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THE LAW COMMISSION

PUBLISHED WORKING PAPER

NO: 25

First Programme - Item VIII

The Law of Landlord and Tenant

WORKING PARTY'S

PROVISIONAL PROPOSALS RELATING

TO

COVENANTS RESTRICTING DISPOSITIONS, PARTING WITH POSSESSION,

CHANGE OF USER AND ALTERATIONS

27 January 1970

The Law Commission will be grateful if comments are sent in by 1st June 1970. All correspondence should be addressed to:-

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THE LAW COMMISSION

FIRST PROGRAMME - ITEM VIII
The Law of Landlord and Tenant

Published Working Paper No: 25

WORKING PARTY'S PROVISIONAL PROPOSALS RELATING TO COVENANTS RESTRICTING DISPOSITIONS, PARTING WITH POSSESSION, CHANGE OF USER AND ALTERATIONS

INTRODUCTORY NOTE

This Working Paper is circulated in the Law Commission's series of published Working Papers in order to obtain comment and criticism. The provisional Propositions have been formulated by the Law Commission's Working Party on the law of Landlord and Tenant and the notes and commentary have been added by the Law Commission.

The Law Commission are most grateful to the Working Party for considering the important questions with which the paper deals. The Commission must not however be taken as necessarily subscribing to the particular solutions which the Working Party propose. Before coming to a decision the Commission wish to have the views of those to whom this paper is circulated and they hope that readers will feel free to put forward alternative solutions to the problems with which the Propositions are designed to deal.

Some of the matters discussed in the paper were also considered by the Jenkins Committee which reported in 1950.[1] The relevant recommendations of that Committee are reproduced in Appendix 1 of the paper and it will be seen that the Working Party's propositions differ from those recommendations in some important respects. The main points of conflict are:

1. Final Report of the Leasehold Committee (Chairman: Lord Justice Jenkins) 1950 Cmd. 7982.

(a) Whether covenants imposing <u>absolute</u> prohibitions of the kind discussed in this paper should be permitted. The Working Party propose (Proposition 1) that subject to special statutory provisions and to one specific exception (Proposition 2) such covenants <u>should</u> be permitted: the Jenkins Committee, however, recommended that such covenants should be construed as if they were expressed to be covenants requiring the landlord's consent which consent was not to be unreasonably withheld.[2]

(b) Whether the right of a business tenant to claim compensation for improvements on quitting the holding, under Part I of the Landlord and Tenant Act 1927 (hereafter called "the 1927 Act"), should be retained and, perhaps, extended to residential tenancies. The Working Party consider that the provisions of Part I are now obsolete and should be repealed (Proposition 11); the Jenkins Committee recommended that they should be retained and that similar provisions should be extended to residential tenancies.[3]

On these two points the Law Commission are not, at present, satisfied that the arguments, which are fully set out in this paper, are sufficiently strong to justify departure from the Jenkins Committee's recommendations.

In general, the Commission believe that in relation to problems such as these, where the arguments are finely balanced, a choice between alternative solutions may depend on what view is taken of the essential nature of the landlord and tenant relationship - in particular whether the grant of a lease is considered primarily as a contract or as the creation of a legal estate in land. It is also necessary to keep in mind the main objectives of reform in this branch of the law. In addition to the simplification of the law and the removal of uncertainty and defects, the Law Commission's view is that the

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2. Paras. 304, 311 and 312; Recommendation 7 on p.113 and Recommendations 1 and 2 on p.118 of their report.

3. Paras. 280 to 286 and Recommendation 1 on p.112 of their report.

main objectives should be:-

(i) to bring the law into line with modern social and economic conditions and to facilitate any alterations which may be required in the light of future changes in these conditions,

(ii) to maintain a fair balance between the legitimate interests of landlords and tenants respectively,

(iii) to avoid unnecessary restrictions on the reasonable use and enjoyment of leasehold property, and

(iv) to encourage the parties to maintain tenanted property in a proper state of repair and, in appropriate circumstances, to improve such property.

Other important points raised by the Working Party's Propositions are whether statutory guidelines should be provided to assist the court in determining the reasonableness of the withholding of consent by the landlord (Proposition 5) and the regulation of the payments which a landlord should be entitled to demand upon granting consent (Proposition 6). The main questions for consideration are set out in Part IV of the paper.

Comments on those questions and on any other matters contained in, or arising from, the Working Party's Propositions are accordingly invited. They should, if possible, be sent to the Law Commission by 1st June 1970.

The Law of Landlord and Tenant

COVENANTS RESTRICTING DISPOSITIONS, PARTING WITH POSSESSION, CHANGE OF USER AND ALTERATIONS

TABLE OF CONTENTS

	Page
PART I - INTRODUCTION	1
PART II - THE WORKING PARTY'S PROVISIONAL PROPOSITIONS	6
PART III - THE LAW COMMISSION'S COMMENTARY ON THE WORKING PARTY'S PROVISIONAL PROPOSITIONS	11
Proposition 1 - Validity of Absolute Covenants	12
Commentary on Proposition 1	13
Proposition 2 - Exception in the case of long leases	34
Commentary on Proposition 2	35
Proposition 3 - Personal representatives and trustees in bankruptcy	40
Commentary on Proposition 3	41
Proposition 4 - Qualified Covenants	44
Commentary on Proposition 4	45
Proposition 5 - Guidelines in determining the reasonableness of refusals	48
Commentary on Proposition 5	49
Proposition 6 - Fines or monetary payments	56
Commentary on Proposition 6	57
Propositions 7 & 8 - Tenant's and Landlord's obligations upon application for consent	70
Commentary on Propositions 7 & 8	71
Proposition 9 - County Court jurisdiction	80
Commentary on Proposition 9	81
Proposition 10 - Power of the County Court to authorise conversion of houses into separate tenements	82
Commentary on Proposition 10	83
Proposition 11 - Part I of the Landlord and Tenant Act 1927 - Improvement of Business Premises	86
Commentary on Proposition 11	87

Page

PART IV - THE MAIN QUESTIONS FOR CONSIDERATION 96

APPENDIX 1 - Relevant recommendations of the Jenkins Committee (1950 Cmd. 7982) 103

APPENDIX 2 - Law Commission's Working Party on Codification of the Law of Landlord and Tenant. Current Membership 105

COVENANTS RESTRICTING DISPOSITIONS, PARTING WITH POSSESSION, CHANGE OF USER AND ALTERATIONS

PART I - INTRODUCTION

1. The Working Party on Landlord and Tenant,[1] which was established by the Law Commission in 1966 to consider the general law of landlord and tenant with a view to its eventual codification, have completed their study of covenants in leases which prevent the tenant from assigning, subletting or parting with possession of the demised property, changing its use or making alterations, additions or improvements to the property. The Working Party's provisional Propositions are set out in full in Part II of this paper. They are also shown, together with notes on the existing law, on the left hand pages of Part III. On the right hand pages of Part III appears a Commentary which includes a number of observations by the Law Commission and contains what appear to the Law Commission to be the main questions requiring consideration.

2. The common feature of these covenants is that they prevent the tenant from having the fullest use and control of the property he has leased. Two of the most important questions are, first, the extent to which absolute prohibitions should be permitted, if at all; and, secondly, if they are permitted, whether the tenant should be entitled to any relief from their operation by being given the right to terminate the tenancy or to apply to the Court or the Lands Tribunal to have the covenant varied or discharged.

3. This paper is not concerned with agricultural leases or mining leases, to which special considerations apply. Apart from these, the proposals are intended to apply, in the appropriate context, to leases of all other kinds of property.[2] They would take effect subject to any special statutory provisions such as those which are listed in the notes to Proposition 1 on page 12: and they would also be subject to

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1. A list of the current members of the Working Party is contained in Appendix 2.

2. The Propositions are put forward as applicable in principle both to existing and future leases although in the case of existing leases the need for any transitional provisions or exceptions will be carefully considered at a later stage. In regard to covenants prohibiting the making of improvements, the Jenkins Committee's recommendations were expressed to relate only to future leases.

any particular statutory rights which are inconsistent with them. For example, under the Rent Act 1968, on the death of a protected tenant the rights of occupation may be transmitted to a member of his family who has been living with him, even where the tenancy contains a covenant against assignment; and a further transmission may occur on the death of that member. Again, under section 41A of the Landlord and Tenant Act 1954 (inserted by section 9 of the Law of Property Act 1969) the court will be able to grant a new tenancy of business premises to the new members of a partnership, provided that one of the original tenants is still a member of that partnership, even though the original tenancy contained a covenant against assignment. Statutory provisions of this kind must necessarily override the general Propositions discussed in this paper.

4. Although the covenants under consideration have certain features in common, the subject-matter varies considerably, and different considerations may influence the landlord in deciding which of them, if any, to impose (for example, whether to impose an absolute prohibition against assignment of the whole or sub-letting of part of the demised premises, or whether change of user should be permitted). Nevertheless the Working Party have found that they can conveniently be considered together and that in relation to many of the Propositions the same principles can be applied. The Law Commission, however, consider that in view of the different nature of each type of covenant they should be considered separately and that, in consequence, a different conclusion may be reached in relation to one type of covenant from that reached in relation to another.

5. Covenants of the kind to which this paper relates may be expressed in terms which either:-

(a) impose on the tenant an absolute prohibition against doing something; or

(b) prohibit the tenant from doing something without the prior consent of the landlord; and in this case there may be a proviso, either expressed in the covenant itself or in certain circumstances implied by statute, that the landlord's consent shall not be unreasonably withheld.

In this paper covenants in category (a) above are called "absolute covenants" and those in category (b) are called

"qualified covenants". In some contexts, however, it has been found necessary to distinguish those qualified covenants which are subject to the proviso that the landlord's consent is not to be unreasonably withheld from those which are not. Where this is necessary those which are subject to the proviso are referred to as "fully qualified covenants".

6. Until 1927, the parties were generally free to agree on which of these covenants should be included in a lease and in what form. The Landlord and Tenant Act 1927 limited that freedom in the following ways:-

> Section 19(1) provides that where a qualified covenant has been adopted in relation to assignment, underletting, charging or parting with possession of the premises, it is deemed to be a fully qualified covenant;
>
> Section 19(2) contains a similar provision in relation to a qualified covenant against making improvements;
>
> Section 19(3) relates to covenants against change of user and provides that where a qualified covenant has been imposed and no structural alteration is involved the covenant shall be deemed to be subject to a proviso that the landlord may not demand a fine as a condition of granting consent.

It will be noted that these provisions apply only where a lease contains a qualified covenant. The Act does not affect the position where a lease contains an absolute covenant.

7. The Jenkins Committee recommended a substantial change in the law,[3] so that absolute covenants against assignment or subletting (paragraph 311), change of user (paragraph 312), and, in the case of future leases, improvements (paragraph 304) should be construed as if they were fully qualified covenants.

8. In Working Paper No. 8 the Law Commission put forward the Working Party's provisional scheme for obligations of landlords and tenants, divided into Groups A, B and C. The parties would not be permitted to exclude or vary the obligations in Groups A and B, although Group B obligations might be transferred from landlord to tenant, or from tenant to landlord,

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3. The relevant recommendations are summarised in Appendix 1.

by the written agreement of the parties. The obligations in Group C, however, would apply only insofar as they were not varied or excluded by the written agreement of the parties. Three of the obligations in Group C relate to matters which form the subject of this paper and are as follows:

> "T107.C. Unless the letting is for more than [say, 14] years, the tenant should be under an obligation not to assign sublet or part with possession of the whole or part of the demised premises without the consent of the landlord, such consent not to be unreasonably withheld.
>
> T108.C. In lettings including buildings, the tenant should be under an obligation not to change the user of any building without the landlord's prior consent, consent not to be unreasonably withheld.
>
> T109.C. In lettings including buildings, the tenant should be under an obligation not to make any physical alteration or addition to any buildings on the premises without the landlord's prior consent (consent not to be unreasonably withheld), statutory authority or order of the court."

The Commission have decided to postpone making final recommendations about such obligations until consultations on the proposals in this paper have been concluded.[4]

9. In both of the previous Working Papers[5] in this series it was mentioned that the Working Party were about to consider, in the present context, how far absolute prohibitions should be permitted. As a result, a number of comments have been received which have been borne in mind in the course of this study.[6]

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4. If adopted they will be subject to certain amendments suggested by some of those who have commented on Published Working Paper No. 8.

5. (i) Published Working Paper No. 8 - Obligations of Landlords and Tenants.
   (ii) Published Working Paper No. 16 - Termination of Tenancies.

6. Those who submitted views on this question included the Association of Land and Property Owners, Association of Local Authority Valuers and Estate Surveyors, Association of Municipal Corporations, Building Societies Association, Chartered Land Societies Committee, National Federation of Property Owners Ltd., Property Owners Protection Association Ltd., and a number of Government Departments.

10. It will be seen from the Propositions set out in this paper that the views of the Working Party are substantially different from the recommendations of the Jenkins Committee. This difference of approach may arise in part from the conflict between the contractual and proprietary aspects of the subject. The Working Party attach greater importance to the contractual nature of the landlord and tenant relationship and consider that the terms of the lease should govern the management and user of the property and the tenant's right to deal with his leasehold interest during the term. Another point of view is, however, possible, namely that the landlord's legitimate interest is confined to ensuring that the tenant pays his rent and other tenant's outgoings, does nothing to diminish the value of the demised property and any adjoining property belonging to the landlord and, at the end of the term, reinstates the property in the condition in which it was before any alterations were carried out. Subject to these considerations a tenant should be entitled to exercise all the rights of an absolute owner during the term of the lease.

PART II - THE WORKING PARTY'S PROVISIONAL PROPOSITIONS

Validity of Absolute Covenants

1. Subject to the existing, and any future, statutory exceptions and to Proposition 2 below, an absolute covenant prohibiting or restricting a tenant from assigning, subletting or parting with possession of the whole or part of the demised premises, or changing the user, or making alterations or additions, or erecting new buildings, shall be valid.

Exception in the case of long leases

2. Where a lease is granted for a term of more than [forty] years, the tenant may assign, sublet or part with possession of the demised premises without the consent of the landlord at any time more than [seven] years before the end of the term.[7]

Personal representatives and trustees in bankruptcy

3. In the absence of express provision to the contrary the trustee in bankruptcy and the personal representatives of a tenant shall be bound to the same extent as the tenant by any covenant in a lease.

Qualified Covenants

4. All covenants binding on tenants which prohibit or restrict assignment, subletting or parting with possession of the whole or part of the demised premises, or a change of user, or alterations or additions, or the erection of new buildings, without consent, shall be subject to a condition that such consent shall not be unreasonably withheld.

Guidelines in determining the reasonableness of refusals

5. Where a covenant is fully qualified, in determining whether it was reasonable for a landlord to withhold consent or to impose conditions upon the granting of consent, the court shall have regard to all the circumstances pleaded by the landlord, including the extent to which the landlord was at the time of refusing consent under a reasonable apprehension that his financial or proprietary interests would be adversely affected and that the tenant would be unable or unwilling to indemnify him or that the interests of good estate management

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7. This Proposition would have effect only if absolute covenants continued to be permissible.

would be prejudiced in relation to the premises or any neighbouring premises belonging to him. By way of illustration only, and without prejudice to the generality of the foregoing, the court may consider whether the landlord had reasonable apprehension that such consent would:-

(a) affect the legal status of the whole or part of the premises, or of the occupier, to the detriment of the landlord's interest;

(b) involve the landlord in financial liability which the tenant is unwilling or unable to undertake (e.g., increased rates, taxes, or other financial burdens);

(c) render the landlord liable for breach of a statutory or contractual obligation or render him liable in tort to any person;

(d) affect the landlord's interest in the user of the premises having regard to planning controls; or

(e) diminish the value of neighbouring premises belonging to the landlord.

Fines or monetary payments

6. The landlord shall not be entitled, as a condition of granting consent under a qualified covenant restricting assignment, subletting or parting with possession, change of user, or alterations or additions, or the erection of new buildings, to require a fine or similar monetary payment; but he shall be entitled to require payment of a reasonable sum for any legal or other expenses incurred.

In addition:-

(1) in the case of consent to an assignment, subletting or parting with possession, the landlord shall not be entitled to require the tenant or his assignee, by reason only of the transaction, to undertake any additional burden under the tenancy or accept any reduced benefit; any provision in the lease to the contrary shall be void, but this shall be without prejudice to the landlord's right to require additional security to cover existing obligations.

(2) in the case of consent to a change of user, the landlord shall be entitled to require a reasonable monetary payment or increased rent:-

(i) where the letting value of the premises or any part will be increased by the change of user, in respect of and related in amount to any such increase attributable to the change of user;

(ii) where the landlord might otherwise be entitled to refuse consent, in respect of and as compensation for:

(a) any financial liability imposed upon him,

(b) any damage caused to or other loss sustained by him,

(c) any diminution in the value of the premises or of any neighbouring premises belonging to him,

in consequence of the change of user.

(3) in the case of consent to alterations or additions or the erection of new buildings:-

(i) the landlord shall be entitled to require a reasonable monetary payment or increased rent where he might otherwise be entitled to refuse consent, in respect of and as compensation for:

(a) any financial liability imposed upon him,

(b) any damage caused to or other loss sustained by him,

(c) any diminution in the value of the premises or of any neighbouring premises belonging to him,

as a result of the alterations or additions or erection of new buildings;

(ii) the landlord shall be entitled to require, as a condition of such consent, an undertaking by the tenant to reinstate the

premises at the end of the term, if called upon to do so.

<u>Tenant's obligation upon application for consent</u>

7. In the case of all qualified covenants, the tenant, upon an application for consent, shall provide the landlord with all the information he reasonably requests and shall allow reasonable time for the application to be considered. Failure to do so shall be a ground for withholding consent.

<u>Landlord's obligation upon application for consent</u>

8. In the case of all qualified covenants, the landlord shall be under an obligation, notwithstanding any term in the lease to the contrary, not unreasonably to withhold consent nor unreasonably to delay the communication of his decision. Breach of this obligation shall entitle the tenant to claim damages [but the court shall be given a discretion to refuse to award damages where it thinks fit].

<u>County Court jurisdiction</u>

9. Without prejudice to the jurisdiction of the High Court, the County Court shall have unlimited jurisdiction to determine the reasonableness of any sums claimed under Proposition 6, and the time and method of payment.

<u>Power of the County Court to authorise conversion of houses into several tenements</u>

10. Section 165 of the Housing Act 1957 should be amended so that the County Court shall have jurisdiction to vary the provisions of any covenant or obligation contained in a lease or any restrictive covenant in order to authorise the conversion of any house or houses into several tenements, whether or not each house remains as a separate entity, if it is proved:-

(a) that owing to changes in the character of, or in the types of dwellings occupied in, the neighbourhood, the house or houses cannot readily be let for occupation but could be let if converted into two or more tenements; <u>and</u>

(b) that, where necessary, planning permission for such conversion has been granted and is in force,

subject to such conditions and terms as it thinks just.

Part I of the Landlord and Tenant Act 1927 - Improvement of Business Premises

11. Part I of the Landlord and Tenant Act 1927 (under which business tenants may qualify for compensation for improvements upon quitting the holding of a business tenancy) should be repealed.

PART III - THE LAW COMMISSION'S COMMENTARY ON THE WORKING PARTY'S PROVISIONAL PROPOSITIONS

Working Party's Proposition 1

Validity of Absolute Covenants

1. Subject to existing and any future statutory exceptions and to Proposition 2 below,[8] an absolute covenant prohibiting or restricting a tenant from assigning, subletting or parting with possession of the whole or part of the demised premises, or changing the user, or making alterations or additions, or erecting new buildings, shall be valid.

Notes:

1. The existing statutory provisions include:
   - (i) section 113(5) of the Housing Act 1957 which requires local authorities to impose a qualified bar against assignment, subletting or parting with possession and prohibits consent being given unless the authority is satisfied that no payment other than a reasonable rent is received by the disposing tenant;
   - (ii) section 169 of the Factories Act 1961 and section 73 of the Offices, Shops and Railway Premises Act 1963, which give power to the County Court to modify agreements to secure compliance with the provisions of those Acts;
   - (iii) section 165 of the Housing Act 1957 which gives power to the County Court, in certain circumstances, to authorise the conversion of a dwelling house into two or more tenements;
   - (iv) section 3 of the 1927 Act which gives power to the County Court to authorise certain improvements to business premises, notwithstanding the terms of the lease;
   - (v) section 84 of the Law of Property Act 1925 as amended which gives the Lands Tribunal power to vary or discharge restrictive covenants as to user or building contained in leases of over 40 years of which at least 25 have expired.

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8. See p. 34.

Commentary on Proposition 1

The Working Party's view - Justification of Absolute Covenants

(1) The Working Party's view is that freedom of contract between landlord and tenant should not be restricted unless good reason can be shown; and in the view of the Working Party there is little evidence in practice of hardship caused by absolute prohibitions.[9] They consider that, in relation to each of the covenants which are the subject of this paper, there are instances where the use of an absolute prohibition may be justified. Absolute prohibitions against dispositions, parting with possession, change of user and alterations enable the landlord to exercise control over his property to an extent which may be necessary in the interest of good estate management, and may operate for the general benefit of the tenants on an estate as well as that of the landlord. Another consideration is that the property might be let to a particular person or for a particular purpose, on concessionary terms; or the landlord might remain personally interested in the return of his property in the same state at the expiration of the lease (for example, because he wishes to reoccupy the premises himself).[10]

(2) The Working Party do not agree with those who say that, because the court will uphold a landlord's refusal of consent if he has good grounds for it, a fully qualified covenant gives the landlord sufficient protection. In their view it is not reasonable to put the landlord in the position where the only means of safeguarding his interest is to spend time and money in defending proceedings in court.

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9. However, the members of the Working Party wish it to be stated that, if in the future abuse were shown, it might be desirable to review the position.

10. In the case of change of user or alterations the possibility of liability for betterment levy under the Land Commission Act 1967 must also be considered - but see note 3 to Proposition 5 below and the observations at pp. 49-55. Questions of planning control might also arise and the requested change might not be to the advantage of the landlord. This was discussed by W.A. Leach, F.R.I.C.S., in (1967) 203 Estates Gazette 1057.

Commentary on Proposition 1 (Continued)

(3) If absolute covenants are to be permitted, the Working Party considered but reached no conclusion as to whether it would be right to provide any relief for a tenant against the operation of an absolute prohibition. If some such provision were felt necessary,[11] the following alternatives were suggested:

(a) that the tenant should be given a statutory right to terminate the tenancy in certain circumstances or, alternatively, to apply to the court for an order terminating the tenancy;

(b) that the powers of the Lands Tribunal under section 84 of the Law of Property Act 1925 to vary or discharge a covenant contained in a lease should be extended.

(4) The Working Party consider that the right to terminate, or to apply to the court for an order terminating, the tenancy would be appropriate only in relation to an absolute covenant against assignment of the whole of the demised premises. It is in such cases that an absolute prohibition might cause the greatest hardship to the tenant.[12] In relation to other covenants (for example, covenants against subletting or assignment of part of the premises or a change of user), the circumstances would not justify termination of a lease which had been accepted by the tenant. Moreover, they consider that, even in relation to covenants against assignment of the whole of the premises, a necessary precondition should be that the landlord has unreasonably refused to waive the covenant for the purpose of an assignment to a responsible or respectable person. If a provision on

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11. Under the present law, unless the agreement of the landlord can be obtained, there is no relief except in the limited circumstances within the provisions of s.84 of the Law of Property Act 1925, s.165 of the Housing Act 1957, or s.3(1) of the 1927 Act.

12. In addition, hardship might be caused to personal representatives of a deceased tenant if an assent by them to the person entitled to the tenancy under a will or upon an intestacy constitutes an assignment (see Proposition 3 below and the Commentary thereon).

Commentary on Proposition 1 (Continued)

those lines were adopted, the length of the term to which such a right should apply and the length of notice which should be required before the tenant could terminate the tenancy were left open by the Working Party for consideration. The following Proposition was considered by the Working Party:

> "If a tenancy granted for a term of [seven years] or more contains an absolute covenant against assignment of the whole of the demised premises and the landlord refuses to waive the covenant for the purpose of an assignment to a responsible and respectable person, the tenant shall be entitled, in the absence of an express term in the lease, to terminate the tenancy upon giving [one year's] notice of his intention so to do."

but the Working Party reached no conclusion as to whether to recommend such a Proposition.

(5) The second possible means of relief would be to extend the power of the Lands Tribunal to vary or discharge a covenant under section 84 of the Law of Property Act 1925. Under the present law, this power applies only to restrictive covenants as to user or building and, so far as leaseholds are concerned, where the term was created for more than 40 years of which at least 25 years have expired. Before the Lands Tribunal can exercise its power it has to be shown, broadly speaking, that the covenant has become obsolete or of no further use to those whom it was intended to benefit. The Law Commission's recommendation[13] that the power should be widened to include restrictions which impede the reasonable user of the land for public or private purposes, if those entitled to the benefit of the restriction can be adequately compensated in money for any disadvantage which they will suffer, have now been enacted in the Law of Property Act 1969.[14] The Working Party suggest that consideration should be given to the possibility of extending the powers of the Lands Tribunal in either or both of the following ways:

(i) by reducing the length of the term to which the power applies, e.g., to leases of 21

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13. Law Com. No. 11 - Report on Restrictive Covenants, Proposition 9.

14. S.28 which (with the exception of Subsection 6 thereof) came into force on 1st January 1970.

Commentary on Proposition 1 (Continued)

years or more of which at least 14 years have expired;

(ii) by applying the power not only to covenants restrictive of user or building, but also to covenants against dispositions and against alterations or additions.[15]

The opposite view: the case against absolute covenants

(6) The following are some of the arguments which the Law Commission think may be put forward in support of the view that absolute covenants should not be allowed:-

(i) In principle, a tenant who is in possession of the demised premises, paying either a rack rent or a premium and a ground rent, should be able to exercise the normal incidents of ownership of the property during the length of his term. The landlord's reversionary interest should entitle him to have only an overriding power to withhold his consent on reasonable grounds where that interest would be adversely affected. Accordingly, a tenant should be able, to the extent of his interest, to dispose of the whole or part of the premises, part with possession, change the user of the premises,[16] or make alterations and improvements[17] unless the landlord's interests are adversely affected.

(ii) The use of an absolute covenant operates as an ouster of the jurisdiction of the court.

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15. It is appreciated that in practice few leases of more than 21 years contain an absolute covenant prohibiting assignment, but it is considered that extension might be useful in relation to other covenants.

16. Change of user will be subject to public policy as to lawful user and the possible argument that when land is let for a specified purpose its use for another purpose may be restrained by an injunction (see Kehoe v. Marquis of Landsdowne [1893] A.C. 451).

17. In relation to alterations and improvements, the landlord's interest might need to be protected by requiring the tenant, in making an alteration, to enter into an obligation to reinstate the premises at the end of the term.

Commentary on Proposition 1 (Continued)

Unreasonable landlords are thus enabled to abuse their position.

(iii) Absolute covenants introduce an undesirable inflexibility. An unforeseen change of circumstances might make it reasonable for the tenant to do something which the covenant prohibits. In such cases, the landlord's refusal to waive an absolute covenant might cause hardship or financial disadvantage to the tenant or enable the landlord, by insisting upon a surrender, to take an undeserved financial benefit.

(iv) The manner in which the courts have recently dealt with the question of reasonable withholding of consent under a fully qualified covenant indicates that the legitimate interests of landlords can be adequately protected by such covenants. Judicial authority relates mainly to covenants against assignment, subletting or parting with possession and it is clearly established that the property interests of landlords are to be taken into account in determining whether consent has been reasonably withheld.[18] Accordingly, if a reasonable man in

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18. See, for example: Premier Confectionery Company (London) Ltd. v. London Commercial Sale Rooms [1933] Ch.904 (where it was held that the landlord's refusal of consent in the belief that the separation of two shops into two competing businesses would injuriously affect his property - although no objection could be taken to the personality of the proposed assignee or the nature of the business - was reasonable); In re Town Investments Ltd. Underlease [1954] Ch.301 (where it was held to be reasonable for the landlord to refuse a licence to a proposed underlease at a rent well below market value on the basis that this would be detrimental to his property interests); Pimms Ltd. v. Tallow Chandlers Co. [1964] 2 Q.B. 547 (where consent to a prospective assignment was held not to have been unreasonably withheld because the interest of the proposed assignee in purchasing the remainder of the term was solely for the possibility of sharing in the profit which might be made out of the development of the property included in the lease). In the relatively early case of Houlder Bros. & Co. v. Gibbs [1925] Ch.575, the Court of Appeal based its decision solely on grounds having reference either to the personality of the proposed assignee or to the effect of the proposed assignment on the user and occupation of the premises. This limitation of the grounds to be considered has been disapproved in subsequent cases, and in particular in Tredegar v. Harwood [1929] A.C.72 (which turned upon a covenant to insure against fire with a named company), Lord Phillimore said (at p.82): "If it be a question whether a man is acting reasonably, as distinguished from justly, fairly or kindly, you are to take into consideration the motives of convenience and interest which affect him, not those which affect somebody else". In relation to improvements, see, for example: F.W. Woolworth & Co. v. Lambert [1937] Ch.37; Lambert v. F.W. Woolworth & Co. (No.2) [1938] Ch.883; Tideway Investments Ltd. v. Wellwood [1952] Ch.791.

the landlord's position might regard the proposed transaction as damaging to his property interests, even though some persons might take a different view, the courts will not normally hold that the landlord has acted unreasonably in withholding consent.[19]

(v) In each of the instances adduced to justify an absolute covenant (for example, a letting on concessionary terms or in the interests of good estate management) a landlord would not be prejudiced if the covenant was construed as fully qualified, because if he had reasonable grounds for withholding consent he could effectively do so.

(vi) If some further protection were needed for the interests of a reasonable landlord, this might be achieved by providing statutory guidelines to indicate the grounds on which consent could reasonably be withheld. This would tend to reduce litigation without removing the protection of the tenant from unreasonable conduct of the landlord.

(vii) In the case of covenants against improvements, the important social question of raising the standard of a part of the nation's housing by encouraging tenants to make improvements to their premises must also be considered.[20]

(viii) As regards covenants against change of user,[21] the Jenkins Committee made the following observation:[22]

> "The omission of any stipulation against the unreasonable withholding of consent would enable an unscrupulous

19. See Pimms Ltd. v. Tallow Chandlers Co. [1964] 2 Q.B.547.
20. See p. 93.
21. The principle is equally applicable to the other types of covenant under consideration.
22. 1950 Cmd. 7982, para. 312.

> landlord to circumvent the protection afforded by [section 19(3) of the 1927 Act which prevents the landlord exacting a fine or sum of money in the nature of a fine] as it stands. It does not matter that no fine by way of increase of rent or otherwise may be imposed on the tenant under the existing lease, as a condition of consent to the proposed change of user: a landlord desiring to profit from the covenant need only to maintain his unconditional refusal to permit the desired change. Then, if the change is really necessary for the tenant's enjoyment of the premises, he may be driven to open negotiations for surrender of the lease and the grant of a new one permitting the desired change of user; and in such negotiations there would be nothing to prevent the landlord from demanding a higher rent as a condition of granting a new lease."

(7) The Working Party, appreciating the force of these observations, considered but felt obliged to reject as ineffective or impracticable the following two possible solutions:

(i) that the landlord should be prohibited from charging a fine or similar monetary payment upon waiver of an absolute covenant: the objection to this, as mentioned in the Jenkins Committee's Report quoted above, is that it would not prevent the landlord from insisting upon a surrender of the lease and a re-grant upon different terms, to which it would not be possible to apply the prohibition;

(ii) that absolute covenants should be permitted where they can be shown to be justified but in all other cases should be treated as fully qualified: this approach would give rise to a number of difficulties: on the one hand, if the legislation did not specify when an absolute covenant was to be effective, a determination by a court would be needed in each case before it could be certain whether the covenant was effective as an absolute covenant: on the other hand, it would be difficult to frame legislation which

Commentary on Proposition 1 (Continued)

satisfactorily specified the instances in which an absolute covenant was to be effective (for example, by reference to the type of tenancy or length of term or the relevant factors to be considered).

Conflicting Arguments

(8) In considering which of these conflicting arguments should be accepted it should be borne in mind that in Propositions 4 and 5 below the Working Party suggest:-

(a) that all covenants which are expressed to be "qualified" should be construed as if they were "fully qualified"; and

(b) that statutory guidelines as an aid to interpretation should be provided.

It will be remembered that under section 19(3) of the 1927 Act a qualified covenant prohibiting change of user is not deemed to be a fully qualified covenant, although the Jenkins Committee recommended that in the case of future leases it should be. As the law now stands a covenant prohibiting change of user without the landlord's consent has the same effect as an absolute covenant because the landlord has unfettered power to withhold consent.

(9) There remains a fundamental conflict between the Working Party's proposals and the recommendations of the Jenkins Committee. The former propose that subject to the special statutory provisions mentioned on page 12 and subject to Proposition 2 absolute covenants should be permitted in each of the categories under discussion - assignment, subletting, parting with possession, change of user, alterations, additions or improvements - whereas the latter recommended that no absolute covenants should be permitted in this field.

The Law Commission's provisional view

(10) Although their respective conclusions are in direct conflict, both the Jenkins Committee and the Working Party appear to have approached the problem as though the same considerations were applicable to leases of

every kind. The Law Commission, however, suggest that it may not be necessary to adopt one view or the other in its entirety, i.e. to decide that absolute covenants should be permitted in every case or in none. Having regard to the wide variety of circumstances in which the landlord and tenant relationship exists - e.g. whether the tenancy is business or residential or a combination of both, whether the subject matter is a single house, a block of flats, a small shop or a departmental store; whether the property is the only one or one of a few owned by the same landlord or whether it forms part of a large estate; whether a rack rent has been reserved or whether a ground rent is payable, the tenant having paid a premium; whether there are rent revision clauses; whether there is a scarcity or surplus of the type of property in question which affects the bargaining power of the parties; and above all what is the length of the lease or tenancy, which may extend from a weekly tenancy at one extreme to a 999 year lease at the other, - it may be that a universal and inflexible rule will not do justice in every case.

(11) In principle it is suggested that the tenant can reasonably expect to be able (in the case of leases or tenancies for a substantial number of years) to make the maximum use of, and to exploit, the property to its fullest extent during the lease. The landlord on the other hand can reasonably expect to retain such a measure of control as will ensure that he does not have to accept a tenant for the time being who is unable to pay the rent and other outgoings for which the tenant is liable or to carry out the repairing covenants, that the tenant does not make unreasonable or inappropriate alterations or additions to the property and that he restores it to its former condition if the landlord so desires, that the value of the property and any neighbouring property belonging to the landlord is not diminished, and finally that, subject to statutory provisions e.g. the Rent Act 1968 and the Landlord and Tenant Act 1954, the landlord obtains vacant possession when the lease expires.

Commentary on Proposition 1 (Continued)

(12) The considerations mentioned above may, for example, lead to the conclusion that absolute covenants against assignment or underletting might be permitted in the case of short leases but not in the case of leases for longer periods. On the other hand, having regard to the difficulty of enforcing the covenants in a head lease against an underlessee and the complications which may arise from a multiplicity of sublettings it may be that absolute covenants against subletting part of the premises should be permitted in all but very long leases. Again, even if absolute covenants against change of user were thought to be generally undesirable, it might be necessary to make an exception for cases where the property was part of a development scheme, such as a "complex" of retail shops, under which the lessees of other properties could enforce against the landlord binding restrictions in relation to the use of that property. And, in general, different considerations may apply to different types of premises such as licensed premises and hotels. In particular, special consideration may be required for large blocks of flats of which the maintenance and control is in the hands of a management company owned collectively by the occupiers of the flats for the time being. In such cases a higher standard of control is generally regarded as beneficial to all flat owners.

Questions for consideration

(13) Accordingly, the main questions arising from the Working Party's Proposition 1 upon which the Law Commission invite views and comment are:-

(a) Should absolute covenants be permitted binding tenants against:

(i) assignment, subletting or parting with possession of the whole of the demised premises, or

(ii) assignment, subletting or parting with possession of part of the demised premises, or

(iii) change of user, or

(iv) the making of alterations, additions and improvements or the erection of new buildings?

(b) Should a distinction be drawn in this context between different types of tenancies and different categories of covenant, so that absolute covenants might be permitted in some instances but not in others? If so in what types of tenancy and in what categories should absolute covenants be permitted?

(c) If absolute covenants are to be permitted, should any means of relief be provided for the tenant in relation to any of the categories in (a) above:

(i) by conferring upon him a statutory right to terminate the tenancy in certain circumstances or to apply to the court for an order terminating the tenancy, or

(ii) by extending the power of the Lands Tribunal under section 84 of the Law of Property Act 1925 to vary or discharge restrictive covenants contained in a lease?

(d) Alternatively, should the financial advantages which may induce a landlord to seek to impose an absolute covenant be removed:

(i) by extending the prohibition upon charging a fine or similar monetary sum which at present only applies to the granting of consent under a qualified covenant, or

(ii) by permitting absolute covenants only where they can be shown to be justified (either by specifying, in legislation, the circumstances in which they are justified, or by leaving the matter to the determination of the court)?

Working Party's Proposition 2

Exception in the case of long leases

2. Where a lease is granted for a term of more than [forty] years the tenant may assign sublet or part with possession of the demised premises without the consent of the landlord at any time more than [seven] years before the end of the term.

Notes:

1. This Proposition would have effect only if absolute covenants continued to be permissible.

2. Section 19(1)(b) of the 1927 Act reads as follows:-

> "19.-(1) In all leases whether made before or after the commencement of this Act containing a covenant condition or agreement against assigning, underletting, charging or parting with the possession of demised premises or any part thereof without licence or consent, such covenant condition or agreement shall, notwithstanding any express provision to the contrary, be deemed to be subject-
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> . . . .
>
> (b) (if the lease is for more than forty years, and is made in consideration wholly or partially of the erection, or the substantial improvement, addition or alteration of buildings, and the lessor is not a Government department or local or public authority, or a statutory or public utility company) to a proviso to the effect that in the case of any assignment, under-letting, charging or parting with the possession (whether by the holders of the lease or any under-tenant whether immediate or not) effected more than seven years before the end of the term no consent or licence shall be required, if notice in writing of the transaction is given to the lessor within six months after the transaction is effected."

3. This Proposition, as framed, does not require notice to be given to the landlord that the transaction has been effected but Obligation T104A in published Working Paper No.8 would require a tenant to notify the landlord of the name of any other person who during the currency of the tenancy has become liable vis-a-vis the landlord for the tenants' obligations under the tenancy. Provision would be required under Proposition 2 to ensure that the landlord was notified of sublettings and partings with possession.

4. The exception contained in section 19(1)(b) where the landlord is a Government department or local or public authority or statutory or public utility company is receiving consideration.

Commentary on Proposition 2

(1) The Working Party consider that section 19(1)(b) of the 1927 Act (which at present applies so as to override qualified covenants against assignment subletting or charging or parting with possession in respect of "building leases" granted for more than 40 years so long as there are at least 7 years left to run), should be extended in two respects. First, they suggest that this provision should override absolute, as well as qualified, covenants: secondly, they suggest that it should apply to all leases of the relevant length and not just to "building leases". In long leases, they argue, any restriction on assignment, subletting or parting with possession is inappropriate. They leave open for discussion whether any alteration should be made in the length of the term referred to in the section or the number of years unexpired.

(2) Some members of the Working Party were attracted to the view that where a lessor has himself erected or financed the erection of a building he should be entitled to retain absolute control over the disposition of the lease of that building even in cases where that lease is for a term of 40 years. Such members thought, therefore, that in such cases, if the lessor has imposed an absolute covenant against assignment underletting charging or parting with possession it should remain effective as an absolute covenant.

(3) The Working Party considered, but rejected, the possibility of extending section 19(1)(b) to covenants against change of user or alterations, additions and improvements. Although this course was, in principle, in accordance with the Working Party's thinking on restrictions in long leases, it was considered that such an extension would not enable the lessor adequately to protect his interest. A further question upon which the Working Party reached no conclusion was whether the Proposition should apply to leases of part of a building. Some members considered that management schemes in relation to flats disposed of by means of long leases might be prejudiced.

Proposition 2. Questions for consideration

(4) The following are the main questions in relation to Proposition 2 on which the Law Commission would welcome comments:-

(i) Should section 19(1)(b) of the 1927 Act (which at present applies only to "a building lease" granted for a term of more than 40 years) be amended:-

(a) to make it apply to all or only some and, if some, to which leases granted for a term of more than 40 years?

(b) to make it override not only qualified covenants, as at present, but also absolute covenants against assignment underletting charging or parting with possession of:-

(i) the whole of the demised premises; or

(ii) the whole or any part of the demised premises

so as to make it unnecessary to obtain the consent of the landlord to such transactions except during the last seven years of the term?

(ii) Should the respective periods of 40 years and 7 years referred to in section 19(1)(b), whether or not amended as indicated in question (i), be replaced by other periods and, if so, what periods?

(iii) If the section is no longer confined to "building leases" should its provisions also override covenants restricting change of user or the making of alterations additions or improvements so as to make it unnecessary to obtain the consent of the landlord except during the last seven years of the term or during some other period and, if so, what period?

(iv) If the section is no longer confined to "building leases" would any special provisions be required

to deal with blocks of flats in cases where each flat is let on a long lease or underlease and the management of the whole building is controlled by a management company or similar body all the members of which are flat owners?

(It will be appreciated that none of these questions will be material if all absolute covenants take effect as fully qualified covenants and that only some of the questions will be material if absolute covenants are prohibited in some cases but not in others).

Working Party's Proposition 3

Personal representatives and trustees in bankruptcy

3. In the absence of express provision to the contrary the trustee in bankruptcy and the personal representatives of a tenant shall be bound to the same extent as the tenant by any covenant in a lease.

Notes:

1. This Proposition relates to all covenants of the kind with which this paper is concerned.

2. In relation to covenants against assignment and parting with possession the vesting of a tenancy in the trustee in bankruptcy or in the personal representatives of a deceased tenant by the operation of law does not constitute a breach of such covenants. (See, in relation to bankruptcy, Re Riggs [1901] 2 K.B.16). An assignment by a trustee in bankruptcy without the landlord's concurrence is however a breach of a covenant against assignment, at least where the term "tenant" is, by the terms of a lease, to be construed as including his successors in title (Re Wright [1949] Ch.729). There is, however, no clear authority as to whether the execution of an assent by a personal representative without the landlord's concurrence is a breach of a covenant prohibiting assignment. The present law in this respect appears to be uncertain and commentators are divided.[23]

3. In relation to restrictions against parting with possession it would appear that a distinction must be drawn between legal possession and factual possession. (See Peebles v. Crosthwaite (1897) 13 T.L.R. 198 and Chaplin v. Smith [1926] 1 K.B.198). It is suggested that parting with possession does not occur until there is some act in law (for example, in the case of a personal representative, the execution of an assent) divesting the personal representatives or the trustee in bankruptcy of legal possession.

4. In the case of protected tenancies of residential premises under the Rent Act 1968 no difficulty would appear to arise because of the right of a widow or members of the family of the protected or statutory tenant to remain in occupation. (See Schedule 1 to the Rent Act 1968).

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23. See for example Hill and Redman's Law of Landlord and Tenant (14th Edition) p.640 and Woodfall's Law of Landlord and Tenant (27th Edition) p.526 which suggest there is no breach. Contra, D.G. Barnsley in (1963) 27 Conv. (N.S.) 159 who mounts a convincing argument that Roe d. Gregson v. Harrison (1788) 2 T.R. 425 correctly stated the law where the tenant expressly covenanted for himself his executors and administrators. Now under s.79(1) of the Law of Property Act 1925 in the absence of a contrary intention a lessee is deemed to have covenanted on behalf of himself and his successors in title.

Commentary on Proposition 3

(1) The Working Party consider that the law should be made clear. They consider that neither the vesting of a lease in a trustee in bankruptcy on the bankruptcy of a tenant nor the vesting of a lease in executors or administrators on the death of a tenant either testate or intestate should constitute a breach of a covenant which restricts assignment or parting with possession. The law in this respect is clear and no amendment is suggested. The Working Party propose however that a personal representative should be required to obtain consent in the case of a qualified covenant or request a waiver of an absolute covenant, or offer to surrender the lease, before executing an assignment or an assent. The Working Party argue that the landlord should be entitled to prevent an undesirable person from succeeding to a tenancy under a bequest in a will or upon an intestacy in the same manner as he is entitled to do under the terms of the lease in the case of any other form of assignment.

(2) The Law Commission would however like consideration to be given to the question whether some distinction could appropriately be drawn between a transfer inter vivos and a transfer which follows from the death of a tenant. In practice, it seems that personal representatives often assent to the vesting of a lease in the person who has become entitled to it under the will or intestacy of the deceased tenant without seeking the landlord's consent, at any rate where that person is a widow or close relative of the deceased. As the law now stands it may be doubtful if this practice is strictly correct. As a general rule it is admittedly difficult to justify the suggestion that personal representatives should be in a more privileged position than the tenant was in his lifetime. On the other hand it would perhaps seem harsh that the landlord should be able to prevent the vesting of a dwelling house in a relative of the deceased who wished to continue to live in it. In the case of a qualified covenant, it would not seem to be particularly objectionable for the proposed assignee to have to prove that he was a respectable and responsible person and, provided that the law was clear, this principle could be accepted. It is in the case of an absolute covenant that the real hardship could arise.

Commentary on Proposition 3 (Continued)

If, therefore, absolute covenants are to be retained generally it would be a possible solution to this difficulty to provide that such a covenant should be treated as fully qualified in relation to a proposed assent in favour of a widow, widower or other near relative who was residing with the deceased at the time of death. Such a provision could be modelled on Schedule 1 of the Rent Act 1968 which is referred to in note 4 to this Proposition.

Proposition 3. Questions for consideration

(3) (i) Should the execution of an assent or assignment by the personal representatives of a deceased tenant, in favour of the person entitled to a tenancy under a will or upon an intestacy, in all cases, constitute an assignment or parting with possession for the purpose of a covenant (whether absolute or qualified) prohibiting assignment or parting with possession?

(ii) If so, should an exception be made in favour of a widow, widower or other near relative of the deceased tenant who was residing with him or her at the date of death and who has become entitled to the tenancy on the death?

Working Party's Proposition 4

Qualified Covenants

4. All covenants binding on tenants prohibiting or restricting assignment, subletting, or parting with possession of the whole or part of the demised premises, or a change of user, or alterations or additions, or the erection of new buildings, without consent, shall be subject to a condition that such consent shall not be unreasonably withheld.

Notes:

1. Section 19(1) of the 1927 Act imports a provision that consent shall not be unreasonably withheld into all qualified covenants against assignment, underletting, charging, or parting with possession of the whole or part of the demised premises. Section 19(2) of that Act similarly imports such a provision into qualified covenants against improvements. There is no corresponding provision in relation to qualified covenants against change of user, but section 19(3) prohibits the charging of a fine or similar monetary payment for giving consent if the change of user does not involve any structural alteration of the premises.

2. As to the charging of demised property, where a mortgage is to be effected by way of subdemise and the lease contains a qualified covenant against subletting, the licence must be obtained before the mortgage is made (see Serjeant v. Nash, Field & Co. [1903] 2 K.B. 304). However, where the leasehold interest is mortgaged by means of a charge by way of legal mortgage, it would seem that neither a prohibition on assignment nor on subletting is broken if consent is not obtained (see Grand Junction Co. v. Bates [1954] 2 Q.B. 160 at p.168). An equitable mortgage would also not appear to be covered by a covenant against assignment or subletting (see Gentle v. Faulkner [1900] 2 Q.B. 267 at pp. 274 and 276). However, it would appear that if a covenant prohibits the tenant from parting with possession of the property in all types of mortgage a breach will occur if the mortgagee enforces his right to possession without the consent of the lessor.

3. This Proposition uses the phrase "alterations or additions" in contrast to the word "improvements" which now appears in section 19(2) of the 1927 Act. It has been held that, for the purposes of that subsection, the test of an "improvement" is whether it improves the premises from the point of view of the tenant rather than that of the landlord (Lambert v. Woolworth [1938] Ch. 883). The Proposition avoids the possible difficulties which that distinction may cause by adopting the plain test of whether an alteration or addition is proposed.

4. Section 20 of the Licensing Act 1964 prohibits certain alterations (which, broadly speaking, are in connection with the part used for drinking) to licensed premises without the consent of the licensing justices.

5. Note Proposition 6 below (fines or monetary payments) and the suggestion that the landlord should not be justified in refusing consent or in delaying the grant of consent on the grounds that entitlement to, or the amount of, the sum demanded is in dispute. Note also Proposition 7 which provides a ground for withholding consent.

Commentary on Proposition 4

(1) The scheme adopted by the Working Party accepts the general pattern of the present law but makes one change. Absolute covenants would be permitted but qualified covenants would be construed as fully qualified not only in relation to assignments etc. (section 19(1)) and to making improvements (section 19(2)) but also in relation to changes of user (section 19(3)). The Working Party consider that in view of the guidelines as to the reasonable withholding of consent contained in Proposition 5 the landlord's interest will not be adversely affected by this change.

(2) In connection with qualified covenants the Working Party have examined the practice of imposing conditions precedent to an application for consent, such as a provision under which the qualified covenant takes effect only if the tenant who wishes to assign has first offered to surrender the lease and such offer has been refused.[24] The Working Party suggest that no limitation should be placed upon these conditions. In their view, such provisions serve a useful purpose in enabling a landlord to exercise the higher degree of control which may be necessary from an estate management point of view and in the light of their conclusion that absolute covenants should be permitted there can be no reason to prohibit them. The Law Commission would like to receive views on the question whether, if in all or some cases absolute covenants are prohibited such conditions precedent are justifiable. If, as may be argued, a landlord is adequately protected by a fully qualified covenant, such conditions may not be necessary to protect his interest. From the tenant's point of view such conditions may be considered objectionable in that they prevent him from obtaining the full benefit of his interest in the demised property.

(3) Covenants prohibiting the charging of the demised premises have been excluded by the Working Party from the Propositions in this paper, although such a restriction is usually contained in the same covenant as restrictions against assignment, subletting or parting with possession and, as appears from Note 1 on page 44, is included with those other restrictions in section 19(1) of the 1927 Act. The Working

24. Upheld in Adler v. Upper Grosvenor Street Investment Ltd. [1957] 1 W.L.R. 227.

Commentary on Proposition 4 (Continued)

Party leave open for consideration the question whether charging should be included in the Propositions in this paper. Whatever the answer to this question, the Law Commission suggest that the same rule should apply both to mortgages by way of subdemise and to charges by way of legal mortgage because the present distinction mentioned in Note 2 on page 44 seems highly artificial.

Proposition 4. Questions for consideration

(4) (i) Should all qualified covenants prohibiting, without the landlord's consent,

(a) assignment, subletting or parting with possession of the whole of the demised premises, or

(b) assignment, subletting or parting with possession of part of the demised premises, or

(c) change of user, or

(d) alterations, additions and improvements or the erection of new buildings,

be construed as subject to the proviso that consent shall not be unreasonably withheld?

(ii) Should conditions precedent to the operation of a qualified covenant (such as an offer to surrender) be permitted?

(iii) Should mortgaging or charging the demised premises be included in the Propositions in this paper and, if so, should the same rule apply to mortgages by way of subdemise as to charges by way of legal mortgage?

Working Party's Proposition 5

Guidelines in determining the reasonableness of refusals

5. Where a covenant is fully qualified, in determining whether it was reasonable for a landlord to withhold consent or to impose conditions upon the granting of consent, the court shall have regard to all the circumstances pleaded by the landlord, including the extent to which the landlord was at the time of refusing consent under a reasonable apprehension that his financial or proprietary interests would be adversely affected and that the tenant would be unable or unwilling to indemnify him or that the interests of good estate management would be prejudiced in relation to the premises or any neighbouring premises belonging to him. By way of illustration only, and without prejudice to the generality of the foregoing, the court may consider whether the landlord had reasonable apprehension that such consent would:-

(a) affect the legal status of the whole or part of the premises, or of the occupier, to the detriment of the landlord's interest;

(b) involve the landlord in financial liability which the tenant is unwilling or unable to undertake (e.g., increased rates, taxes, or other financial burdens);

(c) render the landlord liable for breach of a statutory or contractual obligation or render him liable in tort to any person;

(d) affect the landlord's interest in the user of the premises having regard to planning controls; or

(e) diminish the value of neighbouring premises belonging to the landlord.

Notes:

1. This Proposition aims at laying down guidelines for determining whether the grounds relied upon by the landlord in refusing consent are reasonable. These factors are by no means exhaustive and all the circumstances must be taken into account. It is not intended to alter the rule that the burden of proof is initially upon the tenant to show that the landlord's refusal of consent was unreasonable.

2. Section 5 of the Race Relations Act 1965 provides that the refusal of consent to an assignment on the ground of colour, race or ethnic or national origin is to be treated as unreasonable unless the tenancy entitles

Commentary on Proposition 5

(1) The decided cases give guidance as to the factors to be taken into account and the situations in which a refusal of consent will be regarded as reasonable. For example, in the case of assignment, the personality of the assignee and the proposed user of the premises will be considered and, more generally, it is clearly established that the effect on the landlord's property interests as a whole will be taken into account.[25]

(2) The Working Party consider that it would be helpful to landlords, tenants, estate managers, and to their advisers, if the guidelines as to reasonable refusal of consent were expressed in legislation. Proposition 5, therefore, specifies some of the factors which the court is to take into account.

(3) Under the terms of Proposition 5 the court would have regard to all the circumstances pleaded by the landlord. It is not entirely clear on the present state of authority whether the court is limited to the reasons given by the landlord at the time of his withholding consent (if any are given) or whether it can take into account other considerations subsequently pleaded by the landlord or advanced at the hearing.[26] The view of the Working Party is that the landlord should be entitled to rely upon reasons that are not mentioned at the time of withholding provided they are raised in his pleadings. This would enable the tenant to know the case he will have to meet,[27]

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25. See commentary at p.21 above and the cases cited in n.17. See also, "Assignments and the Sagacious Landlord" by Martin Thomas in (1968) 118 N.L.J. p.172.

26. See, for example, Lovelock v. Margo [1963] 2 Q.B.786, where the court only considered the reasons in the mind of the landlord at the time of his refusing consent. But in the more recent case of Sonnenthal v. Newton (1965) 109 S.J.333 the Court of Appeal held that a court was not confined to reasons put forward by the landlord at or before the commencement of proceedings but could take into account new reasons advanced at the hearing (although the Court of Appeal could not consider reasons advanced for the first time in that court).

27. It must be borne in mind that the onus of proof is initially on the lessee to show that the landlord has acted unreasonably, but once a *prima facie* case has been established the landlord must show that he had reasonable grounds for the refusal. (See, for example, Re Town Investments Underlease [1954] Ch.301 and Cole (R.M.) v. Russells (Tulse Hill) (1955) 165 E.G. 389. (County Court)).

the tenant to use any accommodation (other than for the purposes of access) in common with the landlord; see also sections 5 and 7 of the Race Relations Act 1968 which prohibits discrimination in the disposal of housing accommodation, business premises or other land except in the case of small residential premises in which the landlord will continue to reside.

3. When the tenant's plans for a change of user or the nature of improvements constitute a project of material development, liability for betterment levy under the Land Commission Act 1967 might arise. The effect of section 83 of the Land Commission Act 1967 is that the tenant cannot agree to pay the betterment levy payable by the landlord (assessed upon the fee simple in reversion expectant upon the termination of the tenancy). However, payment of the levy by the landlord can be postponed if the Land Commission think fit (see section 45(2)(a) of the Act) until the development value has been realised by the landlord and interest on the levy may be waived under the Betterment Levy (Waiver of Interest) Regulations 1967 (S.I. No.338).

4. Note section 16 of the Landlord and Tenant Act 1927. Under this section the landlord has a right to reimbursement for payments in respect of increased taxes, rates or insurance premiums which arise as a result of an improvement executed by the tenant under that Act (but see Proposition 11 below). Where the tenant would thus become liable to the landlord and would be able to discharge these liabilities it would not be a ground for the landlord to refuse consent under paragraph (b) of Proposition 5.

Commentary on Proposition 5 (Continued)

and the court should not be able to consider matters not pleaded by the landlord but raised for the first time in court.[28]

(4) A further important feature of the Proposition is that the court may consider whether the landlord "was under a reasonable apprehension" that his interests would be adversely affected in one of the ways specified in the Proposition. This preserves, as the Working Party desire that it should, the present basis for determining whether refusal of consent was reasonable. It appears from the decided cases that where a landlord has a genuine apprehension that his interests would be adversely affected and, although other persons might have taken a different view of the transaction, this apprehension is not in the court's view wholly unreasonable, the refusal of the consent would not be held to be unreasonable.[29] The Working Party considered the alternative approach that the reasonableness of a refusal should be determined solely by the test of what the court itself considers to be reasonable in all the circumstances. The Working Party felt obliged, however, to reject this alternative as they concluded that it would not be appropriate, in this context, to give the court power to substitute its own standard for that of a landlord who was under a genuine and not unreasonable apprehension that his interests would be adversely affected if consent were given.

(5) The examples of the factors to be taken into account by the court mentioned in Proposition 5 are not exhaustive and are included as illustrative of the sort of matters to be considered. The court will take them into account if pleaded by the landlord, but the court will also take note of whether the tenant was willing and able to indemnify the landlord in respect of the matters which

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28. The landlord may seek leave to amend his pleadings; and note Proposition 7 below which should enable the landlord to receive the information he needs.

29. See Pimms Ltd. v. Tallow Chandlers Co. [1964] 2 Q.B. 547, following Premier Confectionery Company (London) Ltd. v. Commercial Sale Rooms Ltd. [1933] Ch. 904.

would adversely affect his financial or proprietary interests. Accordingly, where, for example, a proposed alteration would increase the rateable value of the premises, the landlord would be entitled to refuse consent if the tenant would not agree to bear the increased amount of any rates which would otherwise be payable by the landlord. In such a case the increased liability for rates would continue after the expiration of the tenancy. It would, therefore, also be incumbent on the court, although this is not specifically mentioned in (b) of Proposition 5, to consider whether the landlord would continue to be able to recoup this burden after the end of the current tenancy before reaching its decision on the reasonableness of a refusal.

(6) Where liability to betterment levy is involved the landlord is forbidden (as mentioned in Note 3 to Proposition 5) to require payment by or indemnity from his tenant because of the provisions of section 83 of the Land Commission Act 1967. It is understood that in some cases landlords have recently refused consent to a change of user or the making of an improvement because of the possibility of liability for betterment levy. This situation may be ameliorated by the Land Commission's Practice Note No.9[30] which explains that the Commission are prepared to postpone the collection of levy and waive interest on the levy until the date when the development value is realised. In the case of a reversionary interest this is likely to be the date when the interest is sold or when the lessor obtains possession.

Proposition 5. Questions for consideration

(7) (i) Should statutory guidelines be provided as an indication of the factors which the court should take into consideration in determining whether consent has been unreasonably withheld and, if so, what form should such guidelines take?

(ii) In making its decision, should the court have regard to the "reasonable apprehensions" of the

30. See The New Law Journal (vol. 118, p.1073), The Solicitors' Journal (vol. 112, p.896) and The Estates Gazette (vol. 208, p. 764).

<u>Proposition 5. Questions for consideration</u> (Continued)

landlord that his interests would be adversely affected if consent were given or should the court determine the matter on the basis of what the court itself considers reasonable?

(iii) In determining the reasonableness of a refusal, should the court be limited to considering the reasons advanced by the landlord in his pleadings or should the court be empowered to take into account any further reasons put forward by the landlord at the hearing or should the court be entitled to have regard only to the reasons (if any) put forward by the landlord at the time of his refusal?

Working Party's Proposition 6

Fines or monetary payments

6. The landlord shall not be entitled, as a condition of granting consent under a qualified covenant restricting assignment, subletting or parting with possession, change of user, or alterations or additions, or the erection of new buildings, to require a fine or similar monetary payment, but he shall be entitled to require payment of a reasonable sum for any legal or other expenses incurred.

In addition:

(1) in the case of consent to an assignment, subletting or parting with possession, the landlord shall not be entitled to require the tenant or his assignee, by reason only of the transaction, to undertake any additional burden under the tenancy or accept any reduced benefit; any provision in the lease to the contrary shall be void, but this shall be without prejudice to the landlord's right to require additional security to cover existing obligations;

(2) in the case of consent to a change of user, the landlord shall be entitled to require a reasonable monetary payment or increased rent:

(i) where the letting value of the premises or any part will be increased by the change of user in respect of and related in amount to any such increase attributable to the change of user;

(ii) where the landlord might otherwise be entitled to refuse consent, in respect of and as compensation for:

(a) any financial liability imposed upon him,

(b) any damage caused to or other loss sustained by him,

(c) any diminution in the value of the premises or of any neighbouring premises belonging to him,

in consequence of the change of user.

Commentary on Proposition 6

The principle involved in the Proposition

(1) The principle adopted by the Working Party in Proposition 6 is that, when the landlord is asked for his consent under a qualified covenant, he should not be able to make a profit by requiring a fine or similar sum of money as a condition of granting that consent; but he should be entitled to indemnity against any expense which he will incur and compensation for any loss which he will suffer. The Working Party considered whether it would be possible to apply this principle also to the waiver of an absolute covenant but decided that this was impracticable since a landlord could avoid any attempt to limit his freedom of action in that case by insisting on a surrender of the lease and the grant of a new one on different terms. The Proposition therefore relates only to qualified covenants of the kinds discussed in this paper, and it imposes an absolute prohibition on charging a fine in all cases. It also sets out the matters for which compensation may be claimed and provides that, where alterations are to be made, an undertaking for reinstatement may be required. Further, it introduces a new principle, which will be discussed below, whereby the landlord may in some cases be entitled to share in the increased profitability of the premises resulting from the lifting of a restriction on the permitted user.

Comparison with the existing statutory provisions

(2) The Proposition departs from the existing statutory provisions in the following respects:

(i) In the case of qualified covenants against assignment subletting or parting with possession the Proposition would invalidate even an express provision for the payment of a fine contained in the lease, which is at present permitted under section 144 of the Law of Property Act 1925. Some of the Working Party are doubtful whether it is necessary to override an express agreement of this kind, but the majority feel that the requirement of a fine or monetary payment (such as a half share in any premium taken by the tenant on an assignment) is an unjustifiable

Working Party's Proposition 6 (Continued)

(3) In the case of consent to alterations or additions or the erection of new buildings:

(i) the landlord shall be entitled to require a reasonable monetary payment or increased rent where the landlord might otherwise be entitled to refuse consent in respect of and as compensation for:

(a) any financial liability imposed upon him,

(b) any damage caused to or other loss sustained by him,

(c) any diminution in the value of the premises or of any neighbouring premises belonging to him,

as a result of the alterations or additions or erection of new buildings;

(ii) the landlord shall be entitled to require, as a condition of such consent, an undertaking by the tenant to reinstate the premises at the end of the term, if called upon to do so.

Note on the present law

Assignment, subletting and parting with possession

Where a covenant is qualified, consent must not be unreasonably withheld (section 19(1)(a) of the 1927 Act and unless the lease contains an express provision to the contrary, no fine or similar sum may be charged (section 144 of the Law of Property Act 1925). The requirement by the lessor of an increased rent as a condition to consenting to an assignment is in the nature of a fine (Jenkins v. Price [1907] 2 Ch.229 reversed on another point [1908] 1 Ch. 10)). The landlord may require the payment of a reasonable sum in respect of any legal or other expenses incurred (section 144 of the 1925 Act and section 19(1)(a) of the 1927 Act).

Change of user

Where a covenant is qualified and if no structural alteration is involved, no fine or similar sum, whether by way of increased rent or otherwise, may be charged, notwithstanding any express provision to the contrary (section 19(3) of the 1927 Act). The landlord may require the payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to him and in

profit to which the landlord can never properly be entitled.

(ii) In the case of qualified covenants against change of user the Working Party see no reason to preserve the distinction, at present drawn in section 19(3) of the 1927 Act, between cases where structural alterations are involved and cases where they are not. They consider that in either case the landlord will be adequately protected by his right to withhold consent where his property interests will be adversely affected and no fine or monetary payment can be justified.

(iii) The prohibition of a fine or monetary payment is extended to qualified covenants against alterations or additions. In respect of covenants of this kind the Working Party have also attempted to simplify the law, which is now contained in section 19(2) of the 1927 Act, in some respects. First the word "improvements" has been abandoned in favour of the purely factual expression "alterations or additions or the erection of new buildings" so that it will no longer be relevant to consider whether the proposed work will or will not "improve" the premises from the landlord's or the tenant's point of view. Secondly the landlord's right to require the tenant to undertake to reinstate the premises will no longer depend on whether the alterations would add to the letting value of the holding nor whether the requirement of reinstatement would be reasonable. The Working Party think it right that the landlord should have an unqualified right in all cases to require the reinstatement of the premises if he so wishes. They believe that this may in practice prove to be of some benefit to tenants, as well as to landlords, since it may induce a landlord to consent more readily to his tenant's application for consent to the making of alterations or additions.

(3). The Law Commission welcome the attempt to simplify the law relating to "improvements" but they invite further

respect of any legal or other expenses incurred (section 19(3) of that Act - cf. Proposition 6(2)).

Improvements

Where a covenant is qualified, consent must not be unreasonably withheld but the landlord may require, as a condition of granting consent, the payment of a reasonable sum in respect of any damage to or diminution in the value of the premises or any neighbouring premises belonging to him and in respect of any legal or other expenses incurred (section 19(2) of the 1927 Act). In addition, where the improvement does not add to the letting value of the holding and where such a requirement would be reasonable, the landlord may require the tenant to enter into an obligation to reinstate the premises (section 19(2). cf. Proposition 6(3)).

Note also:-

1. If the giving of consent to the proposed transaction would or might impose an additional financial burden on the landlord this will be taken into account in deciding whether the landlord has unreasonably withheld his consent and in this connection the willingness and ability of the tenant to indemnify the landlord will also be taken into account.

2. For the jurisdiction of the County Court to determine whether the money demanded under this Proposition or the time and method of payment is reasonable see Proposition 9 below. Disputes as to the form and terms of the reinstatement obligation will also be determined by the court. It is suggested that the landlord should not be entitled to withhold his consent merely because there are outstanding questions as to whether the landlord should be entitled to any payment and, if so, what amount should be payable. The matters in dispute would be determined by the court.

views on the question whether the landlord should be able in all cases to require reinstatement of the premises at the end of the term. As the law now stands the landlord can require reinstatement only where an improvement does not add to the letting value and only where such requirement would be reasonable. It is arguable that the landlord will be put in too favourable a position if he can require reinstatement even where the alterations or additions will add to the letting value of the premises. This might particularly be so in cases where reinstatement would be virtually impossible. By insisting upon a requirement for reinstatement in such a case the landlord could, in effect, withhold his consent unreasonably to the carrying out of the proposed alterations or additions.

Sharing the increased letting value on a change of user

(4) The Working Party's argument in favour of this new principle is that the landlord may have a rightful claim to share in the increased profitability of the premises which could be obtained by a complete change in the type of use to which they are put. By way of illustration two, admittedly extreme, classes of case may be mentioned. First, there are those in which, on the grant of the lease, the rent was fixed on a concessionary basis so that the premises could be used for some non-commercial purpose of social utility which the landlord wished to encourage. They argue that in those cases if the tenant wishes to change the use to one of a commercial kind the basis for the concession has gone and the landlord should benefit from the more profitable use of the premises. Secondly, the Working Party have in mind cases where the tenant wishes to take advantage of some new and highly profitable activity which has appeared on the contemporary scene since the lease was granted. The Proposition is, however, drawn in quite general terms, for the Working Party argue that, whenever a change of user would, for some reason, substantially raise the letting value of the premises there is a case for allowing the landlord to share the benefit. They see no reason why the tenant alone should profit from so material a departure from the basis on which the rent was negotiated. They consider that this situation is quite

different from any which could arise under a consent to assignment or to alterations or additions and they recommend this principle only in respect of change of user.

(5) The Law Commission would particularly welcome observations on this aspect of the Proposition which constitutes a novel and, to some perhaps, startling innovation in the landlord and tenant relationship. It seems to the Law Commission that this principle would, in practice, produce difficult problems, both in the calculation of the relevant increase in letting value and in the determination of the landlord's proper share in that increase.

(6) The monetary payment or increased rent must be "related in amount" to the increase "attributable to the change of user" and must be reasonable. It seems clear that the tenant would not necessarily have to pay the current market rent for the new user, for this might reflect other factors (such as social and economic changes, or local development) which had raised the general level of rents since the lease was granted. The intention is presumably to leave the rent at the general level at which it was fixed, but to make an appropriate adjustment to it. The first step should perhaps, in theory, be to calculate the rent which would have been fixed if the new user had been contemplated when the lease was granted; but this would be a difficult valuation if the lease were an old one and the proposed new user had not then been possible. The only practicable comparison may be between the current rental values for the present user and the new user respectively, which could be applied on some fractional basis to the existing rent. Further adjustment would be required if the existing rent were less than a rack rent, because a premium had also been paid or a special repairing obligation had been imposed. All the circumstances would then have to be considered as to the "reasonableness" of an increased rent or monetary payment. The existing rent might, for example, be higher than the current market rent for the present user and the change of user might therefore be intended, in part at any rate, to enable the tenant to meet his obligation to pay that rent. All such

Commentary on Proposition 6 (Continued)

factors could, no doubt, be taken into account, but it seems doubtful whether any formulae could be devised which would assist the parties to reach agreement without going to court.

(7) In considering the need for adopting this principle the Law Commission suggest that it is relevant to bear in mind recent trends in the granting of leases. The rapid rise in rental values has led to the custom of including periodical rent review clauses in a lease or of granting leases for shorter terms. In the light of these developments it may be arguable that it is not necessary to make innovations of the kind proposed by the Working Party, particularly in view of the practical difficulties involved.

Determination of Disputes and Enforcement of Orders

(8) In many cases the determination of the appropriate payment or increase in rent would no doubt be made in proceedings primarily brought on the issue whether the landlord's consent was unreasonably withheld. On the other hand, there might be cases where such determination was the sole matter in dispute between the parties, and Proposition 9 below confers specific power on the court to determine this matter as a separate issue. It will not therefore be necessary for a landlord to withhold, or delay, his consent in order to preserve his claim to a money payment or increased rent. If he does so he will run the risk of having to pay damages under Proposition 8.

(9) If the parties are unable to reach agreement, the court will first have to decide whether to order a monetary payment or the payment of an increased rent. The decision may be expected to depend largely upon the nature of the landlord's claim for compensation; for example, whether such claim is based upon an increase in the amount of rates payable or on the apprehension of loss or damage. The Working Party's provisional conclusion was that any capital sum ordered to be paid under the Proposition should automatically become a charge on the tenant's interest. The Law Commission would like to know whether it is thought to be desirable that a landlord should be given any special security of this nature or whether it

is thought preferable that he should have only the normal rights of judgment creditor.

Proposition 6. Questions for consideration

(10) (i) Where a qualified covenant has been imposed, should a landlord be absolutely prohibited from requiring any fine or similar monetary payment as a condition of giving his consent to

(a) any assignment, subletting, charging or parting with possession of the premises;

(b) the making of alterations or additions or the erection of new buildings;

(c) any change of user?

(ii) If so, should such a prohibition invalidate even an express agreement of the parties in the lease that such a payment could be required?

(iii) In the case of a qualified covenant against alterations, additions or the erection of new buildings should the landlord be entitled as a condition of giving consent to require the tenant to undertake to reinstate the premises at the end of the term; or should this be permissible, as at present, only where the letting value would be increased and the requirement is in all circumstances reasonable?

(iv) Where a change of user would increase the letting value of the premises

(a) should the landlord be entitled, as a condition of giving consent, to require a reasonable monetary payment or increased rent?

(b) if so, what formulae should be adopted as the basis for calculating the amount of such payment or increased rent?

(v) Where a monetary payment due to a landlord, by way of compensation, has been determined by the court:-

Proposition 6. Questions for consideration (Continued)

(a) should such payment be recoverable as an ordinary judgment debt; or

(b) should the landlord be given some special security, such as a charge on the tenant's interest in the property?

(vi) Where the only matters in dispute are a landlord's entitlement to or the amount of any monetary payment or increased rent, should he be entitled to withhold his consent until such matters have been determined by the court?

Working Party's Propositions 7 and 8

Tenant's obligation upon application for consent

7. In the case of all qualified covenants, the tenant, upon an application for consent, shall provide the landlord with all the information he reasonably requests and shall allow reasonable time for the application to be considered. Failure to do so shall be a ground for withholding consent.

Note: see Wilson v. Fynn [1948] 2 All E.R. 40.

Landlord's obligations upon application for consent

8. In the case of all qualified covenants, the landlord shall be under an obligation, notwithstanding any term in the lease to the contrary, not unreasonably to withhold consent nor unreasonably to delay the communication of his decision. Breach of this obligation shall entitle the tenant to claim damages [but the court shall be given a discretion to refuse to award damages where it thinks fit].

Notes:

1. A long line of authority has established that under the present law a tenant has no right to damages for the unreasonable withholding of consent unless the landlord has expressly covenanted not to refuse consent unreasonably (see, for example, Treloar v. Bigge (1874) L.R. 9. Exch. 151, F.W. Woolworth & Co. v. Lambert [1937] Ch. 37 and Rendall v. Roberts & Stacey Ltd. (1960) E.G. 265).

2. The measure of damages will be based upon normal principles applicable to breach of contract.

Commentary on Propositions 7 and 8

(1) These two Propositions complete the scheme adopted by the Working Party in relation to qualified covenants. The tenant will be under an obligation to provide the landlord with all the information he reasonably requests (for example, as to the respectability and financial standing of a proposed assignee or subtenant). Failure to provide information will afford a ground for the withholding of consent. In return, it is suggested by a majority of the Working Party that the landlord should be under an obligation not unreasonably to withhold consent or delay communication of his decision and that a breach of this obligation should entitle the tenant to claim damages.

(2) The unreasonable withholding of or delay in giving consent to an assignment can cause loss to a tenant. In **Rose** v. Gossman (1967) 201 E.G. 767[31] the Court of Appeal refused to strike out a claim for damages for the unreasonable refusal of consent to an assignment although it was accepted that the plaintiff would have little chance of success. In the course of his judgment Lord Justice Danckwerts is reported to have said:

> "When a landlord unreasonably withholds consent, the normal practice is either to disregard the necessity for the landlord to consent, or to take proceedings. The matter is vital for the lessor (sic) if he is to go ahead with his assignment, because prospective assignees do not care to take the risk of an action being brought against them for the purpose of evicting them. So the alternative has been to take proceedings in the Chancery Division by originating summons to obtain a declaration that the tenant is at liberty to assign without bothering further about the landlord. 32 But that again is rather unsatisfactory because the tenant may well suffer loss from the arbitrary and wrongful refusal of consent by the landlord to his proposed assignment apart from the question of delay and loss in that respect. The assignee himself may give up the negotiations as the result of the delay ..."

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31. Also reported in (1967) 111 S.J. Vol.1. p.17.
32. It should be noted that under section 53 of the Landlord and Tenant Act 1954 the County Court also has jurisdiction whatever the value of the demised premises to make a declaration that the licence or consent has been unreasonably withheld.

Lord Denning M.R. in the same case said:

> "If I were left to construe this document without the aid of previous authority, I confess I would be inclined to say that the landlord promised not unreasonably to withhold his consent." 33

(3) The majority of the Working Party consider that a tenant should be able to obtain compensation from his landlord if that landlord has acted unreasonably and that an award of damages is the only effective method by which this can be achieved. They consider that the right to claim damages is particularly necessary in the case of the unreasonable withholding of consent to an assignment and there is no reason in principle why this remedy should not be available in relation to other types of covenant. The Working Party suggest that such a provision would not impose an unreasonable burden on a landlord. Damages under Proposition 8 would be assessed on the principles applicable to actions for breach of contract and the tenant would therefore be under an obligation to mitigate his loss where possible. Moreover, the guidelines in Proposition 5 as to the circumstances in which a landlord may reasonably withhold consent and the tenant's obligation to supply information should safeguard the landlord to some extent. The minority view, however, is that mere "unreasonableness" should not afford a ground for damages. There might well be borderline cases where a landlord considered that he had perfectly genuine reasons for refusing consent and the risk of having to pay damages might encourage landlords to extend the use of absolute covenants. The Working Party suggest as a possible compromise between these views that the court might be given a discretion so that, in cases in which the landlord was acting under a genuine but mistaken belief, the court could refuse damages if it thought fit.

(4) The Law Commission invite comments upon the majority and minority views of the Working Party and upon the question

33. See also the remarks of Cross J. in Sarah Bulcock v. St. Marylebone Property Co.Ltd. and Ivemont Leaseholds Ltd. (1968) 207 E.G. 527 where it was also held that no damages were obtainable.

whether other solutions to the problem would be preferable. The advantage of the solution suggested by the majority of the Working Party is thought to be that it would act as an incentive for the landlord to act expeditiously and fairly. A different solution would be to provide that consent should be deemed to have been given in cases where the landlord has failed to notify the tenant of his decision within a specified period. A somewhat analogous position, in a different context, already exists under section 78 of the Companies Act 1948 which provides that a company must notify a transferee within two months of its refusal to register a transfer. It has recently been held by the Court of Appeal[34] that a company which had delayed, for four months, its notification to the transferee that approval of the transfer had been refused had, by unreasonable delay, lost its right to reject the transfer. There are, however, a number of objections to a provision of this kind in the context of the landlord and tenant relationship. First, the question whether consent has been obtained is a matter of great importance and a deemed consent might well involve difficulties of proof. Secondly, it is difficult to suggest a single time limit which would be appropriate in every case because there are so many different matters for which consent is required and so many different circumstances in which consent will be asked for. If a period appropriate to a difficult and complicated case were adopted this would be too long a period in relation to a simple and uncomplicated case. If, however, a short period were adopted, this might be unfair to the landlord where difficult and complicated questions were raised by the tenant's application. Furthermore, in some cases, consents from a succession of superior landlords (and, possibly, mortgagees) would also have to be obtained which would add to the time required before a decision could be given and, in such cases also, a short period would be inadequate. In addition, it may be doubted whether a third party (e.g. a proposed assignee or, more particularly, a mortgagee) would be willing to complete a transaction in the absence

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34. In re Swaledale Cleaners Ltd. [1968] 1 W.L.R. 1710 (C.A.).

Commentary on Propositions 7 and 8 (Continued)

of an actual consent from the landlord. Apart from these considerations, the Law Commission, in spite of the precedents elsewhere in the law,[35] are reluctant to see any extension into this branch of the law of the principle that a person shall be deprived of a legal right by failure to take action before the expiration of a prescribed period. If a landlord were not to be permitted, in any circumstances, to challenge the transaction once the specified period had expired, this might result in an injustice to him, for example, in cases where the tenant's application had failed to reach the landlord, where the landlord was seriously ill or otherwise incapacitated or where for some other reason it was temporarily impossible to communicate with the landlord. If, however, the landlord's right to challenge were preserved the position would be little different from what it now is. A tenant may, at the present time, proceed, at his own risk, without seeking consent, but a prospective assignee or a mortgagee would, it is thought, seldom be willing to accept the risk because of the possibility of forfeiture.

Propositions 7 and 8. Questions for consideration

(5) (i) In all cases where a landlord's consent is required, should the landlord be under an obligation not to withhold consent unreasonably nor unreasonably to delay the communication of his decision; and if a landlord fails to observe these obligations should his tenant be entitled to claim damages?

(ii) Should the court be given a discretion to refuse to award such damages in cases where a landlord has unreasonably withheld his consent but was acting under a genuine, though mistaken, belief that he was entitled to do so?

(iii) Should a landlord be deemed to have given consent if he fails to notify the tenant of

35. For example, if the landlord serves a notice under s.25 of the Landlord and Tenant Act 1954 terminating a business tenancy, the tenant is not entitled to apply to the court for the grant of a new business tenancy unless he has served a counter-notice within 2 months (s.29(2) of the 1954 Act).

his decision within a specified period from the date when his tenant has lodged an application for consent?

(iv) Is there any and, if so, what period which could appropriately be specified in relation to question (iii) or should different periods be specified in relation to different types of covenant?

Working Party's Proposition 9

County Court jurisdiction

9. Without prejudice to the jurisdiction of the High Court the County Court shall have unlimited jurisdiction to determine the reasonableness of any sums claimed under Proposition 6, and the time and method of payment.

Note on the present law

Where the landlord withholds his consent either to an assignment etc. or to the making of an improvement, or to a change of user, the County Court has jurisdiction (without prejudice to the jurisdiction of the High Court) under section 53 of the Landlord and Tenant Act 1954, whatever the value of the demised premises, to declare that consent was unreasonably withheld; and this jurisdiction may be exercised even when the tenant seeks no other relief than that declaration. There is no corresponding express power for the County Court to make a declaration as to the reasonableness of a sum which the landlord claims under subsections (1) (2) or (3) of section 19 of the 1927 Act where he is prepared to give his consent. It is arguable that, under section 19(2) (improvements) a dispute as to the reasonableness of the sum claimed in respect of damage to, or diminution in the value of the premises could be brought within section 53 of the 1954 Act, since such a sum may be claimed as a condition of giving consent and is thus inextricably bound up with the issue as to consent. Under subsections (1) and (3) of section 19, however, the question of consent and the amount of the sum which can be claimed seem to be separate issues. In those cases it is thought that section 53 of the 1954 Act does not enable the County Court to make a declaration as to the reasonableness of the sum.

Commentary on Proposition 9

(1) The Working Party consider that the position as to the jurisdiction of the County Court to determine whether the sum demanded by the landlord in granting consent under a qualified covenant is reasonable should be clarified.[36] The Working Party suggest that in this respect the jurisdiction of the County Court should be without financial limit, as is now the case where it has jurisdiction under section 53 of the Landlord and Tenant Act 1954.[37]

(2) A question which arises for consideration is whether the Lands Tribunal would be a more suitable authority to determine the reasonableness of the sum claimed since matters of valuation may be involved. The Working Party rejected this, thinking it undesirable that the jurisdiction to declare whether consent has been unreasonably withheld and the jurisdiction to determine the reasonableness of a sum claimed should be exercised by different tribunals.

Proposition 9. Questions for consideration

(3) (i) Where a qualified covenant has been imposed should the County Court be given limited or unlimited jurisdiction to determine the reasonableness of any sum the landlord is entitled to claim upon granting consent?

(ii) Alternatively should the Lands Tribunal be given authority to make such determination?

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36. Note that under Proposition 4 above all qualified covenants are to be construed as fully qualified, but the sum the landlord is entitled to demand under Proposition 6, the Working Party suggest, should not afford a ground for withholding consent but should be determined by the court. There would, therefore, be some doubt as to whether s.53 as it stands would give jurisdiction to the County Court (see note on present law opposite).

37. Some members of the Working Party felt that some financial limit would be appropriate. It must be noted that in Law Com. No.17 (Report on the Landlord and Tenant Act 1954, Part II) it was recommended that the County Court should have power to determine all questions arising under Part II of the Act (e.g., the validity of a s.25 notice or a s.26 counter-notice) in respect of premises within its jurisdiction - i.e., at present where the rateable value is less than £2,000 (see paras. 48-49 and recommendation K on p.21). This recommendation has now been enacted by s.13 of the Law of Property Act 1969 which came into force on 1st January 1970. This jurisdictional limit, the majority of the Working Party suggest, would not be appropriate to the question of which court should have jurisdiction to declare the reasonableness of any sum claimed by the landlord.

Working Party's Proposition 10

Power of the County Court to authorise conversion of houses into separate tenements

10. Section 165 of the Housing Act 1957 should be amended so that the County Court shall have jurisdiction to vary the provisions of any covenant or obligation contained in a lease or any restrictive covenant in order to authorise the conversion of any house or houses into several tenements, whether or not each house remains as a separate entity, if it is proved:-

(a) that owing to changes in the character of, or in the types of dwellings occupied in the neighbourhood, the house or houses cannot readily be let for occupation but could be let if converted into two or more tenements; and

(b) that, where necessary, planning permission for such conversion has been granted and is in force,

subject to such conditions and terms as it thinks just.

Notes:

1. Section 165 of the Housing Act 1957 reads as follows:-

> "Where the local authority or any person interested in a house applies to the county court and-
>
> (a) it is proved to the satisfaction of the court that, owing to changes in the character of the neighbourhood in which the house is situated, the house cannot readily be let as a single tenement but could readily be let for occupation if converted into two or more tenements; or
>
> (b) planning permission has been granted under Part III of the Town and Country Planning Act 1947 for the use of the house as converted into two or more separate dwelling-houses instead of as a single dwelling-house,
>
> and it is proved to the satisfaction of the court that by reason of the provisions of the lease of or any restrictive covenant affecting the house, or otherwise, such conversion is prohibited or restricted, the court, after giving any person interested an opportunity of being heard, may vary the terms of the lease or other instrument imposing the

Commentary on Proposition 10

(1) The Working Party's experience suggests that few applications reach the courts to authorise a conversion under section 165 of the Housing Act 1957, but that the section serves a useful purpose at the stage where a tenant is seeking the landlord's consent to carry out the necessary work. The Working Party consider that the sole fact that planning permission has been granted to the tenant should not enable him to apply for an order where the other conditions are not satisfied. The Working Party appreciate that the court might well refuse the application under section 165 if that were the sole ground; but think it better that paragraphs (a) and (b) should be cumulative.

(2) There is a divergence of opinion amongst the members of the Working Party as to which tribunal is the most suitable to exercise this jurisdiction. One view is that the County Court should have jurisdiction and there should be no limit in respect of the rateable value of the property. Another view is that the County Court should hear cases where the rateable value does not exceed the limit of its jurisdiction under section 63 of the Landlord and Tenant Act 1954 for the time being in force (i.e., at present £2,000) and that cases above this limit should be heard in the High Court. A further view is that the Lands Tribunal should be given jurisdiction, either in all cases or only those above the limit in value of the County Court's jurisdiction.

(3) A further matter which the Working Party discussed was whether section 165 of the Housing Act 1957 should be incorporated in section 84 of the Law of Property Act 1925. Under this latter section, as amended, the Lands Tribunal has power to modify or discharge restrictive covenants as to user or building where such covenants are contained in leases of over 40 years of which at least 25 have expired. The exercise of the power is subject to the payment of compensation where appropriate. Until recently the power could be exercised, broadly speaking, only when the covenant had become obsolete or of no further use to those whom it was intended to benefit. However, under section 28 of the Law of Property Act 1969,

prohibition or restriction so as to enable the house to be so converted subject to such conditions and upon such terms as the court may think just."

2. Conditions (a) and (b) in the Proposition follow section 165 of the Housing Act 1957, (which this proposal will replace) except that they are made cumulative rather than alternative.

3. "Changes in the types of dwellings occupied" has been added as an alternative test to "changes in the character of the neighbourhood" in order to deal with the dicta in Alliance Economic Investment Co. v. Berton (1923) 92 L.J. K.B. 75; 39 T.L.R. 393.

4. Further, this Proposition will reverse Josephine Trust Ltd. v. Champagne [1963] 2 Q.B. 160, where the Court of Appeal held that the County Court had no jurisdiction under section 165 where a row of four houses was to be converted laterally into flats.

Commentary on Proposition 10 (Continued)

which (with the exception of subsection 6) came into force on 1st January 1970, the jurisdiction is widened so that a covenant may be varied or discharged where the restriction impedes some reasonable user and either does not secure any practical benefit of substantial value or advantage or is contrary to the public interest and the persons entitled to the benefit can be adequately compensated in money. The provisions of section 84 of the Law of Property Act 1925 as amended must be contrasted with section 165 of the Housing Act 1957 which contains only a general power for the County Court to impose such conditions and terms as it may think just. There is no express reference to compensation.[38]

Proposition 10. Questions for consideration

(4)

(i) Should section 165 of the Housing Act 1957 be retained as a separate head of jurisdiction with or without modifications or should it be incorporated in section 84 of the Law of Property Act 1925?

(ii) If retained, with or without modifications, as a separate head of jurisdiction should such jurisdiction be exercised by the County Court, as at present, or should it be exercised by another tribunal, such as the Lands Tribunal?

(iii) If retained, as a separate head of jurisdiction:-

(a) should section 165 contain express power for the relevant tribunal to award compensation

(b) should paragraphs (a) and (b) of section 165 (with or without amendment) remain as alternative grounds or should they be cumulative as the Working Party propose?

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38. cf. the conditions as to compensation (etc.) contained in s.162 and s.164 of the Housing Act 1957.

Working Party's Proposition 11

Part I of the Landlord and Tenant Act 1927 - Improvement of Business Premises

11. Part I of the 1927 Act (under which business tenants may qualify for compensation for improvements upon quitting the holding of a business tenancy) should be repealed.

Note on the present law

Part I of the 1927 Act as amended by the Landlord and Tenant Act 1954 applies to premises held under a lease other than a mining lease, used wholly or partly for the purpose of any trade or business and not being an agricultural holding (section 17(1) of the 1927 Act).

The relevant provisions of Part I as to compensation for improvements upon quitting the holding of a business tenancy are contained in sections 1-3 of the 1927 Act.[39]

A tenant of business premises who wishes to make an improvement to the demised premises may serve on his landlord a notice of his intention specifying the improvements he proposes to make. If the landlord objects, he may serve a notice of objection and the tenant must then apply to the County Court (or High Court in certain circumstances) which can in its discretion sanction the improvement by the tenant unless the landlord proves that he has offered to execute the improvement himself in consideration of a reasonable increase in rent (which the court may determine).[40] The court's power applies notwithstanding any contract to the contrary (for example, an absolute covenant prohibiting improvements).[41] Part I of the 1927 Act does not expressly define what constitutes an improvement within that part of

39. Ss. 4-7, which provided for compensation for goodwill where a business tenancy was not renewed and the right to renewal in certain cases, were repealed by the Landlord and Tenant Act 1954 which, in Part II, brought in its own scheme for the renewal of business tenancies and the entitlement to limited compensation in certain cases where the landlord successfully opposes an application for renewal of the tenancy.

40. S.3 of the 1927 Act. The court is given power subsequently to authorise the improvement if it is proved that the landlord has failed to carry out his undertaking.

41. If it appears that the contract was made for adequate consideration (for example, a reduction in the rent) the court is to give effect to it if made before December 1953. (S.9 of the 1927 Act). This was repealed insofar as it affects contracts entered into after December 9th 1953 by s.49 of the Landlord and Tenant Act 1954.

Commentary on Proposition 11

Part I of the Landlord and Tenant Act 1927

(1) The Working Party suggest that the importance of Part I of the 1927 Act has been greatly reduced in consequence of the provisions of the Landlord and Tenant Act 1954; however Part I would still be of some value to a tenant who desired a new lease under Part II of the 1954 Act but whose application was successfully opposed on any of the statutory grounds. The Working Party also believe that few claims for compensation under Part I of the 1927 Act have been brought before the courts in recent years. For these reasons the Working Party feel that the provisions as to compensation have become obsolete and should be repealed but with a saving for the rights of tenants under existing leases.

(2) The Law Commission suggest, however, that even though there are very few applications to the County Court under Part I of the 1927 Act, the existence of the powers contained in Part I influences the way in which landlords deal with negotiations in regard to improvements and that if such powers did not exist landlords would be less co-operative.

(3) Some members of the Working Party, although agreeing that the provisions as to compensation should be repealed, considered that it might be useful to retain the relevant provisions of section 3 of the 1927 Act which would enable a business tenant to obtain consent to the carrying out of improvements of the nature defined in section 3 where the landlord had refused to give consent.

(4) The views of the Working Party are in contrast to those of the Jenkins Committee who not only recommended the retention of Part I of the 1927 Act (subject to a number of modifications the majority of which are now contained in the Landlord and Tenant Act 1954) but also recommended that compensation for improvements, now available to business tenants, should be made available on broadly similar lines to tenants of residential premises.

the Act.[42] However, to qualify as an improvement for which an application can be made to the County Court to authorise the execution of the improvement, it must possess the three characteristics set out in section 3(1) of the 1927 Act; viz. the improvement must:

(a) be calculated to add to the letting value at the termination of the tenancy;

(b) be reasonable and suitable to the premises; and

(c) not diminish the value of property belonging to the same landlord, or the head landlord.

Upon quitting the holding, the tenant will be entitled to compensation for any improvement (including the erection of any building) made by him or his predecessors in title (and which does not constitute a trade fixture or other fixture which he is entitled to remove) which adds to the letting value of the holding at the termination of the tenancy.[43] The tenant's entitlement to compensation is subject to his making a claim in the prescribed manner and within a prescribed time.[44] In the absence of agreement, the court determines the amount of compensation to be paid by the landlord which must not exceed the net addition to the value of the holding attributable to the improvement or the reasonable cost of carrying out the improvement at the termination of the tenancy, whichever is the less.[45]

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42. cf. the definition of "improvement" in s.67 of the Rent Act 1968 (which refers to improvements executed by landlords):"'improvement' includes structural alteration, extension or addition and the provision of additional fixtures or fittings but does not include anything by way of decoration or repair."

43. An improvement may not qualify for compensation when the tenant quits the holding although it had previously qualified as one for which application to the County Court could be made under s.3(1). It would also appear that a different and more restricted meaning must be attached to the term "improvement" when used in Part I of the 1927 Act from that in s.19(2) of that Act. S.19(2) made a general amendment to the law of landlord and tenant and provided, inter alia, that, where the improvement does not add to the letting value of the holding and it would be reasonable, the landlord may require the tenant to enter into an obligation to reinstate the premises. Moreover, in Lambert v. Woolworth & Co. [1938] Ch. 883, it was held that an improvement was within subsection 19(2) if it constituted an improvement from the point of view of the tenant. In National Electric Theatres Ltd. v. Hudgell [1939] Ch. 553, Morton J., in holding that an improvement within Part I may consist of the total demolition of an existing building and the construction of another of an entirely different character, stated that the interpretation of the term "improvement" in relation to s.19(2) was not of assistance in considering Part I of the Act.

44. See s.47 of the Landlord and Tenant Act 1954.

45. S.1 of the 1927 Act. See also s.2 of the 1927 Act as amended by s.48 of the Landlord and Tenant Act 1954 as to the limitation upon the tenant's right to compensation in certain cases. Moreover, when a tenant purchases the reversion to the demised premises it is probable under the present law, although not entirely certain, that he will not be entitled to compensation for improvements because purchase of the reversion would not seem to amount to "quitting the holding" under s.1(1) of the 1927 Act.

Extension of compensation provisions to residential tenancies. Summary of the Jenkins Committee's views[46]

(5) (i) The Jenkins Committee thought it was reasonably plain that the residential tenant's case for compensation for improvements was not as strong as the case of the business tenant for like protection. The Committee felt no doubt that improvements to business premises were made in order to increase the scale or efficiency of the business. Improvements to residential premises, by contrast, were made to satisfy personal needs and tastes and were therefore more liable to depend on the individual habits and even whims of the particular residents. Since these were necessarily more susceptible to changes of fashion the residential improvement of one decade might become an incubus by the next. Difficult questions of valuation would be likely to arise in the assessment of the additional value, if any, which might be ascribed to outdoor improvements such as landscaping, tennis courts, or greenhouses.

(ii) The Committee were impressed by these considerations and some of the members doubted the desirability of extending compensation provisions to improvements to residential premises. They considered that the practical difficulties of valuation opened up such possibilities of disputed claims as to outweigh what they took to be the questionable advantages of such an extension. They also considered that injustice might be done to landlords of residential premises who bought with the intention of personal occupation at a later date if they were deprived of the right to veto so-called "improvements" which did not accord with their own taste and were moreover compelled to pay for such improvements on the basis of a hypothetical increased letting value, which if they occupied the premises themselves they would never in fact enjoy.

46. These are set out in full in paras. 280-286 of the Report.

(iii) Nevertheless the Committee finally concluded that if the procedure were extended to residential premises there would be adequate safeguards for the landlord. Section 3(1) of the 1927 Act permits the County Court to authorise the making of improvements only if they are of such a nature as to be calculated to add to the letting value of the holding and are reasonable and suitable to the character of the holding. Moreover, assuming the retention of the principle that compensation is payable only for improvements which add to the value of the holding at the termination of the tenancy, the landlord would not be held liable to pay compensation for any improvement which did not in fact have that result.

(iv) The Committee suggested however that the County Court should have the widest discretion to decide in the light of the circumstances of each case whether a projected improvement constituted a genuine "improvement". The court should take into account the character of the alteration proposed and consider whether it was one likely to have a general or a highly specialised appeal limited to future residents with particular interests. Again, an alteration calculated to add to the letting value of the house when relet to another tenant might be quite beyond the means of a landlord intending to re-occupy the house himself and the obligation to pay compensation in such a case might impose genuine hardship. The court should also consider whether the "improvement" was ephemeral in character or was likely to rank as an improvement in the future. In addition the Committee thought that the court should take into account such factors as the probable duration of the tenant's interest in the premises (which the Committee considered to require special emphasis where the tenancy was in its last three years), and hence the extent of the enjoyment he might expect to derive from the improvement. The landlord's future intentions, e.g. as regards

personal occupation should also be relevant. The Committee considered that the court should be free to take the very broadest view in deciding whether to authorise, and subsequently whether to award compensation for, an improvement to residential premises.

(v) The Committee concluded that the complications which would arise in relation to rent controlled premises under the Rent Acts then in force could be adequately provided for by minor amendments to those Acts. The Committee did not think that there were any special classes of residential tenancy (e.g. service tenancies) which would require special treatment.

(6) Now that the Leasehold Reform Act 1967 has given to residential tenants under long leases at low rents the right to enfranchise or extend their leases in certain circumstances, it may be that the arguments for extending Part I of the 1927 Act to residential tenancies are less persuasive than they were when the Jenkins Committee reported. Many of the tenants who might have taken advantage of the provisions of Part I would not wish to do so because they will be able to buy the freehold. There is, however, another factor affecting privately rented houses and flats. Since 1949 grants have been available for the improvement and conversion of such properties. It is understood that not a great number of these grants have been taken up by private landlords; the majority have been paid to owner-occupiers and local authorities. The Housing Act 1969 offers further encouragement to private landlords by making increased grants available and providing that, when the property has been brought up to the required standard, a controlled tenancy may be converted into a regulated tenancy thus enabling the rent to be increased, although such increases will be subject to phasing. In cases where the landlord is unable or unwilling to carry out improvements to bring the property up to the required standard it may be thought desirable that the tenant should be given an additional incentive to carry out

such improvements himself. As the law now stands the residential tenant is not entitled to compensation for carrying out improvements and, if he does so, the landlord enjoys the full benefit of those improvements when the tenancy comes to an end. If residential tenants were entitled to seek the approval of the court to the carrying out of improvements in suitable cases and became entitled to compensation on quitting the property, this might encourage them to improve the properties they occupy in cases where the landlord is unable or unwilling to do so. In this way it might be possible to prolong the useful life of a number of privately rented houses and flats which would otherwise deteriorate, because of inaction on the part of the landlord and tenant, to such an extent as to become unfit for habitation.

Proposition 11. Questions for consideration

(7) The main questions on which views are invited are as follows:-

(i) Should the provisions of Part I of the 1927 Act (which enable tenants of business premises to claim compensation for authorised improvements on quitting the holding) be repealed?

(ii) Should the provisions in section 3(1) of the 1927 Act (permitting the court to authorise the execution by business tenants of improvements to which the landlord will not consent) be retained?

(iii) Should similar provisions (subject to a wider discretion of the court to refuse a tenant's application) be extended to residential tenancies thus enabling residential tenants to apply for the authority of the court to carry out improvements to which the landlord will not give consent and to qualify for compensation, when the tenancy comes to an end, for such of the authorised improvements as add to the letting value of the holding?

PART IV - THE MAIN QUESTIONS FOR CONSIDERATION

The following are the main questions raised in the paper. Answers to these questions are particularly invited, and comment upon the Working Party's Propositions and any other matters discussed in the paper or omitted therefrom will be most welcome.

1. (a) Should absolute covenants be permitted binding tenants against:

   (i) assignment, subletting or parting with possession of the whole of the demised premises, or

   (ii) assignment, subletting or parting with possession of part of the demised premises, or

   (iii) change of user, or

   (iv) the making of alterations, additions and improvements or the erection of new buildings?[47]

   (b) Should a distinction be drawn in this context between different types of tenancies and different categories of covenant, so that absolute covenants might be permitted in some instances but not in others? If so in what types of tenancy and in what categories should absolute covenants be permitted?[48]

   (c) If absolute covenants are to be permitted, should any means of relief be provided for the tenant in relation to any of the categories in (a) above:

   (i) by conferring upon him a statutory right to terminate the tenancy in certain circumstances or to apply to the court for an order terminating the tenancy, or

   (ii) by extending the power of the Lands Tribunal under section 84 of the Law

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47. See Working Party's Proposition 1 and the Commentary at p.13.

48. See especially at p.27.

of Property Act 1925 to vary or discharge restrictive covenants contained in a lease?[49]

(d) Alternatively, should the financial advantages which may induce a landlord to seek to impose an absolute covenant be removed:

(i) by extending the prohibition upon charging a fine or similar monetary sum which at present only applies to the granting of consent under a qualified covenant, or

(ii) by permitting absolute covenants only where they can be shown to be justified (either by specifying, in legislation, the circumstances in which they are justified, or by leaving the matter to the determination of the court)?[50]

2. (i) Should section 19(1)(b) of the 1927 Act (which at present applies only to a building lease granted for a term of more than 40 years) be amended:-

(a) to make it apply to all or only some and, if some, to which leases granted for a term of more than 40 years?

(b) to make it override not only qualified covenants, as at present, but also absolute covenants against assignment underletting charging or parting with possession of:-

(i) the whole of the demised premises

(ii) the whole or any part of the demised premises

so as to make it unnecessary to obtain the consent of the landlord to such transactions except during the last seven years of the term?

(ii) Should the respective periods of 40 years and 7 years referred to in section 19(1)(b), whether

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49. See pp. 17 and 19.

50. See pp. 25 and 27.

or not amended as indicated in question (i), be replaced by other periods and, if so, what periods?

(iii) If the section is no longer confined to "building leases" should its provisions also override covenants restricting change of user or the making of alterations additions or improvements so as to make it unnecessary to obtain the consent of the landlord except during the last seven years of the term or during some other period and, if so, what period?

(iv) If the section is no longer confined to "building leases" would any special provisions be required to deal with blocks of flats in cases where each flat is let on a long lease or underlease and the management of the whole building is controlled by a management company or similar body all the members of which are flat owners.

(It will be appreciated that none of these questions will be material if all absolute covenants take effect as fully qualified covenants and that only some of the questions will be material if absolute covenants are prohibited in some cases but not in others).

3. (i) Should the execution of an assent or assignment by the personal representatives of a deceased tenant, in favour of the person entitled to a tenancy under a will or upon an intestacy, in all cases, constitute an assignment or parting with possession for the purpose of a covenant (whether absolute or qualified) prohibiting assignment or parting with possession?

(ii) If so should an exception be made in favour of a widow, widower or other near relative of the deceased tenant who was residing with him or her at the date of death and who has become entitled to the tenancy on the death?

4. (i) Should all qualified covenants prohibiting without the landlord's consent,

(a) assignment, subletting or parting with possession of the whole of the demised premises, or

(b) assignment, subletting or parting with possession of part of the demised premises, or

(c) change of user, or

(d) alterations, additions and improvements or the erection of new buildings,

be construed as subject to the proviso that consent shall not be unreasonably withheld?

(ii) Should conditions precedent to the operation of a qualified covenant (such as an offer to surrender) be permitted?

(iii) Should mortgaging or charging the demised premises be included in the Propositions in this paper and, if so, should the same rule apply to mortgages by way of subdemise as to charges by way of legal mortgage?

5. (i) Should statutory guidelines be provided as an indication of the factors which the court should take into consideration in determining whether consent has been unreasonably withheld and, if so, what form should such guidelines take?

(ii) In making its decision should the court have regard to the "reasonable apprehensions" of the landlord that his interests would be adversely affected if consent were given or should the court determine the matter on the basis of what the court itself considers reasonable?

(iii) In determining the reasonableness of a refusal should the court be limited to considering the reasons advanced by the landlord in his pleadings or should the court be empowered to take into account any further reasons put forward by the landlord at the hearing or should the court be entitled to have regard only to the reasons (if any) put forward by the landlord at the time of his refusal?

6. (i) Where a qualified covenant has been imposed, should a landlord be absolutely prohibited from requiring any fine or similar monetary payment as a condition of giving his consent to

(a) any assignment, subletting, charging or parting with possession of the premises;

(b) the making of alterations or additions or the erection of new buildings;

(c) any change of user?

(ii) If so, should such a prohibition invalidate even an express agreement of the parties in the lease that such a payment could be required?

(iii) In the case of a qualified covenant against alterations, additions or the erection of new buildings should the landlord be entitled as a condition of giving consent to require the tenant to undertake to reinstate the premises at the end of the term; or should this be permissible, as at present, only where the letting value would be increased and the requirement is in all circumstances reasonable?

(iv) Where a change of user would increase the letting value of the premises

(a) should the landlord be entitled, as a condition of giving consent, to require a reasonable monetary payment or increased rent?

(b) if so, what formulae should be adopted as the basis for calculating the amount of such payment or increased rent?

(v) Where a monetary payment due to a landlord by way of compensation has been determined by the court,

(a) should such payment be recoverable as an ordinary judgment debt, or

(b) should the landlord be given some special security such as a charge on the tenant's interest in the property?

(vi) Where the only matters in dispute are a landlord's entitlement to or the amount of any monetary payment or increased rent, should he be entitled to withhold his consent until such matters have been determined by the court?

7 & 8 Propositions 7 and 8. Questions for consideration

(i) In all cases where a landlord's consent is required, should the landlord be under an obligation not to withhold consent unreasonably nor unreasonably to delay the communication of his decision, and if a landlord fails to observe these obligations should his tenant be entitled to claim damages?

(ii) Should the court be given a discretion to refuse to award such damages in cases where a landlord has unreasonably withheld his consent but was acting under a genuine, though mistaken, belief that he was entitled to do so?

(iii) Should a landlord be deemed to have given consent if he fails to notify the tenant of his decision within a specified period from the date when his tenant has lodged an application for consent?

(iv) Is there any, and if so what, period which could appropriately be specified in relation to question (iii) or should different periods be specified in relation to different types of covenant?

9. (i) Where a qualified covenant has been imposed should the County Court be given limited or unlimited jurisdiction to determine the reasonableness of any sum the landlord is entitled to claim upon granting consent?

(ii) Alternatively, should the Lands Tribunal be given authority to make such determination?

10. (i) Should section 165 of the Housing Act 1957 be retained as a separate head of jurisdiction with or without modifications or should it be incorporated in section 84 of the Law of Property Act 1925?

(ii) If retained, with or without modifications, as a separate head of jurisdiction should such jurisdiction be exercised by the County Court, as at present, or should it be exercised by another tribunal such as the Lands Tribunal?

(iii) If retained, as a separate head of jurisdiction:-

(a) should section 165 contain express power for the relevant tribunal to award compensation

(b) should paragraphs (a) and (b) of section 165 (with or without amendment) remain as alternative grounds or should they be cumulative as the Working Party propose?

11. (i) Should the provisions of Part I of the 1927 Act (which enable tenants of business premises to claim compensation for authorised improvements on quitting the holding) be repealed?

(ii) Should the provisions in section 3(1) of the 1927 Act (permitting the court to authorise the execution by business tenants of improvements to which the landlord will not consent) be retained?

(iii) Should similar provisions (subject to a wider discretion of the court to refuse a tenant's application) be extended to residential tenancies thus enabling residential tenants to apply for the authority of the court to carry out improvements to which the landlord will not give consent and to qualify for compensation, when the tenancy comes to an end, for such of the authorised improvements as add to the letting value of the holding?

APPENDIX 1

Relevant recommendations of the Jenkins Committee

(1950 Cmd. 7982)

RELEVANT RECOMMENDATIONS IN CHAPTER VII

1. We recommend that compensation for improvements, at present limited to tenants of business and professional premises under the Landlord and Tenant Act 1927, sections 1-3, should be made available on broadly similar lines to tenants of residential and other premises (paragraphs 280-286).

2. We recommend the retention of the existing principle of compensation on the basis of increased letting value, with the existing limitation of the amount payable to the net addition to the value of the holding or the recoverable cost of carrying out the improvement, whichever is the less (paragraphs 276-278).

. . . .

7. We recommend that, in the case of future leases, unqualified covenants prohibiting the making of improvements should be construed as if they were covenants against the making of improvements without consent, and should thus be deemed to be subject to the proviso that consent is not to be unreasonably withheld. We also propose that the Tribunal[51] under the amending legislation should be given concurrent jurisdiction with the Court to decide whether consent to any given improvement is being unreasonably withheld (paragraphs 301-306).

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51. See s.53 of the Landlord and Tenant Act 1954.

RELEVANT RECOMMENDATIONS IN CHAPTER VIII

1. We recommend that absolute covenants against assignment or subletting should be construed as if they were covenants against assignment or subletting without licence or consent, and should thus be subject to the proviso that consent is not to be unreasonably withheld (paragraph 311).

2. We recommend that covenants against change of user without licence or consent should similarly be deemed to be subject to a proviso that such licence or consent is not to be unreasonably withheld, and that absolute covenants against change of user should be construed as covenants against change of user without licence or consent and accordingly subject to the like proviso (paragraph 312).

APPENDIX 2

Law Commission's Working Party on Codification of the Law of Landlord and Tenant

Current Membership:

Chairman:	Mr Neil Lawson, Q.C.
Deputy Chairman:	Mr A. Stapleton Cotton
Members, other than representatives of the Law Commission:	Mr E.A.K.Ridley C.B.* (Treasury Solicitor's Office resigned April 1969)
	Mr G.A. Sifton (Treasury Solicitor's Office appointed April 1969)
	Mr G.E. Gammie (Ministry of Housing and Local Government)
	Mr D.S. Gordon (Lord Chancellor's Office)
	Mr M.J. Albery, Q.C. (The Institute of Conveyancers)
Alternate	(Mr L.A. Blundell, Q.C. (The Bar Council) (Mr V.G. Wellings (The Bar Council)
Alternate	(Mr R.H. Bernstein, Q.C. (The Bar Council) (Mr J.T. Plume (The Bar Council)
	Mr E.F. George (The Law Society)
	Mr C.M.R. Peecock (The Law Society)
	Mr C.F. Wegg-Prosser (The Law Society)
	Mr P.S. Edgson, F.R.I.C.S., F.A.I. (Chartered Land Societies Committee)
	Mr W.N.D. Lang, F.R.I.C.S., F.A.I. (Chartered Land Societies Committee)
	Mr M.R. Dunnett, F.R.I.C.S. (Prudential Assurance Co.Ltd.)
Secretary	Mr H.D. Brown

* Mr E.A.K. Ridley retired from the Civil Service in April 1969. The Law Commission are very grateful for the help he has given in this and other items of their work.