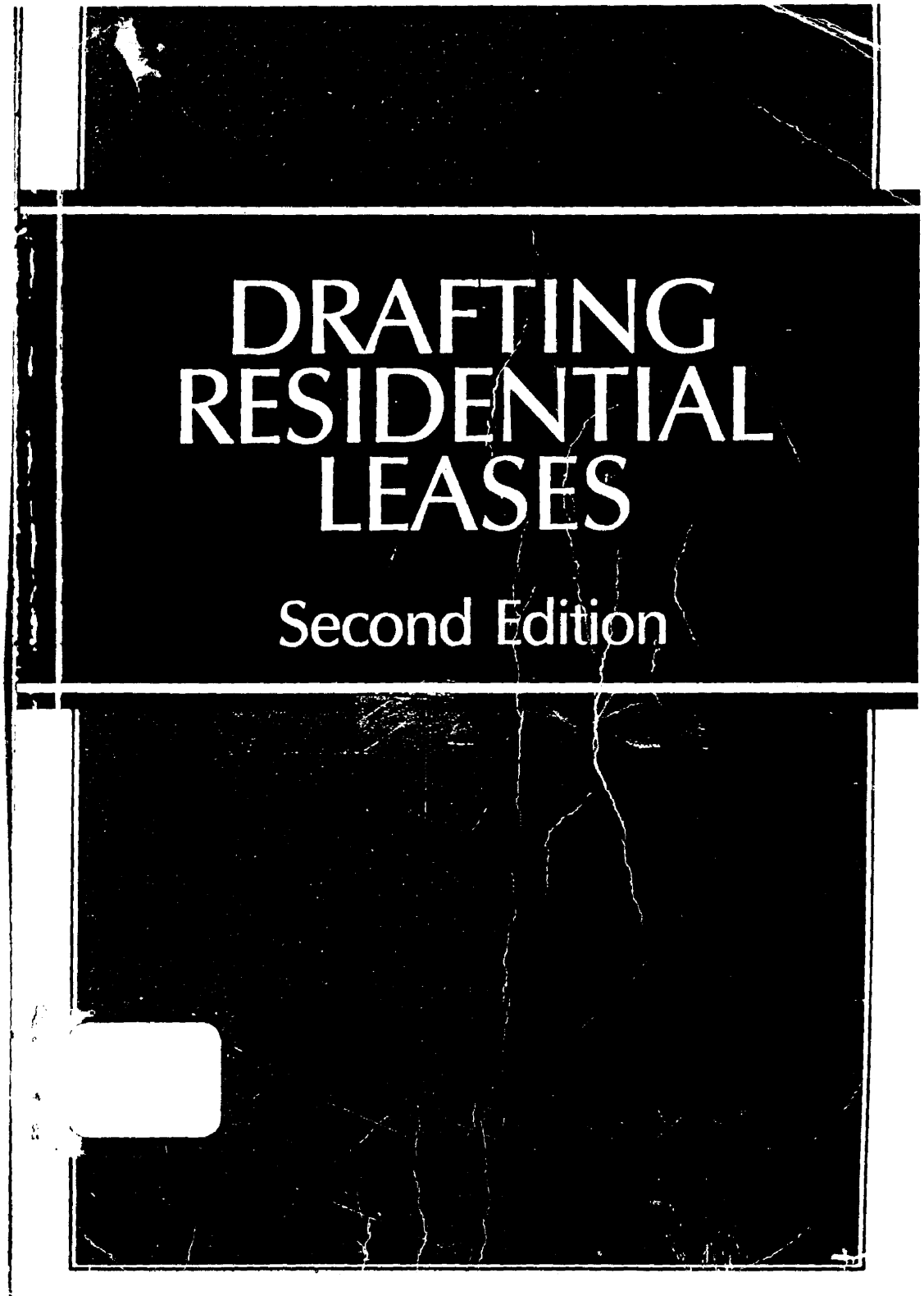
DRAFTING
RESIDENTIAL
LEASES
Second Edition

Landlord

Chapter 5

Premises, Easements and Other Rights

A Definition of the property to be let

1 Definition and plan

It is of fundamental importance that the property to be let should be accurately defined. Its latest postal address should always be checked and included. This should suffice if the property is an existing self-contained house in a town. A plan is likely to be necessary in the case of rural properties—and will always be so when long leases of flats in a block, or leases of flats in a converted house, are granted. A plan is not usually included where rooms in a part of a house in multiple occupation are let under a short or periodic tenancy. But in any case where no plan is used the draftsman must ensure that his verbal description fully identifies the property and is free from ambiguity. The postal address cannot be sufficient where an existing property is being divided into parts.

Where a plan is used it must be of an appropriate scale sufficient to show where each boundary runs. The 1:250,000 Ordnance Survey map is unsuitable for such purpose where a house is to be divided into flats. In such a case, architect's drawings should be used to show the precise positions of rooms and walls (see the observations of the Court of Appeal in *Scarfe v Adams* [1981] 1 All ER 843); the drawings may need reduction on a photocopying machine.

Note therefore that in the case of a long lease of a flat it is likely that two plans will be necessary; a site plan showing the parts retained by the landlord (including any parking areas) and a floor plan showing the layout of the flat should both be incorporated.

The draftsman must decide whether he wishes the verbal description to take priority over the plan or vice versa (his principal aim will be to ensure that there is no discrepancy between the two). The plan can be made to prevail over an unclear or ambiguous verbal description by the use of expressions such as

> all which said premises are more particularly described in the plan . . .
> as the same is more particularly delineated on the plan . . .
> more precisely delineated (or described) . . .

See *Eastwood v Ashton* [1915] AC 900.

'For the purpose of identification only', by contrast ensures that the verbal description of the land will prevail over the plan in the event of inconsistency between them. Likewise, if the boundary line shown on the plan (for identification only) should differ from some physical feature on the ground which the lease otherwise indicates as the intended boundary line, the latter prevails over the plan. However a plan 'for identification only' may be used to determine a boundary where neither the verbal description of the premises nor the physical features assist in determining its position (ie where no other means is available)—see *Wigginton & Milner v Winster Engineering* [1978] 3 All ER 436; *Graham v Philcox* [1984] 2 All ER 643. It may also be looked at where the verbal description in the parcels clause is unclear; see *Scott v Martin* [1987] 2 All ER 813. This form of words should therefore be used only where a clear, complete and accurate description of the property can be given.

It will be obvious from the above that the conjunction of the two expressions

> for the purpose of identification only more particularly delineated on the plan . . .

is to be avoided at all costs. The use of the two expressions together was, correctly, described by Megarry J in *Neilsen v Poole* (1969) 20 P & CA 909 as 'mutually stultifying'.

Where the land is registered the lease must refer to the land by means of its title number; a signed plan enabling the land to be identified on the filed plan must be included (r 113 of the Land Registration Rules 1925). It follows that in the case of

registered land a plan 'for the purposes of identification only' cannot be—and is not—acceptable (see *Wontner's Guide to Land Registry Practice*, 14th ed (1982) at p 26).

Where a plan is used it should be signed by the parties. (Plans for the Land Registry may be signed by the solicitor on behalf of the transferee, but not the transferor: see *Wontner*, p 63.)

If the lease is to be registered at HM Land Registry, a plan must be provided unless a reference to the General Map identifies the land with sufficient accuracy (this will not be so in the case of a flat or part of a building; see r 54 of the Land Registration Rules 1925). Where the lease either is to be registered or may in future be registered the plan should follow the colouring system used by the Registry, namely:

Red edging to show the extent of the registered land;

Green edging to indicate land removed from the title;

Green tinting to show excluded islands of land within the land edged red;

Brown tinting [or hatching] to show land over which the registered land has the benefit of a right of way;

Blue tinting [or hatching] to show any part of the registered land which is subject to a right of way.

Additional colouring or references should be used in the following order:

Tinting pink, blue, yellow, mauve;

Edging the specified area blue, yellow, mauve;

Hatching in colour (other than black or green);

Numbering or lettering of small self-contained areas.

Measurements in such cases should be in metric units; where the lease is not to be registered either imperial or metric units may be used.

The draftsman should follow the Land Registry requirements in relation to plans in all cases where the lease may in future be registered.

2 Boundaries

Where the property let includes land other than the dwelling, the boundaries must be defined. If the land is fenced or hedged the lease should specify where the boundary is to run, ie on which side or through the middle of the fence or hedge. In the case of a road and a non-tidal river the boundary will normally be the mid-point of the road or river unless the contrary is expressed (*Haynes v King* [1893] 3 Ch 439; *Thames Conservators v Kent* [1918] 2 KB 272). The plan is likely, however, to be a sufficient indication to the contrary, particularly on a modern estate.

If, however, the land is shown as being bounded by water, the intention, in the absence of evidence to the contrary will be treated as being that the land is conveyed subject to any gradual and imperceptible accretions or subtractions by erosion and division as might take place over the years. In other words, the water marks the boundary wherever the water may be at any particular time. The rule can only be excluded by firm evidence (ie a declaration in the lease) to that effect. (See *Southern Centre of Theosophy v State of South Australia* [1982] 1 All ER 283.)

(a) External walls

The external walls of a part of a building (whether it is divided horizontally or vertically) will, in the absence of any provision to the contrary, be included in the letting. This includes ornamental features attached to the outer wall, sun blinds and shutters (see *Hope Bros Ltd v Cowan* [1913] 2 Ch 312, *Sturge v Hackett* [1962] 3 All ER 166). However, in the case of a long lease of a flat in a block, where the landlord covenants to repair and paint the exterior and clean and maintain 'communal parts', it is usual for the letting to exclude the walls enclosing the flat, apart from their interior faces (see Form 1, Sched 1). Communal drains, water pipes and other services may also be excluded in such a case—but though logical, this course is not usually adopted. Note that if the external walls are excluded from the definition of 'the Premises', in a short lease they remain subject to the landlord's repairing obligations under s 11 of the Landlord and Tenant Act 1985 (*Campden Hill Towers Ltd v Gardner* [1977] 1 All ER 739).

(b) Horizontal divisions

Where the property is divided horizontally (into flats) there is no authority as to whether, in the absence of express provision, the boundary between the upper and lower flat is the top side, underside, or half-way through the thickness of the floor joists

of the upper flats. The roof will not, in the absence of express provision, necessarily be included in the lease of a top floor flat (*Cockburn v Smith* [1924] 2 KB 119).

(i) *The roof* It has been said that in the absence of express provision the roof will not be included in the lease of a top floor flat (*Cockburn v Smith* [1924] 2 KB 119). That case however involved the letting of 'a suite of rooms' on the top floor of a building; there was also at least one other flat on the top floor. It was in those circumstances that the Court of Appeal held that the roof had not been included in the demise. The writer therefore believes that no general rule can be deduced from *Cockburn v Smith*. The terms of the lease *may* show an intention that the roof is to pass. Thus, in *Straudley Investments v Barpress Ltd* (1987) *The Times*, 14 December, the Court of Appeal concluded from the wording of the tenant's repairing covenant, that the roof was intended to pass.

Under a lease for less than seven years of a top floor flat, the landlord's obligation to repair the structure and exterior of the premises will generally extend to the roof even if the demised property does not include the roof: see s 11(1A)(*a*) of the Landlord and Tenant Act 1985 (as amended by s 116 of the Housing Act 1988) for tenancies created after 15 January 1988, and for tenancies created before that date *Douglas Scott v Scorgie* [1984] 1 All ER 1086; (tenancies created after 15 January 1988 in pursuance of an agreement before that date are not within s 11(1A)(*a*)—see s 116(4) of the 1988 Act—and so are governed by *Douglas Scott v Scorgie*.

(ii) *Internally* The ordinary expectation is that the 'demise entitles the tenant to occupy all the space between the floor of his flat and the underneath of the floor of the flat above' (see Griffiths LJ in *Greystone Property Investments Ltd v Margulies* (1983) 47 P & CR 472. In that case, the sublease was of a flat in a converted Victorian house. As originally constructed the rooms were over 18 feet, 6 inches high. When the conversion took place, lower false ceilings were installed. There were voids between the original and false ceilings of as much as 6 feet. The subtenant wished to remove the false ceiling. His landlord objected on the grounds that the flat consisted only of the space between the floor and the false ceiling. The Court of Appeal rejected the landlord's contention. Griffiths LJ was impressed by the extreme

improbability that the landlord should wish to retain ownership of the voids to which there was no access and which could not be of any use (to the landlord). There was therefore nothing to exclude the (above) ordinary expectation.

It is to be observed that the court was not persuaded that the somewhat curious wording of the parcels clause

> flat H . . . *formed* on the first floor of the block of flats . . .

was sufficient to displace the ordinary expectation. If that expectation is to be displaced either clear words must be used or a plan clearly showing the boundary to be other than the underside of the floor above should be provided.

(iii) *In practice*: the *precise* position of the horizontal boundary will often be academic interest only. If it is likely to be of importance, which it may be either for repairing purposes or in relation to alterations, the draftsman should specifically define it. In a long lease of a flat in a block, the landlord will wish to retain the roof, since the contributions to its upkeep will be taken from all the tenants under the service charge. For a provision defining the boundary in relation to floors and ceilings in a flat, see Form 1, Sched 1. In the case of a maisonette it will be appropriate to provide for the upper maisonette to include the roof, chimneys etc and the underside of the floor joists. As an alternative the floors and ceilings dividing the two maisonettes may be declared a party structure as in the example below. This will have the effect that the boundary will run through the medial plane.

Note that under a lease for less than seven years of a top floor flat, the landlord's obligation to repair the structure and exterior of the premises will extend to the roof even if the definition of the demised property does not include the roof (*Douglas Scott v Scorgie* [1984] 1 All ER 1086).

(c) Vertical divisions

If the letting is of the whole building, so that neither the landlord, nor any tenant of his, occupies any adjoining property, it is best for the definition of the Premises to follow the description in the landlord's document of title. If the property is semi-detached or comprised in a terrace the dividing wall is likely to be a party

wall. The landlord is likely to have a liability to this neighbour to repair the dividing wall or to contribute to its upkeep (in London, under s 56 of the London Building (Amendment) Act 1939; elsewhere, because failure to repair a party wall can give rise to an action for damages (see *Upjohn v Seymour Estates* [1938] 1 All ER 614; *Bradburn v Lindsay* [1983] 2 All ER 408)). Whether that liability can be passed on to the tenant will depend on the length of the lease. If it is for less than seven years no covenant to repair the party wall or contribute to its upkeep can be taken from the tenant (s 11 of the Landlord and Tenant Act 1985). In longer leases the ultimate financial burden of such repairs will generally be imposed on the tenant. This will be done in the case of a letting of the whole house by means of a direct covenant to repair the premises coupled with an indemnity against any claim by the owner of the adjoining property. This latter is particularly important where the adjoining owner is entitled to carry out work to the party wall and recover a share of the cost. The effect of a wall being made a party wall is that it remains

> severed vertically as between the respective owners and the owner of each part shall have such rights to support and user over the rest of the structure as may be requisite for conferring rights corresponding to those which would have subsisted if a valid tenancy in common had been created (s 38(1) of the LPA 1925).

Since the wall is severed vertically, the adjoining owner's half would not be included in the definition of the Premises, and therefore would not be within a covenant to repair the Premises. Accordingly the indemnity against the adjoining owner's claim is necessary.

By contrast, where the letting is of a flat in a block by a landlord who undertakes the obligation to repair the structure subject to payment of a service charge by the tenant, the above covenant and indemnity should *not* be imposed on the tenant. The service charge provision must be worded so as to include sums which the landlord may become liable to pay to the adjoining owner in satisfaction of his obligation to share the cost of maintaining the party wall. In practice this problem is unlikely to be encountered frequently in the case of purpose built blocks

of flats since most are 'freestanding' and have no party walls; but conversions of existing buildings may give rise to this problem.

Where the landlord or his tenants hold adjoining property, different considerations apply. In short leases, again, the landlord must bear the burden of repairs. It will not be necessary to define whether the boundary runs down the middle of the dividing walls or is to be the internal face of the wall. In long leases of flats in a block the dividing wall will be excluded from the lettings save for its internal face (because the dividing wall being one of the walls enclosing the flat will, in accordance with the usual practice, be retained by the landlord (see above)). If this course is not taken—eg if the wall is non-load bearing—the draftsman can provide for the boundary to run through the medial line of the wall. This will also be appropriate in the case of maisonettes, where there is likely to be a party wall separating the stairs of the upper flat from the entrance hall of the lower. In this case the floors and ceilings may also be made party structures. This will be done as in the following example.

Example 1 Declaration that wall (or all internal walls floors and ceilings) a party structure, boundary to run through medial line of the wall

It is hereby declared that:

(i) the northern wall of the Premises [*or*; all floors ceilings and internal walls separating the Premises from the lower maisonette] is [are] to be a party structure [party structures]

(ii) such party structure[s] is [are] included in the Premises as far only as the medial plane thereof.

The words in square brackets are alternatives.

3 Drafting considerations

Except in the case of short term or periodic lettings it will be convenient to include the substantial definition of the property to be let in a schedule. As will be seen from Form 1 the Premises are identified in the Particulars of the Lease by reference to address and the plan; the detailed description is then set out in Sched 1.

B Easements and ancillary rights

1 General drafting considerations

As well as identifying the premises to be included within the letting it is often necessary to make specific provision in relation to easements (rights of way, use of drains etc) and other rights which the premises are to enjoy or to which they are to be subject. In this context the provisions of s 62 of the LPA 1925 are crucial. The provisions of subss 1 and 2 of that section are set out below.

> *Section 62 of the LPA 1925*
> **62—General words implied in conveyances**
> (1) A conveyance of land shall be deemed to include and shall by virtue of this Act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, 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.
> (2) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this Act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, 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, houses, or other buildings conveyed, or any of them, or any part thereof.

A lease (under seal) is a conveyance within the above section as is a written tenancy agreement for less than three years at a rack rent (*Wright v McAdam* [1949] 2 All ER 565). An *agreement* for a lease for more than three years is not however a conveyance (*Borman v Griffith* [1930] 1 Ch 493) nor is an oral agreement for a lease for less than three years (*Rye v Rye* [1962] 1 All ER 146). The general words implied by s 62 are not implied unless there is a conveyance.

Where there is a conveyance—so that s 62 does apply—it is not strictly necessary to spell out all the easements and ancillary rights which are to be enjoyed with the property. No specific provision is therefore necessary to permit the tenant of a self-contained house to use the drains. However, in order that the tenant may know precisely what rights he has, it is good practice to detail the more important rights which are to pass; this is particularly so in relation to rights of way and access (in all cases), and, in flats or maisonettes, to rights in relation to drains, sewers, etc and to support from below and protection from above and, if appropriate, from the side. Section 62 should be looked on as a sweeping up device rather than as a substitute for express definition of important rights. Note also that an obligation to perform personal services, eg to provide hot water and central heating, does not pass under s 62 (*Regis Property v Redman* [1956] 2 All ER 335). Such obligations must therefore be specifically provided for in the lease.

Section 62 deals only with the *rights* which pass under the conveyance. It does not deal with obligations to which the tenant is to be subject. The landlord must therefore reserve in favour of himself (and any other tenants or adjoining occupiers who have rights over the property to be let) all such rights and easements as he requires. The *prima facie* rule is that the landlord cannot assert against the tenant any right unless he has expressly reserved it (*Wheeldon v Burrows* (1879) 12 Ch D 31; *Re Webb, Sandom v Webb* [1951] 2 All ER 131). This *prima facie* rule may be displaced; it is probable that a reservation of the right to use the communal drains and water pipes in a block of flats would be implied if the draftsman omitted to reserve expressly (*Pwllbach Colliery Co v Woodman* [1915] AC 634; *Aldridge v Wright* [1929] 2 KB 117). Clearly, however, trouble can be avoided by expressly reserving the appropriate rights. It must always be remembered that, when drafting a long lease, it is not only the present tenant who must be satisfied by the terms—future assignees and mortgagees (actual and prospective) must also be considered. The absence of usual provisions, even where they are not technically necessary, may be considered by such persons to render the lease unattractive.

The courts will imply easements (and reservations) either under the rule in *Wheeldon v Burrows* (1879) 12 Ch D 31 (on the basis of continuous and apparent user as at the date of the

grant) or on the *Moorcock* (1889) 14 PD 64 principle (necessity to give business efficacy); and see *Liverpool City Council v Irwin* [1976] 2 All ER 39. In that case the House of Lords held that, in a letting of a flat in a high rise tower block, there were implied easements or rights in the nature of easements in favour of the tenant to use the stairs, lifts and rubbish chutes. The draftsman's aim should, however, be to avoid reliance on such implied easements.

In long leases the wording involved in the grant and reservation of easements and other rights is likely to be lengthy. The current practice is to specify these rights granted and reserved in separate schedules. It will be seen that in Form 1 in the Appendix these rights are set out in Scheds 2 and 3 and are referred to in the body of the lease under the label 'the Included Rights' and 'the Excepted Rights'. This method of laying out the lease is substantially easier to read and understand than that adopted in older leases where all the Included Rights and Excepted Rights would have been set out in the body of the lease (where their respective labels appear in Form 1). This method of drafting should always be adopted where there are substantial Included and Excepted Rights.

2 Drains, pipes and cables

As has been mentioned above, specific provision in relation to these matters is essential in leases of flats and maisonettes. Water, gas and sewage pipes and telephone and electricity cables will run through the flat. Some of these pipes and cables will be for the benefit of the block as a whole; others will benefit only the particular flat in which they are. In the case of a long lease of a flat, the usual division of responsibility is that the landlord will undertake responsibility for the repair of the pipes and cables which benefit the block as a whole (the communal facilities) and the tenant will be responsible for maintaining those pipes, drains, etc which serve only his flat. This is done by either:

(*a*) excluding the communal facilities from the definition of the Premises; they therefore do not pass to the tenant under s 62, are outwith his repairing covenant and will be included (expressly) in the landlord's. If this course is taken there is technically no need to reserve a right in favour of the landlord and other tenants to use the communal facilities, since they remain the landlord's property. The tenant need only be granted the right to use them; or

(*b*) allowing the communal facilities to pass to the tenant under s 62 but expressly excluding them from the tenant's repairing covenant and including them in the landlord's. In this case corresponding rights to use must be granted and reserved. This is the method adopted in Form 1. It is technically less elegant but has the advantage of making clear the mutual rights and obligations.

In short leases of flats the landlord is bound under s 11 of the Landlord and Tenant Act 1985 to repair the drains, pipes, etc. There is no point in excluding them from the letting. Where maisonettes are let on the basis that each tenant is responsible for repairs on his side of the dividing line there must always be corresponding easements as between the upper and lower maisonettes. There will be no question of the landlord excluding the pipes, etc from either lease.

If the tenant requires an easement involving the use of facilities which are likely to require periodic maintenance (eg a drain), he must generally stipulate for a covenant by the landlord for its repair. In the absence of such a covenant the mere existence of the easement, under which the landlord has the obligation to *receive* the foul water, does not necessarily give rise either to an implied covenant to repair or a duty of care (see *Duke of Westminster v Guild* [1984] 3 All ER 144), except in those cases to which s 11 of the Landlord and Tenant Act 1985 applies. (See particularly in the case of tenancies granted, other than pursuant to an agreement antedating that date, after 29 January 1989, s 11(1A) and (1B) added by s 116 of the Housing Act 1988.)

A right of entry to inspect and carry out repairs to the communal facilities should be reserved. Whilst such a right would in all probability be implied (*Bond v Norman* [1940] 2 All ER 12) it is best for all concerned if the reservation is express. For an example, see Form 1, Sched 3, para 3. The provision requiring the compensation for damage done should always be inserted. If it is desired to reserve the right to install new pipes or facilities, rather than merely to replace the existing facilities, the right must be restricted to the perpetuity period (*Dunn v Blackdown Properties* [1961] 2 All ER 62).

3 Support and protection

In long leases of flats and maisonettes express provision for rights of support from the property below and protection from that above (and if appropriate from the side) will generally be made. There will be corresponding reservations in favour of the landlord and other tenants. It must be remembered, however, that easements are essentially negative in character—that is to say, that the servient owner is simply under a duty not to withdraw support (or protection); he is not obliged to repair that part of the building which provides the support (*Bond v Norman* [1940] 2 All ER 12)—although it would seem that the servient owner is liable if the support is lost on account of his negligence (*Bradburn v Lindsay* [1983] 2 All ER 408). In *Phipps v Pears* [1964] 2 All ER 35 it was held that there was no *easement* known to the law under which the dominant owner was entitled to protection from the elements from the servient; but that case did not involve flats and rested on the public policy against restraining development of land. A different policy would almost certainly prevail in relation to flats.

The point to bear in mind is that the easements of support and protection are of less importance than the covenants to repair, and (on the part of the tenant) not to damage the structure, etc. It may be that in due course it will be possible to omit specific reference to these easements. At the present time it is thought that practice and expectation require their continued inclusion.

4 Rights of way and access

The tenant of a flat should be granted a right of way over the communal passageways and stairs and also over any driveways, etc. The usual method of granting a right of way is by the use of the words

> to pass and repass to and from the premises over . . .

When used in relation to a road or forecourt they will be held to include the right to stop for a reasonable length of time for the purpose of loading and unloading (*McIlraith v Grady* [1967] 3 All ER 625); those words do not grant a right to park. Parking rights are dealt with below.

Whether the right is to be a right of way simply for persons on foot, or for vehicles, depends on the words used; if no specific provision is made the court must look at the circumstances existing as at the time of the grant (*Cannon v Villars* (1878) 8 Ch D 415; *Bulstrode v Lambert* [1953] 2 All ER 728; *Keefe v Amor* [1964] 2 All ER 517). If it is intended to restrict the right of way over any roadways to foot traffic, this should be done expressly by the use of the words 'on foot only' after 'pass and repass'. Likewise, in order to make clear that vehicle access is permitted the words 'with or without vehicles' should be included.

The area over which the right of way may be exercised must be defined. It will often be sufficient (in a long lease of a flat) to use the form of words in Form 1, Sched 1, para 1. However, where the letting is of a house either on an estate having private roads or itself enjoying a right of way over neighbouring property, it will be necessary to indicate the area on the plan. The Land Registry requires the land *over* which the registered land has a right of way to be tinted or hatched in brown; if registered land is to be *subject* to any rights of way (ie in this context, if the landlord reserves any rights of way in favour either of himself or owners or occupiers of adjoining land) the area subject to the right of way is required to be tinted or hatched blue.

A frequent source of contention in blocks of flats is whether a lock can be placed on either the front (and only) door to the block or on any other communal door. On the one hand, a lock is desirable in the interests of security. On the other hand, particularly where the block has been constructed on the assumption that there will be free access to it, so that each flat's bell is on its own front door, there would be an obvious inconvenience in fitting a lock. The problem is not resolved by issuing each tenant with a key; visitors, tradesmen and postmen would be unable to call. In the writer's view, the fitting of a lock in such circumstances would interfere with the tenants' rights if the rights granted are as per Form 1, Sched 1, para 1. If it is desired to fit a lock it must be expressly provided for in the lease. The tenant should not agree to such provision unless either:

(*a*) there is an alternative (unlocked) means of entry to the block; or

(*b*) a satisfactory external bell or 'Entryphone' system is installed; or

(*c*) twenty-four hour porterage is provided such that visitors can at all times be assured of entry.

The correct method of providing for the keeping of a lock on the front door is by including within the Excepted Rights a paragraph in the terms of the following example.

Example 2 Provision entitling landlord to maintain lock on communal front door
Insert in Form 1, Sched 3
(5) The right to keep and maintain an automated or self operating lock on the front door of the Building subject to the Landlord's providing the Tenant at the Tenant's expense with a key thereto.

5 Rubbish and dustbins

It has been seen above that where the landlord provided a rubbish chute in a tower block, but did not expressly grant the tenants any right to use it, the House of Lords held that there was an implied easement to use it (*Liverpool City Council v Irwin* [1976] 2 All ER 39). If a rubbish chute is provided the draftsman will generally wish to make specific provision in relation to its use, particularly since he will probably wish to impose restrictions on the tenant's right to use it by limiting the types of rubbish or the size of items to be placed in it—this will be done in the 'user' covenants or regulations. The form of the restriction will be determined by the manufactuer's recommendations; the draftsman should obtain a copy before drafting the relevant regulation. It may also be necessary expressly to exclude liability in the event of a breakdown.

The more normal situation is either to provide one communal dustbin or to require (by covenant) the tenant to provide a dustbin and maintain it in a particular area. He must in that case be granted (in the Included Rights) the right to position a dustbin in the specified area.

C Further ancillary matters

As well as rights in respect of drains and services, support and access, there will frequently be other ancillary rights attaching to

the tenancy. Such rights may include the right to use a garage or a car parking space or the right to use communal gardens (or facilities within the garden such as a tennis court). Where the premises include a garden, provision may have to be made for its upkeep.

1 Garages

The first question here is whether to include the garage within the letting. This will depend in part on the parties' wishes. In long leases at a low rent, unless the landlord specifically wishes to retain the garage, it will generally be appropriate and simplest to include the garage within the definition of the Premises. Where this is done, all the repairing and other covenants will apply to the garage as they do to the residential part of the Premises. But note that, if this is done, the cost of repairing the garages will be apportioned between the tenants under the service charge. This is fair if all tenants have garages. If they do not, provision should be made for ensuring that the apportionment is fair generally. This can be done either:

(*a*) By taking the garages out of the landlord's repairing covenant altogether and imposing liability on the tenant of each garage to maintain. This course cannot be adopted where the garages are integral with the structure of the block. In other cases it is probably the most satisfactory method.

(*b*) By providing that the tenants who have garages pay a higher proportion of the Annual Maintenance Cost. This is at best an approximation, and can moreover cause difficulties if substantial repairs are necessary to the garage block.

(*c*) By providing for separate accounting for repairs to the garages and for apportionment among the garage owners. This is complex to provide for in the lease and in practice, and again cannot be adopted where the garages are integral with the structure of the block.

Where the garage is included in the Premises the lease should contain the following covenants:

(*a*) Not to assign sublet or part with possession of the garage independently of the house or flat (or vice versa). Provided that the Premises are defined to include the garage, the

standard clause prohibiting dividing possession—by assigning, subletting or parting with possession of part only of the Premises—will cover this point.

(*b*) Not to use the garage other than as a private garage. This is necessary to prevent a business use and therefore security of tenure under Part II of the Landlord and Tenant Act 1954 being established.

(*c*) Not to obstruct or interfere with other tenants' (or the landlord's) garaging or parking rights.

Where the Premises are let under a short term or periodic tenancy, consideration should be given to letting the garage under an entirely separate agreement. This will prevent any security which the tenant may have (under the Housing Act 1988) in relation to the residential accommodation attaching to the garage. A licence to use the garage is marginally more attractive to the landlord than a tenancy; a tenant who used the garage for business purposes could acquire security of tenure under the 1954 Act if the landlord knew of or acquiesced in such use. No such security could arise if a licence were granted. A form of garage licence is Form 10 in the Appendix; it may be used where the garage owner is landlord of the residential accommodation or where the garage is unconnected with any such accommodation.

For VAT considerations in relation to garage parking, see Chapter 8.

2 Car parking

Where car parking facilities are provided for the tenants of a block of flats or other 'development' the draftsman must decide whether simply to provide a right (in common with the other tenants) to park in the (defined) car parking area, or whether to allocate a specific place to each tenant. It is suggested that the latter is the better provision, in that each tenant knows what his entitlement is. Inevitably from time to time there will be tenants who wish to bring in more than the permitted number of cars or to occupy empty spaces. If the lease makes specific provision it will be difficult for the 'awkward' tenant to maintain an entitlement which he does not have. It is, however, important to ensure that the allocated places are kept clearly marked out, and that there is in fact sufficient space on the ground for the allocated

spaces and for their users to be able to drive in and out of them without difficulty. If there is insufficient space to provide for all tenants to have a car parking space, either the landlord must allocate the available spaces to particular flats (charging, in the case of a long lease, a higher premium for the grant) or simply provide for a general right to use the spaces on a first come first served basis.

Where specific car parking spaces are allocated the space may be included in the Premises; but where a general right to park is given the landlord must retain the area. A frequent cause of trouble is the tenant who uses the car parking space to renovate (usually over a substantial period of time) an elderly or unroadworthy vehicle. It is therefore sensible to provide that only minor or routine maintenance or repair may be carried out in the parking area.

Example 3 Grant of specific parking space; covenant restrictive of user

(*a*) *short lease*

. . . (hereinafter called 'the Flat') together with the parking space numbered on the Plan ('the Parking Space') (all hereinafter called 'the Premises').

(*b*) *long lease*

(as per particulars in Form 1) The Premises ' . . . floor plan and the Parking Space'

add in cl 1: 'The Parking Space' means the parking space numbered and shown edged red on the attached site plan.

[covenant by tenant]

(i) not to use the Parking Space for any purpose other than for the keeping thereon of one private motor car belonging to the Tenant or any member of his family living with him or any guest of his; but the carrying out of minor or routine maintenance or repair to any such motor car kept on the said space shall not constitute a breach of this covenant.

(ii) not to obstruct, park or cause or permit any motor vehicle to stand in the access to or in any of the parking spaces other than the Parking Space

Example 4 Grant of right to park in communal parking area

. . . (hereinafter called 'the Premises') together with the right in common with all others having the like right to park one private motor car belonging to the tenant or any member of his family living with him or any guest of his in the parking area shown in

the said plan but subject always to there being space available. [covenant by tenant]
(i) not to obstruct the access to the said parking area or any motor vehicle parked therein
(ii) not to use the said parking area . . . (then as in the first covenant in example 1 above)

For VAT considerations in relation to car parking, see Chapter 8.

3 Communal gardens and similar facilities

Where the landlord provides substantial communal gardens for the use of all the tenants of a block of flats, or indeed of houses in a square, it will usually be simplest to grant the right to use the garden subject to regulations to be prescribed from time to time by the landlord. This avoids burdening the lease with regulations and allows the landlord to alter the regulations from time to time either to meet with changed circumstances or unforeseen difficulties. A covenant to comply with the regulations should be included. The draftsman must ensure that the cost of maintaining the garden is included within the items chargeable to the tenant under the maintenance charge.

Example 5 Grant of right to use gardens (and tennis court)
. . . together with the right in common with the Landlord and all others having the like right to use the gardens [and tennis court therein] coloured . . . on the site plan subject to such rules and regulations as may from time to time be prescribed by the landlord in connection therewith.

4 Non-communal gardens

The letting may be of premises with a garden. What provision is to be made in respect of the garden will depend in part on the type of letting (long or short lease) and in part on the parties' wishes. Clearly in the case of a long letting of an entire house the tenant will wish for complete freedom to do as he wishes with the garden. The landlord will have little interest in preserving the garden and a covenant to keep the garden in a neat and tidy condition and free from weeds will be sufficient.

In the case of shorter lettings, and particularly where the landlord is letting his own home with a view to re-occupying it at a later date or where the gardens have some special feature, it will be essential to impose more detailed obligations in respect of the gardens.

Example 6 Tenant's covenants to keep garden in order and not to alter layout
(i) to keep the gardens and the trees hedges shrubs and bushes therein in good order and condition, properly manured and tended, and trimmed and pruned as appropriate, to keep the soil fertile, free of weeds and properly cultivated and the lawns properly mown rolled and fed
(ii) not to make any alteration in the layout of the garden or to remove or (except in the proper course of management or cultivation) fell, cut or prune any trees hedges shrubs or bushes and to replace all losses.