The Law Commission

(LAW COM. No. 161)

LEASEHOLD CONVEYANCING

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

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LEASEHOLD CONVEYANCING

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THE LAW COMMISSION

Items VIII and IX of the First Programme

LEASEHOLD CONVEYANCING

To the Right Honourable the Lord Hailsham of St Marylebone, C.H., Lord High Chancellor of Great Britain.

INTRODUCTION

1.1 This report is submitted in the context of Items VIII and IX of our First programme: Codification of the Law of Landlord and Tenant and Transfer of Land (i.e. simplification of conveyancing). In 1985 we published a report recommending certain reforms affecting covenants restricting dispositions, alterations and change of user.[1] We believe that the decision whether or not to give effect to that report has not yet been taken. Contrary to our usual practice, no Bill was appended to that Report.

1.2 The Report recommended, among other things, that where a tenant has to obtain the consent of the landlord to a disposition, the landlord should be under a duty not to withhold his consent unreasonably and to inform the tenant of the decision within a reasonable time. At present, the landlord cannot normally withhold consent unreasonably[2], but he has no duty to give consent unless there is an express covenant to this effect.[3] The tenant cannot sue for damages if the landlord withholds consent unreasonably but can either complete the transaction without the consent (although few assignees would permit this) or seek a declaration in the county court.

1.3 The failure of a landlord to give consent to a transaction can be a considerable source of delay in conveyancing. The Law Society has long pressed for reform in this area. The Conveyancing Standing Committee[4] decided that it wished to encourage implementation of this part of our Report as part of its work to make conveyancing quicker. Judicial support, identifying the mischief, has very recently been given to the need for reform.[5] We accepted the Committee's recommendation that this particular aspect of the problems examined in our previous Report was urgent. Although not yet able to devote the resources necessary to draft a Bill to implement the whole of our previous recommendations, we considered that it would be helpful and appropriate to draft a Bill limited to this particular aspect. The Bill is set out at Appendix A.

1.4 In deciding to publish a Bill which gives effect to only one part of our earlier Report we are conscious that we might be accused of inconsistency. In that Report we suggested[6] that implementation of this recommendation might make fully qualified covenants slightly less attractive to landlords and might lead to some movement towards absolute covenants if they were to remain valid. However we believe that the risk is small because absolute covenants against dispositions are not generally acceptable to tenants, and we doubt whether it would be possible for many landlords to impose such covenants. If we are wrong in this and there is any move towards absolute covenants, this would be an additional reason for the remainder of our Report to be implemented.

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[1] (1985) Law Com. No. 141.

[2] s. 19 Landlord and Tenant Act 1927.

[3] *Treloar* v. *Bigge* (1874) L.R. 9 Ex. 151, *Ideal Film Renting Co. Ltd* v. *Nielsen* [1921] 1 Ch. 575.

[4] The Conveyancing Standing Committee was set up in 1985 at the request of the Lord Chancellor to examine the law and practice of conveyancing with a view to making conveyancing quicker and cheaper.

[5] See *29 Equities Ltd v. Bank Leumi (UK)* [1986] 1 W.L.R. 1490, per Dillon L.J. at p. 1494: "One of the difficulties that arose in this case and arises in many cases where there is a sale of leaseholds subject to landlords' consent to assign is that neither the vendor nor the purchaser has any real leverage on the landlords to give their consent or even to act speedily in going through any necessary formalities. What so often happens is that landlords take a very long time before giving their minds to the matter. Surveyors or managing agents have other things to do and are in no hurry. Ultimately the matter is passed to the landlords' solicitors to prepare a formal deed of licence or consent, and rather a large meal is made of it over a considerable period of time at the expense ultimately of the vendor or purchaser of the leasehold interest."

[6] At para. 4.23.

1.5 In drafting the Bill, we have found it necessary to expand upon and differ slightly from the detail of the recommendations contained in our earlier Report and the remainder of this report is concerned with explaining those differences. We reproduce at Appendix B those parts of our Report which considered this area of the law and which set out the recommendations.

THE RECOMMENDATIONS IN DETAIL

The liability of the landlord

2.1 The Report recommended that "the landlord should be under an inescapable obligation, for breach of which he is liable in damages, not unreasonably to withhold either consent or a decision."[7] The Report did not discuss how this liability should be imposed. We have considered whether a statutory covenant should be implied into every lease, or whether a statutory duty should be imposed on the landlord. We have decided to recommend the latter course. This decision was largely influenced by our consideration of who should be liable.

2.2 If a statutory covenant were to be implied then by virtue of privity of contract,[8] a landlord would remain liable even after assignment of the reversion. We do not think it right that liability should continue in this way. Imposing a statutory duty avoids this problem. The report did not consider whether superior landlords should be liable in damages. There are leases where a tenant proposing a disposition requires the consent of a superior landlord as well as of his immediate landlord. We consider that the superior landlord should have a duty to the tenant, as well as the immediate landlord. A statutory covenant in the lease would only operate between the landlord and tenant as there is no contractual relationship between the tenant and superior landlord. Again, it is a relatively simple matter to impose a statutory duty on the superior landlord as well as the immediate landlord. In addition, the duty we propose may be owed to a tenant's mortgagee who will not normally be in any contractual relationship with any landlord.

2.3 The effect of creating a statutory duty rather than a statutory covenant is that the landlord's liability will be tortious rather than contractual. We do not think that this is likely to make any major difference. Although there are still certain significant differences between the rules for measuring damages for breach of contract and tortious damages, they are unlikely to arise often in this context.[9] However we would reiterate the view expressed in the Report that the purpose of making landlords liable in damages is not to encourage litigation but, in effect, to encourage good practice and quicker conveyancing by giving some "leverage" to vendor-tenants.[10].

Method of application

2.4 The Report recommended that the application should be in writing and in a prescribed form. We now propose that the application should be in writing but we do not make provision for a prescribed form. We are conscious of potential difficulty involved in departing from the earlier Report. However, we now believe that prescribed forms (and there would have to be several different ones) would add to the complexity of the provision without adding greatly to its fairness to either party. There are also cases in which a tenant

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[7] (1985) Law Com. 141, Summary para. 31.

[8] As to which see, (1985) Law Commission Working Paper No. 95 on privity of contract and estate between landlord and tenant which provisionally recommends abrogation of the doctrine of privity of contract between landlord and tenant. The final recommendations we make on privity of contract will, of course, take into account the recommendations in this report.

[9] See *McGregor on Damages*, 14th ed., (1980), Ch. 18: see also *Parsons Ltd.* v. *Uttley Ingham & Co.* [1978] 1 Q.B. 791, where Scarman L.J. said (at p. 806) that "the law is not so absurd as to differentiate between contract and tort save in situations where the agreement, or the factual relationship of the parties with each other requires it in the interest of justice." As a general rule, damages in tort will cover losses which are reasonably foreseeable at the time when the tort is committed whereas damages in contract are normally limited by what was in the contemplation of the parties at the time when the contract was made, although the operation of this limitation in this context is uncertain; note the possibility, unlikely in this instance, of exemplary damages in tort, which are not available for breach of contract.

[10] See ante para. 1.3 footnote 5; also (1985) Law Com. No. 141 para. 8.108: "The purpose of the damages scheme, of course, is not merely to provide compensation for a tenant who has suffered loss, but to deter landlords from acting in a way which may cause him loss, and we think that its deterrent effect will be strong. There may be cases in which damages are hard to assess, but a landlord will be liable if he acts unreasonably, either by delaying a decision or by giving a wrong decision. He would be stupid to run the risk of incurring this liability; and solicitors and other advisers would be failing in their duty if they did not advise him to act in such a way as to avoid it."

must supply information (such as accounts) which would necessarily be too extensive to be included on any form. That information would have to accompany a prescribed form, but the fact that there was a form might mislead some people into believing that a completed form was by itself always a sufficient and comprehensive application. The advantage of having a prescribed form, with prescribed information to be given on any application, is that a warning might be included to bring home to the landlord that he could now be liable in damages. Further, if a prescribed form, rather than just prescribed information, were adopted, it is more likely that the landlord would be given the information he needs to make a decision, and thus the conveyancing process would be speeded up. It might be easier for the courts to decide and for the landlord to assess what is meant by a reasonable time in which to make a decision, if it is clear what information the tenant has to provide. However, the majority of us consider that even to prescribe a warning would unnecessarily increase complexity and add to the risk of invalid applications—that is to say, of applications being invalid for present purposes whilst still valid for all other purposes. Unreasonable refusal of consent or failure to respond at present puts a landlord at risk of the costs of a court application for a declaration, as well as of later litigation concerning breach of covenant or forfeiture. Further, landlords do not receive detailed warnings about the adverse consequences of not complying with their other obligations.[11] If they did, little would be done to preserve any *détente* between individual landlords and tenants. We have therefore decided that, despite respect for the views of those who would prefer a prescribed form and/or warning, our present recommendation should be against any such additional formalities.

Reasonable time

2.5 In the Report[12] it was suggested that 28 days would be a reasonable time limit for the landlord to give his decision, but that the tenant should be able to show that a reasonable time was shorter, and the landlord that it was longer. In view of this scope for uncertainty, we do not now see that the limit of 28 days added much to the proposal. Indeed, we considered that landlords might be misled into delaying for 28 days at least in all cases. Accordingly our Bill refers only to a reasonable time.

Consent from whom?

2.6 When considering the drafting of the Bill it seemed to us that there might be circumstances when a tenant might require the consent of some one other than his landlord, such consent not to be unreasonably withheld. We have therefore made provision to impose the statutory duty on any person whose consent the tenant needs and which cannot be withheld unreasonably.

Consent for whom?

2.7 Similarly, it may be the tenant's mortgagee rather than the tenant who requires consent. Section 89 of the Law of Property Act 1925 provides that where a licence to assign is required on a sale by a mortgagee, such licence shall not be unreasonably refused. We have thought it right to extend our proposals to impose a duty on a landlord to his tenant's mortgagee, so that he will be liable in damages to the mortgagee if he unreasonably refuses consent to assign.

Secure tenancies

2.8 The Report left open the question as to whether these reforms should apply to secure tenancies under the Housing Act 1985[13]. We do not consider that much (if anything) is gained by including secure tenancies. Only in exceptional cases are such tenancies capable of assignment.[14] A tenant is required to obtain the landlord's consent before subletting, but in this case if it is unreasonably withheld it is to be treated as given.[15]

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[11]e.g. the duty to repair implied under ss.11-16 Landlord and Tenant Act 1985 which may give rise to substantial liabilities: no obligations arise until the landlord is sufficiently informed of defects but no form of words has been prescribed (see *O'Brien* v. *Robinson* [1973] A.C. 912 HL).

[12](1985) Law Com. No. 141, Summary para. 36.

[13]Paras. 8.136-8.138.

[14]Housing Act 1985, s.91.

[15]Housing Act 1985, s.93, s.94.

The Crown

2.9 The Report did not consider the question of whether these provisions should bind the Crown. We recognise that further consultation would be necessary if the Crown is to be bound. As a matter of normal and convenient practice, this consultation is best undertaken by your Department once this report has been submitted: clearly such consultations would take place even if we undertook some preliminary consultation now to obtain provisional views. In principle we do not at present see why these new provisions should not bind the Crown, particularly in the light of the fact that the existing statutory provision that a landlord who requires his tenant to obtain consent before assigning or sub-letting is not entitled unreasonably to withhold that consent binds the Crown.[16] We have therefore had drafted a clause which would make the Act bind the Crown in its public capacity. The clause can be deleted if this is not agreed, at a later stage.

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

JOHN GASSON, *Secretary*
13 April 1987

[16]Landlord and Tenant Act 1927, s.19(1) and s.24(1). See also Defective Premises Act 1972 which imposes a statutory duty on landlords and which binds the Crown. In a letter to The Times (20 May 1986) referring to *Department of Transport* v. *Egoroff* (1986) 278 E.G.1361,where the Department of Transport had claimed immunity from repairing obligations, Mr. R.T. Oerton suggested that "surely a thorough review of the patchwork immunities of the Crown is overdue". This Report cannot itself be the place for such a review.

APPENDIX A

Landlord and Tenant Bill

ARRANGEMENT OF CLAUSES

DRAFT

OF A

B I L L

INTITULED

An Act to make new provision for imposing statutory duties in connection with covenants in tenancies against assigning, underletting, charging or parting with the possession of premises without consent.

A.D. 1987.

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

Qualified duty to consent to assigning, underletting etc. of premises.

1.—(1) This section applies in any case where—

(a) a tenancy includes a covenant on the part of the tenant not to enter into one or more of the following transactions, that is—

(i) assigning,

(ii) underletting,

(iii) charging, or

(iv) parting with the possession of,

the premises comprised in the tenancy or any part of the premises without the consent of the landlord or some other person, but

(b) the covenant is subject to the qualification that the consent is not to be unreasonably withheld (whether or not it is also subject to any other qualification).

(2) In this section and section 2 of this Act—

(a) references to a proposed transaction are to any assignment, underletting, charging or parting with possession to which the covenant relates, and

(b) references to the person who may consent to such a transaction are to the person who under the covenant may consent to the tenant entering into the proposed transaction.

EXPLANATORY NOTES

Clause 1

1. This clause implements the recommendation in the report that where a landlord may not unreasonably withhold consent to a tenant's application to assign or sublet, the landlord has a duty to give consent unless he has good reason for not doing so. The duty is imposed upon the landlord directly so that unreasonable withholding of consent will be a breach of statutory duty.

Subsection (1)

2. This sets out the situations in which the duty may apply. By virtue of s.19(1) Landlord and Tenant Act 1927, where there is a covenant against assigning, subletting etc., without consent, in most cases the landlord cannot withhold his consent unreasonably. That provision does not apply to leases of agricultural holdings. Many leases contain a similar provision. Also by s.89(1) Law of Property Act 1925, a landlord may not unreasonably withhold consent to a mortgagee exercising a statutory or express power of sale who applies for licence to assign. However, neither the 1927 Act, nor the provision found in most leases, imposes a duty on the landlord with the result that the tenant cannot sue for damages if consent is withheld unreasonably. The duty is to extend to anyone whose consent the tenant needs under the covenant, for example, a superior landlord or a mortgagee.

(3) Where there is served on the person who may consent to a proposed transaction a written application by the tenant for consent to the transaction, he owes a duty to the tenant within a reasonable time—

(a) to give consent, except in a case where it is reasonable not to give consent,

(b) to serve on the tenant written notes of his decision whether or not to give consent specifying in addition—

(i) if the consent is given subject to conditions, the conditions,

(ii) if the consent is withheld, the reasons for withholding it.

(4) Giving consent subject to any condition that is not a reasonable condition does not satisfy the duty under subsection (3)(a) above.

(5) For the purposes of this Act it is reasonable for a person not to give consent to a proposed transaction only in a case where, if he withheld consent and the tenant completed the transaction, the tenant would be in breach of a covenant.

(6) It is for the person who owed any duty under subsection (3) above—

(a) if he gave consent and the question arises whether he gave it within a reasonable time, to show that he did,

(b) if he gave consent subject to any condition and the question arises whether the condition was a reasonable condition, to show that it was,

(c) if he did not give consent and the question arises whether it was reasonable for him not to do so, to show that it was reasonable,

and, if the question arises whether he served notice under that subsection within a reasonable time, to show that he did.

Subsection (3)

3. In the situation to which subsection (1) applies, this subsection imposes duties on the landlord or other person whose consent is required if the tenant applies in writing for the consent. The landlord must, within a reasonable time, give his consent and give notice that he has given it, or give notice of his reasons for withholding it.

Subsection (4)

4. This subsection prevents a landlord escaping the duty giving consent subject to unreasonable conditions.

Subsection (5)

5. The purpose of this subsection is to cover the situation where the lease itself specifies what is or is not a good reason for withholding consent. It might, for example, state that consent will always be given, provided that the proposed assignee is a respectable person. The Landlord and Tenant Act 1927 applies to such a covenant. By virtue of this subsection, the landlord would only be able to refuse consent if the proposed assignee was not respectable and in the circumstances refusal was reasonable. He could not refuse for any other reason even if, apart from this subsection, the reason would be reasonable. If the tenant asked for consent for assignment to a respectable person, was refused and assigned nevertheless, he would not be in breach of the covenant. The landlord, by withholding consent would be in breach of his duty under subsection (3).

Subsection (6)

6. This puts the burden of proof on the landlord or other person whose consent is required to show that he has fulfilled the duties in subsection (3).

Duty to pass on applications.

2.—(1) If, in a case where section 1 of this Act applies, any person receives a written application by the tenant for consent to a proposed transaction and that person—

(a) is a person who may consent to the transaction or (though not such a person) is the landlord, and

(b) believes that another person, other than a person who he believes has received the application or a copy of it, is a person who may consent to the transaction,

he owes a duty to the tenant (whether or not he owes him any duty under section 1 of this Act) to take such steps as are reasonable to secure the receipt within a reasonable time by the other person of a copy of the application.

(2) The reference in section 1(3) of this Act to the service of an application on a person who may consent to a proposed transaction includes a reference to the receipt by him of an application or a copy of an application (whether it is for his consent or that of another).

Clause 2

7. This provides that when e.g. a tenant applies for consent to his immediate landlord, and also requires the consent of a superior landlord (whose identity or whereabouts he may not know), the immediate landlord will be under a duty to send a copy of the application to the superior landlord. Receipt of a copy of an application in this way is to be treated as an application.

Qualified duty to approve consent by another.

3.—(1) This section applies in any case where—

(a) a tenancy includes a covenant on the part of the tenant not without the approval of the landlord to consent to the sub-tenant—

(i) assigning,
(ii) underletting,
(iii) charging, or
(iv) parting with the possession of,

the premises comprised in the sub-tenancy or any part of the premises, but

(b) the covenant is subject to the qualification that the approval is not to be unreasonably withheld (whether or not it is also subject to any other qualification).

(2) Where there is served on the landlord a written application by the tenant for approval or a copy of a written transaction to which the covenant relates the landlord owes a duty to the sub-tenant within a reasonable time—

(a) to give approval, except in a case where it is reasonable not to give approval,

(b) to serve on the tenant and the sub-tenant written notice of his decision whether or not to give approval specifying in addition—

(i) if approval is given subject to conditions, the conditions,

(ii) if approval is withheld, the reasons for withholding it.

(3) Giving approval subject to any condition that is not a reasonable condition does not satisfy the duty under subsection (2)(a) above.

(4) For the purposes of this section it is reasonable for the landlord not to give approval only in a case where, if he withheld approval and the tenant gave his consent, the tenant would be in breach of covenant.

(5) It is for a landlord who owed any duty under subsection (2) above—

(a) if he gave approval and the question arises whether he gave it within a reasonable time, to show that he did,

(b) if he gave approval subject to any condition and the question arises whether the condition was a reasonable condition, to show that it was,

(c) if he did not give approval and the question arises whether it was reasonable for him not to do so, to show that it was reasonable,

and, if the question arises whether he served notice under that subsection within a reasonable time, to show that he did.

Clause 3

8. In some leases, a tenant covenants not to consent to a disposition by a sub-tenant without obtaining approval to so doing from his own landlord. The Landlord and Tenant Act 1927, s.19 does not apply to such covenants but the covenant itself may state that the landlord may not unreasonably withhold his approval. In such a case, the clause imposes a duty on the landlord, owed to the tenant and to the sub-tenant, not unreasonably to withhold approval. The detailed provisions of the clause mirror the provisions of Clause 1.

Breach of duty.

4. A claim that a person has broken any duty under this Act may be made the subject of civil proceedings in like manner as any other claim in tort for breach of statutory duty.

Interpretation.

5.—(1) In this Act—

"covenant" includes condition and agreement,

"consent" includes licence,

"landlord" includes any superior landlord from whom the tenant's immediate landlord directly or indirectly holds,

"tenancy", subject to subsection (3) below, means any lease or other tenancy (whether made before or after the coming into force of this Act) and includes—

(a) a sub-tenancy, and

(b) an agreement for a tenancy

and references in this Act to the landlord and to the tenant are to be interpreted accordingly, and

"tenant", where the tenancy is affected by a mortgage (within the meaning of the Law of Property Act 1925) and the mortgagee proposes to exercise his statutory or express power of sale, includes the mortgagee.

1925 c.20.

(2) An application or notice is to be treated as served for the purposes of this Act if—

(a) served in any manner provided in the tenancy, and

(b) in respect of any matter for which the tenancy makes no provision, served in any manner provided by section 23 of the Landlord and Tenant Act 1927.

1927 c. 36.

(3) This Act does not apply to a secure tenancy (defined in section 79 of the Housing Act 1985).

1985 c. 68.

(4) This Act applies only to applications for consent or approval served after its coming into force.

Clause 5

Subsection (2)

9. Section 23 of the Landlord and Tenant Act 1927 permits, among other methods, service by sending an application by registered post to the last known address of the landlord, and service on a landlord's agent who is authorised to accept service.

Subsection (3)

10. This is to ensure that the provisions of this Bill do not apply to secure tenancies, that is, public sector tenancies as defined in the Housing Act 1985, s.79.

Subsection (4)

11. By virtue of subsection (1) the Act will apply to leases granted both before and after the commencement date but by virtue of this subsection it will apply only to applications for consent or approval made after that date.

Application to Crown.
1947 c. 44.

6. This Act binds the Crown; but as regards the Crown's liability in tort shall not bind the Crown further than the Crown is made liable in tort by the Crown Proceedings Act 1947.

Clause 6

12. The Act will bind the Crown in its public capacity but it will not bind the Crown in its private capacity.

Short title, commencement and extent.

7.—(1) This Act may be cited as the Landlord and Tenant Act 1987.

(2) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed.

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

Clause 7

13. This provides for the short title, commencement and extent of the Bill.

APPENDIX B

EXTRACTS FROM THE REPORT ON COVENANTS RESTRICTING DISPOSITIONS, ALTERATIONS AND CHANGE OF USER (Law Com. No.141)

(b) The tenant's remedies

3.72 Under a fully qualified covenant the tenant must always *ask* for consent: if he does the forbidden thing without asking he will be in breach of covenant even though the landlord could not reasonably have withheld consent.[1] But if the tenant does ask for consent, and the landlord does withhold it, the tenant—if he thinks the landlord is unreasonable—may take either of two courses.

3.73 First, he may go ahead and do the thing in question and no ill consequences will follow unless the landlord takes action and the court decides that the landlord was reasonable. Second, the tenant may seek a declaration from the court that the landlord is being unreasonable in withholding consent.[2] This second course is safer from the point of view of the tenant. It may also be inevitable if what the tenant wants to do involves the participation of a third party—for example, if the covenant is a disposition covenant and the tenant wants to make a disposition—because the third party will probably not be willing to play his part unless a court declaration has first been obtained.

3.74 Finally, it is important to note a remedy which the tenant does not have. If the landlord withholds consent unreasonably, and the tenant suffers loss as a result, the tenant has no right (under the usual form of fully qualified covenant) to claim this loss from the landlord.[3] This situation will be the subject of recommendations in Part VIII of this report.

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B. TENANT'S REMEDIES

The problems

8.50 We have already dealt briefly with the tenant's remedies against a landlord who withholds consent unreasonably.[4] Here we must examine more closely their defects.

8.51 The existing remedies, such as they are, will assist the tenant in some degree when the landlord unreasonably withholds consent. It is appropriate to begin by analysing this concept of "unreasonable withholding".

(a) "Unreasonable withholding"

8.52 A landlord withholds consent unreasonably if a proper application for consent has been made to him and the circumstances are such that he ought to give it, but:

(1) he refuses it; or

(2) he "consents" subject to a condition which is unreasonable;[5] or

(3) he does nothing at all—in which case he is unreasonably withholding from the time at which a reasonable landlord would have been ready to give a decision;[6] or

(4) he behaves in a dilatory way—in which case, even if he subsequently consents, he is presumably unreasonably withholding between the time mentioned in (3) above and the giving of consent.

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[1] *Eastern Telegraph Co Ltd.* v. *Dent* [1899] 1 Q.B.835

[2] *Mills* v. *Cannon Brewery Co. Ltd* [1920] 2 Ch.38. The county court has jurisdiction, in all cases involving dispositions, "improvements" and change of user, to make such a declaration: Landlord and Tenant Act 1954,s. 53(1).

[3] *Treloar* v. *Bigge* (1874) L.R. 9 Ex.151. Compare *Ideal Film Renting Co. Ltd.* v. *Nielsen* [1921] 1 Ch. 575, where the landlord entered into an express covenant with the tenant that he would not withhold consent unreasonably. It was held that such a covenant rendered the landlord liable in damages for unreasonable withholding although, on the facts, no damages were awarded.

[4] Paras. 3.72-3.74 above.

[5] Housing Act 1980, s.82(3)(b), provides expressly that this amounts to unreasonable withholding, but we think it clearly does so in any event.

[6] Housing Act 1980, ss.36(4)(b) and 82(3)(b), again provides expressly to this effect, but see the preceding footnote.

(b) Shortcomings of the present law

8.53 At any time when the landlord is unreasonably withholding, the tenant can, as explained earlier: [7]

(a) go ahead and do the thing for which consent has been sought; [8] or

(b) apply to the court for a declaration that consent is being unreasonably withheld.

Course (a) is risky, because if the landlord can justify a withholding of consent (and the tenant may have no means of knowing whether he can or not), the tenant will be in breach of covenant. Even if the tenant himself is prepared to take this risk, course (a) will not normally solve his problems if there is (or may be) a third party involved. This latter problem is not confined to disposition covenants—it is obvious that a third party will be reluctant to accept a disposition if his title is at risk in the way just mentioned—but extends to alterations and user covenants as well, because anyone to whom the tenant *subsequently* makes a disposition may well want proof that the alteration or change of use was not improper. Another problem about course (a) arises where the unreasonable withholding falls within case (2) or case (3) in the preceding paragraph: it may be very difficult to judge the point of time at which it begins.

8.54 All these factors make course (b) a more satisfactory one, but it has considerable drawbacks of its own. Expense is one. Delay is another, and a still more serious one. It may take months for an application to be heard, and during that time the tenant may lose part, or all, of the benefit he hoped to gain from doing the thing in question. This is particularly true in the case of disposition covenants: few intending disponees would be prepared to wait for a court hearing, so the tenant is likely to lose his disposition altogether. This process may repeat itself with the tenant losing one bargain after another.

8.55 We have already noted that the landlord is not liable for any loss the tenant may suffer as a result of unreasonable withholding. [9] Not only, therefore, does the tenant have no recompense, but the landlord (because he knows that he risks nothing more than the costs of an action, if the tenant brings one) has little incentive to be either quick or reasonable.

8.56 Convincing representations have been made to us about the hardship to which these difficulties give rise in practice, and we have no doubt that these representations are justified. These difficulties result in serious conveyancing delays which cause frustration and expense to third parties. The legal rules outlined above are one of the most unsatisfactory features in the whole of the area of law with which this report is concerned. Several reforms have been suggested to us and we turn next to consider them. Before doing so, however, it is to be noted that the tenant's difficulties have a further dimension.

(c) A further problem: delayed refusals

8.57 We have been concerned up to now with the unreasonable witholding of consent, and we have pointed out that the tenant's existing remedies are not adequate. But the tenant may suffer nearly as much from a form of behaviour on the part of the landlord which has nothing to do with withholding consent and for which the present law provides no real remedy at all. It consists in the landlord's delay in communicating a *negative* decision which he is entitled to take. [10] The tenant may make in good faith an application for consent which he thinks reasonable. The landlord may have good reasons for refusing it and if he gave a prompt refusal the tenant would have no ground to complain. But if he does not, we think that the tenant has cause for complaint and may suffer loss because of the prolonged uncertainty. For example, under the Law Society's General Conditions of Sale, if the landlord's consent to an assignment is not granted at least five working days before contractual completion date the purchaser is entitled to rescind.

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[7] Para. 3.73 above.

[8] The juridical basis for this is that the effect of unreasonable withholding is to release the tenant from his covenant: see *Treloar* v. *Bigge* (1874) L.R.9Ex.151, per Amphlett, B. at pp. 156 and 157. In other words, consent which is unreasonably withheld is treated as unnecessary. The Housing Act 1980, ss.35(3) and 81(3), provide that a consent unreasonably withheld is to be treated as *given* - a provision which appears to produce the same result. (S. 37A(2) contains a similar provision but in a rather different setting.)

[9] Para. 3.74 above.

[10] It is true, of course, that the tenant may bring matters to a head and get a decision by applying to court for a declaration which (on these facts) the court will refuse.

8.58 We think a fully qualified covenant should be treated as meaning not merely that the landlord will not withhold consent unreasonably but also that he will not unreasonably withhold a *decision*. It is for this dual obligation that a satisfactory means of enforcement is required. Three possibilities have been suggested.

The first possibility: a quicker procedure for resolving disputes

8.59 We have pointed out that course (b)—obtaining a declaration from the court—is normally the most satisfactory remedy available under the present law; and the first idea amounts to a suggestion for its improvement.[11] It is that proceedings for a declaration should be referred automatically for inquiry and report to a member of a panel of expert assessors to be set up at all relevant courts. The members would be appointed on the recommendation of the Royal Institution of Chartered Surveyors. It was suggested that the expert could complete his task within three weeks, and his decision would be final unless one of the parties chose (within a fixed time) to refer the matter to a judge for review.

8.60 There are advantages in this suggestion. At an early stage the assessor would be available to act as a catalyst to produce agreement between the parties, and in many cases his decision would probably be accepted without review. On the other hand, it is not clear that the procedure would be significantly more speedy than that of the county court itself,[12] and it would no doubt often take longer than three weeks. The assessor would be to a large extent in the hands of the parties, and if one of them was bent upon delay the assessor could do little to avoid it. Further, because the question of reasonableness is one of fact and there are no hard and fast rules to apply,[13] it is essentially a judicial matter to be decided by a judge.

8.61 If for these disputes, judicial procedures are required it is wrong to react to the delays which are inherent in judicial procedures by providing that those disputes should be dealt with by procedures which, though they may be more speedy, are less judicial; and in this case it is not clear that the advantage of speed would be obtained. Accordingly we do not support this suggestion. If current suggestions for special Housing Courts are adopted, it may be that there would come into existence a suitable and more speedy judicial forum for resolving these disputes.

The second possibility: damages

8.62 It was suggested in the Working Paper[14] that the landlord should be liable in damages for any loss he may cause the tenant through withholding consent unreasonably, or through unreasonably withholding a decision. We would emphasise the latter point: for reasons given earlier, we think it important that liability in damages (if imposed) should extend to cases where the landlord has delayed his decision, even if it is a justifiably negative one.

8.63 Although it was decided in *Treloar* v. *Bigge*[15] that the landlord is not liable in damages for unreasonable withholding of consent, the decision involved no fundamental principle of law but turned simply upon the wording of a fully qualified covenant in common form. It was held that the words "such consent not to be unreasonably withheld" were to be construed merely as a qualification of the covenant entered into by the tenant and not as a distinct covenant on the part of the landlord that he would not withhold consent unreasonably. But the wording could be such as to impose a liability upon the landlord, and in one decided case it was. In *Ideal Film Renting Co.* v. *Nielsen*[16] the wording was as follows:

> "[The tenant] will not assign, underlet or part with possession of the said premises, or any part thereof, without the previous consent in writing of the [landlord], but the [landlord] covenants with the [tenant] not unreasonably to withhold such consent..."

[11]The suggestion was made by the Holborn Law Society.

[12]As to the jurisdiction of the county court, see footnote 98 to para. 3.73 above and paras. 8.111 and 8.112 below.

[13]See para. 3.62 above.

[14]Proposition 8 on page 70; and see pages 71 and 73.

[15](1874) L.R. 9 Ex.151. The decision has been followed in later cases.

[16][1921] 1 Ch.575.

In his judgment Eve J. said[17] that in this letting there was:

> "...a qualification introduced not by way of proviso in the [tenant's] covenant, but in the shape of an express covenant by the [landlord] not to withhold his consent. Does the fact that the qualification takes this form put the [tenant] in a worse position than if it had been introduced by an express qualification of his own covenant? I do not think it does. The course adopted *gives the [tenant] a further remedy against the [landlord]*, but it also in my opinion qualifies his own covenant, and if consent is unreasonably withheld the [tenant] can, in my opinion, assign without it *and also bring an action for breach of [landlord's] covenant*". (Emphasis added.)

8.64 The courts have not always been happy, in cases where the more usual form of words has to be considered, with the result of *Treloar* v. *Bigge*. Thus in *Rose* v. *Gossman*,[18] Lord Denning M.R. 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".

8.65 The Working Paper suggested[19] that the law would be changed so that the landlord was, even on the usual wording, under a positive obligation for breach of which he would be liable in damages. This proposal received very substantial support. For reasons which we have given earlier,[20] we are satisfied that it is a necessary reform. We therefore recommend that a landlord who has taken a fully qualified covenant (or a covenant which has become fully qualified by reason of the earlier recommendations) should be under an inescapable obligation, for breach of which he is liable in damages, not unreasonably to withhold either consent or a decision.

8.66 Some of those who commented on the proposal made in the Working Paper thought that the assessment of damages might be very difficult, and that it might also be difficult for the tenant to show actual loss. Both these things might indeed be difficult in some cases, though they should be relatively easy in others. There are other contexts in which losses may be difficult to establish, and damages to assess, but this does not affect the principle of liability. In any case, the need to establish loss and to assess damages may arise, in the present context and under the present law, as the *Ideal Film Renting* case shows. Finally, it is not likely that the need would arise often in practice, because the mere existence of the liability should be enough to deter landlords from incurring it.

8.67 Consultees on the Working Paper were also asked[21] whether, if damages were available, the court should have discretion to refuse them in cases where it decided that the landlord's withholding of consent had been unreasonable but was satisfied that he had acted under a genuine but mistaken belief that his grounds for doing so were reasonable. Most commentators thought it should. We have some sympathy for this view but have reached the opposite conclusion. In all such cases the landlord has made the wrong decision, even if unwittingly, and the tenant has suffered loss as a result. Since this loss has to fall somewhere we think it should fall on the landlord. Further the problem is not likely to arise frequently in practice because a landlord who genuinely thinks he is withholding consent for good reasons will not often be judged to have withheld it unreasonably. As we have pointed out in paragraph 3.69 above, the test applied by the courts as to the reasonableness of a landlord's refusal appears to contain a subjective element. Further, any dilution of the damages remedy will be likely to lessen its efficacy in reducing the present conveyancing delays which, as we have said earlier, may cause hardship not only to the tenant but also to third parties. All in all, we do not recommend any discretion of the kind envisaged.

8.68 In this context the first concern of tenants is not damages but a decision from the landlord which is both prompt and right. Whether the threat of damages (which does not exist at all under the present law) would be enough of itself to produce such a decision is a question which we shall consider; but we leave it on one side for the moment in order to discuss the third suggestion for reform because it is a suggestion which aims to achieve this

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[17]At p.582.

[18](1967) 201 Estates Gazette 767 (C.A.)

[19]Working Paper No.25, pages 70-77.

[20]Paras. 8.55-8.58 above.

[21]In para. 5(ii) on page 77.

result more directly. We also leave on one side some remaining details of our proposals about damages, because we shall be better able to formulate them when we have considered this other suggestion.

The third possibility: deemed consent

8.69 In the Working Paper[22] we put forward for comment the idea that the law might "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". This idea gained some approval in consultation and has received strong and sustained support from The Law Society. Those who favour it stress that a tenant is not primarily interested in damages: what he wants is a consent which enables him to proceed. And they point out that a deemed consent scheme would be the ideal solution for the worst feature of the present situation: delay by landlords. In these circumstances we have given detailed consideration to the possibility of recommending such a scheme.

8.70 We would add two things. First, although our eventual conclusion is an adverse one, we reach it with regret because we do not doubt that such a scheme would have real advantages if it could be framed satisfactorily. Second, the idea of a deemed consent scheme seems to us to founder, not for one conclusive reason, but for a number of reasons of which none is conclusive on its own but which are conclusive in combination.

(a) Essentials of a deemed consent scheme

8.71 It is appropriate here to state in summary form the requirements which seem to us essential to a satisfactory scheme for deemed consent.

(i) *Consent must be taken as given if the landlord does not respond within a specified time limit—*

This is a fundamental feature of the scheme, but the imposition of a single time limit upon cases which may differ is an obvious problem. So the need to decide at what moment time should start to run.

(ii) *Deemed consent must be capable of proof—*

The scheme will not work unless it enables the tenant not only to get the deemed consent but to prove, especially to third parties, that he has got it.

(iii) *Deemed consent must not endanger the tenancy—*

If the giving of deemed consent amounts to a breach by the landlord of one of the covenants in *his* tenancy, obvious problems arise.

(iv) *The scheme should operate with a minimum of unfairness to the landlord—*

The scheme is for the benefit of the tenant and it necessarily involves the risk of some unfairness to the landlord. Can this be kept within acceptable limits?

8.72 We shall discuss these requirements more fully later on. Before doing so, we must examine some limitations on the scope of a deemed consent scheme.

(b) Limited scope of a scheme

8.73 There are certain cases in which a deemed consent scheme could not apply.

(i) *Inapplicable to refusals*

8.74 Although the point was not brought out in the Working Paper (and may not have been appreciated by all those who advocated the scheme), it is inherent in the nature of a deemed consent scheme that it could not appply if the landlord refused his consent. (Refusal, for this purpose, would necessarily include giving consent subject to conditions not acceptable to the tenant.) This fact indicates not only a severe limitation on the scheme's efficacy—made more severe by the point mentioned in the next paragraph—but also an interpretation problem; for what exactly amounts to a refusal? If the landlord says, "I will not consent", he is obviously giving a refusal. If he says, "I will not give consent until I have consulted my solicitor", he is clearly giving a refusal which operates until further notice. But what if he simply says, "I have passed on this application to my solicitor for his advice" or, "I cannot deal with this for three months because I am going into hospital"? These cases are more difficult, but we think the landlord's responses should

[22]Pages 75 and 77.

amount to refusals in both—particularly since he could turn the responses into clear refusals by a trifling change of wording. Indeed it might be that any response from the landlord would have to be treated as a refusal unless it amounted to an unqualified consent.

8.75 The fact that the scheme cannot cater for refusals means that a landlord who wishes to avoid the scheme altogether, and to carry on in the same old dilatory way, has a foolproof means of doing so. He may simply say: "No". This refusal does not need to be reasonable: he incurs no penalty if it is not. But once he has given it, the matter has to proceed as if the scheme had never existed. And the deliberately bad landlord—the landlord who combines indifference to his tenant's interests with some knowledge of the law (or ready access to legal advice) and against whom the scheme is perhaps mainly aimed—is precisely the one who is likely to act in this way.[23]

(ii) *Inapplicable to alterations, change of user and dispositions of part*

8.76 The need to secure the essentials of a deemed consent scheme which we have outlined above[24] creates difficulties which are very acute in the case of alterations, change of user and dispositions of part of the premises let. The need to fix a rigid time limit, for example, is a source of great difficulty in these cases; and it is hard to visualise a satisfactory conclusion being reached without some dialogue (which is of course foreign to a deemed consent scheme) taking place between the parties.

8.77 For reasons of this kind The Law Society, who are the main proponents of a deemed consent scheme, have said that they would wish to recommend it only in relation to *assignments* of the *whole* of the property let. They reached this decision when consulted about the scheme on the basis of an earlier draft of this report; and it is true that a deemed consent scheme is more suitable for this case than for any other. In what follows, therefore, we shall assume that the tenant's application is for consent to an assignment of the whole.

(iii) *Inapplicable to cases requiring the landlord's participation*

8.78 In as much as a deemed consent is designed for cases in which the landlord does nothing, it clearly cannot operate when something other than the mere giving of consent is required of the landlord. This may happen because the tenancy lays down in advance conditions which are to be observed on an assignment. If such conditions are reasonable they will be binding and must be observed.

8.79 A condition often laid down in advance is that the assignee shall enter into a direct covenant with the landlord to observe and perform the terms of the tenancy. It might perhaps be possible to comply with this condition in the face of complete non-co-operation by the landlord—the assignee could execute a common form of covenant and send the landlord a copy—but the situation would not be very satisfactory and might be still less satisfactory in the case of other conditions.

(iv) *Deemed consent scheme not a substitute for a damages scheme*

8.80 In the light of the limitations mentioned above—and this again The Law Society has accepted—a deemed consent scheme is not an alternative to a damages scheme of the kind outlined earlier in this part of the report. A damages scheme would still be needed to deal with all the cases in which the deemed consent scheme was inapplicable, including the case where the latter scheme did apply to begin with but was rendered inoperative by the landlord giving a refusal.

8.81 From this point onwards, therefore, the question to be answered is not: is a deemed consent scheme better than a damages scheme? The question is rather: is a deemed consent scheme (confined to assignments of the whole) worth having as an adjunct to a damages scheme?

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[23]A way of tackling the problem might be to provide that deemed consent would operate unless, within the time limit, the landlord had not only given a refusal but indicated the reasons for it (by which he would thereafter be bound). We have already recommended that a landlord should be obliged to give his reasons at the time of a refusal (para. 8.16 above). We doubt, however, whether such a requirement would be satisfactory in this slightly different context. In any case the result would be, not that the tenant obtained deemed consent, but merely that he had the option to proceed without consent—a course which he would seldom take in practice.

[24]Para. 8.71 above.

(c) Problems of securing the essentials

8.82 We now consider the details of the essential requirements outlined above[25] and the problems of securing them.

(i) *Consent must be taken as given if the landlord does not respond within a specified time limit*

8.83 There are two problems here. The first is that of laying down a period of time long enough to allow a reasonable landlord to give a decision, yet not so long that the main purpose of the scheme—avoiding delay—is nullified. Confining the scheme to assignments of the whole certainly simplifies this problem and of course a time limit could be fixed if it had to be fixed, but inevitably there would be cases in which the period was too short[26] or too long.

8.84 The second problem is that of deciding when the period should start to run. It would be wrong if it ran from the date of the tenant's "application", unless the application in fact included all the information (references for the assignee, for example) which the landlord required for his decision. Since it would in practice be very difficult indeed to prove that all such information was included, it would probably be necessary to prescribe a time limited within the main time limit—that is to say, a comparatively short period of time after the application within which the landlord would entitled to, as it were, stop the clock and return it to its original position by requesting further information. If he did this, time would not begin to run until the tenant had supplied the information. If he did not, the application would be conclusively presumed adequate. Some such rule as this seems to us necessary, but it opens up obvious possibilities of disputes and delays. For example, the tenant ought to be absolved from complying with the landlord's request to the extent that it was unreasonable, and if it was wholly unreasonable it ought not to count as a request at all; but in practice the tenant could hardly ignore it either in whole or in part.

(ii) *Deemed consent must be capable of proof*

8.85 Deemed consent would depend upon two things: first, upon the tenant having *made* his application and, second, upon the landlord *not* having responded with anything which could be classed as a refusal. (And if a special rule were made about requests for further information, as suggested in the preceding paragraph, it would depend also upon the landlord *not* having made such a request or, if he had, upon the tenant having *given* the information.)

8.86 All the words italicised involve communication between landlord and tenant. How should this be required to take place? Legislation which required communication of this kind normally provides for some procedure falling short of actual personal service of a document upon the party who is to receive it—for example, that it may be sent by recorded delivery post to his last known address and will then be treated as effectively served.[27]

8.87 Some such rules would no doubt be appropriate here; but their possible unfairness to the landlord must be emphasised. It is inherent in all such rules that the communications in question may go astray or may arrive at a time when the intended recipient is absent or incapacitated. But here the risk would be magnified (because more than one communication might well be involved) and the whole of it would presumably have to fall upon the landlord. The normal rule is that the person who is supposed to receive the communication is the one who suffers if it goes astray, but that would mean (for example) that if a landlord's refusal went astray the tenant would be in breach of covenant if he went ahead in the belief that he had obtained a deemed consent. This seems inconsistent with the purposes of the scheme, so the rule might have to be that all risks of non-receipt fell upon the landlord.

8.88 There is another dimension of this problem, because a scheme for deemed consent to assignments of a tenancy will fail entirely in its purpose unless the tenant can satisfy not

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[25]Para. 8.71.

[26]Quite apart from the "chain" problem discussed in paras. 8.90-8.95 below, it must be borne in mind that "the landlord" might consist of a number of different people (e.g. charity trustees) or be a company with a number of directors and that even if he were a single individual he might have other people to consult (e.g. his mortgagee) before giving consent.

[27]See e.g. Landlord and Tenant Act 1927, s.23, which applies not only to the service of notices under that Act but also to notices served under the Landlord and Tenant Act 1954 (1954 Act, s.66(4)).

only himself but the would-be assignee that deemed consent has been given. The Law Society has made some suggestions on this point. So far as communications from tenant to landlord are concerned, they suggest that the assignee should be entitled to rely on a statutory declaration by the tenant that they were served in the required manner. As regards communcations from landlord to tenant, they suggest that either the same rule should apply (so that the tenant's declaration of non-receipt would be conclusive evidence that the landlord had made no request for further information and/or had given no refusal) or, alternatively, that the landlord should be required to register a request or refusal under the Land Charges Act 1972 (so that the assignee would be entitled to ignore a request or refusal which was not registered or not disclosed on an official search).

8.89 These suggestions seem to us cogent and we agree that some such rules would be necessary. Again, however, we must note that they leave room for possible unfairness to the landlord.

(iii) *Deemed consent must not endanger the tenancy*

8.90 If it were possible for a tenant to obtain deemed consent and act in accordance with it only to find that steps were taken to forfeit the tenancy as a result, then clearly the deemed consent scheme would not serve its purpose. This is in fact a real, if remote, possibility and we must therefore examine it briefly.

8.91 It arises where the tenant who seeks the consent is not the immediate tenant of the freehold owner of the property but is the sub-tenant of someone who is himself a tenant. In theory a hierarchy of any number of intermediate tenants may exist in a chain between the occupying tenant and the freeholder. The problems may be illustrated, however, by taking a simple case in which L is the freeholder and head landlord, T is his tenant, and ST is the tenant of T. ST wishes to assign his tenancy.

8.92 The tenancy granted by L to T contained a fully qualified disposition covenant which extended to subletting. When T wanted to grant a sub-tenancy to ST, he applied to L for consent. L was willing to grant consent, but he still wanted to keep some control over the identities of later occupying sub-tenants and he therefore wished to ensure that ST could not make dispositions without obtaining his (L's) consent. This aim could have been achieved in more ways than one. The best and usual way would be for L, as a condition of giving his consent to the subletting, to require that ST enter into a fully qualified disposition covenant direct with him. If that course had been followed, ST would now know that L's consent to his intended assignment was required and would proceed to seek it—in addition to seeking T's consent, which would probably also be required by the terms of his sub-tenancy.

8.93 But suppose that, instead of taking a direct covenant from ST, L required T to take a fully qualified covenant from ST and then to covenant with L that he (T) would not give *his* consent without first obtaining L's consent. Here again two consents are needed in fact, but ST knows about only one of them. This, then, is the situation which gives rise to the problem. Though skilled drafting should prevent it, it may arise in more ways than one. We think it is likely to arise more often in the case of alteration and user covenants than in that of disposition covenants, but it can arise even in their case.

8.94 The danger to which it gives rise is this. If ST seeks consent to his proposed assignment from T, T is hardly likely to give an express consent without seeking consent from L.[28] He knows that he must do this and that, if he fails to do it, he commits a breach of covenant for which L may seek to forfeit his tenancy. But it is inherent in a deemed consent scheme that consent may be given by people who do not consciously intend to give it. If ST applies to T for consent under a deemed consent scheme, and a few days later T is knocked down by a bus and spends the next two months in hospital, he will still be deemed to have given his consent after four weeks (or whatever the prescribed period may be). L can then seek to forfeit T's tenancy and if he succeeds ST's tenancy will of course disappear with it. It may be said that he will not succeed, or that if he succeeds ST and his assignee will be able to obtain relief against forfeiture (under section 146(4) of the Law of Property Act 1925), but this may not necessarily be true. If ST's assignee really is an unsuitable person, it is difficult to see how the court can justifiably allow him to remain as tenant.

[28]This of itself gives rise to a problem because T will have difficulty in complying with the time limits prescribed by a deemed consent scheme. Unless some special facility were devised for such cases (another source of complexity) his only course would be to "stop the clock" by giving a refusal—but he might well fail to realise this.

8.95 This, then, is the danger to which a deemed consent scheme could give rise in a "chain" situation. We do not suggest that it will arise very often, but the possibility of it is a matter to be taken into account in assessing the value of such a scheme.

(iv) *The scheme should operate with a minimum of unfairness to the landlord*

8.96 It is apparent, from earlier parts of this discussion, that any deemed consent scheme which served its purpose so far as the tenant was concerned would leave room for unfairness to the landlord. The tenant's application, though validly served according to the rules, might not reach him; the fixed time limit might be too short in the particular case; illness or other incapacity might overtake him; the tenant might make a statutory declaration which was false; and so on. Unfortunately these risks would be much more real in the case of the well-intentioned but inexpert private landlord than they would in the case of the well-advised professional (and perhaps ill-intentioned) one. The latter, as we have already pointed out, could in any case avoid the scheme altogether by giving a simple refusal.[29]

8.97 The risks could be mitigated by laying down some standard conditions which would apply for the landlord's benefit in cases of deemed consent, and we think it would be desirable to do this.[30] But the mitigation would be slight and the risks would, for the most part, have to be accepted.

(d) Other considerations

8.98 One or two further points must be made before we describe our conclusions.

(i) *Comparative law*

8.99 We have tried to ascertain whether any other jurisdictions contain anything in the nature of a deemed consent scheme for use in the circumstances with which we are concerned. For this purpose we have investigated the law of Scotland, Ireland (both the Republic and Northern Ireland), Australia, Canada, New Zealand and the United States. We have not found any scheme of this kind.

8.100 It may be worth recording that in most of these jurisdictions there is no damages scheme either, but a damages scheme does exist in some of them (for example, in some of the provinces of Canada[31] and some of the States of America).

(ii) *Combined applications*

8.101 In many cases the intending assignee of a tenancy wishes to change the user of the premises, make alterations to them, or do both, and consent must be obtained for this as well. It would be anomalous if the appropriate applications having been made to the landlord, his inaction operated to give deemed consent to the assignment but a right of action for damages for the withholding of consent to the alterations or change of user.

(iii) *Housing Act 1980, s.37A*

8.102 Section 37A of the Housing Act 1980 (which we mentioned briefly earlier)[32] inserts a term in secure tenancies by which the tenant may, with the landlord's written consent, assign a secure tenancy in exchange for another (or as part of a series of such exchanges). Sub-section (2) of the section says that the consent may not be withheld except on one or more of certain specified grounds[33] and, if withheld otherwise than on such a ground, shall be treated as given. Sub-section (3) then provides that the landlord shall not be entitled to rely on any of these grounds

> "unless, within 42 days of the tenant's application for the consent, the landlord has served on the tenant a notice specifying that ground and giving particulars of it."

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[29]Paras. 8.74 and 8.75 above. Since a deemed consent scheme would have to operate in conjunction with a damages scheme (paras. 8.80 and 8.81 above) his refusal, if unjustified, would attract damages. It may be argued that this would prevent him from giving one. But that would really be an argument against the deemed consent scheme itself because if the threat of damages would be enough to prevent a landlord giving an unreasonable refusal it would also be enough, presumably, to stop him delaying his decision.

[30]Compare paras. 8.128-8.131 below.

[31]The British Columbia Residential Tenancy Act contains a provision, added in 1981, which actually makes it an offence for a landlord arbitrarily or unreasonably to withhold consent to the assignment or under-letting of a residential tenancy. A criminal sanction of this kind would, we think, be workable, but not acceptable, in this country.

[32]Para. 3.43 above.

[33]The grounds are in schedule 4A to the Act. Section 37A(4) permits a conditional consent to be given if there is an outstanding breach of covenant.

8.103 The intention clearly is that if the landlord does nothing within the 42 day period the tenant is free to make his assignment. The section therefore embodies a kind of deemed consent scheme, and the question is: if such a scheme is used there, why can it not be used more generally?

8.104 The answer is that most of the problems identified in the foregoing paragraphs do not apply, or apply only to a limited extent, in that setting. The landlords with whom the section is concerned are all local authorities or other institutions (rather than individuals) which can set up machinery to deal with requests for consent. They cannot, collectively, be absent or ill. They are not much prejudiced by a rigid time limit (and especially not by one as long as 42 days); and they will not need to stop the clock and ask for further information because all the necessary information should be in their possession. They cannot upset the working of the scheme by giving refusal, except on one of the permitted grounds (and they can no doubt be relied upon not to refuse on a ground which has no substance). If something does go wrong in an individual case, they are large enough to absorb the misfortune. And although some problems—for example, the problem of communication and of proving communication—are not expressly dealt with in the section, the fact that the landlords are permanent and responsible bodies, whose whereabouts are known and who are always available to give information, serves to reduce them very greatly.

8.105 It does not seem to us therefore that the existence of a deemed consent scheme in section 37A is in itself a reliable indication of its desirability elsewhere.

(e) Conclusions

8.106 In view of the authoritative support which has been expressed for a deemed consent scheme, we have considered all its aspects in detail. We do not conclude that such a scheme would (at least if confined to cases of assignment of the whole of the property let) be unworkable; but we are convinced that it would be less beneficial than it seems at first sight and that it would involve a good deal of complexity, some risks and a certain amount of what may best be described as rough justice.

8.107 The difficulties which confront a tenant who seeks his landlord's consent under the present law[34] demand a solution. It is clear to us that a damages scheme of the kind recommended earlier[35] (and considered in more detail later[36]) must form part of that solution.[37] The question is whether it should form the whole of the solution or whether it should be supplemented by a deemed consent scheme.

8.108 The deemed consent scheme would be confined to applications for consent to assign the whole of the property let, and even then it would be of no help to a tenant unless (speaking broadly) the landlord simply did nothing. Cases in which he gave anything amounting to a refusal, cases involving other types of disposition, all cases involving alteration covenants and all cases involving user covenants—these would be governed solely by the damages scheme. The purpose of the damages scheme, of course, is not merely to provide compensation for a tenant who has suffered loss, but to deter landlords from acting in a way which may cause him loss, and we think that its deterrent effect will be strong. There may be cases in which damages are hard to assess, but a landlord will be liable if he acts unreasonably, either by delaying a decision or by giving a wrong decision. He would be stupid to run the risk of incurring this liability; and solicitors and other advisers would be failing in their duty if they did not advise him to act in such a way as to avoid it.

8.109 Our view is, therefore, that the damages scheme should be effective to solve the tenant's problems—and just as effective in those cases which would fall within a deemed consent scheme as in the cases which would fall outside it. This being so, and having regard to its difficulties and shortcomings, we do not recommend a deemed consent scheme.

The final recommendations

8.110 Under this heading we deal with our final views about tenant's remedies.

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[34]Paras. 8.53-8.58 above.

[35]Paras. 8.62-8.68 above.

[36]Paras. 8.112-8.131 below.

[37]Paras. 8.80 and 8.81 above.

(a) The present law

8.111 The two remedies provided by the present law in the case of unreasonable withholding-proceeding without consent; and obtaining a declaration from the court—should of course be retained. We also recommend that section 53(1) of the Landlord and Tenant Act 1954, which gives the county court jurisdiction to make the declaration no matter what the annual value of the property, should be extended to cover all fully qualified disposition, alteration and user covenants as we have previously defined them. At present it falls short of this: alterations which do not amount to "improvements", for example, fall outside its scope.

(b) A damages scheme

8.112 Earlier in this part of the report[38] we recommended that a landlord who has taken a fully qualified covenant (or a covenant which has become fully qualified by reason of our earlier recommendations) should be under an inescapable obligation, for breach of which he is liable in damages, not unreasonably to withhold either consent or a decision. Since the county court has and should in our view continue to have full jurisdiction to determine whether consent has been unreasonably withheld, we recommend that it should also have full jurisdiction to award damages[39] (which might well be claimed in the same action). However, there should be provision to enable proceedings to be transferred to the High Court where the amount of the claim exceeds the normal county court maximum.

8.113 The adoption of a scheme for deemed consent would not make a damages scheme unnecessary.[40] It would merely remove certain cases—namely, those in which the landlord made no substantive response, positive or negative, during the period allowed—from its ambit, because in those cases consent would have been deemed to have been given and no question of damages could arise. The result of rejection of a scheme for deemed consent is to bring those cases, too, within the scope of the damages scheme.

8.114 We think, however, that delay would be more effectively prevented if certain standard time limits were established and standard forms of application prescribed by statutory instrument and their use (or the use of forms substantially to the like effect) made an essential pre-condition for the coming into existence of the landlord's liability in damages. We deal later with these two matters. We turn first to a problem which is to some extent common both to a deemed consent scheme and to a scheme for damages.

(i) *The "chain" problem*

8.115 We have already noted that the ability of a tenant at the end of a chain of tenancies to do something affected by a fully qualified covenant may depend not only on the consent of his own landlord but on that of other landlords high up the chain.[41] These other consents may be either:

(a) consents which his landlord needs to obtain (perhaps quite unknown to the tenant himself) before he can safely give his own consent to the tenant, or

(b) consents explicitly required under covenants into which the tenant has entered.

These consents may be called category (a) and category (b) consents respectively. Any one landlord may possibly have to give consent under both headings.

8.116 We think it likely that category (a) consents are relatively rare in connection with dispositions but rather more frequent in the case of alterations and changes of user. Suppose, for example, that L grants a tenancy to T containing a covenant:

"not without the landlord's consent to make or permit any alterations..."

or a covenant:

"that no alterations shall be made without the landlord's consent...."

If T subsequently sub-lets to ST, he would be wise to take a covenant from ST to obtain L's consent (a category (b) consent), but what he may actually do is to require ST to enter

[38]Para. 8.65 above.

[39]This includes damages payable by reason of the further recommendation made in para. 8.117 below.

[40]Paras. 8.80 and 8.81 above.

[41]Paras. 8.90-8.95 above.

into a covenant in the same words as the one in his tenancy, so that the reference to "the landlord" is a reference to T. The consent which must be obtained from L if ST seeks consent from T is then a category (a) consent.

8.117 The present practice, as we understand it, is for the immediate landlord to pass the application on to the next landlord up the chain, and for him to pass it to the next, and so on in turn. In this way both category (a) and category (b) consents are in due course sought. We think that this practice provides the best available means of dealing with the chain problem. We recommend that it be strengthened by imposing upon the landlord a positive duty to pass the application, within a reasonable time, to the next landlord up the chain (or the person whom he honestly believes to be such). We also recommend that he should be liable in damages for breach of duty to the tenant who originally applied to make the disposition, alteration or change of use, if the latter suffers loss as a result.[42]

8.118 There are two cases, however, in which we think that the landlord's duty to pass an application to the next landlord up the chain should be qualified. First, if he knew for a fact that *no* other consents were required, this duty should not arise at all: it would obviously be pointless in those circumstances to require the application to be passed on. Second, if he knew that consent of his immediate superior landlord was not required, he should be at liberty to pass the application instead of the first landlord up the chain whose consent was (or might be) required. We say merely that he should be at liberty to do this because he might in practice be unaware of the identity and address of the higher landlord and so unable to pass the application direct to him. In such a case it should be possible for him to comply with his duty by passing it to his immediate superior for onward transmission.

8.119 Several aspects of the recommendation made in paragraph 8.117 require explanation. First, it presupposes that the tenant's application is an application worthy of the name. If the tenant made an application so inadequate that it could not form the basis of a decision, there would be little point in the landlord passing it on; and any loss to the tenant would flow from the inadequacy of the application, not from the landlord's failure to pass it up the chain.

8.120 Second, the recommendation is intended to apply not only to the immediate landlord who receives an application from the applicant tenant, but also to any landlord in the chain to whom an application is passed by a landlord below him.

8.121 Third, the way in which the duty is framed involves the consequence (even when account is taken of the qualifications recommended in paragraph 8.118) that applications might be passed to landlords whose consent was not in fact needed, and that applications might plough their way up an extended chain of tenancies long after all the necessary consents had actually been obtained. But such results would seldom happen in practice. For one thing, the process would stop as soon as the application reached a landlord who knew that no superior landlord needed to give consent. And for another, there would be nothing to prevent an applicant tenant agreeing that the process should stop at any time. In particular, we think that a landlord who refused consent on his own behalf before passing the application up the chain could, and should, ask the tenant whether he wished the process to continue any further.[43]

8.122 Finally, it may be asked why the duty to apply for category (b) consents should not be placed upon the applicant tenant himself. On the face of it this would be simpler, and more fair, to intermediate landlords who would thus be relieved of their duty to pass applications up the chain in cases where they themselves did not require any consent. But (as we have pointed out) any one landlord may have to give consents in both category (a) and category (b); and it would obviously be undesirable for an individual landlord to be faced with two separate applications, coming at different times from different people. There is also the possibility that the tenant himself might not know the identities of the landlords concerned, because although he had entered into covenants which expressly required their consent, their actual identities might have been hidden behind a description (for example, "the superior landlord") and might in any case have changed since the covenant was taken.

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[42]We recommend that the county court should again have full jurisdiction to award these damages.

[43]Unless the tenant considered the refusal justified and was content to accept it, he would probably be well advised in these circumstances to let the process continue.

(ii) *Time limits*

8.123 As a result of recommendations already made, a landlord could be liable in damages for:

(a) giving an unreasonable refusal of consent (including the giving of consent subject to unreasonable conditions),

(b) failing to give a decision, one way or the other, within a reasonable time, or

(c) failing to pass an application to a superior landlord within a reasonable time.

8.124 Heads (b) and (c) above involve the concept of "a reasonable time",[44] and we think it would be helpful to have some statutory guidance about this. The guidance should not take the form of fixed and unalterable time limits—we have already noted, in connection with the deemed consent scheme, the difficulties to which such limits can lead[45] - but rather of time limits which would apply unless one party showed, on the facts of a particular case, that they were either too long or too short to be reasonable.

8.125 On that basis our initial recommendation is that a reasonable time in head (b) should be taken as 28 days in the case of a disposition covenant and 56 days in the case of an alteration or user covenant; and that a reasonable time in head (c) should be taken as 14 days in all cases. These periods may need to be revised in light of comment by interested persons and bodies after the publication of this report.

8.126 If these time limits were not complied with, the landlord would have to discharge the onus of showing positively that the delay was not in fact unreasonable. It should be made clear, however, that no landlord would be liable for delay caused by a superior landlord's failure to give him the consent he needed in order to give his own consent.

8.127 Conversely, if the time limits were complied with, a tenant who wished nonetheless to claim damages would have to discharge the onus of showing positively that there was, on the facts, unreasonable delay even so.

(iii) *Standard forms*

8.128 We think that standard forms of application should be prescribed by statutory instrument and their use (or the use of forms substantially to the like effect) made mandatory. We discuss their advantages in the following paragraphs. Here we give a brief description of their possible contents. We envisage that they would:

(a) Draw the tenant's attention to the need to give (and where appropriate provide space for the giving of) information about the application.

(i) In the case of disposition, this would consist of the nature of the disposition (including, in the case of a sub-tenancy, the term, rent and other details), the part of the property affected (if the disposition related only to part), and details of the disponee and references for him.

(ii) In the case of alterations, it would consist of plans and specifications detailed enough to enable the landlord to assess the nature and extent of the work envisaged.

(iii) In the case of a change of user, it would consist of full details of the change.

(b) Draw the landlord's attention, in simple language, to his duty not unreasonably to withhold consent or delay a decision one way or the other, to give his reasons if he withholds consent or gives it subject to conditions; and to his additional duty (in a "chain" case) to pass on the application to superior landlords; to the possibility of being liable in damages for breach of these duties; and to the presumptive time limits provided as tests of reasonableness.

(c) Contain (perhaps in a separate part of the form which the landlord could sign and return to the tenant by way of formal consent) certain standard conditions to which consent, if granted, would be subject. These could begin with the condition that the tenant pay the landlord's reasonable expenses.[46] Thereafter the conditions would vary

[44]Time would start to run when a landlord received an application with whatever supporting information was necessary to enable him to make a decision.

[45]See in particular paras. 8.83 and 8.84 and footnote 63 to para. 8.94 above.

[46]Paras. 8.26 and 8.27 above.

according to the nature of the application. Formal grants of consent nowadays commonly contain certain conditions which are regarded as usual and uncontroversial, and these would be set out in the form.

The landlord could delete any conditions which he did not wish to impose and would be able to add any special requirements which were appropriate and necessary.

8.129 Consent must in practice be given by means of a formal written document, and there are at present strong complaints about the delay involved in the preparation of such documents and about their cost.

8.130 The requirement to use the prescribed form (to which minor additions could be made if necessary) should result in reducing both delay and cost.

8.131 Since the contents of the prescribed forms would have to differ according to the transaction, we propose that different forms be prescribed. Initially at any rate—other forms might be added later—we think they should cover:

Assignment of the whole

Assignment of part

Subletting of the whole

Subletting of part

Alterations

Change of user

C. APPLICABILITY OF RECOMMENDATIONS

Existing tenancies

8.132 The recommendations made in this part of the report should apply to existing lettings as well as to future ones. The factors which led us to a contrary conclusion in relation to recommendations in Parts VI and VII are not, in general, relevant here.

8.133 In general retrospective legislation which upsets bargains entered into on the strength of the existing law is undesirable. But we think on balance that this case should be an exception to that rule. As to retrospectivity, the changes in question would be retrospective only in a limited sense: though they would apply to existing lettings they would not, of course, apply to any but future applications for consent. So far as existing bargains are concerned, it is true (in theory at least) that the parties could, had they been forewarned, have avoided these recommendations by entering into absolute covenants instead of fully qualified ones; but we doubt whether this would often have happened in practice.

8.134 In any case, these points are outweighed by other factors. In this part of the report the most important recommendation relates to damages; and we believe that the existing law, in denying tenants this remedy, is unfair. We think it would be better if this unfairness did not continue in relation to existing tenants; and legislation designed to remedy unfairness of this kind is often retrospective in the limited sense explained above. Further, the present absence of a remedy in damages rests upon *Treloar* v. *Bigge*[47] and if the effect of that case had been reversed by a higher court, as it might have been, the change would have been retrospective in that sense.

8.135 There is also a distinction to be drawn between a substantive right on the one hand, and the means of enforcing it on the other; and these recommendations are directed, not to altering the former, but to improving the latter. Finally there is the question of convenience: if applications for consent had a different effect, particularly in regard to landlords' potential liability to damages, according to the date of the tenancy (and other considerations of the kind explained earlier[48]), considerable and unwarranted confusion would arise. In particular, if the form of application contained a reference to damages, as

[47]See para. 8.63 above.

[48]Para. 6.22 above.

we suggest,[49] it would not be appropriate for "old" tenancies (though no doubt it would often be used for them) and another form might have to be prescribed.

Tenancies within the Housing Act 1980

8.136 The Housing Act 1980 contains several provisions which imply fully qualified covenants in certain residential tenancies and deal with the incidents of the covenants thus implied.

8.137 The network of legal rights and obligations which applies in relation to these Housing Act covenants is an amalgam, being made up in part of a substratum of existing law and in part of express statutory provisions which operate to augment, modify or replace elements of that law in their application to these particular covenants. As we explained in an earlier paragraph[50] we do not in this report recommend changes in the express statutory provisions. It may be, however, that the changes which we recommend in those areas of the general law which are unaffected by the express provisions should apply to the Housing Act covenants in the same way as they apply to covenants in general.

8.138 The most important of these latter changes would be those implementing the recommendations for a damages scheme. We recognise, however, that there may be special reasons for excepting tenancies within the Housing Act, or some of them, from this particular recommendation.

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FULLY QUALIFIED COVENANTS: THEIR EFFECT; AND THE TENANT'S REMEDIES

A. EFFECT

Reasonableness

(22) In general the existing law deals satisfactorily with the "reasonableness" of a landlord's withholding of consent under a fully qualified disposition, alteration or user covenant. No specific guidelines should be laid down. There should be provisions like those in the Housing Act 1980 that the landlord should give his reasons for refusing consent at the time of a refusal. If a landlord withholds consent it should in future be for him to show that he has acted reasonably, and not for the tenant to show the contrary.
(Paragraphs 8.3-8.16)

Conditions

(23) The landlord's right, under a fully qualified covenant, to impose conditions upon the giving of consent should continue to depend upon the reasonableness of the conditions; but the provisions summarised in paragraphs (24)-(28) below should be made to deal with particular types of condition.
(Paragraphs 8.17-8.18)

(24) It should never be regarded as reasonable for a landlord to demand a fine or any similar payment or consideration for the giving of his consent, and any payment or consideration given should be recoverable.
(Paragraphs 8.20-8.25)

(25) It should always be regarded as reasonable for a landlord to require the payment of any expenses he may reasonably incur in connection with the giving of consent.
(Paragraphs 8.26 and 8.27)

(26) If a tenant applies to make alterations or a change of user which would cause the landlord loss or damage such that he would otherwise be entitled to withhold consent because of it, the landlord should be entitled to require the payment of compensation as a condition of giving consent. Further, it should be made clear that the county court has unlimited jurisdiction to make a declaration as to the reasonableness of compensation.
(Paragraphs 8.28-8.32)

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[49]Para. 8.128, sub-para. (b), above

[50]Para. 8.5 above.

(27) The possibility that a landlord should be entitled, as a condition of giving his consent to a change of user which would increase the letting value of the property, to require an increase in rent or other payment, was considered but rejected.
(Paragraphs 8.33-8.39)

(28) If a tenant applies to make alterations, the landlord should be entitled, in any case in which the circumstances make it reasonable, to impose a condition that the property be restored to its former condition at the end of the tenancy. And it should be possible, again if the circumstances make it reasonable, for a landlord to demand security for the performance of a condition of this kind.
(Paragraphs 8.40-8.49)

B. TENANT'S REMEDIES

(29) Part VIII B of the report discusses the inadequacy of a tenant's existing rights when the landlord withholds consent unreasonably or unreasonably delays his decision. It considers and rejects two possible remedies: a different procedure for resolving disputes, and a scheme under which inaction on the part of the landlord would result in the giving of "deemed consent". It concludes by making the recommendations summarised in the following paragraphs.
(Paragraphs 8.50-8.109)

(30) The two remedies which the existing law gives a tenant in the case of an unreasonable withholding of consent—proceeding without consent; and obtaining a declaration from the court—should be retained. And the county court should have jurisdiction to make the declaration in respect of all dispositions, alteration and user covenants.
(Paragraph 8.111)

(31) In addition, the landlord should be under an inescapable obligation, for breach of which he is liable in damages, not unreasonably to withhold either consent or a decision.
(Paragraphs 8.65 and 8.112)

(32) Where sub-tenancies have been granted in a "chain" and the consent of more than one landlord may be required, any landlord who receives an application for consent should be under a positive duty to pass the application, within a reasonable time, to the next landlord up the chain (or the person whom he honestly believes to be such). He should be liable in damages for breach of this duty to the applicant tenant if the latter suffers loss as a result.
(Paragraph 8.117)

(33) The duty just mentioned should be qualified in two ways:

(a) It should not arise if the landlord in question knew that no other consents were required.

(b) If the landlord in question knew that the consent of his immediately superior landlord was not required, he should be at liberty to pass the application instead to the first landlord up the chain whose consent was (or might be) required.

(Paragraph 8.118)

(34) The recommendations summarised in paragraphs (32) and (33) above apply not only to the landlord who receives an application from the applicant tenant but to any landlord in the chain to whom an application is passed by a landlord below him. But they do not apply at all if the application is inadequate.
(Paragraphs 8.119 and 8.120)

(35) The county court should always have jurisdiction to award the damages mentioned in paragraphs (31) and (32) above.
(Paragraph 8.112 and footnote 77 to paragraph 8.117)

(36) As a result of recommendations summarised in paragraphs (31) and (32) above, a landlord could be liable in damages for:

(a) giving an unreasonable refusal of consent;

(b) failing to give a decision, one way or the other, within a reasonable time; or

(c) failing to pass on an application to a superior landlord within a reasonable time.

In the absence of evidence to the contrary, a "reasonable time" in *(b)* should be taken to be 28 days in the case of a disposition or 56 days in the case of alterations or a change of user, and a "reasonable time" in *(c)* should be taken to be 14 days. It should however be open to the tenant to discharge the onus of showing that, in the particular circumstances, a reasonable time was shorter; and to a landlord to show that it was longer (and no landlord should be liable for delay caused by a superior landlord's failure to give him any consent he needs in order to give his own consent).
(Paragraphs 8.123-8.127)

(37) Forms of application for consent should be prescribed by statutory instruments and made mandatory. They should refer to (among other things) the landlord's obligations and to his possible liability in damages, and they should include a form of consent incorporating certain standard conditions which the landlord could use (with or without additions or deletions) in order to give consent.
(Paragraph 9.128)

C. APPLICABILITY OF RECOMMENDATIONS

(38) The recommendations summarised in paragraphs (22)-(37) above should apply in relation to existing as well as future lettings.
(Paragraphs 8.132-8.135)

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