The Law Commission

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LANDLORD AND TENANT LAW
PRIVITY OF CONTRACT AND ESTATE

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PRIVITY OF CONTRACT AND ESTATE

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PRIVITY OF CONTRACT AND ESTATE

Summary

In this Report the Law Commission examines the extent, and period, of liability undertaken by the parties to leases of land and their successors in title, under the doctrines of privity of contract and privity of estate. It recommends that all the obligations created by leases should bind the parties who for the time being are interested in the land. Those parties should cease to have any liability—automatically in the case of tenants, and for landlords on the service of notice—when they part with those interests, except in cases where it is objectively reasonable that their liability continue. The Report contains a draft Bill to give effect to the recommendations.

THE LAW COMMISSION

Item VIII of the First Programme

LANDLORD AND TENANT LAW

PRIVITY OF CONTRACT AND ESTATE

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

PART I

INTRODUCTION

Scope of this Report

1.1 This Report examines the nature and duration of the liability undertaken by parties to leases, which depend on the rules of privity of contract and privity of estate. In the law of landlord and tenant privity of contract means that the original landlord and the original tenant normally remain liable to perform their respective obligations for the whole of the period for which the lease was granted, even if they have parted with all interest in the property. Privity of estate means that the landlord and the tenant for the time being automatically assume responsibility for the lease obligations which relate directly to the property for the period during which they own an interest in it, but they are not necessarily bound to comply with all the terms of the lease.

1.2 A comparable situation may arise in relation to mortgages, where a mortgagor who assigns the equity of redemption can continue to be liable on obligations undertaken in the mortgage even though he has parted with the property. However, this Report is not concerned with mortgages,[1] even though the traditional form of mortgage is by demise or subdemise.[2]

Background

1.3 In 1985 we set up a Working Party composed of members with wide experience of the leasehold property market to examine the privity of contract principle and to consider proposals for its reform. The membership of the Working Party is set out in Appendix B. We are very grateful to the members for their assistance.

1.4 In June 1986 we published a Working Paper[3] which examined the criticisms made of the privity of contract rule, explained the position in Scotland and the Republic of Ireland and put forward a number of alternative proposals for reform. This drew on the deliberations of the Working Party but did not seek to represent their views. Our provisional conclusion was that the rule should be abolished. We received a substantial and helpful response to the Working Paper and should like to thank all those who submitted comments (listed in Appendix C).

1.5 We consider the tenor of the consultation later in this Report, but at this stage we note that a clear majority of those who responded agreed that the present position was unsatisfactory and favoured a change in the law. There was considerable support for our provisional proposal that the privity of contract rule should be abolished, but a significant number of those who responded were opposed to it. In the light of the consultation response, we have reconsidered our provisional proposal in the Working Paper and we do not now recommend that the privity of contract principle should be totally abolished. Briefly, our recommendation is that a party to a lease should cease to be liable to perform his obligations under it after he parts with his interest in the property, unless it is reasonable that he should remain liable.

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[1] The Commission is examining this topic separately, and published a Working Paper in 1986: Land Mortgages, Working Paper No. 99.

[2] Law of Property Act 1925, ss. 85, 86.

[3] Privity of Contract and Estate, Duration of Liability of Parties to Leases, Working Paper No. 95.

Consent to assignment

1.6 As will be seen, our recommendations rely in an important respect upon the proposals we previously made concerning consents granted by landlords to tenants who wish to assign their leases. In 1985 we recommended that a tenant who had covenanted not to assign without his landlord's consent should be entitled to damages from a landlord who withheld that consent unreasonably.[4] In May 1987 we published a further Report on this subject,[5] to which was appended a draft Bill to impose the necessary statutory duty on landlords. These recommendations have now been implemented by the Landlord and Tenant Act 1988.[6]

Structure of this Report

1.7 Part II of this Report provides an account of the present law. In Part III we outline the criticisms of the present law and consider the need for reform. Part IV contains our recommendations for reform, and they are summarised in Part V. A draft Bill to implement our recommendations, with explanatory notes, follows in Appendix A.

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

[5] Report on Leasehold Conveyancing (1987) Law Com. No. 161.

[6] The Act came into force on 29 September 1988.

PART II

THE PRESENT LAW

Introduction

2.1 A lease creates a new legal estate, vesting the property in the tenant for a defined period; it also constitutes a contract between the original parties, who normally undertake liabilities under the covenants[1] for the whole term created by the lease.[2] This direct contractual relationship—privity of contract—between the original landlord and the original tenant means that they remain liable to perform their respective covenants for the whole period of the lease, notwithstanding that they have parted with all interest in the property. Thus, e.g., the original tenant remains liable to pay rent if the person to whom he has assigned the term defaults; "of course the expectation, commercially speaking, is that the assignee will pay, but the assignor does not by assignment get rid of one jot or tittle of his original liability".[3] Although the privity of contract principle applies equally to landlords and tenants, examples of tenants being made liable are more common. The main reason for this is probably that in the majority of leases the tenant undertakes many more obligations than does the landlord.

2.2 Privity of estate means that the parties stand for the time being in the relationship of landlord and tenant, which of itself involves certain enforceable obligations. As between the original parties to a lease, there is at first privity both of contract and of estate. However, if either the original landlord or the original tenant parts with his interest in the property, the privity of estate between them comes to an end.[4] There is then privity of estate between the person who is landlord for the time being and the person who is tenant for the time being. The parties currently in the position of landlord and tenant become bound by, and can enforce, certain types of covenant in a lease. The covenants so enforceable are, in general, those which have a direct bearing on their relationship as landlord and tenant—said technically to be, covenants which "touch and concern" the land or have "reference to the subject-matter of the lease",[5] terms which are treated as synonymous. In practice, almost all the most important covenants in a lease fall within this category. Those covenants which impose merely personal obligations bind only the original parties, and not their successors.[6]

2.3 Once the lease is assigned, there will be privity of estate between the landlord and the assignee. When a lease requires the landlord's consent to an assignment by the tenant, it is not uncommon for the landlord to require the proposed assignee to covenant directly with him to observe and perform the tenant's covenants in the lease. In that case, as soon as the assignee covenants directly with the landlord, there will additionally be privity of contract between them. As a result, the new tenant's liability will go beyond the normal privity of estate liability of an assignee in two respects. First, his liability will extend to all the tenant's covenants in the lease and not merely those which touch and concern the land. Secondly, if his covenant is expressed to bind him for the remainder of the lease,[7] he remains liable even if he subsequently assigns his interest.[8]

A. Privity of Contract

(i) *Nature of continuing liability*

2.4 As explained above,[9] the original parties remain liable on their covenants for the whole period of the lease, even after they have assigned their interest in the property.

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[1] Covenants in leases are deemed to be made on behalf of the covenantor and his successors: Law of Property Act 1925, s. 79. This applies "unless a contrary intention is expressed".

[2] Liability can last beyond the original term: para. 2.7 below. It is open to the parties to exclude their liability under privity of contract: see para. 2.17 below.

[3] *Allied London Investments Ltd.* v. *Hambro Life Assurance Ltd.* (1984) 270 E.G. 948, 950 *per* Walton J.

[4] Privity of contract, of course, remains.

[5] See paras. 2.20–2.21 below.

[6] *Ibid.*

[7] Although it is a matter of bargain between the parties, this form of covenant is common.

[8] Under the privity of estate principle, the assignee is only liable for breach of covenants occurring while he is the tenant; if he himself assigns the lease to someone else, privity of estate between him and the landlord ceases, and he therefore does not become liable for subsequent breaches: see para. 2.27 below.

[9] Para. 2.1. For a recent example of the operation of the privity of contract rule, see *Weaver* v. *Mogford* [1988] 31 E.G. 49 (original tenant liable for damages where disrepair occurred after he had assigned the premises).

This is a direct and primary liability, and not the liability of a surety,[10] who only becomes liable to perform the lease obligations if the assignee does not. Thus, e.g., the landlord can first seek recourse against the original tenant for breach of the tenant's covenants[11] though the assignee is also liable to the landlord[12] in respect of the covenants which touch and concern the land under the privity of estate principle. Another consequence of the original tenant's direct and primary liability is that he remains liable even though the lease obligations have been materially altered by agreement between the landlord and the assignee, e.g., if the landlord agrees to release the assignee's guarantor.[13] Again, the original tenant's liability remains unaffected where the lease is disclaimed by the assignee's trustee in bankruptcy or liquidator.[14]

(ii) *Extent of liability*

2.5 The extent of the original party's liability may be increased after he has parted with the interest in the property. An example is where rent is increased on a rent review. Two decisions illustrate how the original tenant's liability can be affected in such circumstances. In *Centrovincial Estate Plc* v. *Bulk Storage Ltd.*[15] the original tenant became liable, on his assignee's default, to pay the increased rent agreed between the assignee and the landlord, even though he had no opportunity of influencing the amount by participating in the rent review.[16] In *Selous Street Properties Ltd.* v. *Oronel Fabrics Ltd.*[17] the original tenant became liable to pay rent based on the value of an improvement made by the assignee. Not only had the original tenant derived no benefit from that improvement, he did not even know that it had been made and, indeed the lease had forbidden the making of improvements[18] so that he might have reasonably supposed that he could not incur such a liability.

2.6 The principle underlying these decisions is that—

> "... each assignee is the owner of the whole estate and can deal with it so as to alter it or its terms. The estate as so altered binds the original tenant, because the assignee has been put into the shoes of the original tenant and can do all such acts as the original tenant could have done".[19]

These observations serve to underline the vulnerable position of the original tenant. Apparently, his liability can be unexpectedly increased by a variation of the terms agreed by the assignee and landlord, e.g., they may agree to a change in the permitted user which would greatly increase the rent of the premises; or the assignee may undertake a full repairing obligation where none existed before.[20] It may also be noted that the original tenant's inability to ensure compliance with the lease obligations does

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[10] *Warnford Investments Ltd.* v. *Duckworth* [1979] Ch. 127; *Selous St. Properties Ltd.* v. *Oronel Fabrics Ltd.* (1984) 270 E.G. 643; *Allied London Investments Ltd.* v. *Hambro Life Assurance Plc.* (1985) 50 P. & C.R. 207.

[11] As between the original tenant and the assignee, the latter has the "primary duty" to discharge the lease obligations; if he fails to do so, and the original tenant has to pay, the latter has a right to be reimbursed by the assignee: see para. 2.16 below. "But as between the [original parties to the lease], ... the assignment of the lease does nothing to disturb the direct liability of the lessee to the lessor under the lease for the whole period of the term": *Warnford Investments Ltd.* v. *Duckworth* [1979] Ch. 127, 138 *per* Megarry V.-C.

[12] Normally, the landlord will look first to the assignee, as the tenant in possession, for redress; but he is not obliged to do so.

[13] *Allied London Investments Ltd.* v. *Hambro Life Assurance Ltd.* (1984) 269 E.G. 41; and see paras. 2.5–2.6 below.

[14] *Warnford Investments Ltd.* v. *Duckworth*, above. The assignee's express guarantor is, however, discharged.

[15] (1983) 46 P. & C.R. 393.

[16] Most rent review clauses do not give the original tenant any right to participate in the rent review after he has assigned his interest and indeed do not even require that he be notified of the revised rent. The justification for making the original tenant liable for the revised rent is that the obligation he entered into in the lease was to pay rent throughout the term, first at the rate stated in the lease, and later at whatever figure might be agreed or determined in accordance with the lease terms. The review therefore merely quantifies the obligation; it does not impose a new duty to pay.

[17] (1984) 270 E.G. 643.

[18] The landlord, as he was entitled to do, gave the assignee express consent to make the improvement.

[19] *Centrovincial Estates Plc* v. *Bulk Storage* (1983) 46 P. & C.R. 393, 396 *per* Harman J. These observations were adopted in *Selous*, above. See also *Baynton* v. *Morgan* (1888) 22 Q.B.D. 74, 78 and 82 (C.A.).

[20] See K. Reynolds (1984) 81 Law Society Gazette 2214, 2215. However, a variation of the lease terms by the assignee and the landlord may in some circumstances result in the surrender of the lease and its replacement by a new one, in respect of which there will be no privity of contract between the landlord and the original tenant of the old lease.

not affect his continuing liability;[21] and that he may have to pay statutory interest[22] on rent unpaid by the assignee.[23]

(iii) *Duration of liability*

2.7 Where the lease contains an option to extend the original term which is exercised by an assignee, the privity of contract between the original parties will continue during the extended term.[24]

2.8 In relation to business tenancies, it seems likely that the privity of contract between the original parties continues during the statutory extension of the initial lease term under Part II of the Landlord and Tenant Act 1954. Section 24(1) of the Act provides that a business tenancy is not to come to an end unless determined in accordance with the provisions of the Act. The effect of this provision is that the common law tenancy continues with a statutory variation as to the mode of determination; it remains throughout one and the same tenancy.[25] Accordingly, Nourse J. in *G.M.S. Syndicate Ltd.* v. *Gary Elliott Ltd.*[26] held that a sub-tenant, who had directly covenanted with the head landlord remained liable for a breach of covenant during the statutory extension. On this basis, it would appear that the original tenant would be similarly liable. This can have important consequences since the statutory extension can be for a considerable period and the landlord may during that time obtain an increased interim rent under section 24A of the Act.[27]

2.9 The death of a party liable under the covenants in a lease does not exonerate him or his estate. To the extent that there is a contingent liability, which is likely to last for the remainder of the term of the lease, a claim can lie against the deceased's estate. To stop this impeding the winding up of estates, statute allows personal representatives to set aside a fund to meet potential future liabilities, and to distribute the remainder of the estate without further personal liability.[28]

(iv) *Who can enforce the original parties' liability?*

2.10 Statute[29] has modified the common law rule that the original tenant remains liable to the original landlord for the whole period of the term, even if the latter assigns the reversion to the lease. It has been held[30] that the effect of section 141(1) of the Law of Property Act 1925 is that, once the original landlord has assigned the reversion the assignee alone is entitled to sue the tenant for breach of covenants which have reference

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[21] In *Thames Manufacturing Co. Ltd.* v. *Perrots (Nichol & Peyton) Ltd.* (1985) 50 P. & C.R. 1, the original tenant was held liable, even though he could not compel the assignee to carry out the repairing and other obligations imposed by the lease. An assignor normally has no right of entry, so he is unable to do the work himself.

[22] Supreme Court Act 1981, s. 35A. The power to grant interest is discretionary.

[23] *Allied London Investments Ltd.* v. *Hambro Life Assurance Co. Ltd.* (1984) 270 E.G. 948, 950.

[24] *Baker* v. *Merckel* [1960] 1 Q.B. 657.

[25] *H. L. Bolton Engineering Co. Ltd.* v. *T. J. Graham & Sons Ltd.* [1957] 1 Q.B. 159 (C.A.); *Cornish* v. *Brook Green Laundry Ltd.* [1959] 1 Q.B. 394, 409 (C.A.); *Scholl Mfg. Co. Ltd.* v. *Clifton (Slim-line) Ltd.* [1967] Ch. 41, 51 (C.A.).

[26] [1982] Ch. 1. In *Junction Estates Ltd.* v. *Cope* (1974) 27 P. & C.R. 482 and *A. Plesser & Co. Ltd.* v. *Davis* (1983) 267 E.G. 1039, it was held that an original tenant's surety is not liable for breaches occurring during a statutory extension of the term under s. 24(1) of the 1954 Act unless the terms of the guarantee expressly impose liability for the extended period. The former case was cited in argument in the *G.M.S.* case, but was not pursued in the judgment presumably because it did not provide an appropriate analogy for the direct liability of the sub-tenant under the covenant.

[27] Such awards, in proceedings to which the assignor/tenant would not be a party, are frequently retrospective.

[28] Trustee Act 1925, s. 26. This does not cancel any claim which is made, but merely transfers liability, to the extent that the reserved fund proves inadequate, from the personal representatives to the beneficiaries. To take advantage of this, the personal representatives are required to retain "a sufficient fund", and they will normally find it prudent to apply to the court for approval of the amount of the proposed retention: R.S.C., Ord. 85, r. 2.

[29] Law of Property Act 1925, s. 141(1). This provides for the benefit of the tenant's covenants, which have reference to the subject-matter of the lease, to go with the reversionary interest. Section 142(1) makes similar provision for the burden of the landlord's covenants.

[30] *Re King* [1963] Ch. 459; *London and County (A. & D.) Ltd* v. *Wilfred Sportsman Ltd.* [1971] Ch. 764. However, the original tenant retains the right to sue the landlord after the lease has been assigned. In *City & Metropolitan Properties Ltd.* v. *Greycroft Ltd.* (1987) 54 P. & C.R. 266, Mr John Mowbray Q.C., sitting as a deputy High Court Judge, held that s. 142(1) of the 1925 Act did not have the effect of terminating the original tenant's right, after he has assigned the lease, to sue the landlord.

to the subject-matter of the lease,[31] irrespective of whether such breaches occurred before or after the asignment.

2.11 It has also been held[32] that section 141(1) of the Law of Property Act enables an assignee of the reversion to sue the original tenant on covenants which have reference to the subject-matter of the lease, even though the latter has assigned the lease before the former has acquired the reversion.[33] Similarly, and more recently, the Court of Appeal has suggested[34] that the effect of section 142(1) of the 1925 Act is to make an original landlord liable, on covenants which have reference to the subject-matter of the lease, directly to an assignee of the lease who only became tenant after the landlord had parted with the reversion.[35]

(v) *Recovery of payments from assignees*

2.12 The liability of the original party under a lease by virtue of the privity of contract principle will normally mean making a payment of money. This is either because the original obligation is to make a payment, e.g., of rent, or because the obligation is one which the original party is no longer in a position to perform (e.g., to repair premises to which he no longer has a right of access) and therefore will become liable to pay damages. In such a case, the original party may be able to claim reimbursement in two ways: First, if he obtained an indemnity when he parted with the property, he can enforce that covenant. Secondly, the original tenant has a quasi-contractual right of reimbursement against the tenant in possession at the time of the breach. Presumably the original landlord has a similar right against the current owner of the reversion. In both cases, obviously, the value of the right to reimbursement depends upon the continuing solvency of the party to whom the payer looks for reimbursement.

(a) *Express or implied indemnity covenants*

2.13 In almost every case, the first assignee gives the original tenant an indemnity covenant when taking over the lease. The second assignee gives the first assignee a similar covenant and so on. These indemnity covenants can be express but are usually implied by statute into assignments or transfers of leases. The assignee agrees to indemnify the assignor against all future payments of rent and agrees to perform all the other obligations contained in the lease.[36] In the case of unregistered land, the covenant is implied in an assignment for valuable consideration.[37] In the case of registered land, the covenant is implied into any transfer.[38] An express provision agreed between the parties can exclude the indemnity in either case, or on the other hand can include it in a case which would not otherwise have it.[39]

2.14 Thus a chain of indemnities can and usually does build up as the lease passes from hand to hand. The original tenant and each successive assignor has a right of indemnity, and can claim against his immediate assignee only. If, e.g., the original tenant's (A) immediate assignee (B) becomes bankrupt or disappears, A cannot proceed against the next assignee (C) down the chain for a breach by the current tenant in possession unless B has assigned to him the benefit of C's covenant.[40]

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[31] See paras. 2.20–2.22 below.

[32] *Arlesford Trading Co. Ltd.* v. *Servansingh* [1971] 1 W.L.R. 1080.

[33] i.e., even though there has never been either privity of contract or privity of estate between the assignee of the reversion and the tenant.

[34] *Celsteel Ltd.* v. *Alton House Holdings Ltd. (No. 2)* [1987] 1W.L.R. 291, 296. The Court of Appeal accepted Scott J.'s dicta at first instance to this effect: [1986] 1 W.L.R. 666, 672.

[35] i.e., even though there had never been privity of contract or privity of estate between the original landlord and the new tenant.

[36] The indemnity extends to all the covenants in the lease, and not merely to those which touch and concern the land, and lasts for the remainder of the term. Where only part of the leased property is transferred, the covenant is suitably modified: see n. 81 below.

[37] Law of Property Act 1925, s. 77(1)(C), Sched. 2, Pt. IX. "Valuable consideration" does not include a nominal consideration in money: s. 205(xxi). In *Johnsey Estates Ltd.* v. *Lewis & Manley (Engineering) Ltd.* [1987] 2 E.G.L.R. 69, the Court of Appeal held that the obligations undertaken by an assignee by virtue of s. 77(1)(C) constituted valuable consideration.

[38] Land Registration Act 1925, s. 24(1).

[39] e.g., a transfer of unregistered land for a nominal money consideration. However, in view of the decision in *Johnsey Estates Ltd*, n. 37 above, it would seem unnecessary to make an express covenant in such a case.

[40] See *Selous Street Properties Ltd* v. *Oronel Fabrics Ltd.* (1984) 270 E.G. 643. If an intermediate assignee becomes bankrupt the original tenant can take from the trustee in bankruptcy or liquidator an assignment of that assignee's right of indemnity against the next person in the chain and can seek recourse from the latter.

2.15 There is no automatic statutory implied indemnity covenant by the assignee of a reversion. However, the commonly used general conditions of sale include provision allowing the landlord to require the purchaser to enter into such an indemnity.[41]

(b) *Quasi-contractual right to indemnity*

2.16 The original tenant and any assignee in whom the lease is vested at the time of the breach of covenant are each liable to the landlord.[42] As between the original tenant and the assignee, the latter has the primary liability.[43] If he fails to perform the lease obligations, and the original tenant has to pay, the latter has the right to be reimbursed by the former.[44] However, this right is of limited practical utility. The defaulting assignee's insolvency is usually why the landlord seeks recourse against the original tenant.

(vi) *Excluding or avoiding continuing liability*

2.17 A lease can, as a matter of bargain, limit the obligations of one or both of the parties, so that they come to an end if the parties transfer their interest in the property. However, this is rarely done. The consultation on our Working Paper indicates that the inequality of bargaining power between landlord and tenant is such that the latter can seldom negotiate the exclusion of his continuing liability.[45]

2.18 Statute provides an exception to the privity of contract rule in two special cases.

(a) On a divorce, the court has power under the Matrimonial Homes Act 1983 to order that the tenancy of the matrimonial home be transferred from one spouse to the other.[46] The Act provides that the spouse who transfers does not have any continuing liability under any covenant "having reference to the dwelling house".[47] If, therefore, a transferring spouse had been the original tenant, his or her liability to the landlord for such covenants under the privity of contract principle is cancelled as soon as the transfer takes effect.

(b) A lease granted after 1925 with a covenant for perpetual renewal takes effect as a lease for a term of 2000 years.[48] The Law of Property Act 1922[49] provides that in this case a tenant is only liable for breaches of the lease covenants occurring while the term is vested in him. This also applies to the original tenant, who will therefore not be liable for breaches occurring after he has assigned the term.

2.19 The original tenant can mitigate the consequences of the privity of contract principle by sub-letting the property, rather than assigning it. Although the original tenant will remain fully liable to the landlord for the duration of the term if he sub-lets, the advantage of this arrangement is that he can exercise considerably greater direct control over the person in occupation of the premises. However, this is not thought to be popular owing to the time and trouble involved in estate management. The Royal Commission on Legal Services[50] criticised the proliferation of sub-lettings as a factor which complicated conveyancing and, as indicated in our Working Paper, we accept that it would be undesirable to create sub-leases merely as a means of mitigating the consequences of the privity of contract principle. Further, there is no equivalent action which the original landlord can take.

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[41] National Conditions of Sale (20th ed.) conditions 18(3), 19(6); Law Society's General Conditions of Sale (1984 rvsn.), condition 17(4).

[42] Whilst the landlord can sue either or both, he can recover from only one of them: *Brett* v. *Cumberland* (1619) Cro. Jac. 522.

[43] See n. 11 above.

[44] *Moule* v. *Garrett* (1872) L.R. 7 Ex. 101. The principle is that where one joint debtor pays money due to the common creditor for the exclusive benefit of the other, the latter becomes liable to reimburse that sum. Thus, the assignee of the lease will only become liable to reimburse the original tenant where the breach is of a covenant which touches and concerns the land. The assignee is liable on such a covenant but not on one which is merely personal or collateral: see para. 2.20 below.

[45] See para. 3.14 below.

[46] The court may also make such an order on granting a decree of nullity or a decree of judicial separation.

[47] Sched. 1, para. 2(2).

[48] Law of Property Act 1922, s. 145, Sched. 15, para. 5. Perpetually renewable leases which existed on 1 January 1926 were converted into leases for 2000 years from the date at which the existing term began.

[49] Sched. 15, para. 11(1).

[50] *Final Report* (Cmnd. 7648), Annex 21.1, para. 4.

B. Privity of Estate

(i) *Covenants enforceable by landlord and tenant and their successors*

2.20 Covenants in leases may be divided into two groups:

(a) those which "touch and concern the land" or have "reference to the subject matter of the lease", terms which have the same meaning; and

(b) those which impose personal or collateral obligations.

Most leases probably impose obligations of both types. The original parties remain bound by *all* the covenants in the lease by virtue of privity of contract. In respect of the first group of covenants only, there is also liability, by way of privity of estate, between the persons, who for the time being, stand in the shoes of the original landlord and the original tenant.

2.21 Thus, when the original tenant assigns his lease, the assignee (and any subsequent assignee) automatically becomes directly liable to the landlord, with whom he has privity of estate, in respect of those covenants which "touch and concern"[51] the land. Examples of such covenants are covenants to pay the rent;[52] to repair buildings;[53] to insure them against fire;[54] to use the property for domestic purposes only;[55] and a covenant not to assign the lease without the landlord's consent.[56] Similarly, when the original landlord, parts with the reversion, his successor becomes responsible for complying with those obligations which have "reference to the subject matter of the lease".[57] Examples of such obligations undertaken by the landlord are covenants to repair or insure the premises, to supply water to the property,[58] and to give the tenant quiet possession of the premises.[59] Personal covenants bind only the original parties, and not their successors. Examples of such covenants are a landlord's covenant not to compete with the tenant's business;[60] a covenant requiring payment of an annual sum to a third party;[61] and one promising to pay the tenant a sum of money at the end of the lease or until a new lease is granted.[62]

2.22 The test for distinguishing between those covenants which touch and concern the land and those which are merely personal has been variously formulated in the decided cases over the years. The covenant will touch and concern the land if it *per se* affects the nature, quality or value of the land;[63] if it affects the landlord in his normal capacity as landlord or the tenant in his normal capacity as tenant;[64] if the covenant is beneficial to the owner for the time being of the covenantee's land and to no one else.[65]

2.23 The rules concerning covenants which run with the land were criticised some fifty years ago as "purely arbitrary, and the distinctions, for the most part, quite illogical".[66] As we indicated in the Working Paper, there are a number of difficult borderline cases from which it is hard to discern a clear guiding principle. To take a few examples. A landlord's covenant to renew a lease runs with the land,[67] but a covenant that a landlord will make a payment to the tenant at the end of the lease, or in default

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[51] *Spencer's Case* (1583) 5 Co. Rep. 16a.
[52] *Parker* v. *Webb* (1693) 3 Salk. 5.
[53] *Martyn* v. *Clue* (1852) 18 Q.B. 661.
[54] *Vernon* v. *Smith* (1821) 5 B. & Ald. 1.
[55] *Wilkinson* v. *Rogers* (1864) 2 De G.J. & S. 62.
[56] *Williams* v. *Earle* (1868) L.R. 3 Q.B. 739; *Cohen* v. *Popular Restaurants Ltd.* [1917] 1 K.B. 480.
[57] Law of Property Act 1925, s. 142(1).
[58] *Jourdain* v. *Wilson* (1821) 4 B. & Ald. 266.
[59] *Celsteel Ltd.* v. *Alton House Holdings Ltd. (No. 2)* [1986] 1 W.L.R. 666, 672.
[60] *Thomas* v. *Hayward* (1869) L.R. 4 Ex. 311, 312. However, a tenant's covenant to retail only the landlord's brand of product on the premises does touch and concern the land: *Clegg* v. *Hands* (1890) 44 Ch. D. 503.
[61] *Mayho* v. *Buckhurst* (1617) Cro. Jac. 438.
[62] *Re Hunter's Lease* [1942] Ch. 124.
[63] *Mayor of Congleton* v. *Pattison* (1808) 10 East. 130, 138; *Dyson* v. *Forster* [1909] A.C. 98, 102 *per* Lord Macnaghten.
[64] *Hua Chiao Commercial Bank Ltd.* v. *Chiaphua Industries* [1987] A.C. 99 (P.C.).
[65] *Vyvyan* v. *Arthur* (1823) 1 B. & C. 410 *per* Bayley J.; *Dyson* v. *Forster* [1909] A.C. 98, 102; *Kumar* v. *Dunning* [1987] 3 W.L.R. 1167 (C.A.); *P. & A. Swift Investments* v. *Combined English Stores Group Plc* [1988] 3 W.L.R. 313 (H.L.); and see n. 77 below.
[66] *Grant* v. *Edmondson* [1931] 1 Ch. 1, 28 *per* Romer L.J.
[67] *Woodall* v. *Clifton* [1905] 2 Ch. 257.

will grant a new lease does not.[68] A covenant not to employ a named person on business premises binds the tenant's successors;[69] a covenant not to employ a particular class of people on the property does not.[70]

2.24 Although those who responded to our Working Paper did not indicate that there were practical problems in distinguishing between the two classes of covenant, recent cases reported since the publication of our Working Paper and after we had received most of the comments, suggest that difficulties can arise, even in respect of the usual covenants to be found in a lease. These latest decisions have also helped to formulate a modern definition.

2.25 In *Hua Chiao Commercial Bank Ltd.* v. *Chiaphua Industries Ltd.*[71] the lease provided that the tenant should pay to the landlord at the commencement of the term a substantial security deposit on the basis that it would be repayable at the end of the term if there was no breach of the tenant's covenants. The Privy Council, overruling the Court of Appeal in Hong Kong, held that the landlord's obligation to return the security at the end of the term did not touch and concern the land.[72] It was merely a personal obligation between the original parties to the lease.[73] Accordingly, the landlord's assignee, who had not received the deposit, was not obliged to return it to the tenant, who had not broken his covenants and who was left without a remedy as the original landlord was in liquidation. Lord Oliver of Aylmerton, giving the judgment of the Board, made it clear that not every covenant which is related to some other obligation which touches and concerns the land itself necessarily has the same character.[74]

2.26 In *Kumar* v. *Dunning*[75] the Court of Appeal did not regard the Privy Council decision as ruling out the possibility that a covenant "closely connected and bound up" with a covenant which does touch and concern the land can itself touch and concern the land. It was held, overruling earlier recent decisions at first instance,[76] that a covenant by a surety, guaranteeing performance of covenants by a tenant which touch and concern the land, itself has the same character and is therefore automatically enforceable by an assignee of the reversion. This decision has recently received the approval of the House of Lords.[77]

(ii) *Duration of liability*

2.27 An assignee of the term or of the reversion is only liable, by virtue of privity of estate, for a breach of covenant occurring during the period that he is the landlord or

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[68] *Re Hunters' Lease* [1942] Ch. 124.

[69] *Lewin* v. *American and Colonial Distributors Ltd.* [1945] Ch. 225.

[70] *Mayor of Congleton* v. *Pattison* (1808) 10 East. 130.

[71] [1987] A.C. 99.

[72] The obligation, it was said, was entered into with the landlord *qua* payee, not *qua* landlord. It did not *per se* affect the nature, quality or value of the land either during or at the end of the term, nor the mode of using or enjoying it.

[73] It was emphasised that the lease did not impose any obligation on the original landlord to pay over the deposit to an assignee of the reversion, nor any obligation on the original tenant to assign to the new tenant his contractual right to receive back the deposit in the event of the term expiring without breach.

[74] In *Moss Empires Ltd.* v. *Olympia (Liverpool) Ltd.* [1939] A.C. 544 the tenant's covenant to spend a specified sum on repairs and to pay over the sum unexpended to the landlord was held to be so "inextricably bound" up with the tenant's covenant to repair that it itself touched and concerned the land. This case was distinguished on the ground that the tenant's obligation clearly affected the value of the landlord's estate and so directly touched and concerned the land. On the other hand, the landlord's obligation to repay the deposit in the *Hua Chiao Bank* case was bound up with the tenant's covenant "at one remove" only and did not *per se* affect the nature, quality or value of the land.

[75] [1987] 3 W.L.R. 1167; see also *Coronation Street Industrial Properties Ltd.* v. *Ingall Industries Plc*, [1988] 30 E.G. 55.

[76] e.g., *Pinemain Ltd.* v. *Welbeck International Ltd.* (1984) 272 E.G., 1166; *Re Distributors & Warehousing Ltd.* [1986] 1 E.G.L.R. 90; *Kumar* v. *Dunning* [1986] 2 E.G.L.R. 31.

[77] *P. & A. Swift Investments* v. *Combined English Stores Group Plc* [1988] 3 W.L.R. 313. Without claiming to expound an exhaustive guide, Lord Oliver of Aylmerton indicated that "the following provides a satisfactory working test for whether, in any given case, a covenant touches and concerns the land: (1) the covenant benefits only the reversioner for time being, and if separated from the reversion ceases to be of benefit to the covenantee; (2) the covenant affects the nature, quality, mode of user or value of the land of the reversioner; (3) the covenant is not expressed to be personal (that is to say neither being given only to a specific reversioner nor in respect of the obligations only of a specific tenant); (4) the fact that a covenant is to pay a sum of money will not prevent it from touching and concerning the land so long as the three foregoing conditions are satisfied and the covenant is connected with something to be done on, to or in relation to the land".

the tenant, as the case may be. Thus, e.g., an assignee is not liable for breaches of covenants which occurred before he acquired the lease;[78] nor is he liable for breaches which occur after he himself has assigned the lease to someone else.[79]

2.28 A recent statutory provision continues the liability of landlords of residential properties on a temporary basis after they have assigned their interest in the property. They remain liable to their tenants in respect of all covenants in the lease—whether or not the covenants touch and concern the land—until the tenants receive written notice of the assignment and particulars of the new landlord's identity from either the old or the new landlord.[80] This continuation of liability is designed as a sanction to back the requirement that residential tenants be told who their landlords are.

(iii) *Transfer of part of the property*

2.29 The tenant may assign part of the leased property, whilst retaining the remainder; or he may assign the whole of the property among different persons who each take part of it. An assignee will be bound by covenants, such as repairing covenants, to the extent that they relate to the part transferred to him.[81] If the rent has been apportioned between the different parts with the landlord's consent, an assignee will be liable to pay the agreed amount in relation to his part. Where, however, the landlord's consent has not been obtained, he is not bound by the apportionment,[82] and it is not entirely clear whether an assignee is liable to the landlord for the rent due in respect of the whole property or only for the proportion attributable to his part.[83] It is clear, however, that, even if his liability is limited in the latter way, the landlord can levy distress against any part of the property for the rent due in respect of the whole; and that the assignee of part of the property, who is compelled to pay the whole rent, by the threat of legal process, e.g., distress or forfeiture, has a right to be reimbursed by any other assignee for the sum paid in respect of the latter's part of the property.[84]

C. The guarantor's liability

2.30 In addition to the landlords, tenants and assignees who undertake liability for the lease covenants, guarantors also accept responsibility. It is not uncommon, particularly in respect of leases of business premises for the landlord to require a guarantor for the covenants of the original tenant or an assignee of the lease.[85] The extent and duration of the guarantor's liability depends on the terms of the guarantee.

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[78] He will, however be liable for continuing breaches, such as that of a covenant to repair: *Granada Theatres Ltd.* v. *Freehold Investment (Leytonstone) Ltd.* [1959] Ch. 592.

[79] *Paul* v. *Nurse* (1828) 8 B. & C. 486. He will, by virtue of privity of contract, remain liable for the remainder of the term if he has directly covenanted with the landlord to that effect: see para. 2.3 above.

[80] Landlord and Tenant Act 1985, s. 3(3A) (inserted by the Landlord and Tenant Act 1987, s. 50). These provisions came into force on 1 February 1988.

[81] *Congham* v. *King* (1631) Cro. Car. 221. The indemnity covenants implied on assignment of whole of the property (see para. 2.13 above) are suitably modified where only part is assigned. In the latter case, the implied covenant by the assignee is to the effect that he will pay his part of the rent apportioned (without the landlord's consent) and observe the other covenants to the extent that they relate to his part: Law of Property Act 1925, s. 77(1)(D)(i), Sched. 2, Pt. X, para. (i). If the rent has been apportioned without the landlord's consent and the assignor retains a part of the land, there is also implied a covenant by the assignor that he will pay his apportioned part of the rent and perform the covenants relating to the land retained by him and will indemnify the assignee accordingly: Law of Property Act 1925, s. 77(1)(D)(ii), Sched. 2, Pt. X, para. (ii).

[82] If the assignee of part of the property himself assigns a part, the rent apportioned by the assignment is binding on the parties but not on the landlord unless he joins in the assignment, which would be unusual. If the landlord, who is not so bound, subsequently enforces payment of rent apportioned to one part against the tenant of the other, the former can recover that rent and costs from the defaulting tenant by distress or taking possession of the income from that land: Law of Property Act 1925, s. 190(3), (4).

[83] In *Whitham* v. *Bullock* [1939] 2 K.B. 81, 86, the Court of Appeal left the point open. The leading textbook writers, on the basis of some early decisions, state that the assignee of part of the property is liable only for a proportionate part of the rent: see *Halsbury's Laws of England* (3rd ed.) Vol. 27, para. 394; *Woodfall's Law of Landlord and Tenant* (28th ed.) Vol. 1, para. 1760; *Hill and Redman's Law of Landlord and Tenant* (18th ed.) Vol. 1, para. 2687; Megarry and Wade, *The Law of Real Property* (5th ed.) p. 749. The rent can be apportioned on application to the Secretary of State under the Landlord and Tenant Act 1927, s. 20, or, apparently, by the court: *Whitham* v. *Bullock*, above.

[84] *Whitham* v. *Bullock*, above.

[85] The landlord's covenants are rarely, if ever, supported by a guarantee.

Since his liability is secondary,[86] he only becomes liable to the current landlord[87] if the principal debtor (the original tenant or an assignee of the term, as the case may be) is in breach. The obligations of the guarantor are, normally and unless modified, co-extensive with those of the principal debtor. Accordingly, the guarantor of the original tenant remains liable for the whole term.[88] Where the term has been assigned, the liability of the assignee's guarantor will be limited to breaches occurring during the period when the assignee is the tenant. Where, however, the assignee has contracted directly with the landlord to accept liability for the performance of the covenants for the remainder of the term, the guarantor's liability continues for that period. Similarly, if the principal debtor's liability ceases, so does that of his guarantor.[89]

[86] However, it is not uncommon for the guarantor's covenant to provide that as between him and the landlord, the guarantor is to be regarded as the principal debtor. This is not the liability of a true guarantor, but a primary liability. Thus, the normal rule that a guarantor is released if the creditor allows the tenant any time or indulgence does not apply.

[87] Since a guarantor's covenant securing the performance of tenant's covenants which touch and concern the land, itself touches and concerns the land, it can be directly enforced by an assignee of the reversion: see para. 2.26 above.

[88] The guarantor's liability will not extend to breaches occurring during the statutory continuation of a business tenancy unless the terms of the guarantee expressly impose liability for the extended period: n. 26 above.

[89] A disclaimer of a lease by the original tenant's trustee in bankruptcy or liquidator terminates the lease, and thus the liability of the guarantor: *Stacey* v. *Hill* [1901] 1 K.B. 660. If, however, the lease has been assigned, disclaimer by the assignee's trustee in bankruptcy or liquidator does not terminate the lease: the original tenant's liability continues, and so does that of his guarantor: *Warnford Investments* v. *Duckworth* [1979] Ch. 127. The disclaimer of the lease, however, releases the bankrupt assignee, and therefore his guarantor, from liability under it.

PART III

NEED FOR REFORM

Working Paper

3.1 In Part III of the Working Paper, we identified the following criticisms of the present law:

(a) It is intrinsically unfair that anyone should bear burdens under a contract in respect of which they derive no benefit and over which they have no control: contractual obligations undertaken in a lease should only regulate relations between current owners with interests in the property.

(b) When a demand is made under the continuing liability of the original tenant it will often not only be unexpected, but beyond the means of the former tenant; there is no logical way in which a former tenant who does understand that there is a contingent liability can estimate its amount.

(c) A single lease can contain some covenants of which the burden automatically passes to an assignee, by privity of estate, and others of which the burden does not pass automatically. This contrast in a single document, which is not apparent from its wording, is unsatisfactory. The distinction does not apply consistently at present, because chains of indemnity covenants effectively often pass on liability under covenants which are beyond the scope of the doctrine of privity of estate.

(d) Many laymen do not realise that the original parties have a continuing liability and most leases do not make it clear on their face.

(e) Where a lease contains a rent review clause, the original tenant's liability, under privity of contract, normally extends to payment of the higher rents after revision. For this reason, privity of contract sometimes results in the original tenant having a greater liability than he understood he was assuming.[1] While this may merely reflect the increased value of the premises, it can cast on a former tenant a burden resulting from an increased value from which he has derived no benefit.

(f) Landlords who are in practice the main beneficiaries of the privity of contract principle are unduly protected. They have the ability to enforce obligations undertaken by tenants by action against both the original tenant and the current tenant, as well as, in many cases, against intermediate assignees who enter into direct covenants with the landlord before taking their assignments. This makes the principle one-sided, and unreasonably multiplies the remedies available to landlords.

(g) Original tenants against whom covenants are enforced after they have assigned the lease are not adequately protected, nor do they have adequate means of reimbursement. They are not released even if the tenant in possession agrees materially to vary the extent of the liability,[2] they are not entitled to notice of default and they have no right to take back possession of the property. Former tenants are therefore often deprived of the opportunity to limit their liability by taking prompt remedial action. Faced with demands they must meet, they are often unable even to have recourse to the property to recoup any losses.

(h) The contingent liability which privity of contract imposes on an original tenant who has parted with his interest in the property can create difficulties in winding-up and distributing the estates of tenants who have died. The response to the Working Paper suggests that this difficulty is more theoretical than practical.

(i) There is some uncertainty whether continuing liability of the original parties to a business lease extends into any period of statutory extension and into the term of any lease granted on a statutory renewal.[3] Again, this does not seem to have caused difficulty in practice.

3.2 In the past, housing estates were developed on a leasehold basis, and in some parts of the country this is still done. Where the original plots are later subdivided, so

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[1] See para. 2.5 above.

[2] See para. 2.6 above. Since the publication of the Working Paper, the Landlord and Tenant Act 1987, s. 39(1), has introduced a new court jurisdiction to vary the terms of long leases of flats. Such variations affect former landlords and former tenants, even though they are not parties to the court application for variation.

[3] See para. 2.8 above.

that further houses can be built, there are often assignments of part of the land in the lease without the rent or other obligations being apportioned in a way which binds the landlord. This causes complications and delays in conveyancing, and can make it difficult to define the precise scope of the obligations of each of the parties involved.

3.3 Against these criticisms we pointed out[4] that continuing liability of the original parties to leases is a matter of contract. They are free to vary the normal rule. This is sometimes done, but not frequently. Some feel that a heavy burden lies on those who propose any further restriction on freedom of contract, but others question whether there is any true freedom here because there is widely thought to be an inequality of bargaining power between landlords and tenants, favouring landlords.

3.4 We provisionally concluded that "the various difficulties caused by the application of the privity of contract principle call for some reform", and that the proper course to recommend was "the total abrogation of the privity of contract principle, at least to the extent that it relates to covenants which bind successors in title".[5] We did, however, ask those responding to our Working Paper to give us evidence of the scale of the discontent with the present law.

Consultation response

3.5 Many people responded to this invitation. The examples cited to us give no basis for making any statistical assessment of the number of actions to enforce the continuing liability of the original parties. But it is clear, and not surprising, that there are a large number of cases which are not publicly reported.

3.6 Almost all examples cited to us concerned commercial property, although there is no doubt that the principle applies equally to residential premises.[6] In relation to commercial properties there have been a number of reported cases in recent years.[7] It is clear from what we were told that these are only the tip of the iceberg. We have been given details of nearly 50 instances, mostly recent, and a number of correspondents said that they had been involved in others. These examples occur all over the country, and involve all types of business property: shops, offices, industrial premises and warehouses. The City of London Law Society reported the experience of one member firm, where relevant cases "probably equated to something in the order of less than half of 1% of all leases dealt with". That is a small percentage, but if it were the general experience it must still amount to a significant number, bearing in mind that there is a very large number of leases, and that the privity of contract principle is generally only involved in enforcement cases where action against the current tenant is unsuccessful or impractical.

3.7 Very large sums of money can be involved in the proceedings. One company received a writ for £1.6m although the claim was settled in some other way. We heard from another company which in recent years has had to pay sums totalling over half a million pounds, and of individual cases where claims have been successful for £300,000, £200,000 and £100,000. These were large properties occupied by substantial companies. However, even though they were able to pay the money, it should be borne in mind that they were not paying damages as a result of their own wrongdoing, but rather for someone else's default in complying with a covenant for which they remained jointly liable.

3.8 Some claims for smaller sums also cause concern. They are made against small businesses and against individuals—often retired businessmen—who frequently do not understand that they would have continuing liability and in any event cannot afford to pay. As examples, we heard from a retired couple whose income was barely above social security level, from a former shopkeeper who faced a claim for £10,000 under a lease which he had assigned when the rent was £450 a year and from the Association of

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[4] Working Paper, para. 3.3.
[5] *Ibid.*, paras. 6.1–6.2.
[6] e.g., *Revlok Properties Ltd.* v. *Dixon* [1972] E.G.D. 924.
[7] *Centrovincial Estates Plc* v. *Bulk Storage Ltd.* (1983) 46 P. & C.R. 393; *Allied London Investments Ltd.* v. *Hambro Life Assurance Ltd.* (1984) 269 E.G. 41; *Selous Properties Ltd.* v. *Oronel Fabrics Ltd.* (1984) 270 E.G. 643; *Thames Manufacturing Co. Ltd.* v. *Perrotts (Nichol & Peyton) Ltd.* (1985) 50 P. & C.R. 1.

Charity Officers which envisaged cases in which charities would have to meet demands addressed to their beneficiaries. We were told of one small company driven into liquidation by such a claim.

3.9 In considering these claims, whether big or small, it must be borne in mind that they represent a loss to someone. The tenant who should have paid has not done so, and if no-one else pays the landlord sustains that loss. However, as things stand it is the *former* tenant, who no longer has any interest in the property and is not taking any benefit from it, who must pay. If, as will most often be the case, where a large sum due on a rack rent is unpaid and the landlord has sanctioned the assignment to the defaulter, many find it hard to understand why that defaulter's predecessor must always underwrite his obligation.

3.10 It is this element of responsibility for someone else's default which many consider intrinsically unfair and which is resented. One company director wrote to us, "It is very difficult to see any natural justice in such a demand, bearing in mind that we were not involved in [the] selection of the defaulting tenant or in setting the rent he paid". Another asked, "What could be more unjust than to believe . . . that an agreement has been reached with a landlord, only to possibly find years later . . . that your company is liable for any future tenant?". The British Legal Association suggested that, "It is clearly against equitable principles that an assignor should remain liable for many years after ceasing to be a lessee . . . for matters of which he has no knowledge and where he has no influence or control".

3.11 Others see the present law as more generally unjust. A solicitor of long experience suggested that the reaction of the majority of his clients on being told of the privity of contract principle was "one of justifiable shock, disbelief and outrage". A small businessman called for legislation "to outlaw this injustice".

3.12 Some people see continuing liability as interfering with legitimate business activity. Large trading companies told us that takeover bids were made unnecessarily hazardous, because it is often impossible to discover what leases a target company once owned, under which liability might in future arise. The danger there is that the company making the takeover will acquire a new subsidiary which later receives a claim under privity of contract in respect of a lease which the new parent company did not know it once owned and of which there were no longer any records at the date of the takeover. Again, the Association of British Chambers of Commerce has suggested that the privity of contract principle "is an additional complication for small firms looking for premises in the private sector". The National Chamber of Trade reported a case of a liquidator of a solvent company who, having distributed the company's assets, faced personal liability under a lease which neither he nor anyone in the company when it was wound-up knew that the company had once owned.

3.13 A further criticism was voiced to us, concerning properties which have fallen into disrepair because the tenant has neglected his repairing obligations. On disposing of the lease, the tenant may pay the assignee, to compensate him for having to do the work. If the assignee becomes insolvent before doing the repairs, the original tenant faces the prospect of liability for dilapidation, even though he has already paid the cost of doing the work.

3.14 There was also concern that the landlord's ability to recover arrears of rent from a former tenant, whose credit-worthiness might be beyond question, meant that he would not take vigorous and prompt action which would limit the former tenant's liability. As one company director put it, "There is no incentive for the landlord to ensure that any delays in rent are followed up vigorously".

3.15 Our belief that there is wide ignorance of the privity of contract principle among tenants was confirmed by our consultation. Many of those who responded said they had known nothing of it before receiving a claim. A number of former tenants first learned of the principle from press reports of our Working Paper, and wrote to us in some alarm. An accountant said that in many years' experience both in industry and the profession he could not recall meeting the point, and one solicitor wrote, "Many overseas people do not understand, and cannot cope with the consequences of privity of contract".

3.16 Even for the knowledgeable, continuing liability represents an inconvenience against which it is difficult to devise sensible precautions. We were told of a number of people and organisations who certainly understood the principle who had found themselves liable. One solicitor was so concerned about his continuing liability as original tenant of a flat that, on selling it in 1975, he had insured against possible liability. Although no claim had been made against him, he pointed out that he was still at risk, but that the effect of inflation on the limit of the policy cover had made its protection less than realistic. A number of people mentioned the possibility of insurance, but this illustrates one of its drawbacks.

3.17 The response to the Working Paper indicated that landlords are often in a dominant position in this market, which either makes it impractical for tenants to negotiate on equal terms or even deters them from trying. As one tenant put it to us, "there really is no alternative". The National Chamber of Trade explained the position by classing landlords as amongst "those with the greatest financial muscle". Solicitors from various parts of the country, who are regularly concerned with negotiating leases, confirmed our impression of the relative strengths of the parties in relation to continuing liability. The City of Westminster Law Society wrote that "the landlords' position has been so strong that it has been impossible to make bargains to the contrary". The Dorset Law Society spoke of the "greater bargaining power of landlords". This was echoed by the Barnsley Law Society, who pointed out, "Attempts to limit or exclude the doctrine . . . prove futile. Landlords are in too strong a bargaining position". In the words of the Nottinghamshire Law Society: "The general inequality of bargaining power between lessor and lessee . . . [makes] . . . efforts to negotiate changes to the principle . . . futile". Clearly, this will not universally be the case, and the Royal Institution of Chartered Surveyors expressed a balanced view about modifying the tenant's continuing liability. "In practice this is not usually possible because of the uneven bargaining position of the parties although we believe it is erroneous to assume that the landlord is always in the stronger position in determining the conditions of the lease. Nonetheless, any attempt to depart from traditional practice may, in any case, prove a major difficulty".

3.18 Many of those who wrote to us felt that the landlords' dominant position was supported by a law which unfairly favoured them. One solicitor said that it "affords undue protection to landlords". Another considered that "the law is outmoded because . . . these days landlords can be very demanding in terms of status of assignees, and landlords, particularly big investment landlords, are perfectly capable of looking after themselves". An accountant asked, "Why should [the landlord] enjoy the luxury of two targets at which to aim in the event of his demands not being met?". A company which had just assigned a lease demonstrated that its former landlords were "covered five times over".

3.19 We see a number of reasons which influence the negotiations in favour of retaining the tenant's continuing liability. First, the practice is for the initial draft of a lease to be prepared on the landlord's behalf, so that the tenant is put in the position of having to justify any amendment. Secondly, continuing liability has been established as the norm, so the inertia of established practice argues against any amendment. Thirdly, landlords are often, although not always, economically more powerful than their tenants. Fourthly, in the case of subdivided buildings and estates, landlords will normally want to keep all the leases identical to facilitate efficient estate management; although that is a good reason for having, e.g., standard repairing covenants, it hardly means that provisions about continuing liability need to be the same, but it is used to justify resisting all amendments to a standard form of lease. The cumulative effect of these pressures appears to us to justify the suggestion that the scales are weighted in the landlord's favour.

3.20 The contingent liability of a former tenant cannot sensibly be ignored. One major retail company, with 850 shops, who had assigned many leases in the course of expanding their activities, calculated that its theoretical exposure amounted to £50m. Until recently it had insured against claims of up to £250,000, but in 1986 it was not able to obtain cover at an acceptable premium. Although many company accounts make no provision for this contingency, that is not always so. One firm of solicitors told us, "We also have experience of original guarantors finding they still have to make provision in their accounts for residual contingent liability, which, not surprisingly, they find particularly galling".

3.21 Another major trading company has adopted a policy never to assign a lease, but always to sublet instead. This is a way to retain control of the position if the sub-tenant, who would have been the assignee, defaults. But it involves a material amount of professional and management time which is certainly unproductive.[8] It seems undesirable that any company should feel obliged to spend its resources and to adopt an inconvenient way of conducting its affairs merely to counter the unpredictable effects of a law which does not seem to offer any general benefits.

3.22 A tenant who faces a claim from his landlord after he has parted with the lease normally suffers a number of disadvantages. He may not know that the current tenant has defaulted, he cannot insist on being promptly notified of the claim and he cannot reclaim possession of the property to put matters right and install a more satisfactory tenant. Although better arrangements could be negotiated as a matter of contract they rarely are, and the evidence suggests that requests for them by tenants would not often be conceded. However, even if they were, the situation would not be satisfactory. Were a property to change hands a number of times, so that several parties sought the right to intervene, the cost and delay involved in transferring properties and enforcing covenants could increase unacceptably.

3.23 We are convinced by the evidence that these difficulties are sufficiently widespread to merit reforming the law in this field.

Apportionment

3.24 There is a further, related, difficulty where parts of a property let by a single lease are assigned separately, subject to an informal apportionment of the rent. It seems that, by action, the landlord may only be able to recover from each assignee their respective proportion of the rent; but he can nevertheless distrain on any part of the property for the whole rent.[9] The landlord's position is therefore that if he chooses to recover the rent by action he is in effect bound by an apportionment to which he did not agree. If on the other hand the landlord opts to distrain, one assignee can be made liable for another's rent even though he has no privity of contract, nor in the usual way privity of estate, with the landlord. We consider this position to be unsatisfactory.

Approach to Reform

3.25 In deciding the way to reform the law in this area, it is necessary to consider what is the modern concept of a lease. In our Working Paper, we explained the position of those who see the continuing liability of the original parties as intrinsically unfair, in this way: "They regard the contractual obligations undertaken in a lease as only properly regulating the terms on which the owner for the time being of a property permits the tenant for the time being to occupy and use it, or as the case may be, to sub-let and profit from it. They see no reason why responsibility should last longer than ownership of the particular interest in the property".[10]

3.26 We accept that the purpose of a lease should be to create temporary property ownership, and we believe that this is now the general understanding. It was universally reflected in the responses to our Working Paper. Even those who favoured the retention of the privity of contract principle did so because they saw it as a way to strengthen the leasehold system, sometimes providing greater security for the parties, sometimes encouraging the grant of leases. We suggest that if the principle still has a place, it should be seen in that sort of ancillary role. Also, it is important that those who will still be bound by continuing liability should so far as possible have that fact brought to their attention.

3.27 Our Working Paper[11] outlined a series of 16 options short of total abrogation of privity of contract principle, many of which would have required legislative interven-

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[8] See para. 2.19 above.
[9] See para. 2.29 above.
[10] Para. 3.1.
[11] Part V. For example, claims by landlords should be subject to financial or time limits, original tenants called upon to pay should be able to reclaim the property or leases should be shorter so that the period of continuing liability would be reduced.

tion. Our provisional conclusion was that none of them met all the criticisms of the present law.[12] Although some could prove helpful, "it is also likely that tinkering with the law in that way would not simplify it".[13]

3.28 Few of those who responded to the paper expressed support for any of the partial solutions. Most of those who favoured reform wanted to go further, and most of those who opposed reform opposed it totally. A few chose one or other partial solution as a poor second best to their primary choice of total abrogation or complete non-intervention. With this support for our own lack of enthusiasm for partial solutions, we do not recommend that any be adopted and we do not propose to consider them further.

Types of covenant

3.29 Another matter which we raised in the Working Paper was that of the distinction between covenants which touch and concern the land,[14] liability for which passes to assignees by privity of estate, and other covenants of which the burden does not pass. We suggested that the line dividing the two categories was not logically drawn and invited those who responded to tell us of any difficulties it had created in practice.[15] None was reported to us. This would not have been a matter worth pursuing merely on a theoretical basis, but the distinction has again been raised in the courts since the conclusion of our consultation.[16]

3.30 The likely reason why there has been little practical difficulty is the very common application of existing statutory provisions which imply covenants into assignments, by which the assignee indemnifies the assignor against all future breaches of covenants in the lease.[17] Because those covenants are not limited to covenants which touch and concern the land, they effectively apply the continuing liability of the doctrine of privity of estate to all lease covenants. Although this does avoid the difficulties inherent in distinctions between the categories, it is not wholly satisfactory. The statutory provisions apply differently to registered and unregistered land, and enforcing obligations through a chain of indemnities is necessarily an uncertain procedure.[18]

3.31 We therefore suggest that the practical effect which statute has already achieved in the majority of cases—the application of privity of estate to all lease covenants—should be one of the objectives of any reform. This rule will be simple and easy to understand. However, it should be achieved in a more straightforward manner, and it will be necessary to consider what exceptions to the rule are justified.

Contracting out

3.32 The main provisional conclusion in our Working Paper was that the privity of contract principle be abrogated, but this was subject to an important qualification. We favoured a flexible approach to contracting out of the general abrogation, i.e., the chance to retain the privity of contract principle in some cases. "Following the precedent of the Unfair Contract Terms Act 1977, the parties could validity contract for continuing liability if that was fair and reasonable. In deciding whether it was, the court would have regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the covenant was entered into".[19]

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[12] e.g., to continue but reduce the liability would do nothing to make prospective tenants better informed, to reduce the period of leases would distort the property market and introduce other disadvantages.

[13] Working Paper, para. 6.2.

[14] Or, covenants which have "reference to the subject-matter of the lease": Law of Property Act 1925, s. 142(1); see paras. 2.20–2.26 above.

[15] Working Paper, paras. 3.6–3.7.

[16] See paras. 2.24–2.26 above.

[17] Law of Property Act 1925, s. 77(1)(C), Sch. 2, Pt. IX; Land Registration Act 1925, s. 24(1); see paras. 2.13–2.15 above.

[18] The Commission has recently published a working paper suggesting reforms: *Implied Covenants for Title* (1988) Working Paper No. 107.

[19] Working Paper No. 95, para. 6.16(d).

3.33 This suggestion did not meet with approval on consultation. The Council of Her Majesty's Circuit Judges, e.g., pointed out that the proposed exception would create great uncertainty. It would be difficult to adjudicate, particularly if the question was raised for decision some fifty years after the date at which the knowledge of the parties, who were by then dead, had to be judged. Although we consider that some flexibility will be needed, we are persuaded that our provisional suggestion does not provide a suitable formula.

Objections to abrogation

3.34 Only a minority of those who responded to our Working Paper were against the total abolition of the privity of contract principle. Not surprisingly, they were mostly landlords, or those interested on their behalf, because landlords are the main beneficiaries of continuing liability. However, some powerful arguments were advanced by them. The points most commonly made were:

(a) leases are freely entered into, and this freedom of contract should not be disturbed;

(b) abolishing continuing liability could cause rents to rise, so as to compensate landlords for the additional risk of default;

(c) abolition could make assigning leases more difficult, time-consuming and expensive, because landlords would justifiably check the credentials of assignees more carefully;

(d) depriving landlords under existing leases of the protection of the privity of contract rule would be unjustified retrospective legislation, in some cases depriving them of essential protection;

(e) the investment value of let properties would be reduced, with serious detrimental effects on financial institutions;

(f) adoption of the privity of contract principle is not at present compulsory, and tenants are only subject to it as a result of bargains freely entered into.

3.35 How common or how serious the consequences of an unconditional abrogation of the continuing liability would be must necessarily be a matter for speculation. We accept that they would apply in some degree to some cases, but believe that they would not be as widespread as some fear. As the Law Society's Land Law and Conveyancing Committee commented, "in the end the matter will be governed by market forces".

3.36 We do not fully accept all the objections to abrogation. For example, the disparity between the bargaining power of some landlords and some tenants belies the suggestion that many leases are the result of free negotiation. Nevertheless, we are persuaded that it is reasonable to deduce from these representations that there would be some cases in which the abolition of continuing liability would bear hardly on landlords and would have undesirable consequences. We assume, although nothing was said to us in this connection, that the same could also apply to tenants.

Conclusion

3.37 We have therefore concluded that there is a case for reform, although stopping short of complete abrogation of the privity of contract principle, and we consider that our recommendations should be flexible enough to distinguish between cases in which continuing liability is necessary and justified, and other cases. The liability should be preserved where it is necessary, but abandoned where it is not. We believe that we have been able to make this distinction and to achieve a satisfactory combination of certainty and flexibility. Our detailed proposals are set out in the next Part of this Report.

PART IV

REFORM PROPOSALS

Basis

4.1 Our proposals for reform recognise the importance of two principles:

First, a landlord or a tenant of property should not continue to enjoy rights nor be under any obligation arising from a lease once he has parted with all interest in the property.

Secondly, all the terms of the lease should be regarded as a single bargain for letting the property. When the interest of one of the parties changes hands the successor should fully take his predecessor's place as landlord or tenant, without distinguishing between different categories of covenant.

4.2 The majority of those who responded to the Working Paper believed that the effect of transferring property which has been leased should be the "clean break" which results from applying the two principles. Nevertheless, the consultation convinced us that there are cases in which, for good reason, landlords can only agree to a proposed assignment if they are assured that their existing tenant will continue to be responsible for complying with the lease terms. We are therefore proposing a scheme based on the general abrogation of the privity of contract principle, but which stops short of abolishing it in all cases.

Outline

4.3 We propose a general rule that the liability of the original tenant, and his entitlement to benefits under the lease, should not survive an assignment of the lease. For this purpose, we propose that all the covenants in a lease should be treated in the same way, whether or not at present they touch and concern the land. Nevertheless, it would be possible for the landlord, when granting consent to the assignment, to impose a condition that the tenant will be liable to guarantee the performance of some or all of the lease covenants by his immediate successor.

4.4 The Landlord and Tenant Act 1988 implements our recommendations generally to impose a duty on landlords not unreasonably to withhold consent.[1] The effect would be that in cases where the landlord is not entitled to withhold his consent to assign, he would only be able to impose a condition that the tenant have continuing liability where it was reasonable to do so.

4.5 For landlords, we propose a rule that when they part with their interest in the property let by a lease they will escape further responsibility for the lease obligations if, but only if, they comply with prescribed conditions. These will involve their giving notice to the tenant and his being able to withhold consent if it is reasonable for him to do so. Again, the benefits of being landlord, so far as they can enure to an owner who has parted with the property, would only continue for a former landlord who had continuing liability.

4.6 Landlords and tenants will generally have different forms of continuing liability, where they have any at all. Former landlords will be jointly and severally liable with the current landlord, and any other former landlord who is still liable. A former tenant, on the other hand, will normally be guarantor of the current tenant; the only exceptional case is where a tenant only assigns part of the property and remains jointly and severally liable with the assignee for some covenants which affect the whole property. Making former tenants liable as guarantors avoids the major injustice to tenants which can arise where the terms of the lease are, in effect, later varied to increase the tenant's liability.[2] That will now release the tenant, except where the court varies an unsatisfactory lease of a flat.[3]

4.7 Cases in which only part of the property let changes hands need special

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[1] Report on Leasehold Conveyancing (1987) Law Com. No. 161; see para. 1.6 above.
[2] *Selous Street Properties Ltd.* v. *Oronel Fabrics Ltd.* (1984) 270 E.G. 643; see para. 2.5 above.
[3] Landlord and Tenant Act 1987, s. 39.

consideration. In general, those covenants which expressly apply only to the property being transferred, or the effect of which can be divided between the property retained and the property transferred, can automatically be treated in the same way as covenants where the whole of the demised premises is being assigned. In other cases, we propose that there be a procedure to enable assignor and assignee to propose future liability arrangements. Unless they are shown to be unreasonable, they would bind the other party to the lease. If the parties do not choose to avail themselves of this procedure, the transferor would continue to be liable, and that liability would be shared with the transferee.

4.8 The features of our reform proposals are:

(a) the majority of tenants will have no liability under lease covenants after parting with the lease;

(b) landlords who reasonably need the security of a guarantee from the assigning tenant may insist on it, so this need be no reason for withholding consent to assign;

(c) every tenant who has continuing liability will have the fact drawn to his attention;

(d) the nature of that continuing liability will be such as to protect a former tenant from any unexpected and unreasonable increase in it;

(e) landlords will be able to opt to escape liability when disposing of their reversions whenever it is reasonable that they should no longer be responsible;

(f) wherever possible the same rules will apply to all lease covenants;

(g) whenever former owners remain responsible, either they will guarantee the obligations of the present owner or they and the present owner will be jointly and severally liable, so that chains of indemnities from one owner to the next will no longer be needed;

(h) when the current owner of an interest in the property is jointly responsible with a former owner, there will in most cases be power to apportion their liability between them in such a way as is just and equitable;

(i) some of the complications of leasehold estate conveyancing, stemming from the subdivision of the original plots, will be eliminated as the properties change hands.

Assignment of whole property by tenants

4.9 When a tenant assigns the whole of the property demised by a lease, we recommend as a general rule that his responsibility to comply with the covenants in the lease after the assignment should cease. Similarly, he should cease to benefit from the lease. The benefit and burden of the lease obligations would pass to the assignee. This would be an automatic consequence of the assignment; no additional action by any of the parties would be needed. This would be the effect whether the assignment was by the original tenant or by a subsequent assignee. Accordingly, the duty to perform the tenant's covenants will always be the responsibility and, subject to the exception outlined in the next paragraph, only the responsibility, of the tenant for the time being. That person would be the only person then deriving a benefit as tenant. This accords with our first principle.[4] This rule would apply to all the covenants in the lease whatever their subject-matter.[5] This accords with our second principle.[6]

Tenant's liability as guarantor

4.10 There will be cases in which the landlord is anxious to have the assurance of a continuing guarantee from his tenant and where it is, objectively, reasonable for him to do so. Our recommendations would make this possible where the landlord had retained the right to approve the identity of any proposed assignee before the tenant's interest changes hands. In other cases, the landlord will not have the right, but that is not likely in practice materially to prejudice him. In general, the market requires that there should be no restraints on dispositions by a tenant when a premium has been paid and a

[4] Para. 4.1 above.
[5] Para. 4.46 below.
[6] Para. 4.1 above.

ground rent reserved. That puts a valuable asset in the tenant's hands. The prospect that it might be forfeited by the landlord on a breach of covenant ensures compliance by the tenant. It is possible that other landlords may have omitted from their leases any restraint on the tenant's power to dispose, in reliance on the original tenant's continuing liability. However, although that is logical as the law now stands, it is not our experience of the practice of property owners. If they regard the security of their tenant's covenant as critical, they normally restrict the tenant's freedom to assign. Furthermore, none of those who responded to our Working Paper made that point, even though we did provisionally recommend dispensing with continuing liability and even though those who responded raised a number of other arguments against that recommendation.

4.11 We recommend that a landlord whose consent has to be obtained should be able to impose a condition that the assignor guarantees the assignee's performance of the lease covenants. It follows from the nature of a guarantor's liability that the former tenant would, e.g., be released when the current tenant is released, or on the lease being disclaimed following the current tenant's insolvency,[7] or by a material change in the current tenant's obligations without the guarantor's consent.[8] This should avoid a former tenant finding himself responsible for obligations much more onerous than those he originally assumed.[9] That continuing liability could last until, but only until, the date of the next assignment.[10] The effect of this limitation on the period is that, where it is appropriate for the landlord to insist, the tenant guarantees the performance of the assignee whom he himself nominates, but not that of subsequent assignees in whose selection he would normally take no part. Where the tenant's covenant against assignment is absolute the landlord has a complete discretion whether or not to grant consent. He will therefore always be able to impose this condition if he wishes. In cases of a qualified covenant against assignment, where the landlord is not entitled unreasonably to withhold his consent, he will only be able to impose this condition where it is reasonable for him to do so.

4.12 It may be objected that this would encourage landlords to require tenants to give absolute covenants against assignment. Only with such a covenant would a landlord have complete freedom to require a former tenant to remain fully liable on the lease obligations after he parts with the lease. We would not favour any tendency to increase the arbitrary control by landlords of the tenant's freedom of disposition.[11] However, we doubt whether our recommendations would have that result. We repeat the views we expressed in relation to imposing the landlords' statutory duty not unreasonably to withhold consent to assign. "We believe that the risk is small because absolute covenants against assignment are not generally acceptable to tenants, and we doubt whether it would be possible for many landlords to impose such covenants".[12] Should there be a greater move than we anticipate towards absolute covenants, statutory intervention would need to be considered.

4.13 We see this suggestion, that landlords can insist on a gurantee from an assigning tenant where to do so is reasonable, but only in such a case, as meeting the legitimate worries of landlords. We accept that in some cases they need the additional security from the former tenant after an assignment. Where it is reasonable, that extra reassurance should not be denied to them. In other cases, where it is not reasonable, landlords will not be able to claim it.

4.14 The criterion of reasonableness is flexible and should achieve an appropriate result. The landlord will know the identity of the proposed assignee and will have an opportunity to judge his financial strength. It will be possible realistically to judge

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[7] See para. 2.30 above.

[8] *Holme* v. *Brunskill* (1878) 3 Q.B.D. 495; see *Rowlatt on the Law of Principal and Surety*, 4th ed. (1982) p. 86.

[9] See para. 4.6 above.

[10] If the current tenant assigns the whole of the property let to him, he will be released from all the tenant covenants. If he assigns only part of the property let to him, he will released from the covenants to the extent they relate to the property assigned: see para. 4.33 below. In either case, the former tenant, as guarantor, will be released to the same extent, and this will be so even if the current tenant's liability is continued as guarantor.

[11] Indeed a restriction on such covenants is recommended in the Law Commission's Report on Covenants Restricting Dispositions, Alterations and Change of User (1985) Law Com. No. 141, paras. 4.13–4.66.

[12] Report on Leasehold Conveyancing (1987) Law Com. No. 161, para. 1.4.

whether the landlord needs further reassurance. It will also be possible to take other relevant factors into account, e.g., the current strength of the assigning tenant's covenant and whether the assignee is offering another separate guarantee.

4.15 Continuing liability as guarantor is limited to the period of the immediate assignee's ownership because that is the period for which the reasonableness of the condition can be judged in advance. If the proposed assignment is to a tenant with few resources, it may well be reasonable for the assignor to give a guarantee. But limiting the period of continuing liability in this way does not prejudice the landlord, because these are cases where he is entitled to consider each assignment when it is proposed. That means that when a second assignment is proposed he may decline to give consent if the loss of the former tenant's guarantee would unreasonably leave him without sufficient protection.

Assignment of whole property by landlords

4.16 In relation to the liability of landlords, we should have preferred our proposals to have mirrored precisely our recommendations for tenants' covenants. However, that is not possible because tenants rarely, if ever, have a right to give or withhold consent to dispositions by their landlord. They would therefore not be in a position to require continuing liability after an assignment of the reversion and to block an assignment if the condition is not agreed. Moreover, there is less need here for radical change. In most leases, the landlord undertakes far fewer obligations than the tenant and landlords may not be troubled by the prospect of continuing responsibility.

4.17 For these reasons, we do not propose that an assignment of the landlord's reversionary interest should automatically affect his continuing liability. Rather, we recommend that an assigning landlord should have an option to operate a procedure which could end his liability, and his entitlement to benefits, under the lease. A landlord who wished to escape further responsibility would have to give the tenant notice of his proposal to assign. In the notice the landlord would propose that after the assignment he should no longer have any liability under the lease. It would give the tenant four weeks in which to reply.

4.18 This notice could be of considerable importance to the tenant and its purpose of alerting him to its significance can only be achieved if it gives a clear and comprehensive explanation. For that reason we recommend that its form should be prescribed. That should make it possible to ensure that it includes all necessary information and that it spells out the consequences to the tenant if he ignores it.

4.19 Before deciding that a form should be prescribed in circumstances such as this, it is important to consider the consequences of its incorrect use. Here, the form would be for the exclusive benefit of the landlord giving it. If he completes it incorrectly and that invalidates it, only he can be prejudiced. That prejudice would only arise on a default by one of his successors, the first of whom the landlord would have selected. For that reason, if the landlord decides to serve notice, the use of the prescribed form would be compulsory. If a notice is incomplete or in a different form it should be ineffective, unless the ommissions or variations are inconsequential.

4.20 On receiving the landlord's notice, the tenant could decide that the proposal to cancel the landlord's continuing liability is not a matter of concern. He may therefore simply do nothing. Alternatively, he may reply that he is content. In either of these cases, the effect would be to cancel the landlord's continuing liability and his rights under the lease when the assignment took effect. A tenant who objected to the current landlord escaping liability would have to notify him in writing within the four week period. In that case, the continuing liability and rights under the lease would only be cancelled if the landlord applied to the court and established that it was reasonable that he be released.

4.21 Whether or not the assigning landlord remains liable, we recommend that the new landlord taking over the reversion should become liable to comply with all the landlord's covenants, and be entitled to the benefit of the lease. There would be no

distinction between different types of covenant.[13] Any previous landlords who were still responsible would be jointly and severally liable.

4.22 Any changes in liability only arise when the assignment of which the landlord gave notice takes place. If, therefore, the proposed assignment falls through for any reason the position of the parties is unchanged. The landlord is free later to give notice of another proposed assignment, and the tenant would then be able to reconsider the position in the light of the new facts.

4.23 When a landlord's liability is continued on the assignment of the reversion, it goes on for the remainder of the lease term, unless he is released on a later assignment as explained in the next paragraph. In contrast to the continuing liability of a former tenant as guarantor, the landlord's liability would not be limited until the date of the next assignment. This is necessary to avoid landlords arranging to escape liability by the stratagem of assigning first to a nominee who very shortly afterwards assigns the property again. For tenants who have to seek their landlords' consent to each and every assignment that artificial escape route is not open. Because tenants generally have no control over assignments by landlords, this different rule is required. The result of this voluntary notice procedure may be that some former landlords have continuing liability while others do not. One landlord (*A*) may assign his interest (to *B*) and decide to serve no notice on the tenant, with the result that his liability continues. *B* may in turn decide to assign (to *C*), serving advance notice under our proposals. If the tenant takes no action and the property is assigned to *C*, *B* escapes liability. At that point, *C* is fully liable to comply with the landlord's covenants, and he is jointly and severally liable with *A*.

4.24 Whenever a reversion comes to be assigned, we recommend that a former landlord who continues to be liable should have the chance to operate the procedure to end that liability,[14] by serving notice on the current tenant. This would apply both to landlords who did not previously seek a release, and to those who did but were refused. However, we do not recommend that parties to later assignments should have an obligation to tell former landlords what they propose. Many former landlords may not be interested in receiving notices of later assignments, and the current parties may no longer have their addresses. To require that former landlords be notified would unreasonably complicate the process of assigning reversions. We recognise that this means that, in practice, few former landlords are likely to seek a release on a later assignment. However, those who can foresee that they may wish to do so can impose a contractual obligation on their successors, giving them a right to advance notice of future assignments.

4.25 The continuing liability of a former landlord would be full liability under the covenants, as principal, rather than the liability of a guarantor which a former tenant may have.[15] This is justified because the tenant normally has no control over dispositions of the reversion and cannot decline to consent to an assignment, even where a refusal would be reasonable, as a landlord can. For this reason, our scheme proposes that the only way a landlord can escape continuing liability is by giving a notice which brings the matter to the tenant's attention and give him the option to object. To make former landlords guarantors would allow their liability to be cancelled in other circumstances. Moreover, to do so could require elaborate adaptations of the law of suretyship which we do not consider the circumstances warrant.

4.26 The reversion to a long lease may change hands many times and the various landlords may take different views about seeking a release from continuing liability. The result could be joint and several liability between the current landlord and a number of other previous landlords, who will not necessarily have been consecutive owners of the property. We do not see this as a drawback to the scheme. Each of the landlords will have had the option of seeking a release, which, if they had wanted it, would only have been refused on the ground that it would have been unreasonable.

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[13] Para. 4.46 below.

[14] The former landlord who has assigned the whole of his reversion in the property would be able to apply for a release from all the landlord covenants at the time of a subsequent assignment by the current landlord, whether the latter assigns the whole or part of his reversion.

[15] Para. 4.11 above.

Further, a landlord whose liability has been continued will be able to seek a release on a later assignment of the reversion.[16]

Assignment of part of the property

4.27 Before looking in detail at what we propose when a landlord or a tenant assigns only part of the property demised by a lease, there are some general points to be made. We must define what we mean by assignments of part of leased property, consider the various types of lease covenant and the relevance of the existing statutory power to apportion rent.

4.28 Assignments of part of leased property fall into two categories. First, there is the landlord or tenant who disposes of part of the leased land which he owns and retains the rest. Second, there is the landlord or tenant who only owns part of the property comprised in a lease, but disposes of the whole of what he owns.

(a) *Assignment of whole of part owned by assignor*

4.29 We consider that the second case is as close as possible to a disposal of the whole of the property comprised in a lease, and a similar result should be achieved. After all, as far as the owner is concerned he retains no interest in the property.

(i) *Assignment by tenant*

4.30 Accordingly, our recommendation is that the tenant who assigns all the property demised by a lease which he owns, although it is not the whole of the property comprised in the lease, should be treated in the same way as a tenant transferring the whole of the demised property.[17] He will have no continuing liability, unless the landlord validly imposes a condition on his consent to the assignment, and no further benefit. The incoming tenant will become liable to perform the covenants that bound his predecessor as tenant, and will be entitled to the benefit of the lease.

(ii) *Assignment by landlord*

4.31 When a landlord assigns the whole of the part of the demised property which he owns, we recommend that the rules relating to an assignment by a landlord of the whole of the demised premises should apply.[18] The procedure for escaping continuing liability and foregoing the benefits of the lease by giving notice to the tenant of the proposed transfer will be available, and if it is not used or if the notice is successfully contested the landlord will remain liable. The incoming landlord will become liable to perform the covenants and be entitled to the benefit.

(b) *Assignment where assignor retains part of the property*

4.32 When considering cases where the assignor assigns part, and retains part, of leased property, covenants can be divided into three classes:

(a) Covenants which expressly apply only to a particular part of the property. A common instance occurs when a shop and living accommodation are let by one lease, and it contains separate tenant's covenants as to the use of the shop and as to the use of the living accommodation.

(b) Covenants which impose a single obligation relating to the whole property, but which, in their application, can be attributed to individual parts of the property. Examples of these covenants are obligations to insure, to repair and to decorate. Leases frequently require one party or the other to repair the whole of the demised property. However, in its practical application, the obligation can be attributed to individual parts of the property on which work needs to be done. It is therefore possible, on the facts as they arise, to treat the covenant as attributed to one or other part of the property.

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[16] Para. 4.24 above.
[17] Paras. 4.9–4.15 above.
[18] Paras. 4.16–4.25 above.

(c) Covenants which cannot be attributed to any particular part of the property. The prime example is the covenant to pay rent, although there are occasional cases in which specific sums of rent are charged on individual parts of the property and they would fall into class (a). Other examples include covenants having little direct connection with any part of the demised property: a landlord's obligation to give the tenant access to facilities separate from the demised property, or a tenant's obligation to comply with rules regulating trading relations between the tenant and the landlord.

(i) *Assignment by tenant*

4.33 We recommend that, where a tenant assigns part, and retains part, of property demised by a lease, the performance of the covenants so far as they are to be complied with in relation to land retained or disposed of should become the exclusive responsibility of the current owner of that part. The benefit of covenants would be dealt with in the same way. This would cover all covenants in class (a) in paragraph 4.32, and those in class (b) to the extent that they affect the part of the land in question. An obligation to pay money (e.g., rent or service charge) can come into this category, but to do so either the covenant must apply only to that part of the land or the sum payable must be calculated by reference to it only.

4.34 The tenant who assigns part only of the leased property which he owns would automatically have no continuing liability, in the absence of a condition validly imposed by the landlord,[19] under any covenant for which his successor takes exclusive responsibility.[20] For the other covenants,[21] the tenant will remain liable and he and his successor will have joint and several liability. This can, however, be avoided if they make apportionment proposals[22] to the landlord before the assignment, and the landlord does not successfully contest them. In that event, the proposals are effective and bind all parties.

(ii) *Assignment by landlord*

4.35 A landlord who assigns only part of what he owns should, we recommend, have the option of taking two forms of special action. If he does nothing, his liability under the lease will continue, and he will be jointly and severally liable with his successor. If he wishes to avoid liability, his possible courses of action would be:

(a) To give the form of notice available in the case of an assignment of the whole property.[23] If he does that, then unless it is successfully contested, he will escape continuing liability, and have no further benefits, under covenants which relate to the property he has assigned; i.e., he will cease to be liable for covenants in class (a),[24] those in class (b)[25] so far as they affect the land he disposed of, and obligations to pay money which apply only to that land or under which the sum payable must be calculated by reference to it. In respect of other covenants[26] applying to the property assigned, the landlord will remain liable, jointly and severally with his successor.

(b) In respect of the latter class of covenants,[27] to make apportionment proposals[28] by agreement with his successor, dividing liability between the two of them, or even proposing that one should undertake full liability and the other be released. If the proposals were not successfully contested, they would become binding on the tenant, as well as the landlord and his successor.

4.36 An incoming landlord should assume full responsibility as landlord, and be

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[19] Para. 4.11 above.
[20] i.e., covenants to the extent that they affect the part assigned.
[21] i.e., those in class (c) in para. 4.32 above.
[22] Paras. 4.37–4.39 below.
[23] Paras. 4.17–4.18 above. A landlord who remains liable after the assignment will be able to seek a release on a subsequent assignment.
[24] Para. 4.32 above.
[25] *Ibid.*
[26] i.e., covenants in class (c) in para. 4.32 above.
[27] *Ibid.*
[28] Paras. 4.37–4.39.

entitled to the benefit of the lease, but only in respect of the property he acquires. Accordingly, we recommend that a new landlord of only part of the demised property should be responsible for complying with the covenants which bound his predecessor as landlord, but only to the extent that they affect the part assigned to him, and should to that extent be entitled to the benefit of the lease. One particular consequence of this should be noted. Say one lease lets two properties, Blackacre and Whiteacre. The landlord (*A*) assigns the reversion in Blackacre to *B* and on that occasion does nothing to cancel his continuing liability. He then assigns the reversion in Whiteacre to *C*. After the first assignment, *A* and *B* are jointly and severally liable as landlords of Blackacre. When *A* assigns the rest of the property to *C*, *C* does not inherit that joint responsibility with *B* for liabilities only affecting Blackacre.

(c) *Apportionment*

4.37 For covenants in class (c) in paragraph 4.32 which cannot be attributed to any particular part of the property, our recommendation is that the landlord or the tenant who disposes of his interest will remain liable and will be jointly and severally liable with his successor, and indeed any other people liable, unless they take action to avoid continuing liability. To escape that, they would serve on the other party to the lease notice of their proposals about the way in which the liability should be treated in future. The party receiving the notice would have four weeks in which to respond. Again, as in the case of notices served by landlords to obtain their total release from continuing liability,[29] this notice could be of considerable importance to the recipient. We therefore recommend that the form of notice be prescribed and that it should incorporate appropriate information about its significance and consequences.

4.38 A party who receives notice proposing an apportionment of liability may agree or acquiesce by doing nothing. In either case, the proposals come into effect at the time the property is assigned. They are then binding on all those concerned. If on the other hand the recipient of the notice contests the proposals, he can only be bound by them if those putting them forward successfully apply to the court for a declaration that they are reasonable.

4.39 The apportionment proposals may take one of three forms. They may propose that a liability be divided between different parts of the property, and that the owners of those parts have exclusive liability for their portions. This is likely in the case of covenants to pay rent. Or, the suggestion may be that a liability be imposed wholly on the owner of one part of the property with the owner of the other part exonerated. Or, each owner of a part might in future be responsible for complying, but without having a liability for the other's actions. This might be appropriate in the case of a tenant's covenant not to obstruct a right of way.

4.40 To treat covenants to pay rent in the same way as other non-attributable covenants is to override the partial acceptance by landlords of informal rent apportionments which the courts have established.[30] However, we regard the position reached by the common law as unsatisfactory: it is not wholly certain, it does not treat all parties equally and it achieves a position that the amount of a tenant's liability varies depending on the way in which the landlord chooses to enforce it. To adopt our proposals involves accepting that there will be some cases in which apportionments do not bind the landlord, either because they are unreasonable or because the parties fail to operate our proposed procedure. We see this as an acceptable price to pay for clarity and certainty in the law.

4.41 There is already a statutory procedure of general application enabling tenants to require an apportionment of rent which becomes binding on the landlord. This involves an application to the Secretary of State for the Environment.[31] We understand that this is regularly done, although only in a small number of cases.[32] It is probably neglected because it is inconvenient and time-consuming. Our alternative procedure will not involve official intervention, and, assuming that in the majority of cases the apportion-

[29] Paras. 4.17–4.18 above.
[30] Paras. 2.29 and 3.24 above.
[31] Inclosure Act 1854, ss. 10–14; Landlord and Tenant Act 1927, s. 20; Housing Act 1980, s. 143.
[32] In 1985 there were 363 applications for apportionment certificates.

ment proposal will be reasonable, it is likely to be swift. There are also a number of other statutory provisions for rent apportionment in particular circumstances.[33]

4.42 We have considered whether we should suggest that our recommendation supersede the existing arrangements for binding apportionments, but we have concluded that they should not. It is possible to apply under the existing general procedure at any time; our recommendations would only apply when some of the property changes hands. To this extent, our proposals, although probably simpler, are not so comprehensive. The provisions relating to more specialised cases may also continue to be needed for the purposes for which they were introduced. For these reasons we do not consider that the present procedures should be withdrawn. However, we do recommend that it be made clear that they cannot be employed to reopen an apportionment which has become binding on all the parties under our proposals.

Forfeiture and disclaimer

4.43 There are two further consequences of a tenant assigning part of the property. We are anxious wherever possible to achieve the clean break on assignment which was urged upon us.[34] This not only means that a former tenant should have no further rights and obligations under a lease, but also that where the property has been divided it should be treated as if each were separately demised. Our proposals so far explained have dealt with the enforcement of obligations by action, but there are two other remedies to be considered.

4.44 If a landlord exercises a right to forfeit on breach of covenant, that forfeiture will normally relate to the whole property,[35] even if different parts of it are in different hands and the default is by only one of the tenants. The security of the tenant of one part of the property may therefore be at risk from the behaviour of the tenant of another part. Furthermore, the covenant which is broken may be one which relates only to that other part of the property. To achieve a clean break, these cross risks need to be eliminated. We therefore recommend that any rights of re-entry and forfeiture resulting from a breach of a covenant relating to one part of the property should only operate to affect the part of which the defaulter is tenant.

4.45 When a tenant becomes insolvent, the lease can in certain circumstances be disclaimed.[36] While the position is not entirely clear, it may be that a disclaimer by the liquidator or trustee in bankruptcy of a tenant of one part of the property demised by a lease will prejudice the whole lease and therefore the tenants of other parts of the property. Again, that is not a satisfactory separation of the parts of the property. Our recommendation is, therefore, that a disclaimer of a lease by the tenant's liquidator or trustee in bankruptcy should not affect the position of the tenant of any other part of the property.

General

(a) *Distinction between covenants*

4.46 Although to accord with our first principle[37] it may be necessary to differentiate between covenants which apply to different parts of property let by a lease, our second principle[38] suggests that covenants should not be put into different categories for other

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[33] e.g., Sites for Schools Act 1849; Ecclesiastical Leasing Act 1858, s. 8; Defence of the Realm Act 1860, s. 26; Universities and Colleges Estates Act 1925, s. 19; Settled Land Act 1925, s. 60; Coal Act 1938, s. 11; Electricity Act 1947, ss. 4(6) and 19(1); Land Compensation Act 1961, s. 1; Transport Act 1962, s. 31(8); Transport (London) Act 1969, Sched. II, paras. 1 and 2; British Telecommunications Act 1981, Sched. II, para. 1(2).

[34] Para. 4.2 above.

[35] Forfeiture of part is possible in certain circumstances, the full extent of which the courts have not yet had occasion to determine. In *GMS Syndicate Ltd.* v. *Gary Elliott Ltd.* [1982] Ch. 1, Nourse J. held that the landlord could forfeit in part but emphasised that he did not intend "to go beyond the circumstances of the present case, where the two parts of the demised property are physically separated one from the other and are capable of being distinctly let and enjoyed, and where the breaches complained of were committed on one part of the property and on that part alone". This view is more cautious than that expressed in our Report on Forfeiture of Tenancies (1985) Law Com. No. 142, para. 5.36.

[36] Insolvency Act 1986, ss. 178 and 315.

[37] Para. 4.1.

[38] *Ibid.*

reasons. We accordingly recommend that there should be no distinction between lease covenants which touch and concern the land and other covenants. Abolishing this distinction will of itself simplify the law, because the current parties to leases will be able to be sure that they are bound by and benefit from all the obligations set out in the lease.

(b) *Voluntary assignments*

4.47 In relation to releasing both landlords and tenants who assign, our recommendations only cover voluntary assignments. They do not apply to transfers by operation of law on a party's death or bankruptcy. It would not be right for someone's liability under a lease to cease on his death or bankruptcy and not to pass to his estate. Accordingly, our proposals have no effect on the rights and liabilities of the parties and their estates as a result of death or bankruptcy. However, when the reversion or the tenancy is further transferred, our recommendations would be effective. So, e.g., whether a personal representative sold a property forming part of the estate in the course of administration or assented to its vesting in a beneficiary, our proposed rules would apply. Nevertheless, a person receiving either a lease or a reversion as a result of a transfer by operation of law would, as now, be responsible for performing the lease obligations. This liability will apply to all the lease covenants.

(c) *Lawful assignments*

4.48 In our recommendations, references to an assignment refer only to a lawful assignment, in the sense that any required consent has been obtained. This is so even though an assignment without that consent is effective to transfer the legal estate.[39] It would not be appropriate to treat lawful and unlawful assignments alike for this purpose. To do so would allow a tenant to escape his responsibilities under a lease by committing a breach of the covenant not to assign without consent, and the landlord would be deprived of the opportunity to impose a continuing liability condition in a case where it would have been reasonable to do so.[40] Accordingly, unlawful assignments would not trigger the rules we propose. Again, however, assignees under unlawful assignments would become responsible for complying with the lease obligations.[41]

(d) *Rights and liabilities*

4.49 The rights and liabilities arising from a lease should go hand in hand. We believe that it will be seen to be fair that only those who have liabilities should be entitled to the compensating rights. We therefore recommend that wherever our scheme cancels a party's liability under a lease, he should cease to have rights under it. This will not prejudice accrued rights. So. e.g., a tenant's right to claim damages from his landlord would not be cancelled when he assigned his interest, but no further claim would accrue.

Joint liability

4.50 In a number of cases, our proposals will result in more than one person being liable to perform the same obligation.[42] We recommend that in such cases the liability of all those who are bound by the same obligation should be joint and several. The effect of this, as far as those enforcing covenants are concerned, is the same as at present: they can take proceedings against any of those liable. However, as between those with joint liability, there must be a way to achieve a fair apportionment of responsibility.

4.51 For these reasons, we recommend that in every case in which parties are jointly and severally liable to perform lease covenants, the contribution provisions of the Civil Liability (Contribution) Act 1978 should be extended to apply.[43] In cases of dispute, the court would have the power to apportion liability between them in

[39] *Old Grovebury Manor Farm Ltd.* v. *W. Seymour Plant Sales & Hire Ltd. (No. 2)* [1979] 1 W.L.R. 1397.
[40] Para. 4.11 above.
[41] Paras. 4.9, 4.30 and 4.33 (incoming tenant); paras. 4.21, 4.31 and 4.36 (incoming landlord).
[42] For tenants' covenants: see para. 4.34 above; for landlords' covenants: paras. 4.26 and 4.35 above.
[43] At present the 1978 Act only regulates the mutual rights to contribution of persons liable for the same damage, and not to the rights of those jointly responsible for the same debt.

whatever shares are just and equitable, and it would have the power to exonerate any party completely.

4.52 These arrangements would supersede the present system of indemnity covenants, intended to protect a former owner against the results of a breach of covenant by a successor. In the case of tenants, they will no longer be needed. If a tenant's liability continues after he assigns, it will generally be as guarantor.[44] A guarantor who is called upon to make any payment always has a right to indemnity from his principal;[45] so any further express or implied covenant would add nothing. For landlords, the position is not wholly satisfactory at the moment, and will become less so. There are already some cases in which indemnity seems appropriate and yet there is no statutory provision for it. The present covenants build into chains which can be complicated to enforce and which can break if some party in the middle becomes insolvent. Under our proposals, there will be cases where liability is shared by several former owners, but not necessarily every successive one, so that a chain will no longer be appropriate. We accordingly recommend that indemnity covenants, both implied[46] and express,[47] be abandoned.

Guarantors

4.53 The position of those who enter into leases as guarantors must be considered. The liability of a true guarantor is dependent upon the liability of the principal debtor. When the latter ceases to be liable, there is no obligation for the former to guarantee. Accordingly, if the result of our proposals would be to release a party to a lease, be he landlord or tenant, that would automatically end the responsibility of that party's guarantor.

4.54 Most of the people now named in leases as guarantors for the tenant actually assume liabilities which make them principal debtors, with obligations independent of those of the party whose covenants they are said to guarantee. They have rights of reimbursement against their principals, but they will not, as a matter of law, be released from their obligations merely because the principal is released. To permit such guarantors, or more strictly indemnifiers, to remain liable when the tenant has been wholly released under our proposals, would undermine the thrust and purpose of those recommendations. We therefore go further. Whenever the liability of a tenant would be wholly cancelled under our recommendations, we recommend that liabilities which had been undertaken in parallel and are essentially to the same effect would also be terminated.

4.55 When a tenant is partially released from his obligations under our proposals, we recommend that a third party who has entered into a parallel obligation supporting the tenant's liability be released to the same extent. This effect will be automatic, without the third party having to take any action.

4.56 We recommend that the position be different on the release of a landlord: this should have no automatic effect on a third party's liability. If it is the first landlord who is released when he assigns, the release of anyone who gave an indemnity covenant would be logical and simple to provide. However, it is likely that our proposals will result in cases where some former landlords have been released but others have not,[48] and third parties could have undertaken liabilities when the lease was originally granted or later. As a result, any general rule for releasing third parties would be likely to be complicated and to operate unfairly. Bearing in mind that in practice cases in which landlords' covenants are supported by third parties are rare, we consider it better to allow those third parties to regulate the duration of their liability by the terms of the obligations which they undertake.

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[44] Para. 4.11 above. In some cases of assignments of parts of the property, former and current tenants will be jointly and severally liable: para. 4.34 above.

[45] *Duncan Fox & Co.* v. *North & South Wales Bank* (1880) 6 App. Cas. 1.

[46] Paras. 2.13–2.15 above.

[47] A contractual arrangement would be void if it created a liability where the proposed scheme did not; see paras. 4.57–4.58 below.

[48] Para. 4.26 above.

Contracting out

4.57 We could have put forward our proposals for reform as a voluntary code, for parties to adopt if they wished, or as a set of rules to apply as a fall-back in cases where the parties did not expressly agree an alternative. We do not see either of these possibilities as satisfactory. The continuing liability effect of the privity of contract principle can be excluded voluntarily at the moment, but this is rarely done. We think it unlikely, given that there will be no change in the relative bargaining power of landlords and tenants, that new rules which the parties could exclude by agreement would have much effect in implementing the principles underlying our proposed reform. We therefore recommend that the new rules should apply notwithstanding any contract between the parties. In making this recommendation, we bear in mind that our proposals themselves have inherent flexibility when variation of the basic rule is reasonable.

4.58 Clearly, there are many ways in which the parties could seek to circumvent the rules we are proposing. Agreements for this purpose might be made outside the lease or agreement to assign, and might be made with third parties. We cannot foresee all the ways in which it could be done, and we do not consider that it would be satisfactory for statute to try to identify and nullify each individually. We recommend a general provision aimed at invalidating all contracts to the extent that they have the effect of subverting the rules we propose.

Transition

4.59 The introduction of our proposed scheme would not have any immediate effect on the rights and liabilities of those who were then landlords and tenants, nor those of people who were previously in that position but no longer had any interest in the property in question. Only when the interest of the current landlord or the current tenant changes hands should the proposed rules change the position. We recommend accordingly.

4.60 We deal first with the position of the tenant. When the whole of the property is assigned for the first time after the scheme comes into effect, the new tenant would become liable to perform the tenant's covenants. The assignor (subject to any condition of continuing liability as guarantor which the landlord successfully attached to a licence to assign)[49] and all previous tenants, would be exonerated. If the first assignment after the Act comes into force is of only part of the property previously assigned, the effect would be that the assignor, and all previous tenants, would be released from covenants to the extent that they are to be complied with in relation to the property assigned. Otherwise, unless the procedure for apportionment had been operated,[50] there will be no affect on the liability of the parties.

4.61 The coming into force of the new scheme, and the first assignment of the reversion after it takes effect, would have no automatic effect on the continuing liability of former landlords. They would, however, have the chance which all former landlords have to serve notice to escape further liability.

4.62 We must emphasise that, even where parties formerly liable are exonerated by a subsequent transfer, they would only cease to be responsible from the date of the transfer. If covenants which are their responsibility are broken before that date, they will be, and will remain, liable for those breaches as they have been until now.

Exceptional cases

4.63 There are two cases in which we recommend that exceptions should be made to our general proposals, in order to continue liability in accordance with the policies adopted by recent statutes:

(a) Residential tenants of local authorities who exercise their right to buy, and others covered by this and similar legislation, are sometimes granted leases at a consideration which gives them a discount on the market value of the property.

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[49] Para. 4.11 above.
[50] Para. 4.37 above.

They covenant to repay some or all of that discount if they dispose of the property within a specified period. A similar position arises where the tenant under a shared ownership lease, granted under the right to buy, sells before acquiring all the shares; he covenants to pay for those shares.[51] To release those liabilities would be to permit the tenants to make an unintended and unjustified profit;

(b) Landlords of residential property remain liable under their lease covenants after assigning the reversion until the tenant is informed of the new landlord's name and address.[52] This temporary extension of liability is a useful sanction to enforce the obligation to give the tenant this information.

[51] Housing Act 1985, ss. 35, 155, Schedule 8, para. 6 (as amended); Housing Associations Act 1985, Schedule 2, para. 1 (as amended).

[52] Landlord and Tenant Act 1985, s. 3(3A); Landlord and Tenant Act 1987, s. 50. See para. 2.28 above.

PART V

SUMMARY OF RECOMMENDATIONS

5.1 We conclude this Report with a summary of our recommendations for changing the law on the matters dealt with in this Report. Where appropriate, we identify the clauses in the draft Landlord and Tenant (Covenants) Bill (contained in Appendix A) to give effect to particular recommendations.

(1) A tenant who assigns all the property let by a lease should generally cease to be liable to comply with the lease covenants, and similarly should cease to have the benefit of the lease. The assignee should become liable to perform the covenants and should have the benefit.

[Para. 4.9; clause 1(1) and (3)]

(2) A landlord consenting to an assignment should be able to impose a condition that the tenant guarantees the performance of the lease covenants by his successor, but only until the following assignment.

[Para. 4.11; clause 2]

(3) A landlord who assigns the whole of his reversion should have the option to escape further liability, and to forego benefits, under the lease by serving a prescribed notice on the tenant.

[Paras. 4.17–4.18; clauses 4 and 6]

(4) The incoming landlord should be liable to perform all the lease covenants, and be entitled to the benefit of the lease. Any previous landlord remaining bound by the covenants should be jointly and severally liable with the new landlord.

[Para. 4.21; clauses 4(4) and 7(1)]

(5) On a later assignment of the reversion, a previous landlord should be able to serve notice to escape further liability, but should have no statutory right to be notified in advance of a proposed assignment.

[Para. 4.24; clause 4(3)]

(6) The owner of part only of property comprised in a lease, who assigns the whole of that part, should be treated as if he were assigning the whole of the demised property. Accordingly, where the assignment is:

(a) by a tenant: he should have no continuing liability, unless the landlord validly imposes a condition on his consent to the assignment, and no further benefit from the lease. The incoming tenant should become liable to perform the covenants that bound his predecessor as tenant and be entitled to the benefit of the lease.

[Para. 4.30; clauses 1(1) and (3), and 2]

(b) by a landlord: he should be able to escape any further liability, and forego benefits, under the lease by serving a prescribed notice on the tenant. The incoming landlord should be responsible for complying with the covenants that bound his predecessor as landlord and be entitled to the benefit of the lease.

[Para. 4.31; clause 4(1) and (4)]

(7) Where part only of the property let by a lease is assigned:

(a) by a tenant: if he retains some part of the property, he should (in the absence of a condition validly imposed by the landlord) cease to be liable to perform covenants to the extent that they affect the part assigned, and to that extent cease to be entitled to the benefit of the lease. The incoming tenant should be responsible for performing the covenants to the extent that they affect the part assigned to him, and should to that extent be entitled to the benefit of the lease.

[Paras. 4.33–4.34; clauses 1(2) and (3), and 2]

(b) by a landlord: he should, if he retains some part of the property, be entitled to escape liability, and forego benefits, under the lease by serving a prescribed notice on the tenant. The incoming landlord should be responsible for complying with the covenants to the extent that they affect the part assigned to him, and should to that extent be entitled to the benefit of the lease.

[Paras. 4.35–4.36; clauses 4(2) and (4), and 6]

In either case, lease covenants which cannot be attributed to any particular part of the property should bind both assignor and assignee jointly and severally unless they comply with a procedure for apportioning liability, by serving a prescribed form of notice.

[Paras. 4.33–4.35; clauses 5, 6 and 7(1)]

(8) Existing statutory procedures for apportioning rent should continue, but should not be available to reopen an apportionment made under the procedure which we recommend.

[Para. 4.42; clause 10(3)]

(9) When part of the property let by a lease is assigned by a tenant:

(a) any right of re-entry or forfeiture exercised by the landlord as a result of a breach of covenant relating to one part of the property should affect only the part of which the defaulter is tenant.

[Para. 4.44; clause 7(4)]

(b) a disclaimer of the lease by the liquidator or trustee in bankruptcy of the tenant of part of the property should not affect the position of the tenant of any other part.

[Para. 4.45; clause 7(5)]

(10) The distinction between lease covenants which touch and concern the land and those which do not should be abolished.

[Para. 4.46; clause 10(1)]

(11) Only lawful assignments (i.e., those with the landlord's consent, if the lease requires) should affect the continuing liability of parties to leases, and not assignments by operation of law.

[Paras. 4.47–4.48; clause 12(1)]

(12) Whenever a party's liability under a lease is cancelled, he should cease to have rights under it.

[Para. 4.49; clauses 1 and 4]

(13) Where our proposals result in more than one person being liable to perform the same obligation:

(a) they should be jointly and severally liable.

[Para. 4.50; clause 7(1)]

(b) the Civil Liability (Contribution) Act 1978 should be extended to cover their mutual rights of contribution.

[Para. 4.51; clause 7(3)]

(c) the present system of indemnity covenants for former owners should be abandoned.

[Para. 4.52; clause 13(2) and Schedule]

(14) Where liabilities have been undertaken in parallel and to the same effect as the tenant's covenants in a lease:

(a) they should be released when liability under the lease covenant ends.

[Para. 4.54; clause 3(5)]

(b) the partial release of a tenant should release them to the same extent, but the partial release of a landlord should not have that effect.

[Paras. 4.55–4.56; clause 3(5)]

(15) Liabilities undertaken in parallel and to the same effect as the landlord's covenants in a lease should not automatically be released when the landlord is released.

[Para. 4.56]

(16) All contract terms having the effect of subverting our proposals should be invalidated.

[Paras. 4.57–4.58; clause 9]

(17) Landlords' and tenants' rights and liabilities existing at the date the scheme comes into force should continue until, after that date, the current landlord or the current tenant, respectively, assigns his interest.

[Paras. 4.59–4.60; clause 3(1) and (2)]

(18) Certain statutory provisions should not be affected by our proposals:

(a) statutory obligations imposed on tenants who have purchased leases from public authorities or housing associations (Housing Act 1985, sections 35, 155, Schedule 8, paragraph 6(1); Housing Associations Act 1985, section 8, Schedule 2, paragraphs 1–3).

(b) the temporary continuation of the liability of former landlords of residential property (Landlord and Tenant Act 1985, section 3(3A)).

[Para. 4.63; clause 10(4)]

(Signed) ROY BELDAM, *Chairman*
TREVOR M. ALDRIDGE
BRIAN DAVENPORT
JULIAN FARRAND
BRENDA HOGGETT

MICHAEL COLLON, *Secretary*
14 October 1988

APPENDIX A

Landlord and Tenant (Covenants) Bill

ARRANGEMENT OF CLAUSES

DRAFT

OF A

B I L L

INTITULED

An Act to amend the law relating to privity of contract and estate in respect of covenants in tenancies; and for connected purposes. A.D. 1988.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Burden of tenant covenants and benefit of landlord covenants to follow demised land

1.—(1) Where a tenant—

(a) assigns land demised by a tenancy; and

(b) does not remain the tenant of any other land demised by the tenancy,

then, on the assignment, he—

(c) is released from the tenant covenants of the tenancy; and

(d) ceases to be entitled to the benefit of the landlord covenants of the tenancy.

(2) Where a tenant—

(a) assigns land demised by a tenancy; but

(b) remains the tenant of other land demised by the tenancy,

then, on the assignment, he—

(c) is released from the tenant covenants of the tenancy to any extent that they are to be complied with in relation to the land assigned; and

(d) ceases to be entitled to the benefit of the landlord covenants of the tenancy to any extent that they are to be complied with in relation to the land assigned.

(3) Where a person becomes the tenant of land demised by a tenancy, then, on becoming the tenant, he becomes—

(a) bound by the tenant covenants of the tenancy—

(i) except to any extent that, immediately before he became the tenant, they did not bind his immediate predecessor as tenant of the land; and

Clause 1

1. This clause deals with the extent and duration of the liability for lease covenants undertaken by tenants and their successors in title; and with their entitlement to benefits under the lease.

Subsection (1)

2. This subsection implements (in part) the recommendations in paragraphs 4.9 and 4.30 of the Report. A tenant, who assigns the whole of the let property that he owns, whether or not that is all the property which was let by the lease, will cease to be liable to comply with the tenant covenants (defined in clause 12(1)) after the assignment, and cease to benefit from the lease. However, he will be liable, as guarantor, for his assignee's performance of the covenants if the landlord validly imposes a condition to that effect by virtue of clause 2. An assignment in breach of a covenant or an assignment by operation of law (see clause 12(1)) will not have the effect of releasing the tenant.

Subsection (2)

3. This subsection implements the recommendation in paragraph 4.33 of the Report. On assigning part of the let property which he owns, the tenant will (subject to any condition of continuing liability, as guarantor, validly imposed by the landlord under clause 2) cease to be liable to comply with the lease covenants to the extent that they affect the part assigned; and to that extent will cease to benefit from the lease. He will be released from covenants which apply exclusively to the part assigned; and in respect of covenants applying to both parts (e.g., a covenant to repair) he will only be released from complying with the covenant in relation to the part assigned. He will, however, remain liable for complying with the latter covenants in respect of the part he retains and for covenants which are not attributed to any particular part of the property, i.e. the part retained or the part assigned. Clause 12(2) makes it clear that a covenant to pay money (e.g., rent and service charge) will fall into the latter category unless it only applies to a particular part of the property or the sum payable is to be calculated by reference to that part only.

Subsection (3)

4. This subsection deals with the rights and liabilities of an incoming tenant. It gives effect (in part) to the recommendations in paragraphs 4.9, 4.30 and 4.33 of the Report.

5. When a tenant assigns the whole of the let property which he owns (the situation envisaged in subsection (1) above), the assignee will (in accordance with the recommendations in paragraphs 4.9 and 4.30) become liable to perform all the covenants that bound the assigning tenant immediately before the assignment and will be entitled to the benefit of the lease.

(ii) except to any extent that they are to be complied with in relation to land of which the person is not the tenant; and

(b) entitled to the benefit of the landlord covenants of the tenancy except to any extent that they are to be complied with in relation to land of which the person is not the tenant.

6. When a tenant assigns part, and retains part, of the let property which he owns (the situation envisaged in subsection (2) above), the assignee will (in accordance with the recommendation in paragraph 4.33) become liable to comply with certain covenants that bound the assigning tenant immediately before the assignment but only to the extent that they affect the part assigned to him, and he will to that extent be entitled to benefit from the lease. The covenants for which he will assume responsibility are: covenants that apply exclusively to the part assigned; and in respect of covenants applying to both parts he will only be liable to comply with the covenant in respect of the part assigned. He will also become bound by covenants which are not attributed to any particular part of the property. Both the assigning tenant (see paragraph (3) above) and the assignee will be bound by, and therefore jointly and severally liable in respect of, such non-attributable covenants: clause 7(1). However, they will be able to apportion their liability by following the procedure authorised by clause 5.

7. The assignee, on becoming tenant of the whole or part of the leased property, will become liable to perform the covenants, and be entitled to the benefit of the lease, to the extent indicated, irrespective of whether the assignment is in breach of a covenant or by operation of law. No distinction is drawn between covenants that touch and concern the land and those that do not: see clause 10(1) and the definition of "tenant covenant" in clause 12(1).

6. When a tenant assigns part, and retains part, of the let property which he owns (the situation envisaged in subsection (2) above), the assignee will (in accordance with the recommendation in paragraph 4.33) become liable to comply with certain covenants that bound the assigning tenant immediately before the assignment but only to the extent that they affect the part assigned to him, and he will to that extent be entitled to benefit from the lease. The covenants for which he will assume responsibility are: covenants that apply exclusively to the part assigned; and in respect of covenants applying to both parts he will only be liable to comply with the covenant in respect of the part assigned. He will also become bound by covenants which are not attributed to any particular part of the property. Both the assigning tenant (see paragraph (3) above) and the assignee will be bound by, and therefore jointly and severally liable in respect of, such non-attributable covenants: clause 7(1). However, they will be able to apportion their liability by following the procedure authorised by clause 5.

7. The assignee, on becoming tenant of the whole or part of the leased property, will become liable to perform the covenants, and be entitled to the benefit of the lease, to the extent indicated, irrespective of whether the assignment is in breach of a covenant or by operation of law. No distinction is drawn between covenants that touch and concern the land and those that do not: see clause 10(1) and the definition of "tenant covenant" in clause 12(1).

Consent to assignment requiring guarantee of tenant covenant

2. Where—

(a) a tenancy—

(i) prohibits absolutely the assignment of land demised by the tenancy; or

(ii) prohibits the assignment of land demised by the tenancy unless a person, whether or not the landlord of the land, consents to the assignment;

(b) the land is assigned with the consent of the landlord of the land or that person, as the case may be;

(c) immediately before the assignment, the tenant of the land was bound by a tenant covenant of the tenancy; and

(c) it is a condition of the consent that that tenant is to guarantee the performance of that covenant by the tenant to whom he assigns the land but not by a later tenant,

then, on the assignment, the assigning tenant becomes bound by the guarantee.

Clause 2

1. This clause implements the recommendation in paragraph 4.11 of the Report that a landlord consenting to an assignment may impose a condition that the assigning tenant should guarantee the immediate assignee's performance of the tenant covenants after the assignment.

2. Paragraph (a) identifies the two situations where the landlord can impose such a condition of continuing liability. Where the lease contains no restriction upon assignment, so that the tenant does not need to seek the landlord's consent, there will be no scope for the landlord to impose a condition of continuing liability.

3. Where a lease contains an absolute prohibition against assignment (paragraph (a)(i)), the landlord will always be able to impose a condition of continuing liability if he wishes, because the granting or withholding of consent will be within his absolute discretion.

4. Where a lease contains a covenant against assigning without consent (paragraph (a)(ii)), the landlord or other person whose consent is required will only be able to impose a condition of continuing liability on his consent to the assignment where it is reasonable to do so (either by reason of the terms of the lease or by statute). The Landlord and Tenant Act 1988 (which came into force on 29 September 1988) imposes a statutory duty on a person in those circumstances not to impose a condition on his consent unless it is reasonable to do so; the onus of showing that the condition is reasonable will be on the person imposing it.

5. The tenant can only be required to guarantee his immediate assignee's performance of the lease covenants. The condition of continuing liability may relate to any lease covenant from which the tenant would otherwise have been released on the assignment.

6. Since the tenant's continuing liability will be that of a guarantor, he will be released when his assignee is released. The assignee, when he subsequently assigns the whole or part of the property, will be released from the lease covenants to the extent indicated in clause 1(1) and (2) and his guarantor will therefore be released to the same extent: see paragraph 4.11 of the Report. Clause 10(2)(b) preserves the application of any law relating to the release of guarantors.

Release of former tenants from tenant covenants and release from parallel covenants

3.—(1) Where—

(a) immediately before this Act came into force, a person who had been the tenant of land demised by a tenancy ("the transferred land")—

(i) was not the tenant of the transferred land;

(ii) did not remain the tenant of any other land demised by the tenancy; and

(iii) remained bound by a tenant covenant of the tenancy; and

(b) after this Act comes into force there is an assignment of all or part of the transferred land,

then, on the assignment, he is—

(c) except where paragraph (d) applies, released from the covenant; or

(d) where the assignment is of part of the transferred land and occurs without all of the remainder of the transferred land having been assigned since this Act came into force, released from the covenant to any extent that it is to be complied with in relation to the part.

(2) Where—

(a) immediately before the day on which this Act came into force, a person who had been the tenant of land demised by a tenancy ("the transferred land")—

(i) was not the tenant of the transferred land; and

(ii) remained the tenant of other land demised by the tenancy; and

(b) on or after that day, there is an assignment of all or part of the transferred land,

then, on the assignment, he is released from the tenant covenants of the tenancy to any extent that they are to be complied with in relation to the land assigned.

(3) Where, under subsection (1), a person is released from all tenant covenants of a tenancy, he ceases to be entitled to the benefit of the landlord covenants of the tenancy.

(4) Where, under subsection (1) or (2), a person is released from all tenant covenants of a tenancy to the extent that they are to be complied with in relation to a part of the land demised by the tenancy, he ceases to be entitled to the benefit of the landlord covenants of the tenancy to any extent that they are to be complied with in relation to that part.

(5) Where—

(a) under subsection (1) or (2) or section 1(1) or (2) or 5, a person is released from a tenant covenant of a tenancy; and

(b) immediately before the release, another person was bound by a covenant imposing an obligation or a penalty in the event of, and as a consequence of, failure to comply with that tenant covenant,

Clause 3

1. This clause deals with the effect on a former tenant's liability of the first assignment of the lease after the Bill comes into force; and the duration of liabilities undertaken by third parties in parallel and to the same effect as the tenant's covenants in a lease.

Subsections (1) and (2)

1. These are transitional provisions. The coming into force of the Act will as such have no effect on the liabilities of tenants, who assigned leased property or ceased to be tenants by operation of law, before the Act comes into force. They will continue to remain liable to perform their covenants by virtue of the privity of contract rule. However, as explained at paragraphs 4.59-4.60 of the Report, the former tenant will be released from his covenants when the current tenant assigns the property after the Act comes into force. The extent of the release will depend on whether (before the Act comes into force) he ceases to be tenant of the whole or part of the property let to him, and on whether the current tenant (after the Act comes into force) assigns the whole or part of the property.

2. Subsection (1) deals with the case where, before the Act comes into force, a person is no longer the tenant of the whole of the property let to him. The effect of this subsection is that he will be released from his covenants once all the property that he owned is assigned after the Act comes into force; where part only of the property is assigned, he will be released from covenants to the extent that they affect the part assigned. To illustrate: T, before the Act comes into force, assigns the whole of the property let to him to T1, who, after the Act comes into force -

(i) assigns all the property. T will be released from all the tenant covenants (paragraph (c));

(ii) assigns part of the property. T will be released from the covenants but only to the extent that they affect the part assigned by T1 (paragraph (d));

(iii) subsequently assigns the remaining part of the property. T will be released from all the covenants (paragraph (c)).

3. Subsection (2) deals with the case where, before the Act comes into force, a person has ceased to be tenant of part only of the property let to him. If, after the Act comes into force, the current tenant assigns the whole of that part, or only part of it, the former tenant will be released from his covenants to the extent that they affect the property assigned by the current tenant.

Subsections (3) and (4)

4. These subsections deal with the former tenant's entitlement to benefits under the lease where he is released from his covenants after the Act comes into force.

then, on the release, that other person is released from his covenant to the same extent as the person referred to in paragraph (a) is released from that tenant covenant.

Subsection (5)

5. In accordance with the recommendations in paragraphs 4.54-4.55 of the Report, this subsection provides for the release of a person who undertakes liabilities in parallel to, and to the same effect as, the tenant's covenants. Where the tenant is released from a tenant covenant (whether wholly or partially) under the provisions specified, the "parallel covenantor" will be released to the same extent. However, he will not automatically be released where the tenant is voluntarily released by the landlord (clause 10(2)(a)).

Burden of landlord covenants and benefit of tenant covenants may follow reversion

4.—(1) Where a landlord—

(a) assigns the reversion in land demised by a tenancy; and

(b) does not remain the landlord of any other land demised by the tenancy,

then—

(c) he may be released in accordance with section 6 from the landlord covenants of the tenancy; and

(d) where he is so released from all of those covenants, he ceases to be entitled to the benefit of the tenant covenants of the tenancy.

(2) Where a landlord—

(a) assigns the reversion in land demised by a tenancy; but

(b) remains the landlord of other land demised by the tenancy,

then—

(c) he may be released in accordance with section 6 from the landlord covenants of the tenancy to any extent that they are to be complied with in relation to the land the reversion in which was assigned; and

(d) where he is so released from all of those covenants to that extent, he ceases to be entitled to the benefit of the tenant covenants of the tenancy to any extent that they are to be complied with in relation to the land the reversion in which was assigned.

(3) Where—

(a) a landlord assigns the reversion in land demised by a tenancy; and

(b) immediately before the assignment, a former landlord of that land remained bound by a landlord covenant of the tenancy,

then—

(c) the former landlord may be released in accordance with section 6 from—

(i) in a case where the former landlord does not remain the landlord of any other land demised by the tenancy, that covenant; or

(ii) in any other case, that covenant to any extent that it is to be complied with in relation to the land to which paragraph (a) applies;

(d) where the former landlord is so released from all landlord covenants of the tenancy, the former landlord ceases to be entitled to the benefit of the tenant covenants of the tenancy; and

(e) where the former landlord is so released from all landlord covenants of the tenancy to the extent that they are to be complied with in relation to a part of the land demised by the tenancy, the former landlord ceases to be entitled to the benefit of the tenant covenants of the tenancy to any extent that they are to be complied with in relation to that part.

Clause 4

1. This clause provides for the extent and duration of the liabilities for lease covenants undertaken by a landlord and his successors in title; and with their entitlement to benefits under the lease. A landlord who assigns his reversion will not automatically be released from complying with the lease covenants. If he wishes to be released, he will have to follow the procedure laid down in clause 6. The landlord will not be able to apply for a release where the assignment of his reversion is in breach of a covenant or by operation of law: clause 12(1). In general, the new landlord will become liable to perform the lease covenants that relate to the part of property of which he becomes the landlord. No distinction is drawn between covenants which touch and concern the land and those that do not: see clause 10(1)(a) and the definition of "landlord covenant" in clause 12(1).

Subsection (1)

2. This subsection implements the recommendations in paragraphs 4.17 and 4.31 of the Report. It authorises a landlord who assigns the whole of his reversionary interest to seek a release in respect of any landlord covenant by following the procedure specified in clause 6.

Subsection (2)

3. In accordance with the recommendation in paragraph 4.35 of the Report, this subsection authorises a landlord who assigns his reversion in part of the property he owns to seek a release from his lease covenants to the extent that they affect the part of the property of which the reversion was assigned.

Subsection (3)

4. This subsection implements the recommendation in paragraph 4.24 of the Report. A landlord, whose liability continues after he assigns the reversion, e.g. if he has not applied for a release or the release has been validly refused, will be able to apply for a release on a subsequent assignment of the reversion.

(4) Where a person becomes the landlord of land demised by a tenancy, then, on becoming the landlord, he—

(a) becomes bound by the landlord covenants of the tenancy—

(i) except to any extent that, immediately before he became the landlord, they did not bind his immediate predecessor as landlord of the land; and

(ii) except to any extent that they are to be complied with in relation to land of which the person is not the landlord; and

(b) becomes entitled to the benefit of the tenant covenants of the tenancy except to any extent that they are to be complied with in relation to land of which the person is not the landlord.

Subsection (4)

5. This subsection implements the recommendations in paragraphs 4.21 and 4.36 of the Report. It deals with two situations: (a) where the new landlord acquires the whole of his predecessor's reversion in the leased property; and (b) where he acquires part of the reversion. In the first case, the new landlord will become bound by all the lease covenants that bound his predecessor at the time of the assignment, and be entitled to the benefit of the lease. In the second case, the new landlord will become bound by the covenants that bound his predecessor but only to the extent that they affect the property of which he has become the landlord, and he will to that extent have the benefit of the lease. In each case, the new landlord will become bound by the covenants to the extent indicated, irrespective of whether his predecessor has been released in accordance with the procedure specified in clause 6. In respect of covenants which are not attributed to any particular part of the property, the new landlord and his predecessor will be able to apportion their liability in accordance with the procedure authorised by clause 5.

Apportionment

5.—(1) Where—

(a) a tenant is to—

(i) assign land demised by a tenancy; and

(ii) remain the tenant of other land demised by the tenancy;

(b) the parties to the assignment would, after the assignment, be bound by a tenant covenant of the tenancy; and

(c) the parties agree that, on the assignment—

(i) liability under the covenant is to be apportioned between them in a way specified in the agreement; and

(ii) they are to be released from the covenant to the extent required by the apportionment,

the release may be effected in accordance with section 6.

(2) Where—

(a) a landlord is to—

(i) assign the reversion in land demised by a tenancy; and

(ii) remain the landlord of other land demised by the tenancy;

(b) the parties to the assignment would, after the assignment, be bound by a landlord covenant of the tenancy, not being a covenant that to any extent is to be complied with in relation to the land the reversion in which is to be assigned; and

(c) the parties agree that, on the assignment—

(i) liability under the covenant is to be apportioned between them in a way specified in the agreement; and

(ii) they are to be released from the covenant to the extent required by the apportionment,

the release may be effected in accordance with section 6.

(3) An agreement referred to in subsection (1)(c) or (2)(c) may apportion liability so that a party to the agreement is exonerated from liability.

Clause 5

1. This clause gives effect to the recommendations in paragraph 4.37 of the Report. Where a party to a lease assigns part of the property he owns, he and the assignee will become bound by, and therefore jointly and severally liable for (clause 7(1)), lease covenants that cannot be attributed to any particular part of the property. This clause enables them to apportion their future liability for such covenants in such proportion as they think fit, and to make the apportionment binding on the other party to the lease, by following the procedure prescribed in clause 6. A covenant to pay money (e.g., rent or service charge) will fall into the category of a non-attributable covenant unless it only applies to a particular part of the property or the sum payable is to be calculated by reference to that part only: clause 12(2).

Subsection (1)

2. This deals with the case where the tenant assigns part, and retains part, of the property let. The effect of paragraph (b) is that the assigning tenant and the incoming tenant can only apportion their liability in respect of covenants that are not attributed to any particular part of the property. See clause 1(2) and (3) and paragraphs 3 and 6 of the notes on clause 1.

Subsection (2)

3. This deals with the case where the landlord assigns part of the reversion that he owns. The effect of paragraph (b) is that the subsection only applies to covenants that are not attributed to any particular part of the property, and accordingly the assigning landlord and the incoming landlord will only be able to apportion their liability in respect of such covenants.

Subsection (3)

4. The parties can seek to apportion their liability in such proportions as they think fit: clause 5(1)(c) and 5(2)(c). Subsection (3) makes it clear that the apportionment agreement can seek to exonerate a party from liability and to impose liability wholly on the other party.

Manner of release

6.—(1) Where, in relation to a tenancy—

(a) section 4 authorises a release in accordance with this section on the assignment of a reversion in land; or

(b) section 5 authorises a release in accordance with this section on the assignment of land or a reversion in land,

the release is effected if—

(c) before the assignment, a person seeking the release served on—

(i) in the case of a landlord covenant of a tenancy, the tenant of the land; or

(ii) in the case of a tenant covenant of a tenancy, the landlord of the land,

prescribed notice of—

(iii) the proposed assignment;

(iv) the request for the release; and

(v) where paragraph (b) applies - particulars of the agreement for the release; and

(d) either—

(i) the recipient of the notice did not, within the period of four weeks beginning with the day on which the notice was served, object in writing to the release; or

(ii) where the recipient did so object - a person seeking the release obtained a declaration by a court that the release was reasonable.

(2) A release effected in accordance with this section in relation to an assignment shall be taken to have occurred on the assignment.

Clause 6

Subsection (1)

1. This subsection sets out the procedure and conditions which must be complied with by: (a) a landlord or former landlord seeking a release under clause 4, or (b) the parties to an assignment, whether landlords or tenants, seeking to make an apportionment agreement binding on all parties under clause 5. The subsection gives effect to the recommendations in paragraphs 4.17-4.18, 4.24, 4.35 and 4.37 of the Report.

2. Paragraph (c). The form of the notice is to be prescribed by secondary legislation (clause 11(1)) and the prescribed form is to include an explanation of the significance of the notice (clause 11(2)). A notice which is not in the prescribed form or in a form to the like effect will not be effective for the purposes of clause 6 (clause 11(3)).

3. Paragraph (d). The onus will be on the recipient of the notice, if he does not wish to be bound by the proposed release, to object in writing within four weeks from the service of the notice. If he does so, the burden will then be on the other party to show that the release would be reasonable in the circumstances.

Subsection (2)

4. The release may be agreed between the person proposing it and the other party to the lease before the date of the proposed assignment, or it may only become clear after the assignment that a party is entitled to be released, e.g. where there has been a dispute and the declaration by a court that the release was reasonable was made after the date of the assignment. This subsection makes it clear that the release is to take effect, in either case, on the date of the assignment.

Covenants binding two or more persons

7.—(1) Where, because of this Act, two or more persons are bound by the same covenant, they are so bound jointly and severally.

(2) Subject to the other provisions of this Act, where—

(a) under this Act, two or more persons are bound jointly and severally by a covenant; and

(b) a person so bound is released from the covenant,

the release does not release any other person so bound.

(3) For the purpose of providing for contribution between persons who, under this Act, are bound jointly and severally by a covenant, the Civil Liability (Contribution) Act 1978 shall have effect as if— 1978 c.47.

(a) liability to a person under a covenant were liability in respect of damage suffered by that person; and

(b) section 7(2) of that Act did not apply in respect of such liability.

(4) Where—

(a) a person becomes the tenant of part only of the land demised by a tenancy; and

(b) under a proviso or stipulation in the tenancy, there is a right of re-entry or forfeiture for a breach of a tenant covenant of the tenancy, being a right that is expressed to apply to that part and to other land demised by the tenancy,

the right shall, in respect of a breach of the covenant by that person, be taken to be a right only in respect of that part.

(5) Where—

(a) a company which is being wound up or a trustee in bankruptcy is the tenant of part only of the land demised by a tenancy; and

(b) the liquidator of the company exercises his power under section 178 of the Insolvency Act 1986 , or the trustee in bankruptcy exercises his power under section 315 of that Act, as the case may be, to disclaim land demised by the tenancy, 1986 c.45

the disclaimer takes effect only in respect of that part.

Clause 7

1. This clause deals with the liabilities of persons who are bound by the same lease covenants.

Subsection (1)

2. This subsection gives effect to the recommendation in paragraph 4.50 of the Report. As a result of clauses 1, 3 and 4, two or more persons may become bound by the same covenant. In such cases, their liability will be joint and several.

Subsection (2)

3. This subsection provides that the release of one debtor will not have the effect of releasing any other debtor jointly and severally liable with him. Thus, for example, the release of a former landlord by the tenant will not automatically release the current landlord, who is bound by the same covenant as the former landlord. The subsection is expressed to be subject to the other provisions of the Bill since it is not intended to prevent the automatic release of a "parallel covenantor" on the tenant's release: see clause 3(5).

Subsection (3)

4. This subsection implements the recommendations in paragraph 4.51 of the Report. The effect of the subsection is to enable a person to recover contribution under the Civil Liability (Contribution) Act 1978 from another person who is jointly and severally liable with him for breach of the same lease covenants. Under the 1978 Act, the court can order such contribution as is just and equitable, and it has power to exempt any party from liability to make contribution.

5. The effect of paragraph (a) of this subsection is that for the purposes of this Bill the contribution provisions of the 1978 Act will be available to regulate the rights of those liable for the same debt. At present the 1978 Act only regulates the mutual rights to contribution of persons liable for the same damage.

6. Section 7(2) of the 1978 Act provides that the Act does not apply in respect of an obligation assumed before 1 January 1979. Paragraph (b) displaces this provision so that, for the purposes of the Bill, the 1978 Act will apply irrespective of when the lease was granted or when the lease obligation was assumed.

Subsections (4) and (5)

7. These subsections implement the recommendations at paragraphs 4.44 and 4.45 of the Report respectively.

Effect of release from covenants on obligations etc.

8.—(1) The release under this Act of a person from a covenant does not affect his liability arising from any breach of the covenant before the release.

(2) Where, under this Act, a person ceases to be entitled to the benefit of a covenant, the loss of his entitlement does not affect his rights arising from any breach of that covenant that occurred before his entitlement ceased.

Agreements cannot limit Act

9. Any provision of an agreement is void to the extent that it—

(a) purports to preclude the operation or effect of this Act; or

(b) provides for the forfeiture, termination or surrender of a tenancy, or the imposition of any penalty, obligation, damages or disability, in the event of the operation of this Act.

Application of Act

10.—(1) This Act applies to a covenant of a tenancy—

(a) whether or not the covenant has reference to the subject matter of the tenancy; and

(b) whether the covenant is express, implied or, subject to subsection (4), imposed by law.

(2) Nothing in this Act prevents—

(a) a party to a tenancy releasing a person from a covenant of the tenancy;

(b) the operation of any law relating to the release of guarantors; or

(c) the parties to a tenancy agreeing to the apportionment of liability under a covenant of the tenancy.

(3) An order or decision under any other Act (including a local and personal or private Act) relating to apportionment shall not vary an apportionment for which there has been a release in accordance with section 6.

(4) Nothing in this Act affects the operation of—

(a) sections 35 and 155 of, and paragraph 6(1) of Schedule 8 to, the Housing Act 1985 (covenants for repayment of discount on early disposal); 1985 c.68

(b) section 8, and paragraphs 1, 2 and 3 of Schedule 2 to, the Housing Associations Act 1985 (covenants for repayment of discount on early disposal); or 1985 c.69

(c) section 3(3A) of the Landlord and Tenant Act 1985 (preservation of former landlord's liability until tenant notified of new landlord). 1985 c.70

(5) In this section, "covenant", in relation to a tenancy, means a tenant covenant of the tenancy or a landlord covenant of the tenancy.

Clause 8

This clause provides that a release will only have prospective effect: it will not affect the released person's liabilities and rights accruing prior to the release. The clause gives effect to the recommendation in paragraph 4.49 of the Report.

Clause 9

This subsection implements the recommendation in paragraphs 4.57 and 4.58 of the Report. Paragraph (b) is designed to prevent indirect methods of escape from the provisions of the Act. Any provision in an agreement which has the effect of circumventing the provisions in the Bill will, to that extent, be void; no other provision in the same agreement will be affected.

Clause 10

Subsection (1)

1. Paragraph (a) implements the recommendation at paragraph 4.46 of the Report.

Subsection (2)

2. Paragraph (a) makes it clear that it would remain open to a party to voluntarily release a person from a lease covenant.

3. Paragraph (b). The liability of a guarantor is dependent on that of the principal debtor. Accordingly, if the tenant or landlord is released either voluntarily (paragraph (a)) or by virtue of the provisions of this Act, his guarantor's liability will automatically cease.

Subsection (3)

4. This subsection implements the recommendation in paragraph 4.42 of the Report that the existing statutory procedures for apportionment cannot be employed to re-open an apportionment which has become binding on the parties by virtue of clause 6.

Subsection (4)

4. This implements the recommendation in paragraph 4.63 of the Report.

Notices for purposes of Act

11.—(1) A prescribed notice referred to in section 6(1)(c) shall be prescribed by regulations made by the Lord Chancellor by statutory instrument.

(2) The form of a notice to be prescribed for the purposes of subsection (1) shall include —

(a) an explanation of the significance of the notice;

(b) a statement that objections in response to the notice must be made in writing within the period of four weeks beginning with the day on which it was served; and

(c) an address in England and Wales for the purpose of receiving such objections.

(3) If a notice purporting to be given for the purpose of section 6(1)(c) is not in the prescribed form or in a form to the like effect, it shall not be effective for the purposes of section 6 but shall not affect the validity of the assignment to which it relates.

(4) Section 23 of the Landlord and Tenant Act 1927 (which relates to the service of notices) shall apply for the purposes of section 6(1)(c). 1927 c.36.

(5) Any statutory instrument under this section shall be subject to annulment in pursuance of a resolution of either House of Parliament.

Clause 11

Subsections (1) and (2)

1. In accordance with the recommendations in paragraphs 4.18 and 4.37 of the Report, subsection (1) provides for the form of the notice to be prescribed and subsection (2) specifies the information which must be included.

Subsection (4)

2. Section 23 of the Landlord and Tenant Act 1927 provides, among other methods, personal service and service by sending the notice by registered post or recorded delivery to the last known address of the person to be served.

Interpretation

12.—(1) In this Act —

"assignment" does not include—

(i) assignment by operation of law; or

(ii) assignment in breach of a covenant of a tenancy,

and "assigns" and "assigned" shall be construed accordingly;

"consent" includes licence;

"covenant" includes term, condition and obligation;

"landlord covenant", in relation to a tenancy, means a covenant that is to be complied with by the landlord of land demised by the tenancy;

"reversion" means the interest expectant on the termination of a tenancy;

"tenancy" means any lease, whether commencing before or after the coming into force of this Act, and includes —

(a) a sub-tenancy; and

(b) an agreement which creates a tenancy,

but does not include a mortgage term;

"tenant covenant", in relation to a tenancy, means a covenant that is to be complied with by the tenant of land demised by the tenancy.

(2) For the purposes of sections 1(2) and (3), 3(1), (2) and (4), 4(2), (3) and (4) and 5(2), a tenant covenant, or a landlord covenant, of a tenancy that is a covenant to pay money shall not be taken to relate to a part of the land demised by the tenancy unless—

(a) the covenant applies to that part only; or

(b) the amount of the payment is determinable by reference to—

(i) that part only;

(ii) in the case of a tenant covenant, anything to be done by or for a person as tenant or occupier of that part; or

(iii) in the case of a landlord covenant, anything to be done by or for a person as landlord of that part.

Short title, repeal, commencement, application to Crown and extent

13.—(1) This Act may be cited as the Landlord and Tenant (Covenants) Act 1988.

(2) The enactments mentioned in the Schedule are repealed to the extent specified in the third column of the Schedule.

(3) This Act shall come into force on such day as the Lord Chancellor may by order made by statutory instrument appoint.

(4) This Act binds the Crown.

(5) This Act extends to England and Wales only.

Clause 12

1. This clause provides for the interpretation of various expressions used in the Bill.

Subsection (1)

2. "Assignment": the reasons for excluding devolution by operation of law and assignment in breach of a convenant are set out in paragraphs 4.47-4.48 of the Report.

3. "Landlord covenant" and "tenant covenant": in accordance with the recommendation in paragraph 4.46 of the Report, no distinction is drawn between covenants which touch and concern the land and those that do not; and see clause 10(1)(a).

Subsection (2)

4. The subsection sets out the circumstances in which a covenant to pay money (e.g. rent or service charge) will, for the purposes of the provisions specified, be taken to relate to a particular part of the property. The effect of this subsection is explained in paragraph 3 of the note on clause 1.

Clause 13

Subsection (2)

This subsection introduces the statutory amendments contained in the Schedule.

Section 13

SCHEDULE

REPEALS

Chapter	Short title	Extent of repeal
1925 c.20.	Law of Property Act 1925	Section 77(1)(C) and (D) In section 77(2), the words ",or part of land comprised in a lease is,", "or of the lessor, as the case may be,", "or (D)(i)", "or (D)(ii)" and ",as the case may require," (wherever occurring) In section 141(1), the words ",having reference to the subject-matter thereof," In section 142(1), the words "with reference to the subject-matter of the lease"
1925 c.21.	Land Registration Act 1925	In section 24(1)(a), the word "and" (last occurring) Section 24(1)(b) Section 24(2)

Schedule

The amendments to section 77 of the Law of Property Act 1925 and section 24 of the Land Registration Act 1925 give effect to the recommendation in paragraph 4.52 of the Report that the present system of indemnity covenants implied by statute on the assignment of a lease should be abandoned. The amendments to sections 141(1) and 142(1) of the Law of Property Act 1925 are consequential upon the recommendation in paragraph 4.46 of the Report that no distinction should be drawn between covenants which touch and the land and those that do not (see clause 10(1)(a)). All lease covenants, including personal covenants, will be capable of running with the land or with the reversion.

APPENDIX B

Membership of the Working Party

Mr. Trevor Aldridge, **Chairman**	Law Commission
Miss Lillian Birch	Department of the Environment
Mr. Christopher Edwards	British Property Federation
Mr. Steven Fogel	Law Society
Mr. Clive Harrison	Legal & General (Investments Management) Ltd.
Dr. Colin Kolbert	Department of Land Economy, University of Cambridge
Mr. James Offen	Royal Institution of Chartered Surveyors
Miss Donatella Phillips	Department of the Environment
Mr. Terence Prendergast	W.H. Smith & Son Ltd.
Mr. Peter De Val, **Secretary**	Law Commission

APPENDIX C

List of individuals and organisations who submitted comments on Working Paper No. 95.

Abacus Express
Abrisa Ladders
Mr. D.M.L. Alexander
Mr. D.W. Andrews, Solicitor
Artists Home Supplies
Association of British Chambers of Commerce
Association of British Insurers
Association of Charity Officers
Association of Corporate Real Estate Executives
Association of Corporate Trustees
Association of County Councils
Association of Land Owning Charities
Association of Local Authority Valuers and Estate Surveyors
Association of Metropolitan Authorities
Association of Property Unit Trusts
Association of South Western Law Societies
Austin Rover Group Ltd.
Barnsley Law Society
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British Alcan Aluminium Plc
British Legal Association
British Property Federation
Brixton Estates Plc
Building Societies Association
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Church Commissioners
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City of Westminster Law Society
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Mr. Vernon Clegg
Ms. Jane Collier
Commercial Union Properties Ltd.
Committee of London and Scottish Bankers
Cornwall Law Society
Council of Her Majesty's Circuit Judges
Country Landowners Association
Ms. Elizabeth A.C. Cousins
Coverhaven Ltd.
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Department of Employment
Department of the Environment

Devon and Exeter Incorporated Law Society
Dixons Group Plc
The Rt. Hon. Lord Donaldson of Lymington,
Master of the Rolls
Mr. R.J. Dormer
Dorset Law Society
Drivers Jonas, Surveyors
Mr. Stephen B. Edell, Solicitor
Edge, Edwards & Tromans, Surveyors
Equity and Law Life Assurance Society Plc
Federation of Private Residents' Associations
Forestry Commission
Mr. David Gordon, University of Manchester
Mr. David Gould, Surveyor
The Grosvenor Estate
Guardian Royal Exchange Assurance Plc
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Holborn Law Society
Insolvency Practitioners Association
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Lex Service Plc
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London Insurance Brokers Ltd.
Lord Chancellor's Department
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Mr. F.J. Michaels
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