THE PROPERTY LAW AMENDMENT ACT 1975 AND LEASES OF DWELLINGHOUSES

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I. INTRODUCTION

The covenants to be implied in leases of dwellinghouses consequent upon the passing of the Property Law Amendment Act 1975[1] will no doubt be welcomed. The anomaly that the landlord[2] of unfurnished premises[3] in the absence of express contractual provision bears no responsibility to the tenant for the fitness of his product[4] has been removed from all leases of dwellinghouses entered into after 19 September 1975[5] and from all leases of dwellinghouses existing at that date as from 19 September 1976.[6] The tenant's obligations to repair and generally look after the premises have been clarified[7] and are reasonable. There are elaborate provisions providing both the landlord and the tenant with the necessary machinery to enforce their respective rights conferred by the Act.[8] As the parties are not permitted to contract out of their statutory rights,[9] the effect of the

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1 This Act, which was given the Royal assent on 19 September 1975, made the following amendments to the Property Law Act 1952 which are relevant to this article: (1) s. 4 inserted new ss. 104A-104E; (2) s. 10 inserted new ss. 116A-116M. For convenient citation each new section will be cited simply by its number in the principal Act and each amended section without reference to the amending provision of the Property Law Amendment Act 1975.

2 Although the Property Law Amendment Act 1975 adopts the terms "lessor" and "lessee", in this article the more popular expressions "landlord" and "tenant" are used.

3 If the premises are furnished there is an implied condition that they are fit for human habitation *when let*: *Smith* v. *Marrable* (1843) 11 M. & W. 5, as explained in *Hart* v. *Windsor* (1844) 12 M. & W. 68. But there is no continuing obligation thereafter upon the landlord to keep them in that condition: *Sarson* v. *Roberts* [1895] 2 Q.B. 395.

4 This rule was based on three cases: *Arden* v. *Pullen* (1842) 10 M. &. W. 321; *Sutton* v. *Temple* (1843) 12 M. &. W. 52; and *Hart* v. *Windsor* (1844) 12 M. &. W. 68. See J. I. Reynolds, "Statutory Covenants of Fitness and Repair: Social Legislation and the Judges" (1974) 37 M.L.R. 377 for a general discussion and criticism of this rule.

5 Property Law Act 1952, s. 116H (1) which provides for a warranty on the part of the landlord "that the dwellinghouse is at the commencement of the tenancy in a fit and habitable condition for residential purposes", and a covenant that he will keep it in such condition.

6 Ibid., s. 116B (2). But of course there can be no retrospective warranty that the premises were in a fit and habitable condition at the commencement of the term: s. 116B (1).

7 Ibid., s. 116D.

8 Ibid., ss. 116E and 116F for the landlord, and ss. 116I and 116J for the tenant.

9 Ibid., s. 104C (1).

legislation is, to a large extent, to standardise leases of dwellinghouses. This is a major step towards acceptance of the modern proposition that the relationship between the landlord of a dwellinghouse and the tenant is one of status and cannot be allowed to rest simply on contract.[10]

But it is not the purpose of this article to examine the effect of the rights and obligations imposed by the Act. This has already been done elsewhere.[11] They are common sense provisions, readily understandable and not likely to raise many problems in their application. To the conveyancer concerned with the drafting of leases there are two more important preliminary questions arising out of the Act, namely:

> To what leases does the Property Law Amendment Act apply?
> What is the effect of the provision in the Property Law Amendment Act restricting the parties' freedom to contract out of their statutory rights?

In attempting to answer these two questions a number of difficulties created by the legislation and a number of deficiencies and impracticalities have been discovered. The purpose of this article is to draw attention to these problems and suggest ways in which the legislation might be improved.

II. To what leases does the Act apply?

With one or two exceptions, the statutory rights and obligations of the landlord and tenant apply whenever they are parties to a lease of a dwellinghouse. This raises two issues:

> What is a lease of a dwellinghhouse?
> What are the exceptions and how are they made?

Each issue will be considered in turn.

A. *What Is a Lease of a Dwellinghouse?*

1. *What is a "lease" for the purpose of the Act?*

"Lease" is defined by section 104A (1) of the Property Law Act 1952 as follows:

> 'Lease', in relation to any dwellinghouse, includes an underlease, an agreement for lease or underlease, a periodic tenancy, a tenancy arising by operation or implication of law (other than a tenancy at sufferance), and any other agreement or arrangement (whether oral or in writing) under which for valuable consideration in money or money's worth any person is given the right to occupy the dwellinghouse . . . .

A difficulty may arise as to whether this definition is wide enough to include a life tenancy created pursuant to the provisions of a will or trust where the life tenancy is subject to payment of rates, insurance and other outgoings. It is arguable that this constitutes an ". . . arrangement . . . under which for valuable consideration in money or money's worth any person is given the right to occupy the dwellinghouse. . . ." The life tenant's right to occupy is no doubt conditional

10 See for example Charles Donahue Jr., "Change in the American Law of Landlord and Tenant" (1974) 37 M.L.R. 242 particularly 258 et seq. where there is criticism of this development.

11 See *Studies in the Law of Landlord and Tenant: The Adams Memorial Essays* (Hinde ed. 1975). In particular see Anthony P. Molloy, "The Landlord's Covenant to Repair", 187, and T. J. Bickley, "The Tenant's Covenant to Repair", 145.

upon making the payments specified, and will terminate should he make default.

If a life tenant is regarded as a tenant for the purposes of the Property Law Amendment Act, then unless the arrangement falls within one of the exceptions specified in the Act, in particular where the life tenant is also trustee,[12] or perhaps where the annual sum paid by the life tenant does not exceed half of the equitable rent for the dwellinghouse as fixed by the Rent Appeal Board within the preceding twelve months,[13] the statutory repairing covenant must apply. In this case, any provision in the will imposing the obligation to repair upon the life tenant will be of no force or effect in so far as it requires the life tenant to put or keep the dwellinghouse in a fit and habitable condition for residential purposes. In other words, the Act could entitle the life tenant to pass on to the trustee and hence to the remaindermen, contrary to the testator's wishes, the bulk[14] of the obligation to repair. Clearly the Act could not have been intended to go so far, particularly as it operates retrospectively, but it would have been helpful if this had been made clear.

The question whether a life tenant can be regarded as a tenant for the purposes of the Property Law Amendment Act has not yet been considered by the court but if or when it is, the case of *Hogenas* v. *Hatton*[15] may be of some assistance. In this case it was held that a "life tenant" was not a "tenant" for the purposes of the Tenancy Act 1948 but it is interesting to note that the reasons which persuaded Shorland J. to make that finding may not be applicable should the same question arise in relation to the repair of a dwellinghouse under the Property Law Amendment Act. For example, the judge was dealing simply with the question whether the life tenant could be regarded as "a tenant of any dwellinghouse". There was no definition of a lease in such wide terms as adopted in the Property Law Amendment Act until the Tenancy Amendment Act 1958. Furthermore, the Tenancy Act was concerned with such matters as restriction of rents, mode of payment of rent and security of tenure. In this case the life tenancy was unconditional. Although rates and insurance had been paid and some improvements to the property made by the life tenant, this was by way of salvage only, there being no funds in the estate. Payment of these expenses was not made a condition of the right of occupancy. Obviously the Tenancy Act was inapplicable to a situation such as this, where no rental even in the broad sense of money or money's worth was payable, and there was no question of the "landlord" being able to recover possession.[16]

12 Property Law Act 1952, s. 104A (1) (c).

13 Ibid., s. 104C (2) and (3) by virtue of which in these circumstances the parties are left free to make their own agreement as to their respective responsibilities for the condition of the premises.

14 The life tenant may still be responsible for any repairs required over and above those which are needed to keep the dwellinghouse in a fit and habitable condition for residential purposes. This is considered at pp. 474-477 infra as it is relevant to the answer to the second question raised.

15 [1955] N.Z.L.R. 684.

16 See also *Murphy* v. *Simpson* [1957] V.R. 598 where a beneficiary was living in the deceased's property with the consent of the other beneficiaries. Although he paid rates and effected improvements, his claim to be a protected tenant was rejected, but only because the evidence fell short of establishing any binding agreement by him to make these payments in return for possession of the house.

2. *What is a dwellinghouse?*

A "dwellinghouse" is defined as ". . . any building or part of a building let as a separate dwelling . . . ."[17]

These words have been considered on many occasions in relation to earlier tenancy acts in this country. A wealth of case law is available but the application of some of this case law to the Property Law Amendment Act may be inappropriate and could give rise to unsatisfactory results. Consequently it is suggested that the first step is to examine the existing case law to determine what judicial meaning has been given to the particular words used in the definition. Then, bearing in mind the warning given by Lawrence J. in *Annicola Investments Ltd.* v. *Minister of Housing*[18] against the application of case law on the meaning of a word in one statute to the same word as it appears in another statute,[19] the next step is to see whether the existing case law meets the object of the Property Law Amendment Act.

(a) The purpose of the letting

A dwellinghouse means a permanent structure either the whole or part of which is intended for a person to live in,[20] and a person can be said to live or dwell in a house if he sleeps, eats and entertains his guests there provided he does so with the intention of making the place his home.[21] Problems may arise in isolated cases where these activities are carried on in more than one place.[22] One solution would be to regard each as a dwellinghouse, but it may be doubtful whether in these circumstances each is a *separate* dwellinghouse.[23]

Although it has been questioned whether letting arrangements for holiday houses fall within the ambit of earlier tenancy protection legislation,[24] it must be remembered that that legislation was concerned with security of tenure. The object of the Property Law Amendment Act would seem to be to regulate as between landlord and tenant the standard of repair expected of a dwellinghouse, and who, as between the two parties, ought to be responsible for achieving and maintaining that standard. This object is equally applicable to holiday houses and to permanent houses; there should be no doubt that an agreement to let a holiday house is a lease of a dwellinghouse for the purpose of the Property Law Amendment Act. The same comment applies to the cases which have decided that the premises are not let as a dwellinghouse if the tenant does not himself reside personally on the pre-

17 Property Law Act 1952, s. 104A (2).
18 [1968] 1 Q.B. 631.
19 Ibid., 640. See also Hill and Redman, *Law of Landlord and Tenant* (15th ed. 1970) 877.
20 Woodfall, *Landlord and Tenant* (27th ed. 1968) 1440 para. 2622.
21 *MacMillan & Co. Ltd.* v. *Rees* (1946) 62 T.L.R. 331, where it was said that many persons over the last few years had slept and eaten in places which could hardly be called dwellinghouses.
22 Compare *McCarthy* v. *Preston* [1951] N.Z.L.R. 1091, with *Wimbush* v. *Cibulia* [1949] 2 K.B. 5464 and *Curl* v. *Angelo* [1948] 2 All E.R. 189. See also *Herbert* v. *Byrne* [1941] 1 All E.R. 882 where the tenant was in the process of moving house and slept in his new and virtually unfurnished house, but had his meals at his old house with his family. It was held that the new house was let as a separate dwellinghouse and Lord Denning M.R. thought that such a man could be said to have two homes.
23 The meaning of the word "separate" is considered at p. 467 infra.
24 See *Blaxall* v. *Shearer* (1946) 5 M.C.D. 61; *Crumpe* v. *De Clive Lowe* (1947) 5 M.C.D. 210.

mises.[25] No such restriction is expressed in the definition, and it would be illogical if the Act did not apply, for example, to premises leased by the tenant as a home for his mother, or for a friend. However, if the tenant takes a lease of the premises with the idea of subletting the whole to other tenants,[26] then the Act may not apply to the head lease as in this case the premises will have been let to the tenant for business purposes and not as a dwellinghouse.

Whether premises are let as a dwellinghouse cannot depend on actual user by tenant.[27] A landlord would not be expected to put and keep a tumbledown garden shed or barn in a fit and habitable condition for residential purposes merely because a tenant decided to use it as a home. Obviously it is a question of determining the intention of the parties.[28] Denning L.J. (as he then was) set out in his usual succinct fashion the appropriate test to be applied in determining that intention when he said.[29]

> In determining whether a house or part of a house is 'let as a dwelling' within the meaning of the Rent Restriction Acts, it is necessary to look at the purpose of the letting. If the lease contains an express provision as to the purpose of the letting, it is not necessary to look further. But, if there is no express provision, it is open to the court to look at the circumstances of the letting. If the house is constructed for use as a dwelling-house, it is reasonable to infer the purpose was to let it as a dwelling. But if, on the other hand, it is constructed for the purpose of being used as a lock-up shop,[30] the reasonable inference is that it was let for business purposes. If the position were neutral, then it would be proper to look at the actual user. It is not a question of implied terms. It is a question of the purpose for which the premises were let.

The only improvement which could be made to this analysis is to point out that perhaps it would be unwise for the express terms of the agreement to be regarded as absolute as Denning L.J. seems to suggest. Taken to its extreme, this could allow circumvention of the Act simply by referring to the premises as, for example, business premises. It has been said that the expression in the lease must be genuine.[31] In other words the court should be given power to look behind the agreement where this does not represent the true intention

25 See for example *Bushford* v. *Falco* [1954] 1 All E.R. 957 and *Meek* v. *Horlock* [1946] N.Z.L.R. 502.

26 As in *Meek* v. *Horlock* [1946] N.Z.L.R. 502.

27 *Williams* v. *Perry* [1924] 1 K.B. 936.

28 Quaere whether the barn would be regarded as a dwellinghouse even when the parties intend it to be used as such. Woodfall, op. cit., 1441 para. 2622 suggests not, but this is difficult to reconcile with the view that it is simply a matter of intention. In *Wolfe* v. *Hogan* [1949] 2 K.B. 194 the tenant for convenience, because of the bombing of London, slept in a large room which initially she rented to store antique furniture belonging to her business. There was no sanitation and she used the upstairs toilet with the landlord's permission. Her case that this was a dwellinghouse was lost as there was no common agreement as to user of the premises, but it was not doubted that had the parties been in agreement, this room could have been let as a dwellinghouse. It is suggested that this is a satisfactory result. There is no need to restrict the operation of the Act to buildings *built* and let as dwellinghouses.

29 *Wolfe* v. *Hogan* [1949] 2 K.B. 194, 204-205. This test was followed by North J. in *Fakir* v. *Gopal* [1957] N.Z.L.R. 253.

30 In this context His Lordship is referring to the shop part of a shop-dwelling type building where there is no direct access between the dwelling and the shop.

31 Woodfall, op. cit., 1443 para. 2624.

of one of the parties, or the provision is designed as a subterfuge to evade the provisions of the legislation.[32]

(b) Change in purpose

A change in the purpose of the letting during the term could have the effect of either bringing premises within or outside the scope of the legislation, and any convenants in the lease relevant to the question of repairs would similarly be affected. Logically the time to decide whether premises are let as a dwellinghouse will be the time when the need for repairs to the building arises. Therefore in each case it will be necessary to look at the purpose of the letting at the time the tenancy is created, and then decide whether there has been any subsequent change in that purpose.

In *Bethune* v. *Bydder*,[33] which concerned an action for possession under the Fair Rents Acts 1936, Johnston J. said:[34]

> . . . . [W]hile the question whether the tenant by his mere use, or disuse, of the demised premises, without the landlord's consent or knowledge, can either take the premises out of the Act or bring the premises within the Act, has not yet been decided, it is clear the change must be unmistakable and supported by unequivocal evidence.

However, it is suggested that the view of the English Court of Appeal in *Wolfe* v. *Hogan*[35] and *Court* v. *Robinson*[36] that there can be no change in the nature of the letting without the landlord's knowledge and consent, ought to be adopted. Moreover, it was held in *Wolfe* v. *Hogan* that the landlord's consent must be affirmative and cannot be implied from his action in accepting rent with knowledge of the change in user unless this continues for so long that no other interpretation is possible than that he has consented to the change.[37] Upon the same principle it was held in *Fakir* v. *Gopal*[38] that a landlord could not alter the nature of the premises by separating off adjoining shop premises and treating that portion as business premises without the tenant's consent.

32 *MacMillan & Co. Ltd.* v. *Rees* (1946) 62 T.L.R. 331, 333. In this case the lease provided that the premises were let as offices for the tenant's business, but express permission was given for the tenant and her partner to sleep on the premises. Although the premises contained a two roomed suite with cooking facilities plus a bathroom and toilet, and although the tenant's partner slept and ate in the premises for approximately four months, it was held that this alone did not amount to use as a dwellinghouse and that the purpose of the letting was for business. New Zealand courts have not placed so much emphasis on the agreement of the parties. In *Bethune* v. *Bydder* [1938] N.Z.L.R. 1 Smith J. took the view that an agreement express or implied was no more than *relevant* as to user and Johnston J. thought that the terms of the agreement express or implied created a presumption as to user.

33 [1938] N.Z.L.R. 1.

34 Ibid., 24.

35 [1949] 2 K.B. 194.

36 [1951] 2 K.B. 60.

37 In this case the landlord accepted rent in respect of business premises for four to five years knowing that the tenant was living on the premises, but it was held that there was still no affirmative consent. A similar view has been taken by the High Court of Australia in *Thompson* v. *Easterbrook* (1951) 83 C.L.R. 467.

38 [1957] N.Z.L.R. 253.

(c) Premises let both as a dwelling and as a business

There has been considerable difficulty in the past over the application of rent control and protection of tenure legislation to a building or part of a building let as one tenancy, but which is to be used both as a dwellinghouse and as a business, such as a combined house and shop, or a house partly sub-let to other tenants or to lodgers or even a private hotel. As long ago as *Epsom Grand Stand Association (Ltd.)* v. *Clarke*[39] the question was raised whether the Downs Hotel in Epsom was "a house or part of a house let as a separate dwelling". The tenant lived in the premises as a resident manager. It was decided that the entire premises were let as a separate dwellinghouse as the tenant made it his home and it made no difference that part, even a substantial part, was used for business. If it were otherwise, ". . . it would exclude a great many premises which the legislature did not intend to be excluded".[40] The legislature did in fact agree and subsequently inserted a statutory provision endorsing the decision.[41] The same statutory extension of the meaning of dwellinghouse can be found in section 2 (2) of the Rent Appeal Act 1973 but there is no such provision in the Property Law Amendment Act. This is all the more noticeable as in other respects the definition sections in the two Acts are almost identical. The problem now is to decide whether and to what extent the Property Law Amendment Act is intended to apply to premises which are used both for business and residential purposes. There are four possible interpretations.

(i) Exclusion of premises used partly for business purposes

By obviously omitting a statutory extension of the meaning of "dwellinghouse" of which it must have been aware, the legislature may have intended the Property Law Amendment Act to apply only to premises let *exclusively* as dwellinghouses. If so, this proposition would be unacceptable. It would mean, for example, that a music teacher, or dress-maker, or for that matter a solicitor, who rents a house may lose his rights and privileges under the Act simply because a room is being used from time to time for purposes associated with the business.[42] Such an interpretation would, to adopt the language of Bankes L.J. ". . . exclude a great many premises which the legislature did not intend to be excluded", and may also have the undesirable effect of leading to fine distinctions as to the degree of non-residential use to which the room is put.

(ii) Adoption of the test used in the Rent Appeal Act

The legislature may have intended the Property Law Amendment Act to apply to joint business and residential premises in the same way as rent control and protection of tenure legislation has been applied, but thought the statutory extension unnecessary as there is authority in *Epsom Grand Stand Association (Ltd.)* v. *Clarke* to the same effect. If this is so, there is a wealth of case law upon which the practitioner can draw, but this is intended more as a criticism of such an interpretation rather than as an argument in favour of it. It would be a retrograde step to revert to the morass of fine distinctions, even

39 (1919) 35 T.L.R. 525.
40 Ibid., 526 per Bankes L.J.
41 See *Vickery* v. *Martin* [1944] K.B. 679 where this development is fully discussed.
42 Compare the obiter dictum of Blair J. in *Wood* v. *Barber* [1946] N.Z.L.R. 323, 327-328.

though they served to keep lawyers in business during difficult economic years.

However, there is another reason why such an interpretation should not to be adopted. Much of the case law seems favourably inclined towards the tenant which is, of course, quite understandable considering the object of the legislation concerned. The main problem was that the courts were not impressed by attempts to draw the line of the basis of dominant or substantial use.[43] It would still seem to be questionable however, whether the same view has been adopted in this country.[44] But it is even more significant to notice that in more recent legislation, which is more in point as it deals directly with the question of responsibility for repairs, there is a definite shift towards the dominant user test. Section 32 of the Housing Act 1961 (U.K.), which imposes an obligation on landlords and not tenants to repair the structure and exterior of dwellinghouses (and certain installations inside) let for a term less than seven years, defines a lease of a dwellinghouse as ". . . a lease whereby a building or part of a building is let wholly or mainly as a private dwelling . . . . " Even more recently in Queensland, where property law reform comparable to that in New Zealand is being considered, "dwellinghouse" seems to have been defined in much the same way.[45]

(iii) Adoption of the dominant or substantial user test

It is suggested that the dominant or substantial user test provides a more realistic solution when compared with the court's inclination to further the object of other legislation by classifying a building as a dwellinghouse simply because the tenant lives in it, and disregarding the extent of the non-residential use. For the purposes of the Property Law Amendment Act, the question should be whether the premises are let principally or perhaps substantially as a dwellinghouse. In the absence of genuine express provision in the lease, it seems that there would be no better way of resolving the issue than to look at the circumstances of the letting and the nature of the premises, and as an objective third person answer the question: 'is the tenant living in the premises mainly as a home, the business side being ancillary, or is he living in the premises just so that he can run his business more efficiently?' Leases to the music teacher or dressmaker or to the

43 *Vickery* v. *Martin* [1944] K.B. 679; *Whitely* v. *Wilson* [1953] 1 Q.B. 77. Australian courts have taken the same approach: *Thompson* v. *Easterbrook* (1951) 83 C.L.R. 467.

44 At one time in fact, the dominant user test was expressly incorporated into our legislation. The Fair Rents Act 1936, s. 2 (b) excluded "[a]ny premises used by the tenant exclusively or principally for business purposes". However, even after the repeal of this provision in 1942, *Vickery* v. *Martin* was clearly applied in only one case: *Drum* v. *Coleman* [1947] N.Z.L.R. 175. It was distinguished in *Wood* v. *Barber* [1946] N.Z.L.R. 323 and the magistrate in *Brays Properties Ltd.* v. *Giles* (1949) 6 M.C.D. 196 (Mr H. Jenner Wily S.M.) felt that there was a definite tendency in New Zealand, which he adopted in this case, to attempt to determine which was the substantial use and classify the tenancy accordingly. However, in *Giles* v. *Bray Properties Ltd.* [1950] N.Z.L.R. 489, in which an appeal was dismissed, Stanton J. expressed the opinion that there were good grounds for applying the provisions of the Tenancy Act to premises even if they were let substantially for business purposes.

45 See H. Tarlo, "Property Law Reform in Queensland" (1974) 8 U.Q.L.J. 205, 225. The statutory covenants are said to apply in a lease of premises for the purpose or principally for the purpose of human habitation.

person who takes in lodgers or repairs cars in the back shed will be treated as leases of dwellinghouses. On the other hand, leases of private hotels, public boarding houses and motels will no doubt be regarded as business ventures even although the tenant also uses the premises as his home.

(iv) Severance

Up until now we have been considering whether the legislature intended either that the whole of the premises are to be excluded where there is a substantial or at least some non-residential use, or that the whole of the premises are to be included where there is a substantial or at least some residential use. In some cases the true solution may lie somewhere in the middle. Severance has been considered in the context of rent control and security of tenure legislation[46] but there it suffers serious difficulties. The problem arises when one building is let as a whole for one composite rent without any differentiation by the parties between the business and residential parts in terms of rent, obligations and use. If it is a question of fair rent, and jurisdiction is assumed on the basis of severance over that portion used as the dwelling, then the difficulty is to apportion the rent attributable to that portion in order to determine whether or not the rent is fair. If it is a question of security of tenure, then there may arise a situation where the tenant is given an effective notice to quit in respect of the business part, but has a protected tenancy in respect of the dwelling.

When it comes to the application of the Property Law Amendment Act, severance does not lead to such problems. The Act would simply apply to so much of the premises as can fairly be said to constitute the dwelling, but not to the business portion. This interpretation, if it were intended by the legislature, would not be suitable in cases such as the lease to the music teacher or dressmaker or other cases where part of the premises are used for only part of the time for business purposes. It would also be unsuitable when dealing with a private hotel business or motel where the tenant lives in. These cases ought to be classified on the principles outlined in (iii) above either as a dwellinghouse, or as a business. But severance provides a solution to the difficult borderline cases such as the shop-dwelling combination, or the house sub-let to various tenants or boarders, where the business and residential uses of the premises are of equal importance to the tenant in the sense that he would not have much need for the one without the other. In this situation the only problem with severance would be the physical one of deciding where the residential portion ends and the business portion begins.

Hopefully the courts will be able to construe the interpretation section in the Property Law Amendment Act in a sensible and realistic way, but it is to be regretted meanwhile that the legislature has left the question open to doubt by its failure to deal specifically with the problem. It is a question which is of considerable importance to the conveyancer when faced with the task of drawing up a lease for multiple purpose premises. The only practical course is to ensure that there

46 See Woodfall, op. cit., 1446 para. 2625, and in New Zealand see *Fakir* v. *Gopal* [1957] N.Z.L.R. 253 and *Lister* v. *Toomey* [1946] N.Z.L.R. 414. In Australia see *Greater Union Organisation Pty. Ltd.* v. *Pappas* (1968) 116 C.L.R. 475 where the premises consisted of two self-contained premises, one to be used as a shop, the other as a dwelling.

is express provision in the lease as to its nature, differentiating if necessary, between the residential and business portions and including covenants to suit.

(d) The meaning of "a separate dwelling"

The final point to note is that the dwellinghouse must be let as a *separate* dwelling. This should not be construed narrowly as referring to one single building let as one single home. If several buildings are let collectively to one tenant as a home, the Act should nevertheless apply to them all.[47] If one building can be used as a home for several families, then either it will consist of a series of separate dwellings if let individually to each tenant, each unit being "a part of a building", or, if the whole is let to one tenant, then, subject to the differentiation between business and residential use referred to above, the whole may be regarded as a single separate dwellinghouse even though the tenant sub-lets the rest of the building. In this latter situation, as the definition of lease includes an underlease,[48] the sub-lessor will be responsible to the sub-lessee for the fitness for habitation of that part of the premises sub-let by him as a separate dwelling, and the sub-lessee will account to the sub-lessor for the repairs for which he is made responsible under the Act. However, in the absence of an agreement between the head lessor/landlord and head lessee/tenant, or severance excluding the provisions of the Property Law Amendment Act from that portion of the building which is sub-let, ultimate responsibility under the Act for the entire premises will fall back on the head lessor/landlord and head lessee/tenant.

In the context of the Property Law Amendment Act, the word "separate" can only mean that the premises must be self-contained, that is, capable of being used as a private and independent home. No doubt the intention is to exclude from the operation of the Act those arrangements whereby persons are living in buildings such as boarding houses, hostels, homes for the aged, hospitals, motels and the like. But it may also have the effect of excluding premises which are shared by the tenant with others such as the landlord or the landlord's friends or perhaps some of his other tenants. The problem arose in *Hilderbrandt* v. *Read*[49] where three tenants rented three business premises as dwellinghouses. As the premises were built as business rooms, the tenants had to share a lavatory, shower, gas and water heater. It was held that in spite of this inconvenience, the premises were nevertheless still separate dwellinghouses.[50] However, in many other cases it has been held that the grant of a right to occupy premises which are shared does not amount to a lease of a *separate* dwellinghouse.

47 As in *Langford Property Co. Ltd.* v. *Goldrich* [1949] 1 K.B. 511 where two self-contained flats, although physically separate, were regarded as a separate dwellinghouse. The tenant wanted the additional flat to accommodate relatives. The cases where the tenant sleeps in one building but eats and lives in another are also relevant here: see supra, n. 22.

48 Property Law Act 1952, s. 104A (1).

49 [1946] G.L.R. 321.

50 See also *MacAnn* v. *Annett* [1948] N.Z.L.R. 116 which was concerned with the application of the Fair Rents Act 1936. The tenant gave a man and his wife permission to share his house in return for personal services. One reason for deciding that the premises were not within the Act was that there was no exclusive occupancy. This situation has now been remedied by express statutory provision: see *Smith* v. *Olliver* (1950) 6 M.C.D. 319 and compare Rent Appeal Act 1973, s. 2 (3).

The question of what constitutes sufficient sharing to exclude the operation of tenancy legislation in England has been considered several times by the Court of Appeal and twice by the House of Lords.[51] Although there can be no fixed principles of law in deciding what constitutes a sharing of premises, the effect of the cases seems to be that if what has been regarded as an essential living area (namely a kitchen, bedroom, dining room or lounge) is, or can be,[52] used by other persons, then the nature and extent of the sharing arrangement should be considered to see whether it amounts to a sufficient invasion of the tenant's free use of the room. If so, then the tenant is not regarded as having leased a separate dwellinghouse. In *Hayward* v. *Marshall*,[53] it was held that the mere right to draw water at all reasonable times from the kitchen and use the stove to boil water for washing once a week, was not a sufficient interference with the tenant's use of the room as an essential living room. In other words, an arrangement is more likely to amount to sharing if there is a right of similar and simultaneous use of the living area.[54]

It is submitted that the object of the Property Law Amendment Act is in no way furthered if the word "separate" is to be interpreted in this way to exclude shared premises. If anything, it creates an unnecessary refinement which may possibly impair the operation of the Act. It makes little sense that a dwellinghouse need not be in or kept in a condition fit for habitation for residential purposes simply because it is shared. In fact it is accommodation which is shared which is most likely to be in poor condition, and the people who are forced into this situation are the sort of people who need these statutory measures to protect their interests. An unscrupulous landlord may even be able to make deliberate use of this anomaly in order to avoid his statutory obligations. For example, he may wish to let a house which is not in a fit and habitable condition to a number of student tenants. If he lets the whole to one student or to all of the students jointly, this no doubt would amount to a letting as a separate dwelling. But if he lets each bedroom individually to each student wtih rights in common to use the kitchen, dining room, lounge and toilet facilities, then in each case he has purported to lease a part of the building but not as a separate dwelling.

It is instructive to note that the Rent Appeal Act 1973, which in this respect has an identical definition of a dwellinghouse, contains an express provision deeming premises to be let as a separate dwellinghouse where a tenant has permission to live in part of a building and has a right to use other parts of the building in common with any other person.[55] Similar savings clauses are included in English legislation[56] where premises shared with other persons not being the landlord are still to be regarded as let as "separate" dwellinghouses. The

51 For a detailed analysis of these cases see Ashley Bramall, [1955] J.P.L. 553 and [1956] J.P.L. 482. See also Hill and Redman, op. cit., 880.

52 Hill and Redman, op. cit., 882 state: "It is probably enough to take the premises outside the Act if there is a right to share living accommodation even if that right is not exercised."

53 [1952] 2 Q.B. 89.

54 The same approach was taken by the House of Lords in *Goodrich* v. *Paisner* [1956] 2 All E.R. 176 where a bedroom was to be shared, but successively at different times and not simultaneously.

55 Rent Apeal Act 1973, s. 2 (3) and see supra, n. 50.

56 Rent Act 1968 (U.K.), s. 102.

exclusion of the landlord in the English legislation is understandable as this legislation is concerned with such matters as security of tenure. If the landlord were not excluded, he may find himself unable to evict a tenant who he can no longer tolerate living with. There would be no call for any such distinction having regard to the object of the Property Law Amendment Act, and it is suggested that to avoid doubts in this area a saving clause similar to that which appears in the Rent Appeal Act should have been incorporated.

(e) Onus of proof

Before leaving this section on definition, it is noted that there is no provision in the Act as to who bears the onus of proof that the premises are or are not let as a dwellinghouse. In *Bethune* v. *Bydder*,[57] a case dealing with the Fair Rents Act 1936, it was suggested[58] that the onus falls on the person who is seeking relief under the Act. It would seem that the same rule would be appropriate for the purposes of the Property Law Amendment Act. The point may be of frequent practical importance as a person with a small claim will be reluctant to pursue it in cases where the nature of the letting is difficult to determine.

B. *What Are the Exceptions and How Are They Made?*

1. *The exceptions*

The exceptions fall into three categories. First there are a number of leases which are specifically excluded from the Act. These are set out in detail in the definition section,[59] but in general terms they are leases whereby the lessee has rights to remove the dwellinghouse or receive compensation for it,[60] licences to occupy within the meaning of section 2 of the Companies Amendment Act 1964, leases under which the lessor(s) is also entitled as lessee,[61] leases to which Part II of the Unit Titles Act 1972 applies, leases of premises licensed to sell liquor, leases of land of 1.25 hectares or more used for agricultural purposes to provide the whole or a substantial part of the tenant's income,[62] and camping ground sites.

The second category is comprised of premises which meet the requirements of the definition section, but because of special circumstances relating to the premises themselves which make it unreasonable to require the landlord to put and keep the dwellinghouse in a fit and habitable condition, the landlord is able to obtain authority from the Magistrate's Court "at any time before granting the lease", to let the property on such terms and conditions as the magistrate approves. Circumstances in which this procedure is available arise when the premises are to be demolished or altered for public works

57 [1938] N.Z.L.R. 1.
58 Ibid., per Ostler and Johnston J.J. Smith and Fair J.J. found it unnecessary to make any comment on this point.
59 Property Law Act 1952, s. 104A (1) and (2).
60 This would take what are commonly referred to as "Glasgow Leases" outside the Act.
61 This may arise where the tenant is also trustee of the land, or perhaps in cases where one joint owner is granted exclusive possession of the premises by the other or others.
62 See *Houston* v. *Poingdestre* [1950] N.Z.L.R. 966 for a full discussion of the difficulties in deciding whether premises fall within this exception.

schemes and urban redevelopment,[63] or where the landlord intends to demolish, rebuild or renovate within a reasonable time.[64] In both cases, the magistrate is not to give his consent unless the dwellinghouse complies with public health and safety requirements.[65]

Making an allowance for premises in these circumstances is quite understandable. What is not so clear is why it should apply only before a lease is granted. There seems to be no jurisdiction to allow the landlord to contract out of the Act should he decide to demolish or should a notice requiring the land for public works be received during the term. In such a case, subject to a suitable adjustment to the rental, there is still good reason for allowing the landland to contract out of the Act and it is to be hoped that this oversight will be rectified.

The final category involves premises which comply with the requirements of the definition section and are in fact within the legislation, but because of special circumstances relating to the nature of the letting, the parties are left free to negotiate their own terms and conditions without the need for a magistrate's approval. The only situation where this is permitted is where the dwellinghouse is let in return for a rent which does not exceed fifty percent of the equitable rent for the dwellinghouse as fixed by the Rent Appeal Board within the preceding twelve months.[66] This provision is no doubt designed to exclude non-commercial arrangements such as family agreements from the operation of the Act. Obviously in these cases there is no real danger that the tenant may be forced to live in unsuitable premises, and it may even be the intention of the parties that the tenant rather than the landlord be responsible for all repairs whether they are necessary for the fitness for habitation of the premises or not.

The interrelation between the Property Law Amendment Act and the Rent Appeal Act could, in a rare situation, give rise to an injustice which would be difficult to avoid. The situation would arise where the Board fixes the equitable rent having regard to the parties existing repairing obligations,[67] but the Board's finding subsequently affects the enforcement of those obligations. For example, assume a tenant covenants to repair and agrees to pay $10.50 per week as rent. The question may arise as to whether this covenant is enforceable. This may depend on whether he is paying more than fifty percent of the equitable rent. Taking into account the tenant's covenant to repair, the Board may decide that the equitable rent is $20 per week. However, in the result, such a finding would, to a large extent,[68]

63 Property Law Act 1952, s. 104D in which case they may be let on approved terms for a period not exceeding six months with a power to apply for six-monthly extensions for an indefinite time.

64 Ibid., s. 104E in which case the premises may also be let on approved terms for a period not exceeding six months but with a limit of two years imposed as the maximum period allowed for six-monthly extensions.

65 Ibid., ss. 104D (1) (a) and 104E (3) (b).

66 Ibid., s. 104C (2) and (3).

67 The responsibility for repair is no doubt a relevant matter to be considered by the Rent Appeal Board in fixing the equitable rent, falling within the category of "[t]he landlord's outgoings in respect of the dwellinghouse": Rent Appeal Act 1973, s. 8 (1) (f). See also J. R. Laidlaw, "The Rent Appeal Boards: Selected Aspects of Their Function and Practice" (1975) 3 Otago Law Review 302.

68 The extent to which such a covenant would be unenforceable is discussed at p. 474 infra.

render the tenant's covenant to repair unenforceable as he would then be paying more than fifty percent of the equitable rent. On the basis that the tenant is not liable for all repairs, the equitable rent may be $22, but, even if the landlord could make application by way of rehearing for an increase in the rent to this amount, the result would still cause injustice to the tenant. He would then be paying less than fifty percent of the equitable rent and his covenant to repair would be enforceable accordingly. A compromise may be the only practical solution.

2. *Other situations where the statutory covenants may be unsuitable*

Having considered the exceptions, the question now is whether they are wide enough? Are the implied statutory obligations suitable for every other lease? The answer must be no. The legislation as it stands is inflationary. It may have the effect of forcing landlords to improve many run down dwellinghouses which are not strictly speaking in a fit and habitable condition but which can be lived in and which are currently leased to tenants at a very low rental. The tenant may be content with the arrangement without having been forced into it. Improvements to the dwellinghouse must be reflected in increased rents which will make low cost housing even more difficult to obtain. These low cost leases satisfy a need in the community and do not in every case present a social evil. Much depends on the circumstances of the tenant.

In other cases it may even be the wish of the tenant that he and not the landlord undertake the repairs neecssary to put and keep the dwellinghouse in a fit and habitable condition. One such situation is the long term lease. There is a vast difference between the short term tenant and the long term lessee both in status and in his attitude towards responsibility for the premises. Similarly an absentee landlord may prefer not to remain responsible for the maintenance of the premises and in exchange for a suitable adjustment to the rent this may suit the tenant. But unless the arrangement falls within one of the existing exceptions[69] the parties' fair and sensible arrangement could be defeated by the Act.

Some interesting arguments could be raised should the tenant agree to carry out all repairs to the dwellinghouse in return for a reduction in the rent, and then subsequently rely on the statutory provisions to avoid liability under his covenant. Could the landlord plead estoppel?[70] Is the tenant using a statutory provision as an instrument

69 Discussed at pp. 469-470 supra.

70 The elements of estoppel may be present; namely a representation that the tenant has waived his statutory rights, made with the intention that the landlord act upon it, together with the landlord's action upon it and his subsequent financial detriment in accepting a reduced rental. However it seems unlikely that the courts would tolerate such a flagrant evasion of the clear non contracting-out provision in the Property Law Amendment Act. The point arose in *Solle* v. *Butcher* [1950] 1 K.B. 671 where a dwellinghouse was mistakenly let as an uncontrolled tenancy. Accordingly, the parties had entered into an agreement for a rent far exceeding that which ought to have been payable. The tenant, having discovered the error, then claimed a refund of the amount he had overpaid. The landlord pleaded common mistake and estoppel. He succeeded on the issue of common mistake but he would have lost the argument on estoppel. As Denning L.J. said at 690:

> ". . . but, just as parties cannot contract out of the Acts, so they cannot defeat them by any estoppel."

Jenkins L.J. expressed a similar view at 707.

of fraud?[71] Could the landlord bring an action in agency?[72] Would there be any relief under the Illegal Contracts Act 1970?[73] In so far as the Act will apply retrospectively to agreements already made by the parties, could the landlord plead frustration?[74] All of these questions raise difficult issues but they will not be considered in detail as it is suggested that the only suitable all-embracing remedy is to broaden the exceptions permitted to the Property Law Amendment Act.

It is suggested that consideration ought to be given to the question whether the Act should apply at all to long term leases. Comparable legislation in England and apparently in Queensland draws the line at leases for terms greater than three years.[75] Even if our legislature is not prepared to arbitrarily exclude long term leases, as seems to be the case in Queensland, it should at least, as it does in England, allow the parties to a long term lease to enter into their own private and legally enforceable arrangements. The same could be said when

71 So far the equity has been applied to remedy evidentiary deficiencies and to prevent fraud by allowing oral evidence in substitution for written evidence to prove certain contracts (Contracts Enforcement Act 1956, s. 2 (2)) or trusts of land (Statute of Frauds 1677 (U.K.), s. 7.). It would be an extension to apply it to a situation where a tenant is making improper use of his statutory rights, but the analogy is there in that in both of the above caees the contract is valid but legally unenforceable, and the extension may be justified where fraud can be shown either at the creation of the contract or trust, or subsequent to it.

72 The landlord could argue that for the purpose of carrying out repairs the tenant was acting as his agent. The consideration for the agency contract would be a sum equivalent to the reduction that has been made to the rent. In this situation he could argue that the tenant has not contracted out of his statutory rights. He, as tenant, has a right of action against himself, as the landlord's agent, to have the dwellinghouse put and kept in a fit and habitable condition. Any action taken by the landlord would be against the tenant, not as tenant, but as his agent for his breach of the agency agreement. The difficulty here is that the tenancy and agency agreement are interwoven in the same transactions and the Act renders ineffective *any* "covenant or agreement" which deprives the tenant of his statutory rights. This might be construed as extending to the agency agreement and might even extend to an agency agreement made with a stranger to the lease, e.g. the tenant's wife.

73 This is doubtful. The Property Law Amendment Act does not prevent the making or the carrying out of a contract containing terms contrary to those implied by that Act; it merely provides that any such terms are to have no force or effect.

74 This would clearly be so if the Act rendered the parties' agreement impossible of performance or illegal, but it does not go so far. However, it does render unenforceable an agreement which was legally enforceable when made, and if the tenant is now by law entitled not only to disregard his part of the bargain to keep the premises fit and habitable, but also to ask the landlord to carry out the necessary work, the very essence of the agreement has been frustrated. The difficulty once again is that application of the doctrine to existing leases would be to ride roughshod over the express statutory provision which states categorically that the landlord's implied covenants will apply in all leases of dwellinghouses entered into before 19 September 1975 as from September 1976.

75 See the proviso to Housing Act 1957 (U.K.) s. 6 (2) where the landlord's implied covenant is excluded from leases for terms of three years or more, but only if the tenant has agreed to keep the dwellinghouse in a fit and habitable condition. For the position in Queensland see H. Tarlo, "Property Law Reform in Queensland" (1974) 8 U.Q.L.J. 205, 225.

there are other special circumstances where the provisions in the Property Law Amendment Act are not suitable.

It is not suggested that the parties should be left free to contract out of the provisions of the Act. The suggestion is simply that there may be other occasions, besides those recognised in the Act, where it may be reasonable for the landlord and tenant to enter into an arrangement with terms differing from the statutory covenants. If it is felt that some form of protective supervision is still required, for example, to ensure that the tenant is not being forced to live in sub-standard housing or is not required to pay an excessive rent having regard to the condition of the premises he has agreed to repair, the landlord could be required to seek authority to contract out of the Act, just as he now must where the dwellinghouse is going to be demolished.

To sum up, it is suggested that there is a case for treating leases for terms of three years or more on the same basis as leases for rents not exceeding fifty percent of the equitable rent. This would mean that the covenants in the Property Law Amendment Act would still apply to these leases, but they would be subject to any contrary agreement by the parties. In all other leases where the Act applies, there should be a provision enabling the parties to seek permission to contract out of the Act. Permission should be granted where the agreement proposed by the parties is fair and reasonable.

3. *Who should be charged with the function of granting permission to contract out?*

In those situations in which the landlord may seek permission to contract out of the Act (e.g. where the dwellinghouse is to be demolished), such permission must be given by the Magistrate's Court.[76] For the reasons set out below, it is suggested that this is a function which would be better fulfilled by the Rent Appeal Board.

(a) Workload. The Property Law Amendment Act has increased the burden on magistrates who are already over-burdened with work in other fields of law.

(b) Delay may result from the fact that magistrates are often concerned with more pressing matters.

(c) Expertise. The granting of permission to contract out of the Act will rarely involve difficult points of law. Usually the inquiry will be limited to whether the dwellinghouse provides safe and healthy accommodation, and whether, in all the circumstances (including perhaps the rent being paid), the arrangement proposed by the parties is reasonable. This is a task which is best left to the Rent Appeal Boards which are in touch with current rents, property trends and have special expertise in assessing the standard of accommodation. This would be a completely new area for magistrates who would require formal evidence as to the condition of the premises in order to determine whether what the landlord proposes is reasonable and ought to be permitted. This also adds to expense.

(d) Formality. This type of application, being concerned with a factual inquiry rather than a determination of law, would be better suited to the informal proceedings held before Rent Appeal

76 Property Law Act 1952, s. 104A (3).

Boards. Dispensing with more formal applications to magistrates also helps to reduce delay and expense.

(e) Convenience. The Property Law Amendment Act and the Rent Appeal Act are both concerned with the protection of tenants. Their combined objective is to ensure that tenants are properly housed in return for an equitable rent. These considerations may be inter-related in that the equitable rent will depend on the condition of the premises, and whether the parties ought to be allowed to contract out of the Property Law Amendment Act may depend on the rent being charged. It is illogical and inconvenient that two different authorities should have jurisdiction on inter-related matters concerned with the same objective, particularly when one already has useful expertise in the field whereas for the other, it is a new and perhaps burdensome task.

III. What is the effect of the provision in the Property Law Amendment Act restricting the parties' freedom to contract out of their statutory rights?

A covenant or agreement has no force or effect to the extent that it deprives the tenant or the landlord of a dwellinghouse of his statutory rights.[77] The corollary to this is that neither the tenant nor the landlord can avoid his statutory obligations. This means that the tenant, not the landlord, must keep the dwellinghouse clean and tidy, and repair the damage he or his visitors cause wilfully or negligently by act or omission. On the other hand, the landlord cannot impose any repairing obligation upon the tenant if the repairs are required to put and keep the dwellinghouse in a condition fit for habitation for residential purposes. However, it remains open for the landlord to cast the burden of *other repairs* on to the tenant and it may therefore be of considerable practical importance to discover what those other repairs might consist of.

The point arose directly in *Jones* v. *Green*[78]. The tenant had convenanted to repair. Legislation subsequently imposed an obligation upon the landlord to keep the premises in a condition fit for human habitation. The question, which was relevant for the purposes of other legislation dealing with rent increases, was whether the landlord was, by virtue of the statutory obligation, liable wholly or only partly for repairs. Salter J. first said:[79]

> I think that there is a marked difference between the state of repair which is defined by the words 'in all respects fit for human habitation' and by such a phrase as 'good and tenantable repair, fair wear and tear only excepted'.

He then went on to say:[80]

> I think therefore that we ought to endeavour to give effect to the distinction between those two standards of repair. I think that this clause [referring to the tenant's covenant to repair] must be regarded as void in so far as it takes from the landlords and puts upon the tenant the duty of doing such repairs as are necessary to keep the premises in all respects reason-

77 Ibid., s. 104C (1).
78 [1925] 1 K.B. 659.
79 Ibid., 668.
80 Ibid., 669.

> ably fit for human habitation, but as being valid, as imposing upon the tenant all repairs above that standard which are necessary to keep the premises in good and tenantable repair, state and condition, fair wear and tear only excepted.

On the authority of this case it is clearly arguable that the Act has narrowed the tenant's liability under a covenant to repair, but has not removed it. Obviously, this is going to create a lot of difficulty and it must be seriously questioned whether this refinement was intended. Surely the Act was intended as a uniform code setting out, in the interests of certainty and for the protection of both parties, the complete rights and obligations of landlord and tenant.

Although it has not yet become obvious in this country, in England there has been a tendency for landlords to take advantage of their superior positions to impose rather rigid repairing obligations on their tenants.[81] This tendency will obviously become more marked when the landlord's income is controlled in the form of rent control legislation such as the Rent Appeal Act. If tenants are to be adequately protected, the task is only partly completed by rent control legislation. The unscrupulous landlord, having his excessive rents restricted, will obviously resort to the alternative left open to him of minimising his outgoings.

The problem may also arise in a more subtle way. There are no doubt many leases of dwellinghouses existing as at 19 September 1975 in which the tenant has expressly agreed to repair. As from 19 September 1976 the tenant is no longer required in these cases to carry out repairs necessary to keep the dwellinghouse in a fit and habitable condition. The decision in *Jones* v. *Green* however suggests that he may have to carry out other repairs under his covenant.

It is suggested that it would be a small but desirable step in the interest of certainty, prevention of unnecessary and costly litigation, and as a further step towards adequate protection for the short term tenant of a dwellinghouse, to rewrite the non contracting-out provision to simply exempt the short term tenant from all other liability to repair the dwellinghouse apart from that imposed on him under the Act.

The difficulty which may arise if the non contracting-out provision is left as it is, arises from the very beginning when an attempt is made to define "fit and habitable condition" for the purpose of advising a tenant who has agreed to repair, exactly what his liability may be. In section 116I (4) of the Property Law Act 1952, several factors are set out which are to be taken into account by the court in determining whether the premises are in a fit and habitable condition, and these include such matters as general state of repair and decoration, stability, dampness, ventilation, light, bathroom facilities and water supply, drainage, sanitary appliances and cooking and food storage facilities. But the real question is at what stage will deficiencies in any of these items give rise to a dwellinghouse which is not in a fit and habitable condition?

81 In a comment in [1961] J.P.L. 391 on what was then the Housing Bill in England, Ashley Bramall observed: "Opportunity is taken in the Bill to deal with a matter outside the normal scope of the Housing Acts, namely the practice which has come into prominence as a result of widespread decontrol under the Rent Act 1957, of imposing on tenants under short leases very extensive repairing obligations." The writer was referring to the provision which was subsequently enacted as the Housing Act 1961 (U.K.), s. 32.

In *Jones* v. *Green* the problem was theoretical and apart from explaining that there may be a distinction, no further guidance was given. The problem did arise in a practical way in *Morgan* v. *Liverpool Corporation,*[82] but the only point on which the three members of the Court of Appeal agreed was that the landlord is not liable to repair a defect, either under an covenant to repair or an obligation to keep in a fit and habitable condition, unless he has first been given notice of the need to repair by the tenant. This being the ratio, the comments made as to the liability of the landlord can be classified as dicta only. The defect in *Morgan's* case was a defective window cord which broke causing the window to fall and crush the tenant's hand. Lord Hanworth M.R. thought this was no more than an accident which could occur in any house and could not render a house unfit for human habitation.[83] Lawrence L.J. thought that a defective window might make a room less comfortable but it was in his view "fantastic" to say that such a slight want of repair would make the house unfit for human habitation.[84] Only Atkin L.J. thought that the landlord would have been in breach of his obligation. He conceded that an obligation to keep in repair was more onerous than one to keep in a fit and habitable condition[85] but in his view no house could be regarded as being in a condition fit for human habitation if it has any defect which could give rise to an injury to the tenant in the course of his normal use of the premises.[86] He also said that what may be regarded as a state fit for human habitation may vary depending on the type of premises rented. For example, in a small house it would be expected that every room would be in use, and, apart from the question of danger, a room in use without a window capable of giving ventilation would, in his view, render the premises unfit.

The matter was next considered, this time by the House of Lords, in *Summers* v. *Salford Corporation,*[87] another case of a defective window cord. This time a decision had to be made on the point as notice had been given by the tenant. The House unanimously agreed with Lord Atkin's definition in *Morgan's* case that a breach of the landlord's covenant arises where the state of the premises is such that damage may naturally be caused to the occupier in the course of his normal use of the premises. It was also considered that in these small premises, a defect which results in the loss of otherwise available ventilation would, apart from the element of danger, constitute a breach. Lord Atkin said the test is not whether the tenant *can live* in the in the premises, it is a question of comfort and safety. The magnitude of the defect in his view should also be irrelevant, and he then added the significant obiter dictum[88] that he found it difficult to differentiate between a covenant to keep in "habitable repair" or "tenantable repair",[89] and a covenant to keep premises in all respects reasonably fit for human habitation. This seems to be a retraction from the view

82 [1927] 2 K.B. 131.
83 Ibid., 138-139.
84 Ibid., 152.
85 Ibid., 147.
86 Ibid., 145.
87 [1943] A.C. 283.
88 Ibid., 289-290. Lord Thankerton agreed with Lord Atkin's judgment.
89 As discussed in *Proudfoot* v. *Hart* (1890) 25 Q.B.D. 42.

he expressed in *Morgan's* case that a covenant to repair is more onerous than one to keep the premises in a condition fit for human habitation.

While there have been other cases in which the words "fitness for human habitation" or the equivalent have been considered, these must be read bearing in mind that what was regarded as fit for habitation many years ago may not be so regarded today.[90] It is also important to consider the object of the legislation in every case. In *Summers* v. *Salford Corporation* Lord Romer referred to legislation authorising local authorities to issue a notice to demolish premises which were "unfit for human habitation". He doubted whether this could be done on the basis of a defective window cord.[91] Finally it was held in *Daly* v. *Elstree Rural District Council*[92] that it is not axiomatic that a house which has fewer facilities than the majority of houses in the surrounding area, is unfit for human habitation.

The law on this point remains in an uncertain and unsatisfactory state. It is clear that if there is any element of danger involved, or if the defect relates to some essential requirement such as ventilation which is necessary because of the size of the house and its location, then the onus is upon the landlord to remedy it. On the other hand, it is not difficult to imagine many defects in dwellinghouses, some of which may involve considerable expense to repair, which do not, at least when the need for repair first becomes apparent, in any way endanger the tenant or affect his reasonable use of the property. Examples of such defects may include a leaking pipe under the house which needs replacement, a cracked window, the exterior paintwork, or woodrot in the weatherboards. The tenant who covenants to repair may not be able to avoid liability for items such as these by pleading the provisions of the Property Law Amendment Act. He may well be liable unless the lease includes a specific exception for fair wear and tear.

IV. Conclusion

The Property Law Amendment Act has, to an extent, removed the question of responsibility for repairs in a lease of a dwellinghouse from the sphere of private contract. The implied statutory covenants may be welcomed. They remove the anomalies that the landlord was not obliged to put or keep unfurnished premises in a fit and habitable condition, and was not responsible for the condition of furnished premises after they had been let. They also clarify the tenant's responsibility for damage to the property and ensure that he is not subjected to unreasonable demands in this respect.

However, the real problems now arise in determining the extent to which the Property Law Amendment Act has or ought to have replaced the operation of private contractual arrangements in

90 *Buswell* v. *Goodwin* [1971] 1 All E.R. 418, where the court asked whether the premises were fit for habitation by modern standards. In this case there was no indoor sanitation, no fixed bath and no running water either hot or cold within the confines of the house. This was held to constitute a breach by the landlord of his implied obligations. Cf. *Daly* v. *Elstree Rural District Council* [1948] 2 All E.R. 13, where the tenant had to heat his own water because of a defective hot water system and this was held not to constitute a breach.

91 [1943] A.C. 283, 297.

92 [1948] 2 All E.R. 13.

this field. For example, there may be difficulties relating to the definition of a lease of a dwellinghouse and, following from this, as to the application of the implied convenants to shared premises and premises let both as a dwelling and as a business. There are strong arguments to support the view that there should be greater freedom to contract out of the Act, and that permission to do so should be given by the Rent Appeal Board rather than by a magistrate. Difficult questions may now arise as to the effect of an express covenant by a tenant to repair a dwellinghouse when the lease is also subject to the implied convenants.

Some of these difficulties, particularly those relating to the definition of a lease of a dwellinghouse, may be resolved satisfactorily in decided cases. The point is, however, that all of them could have been resolved by clear legislative directions.