91 The provisions in this scheme about joint landlords cannot be analogous to those in the other scheme about joint tenants. Under that scheme (paragraph 3.64 above), where a tenancy is owned by a number of joint tenants, and one or more of them is willing to submit to a termination order, the court may nonetheless preserve the tenancy in the hands of those who wish to keep it. But if the reversion were owned jointly by a number of landlords, it would be impossible to have a situation in which some only of those who held the reversion were bound by the tenancy. A tenancy would have to be terminated or else continued against all. If joint landlords were unable to agree upon the conduct of legal proceedings it would be necessary for one or more of them to apply to the court for directions. (See cases cited in footnote 7 to para. 12.7.)

3.92 As to the court jurisdiction, the provision is the same: the county court is to have jurisdiction on all questions where the rateable value of the premises does not exceed £2,000.

3.93 As to transitional matters, this scheme, like the other, is to come into force on a date to be appointed by the Lord Chancellor ("the operative date"). The new law would apply when, and only when, the landlord's breach of covenant occurred (or continued) after the operative date.

DETAILS OF THE TERMINATION ORDER SCHEMES PROPOSED

TERMINATION ON THE APPLICATION OF THE LANDLORD

PART IV

PRELIMINARY

4.1 We have already described[1] the proposal to abolish the present law of forfeiture both statutory and non-statutory and, with it, the doctrine of re-entry, and to replace them with a scheme for termination orders under which there would be no distinction between termination for non-payment of rent and termination for other reasons, and under which the tenancy would continue in force until the date on which the court ordered that it should terminate.

Termination without a court hearing

4.2 We emphasise that a full court hearing is by no means an inevitable consequence of the scheme. If the tenant realised that the tenancy was bound to be terminated, or was content that it should be, he could simply surrender it to the landlord. Surrender may take place either by deed or by operation of law. Surrender by operation of law could occur in this context if the tenant gave up possession of the premises to the landlord (as distinct from simply abandoning them) and the landlord accepted it.[2]

4.3 We envisage that there would also be circumstances in which, although the tenant did not surrender his tenancy, the landlord would be able to obtain summary judgment without a court hearing. Summary judgment may be obtained in appropriate cases under the existing law; and it would be for the Rules Committees to decide upon the procedure by which such judgment should be available under the scheme proposed.

Existing tenancies

4.4 We recommend that the new scheme should apply to existing tenancies as well as to those granted in the future. If it did not, the consequence would be that the existing law about forfeiture would continue to operate, side by side with the termination order scheme, for many years. This duplication would be undesirable even if the present law were satisfactory.

4.5 The effect of this is not, of course, to alter the terms of agreements already made but merely to change in some degree the remedies obtainable

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[1]Para. 3.7 above.

[2]For a recent case discussing the facts from which surrender can be inferred, see *Preston Borough Council* v. *Fairclough, The Times*, 15 December 1982. A surrender, by contrast with forfeiture, would not operate to end any sub-tenancies or other interests derived out of the tenancy. This distinction would be preserved despite the replacement of forfeiture by our scheme for termination orders: see further Part 10 of the report.

(and the procedure for obtaining them) in respect of future breaches of agreement. Transitional problems are considered below.[3]

Repudiatory breach

4.6 The Court of Appeal made it clear, in *Total Oil Great Britain Ltd* v. *Thompson Garages (Biggin Hill) Ltd.*,[4] that the doctrine of repudiatory breach, whereby a contract may be terminated by a breach which is repudiatory in character and which is accepted by the other party, does not apply as between landlord and tenant. We are conscious, however, that the law on this subject may not be immutable and that the authority of this case may to some extent have been weakened by *dicta* of the House of Lords in *National Carriers Ltd.* v. *Panalpina (Northern) Ltd.*[5]

4.7 If the doctrine of repudiatory breach were to apply to tenancies, the effect would presumably be that a breach of this kind by the tenant, and its acceptance by the landlord, would serve of itself to end the tenancy: the law of forfeiture or (in the future) the scheme for termination orders would thus be by-passed. This would not be satisfactory, and we recommend that any implementing legislation should make it clear that the scheme is to apply, even though the tenant's breach of obligation may be repudiatory in character, so as to secure for the tenant the protection of the court's discretion.

[3]Paras. 5.3–5.9; footnote 15 to para. 5.18 paras. 5.24–5.28, 5.29–5.31 and 5.35; and Part XV.
[4][1972] 1 Q.B. 318.
[5][1981] A.C. 675.

PART V

GROUNDS FOR A LANDLORD'S TERMINATION ORDER: "TERMINATION ORDER EVENTS"

5.1 The grounds for termination proceedings may conveniently be called "termination order events". Our intention is to catch within our definition all events connoting fault on the part of the tenant, with the result that a landlord who wishes to end a tenancy for fault on the tenant's part can in future do so only by means of proceedings for a termination order. The events to be within the definition are to be of three kinds, breaches of covenant, disguised breaches of covenant and "insolvency events".

(a) Breaches of covenant

5.2 This term is used in a wide sense, to include all the obligations owed by tenant to landlord, whether they are expressly undertaken or implied[1] at common law or by statute.

(i) *Breaches of covenants in future tenancies to be termination order events without the need for any forfeiture clause.*

5.3 We recommend that all breaches of covenant contained in tenancies granted after the date when the implementing legislation comes into force ("the operative date") should automatically be termination order events. Breaches of covenant are grounds for forfeiture under the existing law only if they are the subject of a forfeiture clause, but we recommend that no such special provision should be necessary to make them termination order events.

5.4 This recommendation will shorten tenancy documents by obviating the need for a piece of verbiage which is at present included, in nearly every case, as a matter of course. There would be nothing to prevent the parties agreeing that certain breaches of covenant, or even breaches of covenant in general, should *not* be termination order events;[2] but cases in which they wished to do this would be very rare indeed. In practice forfeiture clauses are almost never omitted from tenancies today except in cases where the tenancy is created without any formal document. Our recommendation would, in effect, supply such a clause even in these latter cases, and we think this would usually accord

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[1]Under the existing law, the implied obligations of a tenant, though not exactly defined, are certainly very limited. They include an obligation to pay a fair rent (in the unlikely event of the rent not having been agreed), to use the premises in a tenant-like manner, and to refrain from committing voluntary waste (i.e., causing damage to the property) and, in the case of some tenancies, permissive waste (i.e., allowing the property to deteriorate). In our Report on Obligations of Landlords and Tenants (1975, Law Com. No. 67), we recommended that the category of implied obligations should be greatly extended. Implementation of that report would be a step towards the greater standardisation of tenancy provisions recommended by the Report of the Royal Commission of Legal Services (1979, Cmnd. 7648, Annex 21.1, para. 13 (on p.285)).

[2]Or that they should be events giving rise to a right to seek termination only upon certain conditions or after a specified lapse of time. Compare *Parry* v. *Million Pigs Ltd.* (1980) 260 E.G. 281, where it was held that the Agricultural Holdings Act 1948, s.65 rendered void any forfeiture clause which provided for a tenancy to "terminate" too soon to allow the tenant to give notice under s.56 of his intention to claim compensation. Inasmuch, however, as a tenancy does not terminate under our scheme until the court so orders, it is thought that this particular case would not need to be specially catered for in future.

with the parties' intentions because the omission is almost never made deliberately. It would remain open to the parties however to make a contrary agreement. But the point is not of great importance here, because informal tenancies tend to be either periodic or very short and are therfore such that they will end (or can be ended by notice to quit) within a relatively brief period in any event.

5.5 Another effect of our recommendation will be (again subject to contrary agreement) to make breaches of a tenant's implied obligations, as well as breaches of his express ones, grounds for a termination order. Forfeiture clauses today are not normally drafted so as to extend to implied obligations (though there is no legal reason why they should not be). This is presumably because a tenant's implied obligations are at present minimal, and are in any case likely to be subsumed within his express obligations. For the same reason, this particular effect of our recommendation is of small practical importance.

(ii) *Breaches of covenants in existing tenancies not to be termination order events unless covered by a forfeiture clause.*

5.6 It would be desirable on grounds of simplicity to extend the recommendation just made to tenancies already in existence at the operative date. The main impact, again, would be on informal tenancies and normally the only effect would be to imply a term which the parties themselves would have included if they had considered it. The fact remains, however, that this would give the landlord a right which he did not previously have, and we do not think it would be justifiable, on principle, to change the law retrospectively even in these cases. And there might conceivably be cases in which the forfeiture clause had been omitted deliberately (or included but applied only to certain covenants and not to others). In these cases the implication of such a clause would serve actually to reverse the parties' intentions, and that would plainly be wrong. In relation to tenancies granted before the operative date, therefore, we recommend that breaches of covenant should be termination order events only if the covenant in question was the subject of a forfeiture clause.

(iii) *The problem of future tenancies granted under existing obligations.*

5.7 But we must also consider a hybrid situation: that in which the tenancy, though granted on or after the operative date, was granted in pursuance of a binding obligation entered into before it.[3] Take a case where, in a contract entered into before that date, the landlord agreed to grant a long tenancy at a premium[4] in a form which omitted any forfeiture clause (or had a clause

[3]An analogous situation could arise when the obligation to grant a new tenancy is statutory rather than contractual, but no special recommendation seems necessary here. If, for example, a tenancy within Part II of the Landlord and Tenant Act 1954 omitted a forfeiture clause or had one which applied only to some of the tenant's covenants (an unlikely situation), the terms of any new tenancy granted under the 1954 Act after the operative date would fall to be determined under s.35 of the 1954 Act, which (in the event of dispute between the landlord and tenant) would give the court discretion to reproduce the existing situation in terms of the new legislation.

[4]We choose these facts in order to provide an example of a case where the contract is to be implemented by subsequent grant of a formal tenancy. In the case of rack rent tenancies the parties are sometimes content to rely on the agreement alone, leaving it to take effect as an equitable tenancy under the doctrine in *Walsh* v. *Lonsdale* (1882) 21 Ch. D.9. In such a case the equitable tenancy would of course rank simply as a tenancy granted before the operative date.

applying only to certain covenants)—and the tenancy fell to be granted after that date. Or take the case of an existing tenancy which had no forfeiture clause but contained an option for the tenant to take a new tenancy "on the same terms" when the old one ended—and the new tenancy fell to be granted after the operative date. The following points have to be considered:

(a) The problem would be extremely rare. The tenancies in relation to which it arose would be formal ones, and if (as we have said) forfeiture clauses are almost never omitted from such tenancies, their omission from the small class of tenancies which happened also to be "transitional" in the way described would be still more unlikely. There might in fact be no such cases at all.

(b) This rarity would tend to rule out any solution which involved widespread uncertainty. It would be possible, for example, to propose that our earlier recommendation about existing tenancies should be extended to future tenancies granted in pursuance of an existing obligation, so that in the case of these tenancies, too, a breach of covenant would not be a termination order event unless covered by a forfeiture clause. But this would largely destroy the purpose of our main recommendation made in paragraph 5.3 above. The purpose of that recommendation is to enable parties to enter into future tenancies which make no mention of termination or forfeiture but which are nonetheless terminable for breach of covenant by the tenant. Clearly this would not work if, every time he met with such a tenancy, a legal adviser had to explain that its effect depended upon whether it was granted in pursuance of an earlier obligation of the kind just mentioned, and to set about the task of finding out whether it was or not.

5.8 The problem, such as it is, can be solved by a comparatively narrow recommendation: namely that if there is a binding obligation in existence prior to the operative date,[5] whereby both parties are bound to enter into, or one party is bound to grant or to take, a tenancy after that date, and the obligation is such that a forfeiture clause is not to be included (or is not to be included in relation to some of the tenant's covenants), then the parties' agreement should be interpreted as requiring the tenancy to include an express term showing that it is *not* terminable for breach of the tenant's covenants (or some of them, as the case may be). The merit of this solution is that, though adequate to deal with the small problem which may exist, it would not subvert the principle that the effect of a tenancy granted after the operative date should be ascertainable simply by reading it.

5.9 This recommendation leads to another: that where an obligation entered into before the operative date was such that a forfeiture clause *is* to be included in a tenancy granted after that date, that requirement should be treated as fulfilled if the tenancy maintains silence on the point, so allowing breaches of covenant to be termination order events.

[5]This should include the case where the obligation, though it arises after the operative date, does so on the exercise of an option granted before that date.

(b) **Disguised breaches of covenant**

5.10 It is important that a landlord should not be able to by-pass the scheme for termination orders by framing a tenancy in such a way that what is in reality a breach of covenant becomes something else in law. He already has a disincentive to do this, because events which are not breaches of covenant do not give rise to an action for damages, but he might, unless prevented, still have advantages to gain (by circumventing the court's power to refuse termination). The two main ways in which a landlord might seek to avoid the scheme for termination orders would be by imposing a provision that the tenancy was granted "on condition that" the tenant did or did not do something, or by imposing a provision that the tenancy continued only until the tenant acted or failed to act in a similar way. These methods of avoiding the scheme, and the extent to which the relevant act or omission should be turned into a termination order event,[6] are considered in the paragraphs which follow.

(i) *Conditions*

5.11 A tenancy may be granted "upon condition"—so that it is terminable by re-entry on the happening of some particular event (no forfeiture clause being necessary). The event in question may be an act or omission by the tenant, so that its happening connotes fault on his part; or it may not. Events of the latter kind may be called "neutral" events.

5.12 An example will explain this. Suppose that the owner of a field wants to build himself a house on it but cannot obtain planning permission to do so. He might let the field to a tenant for seven years upon condition that planning permission was not granted during that time. The grant of planning permission would clearly be a neutral event.

5.13 Neutral events should not be within our termination order scheme, which is concerned only with events connoting fault on the part of the tenant. The exercise of the court's (relief-giving) discretion would be inappropriate in the case of neutral events and we say no more about them here.[7] We think it is clear that such events do not attract relief under the present law, but there may possibly be doubt on this point. Those provisions of section 146 of the Law of Property Act 1925 which deal with notices and with relief apply to any "right of re-entry or forfeiture under any proviso or stipulation in a lease for breach of *any* covenant or *condition*" (emphasis supplied). It is very hard to believe, however, that the section was intended to apply to conditions like the one in the example just given about planning permission, and we think its actual provisions go far to make this clear.[8] We have no doubt, in any case, that they should fall outside the definition of termination order events.

5.14 What, then, should fall within it? Leaving aside conditions relating to insolvency, with which we deal separately,[9] the answer is, broadly: conditions

[6]The effect of turning the act or omission into a termination order event would of course be that the landlord could terminate the tenancy only by obtaining a termination order.

[7]In Part XIII of this report, however, we make certain recommendations about conditions which turn upon neutral events, these recommendations being a necessary consequence of our earlier recommendation to abolish the doctrine of re-entry (para. 3.7 above).

[8]Cf. *Halliard Property Co. Ltd.* v. *Jack Segal Ltd.* [1978] 1 W.L.R. 377.

[9]Paras. 5.19 and 5.20 below.

which provide for the tenancy to end on the happening of an event against which a landlord would be expected in practice to protect himself (if he protected himself at all) by means of a covenant. A more detailed answer is given below.[10]

(ii) *Limitations*

5.15 A tenancy may be "limited" to continue only until the happening of a specified event, and the event in question might, as in the case of a condition, be either a neutral event or an act or omission of the tenant connoting fault on his part.[11] It is in the nature of a limitation that the happening of the event serves of itself to bring the tenancy to an end: re-entry is not necessary.

5.16 As with conditions, the scheme is not concerned with limitations which turn upon neutral events; but if the event is one against which a landlord would normally protect himself (if he did so at all) by means of a covenant, then it should be a termination order event and its happening should not serve to end the tenancy automatically but should merely entitle the landlord to seek a termination order. This recommendation will be further explained below.[12]

5.17 A landlord would not naturally employ a limitation order to enforce an obligation which he could have enforced by means of a covenant: he would deprive himself not only of damages but also of any choice as to whether or not the tenancy should end.[13] But he might do so if he were able in that way to avoid the termination order procedure and the court's discretion. The existing law contains a provision designed to guard against this. The provisions of section 146 of the Law of Property Act 1925 about notice and relief are expressly extended to some limitations, because subsection (7) provides:

> "For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach."

But this provision does not go far enough. It contemplates only the case where the landlord does protect himself against the event in question by means of a covenant and then goes on to make the breach of the covenant an event upon which the limitation turns. Under the scheme the provisions should cover also the case where the undesired event is not made the subject of a covenant at all but merely of a limitation.

(iii) *The recommendations in detail*

5.18 Since they are intended largely as anti-avoidance measures the provisions should be framed widely. There may be other ways in which a resourceful landlord might seek to avoid the termination order scheme, and the following formulations are intended to cover them:

> Termination order events should include all events on the happening of which the tenancy (whether through the inclusion of a condition or

[10]Para. 5.18 below.
[11]Para. 2.6 above.
[12]Para. 5.18 below.
[13]Para. 2.6 above. But see footnote 7 thereto.

limitation or for any other reason) is to cease (whether immediately or after a period) or the landlord is to have the right (whether or not on notice[14]) to apply for a termination order,[15] to forfeit the tenancy or bring it to an end in any other way, or to require its surrender[16] or its assignment to a person nominated or to be nominated by him being events against the happening of which a landlord would be expected in practice to protect himself (if he protected himself at all) through the imposition of a covenant upon the tenant and including (but without prejudice to the generality of the foregoing words) all events which consist in or result from any of the following matters:

Non-payment of any rent or outgoings or other money to any person;

non-insurance of the premises;

want of repair maintenance or decoration of the premises;

execution or non-execution of building or other work on the premises;

making any disposition or parting with or sharing possession or occupation of the premises or any part of them or ceasing to reside in or occupy them or any part of them or taking in lodgers;

making or not making any alteration to, or change in the use of, the premises;

non-observance or non-performance of any rules or regulations (statutory or otherwise and whether or not contained in the tenancy), or of any covenants or other obligations (not imposed by the tenancy) which affect the premises;

failing to pass on to the landlord or any other person any information or notices or other documents;

failing to afford the landlord or any other person access to the premises; and

failing to become or remain a member of any company, association or body.[17]

(c) **Insolvency events**

5.19 In the preceding paragraph we recommend that termination order events should include breaches of condition in cases where the event constituting the breach was one against which a landlord would be expected in practice to protect himself (if at all) by means of a covenant. There is one condition the breach of which falls outside this definition, but which does connote fault on

[14]Cf. *Richard Clarke & Co. Ltd.* v. *Widnall* [1976] 1 W.L.R. 845 (C.A.) where it was held that a provision in a tenancy which allowed the landlord to terminate it by notice after a breach of covenant did not exclude the tenant's right to seek relief against the "forfeiture".

[15]Since this recommendation will apply both to tenancies granted after the implementing legislation and to those already in existence, it is necessary to refer both to a termination order and to forfeiture.

[16]Cf. *Plymouth Corporation* v. *Harvey* [1971] 1 W.L.R. 549.

[17]This covers the requirement (often found in tenancies of flats or houses in a development) that the tenant shall be a member of the management company or tenant's association. Such a requirement should be a termination order event rather than a neutral one.

the part of the tenant,[18] and if the condition is inserted we consider that its breach should always be a termination order event. It is the only condition commonly included today amongst the terms of a tenancy. It makes the tenancy determinable on the tenant's bankruptcy (or, if the tenant is a limited company, on the company equivalent of bankruptcy), or on events associated with it.[19] Subject to exceptions,[20] such events are within the relief-giving provisions of section 146 of the Law of Property Act 1925. If the tenancy is expressly made terminable on their occurrence, the court's discretion should apply to them and that they should therefore be termination order events.

5.20 To prevent avoidance, the events in question must once again be stated widely and we therefore propose the following formulation. The introductory words are the same as those used in paragraph 5.18 above:

> Termination order events should include all events on the happening of which the tenancy (whether through the inclusion of a condition or limitation or for any other reason) is to cease (whether immediately or after a period) or the landlord is to have the right (whether or not on notice) to apply for a termination order, to forfeit the tenancy or bring it to an end in any other way, or to require its surrender or its assignment to a person nominated or to be nominated by him—being events having to do with the actual or threatened bankruptcy or insolvency of the tenant or any surety[21] and including (but without prejudice to the generality of the foregoing words):
>
> bankruptcy of, or the commission of any act of bankruptcy by, or the making of a receiving order against, a tenant or surety who is an individual;
>
> entering into liquidation, compulsory or voluntary,[22] by any tenant or surety which is a company, or having a receiver appointed in respect of any of its assets;
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> a tenant or surety entering into any arrangement or composition for the benefit of creditors; or
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> a tenant suffering the tenancy to be taken in execution, or a tenant or surety suffering any distress or execution to be levied on goods.

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[18]We recognise that "fault" may be defined in various ways and that, on some definitions, insolvency does not necessarily connote fault. The word is nonetheless a convenient one to use—our intention being, of course, to catch within our definition of termination order events all those events which should be subject to our version of the "relief" provided by the present law of forfeiture.

[19]For example, suffering a distress upon his goods.

[20]See paras. 2.52 and 2.53 above. We consider in paras. 5.47–5.56 below, the question whether any of these exceptions should be reproduced in our scheme.

[21]It was held in *Halliard Property Co. Ltd* v. *Jack Segal Ltd.* [1978] 1 W.L.R. 377 that a condition allowing re-entry on the bankruptcy of a surety fell within s. 146 of the Law of Property Act 1925; and it is considered right that it should be included in the list of termination order events.

[22]The case where a company tenant goes into voluntary liquidation for the purposes of amalgamation or reconstruction is usually excluded expressly from the events which activate a condition of this kind—but it should not be excluded here because if it *is* within the condition it must clearly be a termination order event.

Special considerations

(a) **Non-payment of rent**

5.21 The non-payment of rent is a breach of covenant and the general circumstances in which breaches of covenant should amount to termination order events have already been stated.[23] But in the case of non-payment of rent there is another point to consider.

5.22 Under the present law,[24] non-payment of rent does not give rise to forfeiture until a formal demand is made—unless one of two exceptions applies. The first exception applies if a half year's rent is in arrear and any goods available for distress are inadequate to satisfy the arrears. This exception is unsatisfactory in more ways than one and in practice advantage is usually taken of the second exception, which applies when the tenancy contains a term dispensing with formal demand. For convenience, this may be called the dispensing term.

5.23 The dispensing term has much in common with the forfeiture clause. Both are included as a matter of common form in formal tenancy documents and both could be omitted (with a consequent saving of verbiage) if the general law were amended so as to supply impliedly the provision which has now to be included expressly. Further, the dispensing term is in practice nearly always added to the forfeiture clause and included with it in a single provision.

5.24 In these circumstances we propose that the law be amended, in relation to the forfeiture clause itself, so that the dispensing term need no longer be included. The law about formal demand stems in part from common law doctrines which are inappropriate to present day conditions and in part from statutes which are ambiguous and archaic and it is always excluded in formal tenancies. We see no merit in preserving it.

5.25 However, one further pont must be explained. Dispensing terms always prescribe a time for which rent must be owing before the right to forfeit can arise. This is as it should be because a short and possibly inadvertent delay in payment has little significance. The period agreed in practice is almost invariably 21 days, and we propose the same period for the scheme. But if the parties wished to prescribe a different period they should be free to do so.

5.26 We therefore recommend that, if non-payment of rent would amount to a termination order event under the principles proposed earlier in this part of the report, the landlord should be entitled to seek a termination order once some rent has been unpaid for 21 days after becoming due (whether formally demanded or not). This rule should apply irrespective of whether the tenancy contained a dispensing term—save in one respect: if the tenancy did have a term dealing with the circumstances in which it ended or could be ended for

[23]Paras. 5.2–5.9 above.
[24]Para. 2.20 above.

non-payment of rent,[25] and the term prescribed a period different from 21 days, that different period should apply.

5.27 No landlord would in practice launch termination proceedings for non-payment of rent without first making contact with the tenant if he could. Nor in practice would a single non-payment of rent ever cause the court to end a tenancy, save perhaps in most exceptional circumstances—as where the tenant had become totally unable to pay rent.

5.28 If this recommendation were confined to future tenancies, the present law (statutory and non-statutory) about formal demand would have to remain in force for the indefinite future in order to cater for existing ones. This would be unsatisfactory and we therefore propose that the recommendation should extend to existing tenancies. In practice it will apply to very few (if any) such tenancies[26] and its effect if it did apply would be small.

(b) A note about forfeiture clauses

5.29 To sum up the effect of our recommendations upon forfeiture clauses, the forfeiture clause strictly so called provides merely that breaches of covenant give rise to forfeiture; but we have noted that the clause is often expanded to do two other things: first, to dispense with the need for a formal demand of rent (a dispensing term) and secondly, but rather less frequently, to impose what is in effect a condition providing for forfeiture on the tenant's bankruptcy or on certain similar events (a bankruptcy condition).

(i) *Future lettings*

5.30 By future lettings we mean tenancies entered into on or after the date on which the implementing legislation comes into force, whether or not in pursuance of an obligation entered into before that date.[27] All breaches of covenant (other than non-payment of rent) would be termination order events despite the absence of a forfeiture clause. Non-payment of rent would be such an event after 21 days, without formal demand, despite the absence of a forfeiture clause and of a dispensing term. Both of these propositions would be subject to contrary agreement, and the period of 21 days could be varied, but if the parties were content with the situation just described the tenancy could be completely silent about termination for breach of covenant. Bankruptcy would be a termination order event only if expressly provided for and the express provision could take the form, for example, either of a provision that the tenancy was granted on the condition that the tenant should not become bankrupt or of a provision that his bankruptcy would be a termination order event.

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[25]These words are deliberately wide because the term may be contained in a tenancy granted before our recommendation comes into legal force (in which case it will speak of forfeiture) or afterwards (in which case it will probably speak of termination). As to the "retrospectivity" of the recommendation, see para. 5.28 above.

[26]The recommendation would not apply unless the existing tenancy contained a forfeiture clause but lacked a dispensing term, and this would be rare in the extreme.

[27]As to tenancies entered into in pursuance of such an obligation, see paras. 5.7–5.9 above.

(ii) *Existing lettings*

5.31 By existing lettings we mean tenancies granted before the date mentioned above. Breaches of covenant would be termination order events only if there were a forfeiture clause which applied to them. If such a clause applied to a covenant to pay rent, non-payment would become a termination order event after 21 days, without formal demand, despite the absence of a dispensing term. But if there were a dispensing term, and it specified a different period, the different period would apply. Bankruptcy would be a termination order event only if expressly provided for, and the express provision would normally take the form of a bankruptcy condition added to the forfeiture clause.

(c) **Denial of title**

5.32 The present law regards any action by the tenant which amounts to denial of the landlord's title as the breach of an implied condition which entitles the landlord to forfeit the tenancy with no chance of relief for the tenant.

5.33 This doctrine has its origins in feudal times and we have already quoted Megarry and Wade's description of it as "outmoded".[28] Its history is traced in *Warner* v. *Sampson*[29] in which Lord Denning M.R. said that it should be regarded as obsolete:

> "There is no case, so far as I know, in which it has been applied between ... 1590 and *Kisch* v. *Hawes Brothers Ltd.*[30] in 1935 ... It is a pity that it was not left in oblivion, for it is quite inappropriate at the present day. All the circumstances which gave rise to this medieval law have now disappeared ... [A tenant's] rights and duties are defined by the lease; and there is no room for any implied condition that he is not to dispute the landlord's title ... The landlord is sufficiently protected by the rule that the tenant is estopped from denying his landlord's title. This rule ensures that no denial of title is of any avail to the tenant except in those cases where he may properly put the landlord to proof. To go further and say that the denial involves a forfeiture would be a punishment on the tenant which cannot be justified."[31]

It may be relevant to add that in certain circumstances denial of title by the tenant could, it seems, found an action by the landlord for the tort of slander of title, through which he might obtain damages or an injunction or both.[32]

5.34 It is plainly wrong that a tenant should be unable to claim relief if his landlord seeks to end the tenancy on the ground of his denial of title. But we agree with Lord Denning that the landlord's right to end the tenancy on this ground should be abolished altogether. In reaching this conclusion we do not discount the possibility that a tenant's denial of title might take forms which were genuinely harmful to the landlord; but he has other remedies, as we have mentioned, and we see no reason why this particular form of behaviour by the

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[28]Para. 2.7 above.
[29][1959] 1 Q.B. 297 (C.A.)
[30][1935] Ch. 102. This case was in fact overruled in *Warner* v. *Sampson*.
[31][1959] 1 Q.B. 297, at pp. 315 and 316.
[32]The landlord might also be able to obtain from the court a declaration verifying his title.

tenant, alone among many others which might be equally harmful, should be singled out by the law and made the subject of an implied condition.

5.35 We therefore recommend that, in tenancies granted after the implementing legislation comes into force, there should be no term implied to the effect that the tenant should not deny or disclaim the landlord's title; and we recommend also that any such term implied in a tenancy granted before that time should be ineffective. This is not intended to prevent the inclusion of, or render ineffective, any express term to similar effect. It follows that denial of title would not be an event for which the tenancy could be terminated in any way unless it were prohibited by an express term.

(d) **Severance of the tenancy**

5.36 Property may be let as a single unit to a single tenant, and the tenancy may later be the subject of partial assignments to different people who each become tenants of part of the property. Suppose, for example, that T (the original tenant) assigns half the premises to A and half to B. The question arises as to whether the landlord can bring the whole tenancy to an end because of a breach of obligation by B. The answer given by the present law seems clearly to be in the negative. The principle is conveniently stated in an Irish case, *Dooner* v. *Odlum*,[33] in which Cherry L.C.J. said:[34]

> "The law is, I think, well settled that where a lessee of demised premises assigns a portion of these premises to a stranger, the assignee is liable to the lessor upon the covenants contained in the lease only in so far as those covenants affect the lands in his possession; and, as regards rent, only for an apportioned part of the rent properly chargeable in respect of the lands actually vested in him."

5.37 We think this principle is right and that it should continue to apply in relation to our termination order scheme. It can be argued that if, in the example given above, the breach of obligation enables the landlord, at most, to recover only part of the property originally let, he is unfairly treated: if he let the whole he should be able to recover the whole. But the answer is that if the landlord had wanted to be able to recover the whole he could and should have forbidden partial assignments.

5.38 We apprehend that if our earlier example were varied so that T, instead of assigning half to A and half to B, assigned half to A and kept half for himself, the position would be the same so far as forfeiture was concerned. It is true of course that T, as the original tenant, would normally remain liable in damages for breaches of covenant by A (as indeed he would have been liable in damages, in our original example, for breaches by both A and B). But we do not think that a breach by A would render T liable to lose the premises he had retained—still less that a breach by T would render A liable to lose the premises assigned to him—and, for the purposes of the termination order scheme, we consider that it should not.

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[33][1914] 2 I.R. 411.
[34]At p. 425.

(e) **Should there be exceptions?**

5.39 Under the existing law, tenants can normally seek relief against forfeiture under section 146 of the Law of Property Act 1925. Under the scheme, the place of relief is taken by the primary discretion exercisable by the court when the landlord applies for a termination order.

5.40 In paragraphs 2.47 to 2.53 above we referred to the exceptional cases in which the tenant cannot claim relief (and the landlord need not give him preliminary notice) under the present law. So far as we know, there is no suggestion that any further exceptions should be made. The only question, therefore, is whether the current exceptions should be continued by making corresponding exceptions from the exercise of the court's discretion under the scheme.

5.41 The fact that the exceptions form part of the present law is of course important, but not conclusive. They were introduced nearly a century ago[35] and at a time when the need of tenants for protection was recognised less fully than it is today. The termination order scheme would be most simple if there were no exceptions and the court's discretion were exercisable in every individual case. This would also be most beneficial to tenants; but it would not necessarily be fair to landlords.

(i) *The first three exceptions*

5.42 The first three exceptions are easily disposed of. As to *denial of title* by the tenant, such denial should no longer entitle the landlord to terminate the tenancy at all unless it amounted to a breach of one of its express terms. If it did, it should be a discretionary termination order event. As to *non-payment of rent*, this is excepted from section 146 only because relief is available under a different regime. We have already recommended that this difference should cease, and that the termination order scheme should apply to non-payment of rent as it applies to any other breach of covenant.[36] As to *assignments, etc., before 1926,* this exception is obsolete, and need have no counterpart in the scheme for termination orders. The remaining exceptions require more discussion.

(ii) *Mining tenancies: inspection*

5.43 The apparent justification for this exception[37] is that the amount of rent payable under a mining tenancy usually depends upon the amount of mineral produced, and it is therefore of particular importance that the tenant should comply with obligations to let the landlord inspect books, accounts, records, weighing machines, etc., and the mine itself. The object of providing that breach will lead inevitably to forfeiture is presumably two-fold: to deter tenants from committing breaches; and to ensure that a tenant who is not deterred has no opportunity to repeat his offence.

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[35]They originate in the Conveyancing and Law of Property Act 1881, s. 14, as amended by the Conveyancing and Law of Property Act 1892, s.2.

[36]Para. 3.11. above.

[37]Para. 2.51 above. It is made by s. 146(8) (ii) of the Law of Property Act 1925, which is set out in Appendix A to this report, together with s.1 of the Law of Property (Amendment) Act 1929 which is also relevant.

5.44 This exception should not be preserved. It is certainly true that breaches of these obligations must in general be very undesirable, but we doubt whether they are uniquely undesirable: causing damage to the mine, for example, or failing to maintain it properly, may be at least equally so. Nor does a breach of one of the obligations in question necessarily involve much blameworthiness on the part of the tenant or much actual damage to the landlord. The tenant's failure to let the landlord make his inspection may be due to labour troubles or to the illness or absence of a member of the staff, and it may be made good very soon with no detriment to the landlord. It would be harsh to allow the landlord to insist upon termination in such circumstances.

5.45 If the tenant's breach of obligation really is a serious matter—and we fully accept that it is likely to be—then the court will exercise its discretion against him in any case; and that fact should be an adequate deterrent.

5.46 Finally, there is a point which is relevant to all the exceptions in some degree, but particularly to this one. Under the present law the consequences of abolishing the exception would be that the landlord would have to serve a preliminary notice on the tenant, and that if the breach were remediable in law he would have to require it to be remedied and could take no further action if it were remedied. These consequences would not ensue under our scheme: preliminary notice would not be required, and the remedying of the breach would not prevent the landlord from seeking termination or the court from granting it.[38]

(iii) *Bankruptcy: complete exception in special cases*

5.47 This exception[39] relates to tenancies of certain special categories of property which contain a condition of forfeiture on the tenant's bankruptcy (or on other similar events).

5.48 The cases to which it applies seem all to be cases in which it is arguable that the personal qualities of the tenant are of particular importance in relation to the property let and therefore that the property ought not to remain in the care of a tenant who has become bankrupt or pass into that of his trustees in bankruptcy.[40] The object of making the exception was presumably to ensure that the landlord could recover possession with certainty and with speed.

5.49 So far as certainty is concerned, this is indeed achieved, but at the cost of possible unfairness in individual cases. If the tenancy were allowed to

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[38]Part VII of this report.

[39]Para. 2.52 above. It is made by s.146(9) of the Law of Property Act 1925, which is set out in Appendix A to this report, together with s.1 of the Law of Property (Amendment) Act 1929, which is also relevant.

[40]It is convenient in relation to this exception and the next one to speak of "bankruptcy" and of the "trustee in bankruptcy"; but the former word is intended to include all the situations which fall within the subsection (i.e., bankruptcy; taking in execution; liquidation by arrangement; and winding up of a corporation), and the latter phrase is meant to include anyone else who might act in a similar capacity in these situations (e.g., a sheriff who disposed of a tenancy under a writ of fieri facias). It should also be borne in mind that bankruptcy-like events within the subsection which befall a company do not normally involve the tenancy vesting in some other person: it remains in the company, but the liquidator may acquire powers over it.

continue, prejudice to the landlord would no doubt be likely but it would not be inevitable. The tenancy might, for example, be assignable, in which case the landlord could not logically object to its being sold for the benefit of the tenant's creditors; but the exception would allow him to prevent this and to claim its value for himself as a windfall. If the termination order scheme were allowed to apply to these cases in the ordinary way, the results would be more fair. The landlord would succeed in an application to terminate the tenancy in all those cases in which the tenant's bankruptcy created a genuine need for termination—later recommendations are designed expressly to ensure this[41]—but he would not be able to take advantage of a situation which did him no real harm in order to reap a benefit to which he had no moral right. It is of course to be assumed that the bankruptcy has not been accompanied by any actual breaches of covenant: if it has, then the landlord has independent grounds for seeking termination.

5.50 However, the taking of court proceedings inevitably involves some delay. It has been suggested particularly in relation to agricultural[42] and mining tenancies, that the property ought not to be left for any length of time under the control of someone whose ability to work it properly may have been impaired by bankruptcy. Agricultural property may deteriorate quickly if it is not properly farmed and a mine may deteriorate even more quickly if it is not properly maintained. Similar considerations may apply to the other categories of properties.

5.51 We accept the general truth of these assertions, but the landlord must usually bring an action for possession in order to recover his property, whether relief is available or not, so the exception does not really ensure, even under the present law, that he can get it back at once. It is otherwise, of course, if the tenant is willing to go, and indeed the trustee in bankruptcy may well decide to disclaim the tenancy;[43] but nothing in the scheme will alter this.

5.52 Our conclusion is that this exception should not be reproduced in the scheme.

(iv) *Bankruptcy: partial exception in all other cases*

5.53 The final exception had to do with bankruptcy in all other cases.[44] The tenant's right to seek relief applies for one year from the bankruptcy,[45]

[41]Paras. 9.49 and 9.52 below.

[42]So far as agricultural tenancies are concerned, the problem discussed here is a comparatively small one because forfeiture proceedings are rare. The reason is that most agricultural lettings take the form of yearly tenancies; and even those lettings which were originally for a term of years continue as yearly tenancies when the term ends (Agricultural Holdings Act 1948; s.3). As such, they can be determined by notice to quit; and if the tenant is bankrupt the notice (contrary to the normal rule) need not be of 12 months' duration (Agricultural Holdings (Notices to Quit) Act 1977, s.1(2) (a)) and its operation does not require the consent of the Agricultural Land Tribunal (s.2(3) (Case F)). The arguments in the text against s.146(9) of the Law of Property Act 1925 do not, of course, apply to these provisions: there is a crucial difference between a periodic tenancy being ended by a notice to quit and a tenancy for a term of years being ended prematurely by forfeiture.

[43]See Bankruptcy Act 1914, s.54, and Companies Act 1948, s.323.Subsection (4) of both these sections entitles the landlord to require the trustee or liquidator to decide, within 28 days or such further period as the court may allow, whether to disclaim or not.

[44]Para. 2.53 above. It is made by s.146(10) of the Law of Property Act 1925, which is set out in Appendix A to this report, together with s.1 of the Law of Property (Amendment) Act 1929 which is also relevant.

[45]See footnote 40 to para. 5.48 above.

and if the tenancy is sold during the year it continues to apply for the benefit of the new tenant. But if there is no sale during the year, it ceases to apply and relief can no longer be sought (except by sub-tenants[46]).

5.54 The purpose of this exception is different once again: it seems designed simply to encourage sale of the tenancy (in those cases in which it is assignable) within the year. In doing so, it gives rise to some anomalies and to some unfairness. The bankruptcy does not suddenly become more serious after a year, and the case for granting relief does not become suddenly weaker.[47] Nor is it logical that a landlord may fail to recover his property if he tries to do so as soon as his right of forfeiture arises, but is bound to succeed if he waits a year (always assuming that there has been no sale in the meantime—and some tenancies, of course, are unassignable and so cannot be sold).

5.55 But these disadvantages might be acceptable if the exception served a necessary purpose. It does not. For one thing, its efficacy depends upon the landlord being prepared to go for a whole year without accepting rent: acceptance of rent waives his right to forfeit and so destroys the purpose of the exception. Also the trustee in bankruptcy has other incentives to decide promptly what he intends to do with the tenancy; and if he wishes to retain it for more than a year (in order, for example, to wind up the tenant's business) there may be circumstances in which he should be allowed to do so. Again, we must assume that he is able to perform the tenant's obligations: otherwise the landlord would have independent grounds for termination.

5.56 The scheme provides a better means of dealing with this situation. We later recommend[48] that amongst the orders which a court should have power to make in termination proceedings if the tenant is bankrupt should be an order calculated to ensure that the tenancy is assigned to a new tenant. It may normally be right that a saleable tenancy should be sold before the end of the year, and this recommendation is apt to achieve that end; but the court should retain their discretion.

(v) *The exceptions generally*

5.57 We have thus concluded that none of the existing exceptions for which section 146 of the Law of Property Act 1925 provides should be reproduced in the scheme for termination orders. If the other recommendations are sound, there is no sufficient cause for retaining these exceptions.

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[46]See footnote 77 to para. 2.50 above.

[47]This is illustrated by *Official Custodian for Charities* v. *Parway Estates Development Ltd.* [1984] 3 W.L.R. 525 (C.A.). In that case, although more than a year had passed, the court at first instance granted unconditional relief to the tenant in reliance on the court's inherent, non-statutory jurisdiction (see para. 2.32 above); but the Court of Appeal decided that the provisions of s.146(10) ousted any such jurisdiction.

[48]Para. 9.23(d) below.

PART VI

WAIVER

6.1 Under the present law a landlord may deprive himself, through waiver, of the right to forfeit a tenancy upon some particular ground.[1] Waiver occurs if the landlord, being aware of the facts which constitute the ground in question, does some unequivocal act recognising the continued existence of the tenancy.

Discussion of the present law

6.2 The existing law has been criticised on the ground of artificiality, and particularly for the significance which it attaches to demands for, or acceptance of, rent. It is certainly true that the landlord may not have the slightest intention of giving up his rights, and the tenant may never for a moment suppose that he has; but because the landlord or his agent has gone through motions to which the law attaches an automatic significance a waiver occurs.

6.3 The place occupied by waiver in the general law is not well-defined overlapping as it does with other related concepts. Nor are its principles easy to state concisely and with certainty. But those aspects of it which are reflected in the rule stated above are designed, very broadly, to prevent someone from taking up two inconsistent positions. He cannot be allowed to approbate and reprobate. So it is said that if a landlord, with knowledge of a ground for forfeiture, demands or accepts rent accrued due since the ground arose, he waives his right to forfeit on that ground.

6.4 But the special statutory and other protection available to tenants will nearly always ensure that the tenant remains in possession for some considerable time after the breach whatever the landlord may do, and it often ensures that he does not have to leave at all. It is not clear why, in these circumstances, a demand for or acceptance of rent should have the significance with which the present law endows it.

6.5 Mention of relief brings us to another point. The present doctrine of waiver originated at a time when the common law, disliking the harshness of the remedy of forfeiture, was anxious to find a way of mitigating it. As Sachs J. put it in *Segal Securities Ltd* v. *Thoseby*:[2]

> "When one approaches the law relating to waiver of forfeiture, one comes upon a field—one might say a minefield—in which it is necessary to tread with diffidence and warily. That is in no small degree due to the number of points in that field which are of a highly technical nature, originating in the days before the court was able to give relief, if at all, with such freedom as it can nowadays."

If the court has full power to decide the outcome of a case according to its merits, there seems little to be said for a technical rule which operates to withhold the merits from investigation.

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[1] Paras. 2.12–2.15 above.
[2] [1963] 1 Q.B. 887, at p. 897.

6.6 The doctrine of re-entry does nonetheless provide some theoretical justification for the present law. Though the landlord has normally no immediate right to regain possession of the premises, he does have the right, by means of re-entry (constructive if not actual), to put an almost immediate end to the tenancy itself. It may revive again if relief is granted, and the tenant remains liable to pay for his possession (in the form of mesne profits if not of rent) but these factors have not hitherto been allowed to mitigate the severity of the law of waiver.

The impact of the termination order scheme

6.7 With the implementation of the scheme for termination orders, even this theoretical justification would disappear. The law about forfeiture would be brought into line with the practical realities, and the law about waiver would have to follow suit. The tenancy would remain in existence until such time as the court decided, in its discretion, to terminate it; and rent would continue to be payable, as rent, until that time. There would no longer be any justification for inferring a waiver from the mere demand for or acceptance of rent, or indeed from any conduct by the landlord which amounted merely to a recognition of the continuing existence of the tenancy.

6.8 We therefore recommend that for the purposes of the termination order scheme[3] a termination order event should be regarded as waived if, and only if, the landlord's[4] conduct,[5] after he has actual knowledge[6] of the event, is such that it would lead a reasonable tenant to believe, and does in fact lead the actual tenant to believe that he will not seek a termination order on the ground of that event. This should be a question of fact to be decided in the light of the circumstances of each case; and if the event is a continuing breach of covenant it should equally be a question of fact whether and how far the landlord's conduct indicates a waiver for the future as well as for the past.

6.9 This last point requires explanation. Under the present law the waiver of a continuing breach of covenant—that is to say, a breach which recurs continuously for so long as the wrongful state of affairs continues—normally[7] has effect only up to the time when it is given. If the breach continues after that the landlord can normally forfeit the tenancy despite the waiver. We do

[3]We are of course not dealing here with the waiver of any right to damages to which termination order event may give rise, which is and will remain a separate matter. The right to damages *can* be waived (see e.g., G. H. Treitel, *The Law of Contract* (5th ed., 1979), p. 614; and see *Banning* v. *Wright* [1972] 1 W.L.R. 972 (H.L.) per Lord Simon of Glaisdale at p. 990), but waiver of the right to forfeit does not imply waiver of the right to damages (see *Stephens* v. *Junior Army and Navy Stores Ltd.* [1914] 2 Ch. 516 (C.A.)).

[4]In accordance with general principles, conduct of the landlord's agent may be regarded as his conduct, and actual knowledge on the part of his agent may be imputed to him.

[5]Conduct should of course include statements (whether oral or written), and omissions as well as acts.

[6]Though actual knowledge of the facts is required, knowledge that they amount in law to a termination order event is not: cf. *David Blackstone Ltd.* v. *Burnetts (West End) Ltd.* [1973] 1 W.L.R. 1487.

[7]It seems from *Segal Securities Ltd.* v. *Thoseby* [1963] 1 Q.B. 887 that a demand for or acceptance of a payment of rent *in advance* operates to waive a continuing breach for any part of the period covered by the advance payment for which the landlord knows that a breach will definitely continue.

not question this proposition, but the need to state it expressly in this way has arisen only because of the technicality of the present law. Under the new formulation the question will be purely one of fact: what does the tenant reasonably infer from the relevant conduct of the landlord—that the breach is overlooked no matter how long it continues, or that it will be overlooked for (say) the next three months provided it is ended within that period?

6.10 To avoid any possible doubt we would add that (as the last example suggests) we would wish to allow for the possibility of conditional waiver. If the landlord's conduct is such as to lead a reasonable tenant to believe, and the actual tenant does believe, that he will not seek a termination order *provided* that some condition (probably involving action on the part of the tenant) is fulfilled, and that condition is fulfilled in fact, then clearly waiver should not take place.

6.11 The new formulation of waiver might sometimes be more difficult to apply in practice than the present rule which, though in our view it often gives the wrong result, is at least comparatively short and simple. This occasional uncertainty would be short-lived, however, because it would soon be overtaken by the passing of the time limit which we recommend in Part X of this report.

Delay by the landlord

6.12 It is obviously wrong that the tenant should have the threat of termination order proceedings hanging over his head for a very substantial period of time. The present rule has has the effect of reducing this possibility. Since acceptance of rent operates as a waiver, the tenant knows where he stands as soon as the next payment of rent falls due—provided that it is not a continuing breach which still continues. If the law of waiver is altered in the way we recommend it will cease to produce this incidental effect. We see no objection to this because the effect is in any case haphazard: the next payment of rent may fall due at anytime from a day to a year after the events in question. But a temporal limit must be set to the tenant's uncertainty and in Part VIII of this report we make recommendations which are designed to achieve that end, namely a six month time limit.

PART VII

BREACHES SHOULD REMAIN GROUNDS FOR TERMINATION PROCEEDINGS EVEN THOUGH "REMEDIED"

7.1 We have considered the circumstances in which the landlord should be deprived, through waiver, of his right to seek a termination order on a particular ground. We now consider whether he should lose that right because the ground is a breach which has been "remedied".

7.2 Much of the present law of forfeiture revolves around the concepts of "remediability" and "remedy" in relation to breaches of covenant and condition. Some breaches are irremediable and (subject to waiver and to relief) a landlord can forfeit a tenancy because of them in any circumstances. But other breaches are classed as remediable and a landlord can never forfeit because of them if they have in fact been remedied.

No forfeiture for a remedied breach

7.3 As regards breaches other than non-payment of rent, s.146(1) of the Law of Property Act 1925 precludes forfeiture for a remedied breach. Under that provision, a landlord who wishes to forfeit a tenancy must first serve on the tenant a notice requiring him to remedy the breach, if it is capable of remedy and may proceed with the forfeiture only if the tenant fails to remedy it within a reasonable time.[1] So a remediable breach which is remedied within a reasonable time after the service of a notice cannot be a ground for forfeiture. The same must be true of a remediable breach which is remedied without a notice being served.

7.4 The result is in practice much the same in regard to non-payment of rent. If "remedy" be equated with the payment of the arrears and costs, then a tenant who remedies this breach at any time before, or indeed (in most circumstances and within time limits) after, actual re-entry by the landlord, will be certain not to lose his tenancy.

Assessment of the rule

7.5 This general rule seems to be based on the view that if a breach is remediable its remedy is all that a landlord can ever reasonably expect—apart from compensation if appropriate. This approach has disadvantages.

(a) Uncertainties and anomalies

7.6 The idea of remedying a breach may seem a simple one, but it has not proved to be so in practice. The courts have often had difficulty in deciding whether a given breach is remediable or not. Although an established body of case law now gives some guidance, it falls far short of enabling the landlord

[1]The landlord may also proceed if the tenant has failed to pay any compensation required by the notice.

to answer the question with certainty in every case.[2] Yet the landlord is obliged to take a view, and a wrong view may have serious consequences.[3]

7.7 We have already summarised the main principles which the courts have developed.[4] A layman might not always find them easy to grasp. He might have difficulty, for example, in understanding why the breach of a repairing covenant can normally be remedied by doing the repairs but the breach of a covenant not to sublet cannot be remedied by ending the subletting.

7.8 It must be remembered that the consequence of a breach being remediable is that the tenant is able, by taking the remedial action, to forestall forfeiture altogether and so prevent the matter coming before the court at all; whereas the consequence of it being irremediable is not that the tenancy is bound to be forfeit but merely that the matter falls within the court's discretion in exercising its relief-giving powers. This in itself might seem surprising to a layman, who would probably suppose that a court would never give relief in respect of a breach classed as irremediable. But of course the court will often do so—and indeed will sometimes do so on the ground that the tenant has taken action which those who knew no better might well consider "remedial"[5].

(b) **Unfairness to the landlord**

7.9 But there is undoubtedly a class of breaches which, by being treated remediable, may give rise to considerable unfairness to the landlord. Perhaps the unfairness appears most obviously in relation to a tenant's persistent non-payment of rent. No matter how often the tenant breaks his covenant to pay rent, or how much financial strain this may put on the landlord, or how much the tenant himself may benefit financially by doing it, the tenant knows he is safe provided that he tenders the money before (or soon after[6]) the hearing actually takes place. The inequity of this situation led the Working Party to propose in the working paper[7] that

> "notwithstanding that the arrears of rent and costs have been paid to the landlord or into court before the hearing, the court may in its discretion order termination if the tenant has been repeatedly in arrears . . . "

This proposal was much welcomed in consultation.

7.10 The potential inequity however is not confined to cases in which there is persistent non-payment of rent. It also arises in cases where there are persistent breaches of other covenants (whether remediable or not), and in cases where there is a mixture of the two. But it is not confined even to cases of persistent breach. A single and isolated breach may, even though it is remediable, be just as serious as a number of comparatively minor breaches, or indeed as a breach which is classed as irremediable.

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[2]See, e.g., *Woodfall's Law of Landlord and Tenant* (28th ed., 1978), p.863, para. 1–1927.

[3]See further para. 8.22 below.

[4]Para. 2.40 above.

[5]See e.g., *Scala House & District Property Co. Ltd.* v. *Forbes* [1974] Q.B. 575, in which the Court of Appeal, though deciding that the breach of a covenant not to sublet was irremediable, granted relief on the ground (inter alia) that the sub-tenancy had been surrendered.

[6]The court may, however, take previous persistent breaches into account if the relief sought is discretionary.

[7]Proposition 10.06 on page 14.

7.11 It must be remembered that all breaches which are over and done with, and therefore cannot be undone, are classified as irremediable. The breach of a covenant not to hang out washing is an irremediable breach, and so is the breach of a covenant not to play any musical instrument on Sundays. Of course the landlord would never obtain a possession order merely for such a breach if the tenant sought relief, but the present law allows him to take the tenant to court and ask for one. This being so, we see no reason why a landlord should not have equal rights in respect, for example, of a breach of a repairing covenant which, though ultimately remedied, persisted for a long time despite the landlords's protests and resulted in the property becoming dangerous.

Conclusion

7.12 In short, the question whether a breach is remediable has, as it were, got into the wrong place. It is a question which should be asked at the hearing of the landlord's action, and the answer should continue to play a large part in determining the decision of the court. This is fully reflected in the criteria which we later propose as guidelines for the exercise of its discretion.[8] But the fact that a breach is remediable should not enable the tenant to keep the matter out of court altogether, and the ultimate sanction of termination should be available for use in those few cases in which it was justified.

7.13 We therefore recommend that a termination order event should remain available as a ground for a termination order despite the fact that its consequences may have been remedied—or, to put it in different words, that breaches should remain grounds for termination proceedings even though "remedied". The fear of failure and an award of costs will deter landlords from taking termination proceedings precipitately on the ground of a remedied, or remediable, breach.

[8]Paras. 9.33–9.51 above.

PART VIII

STARTING PROCEEDINGS:

TIME LIMITS AND NOTICES

8.1 The rules recommended in the preceding parts of this report would determine what was a termination order event and whether waiver had occurred. In this part we consider the conditions under which a landlord should be entitled to start legal proceedings for a termination order on the ground of an unwaived termination order event.

A six months' time limit

8.2 At the end of Part VI, which dealt with waiver, we referred to the case where a termination order event has occurred but the tenant does not know whether the landlord will seek to end the tenancy because of it; and we recognised that the threat or termination proceedings should not hang over the tenant's head indefinitely. In addition to the direct and obvious hardship which this would inflict on him, it would also serve gravely to prejudice his chances of selling his tenancy (assuming it to be assignable), because this threat is not one which a third party would readily accept. We return to this point later.[1]

(a) The rule which we recommend

8.3 We recommend that a landlord's right to start[2] termination order proceedings on the ground of a termination order event should exist for only six months after he has knowledge of the facts constituting that event.[3] If, however, the event in question were a continuing breach of covenant, and the breach continued after the landlord was first aware of it, the six month period should run from the date on which the breach was last continuing.

(b) Discussion of the rule

8.4 Several elements of this recommendation require comment. It arises from the need to replace an incidental effect of the present law of waiver—an effect which was in any case capricious and which would not survive the implementation of the recommendations for reform of that law by a more logical and consistent rule. The period of six months is not too long for the tenant to remain in suspense (he is, after all, the party at fault, and he might remain in suspense for a longer period under the present law), but is long enough not only for the landlord to consider his course of action but for the parties to engage in informal discussions and negotiations which are likely to be in the interests of both.

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[1]Paras. 8.9–8.19 below.

[2]Proceedings should be treated as having started for this purpose only when the landlord's writ or summons is served on the tenant.

[3]In accordance with general principles, knowledge on the part of the landlord's agent should be imputed to the landlord. Though actual knowledge of the facts is required, knowledge that they amount in law to a termination order event would not be: *cf. David Blackstone Ltd.* v. *Burnetts (West End) Ltd.* [1973] 1 W.L.R. 1487.

8.5 Two features of the present law of waiver would continue under the recommended rule. First, knowledge on the part of the landlord (or is agent) of the facts constituting the termination order event is necessary before time begins to run against him. It may be said that a prudent landlord ought to keep his property under surveillance, but there are many breaches which would not be apparent even to most conscientious landlord, and some breaches might be deliberately concealed.

8.6 Second the recommendation makes special provision for a continuing breach of covenant. Since it is in the legal nature of such breaches that they recur afresh on every day for which the wrongful state of affairs continues, it is in our view inevitable that the six month period should begin afresh on every such day. If the breach ceases, therefore, the period will end six months after the cessation.

8.7 A small point remains to be made. The recommendation that termination order events should extend to "disguised breaches of covenant"[4] and "insolvency events",[5] included within these categories cases where, by the terms of the tenancy, the happening of the event in question could give rise to temination after a period, or on notice being given.[6] In such cases we recommend, for the purposes of the six month rule, that the event should nonetheless be treated as a termination order event as soon as it happens.

8.8 We deal later in this report with two other matters which are relevant to the six month rule: first with a means by which the six months' period may be extended in order to allow time for the tenant to remedy the consequences of his breach;[7] and second, with the landlord's right to apply for termination on the ground of persistent breaches by the tenant, even though some may have taken place more than six months ago.[8]

(c) The time limit and assignees

8.9 Under the present law a landlord's right to forfeit the tenancy is not affected by its assignment: it remains liable to forfeiture in the hands of the assignee. This is inevitable, because otherwise the landlord's right could always be defeated by assigning the tenancy, and the breach of a covenant not to assign could never give rise to forfeiture at all. A similar rule must apply in relation to the scheme for termination orders, but this gives rise to problems for assignees, who will not want to buy a tenancy which is at risk of being terminated.

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[4]Paras. 5.10–5.18 above.
[5]Paras. 5.19 and 5.20 above.
[6]See paras. 5.18 and 5.20 above.
[7]Paras. 8.67–8.72 below. Because the six month period can be extended by this means, it should not, in our view be capable of extension by agreement or in any other way but should amount to a strict time limit. If the tenant asks the landlord to defer the start of proceedings beyond the six month period so that he can take remedial action then (unless the breach is a continuing one) the landlord should not simply accede to this request but should use the procedure recommended in paras. 8.67–8.72. Otherwise, if the remedial action does not materialise, he will be out of time.
[8]Paras. 9.35 and 9.36 below.

(i) *Protection under the existing law*

8.10 As matters stand under the existing law, an assignee normally has three kinds of protection against this risk.

8.11 *Protection by preliminary enquiries.* Before he commits himself to purchase the tenancy, the intending assignee will normally make enquiries of the tenant about his compliance with his obligations and about any complaints which the landlord may have made. The tenant will be liable in damages if the assignee proceeds on the strength of the answers given and they later prove to be false. The assignee will of course consider these answers in the light of, and supplement them with information obtained from, his own inspection of the property.

8.12 *Protection by last receipt for rent.* When the transaction is being completed, the tenant will produce to the assignee the landlord's receipt for the most recent payment of rent which has fallen due. This has advantages for both of them. The advantage to the tenant arises under section 45(2) and (3) of the Law of Property Act 1925, which requires the assignee, on having the receipt produced, to assume that all the covenants and provisions in the tenancy have been duly performed and observed up to completion, unless the contrary appears. (This requirement does not preclude him from raising the preliminary enquiries mentioned above, nor from relying on the covenants for title mentioned below, but it does prevent him from calling for any evidence on the matter by way of requisition between contract and completion.[9]) The advantage to the assignee (apart from the fact that the receipt confirms the payment of the rent itself) arises through the present law of waiver. By the operation of this law, the receipt will serve to show that the tenancy cannot be forfeited except upon a ground

(a) Which had not arisen at the time of the receipt, or

(b) Which had arisen but of which the landlord did not know at that time, or

(c) Which, being a continuing breach, has continued since that time.

8.13 *Protection by covenants for title.* If the tenant is expressed in the assignment to assign "as beneficial owner" (as is normally the case), he will give implied covenants for title, by virtue of section 76(1), para. (B), of the Law of Property Act 1925, in the terms set out in Part II of Schedule 2 to that Act, to the effect that (among other things) the tenancy has not been forfeited or become voidable. And the tenant will again be liable to the assignee if this proves false. It is usual for the contract to provide that the assignee must take the property in its existing state and condition and that the covenants for title must accordingly be modified[10] so as to absolve the tenant from any liability to the assignee in respect of repairing breaches.

8.14 We may sum up the existing law and practice by saying that the assignee's protection against any risk which is left after the operation of the

[9]It is usual, however, to repeat the preliminary enquiries in the form of a requisition asking the tenant to confirm that the replies would still be the same.

[10]As to the need for their modification in these circumstances, see *Butler* v. *Mountview Estates Ltd.* [1951] 1 All E.R. 693.

law of waiver (associated with the production of the last receipt for rent) lies through his preliminary enquiries and the assigning tenant's covenants for title. (He of course obtains no protection against any risks, such as those flowing from repairing breaches, which he may have agreed to accept.)

(ii) *Protection under the proposed scheme*

8.15 The scheme will make no difference at all to the existing law and practice, except in one respect. The changes proposed in the law of waiver will mean that the production of the last receipt for rent (though no doubt it will still be required as evidence of payment) will of itself afford no protection to the assignee.[11] On the other hand, the proposed six months' time limit will afford him comparable protection. With the implementation of the scheme, therefore, the emphasis will shift from the situation which existed at the date of the last rent receipt to the situation which existed six months ago. The three cases stated in paragraph 8.12, in which the tenancy might be at risk, could in fact be re-stated in exactly the same terms subject only to the substitution of the latter date for the former—unless the six months period has been prolonged by the service of a notice by the landlord under the recommendations made in paragraphs 8.67 to 8.72 below: this point will of course be the subject of enquiry by the assignee.

8.16 To put in another way, the position will be the same under the proposed scheme (subject only to the point just mentioned) as it would be today if the last receipt for rent were six months old.

8.17 In some cases this would lessen the assignee's risk. In others it would to some extent increase it. We think the changes should, on balance, be acceptable to assignees and to those advising them. We emphasise that there would seldom by any real doubt as to whether there were current breaches or not; and we emphasise also that our later recommendations about termination orders would make it most unlikely for a tenancy actually to be terminated if the assignee himself had committed no breaches of obligation.

8.18 The references to the production of rent receipts in section 45(2) and (3) of the Law of Property Act 1925 would require appropriate amendment in any Bill prepared to implement these recommendations.

8.19 It remains to add that the recommendation made in the preceding part of this report—that termination order events should include "remedied" breaches—would serve marginally to increase the number of cases in which a termination order might be made, either against the tenant who was in breach or (in theory) against an assignee from him. But the possibility of a termination order being made against an innocent assignee on the ground of a breach committed and remedied by his predecessor (or committed by his predecessor and remedied by him) may be discounted.

[11]It will still be possible for the tenant to show that a termination order event has been waived under the new rules if the evidence justifies it.

Preliminary notice to the tenant

8.20 Section 146(1) of the Law of Property Act 1925 requires the landlord, before actual or constructive re-entry, to serve a notice on the tenant specifying the breach complained of. If the breach is remediable, the notice must require it to be remedied, and if the landlord wants compensation the notice must require it. In the case of a remediable breach, the landlord may not proceed at all unless the tenant fails to remedy it within a reasonable time, or fails to pay the compensation. We have now to consider whether and how far a preliminary notice of this kind should play a part in the scheme for termination orders.

(a) **No general requirement of notice**

8.21 If the effect of the present law were to be preserved it would be necessary for the scheme to require notice to be given in all cases. For a number of reasons this would be undesirable.

(i) *Problems under the present law, and the Working Party's proposal*

8.22 It is evident that the present law about notice forces the landlord to make two decisions which are more in the nature of predictions and which must be correct if he is to succeed: whether the breach in question will be considered remediable in law; and, if so, within what time it could reasonably be remedied. It is true that he can avoid the first of these decisions by saying in the notice that the breach must be remedied "if it is capable of remedy";[12] but that forces him to make the second prediction, and then wait for the time to pass, even though the breach may in fact be irremediable. If the landlord allows the tenant too little time, either because he thinks wrongly that the breach is irremediable and allows no time for its remedy, or because he thinks rightly that it is remediable but allows too little time, his subsequent actual re-entry or legal proceedings will be invalidated. Furthermore, if the landlord decides that the breach is (or may be) remediable, he is apparently obliged to wait for a reasonable remedial period to expire even if he knows that the tenant has actually no intention of trying to remedy it within that period or at all.

8.23 There is no requirement for preliminary notice in the case of non-payment of rent and we have no reason to think that harm results from this omission. In such a case, the landlord is free to bring his action without notice, but the tenant can stop it by making the necessary payments. The unsatisfactory state of the present law led the Working Party to make a general proposal in the working paper[13] which is in some ways similar. The proposal was that preliminary notice should not be required for an action by the landlord but that the tenant should be entitled to apply for a stay of the action on the ground that

"(a) he has taken or is taking steps to remedy the breaches; or

(b) the damage to the reversion is or would be trivial; or

(c) in all the circumstances, termination would be unreasonable".

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[12]*Glass* v. *Kencakes Ltd.* [1966] 1 Q.B. 611.

[13]Proposition 10.03 on pages 12 and 13. See also Propositions 10.04 and 10.05 on pages 13 and 14, and commentary on pages 20 and 21.

This proposal, however, was made only by a majority of the Working Party; and in consultation slightly more people favoured the retention of a notice requirement than favoured abolition. Those who favoured retention, both on the Working Party and among our consultees, tended to take the view that the service of a notice was useful in bringing the parties together and in securing agreement out of court.

(ii) *The effect of our earlier recommendations*

8.24 The effect of recommendations which we have already made (and of which not all appeared in the working paper) is substantially to undermine the reasons for the present notice requirement.

8.25 Under the present law, one of the main purposes of the requirement is to ensure that the tenant has a chance to claim relief while there is still time to do so. Relief under section 146 is barred once the landlord has actually re-entered, so in those cases in which court proceedings are not a necessary preliminary to actual re-entry the tenant could, but for the notice requirement, be deprived of relief without warning. (This is not true if the breach consists in non-payment of rent because in that case the tenant can seek relief after actual re-entry: that is why a notice requirement can safely be dispensed with in that case.) Under the scheme, however, this risk would disappear because termination by actual re-entry would no longer be possible.[14]

8.26 So if the retention of a notice requirement is to be justified, it must be upon some other ground. The other justification commonly advanced for it is the one mentioned by the minority of the Working Party and by some of our consultees: that it avoids the taking of legal procceedings in cases where the matter could be disposed of without them. What are these cases, and how necessary is the notice requirement in order to achieve this end?

8.27 The answer to "what cases?" is affected by our earlier recommendations. Under the existing law the category in question would include all cases involving a remediable breach, because the tenant could keep the matter out of court merely by remedying it. But under the scheme the taking of remedial action would not prevent the landlord from pursuing termination proceedings.[15] The relevant distinction under the scheme would be between cases in which the landlord intended to ask the court to terminate the tenancy whatever the tenant might do, and cases in which he would be satisfied with something other than termination if the tenant were willing and able to provide it. In cases of the latter kind, and in them only, would there be some point in requiring the landlord to serve notice.

8.28 But even in cases of the kind just mentioned, is a notice requirement necessary to keep the matter out of court? The desirability of settling disputes without resort to court proceedings is as general as it is obvious: it is not confined to landlord and tenant cases. Legal actions are not normally launched until negotiation has been tried and has failed, and we see no reason why the

[14]As to abandoned premises, see Part XI of this report.

[15]The landlord could seek termination even on the ground of a remedied breach: Part VII of this report.

disappearance of a notice procedure should make the situation any different in the particular type of case with which we are concerned. The recommendations to change the law of waiver (and to introduce a six months' time limit for taking proceedings) would help in this connection because, by allowing the landlord to claim and accept rent during the negotiating period, they would relieve him from the financial pressure under which he is placed by the present law.

(iii) *Conclusions*

8.29 For reasons just given, no general requirement of notice is necessary in the context of the proposed scheme.

8.30 Such a requirement would not operate satisfactorily in that context. Consideration has been given to several possibilities, including a scheme involving both notice by the landlord and counter-notice by the tenant, but all such schemes appear to have defects and it is our view that there is no useful place for a requirement of this kind.

8.31 In reaching this conclusion we re-emphasise that a landlord would not in practice launch termination proceedings without preliminary negotiations with the tenant. He would normally have nothing to gain, and might have much to lose,[16] by doing so. This also leads us to reject the suggestion made in the working paper that the tenant should have some special right to seek a stay of the landlord's action.

8.32 We also emphasise, however, that this conclusion relates only to a notice procedure which is both general and compulsory. Under the next sub-heading we shall recommend the retention of a notice procedure which, though compulsory, is special in that it relates only to cases involving want of repair. Later in this part of the report we shall also make recommendations designed to facilitate the use of notices on a basis which, though general, is voluntary.[17]

(b) **Compulsory notice procedure for repairs**

8.33 The present law provides a tenant with two distinct ways of seeking modification of such legal liability as he may have to repair the property let. Both of them are built upon the existing general requirement of notice imposed by section 146 of the Law of Property Act 1925 and they must therefore be considered in this part of the report. The two ways in question are provided respectively by section 147 of the 1925 Act and by the Leasehold Property (Repairs) Act 1938.

8.34 Both of the enactments have two aspects. They affect the landlord's right to forfeit the tenancy, and it is this aspect which is relevant to the termination order scheme. However, they also affect the landlord's right to damages, and since we are recommending changes in them we must consider the question of damages as well.

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[16]As to costs, see para. 9.53 below.
[17]Paras. 8.67 8.72 below.

8.35 Both enactments enable the tenant to seek modification of his repairing liability, but their subject matter is to some extent different. So are their areas of non-application, as are the criteria which the court has to apply, and the procedure which the tenant has to follow. In so far as they overlap with one another, the tenant must choose between them.

8.36 This seems to us unsatisfactory. We do not question the principles which underlie these enactments. Special considerations should certainly apply to tenants' repairing covenants. Such covenants are frequently broken, at least in comparatively minor respects. Indeed, breaches are almost inevitable because a property will not be repaired until it has fallen out of repair, and the fact that it has fallen out of repair may constitute a breach of the covenant. Such breaches seldom cause harm to the landlord until the tenancy nears its end, and there was evidence at the time of the 1938 Act that landlords were buying up reversions and enforcing repairing covenants oppressively as a means of regaining premature possession of property in order to sell it with vacant possession or to use it more profitably. There is no case, for sweeping away these enactments altogether. But we do not think they should continue to exist side by side as they do today.

8.37 The 1938 Act has the wider subject matter, because it applies to all repairs and not merely (as does section 147) to internal decorative ones. Its procedure seems to us the more satisfactory, and we understand that it is much more widely used. We propose, therefore, as part of the scheme for termination orders, a new regime based principally upon the 1938 Act and adopting the procedure laid down in that Act, but incorporating features of section 147 where such incorporation seems necessary or desirable.

8.38 It is necessary at this point to give some preliminary consideration to the policy of the 1938 Act and to certain recent cases which call that policy into question.

(i) *The policy of the Leasehold Property (Repairs) Act 1938*

8.39 The purpose of the 1938 Act was described by its sponsor in these words:[18]

> "The reason the Bill is necessary is that speculators, individuals or companies, buy up the reversion of long leases of residential property, with the object of forcing the occupiers to purchase the reversion under a threat of forfeiture. They depend on the fact that covenants to repair are not normally strictly enforced from year to year during the currency of the lease. The method of the procedure of the speculators who buy leases which have, perhaps, 40 or 50 years to run, is to serve a schedule of dilapidations, calling upon the tenant to fulfil the covenants to the last coat of paint, and threatening them with proceedings for forfeiture if that is not done. The motive of this procedure is to induce the tenant, under threat of forfeiture, to buy the freehold reversion at a price which will show a profit to the purchaser of the reversion; or, alternatively, to force the tenant to sell his interest at a low figure."

[18] *Hansard* (H.C.), 11 February 1938, vol. 331, col. 1422.

To this end the Act provides that, in cases to which it applies, the notice which the landlord is in any case required to serve under section 146(1) of the Law of Property Act 1925 must inform the tenant of his right to serve a counter notice, and if he does so the landlord may not proceed, by action or otherwise, to enforce forfeiture unless he obtains the court's leave which may be granted upon certain specified grounds. It is obvious that the purpose of the Act would not be achieved if it affected only the landlord's right of forfeiture and left him free to achieve a similar result through a claim for damages in respect of the same repairing defects. The damages recoverable would in any case be limited by section 18(1) of the Landlord and Tenant Act 1927 (which limits damages to the amount by which the value of the landlord's reversion is diminished by the defects), but this provision by itself was not thought sufficient to protect the tenant. The 1938 Act therefore extends to claims for damages as well as to forfeiture and requires a landlord claiming damages to serve a section 146(1) notice (which he would not otherwise have to do) giving the tenant the same information about his right to serve a counter-notice claiming the protection of the Act.

8.40 The first three cases to be mentioned are concerned with the kind of claim to which the 1938 Act applies. In *Swallow Securities Ltd.* v. *Brand*[19] the tenancy contained not only a covenant by the tenant to do repairs but also a covenant (which we may call a default covenant) that if the tenant defaulted in doing them she would permit the landlords to carry them out and would repay the total cost to the landlords. The tenant did not do certain repairs and the landlords, relying on the default covenant, did them and claimed their cost from her. The Court held that this claim was one which fell within the 1938 Act, since it was in reality a claim for "damages for a breach of" a repairing covenant within section 1(2) of that Act, and that since the procedure prescribed by the Act had not been followed the claim must fail. But in the later case of *Hamilton* v. *Martell Securities*,[20] the Court declined to follow the *Swallow* case and decided, on similar facts, that a claim made on breach of a default covenant was not within the 1938 Act.[21] Finally, in *Colchester Estates (Cardiff)* v. *Carlton Industries P.L.C.*[22] the court was again presented with similar facts and followed the *Hamilton* case in preference to *Swallow*.

8.41 If this result appeared to be wrong, it would be necessary in this report to recommend a change in the law. In fact, the result seems, on balance, to be right. There was no suggestion in any of these cases that the landlords had acquired the reversion with the intention of driving the tenants out, or that their claims were in fact intended to do so. Moreover, the fact that they had been prepared to pay for the repairs initially out of their own pockets (albeit in the hope of recovering their cost from the tenants) tends to show that they

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[19](1981) 45 P. & C.R. 328.

[20][1984] 2 W.L.R. 699.

[21]One reason for a different decision being reached in the *Hamilton* case was that, in the meantime, *S.E.D.A.C. Investments Ltd.* v. *Tanner* [1982] 1 W.L.R. 1342 (see paras. 8.45 and 8.46 below) had decided that the 1938 Act machinery could not be operated at all in a case where the landlord had remedied the repairing defects himself; so if a claim under a default covenant really was within the 1938 Act it followed that a claim could never be made under it and all such covenants were of no use to the landlord.

[22][1984] 2 All E.R. 601.

at least regarded them as worth doing at that time. In short, the situation does not seem to us to fall within the evil at which the Act was aimed.

8.42 There is a contrary argument. If the landlord had tried to base a forfeiture action, or even one for ordinary damages, upon the tenant's breach of his repairing covenant (as distinct from the default covenant), the 1938 Act would clearly have applied. Why, then, should it not apply to a claim[23] based on the subsidiary default covenant (bearing in mind that even the protection of section 18(1) of the Landlord and Tenant Act 1927 would presumably be unavailable)?

8.43 The choice between these two arguments would be more difficult if it were not for another factor. There is nothing to prevent a landlord omitting altogether any repairing covenant by the tenant and simply imposing on him a covenant to refund the cost of repairs carried out by the landlord. If the 1938 Act applied to default covenants, then logically it should apply in this situation too.[24] Yet to adapt it to those circumstances would be a difficult task and would give rise to very complicated problems, especially in a case where a number of tenants were required to refund a proportion of repairing costs incurred in connection with a block of flats, or offices, or some other development. And even if these problems were surmounted, logic would require another situation to be considered: the case where the tenancy says nothing specifically about the tenant doing, or paying for, repairs, but where the landlord simply pays for them out of the rent and where the rent is for that reason pitched higher than it would otherwise be.

8.44 If the 1938 Act were to cover all cases in which the tenant is required, directly or indirectly, to pay for repairs, then it would have to cater for all the cases mentioned in the preceding paragraph as well as for default covenant cases. It seems to us that it would be unnecessary and unjustifiable to extend the Act in this way and that it is best confined to the specific situation with which it was intended to deal.

8.45 We now turn to a case which has revealed a different problem: *S.E.D.A.C. Investments Ltd.* v. *Tanner*.[25] In this case again the tenancy imposed upon the tenants both a repairing covenant and a default covenant which operated if the landlords called upon the tenants to do repairs and they failed to comply. In the event, however, certain repairs needed to be done so urgently that the landlords carried them out without calling on the tenants, and so the default covenant did not come into play. As a result the landlords simply claimed damages (which, despite section 18(1) of the 1927 Act) they hoped would equal the cost of the repairs for breach of the repairing covenant. They accepted that the case was covered by the 1938 Act, so they served a notice under section 146(1) of the Law of Property Act 1925 which drew attention to the tenants' right to serve a counter-notice. The tenants, however, argued that the section 146(1) notice was not, and could not be, valid and that, since the

[23]It seems to be inherent in the *Hamilton* and *Swallow* decisions that even an action for forfeiture based on breach of a default covenant would not have been within the protection of the Act.

[24]If the tenancy is of a flat, the tenant has the protection of Schedule 19 to the Housing Act 1980; but the purposes of that schedule are not those of the 1938 Act.

[25][1982] 1 W.L.R. 1342.

scheme of the 1938 Act depended on a valid notice being served, the landlords claim for damages could not be made at all. This contention was successful: the court held that section 146(1) contemplates the notice being served only at a time when the breach is unremedied, and since the breach in this case had already been remedied by the landlords the notice could no longer be served at all.

8.46 The *S.E.D.A.C.* case reveals a defect in the present law. At the very least, the law should be changed so that a claim for damages for the breach of a tenant's repairing covenant which the landlord has remedied can be brought within the scheme of the 1938 Act. It seems to us that this is not a situation which ought to fall within the 1938 Act at all. We agree with Mr Michael Wheeler Q.C., who decided the *S.E.D.A.C.* case as deputy High Court Judge, when he said:[26]

> "I should stress at the outset that in the present case nothing that the [landlords] have done comes within a mile of the type of mischief which the Act of 1938 was designed to stop."

The 1938 Act was not aimed at breaches which had been remedied. A claim under a default covenant in respect of a remedied breach is not within the 1938 Act. Why then should a claim for damages in respect of such a breach need to involve the 1938 Act (particularly since the protection of section 18(1) of the 1927 Act is presumably available in the latter case and not in the former)? We make a recommendation on this matter below.[27]

(ii) *Termination orders*

8.47 We now return to the description of the new regime which we propose to take the place of section 147 and the Act of 1938. We deal first with termination orders.

8.48 The table which follows sets out in summary form[28] the relevant provisions[29] of the two enactments. Those provisions which are similar appear side by side, and where there is no similar provision that fact is indicated. In the paragraphs which follow, we give consideration to the respective merits of these provisions.

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[26][1982] 1 W.L.R. 1342, at p. 1346.

[27]Para. 8.66(b) below; and see paras. 8.59 and 8.60.

[28]The table contains only a summary of the provisions, but it includes a note of their source and the full provisions are in Appendix A to this report.

[29]The table omits s.1(2) of the 1938 Act, which relates exclusively to claims for damages: the impact of the two enactments upon such claims is considered in paras. 8.62–8.65 below. The table also omits other provisions—i.e., s.5 of the 1938 Act (application to past breaches); s.6 of that Act (Jurisdiction); and s.7 of that Act and subs. (3) of s.147 (definitions), except in so far as the provisions of s.7 appear in items 3 and 6 of the table.

1938 Act	*Item no.*	*Section 147*
Covers all repairs: s.1(1)	1	Confined to internal decorative repairs: subs.(1)
Applies when landlord serves a notice under Law of Property Act 1925, s.146(1) relating to "a breach of a covenant or agreement": s.1(1)	2	Applies when landlord serves a notice under Law of Property Act 1925, s.146(1): subs.(1)
Counter-notice procedure: s.1(1), (3) and (4)	3	Tenant applies to court for relief: subs.(1)
Tenancy must be for 7 years or more: s.7(1)	4	Tenancy may be of any length: subs.(1)
Term unexpired must be 3 years or more: s.1(1)	5	Court to have regard to length of term unexpired: subs.(1)
Applies only to covenant to keep or put in repair during currency of tenancy: s.1(1) (and note previous item)	6	Does not apply to obligation to *yield up* in specified state of repair at end of tenancy: subs.(2)(iv)
Applies to any property except an agricultural holding: s.7(1)	7	Applies to any house or other building: subs.(1)
Court may impose conditions on either party: s.1(6)	8	No similar provision
Restriction on landlord's right to recover survey expenses, etc: s.2	9	No similar provision
Does not apply to obligation to *put* in repair to be performed when tenant takes possession or within a reasonable time afterwards: s.3	10	Does not apply to obligation to *put* in repair which is not yet performed: subs.(2)(i)
Leave may be given if work needed to prevent or reverse substantial diminution in value of reversion: s.1(5)(a)	11	Does not apply when work needed to maintain structure: subs.(2)(ii)(b)
Leave may be given if work required by or under any enactment or byelaw or by court order: s.1(5)(b)	12	Does not apply where work needed to put in sanitary condition, or where there is statutory liability to keep fit for human habitation: subs.2(ii)(a) and (iii)

1938 Act	*Item no.*	*Section 147*
Leave may be given if tenant is not in occupation of whole and work needed for benefit of other occupiers: s.1(5)(c)	13	No similar provision
Leave may be given if current cost of work is small in comparison with probable expense resulting from its postponement: s.1(5)(d)	14	No similar provision
Leave may be given if any other special circumstances make it just and equitable: s.1(5)(e)	15	No similar provision, because if the case is within the section the court has discretion to decide upon reasonableness: subs.(1)

8.49 *Item 1.*—It follows from what we have said above that the 1938 Act provision must govern in this respect: the new regime should apply to repairs of all kinds.

8.50 *Item 2.*—There is a slight difference here in theory (though perhaps never in practice), in that an obligation to repair imposed by condition, rather than by covenant, would be within section 147 but probably not within the 1938 Act. The new regime should apply to all termination order events involving a failure to repair[30] *which is currently continuing.*

8.51 *Item 3.*—The better procedure is that provided by the 1938 Act. As this now operates, the notice served by the landlord under section 146(1) of the Law of Property Act 1925 is invalid

> "unless it contains a statement, in characters not less conspicuous than those used in any other part of the notice, to the effect that the [tenant] is entitled under [the 1938] Act to serve on the [landlord] a counter-notice claiming the benefit of [the] Act, and a statement in the like characters specifying the time [i.e., 28 days] within which, and the manner in which, . . . a counter-notice may be served and specifying the name and address for service of the [landlord]".[31]

The tenant may then serve a counter-notice within the stated period, and if he does so the landlord may not proceed unless he obtains the leave of the court. This system ensures that the tenant is informed of his rights and it enables him, by serving a counter-notice, to throw on to the landlord the onus of justifying further action and of taking the steps necessary to do so. This is right, because the underlying assumption is that he will not obtain leave unless he shows that there are special reasons. But since the scheme would not perpetuate any general requirement of notice to the tenant, a special requirement

[30]i.e., including events within the definition of para. 5.18 above.
[31]1938 Act, s.1(4) (and see (2)).

is necessary in this particular case. We therefore propose that if a termination order event is such that it falls within the new regime relating to repairs, the landlord should be required, before commencing any action for a termination order, to serve upon the tenant a notice giving full particulars of the disrepair alleged, stating his intention to seek a termination order, and in other respects complying with the existing requirements set out earlier in this paragraph.

8.52 *Item 4.*—Here we propose the provision which is the more generous to the tenant: the new regime should not be limited to tenancies of any particular length. (In the next paragraph, however, we recommend that the new regime should not apply unless the tenancy has still three years to run, so in practice it would have to have been granted for a period longer than that.) If the two enactments are to be amalgamated, this recommendation is necessary in order to preserve the existing rights of tenants as to internal decorative repairs under section 147. As to other repairs within the 1938 Act, it would in practice have little significance. It was as a result of a recommendation made by the Jenkins Committee in 1950[32] that the minimum term of tenancies within the latter Act was reduced from 21 to 7 years.[33] In making this recommendation the Committee said:[34]

> "Cases of a kind requiring and meriting the protection of the Act probably do not often arise under leases for less than 21 years, but in order to cover such cases we think the Act might be made to apply to leases for 7 years or more . . . . We think it is fair to assume that lettings for less than 7 years are adequately covered by the provisions of s.147 of the Law of Property Act 1925 relating to internal decorative repairs."

In other words the Committee thought that a tenant would not in practice be liable, under a tenancy for less than 7 years, for any repairs except internal decorative ones. This supposition has been strengthened by section 32 of the Housing Act 1961 which (subject to certain exceptions) makes the landlord compulsorily liable for substantial repairing obligations in relation to dwelling houses let for less than 7 years.

8.53 *Item 5.*— We propose that the provision in the 1938 Act should be adopted: the new regime should apply only if there is three years or more of the tenancy still to run. The damage to the landlord which results from want of repair is greater towards the end of the term, and so is the urgency of having it made good. The three year period is a reasonable one. This change might theoretically reduce the present rights of tenants in regard to internal decorative repair under section 147, but the reduction would be very slight having regard to the exception contained in section 147 and noted in item 6.

8.54 *Item 6.*—The recommendation made in the preceding paragraph would give effect automatically to the section 147 provision. The 1938 Act provision could suitably be retained, but we are not certain that it adds anything of substance.

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[32]Final Report of the Leasehold Committee, Cmnd. 7982.
[33]By the Landlord and Tenant Act 1954, s.51(2).
[34]Para. 246 of their report.

8.55 *Item 7.*—It appears that the only real difference between these two provisions is that one applies to agricultural holdings and the other does not. The decision to exclude such tenancies from the general protection of the 1938 Act was made as recently as 1954.[35] One reason for it may have been that agricultural lettings have to a large extent their own statutory code. Strong arguments can be advanced in favour of ensuring that farm buildings and fixed equipment are kept in the best possible state of repair at all times in the interests of efficient farming. But to a large extent the question is academic because liability for exterior repair is normally assumed by the landlord;[36] and most agricultural lettings are on a yearly basis and so would fall outside the 1938 Act in any event. Therefore the exclusion is justifiable. The next question is whether it is justifiable, in the interests of simplicity, to apply it to the whole of our new regime, thus extending it to cases now within the protection of section 147. We think it is—and for two reasons. First, because we understand that section 147 is at present used seldom, if at all, by farming tenants. And second, because the fact (noted above) that agricultural lettings are usually on a yearly basis would serve in any case to exclude most of them (in view of the recommendation made in paragraph 8.53 above) from the new regime.

8.56 *Items 8 and 9.*—These provisions of the 1938 Act are obviously less necessary in the case of internal decorative repairs, but we think they should be reproduced for all the purposes of the new regime. Our later recommendations[37] will result in item 9 having a rather different subject matter.

8.57 *Item 10.*—The difference between these two provisions is extremely small. We propose that the 1938 Act provision be reproduced in the new regime.

8.58 *Items 11, 12, 13, 14 and 15.*—These last five items are cast in terms which bring to light a difference in approach between the 1938 Act and section 147. The latter operates by excluding certain cases from the ambit of the section altogether and giving the court complete discretion as to the rest. The 1938 Act, by contrast, although it does exclude some cases altogether (items 4, 5, 6, 7 and 10), operates for the most part by providing that the court cannot give the landlord leave *except* in certain cases. (Even in those cases the court can refuse leave if it sees fit.[38])This is why item 15 is needed in relation to the 1938 Act but there is no corresponding provision in section 147. The approach of the 1938 Act in this respect is in our view satisfactory and we propose that it should be retained. We also propose that the 1938 Act versions of all these five items be reproduced in the new regime.

8.59 It is important finally to make clear the relationship between the new notice regime which we have proposed above for breaches of repairing obligations and the six months' time limit which we recommended earlier in

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[35]The Landlord and Tenant Act 1954 s.51(2), in reducing from 21 to 7 years the term for which a tenancy must have been granted in order to fall within the 1938 Act, excluded agricultural tenancies from it for the first time.

[36]Cf. Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations 1973, S.I. 1973 No. 1473, Schedule, Part I.

[37]Paras. 9.4–9.10 below. See especially paras. 9.8(c) and 9.9.

[38]*Metropolitan Film Studios Ltd.* v. *Twickenham Film Studios Ltd.* [1962] 1 W.L.R. 1315.

relation to termination order events in general. The new notice regime is to apply, and to apply only, to *currently continuing* breaches of repairing obligations. It follows that the six month period would be irrelevant in cases where the notice had to be served—because the period would not even begin to run, in the case of a continuing breach, until the breach had ended.

8.60 *Past* breaches of repairing obligations—that is to say, breaches which had already been made good—would be subject to the six months' time limit in the normal way. Such breaches, once remedied, would not be grounds for forfeiture under the existing law; but in accordance with the general recommendations about remedied breaches[39] they would remain termination order events on which a landlord could seek a termination order within the six months' period in those rare cases in which he felt justified in doing so; and the special notice regime would not apply. At first sight this may seem a startling proposition. If a tenant deserves the protection of this regime when his breach is continuing, it may be said, then surely he deserves it even more when the breach has already been remedied. But this, as we have already explained in a slightly different context,[40] would be to misunderstand the purpose of the 1938 Act: once the repairs have actually been done the situation ceases to be within the evil at which it was aimed. The existing provisions of the Act are indeed quite inapt to cover such a case.

8.61 We set out below a table, corresponding with the one reproduced earlier and with items numbered in the same way, which summarises the new regime recommended in the preceding paragraphs.

Item no.	*The new regime*
1	Covers all repairs.
2	Applies to all termination order events involving a failure to repair which is currently continuing.
3	Landlord must, before commencing any action for a termination order, serve on the tenant a notice stating his intention to do so and giving details of the disrepair alleged. This notice must comply with the requirements now in the 1938 Act, and a counter-notice procedure like that specified in the 1938 Act should apply.
4	Tenancy may be of any length.
5	Term unexpired must be 3 years or more.

[39]Part VII of this report.

[40]Paras. 8.45 and 8.46 above. These paragraphs dealt with the particular question of whether a claim for *damages* in respect of a breach remedied by the *landlord* should be within the 1938 Act regime, and we concluded that it should not. But the same reasoning applies to a claim for termination, and holds good whether it is the tenant or the landlord who has remedied the breach.

Item no.	*The new regime*
6	Applies only to obligation to keep or put in repair during currency of tenancy.
7	Applies to any property except an agricultural holding.
8	Court may impose conditions on either party.
9	Restriction on landlord's right to recover survey expenses, etc. (and see paras. 9.5–9.11 below).
10	Does not apply to obligation to *put* in repair to be performed when tenant takes possession or within reasonable time afterwards.
11	Leave may be given if work needed to prevent or reverse substantial diminution in value of reversion.
12	Leave may be given if work required by or under any enactment or byelaw or by court order.
13	Leave may be given if tenant is not in occupation of whole and work needed for benefit of other occupiers.
14	Leave may be given if current cost of work is small in comparison with probable expense resulting from its postponement.
15	Leave may be given if any other special circumstances make it just and equitable.

(iii) *Damages*

8.62 Both the 1938 Act and section 147 apply not only to cases where the landlord seeks to forfeit because of the breach but also to cases in which he seeks damages for it. The reasons given in the context of the 1938 Act[41] apply also in relation to section 147.

8.63 The 1938 Act achieves its object in relation to damages by requiring the landlord to serve a preliminary notice even when he claims damages alone—something he would not otherwise have to do. In relation to repairing cases which fall within its ambit, it provides[42] that the landlord must serve "such a notice as is specified in [section 146(1)]" at least one month before he begins any action for damages. Once this notice is served, the relieving provisions of the Act come into play in the same way as they do when the landlord is seeking to forfeit the tenancy.

[41]Para. 8.39 above.
[42]Section 1(2).

8.64 The application of section 147 to claims for damages is perhaps less clear, but we need not pursue this problem because it is plain as a matter of policy that claims for damages were intended to be affected in all those cases in which such claims could be used to avoid the impact of the relieving provisions.

8.65 We are recommending that these provisions be changed in such a way as to create a new composite regime, we have reason to consider that this regime should apply not only to claims for termination but also to claims for damages. We therefore recommend that if a termination order event falling within the regime proposed in paragraphs 8.33–8.60 above gives rise also to a claim in damages[43], the landlord should be required, before commencing any action to enforce that claim, to serve upon the tenant a notice giving full particulars of the disrepair alleged, stating his intention to claim damages, and in other respects complying with the existing requirements set out at the start of paragraph 8.51 above. If the landlord intended to seek both damages and a termination order, one notice should suffice provided that both intentions were stated.

8.66 Two recommendations about the applicability of the 1938 Act to claims for damages were implicit in our earlier discussion of the policy of the 1938 Act and these should be made here expressly in relation to the proposed new regime:

(a) it should be made clear that, as between the *Swallow* case on the one hand and the *Hamilton* and *Colchester Estates* cases on the other, the latter should prevail: a claim based on a default covenant should not amount to a claim for damages within the new repairs regime.

(b) The effect of the *S.E.D.A.C.* case should be reversed, so that a claim for damages in respect of a repairing breach which has been remedied should not fall within the new regime.[44]

(c) **Optional notice procedure in other cases**

8.67 Although we do[45] not recommend any general requirement of preliminary notice in connection with the scheme for termination orders, we recognise that legal proceedings should not be started while any hope of agreement remains.

8.68 We therefore recommend that the landlord should have power, within the six months' time limit, to serve on the tenant a notice giving full particulars of the termination order event alleged, and requiring specified remedial action to be taken. He should be entitled, but not bound, to specify in the notice a time within which that action should be completed. If such a notice were served, the six months' time limit for starting legal proceedings should be extended: in

[43]Termination order events which were not breaches of covenant, though included within the new regime (see para. 8.50 above), would not give rise to a claim for damages.

[44]See paras. 8.45 and 8.46 above. This recommendation applies both to cases where the breach has been remedied by the landlord and to those where it has been remedied by the tenant (compare footnote 40 to para. 8.60 above), though in the latter case a claim for damages would obviously be seldom justified.

[45]Paras. 8.21–8.32 above.

general it should then end on a date six months after the service of the notice; but if the notice specified a time for the completion of the remedial action, the period should end on a date three months after the expiry of this time if that date were *later*.

8.69 It is necessary to explain what is meant in the preceding paragraph by "specified remedial action". In dealing with the details of the orders which a court should be able to make at the hearing of a termination order application, we distinguish two kinds of order: the absolute order and the remedial order[46]. A remedial order would require the tenant to take action of a remedial nature, and would provide that the tenancy was to end only if he failed to do so. The range of action which the court could require in this way would be wide. In our view a landlord's notice should be valid for the purposes of the preceding paragraph provided only that the remedial action which he specifies is within this wide range and that he has made a reasonable attempt to specify action of a kind which is appropriate to the situation. The fact that the court took a different view as to the details of the remedial action which the tenant should be required to take would not of itself invalidate the notice.

8.70 Of course the landlord would not serve this notice if the event were such that no remedial action could be taken. Nor would he serve it if remedial action could be taken but would not satisfy him because he intended to seek an absolute termination order in any case (either because the event was particularly serious or because it was the last in a series). Its use would be confined to cases in which remedial action could be taken and the landlord would be satisfied (or thought the court would say he should be satisfied) if it were.

8.71 If the notice were served and complied with it would follow, of course, that the landlord could not obtain a termination order of any kind on the strength of the event in question. By serving the notice the landlord would have declared his willingness to let matters rest if the remedial action were taken, and clearly he could not go back on that. If compliance took place after the landlord had properly begun his termination action, there should in our view be no such absolute rule. In most cases the landlord would still obtain no termination order if the matter proceeded to a hearing; but in rare circumstances he might obtain one and the tenant might in any case be ordered to pay the costs.

8.72 What incentives has the landlord to use the optional notice procedure thus provided? Without it, a landlord who wanted to give his tenant time to take full remedial action before starting legal proceedings (and incurring their cost) might be prevented from doing so by the imminent expiry of the six month period. The notice procedure solves this problem. Further incentives are provided by two recommendations which we shall make later.[47] One would apply if a landlord had failed to give his tenant time to take appropriate remedial action before bringing the matter to court: the landlord would probably have to pay the tenant's costs as well as his own if the court made a

[46]Part IX of this report; and see especially para. 9.23.
[47]Paras. 9.50 and 9.53 below.

remedial order and the tenant complied with it. The other would apply if the landlord *had* given the tenant time to take such action but the tenant had not done so: the landlord's chances of obtaining an absolute termination order would then be increased.

(d) **Notices: mode of service**

8.73 The circumstances in which a notice under section 146(1) of the Law of Property Act 1925 is to be treated as effectively "served" are governed by section 196 of the 1925 Act and section 18(2) of the Landlord and Tenant Act 1927. Unless the breach is of a repairing obligation, section 196 applies. If the breach is of a repairing obligation, service is governed by the stricter requirements of section 18(2).

8.74 We are aware that suggestions have been made for changes in the provisions of section 196, and indeed the working paper contained some suggested rules about the giving of notices.[48] But s. 196 applies to notices in general and is not confined to notices under s. 146(1); and the suggestions in the working paper were also of wider application.[49] These considerations make it inappropriate for us to include recommendations for reform in the present report. It would be anomalous if one set of rules applied to the particular types of notice which figure in this report and another to other cases.

8.75 We therefore recommend that, in cases not involving breach of repairing obligations, section 196 should apply to the optional notice procedure which we have recommended above.[50]

8.76 Our recommendations about breaches of repairing obligations are less simple. Earlier[51] we recommended that the principles of the Leasehold Property (Repairs) Act 1938 and section 147 of the Law of Property Act 1925 should be preserved in what we have called the new repairs regime. Similar reasoning leads us to recommend that the special service requirements of section 18(2) should apply to notices which must be given under this regime. But section 18(2) is not confined to cases within the 1938 Act or section 147: it applies to repairing obligations in general. The question therefore arises: should its special requirements apply also to our optional notice procedure if and in so far as the case involves a repairing breach? It seems to us that the answer should clearly be, No. The object of the optional notice procedure is so different from that of the compulsory notice procedure which now exists under section 146(1) that it would serve no useful purpose for the special requirements to apply in this way. As a result we recommend that, although the requirements of section 18(2) should be preserved, they should in future be restricted to cases within the new repairs regime which we have proposed.

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[48]Appendix on pages 36–39.

[49]See footnote 6 to para. 1.5 above. In particular, the suggestions applied to the service of notice to quit.

[50]Paras. 8.67–8.72 above.

[51]Paras. 8.33–8.66 above.

PART IX

THE COURT'S POWERS AT THE HEARING OF A LANDLORD'S APPLICATION FOR A TERMINATION ORDER[1]

Preliminary matters

9.1 We propose that the court should have three basic choices. First, to make an absolute order which would operate to terminate the tenancy unconditionally on a date specified and which would thus reflect the court's view that the tenant should be given no opportunity to preserve it. Second, to make a remedial order, under which the tenant would have such an opportunity: the order would be suspended upon the taking of specified remedial action by the tenant and would operate to end the tenancy if, but only if, he failed to take it. And third, to make neither type of order. In practice the usual order would be a remedial one. A decision to make no order would be rare, having regard to the width of the concept of remedial action and the consequently large number of cases in which it could appropriately be ordered. Absolute orders, too, would be comparatively rare: subject to certain exceptions, they could be made only if the court were satisfied that the tenant was so unsatisfactory a tenant that he ought not to remain a tenant of the property.

(a) The primary claim

9.2 The landlord's main claim will normally be simply for "a termination order". There should be nothing to prevent him from confining his claim to an absolute order, or to a remedial order, if he so wishes; but this would seldom be an appropriate course to take. If the court declined to grant an absolute order, he might well wish for a remedial order instead. Conversely, even if he would be content with a remedial order, he should bear in mind that the court might not grant it but might take the view that an absolute order was the only appropriate one in the circumstances.[2]

(b) Ancillary claims

9.3 The next matter is the power of the court to make orders in favour of the landlord other than the termination order itself.

(i) *Costs incurred in reference to the termination order event*

9.4 Section 146(3) of the Law of Property Act 1925 provides:

> "A lessor shall be entitled to recover as a debt due to him from the lessee, and in addition to damages (if any), all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor, or from which the lessee is relieved under the provisions of this Act."

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[1]The court's powers in regard to sub-tenants and other derivative interest holders are dealt with in the next part of this report.

[2]We later recommend that the court should not make a remedial order unless satisfied that the tenant was willing, and was likely to be able, to carry out its terms: paras. 9.48–9.50 below.

9.5 There is more to this provision than may at first appear. It originated as a provision[3] in the Conveyancing and Law of Property Act 1892, described as an Act to amend the Conveyancing and Law of Property Act 1881, and it seems to have been prompted by, and must certainly be considered against the background of, the case of *Skinners' Company* v. *Knight*.[4] In that case it was held that the landlord could not claim as "compensation . . . for the breach," under what is now section 146(1) of the Law of Property Act 1925, the costs of employing a solicitor and a surveyor in respect of the preparation of a preliminary notice to the tenant. The court decided that the costs in question arose, "not from the breach of covenant, but solely from the fetter which the wisdom of the legislature has imposed on the enforcement of the cause of action arising from that breach." It would follow, of course, that these costs could not be recovered as damages either: indeed the court considered that "compensation" and "damages" meant the same thing.

9.6 Several points should be noted:

(a) Speaking very broadly, it is clear that costs of the kind made irrecoverable by *Skinners' Company* v. *Knight* are made recoverable by section 146(3). Decided cases leave no doubt about this,[5] though the extent to which it has done so is a matter which we examine more closely below.

(b) In one respect section 146(3) seems to have a wider application than did the *Skinners' Company* case. It is not confined to costs incurred in relation to the preliminary notice but extends to the whole of what may conveniently be called the "immediate costs" incurred by the landlord in respect of the breach. This makes little difference under the present law because a notice is always compulsory and so these immediate costs could always be said to be incurred in respect of its preparation. But if notice ceased to be compulsory the point would assume more importance.

(c) In another respect, however, section 146(3) is narrow. It applies only when the tenant obtains relief or persuades the landlord to waive the breach. So it has been held not to apply when the tenant avoids further proceedings by complying with the notice[6]—which is what the tenant in *Skinners' Company* v. *Knight* had done (or was assumed to have done).[7] Nor, it seems, does section 146(3) apply if forfeiture takes place and is not avoided by any means. It is usual for these limitations to be avoided by the inclusion in the tenancy document of an express covenant by the tenant along the following lines:

> To pay all expenses (including solicitors' costs and surveyors' fees) incurred by the landlord incidental to the preparation and service of a notice under section 146 of the Law of Property Act 1925 notwithstanding forfeiture is avoided otherwise than by relief granted by the court.[8]

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[3]Section 2(1).

[4][1891] 2 Q.B. 542 (C.A.).

[5]It was assumed, for example, in *Nind* v. *Nineteenth Century Building Society* [1894] 2 Q.B. 225 (C.A.).

[6]*Nind* v. *Nineteenth Century Building Society* [1894] 2 Q.B. 226 (C.A.).

[7]It is to be noted, that s.146(3) does not reverse the consequences of the *Skinner's Company* case, namely that the costs in question cannot be claimed as "compensation" in the preliminary notice itself.

[8]*Encyclopaedia of Forms and Precedents* (4th ed.), vol. II (1965), p. 322.

(d) Independently of section 146(3), it has been held that the court has a discretionary power to make the payment of the costs in question a condition for the granting of relief to a tenant.[9] It has also been suggested[10] that the court could, at the hearing, order their payment as charges or expenses under section 203(5) of the Law of Property Act 1925.

(e) Special rules apply, in relation to section 146(3), in cases within the Leasehold Property (Repairs) Act 1938. If the tenant serves a counter-notice under that Act, the landlord's rights under section 146(3) are not exercisable unless he makes an application for leave to proceed, and on such an application the court may nullify or limit those rights.[11] But this restriction does not apply to any rights which the landlord may have independently of section 146(3): if the tenant has expressly covenanted to pay these costs, the 1938 Act is of no help to him.[12]

9.7 How far should these rules be adopted for the purposes of the termination order scheme? Although the rules are open to the points of criticism mentioned in the next paragraph the basic principle of section 146(3) appears to be sound. The landlord should normally be able to recover what we have called his immediate costs from the tenant. This end could not be achieved merely by ensuring that the court could award them as costs in the landlord's termination proceedings because there might be no such proceedings: it is an object of the scheme to encourage the parties to settle the matter out of court. Nor could that object be achieved merely by ensuring that the landlord could recover from the tenant the costs which he incurred in relation to a preliminary notice. This would probably achieve the desired effect in those cases in which notice was given, but under the scheme the giving of notice would be inappropriate in many cases and in these cases the landlord would lose the immediate costs to which the present law entitles him.

9.8 We recommend that the existing rules should, in their application to the scheme, incorporate the following features:

(a) The landlord's right to recover the costs should no longer be restricted to cases in which the tenant obtains relief or persuades the landlord to waive the breach. If the principle of section 143(3) is acceptable, we see no reason why its application should be limited in this way. It would follow that the term now commonly inserted in tenancies in order to escape from the restriction would in future be unnecessary. This would be another small step towards the simplification of tenancy documents.

(b) On the other hand, the landlord's right should not be such that he could use it oppressively. under the present law there must be an actual breach, and the costs must be reasonable costs properly incurred. These qualifications are fair, and we propose that they should be reproduced.

(c) The restriction imposed by the Leasehold Property (Repairs) Act 1938 should, in relation to the proposed repairs regime, override any express

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[9] *Bridge* v. *Quick* (1892) 61 L.J.Q.B. 375.

[10] *Wolstenholme and Cherry's Conveyancing Statutes* (13th ed.) vol. 1 (1972), p. 267.

[11] Leasehold Property (Repairs) Act 1938, s.2.

[12] *Bader Properties Ltd.* v. *Linley Property Investments Ltd.* (1968) 19 P. & C.R. 620; *Middlegate Properties Ltd.* v. *Gidlow-Jackson* (1977) 34 P. & C.R. 4 (C.A.).

term in the tenancy document. A landlord should not be able, as at present, to circumvent it by means of an express covenant.

9.9 Our full recommendation, therefore, is as follows. If a termination order event has in fact occurred, the tenant should be liable to repay any reasonable costs properly incurred by the landlord in ascertaining the existence and nature of the event and in deciding upon his course of action, including the fees of a surveyor, valuer, legal adviser or other expert, and including such costs incurred in the preparation and service of a notice in those cases in which a notice is compulsory or voluntary under our scheme. But if the tenant serves a counter-notice under the new repairs regime, then (notwithstanding any express term in the tenancy) the tenant's liability for such costs should not arise unless the landlord makes an application to proceed and, on such application, the court should have power to nullify or vary such liability.

9.10 Under the present law these costs can be claimed whether or not the landlord takes forfeiture proceedings, and under our recommendations they could be claimed whether or not the landlord took termination proceedings. We recommend later[13] that if he does take such proceedings the court should have power to include the payment of these costs amongst the action which the tenant is required to take under a remedial order.

(ii) *Rent*

9.11 Since under the present law a tenancy is ended—subject to the possibility of relief—by the service of a writ or summons in possession proceedings, a landlord can include a claim for rent only up to the time of service and must claim for "mesne profits" in respect of any period after that. Whether, at the end of the day, he actually receives rent or mesne profits in respect of this period will depend upon whether or not the tenant obtains relief.

9.12 One of the advantages of replacing the present law of forfeiture by the termination order scheme lies in the fact that the tenant's obligation to pay rent (together with his other obligations under the tenancy) will continue until the date on which the court orders the tenancy to terminate.[14] The landlord's entitlement while the proceedings run their course will therefore be determined according to a rate which is known and which does not depend upon their outcome.[15] But this leaves two problems to be dealt with:

(a) Mesne profits rank technically as damages for wrongful possession, whereas a claim for rent ranks as an action in debt. In action for damages, an unliquidated amount (that is, an amount not yet finally ascertained) may be claimed. That is why a landlord today may include

[13]Para. 9.23(a) below. Since the payment of these costs would thus fall within the definition of remedial action it would follow that (by contrast with the present law: see footnote 7 to para. 9.6 above) the landlord could include their payment in the remedial action required by his preliminary notice: see para. 8.69 above.

[14]This fact, and the recommendations made in this paragraph, would supersede s.214 of the Common Law Procedure Act 1852. See, however, the recommendation made in para. 9.18 below.

[15]If the actual rent is lower than a current rack rent would be, the landlord may thus obtain less than he would obtain by way of mesne profits. But he still obtains the rent for which he was content to let the premises; and the tenant may of course be liable in damages for any breach of covenant on which the termination proceedings are based.

a claim for mesne profits up to the date when he regains possession, even though that date is not yet known and the amount of the mesne profits is therefore not yet assessable. But in an action for debt the amount claimed must be a liquidated one; so a landlord could not include a claim for rent payable up to an unknown future date. We therefore recommend a specific provision by which the court, whether or not it made a termination order, would have power (and would indeed be bound, on the landlord's request) to order the tenant to pay such rent. The form of the order should vary with the circumstances. If no termination order were made, the order as to rent should simply require the payment of any arrears due at the date of the hearing. If an absolute or a remedial order were made, the order as to rent would depend upon whether rent were payable in advance or in arrear and whether or not the tenant would continue in possession as a statutory tenant in any event. In general, however, it should be so framed as to require the tenant to pay any arrears due at the hearing and to make on the due dates any further payments falling due prior to the date fixed for termination including (in the case of an absolute order, or in that of a remedial one if the tenant failed to take remedial action) a partial payment for any broken rental period up to actual termination.[16] We recommend later [17] that the court should have a discretionary power to include the payment of rent within the action which the tenant was required to take under a remedial order.

(b) The recommendations made in sub-paragraph (a) above leave a potential gap in the landlord's rights. Because of their nature, mesne profits may be claimed by the landlord up to the date on which he actually *obtains* possession, so that the court's order may include mesne profits in respect of any period for which the tenant wrongfully holds over after the date on which the court has ordered him to relinquish possession. What is to happen under the scheme if a tenant wrongfully holds over after the termination date has passed and the tenancy has ended? Provision should be made under the scheme for rules which will enable the court to do substantial justice to the parties at the least procedural cost. Since the obligation to pay rent as such will have terminated with the end of the tenancy the scheme should impose liability upon the tenant to pay damages for use and occupation while he remains in possession. The amount payable should not be less than the rent payable under the tenancy but the landlord should be entitled to apply upon evidence of value for a higher rate to be fixed. The landlord should be able to apply for an order in the existing proceedings with reference to such damages.

(iii) *Damages, injunction, etc.*

9.13 Section 146(2) of the Law of Property Act 1925 says that if the court grants relief to the tenant it may do so

> "on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain

[16]See, however, the recommendation made, in para. 9.18 below, about absolute orders which allow for continued occupation by the tenant during a "respite" period.

[17]Para. 9.23(a) below. The remedial action would not of course include payments of rent for a broken rental period ordered to be made only if the tenancy came to an end through non-compliance with the terms of the remedial order.

any like breach in the future, as the court, in the circumstances of each case, thinks fit."

9.14 The intention behind this provision seems to be to enable the court, if (but only if) it decides to grant relief, to accompany that decision with certain orders which the landlord could otherwise obtain, if at all, only by claiming them specifically. We recommend that the court should have a similar power to impose terms if it grants a remedial order or refuses a termination order altogether. This recommendation does not, however, extend to costs and expenses: so far as they have not already been dealt with, they[18] are considered later in this part of the report.[19]

The choices open to the court

(a) **Absolute order**

9.15 An absolute termination order would reflect the court's view (arrived at in accordance with the guidelines explained later in this part of the report)[20] that the tenancy should terminate without any further chances being given to the tenant.

9.16 An absolute order would have the effect of terminating the tenancy on a date specified in the order. It is necessary to note the interaction which may occur between the termination of a contractual tenancy and the statutory security of tenure which the tenant may nonetheless continue to enjoy under the Rent Act 1977, the Rent (Agriculture) Act 1976 or the Housing Act 1980. The proposals do not affect this statutory security in any way. But there are three cases to be distinguished and in one of them this point may affect the form of the court's order:

(a) The case where the landlord has grounds for ending the contractual tenancy but cannot (or does not want to) end the statutory protection.[21] Since, under the present law, a landlord's action to end a tenancy takes the form of an action for possession, the court's order in such cases must now take a form which many tenants may find strange. The form of order[22] which applies in cases on non-payment of rent begins: "It is adjudged, *for the purposes of section 191 of the County Courts Act 1959*

[18]Paras. 9.4–9.10 above.

[19]Paras. 9.52 and 9.53 below.

[20]Paras. 9.33–9.51.

[21]Under the Rent Act 1977 and the Rent (Agriculture) Act 1976, the contractual tenancy may be terminated through forfeiture (or, in the future, through termination order proceedings) in the normal way; but a landlord who seeks to end the statutory protection on the ground of breach of obligation by the tenant will not succeed unless, in addition to proving the breach, he can satisfy the court that an order for possession is "reasonable" (see 1977 Act, s.99(1) and Sched. 15, Case I; and 1976 Act, s.7(2) and Sched. 4, Case III).

As to secure tenancies under the Housing Act 1980, the position is similar if the premises are currently let for a term certain: in that event the contractual tenancy may again be terminated in the normal way, and a periodic tenancy then arises to which a like requirement of reasonableness applies; but if the secure tenancy is a periodic tenancy the requirement of reasonableness serves to prevent the ending of the contractual tenancy itself (see 1980 Act, ss.29, 32 and 34 and Sched. 4, Ground 1).

[22]Form N. 27(1) prescribed by County Court (Forms) Rules 1982, S.I. 1982 No. 586. The emphasis in the first extract is supplied.

only,[23] that the plaintiff is entitled to recover . . . possession . . .". And it ends: "And, no order or judgment being made or given under the Rent Acts for the recovery of possession of the land, it is ordered that no warrant shall issue to enforce the aforesaid order for possession."

(b) The case where the landlord has grounds for ending both the contractual tenancy and the statutory protection, and succeeds in doing so. Here the court will now make an unqualified order for possession.

(c) The case where the landlord has grounds for ending the contractual tenancy and no statutory protection arises. Here again, of course, the court will now make an unqualified order for possession.

9.17 In the light of the preceding paragraph we may consider the form and effect of an absolute termination order. In cases (b) and (c) above it is obvious that the date on which the tenancy ends by virtue of such an order should be the same as the date on which the tenant is to give possession of the property let. In these cases the court should have full power to allow the tenant to remain in possession for a limited period after the hearing if his situation justifies this respite. As to cases (b) and (c), therefore, it follows that the date which the termination order specifies for the ending of the tenancy should be the date on which the court thinks it right for the tenant to give possession and will normally be a date some little time in the future. In these cases we recommend that the order, having specified the date in question, should automatically go on to say that the tenant must give possession on that date.[24]

9.18 We pause here to make a recommendation about the court's powers in cases where an absolute termination order provides for a period of respite as described in the preceding paragraph. Although, in the absence of any order to the contrary, the tenant's obligations (including the obligation to pay rent) will remain in force during this period, we think that the court should have power, on the landlord's application, to specify different terms on which the tenant is to hold the property during the respite period and, in particular, to order, upon evidence of value, that rent should be payable at a rate higher than that provided by the tenancy.

9.19 Case (a), however, is different. Here the tenant will not in fact have to give possession at all. It follows that the date on which the tenancy ends will not correspond with the date for giving possession and there will be no reason for deferring the former date. The date specified for the ending of the tenancy would be the date on which the termination order is made. Since the order will be an order for termination, not for possession, it will not suffer from the self-contradiction inherent under the present law in the making of a possession order which does not require the giving of possession. Any possible misunderstanding on the part of the tenant should be avoided by making it

[23]Section 191 is concerned with forfeiture in the county court for non-payment of rent. It has now been replaced, however, by ss.138–140 of the County Courts Act 1984, to which the form will no doubt refer in future.

[24]The order would therefore include an order for possession. Under the existing law an order for possession can be *enforced* only taking a further step and obtaining, in the High Court, a writ of possession (R.S.C., 0.45, r.3) or, in the county court, a warrant of possession (C.C.R., 0.26, r.17). This would remain so under our scheme because it is no part of our purpose in this exercise to examine this area of the general law; but the termination order would itself justify a landlord's application for such a writ or warrant.

clear, in the order or in a note appended to it, that he is not required to leave the premises.

9.20 An absolute termination order could of course be combined with orders for the payment of costs incurred in relation to the termination order event, of rent, of compensation, or of damages for breach of covenant.[25]

(b) **Remedial order**

9.21 A remedial termination order would have the effect of ending the tenancy if, but only if, the tenant failed to take specified remedial action within a specified time. It would thus reflect the court's view (arrived at in accordance with the guidelines explained later[26]) that the tenant should have an opportunity to preserve the tenancy. In most cases he would take the remedial action and termination would not occur.

9.22 Orders having a similar effect are often made under the present law; but they have to take the form of orders granting conditional relief to the tenant – the condition being the taking of the remedial action – and providing that, in default of compliance with the condition, his application for relief be dismissed. This concept of the remedial order is important to the scheme. The recommendations which follow are designed to give to the remedial order a more simple and logical form and a wider scope than the existing conditional order for relief.

9.23 We do not propose that our scheme should incorporate any exhaustive definition of "remedial action"; but we recommend that the term should specifically include the following:

(a) *Making any payment to the landlord or any other person.* – The payment in question might be arrears of rent or general costs, or other payments due under the terms of the tenancy (for example, of rates), or it might be a payment of costs incurred in reference to the termination order event, or of damages, in accordance with the principles recommended earlier. And although damages could not be recovered in respect of a termination order event which was not a breach of covenant we think the court should have power, if it sees fit, to suspend a remedial order upon the payment by the tenant of compensation in respect of an event of that kind.[27]

(b) *In the case of a termination order event which is a continuing breach of covenant, discontinuing the breach.* – Remedial action could thus consist in, or include, the ending of the state of affairs which constituted a continuing breach of covenant.

(c) *In the case of any termination order event, taking action appropriate to rectify the consequences of the event.* – This heading is intended to be a wide one and to apply to termination order events of all kinds. In the

[25]But the wide power described in paras. 9.13 and 9.14 would be inappropriate in the case of an absolute order.

[26]Paras. 9.38–9.57 below.

[27]The court has power at present to make its grant of relief to the tenant conditional upon his paying compensation for a breach of condition: Law of Property Act 1925, s.146(2). The fact that he is not directly liable in damages should not debar the court from requiring compensation if it is exercising its discretionary powers in his favour.

case of a continuing breach of covenant, for example, the court could if it saw fit order both the discontinuance of the breach under the previous head and the taking of further remedial action under this one. But this head is designed to apply especially to cases in which the termination order event is not a continuing breach. Under it, for example, the court could deal with the breach of a covenant not to sub-let by ordering the tenant to end the sub-letting (and, perhaps, to rectify any harm which had resulted from it). Similarly, the court could deal with the breach of a covenant to paint the exterior of the premises during a specified year now past by ordering the tenant to paint the exterior and to put right any damage which had flowed from his failure to do so at the proper time.

(d) *In the case of a termination order event which is an insolvency event, making an assignment of the tenancy which is permitted according to its terms.* – Under this head the court would have specific power, in the case of the tenant's bankruptcy, to suspend a termination order upon the tenancy being assigned to someone else. The power should be exercisable only to the extent that assignment was permitted by the terms of the tenancy. Thus a valid absolute covenant against assignment would prevent its exercise; and a requirement of the landlord's consent (such consent not to be unreasonably withheld) would have to be complied with.

(e) *In the case of a termination order event which consists in the assignment or partial assignment of the tenancy, making a re-assignment to the former tenant.* – This head would provide a special form of remedial action for a case where the termination order event consisted in a wrongful assignment or partial assignment. The court should have power to require an assignment to one particular person only – the tenant who had made the original wrongful assignment - but this power should be exercisable despite any prohibition on assignment contained in the tenancy. However, it would be exercisable only if the former tenant were willing, or could be compelled by the new tenant, to accept the re-assignment. We recommend that, except in this case and the preceding one, the court should have no power to order the assignment of the tenancy as remedial action.

(f) *In the case of any termination order event, finding a satisfactory surety or replacement surety.* – This head is designed to cover two main classes of case. First, cases in which the performance of the tenant's obligations under the tenancy has been guaranteed by a surety all along, and something has befallen the surety (bankruptcy, for example[28]) which amounts to a termination order event under the terms of the tenancy. In these circumstances we think the court should have power to suspend a termination order on a replacement surety being found. The second class of case is that in which there has in the past been no surety, but in which the tenant can find a satisfactory person to act in that capacity in future.

9.24 We emphasise that the preceding paragraph is intended merely to indicate the kind of action upon which the court could suspend a remedial

[28]Cf. para. 5.20 above, and especially footnote 21 thereto.

order *if it decided to make one*. It is not intended to indicate the cases in which such an order should be made: this would depend upon the guidelines which are discussed below.[29]

9.25 The remedial order should specify a date on which the tenancy is to terminate if the remedial action has not been taken, and should automatically require the tenant to give possession on that date in those circumstances.[30] Normally the date so fixed will be the date by which it is reasonable for the tenant to have completed the remedial action, but the court should have power to fix a later date if it wished to let the tenant retain possession for a further period by way of respite.[31]

9.26 In one case, however – where the tenant will enjoy statutory security of tenure after the termination of the contractual tenancy[32] – there would be no need of any respite. Nor would it be possible in this case to require the tenant to give possession in default of taking the remedial action. On the contrary it should be made clear, in the order or in a note appended to it, that the tenant's failure to take the action, though it would end his contractual tenancy, would not require him to leave the premises.

9.27 Further the court, having fixed the date, should have power, whether before or after the date has passed[33] and provided only that possession has not actually been regained,[34] to substitute a later date if circumstances were considered to justify a postponement.

9.28 In the case of a breach of obligation involving the non-payment of rent, the High Court has jurisdiction to grant relief at any time within six months after execution of the judgment. This jurisdiction is exceptional because the county court does not have it at all[35] and the High Court does not have it in the case of any other breach of obligation. Subject to that one exception, the present powers of the courts are broadly analogous to those recommended above.

9.29 Is anything akin to this special rent jurisdiction necessary in the proposed scheme? We see no justification at all for confining it to the High Court. In our view the choice lies between extending it to the county court and abolishing it altogether. There is a case for extending it, particularly in view of the fact that, in each of the two cases mentioned earlier,[36] the High Court

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[29]Paras. 9.33–9.51 below.

[30]But see footnote 24 to para. 9.17 above.

[31]In relation to this period of respite, we make no recommendation comparable to that in para. 9.18 above. We think it would be inappropriate, and a source of complexity in this context.

[32]Para. 9.16(a) above. The practical efficacy of a remedial termination order in such a case might well be limited because the tenant had no reason to fear the termination of the contractual tenancy. But such termination might prejudice him (and benefit the landlord) if the terms of the contractual tenancy were more favourable to him than those of the statutory one.

[33]Cf. *Chandless-Chandless* v. *Nicholson* [1942] 2 K.B. 321 (C.A.).

[34]Possession would of course be regained for this purpose if the premises had passed into the hands of a derivative interest holder who had become entitled under the recommendations in Part X of this report.

[35]The High Court can, however, exercise it in a case heard in the county court: para. 2.28 above.

[36]Para. 2.28 above.

thought that justice required the giving of relief even though the period fixed at the hearing for the payment of rent arrears had passed and the landlord had actually obtained possession. It is undesirable, on any view, that a tenant should be deprived of what may well be a valuable tenancy simply by failing to make the right application at the right time, or by failing to comply with an order by the right date.

9.30 But these arguments are not peculiar to cases involving non-payment of rent. They apply in the case of any other termination order event which gives rise to the need for remedial action. If the six months jurisdiction applies to anything, it should apply to everything; and if not to everything, then to nothing.[37] On balance, we think it should apply to nothing. The power to save tenants from themselves—from their own failure to take the right steps at the right time—is not to be belittled. But neither are the rights of landlords to make beneficial use of their property; and to put them at risk, for six months after they had regained possession, of having to take the old tenant back, would be a serious inroad on those rights and might be undesirable in the public interest as well as their own. As to the two cases to which we have referred it is obvious that courts should be wary, especially in the case of a valuable tenancy which is at risk because of a relatively trivial breach, both of making a termination order and of granting a writ or warrant of possession,[38] without ensuring that the tenant fully understands his situation and what he needs to do.

9.31 Returning now to the main theme, it remains to add that, even if a remedial order were not *suspended on* the payment of costs incurred in reference to a termination order event, or of rent or of damages etc., it could be *combined with* an order for the payment of such sums in accordance with the principles already recommended.

(c) **No order**

9.32 Finally there is the third alternative: that the court declines to make a termination order at all. A decision to this effect would not preclude the court from making an order for the payment of any of the sums mentioned in the preceding paragraph.

Guidelines for the court's decision

(a) **When the court should make an absolute order**

9.33 There are four cases in which, we recommend, the court should make an absolute order. Of these, the basic and most important case is the first and the others are subsidiary.

9.34 Case (1) *Where the court is satisfied, by reason of the serious character of any termination order events occurring during the tenure of the present tenant, or by reason of their frequency, or by a*

[37]But see Part XI of this report for the special rules recommended in relation to abandoned premises.

[38]Footnote 24 to para. 9.17 above.

combination of both factors, that he is so unsatisfactory a tenant that he ought not in all the circumstances to remain tenant of the property.

9.35 The reference to "any termination order events occurring during the tenure of the present tenant" requires preliminary explanation. A landlord is to be entitled under the scheme[39] to seek termination on the ground of the tenant's persistent breaches of obligation. This intention could not be fulfilled if the landlord were entitled to bring before the court only those events on which termination proceedings could validly be founded, because that category would exclude (among other things) all events which fell outside the period covered by the six month rule.[40] We propose, therefore, that provided the landlord's proceedings are validly founded upon at least one event which does fall within that category, he should be entitled—in seeking an absolute termination order under Case (1), but for no other purpose—to rely upon any other termination order events which may have occurred at any time during the tenure of the present tenant.

9.36 These other events are to comprise all the events which may have a bearing on the qualities of the tenant, and they should therefore include events upon which the landlord has currently no right actually to found termination proceedings—either (as we have already indicated) because they occurred earlier than the period covered by the six month rule; or because the landlord has waived his right to found termination proceedings upon them;[41] or because they fall within the new repairs regime.[42] It might seem at first sight that the landlord's right to rely on these other events would serve considerably to lengthen the proceedings at the hearing. But this would probably not be so, because all the events to which we have referred could be relevant under the present law to question whether the tenants should or should not be granted relief.[43]

9.37 As to the substance of Case (1), we emphasise again that it is the primary case for the making of an absolute order. The general rule is that such an order should be made only in these circumstances, and Cases (2), (3) and (4) are best seen as limited exceptions to that rule. It is an important point to note that termination order events would be relevant under Case (1) only if

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[39]Part VII and para. 8.8 above.

[40]Paras. 8.2–8.8 above.

[41]As to the waiver, see Part VI of this report. In theory, of course, a landlord could specifically waive his right to utilise a particular event even for the purpose now contemplated, and a clear waiver to that effect would bind him.

[42]Paras. 8.33–8.63 above. Clearly, however, a court would give little weight to a repairing breach in respect of which leave had been refused by the court or was unlikely to be granted.

[43]Section 146(2) of the Law of Property Act 1925 says that in deciding this question the court is to have regard "to all the . . . circumstances" and its discretion is not in any way circumscribed: *Hyman* v. *Rose* [1912] A.C. 623. Compare *Shiloh Spinners Ltd.* v. *Harding* [1973] A.C. 691 (a case which was not decided under s.146(2) but in which analogous principles were applied), where Lord Wilberforce said (p.725), in relation to the question of relief: "I have examined in detail the evidence given, the correspondence over a period of four years . . . All this establishes a case of clear and wilful breaches of more than one covenant which, if individually not serious, were certainly substantial: a case of continuous disregard by the respondent of the appellants' rights over a period of time, coupled with a total lack of evidence as to the respondent's ability . . . to make good . . .".

they occurred during the tenure of the present tenant and then only in so far as they tended to show that he was so unsatisfactory a tenant that he should not remain tenant of the property.[44] The court could not make an absolute order unless satisfied that this was so.[45]

9.38 Framing the basic test in this way will ensure that the court has regard, and has regard only, to the one question: whether the tenant's qualities are such that the landlord should not be expected to tolerate him as his tenant in the future. These qualities must of course be judged in the light of his past conduct, and the test makes that clear; but the test also makes it clear that the importance of past conduct lies only in the light which it sheds on this basic question. The test is thus designed to militate against what we see as a tendency of the present law to look backwards instead of forwards. The tenancy, if it is terminated at all, is terminated for the future, not for the past. Termination will not undo the breaches which the tenant has committed. The purpose of the law in this field should not be to punish him for his offence but rather to give such protection to the landlord as may be necessary and just, having regard to all the circumstances—including, of course, circumstances affecting the particular landlord which may make the tenant more or less acceptable to him.

9.39 In particular, the test is intended to militate against the doctrine of "stigma". Section 146(2) of the Law of Property Act 1925 lays down no guideline for the granting of relief. The courts have developed a doctrine under which certain kinds of breach on the part of the tenant are assumed almost automatically to debar him from relief. This is not because these breaches are such as necessarily to prove that he is an irredeemably bad tenant: the doctrine simply assumes that they cast a "stigma" on the property or a "slur" on the landlord and then goes on to assume that this slur or stigma can be eradicated only by removing the tenant. Breaches of this kind include allowing the property to be used for immoral purposes or committing breaches of the law in relation to them. For example:

> In *Egerton* v. *Esplanade Hotels, London, Ltd.*[46] the tenants, who had been permitted by the landlords to convert the property let into a hotel, allowed rooms in it to be occupied by people for the purpose of having illicit sexual intercourse. The tenancy had some 11 years still to run.

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[44]It is obvious (and indeed the wording of Case (1) makes it clear) that the court could never reach this conclusion on the basis of a single breach of a trivial nature, such as a delay in making a single payment of rent. But a single non-payment of rent might justify the court in granting an absolute order under Case (4) (paras. 9.48–9.50 below) if the tenant had become totally unable or unwilling to pay rent.

[45]Under the present law it has been held that the court may grant relief to a tenant in respect of one (severable) part of the property let, so that the tenancy terminates only in relation to the remainder: *G.M.S. Syndicate Ltd.* v. *Gary Elliott Ltd.* [1981] 2 W.L.R. 478. The recommendation made in the text means that such a power could not logically exist under our scheme: a finding that the tenant is so unsatisfactory that he should not remain is clearly of an "all or nothing" character. On the facts of the case, however, there are ways in which a similar effect could be achieved in the context of our scheme. But the problem with which the case was concerned is in any event one which could have been avoided under the present law and one which could equally be avoided under our scheme. The landlord took forfeiture proceedings against his head tenant because of a breach of covenant by a sub-tenant of part of the premises. If the head tenant himself had taken such proceedings against the sub-tenant the need for partial relief would not have arisen.

[46][1947] 2 All E.R. 88, following *Rugby School (Governors)* v. *Tannahill* [1935] 1 K.B. 87 (C.A.).

In *Hoffman* v. *Fineberg*[47] the tenants allowed gambling to take place on property used as a social club. The tenancy had some 54 years to run.

In *Ali* v. *Booth*[48] the tenant of a restaurant, having spent a large amount of money on the property, was convicted on one occasion of a number of offences under the food and drugs regulations. His tenancy had some 8 years to run.

In *Dunraven Securities Ltd.* v. *Holloway*,[49] a case concerning a shop tenancy, the tenant's manager had been summoned under the Obscene Publications Act 1959 to show cause why certain articles kept for publication at the shop should not be forfeited, and a forfeiture order was made. The tenancy had some 15 years to run.

9.40 In all these cases, the tenant was refused relief. We have described them very briefly and we do not assert that all the decisions reached would necessarily have been different if the proposed test had been applied. Our concern is that the issue which seems to matter most is sometimes by-passed by the application of an almost irrebuttable presumption in favour of the landlord. If the practical effect of the law is, or should be, that there can be no relief against immoral or illegal user, then the law should clearly say so. But if, as we think, each case should be considered on its own merits in the light of the proposed test then it follows that the doctrine of stigma should have no place, as such, in the law on this subject.

9.41 Case (2) *Where the court is satisfied that an assignment of the tenancy has been made in order to forestall the making of an absolute order under Case (1), that there is a substantial risk of the continuance or recurrence of the state of affairs giving rise to a termination order event on which the proceedings are founded, and that the new tenant ought not in all the circumstances to remain a tenant ought not in all the circumstances to remain a tenant of the property.*

9.42 The need for Case (2) arises from the restrictive terms in which Case (1) is cast. Since an absolute order under Case (1) could be made only on the basis of termination events occurring during the tenure of the current tenant, and only if they showed that the tenant was unsatisfactory, the order could always be forestalled by an assignment of the tenancy. If the assignment were a proper one, made in good faith and to a responsible tenant, there would be nothing wrong in that: to allow an absolute order in these circumstances would be unjustifiable. Of course the former tenant would almost certainly be liable in damages in respect of the event, and a remedial order could still be made against the new tenant, but the basis for absolute termination would have disappeared. This situation, however, is obviously capable of abuse. At the worst a profitable misuse of the premises could be prolonged for a considerable time by passing the tenancy around the different members of a family or from

[47][1949] 1 Ch. 245.
[48](1966) 110 Sol. J. 708 (C.A.). See also *Bickerton's Aerodromes* v. *Young* (1958) 108 L.J. 217 (breach of licensing laws).
[49](1982) 264 E.G. 709 (C.A.).

one associated company to another. Case (2) is designed to prevent conduct of this kind.

9.43 Case (3) *Where a termination order event on which the proceedings are founded is a wrongful assignment, or is an insolvency event, and the court is satisfied that no remedial action which it could order would be adequate and satisfactory to the landlord.*

9.44 Case (3) covers two situations, both of which spring, as did Case (2), from the restrictive terms of Case (1).

9.45 The first situation is that in which the termination order event is the wrongful assignment of the tenancy. In this situation the former tenant would, by one and the same act, commit the breach and simultaneously destroy the court's power to deal with it under Case (1). The assignment would be valid,[50] and the current tenant himself, as assignee, would have committed no breach. We propose to cater for this situation in the way indicated in Case (3). Assuming the circumstances were not such that the court decided, exceptionally, to refuse an order altogether,[51] it would consider whether any action on which a remedial order could be suspended would be adequate and satisfactory to the landlord. If so, a remedial order would be made. If not, an absolute order would be made. In the context of remedial action, attention must be drawn to paragraph 9.23(e) above, which would allow the court to require the re-assignment of the tenancy to the former tenant. Remedial action of this particular kind, even if it were adequate and satisfactory, would seldom be required in practice. It could be ordered only if the former tenant were willing to accept the re-assignment or could be compelled by the new tenant to do so. But there might be cases—for example, where the wrongful assignment had occurred inadvertently in the course of reorganisation within a group of companies—where such an order was both feasible and justifiable.

9.46 The second situation within Case (3) is where the proceedings are founded on an insolvency event. Here the main problem arises in regard to the bankruptcy of an individual, where the tenancy passes from the bankrupt tenant to the trustee in bankruptcy. As in the assignment case discussed above, the event would thus serve automatically to take the situation outside Case (1). We intend to deal with it in the same way as the first situation. As to remedial action, attention must be drawn to paragraph 9.23(d) above. This would allow the court to require the tenancy to be assigned, if such assignment were permitted by its terms, to another person. The court might exercise this power more often than the one mentioned in the precdeding paragraph but it would do so only if this (and any other) remedial action were adequate and satisfactory to the landlord. Case (3) does of course apply not only to the bankruptcy of an individual but to all insolvency events. The need for it may be less obvious in these other cases, but we think it should apply to them.

9.47 The provision made in Case (3) about insolvency events must of course be considered in conjunction with our earlier recommendations[52] that such

[50]This has recently been confirmed by the Court of Appeal in *Old Grovebury Manor Farm Ltd. v. W. Seymour Plant Sales & Hire Ltd. (No. 2)* [1979] 1 W.L.R. 1397.

[51]See para. 9.51, especially sub-para. (b), below.

[52]Paras. 5.49–5.58 above.

events should not be excluded from the court's discretionary (relief-giving) powers, in the way that they are currently excluded from section 146 of the Law of Property Act 1925.

9.48 Case (4) *Where the court, though it would wish to make a remedial order, is not satisfied that the tenant is willing, and is likely to be able, to carry out the remedial action which would be required of him.*

9.49 Case (4) is included in order to deal with situations in which, although a remedial order would otherwise be quite adequate, the court is not satisfied that the tenant would be willing to take the remedial action or is not satisfied that he is likely to be able to take it. In such a situation, but for Case (4), the court would have to go through the motions of making the remedial order nonetheless and the tenancy could end only when the remedial period had elapsed.

9.50 Further, in connection with Case (4), if the landlord has given the tenant time (whether by means of notice or otherwise) to take full remedial action before the hearing, and the tenant has not done so, the court should take that fact into account in deciding whether he is willing, and is likely to be able, to take the remedial action which a remedial order would require.

(b) **When the court should make a remedial order or no order**

9.51 If the circumstances of the case are such that the court does not make an absolute order, we recommend that it should make a remedial order *unless* one of the following situations exists, in which case it should decline to make a termination order at all. The situations are these:

(a) *Remedial action has already been taken.*—If full remedial action had been taken prior to the hearing, then clearly the court's choice would lie between an absolute order and no termination order at all, and if the first alternative were rejected the second would apply. It should be remembered, however, that remedial action is a wide concept and may include in particular the making of certain money payments,[53] so a court might make a remedial order even though the more tangible consequences of the breach had been rectified.

(b) *Remedial action is impossible or unnecessary.*—As to impossibility, the same thing applies: the choice must lie between an absolute order or no order. But cases of complete impossibility would be few, having regard again to the width of the concept. An example of remedial action being unnecessary might be provided by a situation we have mentioned before: where a tenant broke a covenant not to assign (or sub-let) without the landlord's consent, such consent not to be unreasonably withheld, but did so to a person to whom the landlord could not reasonably have objected. If this breach were deliberate an absolute order might possibly result; but if that possibility were rejected the consequence would probably be that no order at all was made.

(c) *Remedial action ought not in all the circumstances to be required.*—This

[53]Para. 9.23(a) above.

heading covers cases in which remedial action would be indicated but for the existence of some special factor: for example, undue delay or oppressive conduct on the part of the landlord.

Costs in general

9.52 We have already made specific recommendations about costs incurred in reference to the termination order event.[54] For the rest, the court should have full discretion as to the award of costs.

9.53 We do however make one specific recommendation in this regard. If the landlord has not given the tenant time to take full remedial action before the hearing, but the court is satisfied that the tenant has taken such remedial action (if any) as it was in all the circumstances reasonable for him to take, the court should be specifically empowered, if it makes a remedial order, to order the landlord to pay the tenant's costs if the tenant complies with it.

[54]Paras. 9.4–9.10 above.

PART X

DERIVATIVE INTERESTS

10.1 In this part of the report we consider the position of sub-tenants and others who hold interests deriving from a tenancy which is terminated by a termination order.

General rule: derivative interests cease

10.2 If a tenancy is forfeited under the present law, all derivative interests terminate with it. There is one exception to this rule (which we propose to preserve[1] and to which we propose to add another[2]), and the holder of such an interest has a right (which we propose to preserve and improve[3]) to seek relief from the court. Subject to these matters, however, we have no doubt that the rule is sound and should be reproduced in the scheme for termination orders. A landlord, terminating a tenancy for fault on the part of the tenant, should not be bound automatically by any derivative interest which that tenant might have granted. For example the tenancy might be one at a rack rent and the derivative interest a sub-tenancy granted for a small ground rent and a large premium which the head tenant had already received.

10.3 Of course the fact that a change in the rule would be unfair to landlords is not necessarily conclusive: it may be said that the existing rule is unfair to derivative interest holders, and that if unfairness has to fall somewhere there is no reason why it should not fall on the landlord instead of on them. Viewed in the abstract, this moral dilemma might not be easy to resolve. As a matter of legal principle it could be argued that the unfairness to derivative interest holders, if such it is, goes to the root of the relationship of landlord and tenant; that the landlord is the lord of the land and thus inherently entitled to recover it if his own tenant defaults; and that the position of derivative interest holders is not so much "unfair" as a natural consequence of the fact that the interests which they hold are subsidiary interests granted out of an interest which is itself subsidiary. The contrary argument, no doubt, would be that derivative interest holders stand in greater need of protection than do landlords, and that if there is a conflict between legal principle and social justice the latter must prevail.

10.4 But if theoretical arguments are inconclusive, practical considerations seem to us compelling. If the rule were changed so that a landlord were automatically subject to every derivative interest which the tenant had created, he might find not only that his rental income was dramatically reduced but that he had acquired the burden of a mortgage or mortgages created by the tenant[4]. Rather than face such risks many landlords might decide not to let at all or, if they had let, not to take termination proceedings no matter how grave their tenants' faults might be; and neither outcome would be satisfactory. So in practice a landlord would wish to eliminate the risk by preventing the tenant

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[1]Para. 10.5 below.
[2]Paras. 10.6–10.21 below.
[3]Paras. 10.22–10.64 below.
[4]Mortgagees do of course have derivative interests and are entitled to seek relief under the present law: para. 10.28 below.

from creating mortgages or other derivative interests with which he himself would not want to be burdened—or, in other words, by limiting severely the tenant's freedom of action in dealing with the property let. This would be undesirable, from the point of view both of the tenants themselves and of society in general: it should be an objective of the law, in our view, to enlarge the freedom of disposition by tenants[5]. In particular under the standard covenant whereby dispositions are permitted with the landlord's consent, such consent not to be unreasonably withheld, the landlord would become entitled, if the change were made, to withhold consent in a much wider range of cases. We conclude that the change should not be recommended.

Existing exception: Rent Act 1977, s.137

10.5 Section 137 of the Rent Act 1977 operates where the tenancy which is terminated is a protected or statutory tenancy within that Act, or a protected occupancy or statutory tenancy within the Rent (Agriculture) Act 1976, and in certain other cases. Its effect is to preserve the statutory rights of occupation under the 1977 Act of any lawful[6] sub-tenant and to make him a direct tenant of the superior landlord. This exception should, of course, be preserved.

New exception: preservation by the landlord

10.6 It is a feature of the present law, and one which many people find strange and unexpected, that a landlord has no means of preserving derivative interests *even if he wishes to do so*. We recommend that this rule be altered. If the head tenancy, instead of being terminated, is voluntarily *surrendered* by the tenant to the landlord, derivative interests are preserved and sub-tenants become direct tenants of the landlord. Our proposal, in outline, is that the landlord should have power to bring about this same situation on termination if he wishes. The details of this proposal are worked out in the following paragraphs.

(a) **The background**

10.7 Although it is right that a landlord should not, on the termination of the interest of his own tenant (the head tenant), be bound automatically by interests deriving from it, we think it wrong that he should have no way of preserving them if he wants to do so. Suppose, for example, that the head tenant has granted a single sub-tenancy of the whole property, that an absolute termination order is made against him, and that the case falls outside section 137 of the Rent Act 1977. Even if both parties want to preserve the sub-tenancy, they have no way of doing so: an entirely new tenancy must be entered into.

10.8 The waste of time and money which this involves is relatively small in the simple case just mentioned, but in some cases it may be very substantial. If, for example, the landlord is the freehold owner of a large block of flats which he has let, as a whole, to a head tenant who has failed to perform his obligations under his tenancy, the landlord may wish (or may acknowledge that it is only fair) to preserve the sub-tenancies of the individual flats. But

[5]See Report on Covenants Restricting Dispositions, Alterations and Change of User (1985), Law Com. No. 141.

[6]A sub-tenant whose tenancy was granted in breach of covenant is not within this provision (unless the breach has been waived): see further para. 10.27 below.

under the present law he cannot do so: if the head tenancy is forfeited all the sub-tenancies will inevitably terminate, together with all the mortgages which may be secured upon them, and everyone will have to start all over again. As a result a large number of new tenancy and mortgage documents may have to be prepared and executed (and often registered) and, although these documents may not need to be as long as the original ones (because they can be made supplemental to them[7]), they will attract the same stamp duties and (if they have to be registered) the same Land Registry fees.

10.9 The problem may be equally serious if, although the property has not been sub-divided, there is a chain of derivative interests affecting the whole. There may have been a series of sub-lettings and some of the sub-tenancies may have been mortgaged. Here again the landlord may be quite prepared to preserve all the derivative interests except that of his own defaulting tenant but, here again, he has no means of doing so.

(b) New powers to preserve derivative interests

10.10 In such circumstances, the exercise of a power of preservation by the landlord would have great advantages. It would save all the time, trouble and expense involved in the preparation, execution, stamping and registration of new documents, together with all the preliminary explanations, correspondence and arrangements. And it would enable the derivative interest holders whose interests were preserved to be eliminated altogether from the complex process of relief. We now discuss the details of the new powers which we propose.

(i) *Derivative interest holders' consent unnecessary*

10.11 The exercise of the new powers should not depend upon the consent of the derivative interest holders.[8] So far as they are concerned the only change which may be brought about by such exercise is a change of landlord; and this is something which may happen to them without their consent at any time if, for example, their existing landlord surrenders or assigns his interest. A requirement of consent would also militate strongly against the advantages mentioned in the preceding paragraph.

(ii) *The extent of the new powers*

10.12 We have already indicated that derivative interests may be of different kinds[9] and may relate to one another in different ways. The property comprised in the head tenancy may be split into parts, each part the subject of a separate sub-tenancy. Each immediate sub-tenancy (whether of part or of the whole) may give rise to a chain of subsidiary sub-tenancies. And any sub-tenant may have created a mortgage or mortgages, or some other interest such as an easement, out of his sub-tenancy. Before going further, it may be helpful to illustrate some of these possibilities by means of a diagram:

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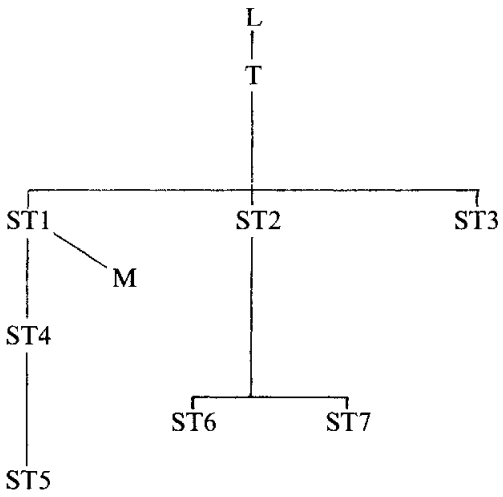
[7]Law of Property Act 1925, s.58.

[8]A derivative interest holder whose interest was not preserved in this way would have to apply for relief if he wished to retain it: paras. 10.22–10.64 below.

[9]Cf. the definition of "the derivative class", for the purposes of relief, in para. 10.26 below.



In this diagram L is the head landlord. He has let the whole property to T, against whom he is now seeking a termination order. T has granted sub-tenancies of separate parts of it to ST1, ST2 and ST3. ST1 has mortgaged his interest to M, and has also sub-let his part of the property to ST4, who has in turn sub-let it to ST5. ST2 has divided his part into two still smaller parts and sub-let these to ST6 and ST7.

10.13 *First Recommendation: power to preserve all derivative interests*—We recommend, first, that the landlord should have power simply to preserve all the derivative interests intact. In the diagram this would involve preserving the interests of all the sub-tenants and that of M.

10.14 But the landlord may not wish to preserve all the derivative interests: how far should he be allowed to pick and choose amongst them, preserving some but not others? In our view, his power to do this must be limited by one clear principle: if he preserves one derivative interest he must preserve all the other derivative interests, inferior or superior, which subsist to any extent in the *same property*. This principle may be illustrated from the case shown in the diagram. Thus it would not be right to allow L to preserve the interests of ST1 and M without preserving those of ST4 and ST5, or to preserve that of ST2 without preserving those of ST6 and ST7. This would be wrong not only as a matter of legal principle, but because it could cause unfairness. It is true that if L were allowed to act in this way, the sub-tenants whose interests were not preserved could be enabled to apply for relief in the hope that the court would restore them to their former positions in the hierarchy; but if they chose not to do this one result would be that ST1 and ST2 were forced to retain their own tenancies but deprived of the benefit of the sub-tenancies which they had created and another might be that M's security was adversely affected. Nor would it be right, for example, to allow L to preserve the interest of ST6 but not those of ST2 and ST7. Again, it would be possible to enable ST2 and ST7 to apply to the court for relief, but if ST2 did this and ST7 did not, the court's power to give relief to ST2 could only be upon terms that ST6 remained as sub-tenant and ST7 did not; and this might be unfair to ST2. It would also

create an unjustifiably confused and complicated situation. The application of the principle stated above leads to the conclusion that the landlord's power to pick and choose among derivative interest holders must be limited to the situation described in the next paragraph.

10.15 *Second Recommendation: power to preserve a complete branch of derivative interests*—We recommend that if the highest derivative interests in the hierarchy are interests in part—not the whole—of the property comprised in the tenancy terminated, the landlord should have power to preserve all the derivative interests relating to that part without having to preserve those relating to any other part. This power does not violate the principle stated in the preceding paragraph, and we think it may in many situations be useful to the landlord. Thus in the case shown in the diagram there are three separate "branches" of interests relating to part only of the property and deriving directly from T's tenancy. The first branch consists of ST1, M, ST4 and ST5, the second of ST2, ST6 and ST7, and the third of ST3. By exercising this power, L could preserve any one (or more) of these branches but not the other (or others). The power would often be particularly useful in the case of a block of flats, where the tenant is tenant of the whole block and has granted sub-tenancies of the individual flats, perhaps to hundreds of different tenants: in such a case the landlord could pick and choose among the flat tenants, preserving the interests of some (and their mortgagees, if any) but not those of others. He could thus choose not to preserve the interest of a sub-tenant who had broken the terms of his sub-tenancy and whose breaches (and the head tenant's failure to deal with them) might even have been the cause of the head tenancy being terminated. But it is important to recognise that this could not be done if the head tenant had created a mortgage or interposed some other interest between his tenancy and the flat tenancies: in that case the existence of the power would violate the principle mentioned in the preceding paragraph because it might be exercised so as to prejudice the position of the mortgagee or other interest holder.

(iii) *The effect of the new powers*

10.16 Having made recommendations about the extent of the landlord's powers of preservation, we must now consider in more detail what the effect of their exercise should be.

10.17 We said earlier that the effect of the exercise of the power of preservation was to be the same as that of a surrender by the head tenant. A surrender operates merely as an assignment of the head tenancy to the landlord, and such assignment is automatically subject to the rights of any derivative interest holders whose interests are thus preserved.[10] (This is fair to the landlord in the context of surrender, because of course he is free to refuse the surrender[11] or to negotiate the terms on whlich he will accept it.) Thus if the head tenant had created a mortgage, the tenancy surrendered is preserved in the hands of the landlord after surrender in so far as is necessary to safeguard the rights of the mortgagee.[12] Subject to that, sub-tenants move, as it were, one rung up the

[10]See, e.g., *Hill and Redman's Law of Landlord and Tenant* (17th ed., 1982), p. 439.
[11]See, e.g., *Hill and Redman, op. cit.*
[12]See, e.g., *David* v. *Sabin* (1893) 1 Ch. 523 (C.A.).

ladder; and under section 139 of the Law of Property Act 1925 the estate of the landlord is deemed to be the reversion expectant on the first sub-tenancy in order to preserve the same incidents and obligations as would have affected the head tenancy if it had not been surrendered. This is precisely the effect which should be achieved by the exercise of the landlord's powers of preservation, and we recommend accordingly.

10.18 More needs to be said, however, about the case where the head tenancy was mortgaged. In order to protect the mortgagee's interests the head tenancy must, when it passes to the landlord, remain subject to the mortgage as we have just recommended. But this leaves certain questions still open. Under the present law, if a mortgaged property is transferred subject to the mortgage, the transferee does not become personally liable to the mortgagee for the capital money or interest.[13] Translated into the present context, this result is plainly right: the former head tenant should remain directly liable, and the landlord should not become so. And if the former head tenant paid off the whole debt, the mortgage would no longer affect the head tenancy in the landlord's hands. This is as it should be.

10.19 But it is inherent in the scheme that the mortgagee would retain all his powers as mortgagee. These would enable him, if the former head tenant defaulted in paying money due under the mortgage, to extract the debt from the landlord. He could achieve this either by selling the head tenancy which now belonged (subject to the mortgage) to the landlord and keeping so much of the proceeds as was necessary to discharge the debt, or by inducing the landlord to discharge it out of his own money in order to avoid such a sale. If this happened, would the landlord have recourse against the former head tenant and be entitled to recover the money from him (if he were able to pay it)? In the case of a surrender, we think the answer is No.[14] In the present context, however, we think the answer should clearly be Yes. It is to be noted that if a property is *sold* subject to a mortgage the *purchaser* usually enters into an express covenant to indemnify the *vendor* against liability and, in the absence of any express covenant, a covenant to that effect will be implied.[15] Translated into our terms (with "purchaser" changed to "landlord" and "vendor" to "head tenant") this rule[16] would produce a result the opposite of that required. It nevertheless provides a useful analogy; and we recommend that it be reversed in this situation, so that the former head tenant is liable to idemnify the landlord against liability as if he had entered into a covenant to that effect.

(iv) *Mode of exercise of the new powers*

10.20 It remains to consider when and how the landlord's new powers of preservation should be exercisable. Later in this part of the report[17] we make recommendations designed to ensure that if derivative interests were not being preserved their holders should be notified of the termination proceedings and

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[13] *Re Errington, Ex parte Mason* [1894] 1 Q.B. 11.

[14] In practice, a landlord's ability to refuse a surrender might enable him to negotiate a variation of this rule.

[15] *Waring* v. *Ward* (1802) 7 Ves. 322, at p. 327. (This assumes, of course, that the mortgagee does not join in and give the vendor a release.)

[16] Even in the context of sale, the rule can be displaced by contrary provision: *Mills* v. *United Counties Bank Ltd.* (1912) 1 Ch. 231 (C.A.).

[17] Paras. 10.53–10.64 below.

given an opportunity to seek relief. The converse of this proposition seems equally true: that if derivative interests *are* being preserved, there is no need for their holders to be notified of the proceedings: preservation should not involve such notification, still less depend upon it. This is not to say that derivative interest holders on the first tier, who would thus be subjected to a change of landlord, should not be notified, after the event, of that fact. In the case of a dwelling, section 122 of the Housing Act 1974 requires a new landlord to whom the reversion is assigned to notify the tenant accordingly: this section ought clearly to apply in the present situation, and any possible doubt as to whether it does so should be removed by the legislation implementing our recommendations. In relation to tenancies outside section 122, there is no specific requirement about notification; but notification ought to take place, if only to ensure that rent is paid in future to the right person.[18]

10.21 There must clearly be some means of verifying that preservation has occurred. Although a landlord would normally have given thought to this question before, or soon after, he brought his termination proceedings, it must be borne in mind that it would, at that stage, be a hypothetical one. It would become concrete only if the court were to make an absolute order, or a remedial order with which the tenant did not comply; and these events would be comparatively rare. We think, therefore, that the landlord should not be required to declare his intention to preserve prior to the hearing. All that matters, it seems to us, is that the court's order should incorporate a provision, inserted with the landlord's assent, that preservation was to take place. The court would wish to ensure either that derivative interests were preserved or that their holders had been (or would be) given an opportunity to seek relief.[19] Its order would reflect these matters and we recommend that it should expressly record any preservation which was taking place. The holders of derivative interests could therefore assume that their interests were safe unless notified formally that they were at risk.

Relief in cases not within the exceptions

10.22 We have already referred briefly to the present rules about relief for those holding derivative interests.[20] We have no doubt that a right to claim relief should continue to exist under the scheme for termination orders, but we propose a number of changes in the existing law.

10.23 Although it seems that the old jurisdiction of the Courts of Chancery still has some application (at any rate in the High Court, and particularly in cases of non-payment of rent), this does not appear to extend significantly the statutory jurisdiction contained in section 146(4) of the Law of Property Act 1925. This reads as follows:

> "Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, or for a non-payment of rent, the court may, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease or any part thereof, either in the lessor's action (if any) or in

[18]Law of Property Act 1925, s.151(1).
[19]See further paras. 10.59–10.64 below.
[20]Paras. 2.29–2.31 and 2.46 above.

any action brought by such person for that purpose, make an order vesting, for the whole term of the lease or any less term, the property comprised in the lease or any part thereof in any person entitled as under-lessee to any estate or interest is such property upon such conditions as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the court in the circumstances of each case may think fit, but in no case shall any such under-lessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease".

"Under-lease" includes an agreement for an under-lease where the under-lessee has become entitled to have his under-lease granted; and "under-lessee" includes any person deriving title under an under-lessee.[21]

(a) **Relief to be available only for those not within the exceptions**

10.24 In our view relief should not be available to holders of derivative interests which are preserved through the operation of either of the two exceptions discussed above (preservation by the landlord; and preservation under section 137 of the Rent Act 1977).[22] This may appear an obvious proposition but there seems no reason in theory why a sub-tenant whose interest is preserved under section 137 of the Rent Act 1977 could not apply under the present law for relief under section 146(4) of the Law of Property Act 1925. If he did so—because, for example, he was a tenant of only part of the property comprised in the head tenancy and hoped to obtain a new tenancy of the whole—we think his application would always fail in practice. But we think it should be made clear that if the holder of a derivative interest is permitted to retain his interest (either through section 137 or through the exercise by the landlord of his new right to preserve derivative interests) he can claim nothing more.

(b) **Who can claim relief: the "derivative class"**

10.25 The precise application of section 146(4) is perhaps not entirely clear. It certainly extends to mortgagees by sub-demise,[23] on the ground that they acquire a term of years and are therefore under-lessees; to chargees by way of legal mortgage[24] on the ground that, although they have no term of years, they have the same "protection, powers and remedies" as if they had;[25] and to cases where a mortgagee has taken a purported assignment of the tenancy by way of mortgage,[26] on the ground that such an assignment operates as a mortgage by sub-demise.[27] But the scope of the provision[28] whereby the sub-section operates for the benefit of "any person deriving title under an under-lessee" is perhaps less clear because it invites the question, title to what? Literally it

[21]Section 146(5)(d) and (c).
[22]Paras. 10.5–10.21.
[23]See *Re Good's Lease* (1954) 1 W.L.R. 309.
[24]*Re Good's Lease* (1954) 1 W.L.R. 309. In this case the applicant did not in fact have a charge but had become entitled to have one granted to him.
[25]Law of Property Act 1925, s.87(1); and see *Grand Junction Canal Co. Ltd.* v. *Bates* [1954] 2 Q.B. 160.
[26]*Grangeside Properties Ltd.* v. *Collingwood Securities Ltd.* (1964) 1 W.L.R. 139 (C.A.).
[27]Law of Property Act 1925, s.86(2).
[28]Section 146(5)(e).

would seem to include a person with a derivative interest of any kind (an easement, for example), but it may be that it is confined by its context to those with derivative proprietary interests.

10.26 At all events, we think the right to claim relief should in future be exercisable by any member of what we shall call "the derivative class", defined as follows:

(a) anyone who holds any interest in the premises (whether legal or equitable, but not including an interest held under a trust) which is derived out of the tenancy in question, including an interest subsisting under any sub-tenancy, mortgage or charge and an interest which is an incorporeal hereditament; and

(b) anyone who does not fall within (a) above but who has the benefit of an enforceable right to acquire any interest within (a).

10.27 Category (a) is the primary one. It covers anyone with a legal or equitable interest derived out of the tenancy except a beneficiary under a trust. This exception is made because we think the trustees should be the only persons entitled to seek relief. We considered whether the category should be restricted, as is section 137 of the Rent Act 1977, to interests *lawfully* derived out of the tenancy, so that the holder of a derivative interest granted in breach of covenant would be excluded. But such a holder is at present within the protection of section 146(4) of the Law of Property Act 1925,[29] and since the granting of relief (unlike the operation of section 137) is discretionary we see no reason to cut down the category in this way. There may be cases in which, although the interest was granted in breach of covenant, the grantee did not know this and ought in all the circumstances to have relief.[30] Category (a) also includes someone who has no proprietary interest in the property but has an incorporeal hereditament (for example, a right of way) derived directly or indirectly from the tenancy.

10.28 A special word should be said about the extent to which category (a) includes people who have acquired a title by adverse possession (or "squatting"). We must preface this, however, by a brief explanation of the present law of limitation as it applies to property which is the subject of a tenancy.

10.29 A person who takes adverse possession of such a property, and retains it for 12 years, acquires a good title to the tenancy as against the tenant;[31] but the title thus acquired is not binding on the landlord: so far as he is concerned, the relationship of landlord and tenant continues to subsist between (and only between) him and the original tenant.[32] Accordingly, the adverse possessor has no right to claim relief if the tenancy in question is

[29] *Factors (Sundries) Ltd.* v. *Miller* (1952) 2 All E.R. 630 (C.A.).

[30] The case cited in the preceding footnote was such a case, and the unlawful sub-tenant was granted relief.

[31] Limitation Act 1980, s.15(1) and Sched. 1, para. 1.

[32] See *Fairweather* v. *St. Marylebone Property Co. Ltd.* (1963) A.C. 510. Adverse possession affects the landlord if it continues after the termination of the tenancy, when it may result in the adverse possessor acquiring title to the landlord's own interest in the property: Limitation Act 1980, Sched. 1, para. 4 (and see paras. 5 and 6).

forfeited.[33] Recently, however, it has been held that the position is different when the tenancy is registered under the Land Registration Act 1925 and the adverse possessor has actually applied for and been granted a registered title in his own name.[34] In these circumstances it seems that the adverse possessor, and he alone, is the tenant as against the landlord, and it is he who can claim relief against forfeiture.[35] So far as sub-tenants are concerned, the same principles must apply: someone who takes adverse possession against a sub-tenant does not become a tenant as against the immediate landlord, and so cannot claim relief on the forfeiture of the head tenancy, unless the sub-tenancy is registered land and he has become its registered proprietor.

10.30 Our recommendation is that, in the same way, a person who has acquired title against a sub-tenant by adverse possession should not be entitled to apply for relief as a member of the derivative class unless he has become the registered proprietor of the tenancy. It may at first sight seem anomalous that his right to relief should vary according to the circumstances in this way; but in fact there is much to be said for the distinction. By choosing to become a registered proprietor the adverse possessor assumes directly[36] the burdens as well as the benefits of the sub-tenancy and perhaps it is only right that this should affect his entitlement to relief. It is clear at all events that these questions arise in relation to the law of limitation,[37] where they have wide implications, and that in this exercise it is necessary to reflect the answers which that law currently gives to them.

10.31 *Category (b)* is self-explanatory; but it may be smaller than at first appears. If the right existed under a contract which was specifically enforceable, the intending assignee would have an equitable interest in the property prior to completion and so would fall directly within category (a).

(c) **Court's powers to grant relief**

10.32 Under section 146(4) of the Law of Property Act, the court's only power is to bring into being a new tenancy for the benefit of the person claiming relief:[38] there is no power to preserve any existing tenancy. Although we think that the court's present power should remain, we also think that it should be supplemented by a power of the latter kind. We turn first to this.

(i) *Powers to preserve existing interests*

10.33 We recommend that the court should have power to preserve existing interests, in the circumstances set out in the following paragraphs. If such powers were exercised, the effect would be that the interest in question did not

[33] *Tickner* v. *Buzzacott* (1965) Ch. 426.

[34] *Spectrum Investment Co.* v. *Holmes* (1981) 1 W.L.R. 221.

[35] It follows that it would necessarily be he against whom the landlord would take termination proceedings under our scheme.

[36] Even if the adverse possessor is not registered, he will in practice be constrained indirectly to perform the tenant's obligations if he wishes to keep the tenancy, since otherwise the landlord is likely to exercise rights of forfeiture.

[37] *The St. Marylebone* case (see footnote 32 to para. 10.29 above) was considered (though at a time when the *Spectrum* case (see footnote 34 to para. 10.29 above) had not yet been decided) by the Law Reform Committee in their *Final Report on Limitations of Actions* (1977), Cmnd. 6923, paras. 3.44 3.46. No recommendation was made for change in the law established by the decision.

[38] *Serjeant* v. *Nash Field & Co.* (1903) 2 K.B. 304 (C.A.) at p. 313.

terminate but continued in the hands of its existing owner or (as the case may be) in those of its new owner. No new documents would be required, therefore, save only the court order itself.

10.34 *Power to preserve all derivative interests; or a complete branch*—We recommend, first, that the court should have the same two powers of preservation as we recommend that the landlord should have: to preserve all the interests which derive in any way from a head tenancy; or, in the case of a property which the head tenant has sub-let in parts, to preserve all the derivative interests relating to any one such part. The effect should be the same as that recommended earlier in relation to preservation by the landlord.[39] In the earlier context we asked whether preservation by the landlord should be dependent upon the consent of those derivative interest holders whose interests were to be preserved; and we recommended that it should not. In the present context this question arises in a rather different form. Since the court's powers to grant relief would be exercisable only on application, should the exercise of these particular powers depend upon relief being sought by all the derivative interest holders or (as the case may be) all those in the branch? On the one hand it might be wrong for the court to exercise the power if its exercise were sought only by one holder of a relatively insignificant interest and resisted by all other interest holders. On the other it might be equally wrong if its exercise, though generally desired, were prevented by the unwillingness of one such holder. On balance we think it right to make no requirement of unanimity on the part of holders. The power would be discretionary in any case, and if fewer than all the holders sought its exercise the court would have to decide whether it was right in all the circumstances to impose it upon unwilling participants for the sake of those who were willing; but the court would bear in mind that to do this would merely be to ensure the continuance of a situation which would, but for the head tenant's breach of obligation, have continued anyway.

10.35 Since the court would, in exercising its powers, take into account the interests of all the parties involved, there is no reason in principle why its powers of preservation should not be wider than those of the landlord. In principle, indeed, the court could be allowed full power to pick and choose, selecting some derivative interests for preservation and rejecting others. But this, in our view, would lead to a situation which was confused, both conceptually and in practice. Picking and choosing would necessarily involve changes in the existing structure of interests, and if such changes were to be made we think they should be made in exercise of the court's powers (discussed below[40]) to order the grant of new tenancies. In other words, we think that a distinction should be drawn and maintained between, on the one hand, the preservation of an existing structure in its existing form and, on the other, the creation of a new structure which was different from the old. The latter process would involve the making of a fresh start and we think it would be best achieved by the creation of new interests. To this rule, however, we propose the exception contained in the next paragraph.

10.36 *Power to preserve the head tenancy for an applicant*—We think the court should have one power of preservation additional to those recommended

[39]Paras. 10.16–10.19.
[40]Paras. 10.38–10.52.

in the last paragraph but one: namely, a power to vest the head tenancy, in respect of which the termination proceedings have been taken, in an applicant for relief. In this one case, therefore, the termination order would not operate to terminate the tenancy altogether: it would have the effect of terminating the tenancy as against the old tenant but of preserving it in the hands of the new one—as if the former had assigned it to the latter. We make this recommendation purely for the sake of convenience. We think there would be many cases in which the court would wish an applicant to have relief on the basis that he held the premises on the same terms as those on which the old head tenant held them, and we think it worthwhile to give the court a power to achieve this object without ordering the grant of a new tenancy. The exercise of this power would of course result in the applicant acquiring a tenancy for a term longer (if only by a matter of days) than the one for which he held his own interest. It can be argued that this would be wrong; and section 146(4), though contradictory on this point, has been held not to permit it.[41] It seems to us, however, that the advantages of making the power available are sufficient to outweight this point. We should not expect the power to be exercised in such a way as to give the applicant a markedly longer term but, subject to that, there might well be cases in which its exercise would protect the landlord's interests (since the head tenancy would continue on exactly the same terms) and be convenient (since it would avoid the need for new documents). The exercise of this power would not (and could not) operate to preserve the interest (if any) deriving from the head tenancy,[42] but we recommend that the court should have power to order the grant of new subsidiary interests to any other designated holders of derivative interests who had applied for relief.

10.37 In relation to all the powers recommended in paragraphs 10.34 and 10.36 above, we recommend that the court should have such of the ancillary powers recommended in paragraphs 10.43 and 10.45 below as would not involve alterations in the terms of the tenancy in question.

(ii) *Power to order the grant of a new tenancy*

10.38 Under the existing law, as we have already noted, the court's only power is to bring into being a new tenancy. With the implementation of the recommendations made in the preceding paragraphs, a power of this kind would be exercised less often, but it would still be required. Suppose, for example, that the head tenant paid a full market rent for the property and had granted a sub-tenancy of part of it at a nominal rent. In the circumstances it would be unfair to the landlord if the court were simply to preserve the sub-tenancy; because the rent would be too low; and it would probably be unfair to the sub-tenant to preserve the head tenancy in his hands, because the property let would be too large. The grant of a new tenancy upon new terms

[41]See para. 10.40 below. It may be that s.38 of the Supreme Court Act 1981, which replaces s.46 of the Judicature Act 1925 but differs from it slightly in this respect, does permit this—but only in cases of forfeiture for non-payment of rent and only when this "ancient" jurisdiction is invoked instead of that in s.146(4).

[42]Since its exercise would involve the vesting of the head tenancy in someone who already had a derivative interest, his elevation would necessarily create a gap in the structure; and it would not always be fair to close this gap by elevating the interests below it.

would be the only solution. In the paragraphs which follow we make detailed recommendations about the power.

10.39 *Documentation*—The court's order, under the existing law, operates of itself to vest the new tenancy in the applicant; but it seems that the new tenant should still "enter into proper covenants and a new proviso for re-entry".[43] Although the proviso would in any case be unnecessary under our proposals,[44] we think the position thus produced is unsatisfactory. If the terms of the new tenancy are to be different from those of any existing tenancy, we think the court's order should take the form of an order requiring the parties to enter into a new tenancy document setting out fully the terms and the obligations on both sides in the usual way.[45] The court should also have power to appoint a person to execute any tenancy or counter part on behalf of any party who was unable or unwillling to execute it himself.

10.40 *Length*—Section 146(4) starts by saying that the new tenancy may be "for the *whole term* of the [head] lease or any less term" (emphasis supplied), but says later that no sub-tenant shall "be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease". This latter statement is doubly surprising: first, because it contradicts the former; and second, because the sub-tenant is not of course entitled in any event to "require" anything. But it has been held[46] to preclude the court from granting to a sub-tenant a new tenancy for a term longer than his original one. As recommended[47] the court should in future have power to preserve the head tenancy in the hands of a sub-tenant, and it would be illogical if this restriction were to continue side by side with that recommendation. Nor is it inconceivable that some extension might be of benefit even to the landlord if, for example, a longer tenancy would conform better to a pattern of letting which he had developed. So although we would expect the court to be slow to extend substantially the length of time for which a derivative interest holder had his interest, and although it would of course take the landlord's interests fully into accounts, we think the only legal limitation on its powers should be that the term of the new tenancy should not exceed that of the old head tenancy.

10.41 *Whole or part*—Under section 146(4) the new tenancy may be of the whole or part of the property comprised in the head tenancy. We recommend that this should remain so. In determining the extent of the property in the new tenancy, the court will of course have regard to that in which the applicant's derivative interest subsists, but this factor should not be conclusive. The court should also be free to grant a new tenancy, not of the property itself, or of some part of it, but of an interest in it. Thus if the applicant for relief were someone to whom the head tenant had granted a right of way for the term of the head tenancy, the court would have power to order the grant by the landlord of a new tenancy of that right for that or some shorter term.

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[43] *Halsbury's Statutes of England* (3rd ed.), vol. 27 (1971), p. 568. See also, e.g., *Re Good's Lease* (1954) 1 W.L.R. 309, at p. 313.

[44] Para. 5.3 above.

[45] Cf. Landlord and Tenant Act 1954, s.29(1).

[46] *Factors (Sundries) Ltd.* v. *Miller* (1952) 2 All E.R. 630 (C.A.). But a sub-tenant whose tenancy, though its term has expired, is prolonged under Landlord and Tenant Act 1954, Part II, may be granted a new tenancy: *Cadogan* v. *Dimovic* (1984) 1 W.L.R. 609 (C.A.).

[47] Para. 10.36 above.

10.42 *Rent*—Section 146(4) contains no specific rules or guidelines as to the amount of the rent under the new tenancy. It is clear that it may exceed the rent formerly paid for the derivative interest, and although it has been suggested that it should not exceed the rent payable under the head tenancy[48] it has in special circumstances exceeded that figure.[49] What is clear, however, is that the court is not intended simply to ascertain the market rent for the property at the time of the new tenancy and fix the new rent at that figure. This would obviously be wrong. The court is clearly meant to have regard to existing rents and to the history of the matter and to fix a rent which is, on balance, fair to all parties. Specific and rigid recommendations would be out of place here, but we do recommend a guideline: that the court should, in fixing the rent under the new tenancy, have regard primarily to the rent hitherto payable for the interest of the applicant and to the rent payable under the head tenancy and (due allowance being made for any differences in the extent of the property) should not fix a rent higher than the greater of these figures unless special circumstances existed. An instance of special circumstances follows.

10.43 *Arrears of rent, etc*—If the head tenancy had been terminated for non-payment of rent, the question arises as to whether the derivative interest holder should be required, as a condition of obtaining relief, to discharge the arrears owing. The courts have not always found this question easy to answer.[50] A similar question may arise in any case where the termination order event has involved loss to the landlords.

The following recommendations are made:

(a) If, as a result of non-payment of rent of any other terminaton order event on which the termination proceedings are founded, the head tenant owes the landlord money which the landlord cannot recover from him, the court should have power to grant relief to a derivative interest holder upon terms designed to make good the landlord's loss, in full or in part.

(b) The power should be exercisable either by requiring that person to make a payment to the landlord as a condition of the grant of a new tenancy or by increasing the rent which would otherwise be payable under it.

(c) But the power should arise only if (and only to the extent that) the grant of relief prevented the landlord from recouping his loss out of the property itself. This recommendation reflects two propositions. First that there is no reason in principle why the derivative interest holder should discharge a debt which is not his; but, second, that the tenancy is security for the debt and if a grant of relief prevents the landlord from realising it there is a case for requiring the grantee to make good the loss which the landlord thus sustains.

(d) If the new tenancy was of part only of the property comprised in the head tenancy, the power should not be exercised, unless the court saw

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[48] *Wardens and Governors of Cholmeley School, Highgate* v. *Sewell* (1894) 2 Q.B. 906, at p. 913.
[49] *Ewart* v. *Fryer* (1901) 1 Ch. 499 (C.A.).
[50] See, e.g., *London Bridge Buildings Co.* v. *Thomson* (1903), 89 L.T. 50; *Chatham Empire Theatre (1955) Ltd.* v. *Ultrans Ltd.* (1961) 1 W.L.R. 817; *Belgravia Insurance Co. Ltd.* v. *Meah* (1963) 3 All E.R. 828 (C.A.).

special reason to the contrary, so as to make good more of the landlord's loss than was fairly attributable to that part.

10.44 *Other derivative interests*—Although the present law contemplates the grant, by way of relief, of several new tenancies of different parts of the property, it does not appear to contemplate the granting of a "chain" of tenancies. So if a new tenancy of the whole is granted to one particular applicant, the claims of all the other applicants must presumably fail. This seems to us an unsatisfactory result. We therefore recommend that the court should have power to impose upon any derivative interest holder to whom a new tenancy was granted a condition that he should grant new interests to any other designated holders of derivative interests who had applied for relief.

10.45 *Other conditions*—Section 146(4) says that the court may grant relief "upon such conditions as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensations, giving security, or otherwise, as the court in the circumstances of each case may think fit". Since most of the items in this list are covered by the recommendations made above, the only ones which we would wish now to perpetuate are "costs, expenses, giving security, or otherwise". We recommend accordingly.

(iii) *New tenancies for mortgagees*

10.46 Special problems arise when an applicant for relief is a mortgagee, either of the head tenancy itself or of some derivative interest. Under the present law, relief granted to a mortgagee must always take the form of a new tenancy. This would not be so under our proposals because the mortgage could be preserved or recreated in its existing form by the exercise of one of the powers already recommended. But of it were not dealt with in that way, the mortgagee should still have a right to seek relief in the form of a new tenancy.

10.47 It was decided in *Chelsea Estates Investment Trust Co. Ltd.* v. *Marche*[51] that the mortgagee does not hold this new tenancy for his own sole benefit but holds it merely as security for the mortgage debt owed by the former tenant who remains in a sense notionally entitled to the equity of redemption. One consequence of this is that if the mortgagee sells the tenancy he must account to the former tenant for any balance of the net proceeds which remains after discharging the debt and any interest then owing to him or to any second or subsequent mortgagees.[52] Another and more startling consequence is that if the former tenant himself discharged his indebtedness in full, the "mortgage" would be redeemed and he would be entitled to the tenancy in place of the mortgagee. Since he is likely to be the very person against whom the landlord has successfully brought termination proceedings, the irony of this situation is obvious.

10.48 It led the working party to propose in the working paper[53] that the new tenancy granted to a mortgagee should be "free from the equity of

[51](1955) 1 Ch. 328.
[52]Per Stephenson L. J. in *Official Custodian of Charities* v. *Parway Estates Developments Ltd.* (1984) 270 E.G. 1077 (C.A.).
[53]Proposition 10.10(3) on pages 17 and 18.

redemption of the tenant" and so not held as security for the debt at all. But this, it seems to us, would not really solve the problem. For one thing, the new tenancy might be worth more than the debt. The answer to that, perhaps, is that the court should seek so to frame the terms of the tenancy that this was not so. A more serious objection is one mentioned in the case cited in the preceding paragraph, where the judge said:[54]

> "If [the] new lease is not treated as part of the mortgage security, then I can see no reason in law why the mortgagee should not keep his new lease and at the same time sue the [former tenant] for the whole mortgage money under the covenants in the mortgage . . .".

It would no doubt be possible to recommend that a mortgagee should be required to elect between relief and his entitlement to enforce the debt by personal action, and that in obtaining the former he would renounce the latter; but we doubt whether that would be fair to the mortgagee.

10.49 The best solution to the problem is to be found in applying by analogy our earlier recommendations about the effect on mortgages of the exercise of the landlord's preserving powers, so that the mortgagee's new tenancy would still be held by him as security for the mortgage debt but in such a way that the landlord, not the former tenant, was entitled to the equity of redemption. So if the mortgagee sold the tenancy, he would be liable to account for any surplus proceeds (after repaying himself and any second or subsequent mortgagee), not to the former tenant, but to the landlord. And if the former tenant discharged his indebtedness the landlord, and not the former tenant, would become entitled to the tenancy (which could, in a suitable case, merge in his reversion). We further recommend that, as in the earlier case, the former tenant should be deemed to give the landlord a covenant for indemnity, so that if the mortgagee did sell the tenancy, or if the landlord paid the debt in order to avoid such a sale, the landlord should have a claim for his loss against the former tenant. These recommendations may at first sight seem hard on the former tenant, who would have lost his tenancy while remaining fully liable under the mortgage; but this seems to us a logically inevitable result of the fact that he has lost his tenancy through his own serious default and at a time when he still owed the mortgage money.

(iv) *Miscellaneous points*

10.50 Two miscellaneous points remain to be made in connection with the court's power to grant relief.

10.51 *Continuing liability of surety*—The performance of a tenant's obligations under a tenancy may be guaranteed by a surety. If the court's order, on an application for relief, results in a sub-tenancy being preserved in its existing form in the hands of the sub-tenant we think it right that the liability of that sub-tenant's surety (if any) should automatically continue. It would therefore continue in cases dealt with under the powers recommended in paragraph 10.34 above. But we do not think it should continue in any other cases. We do recommend, however, that the court should have power, in those

[54](1955) 1 Ch. 328, at p. 338.

other cases, to require, as a condition of granting relief, that a suitable surety should be found.

10.52 *No continuing liability for original tenant or last assignee of head tenancy*—It has been held[55] to be necessary in certain circumstances, if the court's old powers to grant relief to a sub-tenant were to be exercised, for the original tenant and the last assignee of the head tenancy to be before the court; but this rule turned upon the fact that relief involved the revival of these persons' liability and such revival did not take place on the granting of relief under section 146(4). The exercise of the powers of granting relief which are recommended in the preceding paragraphs is in no case intended to result in the continuation of the liability of the original tenant under the head tenancy or of any assignee of it. This is true even in relation to the power, recommended in paragraph 10.36 above, to preserve the head tenancy in the hands of the applicant for relief, because it would be unfair to substitute liability for the defaults of someone whom the original tenant or assignee might have chosen for liability for the defaults of someone who might be a complete stranger.

(d) Giving the derivative class an opportunity to seek relief

10.53 The general purport of the recommendations which follow is that the court should not normally allow a tenancy to terminate through a termination order unless and until it is satisfied that all members of the derivative class will have their interests preserved or have had an opportunity to apply for relief. The onus of satisfying the court of this would necessarily fall upon the landlord, so our opening recommendations are designed to assist him in discharging it.

(i) *Landlord's right to obtain details of the derivative class*

10.54 There may be cases in which the landlord does not have complete knowledge of the composition of the derivative class. We therefore recommend that he should have two rights:

(a) A right to serve upon the *head tenant* a notice[56] requiring him to give all details known to him of all members of the derivative class of whose existence he knows (and if he has no knowledge of the details of the current owner of a derivative interest, to give all the details which he knows of the most recent owner known to him).

(b) A right to serve upon *any member of the derivative class* a notice requiring him to give all details known to him of all members of the derivative class *who derive title from him*[57] and of whose existence he knows (and if he has no knowledge of the details of the current owner of an interest derived from his, to give all the details which he knows of the most recent owner known to him).

10.55 Failure to comply with a notice of the first kind should entitle the court, at the landlord's request, to order disclosure (so that the tenant would

[55]See para. 2.30 above.

[56]The mode of service should be governed by the existing rules in s.196 of the Law of Property Act 1925: c.f. paras. 8.73–8.76 above.

[57]A requirement to give details of all members of the derivative class, without limitations, would be unreasonable in many cases—for example, that of a large block of flats.

be in contempt of court if he disobeyed the order), and to debar the tenant from defending the action until disclosure were made, and to order him to pay any costs incurred by the landlord as a result of his failure to disclose, or to make any one or more of these orders. Failure to comply with a notice of the second kind should entitle the court, at the landlord's request, to order disclosure and to debar the derivative interest holder in question from claiming relief or compensation until disclosure were made, and to order him to pay any costs incurred by the landlord as a result of his failure to disclose, or to make any one or more of those orders.

(ii) *Landlord's right to serve warning notices*

10.56 We also recommend that the landlord should have a right to serve on any member of the derivative class a "warning notice". Such a notice would indicate that proceedings were being taken for the termination of the head tenancy and that they could result in the ending of his derivative interest. It would go on to say that he had a right to apply (in a stated manner) for relief, but that this right would cease if it were not exercised within two months.

10.57 The effect of serving a warning notice would be that stated in the notice itself: the right of the recipient to seek relief would be barred if he did not respond within two months.

10.58 It must be borne in mind that derivative interests would fall to be considered only if the court decided to make an absolute termination order or to make a remedial order with which, in the event, the tenant did not comply. Both these situations would be comparatively rare. For that reason it seems to us inappropriate to *require* the landlord to serve warning notices prior to the hearing: the chances are that they would serve no purpose and would go only to create unnecessary anxiety in the recipients. But the landlord would make his own decision, and if he judged an actual termination likely he would serve the notices.

(iii) *At the hearing*

10.59 If, on hearing the landlord's application, the court decided to make an absolute or a remedial termination order, we recommend that it should then be obliged to consider whether there were any derivative interest holders and, if so, to consider their position.[58]

10.60 If the court were satisfied that there were no such holders, the matter would end there. If the landlord had declared, or then declared his wish to preserve the interests of all those with derivative interests, the court could simply embody a term to that effect in its order as already recommended.

[58]This recommendation gives fuller protection than the present law, particularly to derivative interest holders who are not in actual possession: for the present procedure, see *Woodfall's Law of Landlord and Tenant* (28th ed., 1978), pp. 960–990 (paras. 1-2110–1-2195). It was the fact that a derivative interest holder had had no notice of the forfeiture proceedings which caused the court to grant him relief under its ancient equitable jurisdiction, even though the landlord had already re-taken possession, in *Abbey National Building Society* v. *Maybeech Ltd.* (1984) 3 W.L.R. 793. The scheme proposed does not envisage the preservation of such equitable jurisdiction, but the safeguard for derivative interest holders lies in the recommendation just made.

Failing that, the court could still exclude from its consideration anyone whose interest would be preserved under section 137 of the Rent Act 1977, and anyone who had been served with a warning notice at least two months before and had failed to respond to it (or who had clearly indicated that he did not wish to seek relief).

10.61 If any members of the derivative class had actually applied to the court, the court would of course consider their applications and make orders as to relief as it saw fit. If the termination order were a remedial one, these orders would come into effect only if the remedial action were not taken. If the court preferred to adjourn consideration of these applications until after the date prescribed for the completion of the remedial action, it should have power to do so provided that its remedial order were so framed that the tenancy did not end until the adjourned hearing had taken place.

10.62 The court should then consider whether it was satisfied that there were no members of the derivative class other than any dealt with as mentioned in the preceding paragraph or excluded as mentioned in the previous one. If it were so satisfied, that would be an end of the matter. If it were not satisfied, it should make orders requiring the service of warning notices on any remaining members of the class and it should so frame its termination order that the tenancy did not come to an end before two months had elapsed from such service or, if any application was made within the two months, before the application had been dealt with. If the court made any orders about relief for other members of the class, they would have to be conditional upon any such application and upon its outcome being such as to involve the amendment of the orders.

10.63 We recommend that the court should have a residual power, exercisable in special circumstances, to bar particular members of the derivative class from seeking relief even though it had not proved possible to serve warning notices on them.[59]

10.64 A remote possibility would still exist, despite these recommendations, that a member of the derivative class whose existence had not been known to the court might subsequently appear and claim relief. If matters had not yet reached a state of finality, his application might still be considered; failing this, it would have to be refused.

[59]The rules about the "service" of notices in s.196 of the Law of Property Act 1925 (which will apply in these circumstances: see footnote 56 to para. 10.54 above) are such that service would only rarely be impossible.

PART XI

ABANDONED PREMISES

11.1 The working paper[1] raised the question whether the termination order scheme should incorporate a special facility for use in a case where the premises let had been abandoned.

The present law

11.2 As the law now stands, there are three possibilities to consider.

(a) **Actual re-entry for breach of covenant or condition**

11.3 Under the present law, a landlord can end a tenancy by re-entry if there has been a breach of covenant (assuming that the tenancy contains a forfeiture clause) or condition; and if premises have been abandoned there will be no statutory restrictions[2] on his right to practice actual re-entry.

11.4 Abandonment by itself does not entitle the landlord to re-enter, unless it amounts to a breach of some express term of the tenancy, but it will normally be accompanied by other things which are clearly breaches of covenant or condition. The most common of these is non-payment of rent and this (assuming that formal demand is dispensed with under the tenancy or is unnecessary for some other reason[3]) entitles the landlord to re-enter, and to do so without notice to the tenant—though he is at risk for some six months afterwards of a claim for relief.[4] In the case of any other breach, the landlord must serve a preliminary notice on the tenant under section 146(1) of the Law of Property Act 1925 (though there is no need, except where the breach is of a repairing covenant, to show that the notice reached him[5]), and relief cannot then be claimed after re-entry.

(b) **Distress for Rent Act 1736, s.16**

11.5 The working paper drew attention to section 16 of the Distress for Rent Act 1736. The section begins, "And whereas landlords are often great sufferers by tenants running away in arrear . . .", and goes on to provide a means whereby landlords may in certain circumstances recover possession of premises left uncultivated or unoccupied. But the section (as amended by the Deserted Tenements Act 1817) applies only where the premises were let at a rack rent, or at a rent of three quarters of their yearly value, and half a year's rent is in arrear; and only where the tenant has deserted the premises and left them uncultivated or unoccupied "so as no sufficient distress can be had to countervail the arrears of rent". Application must be made to the local magistrates and two or more of them (or, in the metropolitan police district, a police constable[6]) then visit the premises and affix a notice of a second visit to take place in not less than 14 days' time. If on the second visit the arrears

[1]Proposition 9.00 and commentary thereon, at pages 9 and 10.
[2]See para. 2.9 above.
[3]Paras. 2.21 and 2.22 above.
[4]Paras. 2.26–2.31 above.
[5]Para. 2.56 above.
[6]Metropolitan Police Courts Act 1840, s.13.

of rent are not paid, or[7] there is no sufficient distress upon the premises, the magistrates may give the landlord possession. Provision is made for appeals.

11.6 This procedure was fairly described in the working paper as "cumbersome and out-dated", and it is difficult to think of a case in which actual re-entry (discussed above) would not provide a better remedy. It is true that the procedure just described may be used even where there is no forfeiture clause in the tenancy; but with the implementation of our earlier recommendations about forfeiture clauses[8] this would become of progressively less importance.

(c) **Landlord and Tenant Act, 1954, s.54**

11.7 The working paper drew attention also to section 54 of the Landlord and Tenant Act 1954 of which the sidenote reads:
"Determination of tenancies of derelict land". But this is hardly relevant for present purposes because it applies only where the landlord has power to give a notice to quit and seems intended merely to enable the court to terminate the tenancy despite the fact that such a notice cannot be served on the tenant.

Discussion of the problem

11.8 Of the three remedies mentioned above, the third may be discarded for reasons already given. The first would disappear with our proposed abolition of the doctrine of re-entry. And the second does not, in our view, provide a remedy which is satisfactory for general use in modern conditions.[9]

11.9 It may be argued that the termination order scheme, as it stands, would provide the landlord with an adequate remedy in the circumstances we are considering. If a termination order event had occurred—and if it had not, we do not think the landlord should have a remedy at all—the landlord could take proceedings for a termination order in the way already recommended. The fact that the tenant could not be found would not be an insuperable obstacle because existing rules of court provide for substituted service of proceedings in such cases.[10] And if proceedings were served and the tenant failed to respond, it might be possible for the landlord to obtain summary judgment. But there are important objections to requiring these procedural steps to be taken in cases of abandonment. The main one is that they would increase the already heavy burden which rests upon the courts and court officials.

11.10 It is therefore necessary to propose a special means (not involving court proceedings) of ending tenancies in cases where the premises have been abandoned. The working paper suggested that where the premises let had been abandoned and the tenant was in arrears with the rent, the landlord should have a statutory right to re-enter, the exercise of which would terminate the tenancy. But we no longer recommend a provision of precisely that kind. It

[7]*Sic:* presumably "or" is to be read as "and".
[8]Paras. 5.3–5.9 above.
[9]The implementation of the recommendations made in this part of the report should, we think, be accompanied by its repeal.
[10]See, e.g. R.S.C. 0.10, r.4; C.C.R. 0.7.

would be a pity if, having abolished the doctrine of re-entry, we were to resurrect it for use in this one case. Nor indeed could the resurrection be confined to the doctrine itself: the law about relief would have to be preserved as well because relief would have to be available to the tenant (if he appeared) and to anyone (a mortgagee, for example) who had a derivative interest. There is also a problem about the requirement of rent arrears: the rent may in fact be a peppercorn one, or so small that no one really expects it to be paid, or even non-existent (for rent is not essential to the relationship of landlord and tenant). Before stating our final recommendations there are two preliminary matters to mention.

11.11 First, the meaning of "abandonment". It is doubted whether an exact definition of this concept is possible or even desirable, but clearly it has both a physical and a mental element. Premises are not abandoned if any part of them is currently in occupation or use under the tenancy. But lack of use and occupation, though essential, is not necessarily enough. Just as the "abandonment" by a father of his family connotes an intention not to honour his obligations towards them, so the abandonment by a tenant of the property let must connote an intention on his part not to honour his obligations as tenant. A tenant who intended to re-occupy the premises after a trip abroad, for example, and to perform the covenants in the meantime, would not be guilty of abandonment—even if, perhaps by inadvertence, the rent were temporarily left unpaid.

11.12 The second matter has to do with derivative interests. It has two aspects:

(a) The person who had abandoned the premises might not always be the landlord's own direct tenant (the head tenant). If the premises had been sub-let, it might be a sub-tenant who had abandoned them. The landlord might not know whether there had been sub-letting and he might not know by whom the act of abandonment had actually been committed. In such a case, however, the recommendations made in this part of the report would not constitute an unwarranted threat to the head tenant. As appears later, the remedies would not be exercisable at all unless he were responsible for a termination order event; and even then he would, if he were traceable, receive notice of the impending termination of his tenancy. In practice, therefore, termination would not take place without the head tenant's knowledge unless he himself had disappeared (and if he had, he would almost certainly be the abandoning tenant).

(b) The other aspect of the matter is that there might conceivably be non-occupying derivative interest holders (for example, mortgagees) whose interests derived from that of the abandoning tenant (or, in a case within (a) above, from that of the head tenant). This again would be unlikely. The existence of such holders would normally suggest that the interest of the abandoning tenant had capital value, and probably some equity of redemption which the tenant would not put at risk through abandonment. But the later recommendations about the giving of notices are designed to ensure that any such persons would have a right to seek relief.

Our recommendations

11.13 There is no doubt that the landlord needs a comparatively quick means of recovering possession of abandoned premises. This is not merely because he ought not in fairness to be burdened for long with an asset which is producing no income and may be costing him money. It is also because empty premises are vulnerable both to squatting and to vandalism. As to the method provided, it should not involve court proceedings if they could be avoided: but on the other hand it should leave the tenant and the holders of derivative interests with sufficient means of being heard.

(a) **First recommendation: a right to secure and preserve the premises**

11.14 We recommend, first, that if the landlord reasonably believes the premises to have been abandoned, he should have the right to secure and preserve them. By this we mean that he should be entitled to secure them against vandals and squatters, whether by means of locks and other security devices or by having them guarded, and to carry out any repairs or other work which was necessary to prevent deterioration of the premises occurring in the immediate future (for example, to mend a leaking roof).

11.15 Entering the premises in this way would not terminate the tenancy. Our first recommendation is intended merely to absolve the landlord from any liability in trespass to which he might otherwise be subject. He would of course be bound to seek possession of the premises to the abandoning tenant if he should return to claim it. He would also be liable to the tenant for anything he might do to the premises which was detrimental to the tenant and not covered by the recommendations made in the preceding paragraph. But the landlord's entry for this purpose should not affect a tenant's liability for any breaches of covenant on his part and should not, of course, give rise to any such liability in the landlord.

11.16 The landlord's protection would exist only if he believed the premises to have been abandoned and this belief were reasonable. The suggestion in the working paper was cast in terms of actual abandonment, but we think it would be unfair to the landlord if, having taken a reasonable view about a state of affairs depending partly on intention, he still found himself liable.

11.17 Our first recommendation is thus intended to provide the landlord with a means of obtaining what might be called interim relief. He could take such measures as were immediately necessary, but these measures would not of themselves involve the termination of the tenancy.[11]

(b) **Second recommendation: a right to end the tenancy by notice**

11.18 We further recommend that if:

(i) the landlord reasonably believes the premises to have been abandoned, *and*

[11] It may be compared with the powers for the protection of buildings given to local authorities by Local Government (Miscellaneous Provisions) Act 1982, s.29.

(ii) there is at least one termination order event[12] in respect of which he would be entitled to seek a termination order,[13]

then the landlord should be entitled to serve notices which would operate, if no response were made to them within six months, to terminate the tenancy.

11.19 Before describing this scheme in more detail, we must explain the condition numbered (ii) in the preceding paragraph. For reasons already given,[14] we do not think it sensible to require, in every case, that there should be arrears of rent. On the other hand we think it would be wrong in principle if the landlord were able to end the tenancy when no termination order event at all was outstanding. We therefore recommend a requirement of some such event, which might or might not have to do with the non-payment of rent.

11.20 As to details of the scheme:

(a) To have the desired effect, the landlord's notice would have to be "served" upon the tenant and upon any members of the derivative class[15] of whom the landlord had actual knowledge.

(b) The service of these notices would take place according to the existing rules in section 196 of the Law of Property Act 1925,[16] and actual service on a tenant who could not be found would therefore not be required.

(c) The notices would state that the landlord believed the premises to have been abandoned and was proposing to invoke the machinery provided by the relevant provision of the implementing legislation and that the tenancy would accordingly terminate six months after the giving of the notice, unless a response had been made in the meantime.[17]

(d) For this purpose a response could take the form of any communication to the landlord of the fact that the tenant or any derivative interest holder opposed the termination of the tenancy or claimed relief. A response within the two months would oblige the landlord, if he still wanted to end the tenancy, to seek a termination order from the court in the normal way.

(e) Provided that the landlord had complied with the requirements set out above, and that the conditions mentioned in paragraph 11.18 were fulfilled, lack of response within that period would mean that the tenancy terminated unequivocally at the end of it. Rent would of course be payable up to that time (though the chances of recovering it would naturally be small).

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[12]Other than one falling within the new regime relating to repairs (and replacing the Leasehold Property (Repairs) Act 1938 and the Law of Property Act 1925, s.147) recommended in paras. 8.33–8.60 above.

[13]These last words are intended to exclude, for example, events in respect of which the time limits recommended in Part VIII have expired, or which have been waived under the rules recommended in Part VI.

[14]At the end of para. 11.10 above.

[15]See paras. 10.26–10.31 above.

[16]Cf. paras. 8.73–8.76 above.

[17]We are conscious that six months may seem a long time for the landlord to remain in uncertainty, and perhaps unable to derive any income from the property, but he may stand to gain considerably in the end and the period of six months corresponds with that mentioned towards the end of para. 11.4 above. In view of the potentially serious consequences for the tenant, the period should be a substantial one.

11.21 It is to be emphasised that the tenancy would terminate only if the relevant requirements and conditions had been fulfilled. If the landlord's belief in abandonment were unreasonable, or if the requisite rent were not in arrear, or if the notices were not all properly served, or if a response were received during the relevant period but ignored—in any of these cases the tenancy would not have been ended and anything which the landlord might subsequently have done with the premises could be challenged on the ground that they were still the subject of a valid and subsisting tenancy. These are essential safeguards so far as the tenant (and any derivative interest holder) is concerned, and they would not create any uncertainty markedly greater than is inherent in the existing rules noted at the beginning of this part of the report.[18] It would in most cases still be open to the landlord to seek a termination order in the normal way.

[18]Cf. *Rhodes Trust* v. *Khan* (1979) 123 Sol. J. (C.A.).

PART XII

JOINT TENANTS

12.1 It was decided in *T. M. Fairclough and Sons Ltd.* v. *Berliner*[1] that where a tenancy had been granted to two people as joint tenants, and one of them did not wish to apply for relief under section 146(2) of the Law of Property Act 1925 the other could not do so: he alone was not "the tenant".[2] It seems equally clear that one of two or more joint tenants of an interest which was derivative could not seek relief under section 146(4) of the same Act. And although section 146(2) does not apply to a case in which the landlord forfeits a tenancy for non-payment of rent, there seems no reason to doubt that the same rule would apply in relation to a joint tenant in that case.

Recommendations for change

12.2 We do not think that this rule can be justified in terms of policy.

12.3 One justification might be thought to lie in the fact that, as the law stands, the effect of giving relief would be to bind the unwilling tenant, as well as the willing one, to the terms of the tenancy for the remainder of its duration. This was made clear in the *Fairclough* case.[3] It can be argued that there is nothing wrong in this. The unwilling tenant has no inherent right to be released from the tenancy, and if the landlord had chosen not to exercise his right of forfeiture the tenant would have remained bound anyway. But it is one thing for him to remain bound at the instance of the landlord, and another for him to remain bound at that of his fellow tenant; and on the whole we think it would be wrong to give the latter a power of this kind. Therefore, if relief is to be available at all it should be available only on the basis that the willing tenant became the sole tenant.

12.4 At first sight, relief on that basis might be thought unfair to the landlord, who would be obliged in future to look to fewer people for the performance of the obligations under the tenancy. This unfairness, however, may be less real than it seems. The number of people bound to perform these obligations is inherently liable to diminish through death: if one of two joint tenants dies the landlord can in future look only to the survivor for the performance of obligations[4] (unless the joint tenants were the original tenants, in which case it would seem that the estate of the deceased tenant might remain liable through privity of contract). There may be cases in which the granting of relief to a single tenant (or to fewer than all of the tenants) would cause real hardship to the landlord, and we think the court should take this fully into account in reaching its decision.

12.5 We therefore recommend:

(a) That if a landlord applied for a termination order against a number of joint tenants, and one or more of them were willing to submit to an

[1][1931] 1 Ch. 60.
[2]Para. 2.43 above.
[3][1931] 1 Ch. at p. 66.
[4]*Goddard* v. *Lewis* (1909) 101 L.T. 528.

absolute order, the court should nonetheless have power, on the application of the other or others, to make a remedial termination order or to make no termination order. If the tenancy were preserved in this way it should be on the basis that the applicant tenant or tenants were in future the sole tenant or tenants (without prejudice to the liability of the other tenant or tenants for any existing breaches of obligation). In reaching its decision the court should consider whether this would cause unjustifiable prejudice to the landlord.

(b) That if, on the termination of a tenancy, a *derivative interest* is held jointly by a number of people, of whom fewer than all apply for relief, the court should have power to grant relief to the applicant or applicants in the same way as it could have granted relief to all. In deciding whether to do so the court should consider whether this would cause unjustifiable prejudice to the landlord.

(c) It should in either case be open to the person or persons seeking relief to make proposals (for example, as to the provision of a surety) to overcome any unjustifiable prejudice which might otherwise exist.

The relevance of trust law

12.6 Under the general law the holding of a tenancy or a derivative interest by a number of people almost inevitably involves a trust. Even in a simple case where two people want to take a tenancy jointly, the law[5] creates a trust under which the two people hold the tenancy as trustees upon trusts for themselves as beneficiaries. Cases of that kind may be called "technical" trusts, since the trust arises only because the law requires it. They may be contrasted with "real" trusts—that is, trusts created deliberately so that one set of people may hold property as trustees upon trust for another set of people as beneficiaries.

12.7 In either case it is of course the trustees who rank as the holders of the tenancy or derivative interest for the purposes of the recommendation made above. But the recommendation is really designed only for "technical" trusts and (though it would apply to both) would be most unlikely to be invoked in the case of a "real" trust. If the trustees of a "real" trust, having fiduciary duties towards beneficiaries, disagreed as to the course they should take, they would not in practice try to act independently of one another. They would seek to attain unanimity through discussion and consultation with the beneficiaries or, failing that, would apply to the court for directions as to what they should do.[6] Although the trustees of a "technical" trust could apply to the court for directions in the same way, they would be unlikely to take this course.[7]

12.8 Another consideration in this connection is the general principle of trust law that a trustee must not profit from his trust and therefore may not

[5]Law of Property Act 1925, ss. 34–36.

[6]R.S.C. 0.85, r. 2.

[7]A similar course was in fact taken in *Harris* v. *Black* (1983), 46 P. & C. R. 366 (C.A.), where one of two "technical" trustees sought an order compelling the other to join in making an application for the renewal of a business tenancy under Part II of the Landlord and Tenant Act 1954. The Court of Appeal held that, though there was jurisdiction to make the order, it should be refused because there were no beneficiaries other than the trustees themselves and in such a case the court would be reluctant to order one of them to take a lease he did not want. (Cf. *Greenwich London Borough* v. *McGrady* (1982), 46 P. & C.R. 223 (C.A.); *Parsons* v. *Parsons* (1983) 1 W.L.R. 1390).

keep for his own benefit property which he has been enabled to acquire by virtue of his trusteeship.[8] This principle manifests itself in several ways. Thus in the leading case of *Keech* v. *Sandford*[9] a trustee held an expiring tenancy on trust for an infant beneficiary. He tried to renew it for the infant's benefit, but the landlord refused. The landlord was willing to grant a new tenancy to the trustee personally, however, so the trustee took one for his own benefit. It was held that the trustee must nonetheless hold the new tenancy on trust for the beneficiary. The extent of this rule is not altogether clear.[10] But if one of several trustees were able, through the recommendation made above, to acquire a tenancy in his own sole name, it seems plain that the principle would apply. In the case of a "real" trust like that in *Keech* v. *Sandford*, the application of the principle would be quite likely in such an event and this makes it still more improbable that a trustee of such a trust would act independently.

12.9 But it seems clear that the principle would not apply in practice to a "technical" trust. In theory, it is true, it could do so;[11] but the principle has important exceptions. Thus the court may relax it in appropriate circumstances, and it will not apply at all if the beneficiaries under the trust are of full age and capacity and give informed consent to the trustee's conduct.[12] This latter exception is of particular significance in relation to "technical" trusts, where the beneficiaries and the trustees are the same people, because if one of two co-owners of a tenancy or derivative interest (being of full capacity) deliberately refrained from seeking the exercise of the court's discretion in his favour it seems clear, by reason of this exception, that the *Keech* v. *Sandford* principle would not apply to the tenancy acquired by the other.

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[8]See, e.g. *Underhill's Law Relating to Trusts and Trustees* (13th ed., 1979), Article 33.

[9](1726), Sel. Cas. ch. 61.

[10]See, e.g., *Underhill, loc. cit.*, at pp. 297–300.

[11]In the days when simple co-ownership did not involve a trust, it was held that one of two co-owners owed no fiduciary duty to the other: *Kennedy* v. *De Trafford* (1897) A.C. 180, at p. 189. But the 1925 legislation must be taken to have altered this and the principle has certainly been applied (if sometimes controversially) in "technical" trust cases: see, e.g., *Underhill, loc. cit.*, at pp. 279–300.

[12]See, e.g., *Boulting* v. *Association of Cinematograph, Television and Allied Technicians* (1963) 2 Q.B. 606 (C.A.), at p. 636, and *Underhill, loc. cit.*, at p. 313.

PART XIII

"NEUTRAL" CONDITIONS: A CONSEQUENTIAL RECOMMENDATION

13.1 This part of the report contains recommendations which are technical and are a consequence of our general recommendation for the abolition of the doctrine of re-entry.

13.2 We have already noted that a tenancy may, be means of a condition, be made terminable prematurely at the landlord's option on the happening of a specified event; and the method by which the landlord now effects its termination in these circumstances is re-entry. We have also noted that the event upon which the condition turns may or may not be one which connotes fault on the part of the tenant. If it does connote fault on his part, it will under the scheme be a termination order event and so will render the tenancy terminable by means (and only by means) of termination order proceedings.

13.3 But if the event in question is not one which connotes fault on the tenant's part, how is the landlord in future to end the tenancy? We have described events of this kind as "neutral" events and given as an example the grant of planning permission for some specified development. Events of this kind are not termination order events, and it would be inappropriate if they were: it would be wrong for the court to have discretionary (relief-giving) powers in such cases, and the concept of the remedial order would be out of place. So unless the doctrine of re-entry is to be preserved for use in this one case, it is necessary to prescribe some new method by which the landlord can end the tenancy.

13.4 We recommend that he should in future be entitled to do so by means of one month's written notice to the tenant. In those very rare cases in which a condition turns upon a neutral event, therefore, notice should in future take the place of re-entry (actual or constructive) as the means of formal termination.

13.5 This recommendation, though its ambit is narrow, makes a worthwhile improvement in the law because notice is in fact a more appropriate means of termination than is re-entry. Re-entry, whether it is actual or takes place constructively through the service of proceedings for possession, is an unnecessary procedure in these circumstances, and the better practice, even under the present law, is normally to make the tenancy terminable by notice on the happening of a neutral event. If, despite the termination of the tenancy, the tenant refused to leave, possession proceedings would still be necessary.

13.6 There is one final point to consider. It seems that the present law of waiver applies in the normal way to a landlord's right to end a tenancy even under a "neutral" condition: certainly there is no reason of principle why it should not. We therefore recommend that the proposals[1] for change in the law of waiver should apply equally in this case; and that the proposals for a six months' time limit[2] should apply to determine the period within which the landlord's notice may validly be served on the tenant.

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[1]Part VI of this report.
[2]Paras. 8.2—8.8 above.

PART XIV

COURT JURISDICTION, CROWN APPLICATION AND DRAFTING

Court jurisdiction

14.1 Under the present law the jurisdiction of the county court to decide matters arising in relation to the forfeiture of a tenancy depends on the rateable value (R.V.) of the property concerned and is as follows:

(a) *Landlord's action for possession.*—Jurisdiction under County Courts Act 1984, section 21(1), exists if R.V. does not exceed £1000.[1]

(b) *Relief for tenant in case of non-payment of rent.*—Relief may be given in a landlord's possession action brought in the county court. Where the landlord has re-entered without proceedings, jurisdiction under County Courts Act 1984, section 139(2), exists if R.V. does not exceed £1000.[2]

(c) *Relief for tenant in other cases.*—Relief may be claimed under Law of Property Act 1925, section 146(2). In a case where the landlord is proceeding in the county court for possession, that court has jurisdiction to grant relief[3] (but jurisdiction in relation to the possession proceedings exists only if R.V. does not exceed £1000: see (a) above). Where the landlord is not proceeding by action, jurisdiction exists if R.V. does not exceed £2000.[4]

(d) *Relief for holders of derivative interests.*—Relief is available under Law of Property Act 1925, section 146(4). Jurisdiction is the same as in (c) above, and derives from the same sources.

(e) *Repairs: Law of Property Act 1925, section 147.*—Jurisdiction exists if R.V. does not exceed £2000.[5]

(f) *Repairs: Leasehold Property (Repairs) Act 1938.*—Jurisdiction[6] depends in effect upon the jurisdiction which exists in relation to a landlord's action for possession and so is limited to cases in which R.V. does not exceed £1000: see (a) above.

14.2 It is apparent from the preceding paragraph that jurisdiction exists in some cases up to a rateable value limit of £2000 and in others up to a limit of £1000. This seems to us anomalous, and we recommend that the county court should have jurisdiction in relation to all questions arising out of our scheme for termination orders in cases where the rateable value of the property does not exceed £2000. This figure should of course be increased in line with any general increases made from time to time in county court jurisdiction based upon rateable values.

14.3 The recommendation just made would if implemented also set at rest certain doubts which may exist in relation to tenancies protected by the Rent

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[1]1984 Act, s.147(1).
[2]1984 Act, s.147(1)
[3]1925 Act, s.146(13), added by 1984 Act, Sched. 2, para. 5.
[4]Same, and 1984 Act, s.147(1), and County Courts Jurisdiction Order 1977, S.I. 1977 No. 600.
[5]As in the preceding footnote.
[6]See 1938 Act, s.6.

Act 1977. Property in London may fall within the 1977 Act if its rateable value does not exceed £1500,[7] and proceedings for possession under that Act are normally to be brought in the county court.[8] So if the landlord wished, in the case of premises with a rateable value exceeding £1000 but not £1500, both to end the contractual tenancy by forfeiture and to obtain possession under the 1977 Act, he would—on the face of it—be forced to bring two actions, one in the High Court and one in the county court. It seems, however, that in such circumstances the county court jurisdiction in regard to forfeiture is impliedly enlarged so that a single action in that court would suffice.[9] This recommendation would resolve any doubt upon this point.

Crown application

14.4 There is thought to be no reason why our recommendations should not, in general, bind the Crown. The appropriate consultation has not yet taken place, however, and it may well be that certain of our proposals will need modification in order to adapt them satisfactorily for Crown application.

Drafting

14.5 If and when draft clauses are prepared to give effect to these recommendations, consideration will have to be given to technical matters with which we have not dealt with in this report. They include two groups of such matters.

14.6 The first may be described as having to do with anti-avoidance. Some landlords might feel that they had something to gain by avoiding the impact of the termination order scheme, or certain aspects of it, and it will be necessary to ensure that they cannot do so. We have already alluded to this problem in framing some specific recommendations,[10] but it is of course a general one. In particular, the definition of "tenancies" to which the new law applies should be wide enough to include any agreements which are ancillary or collateral to them.

14.7 The second group of matters which will have to be dealt with are the many existing rules, statutory and otherwise, which relate to forfeiture under the existing law. These will all have to be identified and adapted so as to operate satisfactorily under the new scheme for termination orders.

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[7]Rent Act 1977, s.4.
[8]See, e.g., *Woodfall's Law of Landlord and Tenant* (28th ed, 1978), para. 3–0274.
[9]See, e.g., *Woodfall, loc. cit*; and see *Hillman* v. *Daly* (1951) E.G.D. 321 (C.A.).
[10]E.g., paras. 5.18 and 5.20 above.

PART XV

TRANSITIONAL PROBLEMS

Transitional recommendations already made

15.1 The transitional aspects of one or two of our specific proposals have been the subject of recommendations earlier in this report.[1] Here we are concerned with more general considerations.

When should the new legislation come into force ("the operative date")?

15.2 We think that the new legislation implementing our recommendations should not come into force immediately upon being passed. An interval would be desirable—both to enable consequential rules of court to be made, and to give legal practitioners and the public a chance to become aware of the new scheme for termination orders. The length of this interval is best judged when the time comes, and we therefore recommend that the legislation should come into force on a date to be appointed by the Lord Chancellor's order made by statutory instrument. We call this date "the operative date".

To what cases should the new legislation apply?

15.3 This is a more difficult question. Earlier in this report, we made a general recommendation that the new termination order scheme should apply to existing tenancies as well as to future ones. It follows that tenancies granted before the operative date, having at first been subject to the existing law of forfeiture, would subsequently fall within the provisions of the new legislation.

15.4 This would cause no problems, except in one situation: where the operative date happened to fall somewhere between the beginning and the end of the forfeiture process. We speak of the forfeiture "process" because we have of course been concerned in the preceding parts of this report, not with an isolated event, but with a process extending over a substantial period of time. Under the present law the process begins with the tenant's breach (usually a breach of covenant), and it ends only when the tenant gives up possession or is given relief and any ancillary questions are settled. Between these two points it embraces such matters as waiver, re-entry, preliminary notices, the form of the pleadings, the court's powers, the position of those holding derivative interests, and so on. The recommendations made in this report would result in changes being made in the law applicable at every stage of the process.

15.5 It is not possible to recommend merely that the changeover should occur on the operative date and to let it at that. The parties to cases heard immediately after the operative date would come into court only to find that many of the steps they had taken, though correct under the law of forfeiture, were wrong in the context of the new termination order regime. Some special saving provision would be necessary to deal with cases in which the forfeiture process had already begun at the operative date. In such cases the existing law should continue to apply.

15.6 But when, for this purpose, should the process be said to have begun? There are two possible answers to this question.

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[1] See paras. 5.3–5.9; footnote 15 to para. 5.18; and paras. 5.24–5.28; 5.29–5.31; and 5.35.

(a) **The saving provision: "breach-based" or "action-based"?**

15.7 The process of forfeiture begins, in one sense, with the tenant's breach of obligation. It would be possible to provide that the existing law should continue to apply in any case where the *breach* occurred before the operative date. A saving provision of this kind may be called a "breach-based" provision.

(i) *A breach-based provision considered*

15.8 A breach-based provision would be the more simple, at least in the sense that it would avoid almost entirely the need to "adapt" our earlier recommendations for transitional cases. These recommendations would not apply at all unless the breach occurred on or after the operative date.

15.9 Such a provision would have two particular disadvantages. The first is that it might sometimes be difficult to be sure exactly when a breach had occurred. There would be particular problems about this if the breach were one which arose only gradually. In the case of a continuing breach, these problems would probably not matter much in practice: though the commencement of such a breach might be in doubt, there would be no doubt, once it was established, that it recurred afresh from day to day, and a breach-based provision would apply to it on that basis. But the problems might be very real if the breach, though gradual, was not a continuing one—for example, the breach of a covenant not to change the use of the premises let.

15.10 The second and greater disadvantage is that a breach-based provision would involve the perpetuation of the existing law for a period which might be substantial and would be indefinite. It is true that, since the existing law which was perpetuated in this way would include the present law of waiver, most breaches in respect of which the landlord did not take action would be waived before long by the acceptance of rent. But this would not always happen; and waiver would not occur in any event unless the landlord had knowledge of the breach. So it is conceivable that cases arising years after the new law came into force might still be governed by the old. This seems undesirable.

(ii) *An action-based provision recommended*

15.11 If the forfeiture "process" could be taken for this purpose to begin, not with the breach, but at some later stage, the disadvantages just mentioned would be eliminated or much reduced. The latest stage at which it could be taken to begin is that at which the landlord takes *action* in respect of the breach. The effect of an action-based provision would be that any breach in respect of which the landlord had not taken action before the operative date would be governed by the new termination order scheme; and its great advantage is that it would confine the continuance of the existing law to a period which was relatively short and defined. It would also serve to reduce uncertainty, because the date of a landlord's "action" would be much less open to argument than the date of a tenant's breach.

15.12 For these reasons, we recommend an action-based provision.

(b) **The details of an action-based provision**

15.13 An action-based provision would have to be rather more complicated than a breach-based one. The first necessity is to define "action". Three things, it seems to us, must count as action for this purpose: actual re-entry by the landlord;

constructive re-entry (through the service of proceedings); and the service of a notice under section 146 of the Law of Property Act 1925. Each of these things sets in motion a chain of events which must logically be governed by the law under which it begins. When we speak of actual or constructive re-entry we refer, of course, to re-entry which amounts to a valid forfeiture (subject, in most cases, to relief) of the tenancy. It follows that re-entry would be the first step only in those cases in which section 146 did not apply.

15.14 If the landlord did not take any such action before the operative date, the consequences of a breach committed[2] before that date would be governed by the new scheme. For the most part, this would be acceptable and indeed desirable. Thus re-entry would no longer be possible. The court's discretionary (relief-giving) powers would apply in relation to termination order events even if the events were one of those breaches which are now excepted from the provisions of section 146.[3] Preliminary notice would not be compulsory except in certain cases of repairing breach. The court's powers[4] and the criteria applicable at the hearing would be different, and so would the rules about derivative interests and joint tenants.

15.15 Another group of consequences is perhaps less obviously acceptable. Thus, the passing of the operative date would prevent the landlord altogether from ending the tenancy because of a pre-existing denial of title by the tenant (unless such denial were prohibited by an express term of the tenancy).[5] And the passing of the operative date would entitle the landlord to support a termination order application based on a recent breach by citing previous breaches.[6] But neither of these consequences appears to be unacceptable and the second of them probably marks no very substantial departure from the present law because a landlord seems to be entitled even now to give evidence about the past conduct of the tenant.[7]

15.16 But there is a third group of consequences which calls for closer examination. They are as follows:

(a) *Remedied breaches.*—We have recommended[8] that breaches which have been remedied (including breaches of the covenant to pay rent which have been remedied by paying it) should still be grounds for a termination order. Unless some special provision were made, therefore, a breach which had been not only committed but remedied before the operative date, and for which, therefore, the landlord could not have forfeited the tenancy, would "revive" on the operative date as a ground for a termination order application. This seems to us wrong. We therefore recommend that the old law should continue to apply not only to breaches in respect of which the

[2]This reference to a "breach committed" is of course intended to include the fulfillment of a neutral condition: see Part XIII of this report.

[3]I.e., breaches of certain covenants to permit inspection in mining tenancies and (to a greater or lesser degree) conditions relating to the insolvency of the tenant: see paras. 5.43–5.57 above.

[4]These include the powers in relation to costs incurred in reference to the termination order event: paras. 9.4–9.10. The new law on this subject would be in some respects more favourable, and in others less favourable, to the landlord.

[5]See para. 5.35.

[6]Paras. 9.35 and 9.36 above.

[7]Para. 9.36 above.

[8]Part. VII of this report.

landlord has taken action before the operative date, but also to those in respect of which he has, before that date, become disqualified from doing so.

(b) *Waiver.*—Much the same applies to the changes which we recommend[9] in the law of waiver. Of course a breach which had not been waived under the old law before the operative date would thenceforth be waived only if the new criteria for waiver were fulfilled. But a breach which *had* been waived before the operative date ought not to revive as a ground for a termination order merely because it would not have been waived under the new law. The recommendation just would serve to deal also with this point.

(c) *Six months' time limit.*—Our recommendations that termination proceedings[10] should be impossible after the passing of six months from the date on which the landlord first had knowledge of the breach (or, in the case of a continuing breach, six months from the date on which it was last continuing if that were later) would be unfair if it were applied to a breach of which the landlord had knowledge before the operative date. The six months might already have elapsed. We therefore recommend that, in relation to such a breach, the period should start to run on the operative date itself.

(d) *Rent.*—We have recommended, in regard to existing tenancies as well as future ones, that non-payment of rent should be capable of founding a termination order application whenever some rent is in arrear for 21 days (or, if an express term of the tenancy prescribed some other period, for that other period). In no case, therefore, would it be necessary for the landlord to make a formal demand or wait for six months. At first sight the situation thus produced would seem analogous to that described in the preceding sub-paragraph: a tenant who had not been in any immediate danger of forfeiture might find himself suddenly liable to termination proceedings on the operative date if 21 days had passed since the rent became due. But closer examination reveals differences. For one thing, this could happen in only a very small number of cases indeed.[11] And for another, it would in any event produce no real hardship. We think it unnecessary, therefore, to make any special recommendation for this purpose.

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[9]Part VI of this report. These recommendations apply also in relation to "neutral" conditions: see para. 13.6 above.

[10]Or, in the case of "neutral" conditions, the service of notice: see para. 13.6 above.

[11]It must be remembered that, in relation to an existing tenancy, non-payment of rent could not be a termination order event at all unless the tenancy contained a forfeiture clause which applied to it (see para. 5.6 above). And if it did contain such a clause, the clause would almost certainly incorporate an express term dispensing with a formal demand for rent and permitting forfeiture after it had been due for a stated period. The problem mentioned in the text would thus be confined to cases (if any should exist) in which the tenancy contained a forfeiture clause but no dispensing term.

PART XVI

MATTERS ON WHICH NO RECOMMENDATIONS ARE MADE

16.1 With reference to termination on the application of a landlord, there are two topics which we have considered but on which we have decided to make no recommendations for changes in the law. The first is the possibility that, if a tenancy ends through a termination order, compensation should in certain circumstances be payable by the landlord to the tenant (and derivative interest holders). The second is concerned with imposing liability on the tenant to pay damages for any loss suffered by the landlord as a result of termination of the tenancy.

(a) Compensation for the tenant

16.2 The idea that a tenant should be able to seek compensation from the landlord (and we emphasise that we are speaking here of compensation, not of damages) on the termination of a tenancy occurring through his own fault may seem surprising, but there is a case for it. It can be argued that the present law, under which no such compensation is payable in any circumstances, operates unfairly as between, on the one hand, a tenant whose tenancy is valueless and who may therefore stand to lose nothing financially by its termination and, on the other, a tenant whose tenancy is very valuable (perhaps because he paid a premium for it or because he has made improvements to the property)[1] and to whom its termination would thus involve considerable financial loss. If a tenancy is valuable, its termination will also represent a corresponding financial windfall to the landlord; and we have little doubt that forfeiture is sometimes motivated as much by a desire to obtain this windfall as by concern about the tenant's breach of obligation. It must also be remembered that, although termination takes place through the fault of the tenant, the fault need not be wilful but may consist in his becoming unable through lack of funds (due perhaps to an unforeseeable change of circumstances) to fulfil his obligations.

16.3 There is a case, therefore, for recommending that the court should have at least a discretionary power to award compensation to a tenant if it saw fit, up to an amount which did not exceed the landlord's gain.

16.4 The position of derivative interest holders is also relevant. In all probability they are not at fault at all; yet their interests end automatically on the termination of the tenancy and if they do not obtain relief they may suffer considerable loss. If the court's power to award compensation enabled it to compensate them as well as (or instead of) the tenant, this loss could be mitigated. The total compensation thus awarded should, again, be limited to the landlord's gain.

16.5 In the end, however, we have decided not to make recommendations on these lines. The power to award compensation, on which we have carried out no consultation, would add considerable further complexity to a scheme

[1]Compensation is payable under the present law in analogous circumstances in the case of particular kinds of tenancy: see, e.g., Agricultural Holdings Act 1948, ss. 46–55.

which is necessarily complex already,[2] and we do not think that its advantages would be sufficient to outweigh this drawback.[3] So far as the tenant himself is concerned, we have recommended that termination should not normally take place in future unless he has proved himself an unsatisfactory tenant; and we do not think that a discretionary power to award compensation would be used very often even if it were available. Furthermore, if the tenancy were valuable it would usually be assignable,[4] and an absolute termination order could thus be avoided—and the value of the tenancy realised—through an assignment. As to derivative interest holders, we hope that the changes which we have recommended in the existing law about relief will go far to ensure that relief is granted to all those who have a good claim to it.

(b) Damages for the landlord

16.6 It is of course inherent in the present law that if a tenancy is ended through forfeiture the landlord, though he may be able to recover damages for breaches of covenant which led to the forfeiture, cannot include among those damages, or recover in any other way, losses which occur through the ending of the tenancy. If, for example, the property was let for a substantial term at a full rack rent, and rental values have subsequently fallen, the tenancy will be valuable from the landlord's point of view and he will suffer loss if it ends. But the tenant is not liable for this loss.

16.7 There is, in our view, no sufficient case for recommending a change in this rule of law although, in the converse situation where the *landlord* is at fault and the *tenant* obtains a termination order, it is recommended in this Report that the tenant should be entitled to damages for loss of the tenancy. Landlords are free now to impose such liability by the terms of the tenancy agreement and would continue free to do so after implementation of the proposals in this Report. It does not seem to us that there is any need to impose this liability upon tenants irrespective of the terms of the tenancy.

Rights of re-entry in the wider context

16.8 This report has been much concerned with the subject of "re-entry" by landlord against tenant, which is so central a feature of the present law of forfeiture; and the effect of our recommendations would be to abolish it for the future in that context.

16.9 But rights of re-entry of this sort—rights, that is, which entitle someone who has granted an interest in land to re-take that interest from its present owner for fault on the part of the latter—are not confined to the relationship

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[2]Its ramifications might not be confined to our scheme for landlords' termination orders: we should have to consider making an analogous recommendation for the compensation of the landlord in our scheme for tenants' termination orders. See further footnote 9 to para. 19.8 below.

[3]In some cases there might be another drawback in that the need to raise the compensation money would put the landlord in difficulties. It is true that he could normally do so by mortgaging or selling his interest in the premises, but it would not necessarily be fair to force this course upon him.

[4]The implementation of the recommendations made in our Report on *Covenants Restricting Dispositions, Alterations and Change of User* (1985) (Law Com. No. 141) would make this more certain.

of landlord and tenant. In *Shiloh Spinners Ltd.* v. *Harding*,[5] the tenants of certain premises assigned their tenancy and required the assignees to undertake certain obligations for the benefit of other premises of the assignors. The assignors also reserved a right of re-entry entitling them to take possession of the premises assigned if these obligations were broken.[6] The House of Lords decided that this right was validly reserved even though the assignors retained no reversion and the relationship was therefore not one of landlord and tenant.

16.10 Nor are such rights confined to the particular situation which existed in the *Shiloh* case. So far as the assignment of tenancies is concerned, they are more commonly used in a rather different way. If the assignor tenant is going to remain liable, after the assignment, on the covenants in the tenancy,[7] he may well reserve a right of re-entry in the assignment which enables him to repossess the premises if the covenants are broken. This enables him to put a stop to a situation in which he is being made liable for breaches committed by someone else.

16.11 Nor is there any reason to doubt that such rights can exist in cases which have nothing to do with tenancies at all: they could be imposed upon freehold land in support of obligations affecting that land.

16.12 The *Shiloh* case makes it clear that a court of equity has a general jurisdiction to grant relief against rights of re-entry. The House of Lords in *Shiloh* decided that such relief could be granted, though on the facts relief was unwarranted. Although the courts have declined to extend equitable relief against "forfeiture" into other areas of the law involving commercial contracts,[8] there is no reason to doubt that such relief would be available also in the cases mentioned in the two preceding paragraphs. Such relief is not, however, the subject of express statutory formulation in the same way as relief against forfeiture is formulated in section 146 of the Law of Property Act 1925, or as the version of "relief" would be formulated in any legislation giving effect to the scheme for termination orders.

16.13 The principles which underlie this report may well lead logically to the view that rights of re-entry of the kinds mentioned above should be treated in broadly the same way as this report treats rights of re-entry existing between landlord and tenant. On that view they would cease to be rights of re-entry exercisable as such and become rights to apply to the court for repossession of the interest concerned, the court having an expressly formulated discretion (replacing its unformulated power to grant relief under the present law) to refuse it.

16.14 To make recommendations to this end, however, would be to go far beyond the scope of this report. Nor do we know of any reason to suppose

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[5][1973] A.C. 691.

[6]The right was limited within a perpetuity period: this is essential to the validity of such rights outside the landlord and tenant context.

[7]Normally because he was the original tenant or has entered into a direct covenant with the landlord that the covenants in the tenancy will be observed.

[8]*Scandinavian Trading Tanker Co. A.B.* v. *Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 A.C. 694; *Sport International Bussum B.V.* v. *Inter-Footwear Ltd.* [1984] 1 W.L.R. 776 (H.L.).

that rights of re-entry in those other contracts are giving rise in practice to the sort of problems with which we have set out to deal in this report. We therefore make no recommendations for change in the law relating to them.

16.15 The only right of re-entry which has caused us any misgivings in this connection is the one described in paragraph 16.10 above. If that kind of re-entry right has been employed, then one and the same breach of covenant by a tenant may give rise to two different rights: a right for the landlord to apply for a termination order at the discretion of the court under our new scheme; and a right for a previous tenant to re-enter (subject to the court's power to grant relief) under the old law. We cannot claim that this situation (which does of course exist in analogous form under the present law) is entirely satisfactory, but we think it is at present unavoidable for the following reasons.

16.16 First, it is, as we have already said, outside the scope of this report. It is not a landlord and tenant matter. In saying this we are not taking refuge behind technicality, because it would be impossible simply to apply our termination order scheme as it stands to cases where it is a previous tenant, rather than the landlord, who is taking action. A whole new scheme would have to be devised.

16.17 Second, it seems to us that the existence of this kind of re-entry right is the symptom of a more fundamental problem—the problem, that is, of tenants remaining liable under covenants in the tenancy long after they have parted with their interests. This problem is a vexed one and it has of late been attracting attention. We would as yet state no view of our own on this matter but it would be inappropriate to embark upon a statutory re-formulation of the law affecting such rights of re-entry without looking thoroughly at the legal situation which causes them to be created and which, if it were altered, might cease to do so.

16.18 There is one final point to make about the rights of re-entry mentioned in paragraph 16.8 above. They should not be available as a means to avoid our main proposals. In theory it might (for example) be possible for a landlord to grant a tenancy to a company under his control and then to have the tenancy assigned to the "real" tenant, with a right of re-entry reserved. A breach by that tenant would then give rise to a right of re-entry under the existing law which would in fact be exercised at the behest of the landlord. Relief of course would still be available, and if the facts were brought out the court would hardly be reluctant to grant it, so the landlord would be unlikely to gain from such a device. In any case we suggest that the legislative provisions giving effect to our scheme should be drafted in such a way as to render the device ineffective.[9]

[9]Compare our comments on collateral or ancillary agreements: para. 14.6 above.

PART XVII

TERMINATION ON THE APPLICATION OF THE TENANT

INTRODUCTORY: A NEW RIGHT FOR THE TENANT TO SEEK TERMINATION

17.1 We turn now to the case—in which it is the landlord who is in breach of his obligations—and consider whether and in what circumstances the tenant should have an analogous right to apply for a termination order.

Analysis of the problem

17.2 The working paper said[1] that "under the present law not even the worst possible conduct by a landlord, i.e. wrongfully evicting his tenant, gives the tenant the right to end the tenancy." It is necessary to analyse the present situation further.

17.3 Strictly speaking it is not the law itself which denies the tenant a right to end the tenancy for breaches of obligation by the landlord. Nor does the law itself operate at present to give the landlord a right to end it for breaches by the tenant.[2] The landlord has the latter right only if a forfeiture clause is expressly incorporated in the tenancy; and the tenant would have the former right if only the tenancy incorporated a corresponding provision in his favour.[3] If tenancies in practice contained such a provision, it would no doubt have given birth to a body of law analogous to the law of forfeiture; but in fact they never do, and it is relevant to ask why not.

17.4 The main reason, we think, is that the inherently superior position possessed by landlords as owners of the land (though its practical effects may be less apparent now than they once were) has served to create a situation in which the absence of any such provision is taken for granted. It is also true (as we shall point out in more detail later in this part of the report) that a tenant would nearly always suffer financial loss by terminating his tenancy, so that a provision of this kind would seldom be of much use to him unless it obliged the landlord to compensate him for the loss. But this is probably another aspect of the same point, because there is no reason in law why the provision should not provide for compensation as well.

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[1]Page 27.

[2]It would do so in future, however, because we have recommended that a forfeiture clause should no longer be necessary to enable a landlord to take termination proceedings for a tenant's breach of covenant: see paras. 5.3 and 5.4 above.

[3]The statement in the text is true in regard to obligations imposed by covenant. In the rare case where a tenant's obligation is imposed by a condition, the landlord has an automatic right to end the tenancy—and so has the tenant, even under the present law, if the landlord's obligation amounts to a condition.

Does the tenant need a right to terminate?

17.5 The working paper suggested[4] that the tenant should always have an indefeasible right to seek a termination order in circumstances corresponding with those in which the landlord has such a right because, in relation to breaches of obligation, "both landlord and tenant should be exposed to the same consequences."[5] This evoked considerable support, and little opposition, in consultation; but the question for decision is whether a remedy of this kind is needed, and for that purpose the other remedies which a tenant has for breaches of covenant by his landlord must be considered.

(a) **Existing remedies**

17.6 The tenant has, first, a right to sue for damages. This right is a valuable one, and recent Court of Appeal decisions[6] have considered the measure of damages in cases involving breaches of a landlord's repairing covenant and made it clear that damages may include the cost of obtaining alternative accommodation if the premises become uninhabitable. The tenant's right to claim damages however is only the counterpart of the landlord's similar right, and no one supposes that the existence of the latter renders the landlord's right of forfeiture unnecessary.

17.7 In certain circumstances the tenant has, second, a right which in the nature of things the landlord cannot have: to withhold rent. Thus it has been held[7] that if the landlord has broken a repairing covenant and has had notice of the need for repair, the tenant may himself arrange for the repairs to be done and deduct expenditure properly incurred in this way from rent which subsequently falls due.[8] But the tenant has no right to withhold rent merely because the landlord is in breach of covenant; and the limited right just mentioned is of little use unless the rent is large enough to absorb the cost of the repairs within a reasonable time.

17.8 The tenant has, third, the right to seek an injunction or specific performance to enforce, or restrain the breach of, a landlord's covenant. These are equitable remedies, and therefore discretionary, and the outcome may depend upon whether the covenant in question is a restrictive or a positive one. If it is restrictive, an injunction to restrain its breach is readily obtainable by a tenant against his landlord (as it is by a landlord against his tenant). If the covenant is positive, an order for specific performance, or a mandatory

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[4]Proposition 11 on pages 23–28.

[5]Page 27.

[6]*Calabar Properties Ltd.* v. *Stitcher* [1983] 3 All E.R. 759; *McGreal* v. *Wake* (1984), 269 E.G. 1254.

[7]*Lee-Parker* v. *Izzet* [1971] 1 W.L.R. 1688.

[8]It is said that a tenant may also make, and deduct from his rent, payments which (whether or not the landlord has covenanted to make them) are charged upon the land in such a way that failure to make them might result in the tenant being ousted from the property. And in addition to the right to deduct them from the rent, these payments and those mentioned in the text may be set off or set up by way of counterclaim if the landlord sues the tenant for arrears of rent—as indeed may damages for the breach of a landlord's repairing covenant even if the tenant has not himself done the repairs: *British Anzani (Felixstowe)* v. *International Marine Management (U.K.)* [1980] Q.B. 137; *Melville* v. *Grapelodge Developments* (1979) P. & C.R. 179; and see Andrew Waite, "Disrepair and Set-Off of Damages against Rent: The Implications of British Anzani", [1983] Conv. 373.

injunction, will be granted less readily (and cannot apparently be obtained at all by a landlord against his tenant[9]); but it has been held[10] that one can be granted to a tenant if there has been a clear breach of covenant by the landlord and there is no doubt about the precise action required to put it right. And section 125 of the Housing Act 1974 now gives courts an express discretionary power to order the specific performance of a landlord's covenant to repair premises which comprise a dwelling. But the remedies of injunction and specific performance, though they are of great importance to a tenant, are not universally available; and there is, in any case, no guarantee that a landlord will comply with them, especially if he lacks the money to do so.

17.9 A fifth course of action available to a tenant has come to prominence as the result of a recent case, though its existence was mentioned in the working paper.[11] In *Hart* v. *Emelkirk Ltd.*[12] the Court, by way of interim relief, granted an application by tenants of two blocks of flats for the appointment (under section 37(1) of the Supreme Court Act 1981, replacing section 45(1) of the Judicature Act 1925) of a surveyor to act as receiver of the rents and other money payable by the tenants, to perform the landlord's covenants to manage the flats. This was a case in which the landlord was in breach of several covenants and had not even been collecting the rent. This remedy may clearly be of value to tenants, especially in the case of a block of flats which is generally affected by the landlord's breaches of covenant, but from a financial point of view its shortcomings are obvious enough. It is of help only in so far as the landlord's unfulfilled obligations are to be met out of money which has still to be collected from the tenants (as distinct from money which has already been collected but not rightly applied, or money which the landlord is obliged to find from his own resources). Financially, indeed, it will cast an additional burden on the tenants because the receiver is unlikely to give his services free. For this reason alone the tenant will probably be unwilling to let the receivership drag on indefinitely and the remedy is therefore likely to provide only a short term solution.

(b) **Our conclusions**

17.10 We conclude that the existing remedies of a tenant are not such as to make a termination order scheme unnecessary or of no significant use to tenants.

17.11 In saying this we have particularly in mind the kind of case in which a landlord's breaches of covenant are frequent. None of the existing remedies provides a permanent solution in such cases. The tenant can of course respond to repeated breaches of covenant by the repeated exercise of remedies—but

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[9]*Hill* v. *Barclay* (1810) 16 Ves. Jun. 402; and see the discussion in *Regional Properties* v. *City of London Real Property Co. Ltd.*, (1979) 257 Estates Gazette 64.

[10]*Jeune* v. *Queens Cross Properties Ltd.* (1974) Ch. 97, applied in *Francis* v. *Cowcliffe* (1977) 33 P & C.R. 368; the decision in the first case was in terms confined to the breach of a repairing covenant. In the second case an order was made for the specific performance of a covenant to provide a lift in working order, compliance with which involved the repair of the lift. For a later case involving repair of a lift, see *Peninsular Maritime Ltd.* v. *Padseal Ltd.* (1981) 259 E.G. 860 (C.A.).

[11]Page 3.

[12][1983] 1 W.L.R. 1289.

this is not good enough for him, any more than it would be good enough for a landlord faced with a consistently bad tenant. It is certainly no substitute for a right to end the tenancy and find a better landlord elsewhere.

17.12 We emphasise what is implicit in the preceding paragraph: that the tenants' termination scheme is intended to be the mirror image of the landlord's termination scheme. The fact that such a scheme is available to landlords is in itself a reason a scheme should be available to tenants. The landlords' scheme does not have the actual termination of tenancies as its primary purpose, and neither would the tenants' scheme. Both are intended to put an effective weapon into the hands of an aggrieved party—a weapon which can in the last resort be used but of which the existence is likely to induce better behaviour in the party in default. We think it right that tenants, like landlords, should have such a weapon.

The necessity of a right to damages

17.13 Some consultees, in expressing their support for such a scheme commented that the working paper's proposal, as it stood, was of very limited usefulness. This is because, as a general rule, the premature ending of a tenancy would be damaging to a tenant although not to a landlord.

17.14 To the landlord, the property let amounts, in most cases, only to an investment. He has usually no personal attachment to the current tenant and does not mind losing him through forfeiture—will indeed be glad to do so if he is a bad tenant—provided the property can be re-let without loss; and at a time of inflation re-letting often results in a substantial gain. In short, the landlord usually has little to lose by the premature ending of a tenancy. And it is this fact which enables him to use the threat of forfeiture as a credible and effective means of enforcing the tenant's obligations: the tenant knows that, in making this threat, the landlord is not bluffing. The same situation would exist under the new scheme for landlords' termination orders.

17.15 The tenant's position is different. To him the property is probably not a mere investment but his home or place of business. Even if he could obtain similar accommodation at a similar rent, moving is bound to cost him money in itself. In addition, he probably stands to lose any money which he may have spent on the property and, if he carries on a business there, much or all of the value of his goodwill and (through having a forced sale) of his stock-in-trade. If he has paid a premium for the tenancy, he stands to lose that as well. All these factors would strengthen the landlord's hand if he took forfeiture or termination order proceedings against the tenant. And they would considerably weaken the tenant's hand if he took termination proceedings against the landlord. If nothing were done to redress the balance, therefore, the right to take such proceedings would be of comparatively little value to most tenants. Unless the landlord's misconduct had driven him to desperation, he would normally be forced to conclude that he had more to lose than to gain by ending the tenancy. For this reason the threat of termination would cause little fear to the landlord and so would not be an effective means of enforcing the landlord's obligations.

17.16 The scheme for tenant's termination orders which we put forward in the next part of this report therefore differs in one important respect from the suggestions made in the working paper: it includes a proposal for a tenant not only to seek a termination order but also to claim a right to damages from the landlord for the losses which termination entails. This recommendation besides being fair in principle, seems to us essential if the tenants' termination order scheme is to play a part in the relationship of landlord and tenant comparable with that played in the past by forfeiture and to be played in the future by our scheme for landlords' termination orders.

17.17 It may perhaps be said that, even with these provisions for a right to damages, the tenants' termination scheme will be little used because a tenant will seldom wish, actually, to move out of the premises let, especially if they are his home. We do not accept this. People in general do move their homes quite often in the course of a lifetime, and a consistently bad landlord is exactly the sort of factor which might induce a desire to do so. It may well be, indeed, that the tenant has an active wish to move, whether because of the landlord's behaviour or for other reasons but cannot do so because the landlord's defaults make it impossible to find anyone prepared to take over the tenancy at its proper value: in those circumstances the scheme would be particularly useful.

PART XVIII

TENANTS' TERMINATION ORDERS:

OPENING RECOMMENDATIONS

18.1 Our detailed recommendations for a tenants' termination order scheme can be made briefly. This scheme should resemble as closely as possible the scheme for landlords' termination orders which has already been put forward. For the most part, we can adapt our earlier recommendations with a minimum of explanation. At some points it is clear that different considerations should apply, and that omissions must be made or variations introduced.

Preliminary

18.2 We recommend, as we did in relation to landlords' termination orders, that our scheme should apply to existing tenancies. It is true, of course, that this scheme amounts to a complete innovation, and that the landlord's scheme does not; but we do not think, even so, that any injustice would result from applying it to existing landlord and tenant relationships.

18.3 Termination without a full court hearing would be possible, under the new scheme in circumstances analogous to those stated[1] in relation to landlords' termination, namely by agreement or by summary judgment and, similarly, the scheme should apply to the exclusion of the common law right to terminate by reason of repudiatory breach by the landlord.[2]

Grounds for a termination order: "termination order events"

18.4 In relation to landlords' termination orders, we recommended that termination order events should comprise not only breaches of covenant but what we called "disguised breaches of covenant" and "insolvency events". In relation to tenants' termination orders, however, we see no need to provide for the last two types of termination order event.

(a) Landlords' breaches of covenant only

18.5 For the purposes of the tenants' scheme our recommendation is that the only class of termination order events should be breaches of covenant by the landlord. As in the case of landlords' termination orders, we use the word "covenant" in the wide sense—in this case to include all the obligations owed by landlord to tenant, whether they are expressly undertaken or implied at common law or by statute.[3]

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[1]Paras. 4.2 and 4.3 above.

[2]Paras. 4.6 and 4.7 above.

[3]The implied obligations of a landlord under the existing law are more extensive than those of a tenant. At common law they include obligations by the landlord not to derogate from his grant and to afford the tenant quiet enjoyment of the property, together with certain obligations as to fitness or safety which arise in relation to furnished dwellings, uncompleted dwellings, or common parts retained by the landlord. These common law obligations have been supplemented by statute—see, e.g., the Housing Act 1957, s.6, and the Housing Act 1961, s.32. They are all discussed more fully in our Report on Obligations of Landlords and Tenants (1975), Law Com. No. 67, where we recommend that the category of implied covenants should be greatly extended.

(b) **Disguised breaches of covenant and insolvency events not included**

18.6 The inclusion of disguised breaches of covenant as termination order events in the landlords' scheme was intended primarily as an anti-avoidance measure. The converse danger does not arise under the present scheme. We are satisfied that the relative bargaining strength of landlords and tenants is such that tenants would not be able to impose such terms upon their landlords. The best evidence of this lies in the fact that tenants do not now impose provisions which would allow them to terminate the tenancy on breach of obligation by the landlord. As to insolvency events, similar considerations would apply. Tenancies are not in practice made terminable by the tenant on the insolvency of the landlord. (Tenants tend in any case to be less affected by the insolvency of their landlords than landlords by that of their tenants.) If such a provision were included it could only be as a result of entirely free negotiation and we see no reason why it should not take effect (as it would now) according to its terms and without any court discretion being interposed.

(c) **Tenant should always be free to seek termination for a landlord's breach of covenant, but may be free to end the tenancy in other ways**

18.7 In view of the relative bargaining strength of most landlords and tenants, we think it necessary to recommend that the tenant should be free to seek a termination order for a landlord's breach of covenant whatever provision or agreement may have been made to the contrary. But we do not think it necessary to recommend that the tenancy should be terminable *only* by means of such an order. If a landlord's breach of covenant would give rise under the present law to any other right for the tenant to terminate the tenancy,[4] we think this right could and should continue to exist.

(d) **Severance of the reversion**

18.8 In relation to landlords' termination orders we dealt with the possibility that the tenancy might be severed by the separate assignment of part of the property let. In this context the corresponding possibility is that the landlord may make a separate disposition of part of his reversion. In our view the rule should be the same. A landlord should be at risk of termination order proceedings by the tenant in respect only of breaches of obligation committed in respect of that part of the premises in which that landlord holds the reversion.

Waiver

18.9 Our recommendation about waiver is the counterpart of the recommendation made in relation to landlords' termination orders.[5] A termination order event should be regarded as waived if, and only if, the tenant's conduct, after he has actual knowledge of the event, is such that it would lead a reasonable landlord to believe, and does in fact lead the actual landlord to believe, that he will not seek a termination order on the ground of that event.[6] This should

[4]For example, the landlord's implied obligation at common law as to the initial fitness for human habitation of premises let on a furnished tenancy has been held to amount to a condition as well as to a covenant, so that its breach entitles the tenant to repudiate the tenancy: *Wilson* v. *Finch-Hatton* (1877), 2 Ex. D. 336; 46 L.J. (Q.B) 489.

[5]Para 6.8 above; and see Part VI of this report generally.

[6]The points made in footnotes 3–6 to para. 6.8 apply *mutatis mutandis*, as do our comments in para. 6.10 about conditional waiver.

be a question of fact to be decided in the light of the circumstances of each case; and if the event is a continuing breach of covenant it should equally be a question of fact whether and how far the tenant's conduct indicates a waiver for the future as well as for the past.

Breaches should remain grounds for termination proceedings even though "remedied"

18.10 As under the landlord's scheme, a termination order event should remain available as a ground for a tenant's termination order despite the fact that its consequences may have been remedied.

Starting proceedings: time limits and notices

18.11 The recommendations made under this heading are similar to those made in relation to landlords' termination orders in Part VIII of this report.

(a) **A six months' time limit**

18.12 We recommend that a tenant's right to start[7] termination order proceedings on the ground of a termination order event should exist for only six months after he has actual knowledge of the facts constituting that event.[8] If, however, the event in question is a continuing breach of covenant by the landlord, and the breach continues after the tenant is first aware of it, the six month period should run from the date on which the breach was last continuing.

(b) **Preliminary notice to the landlord**

18.13 We see no need for any special regime comparable to that provided for the benefit of tenants in certain cases involving want of repair by the Leasehold Property (Repairs) Act 1938 and the Law of Property Act 1925, section 147, and retained with adaptations in our scheme for landlords' termination orders. Preliminary notice by a tenant should in no case be compulsory, therefore, but there should be an optional notice procedure analogous to that recommended in relation to landlords' termination orders.

18.14 Under this, the tenant should have power, within the six months' time limit, to serve on the landlord a notice giving full particulars of the termination order event alleged and requiring remedial action[9] to be taken. He should be entitled, but not bound, to specify in the notice a time within which that action should be completed. If such a notice were served, the six months' time limit should be extended: in general it should then end on a date six months after the service of the notice; but if the notice specified a time for the completion of the remedial action, the period should end on a date three months after the expiry of this time, if that date were *later*.

18.15 It is a rule of law that a landlord is not liable on a covenant to repair unless and until he has notice of the need for repair.[10] But this rule is of only

[7]As in the case of landlords' termination orders (paras. 8.2–8.8), above proceedings should be treated as starting only when a writ or summons has been served.

[8]The points made in footnote 3 to para. 8.3 above apply equally here.

[9]As to "remedial action" see para. 8.69 above.

[10]For a full discussion of this subject (including the doubts as to the exact meaning of "notice") see our Report on Obligations of Landlords and Tenants (1975), Law Com. No. 67 paras. 122–131. And see *McGreal* v. *Wake* (1984) 269 E.G. 1254 (C.A.).

limited significance in the present context. As soon as the tenant sought to enforce the covenant against the landlord, the landlord would necessarily have notice of the want of repair.[11] In practice, therefore, the rule would not constitute a formal legal bar to the taking of termination proceedings by the tenant or require, as a matter of law, that the tenant should utilise the formal notice procedure recommended in the preceding paragraph.

18.16 There is, however, a wider principle which flows from the guidelines which we recommend in connection with the making of termination orders.[12] If the circumstances are such that the court would be likely, at the hearing, to make a remedial order, the tenant would always be well-advised to give the landlord a full opportunity to take remedial action before proceedings were begun. Otherwise he would be liable to be penalised by an award of costs.[13] Whether or not the breach were of a repairing covenant, this opportunity would exist only if the landlord were made aware of the breach and given time to put it right. It is this general consideration, rather than any particular rule about repairs, which would generally cause a tenant to give some kind of preliminary notice.

(c) **Notices: mode of service**

18.17 For reasons analogous to those given in connection with landlords' termination orders,[14] we recommend that the service of a tenants' notice under the optional notice procedure should be governed by the existing law stated in section 196 of the Law of Property Act 1925.

[11]Cf. para. 128 of the report mentioned in the preceding footnote.
[12]Paras. 19.22–19.25 below.
[13]Para. 19.26 below. Conversely, if the tenant gave the landlord such an opportunity, and the landlord did not take it, the tenant's chances of obtaining an absolute termination order would be increased: para. 19.24 below.
[14]Paras. 8.73–8.76 above.

PART XIX

TENANTS' TERMINATION ORDERS: THE COURT'S POWERS AT THE HEARING

Preliminary matters

19.1 As in the case of landlords' termination orders, the court should have three basic choices: to make an absolute termination order; to make a remedial one; or to make neither type of order.

(a) The primary claim

19.2 The tenant's main claim will normally be simply for "a termination order".

(b) Ancillary claims

19.3 In addition to the termination order itself a tenant may claim:

(i) *Costs incurred in reference to the termination order event.*

19.4 If a termination order event has in fact occurred, the landlord should be liable to repay any reasonable costs properly incurred by the tenant in ascertaining the existence and nature of the event and in deciding upon his course of action, including the fees of a surveyor, valuer, legal adviser or other expert, and including such costs incurred in the preparation and service of an optional preliminary notice under our scheme.[1]

19.5 As in the case of costs incurred in analogous circumstances by the landlord, these costs could be claimed whether or not the tenant took termination proceedings; but if he did take such proceedings we recommend that the court, whether or not it made a termination order, should be bound at his request to order their payment. We recommend later[2] that the court should also have a discretionary power to include their payment amongst the action which the landlord was required to take under a remedial order.

(ii) *Damages, injunction, etc.*

19.6 The court should have a similar power to impose terms if it granted a remedial order or refused a termination order altogether.

(iii) *Damages for loss of the tenancy.*

19.7 For the reasons given earlier,[3] we recommend that a tenant whose tenancy ends because of a termination order obtained by him should have a right to damages from the landlord.[4]

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[1]Para. 18.14 above.
[2]Para. 19.17(a) above.
[3]Paras. 17.11–17.14 above.
[4]In the section of this report dealing with landlords' termination orders, we considered but rejected the possibility that the court should have power to award compensation to a tenant whose tenancy was ended by such an order (paras. 16.2–16.5 above). If this possibility were to be accepted, it would lead logically to consideration of an analogous power in the context of tenants' termination orders: to award compensation to a *landlord* if the tenancy were ended in this way. But the circumstances in which such compensation could be ordered would be very rare, and the case for recommending a power of this kind is even weaker than the case for compensation to tenants.

19.8 We consider that this should be achieved by giving the tenant a right to seek damages from the landlord in the same way as if the tenancy were a contract which could be terminated by the commission of a repudiatory breach on the part of the landlord and its acceptance by the tenant;[5] and as if it had been so terminated at the date at which the termination order brought the tenancy to a end.

19.9 This would enable the tenant to claim damages for the value of the tenancy of which he is constructively deprived and for consequential losses on the same lines as if he had been evicted from the whole premises.[6] These losses could include removal costs and the expense of setting up in new premises[7] (but not the cost of the premises themselves) and, in the case of a business tenant, loss of profits[8] and presumably loss of good will and any diminution in the value of stock-in-trade. But the value put upon the tenancy for this purpose,[9] and the extent to which damages were recoverable under these other heads, would depend upon the existing law about remoteness of damage for breach of contract and so would involve the question of what was within the contemplation of the parties to the tenancy (as to use of the property and other relevant matters) at the time of its creation.[10]

19.10 However, we recommend that the rules as to remoteness of damage should be applied with one modification: it should not be open to any landlord under a tenancy granted before the legislation implementing our proposals comes into effect, to deny liability on the ground that that legislation was not foreseeable.[11] It may seem at first sight that the effect of this modification on such landlords will be harsh. However, the landlord will only incur liability where he is in breach of covenant, for which he would be liable for *some* damages under the present law; and the modification cannot increase the measure of damages except where the landlord's breach is so serious as to justify termination of the tenancy. Moreover the modification will not affect breaches occurring before the date on which our proposals come into force[12] and most landlords commiting a breach after that date should be aware of the potential consequences. This leaves the case of continuing breaches which begin before that date but continue after it. If, in such a case, the landlord is willing to remedy the breach, the court will be virtually certain to make a remedial order rather than an absolute order, so giving him an opportunity to do so.

19.11 We are aware that it may be thought in some ways inappropriate to apply contract rules to tenancies which may have been created many years before and the parties to which may have changed several times. We accept

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[5]It appears that the doctrine of repudiatory breach has no place in the law of landlord and tenant: see paras. 4.6, 4.7, and 18.3, above. But in cases of eviction from the whole of the premises, the consequences as between the landlord and the tenant may well be similar as regards the compensation of the tenant.

[6]Cf. generally *McGregor on Damages* (14th ed., 1980), paras. 770 and 771.

[7]Cf. *Grosvenor Hotel Company* v. *Hamilton* [1894] 2 Q.B. 836 (C.A.).

[8]Cf. *Rolph* v. *Crouch* (1867) L.R. 3 Ex 44.

[9]See *John Waterer, Sons and Crisp Ltd.* v. *Huggins* (1931) 47 T.L.R. 305 (C.A.).

[10]*Hadley* v. *Baxendale* (1854) 9 Exch. 341; *Victoria Laundry (Windsor) Ltd.* v. *Newman Industries Ltd.* [1949] 2 K.B. 528 (C.A.); *C. Czarnikow Ltd.* v. *Koufos* [1969] 1 A.C. 350.

[11]Cf. *John Waterer, Sons and Crisp Ltd* v. *Huggins* (1931) 47 T.L.R. 305 (C.A.).

[12]See para. 21.7 below.

that the result of doing so may sometimes be that there is uncertainty as to the exact amount which the tenant will be able to recover and that he may fail at the end of the day to recover in full the losses involved in the termination of the tenancy.[13] However, these rules are applied to actions for damages for eviction from the whole property[14] and for other breaches of covenant[15] under the present law. Moreover, the uncertainty will be reduced by the fact that assessment of damages on the grant of a termination order will no doubt follow similar lines to those on which damages for total eviction are assessed under the present law. The only alternative to our proposals would be to prescribe specific heads of damage and to recommend that all losses occurring under those heads should be fully recoverable; but the adoption of such a course would in our view create complication in the law with the risk of unintended limitations.

19.12 The landlord's liability however should not be diminished by his own wrong. If, for example, he has persistently failed to comply with his covenant to repair, the fact that the property is out of repair might serve of itself to diminish the value of the tenancy. We therefore recommend, for the removal of any doubt, that the tenant's right to obtain a termination order and seek damages for the loss of the value of the tenancy should be without prejudice to his right to obtain full damages for reduction in the value of the tenancy caused by the prior breaches of covenant on the part of the landlord.

The choices open to the court

(a) **Absolute order**

19.13 An absolute order would reflect the court's view (arrived at in accordance with the guidelines explained later in this part of the report[16]) that the tenancy should terminate without any further chances being given to the landlord.

19.14 An absolute order would have the effect of terminating the tenancy on a date specified in the order. Considerations applicable to the fixing of this date would be a little different from those which would apply in relation to landlords' termination orders. Since he himself had brought the termination proceedings, the tenant would necessarily be willing to give up possession of the property. He might want time to make arrangements, however, and the landlord might also have some special reason for asking for the date of the actual termination to be delayed. The court's task would be to fix a date which was reasonable in all the circumstances. In the absence of any contrary order rent would remain payable, and the other terms of the tenancy would remain in force, up to that date. But in relation to landlords' termination orders, the court should have power to specify different terms to apply during the period after the hearing and, in particular, to specify that a sum less than the rent reserved by the tenancy be payable.

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[13]Because, for example, the loss is too remote: see para. 19.9 above.
[14]Cf. *Grosvenor Hotel Company* v. *Hamilton*, [1894] 2 Q.B. 836 (C.A.).
[15]*Conquest* v. *Ebbetts* [1895] 2 Ch. 377 (C.A.); *Lepla* v. *Rogers* [1893] 1 Q.B. 31.
[16]Paras. 19.22–19.25 below.

19.15 An absolute order could be combined with orders for the payment of costs incurred in relation to the termination order event,[17] of damages for breach of covenant and for loss of tenancy, in accordance with the principles recommended earlier.[18]

(b) **Remedial order**

19.16 A remedial termination order would reflect the court's view (arrived at in accordance with the guidelines[19]) that the tenancy should be preserved if, but only if, the landlord took specified action of a remedial nature within a specified time.

19.17 As in the case of landlords' termination orders, no exhaustive definition of remedial action is given; but it should specifically include the following:

(a) *Making any payment to the tenant or any other person.*—The payment in question might be general costs,[20] or payments due under the terms of the tenancy (for example, of rates payable by the landlord), or it might be a payment of costs incurred in reference to the termination order event,[21] or of damages,[22] in accordance with the principles recommended earlier.

(b) *In the case of any termination order event which is a continuing breach of covenant, discontinuing the breach.*—Remedial action could thus consist in, or include, the ending of the state of affairs which constituted a continuing breach of covenant.

(c) *In the case of any termination order event, taking action appropriate to rectify the consequences of the event.*—As in the case of landlords' termination orders,[23] this heading is intended to be a wide one and to apply to termination order events of all kinds.

19.18 We emphasise that the preceding paragraph is intended merely to indicate the kind of action upon which the court could suspend a remedial order if it decided, in accordance with the guidelines discussed below,[24] to make one.

19.19 The time limit for the taking of the remedial action should of course be fixed in accordance with the court's view, reached in the light of the evidence, of the period reasonably required for its completion. The tenancy would end immediately upon the expiry of the time limit if the remedial action had not been completed by then; but the court, having fixed the date, should have power (exercisable on the landlord's application, made at any time before the date had passed) to substitute a later date if the circumstances justified a postponement.

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[17]Paras. 19.4 and 19.5 above.
[18]Paras. 19.7–19.12 above.
[19]Paras. 19.23–19.25 below.
[20]Para. 19.26 below.
[21]Paras. 19.4 and 19.5 above.
[22]Para. 19.6 above.
[23]Para. 9.24 (c) above.
[24]Paras. 19.22–19.25.

19.20 It remains to add that, even if a remedial order were not *suspended on* the payment of costs incurred in relation to the termination order event, or of damages etc., it could be *combined with* an order for the payment of such sums in accordance with the principles already recommended. It could also be combined with an order for the payment of compensation to the tenant[25] in accordance with the principles recommended earlier.

(c) **No order**

19.21 A decision to make no termination order would not preclude the making of an order for payment of any of the sums mentioned in the preceding paragraph—except damages for loss of tenancy, which could of course be payable only on termination.

Guidelines for the court's decision

(a) **When the court should make an absolute order**

19.22 There are three cases in which, we recommend, the court should make an absolute order. The main case is the first, and the other two are subsidiary:

Case (1) *Where the court is satisfied, by reason of the serious character of any termination order events occurring while the present landlord has been the landlord, or by reason of their frequency, or by a combination of both factors, that he is so unsatisfactory a landlord that the tenant ought not in all the circumstances to remain bound by the tenancy.*

Case (2) *Where the court is satisfied that a transfer of the reversion has been made in order to forestall the making of an absolute order under Case (1) above, that there is a substantial risk of the continuance or recurrence of the state of affairs giving rise to a termination order event on which the proceedings are founded, and that the tenant ought not in all the circumstances to remain bound by the tenancy.*

Case (3) *Where the court, though it would wish to make a remedial order, is not satisfied that the landlord is willing, and is likely to be able, to carry out the remedial action which would be required of him.*

19.23 The cases set out above are the same, as the cases which we recommended[26] in relation to landlords' termination orders—except that the latter included another case, Case (3) wrongful assignment and insolvency, which is not appropriate here.

19.24 With reference to Case (3) of paragraph 19.22 above, as in relation to landlords' termination orders:[27] if the tenant has given the landlord time (whether by means of a notice or otherwise) to take full remedial action before the hearing, and the landlord has not done so, the court should take that fact into account in deciding whether he would be willing, and is likely to be able, to take the remedial action which a remedial order would require.

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[25]Paras. 19.7–19.12 above.
[26]Paras. 9.34, 9.41, 9.43 and 9.48 above.
[27]Para. 9.50 above.

(b) **When the court should make a remedial order or no order**

19.25 If the circumstances are such that the court does not make an absolute order, we recommend that it should make a remedial one *unless* one of the following situations exists, in which case it should decline to make a termination order at all. The situations are:

(a) Remedial action has already been taken.

(b) Remedial action is impossible or unnecessary.

(c) Remedial action ought not in all the circumstances to be required.

These headings are the same as those proposed in relation to landlords' termination orders.[28]

Costs in general

19.26 We have made specific recommendations about costs incurred in reference to the termination order event.[29] Further, if the tenant has not given the landlord time to take full remedial action before the hearing, but the court is satisfied that the landlord has taken such remedial action (if any) as it was in all the circumstances reasonable for him to take, the court should be specifically empowered, if it makes a remedial order, to order the tenant to pay the landlord's costs if the landlord complies with it.[30] For the rest, the court should have full discretion as to the award of costs.

[28]Para. 9.51 above.
[29]Paras. 19.4 and 19.5 above.
[30]Para. 9.53 above.

PART XX

TENANTS' TERMINATION ORDERS: DERIVATIVE INTERESTS

20.1 Derivative interests consist mainly[1] of sub-tenancies and mortgages.[2] Mortgagees have adequate remedies and our termination order schemes are not designed for use by them. This part of the report therefore deals with the problems which arise when there are one or more sub-tenancies and a tenant or sub-tenant applies for a termination order,[3] and with the protection of mortgagees in cases where a tenant's termination order is applied for by a tenant or sub-tenant.[4]

Tenants' termination orders in cases involving sub-tenancies

(a) Where the applicant for a termination order is the ultimate sub-tenant

20.2 In cases involving sub-tenancies the person most likely to suffer from a landlord's breach of covenant is the person in occupation, that is the lowest sub-tenant in the "chain". He is also therefore the person most likely to start proceedings for a tenant's termination order. As between him and *his* landlord (and assuming that there is no mortgage involved) the position will be governed wholly by the recommendations set out in the preceding parts of this Book.

20.3 However, it is quite likely that, if there is a "chain" of tenancies, there is also a "chain" of covenants. For example, a landlord (L) may have entered into a particular covenant with his tenant (T) and T may have entered into and identical covenant[5] with a sub-tenant (ST).[6] If the person at the bottom of the "chain" (ST) starts proceedings for a tenant's termination order based on T's breach of this covenant, he may recover damages from the intermediate tenant (T) in accordance with the principles set out in paras. 19.8 to 19.12 above. In that event, can T recover the damages which he is forced to pay to ST, from L? So far as damages for breach of covenant are concerned, under the present law T can presumably recover from L, as damages for breach of L's covenant with T, any damages which he is forced to pay to ST for breach of covenant—as long as they are not too remote.[7] The question of remoteness depends upon the normal contract rules.[8] In our view the present law[9] should also provide the answer to the question posed above, so that the amount

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[1]A tenant can of course grant other interests (such as easements) out of his tenancy. In this part the terms "sub-tenant" and "sub-tenancy" include any member of the derivative class as defined in para. 10.29 above (other than a mortgagee) and the interest which he holds respectively.

[2]This term is used here to include both mortgages by way of subdemise and charges, whether they are legal or equitable.

[3]See paras. 20.2 to 20.8 below.

[4]See para. 20.9 below.

[5]Or a covenant to *procure* the carrying out of the relevant obligation.

[6]The covenants can of course be passed down a "chain" of any length.

[7]Compare *Ebbetts* v. *Conquest* [1895] 2 Ch. 377 (C.A.).

[8]See para. 19.19 above.

[9]Modified as suggested in para. 19.10 above. In sub-tenancy cases the modification would apply regardless of whether the intermediate tenant applied for a termination order or merely sued the landlord for damages which included the amount payable to the sub-tenant.

recoverable by T from L in respect of what T has to pay to ST would depend on whether L and T contemplated the possibility of sub-letting at the time of the grant of the tenancy by L and on the extent to which the damages actually payable by T to ST were within the contemplation of L and T at that time. The result will be the same whether T himself asks for a termination order against L or merely sues for damages.

(b) **Where the applicant for a termination order is not the ultimate sub-tenant**

20.4 Although in most cases proceedings for a tenant's termination order will be begun by a sub-tenant at the bottom of a "chain", there may be occasions when such proceedings are originally instituted by an intermediate tenant. For example a tenant who has sub-let part of the property may wish to bring his tenancy to an end because of breaches of covenant by his landlord. And it is even possible to imagine a termination order being sought by a tenant who is not in occupation at all. If, in the example given above, L owes repairing obligations to T and T owes similar obligations to ST, and T honours his obligations but L does not, it will be T rather than ST who wishes to terminate. Cases where the original applicant is an intermediate tenant and not the ultimate sub-tenant present special problems to which we now turn.

20.5 It is first necessary to consider whether a termination order obtained by an intermediate tenant should have the effect of terminating sub-tenancies derived out of the intermediate tenancy. In our view the position must be the same as in the case of a termination order granted to a landlord:[10] the termination of the tenant's interest must involve the termination of the interests of all derivative interest holders. Otherwise unfairness might well result, either to them or to the landlord.

20.6 However, it must be remembered that an intermediate tenant is more "responsible" for the holders of derivative interests derived directly out of his interest than is the landlord; and by obtaining a termination order he will be bringing them to an end. Further more, he will normally have entered into implied covenants not to derogate from his grant and for quiet enjoyment: whether or not the obtaining of a termination order amounts to a breach of any such covenants, it seems to us that it would be inconsistent with their spirit. These considerations lead us to the conclusion that, although there should not be an absolute rule prohibiting an intermediate tenant from obtaining a tenant's termination order, such a tenant should only be permitted to bring his tenancy to an end by this means if the court is satisfied either:

(i) that all sub-tenants will be adequately compensated for any losses arising through termination, and that any objections they may have are not sufficient to outweigh the desirability of termination taking place, or

(ii) that they have consented to termination.[11]

If the court were satisfied of one or other of these things at the hearing (or were satisfied that there were no sub-tenants in existence) the order would take

[10]See paras. 10.2–10.4 above.

[11]Unless his interest were an onerous one, a sub-tenant would not normally give consent unless he were satisfied as to compensation.

the normal form. Otherwise its coming into effect would be suspended until the court was so satisfied.

20.7 The effect of the proposals in the last paragraph on a sub-tenant will be that he will be able to argue that (quite apart from questions of compensation) the intermediate tenant should not be allowed to terminate the sub-tenancy by obtaining a tenant's termination order against the landlord. The sub-tenant may well wish to advance this argument if, for example, the property concerned is his home. If the court agrees with him it will refuse the application of the intermediate tenant for a termination order. However in many cases where the landlord is in serious breach of his obligations the effect of the breaches on the sub-tenant will be such that he will be quite willing for his sub-tenancy to come to an end as long as he receives adequate compensation. In a substantial proportion of such cases the sub-tenant will doubtless be able to agree the amount of compensation with the intermediate tenant and they will arrive at an arrangement under which the sub-tenant consents to the termination of his tenancy in return for the payment (or promise of payment) of the compensation by the intermediate tenant. Where the sub-tenant is willing for his tenancy to be terminated[12] but the amount of the compensation or the arrangements for its payment cannot be agreed between him and the intermediate tenant, the court will be able to assess the compensation but will only grant the intermediate tenant's application for a termination order if it is satisfied that the sub-tenant will actually receive it, and should make an order for its payment at the same time as making the termination order.

20.8 We have referred above to "adequate compensation" for sub-tenants. In view of the particular relationship between sub-tenants and the holders of intermediate tenancies[13] we do not consider that the amount of such compensation should be limited by considerations of remoteness of damage: the sub-tenant should be fully compensated for all losses flowing from the termination of his sub-tenancy. However this proposal requires us to consider whether an intermediate tenant, who has paid[14] such compensation to his sub-tenant in order to secure his consent to termination, should be able to recover the whole sum paid from the landlord as damages for the repudiatory breach which the latter is deemed to have committed.[15] In our view it should not be possible for the amount of the landlord's liability to the intermediate tenant to be increased by reason of the fact that the termination proceedings had been initiated by the intermediate tenant instead of by the ultimate sub-tenant. We therefore recommend that the amount recoverable by the intermediate tenant from the landlord in respect of compensation paid to sub-tenants should not exceed the amount which the intermediate tenant would have recovered if the ultimate sub-tenant and the holder of each interest superior to his in the "chain" had in turn brought successful termination proceedings against their own landlords. To illustrate this proposal we take an example similar to that in paragraph 20.3 above except that there is an extra link in the "chain": there is therefore a landlord (L), a tenant (T) a sub-tenant (ST) and a sub-sub-tenant (SST). Suppose that T brings termination proceedings against L and that he has to

[12]Or the court overrules his objection to termination.
[13]See para. 20.6 above.
[14]Or agreed to pay.
[15]See paras. 19.8–19.11 above.

pay compensation to ST and SST to obtain their consent to termination of their interests.[16] In order to establish how much T can recover from L in respect of this compensation, it will be necessary first to decide how much SST would have recovered from ST had he brought successful termination proceedings against him.[17] It will then be possible to establish how much ST would have recovered from T in a similar action, in respect of his own losses and the amount for which he would have been liable to SST.[18] This is the maximum[19] figure which T will be able to recover from L. As indicated earlier,[20] cases where these problems arise will be rare.

Tenants' termination orders in cases involving mortgages

20.9 In our view a tenant's termination order should not be granted if the grant would prejudice the interests of a mortgagee of the tenancy concerned or of any tenancy derived out of it. We therefore recommend that if a tenant's termination order is applied for in respect of a tenancy which is mortgaged (or out of which a sub-tenancy has been derived which is mortgaged) the court should not grant the order[21] unless it is satisfied either:

(a) that all mortgagees have received or will receive fair compensation (which would normally be an amount equal to the amount of the debt or the value of the security whichever is the less), or
(b) that they have consented to termination.

This recommendation is similar to that made in relation to sub-tenancies in para. 20.6 above. The machinery for ensuring that mortgagees' interests are in fact protected would be the same as suggested in that paragraph.

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[16]See para. 20.6 (ii) above.
[17]See paras. 19.7–19.11 above.
[18]See para. 20.3 above.
[19]The amount recoverable may of course be further reduced by the application of the normal rules of remoteness between L and T. Furthermore T will not in any circumstances recover more than he has actually paid to ST and SST.
[20]Para. 20.4 above.
[21]Even if a tenant's termination order is granted it will not of course affect the mortgagor's personal liability under the covenant to repay.

PART XXI

TENANTS' TERMINATION ORDERS: CONCLUDING RECOMMENDATIONS

Joint Landlords

21.1 In relation to landlords' termination orders, we dealt with the case in which the tenancy was vested in two or more people and fewer than all of them wanted it to continue.[1] At first sight there might seem to be an analogous case in the present context that where there are two or more landlords and fewer than all of them want to resist the tenant's application for a termination order. But the analogy is not a true one because there would be no possibility of binding fewer than all of the landlords to the tenancy: so long as they all remain owners of the freehold (or other reversion), they would all have to remain landlords.[2] We do not propose any special rule in this context. The existing law and procedure does not clearly make provisions for cases in which joint landlords do not agree among themselves either as to how to deal with any dispute between themselves and their tenant or with proceedings commenced by the tenant against them. It would not be just if a claim by a tenant for an absolute termination order and damages for loss of tenancy should inevitably result in the granting of the order, irrespective of the merits of the claim, merely because one or more of joint landlords refused to join in resisting it. Joint landlords hold their legal interest in the land as trustees for sale and do not necessarily themselves have any beneficial entitlement and the trust relationship may give rise to difficult problems but the court has power to give directions. If the scheme for tenants' termination orders is to be implemented consideration should be given to the making of rules of court supplying a simple procedure for dealing with any dispute between joint landlords with reference to proceedings by the tenant.

Court jurisdiction, Crown application and drafting

21.2 As in connection with landlords' termination orders, we recommend that the County Court should have jurisdiction in relation to all questions arising out of the scheme for tenants' termination orders in cases where the rateable value of the property does not exceed £2,000; and that this figure should be increased in line with any general increases made from time to time in county court jurisdiction based upon rateable values. As to Crown application and drafting[3] no further comment is required.

Transitional

21.3 The same basic questions arise here as arose in relation to landlord's termination orders.[4]

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[1]Part XII of this report.
[2]Principles of trust law might of course be relevant in determining their decision: cf. paras.12.6-12.9 above.
[3]Paras. 14.4-14.7 above.
[4]Part XV of this report.

(a) **When should the new legislation come into force ("the operative date")?**

21.4 The answer to this question should be the same: on a date to be appointed by the Lord Chancellor. We call this "the operative date".

(b) **To what cases should the new legislation apply?**

21.5 The answer to this question must be different. Our scheme for tenants' termination orders would serve, not to replace an old method of termination by a new one, but to create a method of termination where there was none before. The choice which presented itself in relation to landlords' termination orders—between a "breach-based" provision and an "action-based" provision—does not arise here, because there is no relevant action which a tenant could have taken, prior to the operative date, in respect of a landlord's breach of obligation. The transitional provision needed in the present context must necessarily be a breach-based one.

21.6 We therefore recommend that the new system of law should apply when, and only when, the breach of covenant constituting a termination order event occurred on or after the operative date. However, a continuing breach, even if it began before the operative date, would attract the application of the new law if it continued after that date.

PART XXII

SUMMARY OF RECOMMENDATIONS

PART I GENERAL INTRODUCTION

(1) The law of forfeiture has become unnecessarily complicated, is no longer coherent and gives rise to injustices. The report recommends its replacement by a new system. In cases where the fault is that of the landlord, the tenant now has no means of terminating the tenancy. The report recommends that he should have a right to do so which is broadly analogous to that of the landlord under the new system.
(Paragraphs 1.3–1.4)

THE PRESENT LAW OF FORFEITURE, ITS DEFECTS AND AN OUTLINE OF PROPOSED SCHEMES

PART II THE PRESENT LAW OF FORFEITURE

PART III DEFECTS IN THE PRESENT LAW AND AN OUTLINE OF OUR RECOMMENDATIONS

(2) Now that re-entry usually occurs constructively by the commencement of legal proceedings (actual re-entry being unlawful in many cases), and relief is usually available, it is anomalous that the tenancy should be ended in this way. In particular:

(a) The landlord's proceedings have to be framed as proceedings for possession when in reality they are proceedings designed to terminate the tenancy.

(b) During the period between the re-entry and the resolution of the legal proceedings, the position of the parties is unsatisfactory and equivocal.

The doctrine of re-entry should be abolished and replaced by a scheme under which, apart from termination by agreement, court proceedings would always be necessary in principle to end a tenancy and the tenancy would continue in full force until the court ordered its termination. Such a scheme would have further advantages:

(1) It would serve to extend the principle of the Protection from Eviction Act 1977, section 2.

(2) The landlord's primary right to end the tenancy would be merged with the tenant's (largely statutory) right to seek relief so as to produce a single principle: that the landlord has no right to terminate, but only a right to seek from the court a termination order which the court has a discretion to grant or to refuse.

(3) It would pave the way for reform of the law of waiver, which can take place only after the removal of the artificialities inherent in the doctrine of re-entry.

(Paragraphs 3.2–3.10)

(3) Under the present law there are two almost wholly distinct sets of rules for the granting of relief to a tenant: one for cases where he has failed to pay

rent, and the other for cases where he has broken some other obligation. The scheme incorporates a uniform set of rules applicable to all cases.
(Paragraphs 3.11–3.13)

(4) Other defects exist in the present law—for example:
(a) The rule that a landlord cannot forfeit for breach of covenant unless there is a forfeiture clause serves only to add verbiage which should be unnecessary.
(b) The implied condition whereby a tenancy may be ended for denial of title is outdated.
(c) The law about relief against forfeiture has a number of detailed defects: and the parties' rights differ according as proceedings are taken in the High Court or a county court.
(d) The law about formal demand for rent is obsolete.
(e) The exceptional cases in which (under the Law of Property Act 1925, section 146(8)—(10)) the tenant is debarred from claiming relief are a source of potential unfairness and need not be reproduced.
(f) The general requirement (under the Law of Property Act 1925, section 146(1)) that preliminary notice be served on a tenant prior to forfeiture proceedings causes difficulties and uncertainties and need not be retained in its present form.
(g) Although a special notice regime should be retained for cases involving lack of repair, there is no justification for the two separate regimes which now exist (under the Law of Property Act 1925, section 147, and the Leasehold Repairs Act 1938).
(h) The fact that a breach of covenant, once remedied, cannot be the subject of forfeiture proceedings, is unfair to the landlord, particularly since it may prevent the tenancy being ended for persistent breaches (for example, of the covenant to pay rent).
(i) Conversely, the doctrine of "stigma", which leads to the almost automatic refusal of relief in particular classes of case, is unfair to the tenant.
(j) The rules about relief for sub-tenants and other derivative interest holders are in several ways inadequate.
(k) The court's present inability to grant relief to fewer than all of a number of joint tenants should be removed.
(Paragraphs 3.14–3.23)

Defects in the present law: termination by the tenant

(5) The present law does not but should provide a way for the tenant to terminate his tenancy for fault on the part of the landlord.
(Paragraph 3.24)

THE DETAILS OF THE TERMINATION ORDER SCHEMES PROPOSED

TERMINATION ON THE APPLICATION OF THE LANDLORD

PART IV PRELIMINARY

(6) The scheme is based upon a system under which there would be no distinction between termination for non-payment of rent and termination for other reasons and under which the tenancy would continue in full force until

the court made an order—a *"termination order"*—determining the date on which it should end.
(Paragraph 4.1)

(7) It is not, however, inherent in the scheme that a full court hearing would take place in every case: a tenant who realised that his tenancy would inevitably be terminated could surrender it; and it would be possible for the landlord, under appropriate rules of court, to obtain summary judgment.
(Paragraphs 4.2 and 4.3)

(8) The scheme should apply to existing tenancies as well as future ones (subject only to the transitional provisions mentioned in paragraphs (99)—(102) of this summary).
(Paragraphs 4.4—4.5)

(9) To remove any possible doubt, it should be made clear that a tenancy cannot terminate, outside the scheme, through the doctrine of repudiatory breach.
(Paragraphs 4.6 and 4.7)

PART V GROUNDS FOR A TERMINATION ORDER: "TERMINATION ORDER EVENTS"

(10) Grounds on which the landlord may base an application for a termination order may conveniently be called *"termination order events"*. They should be of three kinds.
(Paragraph 5.1)

(a) Breaches of covenant

(11) All breaches of covenant by the tenant should be termination order events. We use the word "covenant" in the wide sense, to include all the obligations owed by tenant to landlord, whether they are expressly undertaken or implied at common law or by statute.
(Paragraph 5.2)

(12) Although under the present law breaches of covenant are grounds for forfeiture only if they are expressly made so by the inclusion in the tenancy of a "forfeiture clause", no such special provision should be necessary to make them termination order events. But:

(a) This should not apply to tenancies granted before the date on which the implementing legislation comes into force: in such tenancies a breach of covenant should be a termination order event only if covered by a forfeiture clause.

(b) If a tenancy, though granted after that date, is granted in pursuance of a binding obligation in existence before that date, and the obligation was such that a forfeiture clause was not to be included (or was not to be included in relation to some of the tenant's covenants) then the obligation should be interpreted as requiring the inclusion of an express term excluding the termination order scheme in relation to the tenant's covenants (or some of them as the case may be).

(Paragraphs 5.3—5.8)

(13) Where an obligation entered into before the date on which the implementing legislation comes into force was such that a forfeiture clause *was* to be included in a tenancy granted after that date, that requirement should be treated as fulfilled if the tenancy maintains silence on the point, so allowing breaches of covenant to be termination order events.
(Paragraph 5.9)

(b) **Disguised breaches of covenant**

(14) Termination order events should also include all events on the happening of which the tenancy (whether through the inclusion of a condition or limitation or for any other reason) is to cease (whether immediately or after a period) or the landlord is to have the right (whether or not on notice) to apply for a termination order, to forfeit the tenancy or to bring it to an end in any other way or to require its surrender or its assignment to a person nominated or to be nominated by him—being events against which a landlord would be expected to protect himself (if he protected himself at all) through the imposition of a covenant upon the tenant and including (but without prejudice to the generality of the foregoing words) all events which consist in or result from any of the matters listed in para. 5.18.
(Paragraph 5.18, and see paragraphs 5.10—5.17)

(c) **Insolvency events**

(15) Termination order events should also include all events on the happening of which the tenancy (whether through the inclusion of a condition, limitation or for any other reason) is to cease (whether immediately or after a period) or the landlord is to have the right (whether or not on notice) to apply for a termination order, to forfeit the tenancy or bring it to an end in any other way, or to require its surrender or its assignment to a person nominated or to be nominated by him—being events having to do with the actual or threatened bankruptcy or insolvency of the tenant or any surety and including (but without prejudice to the generality of the foregoing words):

- bankruptcy of, or the commission of any act of bankruptcy by, or the making of a receiving order against, a tenant or surety who is an individual;
- entering into liquidation, compulsory or voluntary, by any tenant or surety which is a company, or having a receiver appointed in respect of any of its assets;
- a tenant or surety entering into any arrangement or composition for the benefit of creditors; or
- a tenant suffering the tenancy to be taken in execution; or a tenant or surety suffering any distress or execution to be levied on goods.

(Paragraph 5.20; and see paragraph 5.19)

Special considerations

(a) **Non-payment of rent**

(16) The law which now prescribes the circumstances in which a tenancy may be forfeited for non-payment of rent is unsatisfactory and is usually circumvented by the inclusion in the tenancy of a "dispensing term". In future,

non-payment of rent should become a termination order event without formal demand after 21 days (whether or not there is a dispensing term)—unless there *is* a dispensing term and it provides in this respect for a period different from 21 days, in which case the different period should apply.
(Paragraphs 5.21—5.26)

(17) The recommendation summarised in the preceding paragraph should apply whether the tenancy is granted before or after the coming into force of the implementing legislation.
(Paragraph 5.28)

(b) **Denial of title**

(18) In tenancies granted after the implementing legislation comes into force, there should no longer be an implied term to the effect that the tenant should not deny or disclaim the landlord's title; and any such term implied in a tenancy granted before that time should be ineffective. But this should not prevent the inclusion of, or render ineffective, any express term to similar effect.
(Paragraphs 5.32—5.35)

(c) **Severance of the tenancy**

(19) If parts of premises originally held as a whole under a single tenancy have been the subject of separate assignments to different people, a tenant of any one part should be at risk of termination proceedings in respect only of termination order events occurring in relation to that part.
(Paragraphs 5.36—5.38)

(d) **Should there be exceptions?**

(20) All events falling within the general definition of termination order events should attract the court's discretionary powers which correspond with its power to grant relief under the present law. The existing exceptions to the court's relief-giving powers under section 146(8)–(10) of the Law of Property Act 1925 should have no counterpart in the proposed scheme.
(Paragraphs 5.39—5.57)

PART VI WAIVER

(21) The law which now governs the circumstances in which a landlord is debarred by waiver from forfeiting a tenancy on a particular ground is unsatisfactory. A termination order event should be regarded as waived if, and only if, the landlord's conduct, after he has knowledge of the event, is such that it would lead a reasonable tenant to believe, and does in fact lead the actual tenant to believe, that he will not seek a termination order on the ground of that event.
(Paragraph 6.8)

(22) And if the event is a continuing breach of covenant, it should be a question of fact whether and how far the landlord has led the tenant reasonably to believe that he has waived it for the future as well as for the past.
(Paragraph 6.8 and 6.9)

(23) It should be possible, according to analogous rules, for the landlord to grant a waiver which is conditional upon some action on the part of the tenant.
(Paragraph 6.10)

PART VII BREACHES SHOULD REMAIN GROUNDS FOR TERMINATION PROCEEDINGS EVEN THOUGH "REMEDIED"

(24) A termination order event should generally remain available as a ground for a termination order despite the fact that its consequences may have been remedied.
(Paragraph 7.13; and see Part VII generally)

PART VIII STARTING PROCEEDINGS: TIME LIMITS AND NOTICES

(25) The landlord's right to start termination order proceedings on the ground of a termination order event should exist for only six months after he has actual knowledge of the facts constituting that event. If, however, the event is a continuing breach of covenant, and the breach continues after the landlord is first aware of it, the six month period should run from the date on which the breach was last continuing. (Extension of the six month period would be possible by use of the procedure mentioned in paragraphs (29)—(32) of this summary.)
(Paragraph 8.3; and see paragraphs 8.1—8.19 generally)

Preliminary notice to the tenant

(a) **No general requirement of notice**

(26) There should be no general requirement such as now exists under section 146(1) of the Law of Property Act 1925, for the landlord to give notice to the tenant before starting termination proceedings.
(Paragraph 8.29; and see paragraphs 8.21—8.32 generally)

(b) **Compulsory notice procedure for repairs**

(27) But in certain cases involving want of repair by the tenant, the giving of preliminary notice should be compulsory and, if the tenant served a counter-notice, the landlord should not be permitted to start termination proceedings unless he obtained the leave of the court. The full details of this new repair regime are to be found in paragraphs 8.33—8.60 of the report and are not summarised here. The new regime is intended to supersede both the Leasehold Property (Repairs) Act 1938 and section 147 of the Law of Property Act 1925 and is based primarily on the former.
(Paragraphs 8.33—8.60)

(28) Since both the enactments mentioned in the preceding paragraph apply not only when the landlord wishes to forfeit but also when he claims damages for the breach of a repairing covenant, the new repairs regime should apply also to cases of claims to damages.
(Paragraph 8.62—8.66)

(c) **Optional notice procedure in other cases**

(29) The landlord should have power in other cases, within the six months' time limit, to serve on the tenant a notice giving full particulars of the termination order event alleged and requiring specified remedial action. He

should be entitled, but not bound, to specify a time for its completion. The effect of such a notice would be to extend the time limit for starting legal proceedings: in general it should then end on a date six months after the service of the notice; but if the notice specified a time for the completion of the remedial action, the period should end on a date three months after the expiry of this time, if that date were later.
(Paragraphs 8.67 and 8.68)

(30) A landlord's notice should be valid for this purpose if the remedial action which he specifies is within the range of action on which the court could suspend a remedial termination order (see paragraph (44) of this Summary) and he has made a reasonable attempt to specify action which is appropriate to the situation.
(Paragraph 8.69)

(31) If the notice were served and complied with, the landlord should be debarred from obtaining a termination order of any kind on the strength of the event in question. But if compliance did not take place until after the landlord had properly begun termination proceedings, a termination order should be possible and the tenant might in any event be ordered to pay the costs.
(Paragraph 8.71)

(32) Incentives to use the optional notice procedure would be provided by the recommendations mentioned in paragraphs (52) and (55) of this Summary.
(Paragraph 8.72)

(d) **Notices: mode of service**

(33) Having regard to the limited scope of this report, we propose no change in the law relating to the giving of notices, but recommend that the existing rules in the Law of Property Act 1925, s. 196, and Landlord and Tenant Act 1927, s. 189(2), should apply.
(Paragraph 8.73—8.76)

PART IX THE COURT'S POWERS AT THE HEARING

Preliminary Matters

(a) **The primary claim**

(34) The landlord's main claim will simply be for "a termination order".
(Paragraph 9.2)

(b) **Ancillary claims**

(i) *Costs incurred in relation to the termination order event*

(35) If a termination order event has occurred, the tenant should be liable to repay any reasonable costs incurred by the landlord in ascertaining the existence and nature of the event and in deciding upon his course of action including the fees of a surveyor, valuer, legal adviser or other expert, and including such costs incurred in the preparation and service of a notice in those cases in which a notice is compulsory or voluntary (see paragraphs (27)-(32)

of this Summary). But if the tenant serves a counter-notice under the new repairs regime (see paragraphs (27) and (28) of this Summary) then, notwithstanding any express term of the tenancy, the tenant's liability for such costs should not arise unless the landlord makes an application to proceed and, on such application, the court should have power to nullify or vary such liability.
(Paragraph 9.9; and see paragraphs 9.4–9.10)

(ii) *Rent*

(36) Since the tenancy would not end until the date on which the court ordered that it should, rent would (subject only to the recommendation made in relation to "respite" periods in paragraph (41) of this Summary) remain payable until that date. In termination order proceedings the court should be bound at the landlord's request to order the tenant to pay rent.
(Paragraph 9.12 (a))

(37) If the tenant wrongfully retained possession for any period after the date on which the tenancy terminated, he would be liable to pay mesne profits during that period. But their amount should be taken to correspond with the amount of the rent unless fixed by the court at a higher figure on proof of value.
(Paragraph 9.12 (b))

(iii) *Damages, injunction, etc.*

(38) If the court granted a remedial termination order (see paragraphs (43) and (53) of this Summary) or refused a termination order altogether, it should have a power analogous to that in the Law of Property Act 1925, s.146(2), enabling it to grant an injunction against the tenant, or order him to pay damages.
(Paragraphs 9.13 and 9.14)

(39) An absolute order, a remedial order and declining to make either order, may be combined with an ancillary order where appropriate.

The choices open to the court

(a) **Absolute order**

(40) An absolute order would reflect the court's view (arrived at in accordance with recommended criteria (see paragraph (51) of this Summary)) that the tenancy should end without any further chances being offered to the tenant.
(Paragraph 9.15)

(41) An absolute order would have the effect of terminating the tenancy on a date specified in the order. In general the date so specified should be the date on which the tenant is to give possession of the property let and the order should specifically require him to do so; but in setting the date the court should have full power to let him retain possession for a limited period after the hearing by way of respite. And during any such respite period the court should have power to vary the terms on which the tenant should be allowed to occupy

the property and in particular to order that rent at a rate higher than the rent reserved should be payable. If, however, the tenant would be able to retain possession in any event under the Rent Act 1977, the Rent (Agriculture) Act 1976 or the Housing Act 1980, then the date specified in the termination order for the ending of the tenancy should be the date on which the order is made. In this case the order should not require the giving of possession and it should be made clear to the tenant that possession need not be given.
(Paragraphs 9.16-9.20)

(42) An absolute termination order could be combined with orders for the payment of costs incurred in reference to the termination order event (paragraph (35) above), of rent (paragraph (36)), or of damages for breach of covenant.
(Paragraph 9.20)

(b) **Remedial order**

(43) A remedial order would have the effect of ending the tenancy if, but only if, the tenant failed to take specified remedial action within a specified time.
(Paragraph 9.21)

(44) No exhaustive definition of remedial action is proposed, but it should specifically include:

(a) Making any payment to the landlord or any other person. This payment might be arrears of rent (paragraph (36) of this Summary) or general costs (paragraph (54)), or other payments due under the tenancy, or a payment of costs incurred in relation to the termination order event (paragraph (35)) or of damages (paragraph (38)). Although damages could not be recovered in respect of an event which was not a breach of covenant, (e.g. breach of condition) the court should have power to suspend a remedial order upon the payment by the tenant of compensation in respect of such an event.
(b) In the case of a termination order event which is a continuing breach of covenant, discontinuing the breach.
(c) In the case of any termination order event, taking action appropriate to rectify the consequences of the event.
(d) In the case of a termination order event which is an insolvency event (paragraph (15) of this Summary), making an assignment of the tenancy which is permitted according to its terms.
(e) In the case of a termination order event which consists in the assignment or partial assignment of the tenancy, making a re-assignment to the former tenant.
(f) In the case of any termination order event, finding a satisfactory surety or replacement surety.

(Paragraph 9.23)

(45) The remedial order should specify a date on which the tenancy is to terminate if the remedial action has not been taken, and should automatically require the tenant to give possession on that date in those circumstances. Normally the date so fixed will be the date by which it is reasonable for the tenant to have completed the remedial action, but the court should have power

to fix a later date if it wished the tenant to have a further period by way of respite.
(Paragraph 9.25)

(46) If, however, the tenant will enjoy statutory security of tenure after the termination of the contractual tenancy, the question of a period of respite does not arise; and in this case the order should not require the giving of possession but should make it clear, on the contrary, that possession need not be given.
(Paragraph 9.26)

(47) In all cases the court, having fixed the date, should have power, whether before or after it has passed, and provided only that possession has not actually been regained, to substitute a later date if circumstances were thought to justify a postponement.
(Paragraph 9.27)

(48) There should be no counterpart in the scheme of the present rule that the High Court has jurisdiction to grant relief, in a case involving non-payment of rent, at any time within six months after execution of the judgment.
(Paragraph 9.30)

(49) Even if a remedial order were not conditional on the payment of costs incurred in relation to the termination order event (paragraph (35) of this Summary), or of rent (paragraph (36)), or of damages etc. (paragraph (38)), it could be combined with an order for the payment of these sums.
(Paragraph 9.31)

(c) **No order**

(50) The court should also have power to refuse a termination order altogether. A decision to this effect would not preclude the making of an order for payment of any of the sums mentioned in the preceding paragraph.
(Paragraph 9.32)

Guidelines for the court's decision

(a) **When the court should make an absolute order**

(51) An absolute order should be made if, and only if:

(1) the court is satisfied, by reason of the serious character of any termination order events occurring during the tenure of the present tenant, or by reason of their frequency, or by a combination of both factors, that he is so unsatisfactory a tenant that he ought not in all the circumstances to remain tenant of the property; or

(2) the court is satisfied that an assignment of the tenancy has been made in order to forestall the making of an absolute order under Case (1) above, that there is a substantial risk of the continuance or recurrence of the state of affairs giving rise to a termination order event on which the proceedings are founded, and that the new tenant ought not in all the circumstances to remain a tenant of the property; or

(3) where a termination order event on which the proceedings are founded is a wrongful assignment, or is an insolvency event, the court is satisfied that no remedial action which it could order would be adequate and satisfactory to the landlord; or

(4) the court, though it would wish to make a remedial order, is not satisfied that the tenant is willing, and is likely to be able, to carry out the remedial action which would be required of him.

(Paragraphs 9.33-9.49)

(52) As to the Case (4) above, if the landlord has given the tenant time (whether by means of a preliminary notice or otherwise) to take full remedial action before the hearing, and the tenant has not done so, the court should take that fact into account in deciding whether he would be willing, and is likely to be able, to take the remedial action on which a remedial order would be suspended.
(Paragraph 9.50)

(b) **When the court should make a remedial order or no order**

(53) If the court does not make an absolute order, it should make a remedial one *unless* one of the following situations exists, in which case it should decline to make any termination order:

(a) Remedial action has already been taken.

(b) Remedial action is impossible or unnecessary.

(c) Remedial action ought not in all the circumstances to be required.

(Paragraph 9.51)

Costs in general

(54) Subject to the specific recommendation as to costs incurred in relation to the termination order event (paragraph (35) of this Summary), and the recommendations summarised in the next paragraph, the court should have full discretion as to the award of costs.
(Paragraph 9.52)

(55) If the landlord has not given the tenant time to take full remedial action before the hearing, but the court is satisfied that the tenant has taken such remedial action (if any) as it was in all the circumstances reasonable for him to take, the court should have power, if it made a remedial order, to order the landlord to pay the tenant's costs if the tenant complies with it.
(Paragraph 9.53)

PART X DERIVATIVE INTERESTS

General rule: derivative interests cease

Existing exception: Rent Act 1977, s.137

(56) The existing exception to automatic termination of a sub-tenancy or other derivative interest contained in section 137 of the Rent Act 1977 should be preserved in relation to a termination order.
(Paragraph 10.5)

New exception: preservation by the landlord

(57) There should be a new exception enabling the landlord to preserve derivative interests if he wishes to do so.
(Paragraphs 10.6-10.10)

(58) The exercise of these preserving powers should not depend upon the consent of those whose interests were being preserved.
(Paragraph 10.11)

(59) The landlord's preserving powers should be of two kinds:

(a) Power to preserve all derivative interests. (This power would always apply and would enable the landlord to preserve every interest derived, directly or indirectly, out of the head tenancy).

(b) Power to preserve a complete branch of interests. (This power would apply when the head tenant had granted a sub-tenancy of part of the property and would enable the landlord to preserve all the derivative interests relating to one part without having to preserve those relating to another part. But the power to preserve a complete "branch" in this way would arise only if there were no interest (for example a mortgage) in the whole property interposed between the head tenancy and the branch in question.)

(Paragraphs 10.12–10.15)

(60) If the landlord exercised his new powers of preservation the effect should be similar to that produced by the present law on the surrender of a head tenancy. If the head tenant had created a mortgage, the head tenancy would be preserved in the landlord's hands in so far as was necessary to safeguard the interests of the mortgagee. Subject to that, sub-tenants would move one rung up the ladder, and the estate of the landlord would be deemed the reversion expectant on the first such sub-tenancy in order to preserve the same incidents and obligations as if the head tenancy had remained.
(Paragraphs 10.16 and 10.17)

(61) If the head tenancy had been mortgaged, and the landlord's exercise of his preserving powers resulted in the head tenancy vesting in him subject to the mortgage, the former head tenant should be liable to indemnify him against liability under the mortgage.
(Paragraphs 10.18 and 10.19)

(62) The exercise by the landlord of his preserving powers should not involve notification being given to the holders of the derivative interests which were being preserved: the preservation would become effective through incorporation in the court's order. But as to derivative interest holders on the first tier, who would be subjected to a change of landlord:

(a) If the property is a dwelling, the notification requirement in the Housing Act 1974, section 122, should apply, and

(b) in other cases, notification ought in practice to take place, if only to ensure that rent is paid in future to the right person (Law of Property Act 1925, s. 151(1)).

(Paragraphs 10.20 and 10.21)

Relief in cases not within the exceptions

(63) Relief for the holders of derivative interests, which is available under the present law mainly through the Law of Property Act 1925, section 146(4), should continue to exist under our scheme, but it should be improved and extended.
(Paragraphs 10.22 and 10.23)

(a) *Relief to be available only for those not within the exceptions*

(64) Relief should not be available to the holders of derivative interests which are preserved through the operation of the exceptions summarised in paragraphs (56)–(61) of this Summary.
(Paragraph 10.24)

(b) *Who can claim relief: the "derivative class"*

(65) The right to claim relief and compensation should be exercisable by any member of the "derivative class", defined as follows:

(a) anyone who holds any interest in the premises (whether legal or equitable, but not including an interest held under a trust) which is derived out of the tenancy in question, including an interest subsisting under any sub-tenancy, mortgage or charge and an interest which is an incorporeal hereditament; and
(b) anyone who does not fall within (a) above but who has the benefit of an enforceable right to acquire any interest within (a).

(Paragraph 10.26 and see paragraphs 10.25–10.27 generally)

(66) Since, under the general law, a title acquired by adverse possession against the tenant is not binding on the landlord, except in a case where the tenancy is registered under the Land Registration Act 1925 and the adverse possessor has been granted a registered title in his own name, Category (a) above will not include such an adverse possessor except in that case.
(Paragraphs 10.28–10.30)

(c) *Court's powers to grant relief*

(67) The court's powers to grant relief should be of two kinds: powers to preserve existing derivative interests and powers to order the grant of new tenancies to derivative interest holders.
(Paragraph 10.32)

(i) *Powers to preserve existing interests*

(68) The court should have the same two powers of preservation which the landlord should have: see paragraph (59) of this Summary. And the effect of their exercise should be the same: see paragraphs (60) and (61). The exercise of the powers should not depend upon the assent of all those whose interests would be preserved.
(Paragraphs 10.34 and 10.35)

(69) The court should also have power to preserve the head tenancy and vest it in an applicant for relief in such a way that it did not terminate but continued in the hands of the new tenant. The exercise of the power could not operate to preserve the interests deriving from the head tenancy, but the court should have power to order the grant of new subsidiary interests to any other holders of derivative interests who had applied for relief.
(Paragraph 10.36)

(70) In relation to the powers dealt with in paragraphs (68) and (69) of this Summary, the court should have such of the ancillary powers dealt with in paragraphs (76) and (78) below as would not involve alterations in the terms of the tenancy in question.
(Paragraph 10.37)

(ii) *Power to order the grant of a new tenancy*

(71) Despite the new powers of preservation the court should retain its existing powers to create a new tenancy for the applicant, subject to the modifications dealt with below.
(Paragraph 10.38)

(72) In future the court's order should take the form of an order requiring the parties to enter into a new tenancy document setting out fully the terms and obligations in the usual way. It should have power to appoint a person to execute any tenancy or counterpart on behalf of any party who was unable or unwilling to execute it himself.
(Paragraph 10.39)

(73) The only limit on the length of the new tenancy should be that it must not exceed that of the old head tenancy.
(Paragraph 10.40)

(74) The court should have power to order the grant of a new tenancy of the whole or of part of the property comprised in the head tenancy or of an interest (for example, a right of way) in it.
(Paragraph 10.41)

(75) In fixing the rent under the new tenancy the court should have regard primarily to the rent formerly payable for the interest of the applicant and to the rent payable under the head tenancy and (due allowance being made for any difference in the extent of the property) should not fix a rent higher than the greater of these figures unless special circumstances existed.
(Paragraph 10.42)

(76) (a) If, as a result of non-payment of rent or any other termination order event on which the termination proceedings are founded, the head tenant owes the landlord money which the landlord cannot recover from him, the court should have power to grant relief to a derivative interest holder upon terms designed to make good the landlord's loss, in full or in part.

(b) This power should be exercisable either by requiring that person to make a payment to the landlord as a condition of the grant of the new

tenancy or by increasing the rent which would otherwise be payable under it.

(c) But the power should arise only if (and only to the extent that) the grant of relief prevented the landlord from recouping his loss out of the property itself.

(d) And if the new tenancy were of part only of the property comprised in the head tenancy, the power should not be exercised, unless the court saw special reasons to the contrary, so as to make good more of the landlord's loss than was fairly attributable to that part.

(Paragraph 10.43)

(77) The court should have power to impose on any derivative interest holder to whom it granted a new tenancy a condition that he should grant new interests to any other designated holders of derivative interests who had applied for relief.

(Paragraph 10.44)

(78) The court should have power to grant relief upon such conditions as to costs, expenses, giving security, or otherwise, as in the circumstances of the case it may think fit.

(Paragraph 10.45)

(iii) *New tenancies for mortgagees*

(79) If the applicant for relief is a mortgagee, either of the head tenancy or of a derivative interest, and his mortgage has not been preserved under any of the powers dealt with in paragraphs (68) or (73) of this Summary, any new tenancy which he acquired by way of relief should be held by him as security for the mortgage debt and in such a way that the landlord was entitled to the equity of redemption. So if the mortgagee sold the tenancy, he would be liable to account to the landlord for any surplus proceeds (after repaying himself and any second or subsequent mortgagee); and if the former tenant discharged his indebtedness to the mortgagee, the landlord would be entitled to the tenancy unencumbered. Further, the former tenant should be deemed to give the landlord a covenant for indemnity.

(Paragraph 10.49; and see paragraphs 10.46–10.48 generally)

(iv) *Miscellaneous points*

(80) A surety's liability in respect of a tenancy should continue only if the court's order results in that tenancy being preserved in its existing form and in the hands of its existing owner under the power dealt with in paragraph (68) of this Summary.

(Paragraph 10.51)

(81) The exercise of the court's powers to grant relief should in no case result in the continuation of the liability of the original tenant under the head tenancy or of any assignee of it.

(Paragraph 10.52)

(d) **Giving the derivative class an opportunity to seek relief**

(82) The court should not normally allow a tenancy to terminate through a termination order unless and until it was satisfied that all members of the derivative class had had an opportunity to apply for relief. The onus of satisfying the court of this would necessarily fall on the landlord, and the opening recommendations summarised below are designed to assist him in discharging it.
(Paragraph 10.53)

(i) *Landlord's right to obtain details of the derivative class*

(83) The landlord should have:

(a) A right to serve upon the *tenant* a notice requiring him to give all details known to him of all members of the derivative class of whose existence he knows (and if he has no knowledge of the details of the current owner of a derivative interest, to give all the details which he knows of the most recent owner known to him).

(b) A right to serve upon any *member of the derivative class* a notice requiring him to give all details known to him of all members of the derivative class *who derive title from* him and of whose existence he knows (and if he has no knowledge of the details of the current owner of an interest derived from his, to give all the details which he knows of the most recent owner known to him).

(Paragraph 10.54)

(84) Failure to comply with a notice of the first kind should entitle the court, at the landlord's request, to order disclosure (so that the tenant would be in contempt of court if he disobeyed the order), and to debar the tenant from defending the action until disclosure were made, and to order him to pay any costs incurred by the landlord as a result of his failure to disclose, or to make any one or more of these orders. Failure to comply with a notice of the second kind should entitle the court, at the landlord's request, to order disclosure, and to debar the derivative interest holder in question from claiming relief until disclosure were made, and to order him to pay any costs incurred by the landlord as a result of his failure to disclose, or to make any one or more of those orders.
(Paragraph 10.55)

(ii) *Landlord's right to serve warning notices*

(85) The landlord should have a right to serve on any member of the derivative class a "warning notice", indicating that proceedings were being taken for the termination of the head tenancy, that they could result in the ending of his derivative interest, that he had a right to apply (in a stated manner) for relief, but that this right would cease if it were not exercised within two months. The service of a warning notice would bar the recipient's right to relief if he did not respond within the two months.
(Paragraphs 10.56 and 10.57)

(iii) *At the hearing*

(86) If, at the hearing, the court decided to make an absolute or a remedial termination order, it should be obliged to consider the position of any derivative interest holders who might exist, whose interests were not being preserved by

the landlord or under s.137 of the Rent Act 1977 and who had not been debarred from seeking relief or compensation by failing to respond to a warning notice. For further details, reference should be made to paragraphs 10.59–10.64 of the report.
(Paragraphs 10.59–10.64)

PART XI ABANDONED PREMISES

(87) If a landlord reasonably believes the premises let to have been abandoned, he should have the right to secure and preserve them.
(Paragraph 11.14)

(88) If a landlord has the same reasonable belief *and* there is at least one termination order event in respect of which he would be entitled to seek a termination order, he should be entitled to serve notices which would operate to terminate the tenancy if they evoked no response within six months. Service would have to be effected on the tenant and all members of the derivative class (see paragraphs (65) and (66) of this Summary) of whom the landlord had actual knowledge, but the normal rules about service would apply (see paragraph (33) of this Summary) and actual service would not be required if a recipient could not be found. If a response were made, the landlord would have to seek a termination order from the court in the normal way.
(Paragraphs 11.18–11.21)

PART XII JOINT TENANTS

(89) The present rule that relief cannot be granted to one or more of a larger number of joint tenants should not apply to the scheme but should be replaced by the two following recommendations.
(Paragraphs 12.1–12.4)

(90) If a landlord applies for a termination order against a number of joint tenants, and one or more of them is or are willing to submit to an absolute order, the court should nonetheless have power, on the application of the other or others, to make a remedial termination order or to make no termination order. But if the tenancy is preserved in this way it should be on the basis that the applicant tenant or tenants are in future the sole tenant or tenants (without prejudice to the liability of the other tenant or tenants for any existing breaches of obligation). In reaching its decision the court should consider whether this would cause unjustifiable prejudice to the landlord.
(Paragraph 12.5(a))

(91) If, on the termination of a tenancy, a derivative interest is held jointly by a number of people, of whom fewer than all apply for relief, the court should have power to grant relief to the applicant or applicants in the same way as it could have granted relief to all. But in deciding whether to do so the court should consider whether this would cause unjustifiable prejudice to the landlord.
(Paragraph 12.5(b))

(92) It should in either case be open to the person or persons seeking relief to make proposals (for example, as to the provision of a surety) to overcome any such prejudice.

(93) The relevance of trust law to this situation is discussed in paragraphs 12.6–12.9 of the report.

PART XIII "NEUTRAL" CONDITIONS: A CONSEQUENTIAL RECOMMENDATION

(94) The earlier recommendation for the abolition of the doctrine of re-entry was a comprehensive one, but our termination order scheme is less than comprehensive because it applies only to cases involving fault on the part of the tenant. Some conditions in tenancies turn upon events which are "neutral" (for example, the grant of planning permission). Since the landlord could no longer exercise his right to end the tenancy in these cases by means of re-entry, he should in future be able to do so by serving one month's written notice on the tenant.
(Paragraph 13.4; and see paragraphs 13.1–13.5 generally)

(95) Our earlier recommendations for reform of the law of waiver (paragraphs (21)–(23) of this Summary) should apply equally in the case of "neutral" conditions.
(Paragraph 13.6)

PART XIV COURT JURISDICTION, CROWN APPLICATION AND DRAFTING

(96) The county court should have jurisdiction in relation to all questions arising out of our scheme for termination orders in cases where the rateable value of the property does not exceed £2000. This figure should be increased in line with any general increases made in county court jurisdiction based on rateable values.
(Paragraph 14.2; and see paragraphs 14.1–14.3 generally)

(97) There is thought to be no reason why any legislation implementing the recommendations should not, in general, bind the Crown, but this is a matter for consultation.
(Paragraph 14.4)

(98) Implementation of these recommendations, will require consideration to be given to anti-avoidance provisions and to the detailed adaptation of existing law.
(Paragraphs 14.5–14.7)

PART XV TRANSITIONAL

(99) The legislation implementing the scheme for termination orders should come into force on a date ("the operative date") appointed by the Lord Chancellor by statutory instrument.
(Paragraph 15.2)

(100) After the operative date the new law should apply to the exclusion of the old, except in cases where the landlord had grounds for forfeiture and had taken action upon them under the old law prior to that date. In such cases the

old law should continue to apply in relation to those grounds. For this purpose "action" should mean actual re-entry; constructive re-entry (through the service of proceedings); or the service of a notice under section 146 of the Law of Property Act 1925.
(Paragraphs 15.12 and 15.13; and see paragraphs 15.3–15.11)

(101) But events occurring prior to the operative date should not be capable of founding termination order proceedings if the landlord had, prior to that date, become disqualified (through waiver under the old law, or through the remedying of a remediable breach of covenant) from forfeiting the tenancy because of them.
(Paragraph 15.16(a) and (b))

(102) And in relation to events occurring prior to the operative date, the six months' period (see paragraph (25) of this Summary) should not start to run until the operative date.
(Paragraph 15.16(c))

PART XVI MATTERS ON WHICH NO RECOMMENDATIONS ARE MADE

(103) In Part XVI we consider and reject the possibility of making recommendations for the payment of compensation by landlord to tenant on termination, and the possibility of extending our recommendations for the abolition of re-entry to cases where rights of re-entry exist otherwise than between landlord and tenant.
(Paragraphs 16.1–16.18)

TERMINATION ON THE APPLICATION OF THE TENANT

PART XVII INTRODUCTORY: A NEW RIGHT FOR THE TENANT TO SEEK TERMINATION

(104) The present law whereby a tenant has no right to end his tenancy because of breaches of obligation by the landlord should be altered so as to give him a new right, analogous to that of a landlord in the converse case, to seek a termination order from the court.
(Paragraphs 17.1–17.12)

(105) Such a scheme would fail to serve its purpose, however, unless it made provision for compensation to be paid, by the landlord to the tenant, on termination.
(Paragraphs 17.13–17.17)

PART XVIII TENANTS' TERMINATION ORDERS: OPENING RECOMMENDATIONS

Preliminary

(106) The new scheme for tenants' termination orders should apply in relation to tenancies already in existence when it comes into force.
(Paragraph 18.2)

(107) Termination without a full court hearing would be possible in circumstances analogous to those mentioned in relation to our earlier scheme (paragraph (7) of this Summary), and the doctrine of repudiatory breach should again be excluded (paragraph (9) of this Summary).
(Paragraph 18.3)

Grounds for a termination order: "termination order events"

(108) Termination order events should be confined to actual breaches of covenant by the landlord. The word "covenant" is used to include all the obligations owed by landlord to tenant, whether they are expressly undertaken or implied at common law or by statute.
(Paragraphs 18.5 and 18.6)

(109) The tenant should always be free to seek a termination order for breach of covenant by the landlord despite any provision or agreement to the contrary, but if such a breach gives rise to any other right for the tenant to end the tenancy, that right should continue to exist.
(Paragraph 18.7)

(110) If the reversion has been severed and disposed of in separate parts, a landlord should be at risk of termination order proceedings by the tenant in respect only of breaches of covenant committed in respect of that part of the property in which he holds the reversion.
(Paragraph 18.8)

Waiver

(111) A termination order event is to be regarded as waived if, and only if, the tenant's conduct, after he has actual knowledge of the event, is such that it would lead a reasonable landlord to believe, and does in fact lead the actual landlord to believe, that he will not seek a termination order on the ground of that event. This should be a question of fact to be decided in the light of the circumstances of each case; and if the event is a continuing breach of covenant it should equally be a question of fact whether and how far the tenant's conduct indicates a waiver for the future as well as for the past.
(Paragraph 18.9)

Breaches should remain grounds for termination proceedings even though "remedied"

(112) Termination order events should remain available as grounds for termination even though their consequences may have been remedied.
(Paragraph 18.10)

Starting proceedings: time limits and notices

(113) A tenant's right to start termination proceedings on the ground of a termination order event should exist for only six months after he has actual knowledge of the facts constituting that event. If the event is a continuing breach of covenant by the landlord, and the breach continues after the tenant is first aware of it, the six months period should run from the date on which it was last continuing.
(Paragraph 18.12)

(114) Preliminary notice to the landlord should in no case be compulsory. But the tenant should have power, within the six months' limit, to serve on the landlord a notice giving full particulars of the termination order event alleged and requiring specified remedial action. He should be entitled, but not bound, to specify a time for its completion. If such a notice were served the effect would be to extend the six months' time limit: in general it should then end on a date six months after the service of the notice: but if the notice specified a time for the completion of the remedial action, the period should end on a date three months after the expiry of this time, if that date were later. (The recommendations summarised in paragraphs (30) and (31) of this Summary should apply, suitably modified).
(Paragraphs 18.13 and 18.14)

(115) Incentives to use the optional notice procedure would be provided by the recommendations dealt with in paragraphs (134) and (137) of this summary.
(Paragraph 18.16)

PART XIX TENANTS' TERMINATION ORDERS: THE COURT'S POWERS AT THE HEARING

Preliminary Matters

(a) **The primary claim**

(116) The tenant's claim will be simply for "a termination order".
(Paragraph 19.2)

(b) **Ancillary claims**

(i) *Costs incurred in reference to the termination order event*

(117) If a termination order event has occurred, the landlord should be liable to repay to the tenant any reasonable costs incurred by him in ascertaining the existence and nature of the event and in deciding upon his course of action, including the fees of a surveyor, valuer, legal adviser or other expert, and including such costs incurred in the preparation and service of an optional preliminary notice (see paragraph (114) of this Summary).
(Paragraph 19.4)

(118) The costs in question could be claimed by the tenant in a separate action or in an action otherwise confined to damages. But if he were applying for a termination order the court should be bound at his request to order their payment (whether or not it made a termination order).
(Paragraph 19.5)

(ii) *Damages, injunction, etc.*

(119) On granting a remedial order or refusing a termination order altogether, the court should have a power to impose terms which is analogous to that stated in paragraph (38) of this Summary.
(Paragraph 19.6)

(iii) *Damages for loss of the tenancy*

(120) A tenant whose tenancy ended because of a termination order obtained by him should have a right to damages from the landlord.
(Paragraph 19.7)

(121) Such damages should be calculated in the same way as if the tenancy were a contract which could be terminated by the commission of a repudiatory breach on the part of the landlord and its acceptance by the tenant; and as if it had been so terminated at the date at which the termination order brought the tenancy to an end.
(Paragraph 19.8)

(122) This would enable the tenant to claim damages for the value of the tenancy and for consequential losses (*prima facie* including the costs of removal and of setting up in the new premises (though not the cost of the new premises themselves) and, in the case of a business tenant, any loss of profits and goodwill and diminution in the value of stock-in-trade).
(Paragraph 19.9)

(123) The normal rules as to remoteness of damage would apply; but it should not be open to the landlord of a tenancy granted before these recommendations become law to deny liability on the ground that the legislation was not foreseeable.
(Paragraph 19.10)

(124) Since the value of the tenancy may be reduced by the landlord's breaches of obligation, the tenant's right to seek damages based upon this value should be without prejudice to his right to obtain further damages for any such reduction in its value.
(Paragraph 19.12)

The choices open to the court

(a) **Absolute order**

(125) An absolute order would reflect the court's view (arrived at in accordance with recommended criteria: see paragraph (133) of this Summary) that the tenancy should end without any further chances being offered to the landlord.
(Paragraph 19.13)

(126) An absolute order would have the effect of terminating the tenancy on a date specified in the order. The court's task would be to fix a date which was reasonable in the circumstances, and rent would normally remain payable up to that date. But the court should have a power, analogous to that recommended in relation to the "respite" period in paragraph (41) of this Summary, to vary the terms on which the tenant should hold the property during any period of occupation after the hearing.
(Paragraph 19.14)

(127) An absolute order could be combined with orders for the payment of costs incurred in relation to the termination order event (paragraphs (117) and (118) of this Summary), of compensation to the tenant (paragraphs (120)–(124)) and of damages for breach of covenant and for loss of tenancy.
(Paragraph 19.15)

(b) **Remedial order**

(128) A remedial order would have the effect of ending the tenancy if, but only if, the landlord failed to take specified remedial action within a specified time.
(Paragraph 19.16)

(129) No exhaustive definition of remedial action is proposed, but it should specifically include:

(a) Making any payment to the tenant or any other person. This payment might be general costs (paragraph (136) of this Summary), or payments due under the terms of the tenancy, or a payment of costs incurred in reference to the termination order event (paragraphs (117) and (118)), or of damages etc. (paragraph (119)).
(b) In the case of any termination order event which is a continuing breach of covenant, discontinuing the breach.
(c) In the case of any termination order event, taking action appropriate to remedy the consequences of the event.

(Paragraphs 19.17)

(130) The time limit for taking remedial action should reflect the court's view of the period required for its completion; but the court should, having fixed the date, have power (exercisable on the landlord's application, made at any time before the date had passed) to substitute a later one.
(Paragraph 19.19)

(131) Even if a remedial order were not confined on the payment of costs incurred in relation to the termination order event (paragraphs (117) and (118) of this Summary), or of damages (paragraph (119), it could be combined with an order for the payment of these sums. It could also be combined with an order for the payment of compensation to the tenant (paragraphs (120)–(124)).
(Paragraph 19.20)

(c) **No order**

(132) The court should also have power to refuse a termination order altogether. A decision to this effect would not preclude the making of an order for payment of any of the sums mentioned in the preceding paragraph, except damages for loss of tenancy which could be payable only on termination.
(Paragraph 19.21)

Guidelines for the court's decision

(a) **When the court should make an absolute order**

(133) An absolute order should be made if, and only if:

(1) the court is satisfied, by reason of the serious character of any termination order events occurring while the present landlord has been the landlord, or by

reason of their frequency, or by a combination of both factors, that he is so unsatisfactory a landlord that the tenant ought not in all the circumstances to remain bound by the tenancy; or

(2) the court is satisfied that a transfer of the reversion has been made in order to forestall the making of an absolute order under Case (1) above, that there is a substantial risk of the continuance or recurrence of the state of affairs giving rise to a termination order event on which the proceedings are founded, and that the tenant ought not in all the circumstances to remain bound by the tenancy; or

(3) the court, though it would wish to make a remedial order, is not satisfied that the landlord is willing, and is likely to be able to carry out the remedial action upon which such an order would be suspended.

(Paragraph 19.22)

(134) As to Case (3) above, if the tenant has given the landlord time (whether by means of a preliminary notice or otherwise) to take full remedial action before the hearing, and the landlord has not done so, the court should take that fact into account in deciding whether he would be willing, and is likely to be able, to take the remedial action which a remedial order would require.
(Paragraph 19.24)

(b) **When the court should make a remedial order or no order**

(135) If the court does not make an absolute order, it should make a remedial one unless one of the following situations exists, in which case it should decline to make any termination order:—

(a) Remedial action has already been taken.

(b) Remedial action is impossible or unnecessary.

(c) Remedial action ought not in all the circumstances to be required.

(Paragraph 19.25)

Costs in general

(136) Subject to the specific recommendation as to costs incurred in relation to the termination event (paragraphs (117) and (118) of this Summary), and the recommendation summarised in the next paragraph, the court should have full discretion as to costs.
(Paragraph 19.26)

(137) If the tenant has not given the landlord time to take full remedial action before the hearing, but the court is satisfied that the landlord has taken such remedial action (if any) as it was in all the circumstances reasonable for him to take, the court should have power, if it makes a remedial order, to order the tenant to pay the landlord's costs if the landlord complies with it.
(Paragraph 19.27)

PART XX TENANT'S TERMINATION ORDERS: DERIVATIVE INTERESTS

(138) The scheme for tenant's termination orders must apply not only in the simple case where L has let to T, but also in that where T has created derivative interests out of his tenancy.
(Paragraph 20.1)

Tenants' termination orders in cases involving sub-tenancies

(139) In a case where T has created a sub-tenancy in favour of ST, the termination order may be sought either by T against L or (more probably) by ST against T. The events which amount to breaches of T's obligations to ST may also amount to breaches to L's obligations to T. If ST succeeds and T has to pay him compensation, T may be able to recover such compensation from L as damages for such breaches. Subject only to a modification analogous to that dealt with in paragraph (123) of this Summary, the existing law should be left to govern this question.
(Paragraphs 20.2 and 20.3)

(140) If, in a case involving L, T and ST (as above), it is T who obtains a termination order against L, the consequence must be that ST's tenancy also terminates. But in such a case T's application should not be granted unless the court is satisfied

(a) that all sub-tenants will be adequately compensated for any losses arising through termination, and that any objections they may have are not sufficient to outweigh the desirability of termination taking place or
(b) that they have consented to termination.

(Paragraphs 20.4–20.6)

(141) If, in such a case, T pays compensation to ST, he should be entitled to recover this, as part of his own compensation from L—but only up to a maximum equivalent to the compensation which ST would have been entitled to recover from T if ST had brought successful termination proceedings.
(Paragraph 20.8)

Tenants' termination orders in cases involving mortgagees

(142) In a case where there is a mortgagee amongst the derivative interest holders whose interests would terminate on a successful application, the application should not be granted unless the court is satisfied

(a) that the mortgagee has received or will receive fair compensation (which would normally be an amount equal to the debt or the value of the security, whichever is less), or
(b) that he has consented to termination.

(Paragraph 20.9)

PART XXI TENANTS' TERMINATION ORDERS: CONCLUDING RECOMMENDATIONS

Joint landlords

(143) If there are two or more joint landlords the tenancy would have to continue against all or none. If joint landlords cannot agree as to how to deal with proceedings by their tenant against them, the trust relationship between

the joint landlords may give rise to difficult problems and, if the scheme is to be implemented, consideration should be given to the provision, by rules of court, of a simple procedure for dealing with any dispute between joint landlords.
(Paragraph 21.1)

Court jurisdiction, Crown application and drafting

(144) The county court should have jurisdiction in relation to all questions arising under our scheme for tenants' termination orders in cases where the rateable value of the property does not exceed £2000. This figure should be increased in line with any general increases made in the county court jurisdiction based upon rateable values.
(Paragraph 21.2)

(145) The position as to Crown application is the same as that stated in paragraphs (97) and (98) of this Summary.
(Paragraph 21.2)

Transitional

(146) The legislation implementing the scheme for tenants' termination orders should come into force on a date ("the operative date") appointed by the Lord Chancellor by statutory instrument.
(Paragraph 21.4)

(147) The new law should apply when, and only when, the breach of covenant constituting the termination order event occurred on or after the operative date. But a continuing breach, even if it began before the operative date, would attract the new law if it continued afterwards.
(Paragraphs 21.5 and 21.6)

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

J.G.H. GASSON, *Secretary*
8 February 1985

*This report had been prepared and approved for submission to the Lord Chancellor before Trevor Aldridge came to the Law Commission in October 1984 and he has taken no part in the formulation or approval of these proposals. Submission of the report was delayed until February 1985 by editorial work on the text.

APPENDIX A

The following are the main statutory provisions of the present law relating to forfeiture

Common Law Procedure Act 1852[1]

210. Proceedings in ejectment by landlord for nonpayment of rent

In all cases between landlord and tenant, as often as it shall happen that one half year's rent shall be in arrear, and the landlord or lessor, to whom the same is due, hath right by law to re-enter for the nonpayment thereof, such landlord or lessor shall and may, without any formal demand or re-entry, serve a writ in ejectment for the recovery of the demised premises, . . . which service . . . shall stand in the place and stead of a demand and re-entry; and in case of judgment against the defendant for nonappearance, if it shall be made appear to the court where the said action is depending, by affidavit, or be proved upon the trial in case the defendant appears, that half a year's rent was due before the said writ was served, and that no sufficient distress was to be found on the demised premises, countervailing the arrears then due, and that the lessor had power to re-enter, then and in every such case the lessor shall recover judgment and execution, in the same manner as if the rent in arrear had been legally demanded, and a re-entry made; and in case the lessee or his assignee, or other person claiming or deriving under the said lease, shall permit and suffer judgment to be had and recovered on such trial in ejectment, and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without proceeding for relief in equity within six months after such execution executed, then and in such case the said lessee, his assignee, and all other persons claiming and deriving under the said lease, shall be barred and foreclosed from all relief or remedy in law or equity, other than by bringing error for reversal of such judgment, in case the same shall be erroneous, and the said landlord or lessor shall from thenceforth hold the said demised premises discharged from such lease; . . . provided that nothing herein contained shall extend to bar the right of any mortgagee of such lease, or any part thereof, who shall not be in possession, so as such mortgagee shall and do, within six months after such judgment obtained and execution executed pay all rent in arrear, and all costs and damages sustained by such lessor or person entitled to the remainder or reversion as aforesaid, and perform all the covenants and agreements which, on the part and behalf of the first lessee, are and ought to be performed.

211. Lessee proceeding in equity not to have injunction or relief without payment of rent and costs

In case the lessee, his assignee, or other person claiming any right, title, or interest, in law or equity, of, in, or to the said lease, shall, within the time aforesaid, proceed for relief in any court of equity, such person shall not have or continue any injunction against the proceedings at law on such ejectment, unless he does or shall, within forty days next after a full and perfect answer shall be made by the claimant in such ejectment, bring into court, and lodge

[1]Printed as amended by the Statute Law Revision Act 1892.

with the proper officer such sum and sums of money as the lessor or landlord shall in his answer swear to be due and in arrear over and above all just allowances, and also the costs taxed in the said suit, there to remain till the hearing of the cause, or to be paid out to the lessor or landlord on good security, subject to the decree of the court; and in case such proceedings for the relief in equity shall be taken within the time aforesaid, and after execution is executed, the lessor or landlord shall be accountable only for so much and no more as he shall really and bona fide, without fraud, deceit, or wilful neglect, make of the demised premises from the time of his entering into the actual possession thereof; and if what shall be so made by the lessor or landlord happen to be less than the rent reserved on the said lease, then the said lessee or his assignee, before he shall be restored to his possession, shall pay such lessor or landlord what the money so by him made fell short of the reserved rent for the time such lessor or landlord held the said lands.

212. Tenant paying all rent, with costs, proceedings to cease

If the tenant or his assignee do or shall, at any time before the trial in such ejectment, pay or tender to the lessor or landlord, his executors or administrators, or his or their attorney in that cause, or pay into the court where the same cause is depending, all the rent and arrears, together with the costs, then and in such case all further proceedings on the said ejectment shall cease and be discontinued; and if such lessee, his executors, administrators, or assigns, shall, upon such proceedings as aforesaid, be relieved in equity, he and they shall have, hold, and enjoy the demised lands, according to the lease thereof made, without any new lease.

Law of Property Act 1925

146. Restrictions on relief against forfeiture of leases and underleases

(1) A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice—

(a) specifying the particular breach complained of; and

(b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and

(c) in any case, requiring the lessee to make compensation in money for the breach;

and the lessee fails, within a resonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach.

(2) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit.

(3) A lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages (if any), all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor, or from which the lessee is relieved, under the provisions of this Act.

(4) Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, or for non-payment of rent, the court may, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease or any part thereof, either in the lessor's action (if any) or in any action brought by such person for that purpose, make an order vesting, for the whole term of the lease or any less term, the property comprised in the lease or any part thereof in any person entitled as under-lessee to any estate or interest in such property upon such conditions as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the court in the circumstances of each case may think fit, but in no case shall any such under-lessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease.

(5) For the purposes of this section—

(a) "Lease" includes an original or derivative under-lease; also an agreement for a lease where the lessee has become entitled to have his lease granted; also a grant at a fee farm rent, or securing a rent by condition;

(b) "Lessee" includes an original or derivative under-lessee, and the persons deriving title under a lessee; also a grantee under any such grant as aforesaid and the persons deriving title under him;

(c) "Lessor" includes an original or derivative under-lessor, and the persons deriving title under a lessor; also a person making such grant as aforesaid and the persons deriving title under him;

(d) "Under-lease" includes an agreement for an underlease where the underlessee has become entitled to have his underlease granted;

(e) "Underlessee" includes any person deriving title under an underlessee.

(6) This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any Act of Parliament.

(7) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

(8) This section does not extend—

(i) To a covenant or condition against assigning underletting parting with the possession, or disposing of the land leased where the breach occurred before the commencement of this Act; or

(ii) In the case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines or other things, or to enter or inspect the mine or the workings thereof.

(9) This section does not apply to a condition for forfeiture on the bankruptcy of the lessee or on taking in execution of the lessee's interest if contained in a lease of—

(a) Agricultural or pastoral land;
(b) Mines or minerals;
(c) A house used or intended to be used as a public-house or beershop;
(d) A house let as a dwelling-house, with the use of any furniture, books, works of art, or other chattels not being in the nature of fixtures;
(e) Any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor, or to any person holding under him.

(10) Where a condition of forfeiture on the bankruptcy of the lessee or on taking in execution of the lessee's interest is contained in any lease, other than a lease of any of the classes mentioned on the last subsection, then—

(a) if the lessee's interest is sold within one year from the bankruptcy or taking in execution, this section applies to the forfeiture condition aforesaid;
(b) if the lessee's interest is not sold before the expiration of that year, this section only applies to the forfeiture condition aforesaid during the first year from the date of the bankruptcy or taking in execution.

(11) This section does not, save as otherwise mentioned, affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.

(12) This section has effect notwithstanding any stipulation to the contrary.

Note. The Law of Property (Amendment) Act 1929 provides that nothing in subsections (8), (9) or (10) above is to affect the provisions of subsection (4).

147. Relief against notice to effect decorative repairs

(1) After a notice is served on a lessee relating to the internal decorative repairs to a house or other building, he may apply to the court for relief, and if, having regard to all the circumstances of the case (including in particular the length of the lessee's term or interest remaining unexpired), the court is satisfied that the notice is unreasonable, it may, by order, wholly or partially relieve the lessee from liability for such repairs.

(2) This section does not apply:—

(i) where the liability arises under an express covenant or agreement to put the property in a decorative state of repair and the covenant or agreement has never been performed;
(ii) to any matter necessary or proper—
  (a) for putting or keeping the property in a sanitary condition, or
  (b) for the maintenance or preservation of the structure;
(iii) to any statutory liability to keep a house in all respects reasonably fit for human habitation;
(iv) to any covenant or stipulation to yield up the house or other building in a specified state of repair at the end of the term.

(3) In this section "lease" includes an underlease and an agreement for a lease, and "lessee" has a corresponding meaning and includes any person liable to effect the repairs.

(4) This section applies whether the notice is served before or after the commencement of this Act, and has effect notwithstanding any stipulation to the contrary.

Landlord and Tenant Act 1927

18. Provisions as to covenants to repair

(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.

(2) A right of re-entry of forfeiture for a breach of any such covenant or agreement as aforesaid shall not be enforceable, by action or otherwise, unless the lessor proves that the fact that such a notice as is required by section one hundred and forty-six of the Law of Property Act, 1925, had been served on the lessee was known either—

(a) to the lessee; or
(b) to an under-lessee holding under an under-lease which reserved a nominal reversion only to the lessee; or
(c) to the person who last paid the rent due under the lease either on his own behalf or as agent for the lessee or under-lessee;

and that a time reasonably sufficient to enable the repairs to be executed had elapsed since the time when the fact of the service of the notice came to the knowledge of any such person.

Where a notice has been sent by registered post addressed to a person at his last known place of abode in the United Kingdom, then, for the purposes of this subsection, that person shall be deemed, unless the contrary is proved, to have had knowledge of the fact that the notice had been served as from the time at which the letter would have been delivered in the ordinary course of post.

This subsection shall be construed as one with section one hundred and forty-six of the Law of Property Act, 1925.

(3) This section applies whether the lease was created before or after the commencement of this Act.

Leasehold Property (Repairs) Act 1938[2]

1. Restriction on enforcement of repairing covenants in long leases of small houses

(1) Where a lessor serves on a lessee under sub-section (1) of section one hundred and forty-six of the Law of Property Act, 1925, a notice that relates to a breach of a covenant or agreement to keep or put in repair during the

[2]Printed as amended by the Landlord and Tenant Act 1954, s. 51, and County Courts Act 1959, s. 204 and Sched. 3.

currency of the lease all or any of the property comprised in the lease, and at the date of the service of the notice three years or more of the term of the lease remain unexpired, the lessee may within twenty-eight days from that date serve on the lessor a counter-notice to the effect that he claims the benefit of this Act.

(2) A right to damages for a breach of such a covenant as aforesaid shall not be enforceable by action commenced at any time at which [three] years or more of the term of the lease remain unexpired unless the lessor has served on the lessee not less than one month before the commencement of the action such a notice as is specified in subsection (1) of section one hundred and forty-six of the Law of Property Act, 1925, and where a notice is served under this subsection, the lessee may, within twenty-eight days from the date of the service thereof, serve on the lessor a counter-notice to the effect that he claims the benefit of this Act.

(3) Where a counter-notice is served by a lessee under this section, then, notwithstanding anything in any enactment or rule of law, no proceedings, by action or otherwise, shall be taken by the lessor for the enforcement of any right of re-entry or forfeiture under any proviso or stipulation in the lease for breach of the covenant or agreement in question, or for damages for breach thereof, otherwise than with the leave of the court.

(4) A notice served under subsection (1) of section one hundred and forty-six of the Law of Property Act, 1925, in the circumstances specified in subsection (1) of this section, and a notice served under subsection (2) of this section shall not be valid unless it contains a statement, in characters not less conspicuous than those used in any other part of the notice, to the effect that the lessee is entitled under this Act to serve on the lessor a counter-notice claiming the benefit of this Act, and a statement in the like characters specifying the time within which, and the manner in which, under this Act a counter-notice may be served and specifying the name and address for service of the lessor.

(5) Leave for the purposes of this section shall not be given unless the lessor proves—

(a) that the immediate remedying of the breach in question is requisite for preventing substantial diminution in the value of his reversion, or that the value thereof has been substantially diminished by the breach;

(b) that the immediate remedying of the breach is required for giving effect in relation to the premises to the purposes of any enactment, or of any byelaw or other provision having effect under an enactment, or for giving effect to any order of a court or requirement of any authority under any enactment or any such byelaw or other provision as aforesaid;

(c) in a case in which the lessee is not in occupation of the whole of the premises as respects which the covenant or agreement is proposed to be enforced, that the immediate remedying of the breach is required in the interests of the occupier of those premises or of part thereof;

(d) that the breach can be immediately remedied at an expense that is relatively small in comparison with the much greater expense that would probably be occasioned by postponement of the necessary work; or

(e) special circumstances which in the opinion of the court, render it just and equitable that leave should be given.

(6) The court may, in granting or in refusing leave for the purposes of this section, impose such terms and conditions on the lessor or on the lessee as it may think fit.

2. Restriction on right to recover expenses of survey, etc.

A lessor on whom a counter-notice is served under the preceding section shall not be entitled to the benefit of subsection (3) of section one hundred and forty-six of the Law of Property Act, 1925, (which relates to costs and expenses incurred by a lessor in reference to breaches of covenant), so far as regards any costs or expenses incurred in reference to the breach in question, unless he makes an application for leave for the purposes of the preceding section, and on such an application the court shall have power to direct whether and to what extent the lessor is to be entitled to the benefit thereof.

3. Saving for obligation to repair on taking possession

This Act shall not apply to a breach of a covenant or agreement in so far as it imposes on the lessee an obligation to put premises in repair that is to be performed upon the lessee taking possession of the premises or within a reasonable time thereafter.

4. [Repealed]

5. Application to past breaches

This Act applies to leases created, and to breaches occurring, before or after the commencement of this Act.

6. Court having jurisdiction under this Act

(1) In this Act the expression "the court" means the county court, except in a case in which any proceedings by action for which leave may be given would have to be taken in a court other than the county court, and means in the said excepted case that other court.

(2) [Repealed]

7. Application of certain provisions of 15 & 16 Geo. 5 c. 20

(1) In this Act the expressions "lessor", "lessee" and "lease" have the meanings assigned to them respectively by sections one hundred and forty-six and one hundred and fifty-four of the Law of Property Act, 1925, except that they do not include any reference to such a grant as is mentioned in the said section one hundred and forty-six, or to the person making, or to the grantee under such a grant, or to persons deriving title under such a person, and "lease" means a lease for a term of seven years or more, not being a lease of an agricultural holding within the meaning of the Agricultural Holdings Act, 1948.

(2) The provisions of section one hundred and ninety-six of the said Act (which relate to the service of notices) shall extend to notices and counter-notices required or authorised by this Act.

8. Short title and extent

(1) This Act may be cited as the Leasehold Property (Repairs) Act, 1938.

(2) This Act shall not extend to Scotland or to Northern Ireland.

Supreme Court Act 1981

38. Relief against forfeiture for non-payment of rent

(1) In any action in the High Court for the forfeiture of a lease for non-payment of rent, the court shall have power to grant relief against forfeiture in a summary manner, and may do so subject to the same terms and conditions as to the payment of rent, costs or otherwise as could have been imposed by it in such an action immediately before the commencement of this Act.

(2) Where the lessee or a person deriving title under him is granted relief under this section, he shall hold the demised premises in accordance with the terms of the lease without the necessity for a new lease.

County Courts Act 1984

138. Provisions as to forfeiture for non-payment of rent

(1) This section has effect where a lessor is proceeding by action in a county court (being an action in which the county court has jurisdiction) to enforce against a lessee a right of re-entry or forfeiture in respect of any land for non-payment of rent.

(2) If the lessee pays into court not less than 5 clear days before the return day all the rent in arrear and the costs of the action, the action shall cease, and the lessee shall hold the land according to the lease without any new lease.

(3) If—

(a) the action does not cease under subsection (2); and

(b) the court at the trial is satisfied that the lessor is entitled to enforce the right of re-entry or forfeiture,

the court shall order possession of the land to be given to the lessor at the expiration of such period, not being less than 4 weeks from the date of the order, as the court thinks fit, unless within that period the lessee pays into court all the rent in arrear and the costs of the action.

(4) The court may extend the period specified under subsection (3) at any time before possession of the land is recovered in pursuance of the order under that subsection.

(5) Subject to subsection (6), if—

(a) within the period specified in the order; or

(b) within that period as extended under subsection (4),

the lessee pays into court—

(i) all the rent in arrear; and

(ii) the costs of the action,

he shall hold the land according to the lease without any new lease.

(6) Subsection (2) shall not apply where the lessor is proceeding in the same action to enforce a right of re-entry or forfeiture on any other ground as well

as for non-payment of rent, or to enforce any other claim as well as the right of re-entry or forfeiture and the claim for arrears of rent.

(7) If the lessee does not—

(a) within the period specified in the order; or

(b) within that period as extended under subsection (4),

pay into court—

(i) all the rent in arrear; and

(ii) the costs of the action,

the order shall be enforced in the prescribed manner and so long as the order remains unreversed the lessee shall be barred from all relief.

(8) The extension under subsection (4) of a period fixed by a court shall not be treated as relief from which the lessee is barred by subsection (7) if he fails to pay into court all the rent in arrears and the costs of the action within that period.

(9) Where the court extends a period under subsection (4) at a time when—

(a) that period has expired; and

(b) a warrant has been issued for the possession of the land,

the court shall suspend the warrant for the extended period; and, if, before the expiration of the extended period, the lessee pays into court all the rent in arrear and all the costs of the action, the court shall cancel the warrant.

(10) Nothing in this section or section 139 shall be taken to affect—

(a) the power of the court to make any order which it would otherwise have power to make as respects a right of re-entry or forfeiture on any ground other than non-payment of rent; or

(b) section 146 (4) of the Law of Property Act 1925 (relief against forfeiture).

139. Service of summons and re-entry

(1) In a case where section 138 has effect, if—

(a) one-half-year's rent is in arrear at the time of the commencement of the action; and

(b) the lessor has a right to re-enter for non-payment of that rent; and

(c) no sufficient distress is to be found on the premises countervailing the arrears then due

the service of the summons in the action in the prescribed manner shall stand in lieu of a demand and re-entry.

(2) Where a lessor has enforced against a lessee, by re-entry without action, a right of re-entry or forfeiture as respects any land for non-payment of rent, the lessee may, if the net annual value for rating of the land does not exceed the county court limit, at any time within six months from the date on which the lessor re-entered apply to the county court for relief, and on any such application the court may, if it thinks fit, grant to the lessee such relief as the High Court could have granted.

140. Interpretation of sections 138 and 139

For the purposes of sections 138 and 139—

"lease" includes—

(a) an original or derivative under-lease;

(b) an agreement for a lease where the lessee has become entitled to have his lease granted; and

(c) a grant at a fee farm rent, or a grant securing a rent by condition;

"lessee" includes—

(a) an original or derivative under-lessee;
(b) the persons deriving title under a lessee;
(c) a grantee under a grant at a fee farm rent, or under a grant securing a rent by condition; and
(d) the persons deriving title under such a grantee;

"lessor" includes—

(a) an original or derivative under-lessor;
(b) the persons deriving title under a lessor;
(c) a person making a grant at a fee farm rent, or a grant securing a rent by condition; and
(d) the persons deriving title under such a grantor;

"under-lease " includes an agreement for an under-lease where the under-lessee has become entitled to have his under-lease granted; and "under-lessee" includes any person deriving title under an under-lessee.

APPENDIX B

Members of the Law Commission Landlord and Tenant Working Party at the time of the publication[1] of Working Paper No. 16

Mr. Neil Lawson, Q.C., Chairman Mr. A. Stapleton Cotton, Deputy Chairman	The Law Commission
Mr. M. J. Albery, Q.C.	The Institute of Conveyancers
Mr. L. A. Blundell, Q.C. Mr. V. G. Wellings Mr. R. H. Bernstein, D.F.C., Q.C. Mr. J. T. Plume	The General Council of the Bar
Mr. E. F. George Mr. C. F. Wegg-Prosser	The Law Society
Mr. M. R. Dunnett, F.R.I.C.S. Mr. P. S. Edgson, F.R.I.C.S. Mr. W. N. D. Lang, F.R.I.C.S.	The Royal Institution of Chartered Surveyors
Mr. E. A. K. Ridley, C.B.	Treasury Solicitor's Department
Mr. E. H. Watson	Ministry of Housing and Local Government
Mr. D. S. Gordon	Lord Chancellor's Office
Mr. D. Lloyd-Evans, Secretary	The Law Commission

[1]All the members listed were not necessarily involved personally in the work leading to the preparation of the working paper.

APPENDIX C

List of those who commented on Working Paper No. 16 and on particular aspects of the report

Association of Local Authority Valuers and Estate Surveyors
Association of Municipal Corporations
Board of Trade
Building Societies Association
Chartered Land Societies Committee
Church Commissioners
Crown Estate Office
Duchy of Lancaster Office
Fair Rent Association
Forestry Commission
Holborn Law Society
Incorporated Society of Valuers & Auctioneers
Institute of Legal Executives
London Chamber of Commerce
Ministry of Agriculture, Fisheries and Food
Ministry of Defence
Ministry of Housing and Local Government
Ministry of Public Building and Works
National Chamber of Trade
National Federation of Property Owners Ltd.
Office of Parliamentary Draftsmen, Northern Ireland
Society of Conservative Lawyers

Professor F. R. Crane, Queen Mary College, University of London
Mr. M. J. Goodman, University of Manchester
Mr. Paul Jackson, University of Birmingham
Professor Lord Lloyd of Hampstead, University College London
Mr. D. Macintyre, University of Cambridge
Mr. F. W. Taylor, University of Hull
Mr. Richard White, University of Birmingham
The Faculty of Law, University of Bristol
His Honour Judge Barrington
His Honour Judge Baxter, O.B.E.
Mr. P. T. Adams, Solicitor
Mr. W. D. Ainger, Barrister
Mr. Bryan W. Cross, D.S.C., Solicitor
Messrs. Hatchett Jones & Co., Solicitors
Mr. W. A. Leach, F.R.I.C.S.
Messrs. P. R. Rogers, F.J.S. Waller and E. C. Koehne, Solicitors

The following have assisted us with information and comments upon particular aspects of the subject matter of the report.

Confederation of British Industry Minerals Committee
Country Landowners Association
Department of Energy
Departments of Industry and Trade

Lord Chancellor's Department
Mining Association of the United Kingdom
Ministry of Agriculture, Fisheries and Food
National Coal Board
Dr. J. Gilchrist Smith, Solicitor
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Mr. Christopher Priday, Barrister

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