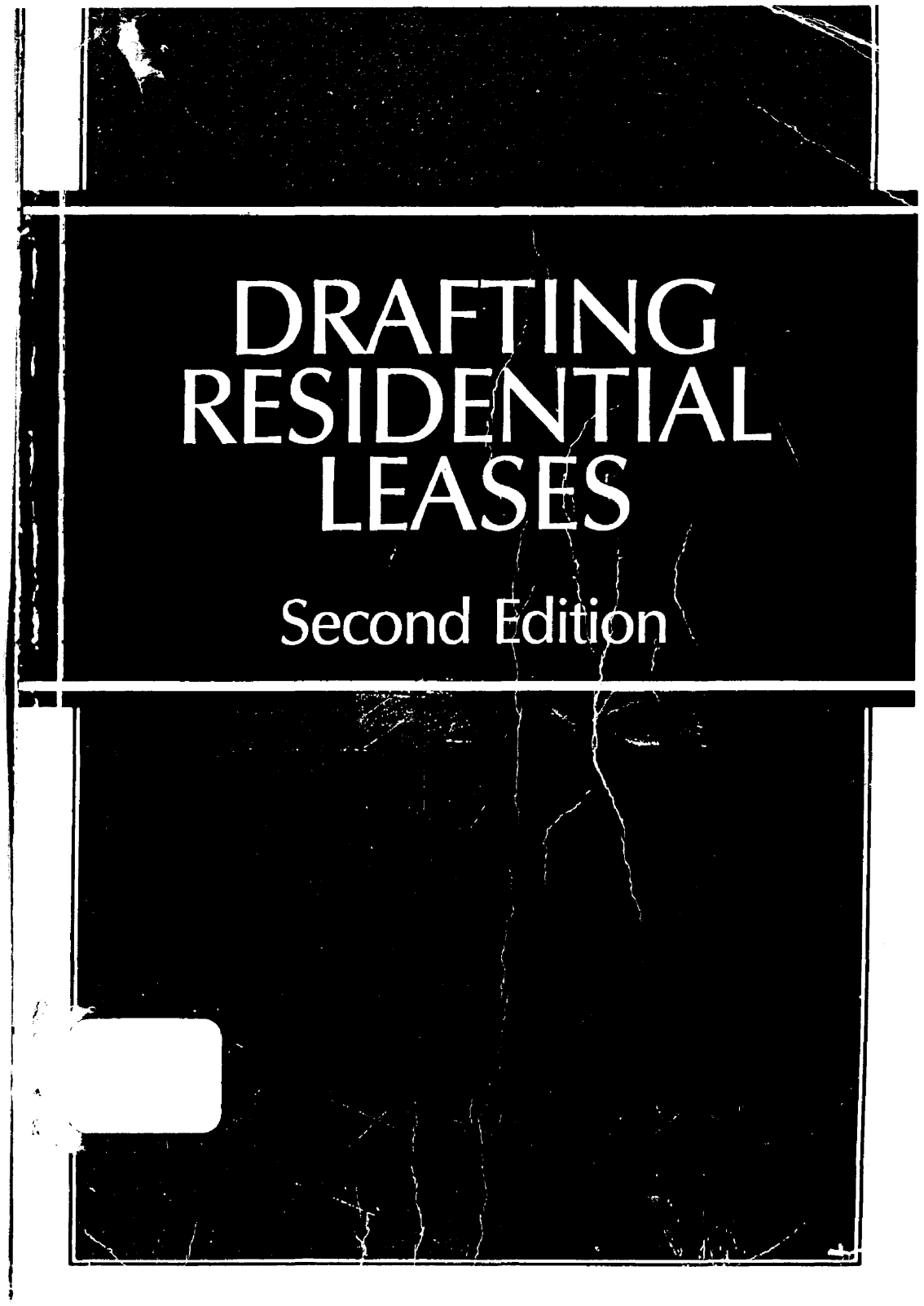
DRAFTING
RESIDENTIAL
LEASES
Second Edition

Landlord

Chapter 6

Rent and Rent Increases

A Rent

1 General principles

It is usual, but not obligatory (*Knight's case* (1588) 5 Co Rep 54(6); *Ashburn Anstalt v Arnold* [1988] 2 All ER 147), to reserve a rent. For the circumstances in which it is appropriate to reserve no rent, see pp 77 below. In theory, rent need not consist of a payment of money but may consist of an obligation to deliver chattels or perform services. The draftsman will rarely be concerned with any provision other than for the payment of a money rent. If it is intended that the rent should consist of services, care must be taken to define precisely what the tenant must do and when he must do it. The arrangement in *Barnes v Barratt* [1970] 2 All ER 483, under which the defendants agreed to carry out personal services (cleaning and cooking) in return for the exclusive right to occupy three rooms in the house, would have been too uncertain at common law, let alone under the Rent Act 1977 (where special rules apply, see p 79 below), to amount to rent. The correct analysis of *Barnes v Barratt*, in the light of the decisions of the House of Lords in *Street v Mountford* [1985] 2 All ER 289 and *A G Securities v Vaughan* [1988] 3 All ER 1058 and of the finding in *Barnes* that the Barratts had exclusive occupation of three rooms, is probably that a tenancy *was* created but, as no rent was reserved, the tenancy was not a protected tenancy. In the writer's view, the rules as to what constitutes 'rent' for the purposes of an assured tenancy will be identical to those which the courts applied in relation to protected and statutory tenancies.

The essential rule is that the amount of the rent must be certain

and the frequency and times for payment must be specified. The amount of the rent must be certain *as at the date when it is payable*. In *GLC v Connolly* [1970] 1 All ER 870 a provision in a local authority letting that

> The weekly net rent and other sums as shown on the front cover of the rent card are liable to be increased or decreased on notice being given

was held to be valid since, once the landlord had given the requisite notice, the rent could be calculated with certainty on the days fixed for payment. In all leases, therefore, the lease must specify either the amount of the rent or a method of determining the amount of the rent which will be certain as at the date of payment.

In *Treseder-Griffin v Co-operative Insurance Society* [1956] 2 QB 127, Denning LJ said that where a money rent was reserved it must be expressed in lawful currency, ie sterling. Whether this statement was then or is now an accurate statement of the law is open to doubt—see *Multiservice Bookbinding Ltd v Marden* [1978] 2 All ER 489. It is probable that a rent could now be reserved in a foreign currency though it is highly questionable whether, in the case of a letting of residential premises, such a course will be worth taking. As discussed below, the landlord is entitled to include rent review provisions in an assured tenancy. If the landlord wishes to protect himself against the falling purchasing power of the pound, it is simpler to do so by providing for periodic rent review than by attempting to link the rent to one particular currency. However well any particular currency may have retained its value in the past, there can be no guarantee that that currency will not in future be undermined by inflation. However, circumstances may arise where reservation of a rent in a foreign currency might suit the convenience of the parties; if for example a Swede who had lived in this country for a number of years and acquired a flat here had returned to Sweden but had retained his flat for occasional use and for investment purposes, were to let it on a short term basis for the purpose of a holiday to a fellow Swede, a rent reserved in Swedish kronor might be mutually convenient. It is difficult to see any reason why such a rent should not be enforced; the courts are now well

used to giving judgments for sums in foreign currencies. If the tenancy is a long lease at a low rent there is obviously no point in reserving a rent in a foreign currency.

The frequency with which, and the dates, including the first date (or in cases where rent is paid weekly or fortnightly, the day of the week), on which the rent is payable must be specified in the lease. In long leases, where rent is payable quarterly, it will normally be convenient to provide for the rent to be paid on the usual quarter days (in England, 25 March (Lady Day), 24 June (Midsummer's Day), 29 September (Michaelmas Day) and 25 December (Christmas Day)). If the rent is very small—as in the case of long tenancies granted to secure tenants who have exercised their right to buy under Part V of the Housing Act 1985 (£10 pa)—the rent should be made payable once a year.

Unless the lease provides to the contrary, the rent will (generally) be payable in arrear (see *Coomber v Howard* (1845) 1 CB 440). If therefore the landlord wishes the rent to be payable in advance, the lease must so provide. For examples see Forms 1 and 2 in the Appendix.

It is unnecessary to stipulate that the rent is to accrue from day to day; s 2 of the Apportionment Act 1870 specifically provides for daily accrual. The apportioned part falls due on the date when the entire portion of which it is part falls, or would have fallen, due (s 3). The landlord has the same remedies for the recovery of apportioned rents as for entire portions (s 4). The provisions of the 1870 Act apply unless expressly excluded. There will rarely be reason to exclude it.

Where the commencement date is a date earlier than the date of the lease the lease should state whether the rent is to be payable from the date of execution or the commencement date; in *Bradshaw v Pawley* [1979] 3 All ER 273, it was held that rent was payable from the commencement date rather than the date of execution. The lease was there a renewal and the tenant had been in possession since the commencement date. Whether the same would apply in the case of a new lease is not clear. Specific provision is therefore necessary. In the case of a *new* lease the draftsman will normally provide that the rent will be made payable only from the date of execution. This will often (in the case of a long tenancy) mean that the first payment of rent will be for a shorter period than the usual rent period. If this is the case it

should be specifically recorded in the lease as in the following example:

> **Example 1 First payment of rent for broken period, rent to be payable from date of execution**
> . . . the first payment of being a proportionate part of the Rent calculated from the date hereof to the next day for payment of Rent, to be made on the date hereof.

2 Amount of rent

Where a long lease is granted at a premium it is usual to reserve a ground rent. This is in theory a nominal amount to represent the value of the ground without any buildings. In practice the value of the undeveloped land is rarely considered and a 'round sum' usually between £25 and £50 is reserved. In the following cases the grant of a long tenancy is capable of being a protected tenancy. In these cases it is still necessary to ensure that the rent is less than two-thirds of the rateable value on 'the appropriate day' in order to prevent the tenancy being a protected tenancy:

(*a*) where the lease is granted pursuant to a contract entered into *before* 15 January 1989; and

(*b*) where the lease is granted to a person who, immediately before the grant, was a protected or statutory tenant and the lease is granted by the person who at that time was the landlord or one of joint landlords under the protected or statutory tenancy. (NB, this includes a tenant whose long tenancy has expired but who has become a statutory tenant under Part I of the Landlord and Tenant Act 1954, but does not include a protected shorthold tenant (see s 34 of the Housing Act 1988).

The 'appropriate day' is defined as:

> (*a*) in relation to any dwelling house which, on 23 March 1965, was or formed part of a hereditament for which a rateable value was shown in the valuation list then in force, or consisted or formed part of more than one such hereditament, means that date, and
> (*b*) in relation to any other dwelling-house, means the date on which such a value is or was first shown in the valuation list

(s 25(3) of the Rent Act 1977) and;

> Where, after the date which is the appropriate day in relation to any dwelling-house, the valuation list is altered so as to vary the rateable value of the hereditament of which the dwelling-house consists or forms part and the alteration has effect from a date not later than the appropriate day, the rateable value of the dwelling-house on the appropriate day shall be ascertained as if the value shown in the valuation list on the appropriate day had been the value shown in the list as altered (s 25(4)).

If the rent under a long tenancy exceeds two-thirds of the rateable value on the appropriate day and the tenancy is capable of being a protected tenancy, it will be a protected tenancy unless saved by some other exempting provision (s 5 of the Rent Act 1977). Under the provisions of Part IX of the Rent Act 1977 it is generally unlawful to require a premium as a condition of the grant or assignment of a protected tenancy. Any illegal premium may be recovered by the payer (see *Farrell v Alexander* [1976] 2 All ER 721). It is therefore essential that, where a long tenancy at a low rent is to be granted in circumstances where a tenancy is capable of being a protected tenancy, the rent must not exceed two-thirds of the rateable value on *the appropriate day*—and *not* the rateable value on the date of execution. The draftsman must therefore check the amount of the rateable value on the appropriate day. Note that for the purposes of s 5, where the tenancy is a long tenancy, in determining whether the rent exceeds two-thirds of the rateable value, sums payable in respect of rates, services, repairs, maintenance and insurance are disregarded unless those sums 'could not have been regarded by the parties as . . . so payable' (s 5(4)). Note also that it is only in the case of a *long tenancy* (term certain exceeding twenty-one years, other than a tenancy terminable before the end of the term by notice to the tenant), that one disregards those items. If the lease is for less than twenty-one years, or if the landlord can determine the tenancy by notice, those items are included.

In the normal case of a lease granted after 15 January 1989 which does not fall in either of the above categories and so is incapable of creating a protected tenancy, the landlord will probably wish to ensure that the tenancy is not an assured tenancy—in order to be certain that subject to the tenant's right to apply for relief, there is no fetter on his ability to forfeit for non-payment of rent or service charge and for breach of covenant.

In this case it is necessary to ensure either that no rent is payable or that the rent is less than two-thirds of the rateable value for the time being. As under s 5 of the Rent Act, sums payable in respect of rates, services, repairs, maintenance and insurance are disregarded in determining whether the rent is less than two-thirds of the rateable value unless those sums 'could not have been regarded as . . . so payable'. Observe that in contrast to the provisions of s 5 of the Rent Act, sums in respect of management are likewise to be disregarded and that the length of the term is irrelevant (see Schedule 1, para 3).

As mentioned above, the ground rent under a long lease granted to a secure tenant who has exercised his right to buy under Part V of the Housing Act 1985 may not exceed £10 pa (Sched 6, para 11).

In the case of a block of flats, where the landlord is a company, membership of which is restricted to and compulsory for the tenants of the block, no rent should be reserved. The costs of administration of the company (audit fees, filing of accounts, etc) will be collected under the service charge. Reservation of a rent complicates the accounting and could give rise to a charge to corporation tax. Furthermore the absence of any reservation of rent will mean that, if a liability ever attached to the company other than one for which it could obtain indemnity under the service charge, the liability would, as a matter of practice, be unenforceable. There would be no advantage to the creditor in winding up the company or appointing a receiver; these courses might be adopted if rents were reserved under the leases. Similarly, where maisonettes have been let on long leases such that the freehold of the upper flat is vested in the tenant of the lower flat and vice versa, no purpose is served by reserving a rent.

In lettings to employees, where it is necessary for the employee to live on the premises for the proper performance of his duties, it will frequently be advantageous to the employee to reserve no rent but to take account of the value of the accommodation in calculating his remuneration. The general rule is that, unless the accommodation is provided by a body corporate of which the employee is a director, the value of the accommodation to him is disregarded in calculating his liability to income tax (see s 145 of the Income and Corporation Taxes Act 1988). Similar considerations apply to the grant of a tenancy to a minister of

religion by an ecclesiastical corporation or a charity of premises for use as a residence from which to perform the duties of the office—provided that the premises are normally occupied as such (see s 332 of the Income and Corporation Taxes Act 1988).

In lettings at a rack rent, the rent and grant of a tenancy will be fixed, as a general rule, in the private sector, by negotiation and, in the public sector, by the landlord. In the case of assured shorthold tenancies, the tenant has the right to refer the rent agreed on the grant of the tenancy to the Rent Assessment Committee. Notices by the landlord seeking an *increase* of rent under a periodic assured tenancy may also be referred to the Rent Assessment Committee. Registration under Part IV of the Rent Act 1977 remains possible in respect of protected and statutory tenancies. Draftsmen should be aware of the Secretary of State's power under s 31 of the Landlord and Tenant Act 1985 to restrict or prevent increases of rent for dwellings which would otherwise take place and to restrict the amount of rent which would otherwise be payable on new lettings of dwellings. This power may be exercised either generally or in relation to any specified description of dwelling. This power has not yet been exercised, but in a period of rapid inflation, it is by no means impossible that the power might be exercised.

Where the landlord:

(*a*) is the rating authority; or

(*b*) is rated (compulsorily under s 55 of the General Rate Act 1967, or voluntarily under s 56)

and where the letting is for less than three months (this includes weekly and monthly tenancies (see s 58(*a*) and *Hammond v Farrow* [1904] 2 KB 332)), the tenancy agreement should, until April 1990 (when domestic rates will cease to be payable), make clear that the rent is inclusive of rates; it is sensible to specify the amount which represents the element for rates. An 'all in rent' is particularly disadvantageous to the tenant in the case of tenancies granted before April 1990 since the rent will contain an element for an amount of rates. When rates cease to be payable in April 1990, it is clear that, morally, the rent should be decreased appropriately. (The tenant will, in most cases, be responsible directly to the charging authority for the Personal Community Charge.) But if an 'all in' rather than an itemised rent has been agreed, it may prove more difficult for the tenant

to insist on an abatement. If the rent includes any other elements (eg heating) these should also be separately specified. The object of so doing is, first, to inform the tenant of the component elements in the rent and, secondly, so that when any increase is called for on account of an increase in any of those elements (eg heating charges), the increase can be readily calculated. Likewise, when rates cease to be payable. This can be done in the terms of the following example.

Example 2 Definition of rent showing component elements (for use in letting at a rack rent)

The Rent means the total of the following:

1	Net Rent	£
[2	Rates	£]
3	Water and Sewerage charges	£
4	Other charges	
	(*a*)	£
	(*b*)	£
	(*c*)	£
	Total	£

All the above are calculated on a weekly basis.

3 Additional rent

In long leases it is common to provide for the sums due under the service charge to be recoverable as additional rent. This is considered in more detail in Chapter 7.

4 Rent under the Housing Act 1988 and the Rent Act 1977

The Housing Act 1988 contains no definition of 'rent'. As has been seen, for the purpose of determining whether the rent is less than two-thirds of the rateable value for the time being, sums expressed to be payable by the tenant in respect of rates, services, management, repairs, maintenance and insurance are to be disregarded unless those sums 'could not have been regarded as . . . so payable' (Sched 1, para 3(2)). That is broadly similar to s 5 of the Rent Act 1977. In the writer's opinion, the decisions on what constituted rent under the Rent Act are likely to be applicable to assured tenancies. Accordingly, except for the purpose of determining whether the rent is less than two-thirds of

the rateable value, 'rent' for the purposes of the Housing Act 1988 and the Rent Act 1977 means the total sum actually paid to the landlord; where the tenant pays a sum inclusive of rates the *whole* of that sum is rent (*Mackworth v Hellard* [1921] 2 KB 755).

'Non-monetary' rents are disregarded except to the extent that they have been quantified by the parties into money terms. Thus the services in *Barnes v Barratt* [1970] 2 All ER 483 (see above), not having been quantified, did not qualify as rent under the Rent Act 1977. Accordingly, even if it had been held that the defendants had been granted a tenancy, it would have been at no rent and therefore would not have been protected (s 5). This should be compared with *Montague v Browning* [1954] 2 All ER 601, where the value of services had been quantified in money terms. If it is desired to avoid creating an assured tenancy it will therefore be important to avoid quantification of services.

5 Abatement or suspension of rent

Until the decision of the House of Lords in *National Carriers v Panalpina (Northern) Ltd* [1981] 1 AC 675, there was substantial authority for the view that the doctrine of frustration did not apply to leases. Accordingly, it was held that, in the absence of a stipulation to the contrary, rent continued to be payable even if the premises were destroyed by fire (*Manchester Bonded Warehouse Co Ltd v Cart* (1880) 5 CPD 507; *Cruse v Mount* [1933] Ch 278). The *National Carriers* case, however, makes clear that a lease may be frustrated if, during the currency of the term, an event occurs such that no substantial use which is permitted by the lease and contemplated by the parties remains possible to the tenant. The ordinary principles of law relating to the frustration of contracts apply. Therefore even the total destruction of the premises will not *necessarily* frustrate the lease. Whether the lease is frustrated will depend on all the circumstances of the individual case, including the length of the term, the period unexpired, the cause of the alleged frustration (supervening illegality of performance, damage or destruction) and the expected time to complete any necessary repairs. In short lettings it will plainly be easier for a court to find frustration to have occurred than in the case of a long lease—though there are

obvious difficulties in denying the frustration of a lease (of whatever length) of a top floor flat in a tower block which has been wholly destroyed by fire. Provided that proper provision for insurance has been made, frustration would not in practice impose any hardship on the tenant, who could receive the insured value of the flat, and the landlord would be free to redevelop the site. Nevertheless it must be accepted that it will be rare to find that a long lease has been frustrated.

It therefore remains necessary to provide as to whether rent is to continue to be payable in the event of destruction by fire (or other perils). The choices open to the parties are:

(*a*) To provide simply for abatement or suspension of liability to pay the rent in such circumstances. If this course is adopted the landlord will calculate the rent on the footing that he has to insure against the possibility of abatement or suspension.

(*b*) To provide that the rent will abate or be suspended but that the tenant will bear the cost of insuring against the loss of rent—usually for two years.

(*c*) To provide that rent will continue in any event.

(*d*) To make no provision.

In the case of a long lease at a ground rent is is logical to adopt course (*c*) or (*d*), since, as is mentioned above, in theory the rent represents the value of the undeveloped land. Course (*c*) is less obviously appropriate in the case of an upper floor flat, since, in the circumstances postulated, even the undeveloped ground has ceased to be usable. The choice will therefore be between (*b*), which places the burden of the loss of rent on insurers, or (*d*) which can lead to uncertainty. However, as the sums involved will be comparatively small (so that litigation will not be worth while), it probably is of little importance which course is adopted. Form 1 in the Appendix makes no provision. A clause providing for abatement or the suspension of the rent is below.

In the case of a letting at a rack rent it will generally be impracticable to require the tenant to insure against this liability, and indeed if he is a weekly or monthly tenant there is no reason why he should bear the cost of such insurance. Course (*b*) should be adopted in such a case. For a provision in a short lease see Form 2, cl 3(3). The form in the example below, using the

wording in the second set of square brackets, may be used as an alternative:

Example 3 Provision for abatement or suspension of rent
Use the words in the first set of square brackets at * and + where the lease requires the landlord to insure. Use the words in the second set where no such requirement is included. The reference to 'the Additional Rent' is appropriate only where the service charge has been reserved and defined as such.

1 If (i) the Premises or any part thereof are at any time during the Term destroyed or so damaged by fire *[or other peril insured against under the insurance required by cl 00] [flood storm or other inevitable accident]* as to be unfit for habitation or use; and
(ii) †[such insurance] [the insurance effected by the Landlord]† has not been vitiated by reason of any act or omission of the Tenant;
the Tenant's liability to pay the Rent [(but not the Additional Rent)] or a fair proportion thereof according to the nature and extent of the damage to the Premises will abate for such period as the Premises or such part remains so unfit.

2 Any dispute arising under this provision shall be determined by a single arbitrator in accordance with the Arbitration Act 1950 or any statutory modification or re-enactment thereof.

B Increases in rent

Leases of business premises generally now provide for periodic increases or review of the rent. Until the coming into force of the Housing Act 1988, such provisions in short term or periodic residential lettings were uncommon, primarily because, in the case of protected tenancies, the tenant could effectively nullify their operation by applying for the registration of the rent. As has been seen, there is no comparable provision in the Housing Act 1988. Where either a 'fixed term' or a periodic assured tenancy contains a provision binding on the tenant under which the rent may be increased, the tenant is not entitled to refer any increase of rent to the Rent Assessment Committee. The current regime for assured tenancies therefore encourages the use of provisions for periodic increase.

In the case of a periodic tenancy which is neither an assured, a secure nor a protected tenancy (ie a tenancy which is governed

solely by the common law), the landlord can secure an increase of rent by serving notice to quit and negotiating a fresh rent to take effect after the notice to quit has expired. (He is not entitled, in the absence of agreement, to an increase in rent before the tenancy has been brought to an end.)

There are four possible types of increases which may be provided for. The first and simplest is to provide for an increase to a particular sum or sums after a particular time or times. This is the method generally adopted in long leases at a low rent.

The second method is to give the landlord the right to increase the rent unilaterally at specified frequencies. The method of providing for such annual increases is shown in the following example. This may be used in either a fixed term tenancy or a periodic tenancy; in periodic tenancies which are neither assured nor protected tenancies such a provision is unnecessary—since the landlord can secure an increase by serving notice to quit. But notice to quit does not terminate an assured periodic tenancy. The inclusion of a provision such as the one which follows, precludes the tenant from referring the increase to the Rent Assessment Committee since the rent is increased under a provision in the tenancy binding on the tenant (see s 13(1)(*b*)).

Example 4 Landlord's right to increase rent annually by notice (fixed term tenancy)
The Rent means £ per month until revised in accordance with clause hereof . . .

(1) The Landlord may serve notice on the tenant specifying an increased rent payable from the Effective Date.

(2) The Tenant may within 1 month of the service of the landlord's Notice give 1 month's notice to terminate this agreement as the later of that month or the Effective Date.

(3)(i) The Effective Date means the date specified in the Landlord's Notice being
(*a*) not less than 2 months after service of that notice; and
(*b*) not earlier than 1 year from the date of this agreement and the date from which the last revision under this clause took effect.

(ii) the Landlord's Notice means the notice served by the Landlord under Subclause (1) hereof.

The above form may be used in a periodic tenancy; however, in the case of a periodic tenancy it is unnecessary to include (2)

(the tenant's right to terminate) since, in a periodic tenancy, the tenant already has that right. (He can serve notice to quit.) Although the Landlord may, in the case of a fixed term tenancy, seek to omit (2), the Tenant would be ill-advised to agree to what is a unilateral unfettered right to increase the rent. Those advising tenants should ensure that the tenant can *always* give notice to terminate to expire *before* the revised rent takes effect. Provided this is done, the sanction which prevents the landlord from increasing the rent beyond the market rent, is the tenant's ability to determine the tenancy.

The third and fourth methods of securing increases of rent are more sophisticated. The third method is to link the rent to some form of index so that it will rise with inflation. The fourth method is to provide for some person, either as expert or arbitrator, to fix the rent. In such a case it will be necessary to determine the method by which such person fixes the rent—usually by reference to the market rent. Such clauses are common in business lettings. In respect of residential lettings, such a method of determination is less satisfactory. There is, at the present time, no real evidence of what a market rent would in fact be.

Additionally, such a provision is likely to be too cumbersome and expensive (since the arbitrator will have to be paid) for use in the case of a residential letting. Business rent review clauses generally provide for three or five yearly reviews; an annual review is likely to be more appropriate in the case of a residential letting. Accordingly, in the writer's opinion, a provision for automatic or 'index linked' review will generally be more appropriate in this type of letting.

These provisions are simpler in operation than arbitration or valuation clauses since no third party (arbitrator or valuer) is involved and will therefore be more appropriate in cases of premises within the Housing Act rateable values. The basic system of such a clause is to provide for the rent to increase automatically on (say) 1 January in each year in proportion to the increase in the selected index. Whilst the index of retail prices may be used as the index the tenant may be more willing to accept a more readily discoverable index or one with a more direct connection with his own means. Under s 125 of the Social Security Act 1975, the Secretary of State is required to vary certain benefits, including the basic Category A retirement pension, under the

Social Security Pensions Act 1975 (the basic element of the old age pension) to ensure that those benefits retain their value in relation to the general level of earnings or prices, whichever is more favourable to the beneficiaries. It is therefore suggested that an annual increase geared to the basic component of the Category A retirement pension is an appropriate alternative to a link with the Retail Price Index. A form linking the rent to the basic component of the Category A retirement pension is Form 4 in the Appendix; a form linking the rent to the index of retail prices is Form 5. These forms are designed for use in short periodic tenancies.

Nevertheless index linked provisions have their drawbacks. If the increase in market rents exceeds the increase in the chosen index, the landlord is disadvantaged; the tenant is prejudiced if the chosen index increases faster than market rents. The basis on which the index is calculated may also change (to the prejudice of one party or the other). The parties may therefore prefer to negotiate afresh at the end of the tenancy. Furthermore, if the landlord is a local authority, a trustee, a housing trust or association, or a charitable entity, an indexed linked provision might be open to criticism on the ground that its adoption was a breach of the landlord's obligation to consider the amount of the rent at any particular time and to obtain the best rent available or conversely not to make a profit.

It is possible to include a rent review provision of the type commonly found in business lettings under which the review is 'triggered' by the service of a notice by a landlord proposing a new rent which will be the 'new rent' unless within a specified period, the tenant serves a counternotice—in which case the new rent is to be fixed by agreement or arbitration in default. It should not be assumed that, because in the business context the courts have held tenants, who failed to respond to the landlord's notice in time, to be bound by the landlord's proposed rent, a similar approach will necessarily be adopted in the residential context. It should be assumed that judicial hostility will be shown to any type of review provision which provides for excessive increases in rent or which seeks to take advantage of the ignorance and lack of sophistication of the tenant. At the same time, it must be appreciated that if a provision for an increase in rent is included which provides for the landlord's proposed rent to be

binding unless objected to within a specified time, and that, in relation to the objection, time is to be of the essence, if the landlord complies strictly with his obligations under the clause, but the tenant fails to object in time, the court may be compelled to give effect to the clause, however sympathetic it may be to him.

Two variants of this type of clause appear in Form 6 in the Appendix. In each of these it will be seen that this procedure is for the landlord to serve a 'trigger notice' to which the tenant must respond promptly (if he fails to do so he is bound by the landlord's proposal), and specify his proposal for the revised rent. Under the first of the variants, if the tenant's proposal is not accepted, the rent is determined by a valuer appointed either by agreement or by a specified third party; but, and this is crucial to this type of clause, the valuer merely determines which proposal is closer to the market rent. The proposal which he selects is the revised rent until the next review. This provision quite clearly discourages the putting forward of 'extreme' proposals. The inclusion of a provision entitling the valuer to order one party to pay the whole of his fees in the event of having unreasonably refused to agree the other side's proposal is an additional incentive to the parties to act reasonably.

Nevertheless, it must be recognised that the mechanics and operation of this type of clause will be too complicated for many tenants. The draftsman should consider the type of tenant who will be occupying under the tenancy when deciding on the type of clause to be included.

1 Assured tenancies

As indicated above, provision for increases of rent may be included in both fixed term and periodic assured tenancies, and their inclusion precludes the tenant from applying to the Rent Assessment Committee under s 13. In the writer's view, consideration should always be given to including such a provision. It should be observed that the right to refer an increase of rent to the Rent Assessment Committee *is* given to the tenant under a statutory periodic tenancy (s 13(1)(*a*)). It would therefore seem that, notwithstanding that the provision for periodic increase is carried forward on expiry of the fixed term tenancy to the statutory periodic tenancy under s 5, the tenant may, *after* the expiry of the fixed term, apply to the Rent Assessment Committee in respect of a new rent fixed by the operation of such a provision. It will also be observed that if the tenant under a periodic assured tenancy or a periodic statutory tenancy believes that the rent determined by reference to the automatic provision is too high, he is entitled to (and probably will) give notice to quit.

If provision is not made for periodic increase in a fixed term tenancy, the landlord is not *entitled* to increase the rent during the fixed term. He must wait until the fixed term has expired and then serve notice under s 13 (unless he can agree a rent increase). That means that if it is not intended to make provision for regular increases, the term of the lease should not exceed one year. In the case of a periodic tenancy not containing provision for increases, the landlord must serve notice under s 13 in order to secure an increase (again unless he can *agree* an increase). Notice under s 13 may not be given to take effect earlier than the first anniversary of the date on which the first period of the tenancy began (this restriction does *not* apply to statutory periodic tenancies) and, if the rent has previously been increased under s 13 or determined by the Rent Assessment Committee under s 14, the notice may not be given to take effect earlier than the first anniversary on which the increased rent took effect (see s 13(2)(*b*) and (*c*)). The notice must be in the prescribed form (Form 5 under the Assured Tenancies and Agricultural Occupancies (Forms) Regulations 1988) and must propose that the new rent take effect at the beginning of a period of the tenancy not earlier than the 'minimum period' after service of the notice. The 'minimum period' means (s 13(3)):

(*a*) in the case of yearly tenancy, six months;
(*b*) in the case of a tenancy where the period is less than one month, one month;
(*c*) in any other case, a period equal to the period of the tenancy.

'Rent' for the purposes of the Rent Assessment Committee's determination does not include any 'service charge' within s 18 of the Landlord and Tenant Act 1985, ie sums payable directly or indirectly for services, repairs, maintenance, insurance or the landlord's costs of management where the whole or part of those sums varies or may vary according to the relevant costs. If these

sums do not vary according to the costs, so that there is not a 'service charge', the Rent Assessment Committee's determination will include those items (see s 14(4)). Put simply, this means that where there is a rent and a service charge, the Rent Assessment Committee determines only the 'true' rent. The service charge is subject only to control under the 1985 Act. If there is a single rent intended to cover the whole of the landlord's expenditure together with the payment for use and occupation, the determination covers both those elements.

2 Assured Shorthold tenancies

In view of the fact that the tenant under such a tenancy has no security after the expiry of the fixed term tenancy, it is not necessary, if a comparatively short term is granted, to make provision for periodic increases. However, if the fixed term is to be for longer than one year, the inclusion of a provision for automatic increases should be considered. The tenant is entitled to refer the rent, either as originally agreed or as increased by such a provision, to the Rent Assessment Committee under s 22. But he may be content to pay the increase; or the increase may not be such as to cause the Rent Assessment Committee to reduce the rent. The fact that the tenant *may* refer the new (increased) rent to the Rent Assessment Committee is not a reason for not including a provision for automatic revision. For the reasons given above, in the writer's view, an 'index linked' provision is the most appropriate form of clause to include.

3 Protected or statutory tenancies

(a) Effect of registration

Where the tenancy is a protected or statutory tenancy under the Rent Act 1977 and a rent has been registered under Part IV of the Act, the landlord may not recover more by way of rent than the registered rent (s 44) notwithstanding any agreement to the contrary. A term in the tenancy agreement providing for automatic increases in the rent can therefore be nullified by the tenant applying for registration. Until registration, and so long as the tenancy remains contractual, the level of rent may be increased; but as soon as the contractual tenancy terminates and is replaced by a statutory tenancy, the level of the rent cannot exceed that recoverable for the last contractual period (s 45). A provision for periodic increase cannot sensibly be included in a short, fixed term agreement. A periodic tenancy may however include such provision, particularly if it is thought that the tenant will not apply for registration.

It should not be assumed that, because the tenant may nullify the provision for periodic increase, he necessarily will do so. There are many tenants who would consider that to do so would be dishonourable and involve going back on an agreement which they had freely made. They may well feel that in inflationary times an annual increase is fair to both themselves and the landlord. So long as a fair method of determining the amount of the increase is provided, such tenants are likely to accept it. The tenant may himself be anxious to ensure that increases are regular and of manageable proportions and therefore welcome the security which an agreed method of calculation gives. If the tenant believes he is being treated fairly he is less likely to apply for registration; and if an increase comes into effect in accordance with the agreement he has signed, he is less likely to be dissatisfied than if it comes unexpectedly or is for an amount he considers to be arrived at in an arbitrary manner.

It is also to be observed that the registered rent is the *maximum* which may be recovered. However, if the registered rent exceeds the contractual rent, the landlord is restricted to the contractual rent. If the landlord considers that a rent might in future be registered at a level higher than the level he is able to negotiate at the time of the grant of the lease the following clause may be inserted:

> **Example 5 Clause permitting increase to amount of registered rent**
> . . . at a rent of £ per month but if a rent is registered for the Premises under Part IV of the Rent Act 1977 [or any enactment replacing that Act] the rent shall be the amount so registered. The rent is to be paid . . .

(b) Rent agreements with tenants having security of tenure

A further provision which must be borne in mind is s 51 of the Rent Act 1977. This provides that where a 'rent agreement with

a tenant having security of tenure' is made at a time when no rent has been registered, the following requirements must be satisfied if the increased rent is to be recoverable. A 'rent agreement with a tenant having security of tenure' is defined to mean:

> an agreement increasing the rent payable under a protected tenancy which is a regulated tenancy, or the grant to the tenant under a regulated tenancy, or to any person who might succeed him as a statutory tenant, of another regulated tenancy at a rent exceeding the rent under the previous tenancy (Rent Act 1977, s 51(1)).

(If the requirements are not complied with, payments of the increase are recoverable by the tenant—see s 54). The requirements are that:

(*a*) the agreement must be in writing and signed by the landlord and the tenant;

(*b*) the agreement must contain a statement in characters not less conspicuous than those used in any other part of the agreement that

(i) his security under the Act will not be affected if he refuses to enter into the agreement

(ii) entry into the agreement will not deprive either party of the right to apply at any time for registration of a fair rent;

(*c*) the statement must be set out at the head of the agreement.

A rent agreement with a tenant having security of tenure is in Form 3 in the Appendix. It will be seen that in the face of a statement such as is required it will be a rare tenant who agrees to sign such a document. This particular provision must always be remembered when granting a new tenancy to an existing tenant of *Rent Act protected premises*. The Form in the Appendix is appropriate for use when the existing tenancy is to continue. If a new tenancy is to be granted the new tenancy must commence with the first two paragraphs of that Form.

It is to be observed that there is no corresponding provision in the Housing Act 1988. The rent under an assured tenancy may be increased without complying with the above formalities. It will also be observed that the grant of a new tenancy (after 15 January 1989) to a former shorthold tenant at an increased rent is not a 'rent agreement with a tenant having security of tenure'

because the new tenancy is an assured shorthold tenancy (unless the landlord serves notice under s 34(3)(*c*), in which case it is an assured tenancy), and therefore *neither* a protected tenancy nor a regulated tenancy. The provisions of s 51 of the Rent Act 1977 apply only to regulated tenancies.

4 Long tenancies at a low rent

In long tenancies at a low rent it is not uncommon to find provisions increasing the rent to a predetermined sum at, for example, twenty-five yearly intervals. While the developer who grants the leases will be covering his costs and making his profit out of the capital sums paid for the grants, the value of the ground rents does represent a further profit item. Inflation has meant that ground rents which increase only at twenty-five yearly intervals to predetermined sums have become less attractive investments than they formerly were. Not surprisingly, attempts have been made to index link ground rents. A type of clause which has proved popular among developers is one which increases the rent on each transfer of the lease, usually in proportion to the purchase price, so that the rent payable by the tenant for the time being bears the same proportion to the price at which he bought, as the rent originally reserved did to the premium or price paid for the grant of the lease by the original tenant. The landlord therefore receives an index linked increase on each transfer.

Those advising tenants should, so far as possible, resist the inclusion of any such provision, since clearly it benefits no one but the landlord. It should be borne in mind that the landlord has the capital sum from the grant of the lease in hand, which he can invest or deal with as he pleases; the fact that the idiosyncrasies of (or at least the common, but by no means certainly correct view that) English land law effectively require all flats to be let on long leases (and not disposed of absolutely) is very little justification for requiring the tenant to pay an index linked ground rent. The presence of such a provision in the lease should be reflected in the price paid for the lease; those advising a would-be tenant can reasonably argue for a substantial reduction.

A Rent act cases

The danger formerly inherent in such a clause was that inflation could cause the purchase price on any assignment of the lease—and therefore the rent—to increase to such an extent that the rent ceased to be less than two-thirds of the rateable value of the premises on the 'appropriate day'.* If that happened the tenancy became a protected tenancy. That was disastrous for the tenant because the restrictions on the charging of premiums on the assignment of a protected tenancy (under Part IX of the Rent Act 1977) meant that he was unable lawfully to recover his investment when he wished to sell. That also put an end to the landlord's index linked rent. Section 115 of the Housing Act 1988 has introduced substantial changes, the net effect of which is that for practical purposes, the danger referred to above is unlikely to materialise where a long tenancy has been granted. Section 115 amends s 127 of the Rent Act 1977 so that where a tenancy is a long tenancy under Part I of the Landlord and Tenant Act 1954 and is a protected tenancy (and this includes cases where, because of an increase in the rent, the tenancy has become a protected tenancy), the restrictions (in Part IX of the Rent Act 1977) on the charging of a premium on the grant or assignment of a protected tenancy do not, and are deemed never to have, applied if the following conditions are fulfilled. Those conditions are:

(*a*) that the landlord has no power to determine the tenancy at any time within twenty years beginning on the date when it was granted. (For these purposes, a power to forfeit for breach of any term or condition is *not* such a power—see s 127(3); by contrast a lease for ninety years but determinable on death or marriage of the tenant would contain such a power and would therefore be subject to the provisions of Part IX.)

(*b*) that the terms of the tenancy do not inhibit both the assignment and the underletting of the whole of the premises comprised in the tenancy. For this latter purpose an inhibition on assignment or underletting only during a period which is or falls within the final seven years of the term is to be disregarded.

See s 127(1) and (2).

The terms of a tenancy 'inhibit' the assignment and the underletting if they either:

(*a*) preclude it; or

(*b*) permit it subject to a consent but exclude s 144 of the LPA 1925 (no payment in nature of fine); or

(*c*) permit it subject to a consent, the making of an offer to surrender the tenancy (s 127(5)).

If it is proposed to rely on s 127, the draftsman must ensure that assignment and subletting are freely permitted or subject only to obtaining the landlord's consent. A clause as in Example 2 in Chapter 9 must not be included; nor must any provision entitling the landlord to a fine in respect of the licence to assign, although a clause (Example 4 in Chapter 9) requiring payment of a reasonable sum in respect of legal or other expenses incurred in relation to such licence may be included.

If the above conditions are fulfilled, the rent may be increased to an amount exceeding two-thirds of the rateable value on the appropriate day without prejudicing the tenant's right to sell.

The tenant would be entitled to register the rent if the rent ever exceeded two-thirds of the rateable value on the appropriate day. As soon as the rent has risen above the two-thirds limit, the provisions of s 5 would cease to apply—so that, as has been seen, the whole of the monetary consideration due from the tenant to the landlord would have to be considered. That would include the sums which fall due under the service charge. While the 'service charge' elements may (and almost certainly would) be registered as 'variable' under s 71(4) the landlord may wish to ensure that, notwithstanding the advantage of an escalating rent, he does not wish the tenancy ever to become a protected tenancy. This is achieved by ensuring that in no circumstances can the rent equal or exceed two-thirds of the rateable value on the appropriate day. This is effected by including in the lease or, where the draftsman is faced with an existing lease which has created or may in future create a protected tenancy, a deed of variation, a provision in the terms of Example 6 below. It will be observed that since one is dealing with protected tenancies,

* 'Appropriate date' means 23 March 1965 or the date when the property first appeared in the valuation list if later; but if that date is before 22 March 1973, and, on 23 March 1965 or on first appearance, its rateable value if in Greater London exceeded £400 or elsewhere £200, the appropriate day is 22 March 1973 (s 5(2) of the Rent Act 1977; in relation to changes in the rateable value after the appropriate day, see s 25(4)

this problem arises only in respect of tenancies granted before 15 January 1989, tenancies granted after that date pursuant to contracts entered into before 15 January 1989 and to cases where a tenancy is granted to an existing protected or statutory tenant (including a tenant whose long tenancy has expired and who has become a statutory tenant under Part I of the Landlord and Tenant Act 1954). It will also be observed that in those cases which do NOT fall within s 127 but where a protected tenancy may be created, an 'upper limit' or 'maximum rent' such as Example 6 provides MUST be included. The answer to the problem is to ensure that in no circumstances can the rent cease to be less than two-thirds of the rateable value on the appropriate day.

Example 6 Schedule to long lease providing for increase of rent on each assignment but limited to 2/3 of rateable value (Rent Act cases)

Note: the rent will have been defined as 'The yearly sum determined in accordance with Schedule '

1 In this Schedule:

(*a*) 'Disposal' means any assignment of the Term or the grant by the Tenant (other than of a mortgage term) of any sublease of the Premises for a consideration greater than the Premium;

(*b*) 'Operative Disposal' means the first Disposal, and any subsequent Disposal for a consideration exceeding the greatest consideration for any prior Disposal;

(*c*) the 'Initial Rent' means [£25];

(*d*) the 'Maximum Rent' means the amount which is £1 less than two-thirds of the rateable value of the Premises on whatever was or is taken to be 'the appropriate day' in respect of the Premises for the purposes of the Rent Act 1977, the rateable value of the Premises being ascertained in accordance with s 25 of that Act.

2 The Rent will be the Initial Rent until the first Disposal.

3 Subject to paragraph 4 of this Schedule, upon any Operative Disposal the Rent will increase with effect from the date of that Disposal to an amount which bears the same proportion to the Initial Rent as the consideration for that Disposal bears to the Premium.

4 The Rent shall not be increased by reason of paragraph 3 above to an amount exceeding the Maximum Rent; if but for this paragraph the Rent would have been increased to an amount exceeding the Maximum Rent, the Rent will be the Maximum Rent.

5 It is agreed and declared that

(*a*) the rateable value on the 'appropriate day' in respect of the Premises for the purposes of the Rent Act 1977 was £ ;

(*b*) any error in this paragraph is not to affect any of the foregoing provisions.

Section 127 of the Rent Act 1977 (as amended by the Housing Act 1988) is not restricted in its operation to provisions for increases of rent on assignments. It applies equally to the more traditional provision (in a ninety-nine year lease) for increases to a fixed sum every twenty-five years or, if such were thought appropriate, an index-linked provision.

For the sake of completeness, one should also take note of the provisions of s 127(3A) and (3B). These provisions apply only to tenancies granted *before* 16 July 1980. The draftsman will need only to consider the provisions when faced with an existing lease which has become a protected tenancy and when the question of whether a premium may lawfully be charged arises. In relation to these (pre-16 July 1980) tenancies, Part IX of the Rent Act does not and is deemed never to have applied if:

(i) a premium was lawfully required and paid on the grant of the tenancy;

(ii) the tenancy was at the time it was granted, a tenancy at a low rent;

(iii) the terms of the tenancy do not inhibit both the assignment and the underletting of the whole of the premises comprised in the tenancy.

It will be observed that for the purposes of these subsections, condition (*a*) above (on p 92), in relation to s 127(2) (landlord not to have power to determine in first twenty years), does not apply but that an inhibition on assignment or underletting in the last seven years is fatal to their application.

Accordingly, if the tenancy was granted before 16 July 1980 and provides for increases of rent on each assignment and was a tenancy at a low rent at the time when it was granted, provided that there is no inhibition on assignment, no remedial action will be necessary unless the landlord wishes to ensure that the tenancy cannot become a protected tenancy (to prevent registration); a premium may be lawfully charged on the assignment. If by contrast the lease contained an inhibition on assignment, remedial

action will be necessary either to remove the inhibition or to impose a limit as in Example 6 above or both.

In all cases where the provisions of s 127 are not applicable or cannot be relied on the draftsman *must* ensure that the rent is always less than two-thirds of the rateable value on the appropriate day. Where the provision for rent increases is to predetermined levels this can readily be checked before the grant.

B Non rent act cases

In the case of tenancies granted after 15 January 1989 and which cannot become protected tenancies, the above dangers do not arise. Although the operation of a provision for automatic increases in the ground rent on assignments could cause the rent to exceed two-thirds of the rateable value for the time being and to cause the tenancy to become an assured tenancy (assuming that it is not otherwise precluded from becoming such a tenancy), since there is nothing in the Housing Act 1988 corresponding to Part IX of the Rent Act 1988, it is clearly not disastrous from the tenant's point of view if that occurs. The landlord however will probably prefer that the tenancy should not become an assured tenancy since the value of his power to forfeit for non-payment of rent or for breach of covenant will be diminished. The forfeiture will determine the fixed term tenancy (subject to the tenant's right to apply for relief); but on the determination of that fixed term tenancy, a periodic statutory tenancy will then arise. For possession to be obtained, the landlord will have to satisfy the county court that one of the grounds provided in Sched 2 applies; the provisions of s 8 (notice of proceedings) will also apply. The net effect will be that the tenant will obtain more time to pay or comply with the covenant than he would if the tenancy were not an assured tenancy. Accordingly in the writer's view, the landlord should ensure that the tenancy can never become an assured tenancy by providing that the rent is always to be less than two-thirds of the rateable value for the time being. Example 6 above can be adapted as follows:

Example 7 Schedule to long lease providing for increase of rent on each assignment limited to two-thirds of rateable value for the time being (where the tenancy cannot be a protected tenancy and would, but for the 'maximum' provision, become an assured tenancy)

1 (*a*)–(*c*) [as in *Example 6*]
(*d*) the Maximum Rent means the amount which, at any time after the date of this lease, is £1 less than two-thirds of the rateable value of the Premises for the time being
2 and 3 [as in *Example 6*]
4 (*a*) The Rent shall not be increased by reason of paragraph 3 above to an amount exceeding the Maximum Rent
(*b*) If but for this paragraph either
(i) the Rent would have been increased to an amount exceeding the Maximum Rent; or
(ii) the Rent would, for any other reason, have exceeded the Maximum Rent the Rent will be the Maximum Rent.

The purpose of 4(*b*)(ii) above is to ensure that the tenancy does not become an assured tenancy as a result of (for example) an increase in the rent followed by a decrease in the rateable value.

5 Licences

No tenancy or other contract entered into after 15 January 1989 (except where entered into in pursuance of a contract made before that date) is capable of being a 'restricted contract' under the Rent Act 1977 (even where the tenancy or contract is entered into by the same persons as were parties to a previous restricted contract). A licensee holding under a licence granted after 15 January 1988 (other than the excepted case referred to above), cannot refer the licence to a Rent Tribunal and thereby nullify any provision for periodic increases. Assuming that the agreement creates a genuine licence rather than an assured tenancy (see Chapter 26), there is no control on the amount which may be charged for use and occupation under a new licence; there is likewise no control on the amount or frequency of any periodic increases. However, since a genuine licence can be determined on notice (unless it is for a fixed term, in which case the length of the fixed term will have been decided on by the landlord, and will therefore be of no greater length than he is willing to accept the stipulated amount) there will rarely be any purpose in including any provision for periodic increases—since on the determi-

nation of the licence, a new 'licence fee' can be negotiated. If the landlord is in doubt as to whether his licence is a 'genuine' licence, he may include an automatic index linked provision for increases—substituting references to 'weekly payment' for 'rent'—in case the licence should be held to constitute an assured tenancy. However, if he does this he will give the tenant the argument that an assured tenancy was created—since such a provision is obviously unnecessary in the case of the genuine licence. In the writer's view, the landlord must first make up his mind as to whether, consistently with *Street v Mountford* [1985] 2 All ER 289 and *A G Securities v Vaughan* [1988] 3 All ER 1058, the 'factual matrix' is such that a licence is capable of being granted. If it is not, he should not attempt to disguise a tenancy as such. If on the other hand the circumstances are such as are capable of giving rise to a licence the landlord should have the 'courage of his convictions' and draft the agreement accordingly. To attempt to 'hedge his bets' is likely to be counter-productive.

6 Essential of clause (increase to be fixed by arbitration, etc)

Whatever form of clause is chosen it must indicate precisely:

(*a*) when any increases are to take effect;

(*b*) what steps (if any) have to be taken, when, to initiate the increase procedure;

(*c*) how and by reference to what any increase is to be calculated or determined;

(*d*) what (if any) matters are to be disregarded in the determination; in the absence of provision to the contrary, a person fixing a market rent for premises must take into account any improvements even though made by the tenant (*Cuff v Stone J & F Property Co Ltd* [1978] 2 All ER 833; *Ponsford v HMS Aerosols* [1979] AC 63 and any future reviews (see *MFI Properties v BICC* [1986] 1 All ER 974; *British Gas v Universities Superannuation Scheme* [1986] 1 All ER 978);

(*e*) the length of term and other conditions which any person determining the rent is to assume (including any future reviews);

(*f*) how, if a person is to be appointed to fix the rent, he is to be appointed and whether he is to act as arbitrator or expert;

(*g*) whether the times and dates mentioned in the clause are to be of the essence; the *prima facie* presumption is that time limits in a rent review clause are not of the essence (*United Scientific Holdings v Burnley Borough Council* [1978] AC 904), but time may be made of the essence expressly or by implication. The draftsman can guard against a finding that time is impliedly of the essence by expressly providing that it is not to be. Some dates and times (eg the tenant's response to a trigger notice) may be intended to be of essence whereas others (eg timing of the trigger notice, landlord's notice to initiate arbitration) will not be. The clause must make this clear;

(*h*) if the times and dates are not to be of essence, whether, in what circumstances and how rent is to be assessed after the commencement of the period in which the new rent is to operate. The clause should deal specifically with what is to happen when there is delay in arriving at the new rent beyond the review date (see *South Tottenham Land v R & A Millett (Shops) Limited* [1984] 1 All ER 614. It should be observed that surrender after the review date does not extinguish the tenant's obligation to pay the reviewed rent up to the date of surrender, even if the review procedure had not been completed before the surrender was effected. (*Torminster Properties v Green* [1983] 2 All ER 457).

An example of a review clause which is not 'automatic' or 'index linked' is Form 6 in the Appendix. As has been suggested above, it will only rarely be appropriate to use such a clause in residential leases. Automatic index linked clauses are Forms 4 and 5.