He has other powers which he can only exercise with the consent of the settlement trustees or the court, e.g. the power to sell or otherwise dispose of the principal mansion house, the power to cut and sell timber, the power to compromise claims and sell settled chattels. He has the power to make improvements at his own expense, or the cost may be borne by the capital money if he complies with the provisions of the Act. He has also power to select investments for capital money.

The tenant for life is in a strong position, for he is subject to no control in the exercise of his powers except that he must give notice to the trustees of his intention to exercise the most important ones, he must obtain the consent of the trustees or leave of the court in certain cases, and he is in fact himself a trustee for the other beneficiaries. There may be joint tenants for life under a settlement and, where this is so, they must usually agree as to the exercise of their joint powers. The court will exercise a power, e.g. by ordering a sale of property, but only if the joint tenant who does not agree to sell is acting in bad faith (*Barker* v *Addiscott* [1969] 3 All ER 685).

It is clear that under a settlement a proper balance must be preserved between the tenant for life and the persons who will be entitled to the land or the proceeds of the land after his death. He is not allowed, therefore, to run down the estate during his lifetime in order to increase his own income, but is only allowed to take from the land the current income and must pass on the estate substantially unimpaired.

Trusts of Land and Appointment of Trustees Act 1996

The above Act has effect upon strict settlements as described above.

The first effect is to prevent the creation of strict settlements over land. Formerly, if successive interests were created over land, as where land was left 'to A for life with remainder to B', then unless a trust for sale (now a trust for land) (see below) was specified in the instrument setting up the trust, e.g. a will, the land became settled land and subject to the Settled Land Act 1925, the trust being managed by the life tenant A as described above. The scheme of the Act is to stop the Settled Land Act applying even where no trust for land is specified in the creating instrument but to allow it to apply to existing settled land arrangements. Therefore these will exist for some time and so it is worth acquiring some knowledge of them (see above).

Where successive interests are created now they will be regarded as trusts of land and operate under the management of the trustees as a trust of personal property, e.g. as shares would.

The second effect is to give trustees of trusts of land all the powers of an absolute owner in regard to the land. There is now no need for the trust instrument to specifically confer such powers on the trustees. The new arrangements do not apply to the power of trustees to invest the trust property, e.g. rents, received as they wish. They were still subject to control in regard to investment in, e.g., equity (or ordinary) shares in companies unless the trust instrument gave them power to do so. However, the Trustee Act 2000 gives a full power of investment of the trust property to trustees as if it were their own, subject to liability in negligence for investing trust property in a risky investment. The power given in s 3 of the Act covers acquisition of freehold and leasehold land (s 8) and may be extended or restricted by the particular trust instrument, i.e. the instrument setting up the trust. The rule of conversion formerly applied to land in a trust is abolished. Thus, if a beneficiary under a trust leaves 'all my realty to R and all my personalty to P', then P no longer gets the land but R does. The land is no longer converted into personal property merely because it is held under a trust for land. This does not affect what has been said in the chapter about the nature of a lease which remains personal property.

Trusts of land

A trust of land is an immediate binding trust for sale whether or not exercisable at the request or with the consent of any person, and with or without a power of discretion to postpone the sale. Such a trust may be either express or by operation of law. Trusts for sale are governed by the Law of Property Act 1925, and not by the Settled Land Act 1925.

An express trust of land is almost always created by two documents – a conveyance to trustees on an express trust of land (see the Trusts of Land and Appointment of Trustees Act 1996, above) and a trust instrument. But even where a trust of land is embodied in a single document, a purchaser of the legal estate is not concerned with the trusts affecting the rents and profits of the land until sale, or with the proceeds of the sale, provided he obtains a receipt for the purchase money signed by at least two trustees or a trust corporation.

There are cases where a trust of land is imposed by statute. These are:

(*a*) where a person dies intestate, i.e. without leaving a will (or valid will);
(*b*) where two or more persons are entitled to land as joint tenants or tenants in common;
(*c*) where trustees lend money on mortgage and the property becomes vested in them free from the right of redemption. Mortgages and the right of redemption are considered later in this chapter.

Co-ownership

Two persons may own land simultaneously. In such a case they are either joint tenants or tenants in common. Where they are joint tenants, there is no question of a share of the property – each is the owner of the whole. Where there is a tenancy in common, each is regarded as owning an individual share in the property, but that share has not positively been marked out. Tenants in common hold property in undivided shares.

A joint tenancy arises where land is conveyed to two or more persons and no words of severance are used. A tenancy in common arises when there are words of severance. Thus a conveyance 'to A and B' would create a joint tenancy, whilst a conveyance 'to A and B equally' would create a tenancy in common. The right of survivorship or *jus accrescendi* is a distinguishing feature of joint tenancies, and upon the death of one joint tenant, his share in the property passes to the survivors until there is only one person left and he becomes the sole owner of the property. The *jus accrescendi* does not apply to tenancies in common and such a tenant may dispose of his share by will. It will be appreciated also that the conveyance (or a will) may, and usually does, actually state the type of co-ownership, e.g. 'to A and B as joint tenants'.

Both types of co-ownership have advantages and disadvantages. The *jus accrescendi* as applied to joint tenancies prevents too many interests being created in the land, because a joint tenant cannot leave any part of the property by will and so the number of interests decreases. When the land is sold the number of signatures on the conveyance will not be excessive. On the other hand, joint tenancies are unfair in that eventual sole ownership depends merely on survival. Where there is a tenancy in common, each tenant can leave his interest by will possibly by dividing it between two or more persons; thus the number of interests increases and on sale many interests must be got in.

The common law preferred the joint tenancy. But equity preferred the tenancy in common and would in certain circumstances treat persons as tenants in common rather than joint tenants regardless of words of severance. For instance, where two persons lend money on mortgage, equity regards them as tenants in common of the interest in the land subject to the

mortgage; also where joint purchasers of land put up the purchase money in unequal shares; and in the case of partnership land, the partners are treated as tenants in common in equity.

The Law of Property Act 1925 has combined the best features of both types of co-ownership by providing that where land is owned by two or more persons they, or the first four of them if there are more than four, should be treated as holding the legal estate as trustees and joint tenants, for the benefit of themselves and other co-owners (if any) in equity. Thus a purchaser of the property is never required to get more than four signatures on the conveyance, and the trusts attach to the purchase money for the benefit of the co-owners. However, the Act does not state what shares the co-owners are to have and this should be dealt with specifically in the conveyance or will, otherwise the court may have to decide in a case of dispute. It does not follow from the provisions of the Act that the co-owners share in equity equally. The statutory trusts on which the property is held are: to sell the property with power to postpone the sale; and to hold the proceeds of sale, and the rents and profits until sale, for those beneficially entitled under the trust. Thus, where there is a trust for sale of land (now a trust for land), it does not mean that the land must be sold straightaway. There is a power to postpone sale.

It should be noted that although the provisions set out in the above paragraph deal with the problems which formerly arose in conveying land which was in joint ownership, it is still possible to create a joint tenancy in both the land and the proceeds of sale. Where such a joint tenancy exists, the *jus accrescendi* will apply to the equitable interests of the joint tenants in the proceeds of sale, unless there has been a severance of the joint tenancy since the creation of the estate. Severance is possible under s 36(2) of the Law of Property Act 1925, which provides that:

> where a legal estate (not being settled land) is vested in joint tenants beneficially, and any tenant desires to sever the joint tenancy in Equity, he shall give to the other joint tenants a notice in writing of such desire or do such other acts or things as would, in the case of personal estate, have been effective to sever the tenancy in Equity, and thereupon under the trust for sale affecting the land [now a trust for land] the net proceeds of sale, and the net rents and profits until sale, shall be held upon the trusts which would have been requisite for giving effect to the beneficial interest if there had been an actual severance.

A notice of severance may be regarded as properly served if sent by post even if it is not received by the addressee (*Re 88 Berkeley Road, London NW9*; *Rickwood* v *Turnsek* [1971] 1 All ER 254). Furthermore, the sending of a notice of severance operates to create a tenancy in common, even where the sender of the notice has changed his or her mind and does not desire severance (*Kinch* v *Bullard* [1998] 4 All ER 650).

The better view is that severance of a joint tenancy may be effected unilaterally by one party other than by giving notice.

Re Draper's Conveyance, 1967 – Unilateral severance (**480**)

It should be noted that one tenant in common is not entitled to rent from another tenant in common, even though that other occupies the whole of the property (*Jones (A E)* v *Jones (F W)* [1977] 2 All ER 231).

Co-ownership and the law of trusts: Trustee Delegation Act 1999

An essential difficulty presented to co-owners has been that each of them is a trustee for themselves and the others. Trustees have in the past had somewhat limited powers of

delegation of their duty to act and so if, for example, it is thought necessary to sell the co-owned land, each co-owner/trustee must sign the contract and the conveyance and any other documents essential in law to the sale. This created particular difficulties in the case of the matrimonial home where, if as is usual, husband and wife are joint tenants of the property they are also and inevitably trustees. It is difficult where, say, the husband is going away for a business trip of a few weeks for steps to be taken by the wife in regard, for example, to the sale of the matrimonial home which has been put in train. Under previous law the husband could not delegate to his wife because the law did not allow delegation to a sole trustee. However, this situation is changed by the Trustee Delegation Act 1999 which received the Royal Assent on 15 July 1999. Section 1 of the Act provides for the drafting of a power of attorney under which one of the two trustees can deal to some extent with, e.g. the sale of property on his or her own, including agreeing to the contract of sale. *However*, the sole trustee cannot complete the sale on his or her own. The statutory rules that require the proceeds of sale to be paid to and receipted by at least two trustees remain, as does the need for at least two trustees to sign the conveyance to convey title (see s 7 of the 1999 Act). Section 8 provides for the appointment of other trustees by the attorney and so, if a wife or husband wishes to complete the sale, another trustee must be appointed, e.g. the couple's accountant. This provides some safeguard in terms of an unwise sale.

Party Wall, etc. Act 1996

Another form of joint ownership arises in connection with party walls dividing properties. London has been covered by protective legislation for many years, the last Act in a line of legislation being the London Building Act (Amendment) Act 1939.

The 1996 Act extends the London provisions to the rest of England and Wales. The Act was inspired by the case of a woman in West Sussex who suffered considerable renovation work by her neighbours who refused to tell her anything about the nature of the alterations. She owned the wall to its mid-point and her neighbours owned the other half and they were, at that time, entitled to do what they liked with it.

The basic principles of the 1996 Act are:

- if the 'building owner', as he is called, wants to carry out work to a party wall, he must serve on the 'adjoining owner' notice of what is proposed;
- the adjoining owner then has the right to appoint a surveyor at the expense of the building owner, and in the case of dispute a further surveyor may be called in to adjudicate.

The procedure has been used regularly in London and has worked well. The legislation applies also to walls which form boundary fences.

A leasehold or a term of years

The major characteristics of a term of years are that the lessee is given exclusive possession of the land and that the period for which the term is to endure is fixed and definite. It is open to the parties to decide whether their agreement shall be a lease or a licence, though the words used by the parties are not conclusive. If there is no right to exclusive possession, then there is a mere licence and not a lease. For example, a guest in a hotel does not normally have a lease, because the proprietor retains general control over the room.

Shell-Mex and BP Ltd v *Manchester Garages Ltd*, 1971 – Is it a lease or a licence? (**481**)

Contractual licences

The parties may put the matter beyond doubt by a properly drafted and signed contract of licence. These have a number of commercial uses as follows:

- for short-term trading, for example, during the Christmas period or during the summer holiday period, either for retailing or storage purposes;
- where a prospective tenant wants early access to premises before a formal lease can be drafted and granted or an existing tenant wishes to remain in occupation for a short period after the lease expires (here the landlord will be anxious to retain rental income but will not want the tenant to acquire security of tenure under, e.g. the Landlord and Tenant Act 1954).

The duration of leases

Leases must be for a fixed period of time, and in this case the commencement and termination of the lease must be ascertainable before the lease takes effect. Thus a lease 'for the life of X' would not come under this heading. A lease may be for an indefinite period in the sense that it is to end when the lessor or lessee gives notice. Even so such an arrangement would operate as a valid lease, since the duration of the term can be made certain by the parties giving notice.

In the absence of agreement, the period of a lease may be determined by reference to the payment of rent. Thus, if a person takes possession of the premises with the owner's consent for an indefinite period, but the owner accepts rent paid, say, weekly, monthly, quarterly or annually, the term may be based on that period, though from early times there has been a presumption that the payment and acceptance of rent shows an intention to create a yearly tenancy. A yearly tenancy requires half a year's notice to terminate it if there has been no agreement on the matter. Other periodical tenancies, in the absence of agreement, are determined by notice for the full period. Even where there has been a definite term, a periodical tenancy can arise. Where X is granted a lease of 21 years and stays on after the expiration of that term with the owner's consent, there is a new implied term based on the period of payment of rent.

However, where the tenant is permitted to stay in possession on the understanding that there are to be negotiations for a new lease, there is a tenancy at will.

A *tenancy at will* may also arise *by agreement* where a person takes possession of property with the owner's consent, the arrangement being that the term can be brought to an end by either party giving notice. However, the court will look at the transaction in order to ascertain its true nature and will not be put off by ambiguous or wrong terminology.

Binions v *Evans*, 1972 – What is the true nature of the transaction? (**482**)

If there is no agreement as to rent, the tenancy can become a periodical tenancy if the tenant pays and the owner accepts rent paid at given periods of time. A tenancy at will may also arise *by implication* from the conduct of the parties. For example, a prospective purchaser of land who is allowed to take possession before completion occupies the property as a tenant at will until completion.

Where a tenant stays on after the expiration of his term without the consent of the owner, there is a *tenancy by sufferance*. No rent is payable under such a tenancy, but the tenant must compensate the owner by a payment in respect of the use and occupation of the land. This compensation is referred to as *mesne profits*. Such a tenancy can be brought to an end at any time, though it may become a periodical tenancy if the owner accepts a payment of rent at given intervals of time.

It should be noted that the law bases the duration of a periodical tenancy on the intervals of time at which the rent has been paid and accepted, on the ground that this is evidence of the parties' intention. If there is other evidence of intention, then the court will also take this into account, e.g. there may be a prior lease which negatives the intention to create the sort of periodical tenancy which the payment of rent suggests.

Special protection for residential and business tenants

The material set out above is amended in certain situations by statutory provisions as follows:

Public-sector tenancies

Here there is a public-sector landlord, such as a local council. These tenancies are governed by the Housing Act 1985. There is security of tenure in that the landlord must prove grounds for possession, e.g. non-payment of rent, and requires a court order. There is no rent control.

Housing association tenancies

These are now generally assured tenancies with security of tenure in that the landlord must prove grounds for possession, e.g. non-payment of rent, but rents are normally market rents. They may also be assured shorthold tenancies with no security of tenure but some rent control. Where a housing association has taken over council tenants, there is security of tenure but no rent control.

Residential tenancies protected by the Rent Act 1977 (private sector)

Many residential tenancies granted before 15 January 1989 remain protected by the Rent Act 1977. The main ingredients of the protection are security of tenure and rent control.

Rent control prevented the landlord from recovering more than a 'fair rent' as decided by the Rent Officer disregarding scarcity value. The position now is that for the first application to a Rent Officer for an increase in rent the increase is capped at the rate of inflation since the previous rent was registered plus 7.5 per cent. For all subsequent applications the limit is inflation plus 5 per cent.

Security of tenure prevents a landlord from evicting a tenant even after the tenancy has expired without a court order which may only be granted on specified narrow grounds. The parties may not contract out of protection unless, e.g., they use the machinery for shorthold tenancies introduced by the Housing Act 1980 (see now the Housing Acts 1988 and 1996).

The Housing Act 1988 provides for new tenancies, but is concerned also to protect existing Rent Act tenants. Therefore, a tenancy granted to a person with a subsisting Rent Act tenancy by a person's landlord or joint landlord will still be protected by the Rent Act, even if granted on or after 15 January 1989. There must, however, be no gap between the Rent Act tenancy and the new tenancy.

Assured residential tenancies under the Housing Act 1988 (private sector)

This is a new regime introduced for residential tenancies granted on or after 15 January 1989.

The security provisions are similar but not identical to those of the Rent Act 1977. However, they are subject only to minimum control of rent and by and large the overriding rule about rent is freedom of contract, i.e. payment of market rent.

Assured shorthold tenancies (private sector)

The Housing Act 1988 permits contracting out of security of tenure by granting an assured shorthold tenancy. If the formalities are correctly followed the landlord has a mandatory ground for possession at the end of the tenancy. The requirements included an initial fixed term certain of not less than six months preceded by service of a shorthold notice in the form prescribed. Unlike the assured residential tenancy, excessive rents may be referred to a Rent Assessment Committee. The shorthold status continues for renewals but the power to refer rents ceases.

Changes effected by the Housing Act 1996

From 28 February 1997 all tenancies which are assured tenancies are automatically to be regarded as assured shorthold tenancies which will be able to run for less than six months unless the parties specifically state otherwise. In addition landlords will be able to seek repossession through the courts after:

(i) rent is in arrears for eight weeks where rent is payable weekly or fortnightly; or
(ii) rent is in arrears for two months where the rent is payable monthly.

The previous provisions were 13 weeks and three months respectively. The 1996 provisions make eviction easier and are designed to encourage the letting of premises. There are also provisions making the eviction of anti-social tenants quicker and easier.

Protection of business tenants by the Landlord and Tenant Act 1954

The 1954 Act is substantially amended by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 (SI 2003/3096). The position as regards protection in business leases is as follows:

(a) The tenancy continues. Unless the parties agree otherwise before the lease is entered into, then the tenancy will continue automatically after the term agreed by the parties expires.

(b) Ending by the landlord and renewal. The landlord can only end the tenancy by following the strict notice procedures laid down in the Act. Even then, provided the tenant acts in time, he or she is entitled to apply to the court for a new tenancy. The landlord can oppose the application only on one of the grounds set out in the Act, e.g. his or her intention to reconstruct or demolish the premises or the landlord's intention to occupy the premises himself or herself either for the purposes of a business or as a residence.

(c) Request for a new tenancy. There is a procedure for a tenant or landlord to take the initiative and request a new lease.

(d) What are the terms of the new tenancy? The length of the new lease is as a maximum 15 years. This reflects the fact that rent reviews are now every five years and not seven years as before.

(e) Compensation on quitting. If the landlord is successful in opposing renewal, the tenant may be entitled to compensation.

(f) Contracting out. There is a procedure by which a business tenancy may be excluded from the protection of the Act.

Creation of leases

Leases are normally created by deed. However, where the lease is not to exceed three years, a written or oral lease will suffice, so long as the lease takes effect in possession at once at the best rent obtainable without a premium or capital payment. It is usual to draw up an arrangement such as a tenancy agreement, rather than execute a deed. Where a tenancy is in excess of three years then, if the agreement is not by deed, it will operate at common law as a yearly tenancy if the tenant enters into possession and pays rent on a yearly basis, i.e. by reference to a year, even if the rent is paid in quarterly instalments.

The position in equity is rather different. In equity, if a person has entered into an agreement for a lease but has no deed, then, if he has entered and paid rent or carried out repairs, i.e. if there is a sufficient act of part performance, equity will insist that the owner of the property execute a formal lease by deed. The equitable maxim, 'Equity looks upon that as done which ought to be done', applies. The contract must be in writing and comply with the formalities of the Law of Property (Miscellaneous Provisions) Act 1989 (see further Chapter 11). It should be noted that the above exceptions apply only to the creation of a lease. Subsequent assignment or transfer requires a deed even for a short lease which could be created orally or in writing.

Walsh v *Lonsdale*, 1882 – Effect of an agreement for a lease (**483**)

It may seem that the above rule makes an agreement for a lease as effective as a lease by deed, and certainly, as between the parties to the agreement, absence of a deed is not vital.

However, the rights of the tenant under the rule are equitable and not legal rights, and the tenant can be turned out by a third party to whom the landlord sells the legal estate, if the third party purchases the property for value with or without notice of the existence of the lease.

Nevertheless, since the property legislation of 1925, the tenant can register the agreement as an *estate contract*, and, once the agreement is so registered, all subsequent purchasers of the legal estate are deemed to have notice of the lease and are bound to honour it.

A lease which is to commence from the date of the lease is called a lease *in possession*. However, a *reversionary lease* may be created under which the term is to commence at some future date. A restriction is imposed by s 149(3) of the Law of Property Act 1925 which provides that the creation of a reversionary lease which is to take effect more than 21 years from the execution of the lease, e.g. a lease signed in 1997 for a term of 10 years to run from 2033, is void. This does not affect the granting of a lease with an option to renew in the future.

In considering the words 'writing', 'signature' and 'deed' in the above material the passing of the Electronic Communications Act 2000 should be noted. Section 7, which is already in force, allows electronic signatures to be adduced and acceptable as evidence of a signature. However, delegated legislation will be required to make changes in statutes, such as the Law of Property Act 1925, to eliminate the 'paper' requirements. The relevant areas are being identified for change.

Rights and liabilities of landlord and tenant

The rights and liabilities of the parties depend largely upon the lease though a landlord has a special right at common law to distrain for rent, i.e. to move in on the tenant's personal property and remove it for sale to satisfy the amount owing for rent. Where the lease is by deed, the deed will usually fix the rights and liabilities by express clauses which are called covenants. Certain covenants are also implied by law where there is no provision in the lease. The most usual express covenants are covenants to pay rent, covenants regarding repairs and

renewals, and a covenant that the tenant will not assign or sub-let without the landlord's consent. In this connection, s 1 of the Landlord and Tenant Act 1988 imposes a duty upon a landlord to give consent unless he has good reason to withhold it and within a reasonable period of a written application for consent. An action for damages arises if consent is not given or is unreasonably withheld.

The Landlord and Tenant (Covenants) Act 1995 (see later in this chapter) provides that in respect of leases entered into on or after 1 January 1996 (other than wholly residential leases or farm leases) the landlord can agree with the tenant the terms on which an assignment will be permitted, e.g. that the assignee satisfies certain prescribed conditions, as where he is not a dealer in scrap metal. The landlord will not be taken as withholding consent unreasonably if the conditions are not fulfilled. This is a major concession to landlords.

The main implied covenants are as follows:

Implied obligations of the landlord

(a) Quiet enjoyment. This means that the tenant shall be allowed to take possession and will be able to recover damages if his enjoyment of the property is disturbed by acts of the landlord, as in one case where the landlord removed the doors and windows of the property (see *Lavender* v *Betts* [1942] 2 All ER 72).

This implied covenant does not extend to requiring the landlord to have sufficient sound-proofing to protect the tenant from the sounds of ordinary domestic life in neighbouring flats, said the House of Lords in *Southwark LBC* v *Mills* [1999] 4 All ER 449. A covenant for quiet enjoyment cannot be converted into a covenant to improve the premises. Thus:

- rent a terraced house where you can hear your neighbours through the walls – no liability in the landlord to correct this;
- rent a flat with a large overhanging balcony above affecting privacy – no obligation on the landlord here;
- rent a bed-sit with no double glazing overlooking a busy and noisy main road – no concern of the landlord.

(b) Landlord and Tenant Act 1985. A provision in this Act implies a condition that a house let for human habitation is fit for human habitation at the beginning of the tenancy and will be kept fit during the tenancy. This Act applies to fewer and fewer properties because the premises concerned must be let at a very low rent, i.e. £80 a year in Greater London and £52 elsewhere (s 8 of the 1985 Act). Inflation and its effect on rents over the years has made the Act almost obsolete.

(c) Landlord and Tenant Act 1985. Under ss 11–16 of the Act landlords have implied repairing obligations when premises are let wholly or mainly as a dwelling house under a lease for a term of less than seven years. This includes a longer term which the landlord can bring to an end within seven years. The implied obligations are:

(i) to repair the structure and exterior including drains, gutters and external pipes;
(ii) to repair and keep in working order the services and sanitary installations;
(iii) to repair and keep working the installations for room heating and heating water.

There is no liability to remedy a latent defect until the landlord knows of it.

It should not be assumed that the above provisions of the 1985 Act work well. There is no obligation to keep the premises fit for human habitation. In particular, condensation has been regarded as a design fault and not a matter of disrepair although it can do untold harm, e.g. to furniture. The Law Commission has recommended reform (see *Landlord and Tenant: Responsibility for State and Condition of Property* (Law Com No 238)).

(d) Defective Premises Act 1972. As we have seen, there is under this Act a duty to build dwellings properly and a duty to take reasonable care to keep the premises reasonably safe (see further Chapter 21). This Act relates, of course, to injuries as a result of defective premises which result in a claim for compensation in the civil courts. It does not provide a direct method of getting defects put right.

(e) Non-derogation from the grant. This means that the landlord must not take action to prevent the use for which the premises were let, e.g. by letting a substantial part of a residential block for business purposes.

Implied obligations of the tenant

(a) General. There is a general obligation to keep and deliver up the premises in a tenant-like manner. This means that the tenant must take proper care of the premises, e.g. by doing small jobs such as replacing fuses and cleaning windows. There may be a duty to keep the premises wind tight and water tight but this was doubted in *Warren* v *Keen* [1954] 1 QB 15 by the Court of Appeal. If it does exist, it does not require the tenant to do anything of a substantial nature.

(b) Waste. A tenant must not commit waste, i.e. he must not do deliberate damage to the premises.

O'Brien v *Robinson*, 1973 – Latent defects (484)

Breach of covenant by the tenant can result in forfeiture of the lease. A landlord's covenant to repair can be enforced by specific performance (*Jeune* v *Queens Cross Properties Ltd* [1973] 3 All ER 97). However, since specific performance is a discretionary remedy, it is advisable for tenants to rely on doing their own repairs and recouping from the rent for relatively trivial breaches rather than to approach the courts for specific performance.

Privity of contract

Liability of original parties: leases granted before 1 January 1996

It sometimes comes as a surprise to a tenant that the original landlord and the original tenant remain liable on the lease throughout its term. Thus, if A leases property to B and B with A's consent assigns the remainder of the lease to C, if C then defaults on the covenants in the lease, e.g. payment of rent, the landlord A can sue B for the amount due.

The problem is particularly acute where C becomes insolvent and cannot pay rent. In *W H Smith Ltd* v *Wyndram Investments Ltd* [1994] 2 BCLC 571 the insolvency of an assignee and a disclaimer of liability by the insolvency practitioner dealing with the insolvency left W H Smith, the original tenant, liable to the landlord on the substantial part of a 25-year lease.

The Landlord and Tenant (Covenants) Act 1995: leases granted on or after 1 January 1996

The above rules deriving from privity changed when the above Act came into force on 1 January 1996. The key elements of reform are as follows:

Abolition of privity

The Act abolishes liability arising under the privity law in respect of leases granted on or after 1 January 1996 so that a landlord will only be able to pursue the tenant for the time being unless there is an authorised guarantee agreement in force.

Authorised guarantee agreement

A landlord may require an assigning tenant to enter into a guarantee with the landlord as a condition of the landlord giving his consent to the assignment. Under such an agreement the outgoing tenant guarantees the performance of the lease *by his immediate (but not subsequent) assignee*.

Landlord's release

Landlords are allowed to apply for a release from liability when they dispose of their interest in the premises. This would occur when the landlord sold the freehold reversion in the property to another. Release is obtained by serving a statutory notice on the current tenant.

Notice requirement

In both existing and new leases a landlord must notify a former tenant (or guarantor, e.g. of rent) within six months of a breach of a covenant in order to be able to take action against him in respect of the breach.

Limitation on increase in liability

A former tenant will be liable only for rent increases due to rent review clauses in the original lease and not for increases due to changes in the terms of the lease since he assigned it.

Overriding leases

In both existing and new leases a former tenant (or his guarantor) who is called upon to remedy the default of the current tenant is given a right to call for an 'overriding lease' thus enabling him to reacquire the premises. This means that a former tenant will have the right to re-enter the premises if he is paying for them. This was not the case in previous law.

Main commercial effects of tenant release from liability

The 1995 Act has the following main commercial effects:

- Landlords will impose stricter criteria before consenting to the assignment of a lease. This affects the 'consent will not be unreasonably withheld' principle. Consequently, a business entering into a new lease as a tenant will need to take advice as to the covenants relating to assignment.
- Those involved in property investment will be concerned about the effect on investment values resulting from loss of privity. An investor will tend to choose an older lease since the original tenant and subsequent assignees will remain liable for the whole term since the 1995 Act is not retrospective.
- Difficulties in relation to assignment may result in businesses going for shorter term leases.

Landlord selling freehold: release from covenants

Where a landlord disposes of his reversion as by selling the freehold so that the tenant has a new landlord the selling landlord may under ss 7 and 8 of the 1995 Act seek release from his