PROPERTY LAW

Property Law encompasses the following areas of law:

**Landlord and Tenant**

- Housing Law – residential landlord and tenant.
- Housing Law: Protection from Eviction
- Landlord and Tenant: Rent and Service Charges.
- Landlord and Tenant Covenants: Covenants Against Assignment.
- Landlord and Tenant Covenants: Other Covenants.
- Landlord and Tenant Covenants: Disrepair and Dilapidations.
- Landlord and Tenant: Third Parties
- Landlord and Tenant: Use and Mesne Profits
- Landlord and Tenant: Possession Proceedings;
- Landlord and Tenant: Freehold Enfranchisement under the Leasehold Reform Act 1967

**Real Property**

- Disputes over the beneficial ownership of Property & Co-habitation
- Sale of Land.
- Boundary Disputes.
- Party Walls.
- Acquiring land by Adverse Possession.
- Restrictive Covenants.
- Easements generally.
- Rights of Way.
- Mortgages and Charges
- Rights of Light.
- Mortgages and Charges
- Assessment of damage in property cases.
- Interim Injunctions in property cases.

LANDLORD AND TENANT

HOUSING LAW

The first question to determine in any Housing Law matter is to decide which of the three “regimes” applies to the tenancy in question. The three species of residential tenancy are either:

- Assured/Assured Shorthold Tenancies: Most commonly, an “assured” or “assured shorthold” tenancy governed by the Housing Act 1988. All private residential tenancies granted after 15/1/1989 (whose rent is less than £100,000 pa) will fall into this category. “Assured shorthold tenancies” give no security of tenure outside the contractual term of the letting. “Assured” tenancies give limited security of tenure.

- Secure Tenancy: all residential tenancies granted by public bodies will be “secure” tenancies. There is security of tenure under secure tenancies, and there are ancillary rights such as “succession rights” and a “right to buy”.

- Rent Act private tenancies: Residential tenancies granted prior to 15/1/1989 will fall into the categories of “Rent Act tenancies”. Rent Act tenancies are now rare, but it is the most favourable security of tenure for a tenant.

- Contractual Tenancies: this is a small category of tenancies with very high rents over £100,000 pa. They are not governed by any statute, but simply by the contractual terms agreed between the parties. They are “contractual tenancies”.

ASSURED AND ASSURED SHORTHOLD TENANCIES

Assured and Assured shorthold tenancies, particularly the latter, are now by far the largest category of residential lettings. The main, and key, distinction between assured shorthold and assured tenancies is that assured shorthold tenancies can be brought to an end without cause pursuant to s. 21 of the Housing Act 1988. This has allowed landlords to grant short (usually one year) fixed term
tenancies with no security of tenure. Where the tenancy is an assured shorthold tenancy of the landlord needs only to show that the tenancy has come to an end and has given proper notice to the tenant requiring possession for possession will be ordered by the court. This is why most landlords use assured shorthold tenancies as their tenancy of choice, because it is easy to recover possession. Prior to 28/2/1997 for a tenancy to be an assured shorthold tenancy of the landlord had to prove service of what was then known as a “section 20 notice”. The requirement to serve a section 20 notice ceased after 28/2/1997 so that, from that date, most assured tenancies will be assured shorthold tenancies.

Section 1 of the Housing Act 1988 provides that a tenancy under which a dwelling house is let as a separate dwelling will be an assured tenancy if and so long as:

(a) the tenant or each joint tenant is an individual; and

(b) the tenant or at least one joint tenant occupies the dwelling as his only or principal home; and

(c) the tenancy is not excluded by Part 1 of Schedule 1 to the Housing Act 1988 from being an assured tenancy. This includes tenancies entered into before 15 January 1989; tenancies at no or low rent (less than £250 pa); tenancies exceeding a rent of £100,000 pa; tenancies where the landlord is “resident”; holiday lettings.

To fall within Housing Act 1988 must first be tenancy. This tenancy can be fixed term or periodic, it may be a sub tenancy or an agreement for a tenant (s.45(1) HA 1988). Therefore, a licence will not be protected under the Housing Act 1988.

A dwellinghouse includes a house or part of a house (s.45(1) HA 1988). A “dwelling house” can be a single room in a house, with or without cooking facilities ([Uratemp Ventures Limited v Collins][2002] 1 AC 301 HL), or even a caravan provided it has been rendered immobile. However, to be a separate dwelling, the tenant must have exclusive use of some accommodation. Living accommodation includes living room, bedroom and kitchen, but not a bathroom or toilet. Where an individual has exclusive occupation of any accommodation (eg, his bedroom) but also, under the terms of his tenancy, shares living accommodation (e.g., living room, kitchen) with another person or persons, none of whom is his landlord, section 3 provides that the separate accommodation will be regarded as a dwelling house let on an assured tenancy.

The tenant must be an individual. This requirement excludes companies and other artificial persons from protection under the Housing Act 1988.
The tenancy only remains assured “if and so long as” the tenant occupies a dwellinghouse as his only or principal home. This is a question of fact. There must be some outward sign that the house can be occupied as a home (eg furniture, personal effects) and an intention on the part of the tenant, it is not physically present, to return to the home. Requirement that the dwelling house is occupied as the tenant’s only or principal founders not mean that the tenant cannot absent himself or herself from the premises for quietly periods, provided the tenant has an intention to return and some physical evidence of this intention is manifest and left on the premises. In a case where the tenant left the property for over a year to go and live with his girlfriend; the electricity and gas were disconnected but the tenant left furniture in the flat it was still held to be his only or principal home (Crawley Borough Council v Sawyer (1987) 20 HLR 98). By contrast, where a tenant sublet the whole of the premises and live elsewhere protection was lost, despite the fact that he left all of his furniture there (Ujima Housing Association v Ansah [1998] 30 HLR 831).

If an assured tenant leaves the dwelling house but his or her spouse or civil partner remains in occupation, the absent tenant continues to occupy the dwelling house through his or her spouse or civil partner by virtue of the Family Law Act 1996, s.30(4), as amended by the Civil Partnership Act 2004.

If the assured tenant ceases to occupied the dwellinghouse as his or her principal home the tenancy will cease to be assured.

The terms of an assured tenancy

In general terms, landlords and tenants are free to agree whatever terms they see fit under an assured tenancy (or an assured shorthold tenancy). The rent will usually be the market rent. However, some social landlords have express term dealing with how the rent is to be increased. Where there is such a provision, the landlord must ensure that the correct rent increase procedure is followed. If not, the rent may not be lawfully due (Riverside Housing Association Ltd v. White [2007] UKHL 20).

If a landlord has not included a rent review clause (enabling the rent to be increased) in an assured periodic tenancy agreement then, by section 13 of the 1988 Act, in order to increase the rent the landlord must serve a prescribed notice to commence a rent increase procedure. The provisions of s.13 only apply to periodic and statutory periodic tenancies. The landlord should propose a rent which, if the tenant considers it to be excessively above current market in the area, the tenant can refer to a rent assessment committee which has the power to determine the market rent the property (s. 14). The parties are free to vary the rent by agreement without recourse to the notice
procedures (s. 13(5)). The provisions in sections 13 and 14 do not apply to fixed term assured tenants were the rent which the parties have agreed stands the whole of the term. In this instance, the parties are bound by the terms of their agreement. The only way in which a landlord can increase the rent during the term of a fixed term tenancy is by including a regular rent review clause in the agreement, in which case the rent may be increased by following the mechanism set out in the terms of the contract. The rent review clause may however be unenforceable it is viewed as a device designed to enable the landlord to obtain possession of the property because he or she knows that the tenant could not possibly afford the increased rent. A tenant only becomes an assured periodic tenancy following the expiry of the fixed term agreement. In the absence of a rent review clause, the landlord will simply have to wait until fixed term tenancy has come to an end so that the statutory periodic tenancy arises automatically which would engage the provisions of s.13 allowing him to increase the rent.

As to subletting/assignment, in the absence of an express provision in the terms of a periodic assured tenancy agreement dealing with the tenant’s right to assign or sublet, s.15(1) HA 1988 implies into the agreement of terms that the tenant shall not sublet or part with possession of the whole or any part of the dwelling house, or assign the tenancy in whole or in part, without the landlord’s consent. The landlord does not have to be “reasonable” in deciding whether to refuse consent, as section 15(2) specifically excludes the general provision in section 19 of the Landlord and Tenant Act 1927 which would otherwise require the landlord to be reasonable in exercising his discretion. A landlord therefore is fully entitled to refuse consent to assignment or a subletting of a periodic assured tenancy even where the refusal of consent is unreasonable (save for where such refusal is on grounds which are discriminatory). Where the tenancy is a contractual (as opposed to statutory) assured periodic tenancy, the HA 1988 will not interfere if the parties have already agreed terms to deal with assignment and subletting. S.15(1) above will not apply therefore if the parties have already agreed a provision either dealing with the prohibition of permitting assignment or subletting.

The spouse or civil partner of a sole tenant to an assured periodic tenancy is eligible to succeed to the assured tenancy. The only condition to be satisfied is that the spouse or civil partner was occupying the dwellinghouse as his or her only or principal home immediately before the tenant’s death. A person who was living with the tenant as his or her spouse or civil partner is also eligible to succeed (s.17(4)). In order to be treated as a spouse relationship had to be an emotional one in tackling a lifetime of commitment, rather than one of convenience, friendship, companionship or living together as lovers (Nutting v Southern Housing Group Ltd (2004) EWHC 2982). The relationship
must be openly and unequivocally displayed to the outside world. If there is more than one person eligible under the provisions, they can agree who will succeed or, failing that, the County Court judge will decide (s.17(5)). The right of succession will not be available where the deceased was himself a successor tenant. The HA 1988 therefore provides only for one succession.

The succession provisions do not apply to fixed term assured tenancies. On the death of a fixed term tenant, the normal rules will apply with the tenancy passing under the deceased tenant’s will or intestacy. This will also be the case for an assured periodic tenancy where there is no one eligible to succeed under the s.17 provisions. In this instance, the landlord will have a mandatory ground for possession under Ground 7.

As to access for repair, implied in every assured tenancy by s.16 of the Housing Act 1988, whether fixed term or periodic, is an obligation for the tenant to allow the landlord access to the dwellinghouse and reasonable facilities to carry out any repairs he is entitled to do. This provision is in addition to an goes beyond the implied term in s.11(6) of the Landlord and Tenant Act 1985 (which only allows the landlord access to view the condition and state of repair of the premises).

Depending on the status of a head landlord, by s.18 of the Housing Act 1988 a sub tenant will be entitled to have his tenancy continue after the termination of his landlord’s interest. This provision modifies the common law rule, which provides that a sub tenancy is determined by operation of law whenever the superior leasehold interest in which it derives comes to an end.

Security of tenure for Assured Tenants

An assured tenancy cannot be brought to an end by the landlord, except by obtaining a court order for possession (s.5 HA 1988). The landlord therefore cannot terminate a periodic tenancy by simply serving a notice to quit. By contrast, a tenant is free to terminate the tenancy by surrender (Truro Diocesan Board of Finance v Foley [2008] EWCA Civ 1162) or serving a notice to quit.

Unlike a periodic tenancy, a fixed term tenancy will come to an end of its own accord by effluxion of time rather than by an action of the parties. The 1988 Act therefore provides that if the tenancy comes to an end in any way other than by order of the court, or by surrender or other action, a periodic tenancy will arise and thereby continue the tenancy. This statutory periodic tenancy, as with an original periodic tenancy, can be terminated only by the execution of the court order. The nature of the periodic tenancy will be determined by the frequency with which the rent was last payable e.g if during the fixed term of the assured tenancy the rent payable was £10,000 pa but payable “in equal quarterly payments in advance on the usual quarter days” then the tenancy will be a quarterly periodic tenancy. “Forfeiture” of a fixed term assured tenancy is not permissible (s.45(4)
HA 1988; Artesian Residential Investments Ltd v Beck [2000] QB 541). However, the landlord may be able to obtain a court order to terminate a fixed term tenancy where he has reserved a specific right to terminate in the tenancy agreement, usually by a break clause.

In order to bring possession proceedings a landlord must serve what is called a “section 8 notice” seeking possession pursuant to s.8 of the Housing Act 1988. The court cannot make an order for possession of the assured tenancy except on one or more of the grounds set out in Schedule 2 to the Housing Act 1988. The court in appropriate circumstances has power to dispense with the service of a s.8 notice, most commonly where the tenant is not prejudiced by lack of service or has notice of the allegations by other means (Kelsey Housing Association v. King (1996) 28 HLR 270). There is no power to dispense with notice in the case of possession proceedings pursuant to Ground 8 (s.8(5)).

The s.8 notice must be in the prescribed form, or substantially to the same effect as stipulated in Form 3 of the Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1997. The notice should make clear that the landlord is intending to take possession proceedings to terminate the tenancy on one or more grounds specified in Schedule 2 to the Housing Act 1988. The notice should give details of the ground specified by giving particulars, so that the tenant understands fully what is being alleged against him/she and what action, if any, he/she can take to avoid a possession order (Mountain v Hastings (1995) 25 HLR 427). The tenant should also be informed in the notice to the earliest date when the landlord may begin possession proceedings and that they cannot begin later than 12 months from the date of service of the notice (s.8(3)). The court can give permission to alter or added to the grounds specified in a notice that has already been served on the tenant (s.8(2)). At the possession hearing the court will need to be satisfied that the tenant has been served with the notice on the date claimed in the particulars of claim. The required method of service of notices are sometimes set out in the tenancy agreement and this must be adhered to. Personal service by a process server is recommended. An affidavit of service, or a certificate of service, should be provided by the person who served the notice.

Once the landlord has successfully demonstrated that he has served a notice of intention to bring possession proceedings (or the court has used its discretion to dispense with the requirement of notice) the landlord must further establish one or more of the grounds of possession set out in Schedule 2 of the Housing Act 1988.

**Notice Period**

The landlord can begin proceedings immediately after service of the s.8 notice if the ground one of the grounds for possession is Ground 14 (antisocial behaviour).
For Grounds 1, 2, 5, 6, 7, 9 and 16, the notice period from service to the commencement of the proceedings must be at least two months, or the equivalent period that would be required for that tenancy under a notice to quit, whichever is the longer. If, for example, the tenancy was a quarterly periodic tenancy, in the absence of express agreement to the contrary, the minimum notice would be three months.

For all other grounds, the notice period from service to commencement of proceedings must be at least two weeks. If the landlord commences proceedings within the notice period, the tenant may be able to challenge the validity of the proceedings but this is subject to the court’s discretion to dispense with the notice requirements.

The Grounds for Possession

The grounds for possession are set out in Schedule 2 to the Housing Act 1988.

Part I contains the grounds for possession which, if established by the landlord, will “automatically” entitle him to an order for possession. These are the “mandatory” grounds for possession - so not dependent on the “discretion” of the court.

Part II contains the grounds which, if established by the landlord, will result in a possession order being made only if the court is satisfied that it is “reasonable” to make a possession order in the circumstances. These are the “discretionary” grounds for possession.

It is often a situation that landlords are more concerned to simply recover possession of the premises under the “accelerated possession procedure” in the County Court, and will simply write off the arrears. There will often take the step, strategically, because of the delays often occasioned by seeking a full possession hearing, and seeking a judgment for arrears (whose enforceability may be uncertain given it is often the position that the tenants are only in arrears because they have insufficient funds to pay the rent, so are unlikely to have sufficient funds to any money judgment).

Possession of an Assured Shorthold Tenancy

the main advantage, from the landlord’s point of view of an assured shorthold tenancy, is that once a fixed term has expired possession can be recovered without having to establish any of the grounds set out in Schedule 2 of the Housing Act 1988. Section 21 (1) provides that on or after the coming to an end of a fixed term short shorthold tenancy of the court will make an order for possession provided it is satisfied that:
(a) the assured shorthold tenancy has come to an end and no further assured tenancy, other than an assured shorthold periodic tenancy, is in existence; and

(b) the landlord (or at least one of a number of joint landlords) has given to the tenant not less than two months notice in writing stating that he or she requires possession of the dwelling house.

Therefore, if a six month assured shorthold tenancy expires on 1 October, the landlord must give notice before 31 July.

Possession of a periodic assured shorthold tenancy

After the expiry of the fixed term tenancy the tenant holds over the same terms pursuant of a periodic assured shorthold tenancy.

Section 21(4) provides:

A court shall make an order for possession of a dwelling house let on an assured shorthold tenancy which is a periodic tenancy if the court is satisfied-

(a) that the landlord all, in the case of joint tenants, at least one of them, has given to the tenant a notice in writing stating that, after the date specified in the notice, being the last day of the period of the tenancy and not earlier than two months after the date of the notice was given, possession of the dwelling house’s report by virtue of this section; and

(b) that the date specified in the notice under paragraph (a) above is not earlier than the earliest date on which, apart from section 5(1) above, the tenancy could be brought to an end by a notice to quit given by the landlord on the same day as the notice under paragraph (a) above.

A notice under s.21(4) is not a notice to quit. It is the means by which the landlord can trigger the statutory power to grant possession. The requirements of s.21(4) must be followed to the letter (Fernandez v McDonald (2003) EWCA Civ 1219). Therefore, if the first day of a monthly periodic tenancy is on the 11th May, the last day of each month period will be 10th of the month. Thus if a landlord gives notice on 8th April, he will have to give at least two months’ notice (taking him to 8th June). The earliest date therefore that can be specified in the notice will be the end of a period of the tenancy after that date. This will be 10th June. As a precautionary measure, so as to avoid taking a notice by calculating the wrong date it is usual to add a “sweeping up” or “catch all phrase” such as
“or at the end of the period of your tenancy which will end next after the expiry of two months from the service upon you of this notice” (Lower Street Properties Ltd v Jones [1996] 48 EG 154).

The court is satisfied that proper notice has been given and either s.21(1) or s.21(4) it has no discretion but to make an order for possession. The court cannot postpone the date of possession for more than 14 days unless “exceptional hardship” would be caused to the tenant, in which case possession date can be postponed for up to 6 weeks (s.89, Housing Act 1980). It is likely that the court would require evidence of exceptional hardship. The court may, however, postpone the date of possession and return inherent jurisdiction if tenant intends to appeal the possession order (Admiral Taverns (Cygnet Ltd) v Daly (2008) EWCA 1501).

Mandatory Grounds for Possession

Ground 1 – returning owner occupier

This ground applies two situations where:

(a) where an owner occupier wants to let out his property; and
(b) where an owner buys a property with the intention to reside in it at some future date but wishes to let it out in the meantime.

This ground can be used where a landlord (or his spouse) has occupied the dwelling as his only or principle home at some time, and having given notice of his intention to return, now wishes to do so. Successors in title may also use this ground provided they did not purchase the dwelling. Therefore, this ground is not applied to a landlord who bought the property after the assured tenancy was created. It also only applies to individuals, not companies or social landlord.

Ground 2 - mortgagees

This ground applies where the property is subject to a mortgage which existed before the assured tenancy was granted on a mortgage or has not kept up with the mortgage payments. Thus, this ground is used by a mortgage wishing to gain vacant possession in order to exercise a power of sale. Notice will need to have been given to the tenant. The mortgage must have been taken out before the tenancy began and the the tenant warned about this contingency within the tenancy agreement. In most cases, a landlord letting out a property will have done so with the consent of his mortgagee. If this is not the case, so that the assured tenancy is in breach of the mortgage terms, and the
mortgagee will be able to obtain possession outside this ground as it will be an unlawful tenancy not binding on the mortgagee (Dudley & District Benefit Society v Emerson [1949] Ch 707).

Ground 3 – holiday lets

This ground applies to premises which within the last 12 months have been the used as holiday lets and have currently been let on a fixed term of up to 8 months, usually for the winter period. Notice must have been served before the start of the tenancy that the property is to be returned to holiday let use, usually for the summer period.

Ground 4 – student lets

This ground applies to student accommodation owned by educational institutions. Whilst students are normally licensees, this ground applies where the institution has let for a fixed term of up to 12 months.

Ground 5 – minister of religion

This ground applies to properties owned by religious bodies, where, for example, the property was occupied by one of their ministers and is now required for another.

Ground 6 – demolition, reconstruction or substantial works

This ground is similar to one established in commercial leases (Landlord and Tenant Act 1954, s.30(1)(f)) where recovery of possession is allowed where a landlord wishes to demolish or substantially reconstruct or redevelop the building and cannot do so without obtaining possession. The landlord must establish that possession is necessary and he is ready to proceed with the redevelopment. The tenant will be entitled to his reasonable removal expenses and possession is obtained under this ground (s.11, HA 1988).

Ground 7 – inherited periodic tenancy

On the death of an assured tenant it is possible for a third party to inherit an assured tenancy (or even a statutorily implied periodic tenancy) without the consent of the landlord (who may consider that third party undesirable). Ground 7 therefore provides a landlord with a means of regaining possession in this situation. This ground also specifically provides that if, after the death of the original tenant, the landlord accepts rent from a new tenant, this will not amount to an implied grant
of a new tenancy. A new tenancy will be created only if there is a written agreement to vary the terms of the tenancy.

**Ground 8 – Serious rent arrears**

Ground 8 is the most commonly used to grounds of possession by landlords. It provides the landlord with a mandatory ground for possession for serious rent arrears. To be able to rely upon this ground, the landlord must show that both at the date of service of the s.8 notice and also at the date of the hearing:

- (a) if rent is payable weekly or fortnightly, at least eight weeks rent is paid;
- (b) if rent is payable monthly, at least two months rent is paid;
- (c) if rent is payable quarterly, at least one quarter’s rent is more than three months in arrears; and
- (d) if rent is payable yearly, at least three months rent is more than three months in arrears.

Ground 8 is one of the two exceptional mandatory grounds (along with Ground 2) that can apply to a fixed term tenancy before the expiry of the contractual term.

The rent must, however, be rent lawfully due from the tenant. If the landlord has failed to provide the tenant with details of a name and address at which notices may be served then the tenant may argue that rent is not “lawfully due” pursuant to s.48 of the landlord and tenant act 1987. Providing these details in a notice under a s.21 notice will be sufficient (*Drew-Morgan v Hamid-Zadeh* (2000) 32 HLR 216). A delay in the payment of housing benefit cannot be used by a tenant as a defence to Ground 8. Nor will the court granted an adjournment of the hearing, in such cases, to enable the payment of housing benefit to be made so as to bring the arrears below the amount for the ground to apply. This is because the court does not have the extended discretion to adjourn or suspend in mandatory cases (*North British Housing Association Ltd v Matthews* [2005] 2 All ER 667).

The tenant who receives a s.8 notice specifying that the landlord seeks to rely on Ground 8 therefore has a last chance to avoid repossession by paying off some or all of the arrears before the hearing date. An uncleared cheque accepted by the landlord at the hearing has been held to be sufficient to avoid repossession on Ground 8 provided it cleared on first presentation (*Day v Coltrane* [2003] EWCA 342). Often landlords will combine a claim under Ground 8 with a claim under one or more discretionary Grounds (usually grounds 10 and 11). A tenants may be able to avoid possession under Ground 8 if he or she is able to counterclaim for breach of the landlord’s covenant to repair.
damages awarded on the counterclaim will be set-off against the rent arrears and may therefore reduce the outstanding amount below the required level under Ground 8. In these circumstances, if there is a realistic prospect that a counter claim for disrepair may cancel out the arrears, or reduce it to a level below the mandatory rent limit for this ground, the court may be persuaded to adjourn the case is pending the outcome of the counterclaim.

**Discretionary Grounds for Possession**

**Reasonableness**

In relation to the discretionary grounds the burden of proof to show that it is “reasonable” to make the order is squarely on the landlord. This requirement of “reasonableness” does not apply to the mandatory grounds above. The landlord is expected to plead any relevant circumstances he wants the court to take into account in exercising its discretion in his favour, otherwise the court may not consider those circumstances (*Laimond Properties Ltd v Raeuchle* (2001) 33HLR 113). In considering reasonableness the court should take into account all relevant circumstances as at the date of the hearing and applied a broad, common sense view (*Cumming v Danson* [1942] 2 All ER 635). Section 5(1A) of the 1988 Act provides that where an order of the court for possession of the dwelling house is obtained, the tenancy ends when the order is executed, namely when the tenant is evicted. The fact that the court makes a possession order will not, therefore, the status of the tenancy. An assured tenancy will not end until the tenant actually gives up possession of the property (*Knowlesley Housing Trust v White* (2008) UKHL 70).

The court has extended discretion under s.9 of the HA 1988, in relation to these discretionary grounds, to adjourn the proceedings, or to stay, postpone or suspend any possession order made.

**Ground 9 – suitable alternative accommodation**

the court may order possession of the landlord is able to show that suitable alternative accommodation is available for the tenant, or will be available when the possession order takes. If the landlord is able to persuade the Local Housing Authority to provide a certificate stating that the authority will provide suitable alternative accommodation for the tenant then this is conclusive evidence that suitable alternative accommodation will be available for the tenant of the court makes a possession order. However, given the scarcity of local authority housing stocks, it is most unlikely that any such certificate would be provided by the Local Housing Authority. Therefore, in practice, the landlord will need to provide or find accommodation which provides adequate security of tenure
and which is suitable for the tenant’s needs. This will be a matter of fact for the landlord to demonstrate at the possession hearing. An alternative accommodation must be suitable for the tenant's needs as regards proximity to place of work, and either similar as regards rental and extent of the accommodation provided by a Local Housing Authority to people with similar needs to those of the tenant; or recently suitable to the means of the needs of the tenant and his family as regards extent and character. The venture was provided and the original assured tenancy, the alternative accommodation should provide furniture which is similar to that provided under the original tenancy or suitable to the needs of the tenant and his or her family. Once the court is satisfied that the accommodation suitable, it must decide whether it is reasonable to make an order for possession. If the landlord retains possession under this ground, as with Ground 6, the tenant is entitled to his reasonable removal expenses (s.11 HA 1988).

Ground 10 – some rent arrears

This ground for possession will be established if the landlord can show both at the date of issue of proceedings and at the date of service of the s.8 notice the tenant was in arrears with rent lawfully due. Thus, it is a far easier herbal for the landlord to surmount than Ground 8. The landlord does not have to show that any rent is outstanding at the date of hearing. It, however, should be borne in mind that this is a discretionary ground so that if a tenant has paid off all the arrears by the date of the hearing it is unlikely that a court will order possession.

Ground 11 – persistent rent arrears

Where there is evidence that the tenant persistently delays paying rent which is lawfully due, the landlord will have satisfied this ground, even if there are no arrears at the start of the possession proceedings. Again, as with Ground 10, it is unlikely that the court would order possession on this ground in isolation if the tenant is not actually in arrears at the date of trial. However, if there is a serious pattern of refusal to pay rent on time so that the landlord cannot reasonably be expected to be saddled with a troublesome tenant the court may be inclined to make a possession order. Alternatively, the court may make a postponed order for possession on condition that complies with the terms of the tenancy in future. The court may be inclined to grant possession where, for example, the tenant is in persistent rent arrears but repeatedly discharges the arrears just prior to a possession hearing so occasioning expense and inconvenience to a landlord.

Ground 12 – breach of obligation
This ground covers tenant’s in breach of their contractual (lease or tenancy) agreement conditions, other than rent payments. The landlord can seek to rely upon this ground even when there is only a trickle breach, but it is most unlikely that the court will regard it as reasonable to make a possession order and the breaches serious. In determining the seriousness of the breach an important factor will be whether the breach is remediable and whether it is continuing. If the landlord has “waived” the breach (eg by accepting rent after becoming aware of the breach) he will not be able to rely upon this ground (Clark v Grant (1950) 1 KB 104).

Ground 13 – recovery due to deterioration of the dwelling house or common parts

if the landlord can establish that the condition of the dwelling house, or any of the common parts, has deteriorated owing to acts of waste by, or neglect or default of, the tenant or any other person residing in the dwelling house, then he would have satisfied the requirements of this ground. Where the acts of waste, or neglect or default were committed by a lodger or subtenant, the landlord must also show that the tenant has not taken such steps as he ought reasonably to have taken for the removal of that person. For the purposes of this ground, “common parts” means any part of a building comprising the dwelling house and any other premises which the tenant is entitled under the terms of the tenancy to using common with the occupiers of other dwelling houses in which the landlord has an estate or interest. It will therefore cover damage to stairways and corridors in a block of flats.

Ground 14 – nuisance and annoyance or conviction for illegal or immoral user

There are three distinct situations where the landlord can use this ground. It is available where the tenant, or a person residing in or visiting the dwelling house:

(a) has been guilty of conduct causing or likely to cause a nuisance or annoyance to a person residing, visiting or otherwise engaging in a lawful activity in the locality; or
(b) has been convicted of using the dwelling house, or allowing it to be used, for a moral or illegal purposes; or
(c) has been convicted of an indictable offence committed in, or in the locality of, the dwelling house.

Ground 14 has become the second most common ground (after rent arrears) on which the social landlords rely in seeking possession. The existing provision goes beyond the activities of the tenant. Antisocial conduct by the tenant’s family, friends and associates can also result in an eviction. This
ground therefore gives the landlord a powerful sanction against antisocial behaviour. The behaviour does not have to cause actual nuisance; it is sufficient for it merely to be likely to cause nuisance or annoyance. Thus, where local residents may be wary of complaining for fear of reprisals, the landlord will be able to rely on evidence from professional witnesses. Ground 14 will also enable a landlord to seek possession where the tenant, or a person residing with or visiting the tenant, has been convicted not only of using the dwelling house for a moral or illegal purposes but also of any arrestable offence committed in the locality of the dwelling house (Knowsley Housing Trust v Prescott (2009) EWHC 924). In Knowsley court where the possession order because the tenant had been convicted of manufacturing and selling a Class A drug or a large-scale. In contrast, the tenant’s conviction for possessing a small quantity of a Class A drug was not sufficiently serious to warrant the making of a possession order (North Devon Homes v Batchelor (2008) EWCA Civ 840).

The Antisocial Behaviour Act 2003 introduced a new s.9A into the Housing Act 1988 which provides that, where the court is considering whether it is reasonable to make a possession order on Ground 14, the court must consider:

(a) the effect that the nuisance or annoyance has had on persons other than the person against whom the orders sought;
(b) any continuing effect nuisance or annoyance is likely to have on such persons;
(c) the effect that the nuisance or annoyance would be likely to have on such persons if the conduct were repeated.

Registered social landlords also have increased powers to obtain injunctions against antisocial tenants under ss 153A to 153E of the Housing Act 1996 (as amended by the Antisocial Behaviour Act 2003, s.13). The behaviour complained of pain include, but is not limited to, behaviour which constitute a breach of the terms of the tenancy agreement. The injunction may contain an exclusion order and/or be backed by a power of arrest (s.153C). A registered social landlord may also apply to the court for the “demotion” of an assured tenancy on the grounds of antisocial behaviour.

**Ground 14A – domestic violence**

this ground was introduced by the Housing Act 1996 primarily to help charitable landlords to obtain possession of family housing from the remaining occupant after his or her partner and children left as a result of that occupant’s violence. It is therefore available only to registered social landlords (“RSLs”) and private registered providers of social housing (“PRPs”) or other charitable housing trust landlords where a dwelling house was occupied by a married couple or civil partners, or by a couple
living together as spouses or civil partners, and one (or both) of the partners is a tenant of the property. The landlord can seek possession if one partner has left as result of violence or threats of violence by the other towards that partner or a member of that partners family was living with a partner immediately before the left. The court may grant possession of satisfied that the partner is unlikely to return. The court must be satisfied that the landlord has served notice of the proceedings for possession on the partner who has left the home, or that it has taken reasonable steps to do so, all that it is just and equitable to dispense with the notice requirements (s.150 HA 1996). The court is unlikely to make a possession order unless it is satisfied that the “real and effective” reason the partner left was because of the domestic violence. It was not sufficient that it was a number of causes for her to leave.

Ground 15 – deterioration of furniture

This ground applies where the condition of any furniture provided for the use under the tenancy has, in the opinion of the court, deteriorated owing to ill-treatment by the tenant or any other person residing in the dwelling house and, in the case of ill-treatment by a person lodging with the tenant or buy a subtenant of his, the tenant has not taken such steps as he ought reasonably to have taken for the removal of the lodger or subtenant.

Ground 16 – recovery from former employee

This ground applies where the landlord can prove that he or she, or a predecessor in title, granted the assured tenancy to the tenant in consequence of that tenant's employment by the landlord and that this employment has now ceased. The landlord does not have to prove that the dwelling house is required for another employee. This case is rarely used as most resident employees are licensees and therefore not covered by the Housing Acts.

Ground 17 – grant induced by false statement

This final ground was introduced by the Housing Act 1996 and covers cases where the tenancy has been created as a result of a false statement knowingly having been made by the tenant or someone acting on his behalf. Ground 17 and is designed to prevent clients from acquiring assured tenancy by falsely representing the circumstances.

Tenancy Deposit Schemes
if a landlord an assured shorthold tenant has taken to posit from the tenant after 6 April 2007 the landlord must safeguard the deposit and the terms of an approved tenancy deposit scheme (s.212 Housing Act 2004). In one of the penalties for failing to comply with this requirement is that the defaulting landlord will not be able to serve a s.21 notice on the tenant’s deposit then held in accordance with an authorised scheme and the tenant has been provided with the prescribed information relating to the scheme (Housing Act 2004, s.215(1) and (2)). If the landlord has taken to posit that consists of property, rather than money, the landlord cannot serve a s.21 notice until that deposit has been returned to the person who provided it (s.215(3), Housing Act 2004).

Licences

A licensee is someone with a contractual right to occupy land, but who does not have a legal interest, or estate, in the property. This is to be contrasted with a tenant who does have legal estate in the property. Unlike a tenant, a licensee does not have the right to exclude all others from the premises during the operation of his licence. “Exclusive possession” is an essential requirement for a tenancy. The grant of exclusive possession to an occupier for a defined term at a rent will usually create a tenancy. A tenancy will be created irrespective of the actual intentions of the parties, or the “label” they apply to their relationship.

The distinction between a lease and a licence used to be of importance in that many of the statutory protections afforded to tenants only applied to tenancies, not licences. Landlords therefore, mostly unsuccessfully, sought to label the agreements as “licences” as opposed to tenancies. Licences can still be useful, for example, in the grant of grazing licences, or fishing licences.

Trespassers

A person is a trespasser whenever he should enter the land premises of another without permission. There are two types of trespasser. Firstly, a person who goes on to land without ever having had permission to do so. In the residential context, such a trespasser is known as a “squatter”. Secondly, a person who had permission to enter onto the land, but that permission has expired or contaminated; but nevertheless the owner allows it tolerates the continued occupation of the premises by the trespassing – he/she is then known as a “tolerated trespasser”.

HMOs

A “HMO” is a house in multiple occupation. Part 2 of the Housing Act 2004 (in force from 6 April 2006) requires landlords of certain types of HMO to be mandatorily licensed. A HMO includes (s.254 HA 2004):
- any building (house, hostel or flat) in which two or more households share basic amenities;

- any converted building containing one or more units which are not self contained accommodation; and

- any converted building which contains self contained flats, which do not meet the 1991 Building Regulation Standards and where more than one third of the flats are let on short leases.

“Household” is defined to include a single person, a family, a cohabiting couple, and other categories to be prescribed by regulations (eg carers and those cared for) who occupy the building as their only or main residence. Thus, a hotel would not normally be a HMO, but a hostel may be.

Any HMO which meets the following for conditions will require a licence:

- the HMO must have three stories and more;

- it must be occupied by five or more persons;

- the persons form two or more households; and

- they have to share facilities.

The licence is valid for five years. In deciding whether to grant the licence, the local housing authority will have to decide whether the landlord is a “fit and proper person” and whether the management arrangements for the property are satisfactory. Local authorities will have to keep a registered of licensed HMOs. The aim of the provisions is to provide greater protection for health, safety and welfare of people who occupy HMOs.

It is an offence to fail to obtain a licence for an HMO where it is a requirement to do so. On conviction, magistrates can impose fines of up to £20,000 (HA 2004, s.72).

RENT ACT REGULATED TENANCIES

As virtually all residential tenancies granted on or after 15 January 1989 will fall and the Housing Act 1988 (being either assured or assured shorthold tenancies), the Rent Act 1977 will generally only applied to residential tenancies created before 15 January 1989. Given it is now some 14 years since the last Rent Act tenancy was created, they are now becoming an increasingly rare species of tenancy as Rent Act tenants move out (and so lose protection) or pass away. As a consequence, contested Rent Act tenancy cases are now is rare as hen’s teeth in the courts. The main distinction between assured (and assured shorthold) tenancies and tenants is governed by the Rent Act 1977 is
that Rent Act tenants complete security of tenure. They cannot be predicted without cause (e.g. serious rent arrears); unlike assured shorthold tenants and can be evicted so long as the extent she notice procedures are complied with lawfully.

Rent Act tenancies are regulated tenancies because they are subject to a “regulated rent”. Regulated tenancies can be:

(a) protected, i.e. during the contractual period of the tenancy; or

(b) statutory, i.e. after the period of the contractual tenancy.

No new Rent Act tenancy can be created after 15 January 1989 when the housing act 1988 came into effect and introduced the assured tenancy regime.

The primary means by which landlords secure possession against Rent Act tenants is to pay a often substantial premium is a condition of giving up security of tenure.

Residential tenancies governed by the Rent Act 1977 are referred to as “protected tenancies”. A tenancy under which a dwelling house (which may be a house or part of a house) which is let as a separate dwelling is a protected tenancy for the purposes of the Rent Act 1977. The occupation must be a tenancy in order to be protected; a licence will not detract full Rent Act protection. There is no requirement that the tenant be an individual, so a company could have a protected tenancy (Hilton v Plustitle Ltd [1989] 1 WLR 149). Unlike assured tenancies, there is no requirement that the tenant occupies a dwelling as “his only or principal home” to be protected.

Security of Tenure

A protected tenancy lasts only so long as there is a contractual relationship between the landlord and tenant. When this contractual relationship ends, whether by notice to quit, effluxion of time, forfeiture, or any other the common more methods of termination, the Rent Act 1977, s.2(1) provides that the relationship between landlord and tenant will continue as a “statutory tenancy” after the termination of the protected tenancy if and so long as the tenant occupies the dwelling house as his residence. Therefore, it is a necessary prerequisite that the tenant remains in occupation of the dwelling house at his residence. A statutory tenancy, unlike a protected tenancy proceeded it, is not an interest in land but a “personal right” which has been described as a “status of irremovability” so long as the tenant continues to occupy the dwelling as his residence (Keeves v Dean [1924] 1 KB 685). The courts have been generous in their interpretation of continued residence, even where the tenant has been absent for considerable periods of time. Whether a tenant is occupying the dwellinghouse as a residence will be a question of fact and degree. Where
there was a prolonged period of absence, such as the prime fascia inference to be drawn is that the tenant has ceased to occupy the premises, the onus is on the tenant to show that he or she has not ceased occupy the premises. The court will often analyse the question by reference to to Roman law concepts: the “animus possidendi” (an intention to return and reside in the dwelling house); and “corpus possessionis” (visible evidence of an intention to return). Therefore, an intention to return must be more than a vague wish to return, it must be “a real hope coupled with the practical possibility of its fulfilment within a reasonable time” (Tickner v Hearn (1960) 1 WLR 1406). A mere intention, however, will not be sufficient; it must be some visible evidence of intention to return. Examples of such visible evidence would be the occupation of the dwelling house by members of the tenant’s family or friends (provided that they are there to preserve the house as a residence for the tenant provided they are there to preserve the house as a residence for the tenant: Skinner v Geary [1931] 2 KB 546). The presence of furniture or other possessions of the tenant is also indicative of an intention to return. Where a tenant sentenced to a period in prison, and his common-law wife and children then left the property, the tenant was held to have ceased occupation of the premises (Brown v Brash & Ambrose (1948) 2 KB 247).

The statutory tenant occupies the dwelling under the terms and conditions of the original contractual tenancy, in so far as they are consistent with the provisions of the Rent Act 1977 (s.3(1) RA 1977). The will be implied term, if not expressly provided for, that the statutory tenant will give the landlord access to carry out repairs (s.3(2)); and that the tenant will give at least three months notice to quit unless a shorter time as stipulated in the original contract (s.3(3)). However, the landlord does not have to serve a notice to quit on the statutory tenant before obtaining a order for possession (s.3(4)).

Occupation by a spouse or civil partner

Where the tenant ceases to occupied dwelling house but his or her spouse or civil partner remains in occupation, the spouse’s civil partner’s occupation account as continued occupation by the absent tenant (Matrimonial Homes Act 1983, s. 1 (6)). This only applies if at some point during the course tenancy the dwelling house has been the matrimonial home of the cup. The right to occupy the dwelling house vicariously through a spouse or civil partner will end of the Of divorce, the civil partnership is dissolved (Metropolitan Properties Co. v Cronan [1982] 126 SJ 229).

Occupation of two homes

It is possible for the tenant of a rent property to the residence requirement evening of the property in question is just one of the tenant’s homes. Again it is a matter of fact and degree. Where a tenant
was sleeping at the premises five nights a week but not eating there a tenant was held not to be occupying sufficiently to be a statutory tenant (Hampstead Way Investments v Lewis-Weare [1985] 1 AllER 564). However, a tenant who has a house in the countryside and regularly uses a flat in London for two or three totally can have a statutory tenancy of that flat (Bevington v Crawford [1974] 232 EG 191). Likewise, a person living in London can claim a statutory tenancy of a country cottage used at the weekends (Regalian Securities Ltd v Scheur [1982] 5HLR 48). Even a tenant who works abroad most of the time but returns to the premises for two or three months each year can have a statutory tenancy (Bevington v Crawford [1974] 232 EG 191). However, where the tenant has sublet the whole of the property on terms where he would not be entitled to occupy it without a surrender by the subtenants cannot be said to occupy the property and would lose protection (Ujima Housing Association v Ansah [1998] 30 HLR 831).

A statutory tenancy by succession

On the death of the regulated tenant, any spouse or civil partner who was residing in the dwelling house immediately before the tenant’s death, or a person who was living with the tenant as a spouse or civil partner, will become the statutory tenant of the property (RA 1977, Sch 1, para 2; Nutting v Southern Housing Group [2004] EWHC 2982). The successor will remain a statutory tenant for as long as he or she continues to occupy the dwelling as his or her residence. He or she will be known as the “first successor” (RA 1977, Sch 1, para 4).

If there is no surviving spouse or equivalent and a member of the tenant’s family who was residing with the tenant for the tedious out the date of death may succeed to the tenancy. However, the succession will be to an assured tenancy of the dwelling (RA 1977, Sch 1, para 3(1)).

It is also possible for there to be a “second succession”. Where a person who was residing with the first successor of the two years immediately before his death was related to the first successor and the original tenant (e.g., a child of the original tenant and the first successor), that person will be entitled to an assured tenancy the dwelling by succession (RA 1977, Sch 1, para 6). If there is more than one person eligible to succeed a statutory tenancy, even as a first or as a second succession, the parties can decide who will succeed, or failing agreement the court will decide (RA 1977, Sch 1, paras 2(3) and 3(1)).

Therefore, only a spouse or civil partner can succeed or statutory tenancy. Other family members, whether they succeed directly from the original tenant or follow on from the successor spouse (the first successor) will only contain an assured tenancy by succession.

Obtaining a Possession Order against a Rent Act tenant
For a landlord to be able to recover possession from a RA 1977 regulated tenant who have to fall into one of these three categories:

(1) he is offering the tenant “suitable alternative accommodation” and the court considers it “reasonable” to make a possession order; or

(2) he is able to satisfy one of the “discretionary” grounds for possession (known as “Cases” listed in Part 1 of Schedule 15 to the RA 1977) and the court considers it “reasonable” to make a possession order; or

(3) he is able to satisfy one of the “mandatory” grounds for possession (known as “Cases” listed in Part 2 of Schedule 15 to the RA 1977).

Suitable Alternative Accommodation

If the landlord can show the court that suitable accommodation will be available for occupation by the tenant, the court will make an order for possession provided it considers it reasonable to do so. By offering the tenant of the accommodation, the landlord cannot thereby reduce security of tenure (see Rent Act 1977, Sch 15, Part IV).

Reasonableness

In relation to any of the “discretionary” grounds, or suitable alternative accommodation ground, the landlord must not only demonstrate to the court that suitable alternative accommodation is available, or that a discretionary ground is satisfied, but he must also satisfy the court that it is “reasonable” to make the order. This is an “overriding requirement”. If the court fails to consider the issue of reasonableness for granting an order for possession, the judgement will be a nullity (Minchburn v Fernandez (No.2) (1986) 19 HLR 29; Verrilli v Idigoras [1990] EGCS 3; R v. Bloomsbury & Marylebone County Court, ex parte Blackburne (1985) 275 EG 1273). In determining the question of reasonableness, the court has a very wide discretion and must take into account “all relevant circumstances as they exist at the date of the hearing” (Cummings v Danson [1942] 2 All ER 653). Reasonableness is a question of fact in every case for the County Court judge to determine. For a grievance a tenant to successfully appeal against such an order, he or she will have to demonstrate that the County Court judge was “plainly wrong” or “misdirected himself or herself in law” (Darnell v Millwood (1951) 1 All ER 88).

Rent Act tenancies: Discretionary Grounds for Possession
The grounds for possession, known as “Cases”, listed in Part 1 similar to those in Schedule 2 to the Housing Act 1988.

Case 1: rent arrears or breach of obligation

There are two elements to this case: firstly rent arrears; secondly breach of obligation.

Case 2: nuisance, annoyance, use for a immoral or illegal purposes

The basis of the claim under this case is limited to the activities of the tenant only, it does not extend to others residing with the tenant, the visitors from causing a nuisance or annoyance to adjoining occupiers. Thus, to make out a case 2 claim, the tenant must actually have caused a nuisance or annoyance. It is enough that the tenant is convicted of using the dwelling house for illegal or immoral purposes. This does not have to be an indictable offence. For a moral or illegal purposes, the landlord must show that the premises themselves have a connection with the crime; it is “not enough that the tenant has been convicted of a crime with which the premises have nothing to do beyond merely being the scene of its commission” (Schneiders & Sons v Abrahams (1925) 1 KB 301). If a person is convicted of possession of the unlawful drug and the drug was found in his or her pocket while he or she was on the premises, it could not be said that the person was using the premises for illegal purposes. By contrast, however, if the person convicted had concealed a stash of illegal drugs somewhere in the premises and the landlord may be able to rely on Case 2 (Abrahams v Wilson [1971] 2 QB 88). Using the premises as a store for stolen goods, or for use as a brothel would fall into the illegal or immoral purposes case.

“Nuisance” generally involve some act of political interference. The keeping of dogs can amount to a nuisance or annoyance, as can the music (Crowder v Mercer, unreported, 6/3/1981) or the use of abusive or obscene language (Cobstone Investments Ltd v Maxim (1985) QB 140). The “nuisance or annoyance” does not have to take place on the demised premises. The fact that a married tenant exercised “undue familiarity” with the landlord’s 16 year old daughter in an alley some 200 yards away from the premises, was held to be an annoyance to the landlord who lived in the flat above the tenant (Whitbread v. Ward (1952) 159 494).

Case 3: Waste or Neglect

The landlord can rely on Case 3 where the condition of the premises has deteriorated as a result of “neglect” by the tenant or the tenants subtenants lodgers. This will include making unauthorised alterations or improvements to the property (Marsden v Edward Heyes Ltd (1927) 2 KB1).

Case 4: Furniture
This ground applies where the condition of any furniture provided for the use under the tenancy has, in the opinion of the court, deteriorated owing to ill-treatment by the tenant or any other person residing in the dwelling house and, in the case of ill-treatment by a person lodging with the tenant or buy a subtenant of his, the tenant has not taken such steps as he ought reasonably to have taken for the removal of the lodger or subtenant.

Case 5: Notice to Quit

This Case will apply where the landlord has contracted to sell, or has taken other steps as a result of the tenant having given notice to quit, and so would be seriously prejudiced if he did not regain possession. The ground by also be used where the landlord needs to gain possession against a lawful subtenant even though it was the head tenant who gave notice to quit (Lord Hylton v Heal (1921) 2 KB 438).

Case 6: assignment or subletting of the whole of the dwelling without the landlord’s consent

Case 6 will allow a landlord to recover possession if the tenant as signs or sublet the properties without consent, even when there is no prohibition against subletting or assigning in the tenancy agreement. This is because, given the high degree of security of tenure afforded to rent act tenants, the landlord does not want to be saddled with a new and unknown tenant occupying his or her premises. This case generally only applies to contractual tenants, because if a statutory tenant sublet some of the premises he or she will cease to occupy the premises as his or her residence and will lose the protection of the 1977 Act. Case 6 does not demand that the sub tenancy be subsisting at the time of the issue of proceedings, but if the sub tenancy has already expired court may well regarded as unreasonable to make a possession order. If the court will regard it as reasonable to make a possession order, a landlord can obtain possession under Case 6 against both the tenant and the subtenant.

Case 7: Off-licences (repealed)

Case 8: Former Employees

Case 8 applies only to service tenants i.e where the flat or house “goes with the job”. This ground applies where the landlord can prove that he or she, or a predecessor in title, granted the rent act tenancy to the tenant in consequence of that tenant’s employment by the landlord and that this employment has now ceased. The landlord does not have to prove that the dwelling house is required for another employee.
Case 9: dwelling required for member of the landlord’s family

This Case will apply where the landlord did not become the landlord by purchasing his interest in the property and he reasonably requires possession so that the dwelling can be occupied as a residence by either:

(a) himself; or
(b) any adult child of the landlord; or
(c) a parent of the landlord; or
(d) a parent of a spouse or civil partner.

In deciding whether to make a possession order, the court is required to consider whether greater hardship because by granting the order than by refusing it (RA 1977, Sch 15, Part III). The burden of proving “greater hardship” is on the Defendant.

Case 10 – recovery for over-charging a sub-tenant of the dwelling

Where a regulated tenant has sublet part of the dwelling and the rent has been registered in relation to the dwelling, the tenant will risk possession under this Case if the charges in excess of the fair rent which has been registered for that part.

Rent Act tenancies: Mandatory Grounds for Possession

If a landlord can establish one of the “mandatory” Cases for possession set out in Part II, Sch 15, of the Rent Act 1977, the court will make a possession order under s.98(2) of the Act; there is no element of discretion and the court will not consider whether or not it is reasonable to make such an order. All of the mandatory cases require the landlord to serve written notice upon the tenant is not later than “the relevant date” stating that possession may be recovered under the Case in question. In most instances, the relevant date will be the start of the tenancy. The court has power in respect of Cases 11, 12, 19 and 20 to “dispense” with the requirement of notice if it is of the opinion that it would be “just and equitable” to do so.

Case 11: returning owner occupier

This case is limited to an owner occupier who gave written notice of his intention to resume occupation beginning of the tenancy but who now wishes to move back into the property. This might be the case, for example, where a person goes to work abroad for a period, let out his or her home, but wishes to retain possibility of winning back when he or she wishes to return.
Case 12: retirement homes

Case 12 is used by a person who has purchased a property with the intention of moving into it when he or she retires. It allows the owner to rent out the property while he or she continues in full time work, but to regain possession on retirement.

Case 13: off-season holiday lets

The aim of this case was to allow the landlord who normally rented out a property as holiday accommodation during the summer to grant a longer tenancy out of season that may not fall within the definition of a holiday letting and might therefore be eligible for Rent Act protection. The aim of the case was to provide the landlord with a means of regaining possession of the property so that it could again be used as holiday accommodation.

Case 14: Educational Institutions

Like holiday accommodation, lettings to students by educational institutions are also excluded from Rent Act protection.

Ground 15 – minister of religion

This ground applies to properties owned by religious bodies, where, for example, the property was occupied by one of their ministers and is now required for another.

Case 16, 17, 18: agricultural employees

These three cases relate to agricultural workers being let premises, where they were given written notice at the beginning of the tenancy that possession might be required under the particular case.

Case 19: Protected Shorthold Tenant

The “protected shorthold tenancy” was the predecessor of the assured shorthold tenancy. It was created by the Housing Act 1980 and permitted a landlord to grant a short fixed term tenancy (of between one of five years) without conferring security of tenure upon the tenant. No more protected shorthold tenancies can be created after 15 January 1989 (unless created pursuant to a contract made before that date) and so such species of tenancy are now very rare.

Case 20: Armed Forces personnel
This Case enables a member of the Armed Forces who purchases a property intending to occupied some future date (e.g. when he or she retires or leave the armed forces) to rent this property out and still regain possession when it is needed.

**Sub-Tenants**

Where a Rent Act protected tenant has lawfully sublet his or her property a landlord wishing to obtain possession is also consider the position of the subtenant. The common law rule is that a sub tenant no longer has any right to remain in occupation following the termination of the Superior tenancy. Thus, if possession is ordered against the superior tenant the subtenant would have to leave the property. S.137 of the Rent Act 1977 provide some measure of protection in that protection will be afforded to a “lawful” subtenant who was in possession before the commencement of the possession proceedings. If the sub tenancy was granted in breach of a covenant in the Superior tenancy it will not be “lawful”. Thus, if the subtenant can establish that the premises had been lawfully sublet, he or she will not be affected by the possession order being made on discretionary grounds against the superior tenant. The subtenant will in effect take the tenant's place and a direct relationship of landlord and tenant will exist between the sub-tenant and the head landlord.

**Rents under Regulated Tenancies**

Parts III and IV of the RA 1977 sets out the provisions dealing with the process for and effect of registration of a fair rent in respect of a dwelling. The determination of a fair rent involves taking account of all relevant circumstances, and including the age, character, locality and state of repair of the dwelling, and any furniture provided. This regard it is any deterioration or improvement of the dwelling attributable to the tenant (RA 1977, s.70).

The most significant assumption made in s.70(2) is that supply even with demand, so that a fair rent should not include any “scarcity value”. A rent officer, who, under s.67, is the person to whom application for a determination is made, must assume that supply equals demand in assessing a fair rent. The Rent Acts (Maximum Fair Rent) Order 1999 (SI 1999/6) limits the maximum rent increase to RPI +7.5% on a first re-registration, and subsequent increases are limited to RPI +5%. It is expected that the gap between “fair” rents and “market” rents or diminish over time.

**SECURE TENANTS – PUBLIC SECTOR HOUSING**

A secure tenancy provides a high level of security of tenure, coupled with below market rents, largely due to government subsidies designed to keep social housing affordable. A tenant who is
allocated accommodation by a Local Housing Authority ("LHA") or Housing Association ("HA") is likely to be a secure tenant. Section 79 of the HA 1985 provides that a tenancy or licence (other than a licence granted as a temporary expedient to a trespasser) under which a dwelling house is let as a separate dwelling, is a secure tenancy at any time when the “landlord condition” and the “tenant condition” are satisfied. The letting may be for a fixed term, or it may be periodic. S.79(3) of the 1985 Act does not exclude licences from statutory protection.

From 2 April 2012, LHAs have the option of granting a new form of secure tenancy, called the “flexible tenancy”.

The “landlord condition” requires that a landlord can be:

(a) a local authority;

(b) a new town corporation;

(c) a Housing Action Trust ("HAT") - this is a trust which requires and manages local authority housing under powers contained under Part III of the Housing Act 1988;

(d) an urban development corporation;

(e) a Mayoral development corporation; or

(f) in certain situations, the Health Care Authority, the Greater London Authority of the Welsh Minister.

The “tenant condition” requires that a tenant must be an individual who occupies a dwellinghouse as his only or principal home (HA 1985, s.81). Where there is a joint tenancy, each of the joint tenants must be an individual and at least one of the must occupy the dwelling house as his only or principal home.

Introductory Tenancies

Part V of the Housing Act 1996 was introduced in response to the general public perception that public sector landlord will often faced with difficult, anti-social tenants who failed to pay the rent on time and who would enjoy significant protection in terms of security of tenure so that it made it difficult to obtain possession orders against them. Public sector landlords did not want to find themselves landed with disruptive, undesirable or antisocial tenants who could not be easily removed. Introductory tenancies is a regime whereby it is possible for tenants to be granted a tenancy on a trial basis: in a probationary tenancy that, at its end, provided the conduct of the
tenant’s satisfactory, will be converted automatically into a secure tenancy. In order to make use of these provisions, a local housing authority, or housing action trust, must first elect to operate an introductory tenancy rushing. Thus, an introductory tenancy is one which would have been a secure tenancy but for the local authority’s having elected to operate an introductory tenancy regime. If by the end of the trial period the tenant’s behaviour has given the landlord no cause for objection and the tenancy will automatically become a secure tenancy. However, the landlord may bring the introduction tenancy to an end at any point during the currency of the trial period if the landlord regard to the tenant as unsuitable. To bring the introductory tenancy to an end the landlord needs only to obtain an order of the court for possession (s.127). The landlord does not have to establish a ground of possession, nor that suitable alternative accommodation is available, nor that it is reasonable to make such an order.

Security of Tenure for Secure Tenants

The security provision is contained in s.82 of the Housing Act 1985. It provides that a landlord can end a secure tenancy only by obtaining a court order for possession and the execution of the order. There are three categories of orders that the court can make on the application of the landlord. They are:

(a) an order for possession, which will not be granted unless the landlord follows the notice requirements stipulated in s.83 of the Housing Act 1985, or the court dispenses with them, and the court is satisfied that one or more of the possession grounds in Sch 2 to the Housing Act 1985 is made out;

(b) an order for “demotion”, which terminates the secure tenancy if the court finds there has been antisocial behaviour; or

(c) an order terminating a fixed term secure tenancy so that a periodic tenancy arises instead.

A secure tenant who wishes to terminate his tenancy can do so by surrender, or by serving a valid notice to quit on his landlord.

HOUSING LAW – PROTECTION FROM EVICTION

Unlawful eviction. Every lease or tenancy agreement includes an express or implied covenant for quiet enjoyment by the landlord. Where the ordinary and lawful enjoyment of demised premises is substantially interfered with by the acts of the landlord, or those claiming under him, there will be a breach of this covenant, even though the tenant is not deprived of possession. In such cases
proceedings for an injunction to restrain further breaches of covenant may be necessary. In extreme cases a tenant may be entirely excluded from the premises by the deliberate act of his landlord. In such circumstances the tenant will have claims against the landlord both for breach of contract and for the tort of trespass. The eviction of the tenant will not bring the tenancy to an end and the tenant will remain entitled to possession; in such cases, proceedings for an injunction requiring the landlord to restore the tenant to possession will be appropriate. Residential tenants who are wholly excluded from the premises will also have a claim for damages under the Housing Act 1988 which creates a statutory tort of unlawful eviction.

**Damages.** At common law the measure of damages for breach of a covenant for quiet enjoyment is the amount of damage sustained and, in an appropriate case, this will include the value of the term lost, the cost of alternative accommodation or loss of profits if the eviction was from a commercial premises. There is an increasing tendency of the courts to assess damages on the basis of the sum of money which would have been arrived at between the parties by agreement for a voluntary release of the covenant (*Jaggard v Sawyer* [1995] 2 All E.R. 189; [1995] 1 W.L.R. 798; *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd* [2007] 14 E.G. 106). Since an action for breach of the covenant for quiet enjoyment is an action for breach of contract no damages can be recovered for injured feelings or mental distress, nor may exemplary damages be awarded. Damages for mental suffering may, however, be awarded where the mental suffering is a direct consequence of physical inconvenience and discomfort caused by the breach (*Watts v Morrow* [1991] 4 All E.R. 937). Moreover, where the manner of eviction has been such as to cause injury to the tenant’s feelings of dignity or pride, aggravated damages may also be awarded, although these will be compensatory rather than punitive (*Ramdath v Daley* [1993] 1 E.G.L.R. 82).

In addition to a claim for damages for breach of contract, a tenant who has been unlawfully evicted will have a claim in tort for trespass and in some cases may have claims for assault. Damages in tort may include exemplary damages designed to strip a landlord of the profit which he hoped to make as a result of the eviction. Exemplary damages will be awarded where the landlord has shown a cynical disregard for the tenant’s rights and has calculated that the profit to be made will exceed the damages likely to be awarded against him (*Rookes v Barnard* [1964] A.C. 1129). An award of aggravated damages compensating the tenant for injury to his feelings and pride may also be made.

**Claims under the Housing Act 1988.** Since June 1988 residential occupiers have had a statutory remedy in tort where a landlord or any person acting on behalf of a landlord either: (a) unlawfully
deprives the occupier of his occupation of the whole or part of the premises, or attempts to do so;
(b) knowing or having reasonable grounds to believe that his conduct will cause the residential
occupier to give up occupation of the premises or to refrain from exercising any right or pursuing
any remedy in respect of them, does acts which are likely to interfere with the peace or comfort of
the occupier or members of his household, or persistently withdraws services and, as a result, the
residential occupier gives up occupation of the premises as a residence (Housing Act 1988 s.27).
Residential occupiers include licensees and in such cases the court will determine the period of
notice that would have been reasonable to determine the licence: Mehta v Royal Bank of Scotland

Damages under the 1988 Act are designed to deprive the wrongdoer of the profit which he might
otherwise have expected to make as a result of the unlawful eviction, and are calculated by
comparing the value of the landlord’s interest free of the tenancy with the value of his interest
encumbered with the tenancy (Jones & Lee v Miah & Miah (1992) 24 H.L.R. 578). The availability of
exemplary damages is not altogether clear (Sampson v Wilson (1994) 26 H.L.R. 468; Nwokorie v Mason
(1994) 26 H.L.R. 60; Francis v Brown (1998) 30 H.L.R. 143, CA). It is considered that the
correct approach is that taken in Francis. In that case the Court of Appeal held that where an award
of damages under the 1988 Act was made there was no scope for an award of exemplary damages
because the statutory damages removed the profit element from the wrongful acts. Aggravated
damages may be appropriate but must be set off against statutory damages (Nwokorie v Mason

The statutory measure of damages is not available where the tenant has been restored to
possession following the eviction, or is so restored following an order of the court. A tenant must
elect at trial whether to seek statutory damages or a continuing right to possession; he is not
entitled to both (Osei-Bonsu v Wandsworth London Borough Council [1999] 1 All E.R. 265; [1999] 1
E.G.L.R. 26, CA). Thus it may be appropriate, where the tenant seeks reinstatement but may not
obtain it, to plead claims in the alternative for exemplary and/or aggravated damages and damages
under s.28 of the 1988 Act.

The 1988 Act provides certain defences both as to liability and as to quantum. A landlord will avoid
liability if he believed and had reasonable cause to believe that the residential occupier had ceased
to reside in the premises at the time of the eviction or acts complained of. A mistake of law as to the
validity of a notice to quit served short by one joint tenant to determine a tenancy does not amount
to a reasonable belief that the other tenant had ceased to reside in the premises (Osei-Bonsu v Wandsworth London Borough Council [1999] 1 All E.R. 265; [1999] 1 E.G.L.R. 26, CA). Damages may be mitigated if it seems to the court to be reasonable to do so on account of the conduct of the former residential occupier or any person living with him in the premises; damages may be reduced if the former occupier has unreasonably refused an offer of reinstatement to the premises in question.

COMMERCIAL LEASES

Commercial leases, of offices, factories, shops and so on, will usually be governed by a detailed lease, usually settled by the landlord’s solicitors. Whereas prior to 2000, it was not uncommon for commercial landlords and tenants to enter into 25 year leases, with no break clauses, the recession of 2008-2013 has meant that leases have increasingly shortened in length so as to give tenant’s increased flexibility. The tenant’s insistence on break clauses, usually at 5 year intervals, has also increased markedly.

Security of Tenure

The Act governing security of tenure of business tenants, and regulating the manner in which business tenancies can be terminated, is Part II of the Landlord and Tenant Act 1954 (“the Act”). The broad scheme of the act is that the business tenancy will not come to an end at the expiry of the fixed term, nor can a periodic business tenancy be terminated by the landlord serving an ordinary notice to quit, but that there is “automatic continuation” of the tenancy pursuant to s.24 until such time as the tenancy is terminated in wonderful a specified in the Act. In addition, upon the expiration of a business tenancy, business and tenants will have a statutory right to apply to the County court for a new tenancy. Section 24 provides:

“(1) a tenancy to which this Part of this Act applies shall not come to an end unless terminated in accordance with the provisions of this Part of this Act; and, subject to the following provisions of this Act either the tenant or the landlord under such a tenancy may apply to the court for an order for the grant of a new tenancy-

(a) if the landlord has given notice under section 25 of this Act to terminate the tenancy, or

(b) if the tenant has made a request for a new tenancy in accordance with section 26 of this Act.

A landlord will be obliged to grant such a new tenancy on terms to be negotiated, and in default of negotiation of a fixed by the court, unless the landlord is able to rely upon, and satisfy, the grounds set out in s.30(1) of the Act to oppose the grant of a tenancy. Thus, business tenants have considerable protection to carry on their and businesses under the Act, so that the strict contractual position between the parties is significantly modified in the tenant’s favour by the Act. Any new
tenancy even negotiated between the parties, or ordered by the court, will also enjoy the protection of the Act. Nearly all contested business tenancy renewals will be determined in the local County court for the area in which the premises are situated.

The Application of the Act

Section 23(1) provides that:

“this Act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and also occupied for the purposes of a business carried on by him all of those and other purposes”

Therefore, for 1954 Act protection there must be:

- (a) a tenancy;
- (b) premises occupied by the tenant;
- (c) such occupation must be for the purposes of a business carried on by the tenant

A Tenancy

To be eligible for protection under the 1954 Act there must be a tenancy. The tenancy can be either “periodic” (e.g. weekly, monthly, quarterly or yearly) or a fixed term tenancy, or an agreement for a lease (e.g. an equitable lease) or a sub-tenancy (or underlease). Even an unlawful sub tenancy may fall within the Act (D’Silva v Lister House Developments Ltd (1971) Ch 17). An occupier holding and a licence will not attract the protection of the 1954. Therefore, a landlord will often seek to grant a licence, as opposed to a tenancy, in order to escape the provisions of the 1954 Act. A prospective tenant who has gone into occupation during negotiations for a lease, on the footing that there is no tenancy to be granted unless and until the negotiations are satisfactorily concluded, the prospective tenant will not, generally, be entitled to 1954 Act protection (Cameron Ltd v Rolls Royce Plc [2007] EWHC 546). However, whether or not protection has been granted will turn on the facts of the individual case, so that where a rent has been accepted by a landlord for a sufficiently long period (at least a year), with no negotiations going on in the background, it is likely that the tenant will have obtained 1954 Act protection as the periodic tenant (as opposed to a mere “tenant at will”, which does not attract 1954 Act protection: Wheeler v Mercer (1957) AC 416; Hagee (London) Ltd v AB Erikson & Larson (1976) QB 209; Javad v Aqil (1991) 1 WLR 1007; London Baggage Co (Charing Cross) Ltd v Railtrack plc (2000) EGCS 57; Fitzkriston LLP v Panayi (2008) L&TR 26). Ultimately, the courts will have to determine whether, objectively, the parties entered into tenancy, or lease, by the the grant of exclusive occupation together with the payment of rent for a term (in accordance with the test as to whether a tenancy has been created in Street v Mountford (1985) UKHL4).
Premises occupied by the tenant

“Premises” includes a building or part of a building and can also include land, even when the land has no buildings on it e.g. a tenancy of land used for training horses is a business tenancy within the 1954 Act (Bracey v Read (1963) Ch 88). A tenancy of a parking space in the basement garage may constitute a business tenancy (Harley Queen v Forsythe Kerman (1983) CLY 2077).

An “incorporal hereditament”, such as an easement (e.g. a right of way) or a profit a prendre (e.g. fishing rights) will not come within the definition of “premises”. However, the tenant of the premises has acquired the rights and lease (e.g. a right of way, or the right to park a car on the adjoining land), these additional rights may be renewed along with the tenancy pursuant to s.32(3) or s.35 of the Act (Pointon York Group v Poulton (2006) EWCA Civ 1001).

In most instances, it will be obvious whether the tenant is in occupation or not. However, occupation need not be by the tenant personally. Occupation may be sufficient for it is conducted through the medium of a manager, agent, provided that such representative occupation is genuine and not a “sham” arrangement (being an arrangement designed to deceive and conceal the lack of occupation). Therefore, a flat provided for a caretaker by a tenant still be occupied by the tenant through the agency of the caretaker. S.23(1A) and (1B) provides that the Act will apply where an individual is the tenant, but the premises then occupied by a company in which the tenant has a controlling interest. “Controlling interest” is defined by s.46(2).

Occupation need not be continuous provided that the “thread of continuity” of the business use is not broken down (Hanock & Willis v GMS Syndicate Ltd (1982) 265 EG 473). Where a tenant stock trading from a shop for a period of seven months still continued in occupation of the premises within the meaning of the 1954 Act (I&H Caplan v Caplan (No.2) (1963) 1 WLR 1247). Occupation is also sufficient for the act where it is “seasonal” (Teasdale v Walker (1958) 1 WLR 1076).

There can be no “dual occupation” for the purposes of the Act. Therefore, where a business tenant sub-let part of the property to a business sub tenant both cannot qualify for protection in respect of the sub-let part. If it is the sub tenant who is in actual occupation, and it is a subletting of the whole of that part, it will be the sub tenant who enjoys the protection of the Act, although in an exceptional case the head tenant may reserve sufficiently extensive rights over the sublet part that it remains the occupier (Graysim Holdings Ltd v P&O Property Holdings Ltd (1995) 3 WLR 854). For such a case, however, the services offered by the landlord must be “extensive”. Where a landlord serviced a number of flats daily, and imposed restrictions on the activities of the occupants, the landlord was held to be protected by the 1954 Act notwithstanding that the sub-tenants actually
occupied the flats in question because the landlord exercised a sufficient degree of control over the other parts the building it was regarded as occupying the whole block (Lee-Verhulst (Investments) Ltd v Harwood Trust (1972) 1 QB 204).

If, by contrast, a company is in the business of letting out flats, without providing any caretaker or other services, and any such tenancy will not be protected within the 1954 Act.

**Occupation must be for the purposes of a business**

For 1954 act protection the tenant must not only occupy at least part of the premises, but he or she must also occupy the premises for “the purposes of a business”. “Business” is widely defined in s.23 to include “a trade, profession or employment and includes any activity carried on by a body of persons, whether corporate or unincorporate”. Where the business is carried on by an individual, it must amount to a trade, profession or employment; but where it is carried on by a body of persons (whether they be “corporate” or “unincorporate”) “any activity” may suffice. The organisation of a tennis club (Addiscombe Garden Estates v Crabbe (1958) 1 QB 513) or the activities of governors in running a hospital (Hills (Patents) Ltd v UCH Board of Governors (1956) 1 QB 90) will suffice for “business use”. However, where a tenant to a number of lodgers, but gave no real commercial advantage from doing so, this did not amount to a “trade” so there was no 1954 Act protection. Thus, the person taking if you lodgers and making little or no profit would not attract 1954 Act protection. However, a person running a seaside boarding house may well be carrying on a “trade” sufficient for the Act. The running of a Sunday School was well outside the definition of a “trade, profession or employment” (Abernethie v AM&J Kleinman (1970) 1 QB 10).

If a tenancy falls within the 1954 Act it will be excluded from being a Rent Act tenancy by s.24(3) of the Rent Act 1977, and from being an assured tenancy by the Housing Act 1988, Sch 1, Part 1, para 4, and from being a secure tenancy by the housing act 1985, Sch 1, para 11. In the case of mixed use the premises (eg a shop below, with a residential flat above) the 1954 Act will apply provided the business activity is a “significant purpose” of occupation and not merely “incidental” to the occupation of the premises as a residence (Cheryl Investments Ltd v Saldhana (1978) 1 WLR 1329; Gurton v Parrot (1991) 1 EGLR 98). The statutory codes applying to business tenancies and the code is applied to residential tenancies are “mutually exclusive”. Where a tenant took a lease of premises comprising a flat and a shop, and the lease contained an obligation on the tenant to keep the shop for retail trade, the fact that the main motive in taking the lease was to have residential rights was insufficient to create a residential tenancy; terms lease meant that the premises were occupied for the purpose of a business (Broadway Investments Hackney Ltd v Grant (2006) EWCA Civ 1790). If the
tenant of a shop with a flat above ceases to trade from the shop, but continues to live in the flat, he or she can no longer be said to be occupying the premises for the purposes of a business. The protection of the 1954 Act will therefore ceases. Moreover, this tenant will not then acquire protection under a residential statutory code as both the Rent Act and the Housing Act apply only to “a dwelling house let as a separate dwelling”. When the premises were let they were let for a business purpose, so that if the business use ceases the premises will not come within the residential code unless the landlord agrees to the change of user (Pulleng v Curran (1980) 44P&CR 58; Wagle and another v Trustees of Henry Smith’s Charity Kensington Estate (1990) 1 QB 42). In order to assert that the landlord has agreed to the change of use the tenant must show that the landlord has given positive consent, mere knowledge of the change of use and acceptance of rent would not be sufficient (Tan v Sitkowski (2007) RWCA Civ 30). This result does not apply when the residential/business user change is reversed, so that if the property was originally let as a dwelling and the tenant subsequently use it for business purposes, during the time of the property is let as a dwelling the tenant will have security under one of the residential codes (eg. Rent Act); however, when business use starts the tenancy will be protected under the 1954 Act; if the use then reverts to residential use the property will regain its Rent Act status (Tan v Sitkowski (2007) RWCA Civ 30).

Often, a lease will have a “user covenant” prescribing strictly which uses of the premises are authorised by the landlord. If the tenant’s in breach of the user covenants, and the lease merely forbids a specific business use (e.g. not use the shop as a newsagents), for any use except the business use specified (e.g. not to use the premises for any purpose other than as a newsagents) a business use in breach of such a provision will not deprive the tenant of the protection of the Act. However, s.24(3) does exclude from protection any tenancy where the use of the premises for business purposes is in breach of a general prohibition preventing or business use (e.g. not carry on any business, trade, profession or employment). It is often the case however that a landlord will have “waived” such a breach, or acquiesced in the breach, in which case the Act will still apply. “Acquiescence” and “consent” are two distinct concepts, in both cases, however, the landlord must have knowledge of the breach. If, with knowledge of the breach, an immediate landlord takes no action and stands passively by, this can amount to acquiescence. Consent, on the other hand, requires the landlord to take some “positive action” which indicates consent (Bell v Alfred Franks & Barlett Co. Ltd (1980) 1 WLR 340).

The Holding

Many of the provisions of the 1954 Act relate only to “the holding”, which is defined by s.23(3) as:
“(3).... the expression “the holding”, in relation to a tenancy to which this Part of this Act applies, means the property comprised in the tenancy, there being excluded any part thereof which is occupied neither by the tenant nor by a person employed by the tenant and so employed for the purposes of a business by reason of which the tenancy is one to which this Part of this Act applies”

This is of significant because where a tenant applies for a renewal of the tenancy he or she will be entitled only to renewal of “the holding”. This means the property comprised in a tenancy but excluding any part of the property which is occupied neither by the tenant nor by an employee of his who is employed in the business which makes the tenancy one to which Part II of the Act applies. Thus, as often is the case, where a significant part of the use is residential the same will be excluded from protection (unless the services provided are extensive enough to amount to a business occupation).

Unless landlord and tenant agree on the scope “of the holding” then the property to be the subject of a new lease is to be determined by the circumstances existing at the date of the order granting the new lease. Thus, it is possible for a tenant to regain occupation of part of a property that was not so occupied at the date of the service of the section 25 notice. In addition to the foregoing law, section 32(2) of the Act permits a landlord to require any new tenancy to be a tenancy “of the whole of the property comprised in the current tenancy”. A landlord should be careful in renewal proceedings that it does not in its answer invoke s.32(2) requiring the tenant to take a lease of the whole of the property because the landlord will be bound by that even where it might have been open to the landlord to limit the scope of the holding where part of the premises were not being used for residential purposes.

The Competent Landlord

The procedures under the 1954 Act must be conducted between the’s “competent landlord” and the tenant. If the freeholder grants a lease, the tenants competent landlord will be the freeholder. However, where the tenant is a subtenant, by s.44 of the Act, the subtenant must examine the chain of superior tenancies above him/her to light upon the first person who either owns the freehold or from has a superior tenancy which will not come to an end within 14 months. That party will be the “competent landlord” upon whom the tenant must serve, for example, his s.26 notice seeking a new tenancy. If in any doubt as to which party is the competent landlord, a subtenant can identify their competent landlord by serving a notice on their immediate landlord under s.40 of the Act seeking information about the landlord’s interest. It is advisable that any subtenant serves a s.40 notice before engaging the procedures under the 1954 if in any doubt as to who is the competent landlord.
Exclusions from the Act

Other than tenancies which failed to satisfy the requirements of s.23, there are other tenancies which are not protected by the Act. These include:

(a) “Contracted out” tenancies. These tenancies are very common (as it is often very much in the interest of the landlord to avoid the tenant acquiring the protection of the 1954 Act). The general rule is that any attempt, or agreement, to contract out of the provisions of the 1954 Act will be void (s.38(1)). However, the strict rules against contracting out have been mitigated by s.38A of the 1954 Act (inserted by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 in place of the previous s. 38(4). S.38A allows the landlord and tenant to enter into an agreement that the provisions of ss 24-28 (which relate to security of tenure) will not apply to the tenancy. For “contracted out” tenancies granted after 1 June 2004, the landlord must serve a notice on the tenant in the prescribed form and the tenant (or someone duty authorised by the tenant) must sign a declaration that he has received the notice and accepts the consequences of the agreement to contract out. The notice must be in the form set out in Schedule 1 to the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003. If the notice is served within 14 days prior to the grant of the tenancy, the tenant must make a statutory declaration to this effect before an independent solicitor. The prescribed form of notice contains a “health warning” advising the tenant that he is giving up the right to security of tenure and advising him to seek advice not only from a solicitor or surveyor but also from his accountant. The “instrument creating the tenancy” (normally the lease) must then contain a reference to the exclusion agreement, notice and the declaration. “Contacted out” tenancies granted post 1 June 2004 no longer require a County court to make the order excluding the lease from 1954 Act protection (as formerly was the position). If the parties to a tenancy entered into an agreement to exclude ss 24 to 28 before 1 June 2004, the parties will have to make an application to the court asking for an order authorising the agreement. The court has retained the jurisdiction to make such an order in cases where the old rules still apply.

(b) Fixed term tenancies granted for a term not exceeding six months unless:

a. the tenancy contains a provision for renewing the term or extending it beyond six months from its beginning;

b. or the tenant, either alone or together with any predecessor in title, has been in occupation for more than 12 months (s.43(3)) (Cricket Ltd v Shaftesbury Plc (1999) 3
All ER 283). For this provision to apply, both predecessor and the extent tenant must have carried on the same business. This may apply where the tenant has acquired the tenancy along with the business as a “going concern”.


(d) Service tenancies, i.e. a tenancy granted to a tenant who holds an office, appointment, or employment from the landlord and which continues only so long as that employment or appointment continues. If the tenancy was granted after 1 October 1954, the tenancy must have been granted in writing which expresses the purpose for which the tenancy was granted (s.43(2)).

(e) Tenancies of the premises licensed to sell alcohol, not including hotels and restaurants in the premises where the sale of alcohol is not the main use of the premises, which were granted before 11 July 1989 (s.43(1)(d)). Tenancies of the premises licence to sell alcohol granted on or after 11 July 1989 to fall within the 1954 Act (Landlord and Tenant (Licensed Premises) Act 1990, s.1(1)).

(f) Agricultural holdings (s.43(1)(a)); and farm business tenancies (s.43(1)(aa).

(g) Mining leases (s.431(1)(b).

Business Lease Renewal in the County Court: The Post Action Protocol (Central London County Court)

In relation to the application of Part II of the Landlord and Tenant Act 1954 (“the 1954 Act”) and Part 56 of the Civil Procedure Rules (“CPR”) (and the Practice Direction PD 56), which governs lease renewals, the Courts have drawn up a “Post Action Protocol” to standardise business renewal cases through the County Court. The purpose of the Post-Action Protocol is to provide general guidance to landlords and tenants, concerning the way in which business tenancy proceedings will normally operate and to provide greater consistency of decision making by County Courts. The Post-Action Protocol has no formal status under the CPR but has been adopted by Central London County Court on a trial basis.
The Post-Action Protocol recognises that business tenancy renewals are, if not unique, unlike most other litigation. Part II of the 1954 Act sets out a procedure, which is, in effect, compulsory (subject to the parties agreeing to extend time). As matters stand at present a tenant is bound to issue renewal proceedings in order to preserve the right to a new Lease. In an overwhelming number of cases landlords and tenants are able to agree, by a process of negotiation, the terms upon which a new Lease should be granted or upon which the tenant should vacate. It is recognised that active case management may not be required in every case and stays may be needed beyond those for which Part 56 makes special provision.

The Post-Action Protocol recognises that lease renewal proceedings can usefully, from the point of view of case management, be categorised in two ways.

- "Standard lease renewal proceedings" are those in which the landlord is not opposing the grant of a new tenancy, although the terms upon which the new tenancy is to be granted are disputed;

- "Contested lease renewal proceedings" are those proceedings in which there is an issue about the jurisdiction of the Court under Section 23 of the 1954 Act to grant a new tenancy or the validity of a Section 25 Notice or Section 26 Request is questioned. In addition, or alternatively, the landlord may oppose the grant of a new tenancy on one or more of the grounds under Section 30 of the 1954 Act.

In all cases, whether standard lease renewal proceedings or contested lease renewal proceedings, when an Acknowledgment of Service is filed (either under Part 56.3 (4) (b), (8) or (9)) the court file will be referred to the District Judge.

When considering expert evidence, the parties will be mindful of their obligation to conduct the litigation in a reasonable manner and to avoid unnecessary costs. Their surveyors should, therefore, make every attempt to reach agreement or to narrow issues before they are required to draft and exchange their reports which, of course, should comply with Part 35 and, among other things, include the range of opinions that a reasonable expert might reach. If it transpires that the parties surveyors have not taken such steps, then the Court may make an order that they do so and, in appropriate cases, impose sanctions. Where an expert relies on comparables, consideration should be given to whether or not they need to be proved and, if so, to what extent.

Standard lease renewal proceedings
These proceedings will range from those in which both landlord and tenant agree that no steps are required from the moment the tenant’s proceedings have been served to the time when the terms of the new Lease are agreed, to those at the other end of the spectrum in which the terms of the new Lease are hotly contested and directions will be required from an early stage. However, in the majority of cases it is likely that both landlord and tenant will wish to have an opportunity to negotiate and the landlord will apply for a 3 month stay under Part 56.3.

The Court has a general discretion to continue such a stay. Where both landlord and tenant wish to continue negotiations, the Court will generally order that a stay is continued on the application of both parties by letter, provided the Court is given sufficient information which confirms that the parties are genuinely making efforts to negotiate the terms for a new Lease. The amount of information which the Court will require for succeeding three month periods will increase and it is unlikely that a stay in aggregate exceeding 9 months will be granted unless there are exceptional circumstances. If the Court is not satisfied that a stay should be ordered on the basis of the information which has been provided, a directions hearing will be fixed.

In all cases the parties are encouraged to consider the use of PACT or mediation (whether court-based or otherwise) as alternative post-action procedures.

Where the parties are not agreed that the proceedings (whether multi-track or fast track) should be stayed, the provisions of Part 56.3 as modified by this protocol will apply and directions given under it.. Where the parties are able to agree a timetable for directions, an Order will normally be made by consent without the need for the parties to attend a hearing.

If the landlord is directed to supply a draft Lease and the tenant responds to the draft, the parties may at that stage apply to the Court for a stay not exceeding three months in order to pursue negotiations if they both consent and apply to the Court by letter. Such an application for a stay will generally be granted provided the Court is satisfied that it is for the purposes of bona fide negotiations.

As a general rule, the Court will not order disclosure of documents in standard lease renewal proceedings. Nonetheless, the parties are reminded of the duty to disclose and specifically Part 31.6 CPR. If a party has no document to disclose, he should say so at the earliest opportunity.

The Court will not normally make an order providing for a single expert witness in relation to rent (and interim rent) unless the amount in dispute is relatively low. Each Court will, in its discretion, resolve upon a suitable figure. For the Central London County Court, the appropriate figure will be a difference of £10,000 per annum between the rent proposed by each of the parties. Where such
difference is £10,000 or less, the Court will probably make an order for a single expert witness but retains a discretion not to do so if either party objects.

Contested Lease renewal proceedings

A challenge to the jurisdiction of the Court will arise where:

- the landlord, or the tenant, does not accept that a valid Section 25 Notice, or Section 26 Request, has been served, or;

- the landlord asserts that the tenant did not serve a counternotice under Section 29(2) or that any such counternotice was served too early or too late, or;

- the landlord asserts that the tenant’s application to court was made too early or too late, or;

- the landlord puts the tenant to proof of the requirements in Section 23 that the tenant is in occupation of the premises carrying on a business.

Where the tenant applies to the Court for a new tenancy, but challenges the validity of the Section 25 Notice served by the landlord, the basis upon which the validity of the Section 25 Notice is challenged should be set out briefly in the application to the Court.

Where the landlord challenges the validity of the tenant’s Section 26 Request, the grounds of challenge should be set out briefly in the Acknowledgement of Service. If the landlord puts the tenant to proof that the tenant occupies the premises for the purposes of a business carried on by him, this challenge should normally be made in the Acknowledgement of Service and brief details provided.

The usual order will be that the challenge to jurisdiction or entitlement to a new tenancy is to be dealt with as a preliminary issue prior to the consideration of the terms upon which a new Lease will be granted. Subsequent directions will relate to the trial of the preliminary issue only and directions for the determination for the terms of the lease will be addressed, if necessary, after the preliminary issue has been resolved.

Where a landlord relies on one of the grounds in Section 30 (1) of the 1954 Act (whether or not in addition to a challenge to jurisdiction or entitlement) the landlord’s written evidence should include particulars of the basis upon which the ground is relied upon. These particulars will frequently include the following:
Ground (a) A Schedule of Dilapidations showing the condition of the premises, the work required to remedy it and the covenant of which the tenant is allegedly in breach;

Ground (b) A schedule showing the payment history in respect of rent;

Ground (c) A schedule showing the covenants in respect of which the tenant has been in breach and the breach or breaches complained of;

Ground (d) A description of the alternative accommodation which the landlord intends to provide;

Ground (e) The level of the rent which the Landlord maintains is obtainable on a letting of the whole and of the individual parts together with an explanation showing when the landlord will obtain vacant possession of the remainder of the building;

Ground (f) (i) A description, in summary, of the works which the landlord intends to undertake;

(ii) if consents are required whether they have been obtained and, if not, when they are expected to be obtained;

(iii) the time when the landlord intends to commence such works

(iv) if relevant, an explanation showing when the landlord will obtain vacant possession of the remainder of the building to be developed

(v) evidence of the landlord’s financial ability to carry out the work may sometimes be required.

Ground (g) A description of the business which the landlord intends to carry on at the premises.

Consideration may be given in the case of grounds (a) and (c) whether or not a single joint expert, or a Court appointed expert, would be appropriate. In the case of ground (f) the Court will normally direct that each party is permitted to call one expert.

Some cases will be suitable for management/trial or both in the Central London County Court’s Chancery List. Although the resident judges at Central London all have considerable experience of 1954 Act cases, there are cases which may be helped by being dealt with by a Chancery/Landlord
and Tenant specialist. These would include difficult valuation disputes, complex issues of conveyancing/drafting and others of a similar type. If the parties consider that the case ought to be in the Chancery List and they say so at the outset, the papers can be put before a Chancery circuit judge or one of the two Chancery district judges for consideration and immediate transfer. Alternatively, an order for transfer can be sought at the case management conference. Generally, if such an order is made in this type of case, the Chancery judges will keep the case in the Chancery List unless it appears then (or later) that this would be unsuitable.

THE LANDLORD AND TENANT ACT 1954, PART II

The protection of the Act

The principal Act conferring security of tenure on business tenants and regulating the manner in which business tenancies can be terminated is the LTA 1954 (statutory references in this chapter are to this Act, unless otherwise stated). The protection given to tenants covered by Pt II of the Act is twofold. First, a business tenancy will not come to an end at the expiration of a fixed term, nor can a periodic tenancy be terminated by the landlord serving an ordinary notice to quit. Instead, notwithstanding the ending of the contractual term, the tenancy will be automatically continued under s.24 until such time as it is terminated in one of the ways specified in the Act. Secondly, upon the expiration of a business tenancy in accordance with the Act, business tenants normally have a statutory right to apply to court for a new tenancy and the landlord may only oppose that application on certain statutory grounds. Any new tenancy granted will also enjoy the protection of the Act.

The application of the Act

Section 23(1) provides that:

“This Act applies to any tenancy where the property comprised in the tenancy is or includes premises which are occupied by the tenant and are so occupied for the purposes of a business carried on by him or for those and other purposes”

This involves a number of elements.

There must be a ‘tenancy’
Tenancy includes an agreement for a lease and an Underlease (even an unauthorised one).

**The premises must be occupied by the tenant**

Occupation need not be by the tenant personally. It has been held that occupation may be sufficient where it is conducted through the medium of a manager or agent provided that such representation occupation is genuine and not a sham arrangement. Similarly, s.23(1A) and (1B) provides that the Act will apply where an individual is the tenant but the premises are then occupied by a company in which the tenant has a controlling interest. ‘Controlling interest’ is defined by s.46(2). There are also special rules as to occupation in ss 41, 41A and 46 where a tenancy is held on trust, vested in parties as trustees, or held by one member of a group of companies but occupied by another member of the same group.

Occupation need not be continuous provided that the ‘thread of continuity’ of business user is not broken (Hanock & Willis v GMS Syndicate Ltd (1982) 265 EG 473 and Flairline Properties Ltd v Hassan [1997] 1 EGLR 138). In Pointon York Group plc v Poulton [2006] EWCA Civ 1001, it was held that parking a car in a car parking space during normal business hours could amount to occupation for the purposes of the LTA 1954.

Problems may arise where a business tenant sub-lets part of the property to a business sub-tenant. In such a situation, they cannot both qualify for protection in respect of the sub-let part; there can be no dual occupation for the purposes of the Act. In normal circumstances, it will be the sub-tenant who enjoys the protection of the Act although in an exceptional case the head-tenant may reserve sufficiently extensive rights over the sub-let part that it remains the occupier (see Graysim Holdings Ltd v P&O Property Holdings Ltd [1995] 3 WLR 854).

**The premises must be occupied for the purposes of a business carried on by the tenant**

‘Business’ is widely defined in s.23 to include a ‘trade, profession or employment and includes any activity carried on by a body of persons, whether corporate or unincorporate’. Where the business is carried on by an individual, it must amount to a trade, profession or employment; but where it is carried on by a body of persons (corporate or unincorporate) ‘any activity’ may suffice. Thus, it has been held that the organising of a tennis club and the activities of governors in running a hospital,
both amounted to a business use (Addiscombe Garden Estates v Crabbe [1958] 1 QB 513 and Hills (Patents) Ltd v University College Hospital Board of Governors [1956] 1 QB 90). This does not mean however that the Act will apply whenever the tenant is a body of persons; the ‘activity’ must be correlative to the conceptions involved in the words ‘trade, profession or employment’.

Two problem areas may arise with this requirement.

The demised premises will sometimes be used for two purposes, only one of which is a business user. For example, the letting may consist of a shop on the ground floor with living accommodation above. Does the Act still apply? In cases of mixed user the Act will apply provided the business activity is a significant purpose of the occupation and not merely incidental to the occupation of the premises as a resident (Cheryl Investments Ltd v Saldhana [1978] 1 WLR 1329 and Gurton v Parrot [1991] 1 EGLR 98). In the example mentioned, the Act is likely to apply. If, however, a residential tenant occasionally brought work home with him this would not result in his tenancy being protected under the Act.

The business user might be in breach of a covenant of the lease. How does that affect the tenant’s rights? If the lease merely forbids a specific business use (e.g. not to use the shop as a newsagents), or any use except the business specified (e.g. not to use the premises for any purpose other than as a newsagents), a business use in breach of such a provision will not deprive the tenant of the protection of the Act. However, s.24(3) does exclude from protection any tenancy where the use of the premises for business purposes is in breach of a general prohibition preventing all business use (e.g., not to carry on any business, trade, profession or employment) although if the landlord had consented to acquiesced in the breach, the Act would still apply.

Exclusions from the Act

Apart from those tenancies which fail to satisfy the requirements of s.23, there are other tenancies which are not protected by the Act. These include:

Tenancies at will. In Java v Aqil [1001] 1 WLR 1007, a prospective tenant who was allowed into possession while negotiations proceeded for the grant of a new business lease was held, on the facts, to be a tenant at will, and thus excluded from protection. A similar decision was reached in
London Baggage Co (Charing Cross) Ltd v Railtrack plc [2000] EGCS 57, where a tenant holding over after the expiry of its lease, pending the negotiation of a new lease, was held to be a tenant at will.

Tenancies of agriculture holdings: these have their own form of protection under the Agricultural Holdings Act 1986.

A farm business tenancy.

Mining leases.

Service tenancies. These are tenancies granted to the holder of an office, appointment or employment from the landlord and which continue only so long as the tenant holds such office, etc. For the exclusion to apply the tenancy must be in writing and express the purpose for which it was granted.

Fixed term tenancies not exceeding six months. These tenancies are excluded unless the tenancy contains provisions for renewing the term or extending it beyond six months, or the tenant (including any predecessor in the same business) has already been in occupation for a period exceeding 12 months (see Cricket Ltd v Shaftesbury plc [1999] 2 All ER 283).

‘Contracted out’ tenancies.

The competent landlord

It is between the tenant and the competent landlord that the procedure under the Act must be conducted. It is important, therefore, that the tenant identifies its competent landlord and deals with that landlord. Where a freeholder grants a lease, there is no cause for concern as the tenant’s competent landlord can be no other than the freeholder. However, where the tenant is a sub-tenant, the statutory definition of competent landlord means that the sub-tenant’s immediate landlord may not be its competent landlord. Using s.44 of the Act, the sub-tenant must look up the chain of superior tenancies for the first person who either owns the freehold or who has a superior tenancy which will not come to an end within 14 months.
It is therefore very important for sub-tenants to identify their competent landlord, and this can be done by serving a notice on their immediate landlord under s.40 of the Act seeking information about the landlord’s interest. A s.40 notice should always be served by a sub-tenant before taking any other steps under the Act.

The ‘holding’

The definitely of the holding is important because the tenant’s right to a new lease normally extends to only that part of the premises known as the ‘holding’. Further, many of the landlord’s grounds of opposition refer to the holding. This term is defined in s.23(3) of the Act as being the property comprised in the current tenancy excluding any part which is not occupied by the tenant or a person employed by the tenant for the purposes of the tenant’s business. In practice, in the majority of cases, it is correct to describe the holding as comprising all the premises originally let except those parts which the tenant is currently sub-letting.

Contracting out – before 1 June 2004

As a general rule, s.38(1) forbids any contacting out of the Act. This means that any agreement purporting to exclude or modify the tenant’s security of tenure is void. However, under s.38(4) of the Act the court was empowered to make an order excluding the security of tenure provisions, provided certain conditions were satisfied:

The proposed letting must have been for a term of years certain. Care must be taken not to fall foul of this requirement. In Nicholas v Kinsey [1994] 16 EG 145, a tenancy for 12 months and thereafter from year to year was held to be outside it. More controversially, in Newham London Borough Council v Thomas-Van Staden [2008] EWCA Civ 1414, the landlord had granted its tenant a lease for a term beginning on 1 January 2003 and ending on 28 September 2004. The lease defined this period as ‘the Term’, which expression shall include any period of holding over or extension of it whether by statute or at common law or by agreement’. The Court of Appeal decided that was not for a ‘terms of years certain’, as required by the legislation, because the term had been defined to include a subsequent indefinite period. This again renders the contracting out void.

There must have been a joint application to court by both parties.
The lease entered into must have been substantially the same as the draft lease attached to the
court order (Receiver for Metropolitan Police District v Palacegate Properties Ltd [2001] 2 Ch 131).

Further, and most importantly, the court’s approval must have been obtained before the tenancy
was granted (Essexcrest Ltd v Evenlex Ltd [1988] 1 EGLR 69).

These provisions have now been changed with regard to leases entered into on or after 1 June 2004.
However, the old rules will still be relevant in the case of a dispute between the parties to a
contracted out lease granted before this date if the tenant were to claim that the contracting out
procedures were not correctly followed and that the lease does have security of tenure. Equally, any
potential purchaser of the landlord’s reversion to a contracted out lease will need to check carefully
that the correct procedures were followed in order to avoid as far as possible any such claim by a
tenant.

Contracting out – on or after 1 June 2004

The new rules no longer require a court order, but still require the proposed letting to be for a term
of years certain. Instead the landlord must serve a notice on the tenant in the prescribed form and
the tenant (or someone duly authorised by the tenant) must sign a declaration that he has received
the notice and accepts the consequences of the agreement to contract out. If the notice is served
within 14 days prior to the grant of the tenancy, the tenant must make a statutory de-
claration as to
this before an independent solicitor. The prescribed form of notice contains a ‘health warning’
advising the tenant that he is giving up the right to security of tenure and advising him to seek advice
not only from a solicitor or surveyor but also from his accountant. The ‘instrument creating the
tenancy’, i.e., normally the lease, must then contain reference to the exclusion agreement, the
notice and the declaration. The prescribed form of notice is set out below:

IMPORTANT NOTICE

You are being offered a lease without security of tenure. Do not commit yourself to the
lease unless you have read this message carefully and have discussed it with a
professional adviser.
Business tenants normally have security of tenure – the right to stay in their business premises when the lease ends.

If you commit yourself to the lease you will be giving up these important legal rights.

- You will have no right to stay in the premises when the lease ends.
- Unless the landlord chooses to offer you another lease, you will need to leave the premises.
- You will be unable to claim compensation for the loss of your business premises, unless the lease specifically gives you this right.
- If the landlord offers you another lease, you will have no right to ask the court to fix the rent.

It is therefore important to get professional advice – from a qualified surveyor, lawyer or accountant – before agreeing to give up these rights.

If you want to ensure that you can stay in the same business premises when the lease ends, you should consult your adviser about another form of lease that does not exclude the protection of the Landlord and Tenant Act 1954.

If you receive this notice at least 14 days before committing yourself to the lease, you will need to sign a simple declaration that you have received this notice and have accepted its consequences, before signing the lease.

But if you do not receive at least 14 days’ notice, you will need to sign a ‘statutory’ declaration. To do so, you will need to visit an independent solicitor (or someone empowered to administer oaths).

Unless there is a specific reason for committing yourself to the lease sooner, you may want to ask the landlord to let you have at least 14 days to consider whether you wish to give up your statutory rights. If you then decide to go ahead with the agreement to
exclude the protection of the Landlord and Tenant Act 1954, you would only need to make a simple declaration, and so you would not need to make a separate visit to an independent solicitor.

It is clear that the Government anticipated that the 14-day ‘ordinary’ notice would be the one most used. However, in practice, the statutory declaration procedure is the one most used. This is largely because solicitors are reluctant to serve the notice until the form of the lease has been finalised – and once it has been finalised, parties do not want to have to wait 14 days before the tenant can take up occupation and start paying rent.

The reason for the reluctance stems from a lack of clarity in the new procedure. Under the old law, it has been held that the lease entered into must be in substantially the same form as the one approved by the court for contracting out. It was not made clear under the new provisions whether a similar rule might apply. What if the contracting out notice was signed and then the terms of the lease were substantially renegotiated. Would that original notice still be valid? In order to avoid any possible problems, it is usual practice for the notice not to be signed until the terms of the lease have been substantially agreed.

Another problem to bear in mind with the procedure is the position of any guarantors. It is not unusual in a guarantee agreement to find a covenant by the guarantor that it will enter into a new lease of the premises if the tenant should become insolvent and the liquidator should then disclaim the lease. If it is intended that such lease is also to be contracted out of the Act, notice must be served on and signed by the guarantor before it is legally obliged to take that lease, i.e. before it signs the guarantee agreement, not before the lease itself is granted. Similar principles must be applied when an outgoing tenant is entering into an Authorised Guarantee Agreement. It is likely that this will require the tenant to take a new lease on disclaimer.

Continuation tenancies

A business tenancy protected by the Act will not come to an end on the expiry of the contractual term. Instead, s.24 continues the tenancy on exactly the same terms (except those relating to termination) and at exactly the same rent until it is terminated in accordance with the Act. However, the landlord may be able to obtain an increased rent by asking the court to fix an interim rent under s.24A.
If the tenant ceases occupation of the premises on or before the contractual termination date then one of the qualifying conditions for the Act to apply is no longer fulfilled. In these circumstances a fixed-term tenancy will come to an end by effluxion of time and no continuation of tenancy will arise (see s.27(A1), confirming the decision in Esselte AB v Pearl Assurance plc [1997] 1 WLR 891; see also Surrey County council v Single Horse Properties Ltd [2002] EWCA Civ 367, [2002] 1 WLR 2106). In this situation the tenant will not incur any further liability for rent (the tenant may also choose to serve a s.27 notice in these circumstances, see 31.2).

TERMINATION UNDER THE ACT

A tenancy protected under the Act will not end automatically at the expiration of a lease for a fixed term nor, if it is a periodic tenancy, can it be ended by an ordinary notice to quit given by the landlord. Instead, such a tenancy can only be terminated in one of the ways prescribed by the Act:

(a) By the service of a landlord’s statutory notice (a ‘s.25 notice’).

(b) By the tenant’s request in statutory form (a ‘s.26 request’).

(c) Forfeiture (or forfeiture of a superior tenancy).

(d) Surrender. To be valid the surrender must take immediate effect.

(e) For a periodic tenancy, by the tenant giving the landlord a notice to quit, unless this was given before the tenant has been in occupation for a period of one month.

(f) Where the lease is for a fixed term, by written notice under s.27 of the Act. Where there is at least three months before the contractual expiry date, the tenant can serve a notice under s.27(1), terminating the tenancy on or after the contractual expiry date. As noted above, s.29(A1), confirming the case of Esselte AB v Pearl Assurance plc [1997] 1 WLR 891, provides that if a tenant ceases to
occupy the premises for business purposes on or before the contractual expiry date, the lease will come to an end by effluxion of time and a s.27 notice is not needed. However, Esselte (and s.27(A1)) must now be read in the light of subsequent cases (Bacchiocci v Academic Agency Ltd [1998] 1 WLR 1313 and Slight and Sound Education Ltd v Books etc Ltd [1999] 43 EG 61) which have created uncertainty over the period of absence required before it can be established that the tenant has ceased occupation for the purposes of the Act.

In light of these cases it may be safer for a tenant to proceed by service of a s.27 notice (see also Arundel Corporation v The Financial Training Co Ltd [2000] 3 All ER 456 which again, emphasises the desirability of a s.27 notice). Where the tenancy is already continuing, or where there is less than three months left to the contractual expiry date, the tenant can serve a notice under s.27(2) giving the landlord not less than three months’ notice of the date of termination.

It is the first two of the above methods, the s.25 notice and s.26 request, which are the usual methods of terminating a protected business tenancy.

Section 25 notices

Form

If such a notice is to be effective, it must be in the prescribed form and be given to the tenant by the competent landlord not less than six months, nor more than 12 months, before the date of termination specified in it. The prescribed forms are contained in the Landlord and Tenant Act 1954, Part II (Notices) (England and Wales) Regulations 2004 (SI 2004/1005), although a form ‘substantially to the like effect’ can be used instead. Two slightly different forms are prescribed: one for use where the landlord does not oppose the grant of a new tenancy; and one for use where it does.

The tenant will often seek to attack the validity of its landlord’s notice on the ground that it is not in the correct form. The task of the court in these circumstances is to ascertain whether the notice served is substantially the same as the prescribed form. In doing this, any omission from the notice of matters irrelevant to the tenant’s rights or obligations may not affect the validity of the notice. However, if the court decides that the notice is not the same as, or substantially to the same effect
as, the prescribed form, it is irrelevant that the recipient did not suffer any prejudice: the notice will be invalid (Sabella Ltd v Montgomery [1998] 09 EG 153).

In Smith v Draper [1990] 2 EGLR 69, it was held that a landlord who had served what turned out to be an invalid notice, could withdraw it and serve a second valid notice.

Content

The notice must comply with the following requirements:

(a) The notice must state the date upon which the landlord wants the tenancy to end. The specified termination date must not be earlier than the date on which the tenancy could have been terminated at common law, and the notice must be given not less than six months, nor more than 12 months, before this specified termination date.

For a periodic tenancy or affixed term with a break clause, the specified termination date cannot be earlier than the date upon which the landlord could have ended the tenancy with an ordinary common law notice. If there is a break clause, it would appear that a separate contractual notice is unnecessary provided that the s.25 notice states a date for termination no earlier than the date the break clause would operate (Scholl Manufacturing Ltd v Clifton (Slim-Line) Ltd [1967] Ch 41). If the tenancy is for a fixed term without a break clause, the specified termination date cannot be earlier than the last day of the contractual term. If, however, the contractual tenancy has already expired and the tenancy is being continued under the Act, the s.25 notice need only comply with the six-12-month rule mentioned above.

(b) The notice must state whether or not the landlord will oppose an application to court by the tenant for the grant of a new tenancy and, if so, on which statutory ground(s). The tenant has the right to apply to court for a new tenancy but the landlord can oppose that application on one or more of the seven grounds of opposition set out in s.30 of the Act. If this is the landlord’s intention, it must state in the s.25 notice the ground(s) upon which it intends to rely. As there is
no provision in the Act allowing the landlord to amend its notice, the choice of ground(s) is a matter which must be given very careful consideration.

It will not be in every case that the landlord states a ground of opposition. Often the landlord will be quite happy with the tenant’s presence and is seeking to end the current tenancy simply with a view to negotiating a new tenancy upon different terms, for example, at an increased rent. In this type of situation the landlord should consult a valuer and obtain expert advice before proceeding further. Where the landlord is not opposing the grant of a new tenancy, the landlord’s notice must set out its proposals for the new tenancy, including the property to be comprised in it (i.e. all or part of the property contained in the existing tenancy), the rent to be payable and the other terms proposed.

(c) The notice must relate to the whole of the premises contained in the lease. A s.25 notice cannot relate to part only of the demised premises (Southport Old Links v Naylor [1985] 1 EGLR 66 and see also M&P Enterprises (London) Ltd v Norfolk Square Hotels Ltd [1994] 1 EGLR 129).

(d) The notice must be given and signed by, or on behalf of the landlord. If there are joint landlords, all their names must be given (Pearson v Alyo [1990] 1 EGLR 114).

Section 26 requests

Rather than wait for the landlord to serve a s.25 notice, the tenant can sometimes take the initiative and request a new tenancy from its landlord under s.26 of the Act. However, the tenant must remember that the sooner there is a new tenancy, the sooner the new rent will be payable, which may be higher than the rent payable under the old tenancy. Nevertheless, there are situations where the service of a request by the tenant has tactical advantages for it.

Not all tenants can request a new tenancy. A request cannot be served if the landlord has already served a s.25 notice. Further, a request is only possible where the tenant’s current lease was granted for a term of years exceeding one year (or during its continuance under s.24). This will
exclude both periodic tenants and those with fixed terms of one year or less; although these tenants still enjoy security of tenure.

Form

To be valid, the request must be in the prescribed form as laid down in the Landlord and Tenant Act 1954, Part II (Notices) (England and Wales) Regulations 2004 (SI 2004/1005) and served on the competent landlord. As with the s.25 notice, a form ‘substantially to the like effect’ can be used instead.

Content

The request must comply with the following requirements:

(a) It must state the date on which the new tenancy is to begin. The current tenancy will terminate on that date. This date must not be more than 12 months nor less than six months after the making of the request, and cannot be earlier than the date on which the tenancy would have expired by effluxion of time or been brought to an end by notice to quit given by the tenant.

(b) It must give the tenant’s proposals as to:

(i) the property to be comprised in the new tenancy, which must be either the whole or part of the property comprised in the current tenancy;

(ii) the proposed new rent (this issue requires the advice of a valuer);

(iii) the other terms of the tenancy (e.g. as to duration).

(c) The request must be signed on or behalf of all the tenants.

A landlord who is unwilling to grant a new tenancy must, within two months of receipt of the request give notice to the tenant that it will oppose any application to court for a new lease starting
on which statutory ground(s) of opposition it intends to rely. This is effected by means of a landlord’s counter-notice.

As with a s.25 notice, the landlord must choose its ground(s) of opposition with care because it will be confined to those stated in its counter-notice.

If the tenant serves a valid s.26 request and then fails to apply to court for a new tenancy within time, it will not be allowed to withdraw it and serve a new one with a view to complying with the time limit the second time since the effect of the s.26 request was to fix the date of termination of the tenancy (Stile Hall Properties Ltd v Gooch [1979] 3 All ER 848).

**Reasons for making a request**

Usually a tenant is best advised not to make a request because it is not always in a tenant’s interest to bring its current tenancy to an end. However, there are some situations in which it might be advisable. For example:

(a) If the rent payable under the current tenancy is more than that presently achievable in the open market. In a falling market like this the landlord is unlikely to serve a s.25 notice, as it in its interests to let the existing tenancy continue under the Act. Therefore, the tenant should give careful consideration to ending the current tenancy and obtaining a new one at a reduced rent.

(b) If, as it is more often the case, the current rent is less than the present market rent, it is in the tenant’s interest to prolong the tenancy for as long as possible. In this case the tenant may be able to make what is sometimes called a pre-emptive strike. Say the lease is contractually due to expire on 30 September. In the previous March the landlord is considering serving a s.25 notice with a view to bringing the tenancy to an end of 30 September and negotiating a new tenancy at an increased rent. If the tenant knows or suspects the landlord’s plans, it can, before the landlord has acted, serve a request specifying sometime in the following March as the date for the new tenancy. The tenant has thus achieved an extra six months at the old rent.
(c) If the tenant has plans to improve the premises, it may prefer the certainty of a new fixed term as opposed to the uncertainty of a statutory continuation.

(d) If the tenant has plans to sell the lease, a buyer would prefer the security of a new fixed term rather than the uncertainty of a statutory continuation.

Counter-notices

The tenant’s counter-notice

Under the procedure applicable prior to 1 June 2004 both landlord and tenant had to serve a counter-notice following receipt of a s.26 request or a s.25 notice respectively. However, the requirement for a tenant to serve a counter-notice on receipt of a s.25 notice has now been abolished. The requirement for a landlord to serve a counter-notice remains, however.

The landlord’s counter-notice

The service of a s.26 request by the tenant will require a counter-notice by the landlord if it wishes to oppose the tenant’s application to court for a new tenancy. This must state any ground(s) of opposition that the landlord intends to rely on to oppose the tenant’s application. If the landlord fails to serve a counter-notice within two months of receipt of the tenant’s request, it will lose its right to raise any ground of opposition to the tenant’s application to court for a new tenancy although it will be allowed to raise issues relating to the terms of the new tenancy.

A landlord who has served a counter-notice stating that it will not oppose the tenant’s application for a new tenancy will be bound by that decision. Similarly, the landlord cannot later amend its stated grounds of opposition.

There is no prescribed form of counter-notice but it should be unequivocal and in writing.

Service of notices and requests

Notices and requests given under the Act require service. Section 23(1) of the LTA 1927 provides for personal service or by leaving the notice at the last known place of abode (which includes the place
of business of the person to be served; *Price v West London Investment Building Society* [1964] 2 All ER 318), or by sending it through the post by registered or (as now applies) recorded delivery. Service on a company may be effected at its registered office (s 1139 of the Companies Act 2006). The effect of complying with one of the methods of service laid down in the LTA 1927 is that there is a presumption of service so that it does not matter that the recorded delivery letter may not have been received by the intended recipient because it went astray in the post. Other methods of service may be effective (e.g., the ordinary post) if in fact the notice is received by the person to whom it has been given. But the risk is that the letter may be lost in the post, in which case, notice will not have been given. The question also arises as to the date on which the notice is treated as having been served. In *Railtrack plc v Gojra* [1998] 08 EG 158, it was held that if the registered or recorded delivery method is used (both being methods laid down in the LTA 1927), the notice (or request) is served on the date on which it is posted. This decision was confirmed by the Court of Appeal *CA Webber Transport Ltd v Railtrack plc* [2004] 1 WLR 320. When, however, notice is sent through the ordinary post, it is served on the date it would have been delivered in the ordinary course of post.

**THE APPLICATION TO COURT**

**The need for an application**

It will become apparent after service of a s.25 notice or counter-notice to a s.26 request, whether or not the landlord is willing to grant a new tenancy. Where a s.25 notice has been served, the contents will have told the tenant whether or not the landlord intends to oppose its application. If the tenant initiated the termination procedure with a s.26 request, the landlord will have responded with a counter-notice if it is not prepared to grant a new tenancy.

Either the landlord or the tenant may apply to the court (although, of course, one cannot make an application if the other has already done so). It will usually be the tenant who will apply to the court. Even if the landlord has stated that it is prepared to grant a new tenancy, the tenant will lose its entitlement unless an application is made to the court within the prescribed time limits (see 31.3.2), or the parties have entered into a legally-binding contract for a new lease. Where the landlord is opposing the grant, there is obviously little possibility of such an agreement and so an application must be made.
The landlord will normally only apply to the court where it is opposing the grant and wants an order determining the tenancy on one of the s.30 grounds to be made as quickly as possible. It could wait for the tenant to apply for a new tenancy, but making its own application would mean the matter could be brought before the court as soon as possible. A tenant who fears it will lose in court may delay making its own application for as long as possible in order to gain an extra few weeks or months in the premises. The landlord can only make such application if it has served a s.25 notice opposing renewal or served a counter-notice to a tenant’s s.26 notice to that effect.

Where a landlord is not opposing the grant, it can apply to the court for the grant of that new lease, again in order to have the matter determined as soon as possible. Otherwise, a tenant may delay its own application for as long as possible in order to enjoy the benefit of the more favourable terms of the old lease for as long as possible.

Unless the parties have already entered into a binding lease, the tenant must always apply to court at the appropriate time otherwise it will lose the right to a new tenancy.

The application

Applications may be commenced in either the High Court or, as is more usual, in the county court.

The application must be made within the ‘statutory period’. This is defined in s.29A(2) to mean a period ending, where the landlord served a s.25 notice, on the date specified in its notice; and, where the tenant made a s.26 request, a period ending immediately before the date specified in its request.

However, where the tenant has made a s.26 request, the court cannot entertain an application which is made before the end of the period of two months beginning with the date of the making of the request, unless the application is made after the landlord has served its counter-notice.

Agreements extending time limits

By s.29B the parties can by written agreement extend the time limit for applications and they may do so any number of times. The only provisos are that the first agreement to extend must be made prior to the end of the statutory period of extension agreed in the previous agreement.
Following the tenant’s application to court it is advisable to protect the application by registration of a pending land action under the Land Charges Act 1972. This will make the tenant’s application binding on a buyer of the reversion. Where the landlord’s title is registered, the application may be an overriding interest under the Land Registration Act 2002, Sch 3, but it would nevertheless be prudent to register a unilateral notice against the reversionary title.

INTERIM RENTS

The need for an interim rent

Where the tenant validly applies to court for a new tenancy, its current tenancy does not terminate on the date specified in the s.25 notice or s.26 request. Instead, the Act provides that the current tenancy will be continued until three months after the proceedings are concluded. If the tenancy were to continue at the old rent, there would be an incentive for tenants to delay proceedings as much as possible, because the longer the current tenancy lasts, the longer the old rent (which was usually below current marker rents) remains payable. This is unfair to landlords, particularly in those cases where, due to the effects of inflation, there is substantial differences between the old contractual rent and the rent achievable in the open market. So, under s.29A of the Act, the court may, on the application of either party, determine an ‘interim rent’ to be substituted for the old contractual rent until such time as the current tenancy ceases.

The interim rent will be payable from the earlier date for the termination of the existing tenancy that could have been specified in the s.25 notice or s.26 request that was served to bring the tenancy to an end. So a tenant who serves a s.26 request but states a commencement date for the new tenancy 12 months after service when the contractual termination date is only six months away (and so it could have served six months’ notice) will find that the interim rent will be payable from that earlier date. Either landlord or tenant can apply for an interim rent. Normally, it will be the landlord who will apply as the interim rent is likely to be higher than the existing rent which may have been fixed several years previously. However, in times of falling property values, it might be advantageous for the tenant to apply if the current market rent will be below that being paid under the lease.

Amount
The interim rent will normally be the same as the rent payable under the new tenancy, i.e., an open market rent. However, this will not be the case where there is a significant movement in the market (upwards or downwards) in the intervening period or where the terms of the new tenancy are so different from the terms of the old one to make a substantial difference in the rent. (Bear in mind here that normally the new lease will be on very similar terms to the old lease. Nor will this be the case where the landlord opposes the grant of a new tenancy. In both cases, the following provisions apply:

(a) Section 24A requires the court to assess the interim rent on the basis of a yearly tenancy, while the rent payable under the new lease is usually assessed on the basis of a term of years. Market rents under yearly tenancies are usually less than under fixed terms, since the latter guarantee tenants a more substantial period of occupation.

(b) The court is obliged to have regard to the rent payable under the current tenancy. This is so that the court can exercise a discretion to ‘cushion’ the tenant from too harsh a blow in moving from the old out-of-date contractual rent to the new rent (see English Exporters (London) Ltd v Eldonwall Ltd [1973] Ch 415). However, a ‘cushion’ does not have to be provided in every case. The court has a discretion which it may use to specify the full market rent, especially in those cases where the tenant has already benefited from a low contractual rent for a long time (see, e.g. Department of the Environment v Allied Freehold Property Trust Ltd [1992] 45 EG 156).

Avoiding 24A

While the introduction of interim rents has been a step in the right direction for landlords, many still feel that the application of the ‘cushion’ can produce unfairness. Accordingly, the landlord may wish to avoid s.24A altogether by including a penultimate day rent review in the lease. This would revise the contractual rent just before the contractual term expired. In such a case the harshness of changing from the old rent to the new rent would be suffered during the contractual term without the imposition of any ‘cushion’. Tenants, on the other hand, will wish to resist such a clause.
Another way of avoiding s.24A would be for the landlord, at the lease-drafting stage, to make it clear that the contractual rent review provisions are to continue to apply notwithstanding the ending of the contractual term. Careful drafting would be required to achieve this but the case of Willison v Cheverell Estates Ltd [1996] 26 EG 133 indicates that this is another possibility for the landlord.

**GROUNDS OF OPPOSITION**

When the landlord serves its s.25 notice or counter-notice in response to the tenant’s s.26 request, it must, if it is intending to oppose the grant of a new tenancy, set out one or more of the seven grounds of opposition in s.30 of the Act. The landlord can rely only on the stated ground(s); no later amendment is allowed.

If the landlord has stated a ground of opposition and the tenant’s application proceeds to a hearing, a ‘split trial’ will usually be ordered with the question of opposition being dealt with first as a preliminary issue. Only if the ground is not made out will the terms of the new tenancy be dealt with.

The statutory grounds of opposition are all contained in s.30(1) of the Act and, as will be seen, some of the grounds ((a), (b), (c) and (e)) confer a discretion on the court whether or not to order a new tenancy even if the ground is made out.

**Ground (a): tenant’s failure to repair**

The landlord can oppose the tenant’s application for a new tenancy on the ground of the tenant’s failure to repair the holding. To succeed, the landlord will have to show that the tenant was under an obligation to repair or maintain the holding and that the tenant is in breach of that obligation. Problems can arise where the repairing obligation is divided between the landlord and tenant, for example, where the landlord is responsible for the exterior and the tenant for the interior of the premises. In such cases, an inspection will be necessary to determine the party in breach. The ground only applies to failure to repair the holding, and not to the disrepair of another part of the demised premises not forming part of the tenant’s holding (e.g., where the tenant has sub-let part and it is that part which is in disrepair).
This is one of the discretionary grounds and the landlord is only likely to succeed if the tenant’s breaches are both serious and unremedied at the date of the hearing.

As an alternative, the landlord may be able to commence forfeiture proceedings to terminate the tenancy, this being one of the permitted methods of termination under the Act. This remedy may be available throughout the term and while the tenant may apply for relief, this will usually only be granted if the tenant rectifies the breach.

**Ground (b): persistent delay in paying rent**

The requirement of ‘persistent delay’ suggests that the tenant must have fallen into arrears on more than one occasion. However, the rent need not be substantially in arrears nor need to arrears last a long time. Indeed, there need not be any arrears at the date of the hearing; the court will look at the whole history of payment (see *Hazel v Akhtar* [2002] EWCA Civ 183, [2002] 07 EG 124). Again, this is one of the discretionary grounds and the court is entitled to take into account the likelihood of future arrears arising should a new tenancy be ordered. The tenant should, therefore, consider offering to provide a surety for any new lease ordered.

**Ground (c): substantial breaches of other obligations**

Discretionary ground (c) requires other substantial breaches by the tenant of its obligations in the lease, or some other reason connected with the tenant’s use or management of the holding. Any breach of an obligation may be relied upon by the landlord (e.g., breach of the user covenant) but the breach must be substantial and this will be a question of fact and degree. The ground also extends to reasons connected with the tenant’s use or management of the holding and this has been held to include carrying on a use in breach of planning control.

**Ground (d): alternative accommodation**

The landlord must have offered and be willing to provide or secure alternative accommodation for the tenant. The accommodation must be offered on reasonable terms having regard to the terms of the current tenancy and all other relevant circumstances. Further, the accommodation must be suitable for the tenant’s requirements (including the requirement to preserve goodwill), bearing in
mind the nature and type of its business and the location and size of its existing premises. It seems
that offering the tenant part only of its existing premises may qualify as alternative accommodation.

This ground, unlike the three previously mentioned, is not discretionary. If the landlord proves the
requirements of the ground, the court must refuse the tenant’s application.

Ground (e): current tenancy created by sub-letting of part only of property in a superior tenancy

Ground (e) is the least used ground because the necessary requirements are seldom fulfilled. It only
applies where the current tenancy was created by a sub-letting of part of the property in a superior
tenancy, and the sub-tenant’s competent landlord is the landlord under the superior tenancy. The
competent landlord will succeed if it can show that the combined rents from the sub-divided parts of
a building are substantially less than the rent to be obtained on a single letting of the whole building,
and that it requires possession to let or dispose of the whole.

This is the last of the discretionary grounds.

Ground (f): demolition or reconstruction

Ground (f) is the most frequently used ground. The landlord must show that on termination of the
tenancy:

(a) it has a firm intention;

(b) to demolish or reconstruct the premises in the holding (or a substantial part of them), or to carry out substantial work of construction on the holding (or art of it); and

(c) that it could not reasonably do so without obtaining possession of the holding.

Each of these elements is considered in turn.

The landlord’s intention
The landlord must prove a firm and settled intention to carry out relevant work. It has been said that the project must have ‘moved out of the zone of contemplation ... into the valley of decision’ (per Asquith LJ in *Cunliffe v Goodman* [1950] 2 KB 237, approved in *Betty’s Cafes Ltd v Phillips Furnishing Stores Ltd* [1959] AC 20). Not only must the landlord have made a genuine decision to carry out relevant work, it must also show that it is practicable for it to carry out that intention. This will be a question of fact in each case but the landlord’s position will be strengthened if it has:

(a) obtained (or shown a reasonable prospect of obtaining) planning permission and building regulation approval (if necessary);

(b) instructed professional advisers;

(c) prepared the necessary drawings and contracts;

(d) obtained quotations and secured finance; and

(e) obtained the consent of any superior landlord (if necessary).

Where the landlord is a company, intention is normally evidenced by a resolution of the board of directors. Similarly, local authority landlords should pass an appropriate resolution and have it recorded in their minutes.

The landlord’s intention must be established at the date of the hearing (*Betty’s Cafes Ltd v Phillips Furnishing Stores Ltd*, above). It is thus irrelevant that the s.25 notice (or s.26 counter-notice) was served by the landlord’s predecessor who did not have the necessary intention. See also *Zarvos v Pradhan* [2003] 2 P & CR 9 where a landlord failed at the hearing because the judge was not satisfied that it would be able to finance the project. The landlord appealed and by the time of the appeal had received assurances from its bank that finance would be available. The Court of Appeal refused to allow the landlord to adduce this evidence at the appeal as this would be unfair to the tenant.

If the court is not satisfied that the landlord’s intention is sufficiently firm and settled at the date of the hearing, a new tenancy will be ordered. In such cases, however, the court in settling the terms
of the new tenancy, may take into account the landlord’s future intentions, and limit the duration of the new tenancy so as not to impede development later when the landlord is able to fully establish intention and the ability to carry it out (see 31.7.2).

The nature of the works

The landlord must prove an intention to do one of six things:

(a) Demolish the premises comprised in the holding (see *Coppin v Bruce-Smith [1998] EGCS 45*).

(b) Reconstruct the premises comprised in the holding. For the works to qualify as works of reconstruction it has been held that they must entail rebuilding and involve a substantial interference with the structure of the building but need not necessarily be confined to the outside or loadbearing walls (*Romulus Trading Co Ltd v Henry Smith’s Charity Trustees [1990] 2 EGLR 75*).

(c) Demolish a substantial part of the premises comprised in the holding.

(d) Reconstruct a substantial part of the premises comprised in the holding.

(e) Carry out substantial work of construction on the holding. It has been held that such works must directly affect the structure of the building and must go beyond what could be more properly classified as works of refurbishment or improvement (*Barth v Pritchard [1990] 1 EGLR 109*).

(f) Carry out substantial work of construction on part of the holding.

The need to obtain possession

The landlord must show that it could not reasonably execute the relevant work without obtaining possession of the holding. This means the landlord must show that it needs ‘legal’ (not just
‘physical’) possession of the holding. It has to show that it is necessary to put an end to the tenant’s interest, and this may not always be the case. Accordingly, if the lease contains a right of entry for the landlord which is sufficiently wide to enable it to carry out the relevant work, its ground of opposition will fail. In such a situation, the tenant will be able to argue that the work can be carried out under the terms of the lease and there is thus no need to end it.

Even if the lease does not include a right of entry, the landlord may still fail in its opposition if the tenant is able to rely on s.31A of the Act. This provides that the court shall not find ground (f) to be established if the tenant will either:

(a) agree to a new lease which includes access and other rights for the landlord, which enable the landlord to reasonably carry out the relevant work without obtaining possession and without substantially interfering with the use of the holding for the tenant’s business; or

(b) accept a new lease of an economically separable part of the holding, with, if necessary, access rights for the landlord.

Ground (g): landlord’s intention to occupy the holding

Ground (g) is another frequently used ground. The landlord must prove that on the termination of the current tenancy it intends to occupy the holding for the purposes, or partly for the purposes, of a business to be carried on by it, or as its residence. There are a number of elements to this ground which will be considered in turn.

The landlord’s intention

As with ground (f), the landlord’s intention must be firm and settled, and many of the matters discussed at 31.5.6 will be equally relevant here. Therefore, not only must the landlord be able to show a genuine intention to occupy the holding, it must also show that it has a reasonable prospect of being able to do so. It is, therefore, necessary for the court to take into account, for example, whether planning permission would be required to use the premises for the landlord’s business and, if so, whether it would be likely to be granted. In some cases, the court has accepted as evidence of intention to occupy, an undertaking to do so given by the landlord. Such an undertaking is not
conclusive but it is a relevant consideration when the court is determining the issue (see, e.g., London Hilton Jewellers Ltd v Hilton International Hotels Ltd [1990] 1 EGLR 112). As with ground (f), the landlord’s intention must be shown to exist at the date of the hearing.

The court will not assess the viability of the landlord’s proposed business venture provided its intention to occupy is genuine. Thus, the court has held the ground to be established even where they thought the landlord’s business plans to be ill thought out and likely to fail; its intention was nevertheless genuine. See, for example, Dolgellau Golf Club v Hett [1998] 2 EGLR 75, CA, but also the contrasting case of Zarvos v Pradhan [2003] EWCA Civ 208, where possession was refused as the landlord could not establish a reasonable prospect of being able to raise finance.

The purpose of occupation

Occupation must be for the purpose of the landlord’s business or as its residence. The landlord need not intend to occupy all the holding immediately, provided that within a reasonable time of termination it intends to occupy a substantial part of the holding for one of these purposes.

The wording of this ground refers to a business to be carried on by the landlord. However, the landlord need not physically occupy the premises and it will be sufficient if occupation is though a manager or agent provided that the arrangement is genuine. Further, the ground is still available where the landlord intends to carry on the business in partnership with others. Where the landlord has a controlling interest in a company, any business to be carried on by the company, is treated as a business carried on by the landlord. The landlord has a controlling interest for this purpose, either if it beneficially holds more than half of the company’s equity share capital, or if it is a member and able, without consent, to appoint or remove at least half of the directors (s.30(3)). Where the landlord is a company in a group of companies, it may rely on ground (g) where another member of the group is to occupy the premises (s.420). If the landlord is a trustee, he may be able to rely on an intention to occupy by a beneficiary (s.41).

The five-year rule

The most important limitation on the availability of this ground of opposition is the ‘five-year rule’ in s.30(2) of the Act. A landlord cannot rely on ground (g) if its interest was purchased or created within five years before the end of the current tenancy, i.e., the termination date specified in the
s.25 notice or s.26 request. However, the restriction only applies if, throughout those five years, the premises have been subject to a tenancy or series of tenancies within the protection of the Act.

The idea behind the provision is to stop a landlord buying a reversion within five years of the end of the lease, and then using this ground to obtain possession for himself at the end of the term. Thus, a landlord will not be able to rely on this ground if it purchased the premises subject to the tenancy within the last five years. However, the restriction does not apply where a landlord buys premises with vacant possession, grants a lease, and then seeks to end the lease within five years relying on this ground.

The wording of the provision refers to the landlord’s interest being ‘purchased’ and this is used in its popular sense of buying for money (Bolton (HL) Engineering Co Ltd v Graham & Sons Ltd [1957] 1 QB 159). Thus, it will not cover a freeholder who has accepted the surrender of a head-lease without payment, and then seeks to use this ground against the sub-tenant.

Finally, a landlord who is unable to rely on ground (g) because of this restriction, may be able to rely on ground (f) if it intends to demolish or reconstruct the premises. This remains so even if the landlord then intends to use the reconstructed premises for its own occupation.

**COMPENSATION FOR FAILURE TO OBTAIN A NEW TENANCY**

On termination, a tenant may be entitled to compensation for any improvements it has made. Additionally, if the tenant is forced to leave the premises it may lose the goodwill which it has built up and it will be faced with all the costs of relocation. This is particularly unfair to those tenants that are forced to leave the premises through no fault of their own, i.e., if the landlord establishes one of the grounds of opposition (e), (f) or (g). In certain circumstances, therefore, the tenant may be entitled to compensation for failing to obtain a new tenancy where the landlord establishes one of these ‘no fault’ grounds.

**Availability**

Compensation is only available on quitting the premises in one of the following situations:
(a) Where the landlord serves a s.25 notice or counter-notice to a s.26 request stating one or more of the grounds of opposition (e), (f) or (g) but no others, and the tenant either:

(i) does not apply to court for a new tenancy or does so but withdraws its application; or

(ii) does apply to court for a new tenancy, but its application is refused because the landlord is able to establish its stated ground.

(b) Where the landlord serves a s.25 notice or counter-notice to a s.26 request specifying one or more of the grounds (e), (f) or (g) and others; the tenant applies to court for a new tenancy but the court refuses to grant a new tenancy solely on one or more of the grounds (e), (f) or (g). Here the tenant must apply to court for a new tenancy and ask the court to certify that a new tenancy was not ordered solely because one of these three ‘no fault’ grounds has been made out.

**Amount**

The amount of compensation is the rateable value of the holding multiplied by the ‘appropriate multiplier’ which is a figure prescribed from time to time by the Secretary of State, and is currently 1. In some cases, the tenant will be entitled to double compensation.

**Double compensation**

Sometimes the appropriate multiplier is doubled. This happens when the tenant or its predecessors in the same business have been in occupation for at least 14 years prior to the termination of the current tenancy.

**Contracting out**

In some situations the tenant’s right to compensation can be excluded by agreement between the parties. This agreement is often in the lease itself. However, s.38(2) of the Act provides that where the tenant or its predecessors in the same business have been inoccupation for five years or more
prior to the date of quitting, any agreement to exclude or reduce the tenant’s right to compensation is void.

**THE RENEWAL LEASE**

If the tenant follows all the correct procedures and properly applies to court for a new tenancy, the court will make an order for a new lease in two situations:

(a) if the landlord fails to make out its s.30 ground of opposition; or

(b) if the landlord did not oppose the tenant’s application for a new tenancy.

The terms of this new lease are usually settled by agreement between the parties and it is only in default of such agreement that the court will be called upon to decide the terms. In either event, any lease will also enjoy the protection of the Act.

The court has jurisdiction over the premises, duration, rent and the other terms.

**The premises**

The tenant is entitled to a new tenancy of the holding only as at the date of the order. This excludes any part of the premises which have been sub-let. However, the landlord (but not the tenant), has the right to insist that any new tenancy to be granted shall be a new tenancy of the whole of the demised premises including those parts sub-let.

The court may grant a new lease of less than the holding under s.31A, where the landlord established ground (f), the redevelopment ground, but the tenant takes a new lease of an ‘economically separable part’ of the holding.

The new lease may also include appurtenant rights enjoyed by the tenant under the current tenancy.

**The duration**
The length of any new lease ordered by the court will be such as is reasonable in all the circumstances but cannot exceed 15 years (often it is much less than this). In deciding this issue the court has a wide discretion and will take into account matters such as:

(a) the length of the current tenancy;
(b) the length requested by the tenant;
(c) the hardship caused to either party;
(d) current open market practice;
(e) the landlord’s future proposals.

It may be that the landlord was unable to rely on ground (f) because it could not prove that its intention to demolish or reconstruct was sufficiently firm and settled at the date of the hearing. If, however, the court is satisfied that the landlord will be able to so soon in the near future, it may order a short tenancy so as not to impede development later. Similarly, if the premises are shown to be ripe for development, the new lease may be granted subject to a break clause (National Car Parks Ltd v The Paternoster Consortium Ltd [1990] 15 EG 53). In the same way, where the landlord has narrowly missed being able to rely on ground (g) because of the five-year rule, the court may be prepared to grant a short tenancy.

The rent

The amount of rent to be paid is the greatest source of disagreement between the parties and specialist valuation advice will be essential. If the question of rent comes before the courts, they will assess an open market rent having regard to the other terms of the tenancy. However, in assessing the rent, the court is obliged to disregard certain factors which may otherwise work to the detriment of the tenant, i.e.:
(a) Any effect on rent of the fact that the tenant or its predecessors have been in occupation. The classic landlord’s argument would be that the tenant, being a sitting tenant, would pay more in the open market for these premises simply to avoid relocation. This would inflate an open market rent and is thus to be disregarded.

(b) Any goodwill attached to the holding due to the carrying on of the tenant’s business. The tenant should not have to pay a rent assessed partly on the basis of goodwill it generated.

(c) Where the holding comprises licensed premises, any addition in value due to the tenant’s licence.

Where the premises are in disrepair due to the tenant’s failure to perform its repairing obligation conflicting views have been expressed on whether the court should disregard this in setting the rent of the new tenancy. One view is that the premises should be valued in their actual condition this will probably produce a lower rent but the landlord may be able to sue the tenant for breach of its repairing obligation.

The other view is that the premises should be valued on the basis that the tenant has complied with its obligation, thus preventing the tenant benefiting from its own breach. This view is supported by cases such as Crown Estate Commissioners v Town Investments Ltd [1992] 08 EG 111.

In Fawke v Viscount Chelsea [1980] QB 441, the premises were in disrepair because the landlord was in breach of his repairing obligation. The court decided that the premises should be valued in their actual condition and, therefore, fixed a new rent which was below open market value but which increased once the landlord had complied with his obligation.

Under s.34(3), the court has power to insert a rent review clause in the new lease whether or not the previous lease contained such a provision. The frequency and type of review is at the discretion of the court which may be persuaded by the tenant to make provision for downward revisions as well as upward (see Foubuoys plc v Newport Borough Council [1994] 24 EG 156).
As to the effect of the LT(C)A 1995.

Finally, the court does have power to require the tenant to provide guarantors.

**Other terms**

It will only fall to the court to decide other terms in the absence of agreement between the parties. In fixing the other terms the court must have regard to the terms of the current tenancy and all other relevant circumstances. For that reason, the terms will be much the same as before. The leading case in this area is *O’May v City of London Real Property Co Ltd* [1983] AC 726 which held that if one of the parties seeks a change in the terms, it is for that party to justify the change. Further, the change must be fair and reasonable and ‘take into account, amongst other things, the comparatively weak negotiating position of a sitting tenant requiring renewal, particularly in conditions of scarcity’ (per Lord Hailsham in *O’May*). Therefore, the tenant should be on its guard against any attempt by the landlord to introduce more onerous obligations into the new lease (e.g. a more restrictive user covenant). In the *O’May* case the landlord was, in effect, trying to transfer the responsibility for the repair and maintenance of office premises to the tenant. This would have increased the value of the reversion by more than £1 million but the House of Lords held that the landlord was not entitled to do this. Notwithstanding the effect of the *O’May* case, variations may be made in the renewal lease to reflect the changes introduced by the LT(C)A 1995. The renewal lease will, of course, be subject to the provisions of that Act. This will often mean that under the current lease (granted before 1 January 1996) the original tenant was liable for the entire duration of the term through privity of contract: whereas for the renewal least, privity of contract will not apply. This change is one of the circumstances to which the court must have regard in fixing rent and other terms of the new lease. For example, the landlord may wish to alter the terms of the alienation covenant to balance the effect of the loss of privity of contract (see *Wallis Fashion Group Ltd v General Accident Life Assurance Ltd* [2000] EGCS 45).

**THE ORDER FOR THE NEW LEASE**

Any new lease ordered by the court will not commence until three months after the proceedings are ‘finally disposed of’. This is when the time for appeal has elapsed, and for appeals to the Court of Appeal the time limit is four weeks from the date of the order. The tenant continues to occupy under its old tenancy during this period. Either party may appeal.
If the court makes an order for a new tenancy upon terms which the tenant finds unacceptable (e.g., as to rent), the tenant may apply for revocation of the order within 14 days.

**LANDLORD AND TENANT – RENT AND SERVICE CHARGES**

Rent is a periodical sum issuing out of hte land paid by the tenant to the landlord for the exclusive possession of the land out of which it issues and for non-payment of which distress may be levied *(Escales Properties Ltd v Robinson* [1995] 2 E.G.L.R. 23).

Rent may be recovered by distress or by action. Claims for rent are actions for a contractual debt. Distress allows a landlord to secure the payment of rent by seizing goods and chattels found upon the premises in respect of which the rent is due. The limitation period in respect of an action brought or a distress made to recover arrears of rent is six years from the date on which the arrears became due (Limitation Act 1980 s.9).

Although claims for rent are largely a matter of contract law there are some statutory restrictions upon the right of recovery. For example, various insolvency procedures impact upon liability for rent and proceedings to recover rent. Further protection is given to residential tenants. Sections 46(1) and 48 of the Landlord and Tenant Act 1987 impose notice requirements upon a landlord of a tenant of premises consisting of or including a dwelling and not held under a tenancy to which Pt II of the Landlord and Tenant Act 1987 applies. Where the tenant of such premises has not been supplied with an address in England and Wales at which notices may be served by the tenant upon the landlord any rent (or service charge) otherwise due from the tenant shall be treated for all purposes as not being payable.


The Landlord and Tenant Act 1985 contains most of the relevant provisions. The Commonhold and Leasehold Reform Act 2002, extends the definition of service charge in s.18 of the 1985 Act to include improvements. Section 19(1) of the 1985 Act provides that service charges are recoverable.
(a) only to the extent that they are reasonably incurred and (b) where they are incurred in the provision of services or the carrying out of works, only if the services or works are of a reasonable standard. Where a service charge is due before expenditure is incurred, only a reasonable amount is payable. Section 27A (as inserted by the Commonhold and Leasehold Reform Act 2002) confers jurisdiction upon the leasehold valuation tribunal to determine disputes as to reasonableness, whether a service charge is or will be payable and to whom, by whom, when and how such a payment is to be made. The leasehold valuation tribunal’s jurisdiction includes the jurisdiction to consider the reasonableness of service charges which have been paid, including service charges paid before s.27A came into force on September 30, 2003: see *Sinclair Gardens Investments (Kensington) Ltd v Wang and Others* (May 23, 2006) per H.H.J. Huskinson, Lands Tribunal.

Sections 20A, 20B and 20C of the Landlord and Tenant Act 1985 impose further restrictions upon the amount of service charge recoverable. Section 20A requires a landlord to give credit in respect of works qualifying for certain grants. Under s.20B a service charge demand may not include costs incurred more than 18 months before the demand is served on the tenant unless, within those 18 months, he was notified in writing that the costs had been incurred and he would be required to pay for them in due course. Section 20C allows a tenant to apply for an order that all or any of the legal costs incurred by the landlord in connection with proceedings under the Landlord and Tenant Act 1985 are irrecoverable as service charge.

The Landlord and Tenant Act 1985 ss.21 and 22 provide that a tenant may require the landlord to supply a written summary of costs recoverable as service charge and to allow him to inspect supporting accounts in respect of any summary so supplied. The Commonhold and Leasehold Reform Act 2002 substitutes ss. 21 and 22 and inserts ss.21A and 21 B. The new s.21 imposes upon the landlord an obligation to supply tenants with a written statement of account for each accounting period tougher with an accountant’s certificate dealing with specified mattes. Under s.21B the statement must include a summary of the tenant’s rights and obligations the Service Charges (Summary of Rights and Obligations and Transitional Provisions) (England) Regulations 2007 make provision for the contents of a demand for payment of a service charge in relation to S.21B to take effect from October 1, 2007. In the absence of compliance with those provisions a tenant may, under s.21A, withhold payment of a service charge up to a prescribed amount unless a leasehold valuation tribunal determines that a landlord has a reasonable excuse for his default. The new s.22 modifies the procedure in respect of inspection of documents to bring it in line with the new s.21.
Under s.47 of that Act, a written demand for rent of other sums made by a landlord to a residential tenant must contain the name and address of the landlord in England and Wales. Any claim for service charges is treated as not being due at any time before the landlord complies with the requirement. Further, s.42 of the Landlord and Tenant Act 1987 provides that where tenants of two or more dwellings are required under the terms of their leases to contribute to the same costs by payment of service charge (as defined in s.18 of the Landlord and Tenant Act 1985) the monies are to be held under a statutory trust. The Commonhold and Leasehold Reform Act 2002 inserts new ss.42A and 42B requiring such trust fund to be held in a designated account at a relevant financial institution and imposing sanctions for breach of that requirement. To date the insertion of ss.42A and 42B has been brought into force only insofar as it confers power to make regulations.

LANDLORD AND TENANT: COVENANTS AGAINST ASSIGNMENT

At common law, a tenant has a right to assign his lease or to sub-let unless restrained by the terms of his lease from doing so (Doe d. Mitchinson v Carter (1798) 8 term, Rep. 57.

Often, however, a lease will contain specific terms as to the circumstances in which the tenant may assign, sub-let or part with possession of the demised premises. In certain types of tenancies, provisions relating to alienation will be implied, e.g. secure tenancies under the Housing Act 1985, assured tenancies under the Housing Act 1988 and agricultural tenancies under the Agricultural Holdings Act 1986.

Covenants prohibiting alienation, which run with the land, are either absolute containing an absolute prohibition or alienation or qualified containing a prohibition on alienation subject to conditions. Often, such a condition will be that the premises cannot be assigned or sub-let without the consent of the landlord. If the consent of the landlord is required, it is for the assignor to obtain such consent prior to the assignment taking place (Lloyd v Crispe (1813) 5 Taunt. 249; Davis v Nisbett (1861) 10 C.B. (N.S.) 752).

By s.19(1) of the Landlord and Tenant Act 1927, there is implied into every qualified covenant against assignment, sub-letting, charging or parting with possession without the landlord’s consent, a proviso to the effect that such licence or consent cannot be unreasonably withheld. The section does not apply to absolute covenants against alienation (Woolworth & Co. v Lambert [1937] Ch. 37). Nor does it apply to leases of agricultural holdings within the meaning of the Agricultural Tenancies
Act 1986 pr farm business tenancies within the meaning of the Agricultural Tenancies Act 1995 (see s.19(4) of the 1927 Act); assured periodic tenancies (Housing Act 1988 s.15(2)); or to a covenant entered into to give effect to the Leasehold Reform Act 1967 (ss.30(2), (5) of the 1967 Act). Further, where a landlord is entitled to insist on approved guarantors for an assignee, there is no statutory requirement that the landlord should act reasonably, although requests made by the landlord for information about the proposed guarantors must be genuinely intended to ensure his financial security: *Mount Eden Land Ltd v Towerstone Ltd* [2002] 27 E.G. 97, CS.

The parties to a lease “cannot by the terms of their contract abrogate the right and duty of the court, in the event of a dispute as to the reasonableness of the withholding of consent where consent is required by the terms of the lease, to decide by an objective standard whether or not the refusal is reasonable. Thus if the parties by their contract purport to say that in such and such circumstances the landlord may withhold his consent, that term of the contract is invalid and is to be disregarded. The court decides whether, in the circumstances which actually existed the refusal f consent is reasonable”: *Bocardo v S & M Hotels* [1980] 1 W.L.R. 17. In *Level Properties Ltd v Balls Brothers Ltd* [2007] EWHC 744 the court held that a provision in a business lease that provided that licence to assign was not to be unreasonably withheld ‘subject to compliance with the following requirements’ was not contrary to s.19(1). In respect of “qualifying leases” i.e. new leases pursuant to the Landlord and Tenant (Covenants) Act 1995, the position has changed. Section 19(1A) of the 1927 Act allows new leases (as defined in s.1 of the 1995 Act) to contain specific reasons or conditions upon which the landlord may rely to refuse consent.

If a landlord unreasonably refuses his consent, the tenant may simply assign or sub-let although in doing so, he runs the risk that he is incorrect about the unreasonableness of the refusal. A safer course is to seek a declaration from the court that the refusal is unreasonable and a declaration that in the circumstances, the tenant is free to assign or sub-let.

A claim under the 1927 Act is a “landlord and tenant claim” within the meaning of CPR Pt 56. Such a claim must be brought under Pt 8 of the CPR as modified by Pt 56 thereto.

The landlord now has a statutory duty to deal with an application for consent under the Landlord and Tenant Act 1988. Under that Act, the landlord has a duty, within a reasonable time to provide a written response to a written application for consent either giving consent unless it is reasonable to withhold consent or stating that he will not give consent and his reasons for refusal. It is for the
landlord to show that the reasons given by him for refusal or the conditions imposed by him are reasonable (see s.1(6)(c) of the 1988 Act and Footwear Corporation Ltd v Amplight Properties Ltd [1999] 1 W.L.R. 551). Where, however, the question is not whether consent has been unreasonably withheld but whether a condition precedent to the triggering of the landlord’s duty has been fulfilled, the burden of proof remains on the tenant: Allied Dunbar Assurance Plc v Homebase Ltd [2002] E.G.L.R. 23; Crestfort Ltd v Tesco Stores Ltd [2005] EWHC 805 (Ch) [2005] 3 E.G.L.R. 25. A landlord who breaches his duties under the 1988 Act may additionally be liable for damages of breach of statutory duty. The landlord may only rely upon those reasons for refusal which he relied upon in his written response under the Act, even if it later transpires that he had a good reason upon which he did not rely (Footwear Corporation v Amplight Properties [1999] 1 W.L.R. 551). A landlord who breaches his statutory duty may be held liable for exemplary damages if he embarks on a deliberate policy to make a profit by unreasonably delaying or refusing consent: Design Progression Ltd v Thurloe Properties Ltd [2004] EWHC 324; [2004] 1. E.G.L.R. 121.

As to the test to be employed to discover whether a reason for refusal is reasonable, see International Drilling Fluids v Louisville Investments (Uxbridge) [1986] Ch. 513 and Roux Restaurants v Jaison Property Development (1996) 74 P. & C.R. 357; Ashworth Frazer v Gloucester City Council [2001] 1 W.L.R. 2180; NCR Ltd v Riverland Portfolio No 1 Ltd [2005] EWCA Civ 312; and Norwich Union Life and Pensions v Linpac Mouldings Ltd [2009] EWHC 1602 (Ch); [2010] 1 P. & C.R. 11.

Where the clause prohibits assignment, a parting with possession by licence or a sharing of possession will not be a breach of the covenant.

A breach of the covenant prohibiting alienation may give rise to forfeiture proceedings or a claim to damages. In some circumstances, a landlord may obtain an injunction requiring the assignee to assign the lease back to the assignor (Esso Petroleum v Kingswood Motors (Addlestone) [1974] Q.B. 142; Hemingway Securities v Dunraven (1994) 71 P. & C.R. 30 (sub-letting).

**LANDLORD AND TENANT – OTHER COVENANTS**

**Use.** Often a landlord will wish to dictate how the premises can be used. The value of a landlord’s interest may be at risk if the premises are not used in a manner which is in accordance with good estate management. Residential tenancies will almost invariably contain a covenant restricting use
for trade or business purposes. Use covenants run with the land so that they bind assign of the term and reversion.

Use covenants can be positive (requiring the tenant to use the premises as, say, a supermarket) or negative (restraining the tenant from using the premises for anything other than, say, residential use). Further, covenants can be absolute or qualified, a change of use usually being subject to landlord’s consent. Section 19(3) of the Landlord and Tenant Act 1927 makes it unlawful to demand a fine in return for the rite of consent to change of use.

If the covenant permits a change of use within the consent of the landlord not to be unreasonably withheld, then the test of reasonableness is similar to that for assignments.

The burden of establishing an unreasonable refusal of consent to a change of use remains, however, on the tenant: *Luminar Leisure v Apostole* [2001] 42 E.G. 140; *Kalford v Peterborough City Council* [2001] E.G.C.S. 42.

The landlord an obtain damages for breach or, in the case of a negative covenant, an injunction to restrain a breach. The landlord may also choose to forfeit the lease for breach of the use covenant.

**Insurance.** Usually, the lease will make provision for either the landlord or the tenant to insure the building. Often, the lease will also contain obligations on the insuring party to reinstate the building if it is destroyed by an insured risk. Where a tenant has covenanted to do so, a failure to insure, even for a short period, is a breach of covenant even if no insured risk occurs during that period. In the case of a premium recoverable as part of a service charge in a residential lease, the sum will not be recoverable unless it is reasonable in amount: Landlord and Tenant Act 1985 s.19.

**Alteration.** Leases commonly contain tenant’s covenants against altering the premises. Covenants may also be absolute or qualified, usually requiring the landlord’s consent. Often covenants are hybrid so that the landlord’s consent is required for structural works of alteration but not for non-structural work.

Section 19(2) of the Landlord and Tenant act 1927 implies into some qualified covenants against making improvements a proviso that the landlord’s consent is not to be unreasonably withheld. An “improvement” for the purposes of s.19(2) is any alteration which is an improvement to the premises from the point of view of the tenant (*Lambeth v Woolworth & Co.* [1938] Ch. 883). The
proviso is not implied into leases of agricultural holdings, farm business tenancies or mining leases (s.19(4) of the 1927 Act). Separate statutory codes apply to protected and statutory tenancies (Housing Act 1980 s.81) and to secure tenancies (Housing Act 1985, s.97).

In the context of a qualified covenant against the making of alterations, the following guidelines have been given by the Court of Appeal (Iqbal v Thakrar [2004] 3 E.G.L.R. 21):

(a) The purpose of the covenant is to protect the landlord from the tenant effecting alterations and additions that could damage the property interests of the landlord.

(b) A landlord is not entitled to refuse consent on grounds that have nothing to do with its property interests.

(c) It is for the tenant to show that the landlord has unreasonably withheld its consent to the proposals that the tenant has put forward. Implicit in that is the necessity for the tenant to make is sufficiently clear what its proposals are, so that the landlord knows whether it should refuse to give consent to the alterations or additions.

(d) It is not necessary for the landlord to prove that the conclusions that led it to refuse consent were justified if they were conclusions that might have been reached by a reasonable landlord in the particular circumstances.

(e) It might be reasonable for the landlord to refuse consent to an alteration or addition to be made for the purpose of converting the premises for a proposed use even if not forbidden by the ease. But whether such refusal would be reasonable will depend upon all the circumstances. For example, it might be unreasonable if the proposed use was a permitted use and the intention of the tenant in acquiring the premises to use them for that purpose was known to the freeholder acquired the freehold.

(f) Although a landlord will usually need to consider its own interests, there might be cases where it would be disproportionate for a landlord to refuse consent, having regard to the effects upon it and upon the tenant respectively.

(g) Consent cannot be refused on the grounds of pecuniary loss alone. The proper course for the landlord to adopt in such circumstances is to ask for a compensatory payment.
In each case it will be a question of fact, dependant upon all the circumstances, as to whether the landlord, having regard to the actual reasons that impelled it to refuse consent, had acted reasonably.

An unreasonable refusal of consent will entitle the tenant to proceed to carry out the improvement without obtaining the consent of the landlord or to seek a declaration from the court that the landlord has unreasonably withheld his consent. The tenant is not entitled to damages.

Part I of the Landlord and Tenant Act 1927 enables a tenant of business premises to carry out improvements if he follows the correct procedure and either the landlord does not object to the works within a specified time or the court decides that the works proposed constitute a proper improvement (s.3 of the 1927 Act). In such circumstances even an absolute covenant against alteration may be overridden. A tenant who has complied with the procedural requirements may also claim compensation for the improvements at the end of his tenancy (s.1 of the 1927 Act).

A claim under the 1927 Act is a “landlord and tenant claim” within the meaning of CPR Pt 56. Such a claim must be brought under Pt 8 of the CPR as modified by Pt 56 thereto.

The covenant is broken if the landlord or someone claiming under him does anything which substantially interferes with the tenant’s title or possession of the demised property or with his ordinary or lawful enjoyment of them. Physical interference will normally be a breach though such interference is not essential. An omission may amount to a breach if the landlord is also in breach of some independent duty to the tenant such as an obligation to repair. Where a lease imposes repairing obligations on the landlord and it carries out necessary repairs in performance of those obligations causing disturbance to the tenant the landlord is not in breach of its covenant for quiet enjoyment for failing to take all possible rather than reasonable precautions: Goldmile Properties Ltd v Lechouritis [2003] 2 P. & C.R. 1.

The landlord is liable under the covenant in respect of a nuisance committed by another of his lessees if he actively participates in the acts, authorises them or continues or adapts the acts. He will not be liable merely because he knows of the acts and takes no steps to prevent them, nor for the unlawful acts committed by persons claiming under him (Martania v National Provincial Bank [1936] 2 All E.R. 633; Mowan v Wandsworth London Borough Council (2001) H.L.R. 56; Southwark LBC v Mills [1999] 4 All E.R. 449, HL; Octavia Hill Housing Trust v Brumby [2010] EWHC 1793 (QB).
Derogation from Grant. A landlord may not derogate from his grant. Such an obligation will be implied into every lease. In other words, he may not by his voluntary acts prejudice any rights which he has created – having given a thing with one hand, he is not to take it away with the other (Birmingham Dudley & District Banking Company v Ross (1888) 38 Ch. D. 295).

The obligation not to derogate from grant and the covenant for quiet enjoyment are substantially the same: it has been said that there is little, if any, difference between the two (Southwark LBC v Mills [1999] 4 All E.R. 449). Accordingly, the two will often be pleaded together.

The doctrine of derogation from grant is usually invoked specifically where the property is let for a particular purpose and the acts of the landlord substantially interfere with the use of the property for the purpose (Aldin v Latimer Clark Muirhead & Co. [1894] 2 Ch. 437; Harmer v Jumbil (Nigeria) Tin Areas Ltd [1921] Ch. 200).

For the principles underlying the obligation not to derogate from a grant see Platt v London Underground Ltd [2001] 20 E.G. 227.

DISREPAIR AND DILAPIDATIONS

The term “disrepair” is more often used in the context of residential landlord and tenant disputes; whereas “dilapidations” is often the term used in commercial/business landlord and tenant matters.

RESIDENTIAL DISREPAIR

A repairing obligation can either will rise by way of an express term in a tenancy agreement, or a repairing obligation implied by common law, or implied by statute.

Meaning of Disrepair

Disrepair cannot be equated with damage. For premises to be in disrepair and must be some deterioration in the state of the premises from an earlier point (Quick v Taff Ely BC [1986] 809). This is most graphically illustrated by reference to condensation damage. In Quick, severe condensation was caused by big metal framed windows. The condensation damage to the tenant’s furniture, bedding, clothes and decorations and rendered some of the rooms of the flat uninhabitable. The court agreed that the condensation “rendered the living conditions of the plaintiff and his family are falling”. However, the tenant’s claim failed because the landlord had merely covenanted to repair
the “structure and exterior” of the flat (implied by the Landlord and Tenant Act 1985, s.11). Such a covenant includes a liability to repair walls and windows. However, the walls and windows themselves were undamaged and so, despite the fact that the flat was virtually unfit for human habitation, there was no disrepair. The key consideration was that the disrepair had to relate to the physical condition of what had to be repaired, not the question of lack of amenity or efficiency. The big metal framed windows were not themselves out of repair; they were design defects. The condensation was caused by the lack of insulation around the concrete window lintels, sweating from the single glazed metal framed windows, and inadequate heating. There was no evidence of any damage or want of repair in the metal windows, in the concrete lintels, or in any other part of the structure and exterior of the house occupied by the tenants. Therefore, design defects which cause condensation damp and mould to the extent of the property becomes unfit for habitation, will not amount to disrepair if there is no damage to the property requiring it to be repaired. Thus, there is no disrepair when a property suffers from damp unless damp arises from disrepair to the structure and exterior of the dwelling or unless damp itself has caused damage to the structure or exterior (Southwark LBC v McIntosh [2002] EGLR 25).

Quick is to be contrasted with Staves and Staves v Leeds City Council [1992] 29 EG 119, where damp and condensation caused small part of the plaster to perish. The tenant was held able to recover because the structure and exterior of the flat itself had deteriorated. However, very serious levels of condensation dampness in the property let by a local authority might constitute a breach of the tenant’s right to family and private life under Article 8 of the European Convention on Human Rights (Lee v Leeds City Council [2002] EWCA Civ 6).

A basement may be prone to flooding, and the tenant may be under an obligation to repair, but of the structure that basement has not deteriorated from a better condition there is no disrepair (Post Office v Aquarius Properties Ltd (1987) 1 All ER 1055).

The covenant to put something in “repair” is not a covenant to give a different thing from that which the tenant took when he entered into the covenant; the tenant is not obliged to make a new and different thing (Lister v Lane & Nesham (1893) 2 QB 212). In Lurcott v Wakely (1911) 1 KB 905, it was held that repair can include the replacement of renewal of part of a house; “it will not cover the rebuilding of a house which has tumbled down, but, so long as the house exists as a structure, “repair” imports an obligation to replace part of it which has deteriorated”. A repairing covenant must also be construed in the context of the property that it relates to. All houses, the age of the property can qualify the meaning of the covenant. What might be required to keep an old house in good condition as an old house, will be different from what is expected to keep a new house in good
condition as a new house. The obligation to keep and leave in repair had to take into account the age, character and locality of the house (*Proudfoot v Hart* (1890) 25 QBD 42).

Whilst the obligation to repair is different from an obligation to “improve” or “renew”, repairs often, inevitably, involve an element of renewal and improvement (*Ravenseft Properties Ltd v Davstone Holdings Ltd* (1980) QB 12). In *Ravenseft*, the whole of the stone cladding on the face of the building needed to be removed and replaced by new cladding including expansion joints which had not previously been there. This was necessary to prevent the danger that had become apparent, of stone cladding falling off the walls. It was held that this work was capable of mounting to repair. In a case where a roof of the premises was in a state of disrepair, so that the landlord arranged for the roof to be "overcladded" as against the tenant’s argument that patch repairs represented a cheaper repair option which had been reasonably and sensibly possible, it was held that patch repairs were the appropriate remedy (*Carmel Southend Ltd v Strachan & Henshaw Ltd* [2007] EWHC 1289 (TCC)).

The cases demonstrate that the appropriate disrepair remedy is often a question of fact and degree, industry norms, and/or expense. This is reflected in the test set out by Mustill LJ in *McDougall v Easington DC* (1989) 21 HLR 310, where he held that the three different tests may be discerned, which may be applied separately or concurrently as the circumstances of the individual case may demand, but also be approached in the light of the nature and age of the premises, their condition when the tenant went into occupation, and other express terms of the tenancy:

(i) whether the alterations went to the whole or substantially the whole of the structure or to only a subsidiary part;

(ii) whether the effect of the alterations to produce a building of a wholly different character from that which had been let;

(iii) what was the cost of the works in relation to the previous value of the building, and what was their effect on value and lifespan of the building.

Works which left no feature of the property under touched, and which substantially prolong the life of the property and nearly doubled its value, could not properly be described as repairs applying any of the above three tests. Similarly, in a damp proof course where none had existed in an old building, did not amount to repair (*Wainwright v Leeds City Council* (1984) 270 EG 1289). Repairing obligations generally carries with it an obligation to redecorate on completion of works (*McGreal v Wake* (1984) 13 HLR 107).

**Notice requirement**

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Where the obligation to repair premises let the tenant is on the land, the obligation not a licence of the landlord has notice, whether from the tenant or otherwise. This is true whether the obligation to repair is the express, implied (O’Brien v Robinson (1973) AC 912). It makes no difference that the landlord may have reserves the right enter to inspect the premises. Thus, a tenant who becomes aware of a defect in the immediately notify his or her landlord of the landlord’s agent. If the tenant has not directly inform the landlord of the defect, he or she may be able to establish liability if it can be shown that the landlord knew about the defect display a reliable source such as a caretaker, workmen employed by the landlord, or even an independent environmental health officer (Dinefwer BC v Jones (1987) 19 HLR 445). The tenant must show that the landlord received information about the defect that would be sufficient to put a reasonable person on inquiry as to whether work was necessary (O’Brien v Robinson (1973) AC 912). It is not sufficient for a tenant to make vague complaints of disrepair (Brewer v Andrews (1997) EGCS 19); the complaint must relate to specific items of disrepair. A covenant to keep in repair creates an obligation to keep the premises in repair at all times; this obligation breached the moment a defect occurs (British Telecom v Sun Life Assurance (1995) 4 All ER 44). It may be appropriate, however, to allow the landlord a reasonable time to carry out repairs where he will she becomes aware of the defect, for example where the landlord is required to consult with the lessees before commencing major works or whether the landlord needs access through a tenant’s flat in order to carry out repairs (Charalambous v Earle (2006) EWCA Civ 1338).

The payment of rent cannot form a condition precedent to the obligation to repair (Yorkbrook Investments v Batten (1985) 52 P&CR 51).

Access to carry out works

Where a landlord has expressed implied duty to carry out repairs he or she will have a correlative common law right enter the tenants premises to carry out those works. This right is subject to an obligation on the part of the landlord to give the tenant reasonable notice that access will be needed, and an obligation to pay freeze and in exercising the right to access (Granada Theatres v Freehold Investments (Leytonstone) Ltd (1959) Ch 592). The tenant can only be required to vacate the property during the course of the works is essential because of the nature or extent of the works, rather than being simply cheaper or more convenient (McGreal v Wake (1984) 13 HLR 107).

Where a landlord is undertaking repairs according to his or her statutory obligations under s.8 or s.11 of the Landlord and Tenant Act 1985 the Act specifically provides that the tenant allow the
landlord entry (s.8(2) and s.11(6)). Similar rights are found in the Rent Act 1977, s.148 and the Housing Act 1988, s.16.

Liabilities of tenants for disrepair

Tenants’ liabilities to keep or put premises in repair may be enforced either by a claim for specific performance (see Rainbow Estates v Tokenhold [1998] 2 E.G.L.R. 34), or by a claim for damages or by proceeding to forfeit the lease. In the case of certain leases, the landlord’s right to forfeit or claim damages is restricted by the Leasehold Property (Repairs) Act 1938, as amended by the Landlord and Tenant Act 1954. The Act of 1938 applies to any lease (except where the demised premises are an agricultural holding) granted for a term of years certain of not less than seven years where the claim is started at a time when three years or more of the term remain unexpired (Baker v Sims [1959] 1 Q.B. 114). Where the Act of 1938 applies, the landlord may not forfeit or claim damages without having first served on the tenant a notice under s.146 of the Law of Property Act 1925 in a special form (s.1(2), (4)). The tenant may by counter-notice served within 28 days after service of the notice claim the benefit of the Act (s.1(1)). If he does not do so, the landlord may proceed to claim forfeiture or disrepair. If the tenant does claim the benefit of the Act, no action for forfeiture or for disrepair for breach of covenant to repair may be started without the leave of the court. A separate application for leave must be made. A mortgagee in possession is not entitled to claim the benefit of the Act because he does not fall within the definition of “lessee”: Smith v Spaul [2003] Q.B. 983. A claim under the 1938 Act is a “landlord and tenant” claim within the meaning of CPR Pt 56: CPR r.56.1. Such a claim is brought using the CPR Pt 8 procedure, supported by a witness statement proving one or more of the grounds upon which the court may give leave under s.1(5) of the 1938 Act. Section 6 of the 1938 Act provides that the appropriate court in which to bring an application for leave is the county court unless the proceeding by action for which leave may be given would have to be taken in a court other than a county court. Claims falling within CPR Pt 56 should, in any event, normally be brought in the county court. Only exceptional circumstances justify starting a claim in the High Court: CPR PD 56, para.2.2. No more than one of the grounds need be proved (Phillips v Price [1959] Ch. 181). The standard of proof is that of an ordinary civil action, i.e. proof on the balance of probabilities (Associated British Ports v CH Bailey [1990] 2 A.C. 703). Both the breach and the ground under the Act must be proved by admissible evidence Jackson v Charles A Pilgrim (1975) 29 P. & C.R. 328). The relevant date upon which the landlord must prove the relevant grounds is normally the date of hearing of the application for leave to bring forfeiture proceedings, although ground (e) gives the court an overriding discretion: Landmaster Properties Ltd v Thackeray Property Services [2003] 35 E.G. 83. If a ground is proved the court has a discretion whether to grant
or refuse leave, and has power to impose conditions on the landlord or the tenant either on grant or refusal of leave. A claim in debt for the cost of repairs carried out during the term is not subject to the restrictions on the Act of 1938 (Jervis v Harris [1996] Ch. 195).

By s.18(1) of the Landlord and Tenant Act 1927, the measure of damages for both disrepair during the term and for terminal dilapidations, is limited to the amount (if any) by which the landlord’s reversionary interest is diminished in value. A claim in debt for the cost of works carried out by the landlord during the term is not subject to this ceiling. Where the claim is for terminal dilapidations and the landlord has actually carried out the work, the cost of repair is invariably the starting point (and is often the best evidence) for the quantum of damages (Jones v Herxheimer [1950] 2 K.B. 106: Smiley v Townshend [1950] 2 K.B. 311). Further, the court is entitled to infer diminution in value to the reversion in the absence of expert evidence from the estimated costs of any repairs to be done by an outgoing tenant which a landlord actually carries out: Latimer v Carney [2006] 3 E.G.L.R. 13. The landlord’s loss may also include compensation for loss of use of the premises while the repairs are being carried out (Drummond v S & U Stores (1980) 258 E.G. 1293). But where business sub-tenants were entitled to new leases from the landlord under the Landlord and Tenant Act 1954, Pt II, and renewed their tenancies at market rents which assume that the premises were in repair, the landlord was held to have suffered no loss (Family Management v Gray (1979) 253 E.G. 369; and see Crown Estate Commissioners v Town Investments [1992] 1 E.G.L.R. 61). The date of valuation is the date of termination of the lease. But if a new tenant, with no existing right to a tenancy, takes a new lease of the premises and agrees to carry out the repairs, that is irrelevant to the assessment of the landlord’s loss (Huvilund v Long [1952] 2 Q.B. 80).

Where, in a case of terminal dilapidations, the landlord has not carried out the repairs and does not intend to do so, and similarly where the claim is for damages during the term, the normal measure of damages is the difference between the value of the landlord’s interest in the premises in their actual condition and the value the interest would have had if the premises were in repair in compliance with the covenants. It has been held that, where a landlord had not done the works for which he was claiming, the burden of proving a diminution in the value of the reversion was on the landlord: Craven (Builders) Ltd v Secretary of State for Health [2000] 1 E.G.L.R. 128. See that case also for the difficulties of quantification of diminution where there is little evidence of market activity. Similarly, where the term of the lease has some years unexpired and the tenant (or any assignee) is solvent, any diminution in value may be difficult to prove unless, for some reason,
specific performance of the repairing obligations is unlikely to be obtained (see Rainbow v Tokenhold, above) and the tenant refuses to comply with his obligations.

**Liability of landlords for disrepair**

A landlord's obligation to repair depends primarily upon the terms of the lease. A tenant's remedy for disrepair is in an action for damages or specific performance and there are no statutory restrictions upon enforceability or recovery such as in respect of tenants' repairing covenants. Damages recovered may be substantial. In Credit Suisse v Beegas Nominees [1994] 4 All E.R. 803, e.g. the commercial tenant was awarded the whole of the rent for the residue of the term because the landlord’s breach had made the premises unusable and the lease unassignable. It is a general principle that a covenant to keep premises in repair requires the landlord to keep them in repair at all times, irrespective of notice (British Telecom v Sun Life Assurance Society [1996] Ch. 6). Where, however, the relevant defect is in the demised premises or the obligation to repair is implied by statute the landlord’s obligation is subject to the implied condition that he is not liable until he has been given reasonable notice: Makin v Watkinson (1870) L.R. 6 Exch. 25; McCarrick v Liverpool Corporation [1947] A.C. 219; O’Brien v Robinson [1973] A.C. 912.

There are implied by statute into certain leases of residential premises landlords’ covenants to repair. The most important are those implied under s.11 of the Landlord and Tenant Act 1985 (as amended by the Housing Act 1996). Section 11 applies to a lease of a dwelling-house granted for a term of less than seven years. Where the tenancy is entered into before January 15, 1989 the obligation is to keep in repair the structure and exterior of the dwelling-house ad to keep in repair and proper working order certain installations in the dwelling-house. Where the tenancy was granted on or after January 15, 1989 and the dwelling-house forms part of the building and specified installations which serve which serve the dwelling-house and (1) form part of a building in which the landlord has an estate or interest; or (2) is owned by the landlord or under his control. As already explained the obligation is an obligation to repair upon notice (McCarrick v Liverpool Corporation; O’Brien v Robinson see above). Damages may be assessed in terms of compensation for discomfort and inconvenience or of diminution in value of the premises (Wallace v Manchester City Council [1998] 3 E.G.L.R. 38). Where a tenant remains in occupation of the premises the prima facie measure is diminution in value to the tenant which may equate to what the tenant would have spent in carrying out the repairs himself together with general damages for inconvenience and discomfort (Colabar Properties Ltd v Stitcher [1984] 1 W.L.R. 287). Awards may be based upon a notional
reduction of rent where the premises are commercial (Electricity Supply Nominees Ltd v National Magazine Co. Ltd [1999] 3 E.G.L.R. 130) or let under a long lease (Earle v Charalambous [2006] EWCA Civ J090; [2007] H.L.R. 8). Section 11(IA) does not impose liability, however, where a sub-lessee does not have an interest in part of a building that contains items of disrepair: Niazi Services Ltd v Van der Loo [2004] 1 E.G.L.R. 62.

Improvements

Leases generally restrict the making of additions to or alterations of the demised premises by the tenant. Often this restriction is qualified by the use of the words “not without the consent of the landlord”, or similar words. Section 19(2) of the Landlord and Tenant Act 1927 provides that in all leases containing a covenant against the making of improvements without consent, the consent is not to be unreasonably withheld. The sub-section applies even though the word “improvement” does not appear in the covenant, if its effect is to prevent the making of improvements without consent (FW Woolworth & Co v Lambert [1937] Ch. 37; Lambert v FW Woolworth & Co. [1938] Ch. 883). Whether work amounts to an improvement is to be judged from the point of view of the tenant (ibid.). When the tenant applies for consent to improvements the landlord is entitled to be informed as to the substance of the proposals: Kalford v Peterborough City Council [2001] 13 E.G.C.S. 150. The landlord is also entitled, as a condition of consent, to require the payment of a reasonable sum in respect of any damage to or diminution in the value of the demised premises or any neighbouring premises of his, and of reasonable expenses in connection with the grant of consent. Further, if the improvement does not add to the letting value of the premises, the landlord may impose a condition of reinstatement, if reasonable so to do). Guidelines have been given by the Court of Appeal as to the permissible approach as to when consent can and cannot properly be withheld: Iqbal v Thakrar [2004] EWCA Civ 592; [2004] 3 E.G.L.R. 21.

The machinery of Pt I of the Landlord and Tenant Act 1927 enables some business tenants to make improvements notwithstanding an express clause to the contrary in the lease and to obtain compensation upon quitting the premises. The provisions apply to premises held under a lease and used wholly or partly for the carrying on of any trade or business other than a mining lease, a tenancy of an agricultural holding or a holding let to a tenant as the holder of any office, appointment or employment from the landlord for so long as he holds it. The tenant must serve upon the landlord notice of his intentions together with specification and plan showing the proposed improvement (LTA 1927 s.3(1)). If the landlord does not object within three months of service of the
notice the tenant may lawfully carry out the improvements. If the landlord objects in time the tenant may apply to court for a certificate that the improvements are appropriate to be made (LTA 1927 ss.3(1), (4)). The landlord may avoid liability for compensation by offering to carry out the improvements himself in return for a reasonable increase in rent. If so the court must not grant a certificate to the tenant unless it is shown that the landlord has failed to carry out his undertaking. If the tenant changes its mind and decides not to proceed with the works the tenant cannot be compelled to accept carrying out of improvements *Norfolk Capital Group Ltd v Cadogan Estates Ltd* [2004] EWHC 384 (Ch); [2004] 2 E.G.L.R. 50. For two recent cases in an area in which case law is often scarce see *Iqbal v Thakrar* [2004] EWCA Civ 592 and *Sargeant v Macepark (Whittlebury) Ltd* [2004] EWHC 1333 (Ch); [2004] 3 E.G.L.R. 26; [2004] 38 E.G. 164. If a certificate is granted and the tenant duly carries out the improvement he may require the landlord to give him a certificate of due execution in default of which he may apply for such a certificate to the court. Whether or not he obtains such a certificate he may then claim compensation within a prescribed period of the determination of his tenancy (LTA 1927, s.1(1)). Claims for a certificate and/or compensation are "landlord and tenant" claims and must be brought in accordance with CPR Pt 56.

The Contractual Obligation: Express Terms

The tenancy agreement may impose express repairing obligations on the landlord, on the tenant from both. In each case, it is a matter of interpreting, or “construing”, the words used in the repairing obligation when set against the factual backdrop, otherwise known as the “factual matrix”.

Express terms cannot, without the authorisation or sanction of the County court, reduce or negate the repairing obligations statutorily imposed on the landlord (LTA 1985, s.12). In other words, a landlord cannot, by express terms in the tenancy agreement, “contract out” of the repairing obligations statutorily imposed on the landlord.

In the case of a covenant by a local authority landlord “to maintain the dwelling in good condition and repair” this was held to go beyond what would normally be regarded as repair and to include an obligation to address condensation problems which caused severe mould growth. The landlord was held liable for failing to install thermal insulation (*Welsh v Greenwich LBC* (2001) 33 HLR 438).

In the case of a newly constructed building, where the landlord had covenanted “to keep the main walls and roof in good structural repair and condition throughout the term” it was held that the court should look at the particular building, the state which it is in at the date of the lease, the precise terms of the lease, and then to conclude whether, on the interpretation of those terms in
relation to the state, the work can be fairly termed “repair”. On this basis, it was held that the landlord was obliged to carry out major works to the foundations of the premises, when serious defect developed as a result of subsidence due to defective foundations. The landlord’s argument that the works amounted to improvement were rejected. The court distinguished only cases, with similar covenants, on the basis that the other cases related to older buildings which had gradually deteriorated over time, whereas the building in question was a new building (*Smedley v Chumley & Hawke* (1981) 261 EG 775).

The following are common repairing covenants:

(a) a covenant “to put in repair” would impose an obligation to perform work on the premises to bring them up to standard;

(b) a covenant “to leave (deliver, yield up) in repair” imposes an obligation on the tenant to have the premises in repair at the end of the term given that the landlord. Unless there is an obligation to keep in repair then the liability only arises at the end of the term. If the property, therefore, falls into disrepair during the course of the tenancy, the landlord will not be able to compel the tenant to make replacement of the tournament;

(c) a covenant “to keep in good condition” will impose a more extensive standard than a covenant to keep in repair e.g in *Welsh v Greenwich LBC* (2000) 49 EG 118 a covenant to keep in good condition was held to trigger an obligation to remedy condensation dampness. The same result would not have followed with a simple repairing covenant (as in *Quick* above).

(d) a covenant “to keep in repair” requires a tenant (or landlord) to ensure the premises are kept in repair throughout the term. The obligation to “keep in repair” meant to putting the property into repair, even if it was not in repair time the tenancy commenced and in keeping in that state during the term. If at any time during the term of the premises fall into a state of disrepair, this will be a breach of covenant. Thus, on the basis that liability will arise once the premises have fallen into disrepair and thus the landlord (or tenant) will be able to compel repair work to be undertaken during the course of the tenancy. Such a covenant will also require the tenant (or landlord) to leave the premises in repair, and also to put them into repair at the beginning of the term if they are not out of repair (*Proudfoot, supra*);

(e) a covenant “to keep in tenantable condition” or go further than a covenant to keep in repair. There does not have to be actual disrepair to give rise to an obligation under such a covenant to carry out works (*Credit Suisse v Beegas Nominees Ltd* (1994) 4 All ER 803).
(f) a covenant “to repair and renew”, unless clear words are used, does not impose any wider obligation on the burden the party than a covenant simply to repair (Collins v Flynn (1963) 2 All ER 1086);

(g) a covenant “to carry out structural repairs” in general means repairs to the fabric of the building such as the roof, walls, floors and foundations, as opposed to repairs to decorations, fixtures and fittings. Such obligations will usually be found on much longer leases (e.g. for a term of 25 years) as it would often be an unfair and unreasonable burden on a short term tenant (e.g. for a term less than 10 years) to bear such a potentially expensive obligation.

(h) The common phrase “fair wear and tear excepted”, which is usually found in shorter leases, exclusive tenant from liability to repair damage which occurs due to the natural process of ageing. Such damage could be caused by the action of the elements, or by the tenant’s normal and reasonable use of the premises for the purpose for which they would let. If the tenant uses the premises in a way not envisage when they were let which puts a greater strain on the building and accelerates where and tear them the tenant will not be saved by these words e.g. by storing very heavy items on a warehouse floor (Manchester Bonded Warehouse Co v Carr (1980) 5 CPD. “Fair wear and tear excepted” will not apply to extraordinary natural events such as earthquakes or floods. Where the cause of the damage can be traced back to a defect which was originally due to fair wear and tear but the damages itself is not directly caused by fair wear and tear then this clause will not assist tenant e.g. Where a task force of the roof due to the natural process of ageing but the leak caused by the missing tile become so serious as to render the whole top floor of the house uninhabitable, in such a situation the tenant is regarded as being under an obligation to do the work “to prevent the consequences flowing originally from wear and tear from producing others which wear and tear would not directly produce” (Haskell v Marlow (1928) 2 KB 45; Regis Property Co Ltd v Dudley (1959) AC 370). The missing tile example can be contrast it with that of the stone floor staircase which gradually wears away over the years of use. The latter scenario would be fair wear and tear so that the tenant would not be liable for it;

(i) a covenant “to rebuild” is an unusual covenant. A landlord is under no obligation to rebuild the premises if they are destroyed unless he or she has expressly covenanted to do so. A tenant, on the other hand, who has covenanted to keep the premises in repair will be
obliged to rebuild the premises if they are destroyed unless this obligation is expressly excluded by the terms of the lease.

**Common Law Implied Terms**

**On the landlord**

In lettings of furnished dwellings for immediate occupation, it is an implied term that the premises will be fit for human habitation at the start of the tenancy (Smith v Marrable (1843) 11 M&W5). This obligation does not go beyond the start of the tenancy.

In appropriate circumstances, the court may imply a repairing obligation “to give business efficacy” to the tenancy agreement. Where, in one case, the tenant had an obligation to keep the inside of the premises in good repair; however, there was no obligation on the landlord to do any repairs, so that it is denied liability when the tenant complained that the disrepair on the structure and exterior had caused extensive water penetration and damage to internal plaster and timbers; the court held that it was appropriate, to give business efficacy to the agreement, to imply a correlative obligation on the landlord to keep the structure and exterior of the premises in repair (*Barrett v Lounova* (1990) 1 QB 348).

Where a tenancy agreement impose no obligation on the landlord to keep the common parts of a large block of flats, such as lifts, stair lighting and rubbish chutes, in repair it was held that it was necessary for the tenant is to use these common parts so that it was necessary to imply a contractual obligation on the landlord to take reasonable care to maintain those common parts in a state of reasonable repair and efficiency (*Liverpool City Council v. Irwin* (1977) AC 239).

**On the tenant**

The tenant has an implied obligation to use the premises in a “tenant like manner” (*Warren v Keen* (1954) 1 QB 15). This can be achieved by doing jobs about the place which one would expect of a reasonable tenant e.g. cleaning windows, unblocking sinks, changing lightbulbs, turning off the water if going away.

Where there is an implied right at common law for the landlord to carry out repairs, there will be an implied obligation on the tenant to allow him access to affect those repairs (*McAuley v Bristol City Council* (1992) 1 QB 134).

**The statutory implied terms on the landlord**

**Section 11 of the LTA 1985**
Section 11(1) of the LTA 1985 implies into certain tenancies granted after 23 October 1961 a contractual obligation on the landlord:

(a) to keep in repair the structure and exterior of the dwelling house (including drains, gutters and external pipes);

(b) to keep in repair and proper working order the installations in the dwelling house for the supply of water, gas, electricity and for sanitation (including basins, sinks, baths and sanction conveniences, but not other fixtures, fittings and appliances for making use of the supply of water, gas or electricity); and

(c) to keep in repair and proper working order the installations in the dwelling house for space heating and heating water.

These provisions apply to all weekly, monthly or yearly periodic tenancies and fixed term tenancies, provided the period granted is for seven years. This is that our granted for a term of less than seven years initially, for example a monthly periodic tenancy, but which actually last for more than seven years, are still within the section. From 1 April 2012, s.11 applies to fixed term assured or secure tenancies of 17 years or more granted by PRPs or LHAs (s.13(1A) LTA 1985).

The obligation on the landlord will not arise under s.11 until the landlord has notice of the defect in relation to premises let to the tenant.

The obligation to keep the installations in proper working order extends to address design defects in them if not working properly (Liverpool City Council v. Irwin (1977) AC 239).

Structure and Exterior

The structure, as defined in s.11(1)(a), and include the walls, roof of a house and its foundations. Where the dwelling house is a flat or part of a building, the structure may not be so extensive. So, for example, the structure of the ground floor flat will not include the roof over the top flat. However, in one case concerning the top floor flat in a block, the roof was held to be part of the structure or exterior of the tenants dwelling, even though it was conceded by the tenant that the roof was not part of the property that had been let to her (Douglas-Scott v Scorgie (1984) 1 WLR 716). The structure goes beyond just the load-bearing elements. It can include external Windows and doors. In one case, it was held that “the structure of a dwelling house consists of those elements of the overall dwelling house which gives it its essential appearance, stability and shape. Expression does not extend to be many in various ways in which the dwelling house will be fitted out, equipped,
decorated and generally made to be habitable” (Irvine v Moran (1992) 24 HLR 1). Plasterwork has been held to be part of the structure (Tanya Grand v Param Gill (2011) EWCA Civ 554).

The exterior is the external part of the dwelling, and can include the path and steps which give access to a house (Brown v Liverpool Corporation (1969) 3 All ER 1345); but it has been held not to extend to access to the backyard, or the back yard or garden itself (Hopwood v Cannock Chase DC (1975) 1 WLR 373).

Installations

this obligation relates to the condition of the pipes, wiring, tanks, boilers, radiators or other space heating installations it covers their mechanical condition, and does not require the landlord to lag pipes against bursting in unusually cold weather (Wycombe Area Health Authority v Barnett (1982) 5 HLR 84).

Remedies available to a tenant

Self help – set off against rent

a tenant can rely on either the common law or equity to set off of the costs of repairs against future rent payments. The common law rules are very strict, requiring certainty about the sum recoverable, equity will allow a tenant to recover against a landlord in breach of an express or implied obligation to repair (Lee-Parker v Izzet (1971) 1 WLR 1688). Thus, often a tenant’s disrepair claim will be raised in answer to a landlord’s rent claim by way of a counterclaim.

Specific Performance

By s.17 of the LTA 1985, the court may make an order for specific performance against a landlord in breach of his obligation to keep in repair a dwelling, or any part of the premises in which the dwelling is comprised. The order is available not just for s.11 repairs, but for any repairing covenant to repair, maintain, renew, construct or replace any property.

Interim Injunction

An interim injunction may be applied for an exceptional circumstances where the court is satisfied that there is an immediate need for the work to be done, for example, because there is a real risk to health. The order should be specific as to what works need to be done (Parker v Camden LBC (1986) Ch 162). A landlord will be in contempt of court if he fails to comply with the terms of an injunction.

Contractual Damages
A tenancy agreement, giving rise to an interest in land, will also be a contract, and will be enforceable as such. A tenant can claim for general and special damages as a result of disrepair (Calabar v Stitcher (1984) 1 WLR 287). The basis of compensation is to restore the tenant to the position he would have been in had there been no breach of the express or implied covenant to repair. This may include, where appropriate, the cost of alternative accommodation, the cost of any relevant repairs carried out by the tenant and compensation for living into deteriorating conditions. The last head of compensation could include general discomfort, inconvenience and ill-health suffered by the tenant as a result of the breach. The amount of compensation payable for personal injury and ill-health suffered as a result of disrepair will depend upon the severity of the claim. Such a claim will usually require medical evidence to be provided.

There are a number of ways of assessing the proper sum to compensate a tenant for the distress and inconvenience resulting from the landlord’s failure to repair. The first approach might be by a notional reduction in the rent on the dwelling. Secondly a global award might be made for discomfort and inconvenience. The third method would be to conflate to previous methods (Wallace v Manchester City Council (1989) 30 HLR 1111). The correct approach the court, when making a global award, is to cross check the prospective award by reference to the rent payable for the period equivalent to the duration of the landlord’s breach, so as to avoid “over” and “under” assessments through failure to give proper consideration to the period of the landlord’s breach of obligation or the nature of the property. However, these principles should not be applied in a mechanistic or dogmatic way. There may be cases where the level of distress or inconvenience suffered by the tenant may require an award in excess of the rent payable (Shine v English Churches Housing Group (2004) HLR 42). However, where this is the case, so that damages exceed the level of the rent payable, clear reasons need be given by the court for taking that course and the conduct of the landlord must warrant such an award. For a tenant who gives a occupation of the premises and sells or sublet it, as a result of the disrepair, the amount of compensation will be the diminution in the sale price or the rent recovered as a result of the disrepair (Wallace v Manchester City Council (1989) 30 HLR 1111).

Remedies available to a landlord

The possible landlords remedies include:

(a) self-help (subject to reservation of the right, either in the lease or by statute, to enter and do the repair works that the tenant ought to have done) and to seek to recover the cost from the tenant;
(b) damages for breach of covenant;

(c) forfeiture/possession proceedings;

(d) specific performance.

For damages, the landlord will be able to recover the lower of the cost of the repair or the damage to his reversion by way of damages (s.18 LTA 1927). If the premises are to be demolished or altered so as to render any repair valueless, no damages will be recovered (s.18 LTA 1927).

Specific performance may be available to a landlord against a tenant in disrepair, albeit in rare circumstances (Rainbow Estates v Tokenhold (1998) 2 All ER 860).

LANDLORD AND TENANT – THIRD PARTY RIGHTS AND OBLIGATIONS

A lease is a contract made in general between two parties: a lessor and a lessee. But on occasions others, usually management companies and sureties, are parties to the initial contract. In addition to being a contract, a lease creates an interest in land, and usually the interests of the lessor and lessee are each assignable. Thus, actions in a landlord and tenant context often involve claims by or against parties other than the original lessor and lessee, and frequently involve those original parties after they have assigned their respective interests. These are the “third parties” with whom this section is concerned.

The old law. For leases granted before 1996, both lessors and lessees remain liable under all the terms of the contract for the duration of the term of years even though they may have assigned their interests in land (Baynton v Morgan (1889) L.R. 22 QBD 74). Either by statute (Law of Property Act 1925 ss.141, 142) or under the doctrine of privity of estate, assignees of term and reversion are entitled to the benefit and subject to the burden of those covenants of the lease which have reference to the demised premises. Thus, for example, an assignee of the reversion can sue the tenant for rent arrears whether they accrued before or after the assignment and the lessor could sue an assignee of the term, but only for rent accruing after the date of the assignment. The right of the assignee of the reversion to sue for pre-assignment rent arrears is subject to the lessee’s right to set off in respect of accrued liabilities under the lease against the assignor (Muscat v Smith [2003] EWCA Civ 962: (2003] 1 W.L.R. 2853, CA). An assignor of the reversion loses his right to sue for rent arrears accrued or breaches of covenant occurring before the assignment unless the right of action is reserved to him as a term of the assignment (Robinson v Gray [1963] Ch. 459).
The new law

Almost all leases granted on or after January 1, 1996 are governed by the new regime for transmission of benefit and burden on leasehold covenants contained in the Landlord and Tenant (Covenants) Act 1995 (for the exceptional cases, see s.1 of the Act). Almost all leases granted before that date remain governed by the old law for the residue of the term of year. The Act abolishes (for “new” tenancies) the doctrine of “touching and concerning”, or covenants having “reference to” the demised premises (s.2) and all landlord and tenant covenant (other than covenants expressed to be personal and other exceptional cases) pass with the reversion and the term respectively (s.3). Lessees (and subsequent tenants) are automatically released from the tenant covenants and lose the benefit of landlord covenants upon lawful assignment of the term (s.5). Lessors (and subsequent landlords) have the right to apply for similar release (ss.6 to 8). If it is reasonable to do so, or if the lease so provides, a landlord may require a tenant to guarantee by an "authorised guarantee agreement" the obligations of his immediate assignee only (s.16). Upon the assignment of the reversion on a new tenancy, the right to sue for arrears of rent or breaches of covenant pre-dating the assignment remains with the assignor, but a right to re-enter in respect of such arrears or breaches passes to the assignee (s.23). A lessee cannot set off a claim for damages in respect of pre-assignment breaches against an assignee’s claim for future rent (Edlington Properties Ltd v JH Fenner & Co Ltd [2006] 1 W.L.R. 1583, CA).

The Landlord and Tenant (Covenants) Act 1995 also introduces changes in the law which apply to “old” and “new” tenancies alike and which restrict the rights of landlords to call upon former tenants and guarantors of former tenants to remedy defaults by the current tenant. There is now a six-month time limit for serving a notice on a former tenant or his guarantor in respect of monies due from the tenant under the lease, and failing timeous service the former tenant and guarantor cannot be sued for those monies (s.17). The House of Lords has determined that, where a sum is unascertained, such as a sum becoming payable following the completion of a rent review, it is not “due” for the purpose of s.17(2), even though it will be treated as having accrued due retrospectively when the new rent is agreed or determined: Scottish & Newcastle Plc v Raguz [2008] UKHL 65, [2008] 1 W.L.R. 2494. No notice need therefore be served in relation to such an unascertained sum until such time as the amount has been ascertained. Former tenants and their guarantors are not liable for any sum due to the extent that it is attributable to a voluntary variation of the lease made by the landlord after the former tenant assigned it (s.18). Former tenants and their guarantors who are called upon by, and pay in response to, a s.17 notice are given the right to call for a concurrent,
“overriding”, lease to be granted to them, which makes them the immediate landlord of the defaulting tenant (ss.19 and 20).

Save in relation to authorised guarantee agreements, there is no right to contract out of the Act, and any agreement which purports to do so is, to that extent, void (s.25) (*KIS Victoria Street v House of Fraser (Stores Management) Ltd* [2011] EWCA Civ 904). However, a lease can, as a matter of bargain, limit the obligations of one or both of the parties, so that they come to an end if the parties transfer their interest in the property although this is rarely done (*London Diocesan Fund & anor v Phithwa & ors (Avonridge Property Co Ltd, Part 20 defendant)* [2005] I W.L.R. 3956, HL).

The Landlord and Tenant (Covenants) Act 1995 applies to tenancies of incorporeal property and also to tenancies of incorporeal rights such as rights of parking and access: *Wembley National Stadium Ltd v Wembley (London) Ltd* [2007] EWHC 756 (Ch); [2008] 1 P. & C.R. 3.

**Sureties.** At common law, a surety is wholly discharged from liability by a variation made to the contract he guaranteed unless either he agreed to the variation or it is plain without inquiry into the facts that the variation cannot detrimentally affect his position as guarantor (*Holme v Brunskill* (1877) 3 Q.B.D. 495 but see *Metropolitan Properties Co. (Regis) v Bartholomew* [1996] 1 E.G.L.R. 82). This principle is unaffected by s.18 of the Act of 1995, and in the case of a guarantor of the current tenant, or a former tenant who has entered into an authorised guarantee agreement, the statutory limitation will not be available to him in any event. Section 18 will therefore apply to those sureties who, for some particular reason, cannot avail themselves of the common law defence. Unlike that defence, the limitation in s.18 is only in respect of any additional liability attributable to the variation and does not release the surety in full.

**Management companies.** These are often created and made parties to leases of blocks of flats or commercial premises in multiple occupation for the purpose of collecting rent and service charge, or enforcing tenant covenants, or performing the landlord covenants in the leases. Under the old law, their rights and liabilities depended largely on a contractual analysis, though the benefit of such a company’s covenants that touch and concern the demised premises could pass with the interests of the other parties (by analogy with *Swift (P&A) Investments v Combined English Stores Group* [1989] A.C. 632). In the case of “new” leases granted after January 1, 1996, however, such third party covenants are treated as if they were tenant covenants or landlord covenants as required to preserve the enforceability of the benefit and burden of them between all parties (s.12).
LANDLORD AND TENANT: MESNE PROFITS AND USE AND OCCUPATION

The law. Mesne profits is the name given to damages for trespass sought by a landlord against his tenant for failing to quit the demised premises upon termination of the lease (Bramwell v Bramwell [1942] 1 K.B. 370). A tenant’s claim for damages for trespass against his landlord is not called mesne profits but is similarly a claim for damages for trespass to land. No mesne profits are payable, nor is a tenant in breach of his covenant to deliver up vacant possession at the expiry of the term, where the tenant has a right to continue in possession under a continuation or statutory emanation of his tenancy (e.g. a continuing business tenancy under Landlord and Tenant Act 1954 Pt II, or a statutory tenancy under the Rent Act 1977) or under a new contractual tenancy deemed to be granted to him (e.g. a statutory periodic assured tenancy under Housing Act 1988 Pt I). But a statutory bar on enforcement of the right to possession, such as Protection from Eviction Act 1977 s.3, does not give any defence to a claim for mesne profits.

Where mesne profits are payable, a landlord may elect to claim these on the basis of the loss suffered by him caused by the trespass (which will usually be at the rate of the current letting value of the premises without the need to prove that he could or would have let the premises during the period of the trespass: Swordheath Properties v Tabet [1979] 1 W.L.R. 285; Inverugie v Hackett [1995] 1 W.L.R. 713) or on the basis of restitution of the benefit conferred on the tenant by the unlawful occupation (Ministry of Defence v Ashman [1993] 2 E.G.L.R. 102; Ministry of Defence v Thompson (1993) 2 E.G.L.R. 107 (see also Bocardo SA v Star Energy UK Onshore Ltd [2009] EWCA Civ 579; [2010] 1 All E.R. 26). In Horsford v Bird [2006] 15 E.G. 136 the Privy Council assessed mesne profits in relation to the value of the land encroached upon (the encroachment in that case being permanent) taking into account the special value of the land to the defendant. This election need not be made until trial, and in any ordinary case the two bases will be the same. Where the lease is terminated by forfeiture, mesne profits are claimed from the date of service of the claim form (Canas Property Co. v KL Television Services [19701 2 Q.B. 433) or, where peaceable re-entry is effected, from the date of physical entry. In other cases (e.g. effluxion of time or notice to quit), mesne profits are claimed from the day after the termination of the tenancy.

A contract to pay reasonable compensation for use and occupation is implied by law from the fact that land belonging to the claimant has been occupied by the defendant with the claimant’s permission. An action for use and occupation lies whenever there is a relationship or an intended
relationship of landlord and tenant (Morris v Tarrant [1971] 2 Q.B. 143) except where there is a valid and continuing lease, in which case the landlord’s entitlement is to the rent payable under it.

“In order to recover in the action for use and occupation, the plaintiff must prove the existence of an agreement express or implied between him and the defendant to the effect that the latter shall at least be the tenant at will of the former of the lands or premises occupied, and shall pay for that occupation” (Att. Gen. v De Keyser’s Royal Hotel [1920] A.C. 508 at 533, where the authorities are reviewed).

A tenancy at will is readily inferred if the defendant enters during negotiations for a lease (see Javad v Mohamed Aqil [1991] 1 W.L.R. 1007). In the absence of express agreement, the claimant may only recover “a reasonable satisfaction” for the land occupied (see Churchward v Ford (1857) 2 H. & N. 446 at 449). In such a case, the amount of compensation depends on the value of the premises occupied and the duration of the occupation (see Att. Gen. v De Keyser’s Royal Hotel). In determining what the occupation is worth, the court will examine what it was actually worth to the particular occupier (see Dean & Chapter of Canterbury Cathedral v Whitbread (1995) 72 P. & C.R. 117). Value to the tenant does not mean commercial value but the value the tenant has chosen to enjoy. Ordinarily that will be the open market rental value (see Lewisham LBC v Masterson [2000] 1 E.G.L.R. 134). As soon as the occupation ceases, the implied contract to pay ends; and as no express time for payment is specified, the compensation accrues from day to day (Gibson v Kirk (1841) 1 Q.B. 850; Churchward v Ford, above).

Under the Landlord and Tenant Act 1730, s.l, a landlord has the right to claim double the value of the land where a tenant holds over after the determination of his tenancy and after demand made by notice in writing for possession to be delivered up. The demand and notice may either be served before the expiration of the term or within a reasonable time thereafter. The operation of the statute is confined to “tenants for any term of life, lives or years”. It therefore does not apply to weekly tenants (Lloyd v Rosbee (1810) 2 Camp. 453) or to periodic tenants for less than a year (Wilkinson v Hall (1837) 3 Bing. N.C. 508), but it does apply to a tenant from year to year (Doe d. Hull v Wood (1845) 14 M. & W. 682). The holding over by the tenant must be wilful; in other words, the tenant must have no genuine belief that he is entitled to hold over (see Swinfen v Bacon (1861) 6 H. & N. 846 at 848). If the tenant wrongly but genuinely believes that he is entitled to remain in possession, the Act does not apply (French v Elliott [1959] 3 All E.R. 866). If the demand and notice are served before the expiration of the term then double value will be calculated from the expiration
date (see Soulsby v Neving (1808) 9 East 310). However, if they are served after the expiration date then entitlement to double value will run from the date of the demand (see Cobb v Stokes (1807) 8 East 358). In the case of a tenancy from year to year, a valid notice to quit is sufficient to satisfy s.1 (see Wilkinson v Colley (1771) 5 Burr. 2694). Possible defences to an action for double value would thus include a mistaken belief on the part of the tenant that he was entitled to hold over, or the tenancy being a weekly tenancy and so not being subject to s.1, or the inadequacy of the notice in writing.

Where a tenant gives notice to quit but does not give up possession when the tenancy expires pursuant to that notice, the landlord is entitled to double rent under s.18 of the Distress for Rent Act 1737. This section applies only if the tenancy is capable of determination by a notice to quit given by the tenant, if the notice itself is valid and if the landlord treats the notice as valid thereby electing to treat the tenant as a trespasser (see Oliver Ashworth (Holdings) v Ballard (Kent) [1999] 2 All E.R. 791 at 809). Unlike the action for double value, s.18 applies to all tenancies capable of termination by notice to quit. Furthermore, there is no requirement that the holding over by the tenant be wilful. Section 18 itself does not require the notice to quit to be in writing, but it must be sufficient to determine the tenancy and therefore will have to comply with any formal requirements for termination of the particular tenancy (see, e.g. Protection from Eviction Act 1977 s.5(1) (notice to quit any premises let as a dwelling to be in writing)). Possible defences would therefore include an invalid notice to quit or the landlord contending that the notice was invalid.

LANDLORD AND TENANT – POSSESSION PROCEEDINGS

General. A tenancy determined by notice to quit ends on the expiration of the notice. Subject to the detailed terms of the tenancy, notice to quit may be given by either party; when once given it can only be withdrawn by assent of both parties. (Blyth v Dennett (1855) 13 C.B. 178). A notice to quit need not be given by the landlord himself. It may be given by an agent of the landlord. However, the agent must have been authorised to serve the notice at the date when it was served; if he had no such authority at the date of service, the notice cannot be validated by subsequent ratification (Doe d. Lyster v Goldwin (1841) 2 Q.B. 143 at 146; Jones v Phipps (1868) L.R. 2 Q.B. 567 at 573). At common law a notice to determine a periodic tenancy given by one of several joint landlords or one of several joint tenants is effective: Hammersmith and Fulham LBC v Monk [1992] 1 A.C. 478. The service of a notice to quit by one joint tenant does not amount to a breach of the other tenant’s human rights under Arts 6 or 8 of the European Convention on Human Rights:
Harrow LBC v Qazi [2004] 1 A.C. 983; Newham London Borough Council v Kibata; Birmingham City council v Bradney; Fletcher v Brent LBC [2006] EWCA Civ. 960; Doherty v Birmingham City Council [2009] 1 A.C. 367. That might not be the case, however, where a local authority has taken an active part in the service of notice to quit: McCann v United Kingdom [2008] 28 E.G. 114.

Form of notice. At common law there is no special form of notice. If the tenancy was created orally the notice may be oral (Bird v Defonville (1846) 2 Car. & Kir. 415 at 420). The notice must not be vague (Addis v Burrows [948] 1 K.B. 445) and it must relate to the whole of the premises comprised in the tenancy (Woodward v Earl of Dudley [1954] Ch. 283). The test is whether a reasonable tenant could have been misled by it (Mannai Investment Co. Ltd v Eagle Star Life Assurance Co Ltd [1997] A.C. 749 applying Carradine Properties Ltd v Aslam [1976] 1 W.L.R. 442). In the case of lettings of dwelling-houses, the notice to quit must be in the form prescribed by regulations made under s.5 of the Protection from Eviction Act 1977. The regulations currently in force are the Notices to Quit (Prescribed Information) Regulations 1988 (SI 1988/2201).

Length of notice. At common law a periodic tenancy, other than an annual tenancy, may be determined by notice equal to one complete period of the tenancy, expiring at the end of one such complete period (Lemon v Lardeur [1946] K.B. 615). Thus a weekly tenancy may be determined by a week’s notice, a monthly tenancy by a month’s notice, and a quarterly tenancy by a quarter’s notice. An annual tenancy may be determined by six months’ notice expiring on the anniversary of the creation of the tenancy (Sidebotham v Holland [1895] 1 Q.B. 378). Statute has, however, intervened. A notice to quit a dwelling-house is invalid unless it is given not less than four weeks before the date on which it is to take effect (Protection from Eviction Act 1977, s.5). And except in certain circumstances a notice to quit an agricultural holding is invalid if it purports to terminate the tenancy before the expiry of 12 months from the end of the then current year of the tenancy (Agricultural Holdings Act 1986, s. 25) and Agricultural Tenancies Act 1995, s.6).

Waiver of notice. Acceptance of rent after the expiry of a notice to quit gives rise to a defence to a claim for possession only if it can be inferred that the parties intended to create a new tenancy. The question is with what intention the rent was paid and received (Clarke v Grant [1950] 1 K.B. 104). It is nowadays a purely open question: is it right and proper to infer from all the circumstances of the case, including the payments, that the parties had reached an agreement for a new tenancy: (Longrigg Burrough & Trounson v Smith [1979] 2 E.G.L.R. 42; Javad v Aqil [1991] 1 W.L.R. 1007).
Most proceedings for possession of residential premises will involve a claim based on some statutory ground for possession (e.g. under the Rent Act 1977) or Housing Act 1988). Particularly large or valuable residential premises may exceed the financial limits for the application of the Rent Acts. Proceedings in which the only issue relates to the valid termination of a tenancy to which no statutory security of tenure attaches are rare, and will usually involve premises which are used neither as a residence nor for the purposes of a trade or business. Alternatively, in the case of business premises, security of tenure under Pt II of the Landlord and Tenant Act 1954 may have been excluded by agreement.

**Right of action for forfeiture**

Most written leases or tenancies contain forfeiture clauses entitling the landlord to forfeit the lease in the event of arrears of rent or breach of covenant by the tenant. Some forfeiture clauses are capable of implementation in other events too, such as the insolvency of the tenant, or of a surety. In an action for forfeiture the claimant must plead and prove:

(a) that he is the original landlord or has acquired the reversion;
(b) that the defendant is the original tenant or an assignee of the original tenancy or claims under the tenant;
(c) the arrears of rent or breach of covenant relied on;
(d) the existence of a proviso for re-entry;
(e) that the claimant has complied with s.146 of the Law of Property Act 1925 where applicable;
(f) that the defendant has not complied with the notice served under that section;
(g) any loss which the claimant has suffered by reason of the breach;
(h) if mesne profits are claimed, the fair letting value of the property.

**Proviso for re-entry.** However the proviso for re-entry is farmed, its effect is usually to put the landlord to his election whether to treat the lease as at an end. Thus even where the proviso states that the lease shall become void on breach of covenant by the tenant, it is construed as rendering the lease voidable at the landlord’s option (*Davenport v R.* (1878) 2 App. Case. 115).

**Compliance with section 146 of the Law of Property Act 1925.** Section 146(1) of the Law of Property Act 1925 provides that a right of re-entry or forfeiture for breach of covenant or condition in the
lease is not enforceable by action or otherwise, unless and until the lessor serves on the lessee a notice:

(a) specifying the particular breach complained of; and

(b) if the breach is capable of remedy, requiring the lessee to remedy the breach; and

(c) in any case, requiring the lessee to make compensation in money for the breach;

and the lessee fails within a reasonable time thereafter, to remedy the breach, if it is capable of remedy and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach. The section does not apply to forfeiture for non-payment of rent (s.146(11)) or in other specified cases (s.146(8)-(10)).

Restrictions on the right to forfeit. Special provisions apply to forfeiture for breach of repairing covenants. Where the lease is one to which the Leasehold Property (Repairs) Act 1938 applies, the notice under s.146 must contain a statement in characters no less conspicuous than those used in any other part of the document, to the effect that the lessee is entitled to serve a counter-notice on the landlord claiming the benefit of the Act, and a similar statement specifying the time within which and the manner in which a counter-notice may be served and the name and address for service of the lessor (Leasehold Property (Repairs) Act 1938 s.1(4)). Where the lessee gives a counter-notice claiming the benefit of the Act no action for forfeiture or for damages for breach of covenant to repair may be begun without the leave of the court. A separate application for leave is made supported by a witness statement proving one of the grounds under which the court may give leave under s.1(5) of the Act. The standard of proof is that of an ordinary civil action, namely proof on the balance of probabilities (associated British Ports v C.H. Bailey Plc [1990] 2 A.C. 703).

A landlord under a long-lease of a dwelling is prevented from exercising a right of re-entry or forfeiture for failure by a tenant to pay an amount consisting of rent, unless the unpaid amount either exceeds the prescribed sum or consists of, or includes, an amount which has been payable or more than a prescribed period (s. 167 of the Commonhold and Leasehold Reform Act 2002). The prescribed sum is presently £350 and the prescribed period is three years.

A landlord may not forfeit a lease of premises let as a dwelling for non-payment of service charges (within the meaning of ss.18(1) and 27 of the Landlord and Tenant Act 1985) unless either the
amount outstanding has been admitted or agreed by the tenant or determined by the court, the leasehold valuation tribunal or an arbitral tribunal (ss.81 and 82 of the Housing Act 1996).

Further, a landlord under a long lease of a dwelling may not serve a notice under the Law of Property Act 1925 s.146 in respect of a breach by a tenant of a covenant or condition in the lease (other than to pay rent, service charges or administrative charges) unless it has been finally determined on an application by the landlord to the Leasehold Valuation Tribunal that the breach has occurred; the tenant has admitted the breach; or a court in any proceedings, or an arbitral tribunal in proceedings pursuant to a post-dispute arbitration agreement, has finally determined that the breach has occurred (s.168 of the Commonhold and Leasehold Reform Act 2002).

Where conditions (a) or (c) are satisfied, notice may not be given until after the end of the period of 14 days beginning with the day after that on which the final determination is made.

Where the Insolvency Act 1986 applies, in certain circumstances, forfeiture proceedings may not be commenced without the leave of the court.

**Waiver.** Since a breach of covenant by the tenant puts the landlord to his election whether to treat the lease as forfeit, it follows that he may elect not to do so, but to treat the lease as continuing. Such an election is irrevocable, and is known as a waiver. The landlord will waive the right to forfeit if, with knowledge of the breach of covenant, he does something which is consistent only with the continued existence of the lease. Thus acceptance of rent accruing due after the date of the breach will amount to waiver (Oak Properties v Chapman [1947] K.B. 886 (although see Osibanjo v Seahive Investments Ltd [2008] EWCA Civ 1282; [2009] E.G. 194)) and s, probably, will a demand for such rent (David Blackstone Ltd v Burnetts (West End) Ltd. [1973] 1 W.L.R. 1487, but see Expert Clothing Service and Sales Ltd v Hillgate House Ltd. [1986] Ch. 340). Other acts, if sufficiently unequivocal, may also operate as a waiver. Waiver is a defence to a claim for forfeiture, and so the particulars of claim need not show that the breach has not be waived.

**Rent/mesne profits.** The expression “mesne profits” is only another term for damages for trespass arising from the particular relationship of landlord and tenant (Bramwell v Bramwell [1942] 1 K.B. 370). The measure of damages is in normal cases the letting value of the property and damages are recoverable without proof that the landlord could or would have let the premises during the period of the trespass (Swordheath Properties Ltd v Tabet [1979] 1 W.L.R. 285). It is the service of the
proceedings claiming forfeiture (rather than its mere issue) which constitutes the notional re-entry, and therefore the proper practice is to claim the rent up to the date of service of the proceedings and mesne profits from that date to the delivery of possession ([Canas Property Co Ltd v KL Television Services Ltd [1970] 2 Q.B. 433]).

FREEHOLD ENFRANCHISEMENT UNDER THE LEASEHOLD REFORM ACT 1967

LEASEHOLD REFORM ACT 1967

So what is it all about and why is it so litigious? A part of the answer lies in the drafting where, like so much of modern landlord and tenant legislation, the draftsman’s skills leave much to be desired. But that is not all of it.

The Act operates in the field of residential landlord and tenant. The main purpose of the Act is to deprive one party (the landlord) of his interest in a property and pass it to another party (the tenant). The Act is a form of compulsory acquisition and nowadays applies to some of the most expensive houses in the most fashionable areas of our cities, particularly London. Much of the smartest areas of London remain in the ownership of “the Great Estates” and historically, their owners have not shown much enthusiasm for an Act which compulsory dispossesses them of their property. Equally, lessees of large houses in central London see an opportunity to acquire an asset at a price that will necessarily be less than its true market value. The Act is inherently confrontational and, if both sides of the confrontation have the means and will to litigate, then that will inevitably lead to litigation.

So what does the Act do? It gives to the tenant of a leasehold house, which he holds under a long lease and which he has owned for a period of at least two years, the right to acquire the freehold, at a price calculated in accordance with provisions of Section 9 of the Act. This is rather more extensive than the limited right originally given in 1967. Originally, the house needed to be within certain rateable value limits, the tenancy needed to be at a “low rent” and the tenant was required to fulfil a residence test. Over a period of time, all these restrictions have been either modified or abandoned.

Arguably, it has never been easier to claim the freehold of a house than it is now but equally the scope for litigation has, in many ways, never been greater. That is because, in part, the abolition of certain qualifying requirements has had an unexpected impact on other sections of the Act and, in
part, because the Government has, in particular circumstances, tried to limit the effect of the abolition of some of the restrictive qualifications.

**House**

In order to decide whether premises qualify, the tenant needs to show that they are a “house” within the meaning of the Act. Not, you would have thought, a very difficult proposition. However, the question of what constitutes a house for the purpose of the Act has, in itself, been the subject of three cases before the House of Lords. (*Parsons v. Trustees of Henry Smith’s Charity* [1974] 1 WLR 435 HL; *Tandon v. Trustees of Spurgeons Homes* [1962] AC 755 and *Malekshad v. Howard de Walden Estates Ltd* [2003] 1 AC 1013).

Section 2 (1) of the Act provides: -

“For the purposes of this Part of this Act, “house” includes any building designed or adapted for living in and reasonably so called, notwithstanding that the building is not structurally detached, or was or is not solely designed or adapted for living in, or is divided horizontally into flats or maisonettes; and –

(a) where a building is divided horizontally, the flats or other units into which it is so divided are not separate “houses” though the building as a whole may be; and

(b) where a building is divided vertically the building as a whole is not a “house” though any of the units into which it is divided may be.

The first point that is obvious from this definition, is that the Act does not apply simply to a single private dwelling in one occupation. It has a much wider application than that and extends not only to mixed-use buildings but also (in express terms) to a building divided into flats. Let us look at the definition in a little more detail.

Building means simply a built structure (*Malekshad v. Howard de Walden Estates Ltd* above) and denotes some kind of permanent erection. It would thereby exclude a caravan or houseboat. It does not matter that the building is not structurally detached (so that it can form part of a terrace) nor that the building as a whole is divided horizontally into flats or maisonettes. Two separate detached buildings are not capable of being a “building”.

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At this stage of the definition, we are not dealing with any degree of precision. That comes from the rest of the definition where there are two distinct issues to be addressed. The first is the issue of structure and the second is the issue of user.

Notwithstanding that the definition uses the word “includes” it is considered that the definition is exhaustive.

The premises must be “designed or adapted for living in”. This is an issue of user. Before the implementation of the Commonhold and Leasehold Reform Act 2002 (which broadly abolished the residence test for claims made under the 1967 Act), this particular part of the definition caused no difficulty. The reason is obvious; the tenant necessarily had to live in the building. However, now that the residence test has been removed as a general qualifying condition, the question as to what is meant by a building “designed or adapted for living in” becomes less self-explanatory. For example, does a building that was originally designed for living in but is now used for some other purpose, nevertheless remain within this part of the definition? There is no doubt that the test needs to be applied at the date of the claim but that in itself does not really answer the question. In Tandon, Lord Roskill said that “designed or adapted for living in” meant “occupation as a residence” but I am not sure whether that really takes us any further forward. It does not matter the building “was or is not wholly designed or adapted for living in” so what matters is that some part of the building either was designed for living in or is adapted for living in. My view is that, so far as this part of the test is concerned, all that is required is that some part of the building, at the date that the desire notice is given, is capable, by design or adaptation, of being occupied as a residence.

If that were the end of it, then buildings such as the Ritz Hotel, a block of mansion flats, a large modern office block with a penthouse flat or a factory with some small residential accommodation such as a caretaker’s flat, would all appear to come within the definition. However, that is not the end of it because there are words of limitation that require that the building must reasonably be called a “house”.

An authoritative explanation of these words was given by Lord Roskill in Tandon. He set out the following proposition of law. First, if the building is designed or adapted for living in, only exceptional circumstances would justify a judge in holding that it could not reasonably be called a house. It is only “if nobody could reasonably call the building a house” that a building, otherwise within the definition, is not a house. Secondly, it is a question of law whether it is reasonable to call
a building a house. Thirdly, as long as a building of mixed-use can reasonably be called a house, it is within the statutory definition of “house” even though it may reasonably be called something else.

It is a consequence of those propositions that a building originally designed as a single house and then later converted to a shop with residential accommodation above has been held to be a “house” (Lake v. Bennett [1970] QB 663 CA) as he has a purpose built shop with residential upper parts (Tandon v. Trustees of Spurgeons Homes, above).

It is not, however, quite as easy as that. In relation to mixed-use buildings, much has been made of Lord Roskil’s third proposition of law, which, on the face of it, seems to suggest that, once you have passed the “design or adapted for living in” test, then it would be very unusual to say that the building was not a house “reasonably so called”. That does not sit entirely comfortably with the time that he also spent in the judgement considering the factors that make up the “character” of the building. What he said was that, whether a building is a house reasonably so called, depends on its character at the date of the Notice of Tenant’s claim. The most important factor is usually the physical appearance of the building. But other relevant factors that may be taken into account for this purpose are the history of the building, the terms of the lease, the proportions of the building respectively used for residential and non-residential purposes and the situation of the building.

What Lord Roskil seems to be saying, therefore, is that, after application of the “character” criteria, a building that is “designed or adapted... (whether in whole or in part)....for living in” would not be a house “reasonably so called” only if the circumstances were that nobody could reasonably call that building a house on the application of the criteria. He went on to say that he thought that such circumstances would be “exceptional” which he found “hard to envisage”. However, neither Salmon LJ in Lake (the Ritz Hotel, Rowton House (a working men’s hostel) or a large purpose-built block of flats) nor Lord Millett in Malekshad (a block of flats or an office block with a residential penthouse suite) seemed to find the task particularly hard when giving the above examples of buildings which would not be a house “reasonably so called”, notwithstanding that they are in part designed or adapted for living in.

A building may be a house even if it is “divided into flats or maisonettes” and this is emphasised by the further provision that “where a building is divided horizontally, the flats or other units into which it is so divided are not separate “houses” though the building as a whole may be”. As Lord Millett pointed out in Malekshad, the words are “may be”; not “is”. Whether or not such a building is in fact a house therefore depends entirely on whether it is a “house reasonably so called”.

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In the converse situation of the vertical division of the building, it is provided that “where a building is divided vertically the building is not a house although any of the units in to which it is divided may be”. Again the words are “may be”, not, “is”. Thus each of a pair of normal semi-detached houses is a “house” on its own as is each of the normal terrace houses in the same terrace. However, if a building comprises two or more “houses, within the definition, it is not reasonable to call that building a house.

Much of the time in Malekshad was spent in trying to decide what is meant by horizontal or vertical in this context. What the Lord Millett said was:

“There is however no need to require the line of separation to be precisely horizontal or vertical i.e. at precisely 90 degrees to the vertical or horizontal as the case may be. Nor is there any need to insist that the line of separation should be an unbroken line, that is to say that it should lie in single plane. It is not the geometric characteristics of the line of separation that matter but the structural relationship of the units into which the building is divided. In my opinion, a building is divided horizontally if it is divided from side to side and vertically if it is divided from top to bottom”.

The question of what constitutes a “house” for the purpose of the Act is therefore determined in accordance with Section 2(1). However, that alone may not be sufficient to get you home because of a further limitation imposed by Section 2(2). What that Section says is that rights under the Act will not apply to a house “which is not structurally detached and of which a material part lies above or below a part of the structure not comprised in the house”.

The expression “structurally detached” in the context of Section 2(2) means actual physical detachment from any other structure and separation merely by party walls, ceilings or floors from the rest of the structure is not sufficient (Parsons v. Trustees of Henry Smith’s Charity [1974] 1 WLR 435 HL).

The question of what is meant by “material” in this context has been the subject of much judicial debate, principally over whether the test is a physical one or a conveyancing one. There were two apparently conflicting decisions of the court on this issue and, although it was hoped that Malekshad would provide the definitive judgment, each of their Lordships chose to say something about this point and, even discounting one dissenting judgment, it is fair to say that the others were not entirely consistent. However, it can be said, following Malekshad, that the test to be applied is a
Their Lordships unanimously disapproved the meaning given by Stevenson LJ in Parsons ("it must mean material to the tenant or to his enjoyment of the house") and (with Lord Hobhouse dissenting) disapproved the test formulated by Nourse LJ in Birrane (a part will be material if "it is of sufficient substance or significance to make it likely that enfranchisement will prejudice the enjoyment of the house or another part of the structure whether by reason of the inability of one freeholder owner to enforce positive obligations against successors in title of the other or otherwise").

Material in the context of Section 2 (2) means “substantial”. It is an issue of structure and it is not dependent on the tenant’s use or enjoyment of the house nor on the relative value or importance that the relevant part of the house bears to the whole. It has to be considered in relation to the house alone and not to the structure as a whole nor to any other part of it which is not comprised in the house. Whether a part is material is a matter for the judge and is an issue which is largely factual and one of common sense. It calls for a broad assessment of the relative importance or unimportance of the part as a feature of the house. Size, value, support of protection may all be factors to be taken into account but all these factors need to be considered solely in relation to the house and not otherwise. It will be question of fact and degree.

Their Lordships took comfort in their decision from the provisions of Section 2(5). That Section permits a landlord to exclude from the conveyance any part of the house and premises which lie above or below other premises in which the landlord has an interest. That part does not need to be “material”. In consequence, any difficulty that might arise from the Nourse LJ “conveyancing” test, can be overcome by the landlord invoking Section 2(5).

It is sometimes difficult to determine the precise premises that constitute the relevant “house” within the provisions discussed above, particularly in cases where buildings have been altered since they were first erected. Such alterations may result in a change in the identity of the original premises, e.g. if two or more adjoining cottages are fully converted into a single residence, which thereupon becomes the only relevant “house”.

The most important factor in seeking to determine what is the relevant “house” is the “physical condition of the structure” (Duke of Westminster v. Birrane [1995] QB 262). In the case of two adjoining houses, much will depend on the number of interconnecting doors or passages, and the extent to which the houses remain capable of use as self-contained units, with separate kitchens, bathrooms, central heating systems, electrical circuits and the like. Each case will be factually
different and those differences could lead to a different result (*Collins v. Howard de Walden Estates Ltd*, [2003] 37 EG 137).

So the suggestion that the Leasehold Reform Act 1967 applies simply to the traditional single private dwelling house is very far from the truth. With the abolition of the residence test, I fully expect cases to come forward, which will push the limit of the definition “house” to include buildings which many people might not traditionally perceive to be a house. It will be interesting to see how these cases develop.

**VALUATION**

Relativity must qualify as the longest running bone of contention in leasehold reform valuations. Unlike other issues on which contention has been largely suspended, at least during periods of truce, however fragile, relativity has become an even harder issue to resolve. The main reason for this, I believe, is that the correct, at least a generally acceptable, answer on relativity has been made harder to find by the extension of enfranchisement rights in successive legislation.

Relativity is a short name for the relationship between the values of leases with differing terms unexpired and of a corresponding freehold interest with vacant possession in the same house or flat. Thus we might talk of a lease with 20 years unexpired being worth 50% of the value for a corresponding freehold.

The value of an existing lease is relevant, as well as that of the freehold or the new lease being claimed, in most cases, because the statutory basis of valuation applicable to most houses and all flats, for which the existing lease term has less than 80 years unexpired, includes “marriage value”. Marriage value is the additional value which is the freehold or new lease being claimed has over the sum of the values of the existing freehold, subject to the existing lease, and of the existing lease, itself. It is a common feature to be found in property markets, not just residential, but it is probably most widespread in leasehold residential property. The amount of marriage value to be found in leasehold residential property has, however, been reduced by leasehold reform legislation, which is a major contributor to the problem that I call relativity.

It is generally agreed that leasehold reform rights add to the values of leasehold properties which offer the potential for exercising those rights. They give the leaseholder the opportunity to compulsorily acquire a greater interest in the property, largely at a time of the leaseholders
choosing, at what may become a historic valuation date by the time when the purchase is completed, and at a price excluding any additional value attributable to tenant’s improvements, and which may be referred to a third party for determination. As the legislation has so increased leasehold values, it has also reduced the gap between leasehold and corresponding freehold values, and hence the actual potential marriage value. But for the purpose of calculating an enfranchisement price or the statutory premium for a new lease, the legislation requires the valuation of the existing lease on the assumption that the leaseholder has no right to acquire the freehold or a new lease of the property. That is implicit in the relevant legislation relating to houses, according to a Lands Tribunal decision (called Norfolk v Trinity College Cambridge reported by Estates Gazette on 8 May 1976), which has survived unchallenged in court since 1976. It is explicit in the legislation on claiming new leases of flats.

The extension of enfranchisement rights by successive legislation has obviously reduced the supply of non-enfranchiseable leases and with them the potential to identify direct comparables for the requisite valuations of leases assuming no rights to acquire the freehold or a new lease. There is now virtually no such information available for leases of more than 21 years.

How is a lease assuming no right to the freehold or a new lease to be valued when there are no longer any such non-enfranchiseable leases of comparable terms unexpired to provide evidence of their current values through sales on the open market?

Some say by reference to evidence of current open market values for enfranchiseable leases of comparable properties, and especially if it is of the same property as is being valued, which obviously provides the most direct comparable(s). The practice has evolved of deducting a percentage for the effect of the opportunity to exercise the leasehold reform rights. If ever there was evidence produced to prove what should be that percentage, it is no longer available from the market now. A less common but more sophisticated approach is, having established a value for an enfranchiseable lease, to deduct a proportion of the leaseholder’s 50% share of the marriage value, which would complement the 50% share of the marriage value that would have been payable to the landlords if the freehold or a new lease of the property had been claimed validly on the same day as the enfranchiseable lease was sold. This involves more complicated calculations than may ever have influenced an actual bid by a prospective purchaser of an enfranchiseable lease.

The critics of any approach to valuing leases assuming no right to the freehold or a new lease by reference to the values of enfranchiseable leases maintain that its fundamental flaw is the practical
impossibility of it delivering the statutorily required exclusion of the effect on value of the relevant leasehold reform rights. It is based on a value for an enfranchiseable lease which has been increased by the value of the leasehold reform right. The value of the leasehold reform right depends upon the cost of enfranchising or buying the new lease. Thus the valuer is drawn into determining one ingredient of the leasehold reform valuation by a means that depends upon the answer to which that ingredient is contributing. The less is the allowance made for the value of leasehold reform rights, the less is the cost of enfranchising, which adds to the value of enfranchiseable leases, and, so long as this practice is continued, the resultant growth in value of enfranchiseable leases will be having the effect of reducing enfranchisement prices and premiums for new leases.

It may also be doubted how close a comparable an enfranchiseable lease is for valuing an unenfranchiseable lease, even of the same property. Would the two distinctly different interests appeal to the same market? Would the purchaser of an enfranchiseable lease have been interested in it if it were not enfranchiseable? Was that purchaser not making the first of two bids in a two stage process of acquiring a larger interest dependent on having the right to buy the freehold or a new lease?

The principal opposing approach to valuing a lease on the statutory assumption of no right to the freehold or a new lease is by applying a relativity to the value of the corresponding freehold in possession. The relativity generally comes from settlement evidence, i.e. analysis of enfranchisement prices and premiums for new leases previously agreed or determined when and where the lease had a similar term unexpired to that being valued. Often, nowadays, it is the only evidence to be found of values for non-enfranchiseable lease. It is claimed, especially by those who have kept such records longest, that the more historic of this settlement evidence is the more reliable, because it dates from a time when those who negotiated the settlements had evidence from, or at least knowledge of and experience of, a contemporary market in non-enfranchiseable leases. Why would their relative values to corresponding longer leases or freeholds with vacant possession have risen over time, but for the effect of leasehold reform rights? But settlement evidence attracts various criticisms, such as depending upon analysis, which may not be agreed, or a transaction resulting from negotiation between only two parties, as distinguished from exposure to a wider market, and for being self-perpetuating.

At this point I am going to turn from one area of steadily increasing contention over the years to one which has re-emerged as more contentious in recent years. It is yield rates.
These are the yield rates applied to value the landlord’s interest at the time of the claim for the freehold or a new lease of the property, which is generally an investment in the rental income from and the reversion to an existing lease and other opportunities for making money by holding the reversion. The lower the yield rates applied, the higher will be the enfranchisement price or premium for the new lease.

There has always been a difficulty of finding comparable evidence for determining the yield rates to apply in valuing reversions to long leases of residential properties, unless the reversions are long deferred. It has been a particular difficulty in valuing properties on the Central London Estates. Such reversions are rarely sold, other than to a leaseholder of the same property. Notwithstanding, the conventional method of valuing the landlord’s interest, even for a sale to the tenant, is to value it first as an investment for sale to a third party and then add in a share of the marriage value which will be realised by the sale to the tenant.

As there was already a dearth of comparable evidence for valuing the landlord’s interest, it has only been exacerbated by the extension of enfranchisement rights, as the statutorily required leasehold reform valuation is required to exclude the effect of the leaseholder’s right to compulsorily acquire the freehold or a new long lease.

From early years following the Leasehold Reform Act 1967, 6% emerged as a fair yield to apply for valuing freehold investments in houses on the highest Central London estates. That it did so owed more to the strength of expert opinion being applied in the negotiation of enfranchisement prices and commanding support from the Lands Tribunal than evidence of actual sales of comparable investments, because there were next to none.

There was a famous and influential intervention by the Court of Appeal in 1974, after the Lands Tribunal, frustrated by absence of any dependable open market transactions, had been persuaded to look at “the broad index of the financial market”. Lord Denning’s reaction was to express “doubt whether the money market is a safe guide in making valuations of land….The important market is the land market in the vicinity,” he said. (See Gallagher Estates Ltd v Walker reported by Estates Gazette on 20 April 1974). In the continued absence of open market transactions, that guidance inevitably led to reliance on settlement evidence.

And so the same yield rates were perpetuated for years and became more fortified by the continuously increasing amount of settlement evidence. The principal means of its attack became
the results from auction sales of long deferred reversions, but they were of little relevance to many leasehold reform valuations in which the value of the landlord’s interest was dominated by its no so long deferred reversion.

The same settlement evidence which had fortified landlords’ valuations and thwarted tenants’ ambitions for the first 30 years of the Leasehold Reform legislation is now being employed on behalf of tenants as evidence against applying lower yields, which are claimed, on behalf of landlords, to be justified by the relevant property market and more general economic conditions of recent years. Residential property has performed spectacularly compared with most other forms of investment, including other property types. That out-performance has come from growth in capital values, which applies as much to reversions to long leases as any other types of residential property. The rental income returns from residential property particularly in Central London, have not done as well. But yields from other types of investments have fallen also, as have interest rates generally and inflation over the longer term.

Whereas there continues to be a dearth of sales of reversions to long leases (other than very long deferred reversions), it is easier to find evidence of yields being obtained for residential properties let on short term tenancies. With the increasing demand for such investments over recent years, there has been a relative abundance of sales of residential properties to investors followed by lettings of those properties short term. Such transactions have contributed to an index maintained and produced by FPD Savills Research for Prime Central London Residential Properties which shows net yields having fallen from 6.9% at the end of 1992 to 2.3% in March 2004. If the investment market will accept such a low income return from an outlay to buy a residential property with vacant possession to let on a short term, because it is expected to be supplemented by growth in the capital value of the asset, why would a much higher return be required from a relatively smaller outlay on buying a less risky reversion to a long lease? It seems unlikely, especially as the less attractive rental income return is a smaller part, than the more attractive growth in capital value, of the total return from the reversion to the long lease than it is from the property bought for letting short term.

With these yields having been falling for more than a decade now, why has it taken so long to reduce the yields applied in leasehold reform valuations? A major part of the answer is lack of direct comparables from sales of reversions to long leases of residential properties which prove the lower yields. There have been so few of such comparables produced with sufficient details in evidence to the Leasehold Valuation Tribunal for Greater London that I believe they have been “outweighed” by the knowledge and experience of the much greater body of settlement evidence. Usually the most
direct comparables from the local land market have been the settlement evidence. Moreover, the same yield rates have often continued to be applied in sales of freeholds outside the legislation, albeit with the extensions to enfranchisement rights they are becoming more and more just an alternative to making a claim under the relevant Act.

There have been cases in which the Leasehold Valuation Tribunal for Greater London have accepted evidence to reduce yield rates below the historic local settlement evidence, but not below 6%. That 6% “barrier” has since been considered by the Lands Tribunal this year in *Cadogan Holdings Limited v Pockney* (LRA/27/2003 determined on 19 May 2004). On the evidence given in that case regarding the application of a 5¼% yield to defer the value of the freehold reversion for a house in Chelsea, the Lands Tribunal was “entirely satisfied that the changes in yields on prime residential property in Central London and on ground rents throughout the country that had occurred since” 1995 “meant that the previously established deferment rate of 6% was too high in June 2002” and found “that the rate of 5¼% suggested … is not too low”.

Even before the Lands Tribunal decision was published, there were cases being made to reduce yield rates for residential properties in Central London as far as 4%. Following the decision, reviews have been undertaken of yield rates for houses and flats on most, if not all, of the Central London Estates and maybe further afield also. Some valuers have reacted by saying that now is not the time to reduce yield rates, when interest rates have risen already since June 2002 and are expected to rise further. Others argue that is to ignore that investment in high value reversions of residential property is generally for the long term and is more likely to be influenced by the returns expected over the long term than it is by short term fluctuations of interest rates. It is the change in the real returns expected from such investments relative to other long term investment which justifies reduction in the yield rates applied for their valuation.

**REAL PROPERTY**

**BENEFICIAL INTERESTS IN PROPERTY BETWEEN UNMARRIED COUPLES OR PARTIES CONTRIBUTING TO PROPERTY**

The determination of beneficial interests in properties, either where the parties are unmarried co-habitees, or where relatives contribute financially to the acquisition of property (by mortgage monies or cash) inevitably involves a close analysis of the facts. This area of the law, perhaps more than most, is one where the cases are said to be decided on “principle”, but behind that facade, in many cases, the merits, and justice, of each individual case will often determine the outcome.
The cases divide into three areas:

1. Where the parties have declared an “express trust” viz. a express declaration of trust as to the beneficial interests;
2. Where there is no declaration of trust and the property is in joint names;
3. Where there is no declaration of trust and the property is in the name of one party, and another party claims an interest.

Express trust

This is where the parties have themselves declared their interests in the property by an “express” trust. An express trust of land can only be created in writing. Where the couple are joint legal owners and have executed a declaration of trust, that will be “conclusive” in the absence of fraud, mistake, subsequent agreement or proprietary estoppel. However, equity defends the informal acquisition of land through the doctrine of constructive trust (see below). In registered conveyancing, express declarations had been rare until recently. Since April 1, 1998, the standard form of transfer “TR1” has had a box for a declaration of trust either as joint tenants or as tenants in common in equal shares or on such other trusts as may be expressly set out. Ticking the “joint tenants” box means that, on severance of the joint tenancy (e.g. on bankruptcy), the respective shares will be equal: Goodman v Gallant (Goodman v Gallant [1986] Fam. 106). This solution will not help where form TR1 was not used or the relevant box was not completed. It will also not assist where the property is registered in the name of only one of the partners.

In the case of Pankhania v Chandegra [2012] EWCA Civ 1438 the question of express declarations of trust was explored again by the Court of Appeal. In this case, Mr Pankhania (“P”) appealed against a County Court decision that the legal and beneficial ownership of a property resided solely with the respondent Mrs Chandegra (“C”), his aunt. The property had been transferred into the names of P and C as tenants in common in equal shares with an express declaration of trust to that effect. The judge below had found that C had insufficient income to obtain a mortgage. P had therefore agreed to become a joint mortgagor so that his salary would be taken into account. The judge determined that P had never sought to live in the property, nor to derive any income from it, and had only recently paid some £2,500 towards the mortgage. The judge decided that the transfer had been a “sham”, that the property had been bought for C, and held that the beneficial interest was C’s entirely. The Court of Appeal allowed the appeal. If the property had been transferred to joint tenants with no indication of their respective beneficial interests, then the judge’s approach would have been correct. However, P and C had made an “express declaration of trust” of the beneficial
interest and that was conclusive. There was no room for a constructive, or common interest trust to be inferred (Stack v Dowden [2007] UKHL 17, [2007] 2 A.C. 432; Goodman v Gallant [1986] Fam. 106 and Pettitt v Pettitt [1970] A.C. 777 followed (see paras 13-16 of judgment). A declaration of trust could be set aside on the ground of “mistake, fraud, or undue influence” but nothing of the kind had been alleged. If the judge had intended to find that the declaration of trust was a sham then he had been wrong to do so, Snook v London and West Riding Investments Ltd [1967] 2 Q.B. 786 followed (paras 17-22). An order for sale was made with the parties entitled to the proceeds in equal shares.

**Pankhania** therefore demonstrates that where there is an express declaration of trust, absent fraud, mistake or undue influence, it will be conclusive.

**Joint Names: Implied Trust**

Most of the cases, however, deal with the situation of where there is no express declaration of trust. There are two types of case; firstly, where the property is in “joint names”; secondly, where the property is in the name of one party, and the other claims an interest (the “sole ownership” cases: see below).

The leading case is **Stack v Dowden** (2007) UKHL 17. This was a case of joint legal ownership. On the facts as found, Ms Dowden made a much greater contribution to the purchase price than Mr Stack. Nonetheless, the trial judge divided the net proceeds of the new property 50/50. The Court of Appeal allowed Ms Dowden’s appeal and divided the net proceeds 65/35 in her favour. Mr Dowden appealed to the House of Lords, where there was unanimity that the appeal should be dismissed. Their approach was, however, different. The main opinion was given by Baroness Hale, with whom three others agreed. Lord Neuberger dissented. The presumption is that the beneficial ownership follows the legal ownership. So, in a case of joint legal owners (even where there is evidence of unequal contributions to the purchase price) they will be presumed to own beneficially in equal shares. However, this presumption can be “rebutted” by evidence that the parties intended their beneficial interests to be other than equal. The party making such a claim will have to show that the parties intended their beneficial interests to be unequal and in what way. The intention may change after the initial purchase and the court will give effect to such a change.

On the facts of Stack, the House of Lords held that where a property was conveyed into the joint names of a cohabiting couple, without any explicit declaration of their respective beneficial interests, the starting point where the property had to be divided upon the breakdown of the relationship was that where there was joint legal ownership, there was also joint beneficial
ownership. It follows from Stack that “context is everything”, and each case would turn on its own facts. Many more factors than financial contributions could be relevant to intention, and the court gave a non-exhaustive list. Cases in which the joint legal owners were to be taken to have intended that their beneficial interests should be different from their legal interests would be “very unusual”. Accordingly, in joint legal ownership, it was for Ms Dowden to show that the common intention when they bought the house was that she and Mr Stack should hold the property otherwise than as joint beneficial tenants. There were, on the evidence, many factors for her to rely on. The fact that she and Mr Stack had lived together for such a long time and had children together, yet had kept their affairs rigidly separate, was strongly indicative that they did not intend their shares, even in the property that was put into their joint names, to be equal, and she had made good her case for a higher share.

Baroness Hale signalled a return to the process of “inferring” the parties' intentions (both as to whether their beneficial shares are to be unequal, but also as to the precise quantification). What is required is a determination of what the parties in fact intended, not what the court thinks it would have been fair for them to agree had they thought about it. As to what evidence will be relevant to divination of the parties' intentions, the potential sources of this evidence is wide. Baroness Hale held that the court must take:

“... a holistic approach to quantification, undertaking a survey of the whole course of dealing between the parties and taking account of all conduct which throws light on the question what shares were intended”

Baroness Hale identifies the factors that might be relevant:

“In law, 'context is everything' and the domestic context is very different from the commercial world. Each case will turn on its own facts. Many more factors than financial contributions may be relevant to divining the parties' true intentions. These include: any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses. When a couple are joint owners of the home and jointly liable for the mortgage, the inferences to be drawn from who pays for what may be very different from the inferences to be drawn when only one is owner of the home. The arithmetical calculation of how much was paid by each is also likely to be less important. It will be easier to draw the inference that they intended that each should contribute as much to the household as they reasonably could and that they would share the eventual benefit or burden equally. The parties' individual characters and personalities may also be a factor in deciding where their true intentions lay. In the cohabitation
context, mercenary considerations may be more to the fore than they would be in marriage, but it should not be assumed that they always take pride of place over natural love and affection.”

A striking feature of the opinions of both Baroness Hale and Lord Walker in *Stack* is that they go out of their way to stress that, in cases of jointly owned homes at least, it will be very “unusual” for the presumption of equality to be displaced (although the presumption was displaced on the facts in *Stack* in relation to facts that might not seem that exceptional). The critical fact was that Ms Dowden had made a much greater contribution to the purchase price. However, this is a common feature of these cases. Their Lordships further emphasise that the burden will be on the person arguing against equality and it will be a heavy burden.

Baroness Hale placed great reliance on the fact that, other than the matrimonial home, the parties kept separate bank accounts and financial affairs. Again, this is not so unusual in the modern climate. The opinion of Baroness Hale has not, therefore, been without criticism.

Indeed, it is hard to read the decision of the House of Lords in *Stack* without concluding that it has certain difficulties. Further light has been shed on *Stack* by the decision in *Jones v Kernott* [2010] EWCA Civ 578.

In 1984 Ms Jones and Mr Kernott bought a house (“the Badger Hall Avenue house”) in their joint names; so although there was no declaration of their beneficial interests, these were prima facie equal: applying *Stack*. They lived in the house as a couple until 1993, when Mr Kernott moved out, subsequently buying another house (“the Stanley Road house”) for himself. In 2008, Ms Jones claimed a larger share in the Badger Hall Avenue house. The County Court Judge (H.H. Judge Dedman, in the Southend-on-Sea County Court) held her to have a 90 per cent interest, Mr Kernott only a 10 per cent interest. The judge’s decision was upheld on appeal by Nicholas Strauss Q.C., sitting as a Deputy Judge of the Chancery Division ([2010] 1 All E.R. 947).

On appeal to the Court of Appeal, it was common ground that the parties' interests were indeed equal until Mr Kernott's departure in 1993 (at [6], [69]). The contentious issue was whether, between 1993 and 2008, this 50/50 division had turned into the 90/10 one, as found by the county court. It seems to have been agreed on all sides that such a change was possible in principle. Where a property is held in joint names, the quantum of the parties' shares is determined by their relevant "common intention" (*Stack v Dowden* at [60]); and it is clear that an original “common intention” can be replaced by a later one to different effect (at [62], [70]). The question was whether this had in fact happened.
This disagreement sprang from a difference in view over the meaning of “common intention”, applying the opinion of Baroness Hale of Richmond in *Stack*. It was unclear whether Baroness Hale's view was that a “common intention” has to be genuine, even if not necessarily expressly evinced; or was that it can be imputed by the court on the parties' behalf. In the event, the Court of Appeal (Wall and Rimer L.JJ., Jacob L.J. dissenting) overturned the decision of Nicholas Strauss Q.C (and the County Court judge), finding the parties to have equal shares after all (*Jones v Kernott* [2010] 1 W.L.R. 2401).

The appellant (Jones) appealed against the decision of the Court of Appeal to the Supreme Court. The Supreme Court held, applying *Stack*, that where a property was purchased in the joint names of a married or unmarried couple for joint occupation, who were both responsible for any mortgage, and where there was no express declaration of their beneficial interests, there was a presumption that the beneficial interests coincided with the legal estate. That presumption could be “rebutted” by evidence of a contrary intention, which might more readily be shown where the parties had contributed to the acquisition of the property in unequal shares, but each case would turn on its own facts. The Supreme Court held it was for the court to ascertain the parties' common intention as to what their shares in the property would be, in the light of their whole course of conduct in relation to it (*Gissing v Gissing* [1971] A.C. 886 and *Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam. 211 applied), *Stack* followed (see paras 10-15, 25, 51 of judgment).

The Supreme Court further held that any challenge to the presumption was “not to be lightly embarked on”, since a decision to buy a property in joint names indicated an emotional and economic commitment to a joint enterprise, and the notion that in a trusting personal relationship the parties did not hold each other to account financially, was underpinned by the practical difficulty of taking any such account after years of living together (paras 19-22). The search was primarily to ascertain the parties' actual shared intentions, whether expressed, or to be inferred from their conduct. However, where it was clear that the beneficial interests were to be shared, but it was impossible to divine a common intention as to the proportions in which they were to be shared, it was for the court to “impute” an intention to the parties which they might never have had. The court could not impose a solution on them which was contrary to what the evidence showed that they actually intended (paras 31, 46-47). On the facts, the Supreme Court held that there was no need to impute an intention that the parties' beneficial interests would change, as the judge had made a finding that their intention did in fact change, and that was an intention which he both could have, and should have, inferred from their conduct. The calculation of their shares by the Supreme Court produced a result so close to that produced by the County Court judge that it would be wrong
for the Supreme Court to interfere with the finding of the County Court judge. The County Court Judge’s decision was therefore reinstated (and the Court of Appeal’s decision overturned).

As indicated at the outset, there is no substitute for reading these cases, as they turn on their own special facts.

**Implied Trust: Sole legal owner**

A further issue arising out of *Stack* is whether the position is now different for joint legal ownership as compared with sole legal owners. Baroness Hale seems to consider that the “holistic approach” will apply to cases of sole ownership just as much as joint ownership.

However, in *Jones v Kernott* (above), the Supreme Court reiterated that where a family home was put into the name of one party only, the starting point was different, and the first issue was whether it was intended that the other party “should have any beneficial interest at all”: there was no presumption of joint beneficial ownership, but their common intention had again to be deduced from their conduct (para.52).

In *Abbott v Abbott* [2007] UKPC 53 (decided after *Stack*, but fore *Jones v Kernott*), the Privy Council had an opportunity to hear an appeal concerning sole legal ownership, including three Law Lords who heard *Stack*. The Privy Council echoed the House’s view in *Stack* that the courts’ struggle for a proper legal basis for resolving property disputes in the family context has now come to an end: the constructive trust is the more appropriate analytical tool (at [4]).

*Abbott v Abbott* involved a matrimonial home in Antigua and Barbuda which was vested in the husband’s name only. The House of Lords held that in determining the beneficial ownership of a former matrimonial home, the Court of Appeal of Antigua and Barbuda had erred by attaching undue significance to the dictum of Lord Bridge in *Lloyds Bank Plc v Rosset* [1991] 1 A.C. 107. The key passage in *Rosset* is the opinion of Lord Bridge that the task of the court was follows:

“...The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her
detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or a proprietary estoppel.

In sharp contrast with this situation is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to reach such an arrangement if they had applied their minds to the question, and where the court must rely entirely on the conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. In this situation direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will do”

In Abbott Baroness Hale held that the law had moved on since Rosset, and the parties' whole course of conduct in relation to a property had to be taken into account in determining their intentions as to its ownership. Proceeding on the legal basis of constructive trust, Baroness Hale reiterated at the beginning of Abbott that the inquiry involved two stages.

First, whether it was intended that the wife should share the beneficial interest in the matrimonial home conveyed to the husband only; and secondly, if so, the proportionate share intended (at [4]). In short, the primary inquiry deals with acquisition of a beneficial interest; and the secondary is about quantification of that interest. With regard to the primary inquiry, despite the husband's sole legal ownership, the wife had undertaken joint liability for the mortgage repayment and it was accepted that her salary contributed towards such repayment (albeit clearly far from 50 per cent of such repayment). Even according to the (narrow) criteria laid down by Lord Bridge of Harwich's dictum in Lloyd's Bank Plc v Rosset [1990] 1 A.C. 107 (that it was extremely doubtful that anything less than a contribution to the initial purchase price or subsequent mortgage instalments would constitute sufficient facts to infer a common intention of shared ownership) this appeared to be sufficient for the wife to claim some beneficial interests. The husband also accepted that the wife did have a beneficial interest (at [19]).

Thus, the issue was about quantification of this beneficial entitlement (i.e. the secondary inquiry). The parties' whole course of conduct in relation to the property must be taken into account in determining their shared intentions as to its ownership” (at [19]). Since the land upon which the property was built was likely to be a gift from the husband's mother to the couple, and the couple also organised their finances entirely jointly, including having a joint bank account for daily expenses and undertaking joint liability for the mortgage repayment, the trial judge's equal split in beneficial ownership was upheld.
In some legal contexts, it is true that a period of cohabitation can give rise to treatment analogous to that of married couples. (For example, in relation to means-testing for welfare benefits, tax credits and access to non-molestation orders). But for many purposes – not least financial relief on separation and death – cohabitants and spouses are treated quite differently.

On the dissolution of marriage and civil partnership, the courts have a wide-ranging discretion to adjust the couple’s property and finances in accordance with what they judge to be a fair outcome in all the circumstances (Matrimonial Causes Act 1973, Part II; Civil Partnership Act 2004, sch 5). By contrast, when cohabitants separate, the courts use a patchwork of statutory and non-statutory rules to determine what should happen to the couple’s property. The courts have few adjustive powers in these cases, so, for the most part, the focus is on determining who owns what as a strict matter of property law, rather than to whom it should in fairness be given (Pettitt v Pettitt [1970] AC 777, 798, per Lord Morris). In the case of household contents and other items of personal property, the basic position is that whoever happened to pay for the property owns it. (For a discussion of the law in this area in the matrimonial context (where the general law is the same as it is for cohabitants), see Matrimonial Property (1988) Law com No 175, paras 2.1 to 2.5). However, the home in which the parties live will often be the most valuable asset falling within the joint property pool of a cohabiting couple. Ascertaining whether one or both parties own it and in what shares, and then deciding whether it should be sold immediately or made available for occupation by one of them for a period, are often the key issues arising on separation, and the law on this issue is complicated.

In cases where one partner dies, the question of who owns what remains important, as it is necessary to identify what property falls within the deceased’s estate: the general law discussed below for ascertaining ownership is therefore as relevant in death cases as it is on separation. However, there is also an adjustive statutory remedy available to the surviving cohabitant which is far more substantial than any of the remedies currently available between cohabitants on separation. The survivor will often be eligible to make an application to court to seek reasonable financial provision where the deceased’s will or the intestacy rules do not adequately cater for the survivor’s maintenance.

EXPRESS REGULATION BY THE PARTIES
Cohabiting couples can seek to regulate the property and financial aspects of their relationship in several ways. The legal consequences of their arrangements may differ according to the method chosen.

Cohabittants can make outright gifts to each other. (A promise to make a gift is unenforceable for want of consideration unless it is made by deed, but this does not apply to a completed gift: *Ayerst v Jenkins* (1873) LR 16 Eq 275). They may confer beneficial interests in property on each other by way of express trusts; depending on the nature of the property involved, certain formalities may have to be completed before such a trust will be binding. Where the home is owned by one cohabitant, the owner may confer a right to occupy on a cohabiting partner by way of contractual licence (*Chandler v Kerley* [1978] 1 WLR 693). However, lingering questions remain in relation to contracts between cohabitants which are designed generally to govern their property and financial relations during their relationship and/or in the event of separation.

**Express declarations of trust in respect of land**

A couple may come to an agreement as to their respective shares (in legal terms, their respective beneficial entitlements) in the house they occupy, or indeed in any property the title to which vests in one or both of them.

Where a couple purchase a house together, they will usually instruct a solicitor. If it is intended that each should obtain a share in the house, the solicitor should draw up a declaration of trust indicating their respective shares. This must be evidenced in writing and signed by the legal owner or owners of the property who, in the majority of cases, will be the cohabitants themselves (Law of Property Act 1925, S 53(1)(b)).

The courts have in recent years emphasised the importance of express declarations of beneficial entitlement (Judges have been beseeching solicitors to take the instructions of transferees as to beneficial interests in property for many years – see *Cowcher v Cowcher* [1972] 1 WLR 425, 442, per Bagnall J. The most famous of these remarks is that of Ward LJ in *Carlton v Goodman* [2002] EWCA Civ 545, [2002] 2 FLR 259, at [44]. “I ask in despair how often this court has to remind conveyancers that they would save their clients a great deal of later difficulty if only they would sit the purchasers down, explain the difference between a joint tenancy and tenancy in common, ascertain what they want and then expressly declare in the conveyance of transfer how the beneficial interest is to be held because that will be conclusive and save all argument. When are conveyancers going to do this
as a matter of invariable standard practice? This court has urged that time after time. Perhaps conveyancers do not need to read the law reports. I will try one more time: ALWAYS TRY TO AGREE ON AND THEN RECORD HOW THE BENEFICIAL INTEREST IS TO BE HELD. It is not very difficult to do”.

(The use of the upper case for emphasis is that of the judge). Sir Peter Gibson recently made a similar comment in Crossley v Crossley [2005] EWCA Civ 1581, [2006] 1 FCR 655, at [5]). Such a declaration is conclusive of the entitlements of those who are party to the transaction, subject only to challenge on grounds such as fraud (Pettitt v Pettitt [1970] AC 777, 813, per Lord Upjohn: see also Goodman v Gallant [1986] Fam 106), mistake (Pettitt v Pettitt [1970] AC 777, 813, per Lord Upjohn: see also Goodman v Gallant [1986] Fam 106) and undue influence (Bullock v Lloyds Bank Ltd [1955] Ch 317. It avoids any need to rely on the difficult law relating to implied trusts, which we discuss below. In fact, where land is to vest in persons as joint proprietors (whether on an application for first registration, on a transfer of land with registered title, or on an assent to the vesting of land in persons entitled under a deceased’s estate), the Land Registry now requires that a declaration of trust be executed (The information is required under the provisions of the Land Registration Act 2002, S 44(1), and the Land Registration Rules 2003, r 95(2)(a). It must be given on Form FR1 in the case of first registration, and on Form TR1 in the case of a transfer of registered land). The statutorily prescribed form requires the intending proprietors to state whether they hold on trust for themselves beneficially (a) as joint tenants, (b) as tenants in common in equal shares, or (c) as tenants in common in unequal shares or as regulated by a separate trust deed. (Under option (c), the parties may specify their unequal shares, or they may state that the land is held on trust for the members of an unincorporated association or in accordance with a separate trust deed). The provision of this information enables the Registrar to enter a Form A Restriction in the Land Register, which alerts subsequent purchasers to the existence of the trust.

The probable involvement of a solicitor and the requirements of the Land Registry make it likely that now whenever a couple decide to purchase a property together, they will execute a declaration of trust concluding the matter of beneficial entitlement in that property. In the event of their relationship breaking down, the proceeds of sale of the property should be divided in accordance with the parties’ beneficial shares. (Disputes about whether the property should be sold so as to realise the parties’ shares may be determined by application under the Trusts of Land and Appointment of Trustees Act 1996 (“TOLATA”), s 14).

However, it is unlikely that a declaration of trust will have been made if the property was not jointly purchased. There is no obvious reason why legal advice would be sought where one person owns a house into which another comes to live. Even if a house is purchased at a time when the couple are
living together, the Land Registry does not require the respective shares of the parties to be declared if the legal title is transferred into the name of one party only. In either circumstances, the non-owning party who wishes to claim a share in the property must resort to the doctrines of implied trust and proprietary estoppel, discussed below.

**Express trusts of personal property**

Express trusts in relation to personal property, including funds in bank accounts in the sole name of one party, do not depend on the execution of any formalities, and so may be declared orally (Rowe v Prance [1999] 2 FLR 787, Paul v Constance [1977] 1 WLR 527). There is no need in the context of personal property for the beneficiary of the trust to have relied to his or her detriment on the oral declaration of trust before it will be enforceable.

**“Cohabitation contracts”**

Private regulation by cohabitants has been problematic owing to the historical illegality of contracts which could be said to promote extra-marital sexual relations. Contemporary case law for the most part clearly distinguishes “meretricious” contracts (where sexual relations form part of the consideration and so the contract may be regarded as contrary to public policy) from those regulating the financial and property relationships of cohabitants (See G Treitel, The Law of Contract (11th ed 2003) p 443-444).

Cohabitation contracts may cover various issues and be concluded at various times. They may regulate the financial affairs of the parties during the currency of the relationship, or make provision for the parties’ financial affairs (including the division of their assets) on separation. They may be concluded before the parties’ cohabitation, during the parties’ cohabitation or following the parties’ separation.

The validity of such contracts depends on the impact, if any, of the illegality rule. It seems that contracts made following separation have never been void for illegality, and so will be binding, provided that they are executed in a deed or otherwise supported by lawful consideration (See G Treitel, The Law of Contract (11th ed 2003) p 443, n 56). Difficulties arguably remain in relation to contracts made before or during the relationship, owing to the lack of clear case law upholding such contracts. Judicial comments in some of the older case law indicate that contracts between cohabitants may be unlawful or unenforceable on the ground of public policy (Uphill v Wright [1911]
However, the better view is that such contracts are only liable to be struck down if they comprise contracts for prostitution (Treitel, *The Law of Contract* (11th ed 2003) p 443; R Probert, “*Sutton v Mishcon de Reya and Gawor & Co* – Cohabitation contracts and Swedish sex slaves” (2004) *16 Child and Family Law Quarterly* 453. In *Tanner v Tanner* (No 1) [1975] 1 WLR 1346, the court implied a contractual licence between an unmarried couple, so it seems unlikely that the courts would hold an express contract to be void for illegality). The modern law was recently stated by Hart J to the effect that:

There is nothing contrary to public policy in a cohabitation agreement governing the property relationship between adults who intend to cohabit or who are cohabiting for the purposes of enjoying a sexual relationship (*Sutton v Mishcon de Reya and Gawor & Co* [2003] EWHC 3166 (Ch), [2004] 1 FLR 837, at [22]).

On this basis, there seems no distinction as far as public policy is concerned as between the types of cohabitation contract described above. The leading textbooks are confident that contracts regulating the financial affairs of cohabitants would be enforced (See, for example, S Cretney, J Masson and R Bailey-Harris, *Principles of Family Law* (7th ed 2003) pp 135-136; G Treitel, *The Law of Contract* (11th ed 2003) p 444; *Chitty on Contracts* (29th ed 2004) paras 16-067 and 16-068; and C Barton, *Cohabitation Contracts: Extra-Marital Partnerships and Law Reform* (1985) p 48-49. Note also that the Committee of Ministers of the Council of Europe has recommended that cohabitation contracts should be enforceable: Committee of Ministers of the Council of Europe, *The validity of contracts between persons living together as an unmarried couple and their testamentary dispositions* Recommendation No R (88) 3 of 7 March 1988: “contracts relating to property between persons living together as an unmarried couple, or which regulated matters concerning their property either during their relationship or when their relationship has ceased, should not be considered invalid solely because they have been concluded under these conditions”, and books of legal precedents exist to aid cohabitants and legal advisers in drafting cohabitation contracts (for example, H Wood, D Lush and D Bishop, *Cohabitation Law, Practice and Precedents* (3rd ed 2005). The current law therefore appears to allow parties to enter into all such kinds of contract and to permit enforcement by the courts in the event of breach. However, it could be argued that the statement of Hart J above was not strictly necessary for the decision in the case. While we would expect it to be followed, in subsequent cases, it cannot be conclusively said that it represents the current state of English law.
In so far as they are lawful, cohabitation contracts are governed by the ordinary rules of contract law. So, for example, there must be an intention to create legal relations and lawful consideration (or use of a deed), and a contract between cohabitants may be susceptible to challenge on grounds such as fraud, duress, undue influence, misrepresentation, mistake, duress or illegality on some other ground.

**CO-OWNERSHIP**

Joint tenants and Tenants in Common. Co-ownership arises when two or more persons hold concurrent interests in land. The two most important forms of co-ownership are the joint tenancy and the tenancy in common. After 1925 the only form of co-ownership which can exist in law is the joint tenancy; a tenancy in common can exist only in equity (Law of Property Act 1925 s.1.(6)). The legal estate must always be considered separately from the equitable interest; frequently co-owners may be joint tenants holding the legal estate in trust for themselves (and perhaps others) as equitable tenants in common.

Joint tenants are, as against the rest of the world, in the position of a single owner. Each joint tenant has an identical interest in the whole land and every part of it. The two main features of a joint tenancy are the right of survivorship (*jus accrescendi*) and the four unities. Survivorship means that, on the death of a joint tenant, his interest in the land passes automatically to the remaining joint tenants. The four unities of a joint tenant are the unities of possession, interest, title and time. Unity of possession means that each co-owner is entitled to possession of as much of the land as the others. Unity of interest requires that the interest of each joint tenant is the same in extent, nature and duration. Unity of title requires that each joint tenant claim title to the land under the same act or document. Unity of time means that the interest of each tenant must vest at the same time.

A legal joint tenancy cannot be severed, although one joint tenant may release his interest to others and there may be a severance in equity (Law of Property Act 1925 s.36(2)). Severance occurs: when a joint tenant alienates his beneficial interest voluntarily or involuntarily (by, for example, bankruptcy); by the mutual agreement of all the joint tenants; by a course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common; by notice in writing (Law of Property Act 1925 s.36(2)); by the acquisition by the joint tenant of another estate in land; and if one joint tenant kills another.
Tenants in common hold in undivided shares so that, whilst the tenancy in common endures, no one is entitled to a distinct share in the land. Only unity of possession is required to create a tenancy in common. There is no survivorship amongst tenants in common and the share of a deceased tenant in common will pass with his estate.

At law, therefore, a tenancy in common will arise where any of the unities other than unity of possession are absent or where the grant contains express words of severance or otherwise indicates that a tenancy in common is intended. In equity there are a number of cases in which a tenancy in common may be created by way of a constructive or resulting trust.

**Resulting and Constructive Trusts.** The basis for a resulting trust is the presumed intention if the parties. A resulting trust will arise where land is conveyed to one person, but the purchase money is provided in whole or in part by another. In such cases there is presumed to be a resulting trust in favour of the person who provided the purchase money. The presumption can be rebutted by evidence that the money was a gift or a loan or by the presumption of advancement which arises if the legal owner is the wife or child of the donor.

A constructive trust will be imposed in a number of situations. There are two circumstances which are of particular importance with regard to co-ownership of property. The first is where it would be inequitable to deny the claimant an interest in the property. A constructive trust was imposed, for example, upon a purchaser who gave an oral undertaking to the vendor that the vendor would retain a beneficial interest in the land after the transfer (*Bannister v Bannister* [1948] 2 All E.R. 133). The second is where a person has acted to his detriment in reliance upon a common intention that he will acquire an interest in a property (*Lloyds Bank Plc v Rosset* [1991] 1 A.C. 107). So, for example, a constructive trust may be imposed where one person purchases land and another claims an interest by reason of some contribution or having made some improvement.

In the case of joint legal ownership the starting point is to assume that equity follows the law. In proving the contrary the presumption of resulting trust arising from the proportion of the parties’ financial contributions is not a rule of law. Instead the courts will seek the result that reflected what the parties must, in the light of their conduct, have intended (*Stack v Dowden* [2007] UKHL 17 (applying *Oxley v Hiscock* [2004] EWCA Civ 546; [2004] 3 W.L.R. 715.))
Property bought in joint names. In the case of joint legal ownership the starting point is to assume that equality follows the law. In proving the contrary the presumption of resulting trust arising from the proportion of the parties’ financial contributions is not a rule of law. Instead the courts will seek the result that reflected what the parties must, in the light of their conduct have intended (Stack v Dowden [2007] UKHL 17; [2007] 2 W.L.R. 831 (applying Oxley v Hiscock [2004] EWCA Civ 546; [2004] 3 W.L.R. 715)).

Trust of Land. Under the Trusts of Land and Appointment of Trustees Act 1996 (“the 1996 Act”) a trust of land is imposed where land is conveyed to or held by or on behalf of two or more persons beneficially entitled (Law of Property Act 1925, ss.35, 26 as amended by the 1996 Act). The 1996 Act entitles a beneficiary who is beneficially entitled to an interest in possession in the land to occupy it, subject to the trustees’ powers to exclude or restrict such right (s.12 of the 1996 Act). In the event of a dispute as to whether to sell or retain land a trustee or any interested person may apply to court pursuant so s.14 of the 1996 Act for an order in relation to the exercise by the trustees of any of their functions. Trustees are given extensive powers to manage and sell the land, subject to a duty to consult with beneficiaries (s.6 of the 1996 Act). A purchaser need consider only the legal title to the land. The interests of the beneficiaries will be overreached if the purchase money is paid to at least two trustees or a trust corporation (Law of Property Act 1925, ss.2(1)(ii), 27(2) and s.25(1) of and Sch.3 to the 1996 Act).

IMPLIED TRUSTS AND PROPRIETARY ESTOPPEL

Where no express declaration of trust has been made on or after the acquisition of property, the laws of implied trusts and proprietary estoppel may be called upon in order to determine the respective entitlements of cohabitants to any property which they own or occupy. (Cases regarding beneficial ownership, most between cohabitants, constitute around 50% of the caseload of the Adjudicator to HM Land Registry. In a study of legally-aided cases, 61% of land-related cases involving current or former cohabitants or spouses: T Goriely and P Das Gupta, Breaking the Code: The impact of legal aid reforms on general civil litigation (2001) ch 11. This study pre-dated major legal aid reforms in April 2000. Data received from the Legal Services Commission for 2004-05 and 2005-06 show that around 80% of cases receiving General Family Help or Legal Representation in relation to trusts of land involved ex-cohabitants). They apply both in cases where the legal title is in the name of one party and where it is in the name of both (Though the new Land Registry rules requiring express declarations of the beneficial shares should mean that, in cases of joint title, the law of implied trusts need no longer be relied on: see para 3.11). The significance of these principles
is that they allow beneficial interests to be created despite failure to comply with the formalities that are required to create express trusts. They are particularly important in relation to the shared home, but can also apply to all other kinds of property. The ownership of funds in a joint bank account and property purchased from that source are discussed separately below (See paras 3.38 to 3.40: and S Cretney, J Masson and R Bailey-Harris, Principles of Family Law (7th ed 2003) pp 159-160).

**Resulting trusts**

Where the legal title to property vests in one party, but another party has paid some (or all) of the purchase price, the presumption of resulting trust holds that beneficial ownership “results” to the parties in proportion to the share of the purchase price that each provided. So if one party contributes £10,000 towards the purchase of property worth £100,000, that party will acquire a 10% share in the value of the property. The presumption of resulting trust may, however, be rebutted by evidence that the contributor did not intend to acquire a beneficial interest in the property purchased. For example, the money may have been provided by way of gift or loan (Fowkes v Pascoe (1875) 10 Ch App 343; Walker v Walker, judgment of 12 April 1984, CA (unreported); Re Sharpe (A Bankrupt) [1980] 1 WLR 219).

Most importantly, a resulting trust will only be presumed at all on the making of particular types of contribution. Direct financial contributions to the purchase price, payment of the deposit and contribution of a “right to buy” discount (Springette v Defoe [1992] 2 FLR 388) all count as contributions. Where parties become joint mortgagors of property that they are buying to live in together, each will be treated as contributing half of the value of the mortgage loan, unless there is a clear agreement between them that payment of the instalments will not be equally shared (Huntingford v Hobbs [1993] 1 FLR 736; Carlton v Goodman [2002] EWCA Civ 545, [2002] 2 FLR 259).

Not all financial contributors are sufficient to give rise to a resulting trust. Whether making mortgage payments will give rise to a beneficial interest under a resulting trust depends on the nature of the mortgage and the intention of the payer in making the payments (See for example Curley v Parkes [2004] EWCA Civ 1515, [2005] 1 P & CR DG15 (payer not party to mortgage); McKenzie v McKenzie [2003] 2 P & CR DG6, at [77] of the full judgment (payer party to mortgage); for comment, M Dixon, “Resulting and Constructive Trusts of Land: the Mist Descends and Rises” (2005) Conveyancer and Property Lawyer 79). Crucially, “indirect” financial contributions will not give rise to a resulting trust: for example, where one party pays the household bills (Gissing v Gissing [1971] AC 886), while the other pays the mortgage. Even payments into a common pool from which
the mortgage is paid may not suffice (Buggs v Buggs [2003] EWHC 1538 (Ch), [2004] WTLR 799). Domestic contributions count for nothing (Burns v Burns [1984] Ch 317.

However, the significance of these limitations on the applicability of the resulting trust presumption is diminished as a result of the developing law of constructive trusts. The forms of contribution from which a resulting trust would be presumed may also generate a constructive trust, which potentially offers contributors a more substantial share than the pro rata value of their contributions. The constructive trust is therefore likely to be preferred by applicants. (Though that fact sometimes appears to be curiously overlooked: for example, no constructive trust argument was considered in Curley v Parkes [2004] EWCA Civ 1515, [2005] 1 P & CR DG15).

**Constructive trusts**

A constructive trust will arise where there is a common intention between the parties that the beneficial ownership of property should be shared, and the party seeking a share has relied on that intention to his or her detriment or otherwise made a change of position in reliance on it.

**Common intention**

Cases of constructive trust fall into two categories:

1. express common intention cases, arising from an express (though informal) agreement, arrangement or understanding between the parties; and

2. inferred common intention cases, which will arise where one party has engaged in relevant conduct referable to the acquisition of an interest in the property (Lloyds Bank Plc v Rosset [1991] 1 AC 107).

**EXPRESS COMMON INTENTION CONSTRUCTIVE TRUSTS**

The courts have been generous in their interpretation of the common intention requirement. They have been prepared to treat excuses for not putting one party on the title documents as evidence of an express common intention to share, even though it is clear that the private intention of the legal owner is that no such share should arise (Grant v Edwards [1986] Ch 638; Eves v Eves [1975] 1 WLR 1338).
INFERRED COMMON INTENTION CONSTRUCTIVE TRUSTS

In *Lloyds Bank Plc v Rosset*, Lord Bridge stated that a common intention would be inferred from financial contributions to the initial purchase price of a house or from mortgage payments, but “it is at least extremely doubtful whether anything less will do”. (*Lloyds Bank Plc v Rosset* [1991] 1 AC 107, 133).

The case law remains crucially ambiguous on the issue of whether a court may infer a common intention from financial contributions if the parties confess to never having considered the matter of ownership. The clear lack of any actual intention might be expected to rebut an inference of common intention to share beneficial ownership. Some judicial remarks suggest that this is not necessarily the case, though those remarks themselves are ambiguous. (*Midland Bank Plc v Cooke* [1995] 4 All ER 563, 575D, per Waite LJ: “It would be anomalous...to create a range of home-buyers who were beyond the pale of equity's assistance in formulating a fair presumed basis for the sharing of beneficial title, simply because they had been honest enough to admit that they never gave ownership a thought or reached any agreement about it”. However, Waite LJ may have intended to confine his remarks to the quantum of a constructive trust, rather than its existence: “I would therefore hold that positive evidence that the parties neither discussed nor intended any agreement as to the proportions of their beneficial interest does not preclude the court, on general equitable principles, from inferring one” (at 575H, emphasis added). Having said this, the facts of the case suggest that the parties had not reached a common intention to share ownership, let alone a common intention as to what their shares should be, but Mrs Cooke obtained an interest nevertheless. Therefore, Waite LJ’s comments must apply to cases where there is evidence that the parties did not form a intention to share ownership, as well as cases where the parties did not form an intention as to the quantum of their shares. In *Oxley v Hiscock* [2004] EWCA Civ 546 [2005] Fam 211, at [68], Chadwick LJ said that “where the evidence is that the matter was not discussed at all” a common intention “will readily be inferred from the fact that each has made a financial contribution”. However, he went on to discuss quantum at [71], and said that “if it were their common intention that each should have some beneficial interest in the property – which is the hypothesis upon which it becomes necessary to answer the second question [how to quantify the beneficial interest] – then, in the absence of evidence that they gave any thought to the amount of their respective shares, the necessary inference is that they must have intended that question would be answered later on the basis of what was then seen to be fair”. This appears to require the actual existence of a common intention in order for the trust to arise (though not as regards quantum), and prevents the finding of an inferred common intention when there is positive evidence that the
parties did not form such a common intention). If, and in so far as, actual intention need not exist, it may be more accurate to say that the intention is “imputed” to the parties than its existence inferred. but it does seem to be necessary at least that the other party was aware of the conduct from which the common intention arises. (Lightfoot v Lightfoot-Brown [2005] EWCA Civ 201, [2005] 2 P & CR 22).

However, whether or not actual intention is required, the inference (or imputation) of common intention will only arise from certain sorts of conduct. It is clear that direct financial contributions to the purchase of the property, including the making of mortgage payments, will suffice. (Though, as in the case of resulting trusts, the evidence might sometimes indicate that those payments were intended for some purpose other than the creation of a beneficial share: McKenzie v McKenzie [2003] 2 P & CR DG6). More difficult is the question of indirect financial contributions. Some decisions and judicial comments appear to accept that, at least in circumstances where the owner paying the mortgage could not have afforded to do so had the applicant not been paying other bills, payment of those bills will count for these purposes. (Gissing v Gissing [1971] AC 886; Le Foe v Le Foe and Woolwich Building Society plc [2001] 2 FLR 970). But other cases and judicial comments do not support the inference of common intention on this basis. (Lloyds Bank v Rosset [1991] 1 AC 107, 132H-133B, per Lord Bridge; Buggs v Buggs [2003] EWHC 1538 (Ch), [2004] WTLR 799; Mollo v Mollo [2000] WTLR 227; Mehra v Shah [2004] EWCA Civ 632, judgment of 20 May 2004, CA (unreported); Stack v Dowden [2005] EWCA Civ 857, [2006] 1 FLR 254; the point was not even considered in Curley v Parkes [2004] EWCA Civ 1515, [2005] 1 P & CR DG 15). It is clear that domestic contributions will not give rise to an inferred common intention to share. (Burns v Burns [1984] Ch 317; Lloyds Bank v Rosset [1991] 1 AC 107).

**Detrimental reliance or change of position**

It is the applicant’s detrimental reliance on the common intention which makes it unconscionable for the legal owner to deny the applicant’s beneficial interest. In cases of express common intention, the range of conduct and contributions that will count as detrimental reliance is wider than that which will give rise to an inferred common intention. In cases of inferred common intention, the conduct from which the common intention is inferred will also constitute detrimental reliance.

However, there remains limitations on which types of conduct the courts will classify as detrimental reliance. In the case of inferred common intention, those limitations derive from the narrow view of
what conduct will generate the intention in the first place. In the case of express common intention, although in theory a wider range of conduct is relevant, it seems necessary to demonstrate that the conduct in question is “referable to” the common intention, and not conduct in which the applicant would have engaged anyway had there been no such intention. The case law is particularly ambiguous about conduct which might equally be attributable to the relationship between the parties: setting up home together, raising a family, sharing household bills and so on may not be regarded as detrimental reliance. If the applicant oversteps the boundary of what might be “expected” of a partner, particularly perhaps in light of the applicant’s gender, (see K Gray & S F Gray, Elements of Land Law (4th ed 2005) para 10.123) a finding of detrimental reliance is more likely. (Contrast Grant v Edwards [1986] Ch 638, 657 A-B, per Browne-Wilkinson V-C and 648 G-H, per Nourse LJ; Hammond v Mitchell [1991] 1 WLR 1127; Eves v Eves [1975] 1 WLR 1338; Cox v Jones [2004] EWHC 1486 (Ch), [2004] 2 FLR 1010).

Quantifying the Interest

Once the relevant intention and detrimental reliance have been found, it is then necessary to quantify the parties’ respective shares. (In Hurst v Supperstone [2005] EWHC 1309 (Ch), [2005] 1 FRC 352, at [11], Mr Michael Briggs, sitting as a deputy High Court judge, pointed out that once the court has found a common intention to share beneficial ownership, it should ask whether the parties intended to share as beneficial joint tenants or tenants in common. As joint tenants are equally entitled to the property, the parties can only hold the property in unequal shares if they intended (or the court imputes an intention) to hold the property as tenants in common. Only at this point does the question of quantifying the parties’ interests arise). Where the couple had an express common intention not only as to shared ownership but also as to the size of their shares, that intention will usually be upheld. (Mortgage Corporation v Shaire [2001] Ch 743, 750B, per Neuberger J: Crossley v Crossley [2005] EWCA Civ 1581, [2006] 1 FCR 655). Where the parties have not reached agreement as to the shares, it is now clear that the court’s function is to determine, in light of the parties’ whole course of dealing in relation to the property, what would be a fair share. (Midland Bank Plc v Cooke [1995] 4 All ER 562, 574C-E, Oxley v Hiscock [2004] EWCA Civ 546, [2005] Fam 211, at [69]). In theory, the court’s inquiry is not confined to examining the parties’ financial contributions (to the acquisition of the property or more generally to the household), but may range more widely, taking into account domestic contributions. (Midland Bank Plc v Cooke [1995] 4 All ER 562; Hurst v Supperstone [2005] EWHC 1309 (Ch), [2005] 1 FCR 352). This makes the process of quantifying a constructive trust distinctive from that used to quantify a resulting trust. However, despite this latitude, recent cases seem to follow the parties’ financial contributions to the acquisition of
property quite closely in ascertaining what fairness requires. (*Oxley v Hiscock* [2004] EWCA Civ 546, [2005] Fam 211; *Stack v Dowden* [2005] EWCA Civ 857, [2006] 1 FLR 254. In *Midland Bank v Cooke* [1995] 4 All ER 562, the wife contributed less than 7% of the purchase price, yet was awarded a 50% beneficial interest in *Oxley*, Chadwick LJ stated, at [69] and [73], that he was undertaking the same broad analysis of the parties’ whole course of dealing in relation to the property. However, the quantification of the constructive trust in *Oxley* reflected the parties’ financial contributions, and it seems likely that the outcome would have been the same had the case been decided on a resulting trust basis. The parties’ marital status may be significant; in *Mortgage Corporation v Shaire* [2001] Ch 743, 750, Neuberger J suggested that “the extent of the financial contribution is perhaps not as important an aspect as it was once thought to be. It may well carry more weight in a case where the parties are unmarried than when they were married”. In *Cooke* (at 576C-D), Waite LJ appears to attach weight to the Cookes having been married, but in *Oxley* (at [74]), Chadwick LJ does not refer to the parties’ status as cohabitants when deciding on the quantification of their respective shares. See E Cooke, “Cohabitants, Common Intention and Contributions (again)” [2005] *Conveyance and Property Lawyer* 555, at 561-562). Analysis of how the size of the applicant’s share is arrived at by the judge is sometimes rather brief. (See, for example, *Cox v Jones* [2004] EWHC 1486 (Ch), [2004] 2 FLR 1010 and *Stack v Dowden* [2005] EWCA Civ 857, [2006] 1 FLR 254).

**Proprietary estoppel**

Proprietary estoppel and constructive trusts share common ground. (The precise relationship between two doctrines has long been a matter of judicial and academic debate: see Sharing Homes: A Discussion Paper (2002) Law Com No 278, paras 2.101 to 2.104). For an applicant to establish an interest in the owner’s property under the law of proprietary estoppel, it is necessary to show that:

1. a representation or assurance that the applicant has or will have an interest in property has been made or given;

2. the applicant relies upon that representation or assurance; and

3. the owner then seeks to deny the applicant an interest in a way that would result in unconscionable detriment to the applicant.
Recent decisions emphasise the need to take a broad approach, looking at the matter “in the round”, in deciding whether the necessary unconscionability is present. (*Gillett v Holt* [2001] Ch 210; *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 FCR 501).

**The representation or assurance**

In order to give rise to an estoppel, there must be a sufficiently specific representation made, or assurance given, by the owner (This may involve the owner standing by while the applicant makes a unilateral mistake about his or her entitlement in relation to the property: *Ward v Kirkland* [1967] Ch 194, 239A-B, per Ungoed Thomas J; *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133, 148E-F, per Oliver J) that the applicant is to have some interest or entitlement in property. The practice of inferring or imputing a common intention in order to found a constructive trust is therefore not mirrored in a proprietary estoppel claim. For the purposes of estoppel, the representation or assurance must actually exist; it cannot be inferred or imputed. It is not necessary that any specific asset or interest in it should be identified, but it must be possible ultimately to interpret the representation as applying to a particular asset or pool of assets. (*Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 FCR 501). What will not suffice is a general promise that the respondent will support the applicant or that the applicant will be “financially secure” in the future. (*Lissimore v Downing* [2003] 2 FLR 308; *Layton v Martin* [1986] 2 FLR 227).

**Detrimental reliance**

Detrimental reliance in the estoppel context poses demands on applicants that are similar to the law of constructive trust. Applicants must show that the conduct engaged in was to some extent caused by the representation. While it need not have been the sole cause of the applicant’s behaviour, it must have been a factor influencing it. (*Wayling v Jones* [1995] 2 FLR 1029). It is clear that non-financial contributions, including “domestic” activities and associated sacrifices of paid employment, may constitute detrimental reliance for the purposes of proprietary estoppel. (*Greasley v Cooke* [1980] 1 WLR 1306, *Campbell v Griffin* [2001] EWCA Civ 990, [2001] WTLR 981). However, as in constructive trust cases, some applicants may find it difficult to satisfy the court that such activities were made in reliance on the representation, rather than pursuant to the parties’ relationship. (*Coombes v Smith* [1986] 1 WLR 808; *Lissimore v Downing* [2003] 2 FLR 308; cf *Grant v Edwards* [1986] Ch 638, 656, per Browne-Wilkinson V-C).

**The remedy: “satisfying the equity”**
Where these requirements are satisfied, the applicant has an “equity” which can be enforced against the owner, and the court may be called on to decide what remedy is necessary to satisfy it. The courts adopt a broad approach in deciding how to satisfy the applicant’s equity. Recent case law emphasises the need for the remedy to be proportionate in light of the detriment sustained and the expectation held. (*Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 FCR 501; *Gillett v Holt* [2001] CH 210). In some cases, they will give effect to the applicant’s expectation. In others, they will simply compensate the applicant for the loss suffered in relying on the assurance, rather than giving the applicant what was been promised. The remedy will frequently involve conferring on the applicant some sort of proprietary interest, although not necessarily a beneficial share; (For example, a freehold in *Pascoe v Turner* [1979] 1 WLR 431; a life interest in *Greasley v Cooke* [1980] 1 WLR 1306; leases in *Griffiths v Williams* [1977] 248 EG 947 and *J T Developments Ltd v Quinn* (1991) 62 P & CR 33; and an easement in *Crabb v Arun DC* [1976] Ch 179) or it may entail monetary compensation. (*Dodsworth v Dodsworth* (1973) 228 EG 1115; *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 FCR 501). In some cases, the court may conclude that no remedy is necessary at all in view of benefits enjoyed by the applicant which cancel out the disadvantage he or she sustained. (*Sledmore v Dalby* (1996) 72 P & CR 196. Roch LJ, with whom Butler-Sloss LJ agreed, said (at 205) that an equity had arisen by virtue of proprietary estoppel, but that the minimum necessary to satisfy that equity had already been received by the claimant. However, Hobhouse LJ considered (at 209) that the claimant had not even established an equity in her favour by virtue of proprietary estoppel; the issue of the minimum necessary remedy therefore did not arise).

**Ownership of funds in bank accounts**

Where an account is held in the sole name of one party, an express trust may arise by oral declaration. (*Paul v Constance* [1977] 1 WLR 527). The mere fact that a bank account is in joint names does not mean that the account holders have a joint beneficial interest in the funds in that account. Whether they do or do not depends on their intentions. If the account is fed from the resources of one party A, but is held in joint names with B merely for convenience – for example, to give B access to funds – B has no beneficial interest in the money in the accounts until he or she actually exercises the right to draw funds from it. While it remains in the account, the money will belong, under resulting trust principles, to A as the party who fed the account. If B has made no contribution to the account, A will be entitled to terminate B’s access to the funds at any time. (*Stoeckert v Geddes (No 2)* [2004] UKPC 54, (2004-05) 7 ITEL R 506, from the Court of Appeal of Jamaica).

Where both parties contribute to the account, pooling their resources, they will at least be found to own the funds on a resulting trust basis in accordance with their contributions. However, both in pooling
cases and in cases where A has provided all the funds, the presumption of resulting trust might be displaced, for example, where there is an express declaration of trust (cf *Paul v Constance* [1977] 1 WLR 527 in relation to an account in the name of one party) or common intention to the effect that the parties should share the account in some other proportions. Indeed, the court might find that the parties intended to be joint tenants of the beneficial interest, each equally entitled to the whole of the fund. (For a discussion of joint tenancy and tenancy in common, see Sharing Homes: A Discussion Paper (2002) Law Com No 278, paras 2.10 to 2.22).

Property purchased with funds from a joint account will ordinarily belong to whoever acquires title to that property, even if that person had no or only a part-share in the funds when they were in the account. (*Stoeckert v Geddes* (No 2) [2004] UKPC 54, (2004-05) 7 ITELR 506) If unusually, there is evidence that the assets acquired were intended to be held in the same way as the funds in the account, then that property will be held accordingly. (*Jones v Maynard* [1951] Ch 572).

**RESOLVING DISPUTES OVER THE HOME CO-OWNED BY COHABITANTS**

Under the general law, if one party has no beneficial interest in the property, he or she is vulnerable to being excluded by the legal owner as a trespasser. (Subject to the finding of a contractual licence for a determinate period or that might require reasonable notice be given: *Chandler v Kerley* [1978] 1 WLR 693). Where both parties are found to have a beneficial share in the property and they are separating, dispute may arise about whether the property should be sole and the proceeds divided (in accordance with their shares) or retained for the occupation of one party and sold at a later date. Either party may apply to the court under the Trusts of Land and Appointment of Trustees Act 1996 ("TOLATA") for orders resolving the questions of sale and occupation. In considering such an application, the court is required to have regard to:

(1) the intentions of the person(s) creating the trust;

(2) the purposes for which the property is held on trust;

(3) the welfare of any minor who occupies or might reasonably be expected to occupy the property as his home; and

(4) the interests of any secured creditors of any beneficial owner. (*TOLATA*, s 15. For the application of this provision, see *Mortgage Corporation v Shaire* [2001] Ch 743; *Bank

Where one purpose of the trust is to provide a home for the parties’ children, the court may be inclined to postpone sale until the home is no longer required for the children (and their primary carer).

If the court orders that sale should be postponed and one partner granted occupation in the meantime, the occupier may be required to pay the excluded party occupation rent during that period. (TOLATA, ss 13-14). This remedy is similar to equitable accounting. Equitable accounting provides compensation between co-owners where, for example, one party has enjoyed the trust property to the exclusion of the other, or one party has paid more in relation to the property than the other (that payment not being reflected in that party’s beneficial share), contrary to the parties’ prior agreement. (See Stack v Dowden [2005] EWCA Civ 857, [2006] 1 FLR 254; Clarke v Harlowe [2005] EWHC 3062 (Ch), [2005] WTLR 1473; E Cooke, “Cohabitants, common intentions and contributions (again)” [2005] Conveyancer and Property Lawyer 555). Where the couple have separated, but the property was intended to provide a family home and is still required for that purpose for the couple’s children and whichever party the children are to live with, the court might decide against an order for occupation rent. (Stack v Dowden [2005] EWCA Civ 857, [2006] 1 FLR 254).

In the exercise of its TOLATA jurisdiction, the court has no power to adjust the parties’ beneficial shares in the property. On any sale, the proceeds will therefore be split according to the parties’ beneficial entitlements, whether express or implied by the court under a resulting or constructive trust.

The statutory remedies available to non-owning cohabitants which might result in a limited right of occupation being granted in relation to the property under Part IV of the Family Law Act 1996 or, where the couple have children, under Schedule 1 to the Children Act 1989. The latter might also be invoked between co-owning cohabitants, (especially if it is unclear whether or not the parties share the beneficial interest) in which case any applications under the Children Act 1989 and the TOLATA should be joined. In such cases, the Children Act application would probably be considered before the TOLATA application, owing to the wider powers enjoyed by the court under the former Act. (White v White [2003] EWCA Civ 924, [2004] 2 FLR 321).
The court has very wide powers to deal with the property of married couples on their divorce in order to ensure a broadly fair outcome between the parties. These powers are contained in Part II of the Matrimonial Causes Act 1973. (Equivalent provision is made for civil partners under the Civil Partnership Act 2004, sch 5. An extract from the Matrimonial Causes Act 1973, setting out the statutory checklist and other factors to which the court is required to have regard when exercising its discretion to grant ancillary relief, may be found in Appendix A). The court may make orders for periodical payments secured or unsecured, lump sum orders, orders for settlement of property or for variation of existing settlements, pension or sharing orders, orders transferring property and orders for sale.

There is no analogous, wide-ranging jurisdiction applicable when cohabiting couples separate. Most cohabitants therefore have to rely heavily on the general law of trusts and estoppel. There are, however, three statutory regimes which they may invoke.

Protection of occupation

Part IV of the Family Law Act 1996 (titled “Family Homes and Domestic Violence”) allows the court to make occupation orders in relation to a dwelling-house in which cohabitants live, lived, or intended to live together. The concept of “cohabitant” is not defined in the Act, save by analogy with marriage (and now civil partnership), (Family Law Act 1996, s 62(1); for judicial application of the concept, see G v F [2000] Fam 186) and there is no requirement that the parties’ relationship should have lasted any minimum duration to qualify for protection under the Act. (Chalmers v Johns [1999] 1 FLR 392, a case arising at the end of a twenty-year long cohabiting relationship, where an interim occupation order was withheld despite a history of assaults by each party against the other, in preference for use of non-molestation orders).

While this jurisdiction is principally used in cases of domestic violence, it is not so restricted and it may in theory be employed to facilitate the separation of cohabitants by making orders for the short-term exclusion of one party from the property. However, the courts regard occupation orders as “draconian”, and so without evidence of abuse that would render continued cohabitation potentially harmful, they are reluctant to make orders excluding cohabitants who are otherwise entitled to occupy the property. (See generally Part 9). Occupation orders may nevertheless provide a very effective short-term remedy. In practice, the long-term resolution of their occupation dispute
will be resolved under TOLATA (TOLATA, ss.12-15) (where both parties are co-owners) or Schedule 1 to the Children Act 1989 (where they have children).

**Applicants who are entitled to occupy**

The best protection is offered by the Family Law Act to applicants who are “entitled to occupy” the property under the general law of property, trusts or contract, or by statute. Spouses and civil partners are included in this category of applicants by virtue of their statutory “home rights”. (Family Law Act 1996, s 30). Where a cohabitant is “entitled to occupy” the property, the court may make an order allowing him or her to occupy the property to the exclusion of the other party for an unlimited period. (Family Law Act 1996, s 33). The court is required to make an order in certain cases where the “balance of harm” demands it. (see Family Law Act 1996, s.33(7)); this complicated test in broad terms entails weighing (i) the harm that might be suffered by the applicant or any relevant child attributable to the conduct of the respondent if an order were not made against (ii) the harm that might be suffered by the respondent or any relevant child if an order were made. If the harm under (i) is greater than that under (ii), an order must be made. If not, the court has a discretion to make an order). Otherwise, in deciding whether to make an order and (if making an order) in what terms, the court is required to have regard to all the circumstances, including: (Family Law Act 1996, s 33(6))

1. the housing needs and housing resources of each of the parties and of any relevant child; (Defined broadly by s 62(2) to include any children who lives with or who might reasonably be expected to live with either party and whose interests the court considers relevant)

2. the financial resources of each of the parties;

3. the likely effect of any order, or any decision not to make an order, on the health, safety or well-being of the parties and of any relevant child; and

4. the conduct of the parties in relation to each other and otherwise.

**Applicants who are not entitled to occupy**
Applications by cohabitants who are not entitled to occupy property which the other is entitled to occupy are more complicated. (Family Law Act 1996, s 36, cf s 38, which applies where neither party is entitled to occupy). The court must first decide whether to give that cohabitant the right to occupy against the wishes of the other (entitled) partner. In making that decision, the court is required to have regard to all the circumstances, including those listed in paragraph 3.50 above, and also; (Family Law Act 1996, s 36(6))

(1) the nature of the parties’ relationship and in particular the level of commitment involved in it;

(2) the length of time during which they have cohabited;

(3) whether there are or have been any children who are the children of both parties or for whom both parties have or have had parental responsibility;

(4) (where relevant) the length of time that has elapsed since the parties ceased to live together; and

(5) the existence of any pending proceedings between the parties under Schedule 1 to the Children Act 1989 for a property settlement or transfer for the benefit of a child, or relating to the legal or beneficial ownership of the dwelling.

If the court decides to allow the non-entitled party to occupy, it then considers whether to restrict the entitled partner’s occupation of the property. In making that decision, it is directed to have regard in particular to the factors listed above, and the “balance of harm” arising to the parties from making or not making an order. (Family Law Act 1996, s 36(7)(8): see n 90 above, but note that in cases brought by non-entitled cohabitants, the balance of harm test never requires the court to make an order; it retains complete discretion).

Where the party seeking the order is not entitled to occupy the property under the general law, the duration of the order is strictly limited in the first instance to a maximum of six months. It may be extended for only one further six-month period, offering at most twelve months’ protection. (Family Law Act 1996, s 36(10) and s 38(6)). We shall see below that considerably longer occupation protection can be obtained indirectly by a non-owning cohabitant, with whom the parties’ children live, by virtue of Schedule 1 to the Children Act 1989.
The court has the power to attach various supplementary provisions to an order made under the Family Law Act. (Family Law Act 1996, s 40(1)). These may deal with repair and maintenance obligations, possession and the use of furniture and other contents. They may require the party in occupation to pay occupation rent to the excluded, entitled party. Finally, and most importantly, they may impose obligations on one party to fund the rent, mortgage payments or other outgoings affecting the property. However, owing to apparent legislative oversight, orders requiring payment of rent, mortgage instalments or outgoings are effectively unenforceable. (See *Nwogbe v Nwogbe* [2000] 2 FLR 744). This is a serious problem, which may effectively deprive this otherwise useful order of much of its utility (not only in non-entitled cohabitants’ cases, but more widely). (TOLATA contains no provisions that could be used to plug the gap. There might be indirect means of enforcing an obligation to pay in matrimonial cases: for example, spouse A undertakes to pay the mortgage and the court encourages A to meet that (unenforceable) undertaking by making a nominal periodical payment order in favour of spouse B, who is in possession of the property. B in turn undertakes not to seek a variation of the periodical payments order unless A fails to pay the mortgage, in which case the order will be increased so that B can pay the mortgage directly. This mechanism involves certain complexities and potential economic disadvantage to B).

**Transfer of tenancies**

Under Schedule 7 to the Family Law Act 1996, the court may order the transfer of certain types of residential tenancy when cohabitants have “ceased to cohabit”. (This provision originates in Domestic Violence and Occupation of the Family Home (1992) Law Com No 207, Part VI). In order to qualify for this remedy, the parties’ relationship need not have lasted any minimum duration.

The legislation directs the courts to have regard to all the circumstances when considering the exercise of this power, including:

1. the circumstances in which the tenancy was granted to either or both of the cohabitants, or in which either or both became the tenant;
2. the suitability of the parties as tenants;
3. factors (1)-(3) from the list of considerations relevant to the making of occupation orders for applicants who are entitled to occupy the property (see paragraph 3.50); and
(4) where only one of the cohabitants is entitled to occupy the dwelling under the tenancy, factors (1)-(4) from the list of additional considerations relevant to the making of occupation orders for applicants who are not entitled to occupy the property (see paragraph 3.51).

The party to whom the transfer is made may be required to pay compensation to the other. (Family Law Act 1996, sch 7, para 10).

There is little reported case law to show how the courts are exercising this power (the tenancy in Gay v Sheeran [2000] 1 WLR 673 was not of a relevant type) and no centrally collected court statistics record the number of Schedule 7 applications or orders made. (Figures obtained from the Legal Services Commission for the year from April 2005 up to March 2006 (financial year ongoing) reveal only a very small number of cases involving tenancy transfer between cohabitants receiving General Family Help and Legal Representation; Legal Help, Family Mediation or Help with Mediation cases are not included, as the codes for these are not specific enough to identify cases involving cohabitants). It may be the case that local authorities are often co-operative and prepared to transfer the tenancy without the need for a court application, assuming that both parties agree to the transfer. The case law does indicate that the courts may be reluctant to make transfer orders in respect of social housing, save in cases of domestic violence or impending homelessness, where to do so may hamper housing authorities’ policies. (Vuong v Huang, judgment of 11 January 1999, Family Division (unreported), [1999] CLY 2723; cf Jones v Jones [1997] Fam 59; Akintola v Akintola [2001] EWAC Civ 1989, [2002] 1 FLR 701).

Conversely, in making these orders, care also needs to be taken to ensure that the party against whom it is sought is not therefore liable to be treated as “intentionally homeless” and so prejudiced in his or her attempts to find new social housing. (See Housing Act 1996, s 191). It seems that this may effectively require respondents to oppose the application for a tenancy transfer, expending time and resources in the process.

In some circumstances, notably where the tenant has the right to buy, an application for tenancy transfer might be bitterly contested. However, in other cases the power to obtain a tenancy transfer may be of only limited value. Much depends on the security represented by the tenancy. In the private sector, the tenant is likely to hold an assured shorthold tenancy which is easily terminable by the landlord serving notice. (Housing Act 1988, S 21(1): the landlord can serve a notice under s
21(1)(b) at any point which must give the tenants a minimum of two months’ notice. However, the
court may not make an order for possession during the first six months of the tenancy).

Where the tenancy is held jointly, it may be vulnerable to one party serving notice to quit on the
landlord before an application can be made. (Hammersmith and Fulham LBC v Monk [1992] 1 AC
478; Newton Housing Trust v Al-Sulaimen [1999] 1 AC 313). Questions have been raised about the
compatibility of the rule permitting unilateral notice to quit with the other party’s rights under
Article 8 of European Convention for the Protection of Human Rights and Fundamental Freedoms
(“ECHR”). (Harrow London Borough Council v Qazi [2003] UKHL 43, [2004] 1 AC 983, held that the
consequent possession proceedings brought by the public sector landlord were compatible with the
Convention (this finding seems to survive Kay v Lambeth LBC [2006] UKHL 10, [2006] 2 WLR 570); the
case did not consider the computability of the underlying notice to quit rule as it operates between
the tenants. In relation to the latter, see S Bright, “Ending tenants by notice to quit: the human
tenant termination of joint tenancies and Article 8 ECHR” (2005) Conveyancer and Property Lawyer
123). The courts currently have no statutory anti-avoidance or other powers to rectify this problem
once the tenancy has been terminated, (In the case of spouses, see H Conway, “Protecting Tenancies
on Marriage Breakdown” (2001) 31 Family Law 208; for arguments based on the European
Convention for the Protection of Human Rights and Fundamental Freedoms, see I Loveland, “After
Qazi: Part 1: Sole tenant termination of joint tenancies and Article 8 ECHR” (2005) Conveyancer and
Property Lawyer 123) although it has been suggested that, in cases involving children, an injunction
to prevent notice being given could be sought under Schedule 1 to the Children Act 1989 or the
inherent jurisdiction. (Bater v Greenwich LBC [1999] 4 All ER 944, per Thorpe LJ. The court may also
have inherent powers to bar the frustration of an application under Schedule 7 before notice to quit
has been given: S Bridge, “Transferring Tenancies of the Family Home” (1998) 28 Family Law 26, at
29). We have already recommended in the course of our project on Renting Homes that all tenants
should agree to the service of a notice to quit in order for it to be effective. (Renting Homes: The

Provision for children

Maintenance and the Child Support Act 1991

Where the Child Support Agency has jurisdiction over a case under the Child Support Act 1991,
(Generally, where the child is a “qualifying child” (Child Support Act 1991, ss.3(1) and 55),
maintenance is sought by a “person with care” (s.3(3)) from a “non-resident parent” (s.3(2)), and all parties are habitually resident in the United Kingdom (s.44); see also restrictions in s.4(10)) income payments for the child’s maintenance will usually be exclusively a matter for the Agency. In such cases the courts are ordinarily unable to award periodical payments. (The cases where the court will have the power to order periodical payments alongside the Agency’s maintenance calculation are listed in Child Support Act 1991, s 8: orders made by consent (which only preclude an application to the Agency for one year (s.4(10)(aa)) or until the parent with care claims relevant means-tested benefits, whichever is sooner); orders in respect of education expenses (such as school fees) or expenses attributable to the child’s disability; and orders dealing with any net income of the non-resident parent which exceeds the jurisdictional limit of the Agency (£2,000 per week).

Capital provision under Schedule 1 to the Children Act 1989

However, in all cases, the court has exclusive jurisdiction to make orders against the child’s parent for lump sums, (Lump sum orders must not be used as a vehicle for evading the limits on the court’s jurisdiction to make maintenance provision. Capitalised maintenance in the form of a lump sum therefore cannot be ordered where the Agency has exclusive jurisdiction over maintenance: Phillips v Peace [1996] 2 FLR 230), property transfers and settlements for the benefit of the child, regardless of the nature of the relationship between the parents. (Regardless of whether the parents ever cohabited. The Act can only be used to make orders against an individual who is not the child’s parent where that individual is married (or in a civil partnership) and both parties to the marriage (or civil partnership) treat the child as a child of the family. This is the case regardless of whether the child is related to either party. Cohabitant “step-parents” and other non-parents are therefore not liable for their partners’ children: Children Act 1989, s 105 and sch 1, para 16). The relevant provisions are contained in Schedule 1 to the Children Act 1989. These powers, focused entirely on the child’s needs, are potentially of very great importance to all parents, even if they never cohabited.

The legislation sets out a checklist of factors to be considered by a court exercising its jurisdiction under Schedule 1. These factors are very similar to those contained in matrimonial legislation for the benefit of children of spouses. (See, for example, Matrimonial Causes Act 1973, s 25(3)-(4); and, for civil partners, Civil Partnership Act 2004, sch 5, para 22. Where the parents have been married and divorce proceedings are pending, the court will almost always make orders under its Matrimonial Causes Act jurisdiction rather than under the Children Act 1989, sch 1). The welfare principle contained in section 1 of the Children Act does not apply to this jurisdiction, (Children Act
1989, s.1 and s.105, definition of “upbringing”) but the welfare of the child is nevertheless an important factor. (Re P (A Child) (Financial Provision) [2003] EWCA Civ 837, [2003] 2 FLR 865). In addition, the court must consider, amongst all the circumstances of the case:

(1) the income, earning capacity, and other financial resources which each parent (The legislation also allows applications to be made by various non-parents: Children Act 1989, sch 1, para 1(1) and in limited cases by the child, para 2(1), in which cases see para 4(4)) has or is likely to have in the foreseeable future;

(2) the financial needs, obligations and responsibilities which each parent has or is likely to have in the foreseeable future;

(3) the financial needs of the child;

(4) the income, earning capacity (if any), property and other financial resources of the child;

(5) any physical or mental disability of the child; and

(6) the manner in which the child was being, or was expected to be, educated or trained.

Where the parties have been cohabiting, the standard of living enjoyed by the family is also a relevant consideration. (F v G (A Child: Financial Provision) [2004] EWHC 1848 (Fam), [2005] 1 FLR 261).

Orders made under this legislation can, in theory, provide children with very substantial protection, for example, the provision of accommodation in the family home with the primary carer.

There are, however, important limitations to orders under the Children Act. They may ordinarily be directed only to meeting the children’s needs during minority, or until the completion of their education. (In A v A (A Minor: Financial Provision) [1994] 1 FLR 657, the house was settled on trust for the child until six months after she reached the age of 18, or six months after she finished her full-time education (which included her tertiary education), whichever was latest. See also Re P (A Child) (Financial Provision) [2003] EWCA Civ 837, [2003] 2 FLR 865). They cannot be used to require the paying parent to support or house children into adulthood when the children are capable of
supporting themselves. *(A v A (A Minor: Financial Provision)) [1994] 1 FLR 657; of where the child is disabled and so “special circumstances” apply – Children Act 1989, sch 1, para 3(2)(b); *C v F (Disabled Child: Maintenance Orders) [1998] 2 FLR 1). The courts are therefore reluctant to order transfers of capital where that capital will not be exhausted in meeting the child’s needs during minority. So, for example, the court will not transfer a house outright. (The property will instead be held on trust by the parents (or other individuals) as trustees for the child for the duration of the order: *K v K (Minors: Property Transfer) [1992] 1WLR 530). Once the child reaches majority or completes education, the home will revert to the parent (or parents), in accordance with their property law entitlements, as is appropriate for a remedy designed to protect the children.

The parent caring for the children is likely to benefit indirectly from orders made for the children, not least by being permitted to occupy the property reserved for them. However, any benefit enjoyed will be in that individual’s capacity as the children’s primary carer, and only to the extent necessary to enable him or her to perform that role. *(Re P (A Child)(Financial Provision) [2003] EWCA Civ 837, [2003] 2 FLR 865). The Act confers no power to adjust the adult parties’ property rights in order to achieve a fair outcome between them, as opposed to providing for the children. The courts cannot, therefore, give parents with any care any beneficial share in the house or an interest in the other party’s pension fund or other property. Again, this is appropriate in the context of a remedy designed to protect the children.

In the unusual cases where the court has jurisdiction to make periodical payments for the child, (See n 113) that order can include a carer’s allowance. But such an allowance is designed to provide the child with a carer and to meet that person’s consequent needs in that capacity. The parent with care cannot be awarded periodical payments for his or her own personal benefit, even while the children are pre-school and may be inhibiting that parent from re-training or returning to full-time work. The adult parties have no independent personal claims against each other, so, for example, the amount awarded by way of carer’s allowance will not permit the parent with care to make savings or invest in a pension. *(See Re P (A Child)(Financial Provision) [2003] EWCA Civ 837, [2003] 2 FLR 865). However, in one recent case a carer’s allowance was awarded on the basis that the mother should have a choice between using it: (i) to buy in child-care, enabling her to retain full-time employment and to accrue earnings of her own from which investments could be made; or (ii) to reduce her working hours so that she could spend more time with the child, but thus forgo her chance to earn and so to save. *(F v G (Child: Financial Provision) [2004] EWHC 1848 (Fam), [2005] 1 FLR 261).
Most contracts of sale are now made on standard conditions of sale containing detailed provisions regulating the rights and obligations of the parties. Most commonly encountered in practice are the Standard Conditions of Sale, although other forms or variants are used (for example for sales by auction).

**Formation of contracts.** By s.2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 a contract for the sale or other disposition of an interest in land after September 27, 1989 can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each. Three exceptions are provided by s.2(5), namely contracts for the grant of short leases mentioned in s.54(2) of the Law of Property Act 1925 (i.e. leases of less than three years duration, taking effect in possession and at the best rent obtainable); contracts made in the course of a public auction; or contracts regulated under the Financial Services and Markets Act 2000 other than a regulated mortgage contract, a regulated home reversion plan, a regulated home purchase plan or a regulated sale and rent back agreement.

**Delay in completion.** Time is not usually of the essence of a contract for the sale of land and consequently a delay in completion will not usually amount to a repudiation of the contract. Most contracts now contain express provisions entitling one party to serve notice on the other “making time of the essence of the contract”, for example under condition 6 of the Standard Conditions of Sale (5th edn). Where the contract contains no such express provisions it is open to a party who is ready and willing to perform its obligations to give notice to a party in default under the contract, requiring the defaulting party to complete the contract within a reasonable time. It is then a question of fact whether the time allowed by the notice is a reasonable time within which to complete (Stickney v Keeble [1915] A.C. 386; United Scientific Holdings Ltd v Burnley BC [1978] A.C. 904; see also North Eastern Properties Ltd v Coleman & Quinn Conveyancing [2010] EWCA Civ 277). It is also important to note that the presumption as to time being of the essence is reversed in the case of exercise of an option to purchase land: there, time is usually of the essence: (United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd [1968] I W.L.R. 74; United Scientific Holdings Ltd v Burnley BC, above; Di Luca v Juraise (Springs) Ltd (2000) 79 P. & C.R. 193).

Even where time is not of the essence of a contract for the sale of land, failure to complete on the contractual completion date is still a breach of contract, and damages may be recovered for the
breach (*Raineri v Miles* [1981] A.C. 1050). Damages representing interest may be recovered as special damage if it is shown that it was in the contemplation of the parties at the date of the contract that delay would cause the injured party to incur interest charges (*Wadsworth v Lydell* [1981] 1 W.L.R. 598). The measure of damages to which the purchaser will be entitled is “such damages as may reasonably be said to have naturally arisen from the delay, or which may reasonably be supposed to have been in the contemplation of the parties as likely to arise from the partial breach of the contract” (*Jacques v Miller* (1877) 6 Ch. D. 153). Damages for loss of some special use may be recovered if the vendor knew at the date of the contract that the purchaser intended to put the property to that use (*Diamond v Campbell-Jones* [1961] Ch. 22).

**Failure to complete.** If the purchaser repudiates the contract by failing to comply with the notice to complete, the vendor is entitled to forfeit the deposit (*Hall v Burnell* [1911] 2 Ch. 551) subject to the discretion of the court under s.49(2) of the Law of Property Act 1925 to order its return. The factors relevant to the exercise of the wide discretion include the conduct of the parties, the gravity of the matters in question and the amount of the deposit (*Universal Corp v Five Ways Properties Ltd* [1979] 1 All E.R. 52, CA; *Country and Metropolitan Homes Surrey Ltd v Topclaim Ltd* [1996] Ch. 307; [1997] 1 All E.R. 254.

In order for the court to exercise its discretion under s.49(2), there needs to be something special or exceptional to justify overriding the ordinary contractual expectation of the parties that the seller can retain the deposit if the buyer defaults (*Midill (97PL) Ltd v Park Lane Estates Ltd* [2008] EWCA Civ 1227).

The parties to a contract for the sale of land cannot agree to exclude the provision of s.49(2) as to do so would amount to an attempt to oust the jurisdiction of the court and, as such, would be void and of no effect on the ground of public policy (*Aribisala v St James Homes (Grosvenor Dock) Ltd* [2007] EWHC 1694).

Alternatively, as failure to complete on time when time is of the essence is a repudiatory breach, the purchaser may accept the repudiation and sue for damages for breach of contract (*Scandinavian Trading Tanker Co. AB v Fiota Petrolera Ecuatoriana (The "Scap-trade")* [1983] 2 A.C. 694; [1983] 2 All E.R. 763; *Union Eagle Ltd v Golden Achievement Ltd* (1997) A.C. 514). The vendor has the same rights, although if he sues for repudiatory breach, he must give credit for the deposit.
**Damages for failure to complete.** The measure of damages is the injury sustained by the claimant (be he vendor or purchaser) by reason of the defendant not having performed their contract. The issue is by how much the claimant is worse off by diminution in the value of the land, or the loss of the purchase money by reason of the failure to complete, as the case may be (*Laird v Pim* (1841) 7 M. & W. 474). The vendor may claim the difference between the contract price and the market value of the land within a reasonable period of the breach (*Noble v Edwards* (1877) 5 Ch.D. 378; *Keck v Faber* (1915) 60 S.J, 253), together with the costs incurred in are-sale if one is achieved (*Janred Properties v E.N.I.T.* [1989] 2 All E.R. 444). A different date may be used in the assessment of damages if justice so requires (*Johnson v Agnew* [1980] A.C. 367, HL).

The purchaser may also claim such damages as are occasioned by the breach, which are likely to be the difference between market value of the land and the contract price, together with such claims as the cost of temporary accommodation (i.e. a residential case) and damages for distress, anguish and inconvenience (*Raineri v Miles* [1981] A.C. 1050; [1980] 2 All E.R. 14). In either case damages are assessed on the basis that the whole benefit of the contract is lost (*Lombard North Central Ltd Plc v Butterworth* [1987] Q.B. 527.

Where the innocent party reasonably presses for the contract to be completed, or where it is otherwise necessary to avoid injustice, damages may be assessed by reference to a date other than the date of breach (*Johnson v Agnew* [1980] A.C. 367; [1979] 1 All E.R. 83; *Domb v Isoz* [1980] Ch. 548; [1980] 1 All E.R. 942). Where the contract is made on one of the various Standard Conditions of Sale, there will usually be an express term of the contract prescribing the measure of damages recoverable by the vendor, although some standard Conditions do not limit the damages to those so prescribed. If the vendor resells the property he may claim the difference between the contract price and the price achieved on the resale, together with the expenses of the resale (*Ockenden v Henley* (1858) E.B. & E. 485).

The rule in *Bain v Fothergill* (1874) L.R. 7 H.L. 158, which provided that where a sale went off because of the vendor's inability to show title, the purchaser's damages were limited to the cost of investigating title, was abolished by the Law of Property (Miscellaneous Provisions) Act 1989 s.3.

**Specific performance.** Although it is usual to serve a notice to complete before beginning an action for specific performance, it is not necessary to do so (*Marks v Lilley* [1959] 1 W.L.R. 749). A claim for specific performance may even be validly commenced before the contractual completion date has
arrived, although it will be necessary to adduce evidence as to why proceedings were thought necessary and no order will be made before that date (Hasham v Zenab [1960] A.C. 316). In every case, the party claiming the remedy must show that he is ready, willing and able to complete (Hynes v Vaughan (1985) 50 P. & C.R. 444). Compensation may be ordered in addition to or in lieu of specific performance, such compensation taking the form of an abatement of the purchase price in the case of an order in favour of the purchaser (Rutherford v Acton-Adams [1915] A.C. 866).

It is usual in a specific performance action to include a claim for all necessary accounts and inquiries to be taken. It may be necessary for an inquiry into the vendor’s title to be made, if the purchaser has not yet accepted it, and an account of what is due to the vendor may be taken. If, despite an order for specific performance, the vendor refuses to transfer, the court may direct that the transfer be executed by the Master or the District Judge on his behalf or may award damages in lieu of specific performance (Johnson v Agnew [1980] A.C. 367).

**Damages in lieu of specific performance.** Alternatively, the court may award damages in lieu of specific performance (Johnson v Agnew [1980] A.C. 367). It is rare for the court to adopt the latter course; specific performance would in these circumstances, be the remedy of choice. Where damages are awarded in lieu of specific performance they may be assessed by reference to values prevailing at the date of the hearing, rather than at the date of the breach (Wroth v Tyler [1974] Ch. 30). Damages for loss of profits may be recovered where the purchaser was intending to use the property for a particular purpose which was made known to the vendor at the date of the contract (Cottrill v Steyning & Littlehampton Building Society [1966] 1 W.L.R. 753).

**The deposit.** A deposit is generally paid as a guarantee of performance of the contract. At common law the purchaser is not entitled to the return of a deposit where the sale goes off as a result of his default (Workers Trust & Merchant bank Ltd v. Dojap Investments Ltd [1993] A.C. 573). Where the contract is terminated because of a breach by the vendor, the purchaser is entitled to sue for the recovery of the deposit as a debt, for which he also has an equitable lien on the land (Whitbread v Watt [1901] 1 Ch. 911). Where both the vendor and the purchaser are in default, the Court is still likely to forfeit the deposit, because it is known and expected, as a commercial reality, that if the buyer does not complete he will lose his deposit: Omar v El-Wakil [2001] EWCA Civ 1090; Midill (97PL) Ltd v Park Lane Estates Ltd [2008] EWCA Civ 1227.
Where, exceptionally, a sum has been paid as part payment of the purchase price rather than as a true deposit, it may be recovered even where the contract goes off due to the purchaser’s default (Mayson v Clouet [1924] A.C. 980) as may a deposit paid in advance of a contract, where no contract is ever concluded (Chillingworth v Esche [1924] 1 Ch. 97; and see Lane v Robinson [2010] EWCA Civ 384).

The court has a statutory jurisdiction under s.49(2) of the Law of Property Act 1925 to order the return of a deposit. The power may be used in any circumstances where repayment of the deposit is the fairest course of action between the parties and can mitigate a vendor’s right at common law to retain the deposit (Universal Corp v Five Ways Properties Ltd [1979] 1 All E.R. 552). A deposit in excess of 10 per cent of the purchase price may be seen as a penalty, in which case the seller would not be able to forfeit it but would be limited to claiming his actual loss: Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd [1993] A.C. 573; [1993] 2 All E.R. 370, PC.

Covenants for title. By s.1(4) of the Law of Property (Miscellaneous Provisions) Act 1994 certain covenants for title will be implied into any instrument made after June 1995 which effects or purports to effect a disposition of property if the disposition is expressed to be made with either full or limited title guarantee. A vendor will be liable for breach of covenant if the land is subject to any charges, encumbrances or third party rights other than those of which he neither knew nor could reasonably be expected to know. The measure of damages is prima facie the difference between the value of the property as purported to be conveyed and its value as the vendor has power to convey (Turner v Moon [1901] 2 Ch. 825).

Options and Rights of Pre-emption. An option to purchase has been described as an offer to sell irrevocably during the period stated (Beesly v Hallwood Estates Ltd [1960] 1 W.L.R. 549; Mountford v Scott [1975] Ch. 258). There must be a binding contract to keep the offer open, which means that it must be by deed or for valuable consideration. In any event it must be made by signed writing pursuant to s.2 of the Law of Property (Miscellaneous Provisions) Act 1989. Consideration may, it seems, be nominal (Mountford v Scott [1975] Ch. 258, CA; Midland Bank Trust Co Ltd v Green [1981] A.C. 513). An option to purchase a legal estate must be registered in order to bind a purchaser of the land as an estate contract (unregistered land) or notice or caution unless the option holder is in actual occupation (registered land). Conditions precedent to the exercise of the option must be strictly fulfilled (West Country Cleaners (Falmouth) Ltd v Saly [1966] 3 All E.R. 210; Hare v Nicoll [1966] 2 Q.B. 130). In particular, time is of the essence of the exercise of the option (United
Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd [1968] 1 W.L.R. 74; United Scientific Holdings Ltd v Bumley BC [1978] A.C. 904; Di Luca v Juraise (Springs) Ltd (2000) 79 P. & C.R. 193). The person exercising the option must do so with clear and unambiguous words (Marseille Fret SA v D Oltmann Schiffarts GmbH & Co KG (The Trado) [1982] 1 Lloyd’s Rep. 157). When the offer contained in the option is accepted a contract for the sale of land arises, so regard must be had to the relevant rules on formalities (Spiro v Glencrown Properties Ltd [1991] Ch. 537; [1991] 1 All E.R. 600). Unless provision is made to the contrary in the option contract itself, the exercise of the option will create an open contract: it is, however, rare for one form or another of Standard Conditions of Sale not to be incorporated.

A right of pre-emption or a right of first refusal obliges the grantor to offer the property first to the grantee at a fixed or ascertainable price if he decides to sell (see per Chadwick L.J. in Bircham Co Ltd v Worrell Holdings Ltd (2001) 82 P. & C.R 34). It is unclear whether such a right creates an interest in land or is merely enforceable contractually. In Pritchard v Briggs [1980] Ch. 338, it was held that it does not create an interest in land and so, even if registered, does not have priority over a subsequent option to purchase. That case has been criticised and distinguished but not as yet overruled. A distinction has been drawn between them as to the nature of the interest upon the grantor offering to sell to the grantee. If the offer is made for a specified period it will create an equitable interest. If the grantor is free to withdraw the offer before acceptance it constitutes a mere contract (Chadwick L.J. in Bircham & Co Ltd v Worrell Holdings Ltd, above). The law relating to rights of pre-emption in respect of registered land has, however, been fundamentally altered by s.115 of the Land Registration Act 2002. Under s.115 of that Act any such right created on or after that section came into force on October 13, 2003: (Land Registration Act (Commencement No. 4) Order 2003) has effect from the time of creation as an interest capable of binding successors in title (subject to the rules on the effect of dispositions on priority).

Both options and right of pre-emption are governed by the rule against perpetuities. For a valuable analysis as to when a right of pre-emption may become an interest in land see Speciality Shops Ltd v Yorkshire and Metropolitan Estates Ltd [2003] 2 P. & C.R. 410.

BOUNDARY DISPUTES

“There is a common misunderstanding that an Englishman’s home is his castle in the sense that he can build walls, put up gates and do other acts on his land whenever he chooses, without regard for his neighbours”

The practitioner, when faced with a client involved in a (usually acrimonious) boundary dispute often has to grapple with difficult issues involving the construction of title documentation, imprecise topographical and physical evidence as to boundary features, infringed express (or implied) rights of way and rights to park. The source of these disputes often lies in high-handed, or oppressive, behaviour by one, or both, parties usually reflecting an underlying deep antipathy between the parties. The genesis of the dispute could be a crossed word over a garden fence, or, in one case, a private class struggle, or an surreptious intent by one party to extend his fiefdom by creeping “accretion” of his land. These disputes are also often marked by the parties battling with a overtly enthusiastic vigour and zeal, and incurring legal costs out of all proportion to the value of the assets or rights in issue.

**How should these issues be unravelled?**

In most cases, the first, and paramount, task is to identify the legal position of the boundary in dispute. The legal boundary is an invisible line dividing one person’s land from another’s and denotes the separation of ownership of land. It does not have thickness, or width, and usually, but not always, falls somewhere in, or along, a physical boundary feature such as a wall, fence or hedge.

The starting point is always to look at the conveyance or deeds as boundaries may, and generally should, be fixed by the deed or deeds conveying one or both of the properties concerned. This involves properly construing, or interpreting, the clause whose words convey what land or rights have been transferred. This clause is known as “the parcels clause”. The recent case of *Strachey v Ramage* [2008] EWCA Civ 384 concerned a poorly drawn conveyance which left in doubt a patch of ground a fraction of an acre in size. The Court of Appeal held that the task of identifying the parcels of land conveyed would require an interpretation of the particular conveyance against the background circumstances in which it was made. The function of the court would be to use all “admissible material” in order to arrive at the correct answer. It was also fundamental that the parcels clause in a conveyance should not be construed in isolation from the remainder of the document. On the facts in *Strachey*, the court had to deal with a conveyance of part that described the land sold by reference to a plan that was for “identification only”. Unfortunately, the red edging on the plan did not coincide with the boundary features on the ground, or with the line of a new fence that was erected a few weeks before the conveyance. The Court of Appeal relied upon a
clause in the conveyance that proclaimed the ownership of the fence and included covenants for its maintenance and repair. The court ruled that the clause took precedence over the plan because it would have been absurd for the sellers to retain ownership of fencing that fell within an area of land that was being sold. In addition, it would have been impossible for the sellers to comply with their covenants to repair the fence without the access that would enable them to do so.

Thus, in cases where the parcels clause is ambiguous, regard should be had to other “admissible evidence” as to the position of the boundary. Such evidence can be found not only in other clauses of the conveyance but (provided the same is reliable) in old survey photographs, property sellers’ information forms prepared for the purpose of a sale, plans submitted for planning applications, recollections of nearby long term residents (or prior owners of the land in question), and established patterns along a street e.g. often each owner in a street will own one side only of their rear fence boundary with their neighbour (the fence owned being the same for each house in the street).

The title (or property) register and title plan held by the Land Registry should always be examined. The title register contains details (amongst other things) of express covenants, easements and rights of way affecting the property. The title register will also contain a physical description of the property, which may include detail relating to boundaries and will also refer to the title plan and describe any markings or colouring that it contains. There may be reference to one or more documents such as transfers, agreements, boundary structure notices, conveyances which may indicate the position of the legal boundary. However, the registered title rarely, if ever, shows ownership of individual boundary structures such as walls, fences and hedges.

The title plan is plainly important, but not conclusive of the boundary position. Perhaps counter-intuitively, the red edging on a title plan is not definitive as to the precise position of the boundaries. The title plan will contain an outline only of the property showing its location in relation to the surrounding properties. It is based on the Ordnance Survey maps, which are increasingly used as the basis of conveyance plans, but do not purport to fix private boundaries. Thus, when most owners of registered land assume that their boundaries are conclusively defined by the Land Registry title plan, they are wrong. The Land Registry can only record their interpretation of the boundaries descriptions that they find in the pre-registration conveyance deeds. This is known as “the general boundaries rule”. Thus, the title plan is meant as a “rough guide” only as to boundary positions. In Derbyshire County Council v Fallon [2007] EWHC 1326 (Ch), the High Court confirmed this, holding that the title plan did not indicate the precise extent of the land in question. Consequently, the court
looked at the pre-registration documents to determine where the boundary lay. However, the title plan may be helpful because it often contains coloured areas and markings which may denote rights of way, sold off areas, easements, parts of the property affected by covenants, or boundary ownership. “T” marks and “H” marks along a boundary show ownership or maintenance responsibility. The land containing the bar of the “T” is the land having complete ownership or responsibility for the boundary feature (wall, hedge, fence). Where there are “H” marks these represent joint ownership or responsibility, viz. that the wall, hedge or fence is a party wall or structure. If the title register or the title plans are not sufficient to identify the boundary, the next step is to see if there are any of the well established legal presumptions that assist. The presumptions are only applicable if the deeds are unclear and admissible evidence does not answer any ambiguities. The most well known is the “hedge and ditch” presumption: this is that the law presumes, in the absence of contrary agreement, that the boundary is on the far side of the ditch from the hedge. This is because no man making a ditch may cut into his neighbour’s soil, but usually he makes it at the very extremity of his own land, forming a bank on his own side with the soil which he excavates from the ditch, on the top of which bank a hedge is usually planted. In the case of wooden fences, it is likely to be inferred that the owner of land will use his land to the fullest extent so that the fence will be deemed to belong to the person on whose side the rails and posts are placed, the palings being placed on his neighbour's side. Where land is bounded by a highway, or a private right of way, there is a presumption that the boundary is, as a general rule, a line drawn along the middle of the highway, or private right of way. This arises because the owners of land adjoining the highway or way are presumed to own the subsoil as far as the middle of the road and the airspace above the soil subject only to the right of passage over the surface and the rights of the highway authority. In relation to the seashore, and foreshore, the boundary line between the seashore and the adjoining land is the line of the median high tide between the ordinary spring and neap tides. Where land is said to be bounded by a river, a distinction must be made between tidal rivers and non-tidal rivers. In those parts of rivers where the tide flows and reflows, the soil between the medium high water mark and medium low water mark prima facie belongs to the Crown, and therefore the boundary between the bed of a tidal river and the adjoining land is, as a general rule, the line of medium high water mark. A tidal river is one where the water is subject to the ebb and flow of the tide whether the movement is lateral or vertical. The right of the Crown ceases at that point in the river where the tide ceases to ebb and flow. In the case of non-tidal rivers or streams, whether navigable or not, the boundary is in general the line of mid-stream, because the bed of such rivers and streams is presumed to belong to the riparian (ie. riverside) owners as far as the middle of the stream. Similarly, a conveyance of a property bounded by a stream normally includes the bed of
the stream to the median line. It should be appreciated that the above are merely “presumptions” capable of being rebutted on clear evidence to the contrary.

As a matter of practice, in many contested boundary disputes, a chartered land surveyor will have to be employed to visit the site and accurately measure, or “map”, the legal boundary by reference to boundary features, deeds, and other extraneous evidence that may exist. Judges themselves will often conduct a “site visit” early on in any trial to see for himself/herself the material topographical features.

Boundary disputes will also often involve related issues of ancillary rights of way, or rights to park. The recent case of *Waterman v Boyle* [2009] EWC Civ 115 concerned a right of way over a driveway granted in conjunction with rights to park two private motor vehicles in an area designated for parking. One of the issues in the case was did the right of way include additional implied rights for visitors to park vehicles on the driveway? The judge at first instance held that, in a residential context, a right to park would be implied on the right of way, otherwise (as he held) how would the visiting grandparents stay for the weekend? The Court of Appeal disagreed, holding that no such rights could be implied. The parties had specifically considered parking rights in the conveyance. They had made adequate provision for parking (2 spaces at the front of the property) and the landowner did not need additional rights to park to make effective use of the right of way.

No discussion of the law relating to boundaries could be complete without brief mention of the Party Wall Act 1996. Development works by neighbours on or near a party wall are often restrained by Injunction by the courts where a neighbour has unlawfully carried out works on or near a party wall without serving the requisite party wall notice. Most of these disputes are resolved by the appointed surveyors agreeing a “party wall award” which sets out the rights and obligations of the neighbours in relation to the works.

The Court of Appeal in almost every boundary dispute that comes before it ventilates its despair at the willingness of parties to litigate rather than settle their disputes in an amicable way. It perhaps should be said that where one party has acted in a wholly deceptive, oppressive, high-handed, or even violent manner, such disputes are often not amenable to ready settlement. It is not easy to shake hands with a person who you firmly believe has stolen a part of your land. However, in the usual case, an active attempt should be made to seek to resolve such disputes amicably before deploying the above law and practice.
FENCES, BOUNDARIES AND ACCESS TO NEIGHBOURING LAND

Fences and Fencing

The owner of land may be bound to maintain a fence for the benefit of adjoining land, who may have a corresponding right to have the fence so maintained and repaired. There is no general obligation at common law upon a landowner to fence his land. The duty or right may arise by covenant or grant (Jones v Price [1965] 2 Q.B. 618 at 639) by prescription usually by proof of immemorial user or by the doctrine of lost modern grant (Egerton v Harding [1975] Q.B. 62). In addition an obligation to fence or to keep a fence in repair may be imposed by statute.

Once there is established an immemorial usage of fencing against a common as a matter of obligation, the duty to fence is proven, provided always it can be shown that such a duty could have arisen from a lawful origin (Egerton v Harding, above). Occasional acts of repair do not in themselves prove either a contract to repair (Boyle v Tamlyn (1827) 6 B. & C. 329) or a prescriptive obligation to do so (Jones v Price [1965] 2 Q.B. 618).

The right to have a fence kept in repair by a neighbour is in the nature of an easement (Crow v Wood [1971] 1 W.B. 77) although since it requires the expenditure of money by the dominant owner it has been described as a “spurious” easement (Egerton v Harding, above).

The duty to fence is usually satisfied by maintaining a fence in the manner usual in the country and so as to keep out ordinary cattle rather than cattle with unusual jumping powers (Coaker v Willcocks [1911] 2 K.B. 124) or in unusual numbers (Cooper v Railway Executive [1953] 1 W.L.R. 223).

In absence of an obligation to repair each of two neighbouring owners has at common law a duty to take care that his cattle do not enter the land of the other (Churchill v Evans (1809) 1 Taunt. 529). The common law obligations have been replaced by the Animals Act 1971. Where livestock belonging to any person strays onto land in the ownership or occupation of another and damage is done by the livestock to the land or any property on it which is in the ownership or possession of the other person, the person to whom the livestock belongs is liable for the damage except as otherwise provided by the Act (1971 Act, s.4(1)). The Act does not make provision for liability for personal injuries, and accordingly Wormald v Cole [1954] 1 Q.B. 614 has been overruled. Section 5(1)
provides that a person is not liable under s.4 for any damage which is wholly due to the fault of the person suffering it. But s.5(6) provides that the damage is not to be treated as due to the fault of the person suffering it merely because he could have prevented it by fencing. However, a person is not liable for straying livestock where it is proved that the straying of the livestock onto the land would not have occurred but for a breach by any other person of a duty to fence.

Right of action. If the claimant’s cattle escape from his land through a defect in a fence which the defendant is liable to repair, the claimant may recover for damage done to his cattle or to cattle belonging to third parties, but which the claimant kept on his own land (Rooth v Wilson (1817) 1 B. & Aid. 59). But if the claimant’s cattle were trespassing upon the land before they escaped through the fence, the defendant is not liable, even though he would have been liable as against the owner of the land (Ricketts v The East and West India Docks and Birmingham Junction Railway Company (1852) 12 C.B. 160). So where the defendant is bound to repair a fence separating his land from the highway, the claimant must show that his cattle were lawfully using the highway (Hickman v Maisey [1900] 1 Q.B. 752). The mere fact that a person’s land abuts the highway does not raise a presumption that he is bound to fence it (Searle v Wallbank [1947] A.C. 341).

The action must be brought against the person who has the liability to fence. That person is usually the occupier rather than the owner (Cheetham v Hampson (1794) 4 T.R. 318). The words “owner and proprietor” do not necessarily import that the party is the occupier (Russell v Shenton (1842) 3 Q.B. 499). Occupation must therefore be specifically alleged.

Access to Neighbouring Land


Section 1(1) of the Act provides that a person who, for the purpose of carrying out works to any land (“the dominant land”), desires to enter upon any adjoining land or adjacent land (“the servient land”) and who needs, but does not have, the consent of some other person to that entry, may make an application to the court for an order. Section 1(2) of the Act provides that upon an application to the county court, the court will make an access order if, and only if, it is satisfied that: (a) the works are reasonably necessary for the preservation of the whole or any part of the dominant land; and (b) that they cannot be carried out, or would be substantially more difficult to
carry out, without the entry upon the servient land. However, s.1(3) of the Act goes on to provide that the court will not make an access order in any case where it is satisfied that were it to make such an order: (a) the respondent or any other person would suffer interference with, or disturbance of, his use or enjoyment of the servient land; or (b) the respondent or any other person in occupation of the whole or any part of the servient land, would suffer hardship to such a degree that it would be unreasonable to make the order.

Where the court is satisfied on an application under this section that it is reasonably necessary to carry out any basic preservation works to the dominant land, those works will be taken to be reasonably necessary for the preservation of the land: see s.1(4) of the Act. “Basic preservation works” mean: (a) the maintenance, repair or renewal of any part of a building or structure; (b) the clearance, repair or renewal of any drain, sewer, pipe or cable; (c) the treatment, cutting back, felling, removal or replacement of any hedge, tree, shrub or “other growing thing” which is in danger of becoming damaged, diseased, dangerous, insecurely rooted or dead; and/or (d) the filling in, or clearance, of any ditch. If the court considers it fair and reasonable in all the circumstances of the case, works may be regarded for the purposes of the Act as being reasonably necessary for the preservation of any land notwithstanding that those works incidentally involve the making of some alteration, adjustment or improvement to the land or the demolition of the whole or any building or structure comprised or situate upon the land: see s.1(5) of the Act.

The Act contains no definition of land (other than excluding highways in s.8(3)). In one of the few reported cases dealing with this legislation, Dean v Walker (1997) 73 P. & C.R. 366, the Court of Appeal held that the definition of land was that contained in Schedule 1 to the Interpretation Act 1978 (including buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right in or over land) and was therefore wide enough to include a party wall. The case preceded, however, the Party Wall etc. Act 1996 and did not deal with the interaction between the two Acts, which remains unclear.

Terms and Conditions of Access Orders. There is a broad range of terms and conditions that the court may impose upon making an access order. These are found in s.2 of the Act. An access order shall specify the works to the dominant land that may be carried out by entering upon the servient land, the particular areas of servient land that may be entered, and the date upon which or the period during which the land may be so entered: s.2(1). The order may impose conditions for the purpose of restricting any loss, damage, injury, and the date upon which or the period during which
the land may be so entered: s.2(1). The order may impose conditions for the purpose of restricting any loss, damage, injury, inconvenience or loss of privacy: s.2(2). Without prejudice to the generality of s.2(2), the order may deal with the manner in which the words are to be carried out, the days on which and hours between which the works may be executed, the identity of the persons who may carry out the works and/or specify precautions which must be taken: s.2(3) of the Act. The court may impose conditions to secure compensation for the respondent or any other affected party (which may include the securing of insurance and/or creating a record of the condition of the servient land): s.2(4). The access order may also include provision requiring the applicant to pay the respondent such sum by way of consideration for the privilege of entering the servient land in pursuance of the order as appears to the court to be fair and reasonable having regard to all the circumstances of the cease, including the likely financial advantage of the order to the applicant and any person connected with him and (b) the degree of inconvenience likely to be cause to the respondent or any other person by the entry. Section 6 of the Act provides for the terms of the order to be discharged, varied, suspended and revived. Furthermore, it provides that if any part contravenes or fails to comply with any requirement of the access order, the court may make an award in damages payable to any other person affected by the contravention or relief.

PARTY WALLS

The Party Wall Act 1996

The Party Wall Act 1996 (“The Act”), which came into force on 1 July 1997, provides a framework for preventing or resolving disputes in relation to party walls, party structures, boundary walls and excavations near neighbouring buildings. The Act regulates a variety of construction operations, including work to party walls, where these are carried out in close proximity to neighbouring properties. The Act makes provision for the service of notices before such work is undertaken, and for the appointment of surveyors to settle any disputes that subsequently arise. The Act repealed the London Building Acts (Amendment) Act 1939 (“the 1939 Act”), which was a local Act concerning London only, but, such was its success, that Parliament rolled it out across England and Wales in the guise of the Party Wall Act 1996. Cases determined under the 1939 are still therefore persuasive authorities as to the application of the provisions in the 1996 Act. The 1996 Act allows Building Owners to carry out acts that would otherwise be a trespass and/or common law nuisance. However, in order to avail himself/herself of the protection of the Act, the Building Owner must engage the statutory machinery of the Act itself, failing which he/she may be on the end of an
injunction to restrain any further works until such times as the statutory procedures have been complied with.

The Building Owner who wants to start work covered by the Act must give Adjoining Owners notice of their intentions. Generally, the notice should be given at least two months before the work is due to start or one month for new party walls or structures, and any excavation. Absent agreement by the Adjoining Owner in writing to start work sooner, the Building Owner has to wait for the full one or two months after serving a notice before starting work. If a Building Owner does not serve a notice as required under the Act then the Adjoining Owner can apply to the court for an Injunction to restrain the continuance of the works pending service of the requisite notices.

An illustration of an example of how a failure to adhere to the provisions in the Act can lead to an injunction and award of damages is provided by the case of *Louis v Sadiq* [1997] 1 E.G.L.R. 136 (albeit a case decided under the 1939 Act). The Building Owner (“S”) carried out extensive building work on his property which caused damage to the party and front walls of the adjoining property, owned by the Adjoining Owner (“L”). L successfully obtained an interlocutory injunction restraining S from carrying out further work until he complied with the requirements of the London Building Acts (Amendment) Act 1939 in providing support for the front elevation of L’s property and making good all damage. L failed to sell the property due to the damage and incurred extra costs concerning a proposed move to Guadeloupe, as a result of which L claimed special damages for extra mortgage interest, building costs in Guadeloupe and general damages for nuisance. S appealed against the general damages awards contending that there was no basis for them, and in any event, L’s losses were not caused by him or were too remote or excessive in amount. The Court of Appeal held dismissing S’s appeal that the work was carried out without first giving notice or obtaining consent as required under ss.47 and 50 of the 1939 Act and was actionable in private nuisance. Nothing in the 1939 Act served to reduce or exclude common law liability for acts committed in breach of the statutory requirements for notice or consent, and subsequently obtaining permission did not relieve S from liability for acts committed prior to consent being granted in the absence of agreement to this effect between S and L. The judge at first instance had correctly decided that the sale could have been concluded if work lawfully carried out under the 1939 Act was in progress, and it was reasonably foreseeable on S’s part that unlawful work carried out by him could prevent L making a sale and result in extra costs to L on the overseas property and additional mortgage interest payments.
Any party intending to carry out work of the kinds described in the Act must give Adjoining Owners notice of their intentions. The “Building Owner” is the owner of the premises where the work is proposed; the person who initiates the work and causes the initial notice to be served the Building Owner must be an “owner” within the meaning of the Act, so he cannot divest himself of responsibility under the act by attempting to assign or delegate his responsibility to others including his contractor, party wall surveyor or insurer.

The “Adjoining Owner” and “Adjoining Occupier” mean any owner and any occupier of land, buildings, stories all rooms adjoining those of the building owner and, for the purposes only of section 6, within the distance specified in that section (ie within 3 metres or 6 metres). an Adjoining Owner is anyone who is an owner of land, buildings or rooms adjoining those of the building owner. The adjoining property may have a freehold owner, or a leasehold owner all of whom may be an 'Adjoining Owner' under the Act. Where there is more than one owner of the property, or more than one adjoining property, it is the duty of the Building Owner to notify all Adjoining Owners. If this involves the wall supporting a block of flats, this could be a substantial numbe of Adjoining Owners.

If an Adjacent Owner receives a notice, he is under a duty to inform any incoming owner about any proceedings under the Act. As long as the Building Owner served upon the person who was the Adjoining Owner as at the date of the notice, the Building Owner has discharged his duty, and is under no obligation to serve a fresh notice on any new, or succeeding, Adjoining Owner. The same does not apply the other way around because a burden passes with land, but not the benefit. Therefore if the Building Owner sells his land then the notice he served the longer has any validity because “the Building Owner” is the person who must serve the notice under s.3 or s.6. In the case of a change of Building Owner, the Building Owner, however, cannot divest himself of his responsibilities under the Act by selling the property (Selby v Whitbread [1917] 1 K.B. 736).

The Act applies even to Crown, Government and Local Authority owned property.

If the Adjoining Owners’ property is owned in joint names both or all names must be given in the notice.

Where the intended work is to an existing party wall (section 2 of the Act) a notice must be given even where the work will not extend beyond the centre line of a party wall.

The Act does not change the ownership of any wall, nor does it change the position of any boundary. The Act does not contain any provision that could be used to settle a boundary line dispute.
Common Law rights are restricted by this Act only to the extent that the Act would take precedence on any matter for which it makes provision and only when the correct notices have been given and the procedures correctly followed. Any other rights, easements or covenants are not affected.

It should be noted that the rights and duties afforded and borne under the Act do not override, or absolve, a party from requiring, where appropriate, planning permission, building regulation approval or listed building consent. The Act does also does not override, or extinguish, any neighbouring rights to light from neighbouring windows. Section 2 of the act confers the right to affect certain rights which have the characteristics of easements, save in respect of s.9 rights which cannot be overridden.

Adjoining Owners can agree with the Building Owner’s proposals or reach agreement with the Building Owner on changes in the way the works are to be carried out, in their timing and manner. Where a dispute arises in relation to a new party wall or party fence wall under section 1, and where there is no written consent by the Adjoining Owner within fourteen days to a notice served in relation to an existing structure under section 2 or an excavation under section 6, the Act provides for the matter to be resolved by a surveyor or surveyors in a procedure for the resolution of disputes.

What is a Party Wall?

A “Party Wall” is defined by s.20 of the Act as:

“(a) a wall which forms part of a building and stands on lands of different owners to a greater extent than the projection of any artificially formed support on which the wall rests;

(b) so much of a wall not being a wall referred to in (a) above as separates buildings belonging to different owners”

Therefore, “party wall” has two definitions. In (a) it is defined as a wall which stands astride the boundary, not necessarily centrally, and not just with its footings on the adjoining owners land. In the type (a) wall therefore the boundary must be found within the wall but it can run very close to the internal surface of either edge of the party wall. A party wall may not necessarily have a boundary running through its centre line but may be straddled “eccentrically” over it. A party wall which stands on the land of two owners is a party wall through its entire length and height and, subject to s.2 and s.11 of the Act, either owner has the right to make use of the whole of it. Owners of a party wall are joint owners of the whole of a party wall rather than the sole owner of half or part of it.
A type (b) wall means a wall which separates the building of two owners, but only that part of a wall which actually separates the buildings of two owners is party. Party rights under a type (b) wall only extend as far as the enclosure by the non-owner. Enclosure is the point at which a part of the non-owners building uses, or “encloses against”, the party wall. The nonowner, for a type (b) wall, has no right to use upward or sideways extension of the wall. An example of a type (b) wall would be where one person has built the wall in the first place, and another has built their building up against it without constructing their own wall. Only the part of the wall that does the separating is "party" - sections on either side or above are not "party".

If the adjoining owner directs a building using his neighbours boundary wall as an enclosure, it does not become a party wall if the neighbour had no building itself enclosing against it. Since a wall is defined as “party” under paragraph (b) when it separates buildings, it becomes so as soon as the second building is placed against it, and there appears to be no defined period for acquisition of party wall rights. The owner of the wall may be able to foresee discontinuance of unauthorised use of a type (b) wall by an injunction to remove the trespass.

A “party fence wall” means a wall (not being part of the building) which stands on lands of different owners and is used or constructed to be used for separating such adjoining lands, but does not include a wall constructed on the land of one owner the artificially formed support of which projects into the land of another owner. The phrase “not being part of the building” is the key to understanding “party fence walls”. Classically, a party fence wall is a wall, such as a garden wall which sets astride the boundary. This does not include such boundaries as wooden fences. It does not include any forms part of a building, the wall which only the foundations project onto the neighbouring land. In other words, there are no buildings attached to a party fence wall, and it is not sufficient boundary to pull through the foundation footings (the boundary must pass through the wall itself).

Walls that are not party walls include boundary walls, a fence wall (where the boundary does not run through the wall, so it is not a party fence wall); a garden wall built wholly on one owner’s land; and external walls (the wall of a building built up to but not astride the boundary).

“Party structure” is a generic term but is defined specifically to include the floors and ceilings between any units of occupation and separate entrances. Maisonettes, flats in purpose-built blocks, and those in converted houses, will have a party structures with the premises above and/or below them, as with offices which will have their own internal or external entrances. Separate entrances would mean set of common hallways and lobbies. Some structures are not buildings, such as a
tunnel or a bridge. A sample embankment is neither a structure not a building. The final (proceeding) of a flat is a party structure. The same is true of blocks of self-contained offices.

**What work does the Act cover?**

The Act applies to:
- work that is going to be carried out directly to an existing party wall or party structure;
- new buildings at or astride the boundary line between properties;
- Excavation within 3 or 6 metres of a neighbouring building(s) or structure(s), depending on the depth of the hole or proposed foundations.

For proposed work under section 2 (existing party walls and structures) and section 6 (excavation and construction) of the Act, if the adjoining owner does not respond after 14 days of being served a notice it would be considered a dispute has arisen.

For proposed work under section 1 (new building on line of junction) if the adjoining owner does not respond after 14 days of being served a notice the building owner may only build the new wall at his own expense and as an external wall wholly within his own land.

If a dispute arises both owners must agree to appoint an “agreed surveyor” to produce an ‘Award’. Alternatively, each owner can appoint a surveyor to draw up an award together. A third surveyor is selected in case the two appointed surveyors cannot agree. If no dispute arises there is no requirement under the Act to appoint a surveyor.

**Section 2: the rights of Building Owners**

Section 2 of the Act provides a Building Owner, who wishes to carry out various sorts of work to an existing party wall, with additional rights going beyond ordinary common law rights. Actions by a Building Owner under s.2 are likely, in general, to me the most common subject of party wall procedures.

S.2 of the Act lists what work can be done. The most commonly used rights under section 2 are:

- to repair a party wall;
- to insert a damp proof course;
- to underpin the whole thickness of a party wall (for example to prevent settlement);
- to cut into a party wall to take the bearing of a beam (for example for a loft conversion);
- to raise the height of a party wall (for example adding another storey);
- to raise a party wall downwards (for example to form a basement);
- to demolish and rebuild a party wall (for example if it is structurally defective);
- to underpin the whole thickness of a party wall (for example to form a basement);
- to cut off projections from a party wall (or from an adjoining owner’s boundary or external wall) if necessary to build a new wall adjacent to that wall (for example removing a chimney breast).

The Duties of the Building Owner

If the Building Owner intends to carry out any of the works mentioned in section 2 of the Act he must inform all Adjoining Owners. The Building Owner must not even cut into his own side of the wall without telling the Adjoining Owners of his intentions.

The Act itself contains no enforcement procedures for failure to serve a notice. However, if the Building Owner starts work without having first given notice in the proper way, Adjoining Owners may seek to stop the work through a court injunction or seek other legal redress. An Adjoining Owner cannot stop someone from exercising the rights given to them by the Act, but may be able to influence how and at what times the work is done.

The Act provides that a Building Owner must not cause “unnecessary inconvenience”. This is taken to mean inconvenience over and above that which will inevitably occur when such works are properly undertaken.

Temporary Protection

The Building Owner must provide temporary protection for adjacent buildings and property where necessary. The Building Owner is responsible for making good any damage caused by the works or must make payment in lieu of making good if the Adjoining Owner requests it. This is why one of the first acts of a Party Wall surveyor is to visit the site and draw up a Schedule of Condition (with photographs) which can be examined at the end of the works to determine whether the works have caused any damage.

It is good practice to prevent debris collecting in (or animals entering) the small gap between two adjacent independent structures during the works. There are several proprietary products that can effectively seal the gap between two buildings without having to cut into or permanently fix to either building. The Building Owner erecting the second structure would usually carry out this work.
Costs of Works

The general principle in the Act is that the Building Owner who initiated the work pays for it if the works are solely for his benefit. However, there are cases where the Adjoining Owner should pay part of the expense of the works, for example, where work to a party wall is needed because of defects or lack of repair for which the Adjoining Owner may be responsible (in full or in part) or where an Adjoining Owner requests that additional work should be done for his benefit. In the absence of agreement, the Award can provide who pays for the costs of any given works.

Where party walls and structures are modified, repaired, or demolished and rebuilt (s.2(2)(a) and (b) of the Act) section 11(4) and (5) provides that the cost of the work shall be shared where the work is necessary on account of defect or want of repair, in proportion to the use each party makes of the structure or wall and the responsibility of each for the defect or want of repair concerned.

Where use is made of party walls previously built at the cost of the Adjoining Owner, the Act makes provision for a fair payment to be made to the Adjoining Owner.

*De Minimis Acts*

Do acts like putting up shelves, or wall units, or installing recessed electric sockets, or removing and renewing plaster? Drilling into a party wall to fix plugs and screws for ordinary wall units or shelving cutting into a party wall to add or replace recessed electric wiring and sockets removing old plaster and replastering are likely to be so minor, or *de minimis*, that service of notice under the Act would not be necessary, or be too minor to require a notice under the Act.

The works would have to be sufficiently substantial, or potentially sufficiently material or substantial, so as cause any possible consequences for the structural strength and support functions of the party wall as a whole, or cause damage to the Adjoining Owner's side of the wall.

Notification of Works to Adjoining Owners

Best practice suggests discussing the planned work with the Adjoining Owner face to face in the first instance before formal notice is given. This may serve to smooth the way to consent; and may be likely to mitigate any early tensions. It is unwise for the Building Owners’ notice should to come as a surprise to the Adjoining Owner. It should be remembered that an Englishman (or Englishwoman) regards his home as his (or her) castle, so any legalistic notice, received without notice and out of the blue, may, in some cases, trigger an overly defensive response. If the Building Owner has already
ironed out possible snags with his neighbours in advance, this should mean that they will more readily give consent in response to the notice. There is no obligation to appoint a professional party wall surveyor to serve notices (the precedents provided on this site should be sufficient, suitably adapted giving names and addresses etc). Whilst there is no official form for giving notice under the Act, the Building Owner’s notice will need to include the following details:

- name and address (joint owners must all be named, e.g. Mr A & Mrs B Owner);
- the address of the building to be worked on (this may be different from the Building Owners’ main or current address);
- a full description of what work the Building Owner proposes to carry out (it may be helpful to include plans; which must be included in respect of excavation works, but you must still describe the works);
- when the works propose to start (which must not be before the relevant notice period has elapsed).

The notice should be dated and it is advisable to include a clear statement that it is a notice under the provisions of the Act (again the precedents on this site can be used).

The Notice may be delivered to the Adjoining Owner(s) in person or sent by post. Alternatively, the notice to addressed to "The Owner", adding the address of the premises, and delivered to a person on the premises, or, if the neighbouring property is empty, fix it to a conspicuous part of the premises.

**Required Period of Notice**

Notice must be given at least two months before the planned starting date for work to the party wall. The Adjoining Owner may agree to allow works to start earlier but is not obliged to even when agreement on the works is reached. The notice is only valid for a year, so the Building Owner should not serve it too long before intending to commence work.

**Steps following Notice**

A person who receives a notice about intended work may:

- give his consent in writing, or
- refuse to consent to the works proposed (in which case the dispute resolution procedure is engaged); or
- do nothing.

If, after a period of 14 days from the service of the Building Owners’ notice, the person receiving the notice has done nothing, a dispute is “deemed” to have arisen.

It should be noted that where consent is given the Building Owner is not relieved of his obligations under the Act, for example, to avoid unnecessary inconvenience or to provide temporary protection for adjacent buildings and property, where necessary. The notice of consent is simply confirmation that, at that time, there is nothing “in dispute”.

Service of a Counter-Notice

The Adjoining Owner who receives notice concerning intended work may, within one month, serve a counter-notice setting out what additional or modified work he would like to be carried out for his own benefit, and accompanied by all necessary particulars. A person who receives a notice, and intends to give a counter-notice, should indicate so to the Building Owner know within 14 days.

If the Building Owner receives a counter-notice he must respond to it within 14 days otherwise a dispute is “deemed” to have arisen.

Agreement as to Works

Any agreements should always be put in writing (or confirmed by say a subsequent email recording what has been agreed). It is often the case that parties have entirely different recollections of what has, or has not, been agreed arising from the same conversation.

If the Building Owner cannot reach agreement with the Adjoining Owner(s), the parties should endeavour to appointing what the Act calls an "Agreed Surveyor" to draw up an "Award". The surveyor must be a person agreed between the owners to act.

Alternatively, each owner can appoint their own surveyor to draw up the Award together. The two appointed surveyors will select a third surveyor (who would be called in only if the two appointed surveyors cannot agree or either of the owners or either surveyor calls upon the third surveyor to make an Award).

The Role of Party Wall Surveyors in operating the Act
In practice surveyors operate the machinery of the Act, and should act impartially in their dealings between the parties to a dispute. Although few surveyors would openly challenge this principle of impartiality, some may feel that it bears little relevance to the commercial realities of the professional role which they actually undertake. Each party understandably expects their own appointed surveyor to represent their interests and this is generally reflected in the surveyors’ approach to negotiations. In *Gyle-Thompson v. Wall Street (Properties) Limited* [1974] 1 All E.R. 295 at 302 Brightman J. noted that:

“... the Act ... give[s] a building owner a statutory right to interfere with the proprietary rights of the adjoining owner without his consent and despite his protests. The position of the adjoining owner, whose proprietary rights are being compulsorily affected, is intended to be safeguarded by the surveyors appointed pursuant to the procedure laid down by the Act”.

Judge Humphrey LLoyd Q.C. in *Chartered Society of Physiotherapy v. Simmonds Church Smiles* [1995] 1 E.G.L.R. 155 when said this of the role of surveyors when he observed that:

“... a party-appointed surveyor while no doubt retaining his professional independence is not obliged to act without regard to the interests of the party who appointed him. In practice matters in difference are regularly resolved by agreement between the two party-appointed surveyors without the need for the intervention of the third surveyor.”

The surveyor(s) should act consistently with the terms of the Act to reach a fair and impartial award. The surveyor(s) will settle the matter by making an "award" (also known as a "party wall award"). This is a document which:

- sets out the work that will be carried out;
- says when and how the work is to be carried out (for example to limit continuous periods of time when excessively noisy work can be carried out);
- specifies any additional work required (for example necessary protection to prevent damage);
- often contains a record of the condition of the adjoining property before the work begins (so that any damage to the adjoining land or buildings can be properly attributed and made good);
- allows access for the surveyor(s) to inspect the works while they are progressing as may be necessary to see that they are doing so in accordance with the Award).

The surveyor(s) can make a party wall award, but cannot decide a dispute concerning the location of the boundary.
If one party disagrees with his appointed surveyor, he is unable to rescind his appointment, but he can approach the Third Surveyor to resolve the matter. However, the parties have chosen just the one surveyor, being the ‘agreed surveyor’, then there is no Third Surveyor to call upon.

**Surveyor's fees**

The surveyor (or surveyors) will decide who pays the fees for drawing up the award and for checking that the work has been carried out in accordance with the award. Usually the Building Owner will pay all costs associated with drawing up the award if the works are solely for his benefit.

**The non co-operating neighbour**

If a dispute has arisen and the neighbouring owner refuses or fails to appoint a surveyor under the dispute resolution procedure, the Building Owner will not be able to appoint an "agreed surveyor".

In these circumstances the Building Owner can appoint a second surveyor on the neighbouring owner’s behalf, so that the procedure moves forward.

**Access to neighbouring property**

Under the Act, an Adjoining Owner and/or occupier must, when necessary, let in the Building Owner’s workmen and/or surveyor or designer to carry out works in pursuance of the Act (but only for those works), and allow access to any surveyor appointed as part of the dispute resolution procedure.

The Building Owner must give the Adjoining Owner and occupier notice of his intention to exercise these rights of entry. The Act says that 14 days' notice must be given, except in case of emergency. If access is necessary to carry out the notified works the Building Owner may wish to include this requirement in the notice that is served when seeking consent to carry out the works, so as to avoid any dispute in this respect at a later stage when work is underway.

It is an offence, which can be prosecuted in the magistrates' court, for the occupier or other person to refuse entry to or obstruct someone who is entitled to enter premises under the Act, if the first-mentioned person knows or has reasonable cause to believe that the latter person is entitled to be there.
If the adjoining property is closed (for example an unoccupied property) the Building Owner’s workmen and surveyor or designer may enter the premises by breaking open a fence or door, if they are accompanied by a police officer after following the Act’s procedures.

The Adjoining Owners Response

If the Adjoining Owner receives a notice from your neighbour he should reply to it in writing within 14 days of receiving it. The Adjoining Owner can consent to or disagree with what is proposed (see the precedent responses). If the Adjoining Owner disagrees with the proposal, and cannot resolve the matter, he should appoint a surveyor.

If the Adjoining Owner does not respond to a notice about an intended new wall built up to (but not astride) the line of junction, the work can commence after the one month notice period.

If the Adjoining Owner does not respond, in writing, within 14 days to a notice about an intended new wall built astride the line of junction (a party wall), the Building Owner must build the wall entirely on his own land. The work can commence after the one month notice period.

If the Adjoining Owner receives a notice about work to an existing party structure, or a notice about excavations within 3 or 6 metres of your foundations, the Adjoining Owner has not responded, in writing, within a period of 14 days from receipt of the notice, a dispute is deemed to have arisen. Again the dispute will be resolved by the surveyors.

If the Adjoining Owner disagrees with the work described in a notice under the Act he should explain his opposition in writing. The Building Owner can then consider the objection and possibly amend his proposal. Agreement might then be reached, without the need to use the formal dispute resolution procedure.

If work is about to start without receipt of a Party Wall Act notice

The Adjoining Owner should complain to the Building Owner. If the Building Owner ignores the request the Adjoining Owner should consider applying for an Injunction to restrain the works pending service of the requisite notices.

Unfinished works by Building Owner

If there is a risk that Adjoining Owner will be left in difficulties if the Building Owner stops work at an inconvenient stage, The Adjoining Owner should request of him, before he starts the notified work,
to make available such security as is agreed (or if not agreed determined by the surveyor/s), which may be money or a bond or insurances, that would allow the Adjoining Owner to restore the status quo ante if he fails to do so.

The money remains the Building Owner’s throughout, but if, for example, the Adjoining Owner needs to have a wall rebuilt, he, or more commonly the surveyors, can draw on that security to pay for the rebuilding.

However, this provision is usually reserved for particularly intrusive or complex works.

Unsafe Buildings

Incomplete work may make a building unsafe and therefore dangerous. Any concerns about dangerous buildings can be raised with the local authority building control department. A structural engineer should be approached to report in serious cases.

Excessive noise from the work being carried out

The Adjoining Owner can might consider bringing an action for an injunction to limit the hours during which the works can be carried out. Clearly works are going cause some noise, but if the works noise or disturbance are extreme, in terms of extent or timing, then a nuisance injunction may be obtainable.

Conclusivity of the Award/Appeals against the Award

The Award is final and binding unless it is rescinded or modified by a county court on appeal. Each owner has 14 days from service of the award on him to appeal to the county court against the award. Party wall award appeals are governed by Part 52 of the Civil Procedure Rules. Prior to 2006, there was some uncertainty as to whether appeals were “de novo” appeals (meaning a full re-hearing); the Court of Appeal in Zissus v Lukomski (2006) EWCA Civ 341 have confirmed that appeals against awards pursuant to s.10(17) of the Act are “statutory appeals” so that the Part 52 procedure should be adopted in all such appeals. That the appeal against a party wall award in the County Court is by way of a “re-hearing”; and that an appeal from the decision of the County Court on an appeal under s.10(17) is a “second appeal” within CPR 52.13. Second Appeals are dealt with more restrictively by the Court of Appeal. The presumption under Part 52 is that evidence that was not before the tribunal against whom the appeal is pursued (meaning in this instance the surveyor(s) who publish the award) will not be allowed unless the court directs otherwise. Therefore, in a party wall appeal is important at an early stage to consider which evidence will be necessary, and to seek
specific directions giving permission to call fact relevant evidence. Ordinarily, directions will provide for the disclosure of relevant evidence, witness statements, and expert reports from, amongst others, either the building surveyors, structural engineers or other relevant disciplines.

The principal steps in the process of appealing against an award in accordance with Part 52 include the following:

- the commencement of the appeal process by filing an Appellant’s Notice (in the form N161). This must be filed within 14 days of the receipt of the Award. The Interpretation Act 1978 s.7 applied to the postal service provisions in the Party Wall etc. Act 1996 s.15(1) with the effect that the 14-day time limit for appeals against awards began on the date of deemed receipt of the award, not the date of posting (Freetown Ltd v Assethold Ltd [2012] EWCA Civ 1657);
- the Appellant’s Notice is served, not only on the other party, but also on the surveyor(s) that made the award being appealed (even though the surveyor(s) will not be parties to the appeal and will often have no direct interest in the outcome);
- the Appellant’s Notice should be accompanied by a document set out in paragraph 5.6 of the PD 52 and also be accompanied by a Skeleton Argument setting out the essential points in the appeal, referring to any relevant case-law, and setting out what relief the Appellant seeks;
- the Respondent may choose to file a Respondent’s notice indicating other grounds for that surveyor(s) arriving at the position supporting the Respondent. If no Respondent’s notice is served, it will be assumed that the Respondent simply supports in full the reasoning of the surveyor(s) as set out in the Award.

A surveyor’s award issued pursuant to the party wall procedure under the 1996 Act can operate as a “bar” a claimant raising similar claims against the Defendant for damage caused to his property by building works in a substantive action (Rodrigues v Sokal [2008] EWHC 2005 (TCC)).

Compensation

Compensation can be awarded under the Act to the Building Owner, for example, if he loses a tenant (and the consequential rental income) because the tenant moved out, rather than suffer the noise and disturbance of the works.

Damage caused by the Building Owner’s Works
The Act only protects the Building Owner from works sanctioned by the statutory machinery. If work is not covered by the Act, at common law, an adjoining owner has the right to be compensated in damages for such damage by the Building Owners works. Where a property is damaged or interfered with as a necessary part of the work to a neighbouring property the adjoining owner has the right for it to be put back into the condition it was prior to the works. If a building owner does not put right any damage caused, the adjoining owner will usually begin legal proceedings for damages. The adjoining owner would need to be able to prove that they have suffered damage or loss.

Adjoining Owners should appreciate that the primary purpose of the Act is to facilitate lawful development. The Building Owner is legally responsible for putting right any damage caused by carrying out the works, even if the damage is caused by his contractor. An Adjoining Owner cannot stop someone from exercising the rights given to them by the Act.

Adjoining Owners do not lose any of your rights by agreeing to the intended works described in the Building Owner's notice. Agreement to the intended works simply signifies that, at this point in time, there is nothing in dispute. If a dispute arises at a later date that cannot be resolved by agreement, say in respect of damage caused, you can then activate the dispute resolution procedure.

The court is unlikely to be sympathetic to a Building Owner arguments that damage was not caused by him when he presses on with unauthorised works and without serving the requisite notice, and when damage to the Adjoining Owner’s house or buildings surfaces during, or soon after, the works have been completed. In Roadrunner Properties Ltd v Dean [2003] EWCA Civ 1816 the Court of Appeal held that a judge had erred in law in preferring the evidence of the Defendant's expert witness when the facts of the case did not support that evidence. The most likely cause of the damage to the Claimant's building was the construction work the Defendants had done to the neighbouring building and, as the Defendants had failed to comply with the Party Wall etc. Act 1996, it was right that the court took a “robust” view of causation. On the facts, the Defendant carried out works to his side of the party wall which involved cutting a channel into the wall with a heavy duty hammer drill. Shortly after the works were carried out, damage became apparent to the floor tiles immediately adjacent to the party wall on the Claimant's side. The Claimant contended that the use of the hammer drill must have caused the damage. The Defendant’s expert witness argued that the damage was due to the tiles having expanded after absorbing moisture from the atmosphere over a number of years and the fact that the damage became apparent just after D's works was coincidental. The Court of Appeal held that (1) the judge had erred in preferring the evidence of the Defendant's expert witness when the facts did not support his reasoning. It might be highly material
that one event followed the other within a short time, particularly where it was what would have been expected had one event been caused by the other, and (2) where a building owner had carried out works to a party wall without serving upon the adjoining owner the requisite notice under the Party Wall etc. Act 1996 s.3, and there had consequently been no pre-works survey, then the court had to be prepared to take a reasonably robust approach to causation. If it could be shown that the damage which had occurred was the sort of damage which might have been expected to occur from the nature of the works that had been done, the court had to recognise that the inability to provide any greater proof of the necessary causative link resulted from the building owner's neglect of his statutory obligations. If there was material from which a causal link could properly be established then the court had to be slow to discard common sense in favour of expert hypothesis advanced after the event.

Rights of Adjoining Owners

Adjoining Owners' rights include the right to:

- appoint a surveyor to resolve any dispute;
- require reasonably necessary measures to be taken to protect their property from foreseeable damage and for their security;
- not to be caused any unnecessary inconvenience;
- be compensated for any loss or damage caused by relevant works;
- ask for security for expenses before the Building Owner starts work under the Act so as to guard against the risk of being left in difficulties if the Building Owner stops work at an inconvenient stage.

New building on the boundary line between neighbouring pieces of land (Section 1 of the Act)

If a Building Owner plans to build a party wall or party fence wall astride the boundary line, he must inform the Adjoining Owner by serving a notice. There is no right to build astride the boundary without neighbour's consent in writing.

The Building Owner must also inform the Adjoining Owner by serving a notice if he plans to build a wall wholly on his own land but up against the boundary line.

How long in advance does the Building Owner have to serve the notice? At least one month before the planned starting date for building the wall. The notice is only valid for a year.
What happens after the Building Owner serves notice about building astride the boundary line? If the Adjoining Owner consents within 14 days to the building of a new wall astride the boundary line, the work (as agreed) may go ahead. The expense of building the wall should be shared between the owners in proportion to the use of that wall made or to be made by each owner.

The consent must be by a notice in writing. It is advisable that it should record details of the location of the wall, the allocation of costs and any other agreed terms.

If the Adjoining Owner does not consent in writing within 14 days to the proposed new party wall astride the boundary line, the Building Owner will be obliged to build the wall wholly on his own land, and wholly at his own expense. He will have to compensate any Adjoining Owner for any damage to his property caused by the building of the wall, or the placing of footings and foundations under his land. There is no right to place foundations under his land without his written consent. The Building Owner may start work one month after your notice was served, or earlier by agreement.

Building up against the boundary line

Unless the neighbour objects, the Building Owner may start work one month after his notice was served.

The wall will be built wholly at the Building Owner’s own expense and he will have to compensate any Adjoining Owner for any damage to his property caused by the building of the wall, or the placing of footings and foundations under his land. There is no right to place reinforced concrete foundations under his land without his written consent, and the placing of normal projecting foundations can only be done if it is necessary.

If there is a disagreement about any work, including any issue concerning compensation, the dispute is to be settled under the dispute procedure by the award, or third surveyor.

Excavation near neighbouring buildings (section 6 of the Act)

If the Building Owner plans to:

- excavate, or excavate for and construct foundations for a new building or structure, within 3 metres of any part of a neighbouring owner's building or structure, where any part of that work will go deeper than the neighbour's foundations; or
- excavate, or excavate for and construct foundations for a new building or structure, within 6 metres of any part of a neighbouring owner's building or structure, where any part of that
work will meet a line drawn downwards at 45° in the direction of the excavation from the bottom of the neighbour's foundations;

Note that, for the purposes of section 6 of the Act, "Adjoining Owners" may include any owners of buildings or structures within the distances mentioned above even if another owner’s land or building separates it from the Building Owner’s proposed work.

The notice must state whether you propose to strengthen or safeguard the foundations of the building or structure belonging to the Adjoining Owner. Plans and sections showing the location and depth of the proposed excavation or foundation and the location of any proposed building or structure must also accompany the notice.

The Act contains no enforcement procedures for failure to serve a notice. However, if the Building Owner starts work without having first given notice in the proper way, Adjoining Owners may seek to stop your work through a court injunction or seek other legal redress.

Prior Notice

The Notice must be served least one month before the planned starting date for the excavation. The notice is only valid for a year.

Steps post service

If the Adjoining Owner gives written notice within 14 days consenting to the proposed works, the work (as agreed) may go ahead. If the Adjoining Owner does not respond, or objects to the proposed work, a dispute is “deemed” to have arisen.

The Adjoining Owner may require the Building Owner to underpin, strengthen or safeguard the foundations of his building or structure so far as may be necessary because of the work.

After the work has been completed, the Adjoining Owner may request particulars of the work, including plans and sections.

ACQUIRING LAND BY ADVERSE POSSESSION

The Land Registration Act 2002 ("LRA 2002") introduced a new regime to the law of adverse possession. Parties claiming adverse possession must make a successful application for registration in order to deprive a registered proprietor of title to land. Where applications are opposed by the
Prior to the coming into force of the LRA 2002, a squatter could acquire the right to be registered as proprietor of a registered estate if they had been in adverse possession of the land for a minimum of 12 years. However, the doctrine of adverse possession did not fit easily with the concept of “indefeasibility of title” that underlies the system of land registration. Nor could it be justified by the uncertainties as to ownership which can arise where land is unregistered; the legal estate is vested in the registered proprietor and they are identified in the register.

The new regime does not extinguish the law of adverse possession; but tilts the scales firmly in favour of the landowner.

Unregistered Land

No action may be brought by any person to recover possession of unregistered land after the expiry of 12 years from the date on which the cause of action accrued (Limitation Act 1980 s.15). For the date on which the cause of action is deemed to accrue see s.15 of and Sch. 1 to the 1980 Act. In essence, the material date is that upon which the paper owner discontinues possession or is dispossessed by the trespasser and the trespasser enters into adverse possession.

Adverse possession requires factual possession and an intention to dispossess (see Buckinghamshire CC v Moran [1990] Ch. 623 at 643, per Slade L.J.). Factual possession means a sufficient degree of physical custody and control. An intention to possess is an intention to exercise such custody and control on one’s own behalf and for one’s own benefit: J A Pye (Oxford) Ltd v Graham [2002] UKHL 30; [2002] 3 W.L.R. 221.

Whether or not the occupation of a trespasser amounts to adverse possession is a question of fact, depending upon the character of the land possessed in addition to the acts of the trespasser. The possession must be obvious to a person who visits the land (Powell v McFarlane (1977) P. & C. R. 452, 480, per Slade J.). As a general rule enclosure of land is regarded as strong evidence of adverse possession (Seddon v Smith (1877) 36 L.T. 168), although it is not necessarily conclusive (George Wimpey & Co v Sohn [1967] Ch. 487).
The possession of the squatter need not be inconsistent with the use of the and by the owner (JA Pye (Oxford Ltd v Graham [2002] UKHL 30; [2002] 3 W.L.R. 221). Accordingly, the fact that the true owner has no present need of or use of the land does not of itself prevent possession from being adverse. If, however, the trespasser is aware of plans for the future use of the land the court is likely to require clear evidence that the trespasser had the requisite animus possidendi (Buckinghamshire CC v Moran [1990] Ch. 623 at 639, per Slade L.J.).

Upon expiry of the limitation period the paper owner loses the right to recover possession of the land and his title is extinguished (s.17 of the 1980 Act). The trespasser obtains a new title based on his adverse possession.

Registered Land

The Land Registration Act 2002 is based on the principle that a registered title will be secure against a trespasser in most circumstances provided the registered proprietor objects when the trespasser first applies to be registered as owner and subsequently takes steps to evict the trespasser or regularise the occupation. The new regime is thought to better reflect the certainty of title introduced by the system of land ownership involving compulsory registration (on which Neuberger J. in JA Pye (Oxford Ltd v Graham [2000] Ch. 676, 709-710).

The common law definition of what amounts to adverse possession still applies, subject to some qualifications (Sch.6, para. 11 to the 2002 Act). However, adverse possession itself does not extinguish title (s.96(1) of the 2002 Act). Rather, a trespasser may apply to be registered as proprietor after 10 years (60 years for Crown foreshore) of adverse possession (Sch. 6, para. 1(1) to the 2002 Act). The registered proprietor will be given notice of the application and must object within a prescribed period, failing which the trespasser will acquire title (Sch. 6, paras 2-4 of the 2002 Act). The effect of registration is to make the trespasser the successor in title of the previous owner by way of a statutory assignment. If there is an objection the trespasser will only succeed if he can establish one of three conditions: (1) the registered proprietor is estopped from seeking to dispossess the trespasser; (2) the applicant has some other right to the land; or (3) the disputed land lies adjacent to the trespasser’s land and he has made a reasonable mistake as to the position of the boundary (Sch. 6, para. 5 to the 2002 Act). Where the application is rejected but the trespasser remains in adverse possession for a further two years he is entitled to be registered as proprietor (s.98 of and Sch. 6, paras 6 and 7 to the 2002 Act).
A trespasser may not make an application for registration of title: (1) if he is a defendant in proceedings which involve asserting a right to possession of the land; or (2) judgment for possession of the land has been given against him in the last two years (Sch. 6, para. 1(3) to the 2002 Act).

Adverse possessors who successfully deprived registered proprietors of title to land before the LRA 2002 came into force are still entitled to apply for registration under transitional provisions in the legislation, which preserve the old regime. The “cut off date” is 13th October 2003 – so if an adverse possessor can establish adverse possession for 12 years prior to this date then, the old rules still apply. Obviously, as 13th October 2003 recedes into history, the old regime will become less and less relevant.

The New Regime

The LRA 2002 has created a new regime that applies only to registered land. In relation to unregistered land, of which there is still a surprisingly large amount, the “old regime” of establishing 12 years adverse possession still applies. There is no doubt that the new regime makes a claim in adverse possession less easy to establish. This is perhaps one reason why surprisingly few cases have turned on the application of the new rules.

This new regime is set out in Schedule 6 to the Act.

The following paragraphs provide a brief overview of the new regime:-

- adverse possession of registered land for 12 years of itself will no longer affect the registered proprietor’s title;

- it is a fundamental principle of the new rules that a registered title cannot be extinguished; so adverse possessors/squatters must make a successful application for registration in order to deprive a registered proprietor of title to land. [this change to the law of adverse possession plainly will work to the advantage of paper title owners in that registered proprietors can now require adverse possessors/squatters to not only prove that they have been in adverse possession for 10 years, but also that they fall within one of the three conditions set out in the LRA 2002];

- After 10 years’ adverse possession, the squatter will be entitled to apply to be registered as proprietor in place of the registered proprietor of the land (para 1 of Sch 6 to the LRA 2002);
- On such an application being made the registered proprietor (and certain other persons interested in the land e.g holders of registered charges) will be notified by HM Land Registry and given the opportunity to oppose the application;

- If the application is not opposed (i.e the registered proprietor of the estate or any chargee fails to serve counter notice) the squatter will be registered as proprietor in place of the registered proprietor of the land;

- The squatter will be registered as proprietor notwithstanding the service of a counter notice by the registered proprietor if squatter is able to satisfy one of the following three conditions:

  **Condition 1**

  Para 5(2) of Sch 6 applies where:

  “(a) it would be unconscionable because of an equity by estoppel for the registered proprietor to seek to dispossess the squatter

  and (b) the squatter ought in the circumstances to be registered as proprietor”;

  [Although there are no decided cases on this paragraph, examples suggested by the Law Commission where this condition might apply are:

  (a) where the squatter has built on the registered proprietor’s land in the mistaken belief that they were the owner of it and the proprietor has knowingly acquiesced in their mistake. The overlap with proprietary estoppel is obvious here.

  (b) where neighbours have entered into an informal sale agreement for valuable consideration by which one agrees to sell the land to the other. The ‘buyer’ pays the price, takes possession of the land and treats it as their own. No steps are taken to perfect their title and there is no binding contract (Law Com 271, para 14.42). It is not entirely clear what this paragraph added to conventional principles of proprietary estoppel]

  **Condition 2**

  Para 5(3) of Sch 6 applies where:

  “the squatter is for some other reason entitled to be registered as proprietor”
[Again, there are as yet no reported cases on this paragraph, but the Law Commission has given an example where this condition might apply are:

- where the squatter is entitled to the land under the will or intestacy of the deceased proprietor, or

- where the squatter contracted to buy the land and paid the purchase price, but the legal estate was never transferred to them (Law Com 271, para 14.43)].

**Condition 3**

Condition 3 is most likely in practice to be relevant.

Para 5(4) of Sch 6 applies where:

(a) the land to which the application relates is adjacent to land belonging to the applicant,

(b) the exact line of the boundary between the two has not been determined under rules under section 60 [this is rarely done].

(c) for at least ten years of the period of adverse possession ending on the date of the application, the applicant (or any predecessor in title) reasonably believed that the land to which the application relates belonged to him, and

(d) the estate to which the application relates was registered more than one year prior to the date of the application.”

[The Law Commission’s example of where this condition might apply is where the dividing walls or fences on an estate were erected in the wrong place (Law Com 271, para 14.46)]

It is condition 3 which has attracted the case-law that exists on the new adverse possession regime. The arguments in the cases focus on what is meant by the words:

“the applicant (or any predecessor in title) reasonably believed that the land to which the application relates belonged to him”

IAM Group Plc v Chowdrey [2012] EWCA Civ 505, decided in March 2012, involved possession proceedings brought by the registered proprietor of No.26, Rye Lane, Peckham London against the
registered proprietor of the neighbouring property, No.26a. At issue was part of the first and second floors in so far as they extended over No.26. This was “the disputed property”.

The key facts of the IAM case were:

a. The adverse possessor, who was the owner of No.26a (Mr Chowdrey), had been in exclusive possession for some 20 years by the time the proceedings were brought in 2010;

b. The only access to the disputed property was via Mr Chowdrey’s property, no.26a;

c. The trial judge held (and the appellants did not contest on appeal) that Mr Chowdrey “honestly and actually believed” that the disputed property belonged to him for those 20 years.

The only question before the Court of Appeal was whether the judge was right to have concluded that this belief was “reasonable”.

The (unsuccessful) appellant sought to argue that, for the purpose of establishing reasonable belief or otherwise, the squatter was to be fixed with the knowledge of his solicitors or the knowledge which it should be inferred they would have had if they had acted with reasonable skill and competence in the purchase of No.26a. Fixed with that knowledge, the squatter's belief that the disputed property belonged to him would not be “reasonable”. The Court rejected this argument. There was to be no such imputing of the solicitors' knowledge – particularly as the solicitors had not given evidence, and the conveyancing file was no longer available.

The appellant’s second argument was that in 2009 and 2010 the solicitors for the owners of No.26 had written to the squatter to assert their clients' ownership of the disputed property; so (argued the appellant) at least from then onwards Mr Chowdrey could not reasonably have continued to believe in his ownership. Again, the argument failed. During which time of Mr Chowdrey’s occupation his use of the disputed property had never been challenged or questioned, and the unusual internal layout of the building, the Court held that the belief continued to be reasonable.

In the second case, Zarb v Parry [2011] EWCA Civ 1306. The key facts of the case are these:

- the claimants and defendants owned adjoining properties in Daisymore, Worcestershire, the claimants having purchased their property in 2000 and the defendants in 2002;
The southern boundary between the two properties had been the subject of an unresolved dispute between the claimants and the defendants’ predecessors in title. The disputed strip measured 890 square feet, and physically formed part of the (cultivated) garden of the defendants (the Parrys). As is often the case, the physical boundary (a hedge) between the two properties did not accord with the paper title;

The claimants contended that the true boundary (as established in their favour by the paper title) ran several feet to the north of a hedge which the defendants and their predecessors had always taken to be the boundary.

In 2007, the disputed “erupted” again when the claimants took matters into their own hands and went on to the strip of land that lay between the hedge and where they claimed the boundary to lie, and sought to take the strip by force by “uprooting the existing fence”, “putting fence posts along the boundary” they contended for, “cutting down a elderberry tree” and “marking out that boundary with a surveyor’s tape”.

By 2007, when the dispute broke out, the defendants (and their predecessors in title) had been in possession of the disputed strip for well over 10 years (15 years on the evidence);

They were discovered and challenged by the defendants, leaving 20 minutes later when the defendants threatened to call the police.

In 2009 the claimants issued proceedings for a declaration that the boundaries between the two properties were as they contended (in accordance with the paper title).

In their defence, the defendants relied on the defence of adverse possession in paragraph 5(4) of Schedule 6 to the Land Registration Act 2002.

The judge dismissed the claim, holding that, although the southern boundary was as contended by the claimants (so the claimants were correct that, according to the paper title, they owned the disputed strip), the defendants, and before them their predecessors in title, had been in adverse possession of the strip for over ten years. In particular the judge held that the defendants’ adverse possession of the strip had not been interrupted by the claimants’ attempt to “fence off” the strip in 2007.

On the claimants’ appeal, it was held, dismissing the appeal, that for adverse possession to be established “exclusive possession” in the sense of “exclusive physical control was required”, so that if exclusive physical control of the land were lost, adverse possession would come to an end and
time begin to run again. Therefore, in order to interrupt adverse possession and bring it to an end, it was necessary for the paper title owner to re-take possession of the land to the exclusion of the adverse possessor, and lesser acts done (such as planting a flag, putting posts in the ground, or making an oral declaration of ownership) with the intention to re-take possession but without establishing exclusive control were not sufficient. Accordingly, by entering on to the disputed land and seeking to take it by force in 2007 the claimants had not managed to retake exclusive physical control of the strip and therefore had not interrupted the defendants’ adverse possession of it; and that, accordingly, the judge had been right to find that although the claimants owned the paper title to the strip of land so that it had been acquired by the defendants by adverse possession pursuant to section 98 of and paragraph 5(4) of Schedule 6 to the Land Registration Act 2002.

Conclusions as to the current state of the law of adverse possession

Given the success of the adverse possessor in IAM Group Plc v Chowdrey and Zarb, what can be learnt from this case to encourage other similar claimants:

- The “reasonable belief” test is an objective (not subjective) one (see para 17 of the judgment) (despite the trial judges sometimes referring to the adverse possessors “honest and genuine” belief)

- The property of the adverse possessor must be “adjacent” to the disputed land – so the cases where squatters occupy £1m London council houses and successfully claim adverse possession are a thing of the past as the landowners will obviously oppose such claims; and the squatters cannot point to any adjacent property in their ownership;

- I should add here that old “wooden lie” that “Trespassers Will Be Prosecuted” has been given more meaning with the passing of Part V Criminal Justice and Public Order Act 1994 (CJPOA) s 61-80, which makes it a criminal offence to squat on residential premises. It is to be noted that the offence only applies to residential premises, so would not apply in respect of the occupation of offices for example. It is interesting to note, as an aside, that although a residential “squatter” commits an offence in occupying such land; after 10 years of the commission of such an offence he then is entitled to apply to be registered owner!

- If the adverse possessor can demonstrate a long period of exclusive user without challenge or disturbance from the paper title owner (in IAM 20 years; 15 years in Zarb) then the court is likely to accept that the adverse possessor’s “belief” in his/her ownership of the disputed land was both genuine and “reasonable”;
- It is the reasonable belief of the adverse possessor that is important (not that of his/her agents, such as solicitors);

- for adverse possession to be established “exclusive possession” in the sense of “exclusive physical control” is required, so that if exclusive physical control of the land were lost, adverse possession would come to an end and time begin to run again.

- The mere fact that the paper title owner challenges the adverse possessor’s asserted ownership of land by correspondence is not in every case sufficient to render “unreasonable” any continuing belief of the ownership on the part of the adverse possessor.

- As soon as the adverse possessor learns facts which might make his belief in his own ownership unreasonable, he/she should take steps to secure registration as proprietor.

In practice, therefore, the law of adverse possession is most likely now to be material mainly within boundary disputes where the use of the disputed land (viz. the “position on the ground”) conflicts with the registered paper title. Usually, the owner of the paper title will bring proceedings for possession; so the adverse possessor will have to demonstrate his 10 years exclusive user and that it was reasonable for him or her to believe the disputed property belonged to him or her.

**Repeat Applications**

In the event that the application is rejected but the squatter remains in adverse possession for a further two years, they will then be able, subject to certain exceptions, to reapply to be registered as proprietor and this time will be so registered whether or not anyone opposes the application.

**Procedure**

Applications must be made on form ADV1 and must be accompanied by a statutory declaration in support of the application.

The Land Registry will examine the application of its merits. If it considers that there are good grounds for the application, it will send the registered proprietor (and certain other persons interested in the land) a notice, accompanied by a form of counter-notice (form NAP). The recipients will then have 65 business days in which to respond. If they consent, or fail to oppose an application within the 65-day period, the adverse possessor will be registered as the proprietor of the land.

Where an application is rejected, the registered proprietor must bring proceedings to evict the squatter, or grant him a lease or licence to legalise the position. This is because:
- if the adverse possessor is still in adverse possession two years after his original application for registration was rejected; and

- if there are no possession proceedings pending, no order for possession has been made and the adverse possessors has not been evicted pursuant to a possession order;

- the adverse possessor can make a further application for registration and will be entitled to be registered as the proprietor of the land.

The squatter will be registered as the new proprietor of the estate with exactly the same class of title as the previous proprietor.

The Land Registry will register the squatter under the existing title number in the case of an application relating to the whole of a registered title. If the application relates to part only, the Land Registry will remove the land from the existing title and register the squatter under a separate title number, with the same class of title as the previous proprietor.

This means that existing entries on the register will be carried forward. However, special rules apply to land that is subject to registered charges. Squatters will take the property free from such charges, unless the application was opposed on one of the new statutory grounds – in which case, the squatter will have the right to require the charge to be apportioned between the land acquired and any other property affected by the charge. How that will operate in practice has yet to be seen.

**RESTRICTIVE COVENANTS**

Restrictive covenants are always enforceable between the original covenantor and covenantee and, by s.56 of the Law of Property Act 1925, a person with whom the contract is purported to be made may also sue upon the covenant. Issues as to enforceability arise, however, upon assignment of the land to which the benefit or burden of the covenant is attached. For these purposes a distinction must be drawn between enforceability at common law and in equity.

Upon disposal of land the benefit of a restrictive covenant may be expressly assigned or it may run with the land. The benefit of the covenant will run with the land at common law if: (1) it touches and concerns the land of the covenantee and the covenantor; and (2) the assignees each have a legal estate in the land benefited. The benefit of most covenants entered into after 1925 passes by virtue of statutory annexation: see s.78 of the Law of Property Act 1925 and the decision in *Federated Homes Ltd v Mill Lodge Properties Ltd* [1980] 1 W.L.R. 594. That will not apply if either
expressly or by necessary implication the covenant is intended only to pass by express assignment. Further, in *Crest Nicholson Residential (South) Ltd v McAllister* [2004] 24 E.G. 150 it was decided that, unless the land intended to be benefited can be clearly identified s.78 will not allow a party to claim the benefit of a covenant. See also *Sugarman v Porter* [2006] 2 P. & C.R. 14.

The benefit of the covenant will run with the land in equity if: (1) it touches and concerns the land of the covenantee (who may have a lesser estate than a legal estate); and (2) the benefit of the covenant has passed to the claimant. The benefit may pass by annexation, by assignment or by reason of the principles relating to schemes of development. Again, following the decision in *Federated Homes* the benefit of covenants entered into after 1925 will pass by s.78 of the 1925 Act unless intended to be expressly assigned. The benefit of a covenant passes under a building scheme where land is to be disposed of in lots and restrictive covenants are imposed on each purchaser for the benefit of the estate generally. There must be reciprocity of obligation between the purchasers and the estate to be benefited must be clearly defined: *Jamaica Mutual Life Assurance Society v Hillsborough Ltd* [1989] 1 W.L.R. 1101.

Following the decision in *Tulk v Moxhay* (1848) 2 Ph. 774, the burden of a covenant may run in equity if: (1) it is negative in substance; (2) it is made for the protection of land retained by the covenantee (subject to some exceptions, such as where there is a scheme of development); and (3) it is intended to run with the covenantor's land. Today the burden will run with the land unless a contrary intention appears: by s.79 of the Law of Property Act 1925 covenants in respect of land are deemed to have been made by the covenantor on behalf of himself, his successors in title, and the persons deriving title under them in the absence of such contrary intention.

An application may be made to court for a declaration as to whether freehold land is or would be affected by any restriction and, if so, the nature, extent and enforceability of it: s.84(2) of the Law of Property Act 1925. A declaration that the land is not subject to a restrictive covenant is an order in rem and the court will only make such an order in cases where the evidence is cogent: *Re 6, 8, 10 and 12 Elm Avenue, New Milton* [1984] I W.L.R. 1398.

The Upper Tribunal has a discretionary power to modify or discharge a restrictive covenant with or without payment of compensation on statutory grounds: s.84(1) of the Law of Property Act 1925. The grounds upon which the discretion may be exercised are: (1) the restriction ought to be deemed obsolete; (2) it confers no practical benefit of substantial value or is contrary to the public interest.
and any loss can be adequately compensated in money; (3) the persons entitled to the benefit of the covenant have agreed the discharge or modification; or (4) the discharge or modification will not injure the persons entitled to the benefit of the covenant. So, for example, a covenant requiring plans to be approved by the vendor or his surveyor has been held to be obsolete upon the original vendor’s death: Re Havering College of Further and Higher Education [2006] P.L.S.C.S. 215; Churchill v Temple [2010] EWHC 3369; [2011] 17 E.G. 72. That is not so when the approval is, on a true construction of the covenant, capable of being given by the vendor’s successor in title: Mahon v Sims [2005] 3 E.G.L.R. 67. The balancing act required of the Lands Tribunal in determining an application for discharge or modification is well illustrated by the case of Shephard v Turner [2006] 20 E.G. 294, CA

Remedies for breach of a restrictive covenant are an injunction or damages in lieu. In Wrotham Park Estate Co Ltd v Parkside Homes Ltd (1974) 1 W.L.R. 798 the court determined that damages should be based upon a hypothetical negotiation between the parties as to the amount that might be paid and accepted for the release of the covenant. That case was followed in Amec Developments Ltd v Jury’s Hotel Management (UK) Ltd [2001] 07 E.G. l63.

EASEMENTS

An easement is a right ancillary to the legal ownership of a parcel of land which benefits the person using or occupying that land in doing so which right is exercisable over land belonging to someone else. Definitions

“Dominant tenement”. The identified parcel of land, the owners and occupiers of which will be benefitted by the right claimed. The land must be identified. The right will be said to be “appurtenant” to this land in that it cannot be assigned separately from the land in order to benefit some other land. The dominant tenement need not adjoin the servient tenement provided that the former is actually benefited by the right over the latter. In the case of fishing or mineral rights, these rights are treated as the dominant interest.

No other parcel of land is entitled to the benefit of the right unless such use as is made of it is truly ancillary to the benefit obtained by the dominant tenement, see Harris v Flower (1905) 74 LJ Ch 127, National Trust v White [1987] 1 WLR 907, Peacock v Custins [2001] 2 AER 827 DAS v Linden Mews [2002] EWCA Civ 590 and Macepark (Whittlebury) v Sargeant [2003] LTL AC0104659.
“Servient tenement”. The identified parcel of land which is subject to the right. The land must be identified. The burden of the right cannot be transferred to some other land without a surrender of the easement and its replacement with a different easement.

Characteristics of Easements

It is well established (Re Ellenborough Park [1956] Ch 131, 163) that a right cannot be an easement unless four requirements are satisfied:

1. there must be a dominant tenement and a servient tenement;
2. the easement must accommodate the dominant tenement;
3. the dominant and servient tenements must be owned by different persons; and
4. the easement must be capable of forming the subject matter of a grant.

There must be a dominant and servient tenement

There must be both a dominant tenement and a servient tenement. An easement is a right annexed to land. A modern case demonstrating this point is London & Blenheim v Ladbroke Retail Parks [1994] 1 W.L.R 31 which was concerned with a right to park cars. The right cannot be sold off separately but can be exercised by every person owning an interest in the dominant tenement to whom the right has been transferred and person authorised by them, or whose use of the right is necessarily ancillary to their ownership.

This requirement means that “every easement is, in principle, linked with two parcels of land, its benefit being attached to a ‘dominant tenement’ and its burden being assessed against a ‘servient tenement’”. (K Gray and S F Gray, Elements of Land law (4th ed 2005) para 8.26 (footnote omitted). The requirement of a dominant tenement has been described as going to the heart of the nature of an easement. (C Sara, Boundaries and Easements (4th ed 2008) para 10.06). It has been said that it is
an essential element of any easement that is annexed to land and that no person can possess and easement otherwise than in respect of and in amplification of his enjoyment of some estate or interest in a piece of land. (Alfred F Beckett Ltd v Lyons [1967] Ch 449, 483, by Winn LJ).

It is therefore essential that there is dominant land, or more accurately a dominant estate in land, to which the easement is attached. Should an attempt by made to create an easement which is not so attached (a so-called “easement in gross”) it will be ineffective, for “it is trite law that there can be no easement in gross”. (London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd [1994] 1 WLR 31, 36, by Peter Gibson LJ. By way of contrast, it is possible for a profit to exist as a profit in gross).

The rule that an easement cannot exist in gross has been criticised. (A J McClean, “The Nature of Easement” (1966) 5 Western Law Review 32 at 61). It has been contended that the rule “exists on the weakest of authority for reasons that are no longer compelling. The judicial statements cited for the proposition are either unreasoned dicta or essentially relevant”. (M F Sturley, “Easements in Gross” (1980) 96 Law Quarterly Review 557, 567 (footnotes omitted)).

The Easement must accommodate the dominant land and be capable of forming the subject matter of a grant

We find it convenient to consider these two requirements (which are, respectively, the second and fourth characteristic listed in Re Ellenborough Park ([1956] Ch 131) together.

The easement must “accommodate and serve”

The requirement that the easement “accommodate and serve” the dominant land ensures that there is a nexus between the land and the right that is attached to it.

At the same time, the courts have acknowledged the somewhat artificial nature of the concept that the land can itself benefit from the right:

The protection of land, qua land, does not have any rational, or indeed any human significance, apart from its enjoyment by human beings, and the protection of land
is for its enjoyment by human beings. (Stilwell v Blackman [1968] Ch 508, 524 to 525, by Ungoed-Thomas J.)

The easement must accommodate the dominant tenement in that it is related to, and facilitates, the normal enjoyment of that land. In other words, the right claimed must be “reasonably necessary for the better enjoyment” of the dominant tenement. (Re Ellenborough Park [1956] Ch 131, 170, by Evershed MR). An easement therefore benefits the owner of the land in his or her capacity as owner of that land, not personally. (See the right, conferred in Hill v Tupper (1863) 2 H & C 121, exclusively to put pleasure boats on a canal adjacent to the grantee’s land: see Megarry and Wade, The Law of Real Property (6th ed 2000) para 18-048: This may be best explained as a right which is too extensive to comprise an easement: see K Gray and S F Gray, Elements of Land Law (4th ed 2005) para 8.38).

It follows that, for an easement to be effectively created, the plots of land in question must be sufficiently close to one another. The dominant and servient properties need not be contiguous but there must be a degree of proximity. (The often quoted phrase that one cannot have a right of way in Northumberland over land in Kent is from Bailey v Stephens (1862) 12 CB (NS) 91, 115, by Byles J. See also Todrick v Western National Omnibus Co Ltd [1934] 1 Ch 561; Pugh v Savage [1970] 2 QB 373).

However, it is well established that an easement may benefit the business being carried out on the dominant land. In Moody v Steggles ((1879) 12 Ch D 261) the grant of a right to fix a signboard to the adjoining property advertising the public house which constituted the dominant tenement was held to comprise an easement. In Copeland v Greenhalf ([1952] Ch 488) leaving carts and carriages on the neighbour’s verge was not objectionable on the ground that it accommodated the wheelwright’s business being conducted on the purportedly dominant land. (The claim to an easement by prescription failed on the ground that the use claimed was too extensive and was therefore not capable of forming the subject matter of a grant). The explanation for this principle is offered by Mr Justice Fry:

It is said that the easement in question relates, not to the tenement, but to the business of the occupant of the tenement and that therefore I cannot tie the easement to the house. It appears to me that the argument is of too refined a nature to prevail, and for this reason, that the house can only be used by an occupant, and that the occupant only uses the house for the business which he
pursues, and therefore in some manner (direct or indirect) an easement is more or less connected with the mode in which the occupant of the house uses it. *(Moody v Stegglees* (1879) 12 Ch D 261, 266).

The easement must be capable of forming the subject matter of a grant.

Exercise of the right in question must be capable of enhancing the utility or benefit of the use and occupation of the dominant tenement as land to the owners and occupiers of that land (although not necessarily exclusively, see *Re Ellenborough Park* [1956] CH 131 and *McCymont v Primecourt Property Management Ltd* [2000] E.G.C.S. 139) without amounting to joint or exclusive occupation of the servient land, see *Hanina v Morland* [2000] P.L.C.S.261 and *Batchelor v Marlow* [2003] 1 WLR 764. A mere right of recreation is not useful or beneficial in this sense although a prescriptive right to use a garden was claimed in *Mulvaney v Jackson* [2003] 1 WLR 360. A right of way which does not actually end at the dominant tenement will still be capable of benefiting if it joins onto land owned by, or over which the owner of the dominant tenement has a right of way so as to link up.

The right in question must be a right which is capable of being legally granted by one person to another person, e.g. a right to a view, or to privacy, or generally to air, or a right to take water from a stream cannot be subject to a legal grant because a view, privacy, general air, or water naturally flowing in a stream are not capable of being owned. A right to go to and from a stream for the purpose of taking water from it is capable of being granted being a right to use land for a specific purpose. Easements (save specific rights to light or air or support) are all rights to make positive use of land for some specific purpose less than a right to exclusive occupation.

All easements are deemed to “lie in grant”, that is to say they must be granted expressly, impliedly or by prescription. In the case of implied and prescriptive easements there is no express grant, but the grant is nevertheless assumed or presumed.

A number of issues arise on consideration of this, the fourth limb of the *Re Ellenborough Park* requirements, as Lord Evershed, Master of the Rolls, himself delineated in the course of the decision: *(Re Ellenborough Park* [1956] Ch 131, 175 to 176, by Lord Evershed MR).

(1) are the rights purported to be granted too wide and vague in character?
(2) are the rights merit rights of recreation? and

(3) do such rights amount to joint occupation or substantially deprive the servient tenement owners of possession?

Too wide and vague

The courts have form time to time rejected claims to easements on the ground that the right would be too wide and vague. In *Hunter v Canary Wharf Limited*, although the right to television reception was not pleaded as an easement, the House of Lords nonetheless considered the issue. Lord Hoffmann concluded that such a right should not be recognised as it would place a burden on a wide and indeterminate area. ([1997] AC 655, 709). The “channel” through which an easement is received needs to be sufficiently denied. Similarly there can be no grant of an easement of free flowing air, even for a windmill. (*Webb v Bird* (1861) 10 CB (NS)).

Recreation and amusement

In *Re Ellenborough Park* ([1956] Ch 131) a right to use an open space was recognised as an easement. The right expressly granted, when the house now belonging to the claimant was first built, was “the full enjoyment ... at all times hereafter in common with the other persons to whom such easements may be granted of the pleasure ground”. Although it is accepted that certain recreational rights cannot take effect as easements, on the basis that they do not accommodate the dominant land, (it is well established that a right to wander at large over the servient land (the so-called *ius spatiiandi*) cannot take effect as an easement: see *Gale on Easements* (17th ed 2002) para 1-46; *Attorney-General v Antrobus* [1905] 2 Ch 188, 198) the Court of Appeal in *Ellenborough Park* considered that “the pleasure ground” was in effect a communal garden, and thereby enhanced the normal enjoyment and use of the house as a house.

The *Ellenborough Park* criteria are firmly entrenched. Their rationale is clear:

(1) To avoid capricious and personal benefits becoming easements.

(2) To promote clarity by demanding sufficient specificity at the time of creation.
(3) To ensure some degree of connection with the land in the same way as the “touch and concern” requirement does in covenants.

Easements and Exclusive Use

It is important to distinguish lesser interests in land, like easements from rights in land that are possessory in nature such as leasehold and freehold estates in land. This follows from the nature of an easement, as a right that one landowner has over the land of another (subject to our provisional proposal that a landowner may have an easement over land that he or she also owns, provided the two estates are registered with separate title see para 3.66 below) whilst the dominant owner exercises rights over the servient land, the servient land continues to belong to the servient owner. It is implicit in this definition that if the dominant owner is entitled to treat the servient land as his own property – that is, as if he has a possessory estate in that land – his right cannot be an easement. In our view, easements and possessory interests in land must be mutually exclusive.

In particular, it would be deeply unsatisfactory if a particular interest could be characterised both as an easement and as a lease. A lease (or tenancy) arises where exclusive possession is granted for a term, usually although not necessarily for a rent. (Street v Mountford [1985] AC 809, as explained in Ashburn Anstalt v W Arnold & Co [1989] Ch 1). It is clear that where a person has exclusive possession of land, he or she is likely to be a tenant of the land. It is also clear that such a person cannot have an easement over the land being exclusively possessed.

While it is generally accepted that an easement cannot give to the dominant owner “exclusive and unrestricted use of a piece of land”, (Reilly v Booth (1890) 44 Ch D 12, 26 by Lopes LJ) the precise effect of this limitation is uncertain. In Copeland v Greenhalf, a claim was made by a wheelwright to a prescriptive easement to use a strip of land belonging to the defendant, and adjacent to a roadway, to store his customers’ vehicles awaiting and undergoing repair and awaiting collection following their repair. Mr Justice Upjohn rejected the claim on the following basis:

I think that the right claimed goes wholly outside any normal idea of an easement, that is, the right of the owner or the occupier of a dominant tenement over a servient tenement. This clam (to which no closely related authority has been referred to me) really amounts to a claim to a joint user of the land by the defendant. Practically, the defendant is claiming the whole beneficial user of the strip of land ...; he can leave as many or as few lorries there as he likes for as long as he likes; he may enter
on it by himself, his servants and agents to do repair work thereon. In my judgment, that is not a claim which can be established as an easement. It is virtually a claim to possession of the servient tenement, if necessary to the exclusion of the owner; or, at any rate, to a joint user, and no authority has been cited to me which would justify the conclusion that a right of this wide and undefined nature can be the proper subject-matter of an easement. It seems to me that to succeed, this claim must amount to a successful claim of possession by reason of long adverse possession. ([1952] Ch 488, 498 (emphasis added)).

The principle upon which Copeland is based has been referred to as “the ouster principle”, and it is thought to have derived from a nineteenth century decision of the House of Lords, on appeal from Scotland. (Dyce v Hay (1852) 1 Macq 305; see A Hill-Smith, “Rights of Parking and the Ouster Principle After Batchelor v Marlow” [2007] The Conveyancer and Property Lawyer 223). However, it has not been consistently applied. For example, it did not prevent the Privy Council from finding that a right to store coopers’ materials, trade goods and produce in warehouses on the servient land was an easement in Attorney-General for Southern Nigeria v John Holt & Co (Liverpool) Ltd. ([1915] AC 599). In Copeland v Greenhalf, Mr Justice Upjohn sought to distinguish the decision of the Privy Council on the basis that it concerned an express grant whereas Copeland concerned a prescriptive claim. (The passage cited above continues “I say nothing, of course, as to the creation of such rights by deeds or by covenant; I am dealing solely with the question of a right arising by prescription”). However, it is no longer though that there should be a difference in principle between easements created by express grant and easements created by prescription or implication. (See in particular Jackson v Mulvaney [2003] EWCA Civ 1078, [2003] 1 WLR 360 at [23]; see also A Hill-Smith [2007] The Conveyancer and Property Lawyer 223 at 232, which makes a similar practical point to Gale on Easements (17th ed 2002) para 1-57; “a prescriptive claim based on user, where a grant has to be invented or imagined by the court, may well have more difficulty in qualifying as an easement than a right actually granted and capable of being scrutinised; and it is not inconceivable that the right asserted by the defendant in Copeland’s case might be acquired, as a valid easement, under a judiciously-worded express grant”).

The test which gives practical effect to the ouster principle has been stated to be one of degree:

If the right granted in relation to the area over which it is exercisable is such that it would leave the servient owner without any reasonable use of his land, whether for parking or anything else, it could not be an easement though it might be some larger
Application of the ouster principle requires the court to decide first what constitutes the servient land. On one analysis, the size of the property over which the easement is claimed is crucial. In *Wright v Macadam*, ([1949] 2 KB 744) the Court of Appeal held that the right to use a coal shed was an easement known to law, although its exercise would apparently preclude use of the shed by the servient owner. Although the issue of ouster was not discussed in the case itself, the size of the coal shed relative to the servient land as a whole has been considered to be material in reconciling the decision with *Copeland v Greenhalf*:

A small coal shed in a large property is one thing. The exclusive use of a large part of the alleged servient tenement is another. (*London & Blenheim Ltd v Ladbroke Retail Parks Ltd* [1992] 1 WLR 1278, 1286).

This analysis has, however, recently been rejected by the House of Lords, deciding that it is necessary to consider whether there is an ouster not from the totality of the land owned by the servient owner, but from that area of land over which the easement is being enjoyed:

If there is an easement of way over a 100 yard roadway on a 1,000 acre estate or an easement to use for storage a small shed on the estate access to which is gained via the 100 yard roadway, it would be fairly meaningless in relation to either easement to speak of the whole estate as the servient land. (*Moncrieff v Jamieson* [2007] UKHL 42, [2007] 1 WLR 2620 at [57]. See also discussion in *Gale on Easements* (17th ed 2002) para 1-52).

There is no doubt that the principle is easier to state than to apply: as Gale states, “The line is difficult to draw, and each new case would probably be decided on its own facts in the light of common sense”. (*Gale on Easements*, above) Gale refers to the right to receive water through a pipe laid under a neighbour’s field, a right acknowledged as an easement, but one which deprives the neighbour of the space occupied by the pipe. The neighbour can of course enjoy the surface of the land above the pipe, at least insofar as he or she does not damage the pipe itself, and he or she would also make full use of the land lying underneath the pipe, subject to the same qualification.
But a narrow definition of the servient land makes such a right difficult to reconcile with a strict application of the ouster principle.

The ouster principle has been most recently considered in relation to parking rights. Although it is generally accepted that the right to park a vehicle or vehicles can exist as an easement, (see, for example, Hair v Gillman & Inskip (2000) 80 P & CR 108; Montrose Court Goldings Ltd v Shamash [2006] EWCA Civ 251, [2006] All ER 272; Moncrieff v Jamieson [2007] UKHL 42, [2007] 1 WLR 2620) there remains doubt as to the parameters within such rights can subsist. Where a right is granted to park anywhere on a large plot of land, such as a car park, then it cannot be sensibly argued that the servient owner is left without any reasonable use of his or her land. But where a right is granted to park on a particular delineated space, the servient owner’s argument that this cannot comprise an easement may be more convincing. As a result it cannot be authoritatively said, on the current state of the law, a right to park a vehicle in a particular space is capable of being an easement. (See, for example, the decision to the opposite effect in Batchelor v Marlow [2001] EWCA 1051, [2003] 1 WLR 764 (Tuckey LJ)).

The issue may be further complicated by arguments concerning the limits of the use of the servient land in terms of both time and space. Does it make any difference if the right is only exercisable for a number of hours per day, or days per week? Does it make any difference if exercise of the right would not prevent the owner of the servient land building over or excavating under, the land in question? The difficulties in application of the ouster principle have been recently explored by Alexander Hill-Smith in an article in the Conveyancer, and he has lucidly summarised them as follows:

The difficulty in applying the ouster principle in practice is that all easements to a greater or lesser extent involve a curtailment of the rights over the land of the beneficial owner, a point eloquently made in Miller v Emcer Products. ([1956] Ch 316. The right to use a lavatory in common with the tenants, landlord and others was held to comprise an easement). The difficulty comes in drawing the line as when the claimed rights are so extensive to attract the ouster principle. To say that the application of the ouster principle is a question of fact and degree ... is to sidestep the issue of what sort of hypothetical reasonable use by the servient owner will defeat the ouster principle. ([2007] The Conveyancer and Property Lawyer 223 at 233).
We agree with Mr Hill-Smith that “the drawing of fine distinctions in this area is inimical to the sensible development of law”. In particular, it should be clear in what circumstances a right to park a vehicle or to store goods may take effect as an easement and in what circumstances it may not. Our provisional view is that as a general rule rights to park should be recognised as easements, subject only to such exceptions as are absolutely necessary.

The House of Lords has considered the operation of the ouster principle in *Moncrieff v Jamieson*. ([2007] UKHL 42, [2007] 1 WLR 2620). While the decision is important, it cannot be said to have determined the issues conclusively. First, as an appeal from the Court of Session, the applicable law was that of Scotland, not England and Wales. Secondly, the central question in the case was whether an expressly granted right of way included (as an ancillary right) the right to park on the servient land. Thirdly, the right claimed was not a right to park on a space large enough for only one vehicle.

Lord Scott doubted whether the test of ‘degree’, expounded by H.H. Judge Baker QC in *London & Blenheim* and applied by the Court of Appeal in *Batchelor v Marlow*, ([2001] EWCA 1051, [2003] 1 WLR 764) was appropriate, not only because of its uncertainty and difficulty in application but also because of its focus. ([2007] UKHL 42 at [57]. He believed that it should be rejected, and replaced with a test which asks:

... whether the servient owner retains possession and, subject to the reasonable exercise of the right in question, control of the servient land.

With respect, we are not convinced that this test is particularly helpful. In particular, we are not sure how it is possible to determine whether a servient owner has retained “control” of the servient land over which the right is being exercised. In *Moncrieff v Jamieson*, Lord Neuberger expressed reservations with Lord Scott’s formulation:

... if we were unconditionally to suggest that exclusion of the servient from occupation, as opposed to possession, would not of itself be enough to prevent a right from being an easement, it might lead to unexpected consequences or difficulties which have not been explored in argument in this case. Thus, if the right to park a vehicle in a one-vehicle space can be an easement, it may be hard to justify
an effectively exclusive right to store any material not being an easement, which could be said to lead to the logical conclusion that an occupational licence should constitute an interest in land. The concept of an “occupational licence” is itself unclear. To confer a right to occupy, which does not amount to exclusive possession, cannot give rise to a lease. However, it may give rise to another interest, including an easement: see Gale on Easements (17th ed 2002) para 1-53.

There are two grounds for the case that a right which confers exclusive possession of the servient land should not be capable of taking effect as an easement. First, as previously argued, the grant of exclusive possession involves something qualitatively different from the conferral of a lesser interest over the land of another, and it should not therefore be capable of taking effect as an easement. Secondly, it is essential to maintain a clear line of demarcation between leases and other interests in land. If the distinction were to be drawn only with reference to the parties’ intentions with regard to the right being granted (that is, whether they considered it to be, and referred to it, as one or the other), the principle laid down in Street v Mountford ([1985] AC 809) would be entirely circumvented. (The principle is set out above).

The dominant and servient tenements must be owned by different persons

The third essential characteristic of an easement identified in Re Ellenborough Park ([1956] Ch 131) is that the owners of the dominant and servient estates must be different persons. In other words, “a man cannot have an easement over his own land”. (Roe v Siddons (1889) 22 QBD 224, 236; Metropolitan Railway Co v Fowler [1892] 1 QB 165; Kilgur v Gaddes [1904] 1 KB 457 at 461). Not only does this mean that an easement cannot be created where the dominant and servient estates are in common ownership, it also results in automatic extinguishment of the easement in the event of the estates coming into common ownership.

An easement is a right carved out of and separated from ownership of the servient tenement, however, an easement can be granted to a tenant of A of one piece of land, over another piece of land, where A is the freehold owner of both. A tenant cannot however prescribe against his landlord for prescription is always in favour of the freehold, see paragraph 10-14. For the same reason a tenant cannot rely upon the doctrine of lost modern grant, see Simmons v Dobson [1991] 1 W.L.R 720. For the position where the owner of two pieces of land sells one, see paragraph 10-11. There is Canadian authority for the proposition that, for these purposes, joint owners are to be treated as a
different person from each singly, see Re Lonegren and Rueben (1987) 37 D.L.R. (4d) 491 which may shed light on the position where one piece of land is owned by a A as trustee whilst the other is owned by A as beneficial owner, on which there is so far no authority.

The loss of an easement is treated as “a permanent injury to the inheritance,” (Gale on Easements (17th ed 2002 para 12-02) and extinguishment will not occur until the owner of the two tenements has “an estate in fee simply in both of them of an equally perdurable nature”. (Gale on Easements (17th ed 2002 para 12-02. Perdurable in this context means enduring or durable. Two estates in land are equally perdurable if they are of identical duration). This means that unity of possession (The case law and academic commentary frequently refer to occupation as well as possession in this context, the two terms apparently being treated as synonymous. See, for example, Megarry and Wade, The Law of Real Property (6th ed 2000) para 18-049 (“occupation”) and para 18-191 (“possession”) and Thomas v Thomas (1835) 2 CrM & R 34, 41 by Aldershot B. For the sake of consistency, we use the term “possession” in this consultation paper) without unity of ownership (or vice versa) is not enough. “If there is only unity of possession the right is merely suspended until the unity of possession ceases”. (Megarry and Wade, The Law of Real Property (6th ed 2000) para 18-191, citing Canham v Fisk (1831) 2 Cr & J 126, see Thomas v Thomas (1835) 2 CrM & R 34 at 40). The effect of unity of ownership (without unity of possession) can be seen in Simper v Foley ((1862) 2 J & H 555 at 563, 564) where it was held that this merely suspended the easement for so long as the unity of ownership continued and that upon severance of the ownership the easement revived. (Gale on Easements (17th ed 2002 para 12-05).

This rule causes particular problems with residential and commercial developments; for example where a developer builds a housing estate and sells off the individual houses. The developer will wish to grant easements over the various plots, but is unable to do so while he remains the owner of the plots while the developer still owns the dominant and servient lands, since the easements will not take effect.

In addition, there is always a risk that easements that are part of the development are automatically extinguished in the event of the dominant and servient tenements falling, albeit for a very short period, into the ownership and possession of the same person:

The fact of extinguishment does not of course matter to the common owner (that, indeed, is in a sense why it occurs): as owner of both lands, he is free to decide
upon, and regulate, his own conduct in relation to them. (The 1984 report, para 16.4).

However, it may give rise to considerable difficulties in the event of those plots subsequently being sold on. Moreover, the operation of this rule is likely to have serious repercussions for the authenticity of the information contained on the register of title. Insofar as extinguishment following unity of ownership and possession occurs automatically, there is on obviously process whereby the easements thereby affected are to be removed from the register of title.

CREATION OF EASEMENTS

It is useful to break the law of acquisition down into four classes:

(1) creation by statute;

(2) express grant or reservation;

(3) implied grant or reservation; and

(4) prescription.

Statutory creation

An easement may be expressly created or granted by statute, whether public or private. Therefore, whenever the land in relation to which ancillary rights are disputed may originally have been the subject of an enclosure award or the construction of a railway or a canal, it is worth considering the relevant legislation.

The effect of the Land Registration Act 2002 on the registration of easements and profits can be summarised as follows:

(1) Easements and profits that are protected by registration will bind a purchaser. (LRA 2002, s 29(2)(a)).
(2) If an easement or profit is not protected by registration but was created before the Act was brought into force and was an overriding interest at that time, its overriding status will be retained. (LRA 2002, sch 12, para 9. The Act came into force on 13 October 2003).

(3) If an easement or profit was created after the Act was brought into force, the amount of protection it receives will depend on its mode of creation:

(a) If it was created by an express grant or reservation it must be registered, otherwise it will not take effect as a legal interest (these are registrable dispositions and should therefore be completed by registration: LRA 2002, s 27) (and it will not override as an equitable interest).

(b) If it was created by any other mode (for example by implied grant or reservation, including implication under section 62 of the Law of Property Act 1925, or by prescription): (LRA 2002, sch 3, para 3).

(i) if it is merely equitable, it will not override; (however, it may be protected by entry of a notice on the register).

(ii) if it is legal, it will override only if certain conditions are satisfied. (See LRA 2002 sch 3 para 3).

The Land Registration Act 2002 has therefore contributed towards solving the problem of the lack of transparency by reducing the number of easements which can take effect as overriding interests. But it does remain the case that it is relatively simple to create a legal easement informally, and that there is a significant risk that a purchaser of land burdened by the easement may be bound by it although it does not appear on the register of title.

It is important that there are effective means whereby easements and profits that have been informally created can be entered on the relevant registers of title. Rule 74 of the Land Registration Rules therefore provides:
(1) A proprietor of a registered estate who claims the benefit of a legal easement or profit, which has been acquired otherwise than by express grant, may apply for it to be registered as appurtenant to his estate.

(2) The application must be accompanied by evidence to satisfy the registrar that the right subsists as a legal estate appurtenant to the applicant’s registered estate.

(3) In paragraph (1) the reference to an acquisition otherwise than by express grant includes easements and profits acquired as a result of the operation of section 62 of the Law of Property Act 1925.

Having considered the evidence provided, the registrar may enter the benefit of the easement as appurtenant to the claimant’s estate. If the estate burdened by the easement is also registered, the register will enter a notice in the register for that land at the same time. (Ruoff and Roper, Registered Conveyancing (Release 36, 2007) para 36.023). If the easement is being claimed over unregistered land, its benefit may still be entered as being appurtenant to the claimant’s registered estate, although steps should first be taken to ensure that notice of the claimant’s application is served on the relevant servient owner. (LRR 2003, r 73(1)). It would be open to the successful claimant in such circumstances to enter a caution against first registration in relation to the burdened land. (LRA 2002, ss 15 to 21).

This is a useful procedure to facilitate the entry of informally created easements onto the register and thereby to make the register a more “complete and accurate reflection” of the state of the title at any given time. The combined effect of the provisions in the Act and the process set out in the Rules is to provide a clear incentive to those with the benefit of informally created legal easement on the register, it may override on a disposition of the burdened land, but only if the easement satisfies the conditions listed in Schedule 3, paragraph 3, to the 2002 Act. (See para 4.39, below). Once the easement has been entered on the register, however, its priority will be protected.

Where title to land is not registered, the effect of an easement depends upon whether it is legal or equitable. A legal easement binds “all the world”, in other words all who may come onto the servient land if it is registered as a Class D(iii) land charge, (Land Charges Act 1972, s 4(6)) or if it takes effect by way of proprietary estoppel and the purchase has notice of it. (ER Ives Investment Ltd v High [1967] 2 QB 379).
Express reservation

An easement or profit (in this section on express creation, we use “easement” for purposes of exposition) may be created by express grant or by express reservation. The express grant or reservation of an easement, right or privilege (in this section on express creation, we use “easement” for purposes of exposition) in or over land for an interest equivalent to an estate in fee simple absolute in possession or a term of years absolute is a “disposition” of a registered estate. (LPA 1925, s 1(2)(a), LRA 2002, s 27(2). The exception to this is an easement or profit which is capable of being registered under the Commons Registration Act 1965 (LRA s 27(2)(d)). It does not therefore “operate at law” (that is, take effect as a legal easement) until the relevant registration requirements are met. (LRA 2002, s 27(1)). These requirements involve:

1. the entry of a notice in respect of the new easement in the register of the servient estate;

2. the entry of the proprietor in the register of the dominant estate. (LRA 2002, sch 2, para 7).

An easement, like any other property right, may be granted (or reserved) by deed incorporating either an agreement or a gift, including a gift by will. If granted otherwise than by deed the easement will only take effect in equity, if at all. Such a grant (or reservation) may be express or implied, although implied reservations are rare and on the whole tend to occur in cases of necessity.

It was not possible in law to reserve an easement before 1926 and there were many complicated arrangements relied upon in an attempt to achieve the same result.

The precise extent and nature of the right will be determined by construing the words of grant (or reservation) including any relevant plan. This may involve consideration of successive assurances, see Holaw (470) v Stockton Estates Ltd [2000] E.G.C.S. 89 or conflicting deeds, see Hanover Trustee Co v Eastern Counties Leather Group Ltd [2000] P.L.S.N.S. 25/7. A grant may be construed out of a covenant. The extent of an easement created by express grant is limited by the actual word of grant and may be cut down to some extent by other reservations in the same deed, e.g. where a landlord reserves the right to develop adjoining land notwithstanding that light air or access are interfered with, see for example Overcom Properties v Stockleigh Hall Residents Management Ltd (1988) 58 P. & C.R.1 where exclusive parking spaces were laid out on the drives and forecourt of a building, thus limiting the extent of the area over which the tenants had a common right of way. In Forestry
Commission of England and Wales v Omega Pacific Ltd January 13 2000, Terence Etherington Q.C. sitting as Judge of the High Court was required to resort to the doctrine of implied terms as a method of limiting the extent of an apparently more general grant.

The relevant date for construction is the date of grant. This rule has considerable consequences in the case of easements where the date of grant may be many years, even centuries, before the date of dispute. The court’s approach is nevertheless practical and reasonable: a vehicle is a vehicle whether a carriage or a tractor and the size of the vehicle permissible will be determined by the physical constraints of the way and purpose as at the date of grant. A grant of a future easement may be void for perpetuities if not expressly limited as required by the Perpetuities and Accumulations Act 1964 although the “Wait and See” rule under section 3 might well save an easement granted without limitation after 1964.

No easement can be enjoyed so as to increase the burden on the servient tenement originally agreed see Peacock v Custins [2001] 2 AER 827, but variations which do not have that consequence can be made see Attwood v Bovis Homes [2001] Ch.379. A diversion of a right of way (save in emergency) is never permissible even of a public footpath, see R. v SoS ex p Gloucestershire County Council [2000] E.G.C.S. 150 where a river path was destroyed by erosion. Excessive use will destroy the right, see paragraph 10-57.

The effect of an express grant or reservation is a question of interpretation. In the case of a grant, the rule that a grantor may not derogate from his or her grant is applied, and the grant is interpreted against the grantor. (Williams v James (1867) LR 2 CP 577). In the case of a reservation, one would expect the words to be interpreted similarly, that is, against the person making the reservation. However, the currently accepted vendor of land is to be interpreted against the purchaser on the basis that the purchase is treated as the grantor. (St Edmundsbury & Ipswich Diocesan Board of Finance v Clark (No 2) [1975] 1 WLR 468).

It is an established principle of law (referred to by lawyers as “the contra proferentem rule) that the terms of a grant are to be interpreted against the person responsible for drafting the document. This rule of interpretation is not to be applied universally, but is supposed to be a last resort in cases where an ambiguity cannot be resolved by other means. (Above, 478, by Sir John Pennycuick).

Prior to 1926, it was not possible to reserve an easement in a conveyance. Instead, where an easement was intended by the parties to benefit land being retained by the vendor, it had to be...
granted by the purchaser. (Gale on Easements (17th ed 2002) para 3-12; Megarry and Wade, the law of Real Property (6th ed 2000) para 18-093). The application of this legal fiction of “re-grant” led to an easement created in such circumstances being interpreted in cases of ambiguity in favour of the vendor (the dominant owner) and against the purchaser (the servient owner).

Section 65(1) of the Law of Property Act 1925 provides:

A reservation of a legal estate shall operate at law without any execution of the conveyance by the grantee of the legal estate out of which the reservation is made, or any regrant by him, so as to create the legal estate reserved, and so as to vest the same in possession in the person (whether being the grantor or not) for whose benefit the reservation is made.

It may have been thought that the intended effect of section 65(1) was that where a vendor reserved an easement, the reservation was to be effective without the necessity of a re-grant (actual or notional) by the purchaser. It would follow from this that the consequences of re-grant, in particular interpreting the easement in favour of the vendor, would no longer apply. (Wade [1954] Cambridge Law Journal 189, 191 to 192). This analysis of the effect of section 65(1) was adopted by Mr Justice Megarry at first instance in St Edmundsbury & Ipswich Diocesan Board of Finance v Clark (No 2). ([1973] 1 WLR 1572. An easement was reserved on a 1945 conveyance of a portion of land by the Church to Mr Clark. The conveyance was expressed to be “subject to a right of way over the land coloured red on the plan to and from [the] Church”. The conveyance did not expressly state whether a pedestrian right of way or a more extensive vehicular right of way was intended).

However, the Court of Appeal took a different view on appeal from Mr Justice Megarry in that case. ([1975] 1 WLR 468. The Court of Appeal held that, interpreting the conveyance in light of the surrounding circumstances, it was clear that a pedestrian right of way only was being reserved, and the appeal was dismissed. The rule stated was therefore obiter: see Megarry and Wade, The Law of Real Property (6th ed 2000) para 18-094. It has however been followed: see Trailfinders Ltd v Razuki [1988] 2 EGLR 46. In St Edmundsbury it was said that “it is necessary to make it clear that this presumption can only come into play if the court finds itself unable on the material before it to reach a sure conclusion on the construction of a reservation. The presumption is not itself a factor to be taken into account in reaching the conclusion”: St Edmundsbury & Ipswich Diocesan Board of Finance v Clark (No 2) [1975] 1 WLR 468, 478, by Sir John Pennycuick). In Johnstone v Holdway, it had been
held that “an exception and reservation of a right of way in fact operates by way of re-grant by the purchaser to his vendor”. ([1963] 1 QB 601, 612 by Upjohn J). In *St Edmundsbury*, the Court of Appeal decided that, in view of reservation still being based on re-grant, the words of the easement should still, in cases of ambiguity, be interpreted against the purchaser and in favour of the vendor.


The *St Edmundsbury* rule is quite illogical. The vendor decides what land he is going to sell, and what restrictions and qualifications are to be made, and it should therefore be the responsibility of the vendor to make the terms of the transaction clear. One would therefore expect the terms of any rights reserved in favour of the vendor to be interpreted, in cases of ambiguity, against him or her. The vendor should certainly not be allowed to benefit from ambiguity and thereby to increase the burden on the servient land.

Moreover, the decision of the Court of Appeal in *St Edmundsbury* leads to inconsistency. In particular, its application is in stark contrast with the approach taken towards implied reservation of easements. An implied reservation will, as it contradicts the express terms of the instrument, be on the face of it a derogation from the grant. (*Chaffe v Kingsley* (2000) 79 P & CR 404, 417, by Jonathan Parker J; *Holaw (470) Ltd v Stockton Estates Ltd* (2001) 81 P & CR 29 at [82], by Neuberger J). It is a well-established rule that there is a duty to make any reservation expressly in the grant and therefore no easements will normally be implied in favour of a grantor. (*Wheeldon v Burrows* (1879) 12 Ch D 31, 49; *Re Webb's Lease* [1951] 1 Ch 808 at 828; *Holaw (470) Ltd v Stockton Estates Ltd* (2001) 81 P & CR 29 at [82]. There are two exceptions to this rule (easements of necessity, and easements of intended use), but in either case there is a heavy burden of proof on the person claiming the benefit of an implied reservation). It seems counter-intuitive that while there is little scope for courts to imply a reservation in the first place, where there is an express reservation, the courts will interpret it more favourably towards the person making the reservation that it would towards a person making an express grant.

**Implied acquisition of easements**
We include the following discussion easements that arise by reason of section 62 of the Law of Property Act 1925. Section 62, where not excluded, operates as a word-saving device. Strictly speaking, therefore, easements granted in this way are expressly granted or reserved. (See paras 4.68 and following below). Nevertheless, the provision is commonly considered alongside the various means of implication because of it similar effect.

On normal principles of construction, e.g. in order to give business efficacy to the transaction, or because the intention to grant can otherwise be properly inferred, e.g. from the description of the land in the parcels clause of a conveyance, or from the use to which the land had been or was clearly intended to be put. The so called easement of necessity is an extreme example of the implication of an easement in order to give business efficacy to the primary grant of transfer of an interest in land and to ensure that land is not landlocked and wholly sterilised.

What is an implied easement?

An implied easement is an easement that comes into existence upon a disposition of land without having been expressly created by the parties to that disposition. Implied easements are most likely to arise when land has been divided into two parts and either one or both parts are sold or let. The circumstances in which an easement will be implied vary (and are discussed in detail below).

In general, implied easements are legal interests. (But see e.g. para 4.62(2) below for an example of an implied equitable easement). Where title to land is registered, implied legal easements created before 13 October 2003 (the date on which the LRA 2002 came into force) that took effect as overriding interests on or before that date will continue to override both first registration and subsequent registrable dispositions. Those created after that date will only override if they are:

(1) known to the person to whom the disposition is made; or

(2) obvious on a reasonably careful inspection of the land; or

(3) exercised within the year before the disposition. (LRA 2002, sch 3, para 3. For a period of three years after the 2002 Act came into force, a legal easement created after 13 October 2003 but before 13 October 2006 did not have to satisfy these conditions. These transitional provisions have now expired).
An equitable easement can never have overriding status. Its priority can only be protected by registering a notice in the register for the servient land. (LRA 2002, s 32).

Where title to land is unregistered, a purchaser of a legal estate takes it subject to all other legal estates, rights and interests. An equitable easement must be registered as a class D(iii) land charge. (Land Charges Act 1972 s 2).

Grant or reservation?

The starting point in deciding whether an easement can be implied is to determine whether the claim being made is to an implied grant or an implied reservation. An implied grant may occur where A sells or lets land to B retaining some neighbouring land of his own. If B contends that she has an easement over A’s land which is neither express nor prescriptive, the claim must be on the basis of an implied grant. An implied reservation may occur if A contends that he has an easement over B’s land (for the benefit of the land which A has retained), and no such easement has been expressly reserved or prescriptively acquired.

As a general rule, the law is readier to imply a grant than a reservation. As Lord Justice Thesiger stated in the seminal case of *Wheeldon v Burrows*:

... if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant. (*Wheeldon v Burrows* (1879) LR 12 Ch D 31, 49).

Judicial reluctance to find such a reservation can be illustrated by the facts of that case:

Example: Land, originally owned by V, was divided into two plots, the first being undeveloped and the second containing a workshop. The first plot was sold to W “together with all walls, fences, ... lights, ... easements and appurtenances”. The conveyance to W did not contain a reservation in express terms of any right to V in respect of his remaining land. A month later B purchased the second plot. The workshop had windows looking out onto W’s land. W wished to build on her land but B objected because it would block the light from coming into his workshop. The Court of Appeal held that B did not have a right to light over W’s land. To enable V
to pass such a right to B on conveyance of the second pot, it would have been necessary for V to have made a reservation in the conveyance of the first plot to W. No express reservation had been made, and the court refused to imply one.

The courts are reluctant to find that an implied easement has been reserved, and not all the rules under which easements can currently be implied extend to reservation. (In particular, LPA 1925, s 62 and the rule in *Wheeldon v Burrows* do not apply to reservations). The list of possible circumstances is not closed, (“... as the circumstances of any particular case may be such as to raise a necessary inference that the common intention of the parties must have been to reserve some easement to the grantor, or such as to preclude the grantee from denying the right consistently with good faith, and there appears to be no doubt that where circumstances such as these are clearly established the court will imply the appropriate reservation”. *Re Webb’s Lease* [1951] Ch 808, 823, by Jenkins LJ) but it is less extensive than the current list of circumstances in which the courts will find an implied grant.

Before considering the current methods of implication, it is necessary to pause to examine the distinction currently drawn between easements implied on grant and easements implied on reservation.

There are a number of reasons why a stricter approach is taken to implication on reservation. First, a reservation inevitably detracts from the grant because an easement implied as a reservation gives the grantor benefit by imposing some burden on the grantee’s land, (see *Chaffe v Kingsley* (2000) 79 P & CR 404, 417, by Jonathan Parker J) while an implied grant adds to or enhances the grant because it gives the grantee an additional benefit. Secondly, there is an expectation that a grantor, as the vendor or lessor, should reserve expressly any easements he or she wishes to obtain and so has a duty to do so. (See *Wheeldon v Burrows* (1879) LR 12 Ch D 31, 49, by Thesiger LJ, quoted below at para 4.59). This expectation is combined with a suspicion that an overly liberal implication of easements in favour of grantors might encourage them fraudulently to refrain from expressly reserving easements in order to gain a higher price for the sale or lease of ostensibly unencumbered land.

However, the distinction between grant and reservation is not uniformly supported. It is, for example, rejected in American case law and the American *Restatement* of servitude law. (According to the American *Restatement* “the weight of modern authority seldom distinguishes between the
situation of a grantor and the grantee”. American Law Institute, *Restatement (Third) of Property: Servitudes* (2000) p 165. The term servitude refers to what are known as easements, covenants, real covenants, equitable servitudes and profits in American law). While we understand the logic underlying the current distinction in English law between grant and reservation, there is a concern that it can have undesirable consequences in practice where disputes arise some time after the transactions in question:

Example: V sells of part of his land to P. There is no express grant or reservation of easements in the relevant conveyance. If, many years subsequently, P’s successor in title, P2, wishes to contend that her land has the benefit of a right of way over V’s retained land, she will have an easier task that V’s successor in title, V2, should he wish to contend that his land has the benefit of a right of way over P’s land. This is because P2 is claiming by way of implied grant, whereas V2 is claiming by way of implied reservation.

**Current methods of implication**

There are currently four principal methods of implication of easements. (Easements may also arise by operation of the doctrine of proprietary estoppel. This is not a method of implied acquisition as such but a principle of general law, and our provisional proposals are not intended to affect its application). The first two methods take effect only on grant; the second two take effect both on grant and on reservation:

1. the rule in *Wheeldon v burrows*; (There are two rules set out in the judgment of Thesiger LJ in *Wheeldon v Burrows* (1879) LR 12 Ch D 31. The first rule is the one referred to here. The second rule is that the grantor who intends to reserve a right is under a duty to reserve it expressly in the grant).

2. section 62 of the Law of Property Act 1925;

3. easements of necessity; and

4. easements of intended use.
The rule in *Wheeldon v Burrows* and section 62 of the Law of Property Act 1925 both give rise to the acquisition of easements as a result of use of the grantor’s land prior to the relevant transaction. They are therefore broadly based on the past exercise of particular rights.

Easements of necessity and easements of intended use, on the other hand, are forward looking. In each case the court is required to examine what the parties to a transaction were contemplating in terms of the future use of the properties in question.

There is arguably one additional means whereby an implied grant of an easement may take effect, and that is by operation of the doctrine that a grantor shall not derogate from his grant. We say “arguably” because, although the doctrine may be said to underpin other rules, (see K Gray and S F Gray, *Elements of Land Law* (4th ed 2005) para 8 129) there are very few reported decisions in which it can be said that non-derogation from grant was the sole method on which an implied grant was found.

**The rule in Wheeldon v Burrows**

In 1878, Lord Justice Thesiger laid down the following rule:

... on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean *quasi* easements), or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. (*Wheeldon v Burrows* (1879) LR 12 Ch D 31, 49, by Thesiger LJ).

*Wheeldon v Burrows* (1879)12 Ch D 31 is an example of a situation in which the grant of an easement is implied when part of a larger portion of land is sold off. Prior to this disposal (because the land is in common ownership) there cannot have been easements but only quasi-easements. The requirements identified in *Wheeldon v Burrows* are that the quasi-easement must (1) have been continuous and apparent (Although rights of way can benefit from this rule even though not continuously used), (2) have been necessary for the reasonable enjoyment of the new dominant
tenement and (3) at the time of the sale, have been used by the owner of the whole of the land (part of which is sold off) for the benefit of the new dominant tenement.

The rule sets out the circumstances in which easements may be impliedly granted where the dominant and servient lands were previously owned by the same person. The rule is concerned with the acquisition of "quasi-easements", in the sense that, prior to the relevant transfer of part, the common owner ("common owner" is used to designate the owner of a plot of land that is divided and part thereof transferred, the other part being retained) used the land now retained for the benefit of the land now transferred. Prior to transfer from the common owner, it could not be said that easements as such were being enjoyed as it is not possible for an owner to exercise an easement over his or her own land. These rights are acquired by the grantee as easements proper.

The following three requirements must be satisfied in order for there to be an implied grant under the rule:

1. The right must be "continuous and apparent". This is taken to mean that it is "seen on inspection" and "is neither transitory nor intermittent". (Ward v Kirkland [1967] Ch 194, 225, by Ungoed-Thomas J).

2. The right must be necessary to the reasonable enjoyment of the property granted. Necessity is not as narrowly interpreted as it is in the context of easements of necessity. (See para 4.81 below). The question is whether the right will contribute to the enjoyment of the property for the purposes for which it was transferred. (It has not been authoritatively determined whether these first two requirements are cumulative, alternative or synonymous. The general consensus taken from the decided case law is that they are cumulative: see, for example, Sovmots Investments Ltd v Secretary for State for the Environment [1979] AC 144).

It should further be noted that:

1. The rule can only grant as easements rights that are capable of fulfilling the requirements of an easement. (Re Ellenborough Park [1956] Ch 131: see para 3.1 above). It cannot transform rights that do not satisfy the necessary characteristics into easements.
The estate transferred may be legal or equitable. If an easement is implied, it will assume the same status as the estate that was transferred and to which it pertains. For example, if the estate transferred was an equitable lease, the easement will be equitable too.

The transfer of the land from the common owner may be a sale, a devise or a gift. It does not therefore have to be for value. However it must be voluntary. (See, for example, Sovmots Investments Ltd v Secretary for State for the Environment [1979] AC 144 (no application where compulsory purchase).

Implied easements arising from the rule in *Wheeldon v Burrows* are based on the doctrine of non-derogation from grant. (See, for example, *Browne v Flower* [1911] 1 Ch 219). Where there is an obvious right being exercised prior to the disposal of part, it will be presumptively assumed that there should be a grant to use it. (*Millman v Ellis* (1996) 71 P & CR 158). As a result, it is said that the express grant of a more limited right in the conveyance will not be sufficient to exclude the implication of a *Wheeldon v Burrows* easement.

Example. (This example uses the facts of *Borman v Griffith* [1930] 1 Ch 493) L owned a private estate, which included two houses; H1 and H2. Prior to L entering into an agreement with C to lease H1 for a seven year term, L had been using the estate drive as a means of access to H1. However, the lease to C did not include any express grant of a right of way over the drive. L then let H2, including the drive, to D, and D sought to prevent C, who had alternative, albeit impracticable, means of access to H1, from using the drive.

The court held that C had obtained a right of way over the drive by application of the rule in *Wheeldon v Burrows*, and D took H2 subject to that right. Mr Justice Maugham stated that “the authorities are sufficient to show that a grantor of property, in circumstances where an obvious, i.e. visible and made road is necessary for the reasonable enjoyment of the property by the grantee, must be taken prima facie to have intended to grant a right to use it”. (Above, 499. The right of way could not pass under LPA 1925 s 62 as the agreement for lease pursuant to which C held H1 was not a “conveyance” within the statutory definition).
Where it can be shown that the parties to a transaction did not intend that a right should pass, the rule in *Wheeldon v Burrows* will not apply, even where all the other requirements for an implied grant have been satisfied. (*Wheeler v J J Saunders Ltd* [1996] Ch 19). However, contrary intention will only preclude the grant of the easement if it is manifest from the documents that transfer the land. (*Borman v Griffith* [1930] 1 Ch 493, 499). Contrary intention can be evidenced by express words or deduced by implication from the language used. (*Millman v Ellis* (1996) 71 P & CR 158. For instance, in *Squarey v Harris-Smith* (1981) 42 P & CR 118, a right of way was not implied under the rule in *Wheeldon v Burrows* because the lease contained a condition of sale which provided that when the property adjoined another, a purchaser of the property should not become entitled to any easement “which would restrict or interfere with the free use of [the] other land …”).

Two final observations may be made about the operation of *Wheeldon v Burrows* easements.

First, where such easements arise, they may not give effect to the actual intention of the parties, or at least the intention of the grantor. As with section 62 easements, discussed below, it is only those who are properly advised who will expressly exclude *Wheeldon v Burrows* easements.

Secondly, the rule operates only to imply a grant and not to imply a reservation. This is understandable given that the basis of the rule is derogation from grant. We have, however, provisionally proposed that it should not be material whether the easement would take effect by grant or by reservation when determining whether an easement should be implied. The rule in *Wheeldon v Burrows* identifies a particular type of transaction in which the need for express easements is commonly overlooked and so it is necessary to imply easements. There is no reason why a similar principle should not operate to imply reservations in such circumstances.

**Section 62 of the Law of Property Act 1925**

Section 62(1) of the 1925 Act provides that a conveyance of land shall be deemed to include and shall operate to convey, with the land:

... all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, water-courses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or, at the time
of conveyance, demised, occupied or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

The statutory predecessor of this provision, section 6 of the Conveyancing Act 1881, was initially viewed as a “word-saving” device, taking away the need painstakingly to enumerate in conveyances all the rights that were to pass with the land. Since the early twentieth century the provision has been given a wider interpretation, by also transforming precarious benefits, merely enjoyed by licence of the owner prior to the conveyance, into permanent property rights. (International Tea Stores Ltd v Hobbs [1903] 2 Ch 165; Wright v Macadam [1949] 2 KB 744). Section 62 often takes effect “automatically” without an appreciation of its effect by the parties to the conveyance.

The following conditions must be fulfilled for section 62 to operate:

1. the right must have been exercised over land retained by the guarantor; (Nickerson v Barraclough [1981] Ch 426).

2. the right must have been appurtenant to or “enjoyed with” the quasi-dominant tenement; (“Enjoyed with” is defined by reference to the factual user of the land: International Tea Stores Ltd v Hobbs [1903] 2 Ch 165).

3. the right must have already been enjoyed “at the time of the conveyance”; (This refers to the date of the completion of the conveyance, not the date of exchange of contracts nor the date of commencement of the lease (Goldberg v Edwards [1950] Ch 247). The court will look at a reasonable period of time before the conveyance to determine this (Green v Ashco Horticulturist Ltd [1966] 1 WLR 889). In Costagliola v English (1969) 210 EG 1425 it was held that a right could still be transferred under s 62 if the period during which it had not been used amounted to less than a year))

4. the conveyance must be of a legal estate. (LPA 1925, s 205(1)(ii). This includes the grant of a (legal) lease, but not an agreement for lease: see Borman v Griffith [1930] 1 Ch 493, and para 4.63 above).

However, the operation of the section is subject to the following important limitations:
the right in question must be capable of being an easement; *(Registration Property Co Ltd v Redman* [1956] 2 QB 612).

the grant must be within the competence of the grantor; *(Quicke v Chapman* [1903] 1 Ch 659).

the user must not be excessively personal, *(Goldberg v Edwards* [1950] Ch 247) excessively precarious, *(Green v Ashco Horticulturist Ltd.* [1966] 2 All ER 232) merely temporary *(Wright v Macadam* [1949] 2 KB 744) or a “mere memory”; *(Penn v Wilkins* [1974] 236 EG 203) and

the section applies only in so far as a contrary intention is not expressed in the conveyance. *(LPA 1925, s 62(4). Any intention to exclude must be clear and in the past there has been a strict interpretation of when and how the section is excluded *(Gregg v Richards* [1926] Ch 521). Although this approach may have softened more recently, particularly where the section would create an injustice *(Selby District Council v Samuel Smith Old Brewery (Tadcaster) Ltd* [2000] 80 P & CR 466), it would appear that only those who have been properly advised can be confident the section is effectively excluded. The Law Society’s 4th edition of the Standard Conditions of Sale (Standard Condition 3.4) excludes s 62 as standard only in so far as it relates to rights to light and air. For all other easements, including rights of way, the conditions allow s 62 to operate in favour of the purchaser).

The operation of the section is best demonstrated by means of an example.

Example: L allows T, her tenant, to park her car anywhere on the forecourt owned by L in front of the demised property, although there is no express term to this effect in the tenancy agreement. Subsequently, T purchases the freehold of the property she had leased (but not the forecourt) from L. The conveyance of the house is silent on parking rights, but it does not expressly exclude the operation of section 62. T will acquire an easement to park on the forecourt retained by L. That easement will be for the same duration as the freehold estate which T has obtained. It is irrelevant that neither L nor T contemplated that L allowing T to park during the tenancy would result in T obtaining a legal easement to the same effect on purchasing the freehold.
There are further difficulties with section 62. The extent of its operation is not entirely clear. In particular, there has been considerable debate as to whether it is necessary that prior to the conveyance there was a diversity of ownership or occupation as between the dominant and servient lands. (Long v Gowlett [1923] 2 Ch 177; Sovmots Investments Ltd v Secretary of State for the Environment [1979] AC 144; C Harpum, “Easements and Centre Point: Old Problems resolved in a Novel Setting” [1977] The Conveyancer and Property Lawyer 415; P Smith, “Centre Point: Faulty towers with Shaky Foundations” [1978] The Conveyancer Property Lawyer 449; C Harpum, “Long v Gowlett A Strong Fortress” [1979] The Conveyancer and Property Lawyer 113). The better view now seems to be that, subject to two exceptions, (The general exception relates to rights which were “continuous and apparent” at the time of the conveyance: P & S Platt v Crouch [2003] EWCA Civ 110, [2004] 1 P & CR 18. Quasi-easements of light will also pass: Watts v Kelson (1870) 6 Ch App 166) there must have been such a diversity, on the basis that:

... when land is under one ownership one cannot speak in any intelligible sense of rights, or privileges, or easements being exercised over one part for the benefit of another. Whatever the owner does, he does as owner and, until a separation occurs, of ownership or at least of occupation, the condition for the existence of rights, etc., does not exist. (Sovmots Investments Ltd v Secretary of State for the Environment [1979] AC 144, 169, by Lord Wilberforce).

The effect is that the operation of section 62 and the rule in Wheeldon v Burrows tend to be mutually exclusive. Wheeldon v Burrows applies to quasi-easements being exercised by a common owner over one part of his or her land for the benefit of another. Section 62 appears generally not to be effective unless there is diversity of ownership or occupation as between the dominant and servient lands.

However, the precise relationship between 62 and Wheeldon v Burrows remains doubtful and uncertain:

There is considerable overlap between s.62 and the Wheeldon rule and it is sometimes difficult to discern why only one or the other of them was relied on in a particular case. (Hillman v Rogers [1997] NPC 183, by Robert Walker LJ).
In general terms, it is easier to succeed under section 62 than the rule in *Wheeldon v Burrows* as there is no need to prove either that the right was continuous and apparent (save where there was no diversity of ownership or occupation prior to the conveyance: see para 4.61 above) or that it was necessary for the reasonable enjoyment of the property conveyed. However, as a counsel of prudence, it is often sensible to base a claim on both methods of implication in the alternative. (*Wheeler v JJ Saunders Ltd* [1996] Ch 19 has been cited as a case which lost on the rule in *Wheeldon v Burrows* but may have succeeded on section 62: see Thompson [1995] 59 The Conveyancer and Property Lawyer 239). Moreover, in the absence of a “conveyance” triggering section 62, the rule in *Wheeldon v Burrows* may be the only recourse available to the claimant to the easement. (See eg *Borman v Griffith* [1930] 1 Ch 493, summarised at para 4.63 above: s.62 could not operate, as an agreement for a lease does not comprise a “conveyance”)

**Easements of necessity**

Easements of necessity were the first type of easement implied by the courts. An ancient common law maxim underlies them according to which a person who grants some thing to another person or reserves some thing from a grant is also “understood to grant [or reserve] that without which the thing cannot be or exist”. (Cited in JW Simonton “Ways by Necessity” (1925) 25 Colombia Law Review 571, 572).

In *Nickerson v Barraclough*, the Court of Appeal rejected the argument that easements implied by necessity are based on public policy:

> I cannot accept that public policy can play any part at all in the construction of an instrument; in construing a document the court is endeavouring to ascertain the expressed intention of the parties. (*Nickerson v Barraclough* [1981] Ch 426, 440 to 441, by Brightman LJ).

An easement of necessity is implied only where the right is essential for the use of the land granted or retained. The question is not whether it is necessary for the reasonable enjoyment of the land but whether the land can be used at all without the implied grant or reservation. A claim will only be successful where the land is “absolutely inaccessible or useless” without the easement. (*Union Lighterage Co v London Graving Dock Co* [1902] 2 Ch 577). The most obvious example of a situation in which an easement of necessity may be implied is where a grantor conveys an entire plot of land
except for a piece in the middle, which is completely surrounded by the part conveyed. Unless the reservation of a right of way over the land granted is implied, the land in the centre would be completely landlocked.

Example: V sells off her land in various plots, intending to retain a single plot on which her dwelling-house sits. Following the final transfer of the various plots, V discovers that no express reservation of a right of access has been made, and she does not therefore appear to have any means of getting to and from her property. V is likely to be able to claim the implied reservation of a way of necessity.

The necessity must exist at the time of the grant of the dominant land, subject to an exception where, at the time of the grant, the owner of the servient land knew that a necessity would arise at a later date. (St Edmundsbury v Clark (No 2) [1975] 1 WLR 468) It must relate to the purpose for which the dominant land was being used at the time of the grant or for other purposes contemplated by the parties at the time of the grant. (In Corporation of London v Riggs (1880) 13 Ch D 798 a grantor of land in Epping Forest gained a way of necessity as the retained agricultural land was encircled by the land sold. A subsequent lessee of the retained land was unable to open public tea-rooms on the site when it was held that the way of necessity could only be used for agricultural purposes). The existence of a permissive (and therefore vulnerable) right over other land as a means of access (such as a licence) will not prevent the implication of an easement of necessity from being implied as the permissive right may in the future be withdrawn. (Barry v Hasseldine [1952] Ch 835).

An easement of necessity will not, however, be implied merely because it makes it more convenient to use the land. For example, a right of way will not be considered a necessity where there is some other means of accessing the land, even where that is difficult to do, expensive to achieve or impractical to use. (Titchmarsh v Royston Water Co Ltd (1899) 81 LT 673). Where land can be accessed by water, a right of way over land will not be deemed necessary. (Manjang v Drammeh (1990) 61 P & CR 194). This means that only the minimum right required to overcome the necessity will be implied. For example, a vehicular right of way will not be acquired if a pedestrian right of way provides sufficient access.

The status of an easement of necessity has yet to be fully determined where the facts that gave rise to the necessity cease. Take, for example, a right of way which was implied granted in respect of land owned by A that was landlocked. That land could cease to be landlocked on the subsequent
acquisition of neighbouring property by A. Some authority suggests that in such circumstances the easement of necessity should also cease. (*Holmes v Goring* (1824) 2 Bing 76, also reported at 9 Moo CP 166; *Donaldson v Smith* [2006] all ER (D) 293 (David Donaldson QC). An appeal from the latter decision was compromised by the parties so the point has not been considered by a higher court). Against this is a substantial weight of authority (*Proctor v Hodgson* (1855) 10 Exch 824; *Barkshire v Grubb* (1881) 18 Ch D 616; *Huckvale v Aegean Hotels Ltd* (1989) 58 P & CR 163, 168 to 169, by Nourse LJ) to the effect that where a grant of an easement is implied, it should not be “affected by the chance subsequent acquisition of other property” by the owner of the landlocked land. (*Maude v Thronton* [1929] IR 454, 458, by Meredith J).

There appear to be three main drawbacks with the common law rules governing easements of necessity. First, landowners (especially grantors because grantees may be able to gain other type of implied easement) who face considerable and disproportionate expense or difficulty in managing their property, but for whom an easement is not an absolute necessity, may not be able to gain an implied easement. Secondly, the requirement that the necessity exist at the time of the grant may leave landowners vulnerable to subsequent, perhaps unforeseen, changes. Thirdly, the final potential problem is the uncertainty of duration.

**Quasi-easements**

Benefits in the nature of easements which exist in favour of part of one landowner’s property over other parts of the same landowner’s property, may be converted into legal easements on disposal of the relevant part under Section 62 of the Law of Property Act 1925 or, more unusually in modern conveyancing, by the use of express general words of grant. A sensible approach to this possibility is, first, to consider whether a right may have arisen under section 62 from the surrounding circumstances, and only then to consider whether the express words of the conveyance negative an intention to make the grant. In most cases it is essential to prove that the relevant parcels of land have at least been occupied by different persons so that there can truly said to have been a “benefit” adhering to the parcel in respect of which a “right” is claimed. This can occur on simultaneous disposals of the relevant parcels of land. Section 62 can apply to rights other than easements. And will apply even to precarious rights if not temporary, see *Hair v Gillman* [2000] 2 EGLR 74.

**Easements of intended use**
The classic definition of easements of intended use was provided by Lord Parker of Waddington in *Pwllbach Colliery Co Ltd v Woodman*. ([1915] AC 634, 646 to 647. Such easements are consequently sometimes known as “Pwllbach easements”. They are also referred to as “common intention easements” or “intended easements”). After mentioning easements of necessity and “continuous and apparent easements” (that is, those passing under the rule in *Wheeldon v Burrows* (see para 4.59 and following above)), his Lordship went on to group implied easements under two heads: first, those implied because they are ancillary to rights expressly granted; (see further *Jones v Pritchard* [1908] 1 Ch 630; *Moncrieff v Jamieson* [2007] UKHL 42; [2007] 1 WLR 2620) and, second, those implied because they are necessary to give effect to the manner in which the land retained or demised was intended to be used:

The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in and for which the land granted or some land retained by the grantor is to be use. ... But it is essential for this purpose that the parties should intend that the subject of the grant or the land retained by the grantor should be used in some definite and particular manner. It is not enough that the subject of the grant or the land retained should be intended to be used in a manner which may or may not involve this definite and particular use. ([1915] AC 634, 646 to 647, by Lord Parker).

There are therefore two requirements for the implication of an easement of intended use: (*Stafford v Lee* (1993) 65 P & CR 172, 175).

1. the parties must, at the time of grant, have shared an intention, either express or implied, that the land demised or retained should be used for a particular purpose; and

2. the easement must be necessary to give effect to that intended use.

Example: (Based on the facts of *Wong v Beaumont Property Trust* [1965] 1 QB 173). Under the terms of this lease, T covenanted to control and eliminate smells and odours on the demised premises, which were to be used as a restaurant. The Court of Appeal held, applying *Pwllbach Colliery v Woodman*, that this conferred on T the
right to construct and maintain a ventilation duct on the wall retained by L. It did not matter that the need for this duct was not recognised by the parties at the commencement of the lease, as its construction was necessary in order to give effect to the parties’ intended use of the premises.

Although easements of intended use are closely related to easements of necessity, the scope and extent of an easement may differ depending on whether it is implied by reason of intended use or by reason of necessity. An easement of necessity will be implied only to the extent that it renders possible the use of the land and no further. Therefore, the scope and extent of an easement of necessity depends upon the nature of the necessity. But where it can be shown that there was an intended use of the land the scope and extent of the easement may be greater. In the example given at para 4.81 above of a landlocked plot of land, the implication of a right of way on foot would suffice to permit the land to be accessed and used, and that would be the full extent of an easement of necessity. However, it may be possible to imply a vehicular right of way as an easement of intended use, if vehicular access could be shown to be necessary to give effect to the use of the plot intended by the parties. The presence of a garage on the dominant land may provide evidence that vehicular access was contemplated.

In Adam v Shrewsbury the Court of Appeal considered how analysis of the parties’ “common intention” should be conducted. It indicated that the court should consider “the terms of the conveyance, the position on the ground, and the communications passing between the parties before the execution of the conveyance which would include the provisions of the contract.” (Adam v Shrewsbury [2005] EWCA Civ 2006, [2006] 1 P & CR 27 at [28], by Neuberger LJ). The Court of Appeal distinguished the earlier authority of Scarfe v Adams ([1981] 1 All ER 843) (holding that communications between the parties outside the conveyance were irrelevant save where a claim for rectification was being made) as being “inconsistent with the general principle that when construing a document all the surrounding circumstances should be taken into account”. (Adam v Shrewsbury [2005] EWCA Civ 2006, [2006] 1 P & CR 27 at [28], by Neuberger LJ). These comments were somewhat difficult to reconcile with the principles of interpretation set out by Lord Hoffmann in the leading case of Investors Compensation Scheme Ltd v West Bromwich Building Society, where it was stated:
The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. ([1998] 1 WLR 896, 912, by Lord Hoffmann).

That said, there do not currently seem to be significant practical problems being experienced with easements of intended use. They are subject to the same objection that can be made in respect of implied easements generally; that, as no express provision for the easement has been made, it is possible that neither party has foreseen and taken account of the restriction in the course of negotiating the sale or lease. In such a case, the loss of value of the servient land will not have been offset by the sale or lease price, and it is the servient owner who will bear the entire loss.

**Non-derogation from grant**

The doctrine of non-derogation from grant, as its name suggests, is based on the idea that once a person has made a grant, he cannot later act in a manner that will detract from the use of the property granted: “a grantor having given a thing with one hand is not to take away the means of enjoying it with the other”. (*Birmingham, Dudley and District Banking Co v Ross* (1888) LR Ch D 295, 313, by Bowen LJ).

This principle can, among other functions, (for example, the doctrine is also the basis for the rule that grantors must make express provision for any rights they wish to reserve: the so-called second rule in *Wheeldon v Burrows* (1879) LR 12 Ch D 31, 49, by Thesiger LJ) be used to imply rights (that were not expressly included) into a conveyance. This is done on the basis that, if the right is not implied, it will not be possible to use the property in the way that was originally intended. The doctrine may be the source of other methods of implication relevant to easements, the rule in *Wheeldon v Burrows* being the prime example. ((1879) LR 12 Ch D 31, 49, by Thesiger LJ; see K Gray and S F Gray, *Elements of Land Law* (4th ed 2005) para 8. 129). It can also be used to imply rights that do not fulfil the easement criteria, for example, a right to air, not through a specified channel or opening, (*Aldin v Lateimer Clark , Muirhead & Co* [1894] 2 Ch 437) or a right not to suffer vibrations from an adjoining building that cause subsidence. (*Grosvenor Hotel Company v Hamilton* [1894] 2 QB 836).

In *Browne v Flower*, ([1911] 1 Ch 219) Mr Justice Parker, analysing the function of the doctrine of non-derogation from grant, said:
This maxim is generally quoted as explaining certain implications which may arise from the fact that, or the circumstances under which, an owner of land grants or demises part of it, retaining the remainder in his own hands. ([1911] 1 Ch 219, 224 to 225).

He went on:

... if the grant or demise be made for a particular purpose, the grantor or lessor comes under an obligation not to use the land retained by him in such a way as to render the land granted or demised unfit or materially less fit for the particular purpose for which the grant or demise was made. ([1911] 1 Ch 219, 226).

There is little evidence of easements being implied solely on the basis of non-derogation from grant. Sara refers to Cable v Bryant ([1908] 1 Ch 259) as the one recent example of a freehold grant, and it seems that the principal importance of the doctrine is to provide justification for the implication of easements pursuant to other rules such as Wheeldon v Burrows, section 62 of the Law of Property Act 1925 and easements of intended use. (C Sara, Boundaries and Easements (4th ed 2008) para 13.25). The question therefore arises whether it would contribute to the simplification of the law to recognise that an easement cannot be created by reference to the doctrine without any other method of implication being engaged.

**Prescription**

An easement over land may be acquired by actual enjoyment of the relevant benefit by owners of the benefited land, without the consent of the owner of the burdened land, i.e. as of right. This requires proof of enjoyment without force, secrecy or licence of a benefit which, if formally granted, would be an easement, for a lengthy and continuous period of years before the litigation in which the right is disputed is commenced. The nature and extent of a right acquired by what is known as prescription depends entirely upon the nature and extent of the enjoyment founding the prescription. Prescription is an immensely complex area of property law and every case will depend not only upon its own facts, but also upon the precise application of the law, whether statutory or common law, to those particular facts.
It is easier to acquire ownership of a man’s land adversely than it is to acquire a lesser right over it by prescription (although under the Land Registration Act 2000 that is going to change in October). Although both squatting and prescription are actions adverse to the interest of the legal owner and both arise out of use which is not dependent upon force, secrecy or licence, there the similarities end. The acquisition of title to land by adverse possession depends upon the expiry of a limitation period, i.e. a period during which the legal owner takes not action to defend his ownership by eviction of the trespasser. Once the period has expired the squatter has his right and need no longer continue his physical use and occupation of the land. Prescriptive rights are dependent upon continuous use and enjoyment, usually (and in the case of statutory prescription certainly) up to and including the date of commencement of court proceedings. It is not therefore possible to be certain that a client has successfully acquired a right by prescription without litigation. This is unusual in property law.

All easements may be prescribed for, but there is an important distinction to be drawn between rights of light and all other easements in this respect. In this section therefore rights of light will be dealt with as a separate topic.

There are two different types of prescription.

Statutory prescription

Easements may be acquired by statutory prescription under the Prescription Act 1832 which remains in full force unaffected by any later legislation, including the Law of Property Act 1925. The 1832 act specifies minimum periods of use and enjoyment which, if proved, will legally entitle the claimant to the benefit so used and enjoyed over the land of another. In certain cases the 1832 Act also limits the circumstances which can be relied upon in defending a claim under the statute (although probably not at common law) to an easement based upon long use and enjoyment.

Common law prescription

Easements may be informally acquired at common law under two doctrines.

Lost modern grant. Long continued use and enjoyment of right, which cannot be explained otherwise than by presuming that there must have been a formal grant of the right at some previous date, the documentary roof of which has since been lost, will found a prescriptive right, see Dalton v
Angus (1881) 6 App. Cas. 740, Attorney General v Simpson [1901] 2 Ch. 671, Tehidy Minerals v Norman [1971] 2 Q.B. 528 Smith v Brudenell-Bruce [2001] 28 E.G. 143 (CS). Any reasonable alternative explanation, such as occasional express permission of the legal owner during the relevant period, see Bridle v Ruby [1989] 1 Q B 169 and Mills v Silver [1991] CH 271, will destroy the claim, see Alfred F Beckett Ltd v Lyons [1967] Ch 449. However evidence is not admissible to show that a grant was not in fact made, other than evidence to show that it was legally impossible for a grant to have been made, e.g. evidence as to the legal incapacity of the presumed grantor. This is therefore a legal fiction rather than a rebuttable presumption. The cases show that user must usually have continued for at least 20 years (the relevant period). This cannot be relied on by a tenant, see Simmons v Dobson [1991] 1 W.L.R. 720.

Use since time immemorial By the Statute of Westminster 1275 the period of “time out of mind” was fixed as before 1189, and has remained so fixed ever since. In practice there is a presumption that a benefit which is proved to have been enjoyed as of right for so long as anyone can remember, has been enjoyed since time immemorial, see Angus v Dalton (1877) 3 Q.B.D. 85, on appeal (1881) 6 App. Cas. 740, 812. The presumption is not easy either to raise or to rebut, and claims relying upon use since time immemorial are extensive and complex, involving considerable research. The presumption is conclusively rebutted if it can be proved on the balance of probabilities that the use must have started after 1189. Therefore, for example, a right of drainage of a building which was not constructed until after that date cannot be prescribed for on this basis. The common law period is rarely relied on, as it is much easier to prove a case for statutory prescription under the Prescription Act 1832 in most instances.

In practice, where a client claims to be entitled to an easement by virtue of long enjoyment, the adviser should consider the following.

Are all the requirements for an easement present? If so, what is the quality of nature of the use relied upon? Is the easement claimed a right to light? Has the use and enjoyment relied upon been continuous to date and if not, what interruptions have occurred and for what reasons?

How long has the use and enjoyment continued?

Nature of use and enjoyment.

No secrecy there are two aspects of this requirement.
Knowledge of the freehold owner of the burdened land as presumed grantor. The actual user relied upon must be such as is actually known to, or ought reasonably to have been known to, the freehold owner of the burdened land. It must be the knowledge of the freeholder because an easement can only be prescribed for and against freehold land. Once continuous use and enjoyment for a sufficient period has been proved by the claimant, the knowledge of the freehold owner will be presumed and the burden of proof of the absence of knowledge will shift to the defendant see *Pugh v Savage* [1970] 2 Q.B. 373.

Where the burdened land has been subject to a lease it may be possible for the freehold reversioner to prove that he had no knowledge, but where the lease commenced after the beginning of the relevant prescription period, the freeholder will be presumed to have the necessary knowledge. There is no such presumption of knowledge in the case of a landlord’s agent, see *Diment v Foot* (N.H) [1974] 1 W.L.R. 1427.

Where the freehold owner of the burdened land can prove that the land was tenanted throughout the relevant period, the burden of proof of knowledge will shift back to the claimant. If, on the other hand, the tenancy did not commence until after the use began, the burden of proof will remain with the defendant, see, for example, *Davies v Du Paver* [1953] 1 Q.B. 184.

Under the Prescription Act 1832, where the claimant is claiming a right of light or relying upon a period of use and enjoyment of more than 40 years, no letting of the burdened land will assist the defendant unless, in the latter case, he protests the use within three years after the determination of the tenancy, see sections 7 and 8 of the Prescription Act 1832. Even if he protests, it is only the period of the letting which is deducted from the 40 year period.

The use must be “as of right”. Not only must the use itself be adverse, but the owner of the freehold interest in the burdened land must know that the use is being made “as of right”, i.e. adversely even though the user himself mistakenly believes that he is not acting unlawfully but that he does legally have the right to an easement. Such a mistake will not prevent the use being adverse, see, for example, *Bridle v Ruby* [1989] 1 Q.B. 169. However, if the defendant is under the same mistake, the claimant will be estopped from seeking to extend the right claimed beyond that mistakenly believed to exist, e.g. if it was mistakenly believed that the claimant had a right of way for a term of years he would not be entitled to claim by prescription a perpetual easement because the acquiescence of the owner of the burdened land, which is the foundation of the presumption of grant raised by prescription, will itself be limited.
No licence Permission, as opposed to more toleration: see Marlborough (West End) Ltd v Wilks Head & Eve [1996] Ch 158 of R. v Oxfordshire County Council ex p. Sunningwell Parish Council [1999] 3 All E.R. 385, on the part of the person having control of the burdened land, insufficient to prevent use as of right. This is how a signboard granting general permission can prevent a right being acquired, as can physical interruption with the express intention of preventing, or at least rendering sufficiently ambiguous, the assertion of use as of right, e.g. the annual closure of a gate barring a way unless immediately protested by the claimant, see, for example, Rafique v Trustees of Walton Charities (1992) 65 P & C.R. 356 and the comments made in Gale on Easements (17th ed), paras 4-84 and 4-85. An oral permission will prevent the acquisition of a right, unless and until it has been asserted by continuous use for more than 40 years (or 20 years in the case of a right of light). A request for permission is an admission, and will always stop time running. An implied licence will be enough, see R. (Beresford) v Sunderland CC [2001] 1 W.L.R. 1327.

No force. Obviously a use which only takes place by virtue of physical violence will not be supported by the courts as a matter of principle. However, this requirement also relates to the presence or otherwise of contention. Contentious user is not user as of right, see for example Newnham v Wilson (1988) 56 P.C.R. 8. Whether contention only exists where there are physical interruptions or obstructions, or whether it may also consist of verbal protests is not clear, see also paragraph 10-30.

General legality. The use and enjoyment must not be contrary to custom, statute or the common law, although there are some very unusual cases where it has been held, in effect, that the right acquired by prescription would otherwise have amounted to a nuisance, see for example Royal Mail Steam Packet Co v George and Branday [1900] A.C. 480 which involved the blowing of coal dust onto the defendant’s land. The reverse side of this coin, is that use and enjoyment cannot be relied upon to found a right if it is not adverse to the rights of the owner of the burdened land i.e. he could not have prevented the use and enjoyment by action. Acquiescence is only material if it involves a surrender of right, see, for example, Sturgess v Bridgeman (1879) 11 CH D 852. As to user without planning permission see Batchelor v Marlow [2003] 1 WLR 764. A right of vehicular way cannot be acquired across common land, see paragraph 10.32.

Duration

The use must be continuous, and not intermittent or casual, although not necessarily incessant, depending upon the character of the easement claimed.
The following points should be considered.

If the provable period of continuous enjoyment by either the claimant or his predecessors in title does not exceed 20 years, there is little or no likelihood of a successful claim, but if it does exceed 20 years then consider whether the period of enjoyment continues uninterrupted (see section 4 of the Prescription Act 1832) to date. If so, there is a prima facie case of statutory prescription, see sections 2 and 3 of the 1832 Act (if the period exceeds 40 years (in the case of rights of light 20 years) the right acquire can only be defeated by roof of written licence). If not, there can be no statutory prescription; but

There may yet be a prima facie case of lost modern grant, otherwise;

It will be necessary to prove enjoyment since time immemorial, if any right is to be proved.

**Legal Incapacity**

Time will not run against, or in favour of, a person who is legally incapable of granting, or taking the grant, as the case may be. Thus, if at any time during the relevant period in a claim relying upon the doctrine of lost modern grant, or the required period in a claim relying upon statutory prescription, either the servient or dominant freehold owner is not a person with full legal capacity, there will be an interruption. For example, a person under a disability such as infancy, is incapable of making a grant of an easement, and therefore the period of his ownership will be discounted as an interruption in calculating the short period of 20 years for statutory prescription for every easement, save the right to light, see Section 7 of the 1832 Act. Time will continue to run despite disability in respect of the long period of 40 years, and in every case of prescription for a right to light. For a successful prescription however, the user relied upon must continue throughout the period of disability also, see Onley v Gardiner (1838) 4 M & W 496 and Clayton v Corby (1842) 2 Q.B. 813.

**Interruptions**

These may be physical perhaps, or, as a result of protests. In the case of prescription at common law they must be physical unless the protests are such as to show that there has been no user as of right. In all cases it must be known, or reasonably obvious, to the claimant that the intention is to interrupt or contest the exercise of the right asserted. In the case of statutory prescription (other than of a right to light) user as of right is a statutory requirement under Section 5 of the Prescription Act 1832.
Further, any interruption acquiesced in by the claimant for more than one year after the date upon which the claimant knew of the interruption, and the identity of the person making the interruption, will stop time running, see Section 4 of the 1832 Act. Any interruption physical or otherwise, should therefore be protested at once by or on behalf of a claimant, see Dance v Triplow (1991) 63 P. & C.R. 1 although it has been held that the commencement of proceedings by the owner of the burdened land will not of itself amount to an interruption. See Reilly v Orange [1955] 2 Q.B. 112. An absence of use for any period of time may or may not carry the necessary inference of discontinuity such as to stop time running.

Prescribing rights of way

There may be a private right of way over the same physical way as there is a public right of way. A public right of way may be stopped up or diverted under Section 116 of the Highways Act 1980, but that will not affect the continued existence of the private right. Equally, the existence of a private right of way is not inconsistent with the status of land which is burdened as common land save that a vehicular right of way cannot be acquired by prescription because acts relied upon must be lawful which driving across common land is not. The most common problem in relation to rights of way is in defining the precise nature and extent of the use permitted, and in determining whether some new use is truly analogous with that originally granted, or made over the period of acquisition. Use of a different kind or for a different purpose, which increases the burden on the burdened land, will be treated as excessive and, therefore, unlawful e.g. a right of way cannot be used for gaining access to land beyond the dominant tenement without express grant or necessary implication, see Peacock v Custins [2001] 2 AER 827. An interesting modern example is the case of Mills v Silver [1991] Ch. 271 where it was held that a prescriptive vehicular right of way had been acquired over a very rough and unmade hill track, but that this did not entitle the dominant owner to convert the track into one useable at all times of year, and in all weathers, by making it up with road stone, for the resultant use would be so different in kind as to increase the burden on the burdened land.

There is a further difficulty in relation to the rule that you cannot prescribe for a right by relying on unlawful acts. This is in relation to the informal acquisition of vehicular rights of way. The first seismic shock in this regard came with the decision of the Court of Appeal in Hanning v Top Deck Travel Group (1994) 68 P & CR 14 when they held that because driving a vehicle over common land was made a criminal offence by Section 193(4) of the Law of Property Act 1925 such acts could not be relied upon in order to found a prescriptive vehicular right of way. This has now been confirmed in Bakewell Management v Brandwood [2003] 9 EG 198 which may be going to the House of Lords
and taken further by *Massey v Boulden* [2003] 11 EG 154 in which case the Court of Appeal has held that the reference in Section 34(1) of the Road Traffic Act 1988 to “other land” means any other land and that “roads to which the public have access” means public highways only so that it would appear that vehicular rights of way can no longer be acquired by prescription over any privately owned land with the possible exception of a privately owned lane over which there is a public bridleway or footpath. This extreme position is modified by the Vehicular Access Across Common and Other Land (England) Regulations 2002 made under the Countryside and Rights of Way Act 2000 which provides a statutory mechanism for the acquisition of vehicular rights by way of purchase.

This is analogous with the general rule where a right of way is expressly, or by necessary implication, granted without defining works, in which case it is the physical size and capacity of the way itself, as it existed at the date of the relevant deed, which defines the use which may lawfully be made of it (but see the reference to *Forestry Commission v Omega Pacific Ltd*, in paragraph 10-07). So a grant of a way over an unmade up rough hill track, impassable at certain times of the year, or in certain weather conditions could not be extended by making up the surface to an all weather condition, see *Mills v Silver* [1991] Ch.271.

There is no right to deviate save where the way is obstructed artificially by action of the owner of the burdened land or some other person. A right of way does not necessarily carry with it a right to pass for longer than is necessary to load and unload, and the latter ancillary right is only available where the circumstances warrant it as necessary rather than convenient. There is a difference between a right to pass and repass over a way and a right to “use” a way in these respects.

There is an implied ancillary right to make up the way, see *Nationwide Building Society v James Beauchamp* [2001] 3 EGLR 6 EWCA Civ. 275.

**Prescribing for a right to light**

This is expressly dealt with in Section 3 of the Prescription Act 1832. The necessary use and enjoyment need not have the character of being use and enjoyment “as of right”. Further, a minimum period of 20 years continuous use and enjoyment will be indefeasible, save by proof of a written licence. No disability on the part of the owner of the burdened land will prevent time from running. No tenancy of the burdened land can prevent time from running. The acquisition of a right to light by prescription can be interrupted not only physically, but by registration of a notice in the local land charges register under section 2 of the Rights of Light Act 1959. Such notice is a “virtual”
obstruction and must specify the size of such obstruction. The application cannot be made until the Lands Tribunal has certified that notice of the application has been given to all persons affected. The notice is effective for one year and thus fulfils the purpose of stopping time under the 1832 Act from running. The person claiming to have acquired the relevant right to light by prescription must bring an action within the period of the notice, objecting to it as an interruption and the notice will be disregarded for the purpose of calculating the necessary period of 20 years uninterrupted use and enjoyment. If such an action is lost the court may order that the action is not to be treated as an effective protest for the purpose of calculating the period of one year of acquiescence necessary to stop time running under the 1832 Act, see Section 3(6) of the 1959 Act.

The natural right to light is to all light falling vertically upon the land. There is no natural right to horizontal light. Such a right must either be formally granted (which is in practice highly unusual although such a right may be acquired by implied grant in respect of a specific building) or prescribed for. Such “ancient light” can only be acquired in respect of particular windows and the extent and nature of the easement is determined by the size and conformation of those windows (not of the rooms behind them).

The principal difficulty relating to rights of light is in determining whether there has been an actionable interference, or it is only when the light is physically reduced to a level constituting a nuisance that there is a cause of action. The advice of a qualified expert is almost always necessary at the earliest possible stage. The leading case is Colls v Home and Colonial Stores Ltd [1904] A.C. 179. In London there is an ancient custom which is still enforceable, to the effect that anyone may rebuild on an ancient foundation to any height, even if his neighbour’s ancient lights are interfered with. However, this only applies where the neighbour’s right to light is founded upon grant or common law prescription, because section 3 of the Prescription Act 1832 expressly negatives the operation of local custom.

Estoppel

It is possible to acquire an easement by relying on the doctrine of estoppel in respect of which further reference ought to be made to Snell’s Equity (30th ed., Chap.39).

RIGHTS OF WAY
The owner of a private right of way is entitled to maintain an action and recover nominal damages for an obstruction, although no special damage is proved, as may a reversioner where the obstruction is of a permanent character and injurious to his reversion (Kidgell v Moore [1850] 9 C.B. 364). Similarly, injunctive relief may be claimed to abate a nuisance caused by an obstruction of a right of way. Obstruction of a right of way does not occur without the existence of an actionable nuisance, and there is no nuisance if the way can conveniently be exercised even though part of its width is obstructed (Keefe v Amor [1965] 1 Q.B. 334; Celsteel v Alton House Holdings [1984] 1 W.L.R. 204).

Like a right of light, a right of way may be expressly or impliedly granted, or its grant may be presumed by reason of long user, or it may be acquired by prescription under the Prescription Act 1832 s.2, or at common law as user since time immemorial. The use required by the Prescription Act must be such as to raise a reasonable inference of a fairly continuous enjoyment of the right claimed, and use on infrequent and special occasions only is not sufficient (Hollins v Verney [1884] 13 Q.B.D. 304). Further, the enjoyment required by s.2 of the Act must be “as of right”, and not by force or by permission or secretively. There is no use as of right where the enjoyment is under an agreement in return for a payment. Where the use is insufficient to support a prescriptive right under the Prescription Act, as where there has been an interruption of enjoyment within the statutory period or where enjoyment ceased before the commencement of the action, a defence of a right of way may be sustained under the doctrine of lost modern grant. Such a grant may be presumed from acts of ownership or of enjoyment for 20 years and more consistent with the grant alleged. Such a grant will not be presumed if it would be contrary to the provisions of a statute (Neaverson v Peterborough RDC [1902] 1 Ch. 557 (letting herbage in breach of the Enclosure Acts). However there is no requirement of public policy that prevents the acquisition of an easement by long and uninterrupted use in breach of a statutory prohibition where it would have been lawful for the landowner to make such a grant and where such a grant would have removed the criminality of user: Bakewell Management Ltd v Brandwood [2004] UKHL 14; [2004] 2 W.L.R. 955. (Holding that the decision in Hanning v Top Deck Travel Group Ltd [1994] 68 P. & C.R. 14 (no grant presumed where driving on a common without permission contrary to s.193 of the Law of Property Act 1925) was wrong).

A right of way of necessity is an incident to a grant of land, where there is no access to the land granted except over remaining land of the grantor; and such a right may exist where there is, conversely, no access to the remaining land of the grantor save over the land granted (“an easement
of necessity is one without which the property cannot be retained at all, and not one merely necessary to the reasonable enjoyment of that property”: Union Lighterage Co v London Graving Dock Co [1902] 2 Ch. 557 at 573. See also Sweet v Sommer [2004] EWHC 1504 (Ch)) [2004] 4 All E.R. 288 affirmed [2005] EWCA Civ 227; [2005] 2 All E. R. 64. But mere necessity, apart from the relationship of grantor and grantee, does not give any right of way over the land of another (Bullard v Harrison [1815] 4 M. & S. 387); and a defence on the ground of a right of way of necessity must show how it arises by way of grant (Proctor v Hodgson (1855) 10 Ex. 824). The right is limited to that which is necessary at the time of grant (Corporation of London v Riggs (1880) 13 Ch. D. 798). A right of way may also be implied, by reason of necessity, upon the conveyance of lands in several parcels (Pearson v Spencer (1861) 1 B. & S. 571; 3 B. & S. 761).

There will be a defence to a claim of trespass if the defendant was exercising a public right of way. A public highway generally must lead from one public place to another (Att. Gen. v Antrobus [1905] 2 Ch. 188). It will therefore be difficult to infer dedication from use of a cul-de-sac (Oldham v Sheffield Corporation (1927) 43 T.L.R. 222). At common law, the dedication of a public right of way can be presumed from uninterrupted user by the public as of right (see Poole v Huskinson (1823) 11 M.W. 830; Att. Gen. v Dyer [1947] 1 Ch.67). By Highways Act 1980 s.31, where there has been user as of right and without interruption for a period of 20 years, the way is deemed to have been dedicated as the highway unless there is sufficient evidence that there was no intention during the period to dedicate the way as to which see R. (on the application for Godmanchester Town Council) v Secretary of State for the Environment, Food and Rural Affairs [2007] UKHL 28; [2007] 3 W.L.R. 85. Thus, a single act of interruption may be of significant weight (Lewis v Thomas [1950] 1 K.B. 438 at 446). The owner must, however, overtly prevent people from using the right of way; evidence that the owner was merely tolerating use and did not intend to dedicate is insufficient (Cumbernauld and Kilsyth DC v Dollar Land (Cumbernauld) Ltd [1992] S.L.T. 1035; R. (on the application of Beresford) v Sunderland [2002] 1 P. & C.R. 585). The act provides that the erection by the owner of the land of a suitably visible notice inconsistent with dedication is, in the absence of proof of contrary intention, sufficient evidence to negative dedication. The statutory presumption does not prevent a common law dedication being inferred (Merstham Manor v Coulsdon U.D.C. [1937] 2 K.B. 77).

RIGHTS OF DRAINAGE

A right of drainage may be created or acquired in essentially the same way as a right of way. But where a grant would have been contrary to some public law (as distinct from a private right of
ownership), for example drainage of sewage effluent into a stream which flows into a river without a licence from the appropriate water authority, the law will not presume a lost modern grant of such a right: (Neaverson v Peterborough RDC [1902] 1 Ch. 557, a case in which, on the facts, the owners of the soil would not have been able to release the restriction) (cf. Bakewell Management Ltd v Brandwood [2004] UKHL 14; [2004] 2 W.L.R. 955 where the owner of the common would have been able to grant the easement).

The owner of one or other bank of a natural stream (other than a tidal stream), that is, the riparian owner, has certain natural rights:

To use the water;

To a natural unimpeded flow of water;

And to freedom from water pollution.

Such an owner may also have acquired rights to construct and maintain jetties or other structures on the stream bed, as he owns it up to the mid-point, subject to any inconsistent rights such as navigation and the unimpeded flow of the stream. These natural rights are subject to statute: the Water Act 1989 and the Water Resources Act 1991. These natural rights result in a web of mutual rights and obligations between all riparian owners, and extraordinary user in breach of these rights is actionable as a tort without proof of actual damage.

There is a very close connection between the law of nuisance and the law of easements especially in relation to drainage, light and support. Until very recently it was thought that the owner of land is not liable for the discharge of water naturally on his land onto the land of another, provided that he has not artificially concentrated, retained or diverted that run-off. This is not the case. The Court of Appeal in Green v Lord Somerleyton [2003] 11 EG 152(CS) has applied the principles set out in Leakey v National Trust to water thus imposing a measured duty of care on the owner. (NB some writers have suggested that the application of the Leakey principles in cases of positive easements especially support e.g. Rees v Skerret [2001] 1 WLR 1541 is contrary to principle as set out in the speeches of the House of Lords in Dalton v Angus which has hitherto been the authority on the law of prescription in relation to building and is also contrary to principle in relation to the law of nuisance as set out by the House of Lords in Hunter v Canary Wharf [1997] AC 655). The owner of a dyke or drain or other artificial watercourse is of course at risk in case of flood, see Bybrook Barn Garden.
Centre v Kent County Council [2001] LGLR 27. However, a right to drain surface water which has not been collected e.g. by a roof or drain, cannot be acquired by prescription because of the natural liberty to allow water to flow over one's land subject only to the measured duty of care, see Palmer v Bowman [2001] 1 WLR 842. The owner of land exposed to the risk of flooding from neighbouring land is entitled to protect his land from flood by reasonable physical measures regardless of the consequences, provided that he does not act maliciously or unreasonably, see Home Brewery Co v William Davis & Co (Loughborough) [1987] QB 339. Ground water cannot be owned so as to give rise to a right to prevent others from draining it off. Rights going beyond the natural rights of riparian owners or interfering with them may be prescribed for or granted in respect of:

The use, flow or pollution of water flowing in a defined channel whether natural or artificial;

Diversion or drainage of water, through artificial channels or pipes or otherwise, including a right to drain a roof of rainwater (the right of eavesdrop).

There can be no rights to ground water.

A river may be publicly navigable, but this is only the case where it is physically capable of navigation, and there has been either express dedication by all the riparian owners, or use by the public since time immemorial.

Ancillary rights and obligations

If an easement is granted, the grant carries with it by necessary implication all such ancillary rights as are reasonably necessary to its exercise, e.g. a wayleave for power cables includes the right to erect the necessary pylons; a right of way includes the right to repair and surface the way in such a manner as will make it useable, see Nationwide Building Society v James Beauchamp [2001] 3 EGLR 6. These rights entitle the dominant owner to prevent any action which will interfere with the exercise of the ancillary rights, e.g. a person having a right to lay and maintain a pipe may obtain an injunction to prevent the construction of a building over it so as to make it impossible to carry out repairs, see Goodhart v Hyett (1883) 25 Ch. D. 182 and Abingdon Corporation v James [1940] CH. 287. However, the ancillary rights do not impose an obligation on the dominant owner to carry out remedial works although, if the easement cannot otherwise be exercised without trespass or nuisance, he may be practically forced to do so e.g. a right to lay and maintain a pipe carries with it the practical necessity to keep it watertight.
Neither does the grant of an easement of itself, without express contractual or statutory provision, oblige the servient owner to carry out remedial works, e.g. a right of way over a bridge does not impliedly oblige the servient owner to keep the bridge in repair, see Jones v Pritchard [1908] 1 Ch 630. However, in this regard the Occupiers’ Liability act 1984 and the law of negligence must be borne in mind, but also see the House of Lords decision in McGeown v Northern Ireland Housing Executive [1995] 1 A.C. 233 where it was doubted that the freeholder of the servient land is the “occupier” of the soil of the way for the purpose. (There is a useful discussion of this point in Gale on Easements (17th ed.) paras 1-91 to 1-97) An easement subject to payment, is probably not conditional upon payment but the right to payment, as well as being enforceable against the original covenantor in contract, is probably enforceable against his successors in title under the principle that whoever takes the benefit must also take the burden, see Halsall v Brizell [1957] Ch. 169, a decision which was approved by the House of Lords in Rhone v Stephens [1994] 2 W.L.R.429. It has very recently been held by the Court of Appeal in Konstantinides v Townsend [2003] LTL AC92500983 that for payment to be a condition of exercise of the right there must be a clear correlation between use and the works for which payment is to be made.

RIGHTS OF LIGHT

A “right to light” is an easement giving a landowner the right to receive light through apertures (commonly windows) in buildings on their land. The easement comprised in a right to light is a legal right, like other legally enforceable easement over property (e.g rights of way). Buildings can acquire a right of light by direct grant or reservation (i.e. in a transfer or other conveyance) but by far the most common means is by long usage for 20 years or more, otherwise known as “prescriptive rights” by virtue of the Prescription Act of 1832. Therefore, unlike most easements, a right of light does not normally arise through express agreement between landowners but rather through a long uninterrupted enjoyment of the flow of natural light. Thus, if a building has had windows in it, in the same place, for 20 years or more, rights of light will have been acquired. Particularly in city environments, this can act as a brake on a development, or at least require the develop to negotiate a settlement with neighbouring owners whose rights to light may be infringed by a development.

These rights are rarely registered at the Land Registry and do not need to be registered to be legally binding. In most cases, those enjoying a right to light or those burdened by it will be wholly unaware of its existence. The owners of land burdened by the right cannot interfere with it by constructing a building in such a way as to obstruct the flow of light, for example, without the consent of the benefitting party.
Rights to light are valuable as they provide certainty that a property will continue to enjoy the flow of sunlight.

The planning system does not take account of private rights and so a right of light can have an impact on development even where full planning permission has already been obtained. The existence of a right can prevent construction which would interfere with it and can even result in the building being demolished after the fact. A court may order damages in lieu, but recent case law has reconfirmed the court’s refusal to legalise a wrong simply because a party is willing to pay damages.

As indicated, commonly, rights to light are acquired by prescription. To acquire a prescriptive right of light under the Prescription Act 1832, a party must have had uninterrupted enjoyment of the light for 20 years. This means that if a building’s windows enjoy light over neighbouring land for 20 years, then the owner of the adjoining land can acquire rights of light over the neighbouring land.

The principle that a building can enjoy rights of light through specific windows is well established in law. Rights can be created either by express agreement, or by prescription after more than 20 years use.

Once a right is established, any obstruction which causes a reduction in light below legally acceptable levels will be actionable. In principle, one of the remedies available is an injunction to prevent the obstruction (as well as damages).

However, it is a matter for the court’s discretion whether to grant an injunction. Courts have usually been willing to exercise that discretion provided the claimant can establish an actual or potential infringement which goes beyond the trivial (Shelfer v. City of London Electric Lighting Company [1895] 1 CH 287).

Certain overriding principles can be stated:

- rights of light can be obtained solely through “defined” window openings;
- a right is not necessarily to the same standard of light as currently enjoyed;
- there is no right to an exceptional amount of light but only to sufficient light “for the ordinary notions of mankind”;
- generally (there being one exceptional case) it has been held that there is no right to sunlight and there is no right to a particular “view”.
A right to light cannot be acquired over adjoining land which is the same ownership (known as “unity of seisin”). Thus, the property claiming a right to light, and neighbouring properties should therefore have been in different ownerships for at least twenty years.

When the owner of a neighbouring property considers that his rights of light are about to be significantly infringed his remedy in law is an action in nuisance against the developer to restrain him from making the infringement. The remedy is therefore an equitable one in the form of an application for an injunction. In general, the action for an injunction is allied with an action for damages. Where an infringement of a right of light exists, careful consideration needs to be given to whether the injury warrants an injunction, or simply damages.

Easements of light are negative easements; they do not involve one person doing something on another’s land. Instead, they prevent someone from doing something on his or her own land. Rights to light prevent a landowner from obstructing a neighbour’s light, and similarly a right of support prevents a landowner from removing a structure that supports an adjoining building. Prescription for a negative easement does not involve doing anything, but rather receiving something, such as structural support or light.

THE CURRENT LAW

There are currently three kinds of prescription:

(1) prescription at common law;

(2) prescription by lost modern grant; and

(3) prescription under the Prescription Act 1832.

Prescription at common law requires continuous enjoyment of the right claimed (openly, without force, and without permission) since 1189. It is therefore very rarely of any practical use, especially in the rights to light context where buildings are likely to have been built, demolished and/or altered significantly since that date.

Prescription by way of lost modern grant is a legal fiction: where there has been enjoyment of the right claimed for 20 years, without interruption, force, or permission, the law will presume that there must have been a grant of the right which has somehow been lost (See Tehidy Minerals Ltd v
Norman [1971] 2 QB 528, 552). This presumption can be rebutted by showing there was nobody who could lawfully have made the grant throughout the entire 20-year period, in which case no easement is created.

The Prescription Act 1832 created two new and distinct prescription regimes: one for rights to light and another for other easements. The rights to light regime provides that where light has been enjoyed across another’s land for 20 years without interruption (interruption has a technical meaning in this context. The 1832 Act provides that non-use less than one year does not count. This leads to the peculiar result that prescriptive use for 19 years and one day, which then stops because it is prevented by the servient owner, will nevertheless almost certainly result in an easement, provided that the dominant owner brings a “suit or action” to crystallise the right on the twentieth anniversary of starting to use the light) and without the written consent or agreement of that landowner, (Prescription Act 1832, s.3) a right to light will arise. Unlike most modern grant or common law prescription claims, under the 1832 Act the 20-years’ enjoyment must be, in the words of the statute, “next before some suit or action”. That means that the 20 years must immediately precede an application to court by the person who claims the right (Prescription Act 1832, s.4. This might be, for example, a claim for nuisance by the dominant owner where the light is interrupted). It is not clear whether an application to Land Registry for registration of the right is equally effective as a “suit or action” (There is little authority as to what constitutes a “suit or action”, several leading texts appear to regard an application to court as being necessary (see C Harpum, S Bridge and M Dixon, Megarry & Wade: The Law of Real Property 8th ed 2012), and K Gray and S F Gray, Elements of Land Law 5th ed 2009). In Wilkin & Sons v Agricultural Facilities Ltd (REF/2011/0420) the Adjudicator to HM Land Registry concluded that “the making of the application [to Land Registry] to register an easement] constitutes a ‘suit or action’”. The recommendation made in the Easements Report for the introduction of a new method of prescription (to replace the three existing methods) makes no provision for a “next before” requirement and, accordingly, any lack of clarity in the existing law will be eliminated following the enactment of that recommendation).

As owner of land has no right of light at common law. Such an easement must either have been granted or reserved, or acquired by prescription under the Prescriptions Act 1832 or at common law since time immemorial. The grant of an easement may be express, implied or presumed. Generally, rights of light are acquired by prescription under Prescription Act 1832, s.3, by 20 years’ actual and uninterrupted enjoyment of light through a defined aperture in the building of the dominant owner without the consent in writing of the servient owner (as to consent, see Willoughby v Eckstein [1937] Ch. 167. An interruption for the purposes of the Act means an adverse obstruction lasting for at
least a year, not a mere discontinuance or voluntary cessation of use (Smith v Baxter [1900] 2 Ch. 138 at 143). These rights of light so acquired are traditionally referred to as “ancient lights”. If a building is altered so that the windows are moved, the rights of light are not lost provided there is some substantial correlation between the former position of the ancient lights and the position of the new windows (Barns v Loach [1879] 4 Q.B.D. 494; Pendarves v Monro [1892] 1 Ch. 611).

A right to the access and passage of air through channels over the servient property into buildings of the dominant owner may be created as a result of long enjoyment, under the fiction of lost grant, by express or implied grant, or by prescription under Prescription Act 1832 s.2, or at common law since time immemorial.

In order to maintain a claim for obstruction of a right of light, there must be (or be threatened) a diminution of light entering the premises such as to make them substantially less fit for the purposes of business or occupation. Thus, the true question to be asked is how much light is left, rather than how much has been taken away. As to the standard of light required to survive in order to eliminate the existence of a nuisance, see Fishenden v Higgs [1935] L.T. 128 (dwelling) and Charles Semon & Co Ltd v Bradford Corp [1922] 2 Ch. 737 (business premises). Whether interference amounts to a nuisance does not depend exclusively on past use of the dominant tenement, but also on possible future uses (Carr-Saunders v Dick McNeal Associates [1986] 1 W.L.R. 922). The modern trend has been to require a higher standard of lighting. The claimant may claim either damages, or an injunction, or both. Where the obstructing building has been built, damages may be the appropriate remedy, whereas an injunction to restrain a threatened nuisance by construction of a building must be applied for in good time although in HKRUK II (CHC) Ltd v Heaney [2010] EWHC 2245 (Ch); [2010] 44 E.G. 126 a mandatory injunction was granted notwithstanding that the development was partially occupied. The principles to be followed in determining whether an injunction should be granted are set out in Regan v Paul Properties DPF No 1 Ltd [2006] EWCA Civ 1319; [2006] 46 E.G. 210. The court may grant damages in lieu of injunctive relief (Leeds Industrial Co-operative Society v Slack [1924] A.C. 851), and in many cases the claimant will be satisfied with pecuniary compensation which reflects the amount for which the necessary rights might have been sold as, in effect, “ransom” rights far exceeding loss of amenity: see Tamares (Vincent Square) Ltd v Fairpool Properties (Vincent Square) Ltd [2007] 14 E.G. 106. The owner of a reversion on a lease of the dominant tenement may bring a claim for damages or for injunctive relief.
Where the owner of the ancient lights resorts to self-help to abate a nuisance obstructing the lights, it is considered reasonable to give notice (Commissioners of Sewers v Glasse [1972] 7 Ch. App. 456). The burden of proof is upon the defendant to show that he had a right in law to deal with the obstruction.

Where it is sought to prevent a right of light being acquired, there is statutory process of registering an obstruction notice under the Rights of Light Act 1959 (see Bowring Services v Scottish Widows Fund and Life Assurance Society [1995] 1 E.G.L.R. 158).

HOW MUCH LIGHT DOES A RIGHT TO LIGHT CONFER?

BACKGROUND: THE CURRENT LEGAL TEST

The extent of an easement can normally be determined by its express terms, or by the use that gave rise to it. So an express grant of a vehicular right of way entitles the dominant owner to drive along that route; and a prescriptive right of way, acquired by driving across land, remains an entitlement to do so at the frequency and with the sort of vehicles used in the course of its creation.

An easement of light is different; despite popular belief, it does not guarantee the continuance of the level of light that the dominant owner has always enjoyed. A diminution in the light, caused by the servient owner (for example by an obstruction), will not infringe the right to light unless the test for infringement is satisfied. And so to answer the question – how much light does a right to light confer? – we have to turn it round and ask what level of obstruction or diminution of light will amount to an infringement of the right.

The leading legal authority on this point is Colls v Home and Colonial Stores Ltd, in which Lord Davey said that the dominant owner is entitled to:

... the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind... ([1904] AC 179, 204).

The dominant owner’s entitlement was summarised more recently by Lord Justice Goff (as he then was) in Allen v Greenwood. He said that the dominant owner was entitled to:
... the light required for the beneficial use of the building for any ordinary purposes for which it is adapted ([1980] Ch 119, 130).

This test is a subjective one; the dominant owner’s entitlement depends upon a judge’s own interpretation of what quantity of light is suitable for the ordinary purposes for which the benefited property is adapted.

When applying this test in Carr-Saunders v Dick McNeil Associates Ltd, Mr Justice Millett (as he then was) held that the court is entitled to take into account potential future uses of the dominant property, including sub-division of the property which would result in different room configurations ([1986] 1 WLR 922, 930). So the dominant owner may argue that although the light – following the obstruction – is adequate in the current open-plan office, it will be inadequate when the space is divided into smaller offices, as he or she plans to do. Such arguments must be based on credible evidence, such as a grant of planning permission or design plans for the building; the dominant owner is not entitled simply to dream up a plan and claim the light needed for it (See Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd [2006] EWHC 3589 Ch, [2007] 1 WLR 2148).

The dominant owner’s use of artificial light is not taken into account by the court when considering whether a nuisance has occurred (although it can be relevant when the court considers whether to award damages or an injunction (Midtown Ltd v City of London Real Property Co Ltd [2005] EWHC 33 (Ch), [2005] EGLR 65 at (61), (62) and (79).

THE DISCRETION TO GRANT DAMAGES INSTEAD OF AN INJUNCTION

The Shelfer Test

The case of Shelfer v City of London Electric Light Company ([1895] 1 Ch 287) ("Shelfer"), which Lord Justice AL Smith said it was a “good working rule”, is that a court may award damages in substitution for an injunction:

1) if the injury is small; and

2) is one which is capable of being estimated in money; and
(3) is one which can be adequately compensated by a small money payment; and

(4) the case is one in which it would be oppressive to the defendant to grant an injunction (1 Ch 287, 322-323).

The court in Shelfer also discussed other considerations, including the effect of the conduct of the parties (“There may... be cases in which ... the defendant by his conduct, as, for instance, hurrying up his buildings so as if possible to avoid an injunction, or otherwise acting with a reckless disregard to the plaintiff’s rights, has disentitled himself from asking that damages may be assessed in substitution for an injunction”; AL Smith LJ 1 Ch 287, 323), but the focus in recent decisions has been on the four numbered criteria above. There appears to have been a tendency for them to be seen by the courts as “tick boxes”, all of which have to be satisfied in order for the court to award damages in substitution for an injunction (See HKRUK II (CHC) Ltd v Heaney [2010] EWCH 2245 (Ch), [2010] 3 EGLR 15 at [61] and [72] and Jacklin v The Chief Constable of West Yorkshire [2007] EWCA Civ 181, (2007) 151 SJB 261 at [48]. Also see S Bickford-Smith and N Taggart, “Don’t be left in the dark” (2012) 1235 Estates Gazette 64, 66). Commentators have argued that this approach fails to give proper weight to the key issue of oppression (the fourth limb of the guidance), (see S Bickford-Smith and N Taggart, “Don’t be left in the dark” (2012) 1234 Estates Gazette 64) so that developers have borne losses out of all proportion to those that would have been suffered by the dominant owner if the injunction had been refused (Consultation Paper, para. 5.42. The developer’s losses could include, for example, being prevented from developing the property for letting or sale or being required to demolish a part which has already been built).

A particular difficulty is the word “small”: it has been difficult to predict whether an injury will be judged by the court to be “small”, and to assess what is meant by a “small money payment”, as there is little consistency in the case law (Some courts have approached this issue by considering whether the sum that the court would award as equitable damages was “small”, whereas in other cases the court had used the figure that would be payable as common law damages (and in some cases the court has looked at both). This can make a difference to the outcome of the case, as the equitable damages figure is likely to be significantly larger than the common law equivalent. See the Consultation Paper, paras. 5.18 to 5.23 and 5.44. The better view appears to be that equitable damages is the relevant measure: Jaggard v Sawyer [1995] 1 WLR 269, 282 by Sir Thomas Bingham MR).
The case of *HKRUK II (CHC) Ltd v Heaney* ([2010] EWHC 2245 (Ch), [2010] 3 EGLR 15) (“Heaney”) provided a useful illustration of the courts’ approach to the criteria in *Shelfer*, and has been the focal point of much criticism of the current law. This was an unusual case where the court proceedings arose not from an application for an injunction by the dominant landowner, but from an application by the developer for a declaration as to its liability to the dominant owner. The dominant land was a recently restored historic building in the centre of Leeds.

In examining whether the injury to the dominant owner was small, the court looked at a number of factors, including the amount of adequately lit space lost; the amount of light lost in specific areas (including a boardroom described as one of the “star rooms” of the building); the amount of light lost in other areas which would not be actionable; and the character of the building and the commitment demonstrated in restoring it. The judge received submissions that common law damages – being the loss in value of the building arising from the loss of light – would have amounted to 2% of the value of the building, and concluded that the claimant’s injury was not small.

The court therefore decided to award an injunction – an order requiring the demolition of the top two storeys of the new building, some of which had already been let by the developer. That decision was met with some surprise, particularly in view of the fact that the dominant owner’s inaction, and the long delay and uncertainty that that caused for the developer, were given so little weight.

**The decision in Coventry**

The Supreme Court has revisited this issue in the case of *Coventry* ([2014] UKSC 13, [2014] AC 822).

The case concerned nuisance to the claimants’ home caused by noise generated at the defendants’ nearby speedway track, at which the defendants carried out racing events in accordance with planning permission. In their judgments, the Supreme Court Justices made general comments as to when it is appropriate to grant an injunction to restrain an infringement of property rights. These comments should therefore carry great weight not only in relation to nuisance claims (of noise or any other variety) but also to claims in respect of breaches of restrictive covenants, or the infringement of easements including rights to light.

The Supreme Court’s remarks on remedies are framed generally, and Lord Neuberger expressly said that he did not see rights to light cases as involving special rules ([2014] UKSC 13, [2014] AC 822 at (122). Lords Sumption and Clarke similarly applied the reasoning of rights to light cases in their
judgments without question). However, Lord Carnwath’s view was that the courts should be cautious of “too direct a comparison” with rights to light cases as these tend to involve the “drastic alternatives” of removing an offending building or leaving the obstruction in place, whereas injunctions in noise nuisance cases can be more flexible, allowing continuation within reasonable limits, perhaps combined with an award of damages ([2014] UKSC 13, [2014] AC 822 at [167]. However, a number of cases considered by the court, in reaching its conclusion as to the appropriate remedy, concerned disputes involving rights to light (for example, Fishenden v Higgs and Hill Ltd [1935] All ER Rep 435, Colls v Home and Colonial Stores Ltd [1904] AC 179 and Regan v Paul Properties DPF No 1 Ltd [2006] EWCA Civ 1319, [2007] Ch 135). Lord Mance endorsed Lord Carnwath’s view and indicated that he was not persuaded that rights to light cases involve the same considerations, though he invited argument on the point in future cases ([2014] UKSC 13, [2014] AC 822 at [247]).

An injunction is still the primary remedy. Lord Neuberger said:

I would accept that the prima facie position is that an injunction should be granted, so the legal burden is on the defendant to show why it should not.

... However...when a judge is called on to decide whether to award damages in lieu of an injunction, I do not think that there should be any inclination either way (subject to the legal burden discussed above) (Coventry v Lawrence [2014] UKSC 13, [2014] AC 822 [121] and [122]. Lord Clarke wished to reserve this question in the absence of submissions on the point, at [170]. The remaining justices did not comment on the matter but stated elsewhere their broad agreement with Lord Neuberger’s judgment).

This would appear to suggest that the dominant owner whose right to light is infringed will, all other things being equal, be able to obtain an injunction to prevent the infringement, but that it is now easier for the servient owner to persuade the court not to grant one. In the absences of argument or evidence about damages, the remedy remains an injunction.

However, the Supreme Court unanimously disapproved of “slavish” ([2014] UKSC 13, [2014] AC 822 at (161) by Lord Sumption) and “almost mechanical” ([2014] UKSC 13, [2014] AC 822 at (119) by Lord Neuberger) applications of the Shelfer criteria. The approach to Shelfer that requires all four boxes to be ticked before damages can be awarded is now at an end, as is the view that damages can only be awarded in exceptional circumstances ([2014] UKSC 13, [2014] AC 822 at (119), (123) by Lord
Neuberger. At (115), Lord Neuberger explained that: In *Watson v Croft Promosport* [2009] 3 All ER 249, the Court of Appeal reversed the trial judge’s decision to award damages instead of an injunction. At para 44, Sir Andrew Morritt C described “the appropriate test” as having been “clearly established by the decision of the Court of Appeal in *Shelfer*”, namely “that damages in lieu of an injunction should only be awarded under ‘very exceptional circumstances’”. He also said that *Shelfer* “established that the circumstance that the wrongdoer is in some sense a public benefactor is not a sufficient reason for refusing an injunction”, although he accepted at para 51 that “the effect on the public” could properly be taken into account in a case “where the damage to the claimant is minimal”). Such approaches are “simply wrong in principle, and give rise to a serious risk of going wrong in practice” ([2014] UKSC 13, [2014] AC 822 at (118) by Lord Neuberger).

Lord Neuberger explained that the power to award damages instead of an injunction “involves a classic exercise of discretion which should not, as a matter of principle, be fettered” ([2014] UKSC 13, [2014] AC 822 at (120)). But he added:

... it is only right to acknowledge that this does not prevent the courts from laying down rules as to what factors can, and cannot, be taken into account by a judge when deciding whether to exercise his discretion to award damages in lieu. Indeed, it is appropriate to give as much guidance as possible so as to ensure that, while the discretion is not fettered, its manner of exercise is as predictable as possible. ([2014] UKSC 13, [2014] AC 822 at (121).

Little such guidance was given in *Coventry* itself, save that it is clear that the court must consider all factors that are relevant. (Lord Neuberger said that he “cautiously (in the light of the fact that each case turns on its facts) approve[d] the observations of Lord Macnaghten in *Colls v Home and Colonial Stores Ltd* [1904] AC 179, 193, where he said: ‘In some cases, of course, an injunction is necessary – if, for instance, the injury cannot fairly be compensated by money – if the defendant has acted in a high-handed manner – if he has endeavoured to steal a march upon the plaintiff or to evade the jurisdiction of the Court. In all these cases an injunction is necessary, in order to do justice to the plaintiff and as a warning to others. But if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think that the Court ought to incline to damages rather than to an injunction. ...’”). However, a new factor is to be afforded relevance, namely the public interest. (Previously the public interest was only relevant in exceptional circumstances, for example where necessary for the defence of the realm: see *Dennis v Ministry of Defence* [2003] EWHC 793 (QB), [2003] Env LR 34 and J McGhee, *Snell’s Equity* (32nd ed. 2010)). The majority saw this as a wide ranging idea, involving not only the public interest in the activity that was
causing the nuisance (and therefore, we may speculate, in the development that might infringe the right to light) but also the public interest in employment and the interests of those whose livelihoods are bound up in the nuisance ([2014] UKSC 13, [2014] AC 822 at (118) and (124) and following Lord Neuberger and at (239) by Lord Carnwarth). Planning permission is not to be regarded as raising a presumption against an injunction, in view of the majority, ([2014] UKSC 13, [2014] AC 822 at (127) by Lord Neuberger; at (246) by Lord Carnwath. Contrast the views of Lord Sumption at (161) where he argued that: There is much to be said for the view that damages are ordinarily an adequate remedy for nuisance and that an injunction should not usually be granted…) but it is given a new importance:

In some cases, the grant of planning permission for a particular activity (whether carried on at the claimant’s, or the defendant’s, premises) may provide strong support for the contention that the activity is of benefit to the public, which would be relevant to the question of whether or not to grant an injunction ([2014] UKSC 13, [2014] AC 822 at (125) by Lord Neuberger).

However, the public interest can cut both ways; the Supreme Court also suggested that the fact that many others in addition to the claimant may be badly affected by a nuisance would point in favour of granting an injunction ([2014] UKSC 13, [2014] AC 822 at (124)). Other relevant factors mentioned included the possible waste of resources an injunction would bring about (particularly if on account of a single claimant), whether an injunction would stop the tortfeasor’s activities altogether, and the proportionality of the financial implications of an injunction to the damage done to the claimant. Lord Neuberger said:

... the court may well be impressed by a defendant’s argument that an injunction would involve a loss to the public or a waste of resources on account of what may be a single claimant, or that the financial implications of an injunction for the defendant would be disproportionate to the damage done to the claimant if she was left to her claim in damages. In many such cases, particularly where an injunction would in practice stop the defendant from pursuing the activities, an injunction may well not be the appropriate remedy ([2014] UKSC 13, [2014] AC 822 at (126)).

Proportionality is a powerful and pervasive idea in the law. At its simplest, in this context, the idea is not that one consideration should outweigh another if it is simply greater; rather, it is that one consideration should outweigh another only if is is so much greater that it is right for it to outweigh the other. In this context, where for example a court is asking whether the financial implications of
an injunction for the defendant would be disproportionate to the damage done to the claimant if he or she were left to a remedy in damages, the court might consider whether the impact on the defendant of an injunction is so much greater than the problem for the claimant of receiving only damages that the injunction ought not to be granted. It may be that the introduction of the public interest as a relevant factor here will weight the scales in the defendant’s favour by adding a further ingredient which may, alone or in combination with other factors, incline a court towards damages.

BRINGING RIGHTS TO LIGHT TO AN END

INTRODUCTION

Rights to light, like all easements, are resilient and they can be brought to an end in only a limited number of ways.

ABANDONMENT OF AN EASEMENT

Abandonment of an easement occurs when a dominant owner ceases to use it and intends to abandon the right permanently. Whether abandonment occurs is a question of fact.

Various factors can lead a court to infer that abandonment has occurred (For example, where a dominant owner has made alterations to the dominant land which make the enjoyment of a right impossible or unnecessary). However, the intention to abandon always has to be proved by anyone who claims that an easement has been abandoned, and proving someone else’s intention is difficult.

Problems arise when a window (that benefits from a right to light) has been blocked up, or the building has been demolished and a new building constructed with windows in the same place, or similar places, or different places. Has the right to light been abandoned or does it survive to benefit the new window? A right to light can survive the alteration or movement of an aperture, and so it can survive demolition and re-building, in some circumstances.

In deciding whether the dominant owner’s right to light survives the movement or expansion of apertures it is necessary to ask whether the new aperture receives substantially the same light – described by Lord Justice Cotton as the same “cone of light” (Scott v Pape (1886) 31 Ch D 554, 569) – as previously was the case.
SECTION 84 OF THE LAW OF PROPERTY ACT 1925

Section 84 of the Law of Property Act 1925 ("section 84") enables the Lands Chamber to modify or discharge restrictions on the use of land – generally restrictive covenants – but only where certain statutory grounds are met (For a consideration of the relevant grounds, and how they might operate in the context of rights to light, see the Consultation Paper).

Additional grounds or amendments to section 84

The Upper Tribunal may order the discharge or modification of a restrictive covenant only where it is satisfied that one or more of the following grounds is met:

(1) that following a change in the character of the neighbourhood or other circumstances the restriction ought to be deemed obsolete;

(2) that the continued existence of the restriction impedes some reasonable user of the land and either does not give those entitled to it any practical benefits of substantial value or advantage or is contrary to the public interest, where money will be an adequate compensation for any loss or disadvantage suffered;

(3) that all those entitled to the benefit of the restriction have agreed by their acts or omissions to its discharge or modification; or

(4) that the proposed discharge or modification will not injure those entitled to the benefit of the restriction (See the Law of Property Act 1925, s 84(1) and (1A)).

SECTION 237 OF THE TOWN AND COUNTRY PLANNING ACT 1990

Section 237 of the Town and Country Planning Act 1990 ("section 237") is a planning power that, in certain circumstances, allows for a dominant owner’s easements and other interests that affect land to be overridden, allowing developments to proceed where otherwise they could be subject to an injunction.

The section 237 power is exercisable only by local authorities, ("Local authority" is defined in the Town and Country Planning Act 1990, s.336) and only where they have acquired or appropriated
land for planning purposes. In the context of section 237, land can be so acquired or appropriated only where:

(1) the authority thinks that the acquisition will facilitate the carrying out of development, re-development or improvement on or in relation to the land; or

(2) it is required for a purpose which it is necessary to achieve in the interests of the proper planning of an area in which the land is situated (See the Town and Country Planning Act 1990, ss 226, 227 and 246).

A local authority is not permitted to acquire or appropriate land under (1) above unless it is likely to contribute to achieving the promotion or improvement of the economic, social or environmental well-being of their area (See the Town and Country Planning Act 1990, s.226(1A)).

Once the section 237 power has been exercised and the interests affecting the land are overridden, the local authority is free to transfer or lease the land to a developer.

The primary use for section 237 is where a local authority is keen to undertake or promote a development on land that it owns or is able to acquire. A wide range of rights might be involved, including restrictive covenants and easements. The idea behind the provision is that the overriding of private rights is justified by the public interest in the development. Compensation is payable to the holders of the rights overridden, but only on a diminution in value basis (See C Fielding and D Rosen “The key to success: section 237” (2011) 1121 Estates Gazette 89).

Section 237 can therefore play an important role in the context of private development (It is often difficult to draw the line between a local authority’s development scheme and that of a private developer. It is common for the local authority to work in partnership with private developers. In these circumstances the local authority may promote a broad development scheme and seek a development partner to design, construct and later manage the development as a going concern. For the purposes of this Report “private development” means a development scheme that has emerged from the private sector to be constructed on land that the developer controls) and the management of problems relating to rights to light. A number of local authorities are prepared to assist developers by acquiring, or threatening to acquire, servient land so that they can use their section 237 powers in effect to clear the burden of rights of light from the land. Where the land is acquired and the section 237 power exercised, the ownership of the land is then transferred back to
the developer. This is legitimate because the subsequent use of the servient land must relate to the planning purpose for which it was appropriated, but the development and subsequent use do not have to be carried out by the local authority itself.

A well-known recent example of section 237 being used in the context of a private development is Land Securities’ project at 20 Fenchurch Street, London (known as the “Walkie-Talkie building”) (See P Gower, “City of London to acquire an interest in the walkie-talkie” (11 May 2011) Property Week (online)). The developer was having difficulties in negotiating with neighbouring holders of rights to light, but was able to proceed after the City of London Corporation resolved to use its power under section 237. The threat of the use of the powers was enough, to bring neighbouring owners to the table to agree compensation with the developer.

Injunctions in rights of light cases

There are four main forms of injunctive relief available:

- a “prohibitory injunction”, otherwise known as a “negative” injunction. This relief entitles a party to restrain certain acts or conduct infringing a right to light;

- a “mandatory injunction”. This injunction requires the Defendant to do some “positive” act to put right the infringement to the right to light. Thus, in normal circumstances this form of relief compels a party to do some act. For example, if warning has been given of an adjoining owners’ intention to protect their right to light and the developer continues to erect buildings then such an injunction may order the pulling down of the work that has been undertaken. It is important to discover whether the Defendant knew what he was doing was in fact wrong. A “contumacious” or “flagrant” breach of a right to light, knowing full well that a neighbours rights will be infringed, is conduct more deserving of sanction than a party to acts in ignorance, but who then immediately takes steps to rectify or remedy any default.

- A “quia timet” injunction – this type of injunctions arise where it is apprehended that an injury to a legal right or easement may occur in the future even if it has not occurred to date, and action is taken to restrain a “threatening wrong imminently about to take place”.

Interim injunction
This form of relief is given where the Claimant contends that there is a “serious issue to be tried”, or “a prima facie” case, justifying a retention of the “status quo” pending a trial at some future date. Applications for these forms of injunctions must normally be supported by a cross undertaking in damages whereby the Claimant undertakes to pay any damages incurred to the Defendant if when the matter comes to trial at a later date it is considered that the injunction was improperly obtained. An interim injunction is often applied for when the Claimant becomes aware of the infringement to his/her right to light and the principles in *American Cyanamid* should be considered.

**Compensatory damages**

The Chancery Amendment Act 1858 (subsequently superseded by s.1 of the Supreme Court Act 1981) conferred a power to award damages either in addition to or in substitution of an injunction (prior to 1858 a party applied to the Court of Equity for a remedy for an injury and if the Court considered damages were appropriate the plaintiff was then sent to a Court of Law to recover such damages).

How does the court exercise its discretion when it refuses to grant an injunction and awards damages in lieu.

In *Shelfer v. City of London Electric Lighting Co* [1895] 1 Ch. 287 at 322-3, A.L. Smith L.J. laid down his “good working rule” as to the circumstances in which equity would award damages in lieu of an injunction. These included the fact that the injury to the claimant’s rights was small, that it was capable of being estimated in money and that it could be adequately compensated by a small money payment. Although this should be a guideline and not an inflexible rule, it does mean in many cases that the court, when considering the measure of damages, will already have concluded that the claimant's loss is small. This will not always be true. There may be cases where an injunction is refused for different reasons, *e.g.* because the claimant has indicated a willingness to accept damages in lieu.

Thus, if the injury:

i) is small;

ii) is capable of being estimated in financial terms;

iii) can be adequately compensated by a small financial payment;

iv) is a case in which it would be oppressive to the Defendant to grant an injunction,
then damages in lieu of (i.e. substitution) an injunction may be given.

Many cases turn on these four considerations in establishing whether an injunction, or damages, is an appropriate remedy for an injury to light. The assessment as to whether an injury is great or small must naturally always be to a great extent subjective. Recent cases, as discussed below, have seemed to indicate a tendency to favour injunctions to stop work, or worse to remove infringing buildings, rather more than was the case historically; and it has been expressly emphasised in several cases that the law does not favour the proposition of servient owner (i.e. a developer) being able to purchase the rights of light acquired by the dominant owner’s (i.e. the adjoining owner) building. The dominant owner of an easement is the party who is entitled to enjoy, and enforce, the right of light; the servient owner being the party wishing to interfere with that right by the erection of buildings.

This usually results in the developer re-designing his proposals, or approaching the adjoining owner with a view to reaching an agreement, or, in some cases, not proceeding with the development at all. Only a developer who is convinced of his own legal position, or alternatively chooses to ignore the law and risk his building being ordered to be torn down, would proceed with the development without having regard to the legal rights and remedies available to a “dominant owner”.

There are also indications that the usually accepted method of calculating the infringements are being extended by the Courts. In the case of Carr Saunders v. Dick McNeill Associates [1986] 1 W.L.R. 922 the court decided that where an injunction is sought, but compensation is granted, compensation need not only be based by reference to the loss to the injured party but also loss of amenity and the benefit to the developer. In that particular case a factor of just over 2.5 was applied to the compensation figure agreed between the experts which was obtained on valuation methods normally used by rights of light consultants.

This concept of taking into account the benefit to the developer was taken further in Tamares (Vincent Square) Limited and Fairpoint Properties (Vincent Square) Limited [2007] 1 W.L.R. 2167 which was a case to determine damages after an application for an injunction had been lost. The court assessed damages in lieu of an injunction. The court had previously found that the Defendant company (F) was liable to the claimant company (T) for infringing a right to light to two windows that illuminated some stairs leading to the basement of T’s building. The court had, however, declined to grant an injunction and had left over the question of assessment of damages in lieu of an injunction. There was no dispute between the parties that the correct measure of damages was the greater of (i) damages for loss of amenity to the dominant owner; and (ii) damages to compensate for loss of
the ability to obtain an injunction. Expert evidence was submitted as to the appropriate measure of damages due to T. The following principles applied to the assessment of damages for loss of the ability to prevent an infringement of a right to light at the point just before any infringement took place:

- the court had to attempt to find what would be a "fair" result of a hypothetical negotiation between the parties;
- the context, including the nature and seriousness of the breach, had to be kept in mind;
- the right to prevent a development (or part) gave the owner of the right a significant bargaining position;
- the owner of the right with such a bargaining position would normally be expected to receive some part of the likely profit from the development (or relevant part);
- if there was no evidence of the likely size of the profit, the court could do its best by awarding a suitable multiple of the damages for loss of amenity;
- if there was evidence of the likely size of the profit, the court should normally award a sum that took into account a fair percentage of the profit;
- the size of the award should not in any event be so large that the development (or relevant part) would not have taken place had such a sum been payable;
- and after arriving at a figure which took into consideration all the above and any other relevant factors, the court needed to consider whether "the deal felt right".

On the particular facts of the case, the parties, as hypothetical reasonable commercial people, would take the half-way point between the two figures given by the expert valuer for loss based on the rival right to light experts reports, namely £174,500. They would then agree prima facie at a one-third split of that profit. However, taking into account the context of the relatively modest nature of the infringement of the right and the need not to have a sum that would put F off the relevant part of a future development in that context, that sum would be reduced to £50,000 as a "fair" result. That sum was very substantially more than any sum available for the loss of amenity, but in terms of the price of avoiding an injunction for infringing F's rights it "felt right", and would accordingly be the sum awarded to T.

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Thus, in *Tamares*, the court concluded that the nature and seriousness of the breach had to be kept in mind and where an owner had a right to prevent the development (by successful application for an injunction) a share of some part of the profit from the development was a normal expectation. Notwithstanding that an injunction had already been refused, and the loss of light to a reception lobby and stair was relatively small, damages were awarded based upon one third of the profit, reduced by a further 14%, to produce a figure considered a ‘fair’ result in a hypothetical negotiation between the parties.

In *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* [2006] EWCA Civ 430 the Court of appeal held that, when assessing compensatory damages in lieu of an injunction under the Chancery Amendment Act 1858, there was no absolute rule that damages could not be assessed on the basis of events which arose after the breach occurred or even after the injunction was refused. In this case, the appellant landlord (L) appealed against the judge’s decision awarding damages in lieu of a final injunction and refusing L an enquiry as to damages on the cross-undertaking of the tenant (T). L was the freeholder of a shopping centre. T was the tenant of one of the shops. L gave T notice of its plans to carry out substantial improvement works to the centre including plans that clearly showed the blocking up of an existing fire door included in the demise to T and the creation of a new fire door in a different location. L started construction work before T had agreed to relocation of the fire door. While T sought to negotiate a suitable financial incentive to agree to the relocation of the fire door the delay to the works was costing L money. L then bricked up the existing fire door after warning T that it was going to do so. T obtained an interim injunction and its claim for an injunction requiring L to reinstate the fire door and not to interfere with it was heard at the same time as L’s claim to forfeit the lease for breach of covenant by T in assigning the lease to an associated company. The judge held that the breach of covenant was made out, that L had not waived the right to forfeit but that T was entitled to relief from forfeiture on terms. He awarded damages in lieu of an injunction on the basis that L was not entitled to block up the fire door and the real cause of loss was L’s own attitude in refusing to accept that T could choose the location of the fire door and demand damages. L submitted that (1) damages in lieu of an injunction were to be assessed at the date of breach with the result that the judge should have taken into account the fact that T was at that date at risk of losing the lease altogether as a result of the forfeiture proceedings based on the breach of covenant; (2) the judge should have ordered an enquiry as to damages on the cross-undertaking given by T to obtain the interlocutory injunction.

The Court of Appeal held that:
(1) There was only a presumption that damages in lieu of an injunction would be assessed as at the date of breach and that presumption would sometimes not be applied. The court was not limited to any specific basis for assessing damages in lieu of an injunction and a normal basis was negotiating damages, giving a sum based on what reasonable people in the position of the parties would negotiate for a release of the right that had been breached. Given that negotiating damages were meant to be compensatory and were normally to be assessed at the date of breach, principle and consistency indicated that post-valuation events were normally irrelevant. However, given the quasi-equitable nature of such damages the court could, where there were good reasons, direct a departure from the norm either by selecting a different valuation date or by directing that a specific post-valuation date event be taken into account (see *Amec Developments Ltd v Jury's Hotel Management (UK) Ltd [2002] T.C.L.R. 13*). In the instant case the judge had been entitled to conclude that the valuation should not proceed on the basis that the lease was liable to forfeiture. It would be disproportionate to introduce that element into the hypothetical negotiations when the outcome of the forfeiture proceedings was known and as a matter of established law there had never been a significant risk of forfeiture.

(2) Special circumstances were required before an enquiry as to damages on the cross-undertaking could properly be refused where the claimant had not succeeded in obtaining an injunction at trial. In the instant case the judge had not erred in the exercise of his discretion to refuse an enquiry. L had brought the interlocutory injunction on itself by its unreasonable conduct and L's position in relation to its rights was very different and much less realistic when the interlocutory injunction was granted than it was at trial. Furthermore, T's conduct, which was also undoubtedly unreasonable in many respects, would not justify over-ruling the judge.

An "account of profits" will not normally be available to a claimant in a right to light case. In *Forsyth-Grant v Allen [2008] 2 E.G.L.R. 16* the Court of Appeal held that a judge had been right to reject a claim for an account of profits for nuisance, which arose out of a hotel owner's loss of a right to light, as an account of profits was not an available remedy for nuisance. In this case, the appellant hotel owner (F) appealed against the dismissal of her claim against the respondent (R) for an account of profits for nuisance caused by loss of her right to light. R had purchased land next to F's hotel and had been granted planning permission to build two houses. F was opposed to the development and eventually issued proceedings claiming, amongst other things, damages for nuisance or for an account of profits as a result of her loss of a right to light. The judge awarded damages but rejected F's claim for an account of profits and held that it was not an exceptional case that justified such an order. F contended that the judge had been wrong to hold that he could only order an account of

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profits in exceptional circumstances. In dismissing the appeal, the court noted that there was no
decided case where an account of profits had been awarded in lieu of damages for nuisance and
there was no reason not to hold that it was only available in exceptional circumstances (Attorney
General v Blake [2001] 1 A.C. 268 applied). The actionable nuisance did not involve a
misappropriation of a claimant’s rights and the judge was entitled to reject F’s claim for an account
of profits on the basis that it was not an available remedy for nuisance. Even if that was wrong, his
finding that such an award required exceptional circumstances could not be wrong.

“Transferred” rights of light

The owner of an adjoining building may be successful in an action against the developer even if the
window openings within that building are completely new. This is on the basis that the new window
openings have a “degree of coincidence” with those which existed previously in the demolished
building. A rights to light surveyor would have to be engaged in such a case to analyse the planes of
light to those apertures from old to new windows.

Use of the light

In the old case of Colls v. Home and Colonial Stores Limited [1904] A.C. 179 the House of Lords held:

“To constitute an actionable obstruction of ancient lights it is not enough that the light is less than
before. There must be a substantial privation of light, enough to render the occupation of the house
uncomfortable according to the ordinary notions of mankind and (in the case of business premises) to
prevent the plaintiff from carrying on his business as beneficially as before”

It is established principle in rights to light cases that the court should consider not only the actual
present use of the premises but also any purposes to which it may be reasonably expected that in
the future they may be applicable. Lord Davey in Colls also held that regard might be had not only to
the present use, but also to any ordinary uses to which the dominant tenement is adapted and that
a man does not restrict his right by not using the full measure of light which the law permits. It was
the opinion of Lord Lindley in Colls that if the dominant owner (the interest that can demonstrate
the right to light) chooses to use a well lighted room for a back room for which little light is required
he does not lose his right to use at some future time the same room for some other purpose for
which more light is required. Price v. Hilditch (1930) 1 Ch. 500 held that a right of light by
prescription to a room in a residential house is not to be measured by the use to which the room has
been put in the past. On the facts, the plaintiff’s right of light to the scullery windows was not limited
by the use to which the scullery had been put in the past.

Method of Assessment
The court will have regard to not only how much light has been taken away but also how much is left to a dominant owner’s building after a development has taken place.

THE LEGAL TEST IN PRACTICE

The Waldram method and the 50/50 rule

The subjective legal test in the Colls decision has to be interpreted by the courts in the light of expert evidence from rights to light surveyors. A great deal of technical learning and expertise has been developed over the years, but there is some consensus over the way that the natural light in a room is measured, and its sufficiency assessed. While it is not universally admired, the “Waldram” method of assessing the sufficiency of light is in widespread use in rights to light cases.

The Waldram method involves plotting – nowadays by the use of computers – the area of a room which receives adequate light before the proposed infringement, and the area that will be adequately lit afterwards. Light is measured in lumens, and one lumen is the light emitted by 0.2% of the sky (In more detail, Percy Waldram described this as “0.2% of the light which would fall from an unobstructed hemisphere of uniform sky on to a flat roof.” (P Waldram writing for the Illuminating Engineer of April/May 1923 and quoted in S Bickford-Smith and A Francis, Rights to Light (2nd ed 2007) para 12.12). It is possible to plot the points in a room from which 0.2% of the dome of the sky is visible at table-top level; one lumen per square foot is regarded as adequate. The notional line in a room beyond which there is less than one lumen per square foot has been referred to as the “grumble line”; (see the statement of facts from Crossman J’s judgment set out in Fishenden v Higgs and Hill [1935] All ER 435, 437) as Waldram himself put it, for “ordinary purposes, comparable with clerical work”, a level of light below which an “average reasonable (person) would consistently grumble” (P Waldram writing for the Illuminating Engineer of April/May 1923 and quoted in S Bickford-Smith and A Francis, Rights to Light (2nd ed 2007).

The weaknesses in this method are obvious; for example, reasonable people grumble at different levels, and the brightness of the sky is not uniform and varies at different times of the year and in different locations. Recent research has queried both the mathematics and the empirical evidence on which Waldram’s work was based (see, for example, P Defoe and I Frame, “Was Waldram wrong?” (2007) 25(2) Structural Survey p.98-116). Nevertheless, his method remains in general use in rights to light cases (Another method used to measure lost light is the “EFZ” (“equivalent to first zone”) method; see S Bickford-Smith and A Francis, Rights to Light (2nd ed 2007). This is more
controversial and tends to be used to calculate compensation when it is agreed that an infringement has taken place).

Using that method, it is possible to ascertain how much of the room was adequately lit before and after the infringement. The conventional approach, regarded by the courts as a useful practice but not a rule of law, is to say that if the remaining area of adequate light (assessed as described above) exceeds 50% of the area of the room, there is no infringement (it will be seen that the deeper the room, and the smaller the window, the more likely it is that a given obstruction will be actionable). This is known as the “50/50 rule” or “50/50” test. It is not applied rigidly, either as a test or a rule; nor is there any legal rule that this method of measurement must be used. But there seems to be considerable caution among rights to light practitioners which leads them to continue to use the Waldram method and the 50/50 rule. As one of the consultees – BRE (The response of BRE was written by Paul Littlefair, who is the author of Site layout planning for daylight and sunlight: a guide to good practice (2nd ed 2011 (“BRE daylight and sunlight”) published by BRE and widely used by local planning authorities when assessing daylight and sunlight levels within residential buildings and the open spaces between them. BRE daylight and sunlight does not prescribe a single test for adequate light) – said:

In principle, it is possible for rights to light experts to argue that different measures of daylight should be used.

Nevertheless, the Waldram method is entrenched. BRE continued:

In practice developers are not keen to embark on long and costly legal action which could easily result in their building [being] pulled down if a judge sticks to the methodology employed by his predecessors.

As to the 50/50 standard, sometimes a lesser interference is regarded as actionable; (Cory v City of London Real Property Co [1954], cited in S Bickford-Smith and A Francis, Rights to Light (2nd ed 2007) p. 32; the adequately lit area of the room was reduced from 64.05% to 51.27%) sometimes a higher standard is imposed. The 50/50 rule has been described as a “pretty irreductible minimum” for a living room (Deakins v Hookings [1994] 1 EGLR 190, 193 by HHJ Cooke). The legal rule remains that set out in the Colls case; it follows that where a property is designed or adapted for a special use, for example a greenhouse, the light to which it is entitled is greater than usual, and the usual measure of one lumen per square foot is unlikely to be adequate (Allen v Greenwood [1980] Ch 119,
concerned a greenhouse. Buckley LJ said at 135: “If the building be a greenhouse, the measure of [adequate light] must, in my opinion, be related to its reasonably satisfactory use as a greenhouse”).

Accordingly, we can say that the obviously subjective legal test is supplemented by the expertise of surveyors; there is a settled practice of use of the Waldram method as a way of determining the level of light loss, and of the 50/50 rule as a starting point for what is and is not acceptable. But that methodology is not rigidly followed; as a result the courts’ approach combines a reasonable level of predictability with some flexibility. The legal test is responsive to unusual properties and unusual uses of land, and it is also able to be receptive to new ways of measuring light as they become available.

The RICS guidance contains information on how to assess whether a room is adequately lit. In particular, it notes the following:

Modern research (Defoe, 2009) shows that [the measure of adequate light established by Percy Waldram] is less than half of what most people actually require... Although [the higher standard] has been widely mentioned in academic papers, the courts still work on the 1/500th (or 0.2% sky factor) figure. Until a legal case sets a different standard or criterion, members should continue to assume that the 1/500th (or 0.2% sky factor) figure will be applied by the courts. Experts, however, should be aware of other methods of measurement and may wish to put them forward as an alternative (The RICS Guidance, p. 9).

Rights to light surveyors still use Mr Waldram’s method. There is now good scientific evidence that this is inadequate and sooner or later a new method will be advanced and accepted by the courts. The courts have been clear that the Waldram analysis and the 50/50 rule are guides only. A more precise scientific test could be enshrined in statute but this would not make any sense if, as the courts have rightly said, the test for interference with rights to light is of loss of amenity (Others who supported the retention of the existing test included the Council of HM Circuit Judges, the National Organisation of Residents Associations, the Compulsory Purchase Association, Allen & Overy LLP, the UNITE Group plc and Travis Perkins plc).

Not all obstructions of light are actionable. The level of light that an easement protects and the level therefore of interference that amounts to an infringement. But if there is an infringement, then the claimant’s primary remedy is an injunction, with the possibility of damages being awarded instead.
That said, there is no absolute entitlement to an injunction. An injunction is an equitable remedy and the traditional equitable principles apply. For example, the claimant who does not have “clean hands” (See J McGhee (ed), Snell’s Equity (32nd ed 2010). The equitable principle is complex but, in short, it “purports to insist that a claimant must show that his past record in the transaction is clean” (J McGhee (ed), Snell’s Equity (32nd ed 2010)) or has delayed so long as to offend the equitable doctrine of laches, (“Laches” is an equitable doctrine which can provide a defence to claims for equitable relief such as injunctions, where delay is coupled with circumstances that make it inequitable to grant relief. See J McGhee (ed), Snell’s Equity (32nd ed 2010) and the Consultation Paper) will not be entitled to an equitable remedy. In that event, the dominant owner will be entitled only to common law damages, compensating him or her for any loss in value to the property. But that is a very unusual situation. Generally, where a right to light has been infringed, the court does have jurisdiction to grant an equitable remedy, and that will prima facie be an injunction, to prevent the obstruction or to order the removal of an obstruction that is already in place. But where that is the case the court has discretion to award equitable damages instead, and those damages will be at a higher level than common law damages (Hence the significance, in the cases and legal writing, of the term “damages in lieu of an injunction”. We use the phrase “damages instead of an injunction” or “in substitution for an injunction” to denote damages at that higher level). There is some controversy over the measure of equitable damages awarded instead of an injunction.

The law in this area has been the subject of a recent review by the Supreme Court in the case of Coventry v Lawrence ([2014] UKSC 13, [2014] AC 822) (“Coventry”).

The easement of light is directly related to the amount of sky visibility available on the working plane (e.g. the top of a table which is taken to be 2 feet 9 inches or 850mm). Therefore the amount of sky is assessed for each of the affected rooms; and this is determined scientifically by the use of what is known as the “Waldram diagram”. In 1932 it was acknowledged by an International Conference on Illumination that sufficient amount of light to enable visual discrimination would equate to 1 lumen of light per square foot. This is the amount of light given out by a 1 foot candle over 1 square foot. The amount of sky through a defined window opening will therefore determine the amount of luminosity to a particular point within a room and a 0.2% of the sky factor equates to a 1 lumen per square foot or 1 foot candle.

The right to light consultant therefore evaluates on plan a contour where 0.2% of the sky factor exists at “working plane” within a room firstly in relation to buildings which currently exist opposite
the window in question and thereafter a new contour is drawn taking account of the new buildings which are intended to be built opposite this window. It will be appreciated that where the new buildings are of a greater size and massing than those of the existing then less sky will be observed from a given point in the room. This would mean that to see the same amount of sky as before which equates to 1 lumen one would need to come closer to the window.

This method then indicates the amount of area over which the diminution in light to the intensity of one lumen occurs and this figure can then be put into a formula (by the right to light consultant/expert) for assessing the loss in terms of monetary value.

It has been argued that the availability of 1 lumen or 0.2% sky visibility over half the area of a room may be sufficient to meet one of the Court’s requirements which is to provide sufficient daylighting “for the ordinary notions of mankind” (as was held in Colls).

**Adequacy of Light**

As indicated above, the owners of an adjoining property which can demonstrate prescriptive rights of light are not entitled to protect all the light that they currently enjoy. The right to light relates only to so much light as is necessary or adequate for normal use and occupancy given the ordinary notions of mankind.

What constitutes “adequacy” has never been clearly established by the case law which exists.

In *Ough v. King* (1976), which was an action for infringement of an easement of light, the court held that it entitled to take into account the nature of the locality and also modern lighting standards. The plaintiff's premises in Gravesend, which adjoined those of the defendant, enjoyed an easement of light acquired by prescription. Despite the plaintiff's objections, the defendant extended his premises in such a way that the light enjoyed by the plaintiff's premises was diminished. The defendant adduced the evidence of an expert, who applied the "Waldram method" and came to the opinion that since more than half of the room affected still received light despite the extensions, the room was adequately lit. The county court judge viewed the premises and gave judgment for the plaintiff on the grounds (a) that the "Waldram method" was not conclusive as to modern lighting requirements, (b) that the nature of the locality could be taken into account, thus allowing a possible difference between the standards of lighting in London and elsewhere, and (c) that the room affected did not enjoy a reasonable amount of light subsequently to the extension of the defendant's premises. On appeal, held, dismissing the appeal, that the county court judge had not erred. It was held that:-
that the judge in finding that there had been an infringement of the right to light had directed himself properly in law by taking into account not only the locality of the premises but also the higher standards of light demanded for comfort according to the “ordinary notions of contemporary mankind”;

- That the judge was entitled to adopt as the measure of damages his own estimate of the difference in the value of the house before and after the infringement;

- the method of measuring the sufficiency of light evolved in the 1920s is not a rule of law (post, pp. 1553G — 1554B).

Prior to the case of Ough, it had previously been acknowledged that if a room, notwithstanding some interference with light, remained adequately lit to no more than 50% of the floor area then it could not be said that the light was injured. In Ough it was demonstrated that just over 51% of the room remained adequately lit but the Appeal Court Judge concluded it was dark having visited the adjoining property on a grey afternoon in February. Although an injunction protecting the Adjoining Owner’s light was granted but one of the Appeal Court Judges indicated that the 50% rule was still a convenient rule of thumb.

In Deakins v. Hookings (1994) 14 E.G. 133, the facts were: P had lived in a row of terraced cottages for 40 years and had a small courtyard at the rear. The windows of the property overlooked the courtyard and had acquired easements of light. D owned the adjoining property and constructed an extension with planning permission in 1986. The extension affected the light which reached P's windows and P commenced proceedings alleging interference with her right to light. It was held that there had been an actionable interference with the right to light in the living room, but not the kitchen. Even though P had failed to obtain an interlocutory injunction, P had complained promptly and would be granted a mandatory injunction. P's loss was sufficiently serious to justify the inconvenience and expense of removing the interference with light. The damages which would have been awarded as an alternative to the injunction would be GBP 4,500, which was 15 per cent of the benefit of the development to D. The Judge took the view that when dealing with residential properties, 50% could be considered as only a bare minimum and that where possible a higher percentage should be sought although there was no indication what that higher percentage should be.

When considering the effect upon commercial properties, whilst the Courts have not ruled on the point of adequacy, some rights experienced rights to light experts consider that the adequacy for
commercial use and occupancy can be achieved with light to less than 50%, but acknowledging that it is impossible to identify what an acceptable area might be if the room shape and size is not known and this is often the case at the time of a preliminary analysis if drawings of adjoining properties are not available and it is not intended to alert the adjoining Owners to the potential problem.

In *Midtown Limited and City of London Real Property Company Limited* (2005) 1 E.G.L.R. 65 an application for an injunction was declined notwithstanding a very serious infringement to light because the court was satisfied that damages would be an acceptable remedy.

The claimants (M and L), freeholder and leaseholder respectively of a London office building, sought injunctive relief, or damages in lieu, against the defendant owner (C) of a neighbouring development site. C had planning permission for an office complex on the site and M and L alleged that the development would interfere with their right to light, acquired by prescription pursuant to the Prescription Act 1832 s.3 and s.4. M’s freehold was subject to leases which had been granted in 1978 and 1993, the former expiring in 2001 and the latter commencing on the former’s expiry and extending to 2018. At the time of trial it was conceded that M had acquired a right to light. However, L could only show enjoyment pursuant to the 1993 lease, at which time M was still in the process of acquiring the right. During the trial, therefore, M granted L a right to light in respect of the property and L applied to amend its claim accordingly. L submitted that it should have permission to amend in order to rely on the grant of a right to light by M, but that in any event rights in the course of being acquired under the 1832 Act were capable of passing under the Law of Property Act 1925 s.62 so the right to light in the process of being acquired by M had passed by implication on the occasion of the 1993 lease. C submitted that it was entitled to interfere with the claimants’ rights to light on the basis of a 1930 conveyance of part of its site which contained a provision intended to prevent the operation of s.3 of the 1832 Act. Moreover, as part of its site had been acquired by the local authority for planning purposes in 1956 as part of the regeneration of London following war damage, C argued that the Town and Country Planning Act 1990 s.237 overrode any right to light. C also argued that any loss of natural light was immaterial because a London office building was always lit internally by artificial light.

It was held that:

(1) L should have permission to amend so as to allow it to rely on the grant of a right of light by M. However, in any event, the wording of s.62 of the 1925 Act was sufficiently wide to pass on rights in the course of being acquired, even if they were precarious;
(2) The clear purpose of the provisions in the 1930 conveyance was to enable the owners of C's site, and their successors, to redevelop the site notwithstanding that that might interfere with the light then or thereafter enjoyed by the owners or occupiers of the neighbouring property. That agreement negatived the effect of s.3 of the 1832 Act. In respect of that land, C could rely on the provisions of the 1930 conveyance to override any rights to light enjoyed by the area of land affected by that conveyance (Marlborough (West End) Ltd v Wilks Head & Eve (Unreported, December 20, 1996) followed);

(3) Where land had been appropriated by a local authority for a planning purpose, and the authority, or its successor in title, wished to rely on the power to override under s.237 of the 1990 Act, the proposed development had to be related to the planning purposes for which the land was originally acquired or appropriated. In the instant case, C's proposed development was completely unconnected with the original purpose of the 1956 acquisition. Therefore, C could not rely on s.237, R. v City of London Corp Ex p. Mystery of the Barbers of London (1997) 73 P. & C.R. 59. Thus, with the exception of the land affected by the 1930 conveyance, M and L had established rights of light and C's development of its site would affect those rights.

(4) C's development would cause an interference with the M and L's rights to light amounting to a nuisance even if in practical terms no use was made of the natural light to the building because the offices were lit by artificial light.

(5) M was only interested in the property from a money making point of view and if the value of the property had been diminished, that could be calculated and compensated.

There was probably no present loss because of the existing lease and it seemed that M had in mind redevelopment proposals of its own, which would make the injunction academic. Consequently, M was not entitled to an injunction and was entitled to damages to be assessed for infringement of its right to light, (Jaggard v Sawyer [1995] 1 W.L.R. 269 and Colls v Home & Colonial Stores Ltd [1904] A.C. 179 applied). For similar reasons, L was not entitled to an injunction. Its rights, if infringed, would suffer even less damage than those of M.

(6) The court directed an inquiry as to damages.

Thus, in Midtown there was substantial debate about the use of artificial lighting, but the court held that whilst offices do use artificial light to maintain a constant light that does not override a right to light in respect of natural light.
Valuation of the right to light

A convention that has been in use for many years, and accepted by the courts as a basis of valuing the light itself, particularly for commercial buildings, is to effectively discount the rental value for each sq ft of light lost by up to a maximum figure of £5 and capitalise that figure normally adopting a yield of 5% to 6%. This produces an absolute base value, but unless the loss is of a very small nature it is unlikely that any Adjoining Owner would settle for base value alone. Adopting the principal in the Carr-Saunders case, the base value would normally be enhanced with a multiplier which in that case related to a factor of approximately 2.5. Anticipated compensation figures based upon an amenity base value and also a profit based figure based upon the Tamares decision should be addressed by a right to light expert.

Recent cases – one way traffic?

A series of cases in recent years have considered the circumstances in which a neighbouring landowner can obtain an injunction to protect his rights to light in the face of an actual or potential obstruction. Until recently, the reported decisions seemed to have been moving very much in one direction – in support of neighbouring land owners and the grant of injunctions.

First there was the case of Regan v. Paul Properties Ltd [2006] EWCA Civ 1891 concerning the impact that a mixed-use development would have over light enjoyed by Mr Regan’s sitting room opposite. Mr Regan sought a mandatory injunction to get the offending obstruction removed. Although at first instance the court decided Mr Regan could be adequately compensated by a damages payment, the Court of Appeal disagreed. It determined that:-

- a claimant was prima facie entitled to an injunction against a person committing a wrongful act, such as a continuing nuisance, which invaded his legal right, and the wrongdoer was not entitled to ask the court to sanction his wrongdoing by purchasing the claimant's rights on payment of damages assessed by the court;

- that the court's discretion to award damages instead of an injunction should not be exercised to deprive a claimant of his prima facie right except under very exceptional circumstances;

- that the judge was wrong in principle in placing the onus on the claimant to show why damages should not be awarded;
that the defendants were obliged to take the natural consequences of their actions in interfering with his right to light;

that what mattered was not so much the amount of light taken as the amount of light left behind as a result of the infringement, and the reduction of light, although capable of being estimated in money terms, was not a small injury and would not be adequately compensated by a small money payment;

that, furthermore, the diminution in the value of the maisonette was more than a small amount, and the fact that the defendants’ plans would be affected and likely losses suffered upon grant of an injunction were matters which on their own were not determinative of the question of oppressiveness and the choice of remedy;

and that, accordingly, it was not oppressive or unreasonable in the circumstances to grant an injunction in the claimant’s favour the infringement to Mr Regan’s right to light, albeit estimated as a loss of only £5,500, was not a “small injury” (cf. this with the developer’s cost of remedial works to comply with the injunction, which were said to be £175,000).

Regan, understandably, sent shock-waves through the community of developers who had, wrongly assumed, that, however egregious a developers conduct, it was really only a matter of how much a developer would have to be pay in damages, as opposed to the draconian consequences of having the building torn down.

Then came HKRUK II (CHC) Ltd v. Marcus Alexander Heaney [2010] EWHC 2245 (Ch) concerning the redevelopment of commercial premises next to old Yorkshire Penny Bank in Leeds. The scheme included the construction of two additional floors on the top of the existing building. Mr Heaney, the owner of the old bank premises, alleged that the redevelopment would interfere with the rights to light enjoyed by windows overlooking the new building. The two property owners tried but failed to reach an agreement on how the alleged impact on rights to light would be dealt with. Expert evidence revealed that the area in Heaney’s building which had suffered actionable loss of light was only 28sq m. The development was carried out and following completion the developer decided, in the absence of a negotiated settlement, to seek a declaration that Mr Heaney was no longer entitled to an injunction as a result of his acquiescence and delay in issuing proceedings. In response, Mr Heaney issued a counter claim for an injunction preventing interference with his rights to light. Despite the fact that by this time the building had been fully fitted out and partly let to tenants, the court granted a mandatory injunction which had the effect of requiring the developer to demolish the two additional floors. For damages to be awarded, it would have to be shown that the injury to
H's legal rights was small, that the injury was capable of being estimated in money, that it was one which could be adequately compensated by a small money payment and that it would be oppressive to the claimant to grant an injunction. The court held that it would be wholly wrong for the court effectively to sanction what had been done by compelling H to take monetary compensation. The estimated cost was said to be around £2.5m.

Heaney established that an injunction may still be available even if sought very late in the day: something of considerable concern to those seeking to manage the risks of rights to light claims in complex development schemes. Heaney was another blow to developers.

Just how broad is the range of circumstances in which an injunction might be granted? And what about the other end of the spectrum? Can it ever be too early to seek an injunction? That was the issue which concerned the court in the recent case of CIP Property (AIPT) Ltd v. Transport for London and others [2012] EWHC 259 (Ch). The conclusion reached may give developers some encouragement that the balance of case law is beginning to shift back in their direction.

The CIP Property case concerned the proposed development of land at Tottenham Court Road underground station. The station forms part of the Crossrail project and extensive construction works are under way below ground. Once they are completed – which is not expected until 2017 – it is also intended that the area above ground at Tottenham Court Road station will be redeveloped.

The area earmarked for redevelopment is owned by the first two defendants, TfL and London Underground. The claimant, a company in the Aviva Investors Group (Aviva), owned a property to the rear of the site, known as 20 Soho Square.

The third defendant, Derwent, enjoyed rights of pre-emption to acquire the site for development under an agreement (the pre-emption agreement) which it entered into in 2007. The right of pre-emption was conditional upon satisfaction of a number of prerequisites, including the completion of the below-ground Crossrail works.

The question of how Derwent’s proposed scheme for the site might affect neighbouring buildings had been a matter of discussion between the parties long before proceedings were issued in May 2011. Having entered into the pre-emption agreement in 2007 and worked up initial proposals for the development, Derwent (along with Crossrail) entered into discussions with neighbouring land owners – including Aviva – about the potential impact the development might have on rights to light enjoyed by surrounding buildings. During the course of those discussions Derwent indicated that
the proposed development would not proceed without regard to the rights of neighbouring third parties.

By 2011 the below-ground Crossrail works had begun, but plans for the above-ground development were still being finalised. The discussions between Aviva, Derwent and Crossrail had also yet to reach a solution.

It was against this background that Aviva first threatened and then issued court proceedings claiming that:

d. rights to light were enjoyed by 20 Soho Square;

e. the development proposed by Derwent would substantially interfere with those rights; and

f. an injunction and declaration should be granted to prevent the development being carried out in such a manner as to interfere with those rights.

The Defendants’ response was to apply for an order summarily dismissing the application under Part 24 CPR on grounds of prematurity. The crux of the Defendants’ argument was that no above-ground development could begin until the below-ground Crossrail works were completed, which was not expected until 2017 at the earliest. Completion of those works was also one of the preconditions (among others) to be satisfied before Derwent would acquire ownership of the site under the pre-emption agreement. Coupled with the fact that no planning consent was yet in place meant that establishing the detail of any development on the site – and what impact it might have on 20 Soho Square – was a very long way off indeed.

Not so, said Aviva. In support of its contention that relief should be granted at this stage, it cited:

- the Defendants’ refusal to give an undertaking not to pursue the development without regard to the rights of light enjoyed by neighbouring properties;

- the failure of the without prejudice negotiations;

- the failure of the defendants to allege prematurity until six months after proceedings were first noted; and

- the failure of Derwent to amend its proposals as to its development scheme in the light of objections advanced by Aviva;
- Any delay on its part in bringing proceedings, argued Aviva, might leave it open to allegations of acquiescence to Derwent’s plans at a later date.

The case came before the Chancellor of the High Court in January 2012, who concluded that, before an injunction or declaration should be granted:

“There must be an immediate threat to do something which requires the intervention of the court to prevent it”.

On these facts the Chancellor decided there was no such threat.

In the case of TfL/London Underground, he concluded that although as landowners they may intend to enter into a development agreement, they would not in fact carry out any works themselves. Nor, on the facts, could they be said to be encouraging or accepting Derwent’s plans in a way that could make them liable for the consequences of the development. They could not then be said to have threatened to infringe Aviva’s rights and therefore no injunction against them was available.

Likewise, there was no immediate threat by Derwent to any rights Aviva might enjoy:

- Derwent did not yet own the site and its future ownership depended on whether Derwent chose to exercise its right to acquire, in addition to overcoming a number of hurdles, including the preconditions set out in the pre-emption agreement. It was clear on the facts that the exercise of this right would not have occurred before 2017;

- Planning permission had yet to be granted, which, given the scale of the proposed project, would undoubtedly take some time to obtain. It would also involve Derwent and Crossrail satisfying any conditions that the local authority chose to impose; and

- Derwent had made it clear that the proposed development would not proceed without regard to the rights of third parties and there was no suggestion by Aviva that these assurances were not genuine.

Nor could the fact that Derwent disputed the existence of Aviva’s rights of light, or the impact which the proposed development might have, amounted to an “immediate threat” where none otherwise existed. Similarly, Derwent’s refusal to amend the development scheme or provide the undertaking requested by Aviva did not, of itself, create such a threat.
In concluding that, “There is not now and cannot be for at least five years an immediate threat by the third defendant to infringe the rights to light claimed by Aviva”, the chancellor granted judgment in favour of the defendants.

Where are we now?

CIP Property serves as a useful reminder that whatever support may be gleaned by landowners from recent case law on rights to light injunctions, there must be an immediate threat of interference by the developer. And as CIP Property shows, it can sometimes be too early to apply for an injunction.

How to prevent the prescriptive right

For the developer, the best option is to prevent any rights of light being acquired. To do this and interrupt the enjoyment, the developer must either physically block the light for one full year (by erecting a hoarding or carrying out the development) before expiry of the 20 year period; or make an application under section 2 of the Rights of Light Act 1959 in the form of a light obstruction notice (“LON”).

A LON acts as if a wall of unlimited height has been erected overnight and access of light to the benefiting building has been interrupted. The purpose is to “virtually” block the light before the right is acquired. The landowner can then develop his land without fear of a claim or injunction from the neighbour.

Procedure

The freeholder, a tenant for a term with at least seven years remaining and a mortgagee in possession can apply for a LON. A LON needs to be registered with the relevant local authority on the Local Land Charges Register. Applications are in a prescribed form and need a plan showing the location of the property and the location of the virtual obstruction. This must be accompanied by a definitive Upper Tribunal (Lands Chamber) certificate, obtained by applying to the Upper Tribunal for confirmation that adequate publicity has been given of the proposed LON. The Upper Tribunal will issue directions about publicity to be given and this requirement will include serving the LON on all parties with an interest in the relevant adjoining building. Evidence of service will need to be provided.

Once the definitive certificate for registration of the LON is issued by the Upper Tribunal, this is sent together with form A, (the application for registration of a LON) for registration on the Local Land Charges Register. This process could take 12 weeks. If the right will be acquired sooner, a
temporary certificate can be applied for, in which case, the Upper Tribunal will require evidence that the building will shortly acquire a right of light. If given, a temporary certificate can be registered in the Local Land Charges Register. On the date of registration (of either a temporary certificate in emergency or the definitive certificate), a 12-month period of interruption to the light of the adjoining building commences.

The LON can be challenged within 12 months of registration by issuing proceedings at court which has the power to alter or cancel the notice. Alternatively, a challenge can be made to the applicant direct. Once the notice has been on the register for one year, assuming no successful challenges, any right to light is defeated and the 20-year period is reset to zero.

**Enforcement, Exercise and Protection – Remedies**

The disputes which arise over easements generally fall into two categories:-

- Disputes as to the existence, nature or extent of an easement, i.e. title disputes;
- Allegations of disruption or excessive user i.e. use and control disputes.

Of course the two categories often appear together in the same action usually because a landowner will raise a matter of title in defence to a claim for disruption, or a claimant will raise a matter of title in defence to a claim by a landowner in trespass.

The cause of action of a landowner objecting to the exercise (or excessive exercise) of a positive easement is trespass, save in the case of the easement of eavesdrop when the claim will be in nuisance. The cause of action of a claimant to an easement where it is alleged that exercise of the easement is being disrupted, is effectively in nuisance as owner of the easement (not as owner of the dominant land). It must be borne in mind that trespass is actionable upon objective proof of substantial interference with the reasonable enjoyment of the right to possession. It is not every obstruction or interference which will be actionable, only an obstruction which makes reasonable use and enjoyment of the right (taking into account all other circumstances, such as lawful use of the way by others) materially less convenient or beneficial, e.g. a gate across a right of way is not actionable unless it narrows the way so as to render it unusable for the purpose for which it was granted. (See *Pettey v Parsons* [1914] 2 Ch 653 and *Celsteel Ltd v Alton House Holdings Ltd* [1985] 1 W.L.R. 204 and *B & Q plc v Liverpool and Lancashire Properties Ltd* [2001] 15 E.G. 138) or unless it is kept locked, although it may be that, if the owner of the way has reasonably convenient access to
the key, there is no obstruction, see Johnstone v Holdway [1963] 1 Q.B. 601 and Dawes v Adela Estates Ltd (1970) 216 E.G. 1405.

Declaration

This is an essential remedy where the claim to be entitled to an easement is based upon either implied grant or prescription. It may also be necessary where there is a dispute as to the precise nature and extent of the right claimed, although the existence of the right is not in dispute, for example where there is a dispute as to the true construction of a formal grant. A declaration may also be necessary where a landowner wishes to prove that an easement has been destroyed by release or factual abandonment. Ancillary to a declaratory remedy where the land in question is registered, will be a direction to the Chief Land Registrar to rectify the Land Register as appropriate. The new Land Registration Act 2002 requires registration of easements which are no longer going to be protected as overriding interests. This comes into force in October.

The declaration has a more aggressive role to play in the absence of any unilateral way in which a servient owner can release or modify an easement over his land. If the servient owner can make a case, even a conditional case, that the dominant owner would not be able to obtain injunctive relief to protect the easement were he to apply for an injunction then the court may grant a declaration to that effect thereby effectively releasing the land, see Greenwich Healthcare NHS Trust v London & Quadrant HT [1998] 1 WLR 1749. The Court of Appeal recently upheld a judge’s decision to make a declaration upon undertakings to enable a development to take place, see Well Barn Shoot v Shackleton [2003] LTL AC0103011.

Injunction

Prohibitory injunctions are the remedy most often sought by landowners, and mandatory injunctions requiring the removal of physical obstructions are the remedy most often sought by easement owners. A permanent prohibitory injunction will nearly always be awarded to enforce a legal right, regardless of the consequences for the defendant (see Redland Bricks Ltd v Morris [1970] A.C. 652) unless there is some equitable ground for refusal such as laches, estoppel or triviality. Mandatory injunctions are in the entire discretion of the court. A mandatory injunction will usually be awarded where to fail to do so would, without equitable justification from the circumstances of the particular case, effectively enable the wrong-doer compulsorily to purchase the rights of the claimant, see Shelfer v City of London Electric Lighting Co [1895] 1 Ch. 287, Coils v Home and Colonial
Stores [1904] AC 179 the leading cases on equitable damages awarded in lieu of an injunction, and Krehl v Burrell (1878) 7 CH. D. 551 affirmed (1879) 11 CH.D. 146 and Cowper v Laidler [1903] Ch 337.

Such an injunction ordering work of demolition on the defendant’s own land, is only likely to be granted where it is proved that the work was done or completed after express notice was given to the defendant that it was objected to and, in most cases, the grounds of the objection, see for example Mathias v Davies [1970] E.G.D 370 a right of light case. The recent case of Snell & Prideaux Ltd v Dutton Mirrors Ltd [1995] 1 E.G.L.R. 259 demonstrates this. Damages in lieu equivalent to the consequential diminution in the value of the claimant’s property were granted because, in that case, the works deprived the claimant of the whole benefit of its right of way. Delay and acquiescence are generally fatal to an application for a mandatory injunction. The claimant should seek an interim prohibitory injunction in mitigation of potential harm at the earliest practicable moment, and unwillingness to give an undertaking in damages is not an acceptable excuse for failing to do so if a mandatory injunction is later sought to cure the harm caused in the meantime. There is a very helpful discussion of the principles to be applied in paragraphs 14-86 to 14-91 inclusive of Gale on Easements (17th ed).

A mandatory injunction to carry out protective works may be awarded in anticipation of future harm, e.g. in a case concerning rights of support where there is a danger of further subsidence if such works are not carried out, but the requirements for proof of risk are tough, see Redland Bricks Ltd v Morris [1970] A.C.652. The cost to the defendant of the works will be taken into account unless he has acted unconscionably.

As indicated above, it must always be borne in mind that declarations and injunctions, being in the court’s discretion, are not an entitlement of the claimant. Indeed, where the claimant might otherwise be entitled to discretionary relief the court may, having regard to the particular circumstances of the case, refuse to grant any relief or (in the case of a claim for an injunction) award damages in lieu thereof (as to which, see further below).

**Damages**

Whether sought in trespass by a landowner, or for interruption to the easement and/or nuisance by the claimant to an easement, the proper measure of damages is the tortuous measure, ie such sum as will put the particular claimant into the position he would have been in as at the date of trial had the wrongful act not been committed see Saeed v Plustrade Ltd [2002] 2 EGLR 19 a case concerning
disruption to parking rights. Equitable damages under the principle in Lord Cains’ Act in lieu of an injunction are, in practice, frequently awarded on the so-called “licence” basis, see for example, Bracewell v Appleby [1975] Ch 408 Carr Saunders v Dick McNeil Associates Ltd [1986] 1 W.L.R. 922 Deakins v Hookings [1994] 1 E.G.L.R.190 Jaggard v Sawyer [1995] 1 W.L.R. 269, Gafford v Graham [1999] 41 E.G.159 and, of course, Shelfer v City of London Electric Lighting Co. [1895] 1 Ch 287. Such damages will encompass amongst other matters diminution in value of the benefited or burdened land, loss of general amenity and the circumstances of both parties, e.g. a defendant who would make a substantial profit out of his wiring, will be expected to pay a higher “licence fee”. Where common law damages are claimed, claims to consequential loss such as those incurred as a consequence of losing a sale of the land (or the land benefited by the easement) or delay to a development, will only be successful if it can be proved that such losses were reasonably foreseeable at the time that the wrong was committed.

It is also worth bearing in mind the possibility of aggravated and/or exemplary damages in a case where it is believed that there has been deliberate breach of rights for the purpose of gaining a financial advantage or malice or abuse of official power.

Self-help

As in all cases of trespass or nuisance there is a right to take direct action to abate the consequences of the wrong, provided that that action is not itself unlawful. The most important form of self-help is a watchful eye on developments on both the benefited and burdened land, so that early steps can be taken to prevent or mitigate harm, including the making of express written protests. In some cases the erection of a gate accompanied by a notice stating the reason, the whole recorded by a dated photograph, may be cheaper and more effective than an injunction. Self-help in the form of abatement in a case of excessive use can be particularly useful tactically see paragraph 10-51.

Limitation

The wrongful use of land as if an easement existed is a trespass, and is committed afresh on each occasion that use of the land is made. The wrongful interference with a legal easement is equivalent to a nuisance, and is committed afresh on each day that the interference continues in existence. Both are torts and the limitation period is six years from the date of damage. Therefore there are rarely limitation defences available.
Loss or Extinction of Easements

In the absence of execution of an express deed of release by the person entitled to the easement, it is very difficult to lose the right to an easement. An easement may be extinguished by the following:

Release or abandonment

Release may be express, in which case it must be by deed, or implied from the actions and words of the person entitled to the easement. It will be implied from an unequivocal act of the dominant owner which precludes any continued enjoyment of the right thereafter, e.g. agreeing to the physical alteration of the servient land. The strongest case of agreement is where consideration is given to the former dominant owner. If the owner of the easement simply stops using the right altogether, or alters his use in some way without agreement supported by consideration, he will not be held to have abandoned the right permanently without very strong evidence to that effect, even where the right has not been used for many years.

Alterations even substantial alterations to the dominant land will not be sufficient evidence unless those alterations impose a substantially heavier and prejudicial burden on the owner of the burdened land (the so-called Rule in Luttrell’s Case) or it can be shown that the owner of the dominant land could never in future benefit from the existence of the easement, e.g. where a building benefiting from a right to light to particular windows is demolished, and replaced with one having only a blank wall in the relevant position, which is then maintained for a very long period. Such a case would be even stronger if the owner of the burdened land has made physical alterations to his land in reliance on abandonment, known to and not objected to by the owner of the easement. It is generally easier to prove abandonment of a continuous easement, such as a right to light, than of a discontinuous easement such as a right of way. Where simple non-use even for a long period, is relied upon in relation to a discontinuous easement, it is necessary to prove an intention to abandon on the part of the dominant owner.

Unity of ownership of the dominant and servient land

Both must be owned in the same right in possession by the same person. Mere unity of possession in the same person e.g. the freehold of one and a lease of the other, will merely suspend the easement.
**Excessive user**

Alteration of use, land or buildings so as to impose a different and excessive burden on the burdened land, will only result in loss or suspension of the original easement if the old benefit is inextricably bound up with the new and cannot be severed, or where the alteration is evidence of abandonment, see as to rights of light *Tapling v Jones* (1865) 11 H.L.C.290 as explained in *News of the World Ltd v Allen Fairhead & Sons Ltd* [1931] 2 Ch 402; as to rights of way *Graham v Philcox* [1984] Q.B. 747 and, as to rights of drainage, *Atwood v Bovis Homes Ltd* [2001] Ch 379. In a case of excessive user, the owner of the burdened land can often, in practice, force the problem of disentangling the lawful from the unlawful use onto the owner of the easement, by seeking to prevent the whole use either by abatement or by injunction, see, for example the compromise reached in the case of *Milner’s Safe Co Ltd v G.N & City Railway Co* [1907] 1 Ch 227 and 229 and *Hamble Parish Council v Haggard* [1992] 1 W.L.R. 122.

Exercise of an easement in excess of that originally granted or acquired either in quality or quantity, will be a trespass. For example, use of a vehicular right of way granted for the benefit of a field in use for agricultural purposes, for vehicular passage to and from a residential development on the field, will be a trespass.

**MORTGAGES AND CHARGES**

The overwhelming majority of claims by mortgagees of land are for two forms of remedy, namely (1) payment of moneys secured by the mortgage of land; and (2) delivery of possession of the mortgaged property.

Note that a claim to payment of money secured by a mortgage falls within the definition of a mortgage action only if the claimant is in fact relying on the mortgage in order to make his claim (*National Westminster Bank v Kitch* [1996] 1 W.L.R. 1316, CA). If, for example, the claimant bank claims in respect of overdraft liabilities which are secured by a mortgage, but does not wish to rely on the mortgage, and claims only on the debt, this is not a mortgage action, but an ordinary debt action which would have none of the procedural requirements of a mortgage action.

**Mortgage possession action**
This is an action where the claimant mortgagee, usually a bank or building society claims possession of land which includes a dwelling house. It should be noted that when instituting proceedings under a mortgage, it is possible for the claimant to decide to claim only for a money judgment for the sums due, rather than claiming for possession in addition.

The mortgagee’s right to possession

In the absence of any contractual or statutory constraints, the mortgagee (lender) is entitled to possession of the mortgaged property “before the ink is dry on the mortgage”, i.e. from the moment the mortgage has been executed notwithstanding the absence of any fault. This is of course unless there is a term expressed or necessarily implied into the contract of mortgage that the mortgagee has limited that right.

In practice, the terms of the mortgage deed of the lender will often state that the lender may only seek an order for possession where the mortgagor/borrower is a certain number of months in arrears with repayments.

Administration of Justice Act 1970 s.36; Administration of Justice Act 1973 s.8; and Mortgage Repossessions (Protection of Tenants etc) Act 2010

If the court is satisfied that the mortgagee/lender is entitled to possession under the terms of the mortgage it must generally go on to consider s.36(1) to (4) of the AJA 1970 which allows the court a certain limited discretion to adjourn the proceedings or make the possession order subject to a stay or suspension or postponement for a “reasonable” period. Conversely, the court cannot suspend an order for possession under s.36, however hard the circumstances, if there is no prospect, on the evidence, of the mortgagor reducing the arrears: Abbey National v Bernard (1996) 71 P. & C.R. 257, CA; Abbey National Building Society v Mewton (1995) 9 C.L. 346, CA. This may be made subject to conditions as to payment of outstanding capital sums or arrears, as the court thinks fit.

The court may exercise this discretion if it has before it evidence that the mortgagor is likely to be able to pay any sums due under the mortgage within a “reasonable” period.

There is much case law on the exercise by the court of this discretion, and in order to see how the discretion is applied in practice, see for example Western Bank v Schindler [1977] Ch. 1; Cheltenham

Also, in certain cases, s.8(l), (2) and (4) of the AJA 1973 must be borne in mind. This allows the court to treat the sum due under the mortgage in certain types of mortgage (under an instalment mortgage for example), as being only those sums that are in arrears even if there is a clause in the mortgage which triggers repayment of the whole amount outstanding upon default of an instalment. For the operation of this discretion in practice see the cases of Habib Bank v Tailor [1982] 1 W.L.R. 1218; Bank of Scotland v Grimes [1985] 2 All E.R. 254; Cheltenham and Gloucester Building Society v Norgan [1996] 1 W.L.R. 343, CA; Cheltenham and Gloucester Building Society v Krausz [1997] 1 W.L.R. 1558.

The 2010 Act gives courts additional, discrete, powers to postpone the delivery of possession of a dwelling if there are specified categories of unauthorised tenants in occupation.

**Costs**

A lender who is successful in the mortgage action is almost invariably entitled to add the costs of the action to his security under the terms of the mortgage. (Gomba Holdings (UK) Ltd v Minories Finance Ltd (No. 2) [1992] 4 All E.R. 588, CA.)

**Defences: setting aside the mortgage or charges**

Defences of undue influence or misrepresentation (by either the lender or a third party in circumstances where the lender had notice) may, if established, allow the mortgage to be set aside.

In certain circumstances, an occupier of mortgaged property, who has not consented to the execution of the mortgage in favour of the mortgagee/lender, may establish that he has an “overriding interest” (within the meaning under Sch. 3 para. 2 of the Land Registration Act 2002) which takes priority to that of the lender. For this reason, the lender will usually obtain the consent to the mortgage (in writing) of any non-borrowing spouse or other “occupier” of a mortgaged property at the time of the execution of the mortgage. If this consent has not been obtained, difficulties may arise in attempting to enforce the mortgage against the occupier: see the cases of

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**Mortgage possession action**

This is an action where the claimant mortgagee, usually a bank or building society, claims possession of land which includes a dwelling house. It should be noted that when instituting proceedings under a mortgage, it is possible for the claimant to decide to claim only for a money judgment for the sums due, rather than claiming for possession in addition.

**The mortgagee’s right to possession**

In the absence of any contractual or statutory constraints, the mortgagee (lender) is entitled to possession of the mortgaged property “before the ink is dry on the mortgage”, (Fourmaids Ltd v Dudley Marshall (Properties) Ltd [1957] 2 All E.R. 35 AT 36), i.e. from the moment the mortgage has been executed. This is of course unless there is a term expressed or necessarily implied into the contract of mortgage that the mortgagee has limited that right.

In practice, the terms of the mortgage deed of the lender will often state that the lender may only seek an order for possession where the mortgagor/borrower is a certain number of months in arrears with repayments.

It is now clear that the limitation period is six years in respect of interest and 12 years in respect of capital; see: Bristol & West BS v Bartlett [2002] EWCA Civ 1181; [2002] 4 All E.R. 544; [2002] 2 All E.R. (Comm) 1105. Recent cases include Scottish Equitable Plc v Thompson [2003] EWCA Civ 225; (200307 E.G.C.S. 137 and West Bromwich BS v Crammer [2002] EWHC 2618 (Ch) (Neuberger J). (Note however the overriding effect of the FSA's new rules on regulated first charge mortgages contained in “MCOB” Sourcebook of the FSA Handbook. In particular MCOB 12.4.1BR, in effect since June 25, 2010, requires lenders, where there is a payment shortfall, to allocate any payment the customer
does make, “first towards paying off the balance of the shortfall (excluding any interest or charges on that balance)”. Failure to file or serve a defence does not prevent the defendant from taking part in the proceedings, although it may be taken into account when deciding what costs order to make: see CPR r.55.

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The court may exercise this discretion if it has before it evidence that the mortgagor is likely to be able to pay any sums due under the mortgage within a “reasonable” period.

There is much case law on the exercise by the court of this discretion, and in order to see how the discretion is applied in practice e, see for example Western Bank v. Schindler [1977] Ch. 1; Cheltenham and Gloucester Building Society v. Norgan [1996] 1 W.L.R. 343 CA; National and Provincial Building Society v Lloyd [1996] 1 All E.R. 630; Cheltenham and Gloucester Building Society v Krausz [1997] 1 W.L.R. 1558; Ropaigealach v Barclays Bank Plc [1999] 3 W.L.R. 17. See also Horsham Properties Group Ltd v Clark [2009] 1 W.L.R. 1255.

Also, in certain cases, S.8(1), (2) and (4) of the AJA 1973 must be borne in mind. This allows the court to treat the sum due under the mortgage in certain types of mortgage (under an instalment mortgage for example), as being only those sums that are in arrears, even if there is a clause in the mortgage which triggers repayment of the whole amount outstanding upon default of an instalment. For the operation of this discretion in practice, see the cases of Habib Bank v Tailor [1982] I W.L.R. 12 L8; Bank of Scotland v Grimes (1985) 2 All E.R. 254; Cheltenham and Gloucester Building Society v Norgan [1996] 1 W.L.R. 343 CA; Cheltenham and Gloucester Building Society v Krausz [1997] I W.L.R. 1558.
The court's inherent power to stay an action or the case management powers contained in the CPR give the court no power to stay except "for some procedural reason connected with the proceedings in which the possession order is made": per Jonathan Parker L.J. in State Bank of New South Wales (t/a Colonial State Bank) v Harrison [2002] EWCA Civ 363.

It is to be noted that s.36 confers a power only in respect of the whole of the property – it cannot apply in respect of a part only: see Barclays Bank Plc v Alcorn (Hart J. Ch. D., March 11, 2002) and on appeal [2002] EWCA Civ 817.

Costs

A lender who is successful in the mortgage action is almost invariably entitled to add the costs (subject to the costs being reasonably incurred and reasonable in amount) of the action to his security under the terms of the mortgage. (Gomba Holdings (UK) Ltd v. Minories Finance Ltd (No. 2) [1992] 4 All E.R. 588 CA.)

Counterclaims

Generally, the existence of a counterclaim for a sum of money where the counterclaim is for (1) unliquidated damages or (2) liquidated damages which do not (even if proved) exceed the amount of the mortgage debt, does not defeat the mortgagee/lender’s claim to possession. (Ashley Guarantee v Zacaria [1993] 1 W.L.R. 62 CA; National Westminster Bank v Skelton [1993] 1 W.L.R. 72 CA.) It is as yet undecided whether or not a counterclaim to a liquidated sum which exceeds the mortgage debt is sufficient to discharge the debt altogether and prevent the mortgagor from obtaining possession under the mortgage or charge.

Defences: setting aside the mortgage or charge

Defences of undue influence or misrepresentation (by either the lender or a third party in circumstances where the lender had notice) may, if established, allow the mortgage to be set aside. These defences are dealt with comprehensively in other sections of this work.

In certain circumstances, an occupier of mortgaged property, who has not consented to the execution of the mortgage in favour of the mortgagee/lender, may establish that he has an
“overriding interest” (Land Registration Act 2002 Sch. 3, para. 2, previously within the meaning under s.70(1)(g) of the Land Registration Act 1925) which takes priority to that of the lender. For this reason, the lender will usually obtain the consent to the mortgage (in writing) of any non-borrowing spouse or other “occupier” of a mortgaged property at the time of the execution of the mortgage. If this consent has not been obtained, difficulties may arise in attempting to enforce the mortgage against the occupier: see the cases of *Williams and Glyn’s Bank Ltd v Boland* [1980] 2 All E.R. 408; *City of London Building Society v Flegg* [1987] 3 All E.R. 435; *Woolwich Building Society v Dickman* [1996] 3 All E.R. 204; *State Bank of India v Sood* [1997] Ch. 276 for problems caused for mortgagees by overriding interests.

THE ASSESSMENT OF DAMAGES IN PROPERTY CASES

Where a breach is actionable but not sufficiently serious to warrant the grant of an injunction and damages are to be awarded, the basis of the assessment of those damages has previously been the subject of much debate. The courts have a wide discretion when assessing damages in trespass and for other breaches of covenant.

The measure of damages here is relevant in cases of damages for:

- trespass;
- breach of a restrictive covenant;

There are three normal bases for the assessment of damages:

(a) traditional compensatory damages (to compensate the claimant for losses resulting from the breach i.e., damages intended to place the injured party, in so far as money can, in the position that it would have been in had the covenant not been breached);

(b) “hypothetical negotiation damages” (i.e., a sum based upon what reasonable people in the position of the parties would negotiate for a release of the right that has been breached); and;
(c) an “account of profits” (i.e. a sum based upon an account, namely, on the profit that the defendant has made, is making and will make as a result of the breach).

Although damages are normally assessed under (a) and (b), a party can elect which measure to request and, in exceptional cases, damages under (c) may be awarded. Category (c) is more likely to be applied where the defendant’s conduct has “aggravating” features, such as a blatant profiteering from the misappropriation of property.

To illustrate how the different measures of damages may apply:

- Suppose A and B own neighbouring office blocks separated by a party wall which is jointly owned by both A and B – so that A and B will require the consent of the other to carry out any works to that party wall – without which consent an actionable trespass would be committed;

- Now suppose, A, without B’s consent (and without serving the requisite party wall notices), gets his builders to put windows into the party wall at roof level with a view to converting his top floor office space to residential penthouse flats selling at £1m each – and that his net development gain is £3m.

- Assume B had, at the same time, planned a development of his offices by adding an additional floor of office space – for which he can no longer pursue because A’s windows are now in place and they overlook the development land. B cannot get planning permission for his development because A’s windows now overlook his land – B’s land is now “sterilised” in development terms by the presence of the windows.

- Assume B demonstrates that A’s actions are a trespass, so breach is established – but that B waits 2 years before taking action so elects to claim damages rather than an injunction.

- The question is - what damages would B be entitled to?

Three approaches to damages

Compensatory approach

This is generally calculated with reference to the “diminution in the value” of the injured party’s land that results from the breach. The compensatory approach causes problems were the injured party has suffered little or no actual loss.
In our example, B, the injured party arguably suffers a negligible loss on a diminution in value basis because having windows in a party wall at roof level will not make much difference to the value of his property (for which he has no planning permission for his development). So compensatory damages are of little value to B.

**Buy-out (Hypothetical negotiation) damages**

It is in this context that “buy-out damages” have evolved.

Buy-out damages started with the case of *Wrotham Park Estate Co Ltd v. Parkside Homes Ltd* [1974] 1 WLR 798, where the offending party (Parkside) breached a freehold restrictive covenant by commencing the development of land. Brightman J ordered the developer to pay damages on the following basis:

“A just substitute for a mandatory injunction would be such sum of money as might reasonably have been demanded by the plaintiffs from Parkside as a quid pro quo for relaxing the covenant”

Damages were fixed at 5% of the developers' net profit in Wrotham Park. As subsequent cases have shown, 5% is firmly at the lower end of the scale.

Therefore, the starting point is to look at the developers’ anticipated “profit” to be made from the development in breach (i.e., the As development, not the Bs development in this instance). There is then applied what is called “a Stokes percentage” (derived from *Stokes v Cambridge Corporation* (1961) 180 EG 839) which is, as a rule of thumb, one third of the net profit (though the precise percentage depends on the evidence – the one third approach was endorsed in Tamares). The cases show that the courts have applied a percentage between 5% and 50% of the net profit of the development in breach.

In our example, this would be one third of A’s development profit, not one third of the sterilisation loss of the innocent party B. So, in the original example, B might expect to recover one third of the net development gain of A, namely £1m. It would be open to B in our example to contend that the damages should be at the higher end of the scale because not only did A make a development gain, but B lost a development opportunity by not being able to proceed with its own development by reason of the development.

In the more serious cases, damages can go as high as 50% of the profit of the wrong-doing party. The percentage is never 100% because that can never be the outcome of a hypothetical negotiation that
a developer in breach would agree to disgorge of his net profit – he would have “walked away” from
the hypothetical negotiations.

To summarise therefore, in seeking to determine what level of damages should be awarded in lieu of
an injunction, the following principles apply:

- damages will usually be assessed as at the dated of the breach;

- the context, including the nature, seriousness and effect of the breach has to be considered
  \textit{(Wrotham Park)};

- the claimant will usually be expected to receive some part of the likely profits from the
defendant \textit{(Carr-Saunders)};

- the level of damages ought not to be so great that the development, or the relevant part of
  the development, would not have been carried out had such a sum been payable
  \textit{(Bracewell)}, namely this is not a true ransom situation where an “unreasonable” amount can
  be demanded from one side;

- the court must consider whether the deal “feels right” in all the circumstances \textit{(Bracewell v.
  Appleby [1975] Ch 408)}.

However, the role of the hypothetical negotiation when assessing \textit{Wrotham Park} damages has been
unclear. For example, can events occurring after the hypothetical negotiation be properly taken into
account? Can a court properly take into account how profitable the outcome of a given venture has
proved to be for the party in breach, rather than how profitable it was expected to be at the time a
pre-breach negotiation would have taken place?

The principles to be applied in “hypothetical negotiation damages” cases were summarised by Vos J
in \textit{Stadium Capital Holdings (No 2) Ltd v Marylebone Property Co PLC [2011] EWHC 2856 (Ch)} as
follows:

- The negotiation is taken to be one between a “willing buyer and a willing seller at an
  appropriate time” (in this case accepted to be when the trespass began);

- Events after the valuation date are generally ignored;

- The fact that one party might have refused to agree is irrelevant;

- But the fact that one party held a “trump card” and could have stopped the defendant
  obtaining any benefit is a relevant matter. The value of the benefit of the trespass to a
reasonable person in the position of the particular defendant is what is being sought. In other words, the price which a reasonable person would pay for the right of user, or the sum of money which might reasonably have been demanded as a quid pro quo for permitting the trespass;  
- the personal characteristics of the parties were to be ignored.

**Licence fee approach**

In April 2011, the Court of Appeal heard the case of *Jones v Ruth [2011] EWCA Civ 804; [2011] C.I.L.L. 3085*. The claimants brought an action for damages for nuisance, trespass, personal injury and harassment arising from the defendants’ building works in the next door terraced property which lasted for a period of four years. At first instance, damages for the trespass were awarded based on the increased value of the defendants’ house. The Court of Appeal reversed the decision quantifying damages instead by reference to a “licence fee”. Patten LJ held:

*The test was what the parties, acting reasonably, were likely to have agreed as payment for the necessary licence. As part of that hypothesis, one had to assume that the parties would have acted as willing grantors and willing grantees. Consistent with this, the defendant would not have either withdrawn from the negotiations or been willing to give up the entirety of any value attributable to the planned works. Similarly, the claimants would not have refused permission except upon payment of the lion’s share of any increase in value.*

*The licence fee would not have likely exceeded one-third of the prospective increase in value. The issue for the court was to determine what the parties, acting reasonably, were likely to have agreed as payment for the necessary licence. On the facts, the licence fee was not likely to have exceeded one-third of the prospective increase in value. This was more generous to the claimants than the five per cent of the anticipated profit awarded in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd [1974] 1 W.L.R. 798* but it did take account of the claimants’ sensitivity about interference with their property and the defendants’ keenness to tie the development into the works at another property owned by them on the other side.*

In *Kettel v Bloomfold Limited [2012] EWHC 1422*, the claimants were leaseholders of flats in a block. Their leases provided that they were entitled to use a car park at the block for the purpose of parking a car or motorbike. In practice, they each used a space which had been allocated to them. The defendant freeholder wanted to build a new block of flats on part of the car park used by the claimants. The claimants issued proceedings for an injunction, arguing that they were each entitled to a specific parking space and that the proposed building works would interfere with this right. The freeholder resisted the claim, contending that there was no more than an easement providing a general right to park which could be satisfied by alternative parking spaces on other parts of the site. The injunction was granted. The leaseholders were wrong to claim that they had identifiable rights to specific car parking spaces: the right was to use the car park area for the parking of a car or
motorbike. That right was an easement and could not be unilaterally extinguished by the freeholder, even on terms that an equivalent right would be created over other land.

Albeit obiter, HHJ David Cooke in Kettel held that, had he refused an injunction, and granted damages in lieu he would have held, after allowing a 25% developers’ profit, the proper split was 50/50 of the balance of the development value occasioned by the developers’ new block of flats.

The above cases suggest that a one-third rule of thumb for hypothetical negotiation damages is what the parties can expect to pay, and receive.

Account of profits

Account for profits means that the infringing party is required to give up its unlawful gain. Such a measure of loss is not compensatory, but is restitutionary.

Such damages were awarded in Attorney-General v. Blake [2001] 1 AC 268. Here, the government sought to prevent a former agent and spy from benefitting from the sale of his autobiography, the contents of which contravened confidentiality undertakings. The breach of trust element of his actions was cited to justify him having to account for his profits rather than merely paying compensation. Such an award will be made only in exceptional circumstances.

An exceptional decision on damages for trespass arose in the case of Ramzan v Brookwide Ltd [2011] EWCA Civ 985, which was heard by the Court of Appeal in June 2011. LJ Arden described it as “a remarkable case” resulting from “the misappropriation by the appellant, Brookwide Limited (“B”), of a room forming part of a property then owned by Mr Ramzan, then a bankrupt”. It was a “straight misappropriation of property”.

In this case, damages were assessed by reference to an “account of profits” rather than a licence fee.

B’s parent company, Agra Ltd, owned two adjoining terrace properties. In 1992, Agra sold one of the terraced properties to R’s father. Included in the sale agreement was a room on the first floor of the adjoining property retained by B. This room was a store room through which it was possible to access a fire escape. The room could be accessed from R’s property but was sealed off from B’s retained property.

B broke through the wall, removed the tools in the store room, cut the fire alarm wires and blocked up the access to R’s property. It then turned the first floor into a flat and rented it out. It was accepted that B would not have been able to do so without the store room space. B acted quickly
intending to make it as difficult as possible for R to reverse the situation which led the judge at first instance to comment in finding for R in the following terms:

“... appropriating property with reckless disregard of the rights of others, and then taking all available steps to ensure that it cannot be returned, all with a view to making a gain, is almost as bad as deliberately taking for oneself property which is known to belong to someone else”

The Court of Appeal endorsed the trial judge’s decision, in principle, to stand back and assess each head separately before proceeding to check whether there was any element of double recovery. Faced with alternative and inconsistent remedies, a party had to elect between them when, but not before, judgment is given in his favour and the judge is asked to make orders against the defendant. He is not required to choose at the time he issues proceedings. If he is unable to decide because, for example, he does not know how much profit the defendant has made, the court can order further disclosure so that this can be established.

In discussing the options available to a successful claimant, the Court of Appeal identified four possible orders (at [51]) and held that an award for loss of profits was subject to clear authority, namely Severn Trent Water Ltd v Barnes [2004] EWCA Civ 570; [2004] 2 E.G.L.R. 95 and Tang Man Sit (Deceased) v Capacious Investments Ltd [1996] A.C. 514.

In Forsyth-Grant v. Allen [2008] EWCA Civ 505, however, an account for profits was denied. The case concerned the construction of houses that affected rights of light prescriptively acquired by an adjoining hotel. The hotelier refused to co-operate. The building went ahead, but with amended plans so as to minimise any infringement of the hotelier’s right to light. The hotelier issued proceedings for infringement of rights to light, seeking damages based on the profits made by the builder. The first instance judge decided that it would be inequitable to grant an injunction in respect of the infringement, and damages on an account for profits basis were refused; the judge awarded compensatory damages of £1,850 on the basis of the loss actually suffered. One factor in this decision was that the hotelier had resolutely refused to negotiate with the builder.

On appeal, it was argued that the judge was wrong to hold that he could order an account for profits only in exceptional circumstances. The Court of Appeal upheld the first instance decision, ruling that the standard remedy for nuisance was an award of damages. Such damages would ordinarily compensate a claimant for the loss actually suffered. However, they might, in appropriate cases, include a share of the profits derived from the breach, calculated by reference to what the claimant would have secured in negotiations to relax the right infringed (that is, buy-out damages). The Court of Appeal noted that account of profits is “a distinct and different remedy” to be made only in
exceptional cases where a defendant had misappropriated proprietary rights belonging to the claimant (for example, a breach of confidence as in *Blake*); cases of nuisance do not involve the misappropriation of the claimant’s rights in such a way.

These cases demonstrate the importance of giving careful thought before commencing proceedings as to what measure of loss a claimant will be contending for.

**INTERIM INJUNCTIONS IN PROPERTY CASES**

In 1975 Lord Diplock laid down his guidelines as to the courts’ approach to the granting of interim injunctions (pending a trial on the merits) in the well known and leading case *American Cyanamid* [1975] AC 396. Despite its vintage, American Cyanamid is the case to which practitioners will need to turn in order to decide whether or not a court is likely to grant an interim injunction to restrain a potential defendant from the matters his client is complaining of. This article will look at the application of the American Cyanamid principles in property cases.

Firstly, a reminder the of the limbs of the American Cyanamid guidelines which the court will apply systemically:

1. **Is there a serious issue to be tried?** The claimant does not need to show a prima facie case, in the sense of convincing the court that, on the evidence before it, he is more likely than not to obtain a final injunction at trial. As Lord Diplock held at 406G-407G:

   "The evidence available to the court at the hearing of the application for an interim injunction is incomplete. It is given on affidavit and has not been tested by oral cross-examination. The purpose sought to be achieved by giving to the court discretion to grant such injunctions would be stultified if the discretion were clogged by a technical rule forbidding its exercise if on that incomplete untested evidence the court evaluated the chances of the claimant’s ultimate success in the action at 50% or less, but permitting its exercise if the court evaluated his chances at more than 50%........there is no such rule.....the court no doubt must be satisfied that......there is a serious question to be tried...."

This "serious issue to be tried" preliminary hurdle is often the easiest of the American Cyanamid guidelines for a claimant to satisfy.

2. **Adequacy of damages to either party:** would the claimant be adequately compensated by an award of damages at trial? The next question, if the court considers that there is a serious issue to be tried, is this: if the claimant were to succeed at trial in establishing his right to a permanent injunction, would he be adequately compensated by an award of damages for the loss he would
have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. As Lord Diplock held at 408B-C:

"If damages....would be an adequate remedy and the defendant would be in a financial position to pay them, no interim injunction should normally be granted, however strong the claimant's claim appeared to be at that stage"

This is a very powerful tool in the hands of a defendant to an interim injunction application; and is probably the prime reason for the failure of interim injunction applications. If the defendant can demonstrate that the nature of the matters complained of by the claimant are in the nature of pure financial losses (so compensatable in damages) then an injunction will normally be refused, however strong the claimant's case.

However, if damages would not adequately compensate the claimant for the temporary damage, and the claimant is in a financial position to give a satisfactory undertaking in damages, and an award of damages pursuant to that undertaking would adequately compensate the defendant in the event of the defendant succeeding at trial, an interim injunction may be granted.

3. Is there a doubt as to the adequacy of damages? As Lord Diplock held at 408E:

"It is where there is a doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of the balance of convenience arises".

By definition, once the investigation has reached this third stage, the decision of the court, whether in favour of or against an injunction, will inevitably involve some disadvantage to one or the other side which damages cannot compensate. The extent of this "uncompensatable disadvantage" either way is often a significant factor in determining the "balance of convenience".

4. Status Quo: Lord Diplock held at 408F:

"Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo"

These words illustrate how essential it is for a claimant to move quickly if applying for an interim injunction. In many cases prompt action may mean that the preservation of the status quo favours the claimant as the defendant's activities are still at a preliminary stage. The application of the American Cyanamid principles were illustrated recently in Loughman v. Network Rail (3rd August 2011, Ch D, unreported).
Loughman, a construction company, was a commercial tenant of storage premises in east London. Loughman possessed a number of storage premises in and around London. Network Rail was Loughman's landlord under a 15 year lease. In January 2011, Loughman served notice to terminate its lease by service of a 6 month break notice under a break clause in its lease. Loughman, however, failed to stipulate a termination date in its break notice. Network Rail, who wished to develop the premises themselves, was pleased to receive the break notice (as it fitted in with its own development plans). Network Rail therefore accepted the termination of the lease, and set a termination date of 13th July 2011. Loughman then learned that the premises had development potential, so changed its mind, and contested the validity of its own break notice on the basis that, in the absence of its break notice stipulating a break (termination) date, it was impossible for either party to know when the lease terminated. Leaving aside any estoppel arguments preventing Loughman from challenging its own notice, the consequence of this argument was that Loughman argued (rather unusually) that its own notice was invalid and it was entitled to remain in possession.

Network Rail did not accept Loughman's arguments and, on 14th July 2011 in the early hours of the morning, it changed the locks to the premises, thereby excluding Loughman. Loughman then applied for an interim injunction requiring Network Rail to allow Loughman back into the premises pending a trial of the determinative issue of the validity of the break notice.

Addressing the American Cyanamid guidelines, Network Rail accepted that the issue of whether or not Loughman's break notice was invalid was a "serious issue to be tried". Thus, Loughman had surpassed the first hurdle in American Cyanamid. However, Network Rail argued that damages were an "adequate remedy" for Loughman so an interim injunction should be refused. The court (Mr Justice Roth) agreed for essentially two reasons. Firstly, Loughman had other storage premises in London which it had been operating from since 14th July 2011, and although it would be more expensive for Loughman to continue to operate from those alternative premises pending trial, that was a financial loss for which damages would be an adequate remedy at trial. The other losses that Loughman would be exposed to, such as the costs of moving equipment back to the premises in the event it succeeded at trial, were also financial losses that would be compensatable by Network Rail as damages at trial. If damages were an adequate remedy then, as Lord Diplock held in American Cyanamid, it does not matter how strong a claimant's case is in such circumstances, an interim injunction will be refused. As a secondary reason, the court noted that Loughman had been a little slow to apply for an interim injunction, waiting 3 weeks. This illustrates that, if you are to apply for an interim injunction, you must apply to the court as soon as possible. In most cases, this will mean applying to the court within a week of the alleged infringement of the claimant's rights. A potential
claimant who is dilatory runs the risk that the court will infer that the claimant can cope with an interim remedy and refuse relief.

What are the lessons from Loughman? Firstly, as indicated above, a claimant must not delay in making its application. Time is of the essence in such applications. Secondly, the claimant must ensure that it will not be defeated by the defendant’s likely “damages are an adequate remedy” argument. For example, if the facts had been that the premises in Loughman were its only, and central, operational premises, to which attached its customer goodwill, Loughman may have had a stronger case for an injunction on the basis that these specific premises were crucial to its business. As matters stood, the premises were only one of a number of satellite storage premises that it used. It could not be argued that these premises were pivotal to Loughman. Thus, any losses could be compensated in damages.

In what other factual situations in a property dispute is an interim injunction likely to be considered? The following are common examples:

(a) to restrain trespass to land by a persons or structures; or to compel the removal of overhanging structures; or to order the removal of a tree whose roots are causing damage to a wall (Elliott v. Islington LBC [1991] 10 EG 145);
(b) to exclude a defendant from his home so as to stop a serious nuisance committed against a neighbour (Liburd v. Cork [1981] CLY 1999; and more recently injunctions against anti-social behaviouir (Housing Act 1996, s.152);
(c) to restrain an infringement of a right to light; and to compel the removal of structures so built (Pugh v. Howells (1984) 48 P&CR 298);
(d) to protect a licence to occupy premises;
(e) to restrain the sale of land to a third party when the vendor has already agreed to sell it to the claimant;
(f) to enforce a local authority's right to buy (Dance v. Welwyn Hatfield DC [1990] 1 WLR 1097);
(g) an application by a landlord to restrain subletting or assignment in breach of the terms of a lease;
(h) an application by a tenant to restrain harassment; and to compel the landlord to allow peaceful re-entry;
(i) an application by a tenant to enforce the landlord's liability to repair under the Defective Premises Act 1972 (Barrett v. Lounova Ltd [1989] 1 All ER 351).
In conclusion, therefore, a potential claimant considering applying for an interim injunction should carefully weigh in a systematic way the American Cyanamid guidelines in coming to a decision as to whether the application is justified. Just do not delay in arriving at that decision.