The Law Commission

Consultation Paper No.123

Landlord and Tenant
Responsibility for State and Condition of Property

HMSO

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This consultation paper, completed on 25 March 1992, is circulated for comment and criticism only. It does not represent the final views of the Law Commission.

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PART I

INTRODUCTION

Background

1.1 Both landlord and tenant have an obvious interest in the state and condition of property which one lets to the other. The landlord wishes to ensure that the value of his property is maintained; the tenant may equally be interested in its value, but is also concerned that it is in or is put into a fit state for the use to which he wishes to put it. The obligations which one or both parties undertake to maintain the property may be a matter of contract, with the terms recorded in the lease or tenancy agreement, or in some cases they are implied by law.

1.2 The present rules can be criticised for not guaranteeing that there will always be a party responsible for maintaining premises which are let, for failing to provide a satisfactory standard which premises must meet, for providing incomplete and piecemeal statutory intervention and for being difficult to ascertain. This Consultation Paper examines the scope of both the contractual and the implied obligations, and also issues concerning their enforcement, with a view to solutions to meet the criticisms.

1.3 In 1950 the Jenkins Committee recommended the adoption of standard repairing obligations, as part of a code of standard covenants to apply to most leases.[1] The suggested range of obligations followed what the Committee considered to be normal practice in increasing the landlord's degree of responsibility as the period of the letting reduced. It was to be possible to exclude the standard terms by written agreement between the parties.[2] This scheme was not adopted.

1.4 The Housing Act 1961 introduced implied repairing obligations on the part of the landlord into most lettings of residential accommodation for terms of up to seven years.[3] This duty can only be excluded under the authority of a court order.

1.5 In 1970 the Commission published a Report[4] which included two recommendations: first, that landlords should be liable for damage or injury

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[1] They were to apply to unfurnished lettings at a rack rent of all types of premises, but not to furnished lettings or building leases.

[2] *Leasehold Committee - Final Report* (1950) Cmd. 7982, paras. 267-273 and Table facing p.118.

[3] Housing Act 1961, ss.32-33, now Landlord and Tenant Act 1985, ss.11-16; paras. 2.31 *et seq* below.

[4] *Civil Liability of Vendors and Lessors for Defective Premises* (1970) Law Com. No. 40.

resulting from defects in premises of which they knew at the date of the letting and, secondly, that a landlord under a repairing obligation or with a right to do repairs should have a general duty of care in relation to injury or damage resulting from a failure to perform the obligation or to exercise the right.[5] The second, but not the first,[6] of these recommendations was implemented by the Defective Premises Act 1972.[7]

1.6 In 1975 the Commission reported on a wide range of obligations undertaken by parties to leases.[8] The Report recommended dividing statutory implied lease covenants into "variable covenants" (which the parties would be free to modify or exclude) and "overriding covenants" (which would apply regardless of any express term). In relation to repairs, it recommended an overriding landlord's covenant to repair the structure and exterior of dwellings let for less than seven years, and a series of variable covenants as follows:[9]

Generally	Tenant to take proper care of premises and make good wilful damage
Furnished dwelling let for up to twenty years	Landlord to repair the whole property
Other dwellings let for up to twenty years (not covered by landlord's overriding covenant)	Landlord to repair structure and exterior, tenant to repair the remainder
Lettings for over twenty years	Tenant to repair the whole property
Lettings of part of a building	Landlord to repair structure and exterior of the building, and to keep in good order any part of the building and curtilage which the tenant is entitled to use, and to maintain facilities provided by the landlord

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5 *Ibid.*, para. 70(3), (4).

6 See para. 2.26 below.

7 Section 4; para. 2.52 below.

8 *Report on Obligations of Landlords and Tenants* (1975) Law Com. No. 67.

9 *Ibid.*, paras. 136-152.

Means of access to demised premises in the possession or control of the landlord	Landlord to keep the means of access safe and fit for use

1.7 No action has been taken to implement the proposals in that Report. We have previously stated that "we can only assume, given the time which has elapsed since the Report was published, that they will not be implemented".[10] This Consultation Paper therefore covers some of the same ground as that Report, although it ranges more widely.

1.8 The Commission's Report on Forfeiture of Tenancies[11] touched on certain issues directly concerning the enforcement of repairing covenants.[12] We have in hand further work aimed at publishing a Bill to implement the recommendations in that Report,[13] and we have therefore sought to avoid dealing with the same topics in this study.

1.9 Another topic covered by this Consultation Paper has also been considered previously. Very soon after the Commission was established, it examined the operation of the doctrine of waste between landlords and tenants. Having circulated a questionnaire to Government Departments and other interested bodies, it formulated some propositions for reform.[14] After deciding to extend the study to include the law of waste as it applied in other cases, the Commission did not carry the work forward to a conclusion because it became part of the project to codify the law of landlord and tenant which was subsequently abandoned.

1.10 Topics relevant to this Consultation Paper have also been considered in two Consultation Papers, on a *New Right to Repair* and a *Better Tenant's Charter*, circulated by the Department of the Environment in 1991 pursuant to the *Citizens' Charter White Paper*.[15] The aim is to include in an enhanced Tenant's Charter an improved right to repair and to strengthen procedures for urgent minor repairs affecting health, safety or crime prevention.

1.11 We have been much assisted in the preparation of this Consultation Paper by Mr Peter Smith, Reader in Law at the University of Reading, to whom we are most grateful. We are also grateful to Mr T M Fox LL.M, formerly a research assistant with the Commission, for making available to us his unpublished thesis on this subject.

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[10] *Landlord and Tenant: Reform of the Law* (1987) Law Com. No. 162, para. 1.6. That later Report drew attention to some unsatisfactory aspects of the law on this topic: paras. 4.69-4.71.

[11] (1985) Law Com. No. 142.

[12] *Ibid.*, paras. 8.39-8.62.

[13] *Twenty-sixth Annual Report* (1992) Law Com. No. 206, para. 2.44.

[14] *First Annual Report* (1966) Law Com. No. 4, paras. 62-64.

[15] Cm. 1599.

Fitness for Human Habitation

1.12 One aspect of this subject is the statutory implied obligation of some landlords of houses to put and keep them in a state which is fit for human habitation.[16] In June 1989, the Department of the Environment circulated a consultation paper raising questions about the possibility of amending that provision. After concluding their consultation, the Department decided to refer the matter to us as part of our general review of the law in this area, and we have had the advantage of reading the responses received by them.

Scope of this Paper

1.13 We are not considering, in the course of this project, obligations concerning the state and condition of agricultural holdings. Lettings of farm property are the subject of a comprehensive legislative code[17] which includes provisions regulating repairs and improvements. Special principles govern them and we think it appropriate that they be excluded from consideration here.

1.14 There are many general and specialist statutes which seek to regulate the state and condition of particular properties, including properties which are let. We consider below how these general law rules supplement the bargain between landlord and tenant.[18]

Structure of this Paper

1.15 Part II of this Paper summarises the present law. In Part III we consider the need to reform it, and in Part IV discuss some of the principles which reforms should take into account. Possible reform options are set out in Part V. Part VI is a summary of the issues we are asking readers to consider.

1.16 We have not yet reached any firm conclusions, and this Consultation Paper is issued to canvass as wide a range of opinions as possible. We should be glad to hear from all those who are concerned with this aspect of the law, whether as landlords, tenants, professional advisers or academic lawyers. We welcome views on the present rules, details of the practical results which they have and appraisals of the reform options we put forward.

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[16] Landlord and Tenant Act 1985, s.8; see paras. 2.29-2.30 below.

[17] Agricultural Holdings Act 1986; Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations 1973.

[18] Paras. 2.50 *et seq* below.

PART II

THE PRESENT LAW

2.1 The duties concerning the state and condition of premises let undertaken by the parties to leases, as part of their relationship of landlord and tenant, are imposed in three ways: those implied at common law,[1] express contractual obligations[2] and those implied by statute.[3] All may apply to a particular case, although express agreement will exclude what the common law implies[4] and statute may, depending upon the terms of the particular provision, overrule any bargain between the parties.

2.2 In addition to the duties imposed by the bargain between them, landlords and tenants may also be affected by other statutes requiring that the condition of properties put to particular uses or properties of a particular nature should be put into or maintained to a defined standard.[5] The ways in which these Acts operate vary, some making special provision for properties which are let while others do not.

A. Common Law

Landlords' Obligations

2.3 Generally, a landlord who undertakes no contractual duty to repair only has such duty as statute imposes, but this is subject to limited exceptions. There are three relevant common law duties imposed on landlords: first, an undertaking as to fitness for human habitation, secondly, correlative duties and, thirdly, obligations relating to other property. Strictly, the last does not relate to the property let, but is relevant because it has a direct bearing on the upkeep and use of that property and arises as part of the landlord and tenant bargain.

Human Habitation

2.4 There are two cases in which, at common law, a landlord undertakes an obligation about the fitness for human habitation of residential property which he lets:

(a) There is an implied condition that furnished premises are let in a state reasonably fit for human habitation.[6] This does not impose

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[1] Paras. 2.3 *et seq* below.

[2] Paras. 2.18 *et seq* below.

[3] Paras. 2.29 *et seq* below.

[4] *Standen* v. *Christmas* (1847) 10 Q.B. 135.

[5] Paras. 2.50 *et seq* below.

[6] *Smith* v. *Marrable* (1843) 11 M. & W. 5.

a duty on the landlord to keep them in that condition,[7] and does not affect unfurnished lettings.[8]

(b) When a landlord agrees to let a house which is in the course of erection, there is an implied covenant "that, at the date of completion, the house should be in a fit state for human habitation".[9] This does not apply where the contract is entered into after the house is finished.[10]

Correlative Duties

2.5 In a recent case, the Court of Appeal held that where the tenant had a duty to do interior repairs but neither party had an express obligation to repair the exterior of the premises, the landlord had an implied duty to do that work because the tenant's obligation could not otherwise be satisfactorily performed.[11] Kerr L.J. explained, "It is obvious ... that sooner or later the covenant imposed on the tenant in respect of the inside can no longer be complied with unless the outside has been kept in repair. Moreover, it is also clear that the covenant imposed on the tenant was intended to be enforceable throughout the tenancy. ... [I]t is therefore necessary, as a matter of business efficacy to make this agreement workable, that an obligation to keep the outside in repair must be imposed on someone". Having rejected the possibility of imposing liability on the tenant as "unbusinesslike and unrealistic", and a joint obligation as "obviously unworkable", he concluded that an implied covenant on the landlord "is the only solution which makes business sense".[12]

2.6 This seems to be a clear development of the law.[13] There has in the past been considerable resistance to implying repairing covenants, except in special cases; "... without an express covenant or a statutory obligation to repair, the landlords would clearly be under no liability to repair any part of the demised premises whether the required repairs were structural or internal and whether they had or had not notice of the want of repair".[14] It has, however, been recognised that there is no absolute rule. "I cannot agree ... that the absence of some express term in the tenancy ... means there can never arise a contractual duty on the

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[7] *Sarson* v. *Roberts* [1895] 2 Q.B. 395.

[8] *Hart* v. *Windsor* (1844) 12 M. & W. 68.

[9] *Perry* v. *Sharon Development Co. Ltd.* [1937] 4 All E.R. 390, 395, *per* Romer L.J.

[10] *Hoskins* v. *Woodham* [1938] 1 All E.R. 692.

[11] *Barrett* v. *Lounova (1982) Ltd.* [1990] 1 Q.B. 348.

[12] *Ibid.*, pp.358-359.

[13] It had been foreshadowed. "We do not ... doubt that in some instances it will be proper for the court to imply an obligation against the landlord, on whom an obligation is not in terms imposed by the relevant lease, to match a correlative obligation thereby expressly imposed on the other party": *Duke of Westminster* v. *Guild* [1985] Q.B. 688, 697, *per* Slade L.J.

[14] *Cockburn* v. *Smith* [1924] 2 K.B. 119, 128, *per* Bankes L.J., dealing with the position of a letting of a house as a whole, as distinct from letting part of a house.

landlord to do the repairs - in other words, that such term can never be implied. ... I am not prepared to say that circumstances may not arise in which a court could find itself impelled to imply such terms in a tenancy agreement".[15] Now, however, the Court of Appeal has firmly said, "[A] repairing obligation upon the landlord can clearly arise as a matter of implication".[16]

2.7 No further examples of the implication of repairing obligations have yet been reported and it is not possible to predict all the circumstances in which the court will be prepared to imply such an obligation on the part of the landlord. None was implied in a case where the tenant had undertaken no repairing obligation.[17]

Other Property

2.8 It is not possible to be precise about the basis and extent of the landlord's obligation to the tenant in relation to property which is not the subject of the tenancy.[18] Certainly, it only affects property which remains under his control. There are two distinct types of case. The first group relates to work required to remedy defects which have a physical effect on the demised property or the occupation of it. The second group concerns work on property on or over which the tenant needs to exercise rights.

2.9 The general principle established by the case law[19] has been summarised as follows -

> "Where the lessor retains in his possession and control something ancillary to the premises demised, such as a roof or staircase, the maintenance of which in proper repair is necessary for the protection of the demised premises or the safe enjoyment of them by the tenant, the lessor is under an obligation to take reasonable care that the premises retained in his occupation are not in such a condition as to cause damage to the tenant or to the premises demised".[20]

2.10 Despite these cases it is not possible to be precise about the scope of any implied covenant. Goulding J. has spoken in very general terms: "Where there are gaps in an instrument expressing the reciprocal obligations of landlord and tenant, it is,

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[15] *Sleafer* v. *Lambeth Borough Council* (unreported) *per* Glyn-Jones J., cited with approval on appeal [1960] 1 Q.B. 43, 60, *per* Ormerod L.J.

[16] *Barrett* v. *Lounova (1982) Ltd.* [1990] 1 Q.B. 348, 358.

[17] *Demetriou* v. *Poolaction Ltd.* [1991] 1 E.G.L.R. 100.

[18] In the type of case dealt with here, tenants may also be able to seek relief for breaches of the landlord's covenant for quiet enjoyment; see *Gordon* v. *Selico Co. Ltd.* [1985] 2 E.G.L.R. 79, 83. However, the covenant for quiet enjoyment does not impose a positive obligation on the landlord to do repairs which he would not otherwise have been under any obligation to do: *Duke of Westminster* v. *Guild* [1985] Q.B. 688, 703.

[19] See, e.g., *Hargroves, Aronson & Co.* v. *Hartropp* [1905] 1 K.B. 472; *Cockburn* v. *Smith* [1924] 2 K.B. 119.

[20] Woodfall, *Landlord and Tenant*, 28th ed. (1978), Vol. 1, para. 1-1469. This statement was approved by the Court of Appeal in *Duke of Westminster* v. *Guild* [1985] Q.B. 688, 701.

in my judgment, more natural to fill them by implication ... than to invoke the law of tort".[21] In one case, the tenant was under a duty to pay the cost of exterior painting done by the landlord, and although the landlord was under no express duty to do the work, an obligation to do it was implied.[22] However, Dillon L.J. recently accepted that if there were no express covenant to repair other important parts of the building, for which it would have been sensible or reasonable to make provision, that would not be enough to warrant implying obligations.[23]

2.11 In relation to other property retained by the landlord over which the tenant enjoys rights, the position is perhaps clearer. Adequate repair of the other property may be fundamental to the use and enjoyment of the demised premises. This has been applied to means of access. "The tenants could only use their flats by using the staircase. ... It was contended ... that, according to the common law, the person in enjoyment of an easement is bound to do the necessary repairs himself. That may be true with regard to easements in general ... This is not the mere case of a grant of an easement without special circumstances. It appears to me to be obvious, when one considers what a flat of this kind is, and the only way in which it can be enjoyed, that the parties to the demise of it must have intended by necessary implication ... that the landlord should maintain the staircase".[24] Again, "A lessor who lets rooms to a tenant and provides a common staircase which the tenant must use must come under an implied contractual obligation to keep the access in a reasonably safe condition, otherwise the tenant cannot enjoy the use of the rooms which he has contracted to take".[25]

2.12 This approach was developed in the House of Lords: the landlords of a tower block were held to have implied obligations to take reasonable care to maintain in a state of reasonable repair and usability the stairs, lifts and lighting on the stairs.[26] However, in explaining this decision, some doubt was cast on the earlier cases by Lord Wilberforce, who drew a distinction between some access easements and others, even within a building. He said, "I accept, of course, the argument that a mere grant of an easement does not carry with it any obligation on the part of the servient owner to maintain the subject-matter. The dominant owner must spend the necessary money, for example, in repairing a drive leading to his house. And the same principle may apply when a landlord lets an upper floor with access by a staircase: responsibility for maintenance may well rest on

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[21] *Gordon* v. *Selico Co. Ltd.* [1985] 2 E.G.L.R. 79, 84.

[22] *Edmonton Corporation* v. *W. M. Knowles & Son Ltd.* (1961) 60 L.G.R. 124.

[23] *Tennant Radiant Heat Ltd.* v. *Warrington Development Corporation* [1988] 1 E.G.L.R. 41, 43.

[24] *Miller* v. *Hancock* [1893] 2 Q.B. 177, 180, 181, *per* Bowen L.J. The decision, which allowed a third party a right of action on that implied covenant, was subsequently reversed: *Fairman* v. *Perpetual Investment Building Society* [1923] A.C. 74.

[25] *Dunster* v. *Hollis* [1918] 2 K.B. 795, 802, *per* Lush J. A landlord was also held liable to repair a path which was an essential means of access to a house let on a weekly tenancy: *King* v. *South Northamptonshire District Council* [1992] 06 E.G. 152.

[26] *Liverpool City Council* v. *Irwin* [1977] A.C. 239.

the tenant. But there is a difference between that case and the case where there is an essential means of access, retained in the landlord's occupation, to units in a building of multi-occupation, for unless the obligation to maintain is, in a defined manner, placed on the tenants, individually or collectively, the nature of the contract, and the circumstances, require that it be placed on the landlord".[27] In a later case concerning the maintenance of an access way, Mann L.J. placed some emphasis on the purpose of the letting: "the rear access was plainly for the removal of refuse and the delivery of coal and the like, uses to which this rear access was in fact put. The houses could not be enjoyed or function in accord with their design without the rear access".[28]

2.13 In another recent case, an attempt was made to imply into a lease an obligation on the landlords to maintain a drain serving commercial premises which had been let.[29] This failed on a number of grounds: careful provision had been made for the tenant's repair obligations in contrast to the absence of any repairing obligations on the landlord in respect of the drain, an implied obligation on the landlords would be onerous, there would be some conflict with the express terms of the lease and the implied obligation was not necessary to make the scheme of the lease work. There was, therefore, no decision whether drains could in other circumstances be the subject of such an implied obligation.

Repair on Notice

2.14 A landlord who is responsible for repairing property let is not normally liable until he has had notice of the need to do the work.[30] This recognises the fact that he is not in occupation and control of the property; but it therefore follows that there is no such restriction on a landlord's duty to repair property not included in the lease.[31] The need to give the landlord notice extends to the repairing duties implied by statute.[32]

Liability for Negligence

2.15 A landlord who has built the premises which he then lets[33] also has a liability which is sometimes included as an example of his implied obligation to his tenant.

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[27] *Ibid.*, p.256.

[28] *King* v. *South Northamptonshire District Council* [1992] 06 E.G. 152, 155.

[29] *Duke of Westminster* v. *Guild* [1985] Q.B. 688.

[30] *Torrens* v. *Walker* [1906] 2 Ch. 166. Information received from a third party is sufficient notice: *Hall* v. *Howard* (1989) 57 P. & C.R. 226.

[31] E.g., common parts of a building: *Melles & Co.* v. *Holme* [1918] 2 K.B. 100.

[32] Duty to keep residential property fit for human habitation, para. 2.29 below: *McCarrick* v. *Liverpool Corporation* [1947] A.C. 219; duty to repair residential property subject to short lettings, para. 2.31 below: *O'Brien* v. *Robinson* [1973] A.C. 912.

[33] But not a landlord who was not the builder: *McNerny* v. *London Borough of Lambeth* [1989] 1 E.G.L.R. 81.

This is a duty to ensure that the premises are reasonably safe when let.[34] However, this is not truly part of the contractual bargain by which the landlord agrees to let the property to the tenant; it is an obligation owed by the landlord to later occupants of the property, a breach of which may give rise to a liability in tort.[35] For this reason, it is beyond the scope of this project.

No other Duties

2.16 The examples we have given of common law obligations are exceptional. The general rule used to be quite clear: a landlord has no implied obligation in relation to the state and condition of property which he lets.[36] However, there must now be some doubt about the universality of this rule.[37] Nevertheless, even in the light of recent developments, it has been pointed out that "it is a phenomenon, certainly known at common law, that there may be situations in which there is no repairing obligation imposed either expressly or impliedly on anyone in relation to a lease".[38] A similar rule, not so far challenged, is that the landlord does not impliedly give any undertaking that the premises will be physically suitable for use for a particular purpose,[39] nor does he give any implied undertaking that the premises may be lawfully used for the purposes for which they are let.[40]

Tenants' Obligations

2.17 Apart from duties arising under the doctrine of waste, with which we deal separately,[41] tenants have very few obligations implied at common law. The primary duty is to use the property in a tenantlike manner,[42] and a weekly tenant has no further obligation. Tenants from year to year have an implied duty to keep

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[34] "The council [landlord], as their own architect and builder, owed the plaintiff a duty to take reasonable care in designing and constructing the flat to see that it was reasonably safe when they let it to him": *Rimmer* v. *Liverpool Corporation* [1985] Q.B. 1, 16, *per* Stephenson L.J.

[35] "The duty for which the plaintiff argued and which the judge imposed was a duty at common law. It was not alleged that there was any contractual liability": *ibid.*, p.7, *per* Stephenson L.J.

[36] *Arden* v. *Pullen* (1842) 10 M. & W. 321.

[37] Para. 2.6 above.

[38] *Demetriou* v. *Poolaction Ltd.* [1991] 1 E.G.L.R. 100, 104, *per* Stuart-Smith L.J.

[39] *Cheater* v. *Cater* [1918] 1 K.B. 247. Nevertheless, in the case of a licence to occupy business premises, such a term on the part of the owner was implied: *Wettern Electric Ltd.* v. *Welsh Development Agency* [1983] Q.B. 796. The latter case was distinguished in *Morris-Thomas* v. *Petticoat Lane Rentals* (1987) 53 P. & C.R. 238.

[40] *Hill* v. *Harris* [1965] 2 Q.B. 601.

[41] Paras. 2.46 *et seq* below.

[42] The flavour of the nature and extent of this obligation is given by the following explanation. "The tenant must take proper care of the place. He must, if he is going away for the winter, turn off the water and empty the boiler. He must clean the chimneys, when necessary, and also the windows. He must mend the electric light when it fuses. He must unstop the sink when it is blocked by his waste. In short, he must do the little jobs about the place which a reasonable tenant would do": *Warren* v. *Keen* [1954] 1 Q.B. 15, 20, *per* Denning L.J.

buildings wind and water tight,[43] but it is not clear how far the obligation extends.

B. Contract

Repair

2.18 In deciding what responsibilities the parties to a lease are to undertake in relation to the state and condition of the property, they are of course free to select any obligation and any standard that they wish. Most commonly, however, the duty is an obligation "to repair", and for that reason most of the reported cases concentrate on defining that term. It has also been adopted for statutory implied obligations, which are therefore to be interpreted in the same way.

2.19 "Repair" has a dictionary definition of "to restore to good condition by renewal or replacement of decayed or damaged parts, or by refixing what has given way; to mend".[44] It has been judicially defined similarly. "[The word] connotes the idea of making good damage so as to leave the subject so far as possible as though it had not been damaged. It involves renewal of subsidiary parts; it does not involve renewal of the whole.[45] Time must be taken into account; an old article is not to be made new; but so far as repair can make good, or protect against the ravages of time and the elements, it must be undertaken".[46]

2.20 Repair is required to a standard which depends on the age and nature of the premises at the start of the lease.[47] But that does not mean that, if a dilapidated property is let, any obligation to repair it is ineffective, because an obligation to repair includes a duty to put it into repair at the outset.[48] The tenant is not obliged to hand back a substantially different property at the end of the lease.[49]

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[43] *Wedd* v. *Porter* [1916] 2 K.B. 91. "I think that the expression 'wind and water tight' is of doubtful value and should be avoided. It is better to keep to the simple obligation 'to use the premises in a tenantlike manner'": *Warren* v. *Keen, supra*, p.20, *per* Denning L.J.

[44] *Shorter Oxford English Dictionary*, 3rd ed., revised (1959).

[45] Hoffmann J. agreed with an arbitrator's view that "the words 'rebuild, reconstruct or replace' ... extend the lessee's liability ... far beyond that contemplated in a covenant to keep the demised premises in good and substantial repair": *Norwich Union Life Insurance Society* v. *British Railways Board* [1987] 2 E.G.L.R. 137, 138.

[46] *Anstruther-Gough-Calthorpe* v. *McOscar* [1924] 1 K.B. 716, 734, *per* Atkin L.J.

[47] *Lurcott* v. *Wakely & Wheeler* [1911] 1 K.B. 905; *Brew Bros. Ltd.* v. *Snax (Ross) Ltd.* [1970] 1 Q.B. 612. This qualification also applies to the repairing obligations imposed by statute on lettings of agricultural holdings (*Evans* v. *Jones* [1955] 2 Q.B. 58) and those implied on the part of a landlord letting residential property for up to seven years, in which case the prospective life of the dwelling-house is also to be considered (Landlord and Tenant Act 1985, s.11(3)).

[48] *Proudfoot* v. *Hart* (1890) 25 Q.B.D. 42; necessarily, there must have been some deterioration: see para. 2.24 below.

[49] "However large the words of the covenant may be, a covenant to repair a house is not a covenant to give a different thing from that which the tenant took when he entered into the covenant": *Lister* v. *Lane & Nesham* [1893] 2 Q.B. 212, 216-7, *per* Lord Esher M.R.

Nevertheless, the renewal over time of successive subsidiary parts[50] may result in replacing the whole; however, merely adding a duty "to renew" to a repairing covenant does not enlarge the obligation.[51] All the same, a normal repairing covenant imposes a duty to rebuild if the premises are destroyed.[52]

2.21 "The true test is ... that it is always a question of degree whether that which the tenant is being asked to do can properly be described as repair,[53] or whether on the contrary it would involve giving back to the landlord a wholly different thing from that which he demised".[54] Another examination of the authorities suggested that "three different tests have been discerned, which may be applied separately or concurrently as the circumstances of the individual case may demand, but all to be approached in the light of the nature and age of the premises, their condition when the tenant went into occupation, and the other express terms of the tenancy: (i) whether the alterations went to the whole or substantially the whole of the structure or only to a subsidiary part; (ii) whether the effect of the alterations was to produce a building of a wholly different character from that which had been let; (iii) what was the cost of the works in relation to the previous value of the building, and what was their effect on the value and life span of the building".[55] In applying these principles certain categories of work have particularly given rise to questions.

Improvements

2.22 As a matter of principle, someone who has a duty to repair property is not obliged to improve it. Accordingly, a landlord who covenanted to repair a house, the outside walls of which had no damp proof course, was not obliged to insert one.[56] This can mean that a party required to repair is responsible for

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[50] Which is repair: *Anstruther-Gough-Calthorpe* v. *McOscar* [1924] 1 K.B. 716, 734, *per* Atkin L.J.

[51] *Halliard Properties Co. Ltd.* v. *Nicholas Clarke Instruments Ltd.* (1983) 269 E.G. 1257.

[52] But not as a result of action by the Queen's enemies: Landlord and Tenant (War Damage) Act 1939, s.1.

[53] The narrowness of the distinction may be seen by contrasting the decision that to replace defective foundations was not repair (*Lister* v. *Lane & Nesham* [1893] 2 Q.B. 212) with the fact that substantial underpinning of foundations was (*Rich Investments Ltd.* v. *Camgate Litho Ltd.* [1988] E.G.C.S. 132).

[54] *Ravenseft Properties Ltd.* v. *Davstone (Holdings) Ltd.* [1980] Q.B. 12, 21, *per* Forbes J. The factors to be considered can include: "the nature of the building, the terms of the lease, the state of the building at the date of the lease, the nature and extent of the defect sought to be remedied, the nature, extent and cost of the proposed remedial works, at whose expense the remedial works are to be done, the value of the building and its expected life span, the effect of the works on such value and life span, current building practice, the likelihood of a recurrence if one remedy rather than another is adopted, the comparative cost of alternative remedial works and their impact on the use and enjoyment of the building by occupants": *Holding and Management Ltd.* v. *Property Holding and Investment Trust plc* (1989) 21 H.L.R. 596, 605, *per* Nicholls L.J.

[55] *McDougall* v. *Easington District Council* [1989] 1 E.G.L.R. 93, 95-6 *per* Mustill L.J.

[56] *Pembery* v. *Lamdin* [1940] 2 All E.R. 434.

eliminating the results of design faults without removing their cause.[57] However, there are cases in which the repair cannot be effected without correcting the defect, in which case the general principle of repair not extending to making the property substantially different must apply; the work may be repair,[58] or it may not.[59]

Inherent Defects

2.23 It was at one time suggested that an obligation to repair could not extend to rectifying a defect which was inherent in the property,[60] but it is now accepted that this is not the crucial test. Necessarily, these will be cases of improvement, so this category overlaps with the previous one, and it is recognised that the general test is to be applied. The work to repair an inherent defect may be substantial, but it is still a repair if it does not materially alter the nature of the property.[61]

2.24 However, there is one case which cannot be repair: where the condition of the property which it is proposed to change has existed since the building was constructed. The argument is: repair means rectifying disrepair, disrepair implies deterioration, but if the property is as it always was, there has been no deterioration.[62] It may be hard to determine whether rectifying a design fault or replacing a component which was always unsatisfactory falls within this principle, or whether it is an improvement.

2.25 When examining the responsibility of landlords for the condition of premises which they let, the Commission proposed more than twenty years ago that they should be under a general duty of care in respect of defects which could result in injury or damage known to them at the date of the letting.[63] This duty would have been formulated as follows:[64]

> "A person who disposes of premises, knowing at the material time or at any time thereafter while he retains possession of the premises

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[57] *Wates* v. *Rowland* [1952] 2 Q.B. 12: timber affected by rot had to be replaced, but the cause of the rot did not have to be eliminated; *Plough Investments Ltd.* v. *Manchester City Council* [1989] 1 E.G.L.R. 244: a rusted steel frame did not have to be repaired, although the bricks in the outside wall which had cracked as a result had to be replaced.

[58] *Ravenseft Properties Ltd.* v. *Davstone (Holdings) Ltd.* [1980] Q.B. 12: external cladding replaced because the design of the original fixing system was defective.

[59] *Sotheby* v. *Grundy* [1947] 2 All E.R. 761: house could only be saved from demolition by new foundations.

[60] *Pembery* v. *Lamdin* [1940] 2 All E.R. 434; *Hill and Redman's Law of Landlord and Tenant*, 16th ed., (1976) p.239.

[61] *Ravenseft Properties Ltd.* v. *Davstone (Holdings) Ltd.* [1980] Q.B. 12.

[62] *Post Office* v. *Aquarius Properties Ltd.* [1987] 1 All E.R. 1055.

[63] *Civil Liability of Vendors and Lessors for Defective Premises* (1970), Law Com. No. 40, para. 54.

[64] *Ibid.*, Appendix A, draft Bill, cl.3(1).

that there are defects in the state of the premises, owes a duty to all persons who might reasonably be expected to be affected by those defects to take reasonable care to see that they are reasonably safe from personal injury or from damage to their property caused by any of those defects".

2.26 That recommendation was not included in the Private Members' Bill which became the Defective Premises Act 1972 and implemented the Report's other proposals. Introducing the Bill, its sponsor Mr. Ivor Richard said, "This recommendation attracted a certain amount of controversy. For a number of reasons, the most important for a practical politician being the need to get at least three of the Commission's recommendations on the statute book and not to press the fourth, that recommendation is omitted from the Bill".[65]

Standard of Repair

2.27 A covenant simply "to repair" means to keep the property in substantial repair.[66] Commonly, covenants require "good repair", "habitable repair" or "tenantable repair". These expressions seem to bear the same meaning.[67] "Good tenantable repair" has been defined: "such repair as, having regard to the age, character and locality of the house, would make it reasonably fit for the occupation of a reasonably minded tenant of the class who would be likely to take it".[68] A covenant to repair must be construed by reference to the condition of the property at the date of the letting,[69] although it is to be construed as imposing not only a duty to keep the property in repair, but also to put it into repair.[70]

2.28 Leases often impose separate obligations to decorate. In the absence of special provisions, a duty to repair extends to giving proper protection to the materials from which the property is constructed, even, e.g., extending to interior painting.[71]

C. Statutory Duties

Fitness for Human Habitation

2.29 Where a house[72] is let for human habitation, it is a condition that it is fit for that purpose when the tenancy starts and there is an implied undertaking by the landlord that he will keep it fit throughout the tenancy. This applies,

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[65] *Hansard*, 11 February 1972, col. 1823.

[66] *Harris* v. *Jones* (1832) 1 Moo. & R. 173.

[67] *Woodfall's Law of Landlord and Tenant*, 28th ed., (1978), para. 1-1433.

[68] *Proudfoot* v. *Hart* (1890) 25 Q.B.D. 42, 55, *per* Lopes L.J.

[69] *Walker* v. *Hatton* (1842) 10 M. & W. 249.

[70] *Proudfoot* v. *Hart* (1890) 25 Q.B.D. 42.

[71] *Monk* v. *Noyes* (1824) 1 C. & P. 265.

[72] Which includes part of a house.

notwithstanding any agreement to the contrary, to lettings at modest annual rents,[73] so long as the property is capable of being made fit at reasonable expense.[74] It does not apply to lettings for at least three years, and not terminable earlier, on terms that the tenant puts the premises into a condition reasonably fit for human habitation.[75]

2.30 There is statutory guidance as to the standard of fitness to be applied. A house is only to be regarded as unfit for human habitation if it is not reasonably suitable for occupation because its condition is defective in respect of one or more of certain specified matters. They are: repair, stability, freedom from damp, internal arrangement, natural lighting, ventilation, water supply, drainage and sanitary conveniences, facilities for preparation and cooking of food and for disposal of waste water.[76]

Short Residential Tenancies

2.31 Since 25 October 1961, a landlord[77] who lets a dwelling-house for less than seven years has certain implied repairing obligations.[78] Where the premises were let on or after 15 July 1989 and form part only of a building, the landlord's obligations to repair the premises extend to any part of the building in which he has an estate or interest. His obligations relating to installations include those serving the demised premises and either forming part of the building in which he has an estate or interest or which are owned by him or under his control. However, no obligation is implied into leases granted on or after 3 October 1980 in favour of certain public sector and similar bodies.[79]

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[73] The relevant limits depend on the date of the letting and the location of the premises. The limits are: lettings before 6 July 1957, London £40, elsewhere £26 (or in some places for lettings before 31 July 1923, £16); later lettings, London (from 1 April 1965, Inner London) £80, elsewhere £52.

[74] *Buswell* v. *Goodwin* [1971] 1 W.L.R. 92.

[75] Landlord and Tenant Act 1985, s.8. That obligation is extended to the case of a worker employed in agriculture who is provided with housing as part of his remuneration: *ibid.*, s.9.

[76] Landlord and Tenant Act 1985, s.10.

[77] But not the Crown: *Department of Transport* v. *Egoroff* [1986] 1 E.G.L.R. 89.

[78] Landlord and Tenant Act 1985, ss.11, 13. These rules apply for deciding the length of the term for this purpose: any part of the term falling before the grant is disregarded, a lease containing a landlord's option to determine within seven years is treated as a term for less than seven years and a lease with a tenant's option to renew is treated (unless it also contains a landlord's option within the last category) as a lease for seven years or more if that would be the length of the term as extended by the option.

[79] *Ibid.*, s.14(4), (5).

2.32 The extent of the landlord's duty is:

> "(a) To keep in repair the structure and exterior of the dwelling-house (including drains, gutters and external pipes);[80] and
>
> (b) To keep in repair and proper working order the installations in the dwelling-house for the supply of water, gas and electricity, and for sanitation (including basins, sinks, baths and sanitary conveniences but not other fixtures, fittings and appliances for making use of the supply of water, gas or electricity), and
>
> (c) To keep in repair and proper working order the installations in the dwelling-house for space heating and heating water".[81]

The standard of repair is to be determined having regard to the age, character and prospective life of the dwelling-house, and its locality.[82] The duty does not include work which falls within the tenant's obligation to use the premises in a tenant-like manner,[83] rebuilding or reinstatement after destruction or damage by fire, tempest, flood or other inevitable accident, nor maintaining anything which the tenant is entitled to remove from the property.[84]

2.33 To ensure that the liability does effectively fall on the landlord, the Act provides that a tenant's covenant to repair "is of no effect" so far as it relates to matters within the landlord's implied duty.[85] This renders ineffective a tenant's express covenant to paint and decorate the exterior, because that work inevitably involves a degree of protection against the elements.[86] Also, the statute makes void[87] any covenant or agreement which excludes or limits the landlord's obligations or, if the tenant enforces or relies on those obligations, allows the tenancy to be

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[80] It may be that, in some circumstances, the repairing obligation can extend to property which is not demised: *King* v. *South Northamptonshire District Council* [1992] 06 E.G. 152. Mann L.J. (at p.156) ruled out liability under the Defective Premises Act 1972 on the grounds that the property in question had not been demised, but did not, on that ground, rule out repairing liability under the 1985 Act.

[81] Landlord and Tenant Act 1985, s.11(1).

[82] *Ibid.*, s.11(3).

[83] Para. 2.17 above.

[84] Landlord and Tenant Act 1985, s.11(2).

[85] *Ibid.*, s.11(4). There are exceptions relating to the matters not covered by that duty: para. 2.32 above.

[86] *Irvine* v. *Moran* [1991] 1 E.G.L.R. 261.

[87] Unless authorised by the county court, which may make a consent order if it appears to the court that it is reasonable to do so, having regard to all the circumstances of the case, including the other terms and conditions of the lease: Landlord and Tenant Act 1985, s.12(2).

forfeited or imposes any penalty, disability or obligation on the tenant.[88] This has been held to prevent the landlord including the cost of exterior repairs in a service charge which the tenant had to pay.[89]

Right to Buy Long Leases

2.34 Certain repairing obligations on the part of the landlord are implied into a long lease granted as a result of a public sector tenant exercising his right to buy,[90] unless the county court authorises their exclusion or modification. The implied covenants are:

> "(a) to keep in repair the structure and exterior of the dwelling-house and of the building in which it is situated (including drains, gutters and external pipes) and to make good any defect affecting that structure;
>
> (b) to keep in repair any other property over or in respect of which the tenant has rights ...;
>
> (c) to ensure, so far as practicable, that services which are to be provided by the landlord and to which the tenant is entitled (whether by himself or in common with others) are maintained at a reasonable level and to keep in repair any installation connected with the provision of those services".

The landlord's obligation extends to rebuilding or reinstatement in case of destruction or damage by fire, tempest, flood or any other cause against the risk of which it is normal practice to insure;[91] but all his duties are modified if he is unable to discharge them because of the terms of a superior lease.[92]

2.35 Covenants by the tenant are also implied into those long leases, unless otherwise agreed by the parties. Where the property which is let is a house, the covenant is to keep it in good repair, including decorative repair. In the case of a flat, the obligation is to keep the interior in such repair.[93]

D. Enforcement

2.36 The remedies available to a landlord whose tenant is in breach of a repairing covenant are damages or, if a right of re-entry was reserved in the lease, forfeiture of the lease. A tenant whose landlord is in default can claim damages and apply for specific performance of the obligation. It will sometimes be appropriate to

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[88] *Ibid.*, s.12(1).

[89] *Campden Hill Towers Ltd.* v. *Gardner* [1977] Q.B. 823.

[90] Housing Act 1985, s.151(1) and Sched. 6, para. 14(2).

[91] Housing Act 1985, Sched. 6, para. 14.

[92] *Ibid.*, Sched. 5, para. 15(2).

[93] *Ibid.*, Sched. 6, para. 16.

apply for the appointment of a receiver or manager.[94] We confine ourselves here to examining issues which we see as of particular relevance.

Damages

2.37 There are two separate statutory restrictions on a landlord's power to recover damages for breach of a tenant's repairing covenant. The first is a limit on the amount recoverable, and the second is a restriction on taking proceedings.

2.38 The amount of damages is limited to "the amount (if any) by which the value of the reversion (whether immediate or not) in the premises is diminished owing to the breach".[95] Further, nothing is recoverable at the end of a lease if the premises are then to be pulled down, or there are to be structural alterations which would render any repairs valueless.[96] The limit covers all heads of damage. So, for example, the landlord may have a claim for loss of rent to cover the period for carrying out the repairs,[97] but this would have to be accommodated within the statutory limit.

2.39 Proceedings for damages for breach of a covenant contained in a lease originally granted for at least seven years, of which at least three years remained unexpired, are restricted. A landlord must serve a preliminary notice[98] giving the tenant twenty-eight days to serve a counternotice, the result of which is that the landlord must obtain leave of the court before proceeding.[99] For the court to give leave, the tenant must prove one of five grounds:[100]

> (a) that immediate repairs are necessary to prevent a substantial diminution in the value of the reversion, or that the breach of covenant has already caused a substantial fall in its value;
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> (b) that immediate repairs are needed to comply with any enactment, court order or requirement of a statutory authority;
>
> (c) where the tenant is not in occupation of the whole premises, that immediate repairs are required in the interests of the occupier;

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[94] The court has jurisdiction to appoint a receiver in all cases where it appears just and convenient to do so: Supreme Court Act 1981, s.37(1); see *Hart* v. *Emelkirk Ltd.* [1983] 1 W.L.R. 1289. A tenant of a flat can apply for the appointment of a manager, to carry out management functions, the functions of a receiver or both: Landlord and Tenant Act 1987, s.24; where an application can be made under this provision, the court's general jurisdiction does not apply: *ibid.*, s.21(6).

[95] Landlord and Tenant Act 1927, s.18(1).

[96] *Ibid.*

[97] *Woods* v. *Pope* (1835) 6 C. & P. 782.

[98] Under the Law of Property Act 1925, s.146.

[99] Leasehold Property (Repairs) Act 1938, s.1; Landlord and Tenant Act 1954, s.51.

[100] Leasehold Property (Repairs) Act 1938, s.1(5).

(d) that the breach of covenant can be remedied immediately at a cost which is relatively small in comparison with the likely cost of the work if postponed; or

(e) that special circumstances exist which render it just and equitable that leave be given.

2.40 After some conflicting decisions,[101] it has now been established that a landlord who seeks leave to proceed must prove one of the statutory grounds on the balance of probabilities, rather than merely showing a prima facie case.[102] "If the landlord fails to prove that he is entitled to pursue his remedies, the tenant is entitled, as of right, to a dismissal of the landlord's application under the Act of 1938".[103]

Specific Performance

2.41 Specific performance can in some circumstances be granted to enforce a landlord's repairing covenant. There has been a limited use of the remedy in equity and there is a statutory jurisdiction.

2.42 Specific performance has been granted against the landlord to repair a balcony on the front of a house, which was not included in any of the four flats into which the house had been divided and which were separately let,[104] and to repair a lift which was also outside the premises demised.[105] The principles were set out by Pennycuick V.-C., "The rule has now become settled that the court will order specific performance of an agreement to build if - (i) the building work is sufficiently defined by the contract, e.g., by reference to detailed plans; (ii) the plaintiff has a substantial interest in the performance of the contract of such a nature that damages would not compensate him for the defendant's failure to build; and (iii) the defendant is in possession of the land so that the plaintiff cannot employ another person to build without committing a trespass".[106]

2.43 The statutory jurisdiction to grant an order for specific performance may be exercised in favour of the tenant of a dwelling whose landlord fails to perform a

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[101] Cp. *Phillips* v. *Price* [1959] Ch. 181; *Sidnell* v. *Wilson* [1966] 2 Q.B. 67.

[102] *Associated British Ports* v. *C. H. Bailey plc* [1990] 2 A.C. 703.

[103] *Ibid.*, p.713 *per* Lord Templeman.

[104] *Jeune* v. *Queen's Cross Properties Ltd.* [1974] Ch. 97.

[105] *Francis* v. *Cowcliffe Ltd.* (1976) 33 P. & C.R. 368.

[106] *Jeune* v. *Queen's Cross Properties Ltd.*, *supra*, pp.99-100, adopting *Snell's Principles of Equity*, 26th ed., (1966), p.647. Interlocutory relief may be granted in cases of extreme urgency and hardship: *Parker* v. *Camden London Borough Council* [1986] Ch. 162.

repairing covenant.[107] The breach of a covenant may relate to the premises let to the tenant or to some other part of the property comprising the dwelling.[108]

2.44 It has not yet finally been settled whether specific performance can be ordered to enforce a tenant's repairing covenant. Such authority as there is indicates that the remedy is not available to a landlord.[109] However, the decision in *Jeune* v. *Queen's Cross Properties Ltd.*[110] suggests that the court may now be more ready to contemplate in an appropriate case specific performance of a tenant's repairing covenant.[111]

Rights of Entry

2.45 A landlord only has a right to enter premises which he has let if he reserves one,[112] but if he expressly covenants to repair he has an implied licence to enter for that purpose.[113] Rights of entry for repairs are also implied by statute: into assured tenancies,[114] protected tenancies[115] and statutory tenancies of tied agricultural accommodation.[116] A landlord of residential accommodation let on a short lease who has an implied repairing obligation[117] has a statutory right to enter the premises to view their condition and state of repair.[118]

E. Waste

2.46 The doctrine of waste imposes obligations on the occupiers of land which belongs to others or in which others have an interest.[119] It was introduced into the

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[107] Defined to mean a covenant to repair, maintain, renew, construct or replace property: Landlord and Tenant Act 1985, s.17(2)(d).

[108] *Ibid.*, s.17(1).

[109] *Hill* v. *Barclay* (1810) 16 Ves. 402: "the tenant cannot be compelled to repair" *per* Lord Eldon L.C. Although Oliver J. in *Regional Properties Ltd.* v. *City of London Real Property Co. Ltd.* (1979) 257 E.G. 65, expressed grave doubts whether specific performance would be available to enforce the tenant's repairing covenant, he did not decide the point and acknowledged that what may be only a dictum in *Hill* v. *Barclay* had been logically much weakened by the decision in *Jeune* v. *Queen's Cross Properties Ltd., supra.*

[110] [1974] Ch. 97.

[111] See Jones & Goodhart, *Specific Performance* (1986), p.32.

[112] *Stocker* v. *Planet Building Society* (1879) 27 W.R. 877.

[113] *Saner* v. *Bilton* (1878) 7 Ch. D. 815.

[114] Housing Act 1988, s.16.

[115] Rent Act 1977, s.148.

[116] Rent (Agriculture) Act 1976, Sched. 5, para. 8.

[117] Para. 2.31 above.

[118] Landlord and Tenant Act 1985, s.11(6).

[119] "Waste is a somewhat archaic subject, now seldom mentioned; actions in respect of disrepair are now usually brought on the covenant": *Mancetter Developments Ltd.* v. *Garmanson Ltd.* [1986] Q.B. 1212, 1218, *per* Dillon L.J.

general law of landlord and tenant by the Statute of Marlborough 1267,[120] having previously applied only to tenancies arising by operation of law. Waste imposes duties on tenants, enforceable by landlords, in addition to contractual obligations.[121] Also, although we are not here concerned with these other cases, it applies between trustee and beneficiary, mortgagor and mortgagee and vendor and purchaser. Causing or permitting damage to property[122] in breach of an obligation imposed by the doctrine of waste is a tort,[123] which means that people other than the contractual tenant may also be liable.[124] The landlord's remedy for a breach will either be damages[125] or an injunction.[126] Being tortious, a right of action for waste against a tenant is not assignable,[127] and does not therefore automatically run with the reversion.

Categories of Waste 2.47 There are four categories of waste:

(a) *Permissive Waste*. Permissive waste is committed by lack of action which allows premises to fall into disrepair.[128] Examples are: allowing walls to decay for want of daubing or plastering,[129] and not repairing fences.[130]

(b) *Voluntary Waste*. Voluntary waste is a deliberate act, whether wilful or negligent, which damages the property permanently changing its character.[131] A recent example was the removal of

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[120] Which provided that lessees during their terms should not "make waste ... of houses, woods, men or of anything belonging to the tenements".

[121] There is some doubt whether an action in waste will lie where the act is covered by a covenant. In *Mancetter Developments Ltd.* v. *Garmanson Ltd.*, *supra*, Dillon L.J. said that the landlord has an election where damage is covered both by the doctrine of waste and a covenant (pp.1219-1220) and Kerr L.J. doubted whether there could normally be alternative claims (p.1223).

[122] But not merely nominal damage: *Harrow School* v. *Alderton* (1800) 2 B. & P. 86.

[123] In *Mancetter Developments Ltd.* v. *Garmanson Ltd.*, *supra*, Dillon L.J. accepted that the landlord had a choice of suing for waste or on a lease covenant (p.1218), but Kerr L.J. doubted this (p.1223).

[124] *Mancetter Developments Ltd.* v. *Garmanson Ltd.*, *supra*: the director of a former tenant company was personally liable.

[125] *Whitham* v. *Kershaw* (1886) 16 Q.B.D. 613.

[126] *West Ham Central Charity Board* v. *East London Waterworks Co.* [1900] 1 Ch. 624.

[127] *Defries* v. *Milne* [1913] 1 Ch. 98.

[128] *Herne* v. *Bembow* (1813) 4 Taunt. 764.

[129] 2 Roll. Abr. 816, pl. 36, 37.

[130] *Cheetham* v. *Hampson* (1791) 4 Term Rep. 318.

[131] *West Ham Central Charity Board* v. *East London Waterworks Co.* [1900] 1 Ch. 624.

tenants' fixtures without making good.[132] Older examples include: demolishing, or making structural alterations to, a building,[133] changing the course of husbandry[134] and opening and working a new mine or quarry.[135]

(c) *Ameliorating Waste*. Ameliorating waste is an act of voluntary waste which increases the value fo the property. In this case, the landlord cannot show loss, so no damages are likely to be awarded, and an injunction will only be ordered if there is damage to the reversion.[136]

(d) *Equitable Waste*. If a person who would otherwise have been liable for waste at common law has been expressly made unimpeachable for waste, the court may nevertheless exercise an equitable jurisdiction to restrain him from acts of gross or malicious damage.[137] We are not aware of leases which make the tenant unimpeachable for waste, so this category probably has no application in the field of landlord and tenant. To the extent that legal waste is in future abolished, equitable waste would necessarily cease to apply, because it only affects those exonerated from the duty they would otherwise have not to commit acts amounting to legal waste.

Defences

2.48 A tenant is not liable under the doctrine of waste for damage which results from:

(a) the reasonable and proper use of the property "... provided it is for a purpose for which the property was intended to be used, and provided the mode and extent of the user was apparently proper, having regard to the nature of the property and to what the tenant knew of it and to what as an ordinary businessman he ought to have known of it";[138]

(b) an act authorised by the landlord;[139]

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[132] *Mancetter Developments Ltd.* v. *Garmanson Ltd.* [1986] Q.B. 1212.

[133] *Buckland* v. *Butterfield* (1820) 2 Brod. & Bing. 54; *Marsden* v. *Edward Heyes Ltd.* [1927] 2 K.B. 1.

[134] Co. Litt. 53b; *Simmons* v. *Norton* (1831) 7 Bing. 640.

[135] *Clavering* v. *Clavering* (1726) 2 P. Wms. 388.

[136] *Doherty* v. *Allman* (1878) 3 App. Cas. 709.

[137] *Vane* v. *Barnard* (1776) 2 Vern. 738.

[138] *Manchester Bonded Warehouse Company* v. *Carr* (1880) 5 C.P.D. 507, 512.

[139] *Meux* v. *Cobley* [1892] Ch. 253, 262.

(c) accidental fire;[140] or

(d) act of God, e.g. tempest.[141]

Tenants' Liability

2.49 Tenants under leases for terms of years are fully liable for waste.[142] The extent of the liability of other tenants is less certain. A tenant from year to year or a monthly tenant is apparently liable for voluntary, but not for permissive, waste,[143] and that is certainly the position of weekly tenants.[144] A tenant at will is not liable for waste, but voluntary waste automatically ends his tenancy.[145] A tenant at sufferance is liable for voluntary waste,[146] but his liability for permissive waste is doubtful.

F. Other Statutes

2.50 The other statutes with which we are concerned here are those which seek to ensure that the owner of property - whether landlord or tenant in the case of premises which are let - keep it in a particular physical condition. This generally relates to the use to which the property is put. The rules have been enacted to meet a variety of public concerns, generally aspects of public health, safety and welfare. They do not form a consistent code, but because of the wide range of issues which they address - from the elimination of sub-standard housing, through hygiene in commercial food preparation to safety in the manufacture of explosives - it is not reasonable to expect that they should do. Consequently our statement of this part of the law cannot be comprehensive, but it will nevertheless be possible to consider the implications of the legislation for the reform of landlord and tenant law.

2.51 Most of these statutes apply equally to property which is owner-occupied and to property which is let. They are concerned not with the bargain between landlord and tenant, but directly with the property. However, leases frequently contain an express covenant, normally on the part of the tenant, to comply with all statutory requirements relating to the premises.[147] Accordingly, even without a provision referring to the Act in question, compliance with any requirement about the condition of the property will frequently constitute a matter of bargain. Further, the effect of the covenant may well be to require compliance with legislation enacted later.

General

2.52 Any landlord who lets premises, on terms either that he has an obligation to the

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[140] Fires Prevention (Metropolis) Act 1774, s.86.

[141] Woodfall, *Landlord and Tenant*, 28th ed. (1978), Vol. 1, para. 1-1517.

[142] *Yellowly* v. *Gower* (1855) 11 Ex. D. 274.

[143] *Torriano* v. *Young* (1833) 6 C. & P. 8.

[144] *Warren* v. *Keen* [1954] 1 Q.B. 15.

[145] *Countess of Shrewsbury's Case* (1600) 5 Co. Rep. 13b.

[146] *Burchell* v. *Hornsby* (1808) 1 Camp. 360.

[147] E.g., *Encyclopaedia of Forms and Precedents* (5th ed.) (1986), Vol. 22, p.286.

tenant to maintain or repair them or that he has the right to do so, owes a statutory duty to all who may reasonably be expected to be affected by defects in the property. This duty is to take such care as is reasonable in all the circumstances to see that these people are reasonably safe from personal injury or damage to their property.[148] Although this provision was primarily intended to protect third parties,[149] it has been construed to give tenants a right against their landlords which they would not otherwise have had. For the purposes of the Act, the legislation treats a landlord's right to enter to do maintenance or repair work as the equivalent of an obligation to the tenant to do the work, as soon as the landlord is in a position to exercise the right.[150] Such a right of repair may be implied.[151] Accordingly, even if a landlord has no obligation to do the work, but has reserved a power to do so, a tenant who is injured as a result of the landlord's failure to repair can maintain a claim for breach of the statutory duty.[152]

Residential Property

2.53 Statutory regulation has probably been most extensive in relation to residential property. The objectives of the legislation are to ensure that dwellings are fit for human habitation, to eliminate insanitary conditions and to engender the improvement of individual properties and whole neighbourhoods. These policies are pursued both by offering financial incentives, with which we are not concerned, and by coercive measures. The provisions overlap, in the sense that it may be possible to employ more than one of them in a particular case. We can only give an outline of the relevant legislation.

Fitness for Human Habitation

2.54 A local housing authority which is satisfied that a dwelling-house[153] is unfit for human habitation,[154] has a duty to adopt one of the following courses.[155] It

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[148] Defective Premises Act 1972, s.4(1), (4).

[149] *Civil Liability of Vendors and Lessors for Defective Premises* (1970), Law Com. No. 40, paras. 65-69.

[150] Defective Premises Act 1972, s.4(4).

[151] *McAuley* v. *Bristol City Council* [1992] 1 Q.B. 134.

[152] *Smith* v. *Bradford Metropolitan Council* (1982) 44 P. & C.R. 171.

[153] Which includes any yard, garden, outhouses and appurtenances belonging to it or usually enjoyed with it: Housing Act 1985, s.207(2); Housing Act 1988, Sched. 15, para. 12(2). The term also includes houses or flats in multiple occupation: Local Government and Housing Act 1990, Sched. 9.

[154] See para. 3.26 below. In the case of a flat, the condition of the building outside the flat can make it unfit: Housing Act 1985, s.189(1A); Housing Act 1988, Sched. 15, para. 1(2).

[155] *R.* v. *Kerrier District Council, ex parte Guppys (Bridport) Ltd. (No. 1)* (1977) 32 P. & C.R. 411.

must either serve a "repair notice"[156] or make a closing order[157] or a demolition order.[158] This is subject to exceptions.[159]

2.55 Even in the case of a dwelling which is not unfit for human habitation, although still in need of repair, the local authority has a discretionary power to serve a repair notice.[160] This applies in two cases. Either, the authority must be satisfied that substantial repairs are necessary to bring the house up to a reasonable standard, having regard to its age, character and locality. Or, it must be satisfied on a representation from an occupying tenant that the state of repair is such that the condition interferes materially with the tenant's personal comfort. In this case, unlike that of unfitness for human habitation, a repair notice cannot extend to internal decorative repair works.[161]

2.56 A repair notice is served on the person having control of the dwelling-house.[162] It requires him to carry out specified repairs within a stated reasonable time, with a minimum of twenty-eight days.[163]

2.57 There is a major limitation on the use of the repair notice procedure to protect residential tenants from their landlords' repair defaults, bearing in mind the large number of public sector tenancies. A repair notice cannot be served if the person having control of the house is the local housing authority for that area.[164] "It is not the status of a local authority as such that excludes it from being the

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[156] Housing Act 1985, s.189.

[157] Housing Act 1985, s.264; Local Government and Housing Act 1989, Sched. 9, para. 14.

[158] Housing Act 1985, s.265; Local Government and Housing Act 1989, Sched. 9, para. 14.

[159] No action need be taken if the clearance area procedure is employed: *Holmes* v. *Ministry of Housing and Local Government* (1960) 12 P. & C.R. 72; a local housing authority has no duty to serve a repair notice if the building is to fall within a group repair scheme: Housing Act 1985, s.190A; Local Government and Housing Act 1989, Sched. 9, para. 3.

[160] Housing Act 1985, s.190. "... the policy of Parliament was to make the owners of houses keep them in proper repair. Not only so as to keep up the stock of houses, but also to see that protected tenants should be able to have their houses properly kept up": *Hillbank Properties Ltd.* v. *Hackney London Borough Council* [1978] Q.B. 998, 1009 *per* Lord Denning M.R. Generally, there must be a tenant in occupation: *ibid.*, s.190(1B); Local Government and Housing Act 1989, Sched. 9, para. 2(2).

[161] Housing Act 1985, s.190(2).

[162] The person who is receiving the rack rent - for this purpose not less than two-thirds of the full net annual value of the premises - whether for himself or as agent or trustee for another, or would be receiving it if the house were let on those terms: Housing Act 1985, s.207; Housing Act 1988, Sched. 15, para. 12(1). In the case of a house in multiple occupation, the notice may be served on the person managing the house: Local Government and Housing Act 1989, Sched. 9, para. 1.

[163] Housing Act 1985, ss.189(2)(a), 190(2); Local Government and Housing Act 1989, Sched. 9, paras. 1(4), 2(3).

[164] *R.* v. *Cardiff City Council, ex parte Cross* (1983) 45 P. & C.R. 156, affd. (1983) 81 L.G.R. 105.

recipient of a notice; it is the fact that under the Act it is charged with the duty of giving notice. It follows, therefore, that if, as is not infrequently the case, a local authority has housing in the area of another district, the authority in whose area the property is situated can serve a notice on the authority that has the relevant interest in the property".[165]

2.58 If a repair notice is not complied with, the local housing authority has power to do the work itself and to recover the expense from the person on whom the notice was served.[166] It is an offence intentionally to fail to comply with a notice.[167]

Public Nuisance

2.59 Other statutory provisions which can be used to enforce standards of tenanted accommodation, both residential and commercial, are found in the public health legislation. If any premises are "in such a state as to be prejudicial to health or a nuisance",[168] the local authority for the area may serve an abatement notice, requiring the abatement of the nuisance and the execution of any necessary work.[169] In the case of a structural defect, the notice is served on the owner of the premises.[170] Failure to comply with the notice is an offence.[171]

2.60 A separate procedure allows a person who is aggrieved by a statutory nuisance to apply to the magistrates' court for an order that it be abated, prohibiting its recurrence and for the person responsible to do any necessary work.[172] As this action can be initiated by anyone who is aggrieved, it is available against a local authority landlord. The court can impose a fine on the person responsible for the nuisance, and breach of the order is an offence.[173] A landlord who is convicted under this provision can be required to pay the tenant compensation for personal injury, loss or damage.[174]

2.61 "Prejudicial to health" is itself defined to mean "injurious, or likely to cause injury to, health".[175] This can extend to cover damp caused by condensation.[176]

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[165] *Ibid.*, p.164 *per* Woolf J.

[166] Housing Act 1985, s.193, Sched. 10; Housing Act 1988, Sched. 15, para. 5.

[167] Housing Act 1985, s.198A; Housing Act 1988, Sched. 15, para. 8.

[168] Environmental Protection Act 1990, s.79(1)(a). "Nuisance" means a common law nuisance, and cannot therefore be to the prejudice of the occupiers of the property in question: *National Coal Board* v. *Neath Borough Council* [1976] 2 All E.R. 478.

[169] Environmental Protection Act 1990, s.80(1).

[170] *Ibid.*, s.80(2).

[171] *Ibid.*, s.80(4).

[172] *Ibid.*, s.82(1), (2).

[173] *Ibid.*, s.82(2), (8).

[174] Powers of Criminal Courts Act 1973, s.35(1); *Daily Telegraph* 21 November 1991.

[175] Environmental Protection Act 1990, s.79(7).

Health is not, however, to be equated with personal comfort, and there is no direct link with the statutory standard of fitness for human habitation.[177] However, when action is taken by a person aggrieved and the court is of the opinion that the nuisance renders the premises unfit for human habitation, it may prohibit their use for that purpose until they have been rendered fit.[178] The test to be applied in ordering the abatement of a nuisance must take into account the circumstances of the case. "The shorter the period before probable demolition, the more severe must be the injury or likely injury to health or, as the case may be, the nuisance, to justify action by way of abatement".[179]

2.62 An emergency procedure is available where it appears to a local authority that premises are in a state which is prejudicial to health[180] or a nuisance and that the procedure relating to nuisances outlined above[181] would result in unreasonable delay in remedying the defects.[182] The local authority can serve notice, on the owner or person responsible, that it intends to remedy the defective state of the premises, and after nine days it may do the work and recover the costs from the recipient of the notice.[183] The recipient of the notice has seven days within which to serve a counternotice that he will remedy the defects, in which case the local authority may take no action unless the work is not started within a reasonable time or reasonable progress is not made towards completion of it.[184]

Commercial Property

2.63 A number of statutes also regulate the condition in which commercial property is to be maintained, frequently with reference to the activity conducted there. In general terms, e.g., an employer has a duty with regard to any place of work under his control. So far as is practicable he must ensure that it, and the means of access to it, are maintained in a condition which is safe and does not present any risk to health.[185] More specifically, and again as an example, both in

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[176] *Dover District Council* v. *Farrar* (1980) 2 H.L.R. 32.

[177] *Salford City Council* v. *McNally* [1976] A.C. 379.

[178] Environmental Protection Act 1990, s.82(3).

[179] *Salford City Council* v. *McNally, supra*, p.390, *per* Lord Wilberforce.

[180] See para. 2.61 above.

[181] Paras. 2.59 *et seq* above.

[182] Building Act 1984, s.76(1); Environmental Protection Act 1990, Sched. 15, para. 24.

[183] Building Act 1984, s.76(1), (2). The costs may not be recoverable if, in proceedings to recover them, the court concludes that the authority was not justified in using this procedure: *ibid.*, s.76(4).

[184] *Ibid.*, s.76(3).

[185] Health and Safety at Work etc. Act 1984, s.2(2)(d). Section 4 of this Act has been held to imply a statutory duty on the management company controlling the common parts of a block of flats, owed to the tenant of one of the flats, in respect of the lifts within the common parts controlled by the management company: *Westminster City Council* v. *Select Management Ltd.* [1984] 1 W.L.R. 1058.

relation to factories and to shops, offices and railway premises, there are obligations relating to floors, passages and stairs. They must be of sound construction and properly maintained.[186] This has been accepted as meaning "that the floor should be of sound construction and so maintained as to be fit to be used for the purpose for which the factory is intended to be used".[187]

2.64 There is also a series of statutes conferring on the courts the power to vary the terms of leases of business premises relating to improvements, so that the property may be put or kept in a fit state to carry on the intended business.[188] The court's jurisdiction is normally to order such modification of the lease terms as is fair and equitable in the circumstances.

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[186] Factories Act 1961, s.28(1); Offices, Shops and Railway Premises Act 1963, s.16(1).

[187] *Mayne* v. *Johnstone & Cumbers Ltd.* [1947] 2 All E.R. 159 *per* Lynskey J.

[188] E.g., Baking Industry (Hours of Work) Act 1954, s.8; Factories Act 1961, s.169; Offices, Shops and Railway Premises Act 1963, s.73; Fire Precautions Act 1971, s.28.

PART III

NEED FOR REFORM

3.1 This branch of the law may be open to criticism in a number of respects:

(a) *Condition of premises* Even where the landlord is fully responsible for repairs to premises which are let, their condition may be such that they are unfit for the tenant to use them for their intended purpose. The full performance of the current obligations may not result in a building of a satisfactory standard. In addition, the standard to which the property is to be maintained is normally influenced by the date at which it is let and there is no provision for modernisation;

(b) *Responsibility* The allocation of responsibility is not always satisfactory. The present arrangements may leave some work entirely out of account, not requiring either party to the lease to be concerned, or they may in practice place responsibility where it was probably not intended to lie. Although we are primarily concerned in this Paper with relations between landlords and tenants, it is necessary to take account of the public interest in the satisfactory maintenance of buildings which may in most cases be thought to require that someone be responsible;

(c) *Other property* Where the property let to the tenant is dependent on other property belonging to the landlord for its security or for necessary services, the nature and extent of the landlord's duties relating to that other property are unclear, and, to the extent that the tenant may not satisfactorily receive the services, unsatisfactory;

(d) *Enforcement* There may be no practical prospect of enforcement of some of the obligations imposed. If the aim of imposing duties to repair and maintain property is to ensure that the work be done, there is a case for reconsidering the present limits on the sanctions imposed, which often have the effect of ensuring that less compensation is payable for breach of duty than would be necessary to put matters right;

(e) *Lack of clarity* One of the reasons for confusion in this area of the law is the accretion of rules which overlap. The duties imposed by the law of waste, which frequently duplicate the contractual obligations of tenants provide one example. Legislation addressing repairing obligations between landlord and tenant has proliferated; the difficulty of ascertaining the rules governing any particular situation can make them less effective.

3.2 We consider each of these matters below and we invite those responding to this Paper to consider whether they agree with these criticisms and whether there are other unsatisfactory features of the present law which need to be addressed.

Condition of Premises

Repair

3.3 Until now, most obligations, both contractual and statutory, have been obligations "to repair". It is clear that "disrepair" is related to the physical condition of whatever has to be repaired, and not to the questions of lack of amenity or inefficiency.[1] Accordingly, there may be no obligation to ensure that the building let is fit for use for its intended purpose. This is graphically made by the facts of a recent case concerning a terraced house in Wales let by the local council.[2] "The evidence shows that there was considerable condensation on the walls, windows and metal surfaces in all rooms of the house. Water had frequently to be wiped off the walls; paper peeled off walls and ceilings, woodwork rotted, particularly inside and behind the fitted cupboards in the kitchen. Fungus or mould growth appeared in places and particularly in the two back bedrooms there was a persistent and offensive smell of damp. Among the places where there was mould growth were the wooden sills and surrounds of the windows in the bedrooms, and some of these have become rotten. Additionally, in the bedrooms condensation caused the nails used for fixing the ceiling plasterboard to sweat and ... there was some perishing of the plaster due to excessive moisture".[3]

3.4 As the law stands, the tenants had only limited recourse against the landlord. Much of the condition of the premises resulted from condensation which was not caused by any deterioration of the exterior or structure of the house, for which the landlord was responsible, and therefore there was no repair which it was liable to carry out. Lawton and Neill L.JJ. reached that conclusion with regret. In another case, Ralph Gibson L.J. said: "I found it at first to be a startling proposition that, when an almost new office building lets ground water into the basement so that water is ankle deep for some years, that state of affairs is consistent with there being no condition of disrepair under a repairing covenant in standard form whether given by landlord or tenant".[4] It might be thought that the law should go further and seek to ensure that premises let will be kept in a satisfactory state for their intended purpose.[5]

3.5 The nature and extent of the work which falls within the term repair can best be explained by examining a number of the issues which the courts have had to determine in this context.

Improvement

3.6 A sharp distinction has been drawn between "repair" and improvement work; the latter does not come within the duty to repair.[6] This is justifiable on the grounds that, in the absence of a special bargain, a lease entitles the tenant to enjoy the property in the state in which it was let to him, without the landlord being obliged

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1 *Quick* v. *Taff Ely Borough Council* [1986] Q.B. 809, 818.

2 *Ibid.*

3 *Ibid.*, p.815 *per* Dillon L.J.

4 *Post Office* v. *Aquarius Properties Ltd.* [1987] 1 All E.R. 1055, 1063.

5 We consider this issue in Part V below.

6 Para. 2.22 above.

to improve it, and obliges the tenant to hand the property back to the landlord at the end of the lease, in a specified state of repair but without improvement. The transaction is, therefore, essentially the hiring of a property in its existing state for an agreed fee,[7] but without any obligation on either party to make any further capital investment in it.

3.7 The different treatment of improvements may be much more difficult to justify in practice. As Sir John Megaw said in a recent judgment,[8] "Assume facts such as exist in the present case:[9] that is, serious defects in the structure which can be properly remedied (I must, of course, avoid the word 'repaired') only by works which fall outside the meaning of 'repairs', or defects which it is sensible should be remedied by such works rather than by repeated temporary or ephemeral repairs. ... On those assumptions, the landlord, under the law as it has been interpreted, cannot be compelled by the tenant to remedy the defects. ... All this arises because of the distinction which the law has drawn between 'repairs' and works of remedy of serious defects which fall outside the meaning of 'repairs'." However, it may be, as he went on to suggest, that the difficulties are in practice too rare to justify legislation, which might result in more problems than it solved. We should welcome views on whether the distinction between repair work and improvement work frequently gives rise to problems in practice and whether that distinction should be retained.

3.8 Another issue arises in connection with improvements to property, which is whether an express duty to repair should extend to improvements. The position is not at present entirely clear. A duty to repair "the demised premises" normally includes buildings erected after the date of the demise,[10] but a slight change in the wording of the lease, requiring the repair of "the demised buildings", can restrict the obligation to the buildings in existence when the lease was granted.[11] On the other hand, where improvement work, at least that which is done by the party who does not have the repairing duty, makes that duty more onerous it may cancel the obligation, unless the lease expressly provides for repairs to improvements.[12] While it is true that a duty to repair the improvements could make that obligation materially more onerous, when improvements are authorised by the lease or by statute[13] there can hardly be any reason to exclude them. If

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7 "In common usage rent refers to a payment for the use of either a tangible or intangible asset for a fixed period of time, and will usually include the servicing of interest, depreciation, taxes and other charges": Beirne, *Fair Rent and Legal Fiction* (1977), p.54.

8 *McDougall* v. *Easington District Council* [1989] 1 E.G.L.R. 93, 96.

9 An unsatisfactory system-built house required extensive remedial work, involving removing the front and rear elevations, the roof structure and the rain dispersal system.

10 *Hudson* v. *Williams* (1878) 39 L.T. 632.

11 *Doe d. Worcester Trustees* v. *Rowlands* (1841) 9 C. & P. 734.

12 *Barton* v. *Alliance Economic Investment Co. Ltd.* (1935) 179 L.T. Jo. 256.

13 E.g., Landlord and Tenant Act 1927, s.3(4); see *Compensation for Tenants' Improvements*, (1989), Law Com. No. 178.

it is a proper case for requiring that the property be repaired, and a proper case for allowing it to be improved, there seems no logic in not maintaining any improvement in good condition.

Inherent Defects

3.9 Despite the dismissal of earlier suggestions that rectifying inherent defects in premises let could never fall within the definition of repair,[14] similar questions have been raised by a recent case concerning the position of a building part of which was never suitable for its purpose.[15] A recently built office building in the City of London was let in 1969. For some years, when the water table rose, the basement was ankle deep in water because of the form of construction. In fact, this does not appear to have caused inconvenience because the basement was not used. The case was disposed of on the basis that it is not repair to change a state of affairs which has always existed,[16] although this view does not find universal favour.[17] If repair, as it is now understood, were not the test, the conclusion might not be the same. Judged on the basis of intended use, the decision might turn on whether there was evidence of intention to use the basement for a purpose for which the flooding would have made it unsuitable. If there was such evidence, it is hard to see why there should not be a duty to do the remedial work, although there would be the further question of who should pay for it.

3.10 As Ralph Gibson L.J. pointed out,[18] "the reasoning ... is equally applicable whether the original defect resulted from error in design, or in workmanship, or from deliberate parsimony or any other cause".[19]

3.11 Clearly, there will be cases in which a satisfactory repair - in the general sense of works carried out to remedy a deficiency which renders property unusable - will involve changing a state of affairs which existed before the lease was granted, and possibly since the property was built. The present distinction, between defects in a building as originally built and faults which develop later, will produce anomalies. Whether or not a party has to cure a particular physical defect may

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[14] Paras. 2.23-2.24 above.

[15] *Post Office* v. *Aquarius Properties Ltd.* [1987] 1 All E.R. 1055.

[16] "The tenant cannot ... be under any obligation to do any work pursuant to this covenant [to repair] unless the demised premises are at present out of repair. However, a state of disrepair, in my judgment, connotes a deterioration from some previous physical condition": *ibid.*, p.1065 *per* Slade L.J.

[17] "... if the only defect in the door was that it did not perform its primary function of keeping out the rain, and the door was otherwise undamaged and in a condition which it or its predecessors had been at the time of the letting then it seems to me ... this cannot amount to a defect for the purpose of a repairing covenant even though, as it seems to me in layman's terms, that a door which does not keep out the rain is a defective door, and one which is in need of some form of repair or modification or replacement": *Stent* v. *Monmouth District Council* (1987) 54 P. & C.R. 193, 209, *per* Stocker L.J.

[18] In commenting on *Quick* v. *Taff Ely Borough Council* [1986] Q.B. 809; see paras. 3.3-3.4 above.

[19] *Post Office* v. *Aquarius Properties Ltd.* [1987] 1 All E.R. 1055, 1063.

depend on whether it was built into the property or it developed later, even though the prejudicial effect of the defect is the same whatever and whenever its origin.

3.12 Liability for curing inherent defects can be linked to the more general question of responsibility for remedying matters which existed before the lease was granted, which will necessarily include inherent defects. To the extent that the defective state of the property is apparent at the date of the letting, the parties can assess their position, although this may involve taking expensive professional advice. There may, however, be a lack of equality. Defects may be known to the landlord which are not apparent, or which would save the tenant a great deal of investigation if the information were volunteered. At present, the landlord has no obligation to tell the tenant what he knows. There is an argument for requiring him to disclose that information, so that both parties contract on an equal footing.

3.13 When considering a liability of this nature, the question arises whether a disclosure duty should apply to all information, to what the landlord actually knows or to both what he actually knows and what he ought to have known. To impose liability to disclose information which the landlord does not in fact have must necessarily mean that he cannot comply. But it is not reasonable that a landlord can disadvantage his tenant by deliberately avoiding informing himself. A landlord may already owe a duty under the Defective Premises Act 1972 where he "knows (whether as a result of being notified by the tenant or otherwise) or if he ought in all the circumstances to have known of the relevant defect",[20] and it might be appropriate here to follow that formulation.

Date of Letting

3.14 The standard to which a property is to be repaired normally depends on its age and nature at the date when it is let.[21] There is apparent fairness in this, when balancing the economic interests of the parties: if the tenant is to repair, it is reasonable that he should give back at the end of the lease a property which is neither better nor worse than he received at the start. However, the appropriateness of the principle may be more apparent than real.

3.15 First, it is never possible to do more than "have regard" to the age and nature of the property; there is no hard and fast rule. If, when the lease starts, the property is dilapidated, that does not necessarily render any repairing obligation nugatory. On the other hand, if the lease is lengthy some natural deterioration is allowable, so one does not look exclusively at the condition of the property when the lease was granted. Secondly, no account is taken of changes in the meantime to the surrounding neighbourhood,[22] which may make the earlier standard of repair wholly inappropriate. Thirdly, this construction of repairing covenants can lead to misunderstanding and inconvenience when property is sub-let. The head lease and the sub-lease may contain identical repairing covenants, which would appear to be appropriate when the mesne landlord wants to pass on to the sub-tenant the duties imposed on him by the head lease. However, the two covenants may be interpreted differently merely because of the different dates on which the

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[20] Section 4(2).

[21] Para. 2.20 above.

[22] *Anstruther-Gough-Calthorpe* v. *McOscar* [1924] 1 K.B. 716.

lease and the sub-lease were granted,[23] so that the mesne landlord is unintentionally left with some duty to repair. Fourthly, and more fundamentally, if the property is let for a specified period so that it may be used throughout for a particular purpose, the state at the date of the letting may be seen as less relevant than whether it allows the objective to be achieved. Fifthly, the requirements of a reasonably minded class of tenant likely to take the property are also to be judged as at the commencement of the lease.[24] In relation to commercial property with a company tenant, it is not clear whether this refers to the size and financial standing of a likely tenant, the type of business they would conduct, the way they would conduct it or to these and other factors.

Modernisation

3.16 A duty to repair does not normally carry a duty to modernise the premises. If the only way to do satisfactory remedial work is by adopting a better, more modern form of construction or design, the work is likely to be one of improvement.[25] However, that presupposes these facts: remedial work to the building is needed and it is possible using new techniques. It is open to question whether neglecting the work, which may mean that the building falls into disuse, can be justified merely because of changes in building methods.

3.17 Modernisation can involve other problems. It is easy to envisage circumstances in which changes in statutory requirements concerning safety, hygiene or working conditions result in the continued use of existing premises for a particular purpose becoming unlawful. Less dramatically, changes in living habits, working practices or market conditions might stop a property being considered suitable for a particular purpose. Or, again, an intended use might be forbidden, or forbidden in that location, or might fall into disfavour.

3.18 Of necessity, no duty to do remedial or improvement works can arise where it is legally or practically impossible to carry out those works.[26] Similarly, if there was no real intention of continuing a particular use, there would be no purpose in enforcing an associated obligation to do work. In practice it is likely that the property would be put to a different purpose, and any linked duty to do remedial work would then be adapted accordingly.

3.19 That leaves cases in which changes to statutory rules necessitate doing work if the use is to continue. Such requirements can be expensive, although some leases already impose an express duty to do work required by statute, separately from repairing obligations.[27] Certainly, there are serious questions to address about where the burden of such an obligation should lie, but if the property is to

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[23] *Walker* v. *Hatton* (1842) 10 M. & W. 249.

[24] *Proudfoot* v. *Hart* (1890) 25 Q.B.D. 42, 52.

[25] *Collins* v. *Flynn* [1963] 2 All E.R. 1068: inadequate foundations needed to be replaced by newly-designed ones.

[26] E.g., *Gooderham & Worts Ltd.* v. *Canadian Broadcasting Corporation* [1947] A.C. 66: a covenant to modernise could not be complied with unless further land was purchased, and the covenant did not oblige the tenant to do that.

[27] E.g., 22 *Encyclopaedia of Forms and Precedents*, 5th ed., (1986), p.733.

continue to be put to that use there is no escaping the cost. One option to explore, particularly for business property where the aim is to use it for profit, is whether the duty should be limited to cases where, taking the expenditure into account, the business could still be profitable.

Responsibility

Part of a Building

3.20 In the absence of express or implied repairing obligations, the parties to a lease generally have no such duties. The situation in which the property can deteriorate, without either party being able to insist on the other repairing, is clearly unsatisfactory. This is the more serious if the party who voluntarily wants to repair has no right to gain access, which is the position of the landlord who has not reserved a right of entry for the purpose,[28] and the position of the tenant of part of a building where some other part of it needs repair. "Where a landlord of a building grants a lease of part only and is in a position to insist on the lessee taking a lease in a common form of the landlord's choice, it is not at all unusual to find that the lease does not contain any covenant by the landlord to do repairs to parts of the building, however important, and whether included in the demise or not. ... It may well be objectively sensible, or reasonable, that there should be a landlord's covenant, with a corresponding covenant by each lessee to contribute a proportionate part of the expense, but that is not enough to warrant implying such covenants".[29]

3.21 We do not know how far it is still the case that landlords insist that they are only prepared to let a part of a building on terms that the tenant undertakes to repair the demised premises, but they do not accept responsibility for the rest of the building. Certainly, it was not infrequent in the past. Landlords, particularly of buildings where potential tenants were competing to take leases, would propose such terms and would make much use of the argument that all lettings within one building must, for efficient estate management, be on standard terms so that they would not entertain any proposal to amend them. Many such leases must still be subsisting, but how different is modern practice? We should welcome information from those responding to this Paper.

3.22 The problems which arise when the maintenance and repair of property which is let depend on the upkeep of other property are not limited to ensuring that one or the other party to the tenancy has a duty relating to all parts of the demised premises. Clearly, the stability of a flat or a suite of offices at the top of a building depends on the repair of the lower part of the building which supports it, and there will be many other instances of interdependence. But there are limits on what can be done to regulate the position by intervention in the landlord and tenant relationship. Clearly, if the landlord owns relevant property other than what was let to the tenant in question, he can undertake appropriate duties; if the property belongs to a third party, this is not the context in which any obligation

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[28] *Plough Investments Ltd.* v. *Manchester City Council* [1989] 1 E.G.L.R. 244.

[29] *Tennant Radiant Heat Ltd.* v. *Warrington Development Corporation* [1988] 1 E.G.L.R. 41, 43, *per* Dillon L.J.

can be imposed. However, even the basis of the duties which the landlord already has is not clear.[30]

3.23 In relation to residential property, this problem has been recognised by two statutory provisions. First, the statutory covenant to repair a dwelling-house let for less than seven years[31] was extended in 1988 to include, where what was let formed part only of a building, other parts of that building in which the landlord had an estate or interest.[32] Secondly, in 1974[33] the court was given jurisdiction to make an order for specific performance of a landlord's repairing covenant, whether statutory or contractual,[34] and that power extends to alleged breaches of covenant relating to property other than the premises let.[35]

3.24 The situation where what is let is part only of a building or structure is not confined to residential property. Although the parties to leases of business premises and other property, falling into this category of subdivided buildings, may be able to make satisfactory arrangements by contract, they frequently do not.[36]

Services

3.25 The extent to which a landlord undertakes to keep in good condition other property which he owns over which the tenant obtains services necessary for enjoyment of the demised premises is not clear.[37] Lord Wilberforce[38] drew a distinction between a staircase to upstairs premises and an essential means of access to a unit in a multi-occupied building. The precise nature of the distinction, and the criteria for recognising the different cases, are unclear.

Fitness for Human

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[30] Para. 2.10 above.

[31] Landlord and Tenant Act 1985, s.11.

[32] Housing Act 1988, s.116. The extension also covers service installations elsewhere in the building, but is subject to the landlord having a right of access, or being able to obtain access, to the other parts of the building.

[33] Housing Act 1974, s.125.

[34] "'Repairing covenant' means a covenant to repair, maintain, renew, construct or replace any property": Landlord and Tenant Act 1985, s.17(2)(d).

[35] Landlord and Tenant Act 1985, s.17.

[36] Para. 3.20 above.

[37] Paras. 2.8-2.13 above.

[38] *Liverpool City Council* v. *Irwin* [1977] A.C. 239, 256; para. 2.12 above.

Habitation

3.26 The long-standing[39] statutory implied obligation on landlords of houses let for human habitation applies only within modest rent limits.[40] They have not been revised since 1957.[41] Clearly, with rents generally rising, the impact of the provision is reduced.[42]

3.27 Even if more cases were brought within the scope of this provision, and perhaps particularly if that were done, there would also be good reason for examining the extent of the obligation it imposes. The statutory definition for other purposes of fitness for human habitation has recently been revised.[43] Adopting this new definition would, at least in part, meet the difficulty that it has been held that the statutory duty does not extend to common parts of a building leading to the demised premises.[44] This contrasts with statutory obligations for maintenance of common parts of some business premises[45] imposed on the "owner" of the building.[46]

Landlords Repairing on Notice

3.28 As we noted above,[47] a landlord's liability to repair does not normally arise until he has been given notice of the defect. Although there is some logical justification for this, it can have the effect of nullifying the landlord's duty in some circumstances. First, if the defect is latent until the moment that the damage occurs, there is no chance that the landlord can be given notice and he will have

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[39] Dating back to the Housing Town Planning etc. Act 1909, ss.14, 15.

[40] Para. 2.29 above.

[41] The Minister of State for the Environment gave updated values for the current rent limits, of £80 a year in London and £52 a year elsewhere, as £662 a year and £430 a year respectively: letter following Written Answer to Parliamentary Question, *Hansard*, 19 December 1986, col. *749*.

[42] "... in view of inflation, the section must now have remarkably little application": *Quick* v. *Taff Ely Borough Council* [1986] Q.B. 809, 817, *per* Dillon L.J.

[43] Housing Act 1985, s.604, as substituted by Local Government and Housing Act 1989, Sched. 9, para. 83. To be fit for human habitation, a dwelling must meet all of the following requirements: be structurally stable, free from serious disrepair, free from dampness prejudicial to the health of the occupants, have adequate provision for lighting, heating and ventilation, have an adequate piped supply of wholesome water, have satisfactory facilities for preparing and cooking food, including a sink with a satisfactory supply of hot and cold water, have, for the exclusive use of the occupants, a suitably located W.C. and, with a satisfactory supply of hot and cold water, bath or shower and wash hand basin, and have an effective drainage system for foul, waste and surface water. In the case of a flat, the building of which it forms part must also be structurally stable, free from serious disrepair and dampness, have adequate provision for ventilation and an effective drainage system for foul, waste and surface water.

[44] *Dunster* v. *Hollis* [1918] 2 K.B. 795. In some circumstances, there may be an implied duty to repair common parts: *Liverpool City Council* v. *Irwin* [1977] A.C. 239; but not always: *Duke of Westminster* v. *Guild* [1985] Q.B. 688.

[45] Offices, Shops and Railway Premises Act 1963, s.42.

[46] I.e., the person receiving the rack rent: *ibid.*, s.90(1).

[47] Para. 2.14 above.

no liability to repair.[48] Secondly, if by the time the landlord is given notice the condition of the property has so far deteriorated that rectification is impossible, he escapes responsibility.[49]

Crown as Landlord

3.29 The landlord's statutory duty to repair which is implied into lettings of dwellings for up to seven years[50] is of general application. To this, there is one major exception: in one case it was held not to bind the Crown when landlord.[51] The report of that case does not detail the alleged breaches of covenant, but it does record that the tenant claimed that as a result he had suffered loss or damage amounting to £68,560.

Enforcement

Damages

3.30 The amount of damages which a landlord can recover for breach of a tenant's repairing covenant is limited by statute.[52] The limit on damages while a lease is current, to any diminution in the value of the reversion, causes concern at two levels. First, as it operates at present, it may not be sufficiently broad to achieve its objective. It does not, e.g., restrict the operation of a covenant to spend a regular specified sum on repairs,[53] nor a duty to reinstate premises converted in breach of covenant, even though the conversion increases the value of the property.[54] Secondly, the policy behind the restriction may be questioned.

3.31 Where a property is let on a long lease at a ground rent, the value of the reversion, which may not fall in for, say, 50-100 years, will depend little, if at all, on the state of repair of the buildings. Let us suppose that they are allowed to fall into such disrepair that it is no longer an attractive proposition, or even no longer possible, to use them. The tenant has failed to comply with his duty to repair, but - effectively -is not obliged to pay damages. The situation may become such that the landlord's only remedy is to forfeit the lease, but he then recovers premises which are in no fit state to use as intended. If the fear is that landlords will unreasonably persecute tenants with trifling demands for damages in the course of a long lease, a restriction on proceedings may be more appropriate than a limit on damages. Or, if the policy adopted were to be that landlords had no proper interest in the physical state of the property while a lease has a substantial time to run, the logical approach would be to ban obligations

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[48] *O'Brien* v. *Robinson* [1973] A.C. 912: a bedroom ceiling collapsed injuring the tenant as a result of a latent defect of which neither landlord nor tenant was previously aware.

[49] *Torrens* v. *Walker* [1906] 2 Ch. 166.

[50] Paras. 2.31 *et seq* above.

[51] *Department of Transport* v. *Egoroff* [1986] 1 E.G.L.R. 89.

[52] Para. 2.38 above.

[53] *Moss Empires Ltd.* v. *Olympia (Liverpool) Ltd.* [1939] A.C. 544.

[54] *Eyre* v. *Rea* [1947] K.B. 567.

imposed on tenants, rather than allowing obligations but removing the sanctions from them.

Specific Performance

3.32 Specific performance can be seen as the ideal remedy for breaches of covenant to repair. After all, it results in the work being done, so that the premises can be enjoyed as they should be, and that also satisfies the public interest in having buildings satisfactorily maintained. Those objectives are not achieved by an award of damages to compensate for failure to comply. Nevertheless, only recently has there been any departure from the traditional assumption that specific performance was not available.[55] As far as we are aware, the earlier objection that the court cannot supervise repair work to ensure that its order has been complied with has not proved to be a difficulty. In a case involving complex repairs, the court referred the order to the Chief Chancery Master to give directions.[56] If this new practice, permitting specific performance of some repairing covenants, has proved useful and free from problems, it is hard to see why it should not apply to all leases, and to obligations undertaken by tenants.

Rights of Entry

3.33 Clearly, a repair can only be carried out by someone who is entitled to enter the property where the work has to be done; no legal right of entry exists merely because that is the only place where essential work can be carried out. A landlord who has no duty to repair must reserve a right of entry to carry out repairs on property which he has demised,[57] a tenant has no inherent right to go onto his landlord's adjoining property even to do repair work on the property demised.[58]

3.34 In many cases, this will be an aspect of a more general problem - the need for any property owner to have his neighbour's authority before doing work on his property from the adjoining one - on which there has been recent legislation.[59] However, the possibility of a right of entry for the landlord goes beyond the general neighbour case. He may not have adjoining property, and his interest may rather be a purely financial one in the property he wishes to enter.

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[55] Paras. 2.41-2.44 above.

[56] *Gordon* v. *Selico Co. Ltd.* [1986] 1 E.G.L.R. 71.

[57] "Where a reversioner has granted a lease with no power of re-entry reserved on breach of a covenant to repair, can he give himself the right to enter and do the repairs? It is a plain invasion of the rights of property. He has no more right than any stranger has ... As a matter of law ... there is no right in a reversioner to go in and do necessary repairs": *Stocker* v. *Planet Building Society* (1879) 27 W.R. 877, *per* James L.J.

[58] *John Trenberth Ltd.* v. *National Westminster Bank Ltd.* (1979) 39 P. & C.R. 104 (not a landlord and tenant case). A tenant may, however, have a right of entry on the landlord's property to do work which the landlord has defaulted in doing: *Loria* v. *Hammer* [1989] 2 E.G.L.R. 249.

[59] Access to Neighbouring Land Act 1992. This Act was based, with amendments, on our recommendations: *Rights of Access to Neighbouring Land* (1985) Law Com. No. 151.

General Considerations

Clarity of Rules

3.35 There is little doubt that the law in this area, which at present is an amalgam of common law rules and statutory variations added piecemeal, could be stated more coherently, in a way which would make it more accessible and clearer. In some cases, there are repetitive statutory provisions which could be replaced by general rules,[60] in others, related topics are dealt with in different Acts.[61]

3.36 A further example of duplication and overlap is provided by the law of waste, which gives tortious remedies.[62] As waste extends beyond the landlord and tenant relationship,[63] we cannot deal with it comprehensively in the course of this reform project. It is, however, for serious consideration whether, after the reform of the contractual obligations of landlords and tenants, it would remain useful in this field.

3.37 Another aspect of stating the law clearly is to eliminate examples of rules which are not readily apparent, and which therefore constitute a hidden trap. An example of this is the rule that a lease covenant expressed as "to repair" or "to keep in repair" automatically includes an obligation to put the premises into repair, even if they were out of repair at the start of the term.[64]

Type of Property

3.38 Much, but by far from all, of the statutory intervention in this area relates exclusively to residential property. No doubt this proceeds on the assumption that residential tenants require more statutory protection because, opposite their landlords, they are in a weaker bargaining position than other tenants. As a general proposition, this might justify distinguishing cases in which statutory rules should be mandatory, from those which the parties are free to vary; but where sensible general rules have been introduced by legislation, it might be thought that they should apply, as basic propositions, to all types of property.

3.39 Most of our discussion in this Part of the Consultation Paper has related to the repair of buildings. Although this will be the main area of concern, obligations relating to the condition of property can extend beyond buildings. There are many cases in which they can also relate, e.g., to fixtures,[65] boundary fences[66]

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[60] E.g., rights of entry to repair in different circumstances are conferred by: Rent (Agriculture) Act 1976, Sched. 5, para. 8; Rent Act 1977, s.148; Landlord and Tenant Act 1985, s.11(6); Housing Act 1988, s.16.

[61] E.g., Law of Property Act 1925, s.146; Landlord and Tenant Act 1927, s.18; Leasehold Property (Repairs) Act 1938, ss.1, 2.

[62] Paras. 2.46 *et seq* above.

[63] Para. 2.46 above.

[64] *Proudfoot* v. *Hart* (1890) 25 Q.B.D. 42.

[65] *Openshaw* v. *Evans* (1884) 50 L.T. 156.

[66] *Cheetham* v. *Hampson* (1791) 4 Term Rep. 318.

and access paths.[67] The simplest legal rules are those which draw the fewest distinctions. If possible, therefore, it would be desirable for re-formulated obligations concerning the condition of property to relate to the whole of any demised premises, whether or not a building. It would be helpful if those responding bore this in mind, with a view to highlighting cases in which they consider that there should be a distinction between buildings and other types of property.

[67] *Brown* v. *Liverpool Corporation* [1969] 3 All E.R. 1345.

PART IV

REFORM: PRELIMINARY CONSIDERATIONS

Objectives

4.1 Clearly, in reconsidering the rules of this branch of the law, the first need is to define the objectives which it should seek to achieve. There are a number of possible aims, some of which it may be practical to combine, but the first question on which we should welcome views is what should be the aims of the law here.

Encapsulating the Parties' Bargain

4.2 At one level, the terms in a lease or tenancy agreement about the condition of the property can be seen as satisfactory if they set out the bargain between the parties, allocating their respective responsibilities, in a way which is clear and comprehensive. The extent of the repairing obligations imposed cannot be assessed in isolation and adjudged as right, or even as appropriate. "It is to be borne in mind that the question of repairs is only one factor in the bargain, and that generally speaking the degree of liability in this respect undertaken by one side or the other is reflected in the amount of rent and other terms of the letting".[1]

4.3 In considering the terms of leases, the circumstances in which the bargains are made must be borne in mind. The commercial property market seems to be cyclical, veering between extremes at which, on the one hand, property is very difficult to let and, on the other, very difficult for potential tenants to obtain.[2] The state of the market for the time being will necessarily influence the terms of a letting, which will then continue throughout the term granted. In judging the need for a change in the law, one therefore needs to consider whether any current practice - be it satisfactory or unsatisfactory - is likely to be permanent, or likely to change with future variations in market conditions. One factor will, however, probably be constant: there is a scarcity element in the market, because the supply of property is limited. Further, there may be a degree of monopoly, where the bulk of the land in one neighbourhood which is available for a particular use is owned by one person or a small number of people. This has a particular effect on some commercial lettings, where the position of property can have a great effect on its usefulness and value.[3]

4.4 Another factor, which influences the terms of leases and undermines the notion that they represent the result of a free negotiation between the parties, has been identified. Over 40 years ago it was recognised that "in practice the extent of the obligations undertaken by the tenant is, broadly speaking, normally determined by

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[1] *Leasehold Committee - Final Report* (1950), Cmd. 7982, para. 213.

[2] The residential market is also cyclical, but this principally affects owner-occupied property, as distinct from property which is let.

[3] It has also been identified as a feature of the residential market at the time when owners of large estates granted long building leases for residential development: *Leasehold Committee - Final Report* (1950), Cmd. 7982, Minority Report by C. L. Hale and A. L. Ungoed-Thomas, para. 41.

reference to what has in the course of years become recognised as usual in the case of a lease of the length, and property of the type, in question. In other words, where there is a lease or tenancy agreement prepared with professional assistance, the tenant generally gets something in the nature of a standard bargain recognised as appropriate to the particular type of case, with more or less unimportant variations depending on which of the various books of precedents is favoured by the solicitors or counsel concerned".[4] This remains true today.

4.5 If the law is to go beyond merely recording the bargain which the parties have made, it is important to define the aims to be achieved. When doing so, it will be useful to assess the success of earlier statutory intervention in this field, and to consider whether it should be reduced, varied or extended.

Correcting Inequality of Bargaining Power

4.6 Most of the statutory intervention in the field of landlord and tenant has for a very long time been aimed at redressing the imbalance between the position and bargaining power of the parties. "One major concern has been to protect tenants against the oppressive use of the landlord's power. This is a classic interference with apparent freedom of contract, in the belief that the position of the parties when they negotiate is so unequal that the freedom is illusory".[5]

4.7 There have been many examples of this intervention in relation to repairing obligations, and the following may be cited:

(a) Tenants can claim relief against the enforcement of obligations to do decorative repairs;[6]

(b) The amount of damages to which a landlord is entitled as a result of a tenant's breach of a repairing covenant is limited;[7]

(c) Tenants can require their landlords to obtain the consent of the court before enforcing a repairing covenant in many circumstances;[8]

(d) Landlords who let residential premises for up to seven years undertake repairing responsibilities which they can only escape by obtaining a consent order of the county court.[9]

4.8 Intervention in the free market between landlord and tenant is not new. Over 100 years ago, a distinguished commentator wrote, "The truth is ... that the law of landlord and tenant has never, at least under any usual conditions, been a law of

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[4] *Leasehold Committee - Final Report* (1950), Cmd. 7982, para. 213.

[5] *Landlord and Tenant: Reform of the Law* (1987), Law Com. No. 162, para. 2.6.

[6] Law of Property Act 1925, s.147.

[7] Landlord and Tenant Act 1927, s.18.

[8] Leasehold Property (Repairs) Act 1938.

[9] Landlord and Tenant Act 1985, ss.11-13; paras. 2.31 *et seq* above.

free contract".[10] There is a tendency now to see this merely as an example of consumer protection, not needed by those contracting in the course of business, and therefore something to be confined to lettings of residential property for individual occupation. However, this view is not supported by the way that statute law has developed. Only one of the examples given above,[11] the fourth one, applies exclusively to lettings of dwelling-houses. Also, there has been detailed intervention to regulate the repairing obligations of parties to tenancies of agricultural holdings,[12] which are predominantly commercial lettings.

4.9 Experience suggests that the bargaining power of the two parties to any particular lease is frequently unequal, even in relation to commercial property. The advantage may sometimes lie with the landlord and sometimes with the tenant. The imbalance may result from the nature or identity of the parties,[13] the current state of the market or the monopolistic position of the landlord.[14] Statutory intervention may be justified in commercial cases, although in this area it should perhaps be more evenhanded. The aim could be to establish an acceptable norm which balances the interests of the parties, and from which, in some or in any circumstances, the parties can depart if they so wish.

Separate Categories

4.10 It may, however, be that further legislative change in this area should be restricted to residential property; this is a question on which we invite views. Primarily, the question must depend on whether and where there is need for change. If there are to be separate rules for different types of property, the division between premises put to residential use and other premises may be the most convenient. It is a distinction which is already well established, and it is normally easy to recognise into which category any particular property should fall. However, there is another general consideration, suggesting that there should be no distinction: the law will be simpler if it is possible to apply a single rule to all properties. If there are different sets of rules, there will always be the difficult marginal cases falling on the dividing line between the categories as well as examples of properties whose use changes, first falling into one class and then into another. Eschewing the application of different rules avoids those complications.

4.11 From a technical point of view, when rules apply only to particular types of property, it is necessary to define the limits of the class affected. This may be better done by reference to the nature of the property, or a reference to the

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[10] Pollock, *The Land Laws* (1883), pp.143-144.

[11] Para. 4.7 above.

[12] Agriculture (Maintenance, Repair and Insurance of Fixed Equipment) Regulations 1973, regs. 5-11. The tenancy agreement may nevertheless vary the provisions of the Regulations by making the landlord responsible for any item which the tenant would otherwise have had to repair: reg. 2.

[13] E.g., "As tenants, carrying on a solicitor's business, they have no staff capable of performing those tasks [inspecting a building, controlling and verifying work done to it], whereas the landlord, as a large property company with an interest in over 200 buildings in the City of London, has": *O'May* v. *City of London Real Property Co. Ltd.* [1983] 2 A.C. 726, 749.

[14] Para. 4.3 above.

purposes of the letting might be preferable; in either case, the question arises whether the state of affairs when the lease is granted governs the position throughout the term, or whether the application of the rules should be flexible to take into account later changes. Again, the case of mixed-use property must be considered: should it fall wholly within one class or the other, or should the rules apply to different parts of the property according to their use.

Fitness for Use

4.12 The purpose of the majority of lettings is that the property should be occupied by the tenant, or by a sub-tenant, for some purpose. Frequently, but by no means always, that purpose will be stated[15] or will be apparent.[16] It is obvious that in many cases a want of repair if serious enough would render the property incapable of occupation, and therefore useless to the tenant.[17] Nevertheless, ensuring that premises are or remain fit for their intended purpose is not one of the objectives of the present law about repairing obligations.[18] It is clearly a possible view that a tenant contracting to take premises for a particular use should have a right that they then be, or that they should throughout the term be maintained, in a state fit for that purpose. It is for consideration whether that should at least be the starting point for formulating new provisions.

4.13 In a limited way, the principle of a landlord's guaranteeing that the state of a property will be suitable for its use has been introduced in this country, in relation to lettings of houses at low rents.[19] Elsewhere, it has been applied to residential lettings generally. "[T]he urban tenant is in the same position as any normal consumer of goods. ... A tenant may reasonably expect that the product he is purchasing is fit for the purpose for which it is obtained, that is, a living unit".[20] In France, the principle is universal for residential property. "The landlord is obliged, by the nature of the contract, and without the need for any special provision ... to maintain the premises in the condition fit for the use for which they are leased".[21]

4.14 In various United States jurisdictions there have been developments in the law recognising repairing liabilities based on a landlord's obligation to keep premises

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[15] Albeit obliquely, by a tenant's covenant not to use the premises except for a particular purpose.

[16] Because the property is only physically adapted for one use or because planning restrictions would make it illegal to use it in any other way.

[17] E.g., *Demetriou* v. *Poolaction Ltd.* [1991] 1 E.G.L.R. 100: the poor state of premises let for sub-letting as residential rooms prevented their being so used for ten years. Neither landlord nor tenant had any obligation to repair.

[18] "[D]isrepair is related to the physical condition of whatever has to be repaired, *and not to questions of lack of amenity or inefficiency*": *Quick* v. *Taff Ely Borough Council* [1986] Q.B. 809, 818 *per* Dillon L.J.; emphasis added.

[19] Landlord and Tenant Act 1985, s.8; para. 2.29 above.

[20] *Green* v. *Superior Court of San Francisco* (1974) 10 Cal. 3d 616, *per* Tobriner J.

[21] Code Civil, Art. 1719(2). Similar provisions apply in the civil law jurisdiction of Quebec, where there is doubt how far a landlord may contract out of his responsibility: *Williams' Canadian Law of Landlord and Tenant*, 4th ed. (1973), pp.757-761.

fit for the purpose for which they were let. This applied first, and still applies most widely, to residential property. The general principle was enunciated in 1969 in the Supreme Court of New Jersey. "[A]ny act or omission of the landlord or of anyone who lets under authority or legal right for the landlord, or of someone having superior title to that of the landlord, which renders the premises substantially unsuitable for the purpose for which they are leased, or which seriously interferes with the beneficial enjoyment of the premises, is a breach of the covenant of quiet enjoyment and constitutes a constructive eviction of the tenant".[22] In 1970, the United States Court of Appeals for the District of Colombia held that the landlord of an urban apartment house in multiple occupation had a duty to a tenant to keep the property free from substantial violations of the Housing Code, which included stipulations about the condition of the property.[23] At least forty American jurisdictions now recognise an obligation on landlords to repair defects in premises they let.[24] It has been suggested that laws enforcing fitness for habitation requirements positively raise the standard of the housing stock. The author of a statistical study suggests that "if we want to decrease the relative prevalence of sub-standard rental housing in metropolitan areas, we should seek enactment and enforcement of laws that extend the warranty of habitability in a decisive manner".[25]

4.15 There have been similar moves in relation to commercial property, although they have come later and have so far been less decisive. Although the Civil Court of the City of New York held in 1961 that "there ought to be and is an implied warranty of fitness for commercial purposes",[26] that decision was doubted[27] and in 1985 a commentator wrote, "No jurisdiction has recognised an implied warranty of fitness in commercial leases subsequent to the Reste Realty[28] decision".[29] However, in 1988 the Illinois Supreme Court extended the landlord's repairing duty based on fitness for purpose to commercial landlords[30]

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[22] *Reste Realty Corporation* v. *Cooper* (1969) 251 A. 2d 268, 274 *per* Francis J.

[23] *Javins* v. *First National Realty Corporation* 428 F. 2d 1071, 400 U.S. 925 (1970).

[24] Rabin, *The Revolution in Residential Landlord-tenant Law: Causes and Consequences* (1984) 69 Cornell Law Review 517, 522.

[25] Burrows and Veljanovski (eds.), *The Economic Approach to Law* (1981), Hirsch, *Landlord-tenant Relations Law*, p.289.

[26] *40 Associates Inc.* v. *Katz* 446 N.Y.S. 2d 844, 845 *per* Judge Nason.

[27] Bopp, *The Unwarranted Implication of a Warranty of Fitness in Commercial Leases - An Alternative Approach* (1988) 41 Vanderbilt L.R. 1057.

[28] See para. 4.14 above.

[29] Pinto, *Modernizing Commercial Lease Law: The Case for an Implied Warranty of Fitness* (1985) 19 Suffolk U.L.R. 929, 947.

[30] *Rowe* v. *Lombard State Bank* 125 Ill. 2d 205, 531 N.E. 2d 1358 (1988).

and the Texas Supreme Court applied the principle to the lease of a doctor's surgery.[31]

4.16 A number of European countries have relevant rules.[32] In Greece, there is an implied obligation to keep commercial or industrial property which is leased in a state fit for its intended purpose. What that purpose is can be conclusively settled by a declaration in the lease, unless later varied by agreement, but in the absence of any declaration is established by evidence. In Italy, the standard of repair required for leased commercial or industrial property is to "a condition suitable for the agreed use".[33] In some cases, the obligation falls mainly on the tenant, with the landlord being responsible only for extraordinary repairs;[34] in other cases, the landlord has to undertake all but minor maintenance. In Germany, the landlord of any property has an obligation to hand it over to the tenant and to keep it in a condition appropriate for the stipulated use,[35] unless the parties otherwise agree. The use in question can be stated in the lease, but if it is not, the court will determine the parties' intention; in the absence of any intended purpose, it is assumed that the property has been let for the normal purpose for which it is fit. In the Netherlands also, the landlord has an obligation to keep the property in such a state that it can serve the purpose for which it was let,[36] unless the parties otherwise agree which they frequently do. The intended purpose will generally be stated in any written lease, but in default a court will judge the parties' intention from other evidence.

Public Concern

4.17 The landlord and tenant have obvious interests in the property which is let. The landlord generally expects to receive a rent and can look forward to the right to occupy or re-let the property when it reverts to him at the end of the term. The tenant usually expects to put the property to use for his own benefit during the term, and may also have an interest in its capital value. Both these interests are likely to be harmed if the state of the premises is allowed to deteriorate. However, there are wider interests in the maintenance of buildings, and a case can be made for taking them into account when deciding what obligations the law should impose on landlords and tenants.

4.18 The wider interest operates at two levels. Property in the vicinity of a building which is allowed to deteriorate may lose value, even though in different ownership

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[31] *Davidow* v. *Inwood North Professional Group* 747 S.W. 2d 373 (1988).

[32] For information about the position in their respective countries, we are indebted to Me. Sofia Mouratidou, notary of Thessalonika, to Dr. Mario Miccoli, notary of Livorno, to Dr. H H Hellge, notary, and Dr. Wenckstern, deputy notary, of Hamburg and to Prof. Mr. A A van Velten, notary of Amsterdam.

[33] Civil Code, art. 1575, para. 2.

[34] If the landlord's default causes the tenant to sustain a loss exceeding 20% of his annual income from the property, he is entitled to a proportionate reduction in rent: *ibid.*, art. 1622.

[35] Civil Code, art. 536.

[36] Civil Code, art. 1586. It is expected that amended provisions, already in draft, will before long replace this part of the Civil Code.

and not connected. The owners of that other property are therefore prejudiced. But beyond that, it may be argued that the building stock in this country is part of our national wealth; if it is allowed prematurely to deteriorate, that wealth is diminished. Obviously, individual buildings will become obsolete and need to be replaced, but if that process is accelerated by unjustified neglect, there is a greater likelihood of creating slum housing and run down industrial and commercial areas, to which over the years it has proved necessary to devote considerable sums from taxation revenue.

4.19 This public interest may be at variance with what seems to be the best course to adopt between landlord and tenant. "It is less costly and more conducive to a peaceful existence to allow lessees to go their own way until the lease expires and a formidable bill of dilapidations can be presented. This is a thoroughly bad practice from the standpoint of the community's interest in preserving the stock of houses, though it receives encouragement from some of the legislation designed to protect lessees from oppressive use of covenants".[37] The position may indeed be more complicated. "There appears to be a complex conflict of interests. On the one hand, society as a whole suffers if repairs are not actually done, since houses decay and become slums; on the other hand, tenants, particularly poor tenants may suffer if their repairing obligations are too onerous and are too rigidly enforced; also many private landlords are too poor to carry out major repairs".[38]

Encouraging Repair

4.20 A simpler aim was adopted in the United States by those preparing a landlord and tenant code. "The first object of landlord-tenant law, in our view, is to encourage the making of repairs and the general maintenance of property. To accomplish this, it was decided to (i) allocate maintenance responsibilities between the parties in accordance with their respective abilities and probable expectations, (ii) provide that an individual tenant can correct the landlord's default at the landlord's expense, (iii) limit the tenant's liability when he repairs at the landlord's expense in error, (iv) allow the tenants of an apartment building to put a grossly deteriorated building into receivership for the purpose of correcting major defects, (v) condition the landlord's most desirable remedies for tenant maintenance default on his first correcting the defaults complained of, and (vi) allow the landlord to correct such defaults at the tenant's expense".[39] To the extent that the objective is simply to ensure that the work is done, it is necessary to consider our statutory curbs on enforcing repairing obligations undertaken by tenants.[40]

Role of Lease Bargain

4.21 In looking at the aim of any repair which would govern the bargain between landlord and tenant about the condition of the property, it is necessary to consider how far it is appropriate that the obligations in question should be privately enforced. Where the objective is a public one, the implementation of good practice in relation to housing or in the work place, it may be that enforcement

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[37] Political and Economic Planning, *The Future of Leasehold* (1952), 18 *Planning* No. 338, p.205.

[38] Partington, *Landlord and Tenant* (1975), p.262.

[39] Levie and Others, *Model Residential Landlord-tenant Code, American Bar Foundation Research Project* (1969), p.11.

[40] Paras. 2.36 *et seq* above.

should be left to public authorities taking civil or criminal proceedings. This has been a matter of some debate.

4.22 The difference has been clearly noted. "When a private landlord fails to do repairs a solicitor will tend to see a solution within the framework of the terms of the tenancy, backed up by the county court. The alternative, however, is enforcement proceedings by the Public Health Department under the Public Health Acts and the Housing Acts. ... Within the development of a more open attitude to rights, more stress will be placed on the value of these enforcement functions. [Footnote to the original: Jurisprudentially of course these functions are concerned with the enforcement of public obligations and are not directly related to private rights.]".[41] Some see public enforcement as superior. "In theory the covenants of a lease should be effective instruments for securing the maintenance of the houses. The lessor has an interest in seeing that the house that will come into his possession is well cared for ... This control should work better than control through bye laws. In practice, repairing covenants often fail to prevent any serious deterioration".[42]

4.23 However, public enforcement can be inconsistent. Of the position in the United States, it has been said that "the practical enforcement of building codes is another matter. Building Inspectorates are often under-staffed, inefficient, or simply corrupt, and the process of enforcement can be hampered or delayed beyond the tolerance of the average tenant".[43] Another commentator wrote, "[C]ode enforcement tends to oscillate wildly between passive and active phases. At times, City officials - temporarily confident of their superior wisdom - impose their preference for better housing upon the poor and embark on a moralistic code enforcement 'campaign' which couples a 'massive crash enforcement program' with an even more massive dose of invective against greedy slumlords and 'intolerable' living conditions. Unfortunately, moral indignation is difficult to maintain for any cause, however noble".[44] Although many factors may differ in this country, some elements of these misgivings may be apparent here.

4.24 There seems no reason why private and public enforcement should be regarded as mutually exclusive. If it is appropriate to impose an obligation, there is every reason why it should be enforced, if not by one means then by another. The legislation governing factories provides a well-established example of a code imposing criminal sanctions for breach of it,[45] enforceable by public authorities,[46] where it is also possible for individuals who suffer as a result of a breach to bring civil proceedings to recover damages. This dual approach seems

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[41] *Social Needs and Legal Action* (1973), White, *Lawyers and the Enforcement of Rights*, pp.41-42.

[42] Political and Economic Planning, *The Future of Leasehold* (1952) 18 Planning No. 338, p.204.

[43] Tiplady, *Recent Developments in the Law of Landlord and tenant: The American Experience* (1981) 44 M.L.R. 129, 140.

[44] Ackerman, *Regulating Slum Housing Markets* (1971) 80 Yale L.J. 1093, 1095.

[45] Factories Act 1961, s.155(1).

[46] Health and Safety at Work etc. Act 1974, ss.18, 53(1), Sched. 1.

to achieve both the possibility of ensuring compliance with standards required in the public interest and the opportunity for an individual who is prejudiced to act on his own initiative and obtain compensation for his personal loss.

4.25 Any extension of public enforcement would no doubt have implications for the local authorities charged with the duty of enforcing these obligations. We should be interested to learn from them whether they consider such an extension would be desirable.

PART V

REFORM OPTIONS

5.1 In Part III of this Working Paper we identified a number of matters of concern and we now turn attention to ways to address them. We examine, in turn, three approaches: to do nothing, to adopt a comprehensive new approach or to make reforms to individual points.

NO CHANGE

5.2 The first option is to make no changes. The scope of the contractual property maintenance bargain between the parties to leases, however the obligation has been allocated, has remained unaltered for many years, although litigation has served to clarify aspects of it and to demonstrate how it applies to particular circumstances. At least those who enter into a lease with professional advice and have the implications explained to them, should be reasonably clear about the scope and limitations of the duties undertaken. Some may consider that the circumstances to which leases apply vary so greatly that no greater precision is possible or should be attempted.

5.3 Indeed, some may be of the view that the matters of concern to which we have referred occasion real difficulty only rarely and that a complex reform is not justified. As Sir John Megaw said, after referring to difficulties arising from the distinction between repairs and remedial work which are not repairs: "It may be, however, that in practice - in real life as distinct from legal theory - the cases where such difficulties would arise would be rare, since the carrying out of such works will usually be very much in the interest of both landlord and tenant; and an attempt to cover by legislation such rare cases where the parties have failed to agree might lead to more problems than it would solve".[1]

5.4 Although our provisional conclusion is that at least some of the matters of concern which we have identified do justify action, we should certainly wish to hear from readers of this Paper who consider that no changes in the law should be proposed.

A NEW APPROACH

5.5 An alternative approach to the present rules could place emphasis on the purpose for which the property was let. As we have seen, a duty to maintain premises in a state suitable for a particular use has been adopted elsewhere: it is common in civil law countries,[2] and it is spreading into common law jurisdictions in the United States.[3] It cannot therefore be dismissed as unworkable, but it would be a considerable change in this country. The traditional imposition of repairing obligations treats the need to maintain the condition of the property as independent from the purpose for which the property is to be used. The standard of repair is not dictated by what is needed for that use, and indeed the premises may be

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[1] *McDougall* v. *Easington District Council* [1989] 1 E.G.L.R. 93, 96; see para. 3.7 above.

[2] Para. 4.16 above.

[3] Paras. 4.14-4.15 above.

unusable even though the repairing duty has been discharged. The attraction of a duty linked to the use is that it treats the grant of the lease as an integrated transaction, recognising that the physical state of the property can determine whether the tenant is able to obtain the intended benefit. Such a use-based approach would clearly be a radical change for English law, and it therefore requires detailed examination.

Duty to Maintain

5.6 The essence of an obligation linked to the use of a building is that the duty it imposes is flexible, governed by that use and not simply by the nature of the building. This is illustrated by the different standards which varying uses demand. The same physical building could be used as a dwelling, an office or for storing canned goods. For each of the cases, the requirements for heating, sound insulation and decoration could be very different. Similarly varying demands might apply to the nature of the fundamental construction. A small structure may be a satisfactory bus shelter if its walls do not extend down to ground level and it has no door; a tool store may conveniently be the same size, but could be unsuitable unless fully weatherproof.

5.7 The objective of this type of obligation is that any building let will be kept in a satisfactory state for its intended purpose. The fundamental duty might be formulated along these lines -

> To put and keep the demised property, and all parts of it, in such state and condition that it may safely, hygienically and satisfactorily be used, and continue in the immediate future to be used, for its intended purpose with an appropriate degree of convenience and comfort for the occupants.

The duty - which, for convenience, we shall refer to below as "the duty to maintain" - would include making good all defects whether original or developed later (and including the impact of legal requirements), by - as appropriate - repair, replacement, improvement or renewal. The standard required would be such as was appropriate in putting those premises to that use; that will allow the necesssary flexibility to recognise the age of a building.[4]

5.8 The duty to maintain is deliberately drawn more widely than the obligation to repair. The object is to cover improvements, and the correction of defects which the premises have always had, even though the result would be that at the end of the lease the tenant would hand back to the landlord a property substantially different from what was let. There is, however, a limit, and that is the reference to the intended purpose.

Intended Purpose

5.9 Ascertaining the intended purpose of a letting would be crucial to defining the scope of the duty to maintain in a particular case. Clearly, different intended

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[4] It is conceivable, e.g., that in an old office building a lower standard of heat insulation in the exterior walls would be acceptable than in a new building. That would not be a breach of the duty to maintain. But if the state of the wall became such that the building could not be used as an office at all, the duty would be broken.

purposes could apply to different parts of a property let by a single lease.[5] Again, the parties might wish to go into some detail, even though not obliged to do so. For example, a lease might define the proposed use not merely as "residential", but as "a maisonette for family use on the ninth floor of a high block".[6] For consideration, we suggest that the intended purpose of a letting might be determined by one of the following means, in this order of priority:

(a) First, the purpose expressly stated by the parties would be the intended purpose. This would, however, need some modification to prevent unfair manipulation where the parties' bargaining strength was unequal. Accordingly, a statement of intended purpose could be ineffective in a case where it was shown that, at the date of the letting, there was not a reasonable prospect that the property could physically and legally be put to the stated use.

(b) Secondly, the intended purpose would be the use to which the premises had been last put before the letting (whether they had then been let or had been owner-occupied). Again, some qualification would be needed. This would not apply if, at the date of the letting, it had not been possible, whether physically or legally, to use the property for that purpose, and there was no reasonable prospect that it would again be so. This limitation would be required to cope with cases where the circumstances have changed since the property was last used, e.g., where there had been substantial fire damage, or where a closing order had been made.

(c) Thirdly, the intended purpose would be any use to which the property was physically adapted. This would be subject to two provisos: (i) it could be legally used in that way, or there was a reasonable prospect that that would be allowed, and (ii) that it would be reasonable to use it for that purpose.

Limits on Work

5.10 Stating the duty to maintain in such wide terms would make it necessary to impose some practical limits on the work which had to be done. Work which it was not legally or in practice possible to do, given reasonable diligence in seeking permission or making practical arrangements on the part of the person liable, would have to be outside the duty.

5.11 There would also of necessity be cases where the original intended purpose of a letting would be superseded.[7] This involves two consequences: substituting a new purpose and, in the absence of any change, deciding when the original purpose should cease to govern the duty to maintain. Agreeing a new intended purpose could be left to the parties, but it could well be necessary for the law to

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[5] There might, in effect, be two properties let together, as where a ground floor shop is let with a flat above; or one part might have a use subsidiary to the other, as where a building is let together with an access drive.

[6] *Liverpool City Council* v. *Irwin* [1977] A.C. 239, 253 *per* Lord Wilberforce.

[7] Who now needs a mews property for keeping a coach and horses?

define when an existing intended purpose should no longer govern the duty to maintain. Otherwise, a party might be put under an expensive duty to carry out inappropriate work.

5.12 There should also be some safeguard against the duty operating to require pointless work. There would be no duty to do work required only for a purpose which had been discontinued without reasonable prospect of being resumed, or for one which was not reasonably likely to continue for long enough for reasonable advantage to be taken of the work. Again, where the intended purpose was with a view to profit, there would be no duty to do work which could not be turned to profitable account.

Neighbouring Property

5.13 Whatever the extent of the duty to do work, there is still the question whether the duty should in some circumstances extend beyond the property which is let. When the stability of those premises depends on other property, their satisfactory maintenance entails taking some responsibility for that other property.[8] In cases of some physical dependency, the duty applicable to the demised premises could appropriately extend to doing work on any neighbouring property in the ownership or control, in whatever capacity, of the party with the duty, so long as he had the right to enter to do the work on that property or was lawfully able to do so.

5.14 Because any obligation to do work on neighbouring property must be dependent on a right of entry, it would be open to some manipulation. The party obliged to do the work - be he landlord or tenant - might dispose of neighbouring property, or let it, deliberately to ensure that he had no right to enter and do the work. It seems unlikely that anyone would go to the lengths of disposing of property for this reason alone, except in an extreme case. The only way to counter such moves would be for statute to impose an absolute obligation to do work on neighbouring property. This would be an infringement of the neighbour's rights. We do not see this as a case demanding such stringent, and perhaps impractical, measures.[9]

Access and Easements

5.15 It seems unsatisfactory that it should be possible for property to be let with the benefit of rights over other property owned by the landlord, without there being any obligation to ensure that it is maintained so that the tenant can satisfactorily use the facilities.[10] Certainly, this reflects the general rule relating to easements, where, merely as a result of granting the right, the owner of the servient tenement undertakes no maintenance obligations.[11] That may well be acceptable where the easement represents an enhancement of property which the grantee already owns.

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[8] In practice this is already sometimes the case. E.g., a landlord who owns adjoining property may be guilty of nuisance if he neglects it to the detriment of the demised premises: *Bradburn* v. *Lindsay* [1983] 2 All E.R. 408.

[9] In some cases, a party might be able to take advantage of the Access to Neighbouring Land Act 1992.

[10] The precise extent to which this is so is uncertain: paras. 2.8-2.13 above.

[11] *Duncan* v. *Louch* (1845) 4 L.T. O.S. 356.

However, in the case of easements granted where land is demised there is a distinction: the landlord lets property and grants rights to the tenant as part of a single package and normally for consideration. Sometimes, it will not even be possible to use the demised premises satisfactorily without the benefit of the easement.

5.16 In the light of these considerations, we see logic in extending the duty to maintain to property beyond the demised premises, where the condition of that other property affects the rights over it granted to the tenant. Again, the obligation to do work would necessarily here depend on a right of entry.[12]

Fitness for Human Habitation

5.17 If the general obligation for maintenance of the fabric of property was linked to the use to which it was put, there would be a case for ceasing to have a separate statutory provision relating to fitness for human habitation.[13] However, fitness for human habitation is not simply a general standard; statute lays down specific tests by which it should be judged. Respondents to the Department of the Environment's consultation[14] clearly saw these tests as a useful tool in enforcing the law, and they do add precision. We agree that that advantage should not be lost, and we also feel that it would be appropriate for this legislation to adopt the recently revised standards used for other purposes.[15] However, the two approaches could conveniently be combined. Landlords could have a duty to maintain,[16] and the statutory standard of fitness for human habitation could be expressly adopted as a minimum standard for compliance with the general duty.[17]

Allocation of Responsibility

5.18 Whatever the extent of the duty to do work on premises, it is also necessary to determine on whom the duty is to be placed. Without statutory provisions, it is not uncommon, as we have noted,[18] for no obligation to be imposed in relation to some or all of the premises. This is unsatisfactory. As a fall-back, statute should imply duties to do all the work needed on the state and condition of the property let. Normally, it could be for the parties to decide whose the responsibility should be, although in exceptional cases it could be imposed on a particular party. Some general exceptions would be required.

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[12] Para. 5.14 above.

[13] Para. 2.29 above.

[14] Para. 1.12 above.

[15] Para. 3.27 above.

[16] In a case where, with statutory authority, the landlord was relieved of the duty to maintain, it would be appropriate for this additional obligation not to apply.

[17] There is a parallel statutory provision which implies an undertaking of fitness for human habitation into an agricultural worker's terms of employment where they give him a licence to occupy housing accommodation: Landlord and Tenant Act 1985, s.9. The revised standard of fitness for human habitation could also be adopted for interpreting that provision.

[18] Para. 3.20 above.

Primary Responsibility

5.19 Many leases divide responsibility for repairs between the parties: typically, the landlord may be responsible for the structure and exterior of a building and the tenant for the interior. Legislation could take a similar approach, analysing a series of typical situations and providing a detailed scheme of responsibilities in different cases.[19]

5.20 However, that is likely to prove unnecessarily and unacceptably complex. The more sophisticated the scheme, the more unlikely it would be that the outline of the law would be generally understood. Landlord and tenant law affects a large number of people in many different situations. It is already criticised for its complexity and incomprehensibility, justifiably in our view, and we should not want to add to the difficulties. For this reason, we provisionally suggest placing the entire burden of work on one party in the first instance. It would not matter if it is frequently transferred, in whole or part, to the other party: any such transfer would have to be part of the express agreement between the parties, and there would therefore be the advantage that the provision had been expressly drawn to both parties' attention.

5.21 In making the choice of where to place the primary responsibility, on the landlord or on the tenant, these points need to be taken into account:

(a) For placing it on the landlord: The landlord is the permanent owner of the property, even if his right to resume possession may be considerably postponed, he therefore has the longest-term interest in its preservation and some statutory obligations have already been mandatorily placed on him.

(b) For placing it on the tenant: The tenant is in possession of the property, has the immediate incentive to ensure that it is kept fit for use and if the maintenance duty is geared to the intended use of the letting, it is he who is using the property for that purpose.

5.22 Our provisional conclusion is that the primary responsibility should be placed on the landlord. Two factors seem to us to be conclusive: first, his permanent ownership,[20] giving him a continuing interest even if, e.g., he forfeits the lease; secondly, the fact that in some circumstances he already has compulsory repairing obligations would make for a most confusing statute if it were first to place a duty on the tenant and then immediately to transfer it to the landlord. For the reasons given above,[21] we do not consider that the landlord's responsibility should be limited to defects of which he has notice. Rather, he should have a power to inspect and should be liable for all work which a diligent inspection would have revealed as necessary. As we suggested previously, the landlord's responsibility could by agreement be freely transferred to the tenant, except in specified

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[19] The Law Commission's previous proposals adopted this approach: para. 1.6 above.

[20] Or, in the case of the owner of the reversion to a sub-lease, his interest for a term which is longer than that which the tenant enjoys.

[21] Para. 3.28 above.

exceptional cases. The term "responsibility" here means not merely undertaking the physical work, but would include the liability to pay for it. So, to include a payment for work in a service charge would, for this purpose, be to transfer responsibility.[22]

5.23 To the overall rule of the landlord's duty, there could be one general exception. It would clearly be unsatisfactory if tenants felt that they had no responsibility at all for the property which they occupied. They should be encouraged, and indeed obliged, to treat it properly. Accordingly, it seems appropriate that all tenants should, as now, have a duty to use the property in a tenant-like manner.[23] This obligation, like the landlord's general obligation, could be transferred if the parties so agreed.

5.24 The parties' ability to transfer responsibility would allow of a great deal of flexibility. The terms would be for them to agree, subject to the general rule that between them they must have the duty to do all the work. The following examples suggest possible variations which might be agreed:

(a) The tenant would be responsible for all the work, except any required as a result of damage by insured risks, which the landlord would have a duty to make good;

(b) The tenant might covenant "to repair", thereby accepting responsibility for all the work now covered by a repairing covenant, but leaving the landlord to do the additional work that the duty to maintain would involve;

(c) The primary duty to do the work could be undertaken by a third party, e.g. a service company, but in that case responsibility if the third party defaulted would have to be accepted by the landlord or the tenant, or be divided between them.

5.25 It is clearly important that parties to a lease should be in no doubt where the responsibility for maintenance work lies. There is therefore a case for requiring any agreement transferring responsibility to be in writing. That would ensure that the matter was drawn to the parties' attention, would lay some emphasis on its importance and would provide evidence in the case of a dispute. There are, however, many informal lettings of business premises, which can validly be created orally and which are not subject to any implied repairing provisions. We should welcome views on whether writing should be required by statute in cases where the duty to maintain is to be transferred.

5.26 It seems appropriate that the cases in which the landlord is forbidden to transfer responsibility for maintenance should correspond to the present statutory duties to repair. These relate to short lettings of residential premises[24] and to long leases

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[22] *Campden Hill Towers Ltd.* v. *Gardner* [1977] Q.B. 823.

[23] Para. 2.17 above.

[24] Landlord and Tenant Act 1985, s.11.

of flats granted after the exercise of the tenant's right to buy.[25] We are not aware of suggestions that these implied duties should be extended or restricted, but should welcome comments. Both exceptional cases could, as now, be subject to modification by court order.[26]

5.27 The general rule that the landlord - or by agreement the tenant - should be responsible for maintaining the property would need to be subject to some flexibility. There are bound to be cases where the parties quite reasonably agree that there is no need for such a duty to be imposed on anyone. An example would be a temporary letting of a redundant building pending its demolition. One possibility would be to leave the parties to decide when the statutory provision should cease to apply; but this could be open to the objection of being likely to defeat the purpose of the provision, by giving free rein to any inequality of bargaining power. A possible alternative is that contracting out of responsibility should only be effective when sanctioned by court order. Although following well-tried precedents,[27] this could be an unwelcome burden to the parties while at the same time adding unnecessarily to the business of the courts.

5.28 We therefore suggest this compromise for consideration. The parties could validly exclude the duty if the lease or written tenancy agreement:

(a) Stated that the property (or that part of it to which the exclusion applied) was redundant and of no value to the parties;

(b) Perhaps - and we seek views on whether this seems necessary - included a prescribed statement explaining the effect of the exclusion;

(c) Contained no term inconsistent with the declaration of redundancy. A duty to insure a building for its rebuilding value would, e.g., be inconsistent with its being redundant.

As an alternative, the parties would be able to apply for a court order authorising exclusion of the duty; that would cover any unusual case.

The Crown

5.29 The Crown is party to a large number of leases, either as landlord or as tenant. As a matter of general principle, we do not see any reason why it should not be bound by a maintenance obligation in the same way as its subjects. As we noted above, it is not at present bound by the provisions introduced for the protection of residential tenants,[28] and this is consistent with its not being bound by other tenant protection statutes, such as the Rent Acts. The possible duty to maintain is, however, of more general application; it is intended to apply to the majority of property lettings. For this reason, and while we have not yet carried out any

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[25] Housing Act 1985, Sched. 6, para. 14.

[26] Landlord and Tenant Act 1985, s.12; Housing Act 1985, Sched. 6, para. 14(4).

[27] E.g., Landlord and Tenant Act 1985, s.12.

[28] Para. 3.29 above.

consultation, we provisionally consider that any resulting legislation should bind the Crown.

Sub-tenants

5.30 If such a scheme as this is adopted, it should apply in relation to sub-leases in the same way as it does to head leases. Necessarily, a head tenant has the position of landlord under a sub-lease, but this should cause no difficulty. Normally, any obligation of that intermediate party would either be passed on to his head landlord or to his sub-tenant, but this is subject to the bargain which the parties make. As the nature of the duty would not depend on the age and condition of the premises when let,[29] this should cause no difficulty. Should others foresee problems in this area, we hope they will express their reservations to us.

Transitional Provisions

Leases

5.31 There is always a problem in introducing changes to landlord and tenant law where the question is whether the new provisions should affect existing leases. To impose the new rules on the parties to those leases may be to change their bargain drastically and unfairly. Retrospective legislation is unpalatable to many, particularly when it alters the nature of existing bargains. On the other hand, some earlier statutes in this field have had retrospective effect.[30] To leave existing leases untouched may mean that not until, say, 75 years have passed can one be confident that the overwhelming majority of leases are covered by the new rules; and throughout, two sets of rules apply in parallel. It might be thought that such additional complexity should be avoided.

5.32 The introduction of a duty to maintain would undoubtedly have a considerable effect on the bargains incorporated into most leases. We invite those who comment to say if they favour either immediate universal introduction of the new rules or no change at all to existing leases, but also to consider and comment on the following compromise suggestion. First, existing leases granted at a premium or in consideration of the tenant erecting a building would be excluded. Secondly, other existing leases could be covered from, say, five years after legislation was introduced. This could generally allow for at least one rent review, at which the impact of the new rules could be taken into account. In the case of a lease which did not provide for a review during those five years, the Act would give a right of review exclusively to take account of the impact of the change, with the new rent becoming payable at the end of the five years. In the absence of agreement on the amount of the new rent, there would be a right to arbitration.

5.33 It would also be possible to cope with exceptional cases by giving a right of recourse to the court, which could have a discretion to vary the terms of a lease or to bring it to an end where a party would otherwise suffer hardship.

Statutes

5.34 Many statutes at present refer to repairing obligations. Clearly, if the fundamental obligation of the parties to leases became a duty to maintain, many of these

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[29] Paras. 3.14-3.15 above.

[30] E.g., Common Law Procedure Act 1852, s.210; Law of Distress Amendment Act 1908, s.3; Leasehold Property (Repairs) Act 1938; Landlord and Tenant Act 1988.

provisions would need amending. We have not considered precisely what these changes should be, as such detailed consideration seems premature. we suggest, however, that the approach might be as follows:

(a) Provisions imposing a duty to repair[31] should become a duty to maintain;

(b) Provisions regulating the consequences of breaches of a repairing duty[32] should be extended to apply to the consequences of breaches of a duty to maintain.

It may well be that there are cases to which special considerations should apply, and we invite those who comment on this paper to identify any of particular concern to them.

Waste

5.35 We make suggestions below for the abolition of the doctrine of waste in this context,[33] and they could apply equally on the introduction of a duty to maintain.

INDIVIDUAL REFORMS

5.36 In this section we set out a number of possible individual reforms, as an alternative to a comprehensive approach. These suggestions are not presented on the basis that if any is adopted all must be, but rather as a collection from which one, some or all may be selected. Those responding to this Paper should therefore consider each individually, indicating their views as appropriate.

Meaning of "Repair"

5.37 An overwhelming number of duties undertaken in relation to the fabric of property which is let, whether they be contractual or statutory duties, are expressed in terms of an obligation to repair. The meaning of the term "repair" is therefore fundamental in defining the extent of the obligation undertaken by parties to leases. How far the obligation extends has given rise to many disputes; in some cases the work which has to be done has been seen to be inadequate. It is therefore for consideration whether reform should take the direction of re-defining or extending the meaning of "repair" when used in leases.

Improvement

5.38 The distinction which is probably most frequently drawn is between work which constitutes repair on the one hand and improvement work on the other. The justification is clear enough: neither party should, merely because the tenant is authorised to occupy the property, be obliged to make a further investment in it. Although that seems reasonable, the result can be unsatisfactory: work is required

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[31] E.g., the implied duty of landlords of residential premises let on short leases: Landlord and Tenant Act 1985, ss.11-13.

[32] E.g., the requirements for serving notices: Law of Property Act 1925, s.146; Landlord and Tenant Act 1927, s.18(2); Leasehold Property (Repairs) Act 1938.

[33] Paras. 5.58 *et seq* below.

to cure the symptoms of defects but need not tackle the cause,[34] and similar work may in one case be a repair and in another an improvement.[35]

5.39 Nevertheless, there can surely be no question of extending the duty to repair to cover all improvements. Without some limitation it would be quite impossible to define and limit the work covered, and no one could be advised to undertake such an unlimited obligation.

5.40 The difficulty some see is that work needed to rectify defects, which they consider should therefore be regarded as a repair, is classified as an improvement. An apparent way to tackle that would be to provide that "repair" would cover work which would, if not also an improvement, constitute a repair. However, put in that way, we doubt whether a formulation would be successful; the analysis of the position until now treats repairs and improvements as alternatives. Accordingly one cannot sensibly refer to repair work which has been excluded from the obligation because it was *also* an improvement; work has been in one category or the other, but not both.

5.41 Where improvement is the only way to cure a defect - say, by replacing wholly inadequate foundations - a provision could extend the meaning of a repairing duty to include a requirement to do whatever work is necessary to allow a part of a building to perform its intended function, notwithstanding that the result is to make an improvement.

5.42 However, a satisfactory formula might well have to go further. In some cases, a necessary constituent part of a building might be entirely missing, so to talk of it performing its intended function would be meaningless. Would it be satisfactory to talk in terms of the intended function of the building? There would also be difficult definition problems. Say, the outside wall of a building was without a damp proof course: would that be a wall with a defect, or a completely absent damp proof course? If the duty were to extend to remedying deficiencies, as well as defects, strict limits would be needed: would necessity provide an adequate and satisfactory test?

5.43 We entertain doubts about this approach, but we invite any respondent to this Paper who favours this approach to consider in some detail how this type of extension to the repairing duty might be formulated.

5.44 Even to extend the scope of repairs to work required to make parts of the building perform as was originally intended does not tackle cases where at present the duty requires symptoms to be cured while ignoring the cause. However, this does not seem to us to be a problem of the same nature. In one case, the present position means that no work is done at all, but in the other a temporary solution is found. It is already established that the person who has to do repairs, albeit at the expense of the other party, may choose whether he does a cheap temporary job or an

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[34] Para. 2.22 above.

[35] Para. 2.21 above, footnote.

expensive long-term one.[36] There seems to be no reason why that principle should not apply generally. If appropriate work is satisfactorily done, it should be open to the person doing it to choose what he does.

5.45 We referred earlier to another issue concerning improvements: whether, once they have been done, the duty to repair should apply to the resulting altered property.[37] There seems to be only one case in which a duty to repair improvements to a property could be unduly onerous: if one party (say, the landlord) voluntarily improves the property, without the tenant's concurrence, but it is the tenant who has the repairing obligation. That could increase the cost to the tenant of performing his duty. It cannot be justifiable that the landlord can unilaterally increase the burden of the tenant's obligation.

5.46 However, in other cases we see no reason why any repairing duty which applies to the whole of the property should not extend to any improvements made after the date of the lease. This would apply to cases of improvements made pursuant to statutory obligations, those required or authorised by the terms of the lease and any made by the party who was obliged to repair or with his consent.

Inherent Defects

5.47 An inherent defect is a state of affairs in relation to the design or construction of the building or the materials employed in it, which has existed since it was erected. To put right an inherent defect will necessarily be to make an improvement to the property; any proposal to extend the repairing obligation to cover such defects is accordingly an aspect of the move to extend it to improvements. If repairing duties were to be extended to cover defects in existence when the property was originally built, there would be a problem similar to the one we identified in relation to improvements,[38] that it is neither practical nor desirable that the obligation be unlimited. However, if some degree of improvement is to be included within the duty to repair, there seems no reason why any distinction should be drawn between work resulting from inherent defects and other improvements.

5.48 Necessarily, an inherent defect will pre-date the grant of the lease. We now turn to discussing how far liabilities should extend to rectifying defects which existed when the lease was granted.

Existing Defects

5.49 The property may be defective when the lease is granted. This raises the question how far it is appropriate that a duty to repair - whether cast on landlord or tenant - should relate to those existing defects. The answer may not be straightforward. Bearing in mind that a repairing covenant is normally interpreted to include an obligation to put the premises into initial repair,[39] there should be no valid distinction between the rectification of defects which occur during the lease term

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[36] *Manor House Drive Ltd.* v. *Shahbazian* (1965) 195 E.G. 283.

[37] Para. 3.8 above.

[38] Para. 5.39 above.

[39] Para. 2.20 above.

and those originating before the lease begins. On that view, if repair is extended to cover appropriate improvement work, the duty to do those improvements would apply whenever the defects occurred and even if they were in the premises as originally constructed, i.e. inherent defects.

5.50 But the apparent fairness of requiring the tenant who has a duty to repair, to rectify a state of affairs which existed when the lease was granted - which, to an extent, it already does - may be influenced by what information he is given in advance. Where an existing defect is known to the landlord, but is not readily apparent to the tenant, should the landlord be able, once the lease has been granted, to require the tenant to rectify it? Some may see that as unconscionable.

5.51 The Commission's earlier proposal to impose liability on landlords for injury or damage resulting from pre-existing defects[40] extended far beyond the need simply to give information. It involved imposing a liability on the landlord[41] not only to the tenant but to other future users of the property. A less far-reaching proposal may be more generally acceptable. Looking only at the position between landlord and tenant, a new provision could give an incentive to landlords to give tenants preliminary information. All tenants' repairing duties,[42] could exclude liability to remedy any defect known to the landlord when the lease was granted unless it was notified to the tenant in advance. A more stringent restriction, from the landlord's point of view, would extend the exclusion to cover not only defects known to the landlord, but also those which ought to have been known to him.[43]

Standard at Date of Letting

5.52 We noted above doubts which arise about using the date of the letting as a criterion to judge the standard of repair.[44] An alternative would be a standard which looks for guidance to the age and nature of the premises and the character of surrounding property at the date when the state of repair is being judged. We recognise that this would not give certainty in advance as to what would be required to comply with the repairing covenant and it would not give a guarantee to the landlord that he would receive back a property in the state in which he let it. However, to the extent that what is being assessed is not what has to be done, but how far the work should go, and taking into account the necessary changes with the passing years, the alternative could be more appropriate. The passage of time may make repair to the building's former standard impracticable. If a neighbourhood has deteriorated, repair to a standard no longer locally regarded as necessary will often add nothing to a property's value. An alternative view may be that this additional test, relating the standard of repair to the date of the

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[40] See para. 2.25 above.

[41] And also on sellers of property.

[42] If appropriate, as extended by the provisions suggested above concerning improvements.

[43] This would reflect the Defective Premises Act 1972, s.4 which imposes a duty on the landlord if he "knows (whether as the result of being notified by the tenant or otherwise) or if he ought in all the circumstances to have known": s.4(2).

[44] Paras. 3.14-3.15 above.

letting or to some other date, is simply not needed at all. We invite those who respond to this Paper to comment.

Fitness for Human Habitation

5.53 Until now, direct statutory intervention to require that the state of premises let be suitable for the use to which they are put has been confined to residential property.[45] But this statutory undertaking as to fitness for human habitation is not wholly satisfactory: there is a case for extending the implied repairing covenants which can be criticised for not being comprehensive enough.[46]

5.54 The present rules[47] could, we suggest, be changed in two ways:

(a) The rent limits for implying a statutory duty should no longer apply;

(b) The new statutory definition of fitness for human habitation[48] should apply to govern the standard required for compliance by landlords.

5.55 There are, of course, many residential properties let on the basis that the tenant undertakes all repairs and maintenance obligations. Most of those let by leases for 99 years or more are, effectively, sales to the tenants and the ground landlords have little or no continuing interest in or responsibility for the property. We see no need to interfere with this method of home ownership, and to bring those cases within this implied undertaking would be a substantial change. It seems to us that lettings of this nature should be excluded and that a classification by the length of lease would be satisfactory. We suggest these possible alternatives, and would ask those who support this reform option to indicate which they prefer, or to suggest some other limit:

(a) The undertaking could apply to all lettings for less than seven years. This would make it cover the same tenancies as are within the scope of the landlord's repairing covenant.[49]

(b) The undertaking could apply to all lettings for up to 21 years. This is the division which has come generally to be adopted by statute for distinguishing between short and long leases.[50] In this case it would be necessary to make provision for the statutory obligations to override any conflicting tenant's covenants in the lease.

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[45] Paras. 2.29 *et seq* above.

[46] *Quick* v. *Taff Ely Borough Council* [1986] Q.B. 809; paras. 3.3-3.4 above.

[47] Paras. 2.29-2.30 above.

[48] Para. 3.27 above.

[49] Paras. 2.31 *et seq* above.

[50] E.g., Landlord and Tenant Act 1954, s.2(4); Leasehold Reform Act 1967, s.3.

Property to be Repaired

5.56 We have drawn attention to the need, in certain circumstances, to extend the duty to repair beyond the premises which are demised.[51] The stability of what is let to the tenant, or the maintenance of services which he enjoys, may depend upon other neighbouring property being properly maintained. The question here is not what work should be done, but to what premises it should be done. Whatever standard of work is adopted could appropriately be required not only to the property let, but to whatever other property was included in the repairing duty.

5.57 We suggest for consideration that the two following extensions to the property to be repaired should apply, unless expressly excluded:

(a) Any obligation to repair the property demised should include an obligation to repair other property on which the party with the duty was entitled to do work, to the extent that the state of the other property affected the repair of the demised premises.

(b) A landlord's repairing obligation should similarly extend to other property, over which the tenant had an express easement or an easement of necessity, and on which the landlord was entitled to do work.

Waste

5.58 The role of the law of waste in relations between landlord and tenant[52] can be seen as supplementing inadequate contractual provisions, whether express or implied. Once those provisions have been reviewed, and reformed where necessary, there should be no need for this back-up, which serves to complicate the law by providing a second and separate code of obligations covering the same situation. We therefore suggest that as between landlord and tenant, but not in other situations which we are not considering in this Paper, the doctrine of waste should be abolished.

5.59 The one circumstance in which the law of waste might continue to have a role to play is where the lease has expired, but the tenant is still in possession. If the need for this can be avoided, the simplification will be more complete. Accordingly, we suggest for consideration the two following alternatives. Both are put forward on this basis: that the lease has come to an end, and has not been extended by agreement or statute; that the tenant continues in possession; and that the doctrine of waste no longer applies.

(a) The lease provisions as to the duty to maintain, including any implied obligations, should continue to apply between the owner of the property and the former tenant in possession; or

(b) Any duty to maintain which, expressly or by implication, was, while the lease subsisted, cast on the tenant - but *not* on the landlord - should continue to bind the former tenant in possession. This one-

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[51] Paras. 3.20 *et seq* above.

[52] Paras. 2.46 *et seq* above.

sided provision would recognise that the tenant was wrongfully continuing in possession.

Enforcement

Objective

5.60 It is perhaps in the enforcement of repairing duties that the view taken of the underlying purpose of these obligations is most important. The emphasis of the law until now has been on the economic view of leases: damages are payable for loss of value to the party with the benefit of the covenant, rather than for the cost of work not done, although in many cases the resulting figure may be the same. This seems to us inconsistent with an approach which places the emphasis on ensuring that necessary work be done, and alternatives based on that view should be considered.

Specific Performance

5.61 That objective would be better served if specific performance became the primary method of enforcing property maintenance duties. It is not appropriate to dictate to parties what remedies they should choose, but this remedy can be made available for all cases of default. As we pointed out earlier,[53] the statutory extension of the remedy in the case of residential property does not appear to have caused difficulties. In these circumstances, it is for consideration that that provision should be extended to all types of property.

Damages

5.62 When discussing damages above,[54] we identified the concern with the statutory limitation on the sum recoverable by the landlord, which cannot exceed the reduction in the value of his interest. This places the emphasis on compensation rather than performance, but is of course consistent with principle. "The general object underlying the rules for the assessment of damages is, so far as is possible by means of a monetary award, to place the plaintiff in the position which he would have occupied if he had not suffered the wrong complained of".[55] However, the cost of repair is already the starting point for assessing such damages, or, in the words of Dillon L.J., "a guide to the diminution in value of the reversion".[56] It is true that there are cases in which the cost of repairs exceeds the fall in the value of the landlord's interest. The same may well be true in reverse, when the landlord has the duty to do the work. Nevertheless, there is a danger that damages, even if related to the cost of works, will not ensure that the building is repaired. The cost of building work generally rises, and by the time damages are recovered, the cost of the work when it should have been done will not then be enough to pay for it. It is also a concern that a successful plaintiff may walk away with the damages and leave the property in its unsatisfactory state. We therefore suggest, for comment, two provisions:

(a) Damages for breach of a duty to maintain property, whether payable by landlord or tenant, should, while the lease continues, be

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[53] Para. 3.32 above.

[54] Paras. 3.30-3.31 above.

[55] *Dodd Properties Ltd.* v. *Canterbury City Council* [1980] 1 W.L.R. 433, 456, *per* Donaldson L.J.

[56] *Culworth Estates Ltd.* v. *Society of Licensed Victuallers* (1991) 62 P. & C.R. 211, 214.

the sum required to pay for the work needed when the damages are awarded.

(b) It should be open to the court, on the application of the defendant, to impose a condition on an award of damages that it be spent on doing the work.

The Crown

5.63 The position of the Crown under legislation regulating repairing responsibilities is not at present consistent. This may be illustrated by taking the four major cases of statutory intervention cited above:[57]

(a) Relief for tenants against enforcement of obligations to do decorative repairs:[58] this provision binds the Crown.[59]

(b) Limit on the amount of damages payable on a breach of a tenant's repairing covenant:[60] this provision binds the Crown.[61]

(c) Landlords sometimes require consent of the court before enforcing a tenant's repairing covenant:[62] this provision binds the Crown.[63]

(d) Implied repairing covenants by landlords of residential premises let for up to seven years:[64] this provision does not bind the Crown.[65]

5.64 Although rent restriction legislation affecting residential property has not generally bound the Crown, we do not see why, in relation to repairs, it should not be put in the same position as ordinary citizens when it is a party to a lease, whether as landlord or as tenant. Statutory intervention in this field is intended to provide an equitable framework for property ownership and enjoyment, and there seems no reason why different considerations should apply to the Crown. We provisionally suggest, therefore, for comment by others, that all legislation in this field should bind the Crown.

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[57] Para. 4.7 above.

[58] Law of Property Act 1925, s.147.

[59] *Ibid.*, s.208(3).

[60] Landlord and Tenant Act 1927, s.18.

[61] *Ibid.*, s.24(1).

[62] Leasehold Property (Repairs) Act 1938.

[63] Landlord and Tenant Act 1954, s.51(3). Until the enactment of the 1954 Act, the 1938 Act did not bind the Crown.

[64] Landlord and Tenant Act 1985, ss.11-13.

[65] *Department of Transport* v. *Egoroff* [1986] 1 E.G.L.R. 89; para. 3.29 above.

PART VI

SUMMARY OF ISSUES FOR CONSIDERATION

6.1 In this Consultation Paper we are seeking views on all the issues we have raised. These range from the analysis and criticisms of the present law to whether any change is necessary or desirable and if so what changes there should be. For convenience, we set out below a summary of the issues raised in the Paper. We welcome comments on individual topics as well as on the whole Paper, and comments on any related matters on which we did not touch.

The Present Law

6.2 After summarising the present law in Part II of this Paper, we set out, in Part III, a number of criticisms of it. We invited those responding to consider whether they agreed with the criticisms and whether there were other unsatisfactory features in the present law which should be addressed.

Repair

6.3 The following issues arise from the definition of the obligation to repair:

(a) Disrepair is limited to deterioration in physical condition, and ignores lack of amenity or inefficiency; [paras. 3.3-3.4]

(b) Improvement work is excluded, so that work to remedy a serious defect may not be required. Does the distinction between repair and improvement work give rise to problems in practice? [paras. 3.6-3.8]

(c) Curing inherent defects and responsibility for matters existing before a lease is granted can raise difficulties. Should landlords have a duty of disclosure to prospective tenants? [paras. 3.9-3.13]

(d) The standard of repair governed by the age and nature of the property at the time let is unsatisfactory because: it is not wholly judged at that date, initial dilapidation may be ignored and allowance is made for subsequent natural deterioration; changes in the surrounding neighbourhood are ignored; there are difficulties on sub-letting; [paras. 3.14-3.15]

(e) A duty to repair does not usually extend to modernisation. [paras. 3.16-3.19]

Responsibility

6.4 The issues arising from the duties imposed on parties to leases are:

(a) When only part of a building is let, it may be that neither party has a repairing obligation. Do landlords still decline to take

responsibility for the parts of the property they retain? [paras. 3.20-3.24]

(b) The extent of the landlord's obligation to repair retained property over which the tenant obtains services is unclear; [para. 3.25]

(c) The statutory implied obligation on landlords to provide and keep residential premises fit for human habitation has been reduced in scope; [paras. 3.26-3.27]

(d) The requirement that the landlord has notice of a defect before incurring liability to repair can result in his escaping responsibility; [para. 3.28]

(e) The Crown is not bound by the statutory implied landlord's covenant to repair residential premises let for up to seven years. [para. 3.29]

Enforcement

6.5 In relation to the enforcement of repairing covenants, there are the following issues:

(a) The statutory limit on damages for breach of a tenant's repairing covenant does not always achieve its present objective, but it may nullify the aim of keeping premises in repair; [paras. 3.30-3.31]

(b) Restrictions on specific performance may be unjustified; [para. 3.32]

(c) Landlords do not have automatic rights of entry. [paras. 3.33-3.34]

General

6.6 In addition, there are these general points:

(a) The law in this area is not clearly stated, nor is it easily accessible; [paras. 3.35-3.37]

(b) Although most statutory rules have until now applied only to residential tenancies, sensible general rules should perhaps apply to all types of property. What rules applying to buildings could satisfactorily extend to other types of property? [paras. 3.38-3.39]

Reform

Objectives

6.7 Before commenting on possible reform options, we invite views on what the aims of the law should be in this area. The possibilities discussed earlier in the Paper are:

(a) Limiting leases to encapsulating the parties' bargain; [paras. 4.2-4.5]

(b) Correcting the inequality of bargaining power between the parties; [paras. 4.6-4.9]

(c) Restricting further legislative change to residential property; [paras. 4.10-4.11]

(d) Ensuring that premises are or remain fit for their intended use; [paras. 4.12-4.16]

(e) Recognising a public interest in the satisfactory maintenance of buildings; [paras. 4.17-4.19]

(f) Encouraging repair; [para. 4.20]

(g) Choosing between public and private enforcement. [paras. 4.21-4.25]

First Option: No Change

6.8 We provisionally conclude that at least some of the matters of concern justify action; those who disagree will favour making no changes. [paras. 5.2-5.4]

Second Option: A New Approach

6.9 Our second option would replace the duty to repair with an obligation linked to the use of the property, ensuring that the tenant was able to obtain the intended benefit from the lease. The following features need to be considered:

(a) The formulation of "the duty to maintain" would refer to the safe, hygienic and satisfactory use of the property for its intended purpose. This would include making improvements and correcting inherent defects; [paras. 5.6-5.8]

(b) The intended purpose would be: expressly stated in the lease; or, if not, the purpose to which the premises were last put; but, if not, the purpose to which they were physically adapted; [para. 5.9]

(c) The work required by the duty to maintain would be limited to exclude matters which were illegal or impractical. Provision would be made for changes in the intended use; [paras. 5.10-5.12]

(d) The duty could extend to neighbouring property on which the demised premises depended, subject to rights of entry; [paras. 5.13-5.16]

(e) The duty to maintain could be combined with the statutory obligation relating to fitness for human habitation; [para. 5.17]

(f) The duty to maintain would in the first instance be placed on the landlord. But, except in cases where statute at present obliges the landlord to repair, the parties would be free to transfer it, in whole or part, to the tenant; [paras. 5.18-5.26]

(g) The duty could be excluded altogether in the case of a redundant building. Should a prescribed statement be required in leases explaining the effect of the exclusion? [paras. 5.27-5.28]

(h) The legislation would bind the Crown and sub-tenants; [paras. 5.29-5.30]

(i) Transitional provisions need to be considered. Should existing leases be affected? Would it be satisfactory to apply the new rules to existing leases, other than those granted at a premium or in consideration of the tenant erecting a building, five years after the legislation is introduced? [paras. 5.31-5.33]

(j) Statutes would be amended to convert references to a duty to repair to references to a duty to maintain. Are there cases to which special considerations would apply? [para. 5.34]

(k) Proposals in relation to the doctrine of waste, see below,[1] would apply. [para. 5.35]

Third Option: Individual Reforms

6.10 Possible individual reforms are for consideration on the basis that one, some or all might be implemented. We therefore invite comments on them individually.

Meaning of "Repair"

6.11 The definition of repair could be adjusted in a number of ways:

(a) Some improvements might be included. Would it be satisfactory to extend the repairing duty to include improvements which enable a building to perform its intended function? Should an obligation to repair a whole building include the obligation to repair improvements? [paras. 5.38-5.46]

(b) In relation to defects in the property existing at the date of the lease, a tenant's repairing liability might not extend to any known to

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[1] Para. 6.12 below.

the landlord, or possibly any which ought to have been known to him, unless the tenant was notified; [paras. 5.49-5.51]

(c) The standard of repair could be judged at the date it was being considered, rather than as at the date of the lease, or perhaps no date is relevant; [para. 5.52]

(d) The statutory obligation in relation to fitness for human habitation could be amended to dispense with the rent limits and to apply the new statutory definition of fitness. Possible alternative limits on the application of the duty are: to apply it only to lettings for less than seven years or only to those for up to twenty-one years; [paras. 5.53-5.55]

(e) Repairing obligations could extend to neighbouring property on which the demised premises are dependent, if the party responsible for repair had a right of entry. A landlord's duty could extend to property over which the tenant had an easement, where the landlord was entitled to do the work. [paras. 5.56-5.57]

Waste

6.12 The doctrine of waste could cease to apply between landlord and tenant, but a new rule should be introduced. This would be either that lease provisions would continue for so long as the former tenant remained in possession, or, in those circumstances, that only the former tenant's obligations would continue. [Paras. 5.58-5.59]

Enforcement

6.13 The objective of enforcement should be to place an emphasis on ensuring that necessary work is done. The following possibilities arise:

(a) Specific performance should be the primary method of enforcing property maintenance duties. The statutory provisions facilitating this in the case of residential property should extend to all types of property; [para. 5.61]

(b) Damages for breach of a duty to maintain property awarded while the lease continues should be of the amount required to pay for the work when damages are awarded. The court should be able to impose a condition that the money be spent on the work; [para. 5.62]

(c) Legislation in this field should bind the Crown. [paras. 5.63-5.64]

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