

**ANGLIA RUSKIN UNIVERSITY**

**REFORM OF COMMERCIAL PROPERTY LEASES  
IN ENGLAND**

**RAY SAVAR**

A Thesis in partial fulfilment of the  
Requirements of Anglia Ruskin University for the Degree of Doctor of Philosophy  
(PhD) Law

Submitted May 2013

## **ACKNOWLEDGEMENTS**

Completion of this thesis has been a great milestone in my life. I could not have embarked on this expedition without the fervent and continued support of the university, colleagues, friends, and family. I would like to take this opportunity to extend my highest gratitude to certain individuals: my supervisor Professor Robert Home for his advice and regular monitoring; my wife Dominique for her warm encouragement and huge support; my daughter Cara [LLB] for her efforts in facilitating interviews with practitioners and enabling access to resources; Mr Patrick Martin, the head of department for Communities & Local Government and Mr Paul Bagust, Associate Director of Professional Groups and Forums (RICS), for their support; Miss Nikki Payne at the Law Society and Mr Graham Cooper of HM Land Registry for their guidance; Professor Sarah Brown and Helen Jones of the Law School of Anglia Ruskin University in Cambridge for their guidance; and last, but by no means least, thanks must go to all the participants who, despite very busy schedules, managed to find the time to give interviews.

ANGLIA RUSKIN UNIVERSITY

**ABSTRACT**

FACULTY OF ARTS, LAW AND SOCIAL SCIENCE

DEGREE OF DOCTOR OF PHILOSOPHY (PHD) LAW

REFORM OF COMMERCIAL PROPERTY LEASES IN ENGLAND

RAY SAVAR

July 2012

This thesis explores the arguments and evidence for reform of commercial property leases through legislative intervention. It identifies and explains the causes of landlord and tenant disputes arising mainly from poorly drafted commercial leases. It investigates the relevant codes for leasing business premises, the Law Society business lease, the regulatory reform of part II of the 1954 Act, the British Property Federation lease, and various other attempts at reform of commercial property leases.

This research also investigates the potential need for ethnic minorities in commercial property to have the key legal terms of commercial property leases made available in both English and other languages.

There is little previous academic research on reform of commercial property leases through legislative intervention (other than Crosby Reading reports). This research aims to contribute towards filling the gap that exists in the literature by investigating reform through legislation.

This research involved semi-structured interviews with participants from five groups: lawyers, surveyors/agents, landlords, tenants, and business owners. Most interviewed supported reform of commercial property leases through legislative intervention, and better guidance explaining the meaning of key legal terms of commercial property leases, especially from ethnic minority businesses.

# TABLE OF CONTENTS

<b>TITLE PAGE</b>	<b>i</b>
<b>ACKNOWLEDGEMENTS</b>	<b>ii</b>
<b>ABSTRACT</b>	<b>iii</b>
<b>TABLE OF CONTENTS</b>	<b>iv</b>
<b>LIST OF FIGURES, TABLES AND CHARTS</b>	<b>viii</b>
<b>ABBREVIATIONS</b>	<b>ix</b>
<b>COPYRIGHT DECLARATION</b>	<b>xi</b>
 <b>CHAPTER 1 – INTRODUCTION</b>	
<b>1.1 Problems with commercial property leases</b>	<b>1</b>
1.1.1 Self-regulated poor drafting	2
1.1.2 Complex laws and clauses	3
1.1.3 Vexatious litigations	5
<b>1.2 Research aim, questions and limitations</b>	<b>6</b>
<b>1.3 Literature review</b>	<b>8</b>
1.3.1 Relevant previous studies	9
1.3.2 Analysis of previous studies compared with this research	13
1.3.3 Commercial property lease reform in the Commonwealth	14
1.3.4 Voluntary Codes	16
<b>1.4 Research design and methodology</b>	<b>24</b>
1.4.1 Anonymity of participants	31
<b>1.5 Ethnic Minorities</b>	<b>34</b>
<b>1.6 Thesis Structure</b>	<b>40</b>

## **CHAPTER 2 – LEGISLATIVE DEVELOPMENT, ANALYSIS OF CASE LAW AND LEASE CLAUSES**

<b>2.1</b>	<b>Introduction</b>	<b>44</b>
<b>2.2</b>	<b>Legislative development</b>	<b>46</b>
2.2.1	Landlord and Tenant Acts	46
2.2.2	Regulatory reform order part II of the 1954 Act	48
<b>2.3</b>	<b>Analysis of case law disputes</b>	<b>56</b>
<b>2.4</b>	<b>Analysis of lease clauses</b>	<b>67</b>
<b>2.5</b>	<b>Conclusion</b>	<b>77</b>

## **CHAPTER 3 – ATTEMPTS AT REFORM**

<b>3.1</b>	<b>Introduction</b>	<b>81</b>
<b>3.2</b>	<b>Law Commission proposals</b>	<b>84</b>
<b>3.3</b>	<b>Government-led reform</b>	<b>88</b>
3.3.1	Chronology of government-led reform 2004	89
<b>3.4</b>	<b>Code for Leasing Business Premises 2007</b>	<b>93</b>
3.4.1	How landlords and tenants view the 2007 Code	96
3.4.2	Trade and press views on the 2007 Code	96
<b>3.5</b>	<b>Law Society Business Lease</b>	<b>102</b>
<b>3.6</b>	<b>British Property Federation (BPF) Lease</b>	<b>104</b>
<b>3.7</b>	<b>Land Registry Prescribed Clauses “Leases”</b>	<b>107</b>
<b>3.8</b>	<b>Conclusion</b>	<b>111</b>

## **CHAPTER 4 – STAKEHOLDERS’ ATTITUDE**

<b>4.1</b>	<b>Introduction</b>	<b>116</b>
<b>4.2</b>	<b>Survey Methodology</b>	<b>118</b>
4.2.1	Research questions	120
4.2.2	Sample	121
4.2.3	Interviews, methods and procedures	126
<b>4.3</b>	<b>Analysis of findings</b>	<b>129</b>
4.3.1	Rationale for bar charts and discussions	129
4.3.2	Summary of key findings	154
<b>4.4</b>	<b>Conclusion</b>	<b>155</b>

## **CHAPTER 5 – COMMERCIAL LEASES IN OTHER JURISDICTIONS AND ALTERNATIVE DISPUTE RESOLUTION (ADR)**

<b>5.1</b>	<b>Introduction</b>	<b>159</b>
<b>5.2</b>	<b>Australian lease reform</b>	<b>160</b>
<b>5.3</b>	<b>Commercial property leases in other jurisdictions</b>	<b>166</b>
5.3.1	United States of America	167
5.3.2	Canada	168
5.3.3	Europe	170
<b>5.4</b>	<b>Alternative Dispute Resolution (ADR)</b>	<b>172</b>
<b>5.5</b>	<b>Conclusion</b>	<b>176</b>

## **CHAPTER 6 – CONCLUSION**

<b>6.1</b>	<b>Introduction</b>	<b>176</b>
<b>6.2</b>	<b>Summary of research findings</b>	<b>185</b>
<b>6.3</b>	<b>Limitations of the research</b>	<b>190</b>
<b>6.4</b>	<b>The way forward</b>	<b>191</b>

<b>BIBLIOGRAPHY</b>	<b>195</b>
---------------------	------------

## **SCHEDULE OF INTERVIEWS**

<b>Appendix 1</b>	<b>Interviews with Lawyers</b>	<b>215</b>
<b>Appendix 2</b>	<b>Interviews with Surveyors/Agents</b>	<b>217</b>
<b>Appendix 3</b>	<b>Interviews with Landlords</b>	<b>218</b>
<b>Appendix 4</b>	<b>Interviews with Tenants</b>	<b>220</b>
<b>Appendix 5</b>	<b>Interviews with Business Owners</b>	<b>223</b>

## **LIST OF FIGURES, TABLES AND CHARTS**

### **Figures**

Figure 1:	Research Process: “adapted” (Partington, 2002a:139)	32
Figure 2:	Philosophical Assumptions Social Scientific Research: “adapted”	33

### **Tables:**

Table 1:	Population in Europe Nationals and Non-Nationals	38
Table 2:	Land Registry Prescribes Clauses Leases	111
Table 3:	Stakeholders, Actors, their interests and roles	117
Table 4:	Australian State/Territory current legislation	165

### **Charts:**

Chart 1:	Participants’ Opinion of Commercial Property Leases	136
Chart 2:	Participants’ Opinion of Codes and Variable Leases	140
Chart 3:	Participants’ Views on Reform of Leases	145
Chart 4:	Participants’ Comments on Alternative Dispute Resolution (ADR)	149
Chart 5:	Participants’ Comments on Translation and Guide	153

## **ABBREVIATIONS**

ADR	Alternative Dispute Resolution
AGA	Authorised Guarantee Agreement
BIS	Department for Business Innovation & Skills
BPF	British Property Federation
CBA	Chancery Bar Association
CLWG	Commercial Leases Working Group
CPL	Commercial Property Lease
CDM	Construction Design and Management
CMC	Computer Mediated Communication
DETR	Department for Environment, Transport and the Regions
DCLG	Department for Communities and Local Government
DTLR	Department for Transport Local Government and the Regions
DTI	Department for Trade and Industry
EM	Ethnic Minority
EMBO	Ethnic Minority Business Owners
FTF	Face to Face (interview)
GEM	Global Entrepreneurship Monitor
HSE	Health and Safety Executive
ISBE	Institute for Small Business and Entrepreneurship
LAT	Landlord and Tenant
LC	Law Commission
LR	Land Registry
LRR	Land Registry Rule
ODPM	Office of the Deputy Prime Minister
PIF	Property Industry Forum

PLA	Property Litigation Association
PLC	Practical Law Company
RICS	Royal Institution of Chartered Surveyors
RRO	Regulatory Reform Order
SMEs	Small to Medium Enterprises
TEA	Total Entrepreneurial Activity
UCPD	Unfair Commercial Practices Directive
UORR	Upwards-Only Rent Reviews

## **COPYRIGHT DECLARATION**

Attention is drawn to the fact that copyright of this thesis rests with

- (i) Anglia Ruskin University for one year and thereafter with
- (ii) Ray Savar

This copy of the thesis has been supplied on condition that anyone who consults it is bound by copyright.

## CHAPTER 1 – INTRODUCTION

### 1.1 Problems with commercial property leases

#### 1.1.1. Self-regulated poor drafting

The genesis of this research problem lies in the self-regulated<sup>1</sup> and often poor drafting of commercial property leases<sup>2</sup>, which can lead to landlord and tenant disputes<sup>3</sup>. UK Government policy, to address perceived challenges in the area of commercial property leases, has largely been pursued through industry self-regulation<sup>4</sup>. Property litigation is mainly prompted by differing interpretations<sup>5</sup> and misunderstandings of the terms of property agreements<sup>6</sup>. The capacity of computers to store and replace text has only compounded the problem. In many (perhaps most) instances, the senior lawyer of a law firm accepts a client's instructions or negotiates a deal involving a commercial property lease, and then leaves the drafting to a relatively junior member of staff, who has neither adequate experience nor the authority to be innovative. There is also a trend towards the excessive use of cut-and-paste of one leases' terms into another<sup>7</sup>. Some solicitors, if they do not like the landlord's schedule<sup>8</sup>, rather than trying to amend<sup>9</sup> the schedule, simply delete it and

---

<sup>1</sup> C Hughes and N Crosby, 'The challenge of self-regulation in commercial property leasing': a study of lease codes in the UK, *International Journal of Law in the Built Environment* (Vol. 4 Iss: 1, pp.23 – 44 2012)

<sup>2</sup> Janet Bignell, *Drafting Business Leases*, (seventh edition London, Sweet & Maxwell, 2007)

<sup>3</sup> V. G. Wellings, *Law of Landlord and Tenant* (London, Sweet & Maxwell, London, 1978)

<sup>4</sup> Ibid 1

<sup>5</sup> R Castle and J Castle, 'It is time leases moved with the times', *New Law Journal* (30 July 2010)

<sup>6</sup> Tony Bell, *Drafting and Negotiating Commercial Leases*, (Fifth Edition London, Butterworth's, 1995)

<sup>7</sup> Karl Bamford, *Amending a Commercial Lease* (Third Edition, Haywards Heath, Tottel Publishing, 2007)

<sup>8</sup> Ibid

<sup>9</sup> Robert Sweet, *Commercial Leases, Tenant's Amendments*, (Sixth Edition London, Sweet & Maxwell, 2009)

insert their preferred clauses instead, often without regard to the other provisions of the first draft<sup>10</sup>.

No matter how long it takes or how difficult the process, the parties can usually ascribe some meaning to a poorly written document<sup>11</sup>. Moreover, sensible people often happily organise their affairs in ignorance<sup>12</sup>, and in spite of the terms of their governing instrument. Inevitably, however, some poor writing does end up before the courts.<sup>13</sup>

A lawyer should be answerable to his or her own client in the matter of costs. Drafts would be shorter and tailored to the job in hand if solicitors knew that their own client would have to pay the bill. The Law Society's business leases<sup>14</sup> are a noble attempt at this, but regrettably have been little used. In style and attitude they follow the patterns of the Standard Conditions of Sale and the RICS's Common Auction Conditions<sup>15</sup>. A person who wants to draft in the modern way can look at any of these documents and be inspired.

Trevor Aldridge's Practical Lease Precedents<sup>16</sup> (Sweet & Maxwell) provides a vast store of material in this field, all written in Standard English and concisely set out. There is a large body of literature available on the benefits of the "plain English" approach, such as clarity<sup>17</sup>, which is a movement dedicated to simplifying legal English. Clarity has grown from modest beginnings in 1983 to become a truly

---

<sup>10</sup> Ibid 6

<sup>11</sup> Ibid

<sup>12</sup> P Atiyah, *An Introduction to the Law of Contract* (Clarendon 2000)

<sup>13</sup> Ibid

<sup>14</sup> Law Society, 'Business Lease' <<http://www.lawsociety.org.uk/newsandevents/news/view=newsarticle.law?NEWSID=314002>> accessed 21 November 2011

<sup>15</sup> RICS, 'Common Auction Conditions' 3rd edition' <<http://www.rics.org/uk/knowledge/more-services/guides-advice/>> accessed 12 November 2011

<sup>16</sup> Practical Lease Precedent <<http://www.sweetandmaxwell.co.uk/Catalogue>> accessed 24 November 2011

<sup>17</sup> Clarity, 'clear legal language' is a worldwide group of lawyers and others who advocate using plain language in place of legalese <[www.clarity-international.net/](http://www.clarity-international.net/)> accessed 24 November 2011

international grouping. However, it is the lack of any substantial change since 1985 that gives cause for concern<sup>18</sup>. The average practitioner may not know the available material<sup>19</sup>. Drafting a document is merely a means to an end, and that end is delivery of the bill. The reasons for some of the poor drafting of leases that we still see today could be due to: self-regulation; the feeling of security in adopting a form of words which has been used before and seen to work; conservatism; laziness; fear of a negligence claim; reliance on drafts produced by others; the increasing use of word processing software; and client resistance. Numerous previous attempts at reform to improve leases through voluntary codes have had little success. These attempts (see Chapter 3 for full details) include various versions of the Code for leasing business premises in England and Wales<sup>20</sup>, the 2004 regulatory reform Order of Landlord and Tenant Act 1954 Part II<sup>21</sup>, the Law Society Business Lease<sup>22</sup>, and the British Property Federation Leases<sup>23</sup>. This study also considers the fast-expanding, Ethnic Minority Business Owners (EMBO), and identifies the need for them to understand the key legal terms contained in commercial leases through a guide explaining the said terms in different languages.

### 1.1.2 Complex laws and clauses

In England and Wales commercial tenancy law is a complex mix of the law of contract, property laws, and statutory rules<sup>24</sup>. The commercial property environment

---

<sup>18</sup> C Edwards and P Krendel, *Institutional Leases in the 21st Century* (London, EG Books, 2006)

<sup>19</sup> R Abbey and M Richards, *A Practical Approach to Commercial Conveyancing and Property*, (fourth edition Milton Keynes, OUP, 2009)

<sup>20</sup> Code for leasing business premises 2007  
<[http://www.leasingbusinesspremises.co.uk/downloads/lbp\\_booklet.pdf](http://www.leasingbusinesspremises.co.uk/downloads/lbp_booklet.pdf)> accessed 06/10/2011

<sup>21</sup> Regulatory Reform Order 2004 <[www.legislation.gov.uk/ukxi/2003/3096/contents/made](http://www.legislation.gov.uk/ukxi/2003/3096/contents/made)> accessed 07/10/2011

<sup>22</sup> Ibid 20

<sup>23</sup> British Property Federation, 'Business leases' <<http://www.bpf.org.uk/>> accessed 20 October 2011

<sup>24</sup> A S Hudson, *New Perspectives on Property Law and Human Rights* (Cavendish Publishing London 2004)

is affected and governed by the market, regulatory rules and procedures<sup>25</sup>, hence its complexity. This complexity can cause disputes. As tenants, we want security and a sense of ownership when we take a lease of premises. As landlords, we may want financial security or a sense of respect from our tenants. Both sides have certain expectations of the other, and occasionally conflicts arise when these expectations are not met. There are legal courses of action that can be taken to settle conflicts between landlord and tenants<sup>26</sup>, but these solutions can prove to be costly and more final than either side really wanted. Repossession procedures can be financially and emotionally draining, while small claims court cases can damage the landlord/tenant relationship even further.

In commercial property leases<sup>27</sup>, renewals under the Landlord and Tenant Act 1954 hamper innovation in view of the pointer in s 35<sup>28</sup> that “...the court shall have regard to the terms of the current tenancy”<sup>29</sup>. The common dependency on standard forms (precedents) and the pressure both to get something out and later to complete all play their part. Property disputes affecting land may stem from restrictive covenants, access issues, overage arguments, adverse possession, trespass, neighbour usage issues such as right to light, walls (the Party Wall Act 1996)<sup>30</sup>, access to neighbouring land and nuisance claims.

Earlier research on commercial property leases has mainly focused on studies of the voluntary codes (see Chapter 3). Some of the ethnic minorities’ business failures are as a result of entering into commercial leases without understanding the terms of the leases properly due to their poor English<sup>31</sup>. This research therefore explores the

---

<sup>25</sup> Peter Sparkes, *A New Land Law* (2nd edn Hart Publishing 2003)

<sup>26</sup> Susan Bright, *Landlord and Tenant Law in Context*, (Hart Publishing 2007)

<sup>27</sup> L Crabb, and J Seidler, *Leases: Covenants and Consents* (Second Edition London, Sweet & Maxwell 2008)

<sup>28</sup> Section s 35 of the Landlord and Tenant Act 1954 <[www.legislation.gov.uk/ukpga/Eliz2/2-3/56/section/35](http://www.legislation.gov.uk/ukpga/Eliz2/2-3/56/section/35)> accessed 18 November 2013

<sup>29</sup> Landlord and Tenant Act 1954 <[www.legislation.gov.uk/ukpga/Eliz2/2-3/56/section/35?view=plain](http://www.legislation.gov.uk/ukpga/Eliz2/2-3/56/section/35?view=plain)> accessed 18 November 2011

<sup>30</sup> Party Wall Act 1996 <[www.legislation.gov.uk/ukpga/1996/40/contents](http://www.legislation.gov.uk/ukpga/1996/40/contents)> accessed 19 November 2011

<sup>31</sup> Christine Rossini, *English As A Legal Language* (Kluwer Publishing 1998)

argument for a guide in translating and explaining key terms of leases. The property market industry suffers from too many landlord and tenant disputes<sup>32</sup>. Even the conservative Encyclopaedia of Forms and Precedents<sup>33</sup> (vol 23(1) 2007 reissue) acknowledges that traditional approaches to commercial leases can make leases difficult to follow, even for the experienced. The Encyclopaedia cites the exposition of tenant's covenants and landlord's covenants regardless of subject matter and long dictionary-like lists of definitions as examples of customary practice that might be reconsidered.

### **1.1.3 Vexatious litigations**

Complex terms of commercial leases can cause vexatious (landlord and tenant) disputes<sup>34</sup>, where legal actions are brought regardless of their merits, solely to harass or subdue an adversary regarding rent reviews<sup>35</sup>, lease renewals, dilapidations, breach of covenants, possession claims, break clauses, service charge disputes or claims against former tenants or guarantors. Disputes may also involve subletting or assigning property or may come about where a proposed change of use is opposed; there may be breaches of a covenant to repair a building in the lease. In repair disputes, the landlord may serve what is known as a schedule of dilapidations, requiring the breach to be remedied within a certain time frame. Recovery of land premises from unlawful squatters may require litigation while disputes relating to access to property, rights of way, commercial rent disputes, lease surrender negotiations, lease determination, possession actions whether against environmental mass protesters or unwanted occupiers are all areas of property litigation. In addition, negligence of property professionals, impact of statute on property interests (e.g.

---

<sup>32</sup> Ibid 2

<sup>33</sup> Encyclopaedia of Forms and Precedents <<http://lexisweb.co.uk/guides/sources/encyclopaedia-of-forms-and-precedents>> accessed 21 November 2011

<sup>34</sup> Richard Megarry, William Harpum and Stuart Bridge, *A Manual of the Law of Real Property* (7<sup>th</sup> edn Sweet & Maxwell 2008)

<sup>35</sup> Michael Barnes, *Guide to Rent Review* (London, Butterworth's 2002)

Insolvency Act<sup>36</sup>, Licensing Act 2003<sup>37</sup>, village greens legislation (Commons Act 2006)<sup>38</sup>, negotiations and disputes in mergers, acquisitions, and planning are all commonly seen.

The Law Commission has put its weight behind reform<sup>39</sup> and the Law Society has published a series of well written business leases (see Law Commission Chapter 3). Review of the Code for Leasing Business Premises 2007, also (see Chapter 3) highlights problems with commercial leases. The code aims to redress the imbalance between landlord and tenant and to cut down convoluted negotiations on lease terms.

## **1.2 Research aim, questions and limitations**

This research explores the problems with commercial property leases (see 1.1 above), enquiring as to why little development or improvement has been made to commercial leases, and examining what can be done through legislative intervention. In a quarter of a century, not much improvement has been made in terms of the style, layout, language and design of leases<sup>40</sup>. Does that matter? This research argues that it does, and that it is worth investing time and effort to reform. This project inquires as to how numerous previous attempts at reform through voluntary codes have brought about little success. Another key aim of this research has been to investigate the potential need for the production of a guide explaining the key legal terms of commercial property leases in English and also in other main languages for the benefit of ethnic minorities involved with the commercial property industry. The principal research questions, challenges and limitations (see Chapter 6 for detailed research limitations) in this research have been:

---

<sup>36</sup> Insolvency Act 2000, <[www.legislation.gov.uk/ukpga/2000/](http://www.legislation.gov.uk/ukpga/2000/)> accessed 10/10/2011

<sup>37</sup> Licensing Act 2003 <[www.legislation.gov.uk/ukxi/2005/42/contents/made](http://www.legislation.gov.uk/ukxi/2005/42/contents/made)> accessed 23 November 2011

<sup>38</sup> Village Greens Legislation Common Act 2006 <[www.legislation.gov.uk/.../2006/.../nonregistration-of-town-or-villag](http://www.legislation.gov.uk/.../2006/.../nonregistration-of-town-or-villag)> accessed 22 November 2011

<sup>39</sup> Law Commission, 'Provisional Proposals for Amendments to the Landlord and Tenant Act 1954' (Working paper No 7) (London, HMSO, 1969)

<sup>40</sup> A S Hudson, *The Unbearable Lightness of Property New Perspectives on Property Law Obligations and Restitution* (Cavendish Publishing London 2004)

- a) In order to address the theoretical challenges in this research, it was appropriate to examine a number of pertinent theories to create a robust heretical lens to gain an insight and understanding of commercial property leases in context.
- b) The lack of good understanding of the research questions by some participants (specifically, members of the ethnic minority group) caused some limitation. This was overcome through prolonged engagement and impartial translation, albeit this limitation further highlights the ethnic minority's disadvantageous position in entering legal leases, and the need for translation of the key legal terms of the said lease presented in the form of a guide.
- c) Some of the participants in the five categories involved with the commercial property industry were not aware of the various Codes for leasing business premises, the Law Society business lease, and the British Property Federation leases.
- d) One of the main research challenges causing concern was establishing the validity of the research, also referred to as the credibility and/or the dependability. Member check, interviewer corroboration, peer debriefing, prolonged engagement, negative case analysis, bracketing, balance, and supporting documentary evidence were done to ensure validity and credibility. This study employed the instrument of the semi-structured interviews (see Chapter 4).
- e) In exploring literature, it was noticed that certain fields have not been covered properly, this led to another research challenge.

### 1.3 Literature review

In Europe, the law of property is an area of law which remains essentially national<sup>41</sup>, and where differences between national laws remain greatest.<sup>42</sup> The Law Commission Programme of Law Reform<sup>43</sup> acknowledged that of all the areas on which the Law Commission had worked, landlord and tenant law had been the least successful in terms of development and modernisation. The literature on reform of commercial property leases is fragmented and underdeveloped. In this research a critical detailed review of attempts at reform, the landlord and tenant law, analysis of case law and lease clauses (see Chapters 2 & 3) provided the foundation upon which this new academic research is built.

The sources of the literature review included peer-reviewed, academic journals, textbooks, professional publications, bibliographies and references in key textbooks, recent journal articles, commercial lease (relevant) journals, abstracting journals, the British Library information on property law, electronic databases, e-electronic reference library (ERL), Westlaw, LexisNexis, Anglia Ruskin University library, relevant books, study of different types of commercial property leases and their clauses, analysis of commercial property laws, the Land Registry, the Law Society, analysis of relevant landlord and tenant case law and “common” causes of disputes, legislative development in commercial property specific to leases, Law Commission and relevant LC proposals, government-led reforms including the Regulatory Reform Order 2004, Codes for Leasing Business Premises, Law Society Business Leases, British Property Federation leases, Land Registry Prescribed Clauses leases, Royal Institute of Chartered Surveyors, and other jurisdictions (see Chapters 2,3 & 5).

---

<sup>41</sup> Peter Sparks, *European Land Law*, (2007 Hart Publishing)

<sup>42</sup>European University Institute Department of Law ‘Property Law’  
<<http://www.eui.eu/DepartmentsAndCentres/Law/ResearchAndTeaching/ResearchThemes/ProjectRealPropertyLaw.aspx>> accessed 09 November 2011

<sup>43</sup> Law Commission, ‘Seventh Programme of Law Reform’ (Law Com No 259, 1999) 435. The *Seventh Programme of Law Reform* was laid before Parliament by the Lord High Chancellor pursuant to section 3(2) of the Law Commissions Act 1965 and ordered by the House of Commons to be printed 15 June 1999.

### 1.3.1 Relevant previous studies

Standard land and property law texts in England, do not discuss the complete reform of commercial property lease through legislation. The relevant comparable research and studies have been; the various commissioned studies from the University of Reading (see below), attempts at reform (see Chapter 3) , and lease reform in other jurisdictions (see Chapter 5).

#### a) Crosby, N. (2006) Commercial lease reform in the UK

The research<sup>44</sup> presented in this seven-page report was carried out by Professor Neil Crosby of the University of Reading Business School, with a travel grant provided by the RICS Education Trust and the Investment Property Forum Educational Trust. The aim of the research was to examine perceptions of the effectiveness of small business tenant legislation in Australia and to provide a preliminary evaluation of its potential use in the UK. The research was undertaken during the first half of 2006 and consisted of a review of the literature concerning the development of lease legislation in Australia since the 1980s. As the legislation is state-governed and not Commonwealth based, a case study approach of Victoria was used, supplemented by a brief overview of legislation in the other states. During March and April of 2006, the issues identified in the literature were developed within a set of semi-structured interviews with a combination of government officials, property professionals and representatives of landlords and tenants in Australia. In total, 28 individual interviews were carried out with 36 interviewees. The majority took place in the case study area of Melbourne, but a number of interviewees acting nationally were interviewed in Sydney. Professor Crosby concluded that the UK's voluntary lease code is not fully effective. Overall, it is plain from Crosby's research that some of the themes of lease legislation in Australia address the same issues of business tenancy that exist in the UK. The most obvious ones are the information and disclosure provisions and the use of lease registrars or commissioners to administer education, compliance, and dispute resolution.

---

<sup>44</sup> Neil Crosby, 'commercial lease reform in the UK', University of Reading School of Real Estate and Planning <[www.reading.ac.uk/REP/Aboutus/Staff/neil-crosby.aspx](http://www.reading.ac.uk/REP/Aboutus/Staff/neil-crosby.aspx)> accessed 11/11/2011

The findings of the research recommend that, given the failure of the property industry in the UK to voluntarily ensure proper dissemination of the lease Code, the information provisions and easier dispute resolution processes in the Code could be made mandatory.

- b) Crosby, N., Hughes, C. and Murdoch, S. (2005) Monitoring the 2002 Code of Practice for Commercial Leases Final Report. London: Office of the Deputy Prime Minister.

This study<sup>45</sup>, known as “Monitoring the 2002 Code of Practice for Commercial Leases”, co-written by Neil Crosby at Reading University for the UK government, was designed to measure in detail the impact of the 2002 Code. It presents key research which provides evidence that the 2002 Code was unsuccessful and therefore requires change. An interview survey was carried out with a number of chartered surveyors, and also with solicitors involved with conveyancing and lease contract negotiation.

The perception of property professionals acting for clients in 2005 was noted as follows: first, virtually all interviewees were aware of the 2002 Code. Second, it is clear that larger and institutional landlords are more likely to have knowledge of the Code and that smaller landlords may not. Third, tenants are perceived to have no knowledge of the Code unless they are large tenants with direct access to professional property services advice.

The conclusion was that, most consider that the Code is having no influence at all on lease negotiations, although some of the agent interviewees regard it as having some small, indirect, influence. Only two interviewees, one surveyor and one solicitor actively and regularly used the Code when negotiating on behalf of tenants.

- c) Department for Communities and Local Government: “Monitoring the Code 2007”

---

<sup>45</sup> N Crosby, C Hughes, and S Murdoch, ‘Monitoring the 2002 Code of Practice for Commercial Lease’ <[www.reading.ac.uk/rep/leasefinal.pdf](http://www.reading.ac.uk/rep/leasefinal.pdf)> accessed 12/11/2011

This was carried out by Neil Crosby and Cathy Hughes: School of Real Estate and Planning, University of Reading July 2009<sup>46</sup>, for the Department for Communities and Local Government.

The aim of this research was to monitor the dissemination, awareness, and use of the 2007 Code for Leasing Business Premises. Specific objectives were to identify:

- a) how far the 2007 Code has been disseminated into the market as demonstrated by awareness of it, among landlords and tenants and their advisors
- b) the extent to which the Code is being used in negotiations
- c) sources of advice to tenants on the Code
- d) the perceptions of landlords, tenants, and their advisors on the impact of the Code on leasing.

With these objectives, the research aimed to distinguish between large and small tenants, and also between major and smaller landlords. The research was undertaken across England and Wales, primarily by a questionnaire survey complemented by a small set of interviews. Questionnaires were sent to a sample of major and regional landlords and to tenants who have recently taken new leases. The interviews were with professional advisors to landlords and tenants, including property agents and solicitors, with additional interviews of members of organisations representing landlords and advisors. A brief review was also made of the material available on the websites of a number of organisations, including those that give advice to small businesses, which referenced the Code; this review included all of the sponsors of the 2007 Code (see Chapter 3 Code for Leasing Business Premises 2007).

---

<sup>46</sup> N Crosby and C Hughes, 'Monitoring the Code for leasing Business Premises 2007', Community and Local Government , <<http://www.rmd.communities.gov.uk/project.asp?intProjectID=12576>> accessed 14/11/2011

The findings of this research suggest that awareness of the 2007 Code is no better than that found for the 2002 Code.<sup>47</sup> In fact, small business tenants and small landlords appear to have a lower level of awareness of the current Code. Although some professional advisors may be well informed about the 2007 Code, there is evidence that many are not, despite the efforts of their professional institutions to inform and disseminate information. The 2007 Code is rarely specifically referred to in negotiations. Larger tenants and their solicitors are likely to use it. Overall, any references to the Code in negotiations are usually quite general, with occasional references to the landlord Code (see Chapter 3, 3.4). The extent of advice being given to tenants on the Code is limited. The interviews suggest that some large tenants (particularly retailers) are conversant with the Code through their in-house property expertise.

- d) Cathy Hughes and Neil Crosby, Policy making without legislating; the self-regulation of commercial property leasing: A Paper presented at The 17th Annual Conference of the European Real Estate Society, Milan, Italy, June 2010

This research, presented in a 20-page dissertation<sup>48</sup>, found that in contrast to the heavily-legislated residential sector, commercial landlords and tenants in the UK are largely free to negotiate the terms of their contract. Yet, since the property crash of 1989/1990, successive governments have taken an interest in commercial leasing; in particular, there is a desire to see landlords be more flexible. UK Government policy in this area has been pursued through industry self-regulation rather than legislation. Since 1995 there have been three industry codes of practice on leasing. These codes are sanctioned by government and monitored by it. Yet, 15 years after the first code was launched, many in the industry see the whole code concept as ineffective and unlikely to ever achieve changes to certain aspects of landlords' behaviour.

This paper is the first step in considering the lease codes in the wider context of industry self-regulation. The aim of the paper is twofold: first, a framework is created using the literature on industry self-regulation from various countries and

---

<sup>47</sup> A Code of Practice for Commercial Leases  
<[www.bpf.org.uk/.../commercial/Code\\_of\\_practice\\_for\\_commercial](http://www.bpf.org.uk/.../commercial/Code_of_practice_for_commercial)> accessed 12/11/2011

<sup>48</sup> C Hughes and N Crosby, 'European Real Estate Society'  
<<http://www.eres.org/eres2010/contents/Abstracts-Programme.pdf>> accessed 14/11/2011

industries, which suggests key criteria to explain the effectiveness (or ineffectiveness), of self-regulation. This is then applied to the UK lease codes based on research carried out by the authors for the UK government to monitor the success of all three codes. The outcome is a clearer understanding of the possibilities and limitations of using a voluntary solution to achieve policy aims within the property industry.

### **1.3.2 Analysis of previous studies compared with this research**

Previous studies did mainly focus on monitoring the impact of voluntary codes, the self-regulation leasing in England, and study of Australia lease to improve the 2007 Code for leasing business premises in England. Those studies concluded that the Codes have failed; the commercial leasing in England is self-regulated; the information provisions and easier dispute resolution processes of the Code should become mandatory.

However, this research is distinctive and comprehensive as it explores the complete reform of commercial leases through legislation. This study investigates whether in England commercial property leases are standard, consistent, easy to understand, uniform in; style, drafting, and presentation, or not. This study explores the awareness and use of the voluntary Code for Leasing Business Premises in England and Wales 2007, the Law Society Business Lease, and the British Property Federation Business Lease. In landlord and tenant disputes, this research explores the cause of disputes, and potential for mediation, which is a form of alternative dispute resolution, rather than going to court. This study investigates the argument for production of a short, simple guide, explaining the meanings of key legal terms of commercial property leases in English and other main languages, for the benefit of ethnic minorities. The difficulties of ethnic minority groups encountered with commercial property leases have not been explored before. This research aims to fill the gap that exists in literature and makes significant contribution to the body of knowledge.

### 1.3.3 Commercial property lease reform in the Commonwealth

In this study it became profoundly important to explore extensive literature (see chapter 5) to compare the workings, structure and effectiveness of commercial leases in other jurisdictions, which are regulated by statute through legislation, in contrast with the voluntary self-regulated (see 1.1 above & Chapter 3) commercial lease conventions in England. The significant and central premise of this research has been to research the assertion or rejection of potential legislative intervention to achieve a standard commercial lease in order to reduce landlord and tenant disputes.

Study of the voluntary self-regulated English commercial lease (see Chapter 3) against the legislative Australian commercial lease (see Chapter 5) gives a comparable viewpoint. The comparative law's aim must be the acquisition of knowledge; in this context the leaders of comparative analysis, Zweigert and Kotz, contend that:

The primary object of comparative law – as in the case of all scientific methods – is knowledge...comparative law, however, has four more specific practical objectives...: comparison provides material for the legislator; it serves as an instrument of interpretation; it plays a role in university instruction; and it is of significance for the supranational unification of law<sup>49</sup>.

In this research it was essential to study comparative commercial leases in order to establish to what extent they are identical or different<sup>50</sup>. It is doubtful whether it is possible to actually draw up a logical and self-contained methodology of comparative law which would claim to work perfectly. This study applies a functional approach to comparative law. Functionalism is still the dominant method of comparative legal studies and the most, perhaps the only, fruitful method<sup>51</sup>. This

---

<sup>49</sup> K Zweigert and H Kotz, *Introduction to comparative law* (Pearson Publishing 1998) 32

<sup>50</sup> R Sacco, 'A Dynamic Approach to Comparative Law' *The American Journal of Comparative Law* 72 (Hart Publishing 1991)

<sup>51</sup> H Collins, 'Methods and Aims of Comparative Contract Law' 11 *Oxford Journal of Legal studies* 396-405 (1989)

research is particularly concerned with commercial lease laws across other legal systems<sup>52</sup>, and therefore allows rules and concepts to be appreciated for what they do, rather than what they say<sup>53</sup>. Functionalists believe that the “function” of a rule and its social purpose are the common denominator that permits comparison<sup>54</sup>. Several commentators claim that the functional method is a contradiction<sup>55</sup>, where there is not one functional method.

In this research, it is argued that the study of Australian reform of commercial leases enables the researcher to obtain critical information regarding their legal systems by stepping out of them and looking back in. With the increased demand for law and legal framework changes on society and technology, the comparative law method<sup>56</sup> has been seen as a way to reach solutions to new problems by looking at the experience of other legal systems with reference to similar problems<sup>57</sup>. Increasing globalisation and the reduction of the limits of both customers and their business concerns require lawyers to escape the isolation of their own legal systems to advise international and multinational clients<sup>58</sup>. Sacco suggests another distinctive feature of the theory of comparative law in that it plays an important role in the interpretation of legal rules in different legal systems and the adoption of one socio-legal system to another<sup>59</sup>. Some comparativists regard comparative jurisprudence as a tool for deeper

---

<sup>53</sup> J Reitz, ‘How to do Comparative Law’ 46 *American Journal of Comparative Law* (1998) 620-622

<sup>54</sup> O Brand, ‘Conceptual Comparison’ 32 *Brooklyn Journal of International Law* (2007) 409

<sup>55</sup> M Reimann, ‘The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century’ 50 *American Journal of Comparative Law* (2003) 671

<sup>56</sup> R Michaels, ‘The Functional Method of Comparative Law’ 87 *Duke Law School Legal Studies* (2005) Paper 1

<sup>57</sup> P Cruz, *Comparative Law in a Changing World* (2<sup>nd</sup> edn, Oxford University Press 1999) 230

<sup>58</sup> W Kamba, ‘Comparative Law’ (1974) *International Law Quarterly* 485

<sup>59</sup> R Sacco, ‘A Dynamic Approach to Comparative Law’ (1991) *American Journal of Comparative Law* 4

understanding of legal data, with legal reform and the interpretation of laws minor or subsidiary.<sup>60</sup>

Some legal experts<sup>61</sup> maintain that comparative law is not a legal science, but only an educational discipline taught in law schools and universities. It is argued by these experts that comparative law is the application of the comparative method in cases where the comparison process exceeds the framework of a legal system. The comparison process itself does not create legal norms, but only contributes to the creation of legal rules in the framework of one or more legal systems. This thesis can be rebutted, however, by the fact that during the judicial process, the European Court of Human Rights and the courts of the Member States of the European Union often turn to practice the comparative analysis of judicial decisions and national legislation of Member States. This thus confirms an evolutionary role of the practical application of comparative law in the European integration process.<sup>62</sup>

#### **1.3.4 Voluntary Codes**

In England earlier research on commercial property leases has focused mainly on studies of voluntary codes (see Chapter 3). Such studies and research include Monitoring the 2007 Code for Leasing Business Premises, by Neil Crosby and Cathy Hughes,<sup>63</sup> who also produced Monitoring the 2002 Code of Practice for Commercial Leases.<sup>64</sup> The Code for Leasing Business Premises in England and Wales 2007<sup>65</sup> was the result of a joint collaboration between professionals of the commercial property sector and the property industry bodies representing both owners and occupiers.

---

<sup>60</sup> Ibid 49

<sup>61</sup> Ibid

<sup>62</sup> D Kiekaeu, 'Comparative Law' (2003) Electronic Journal of Comparative Law  
<<http://www.ejcl.org/73/art73-2.html>> accessed 12 October 2011

<sup>63</sup> Ibid 46

<sup>64</sup> Ibid 45

<sup>65</sup> Ibid 20

In England the government departments responsible for review of commercial lease matters have transformed several times. In the year 2000, it was the Department for Environment, Transport and the Regions (DETR)<sup>66</sup>, followed by the Department for Transport, Local Government and the Regions (DTLR). The Office of the Deputy Prime Minister (ODPM) took over responsibility for commercial lease agreements from the DTLR in 2002. On the disbanding of the ODPM in 2006, these matters became the responsibility of the Department for Communities and Local Government (DCLG).<sup>67</sup> Initially in July 1994, Tony Baldry, the then Environment Minister, called<sup>68</sup> on the property industry to negotiate a Code of Practice on business leases. This was followed by a consultation exercise dealing with UORRs, confidentiality clauses in leases, and dispute resolution procedures. The then government concluded that it would not be appropriate to legislate on these matters and instead asked the industry to ensure that business tenants were better informed about their rights and obligations and to commit itself to openness in lease negotiations.

This led to a Code of Practice being drawn up by representatives of the property industry, which was duly launched on 14 December 1995.<sup>69</sup> The government undertook to review the operation of the Code after three years. The government's stated objective was that the Code should draw attention to the implications of UORR clauses<sup>70</sup>. It was suggested that the significance of this objective was not merely that tenants should be told what such clauses mean, but also that they should understand the implications of them.

---

<sup>66</sup> Department of Transport, Business Tenancies, 'Monitoring the Code of Practice for Commercial Leases' Volume 1, April 2000

<sup>67</sup> Department for Communities and Local Government was established in May 2006 and is the successor to the Office of the Deputy Prime Minister, established in 2001

<sup>68</sup> Business tenancies: rent reviews Parliament <[www.parliament.uk/briefing-papers/SN00849](http://www.parliament.uk/briefing-papers/SN00849)> accessed 17/11/2011

<sup>69</sup> Commercial Code of Practice  
<[http://www.bpf.org.uk/en/files/bpf\\_documents/commercial/Code\\_of\\_practice\\_for\\_commercial\\_leases.pdf](http://www.bpf.org.uk/en/files/bpf_documents/commercial/Code_of_practice_for_commercial_leases.pdf)> access 16/11/2011

<sup>70</sup> Business Tenancies, 'Upward Only Rent Review', <[www.parliament.uk/briefing-papers/SN00849](http://www.parliament.uk/briefing-papers/SN00849)> accessed 9/11/2011

Subsequently, the Labour government commissioned a team of academics at the University of Reading to research the impact of the Code of Practice for Commercial Leases<sup>71</sup>, and who presented their findings in April 2001. Overall, the research found that the Code was not in regular use in the market place and did not have any meaningful impact. Some of the changes that had been sought, for example, greater flexibility in lease terms, shorter lease terms and a shift in repairing obligations to landlords in shorter leases in lower value properties had come about, but not as a result of the Code. UORRs were found to be the dominant form of rent revision mechanisms.

Since 1990, the UORR clause has been retained as a dominant clause in new leases of longer than five years, and has, arguably, now been priced into the contract by lawyers and landlords.<sup>72</sup> In respect of those leases already in existence in 1990, the UORR clause was vital in underpinning capital values, this being an important element in reducing the risk and volatility of cash flow from property investments. In combination with leases of more than 10 years' duration, it has been very important to the property lending process, giving a floor to the income and virtually allowing banks to guarantee that interest will be covered by the rent over the period of the loan, therefore reducing their risk exposure. There is firm evidence to suggest that landlords will not give up the UORR voluntarily under any circumstances, and there is no evidence that the poor state of the market has had any significant effect on its use.<sup>73</sup>

In response to the University of Reading's report, Nick Raynsford, then Minister at the Department of Environment, Transport and the Regions (DETR), invited the property industry and property professions to consider:<sup>74</sup>

- a) the scope and substance of the Code of Practice

---

<sup>71</sup> DETR, 'Monitoring the Code of Practice for Commercial Leases' (April 2000) 2 volumes

<sup>72</sup> Ibid 70

<sup>73</sup> Ibid

<sup>74</sup> DETR, Press Notice 324, 19 April 2000

- b) the provisions for disseminating the Code and other forms of advice for tenants
- c) how the market could encourage alternatives to UORR clauses, ensuring that they are presented attractively while bearing the appropriate price tag.
- d) how to promote a better understanding of the workings of dispute mechanisms and, in particular, to encourage wider take-up of the special dispute resolution scheme for small businesses, which RICS introduced last year.<sup>75</sup>

He asked the industry and professionals to consider these points and indicated that he would invite them to discuss the matter at a forthcoming meeting of the Department's Property Industry Forum. This meeting took place on 5 September 2000. The forum agreed to reconvene the Commercial Leases Working Group, which had drawn up the 1995 Code of Practice, and to report back with proposals. Consequently, it was agreed that the Group would be enlarged to embrace more bodies representing occupiers and small businesses in particular.<sup>76</sup>

In July 2001, the forum agreed to work to a strict timetable to formulate a new voluntary code on the issue of flexible commercial leases, and that failure to adhere to the timetable would trigger moves towards statutory Code and Legislation. On 22 April 2002, the DTLR announced the publication of the new voluntary Code of Practice for commercial property leases.<sup>77</sup>

---

<sup>75</sup> RICS 'Dispute Resolution Service' (DRS) is the world's largest providers of alternative dispute resolution services to the property and construction industries, appointing around 10,000 dispute resolvers per year. DRS has been in existence for over 30 years, and offer a complete range of methods for resolving disputes. All DRS management and administration systems are accredited to BSi standard ISO 9001:2008

<sup>76</sup> DTLR, Press Notice 168, 22 April 2002

<sup>77</sup> Ibid 47

The Minister (Sally Keeble) also outlined a three-point package of monitoring, involving feedback from the industry, analysis of complaints and research by the DTLR, with an interim report at the end of the first year. The purpose of the research was to assess the degree of choice and flexibility in the market. The Minister emphasised that self-regulation was not a soft option. She urged business owners, occupiers, and advisors to familiarise themselves with the Code and observe it in the spirit as well as in the letter. She also said that the government would be disappointed if it had to resort to legislation.<sup>78</sup>

The ODPM awarded a contract to the University of Reading in July 2002<sup>79</sup> to measure the impact of the voluntary code. The specific objectives of the research were:

- i. to evaluate changes in commercial property market conditions over the review period (April 2002–April 2004)
- ii. to measure flexibility in the commercial property leasing market over the review period, using the findings of the University of Reading report on the 1995 Code of Practice as a baseline
- iii. to measure the degree of choice in the commercial property leasing market over the review period, focusing particularly on the availability of alternative options to UORR
- iv. to measure the degree of awareness of property matters among occupiers of commercial property, concentrating particularly on small businesses; and
- v. to assess how far the 2002 Code of Practice had influenced the commercial property leasing market over the review period.<sup>80</sup>

---

<sup>78</sup> HC Deb 24 March 2003 cc82-3W

<sup>79</sup> Ibid 45

<sup>80</sup> House of Commons, 'Business Tenancies Rent Review' HC Deb (24 March 2003 cc82-3W)

An interim report was due by 31 December 2003 with a final report to be published by 31 December 2004. It was made clear that if the research showed no signs of change in the commercial property market, legislation would be on the agenda as opposed to a voluntary code. Prior to the publication of the interim report by the University of Reading, the British Property Federation (BPF) published<sup>81</sup> research into 1,334 commercial leases entered into since the introduction of the voluntary code (November 2003). The BPF found that 92% of these leases still contained UORR clauses. The BPF study claimed that the majority of businesses that signed new leases containing UORR provisions were offered alternatives but turned them down on the basis that they were more expensive.<sup>82</sup> It was reported that the BPF intended to make a submission to the Minister for Housing and Planning, Keith Hill, arguing that there was no model in any other commercial sphere for the government interfering with the terms of the transaction between two consenting parties.

Reading's interim findings, monitoring the code of practice for commercial leases: interim report,<sup>83</sup> in April 2004, stated that there were no changes to UORR provisions. The UORR is virtually universal and the incidence of alternative review types is still, in 2012, rare. Review patterns remained the same, with five-yearly reviews standard in the institutional market, while three-yearly reviews are still more common in secondary and tertiary property on short-term leases. The report found that there was no evidence that choice was being offered or sought in respect of rent review types. Where a lease was to contain a rent review, it appeared to be accepted by both parties that it would be a standard UORR to market rent. Landlords were offering neither the threshold review nor any other alternative; but there was equally no evidence that tenants were asking for an alternative or would be prepared to pay rent or any other payment for the relaxation of this term. UORRs were claimed not to be a major issue for tenants, but further explanations for the apparent inertia on rent reviews formed an

---

<sup>81</sup> Business Tenancies Rent Reviews <[www.parliament.uk/briefing-papers/SN00849](http://www.parliament.uk/briefing-papers/SN00849)> accessed 14/11/2011

<sup>82</sup> Jenny Davy, 'Upward-only rent review clauses may be banned,' *The Times* (24 November 2003)

<sup>83</sup> Ibid 45

important element of landlord and tenant surveys. The survey by Reading University will also expand our knowledge of whether the choice available to tenants is appropriate for their particular business requirements. The study concluded that the new Code was having more impact than its predecessor, but found that even where the Code was known about it was believed to have very little direct impact on lease negotiations, a year after its introduction. The government said<sup>84</sup> it would issue a consultation paper shortly and would seek views on the whole principle of legislation in this field, as well as various options for regulating lease terms. A decision on whether to legislate was to be taken after the University of Reading's final assessment of the impact of the Code of Practice was published (due at the end of 2004). Yvette Cooper said:

It's critical we have all the evidence available before we take a final decision. Our priority is to get a fair and flexible market which works for all.<sup>85</sup>

In June 2004, the ODPM published a consultation paper, commercial property leases: options for deterring or outlawing the use of upwards-only rent review clauses consultation paper.<sup>86</sup> The consultation exercise closed at the end of September 2004. The paper recognised that there are advantages and disadvantages of UORR clauses for both landlords and tenants. Overall, the government expressed concern over the use of these clauses to restrict flexibility in the market.

The government was concerned that the widespread use of the UORR in longer leases restricted flexibility in the market and prevented the development of alternative forms of rent review, for example, indexation or fixed interest rents (i.e. rents that rise periodically in accordance with a prescribed retail price index). Objections to UORRs have been particularly serious either when the tenant has to accept a UORR clause because the landlord is offering no alternatives or where the tenant has

---

<sup>84</sup> Ibid 2

<sup>85</sup> ODPM press release 2004/0106, 23 April 2004

<sup>86</sup> ODPM, *Consultation Paper on Upward Only Rent Review Clauses in Commercial Leases - Summary of Responses* Published 3 June 2005

accepted a UORR clause in ignorance of its implications or of the relative merits of available alternatives. The government expected landlords to offer alternative terms to UORRs on an appropriate risk-adjusted basis, even where there was strong competition for occupation of premises on a particular site. The use of UORRs would be objectionable where the landlord has offered alternatives, but the pricing overstated the relative risk of non UORR options. It is the use of UORRs in the circumstances set out above that the government has tried to address.<sup>87</sup>

The final report on the work carried out by the University of Reading was published in February 2005 “Monitoring the 2002 code of practice for commercial leases”.<sup>88</sup> Both property owners and business occupiers found evidence in the report to support their respective positions.<sup>89</sup> The report stated that landlords had become more flexible by offering shorter leases and allowing more tenants the right to break them, but majority of leases with rent review clauses were still in the form of upwards-only clauses. Landlords were also found to be refusing to allow tenants to sub-let space for less than the rate they were paying for it. In March 2005, the Minister, Yvette Cooper, announced that legislation to tackle upwards-only rent review clauses would not be introduced at that time.<sup>90</sup>

Subsequently, a summary of responses to the government’s consultation exercise was published in June 2005, ODPM Consultation paper on Upward Only Rent Review Clauses in Commercial Leases<sup>91</sup> Summary of Responses. There were strongly polarised views on whether or not the government should legislate against UORRs. Almost two-thirds of respondents opposed legislation, while the Federation of

---

<sup>87</sup> ODPM, *Commercial property leases: Options for deterring or outlawing the use of upward only rent review clauses*, consultation paper, (June 2004)

<sup>88</sup> Ibid 45

<sup>89</sup> Ibid

<sup>90</sup> Ibid 86

<sup>91</sup> Ibid 87

Small Businesses reacted angrily to the government's decision not to outlaw upwards-only rent review clauses.<sup>92</sup>

No expressive research has been made in England on reform of commercial leases through legislation to ensure compulsory terms of leases. Therefore much of the literature dealing with legislative intervention of commercial property leases is limited to theoretical arguments with little or no empirical support. This research aims to contribute towards filling the gap that exists in the literature by examining the potential for reform of commercial property leases through legislation.

## **1.4 Research design and methodology**

The research design involved a conceptual framework, which served as a robust qualitative methodological guide to support the researcher in filtering the essence of the data. (See Chapter 4 for detailed sampling strategy, procedures and analysis)

For some researchers, the puzzling constraints of the research under investigation can tempt the distortion or fabrication of data, the publication of analysis that is designed to mislead, or plagiarism<sup>93</sup>.

The strategic feature of this research project involved generating the most suitable qualitative data, which sequentially would assist in establishing findings in support of or against reform of commercial property leases through legislative intervention and of translation of key legal terms of commercial leases for the benefit of EMBO (see Ethnic Minorities 1.5 below). Semi-structured interviews were found to be most suited and appropriately relevant to this research. The relevant characteristic of a qualitative research, as best defined by Creswell,<sup>94</sup> is the natural setting as the source of data. Flick<sup>95</sup> asserts that “all qualitative research is explicitly political and intends

---

<sup>92</sup> Christopher Hope, 'Rents fight renewed after Prescott's climb-down' *Daily Telegraph* (London, 18 April 2005)

<sup>93</sup> B Beins, *Research Methods A Tool For Life* (Pearson Publishing 2004)

<sup>94</sup> J W Creswell, *Qualitative Inquiry and Research Design* (Sage Publications 1998)

<sup>95</sup> U Flick, *An Introduction to Qualitative Research* (Sage Publications 2006)

to transform the world with its practice”. Methods as determined and adopted in this research do not claim any particular methods for data collection or data analysis, thereby any and all methods of gathering data from semi-structured interviewing, observations and documentation can be used, although certain techniques are used more than others.<sup>96</sup>

The detail involved in most qualitative research is both a blessing and a curse. On the positive side, it enabled the researcher to describe the phenomena in great detail, and in the original language of the research participants. (See Chapter 4 for page 126 sample’s representativeness.) In fact, some of the best qualitative research is often published in book form, in a style that almost approaches a narrative story. The main focus is on interpreting the respondent’s perceptions rather than seeking quantitative proof, Silverman<sup>97</sup> and Mason<sup>98</sup>. This study seeks to capture context. It does not aim to test any detailed pre-formulated hypotheses, but rather it sets out to examine the reality of commercial property lease reform through the perspective of individual participants and aims to describe key finding.<sup>99</sup>

Research is guided by a research perspective or paradigm, comprising ontological, epistemic and methodological assumptions, which collectively frame the nature and objectives of the research and the role of the researcher. The purpose of this chapter is to explain the methodological foundations of this thesis and to relate them to the research methods used to collect the data. This explains that an interpretive research framework is an appropriate methodological basis for the phenomena under investigation, being the argument for reform of commercial property leases.

The philosophical bases of undertaking academic research means:

- i. that the study is undertaken within an articulated ontological and epistemic framework, and

---

<sup>96</sup> S B Merriam, *Qualitative Research* (Wiley Publication 1988)

<sup>97</sup> D Silverman, *interpreting qualitative data* first published (Sage Publications 1993)

<sup>98</sup> J Mason, *Qualitative Researching* (Sage Publications 2002)

<sup>99</sup> Sotirios Sarantakos, *A tool kit for quantitative data analysis* ( McMillan Publishing 2007)

- ii. that the processes, methods and the techniques used have validity and are reliable. It follows that the philosophical and methodological underpinnings of this thesis must be considered in order to make explicit the choices that may be implicit in the research question and proposed methods. The choice of research methodology depends upon the philosophical orientation of a researcher.

In this study, which is a qualitative research, when carrying out data analysis (see Chapter 4) and interpretations, there are no formulae or steps for analysing and interpreting those qualitative research data. However, here are some suggestions: first, data analysis is the researcher's attempt to summarise collected data in a dependable and accurate manner. Second, data interpretation is the researcher's attempt to find meaning in the data, or to make sense of the data. When analysing and interpreting qualitative data, the researcher challenged himself to explore every possible angle and to try to find patterns and seek out new understandings among the data (see Chapter 4).

Mouton refers to the higher level of complexity in any research, including qualitative and quantitative research designs, as methodological paradigms.<sup>100</sup>

Applying exploratory research as a research strategy is very important for the current study, as Miller and Brewer assume that the most important research design considerations that apply to exploratory research are: the need to follow an open and flexible research strategy, and; the use of methods such as literature reviews, which may lead to insight and comprehension.<sup>101</sup> Babbie and Mouton argue that exploratory studies are: "...essential whenever a researcher is breaking new ground, and they can almost always yield new insight into a topic of research..."<sup>102</sup> Baker states that the main shortcoming of exploratory studies is that they hardly ever provide satisfactory answers to research questions, although they could indicate clues

---

<sup>100</sup> J Mouton, *Introduction to qualitative research* (Sage Publishing 1998)

<sup>101</sup> R Miller and J Brewer, *The A-Z of Social Research* (Sage Publishing 2003)

<sup>102</sup> E Babbie and J Mouton, *The practical of social research* (Wadsworth 2001)

and could therefore give insight into research methods that could provide definitive answers.<sup>103</sup>

The data collection method applied in this research consisted of semi-structured interviews conducted face to face, by e-mail, or by telephone, in a positivist-orientated research (see Chapter 4). These methods were chosen as basis that would fit the hypothetical propositions and which suited the examination of causal relations and analyses of well-established variables. The type of research employed was field research, which is commonly employed for interpretive and phenomenological-type research projects that are characterised by complex constructs, emergent variables, and qualitative analysis of dynamic phenomena. However, while a research method may appear to have a natural fit with a particular research paradigm, it remains possible and reasonable to consider interviews and to document research in the context of interpretive and phenomenological research. The choice of methods ultimately depends on the specifics of the research objectives, the methodological framework within which the research is undertaken and the practical limitations within which the researcher operates.

Interviews were undertaken with a total of 90 participants involved in the commercial property industry (see sample, Chapter 4). Each interviewee was chosen by the researcher for specific reasons. The data arising from the interviews varied in quality, and some were of limited value in the subsequent analysis. The reasons for this emerged during data analysis.

Hitchcock and Hughes described this type of interview as the semi-structured interview:

...which allows depth to be achieved by providing the opportunity on the part of the interviewer to probe and expand the interviewee's responses. ... Some kind of balance between the interviewer and the interviewee can develop which can provide room for negotiation, discussion, and expansion of the interviewee's responses.<sup>104</sup>

---

<sup>103</sup> T Baker, *Doing Social Research* (McGraw-Hill Publishing 1999)

<sup>104</sup> G Hitchcock and D Hughes, *Research and the Teacher* (Routledge Publishing 1989)

The advantage of the semi-structured interview is that the interviewer is in control of the process of obtaining information from the interviewee but is free to follow new leads as they arise.<sup>105</sup> A common set of questions, based on a review of literature on commercial property leases, provided a basic framework for examining the phenomena and the accompanying attitudes. But, given the diverse nature of the different participants, freedom to move beyond the basic set of questions was essential (see Chapter 4).

Several assumptions can be made about semi-structured interviews. One of the principal assumptions is that the interviewee has information that the interviewer needs, and thus the interviewer is seeking to place himself in the shoes of the interviewee to interpret a situation from the standpoint of the participant. At the beginning of the interview, the interviewer and interviewee did not share an equal understanding of the phenomena under investigation, and the understanding of the interviewer and his attitude toward the phenomena were possibly very different from those of the interviewee. The interviewer did in some interviews only reach a partial understanding of the interviewee's point of view, because those respondents' views were complex and contradictory, and in part because it was not possible to cover fully the experiences of another person.<sup>106</sup> (See Chapter 4)

Interviews were held either in the researcher's office or the participants' offices or conference rooms, as well as in some of the participants' private homes. Participants were interviewed individually, but were not tape recorded: notes were taken instead. For this study, the researcher designed an initial framework. By the nature and direction of the questions, the researcher created meaning from the participants' responses. The face-to-face interview approach offered some advantages, but also some disadvantages. Some of the advantages of face-to-face interviews were:

---

<sup>105</sup> H Bernard, *Research Methods in Cultural Anthropology* (Rowman & Littlefield Publishers 1988) 210

<sup>106</sup> G Partington, 'Qualitative research interviews' (2001) The Institutes for Educational Research <<http://www.iier.org.au/iier11/partington.html>> accessed 21 February 2011

- a) They have the highest response rates and allow longer questionnaires to be conducted in their entirety<sup>107</sup>.
- b) Face-to-face respondents receive one question at a time. In this research the interviewer did specifically design an interview that starts with a general question (Question 1: see Chapter 4) and then moves on to specific questions; thus the face-to-face interview did not allow the interviewee to jump ahead.
- c) The face-to-face approach was used with people who could not otherwise provide information, such as ethnic minorities who suffered from language problem<sup>108</sup>.
- d) In face-to-face survey interviews, several different data collection techniques can be used with the same respondent.
- e) Interviewers can also observe the surroundings and use non-verbal communication and visual aids.
- f) If a respondent does not understand the question in the personal interview, assistance may be given, and, if the interviewer senses that the respondent is not answering fully, he can probe for more complete data.

In this research the face-to-face interviews also have disadvantages, including:

- g) High costs and time consuming the biggest disadvantage, which encompasses both personal, lengthy travel and costs to the interviewer.
- h) The interview bias issue: i.e. the appearance, tone of voice, question wording, and so forth of the interviewer may affect the respondent's answers.

The researcher did pre-test the draft questionnaire on 15 participants from the sample

---

<sup>107</sup> Ibid

<sup>108</sup> R Singleton, *Approaches to social research* (Oxford University Press 1988)

populations (see Chapter 4 sample for representativeness), who were asked to give interviews and answers to the questions. They were also asked to consider whether the questions were ambiguous, biased, and/or made implicit but incorrect assumptions, and were given the opportunity to comment generally on the questions and format of the interview. In addition, the researcher contacted a number of participants by e-mail and telephone to gauge their willingness to complete the questionnaire. As a result of the pilot and pre-test research, a number of amendments were made to the questionnaire, and the average time to interview transpired to be about 30 minutes, which was generally acceptable to most participants<sup>109</sup> (see Chapter 4). Following the initial pre-interviews, the questionnaire was rephrased to make the interview more concise and quicker. The main objective of the pilot testing of the interview format and content was to refine the interview so that respondents were more likely to be able to give effective interviews, as well as to demonstrate that the interview would be capable of generating useful responses from the target population. A pilot test can also provide evidence regarding the validity and reliability of the data to be collected. The primary basis upon which respondents are categorised is by reference to responses to the research question. For example, the interpretations of respondents who support the reform of commercial property leases may be compared with those of respondents who do not support reform, in order to assess whether their respective beliefs are based on comparable interpretations of the research question.

Through over 400 e-mails, 54 telephone calls, nine seminars and conference meetings, the researcher achieved a total of 90 interviews with those involved in the commercial property leasing sector, completed during 2011–12 (see Chapter 4). The participants were categorised in five different groups consisting of:

1. Lawyers
2. Surveyors/Property Agents
3. Commercial Property Landlords
4. Commercial Property Tenants
5. Commercial Property Business Owners

(See Chapter 4 for sample)

---

<sup>109</sup> T Proctor, *Essentials of Market Research* (4<sup>th</sup> edn, Oxford University Publishing 2005)

### 1.4.1 Anonymity of participants

In this research the Anglia Ruskin University's Code of Practice for ethical standards in research involving human participants were fully observed and adhered to. Although the researcher obtained from participants a signed consent and declaration to waive their anonymity, however, pursuant to the Data Protection Act (1998)<sup>110</sup>, which came into effect on 1 March 2001, the consideration of anonymity and privacy is no longer simply a matter of ethics: it can also have legal implications. The fundamental principle of the Act is the protection of the rights of individuals in respect of personal data held about them by this academic research. The researcher therefore was obliged to ensure anonymity of respondents by not showing their names. The Data Protection Act (1998) emphasises the importance of respecting the anonymity and privacy of research participants. A range of authors in a variety of methodological texts address anonymity and the norm is to emphasise the importance of maintaining it<sup>111</sup>. Thus the usual "rule of thumb"<sup>112</sup> is that data ought to be presented in such a way that respondents should be able to recognise themselves, while the reader should not be able to identify them.

It must be acknowledged that this research project has a number of features that distinguishes it. It deals with no emotional and personal issues; the responses were entirely "voluntary" and there was continuing contact between the researcher and the respondents; and no institution that might wish to maintain secrecy was involved. There was strong motivation for some respondents in such an area to have their experiences recognised and acknowledged. Nevertheless, anonymity has been maintained.

The primary objective of this researcher has been to ensure honest and transparent reporting of research practice, being the ethical duty of a researcher. Everything done, how and why it was done, and the known deficiencies of what was done should be transparently reported.

---

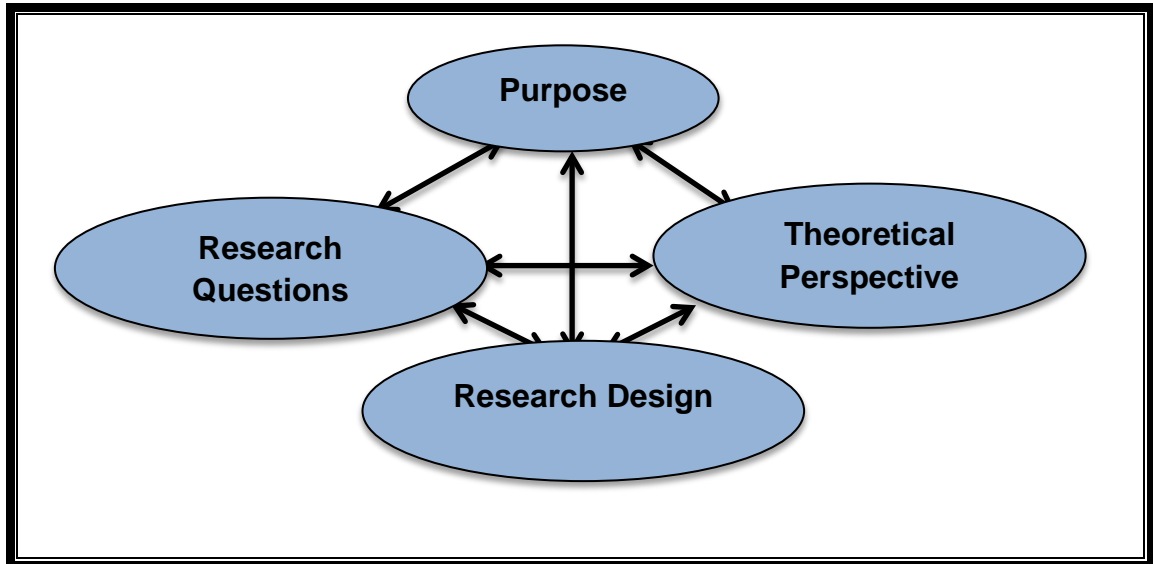
<sup>110</sup> Data Protection Act (1998) <<http://www.legislation.gov.uk/ukpga/1998>> accessed 19/11/2011

<sup>111</sup> C Heath and P Luff *Explicating face-to-face interaction*, Researching Social Life, (Sage publishing London, 1995)

<sup>112</sup> J Barnes, *Who Should Know What?* (Penguin publishing, Harmondsworth 1979)

Figure 1 below shows the interplay between the four elements of research: the question, purpose, theoretical perspective and design, based on Partington<sup>113</sup>.

**Figure 1: Research Process: “adapted” (Partington, 2002a:139)**



The philosophical bases of this research mean that the study is undertaken within an articulated ontological and epistemic framework, that the processes, methods, and techniques used have validity and are reliable<sup>114</sup> It follows that the philosophical and methodological underpinnings of this research must be considered in order to make explicit the choices that may be implicit in the research questions and proposed methods. The choice of research methodology depended upon the philosophical orientation of the researcher. This is something a researcher may not be fully conscious of at the outset of a research project.

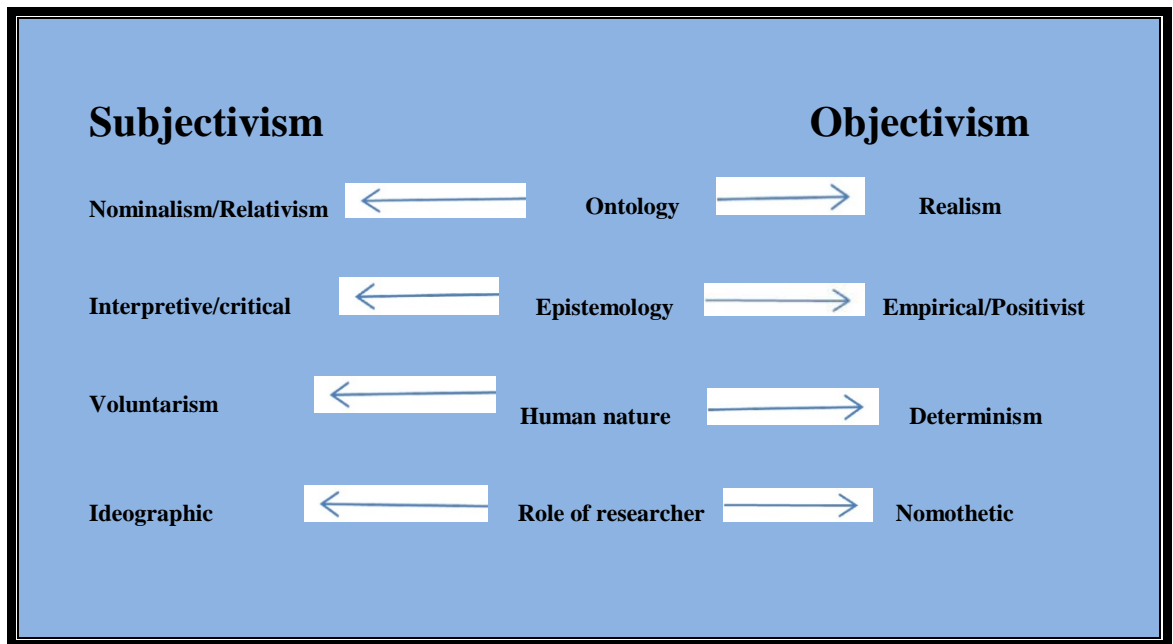
Figure 2 below shows the philosophical assumptions of this research.<sup>115</sup>

<sup>113</sup> M Partington, *Research Process Grounded theory, Essential Skills for Management* (Sage Publication 2002)

<sup>114</sup> R Kumar, *Research Methodology* (Sage Publishing 1999)

<sup>115</sup> Gibson Burrell and Gareth Morgan, *Sociological Paradigms and Organizational Analysis*, (Heinemann Publishing 1979)

**Figure 2: Philosophical Assumptions that Underpin Social Scientific Research:  
“adapted”**



In the twentieth century, practically all of the social sciences experienced a quantitative revolution.<sup>116</sup> However, as Bryman<sup>117</sup> points out, the apparent rigour of conclusions based on quantitative data can be misleading and the generalisability of quantitative research exaggerated. In this research, the researcher chose qualitative research as opposed to quantitative for two reasons. First, he agrees with Merriam<sup>118</sup> that research focused on discovery, insight and understanding from the perspectives of those being studied offers the greatest promise of making significant contributions to the knowledge base and practice of education. Secondly, qualitative research approaches a problem of practice from a holistic perspective in order to gain an in-depth understanding of the situation and its meaning for those involved. The interest is in process rather than the outcomes, in context rather than specific variables, in discovery rather than confirmation. These understandings into reform of commercial leases can have a direct influence on policy, practice and future research.

<sup>116</sup> M Hammersley, *Social Research Philosophy, Politics and Practice* (Sage Publications 1993)

<sup>117</sup> A Bryman, *Quantity and Quality in Social Research* (Urwin Publishing 1988)

<sup>118</sup> Ibid 96

## 1.5 Ethnic Minorities

In the United Kingdom, ethnic minorities account for ten per cent of the British population, though in some parts of London it is reported that ethnic minorities account for more than 50 per cent of the local population.<sup>119</sup> This geographical concentration has an impact on the economic contribution by EMBO to the local economy. The increase in ethnic minority businesses in the UK, particularly in London, indicates that the numbers of such businesses are growing and playing an important part in the British economy as the result of their involvement with commercial property leases. This growth in the number of ethnic minority businesses in London has generated considerable interest among academics, practitioners, and policy-makers as to how these businesses are performing.

More people from ethnic minorities than British white backgrounds<sup>120</sup> are starting their own businesses and entering into commercial leases. In recent years in the UK there have been noticeable increases in the number of ethnic minorities who go on to set up their own businesses and enter into commercial leases. The most entrepreneurial ethnic groups in the UK are Asians and black Africans, who are more than three times more likely to start a business and to enter into commercial leases than their white counterparts. Throughout the UK more than a quarter of a million ethnic minority enterprises contribute over £35 billion a year to the British economy<sup>121</sup>.

However, the business failure rate and the proportion of landlord and tenant disputes among ethnic minorities Asians and black Africans are also higher than that of any other group<sup>122</sup>. For some EM business owners, their business failures may be the result of poor English skills, affecting everything from their ability to engage in

---

<sup>119</sup> Institute for Small Business and Entrepreneurship, 'Ethnic Minority Businesses: Challenges' (ISBE) <<http://www.isbe.org.uk/EthnicMinorityBusinesses>> accessed 28/11/2011

<sup>120</sup> Ibid

<sup>121</sup> DTI, Ethnic Minority Business Forum was established in 2000 and is supported by the SBS in the Department of Trade and Industry

<sup>122</sup> Ibid 120

competition to entering into business leases and understanding the terms of commercial leases, which can give rise to disputes.

Forty one per cent of participants interviewed were from ethnic minorities, and participated as lawyers, surveyors, landlords, tenants, or business owners. This research also explores Asian and African ethnic minorities participants involved in commercial property leases and ascertains their views on the production of a guide explaining the key legal terms of commercial property leases in other main languages. According to the Institute for Small Businesses and Entrepreneurships<sup>123</sup>, it is estimated that ethnic minority communities own 20 per cent of the 241,000 businesses in London alone.

According to a survey done by the University of Leeds and reported by the *Guardian* in July 2010, Ethnic Minorities<sup>124</sup> will make up 20 per cent of the UK population by 2051, compared with eight per cent in 2001. The figures, which show Britain's total population growing to 77.7 million by then, also indicate that the UK will become far less segregated as ethnic groups disperse throughout the country. In October 2011, the Office for National Statistics predicted the population would exceed 70m by 2029<sup>125</sup>. There are striking differences in the respective growth rates of the 16 ethnic groups studied. White British and Irish groups are expected to grow the most slowly, while the so-called "other" white group is projected to grow the fastest, driven by immigration from Europe, the US, and Australasia. Traditional immigrant groups of South Asian origin (Indian, Pakistani and Bangladeshi) will also grow rapidly. In the last decade there has been a significant shift away from traditional ethnic niche markets into more mainstream and international growth sectors, and in the scale, complexity, and diversity of firms owned and run by people from minority ethnic backgrounds. An increasing number of ethnic minority entrepreneurs are running successful multi-million-pound companies in commercial property sectors.

---

<sup>123</sup> Ibid

<sup>124</sup> Ethnic Minority Population Growth, *Guardian* <<http://www.guardian.co.uk/uk/2010/jul/13/uk-population-growth-ethnic-minorities>> accessed 01/12/2011

<sup>125</sup> Office for National Statistics *Population in UK* <<http://www.statistics.gov.uk/hub/population/index.html>> accessed 16/11/2011

The Global Entrepreneurship Monitor (GEM) 2004 report on the United Kingdom<sup>126</sup> pays special attention to the entrepreneurial activity within ethnic minority communities in the UK. The report indicates that ethnic minority communities tend to have more positive attitudes towards entrepreneurship and better self-perceptions of their capacity to establish a business. However, they are proportionately more likely to let fear of a lack of finance prevent them from starting a business and to use family and friends as the key source for start-up financing. According to the report, the key areas of weakness for ethnic minority businesses are English language difficulties, finance, and business support. These are areas which, with careful targeted support at ethnic minority businesses, are relatively easy to address and, given that ethnic minority people tend to be more entrepreneurial and have positive attitudes towards entrepreneurship, there is scope for increasing entrepreneurial activity in the UK as a whole by promoting it further and providing support amongst the relevant communities. Some of that support for EMBO in entering into commercial property leases would be for them to have the key legal terms of commercial leases translated into their main languages.

Total Entrepreneurial Activity, <sup>127</sup>(TEA) is highest amongst Bangladeshi people. They exhibit the most positive attitudes and perceptions of entrepreneurship. For example, Bangladeshi people are the most likely of all ethnic groupings to see an opportunity (58.1%) and the least likely to fear failure (14.9%). Compared with all other groups, except Pakistani people, they were the most likely to know an entrepreneur, and the most likely to see good start-up opportunities as well. Interestingly, they are also the ethnic groupings that are most likely to let lack of finance and difficulties in understanding business leases prevent them from starting a business. The results for the Pakistani community provided in the report are also worth discussing. Pakistani people are most likely to expect to start a business over the next three years. They are quick to see opportunities and have a very low fear of failure rate.

---

<sup>126</sup> Global Entrepreneurship Monitor (GEM) 2004 report on the United Kingdom, <[www.gemconsortium.org/docs/260/gem-2004-global-report](http://www.gemconsortium.org/docs/260/gem-2004-global-report)> accessed 17/11/2011

<sup>127</sup> Total Entrepreneurial Activity <<http://www.internationalentrepreneurship.com/total-entrepreneurial-activity/>> accessed 14/11/2011

Therefore, the key barriers for ethnic minority businesses and entrepreneurs continue to be language problems and access to finance, both of which are particularly relevant to this research. There are signs that the financial needs of the Muslim community have been recognised by the private sector. An Islamic Bank (Islamic Bank of Britain) has been created and at least one international bank is now advertising Sharia-compliant financial products. A European Commission study of SMEs<sup>128</sup> recommends the promotion of migrant and ethnic minority entrepreneurship, and in 2003 the European Commission organised a conference on Ethnic Minority Entrepreneurs to raise awareness of the important contribution to the European economy and to address their problems.

Table 1 below shows the relative population of ethnic minorities in the 29 EU countries, with the UK and the EU average.

---

<sup>128</sup> European Commission, 'Small and medium-sized enterprises' (SMEs)  
<[http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-definition/index\\_en.htm](http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-definition/index_en.htm)>  
accessed 16 November 2011

**Table 1: Population in Europe – Nationals and Non-Nationals (1,000)**

Country	Population	Non - EU	Ratio %
Belgium	9,536	860	9.0
Bulgaria	7,903	26	0.3
Czech Republic	10,016	195	2.0
Denmark	5,126	271	5.3
Germany	75,190	7,342	9.8
Estonia	1,098	274	25.0
Greece	10,149	891	8.8
Spain	39,573	2,772	7.0
France	55,486	3,263	5.9
Ireland	3,829	215	5.6
Italy	55,898	1,990	3.6
Cyprus	643	65	10.1
Latvia	2,286	33	1.4
Lithuania	3,450	34	1.0
Luxemburg	277	174	62.8
Hungary	9,987	130	1.3
Malta	389	11	2.8
Netherlands	15,556	702	4.5
Austria	7,375	765	10.4
Poland	37,530	700	1.9
Portugal	10,169	239	2.4
Romania	21,686	26	0.1
Slovakia	5,350	30	0.6
Slovenia	1,951	45	2.3
Finland	5,113	107	2.1
Sweden	8,500	476	5.6
United Kingdom	55,612	2,941	5.3
Norway	4,373	205	4.7
Turkey	67,531	273	0.4
<b>EU27</b>	<b>459,678</b>	<b>24,578</b>	<b>5.3</b>

Source:  
Eurostat<sup>129</sup>

Many of the ethnic minorities in England possess excellent business ethics and professional skills, but are speakers of other languages and do not fully understand the terms, consequential effects and true interpretations of key legal terms of commercial property leases. The ethnic minority population has grown by 48 per

<sup>129</sup> European Commission Eurostat Population in Europe – ‘Nationals and Non-Nationals’  
<<http://epp.eurostat.ec.europa.eu/portal/page/portal/eurostat/home/>> accessed 09 October 2011

cent between 1991 and 2001, half of whom are under 25, and by the year 2010, only 20 per cent of the workforce was male, white, able-bodied and under 45.<sup>130</sup>

University of Manchester research<sup>131</sup> into the London economy has shown that there are 66,000 ethnic minority-owned businesses in the capital alone, as well as around 93,000 self-employed people from ethnic minority communities, and that the ethnic minority business sector employs well over half a million people in the UK, with a combined sales turnover of a staggering £90 billion. The first generation of migrant and ethnic minority entrepreneurs often start on markets with low entry barriers. Their businesses have low capital requirements (for example, restaurants) and relatively low skill requirements. Since some of the owners' knowledge of marketing techniques and the English language tends to be limited, they usually do not manage to turn their business into a thriving venture. Thus, they have to act in a rather competitive environment where price is the main parameter. This again results in labour intensive production, long working hours, and low wages. Those ethnic minorities also tend to enter into property leases without fully understanding the contents and legal key terms, giving rise to future disputes. Therefore, translation of commercial leases key terms into other languages presented in the form of a simple-to-follow guide would be a contribution, this also adds to the body of the knowledge, and is supported by RICS and the DCLG.

The Centre for Enterprise and Economic Development Research (CEEDR) study undertaken on behalf of the European Commission supports the proposition that<sup>132</sup> ethnic minority and migrant businesses face challenges in specific language problems. This reinforces the fact that EM enter into commercial leases without understanding the full meaning and implications of the key legal terms of the said leases. This limitation gives rise to future landlord and tenant disputes. This further justifies the inclusion of EM in this research, and the ancillary aim of this study

---

<sup>130</sup> Small Business Service (SBS), 'Report of Ethnic Minorities'  
<[www.bis.gov.uk/files/file38308.pdf](http://www.bis.gov.uk/files/file38308.pdf)> accessed 10 November 2011

<sup>131</sup> Black and Minority Ethnic (BME) Small Business Owners, The University of Manchester  
<<http://www.train2000.org.uk/research-reports/pdfs/BME-report.pdf>> accessed 14/11/2011

<sup>132</sup> Centre for Enterprise and Economic Development Research, CEEDR (2000), 'Ethnic Minority Entrepreneurs and Co-Entrepreneurs in the European Union'

which is to explore the need for translation of key legal terms of commercial leases to be presented in a guide.

## **1.6 Thesis Structure**

The thesis has been structured into six chapters.

Chapter 1 outlines the research problems and highlights the need to reduce the escalating disputes between landlord and tenants. In commercial property transactions litigation is mainly provoked by differing interpretations and misunderstandings of the terms of property agreements. This chapter outlines the problems with commercial property leases, enquiring why little development and improvement has been made to commercial leases, and what can be done through legislative intervention. This chapter states the aim of this research, which is to investigate problems with commercial leases, enquiring why numerous previous attempts at reform to improve leases through voluntary codes have had little success. The literature review provides the backdrop to the research questions, first, in terms of identifying the subject domains within which the thesis is set and second, critically reviewing the relevant body of literature. The literature is then reviewed in relation to the research problems. The rationale for the study and for the inclusion of the Asian and African Ethnic Minorities (see 1.5 above) explains that in the United Kingdom ethnic minorities account for ten per cent of the British population, though in some parts of London it is reported that ethnic minorities account for more than 50 per cent of the local population.<sup>133</sup>

Chapter 2 analyses the statutory law, case law and lease clauses connected to commercial property leases, arguing that the commercial property environment is affected and governed by the market, regulatory rules and procedures, thus making it complex. Such complex environment inevitably generates disputes. For the past 25 years, no significant improvement has been made in the style, layout, language or design of commercial property leases. It is still worth investing time and effort to

---

<sup>133</sup> Institute for Small Business and Entrepreneurship, 'Ethnic Minority Businesses: Challenges' (ISBE) <<http://www.isbe.org.uk/EthnicMinorityBusinesses>> accessed 28/11/2011

bring leases into the 21<sup>st</sup> century. In contrast to residential tenancies, most of the acts and statutes relevant to business tenancies come into effect only when they come to an end. At this stage, the Landlord and Tenant Act 1927 Part I and the Landlord and Tenant Act 1954 Part II may apply. A summary abstract of the relevant Acts is outlined. The Regulatory Reform (Business Tenancies), Part II of the Landlord and Tenant Act 1954<sup>134</sup> provides a framework for the renewal and termination of business tenancies in England and Wales. However, the main features of the 1954 Act remain unchanged. Commercial leases, just like properties, come in all shapes and sizes and are prepared and taken by all sorts of people and businesses and for all kinds of reasons.

Chapter 3 focuses on the historical background and attempts, at reform of commercial property leases. It identifies any particular influence that those attempts may have had. The government's proposals for changes to the Landlord and Tenant Act 1954 may conveniently be split into a number of sections. Each section deals with separate aspects of the workings of the Act. The Law Commission was set up as the result of the Law Commissions Act 1965 for the purpose of promoting the reform of the law. With reference to commercial property, the Law Commission has conducted two periodic reviews of the Act. In 1969 it published a report recommending some amendments<sup>135</sup>, which were implemented by the Law of Property Act 1969. In 1992<sup>136</sup>, the Commission published a further report proposing the amendments that form the basis of the proposal.<sup>137</sup> On this occasion, the Commission identified some features which experience has shown could benefit from change.<sup>138</sup> The Law Society lease<sup>139</sup> is designed to comply with the latest Code

---

<sup>134</sup> Ibid 30

<sup>135</sup> Unfair Terms in Contract <[http://lawcommission.justice.gov.uk/docs/lc292\\_Unfair\\_Terms\\_In\\_Contracts.pdf](http://lawcommission.justice.gov.uk/docs/lc292_Unfair_Terms_In_Contracts.pdf)> accessed 22/11/2011

<sup>136</sup> Law of Property Act 1969  
<<http://www.publications.parliament.uk/pa/cm200203/cmselect/cmdereg/182/18205.htm>> accessed 23/11/2011

<sup>137</sup> Ibid

<sup>138</sup> Ibid 137

<sup>139</sup> Ibid 25

for Leasing Business Premises 2007.<sup>140</sup> However the Law Society does refrain from making its own lease compulsory and confirms that the Solicitors' Code of Practice would suffice. The British Property Federation is a trade association for the property industry and represents owners and investors in commercial and residential property. The BPF's aim is to create the conditions in which the property industry can grow and thrive, for the benefit of their members and the economy as a whole. The Land Registry issued a consultation document entitled Presentation of Prescribed Information in Registrable Leases in September 2004. The replies that the LR received at that time allowed it to refine its original proposals before issuing them for the further consultation in 2004.<sup>141</sup> The Land Registration Act 2002 (LRA 2002) lowered the threshold for compulsory registration to apply to leases granted for more than seven years; thus many more leases became subject to compulsory registration.

Chapter 4 sets out the survey methodology, the particulars of the research questions, and the methods employed to answer them. The literature review explores previous studies, attempts at reform of commercial property leases, examines the causes of landlord and tenant disputes and data. Those provide the basis for the research questions, recognising the subject fields within which this research is progressing and critically reviewing the relevant bulk of literature. The semi-structured interviews focused on expert individuals who are active within the commercial property industry. This chapter explains that the researcher initially identified 400 key potential participants. Those were drawn from legal and property organisations and institutes. For a variety of reasons, it was only possible to interview 90 of these stakeholders. The interviews were held in London and in the South East of England. Then the key findings were analysed and discussed.

Chapter 5 studies the comparable models of the reform of commercial property leases in other jurisdictions. In the USA, leases dealing with commercial property are strictly regulated by statute. In Canada, commercial property leases differ

---

<sup>140</sup> Ibid 29

<sup>141</sup> Land Registry, 'Report on consultation, Presentation of prescribed information in Registrable leases' (London, HM Land Registry, 2005), para. 9

significantly from residential leases. Residential leases are highly regulated while, in contrast, commercial leases are very loosely regulated. The researcher explored the European Union's approach to commercial property leases and the comparative law of the Member States. In Europe, property law is one of the few legal branches which has remained essentially national and in which differences among national laws remain greatest. In this chapter the Australian lease reform was extensively explored. This is due to the fact that many of the laws and policy objectives of the Australian state governments are similar to England. The Australian response to the on-going problems with commercial leases and disputes between landlords and tenants has been to ignore voluntary solutions and implement mandatory legislation. This chapter also explores alternative dispute resolution (ADR). If the landlord and tenant have a dispute which they have been unable to settle through negotiation, they may wish to consider using ADR rather than taking court action. These schemes use a third party such as an arbitrator or an ombudsman to help them to reach a solution.

Chapter 6 intertwines together the threads of the research to provide an overview of the research's key findings, the contribution those findings make to the literature, and their implications for practice. This chapter also examines the limitations inherent within the current research with a view to providing suggestions for the way forward. A summary of research findings are outlined, including the contributions the research findings make to the body of the knowledge.

## **CHAPTER 2 – LEGISLATIVE DEVELOPMENT, ANALYSIS OF CASE LAW AND LEASE CLAUSES**

### **2.1 Introduction**

In contrast to residential tenancies, most of the relevant commercial property regulations affect business tenancies when they come to an end, at what time the Landlord and Tenant Act 1927 Part I and the Landlord and Tenant Act 1954 Part II may apply. Otherwise business tenancies are governed by the general law of landlord and tenant, which is common contract law, enhanced by statute. Disputes during the term of the lease are reviewed by the courts according to precedent and in view of any statutes affecting that particular issue.

The commercial lease legislation is mainly used to give security of tenure to the tenant and grounds for possession at the end of a tenancy. The Landlord and Tenant Act in effect set out a series of rules governing security of tenure for business tenants. Unless a business tenant fails to pay the rent or breaches a condition of the tenancy, the landlord can only bring the tenancy to an end under certain specified conditions, and after validly serving notice. When the tenant receives a notice of termination, he or she can apply to the court for a new tenancy and the court must grant one unless the landlord can show he is entitled to possession. There are a limited number of grounds upon which a landlord can claim possession at the end of a business tenancy.

A tenancy gives the tenant a legal interest in the land for the period of the tenancy. The tenancy can even be assigned to another tenant. The grant of a licence does not create an estate in land and the licensee does not gain an interest in the property, but permission to occupy it. The security of tenure afforded to tenants on business leases does not apply where the premises can be shown to be held on a licence.

A business tenancy can be created by the conduct of the parties and does not need to be a written agreement to be legally binding. Once a person is given possession (exclusively) of land or property, usually evidenced by possession of the keys and acceptance of rent payments by the owner, a tenancy legally comes into existence.

Creating tenancies on a casual basis such as this, even for friends – perhaps especially for friends is not the sort of thing any sensible landlord would do. A written agreement or lease is absolutely crucial to any successful tenant–landlord relationship. Any landlord or tenant without a written agreement is in the lap of the gods or, more specifically, the civil court judges.

Unlike residential tenancies, business tenancies tend to be set up on the *caveat emptor* principle: let the buyer beware. Landlords generally try to get the best rent and the most favourable lease terms that they can, given the prevailing property market. It is up to the tenant to negotiate and question the lease terms, rent levels and to make sure that there are no excessive or onerous obligations. For instance, if the property has defects and the tenant takes on repairing obligations, then he could be in trouble. Ideally, tenants need a survey prior to signing a full insuring and repairing lease. Tenants in any doubt should seek legal advice.

In the commercial property industry, the bedrock of the UK commercial property market has traditionally been the 25-year full insuring and repairing (FRI) lease, with perhaps five-yearly upwards-only rent reviews. This type of lease has encouraged institutional investor landlords such as pension funds to invest directly in property. It gives them a guaranteed clear return on their investment, provided of course that they let to substantially reliable tenants. Despite a far less predictable business environment, the modern standard business lease, even for secondary property, is regarded as an FRI lease with upwards only rent reviews. However, there is now a trend towards much shorter terms and the use of break clauses. This gives the ability, for the tenant and sometimes the landlord, to break the lease at some specified time.

Ordinary written tenancy agreements can be bought off the shelf from various sources. So long as these agreements have been well drafted, they usually suffice for business tenancies. Experienced landlords and agents often like to include specific clauses of their own and may have them prepared by a solicitor. An ordinary written agreement cannot be used for a tenancy exceeding three years in length. Tenancies for longer periods need a lease by deed. Under the current voluntary system, anyone can draw up a tenancy agreement, but a lease by deed requires a solicitor or licensed conveyancer albeit this is not always observed.

## 2.2 Legislative Development

A summary of the relevant Acts and their development, together with Regulatory Reform (Business Tenancies) are explored below. Part II of the Landlord and Tenant Act 1954 (the 1954 Act) provides a framework for the renewal and termination of business tenancies in England and Wales. While the main features of the 1954 Act remain unchanged<sup>142</sup>, the Regulatory Reform (Business Tenancies) (England and Wales) Order attempts to modernise the workings of the Act, by removing certain anomalies and making the renewal and termination of business tenancies quicker, easier, fairer, and cheaper. The detailed changes to the working of the 1954 Act took effect from 1 June 2004, as did accompanying changes to the statutory notices 2 and changes to the Civil Procedure Rules.<sup>143</sup>

### 2.2.1 Landlord and Tenant Acts<sup>144</sup>

- i. The Landlord and Tenant Act 1709: An Act utilised to secure rents and to prevent fraud committed by tenants.
- ii. The Landlord and Tenant Act 1730: An Act for the more effectual prevention of fraud by Tenants, and for more easy recovery of rents, and renewal of leases.
- iii. The Landlord and Tenant Act 1851: An Act to improve the law of landlord and tenant in relation to emblements, to growing crops seized in execution, and to tenants' agricultural fixtures.
- iv. The Landlord and Tenant Act 1927: This Act comprised three parts: Part I Compensation for Improvements and Goodwill on the termination of Tenancies; Part II General Amendments of the Law of Landlord and Tenant Business Premises; and Part III General.

---

<sup>142</sup> Landlord and Tenant Acts <[www.legislation.gov.uk](http://www.legislation.gov.uk)> accessed 21/11/2011

<sup>143</sup> Office of the Deputy Prime Minister, 'Regulatory Reform (Business Tenancies)' <[www.odpm.gov.uk/businessstenancies](http://www.odpm.gov.uk/businessstenancies)> accessed 19 November 2011

<sup>144</sup> Ibid 143

- v. The Landlord and Tenant (War Damage) Act 1939: An Act to modify the rights and liabilities of landlords, tenants, and other persons interested in land damaged by war.
- vi. The Landlord and Tenant (Rent Control) Act 1949: The Landlord and Tenant (Rent Control) Act 1949 (12, 13 & 14 Geo. VI c. 40) was an Act of Parliament intended to control excessive rents being charged by landlords. It also extended the provisions of the furnished houses.
- vii. The Landlord and Tenant Act 1954: An Act created to provide security of tenure for occupying tenants under certain leases of residential property at low rents and for occupying sub-tenants of tenants under such leases; to enable tenants occupying property for business, professional or certain other purposes to obtain new tenancies in certain cases; to amend and extend the Landlord and Tenant Act 1927, the Leasehold Property (Repairs) Act 1938, and s 84 of the Law of Property Act 1925; to confer jurisdiction on the County Court in certain disputes between landlords and tenants; to make provision for the termination of tenancies of derelict land; and for other purposes connected with the matters aforesaid.
- viii. The Landlord and Tenant Act 1985: An Act engendered to consolidate certain provisions of the law of landlord and tenant formerly found in the Housing Acts, together with the Landlord and Tenant Act 1962, with amendments to give effect to recommendations of the Law Commission.
- ix. The Landlord and Tenant Act 1987: An Act written to confer on tenants of flats rights with respect to the acquisition by them of their landlord's reversion; to make provision for the appointment of a manager at the instance of such tenants and for the variation of long leases held by such tenants; to make further provision with respect to service charges payable by tenants of flats and other dwellings; to make other provisions with respect to such tenants; to make further provisions with respect to the permissible purposes and objects of registered housing associations as regards the management of leasehold property; and for connected purposes.

- x. The Landlord and Tenant Act 1988: An Act created to make new provisions for imposing statutory duties in connection with covenants in tenancies against assigning, underletting, charging, or parting with the possession of premises without consent.
- xi. The Landlord and Tenant (Covenants) Act 1995: An Act to make new provisions for imposing statutory duties in connection with covenants in tenancies against assigning, underletting, charging or parting with the possession of premises without consent.

There are several instances where the tenant may not have the security of tenure protection of the Landlord and Tenant Acts:

- a) When both landlord and tenant have agreed to contract out of the Act in writing using certain procedures.
- b) Agricultural tenants, service tenants (tenancies connected with employment), and where premises are used for business, even though this is prohibited by the terms of the tenancy.
- c) Where a tenancy is for a fixed term up to six months, with no right to extend or renew.
- d) A tenancy sanctioned by the courts beforehand, granted on the specific understanding that the protection of the Act shall not apply. This is known as contracting out of the Act.

### **2.2.2 Regulatory Reform Order Part II of the Landlord and Tenant Act 1954**

This came into effect on 1 June 2004 and was brought about by the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 (SI No. 3096)<sup>145</sup>. The

---

<sup>145</sup> Ibid 30

working and impact of this Order was subsequently reviewed<sup>146</sup> by the government with recommendations for further change, to improve the system further. None of these further changes have been brought into effect. The recommendations were as follows<sup>147</sup>:

Easier contracting out; instead of the joint application to the court, the landlord gives the tenant a Warning Notice in a prescribed form at least 14 days before the tenant enters into the lease or becomes legally bound to do so. The tenant signs a simple declaration, in a prescribed form, acknowledging receipt of the Warning Notice. The 14 day cooling off period can be waived if the tenant (or someone authorized on his behalf) instead makes a statutory declaration in a prescribed form.

The criteria for leases that can be contracted out remains the same, but probably one can no longer have agreements for leases that are conditional on performing the contracting out procedure; this may have to be carried out before the agreement for lease is exchanged. The statutory declaration procedure may not in practice give the tenant additional protection since independent solicitors administering declarations are not required to explain the contents of the declaration to the declarant.

Ownership and control; where the tenant is one or more *individuals*, they will have a right of renewal where business is carried on in the premises, either by themselves or by a company that they control. Where the tenant is a *company* controlled by one or more individuals, it will have a right of renewal where business is carried on in the premises either by that company, by those individuals or by another company controlled by them. The voluntary improvements are disregarded when determining the new rent. This will include those carried out by the controlled company or controlling individuals.

---

<sup>146</sup> Review of the 2004 Reform <<http://www.propertylawuk.net/businessleasereform.html>> accessed 19/11/2011

<sup>147</sup> Ibid

The existing provisions are retained for giving rights of renewal where the tenant and the business occupier are companies in the same corporate group, but the definitions are updated to those contained in the Companies Act 1985. Landlords who are companies will be able to oppose renewal on ground G. Section 30(1) of the Act ground (G) provides that the tenant will not be entitled to a new lease if the landlord intends to occupy the premises for the purposes of a business to be carried on by him, or as his residence, or if the individual controlling a company, or another company controlled by them intend to carry on business at the premises. Landlords who are individuals will be able to oppose renewal on ground (G) if a company controlled by them intends to carry on business in the premises. The 5 year rule for ownership of the reversion where the landlord opposes renewal on ground (G) will be applied to these cases of control of the relevant company. These provisions do not apply where the tenant or occupier is a LLP or other incorporated body other than a company under the Companies Acts. In such cases, if a trust of the tenancy by or in favour of such an entity cannot be established within s.41, the tenancy may be unprotected.

Severed reversions; here different persons own parts of premises let on a single tenancy, they will collectively comprise the landlord so that they can collectively serve a s.25 notice, (See section 25 notices and counter-notices below) be given a s.26 request, and apply to the court. The court may order the rent under the new tenancy to apportion between the landlords of the different parts.

This protects tenants from problems that might otherwise be caused by the freehold being broken up. The new provisions do not allow the individual landlords to serve separate notices, or allow separate new tenancies to be granted in place of a single tenancy, or cater for the situation where one landlord wishes to oppose a renewal and the other does not, or where they disagree over the rent or other terms to be sought for the new lease. That is left for the landlords to sort out between themselves. If the different landlords cannot agree amongst themselves, they will be unable to take the statutory steps, because they can only act collectively. So if one landlord wants to redevelop and the other is content for the tenant to renew, they would be unable to serve s.25 notice. (See notices requiring information below) and if the tenant serves s.26 request, they would not be able to serve a counter-notice.

How they would participate in any court proceedings in those circumstances is also unclear.

Notices requiring information; more information must be given in response to s.40 notice, including more details about sub-lettings and information about severed reversions. Provision is made for cases where the party giving or receiving the notice assigns its interest. A party who responds to s.40 notice will have to give updated information to the other party if the information given changes, or is discovered to have been wrong at any time within the six months from the giving of the original notice. The court can order a recalcitrant party to provide the information required.

The civil remedy of breach of statutory duty will be available if a failure to supply or update information in response to a statutory notice results in loss. The six-month updating duty may be very onerous, but it is necessary to enable landlords to serve s.25 notices on all protected tenants and subtenants or to enable tenants to serve s.26 requests on the competent landlord, as well as identifying the parties to be named in court proceedings. A party who fails to give the other the requisite information and causes loss may be liable in damages, such as where the tenant loses his right of renewal or the landlord finds that his redevelopment scheme is delayed. If a party instructs his solicitor or surveyor to respond to s.40 the notice on his behalf, this could create serious liability for the solicitor or surveyor and the extent of his retainer needs careful consideration.

Surrenders and agreements for surrender; a tenant in occupation will no longer have to wait until he has occupied for a full month before he can surrender his tenancy by instrument. For authorising agreements to surrender, instead of the joint application to the court, the landlord gives the tenant a Warning Notice in a prescribed form at least 14 days before the tenant enters into the agreement. The tenant signs a "simple" declaration, in a prescribed form, acknowledging receipt of the Warning Notice. The 14 day cooling off period can be waived if the tenant, or someone authorised on his behalf, instead makes a statutory declaration in a prescribed form. The existing limitation of this procedure to the persons who are currently the landlord and the tenant remains the same. The requirement for the tenant to make a declaration may make it difficult to use this procedure to

force, an unwilling tenant to complete surrender under a surrender back clause in his lease.

Section 25 notices and counter-notices; there are twenty four new prescribed versions of the s.25 notice. Half are in Welsh and most will apply to special category landlords. Typical landlords will usually have to choose between two versions. Landlords who are not opposing renewal will have to use a new form of the s.25 notice, which sets out the landlord's proposals for the property to be let, the duration of the term, the rent, and the terms of the new lease. The notice will include a warning that these are just a basis for negotiation, and will not bind either party. Landlords who are opposing renewal will have to use a new form of the s.25 notice, which sets out the grounds of opposition in more detail, and contains a statement that the tenant can challenge them. All the new forms of the s.25 notice will contain clearer warnings to tenants about the consequences of failure to apply to the court and about the time limits. There will be no need for the tenant to give a counter notice at any time.

The extent to which a landlord who is not opposing renewal must, insert very precise details of his proposals into his s.25 notice is unclear. For example, he is required to state his proposal for the rent to be payable, rather than the amount of the rent to be payable, so can the landlord just put an open market rent to be determined under s.34, and he may insert proposals which he does not genuinely expect to be achievable. The abolition of the counter notice may make it difficult for the landlord to be certain that a tenant who is willing to vacate, will actually do so.

Tenant vacating; a tenant wanting to terminate a fixed term tenancy on its contractual expiry date may do so either by giving at least three months' notice under s.27(1) before the end of the contractual term, or simply by vacating by that date. Once the tenant is holding over after the term expiry date, simply vacating will not cause a disapplication of the Act and s.27 (2) notice must be given by the tenant in such cases. A three months' notice under s.27 (2) may end on any day (and not just on a quarter day). If a s.27 (2) notice is used to end the tenancy, the tenant will be entitled to have the rent apportioned down to the end date and to have a pro rata refund of any rent paid in advance. The change to s.27 (1) enacts the

decision in the *Esselte* case<sup>148</sup>, which the Government justifies, because the landlord knows the term expiry date and can inspect the property around that date. The different rule for cases where the tenant is holding over is justified because there is no particular date on which the landlord should inspect the property. The provisions of s.64, which apply once a court application is made, continue to apply.

Court applications; the time limit for a court application will be the date specified in the s.25 notice or the day before the date specified in the s.26 request. The time limit can be extended to another fixed date if the landlord agrees in writing. Further extensions of the time limit will be possible, provided they are each agreed in writing before the expiry of the currently agreed limit. Where the landlord is not opposing renewal, either party may apply to the court to order terms for the renewal of the tenancy. Where the landlord is opposing renewal, the tenant may apply to the court to order terms for renewal of the tenancy, or the landlord may apply to the court for an order terminating the current tenancy without a renewal. Once one party commences and serves proceedings, the other cannot. If an opposing landlord applies but is unsuccessful in obtaining a termination order, the court will then proceed as if there was an application to order terms for renewal. The landlord may not withdraw any application he makes, without the tenant's consent. The tenant can require the court to dismiss a landlord's application if he decides not to seek a renewal.

There is an omission in the new provisions. Whilst s.24 provides that an application to the court to order, a renewal cannot be made if another party has already made and served such an application. The s.29 provides that a landlord cannot make an application for a termination order if an application for an order for a new tenancy has already been made and served. How will the landlord know about an application made by the tenant for a renewal order if it has not yet been served on him?

There is also a problem for landlords created by the abolition of the tenant counter notice, and the extension of deadlines for court applications. If the landlord asks the

---

<sup>148</sup> *Esselte AB v Pearl Assurance Plc* [1997] 2 All ER 41

tenant whether he intends to stay or go and the tenant says he will go, the landlord cannot rely on that, since there is a risk that the tenant may change his mind and make an application to the court before the deadline expires. It is unlikely that the court could refuse the application just because the tenant had said that he would not be making it.

So what should the landlord do in that situation? He could make an application to the court himself and then ask the tenant to require the court to dismiss the application. However a simpler solution would be for the landlord to ask the tenant to give him a s27 (1) notice, if the term has at least three months unexpired. That should prevent the tenant from changing his mind and making a last minute application to the court and should allow the landlord to set in motion, the re letting of the property.

Interim rent; Tenants as well as landlords will be able to apply for interim rent. If an application is made, the interim rent will run from the earliest date that could have been specified in the actual s.25 notice or s.26 request. The new full rent will also be the interim rent, if a new tenancy is actually granted for the whole of the premises let to the tenant, the tenant is in occupation of all those premises, and the landlord did not oppose the renewal. However, the court can be asked, at its discretion, to vary the interim rent where the amount of the new rent would have been substantially different, if it had reflected the rental market conditions, at the start of the interim period, or where the terms of the new lease materially differ from those of the old tenancy, and the amount of the new rent would have been substantially different if the tenancy terms had not been changed. In other cases, the existing method of determining interim rent will continue to apply.

Duration of new term; Gives provision to increase in the maximum new term that the court can order, in the absence of agreement, from fourteen years to fifteen years.

Statutory compensation; The tenant's right to compensation, based on rateable value, for non-renewal on a tenancy on non-default grounds, are extended to reflect

the changes to ground (G) and the different types of court application. Where only part of the property has been occupied for the full fourteen years, the double compensation will apply to only the rateable value of that part of the property. Where there is a divided reversion, the liability to pay the compensation will be apportioned between the different landlords. The existing provisions for a valuation officer, to determine a rateable value for a holding, that is not separately rated, have not been applied to these new provisions, so presumably any disagreement about apportionment of sums between different parts of the holding will have to be decided by the court.

Compensation for misrepresentation; the existing provisions for a tenant to claim compensation where the court, refuse a new tenancy based on the landlord's misrepresentation will be extended to the new type of proceedings. They will also be extended to cover the situation where the tenant quits without a court hearing, such as where he refrains from making a court application in reliance on the landlord's representations about his opposition to renewal.

Transitional matters; the Order will not affect anything stemming from s.25 notice or s.26 request which has been served before 1 June 2004. The Order will not affect any s.40 served before 1 June 2004. The Order will not affect any claim for compensation for misrepresentation by a tenant who quits before 1 June 2004. Where the terms of any lease require the old Court Order procedures under s.38 (4) to be followed, in relation to subletting, those terms are to be interpreted as from 1 June 2004, as if they referred instead to the new contracting out procedure. Where the terms of an Agreement for lease subsisting on 1 June 2004 require the lease to be excluded from the Act by Court Order under s.38 (4), the existing court procedure will remain available.

Because the old rules for court proceedings, interim rent and compensation continue to apply where s.25 notice or s.25 request is served before 1 June 2004, it is necessary to consider in all cases where the lease expiry date is before 1 June 2005, whether it would be advantageous to the client to serve a s.25 notice or s.26 request before or after 1 June 2004. Where the premises are currently over rented,

the landlord should consider serving a long dated s.25 notice before 1 June 2004 to avoid the tenant having the right to apply for an interim rent and to avoid the interim rent running from the earliest permissible termination date. Where the premises are currently under rented, the tenant should consider serving a long dated s.26 request before 1 June 2004 to perpetuate the old rent as long as possible and to obtain the cushioning effect of the existing rules on interim rent.

What is missing from the 1954 Act Reform 2004?

Inclusion of leases of incorporeal hereditaments; exclusion of unlawful sub tenancies; authorisation of surrender back clauses; involving landlords in interim rent proceedings between the competent landlord and a subtenant; sorting out ground (F) anomalies; updating s.34 to match modern rent review clauses; assessing compensation on a basis other than rateable value; and clarifying whether s.26 allows the tenant to chop the last day off his lease.

### **2.3 Analysis of case law disputes**

The rationale for the analysis of the following 19 dispute cases between landlords and tenants is to highlight the cause of disputes which are poor drafting and self-regulated commercial leases, irrespective of the judgments and or the dates. Those who may not be conversant with the causes of landlord and tenant disputes, and who distrust plain English, say that the traditional style of legal writing brings to new documents the knowledge and wisdom of earlier litigation. This is a misconception: if anything, this action brings with it the folly which triggered the litigation. Legal practitioners are so sceptical of departing from patterns that they often include things which neither they, nor their clients mean. When a lease clause has been included into a firm's standard document it is replicated at all times regardless. Some traditional practitioners when drafting leases assert that it is hazardous to implement plain language because, in contrast to traditional legal language, it may not have been

tried and tested. This attitude is itself typical of jargon, which is both equivocal and incorrect, in that it uses numerous words where one would do.

The following 19 cases were selected out of hundreds of cases explored in order to highlight the central argument of this research problem, which are poor drafting and self-regulated commercial leases, causing misinterpretations and misunderstandings in turn leading to disputes between landlords and tenants. These cases all have a common cause or theme, being the unregulated drafting of leases which contain ambiguous terms, and opportunities for misinterpretation. Therefore this analysis of relevant case law is primarily concerned with the cause<sup>149</sup> of the disputes, rather than the outcomes of the cases,<sup>150</sup> and different interpretations of the ancient Acts<sup>151</sup>.

*Chartbrook v Persimmon Homes* [2009] UKHL 38, [2009] All ER (D) 12 (Jul)

One of the clearest examples of over-complicated drafting can be seen in the recent case of *Chartbrook v Persimmon Homes* where, in a thicket of rather confusing definitions, one of them (ARP, standing for additional residential payment) was obviously defective as a piece of drafting.

The dispute: *Chartbrook* involved a payment due under an agreement. Defective drafting resulted in uncertainty over how a payment should be calculated, with Chartbrook claiming over £3.5 million of the amount Persimmon argued that it was entitled to. The High Court and the Court of Appeal decided in favour of Chartbrook by strictly interpreting the language on the agreement. Persimmon appealed to the House of Lords, claiming that the contract should be rectified and that the exclusionary rule should not apply. The House of Lords found the necessary conditions for rectification and on this basis allowed the appeal. However, the House of Lords rejected submissions on departure from the exclusionary rule and upheld an objective approach in the construction of contracts.

---

<sup>149</sup> Landlord and Tenant Disputes Cases (Butterworths) LexisNexis <[www.lexisweb.co.uk](http://www.lexisweb.co.uk)> accessed 9 December 2011

<sup>151</sup> Mark Adler, 'Legal Writing' First published in Clarity Journal 34 (January 1996)

Lord Walker's observations really say it all:

Nevertheless it may be unfortunate that the draftsman chose to define the ARP by a formula referring to the MGRUV rather than by referring directly to the TRLV (to which the MGRUV is directly linked, being, as events turned out, one per cent of it). The use of the two liked formulae rather than one, and the fact that the formulae are not set out in mathematical notation, make it harder to keep clearly in mind the structure of the arrangements contained in.

*Welsh v London Borough of Greenwich* [2000] 3 EGLR 41

The case of *Welsh* demonstrates how a pared-down style by itself will not solve every problem, but careful drafting should make potential misunderstandings more obvious. The Court held that an express covenant to maintain the dwelling in good condition and repair did impose on the landlord an obligation to remedy the underlying cause of excessive condensation, which had resulted in mould. The Court found, in that context, that the words "good condition" was "intended to mark a separate concept and to make a significant addition to what is conveyed by the word "repair." It must follow that to imply an obligation to keep the dwelling in good condition in a tenancy agreement that contains only an express term, to keep the structure in repair (as in the *Lee* appeal), or which contains no express repairing obligation on the landlord, so that the repairing obligations are those implied under section 11(1) of the 1985 Act (as in the *Ratcliffe* appeal), is to invite the criticism that the court is seeking to make for the parties a bargain which they have not themselves made. The term would impose on the landlord obligations which, on a proper understanding of the law as explained by this Court in the *Quick* case, the landlord could not have intended to undertake; nor, viewed objectively, could the tenant have thought that the landlord did intend to undertake those obligations.

*Haq-v-Island Homes Housing Association* (20 July 2011)

The case of *Haq* emphasises that parties who jump the gun to enter into poorly drafted agreements may well suffer the consequences.

The Case: The Court of Appeal has again had to deal with a dispute between parties over an agreement relating to considerable expenditure on land that was never properly documented.

*Jenkins v Price* [1908] 1 Ch. 10

By a lease of a hotel, the lessee covenanted (1) not to assign without the previous consent of the lessor, unless such consent should be unreasonably withheld; and (2) at all times during the term to reside at the hotel and personally carry on the business of a licensed public house. The lessee asked permission to assign to a limited company, which carried on a brewery business. The lessor, being of the opinion that an assignment to brewers would depreciate the goodwill, gave an unconditional consent to the assignment to a private person, but required as a condition of giving his consent to an assignment to a brewery firm that the rent should be increased and the term of the lease extended. The lessee brought an action for a declaration that the lessor was not entitled to impose such terms as a condition of giving his consent. This case highlights that traditional poorly written leases can be misinterpreted, causing disputes.

*Sargeant v Macepark (Whittlebury) Ltd* [2004] 4 All E.R. 662

In *Sargeant*, the claimant (S), a landlord, applied for a ruling that a clause restricting the use of a proposed extension to hotel premises on land leased by the defendant tenant (M) was reasonable and could be inserted into the lease so as to vary it. The licence contained a term allowing for a clause restricting use of the extension to be inserted in the lease subject to the court's decision that such a condition was reasonable.

*Anglia Building Society v Sheffield City Council* [1982] 266 E.G. 311

A lease of business premises restricted their user to that of a travel and employment bureau and a theatre ticket agency, and further provided that the user could be

changed with the consent of landlords, such consent not to be unreasonably withheld. T, an employment agency, wished to assign the premises to AB for use as a building society office, but L refused consent on the grounds that the rental value of neighbouring shops would be higher if the premises were used as a class I retail outlet. It was acknowledged that the proposed service user would indeed depress the rental value of neighbouring shops, but it was further acknowledged that the existing service user had already had that effect.

*Iqbal v Thakrar* [2004] 3 E.G.L.R. 21

In *Iqbal*, T, the landlord, appealed against a decision that he had unreasonably withheld consent to I's proposed alterations to the leasehold premises. The premises consisted of the ground floor of a building of which T owned the top floor as well as the reversion to I's lease. The designated planning category of the premises was for the sale of hot food for consumption on or off the premises. The lease contained an ambiguous covenant requiring T's consent before structural alterations or additions could be made, such consent not to be unreasonably withheld. The tenant wanted to convert the premises to a restaurant and submitted architect's plans to T identifying various structural features and load bearing walls that required checking before work commenced. But the plans submitted did not set out what would be done with any such walls that were found. T refused to give consent, and I applied for a declaration that consent had been unreasonably refused. On appeal, T argued that the judge had taken the wrong approach to the test of reasonableness.

*Oriel Property Trust v Kidd* 154 E.G. 500

Landlords withheld their consent to the assignment of a tenancy because they had a waiting list as supported by the unclear terms of the lease of prospective tenants and it was their policy, not to allow tenants, to choose their successors.

*The Governors of Bridewell Hospital v Fawkner & Rogers* [1892] 8 TLR 637

The Plaintiff sought an injunction to restrain the Defendants, the assignees of a lease of premises in New Bridge Street, Blackfriars, from assigning the premises to any persons except in such manner and with such license as expressed in the lease. The original lessee covenanted not to assign or underlet the premises without the license or consent in writing of the officers of the hospital, such license or consent not to be arbitrarily or without good and sufficient reasons withheld. In March, “General” Booth applied for an assignment of the premises to him for the purposes of the Salvation Army. On the original lessee’s application to the Plaintiff for leave to assign the premises to “General” Booth, the Plaintiff refused the license on the grounds that the use of the premises for the purposes of the Salvation Army might deteriorate the other property held by the Plaintiff, and served affidavits, by persons competent to judge, confirming that position. “General” Booth stated in evidence that he required the premises for offices only and not for meetings or band playing. Regardless of the outcome of the case, this highlighted the cause as poor drafting and misinterpretations of terms.

*NCR Ltd v Riverland Portfolio No.1 Ltd* [2005] EWCA Civ 312

The more recent decision of *NCR Ltd v Riverland Portfolio No.1 Ltd* provides some useful material for landlords seeking to argue that more time is required. Where the landlord is seeking further information he should send a clear properly drafted request promptly on receiving the request for consent. Where the tenant’s response is incomplete a further letter should explain that the landlord is well aware of his obligations under LTA 1988 but requires clarification before he can make a decision.

*Estafnous v London & Leeds Business Centres Ltd* [2009] EWHC 1308 (Ch)

The principal message of the case was that careful drafting of contractual documents is still vital. The Court of Appeal has made clear there is a limit on how liberal the Courts will be when interpreting documents.

*Gutteridge v. Munyard* (1 Moo & R 336, 1834)

This case highlights typical poor ambiguous drafting of a clause of commercial lease:

That he, his executors, administrators, or assigns, should and would from time to time, and at all times during, &c, at his and their own proper costs and charges, well and sufficiently repair, uphold, support, maintain, glaze and amend, and keep the said messuage or tenement, and other the buildings, and the windows and sashes, tiling's, &c, and all other the appurtenances thereby demised, in, by, and with all and all manner of needful and necessary reparations and amendments whatsoever. And should and would at the end or other sooner determination of the said demise, leave, surrender, and yield up unto the said John Stayley, his heirs and assigns, the said messuage or tenement, and all and singular other the premises, with the appurtenances thereby demised, so well and sufficiently repaired, upheld, supported, maintained, glazed, &c, and kept as aforesaid, and all new erections, buildings, and improvements that should or might be made in or upon the said premises in the meantime, (reasonable use and wear thereof in the meantime only excepted).

The Dispute: The building was at least 200 years old, and perhaps more than 300. It was very dilapidated. The walls were no longer perpendicular, and had cracked; the floors had sunk; the timber was rotten; the tiling and woodwork were broken; and there were other defects not listed in the report. The tenant had painted the inside two or three years before the trial, but "it did not appear that much else had ever been done to it." The dispute was, could the landlord forfeit the lease because the tenant had broken the covenant to repair?

Comment: The judge ignored the detailed verbiage ambiguous drafting of the covenant, and treated it as a simple covenant to repair.

*Scales v. Lawrence* (1860 2 F&F 289)

The Tenant's Covenant contained a rather confusing term:

So often as need should require, well and sufficiently to repair, uphold, sustain, paint, glaze, cleanse, scour, &c a house and premises, with all needful reparations and

cleansings, and to leave the premises in such repair, reasonable wear and tear excepted.

The Dispute: Was the tenant liable for replacing dirty wallpaper?

*Proudfoot v. Hart* (1890 25 QBD 42)

The Tenant's Covenant: "During the said term keep the said premises in good tenantable repair, and so leave the same at the expiration thereof."

The Facts of the Case: at the end of a tenancy, the premises needed redecoration: the wallpaper had worn; the paint on the woodwork had faded; the staircases and ceilings were ready for cleaning and whitewashing; and the kitchen floor needed replacement.

The Dispute: Was the Official Referee right in assuming that the tenant was responsible for the cost?

Comment: Lord Esher reads an implied covenant to "put into repair" in an express requirement to "keep and deliver up in repair." It would make the tenant's obligations clearer but no more onerous, to make this duty explicit; if the extra liability is not intended, it should be clearly excluded. From one line to another, Lord Esher uses "tenantable repair" without comment as a synonym for "good tenantable repair," and he draws no distinction between that and "habitable repair." He also says that "good repair" is "much the same thing," without committing himself to any particular difference. But "repair" does not include all decoration, for which a lease should explicitly provide.

*Lister v. Lane & Nesham* (1893 2 QB 212)

The Tenant's ambiguous Covenant:

When and where, and as often as occasion shall require, well, sufficiently and substantially repair, uphold, sustain, maintain, glaze, pave ... amend and keep all and singular the said wharf, Shot Tower, warehouse, messuage, buildings and premises ...

and all the walls, pavements, &c, to the said premises belonging or in anywise appertaining ... and the said wharf, Shot Tower, warehouse, messuage, buildings and premises ... so well and substantially repaired, upheld, sustained, maintained, glazed ... amended, and kept, at the end or other sooner determination of the said term hereby granted, will peaceably and quietly leave, surrender and yield up” to the landlord in such good and substantial state and condition as the landlord “may be bound to deliver up the same premises to the superior landlord or landlords thereof at the expiration of the lease under which they now hold the premises.”

The Dispute: Was the tenant responsible for the rebuilding costs?

The Judgement: No

Lord Esher MR said:

Such hidden errors are surprisingly frequent in traditional, “precise” legal writing.

*Ravenseft v. Davstone* (1980 1 QB 12)

The Tenant’s Covenant:

When where and so often as occasion shall require well and sufficiently to repair renew rebuild uphold support sustain maintain pave purge scour cleanse glaze empty amend and keep the premises and every part thereof (including all fixtures and additions thereto) and all floors walls columns roofs canopies lifts and escalators (including all motors and machinery therefor) shafts stairways fences pavements forecourts sewers drains ducts flues conduits wires cables gutters soil and other pipes tanks cisterns pumps and other water and sanitary apparatus thereon with all needful and necessary amendments whatsoever .

The Dispute: The landlord sought to recover the cost of repairs from the tenant under the repairing covenant in the lease. The tenant company argued that the repairing covenant did not make it liable for inherent defects.

The Judge's Comments on the Drafting:

This was a complex case, but the complexity had nothing to do with the verbosity of the repairing covenant. Mr Justice Forbes said: "I have already mentioned the plethora of words used to describe the obligations of the tenant.... The view I have formed is, of course, relative to the use of the word 'repair', and that by itself seems to me to be sufficient to render the tenant in this case liable for the whole cost of the remedial works. It is not, therefore, necessary to pursue the question of whether, if it had not been so, other words used would have been sufficient to fix the tenant with liability."

*Post Office v. Aquarius Properties Ltd* (1987 1 All ER 1055)

The Subtenant's Covenant: "Well and substantially to repair ... amend ... renew and keep in good and substantial repair and condition...."

The Dispute: Was the sub-tenant responsible?

The result: No.

The Judgement (by Hoffman J):

In the end ... the question is whether the ordinary speaker of English would consider that the word 'repair' as used in the covenant was appropriate to describe the work which has to be done. The cases do no more than illustrate specific contexts in which judges, as ordinary speakers of English, have thought that it was or was not appropriate to do so.

*Norwich Union v. British Railways Board* (1987 2 EGLR 137)

The Landlord's Covenant "To keep the demised premises in good and substantial repair and condition and when necessary to rebuild, reconstruct or replace the same and in such repair and condition to yield up the same at the expiration or sooner determination of the said lease."

This case was unusual on three counts:

1. The tenant (rather than the landlord) argued that "rebuild and reconstruct" meant what it said, imposing a more onerous duty than the normal repairing covenant (the tenant's motive was to minimise the reviewed rent).

2. The judge stressed the fundamental importance of the “plain meaning” rule.
3. The judge used it to impose the “complete rebuilding” obligation for which so many landlords have argued unsuccessfully.

The Judgment (by Hoffman J):

According to normal rules of construction the additional words should be given some additional meaning. But [counsel for the landlord] says, with some justification, that this rule frequently cannot be applied in its full force to documents such as leases, where a torrential style of drafting has been traditional for many years....

*Credit Suisse v. Beegas Nominees Ltd* (1994 1 EGLR 151)

The Landlord’s Covenant: “To maintain repair amend renew cleanse repaint and redecorate and otherwise keep in good and tenantable condition... Provided that the landlord shall not be liable ... for any defect or want of repair ... unless [it] has had notice thereof...”

The dispute: Was the landlord’s failure to stem the leaks a breach of its covenant?

The Reasoning (by Lindsay J):

The normal rule of construction is that additional words should be given additional meaning...A covenant “to repair and otherwise to keep in good and tenantable condition” suggests something more than a covenant merely ‘to repair’.

The Judge’s comment on the drafting:

The lease is over 45 pages of single-spaced typescript and I am far from confident that its draftsman ship is of a quality such that one can derive very much from [contrasts between the wording of two clauses 30 pages apart]....

Comment: Superficially, *Credit Suisse* is a counter-example to my theme, which is that the torrential style of drafting is pointless. Clearly, in this case the extra words did have an effect (though one that backfired on the drafter's client). It does, however, support my argument that torrential drafting creates rather than resolves doubts about the meaning, thus promoting expensive and unpredictable litigation. This decision was not predictable and might not be followed in future. The above cases clearly support the fact that the tortuous traditional language is unnecessary, and ineffective. Drafters cannot be sure that their additional words will be given additional meaning (preferably by the other side, without recourse to the courts) unless they make it clear that each word is used advisedly.

The torrential style is self-defeating. Since judges know that lawyers pour in unnecessary words with little thought about their meaning, they generally (though with occasional unpredictable exceptions) treat a repairing covenant in much the same way however it is phrased, and the exact wording chosen by the drafter is largely irrelevant.

## **2.4 Analysis of lease clauses**

Commercial leases, just like properties, come in all shapes and sizes and are prepared and taken by all sorts of people and businesses for all kinds of reasons. It is important to ensure whether the landlord and or the tenant have the right format of lease to suit their requirements and that the essential requirements have been incorporated.

On the surface leasing commercial real estate would seem to be a straightforward and unsophisticated commercial contract agreement. The landlord simply agrees to let a commercial property to a tenant to occupy the property, in return for a negotiated rent. There are plenty of potential risks when negotiating and drafting a commercial lease of business premises. As soon as the lease is in place there become a lot of risks evident. Commercial property leases encompass huge number of clauses. Each clause deals with a distinct aspect of the tenancy agreement. The misinterpretation and incorrect strategy on any one of those aspects of the tenancy and different

clauses in the lease could give rise to landlord and tenant disputes. It is therefore significantly important for this study to analyse the most common lease clauses<sup>152</sup>:

Negotiations of lease; when lease terms are being negotiated the emphasis should be on the need for clarity and flexibility. There must be model heads of terms. If all agents used these or even used those as a checklist, the parties to leases and their advisers would save a lot of time and trouble once the detailed wording of the lease comes to be worked out. Time is money, and both parties, specifically the tenant, should be able to understand the total extent, duration, cost and liabilities that they are taking on, if they sign a lease based on the terms being offered by the landlord. However good the relationship between the landlord and tenant is or seems to be, the landlord may sell to another party. The terms agreed and the lease taken must reflect everything the tenant relies on to conduct and safeguard his business. The tenant must seek alternative terms if he is unhappy about what has been proposed to him.

Wendy Wilson underpins the source and the bench mark for inception of negotiation in commercial leases in her Parliamentary report.<sup>153</sup> Historically, the law of England and Wales has largely left the parties free to negotiate the initial form of a commercial lease. The main legal intervention has been the Landlord and Tenant Act 1954, which deliberates a statutory right of renewal on occupying business tenants. The Act does not provide for any degree of rent regulation and does not cover the overall context of commercial leases. Notwithstanding the above, the Code<sup>154</sup> confers that the landlords must make offers in writing which clearly state: the rent; the length of the term and any break rights; whether or not tenants will have security of tenure; the rent review arrangements; rights to assign, sublet, and share the premises; repairing obligations; and the VAT status of the premises. Landlords must promote flexibility, stating whether alternative lease terms are available and must propose rents for different lease terms if requested by prospective tenants.

---

<sup>152</sup> Ibid 29

<sup>153</sup> Wendy Wilson, 'Business Tenancies rent reviews' Parliamentary Report Social Policy Section (2010)

<sup>154</sup> Ibid 29

Rent deposits and guarantees; in any lease, it is required for the terms to state clearly any rent deposit proposals, including the amount, for how long, and the arrangements for paying or accruing interest at a proper rate. Tenants should be protected against the defaulting or insolvency of the landlord. The lease also should state clearly the conditions for releasing rent deposits and guarantees.

Assignment and subletting; there is plenty of scope here for unduly restrictive terms to be incorporated. There should be as few restrictions as possible. At one time an original tenant might remain liable under her lease covenants many years after she has assigned its lease. There are still plenty of 'old' leases still around. A tenant can still, in new leases be asked to guarantee the obligations of his or hers immediate successor. Even a tenant's guarantor might be called on to guarantee the tenant's immediate successor although whether this is legal or not.

The tenants must ensure that they understand what notices they would be required to serve on the landlord to assign or end the lease, and how and when these should be served. The Landlord and Tenant Act 1954, gives the tenant the right to extend his tenancy when his lease runs out. Unless both the tenant and the landlord have agreed (in the correct procedure) that the lease is to be excluded from the relevant sections of the Landlord and Tenant Act 1954, the tenant will be entitled to renew the lease unless the landlord can prove certain specific circumstances, which include redeveloping the property or occupying the space himself. The tenant should make sure they understand the options available when the lease expires. Tenant should take professional advice to make sure all notices are properly served and that the tenant's interests are protected.

Service charges; this is another complex area in commercial leasing and the RICS issued a Code of Practice on Service Charges in Commercial Property in 2006<sup>155</sup>. The emphasis must be on clarity, fairness, and protection for tenants. The tenant should expect the landlord to be explicit in his offer about any service charges, including how those costs are calculated, what they cover (and don't cover), and the extent to which tenant will be obliged to pay towards any capital improvements and

---

<sup>155</sup> RICS code of practice: Service Charges in Commercial Property (June 2006)  
<<http://www.rics.org/servicechargecode>> accessed 11/12/2011

long term repairs or replacements of structure, fabric, or machinery and equipment. Landlords must, during negotiations, provide best estimates of service charges, insurance payments, and any other outgoings that the tenants will incur under their leases. Landlords must disclose known irregular events that would have a significant impact on the amount of future service charges. Landlords should be aware of the RICS 2006 Code<sup>156</sup> of Practice on Service Charges in Commercial Property and seek to observe its guidance in drafting new leases and on renewals (even if granted before that Code is effective).

Repairs; any repairing obligations should be appropriate to the length of the lease term and the condition of the premises. An obligation to 'keep' property in repair is tantamount to an obligation to first of all put and then keep the property in repair. This is yet another trap for the unwary. A lease does not always mean what a lay person thinks it does! Save as if stated in the heads of terms, tenants can only be obliged to give the premises back at the end of their lease in the same condition as it was in at its grant, unless they specifically agree at the time of taking the lease to carry out works or to reinstate the property to its original state. Tenants should check that the lease does not require them to put the property into a better condition than when they took the lease, and should also bear in mind that if they buy an existing lease (take an assignment of someone else's lease), the condition of the property when they take the premises may be poorer than it was at the beginning of the lease. Tenants may be required to put the property back into its original condition so it is worth taking professional advice

Alterations and Changes of Use; the problem with provisions dealing with alterations is that they often give landlords the upper hand by providing that at the end of the lease, the premises have to be put back into the state that they were in before the change. There are plenty of situations where this would be reasonable from a landlord's perspective. In other cases, however, it might be unreasonable.

The landlord's control over alterations and changes of use must not be more restrictive than is necessary to protect the value of the premises at the time of the application, and any adjoining or neighbouring premises of the landlord. Internal

---

<sup>156</sup> Ibid

non-structural alterations should be notified to landlords but do not need landlords' consent unless they could affect the services or systems in the building. Landlords should not require tenants to remove permitted alterations and make good at the end of the lease, unless reasonable to do so. Landlords should notify tenants of their requirements at least six months before the termination date. The lease will usually put the responsibility on the tenant, to check that his proposed use complies with any planning consent. The lease may be quite restrictive in terms of any signage and any alterations he is permitted to make. Before the tenant enters into the lease, he should make sure that he is permitted to carry out any works for his business needs. The landlord should be required to give his consent within a reasonable time period (say 21 days) and should not be able to refuse tenants' proposed alterations without good reason. Tenants should be aware of statutory requirements such as the Construction Design and Management (CDM) Regulations 2007<sup>157</sup>, which they must comply with when carrying out any works or alterations to the Property. The CDM regulations require tenants to keep full and detailed formal records, which they must maintain throughout the lease.

Insurance; as concerns with terrorism have been in the news for so many years now, people may be aware that terrorism cover under insurance policies for commercial premises is limited to £100,000 unless additional cover is specially taken out. The problem for landlords is that if they take out this additional coverage for one property, they have to take it out on all of their properties; there is no ability to cherry pick. There may be other risks that are not covered, such as heave and subsidence. If damage or destruction is caused by an uninsured risk the tenant should have the benefit of rent suspension, just as they should if damage is caused by an insured risk. Tenants should also have the right to terminate the lease unless the landlord elects to rebuild at the landlord's own cost.

In the circumstances when landlords are insuring the property, the insurance policy terms should be fair, reasonable, represent value for money, and be placed with reputable insurers. Landlords must always disclose any commission that they are receiving and must provide full insurance details on request. Rent suspension should

---

<sup>157</sup> Construction Design and Management 'CDM Regulations 2007' HSE Health and Safety Executive <[www.hse.gov.uk/construction/cdm.htm](http://www.hse.gov.uk/construction/cdm.htm)> accessed 19 October

apply if the premises are damaged by an insured risk or uninsured risk, other than where caused by a deliberate act of the tenant. If rent suspension is limited to the period for which loss of rent is insured, leases should allow landlords or tenants to terminate their leases if reinstatement is not completed within that period. Landlords should provide appropriate terrorism cover if practicable to do so. If the whole of the premises are damaged by an uninsured risk so as to prevent occupation, tenants should be allowed to terminate their leases unless landlords agree to rebuild at their own cost. Tenants may be required to reimburse the landlord for his insurance premiums, and the landlord should tell tenant what commission payments (if any) he receives. The lease should provide for the landlord's policy to be used to repair or rebuild the property unless the insurance is invalidated by anything the tenant does, in which case tenant may be liable for the reinstatement.

On-going management; in the circumstances where a tenant has not repaired premises to the standard required by the lease, the landlord can serve what is known as a "schedule of dilapidations." These are often served at the last minute or even after the lease have come to an end. The landlords should serve terminal schedules at least six months before the end of the lease term. The problem for tenants is that if the lease is coming to an end (or has come to an end), they will not have the time or ability to carry out the works themselves at a reasonable cost. After the lease has ended, they are not entitled to enter the property. There is some statutory protection for tenants when faced with a schedule to engage the services of a building surveyor.

The landlord should handle all defaults promptly and deal with tenants and any guarantors in an open and constructive way. At least six months before the termination date, landlords should provide a schedule of dilapidations to enable tenants to carry out any works and should notify any dilapidations that occur after that date as soon as practicable. When receiving applications for consents, landlords should where practicable give tenants an estimate of the costs involved. Landlords should normally request any additional information they require from tenants within five working days of receiving the application. Landlords should consider and request what other consents they will require at an early stage (for example, from superior landlord or mortgagees). Landlords should make decisions on consents for alterations within fifteen working days of receiving full information.

Length of Term, Break Clauses and Renewal Rights; this section concerns the length of term, which must be clear in the lease. The only pre-conditions for tenants exercising any break clauses should be that they are up to date with the main rent, have given up occupation, and have not left behind any continuing subleases. The Code<sup>158</sup> reinforces that any disputes about the state of the premises or what has been left behind or removed should be settled later, for example, any disputes upon lease expiry. This section of the Length of Term, Break Clauses and Renewal Rights of the Code encourages the tenant to ensure that the landlord has provided him with full and precise details of the financial costs to the tenant right from the outset. Not all costs will be fixed at the time of agreeing the lease. The tenant should expect the landlord to explain how any costs are calculated so that the tenant can understand the risks and make sure that the tenant can afford all of the costs of leasing the property. If the tenant is asked to give a personal guarantee, he should avoid using his home as security. The tenant should be able to understand both when and how the landlord may call on the tenant's guarantee, and also what the guarantee would actually cover. The fall-back position under the Landlord and Tenant Act 1954 is that business tenants have rights to renew their lease, but it is accepted that there are a number of circumstances in which that is not appropriate. In such cases, landlords should state at the start of negotiations that the protection of the 1954 Act is to be excluded and encourage tenants to seek early advice as to the implications.

Rent Review; during the negotiations and the beginning of a business tenancy, the rent that the landlord and the tenant agree will normally be endorsed in the commercial lease. The tenancy agreement "lease" may provide for rent increases or reviews during the term, but if it does not, the initial rent will normally apply for the full length of the tenancy. In the event of failure to agree a new rent under a rent review clause, the parties may achieve determination by referring the matter to an independent third party, to provide arbitration or expert valuation. Where arbitration is used, the Arbitration Acts of 1950 and 1979 govern the proceedings and an appeal may be made to the High Court from an arbitrator's award on questions of law. The rent review clause will usually set out the machinery to be used to achieve an agreed rent increase.

---

<sup>158</sup> Ibid 29

In commercial leases terms, there is no particular form of wording for the creation of a rent review clause; however, while these clauses vary considerably, they tend to place certain standard obligations on the parties concerned, for example:

- a) they require a rent review to be carried out every five years;
- b) they are typically not geared to any index and specify that the rent may be reviewed upwards-only (whatever the condition of the rental market at the time); and
- c) new rent payable after the review is stipulated as that which the landlord might reasonably expect to obtain on the open market if he was to re-let the premises on the rent review date.

A consultation paper on upwards-only rent reviews was issued in 2005 by the ODPM<sup>159</sup>. The paper concluded that long leases and UORRs (Upward Only Rent Reviews) continue to be in long-term decline. Some new leases would not be affected by legislation as they are too short or do not contain UORRs. Over-renting is not a major problem, apart from unstable market sectors, such as central London offices banning or restricting UORRs, which would be likely to lead to an increased use of fixed increase or index-linked reviews, weakening the link between rents paid under leases and market value. The rent review clause must be stated in a comprehensive and simple manner. Rent reviews should be clear. Landlords should on request offer alternatives to their proposed option for rent review priced on a risk-adjusted basis. For example, alternatives to upwards-only rent review might include up/down reviews to market rent with a minimum of the initial rent, or reference to another measure such as annual indexation. Where landlords are unable to offer alternatives, they should give reasons.

Tenants should also make sure that there are controls in the event of disagreement, referring disputes to an independent expert or arbitrator to settle. The lease should

---

<sup>159</sup> Ibid 95

include a provision allowing them to serve a rent review notice on the landlord. If the landlord does not initiate the rent review, the tenant should think very carefully before deciding not to serve notice on the landlord as he may be responsible for paying interest on any increase in rent above the original rent from the appropriate rent review date until the review has been agreed. The lease should include a provision allowing the tenant to serve a rent review notice on the landlord.

Some of the issues here are of a highly technical nature. It is not surprising perhaps that this is one of the most heavily litigated areas of property law. Landlords should be aware that being too hard or restrictive in relation to other lease provisions could backfire when the time comes for a rent review.

Tenant's defaults; as the lease forms a legal contract between landlord and tenant, any breach of contract may have serious consequences and the tenant should take care to understand his or hers obligations and the steps that the landlord may take against them and, if applicable, the tenant guarantors, including court action. The laws relating to LAT relationships are complex and tenants should seek professional advice so that they are clear on their obligations and rights. A fair lease is one that allows the tenant enough opportunity to fix any problems (without loss to the landlord) before any legal action is taken. The tenant may find that he has failed or forgotten to carry out some obligations under the lease. It is usually best if tenants are able to carry out these obligations themselves, though it may be better sometimes to approach the landlord and negotiate a reasonable payment to have the landlord carry out the obligations after the lease has expired. The remedy for a breach of the agreement may range from the landlord sending in the bailiffs, who may seize goods to the value of the breach, or the landlord taking back the property from tenant ('Forfeiture'). Tenants should note that this would not take away their liability to pay arrears of rent. The landlord may try to forfeit the lease by locking the tenant out of the property or by obtaining a court order. In either case, the tenant can apply to the court to obtain time to put matters right or to pay what he owes. Leases often require tenants to comply with statute (early Acts) at their own cost. Tenants should ensure that their obligations under the lease are proportionate to the length and terms of their lease and they should take professional advice and make their own estimate of any expected costs.

Applications for consent; the tenant will need to make applications to the landlord during the lease, for example, if they intend to carry out alterations or if they propose to sublease or assign the lease. The lease should specify that the landlord may not unreasonably withhold or delay his consent. The landlord's duty to respond only applies from when he has received from tenant adequate information about the proposed alterations or about the proposed assignee or subtenant and full details of the proposed transaction.

Grounds for Possession; a landlord can only oppose a tenant's application for a new business tenancy on a limited number of grounds, where:

- a) The tenant has not sufficiently complied with the lease terms or has otherwise failed to behave properly as a tenant;
- b) The landlord can provide suitable alternative accommodation for the tenant;
- c) The landlord may suffer financially when a sub-tenant occupying only part of the premises gets a new tenancy;
- d) The landlord requires possession to demolish the property; or
- e) The landlord intends to use the premises himself for a business or a residence.

These grounds are by no means automatic and will often require interpretation by the courts in specific cases. The Landlord and Tenant Act 1954 Part II is the key statute used when grounds for possession are in dispute. Commercial and industrial tenancies are a more complicated area of law, as each lease will vary significantly.

## 2.5 Conclusion

Resistance by the landlords, property owners and the government to any fundamental change through legislation to the way commercial property leases balance the respective interests of the landlord and tenant, must call into the question the effectiveness of any voluntary attempt at reform (See chapter 3). Generally the practice of an assumed majority of good landlords, have been used as a powerful argument against legislative reform. In seeking to regulate and disseminate good practice but without any way of securing compliance in the absence of legislative intervention, the voluntary approaches are inevitably vulnerable to criticism that they merely pays lip service to tenants' concerns.

Commercial property lease documents in their current form conceal conditions and lack clarity. Complicated and complex terms of leases will eventually give rise to disputes and inequality. Some of conditions attached to the tenants' break clause rights inserted in during the negotiations and are drafted into the lease terms, can be ambiguous. In practice, the right of the tenant is inevitably defeated by the tenant's failure to comply with some of the concealed, ambiguous pre-conditions, i.e. failure to comply with all the covenants under his obligations as outlined in the lease. Analysis of commercial property leases "clauses" demonstrates that, just like properties, leases come in all shapes and sizes and are prepared and taken by different parties and businesses and for all kinds of reasons. Whether you are a landlord or a tenant, you have the right to receive the correct format of lease to suit your requirements and the right to having the essential conditions incorporated into the lease. In leases, emphasis should be on the need for clarity and flexibility when lease terms are being negotiated.

In England, standard tenancy agreements are readily available and can be purchased from various sources, although an ordinary written agreement cannot be used for a tenancy exceeding three years in length. Tenancies for longer periods need a lease by deed. Under the current unregulated voluntary system, anyone can draw up a tenancy agreement. The Landlord and Tenant Act 1954 Part II offers a charter for terminating or renewing of commercial property leases in England. While the main features of the 1954 Act remains unchanged, the Regulatory Reform of Business Tenancies

England and Wales Order 2003 has attempted to improve the workings of the Act, removing certain anomalies and making the renewal and termination of business tenancies quicker, easier, fairer, and cheaper. The detailed changes to the working of the 1954 Act took effect from 1 June 2004, as did accompanying changes to the statutory notices 2 and changes to the Civil Procedure Rules.

Inquiry to the main clauses of commercial property leases evidences that in assignment and subletting there is plenty of scope for unduly restrictive terms to be incorporated. In older leases, an original tenant might remain liable under his lease covenants many years after he assigned the lease. There are plenty of old leases still around. In new leases, a tenant can still be asked to guarantee the obligations of his immediate successor. Even a tenant's guarantor might be called on to guarantee the tenant's immediate successor, although it is unclear whether this is lawful; it would be better to negotiate alternatives if possible.

Service charges attached to commercial property leases are another complex subject, though the Royal Institute of Chartered Surveyors issued a Code of Practice on Service Charges in Commercial Property in 2006<sup>160</sup> to make this difficult area easier to understand. The emphasis must be on clarity, fairness, and protection for tenants. The tenant should expect the landlord to be explicit about any service charges, including how the costs are calculated, what they cover and what they do not cover, and the extent to which a tenant will be obliged to pay towards any capital improvements and long term repairs or replacements of structure, fabric or machinery and equipment. Landlords must, during negotiations, provide best estimates of service charges, insurance repairs.

Another convoluted area of commercial leasing is the repairing obligations. These should be appropriate to the length of the lease term and the condition of the premises. An obligation to keep property in repair is tantamount to an obligation to first of all put and then keep the property in repair. A similarly complicated clause in commercial lease is the alterations and changes of use clause. The problem with provisions dealing with alterations is that they often give landlords the upper hand by providing that at the end of the lease, the premises have to be put back into the state

---

<sup>160</sup> Ibid 75

they were in before the change. While the aforementioned clauses tend to cause problems to tenants, other poses difficulties to landlords, for example, the lease clause covering insurance with terrorism. Terrorism cover under insurance policies for commercial premises is limited to £100,000 unless additional cover is specially taken out. The problem for landlords is that if they take out this additional cover for one property they have to take it out on all their properties. If the tenant has not repaired premises to the standard required by the lease, the landlord can serve what is known as a schedule of dilapidations, which can be served at the last minute or even after the lease have come to an end. The landlords should serve terminal schedules at least six months before the end of the lease term. The problem for tenants is that if the lease is coming to an end or has come to an end, they will not have the time or ability to carry out the works themselves at reasonable cost. Complex clauses covering the length of term break clauses and renewal rights can be contentious. This chapter did explain that emphasis should be made on the length of term, which must be clear to all parties. The only pre-conditions to tenants exercising any break clauses should be that they are up to date with the main rent, give up occupation, and leave behind no continuing subleases. Any disputes about the state of the premises, or what has been left behind or removed, should be settled.

The result of negotiations about rent review clauses at the beginning of a business tenancy and the rent that the landlord and the tenant agree will normally be endorsed in the commercial property lease. The tenancy agreement “lease” may provide for rent increases or reviews during the term, but if it does not, the initial rent will normally apply. Tenant’s defaults and applications for consent can be complicated. As the lease forms a legal contract between landlord and tenant, any breach of contract may have serious consequences and the tenant should take care to understand their obligations and the steps the landlord may take against them. A fair lease is one that allows parties enough time to remedy a breach.

Tenant will need to make applications to the landlord during the lease, for example, if they intend to carry out alterations or if they propose to sublease or assign the lease. The lease should specify that the landlord may not unreasonably withhold or delay his consent. The landlord’s duty to respond only applies from when he has

received from the tenant adequate information about the proposed alterations or about the proposed assignee or subtenant and full details of the proposed transaction.

The key findings of a consultation paper on upwards-only rent reviews were issued in 2005 by the ODPM<sup>161</sup>. It concluded that long leases and UORRs (Upward Only Rent Reviews) are less prevalent, so some new leases would not be affected by legislation as they may be too short or do not contain UORRs. Fixed increase or index-linked rent reviews are becoming more popular<sup>162</sup>. In commercial property leases, the rent reviews should be clear. In negotiating leases, landlords should offer alternatives to their proposed option for rent review priced on a risk-adjusted basis if requested. Where landlords are unable to offer alternatives, they should give reasons to the tenant.

In leases, arbitration clauses should be encouraged and included and tenants should also make sure there are controls in the event of disagreement, referring the dispute to an independent expert or arbitrator to settle. The lease should include a provision allowing them to serve a rent review notice on the landlord. If the landlord does not initiate the rent review, the tenant should think very carefully before deciding not to serve notice on the landlord, as tenant may be responsible for paying interest on any increase in rent above the original rent from the appropriate rent review date until the review has been agreed. The lease should include a provision permitting the tenant to serve a rent review notice on the landlord. Some of the issues with rent reviews are of a highly technical nature. It is not surprising perhaps that this is one of the most litigious areas of property law. Landlords should be aware that being too hard or restrictive in relation to other lease provisions can miscarry when it is time for a rent review. Tenants should be offered priced alternatives based on whether they want to go for a traditional upwards-only review or not. The above highlight the unregulated culture of commercial leases.

---

<sup>161</sup> ODPM, 'Consultation paper on Upward Only Rent Review Clauses in Commercial Leases' Summary of Responses.

<sup>162</sup> British Property Federation Upward Only Rent Review  
<[http://www.bpf.org.uk/en/files/bpf\\_documents/commercial/Upward\\_only\\_rent\\_reviews.pdf](http://www.bpf.org.uk/en/files/bpf_documents/commercial/Upward_only_rent_reviews.pdf)>  
accessed 7/12/2011

## CHAPTER 3 -ATTEMPTS AT REFORM

### 3.1 Introduction

The aim and structure of this chapter is to investigate the historical background and attempts at reform of commercial property leases. It distinguishes any particular influence, benefits, and awareness that those attempts may have had, as well as the relationship between those attempts and the use of standard form lease documentations. It concludes with an examination of whether those attempts help balance the risk and liability between owners (landlords) and occupiers (tenants) and their impact on standard lease documentation. The literature review highlighted the gap that would need to be explored and the significance of this thesis. There have been efforts in making commercial leases reader friendly, flexible, and simple, but without much significant success. The latest attempt has been a joint collaboration between professionals of the commercial property sector and the property industry bodies representing both owners and occupiers resulting in the Code for Leasing Business Premises in England and Wales 2007.<sup>163</sup> (See 3.4 below)

With regard to commercial property leases, the Law Commission has reviewed the system of giving security of tenure under the Landlord and Tenant Act 1954 Part II with recommendations<sup>164</sup> (3.2 below). The object of the Act is to give traders and professional persons a general right to retain their business premises so long as they comply with their obligations as tenants. Landlords are entitled to a full market rent, revised from time to time, and are not unreasonably prevented from regaining possession if they want the property for their own occupation or for redevelopment. This chapter will explore the Law Commission's previously recommended changes to the 1954 Act, which was implemented by the Law of Property Act 1969. The 1954 Act is an established part of the commercial property market and as the practices of that market develop and change over the years, it is appropriate for the statutory provisions to be reviewed from time to time to ensure

---

<sup>163</sup> Ibid 20

<sup>164</sup> Landlord and tenant HC 224

that they are still fulfilling their intended purpose. The LC have identified some features which experience has shown could benefit from change (See 3.2 below). The aim of LC reform proposals is to improve the working of the Act by amending some of its details while leaving its fundamentals undisturbed; this should increase its usefulness and eliminate unnecessary formalities.

The LC proposals for changes to the Landlord and Tenant Act 1954 may conveniently be split into a number of sections, dealing, with separate aspects of the working of the Act. The report consists of two parts. The first part describes the effect of those sections, and assesses each one against the standing order criteria applying to individual provisions: “burden,” “proportionality,” and “necessary protection.” The second part of the report assesses the proposal against the remaining criteria, which apply to the LC proposal as a whole. Briefly, they are as follows:

- (a) Tenant’s failure to repair;
- (b) Persistent delay in paying rent;
- (c) Other substantial breaches by the tenant;
- (d) Availability of suitable alternative accommodation;
- (e) The tenant is a sub-tenant of part of the property originally let and the landlord can obtain a better rent by re-letting the property as a whole,
- (f) The landlord’s intention to demolish or reconstruct the premises; and
- (g) The landlord’s intention to occupy the premises himself either for the purposes of his business or as a residence. The tenancy of a members’ tennis club has been held to be within the Act, since playing tennis is an activity that carried on by a body of persons. But for an individual, carrying on an activity is not enough. It must be a trade, profession, or employment. So a tenant who runs a free Sunday school in a shop is held to be outside the definition. Other examples include short fixed-term lettings not exceeding six months and certain other tenancies, such as agricultural holdings, mining leases, and service tenancies. Where the court grants a new tenancy for a period limited in accordance with a ministerial certificate that

on a certain date the use and occupation of the premises should change in the public interest, there is no right to renew the tenancy.

The 2007 Code for Leasing Business Premises ('the Lease Code')<sup>165</sup> attempts to provide a framework within which a prospective tenant can reasonably expect a landlord to operate. A potential tenant must not assume that a landlord complies with the Lease Code automatically. The Lease Code does not provide all of the protection that any prospective tenant needs for his business in leasing premises. The Code is voluntary and only advises the tenant that sometimes the person who is named as landlord on the lease agreement is also the tenant of another owner. This may restrict the flexibility of terms the landlord can offer. The voluntary code also makes recommendations to the landlord.

This chapter will investigate the Law Society Business Lease<sup>166</sup>. (See 3.5 below) Although the LS lease contains terms difficult to understand for ordinary landlords and tenants, it is a lease designed by the Law Society for relatively short terms of simple buildings, which helps to speed up the negotiation process. The Law Society asserts that it has done this by creating a neutral lease, which is a lease that is generally fair for both landlord and tenant. That said, it is still normal for a certain amount of customisation to be made to the lease, particularly concerning smaller premises where for example the repairing obligations may change or the rent review provisions may be altered. The Law Society Business Lease is ideal for lower value leases and a good application would be for a retail shop unit on the high street; shopping centres would in virtually every case have a standard centre lease covering service charges to repair and maintain the public areas.

Inquiry will be made into the British Property Federation, which played an important role in the production of a succession of lease codes that have not had much success. The BPF demands that members adopt and use the code, as well as join the BPF Commercial Landlords Accreditation Scheme (CLAS)<sup>167</sup>. The BPF also collects information on the terms (lengths) of leases, and provides a forum for

---

<sup>165</sup> Ibid 20

<sup>166</sup> Ibid 14

<sup>167</sup> Commercial Landlords Accreditation Scheme (CLAS) <<http://www.clascheme.org.uk/index.html> accessed> 15/12/2011

landlords and retail occupiers to discuss issues of concern. In recent years, one of the hottest issues has been whether occupiers can pay their rents on a monthly, rather than quarterly, basis. Service charges can be another bone of contention and the BPF support measures to lower costs and improve transparency. The recession has hit a lot of retail businesses hard, and a number have gone into administration or have taken steps to reduce the number of shop units that they occupy. This obviously has an impact on BPF landlord members.

This chapter will explore why the Land Registry relies solely on the information given in prescribed clauses when registering a prescribed clauses lease and when making entries in the registers in respect of rights created or reserved by the lease. It is in both parties' interests to ensure that the prescribed clauses are completed properly. Failure to submit a prescribed clauses lease in the correct form may result in rejection of the tenant's application for registration. Also, if the correct information is not provided in the prescribed clauses, this may result in the landlord's or the tenant's rights not being properly noted in the relevant title registers.

### **3.2 Law Commission Proposals**

The Law Commission was set up as the result of the Law Commissions Act 1965 for the purpose of promoting the reform of the law.<sup>168</sup>

In commercial property, the Law Commission has conducted two periodic reviews of the Act. In 1969, it published a report recommending some amendments,<sup>169</sup> which were implemented by the Law of Property Act 1969. In 1992, the Commission

---

<sup>168</sup> Law Commission, '*Seventh Programme of Law Reform*' (Law Com No 259, 1999) 435. The *Seventh Programme of Law Reform* was laid before Parliament by the Lord High Chancellor pursuant to section 3(2) of the Law Commissions Act 1965 and ordered by the House of Commons to be printed 15 June 1999.

<sup>169</sup> Parliament Publications Select Committee, '*Regulatory Reform Second Report*' <<http://www.publications.parliament.uk/pa/cm200203/cmselect/cmdereg/182/18205.htm>> accessed 26 November 2011

published a further report proposing the amendments that form the basis of the proposal. The Law Commission's report of 1992 states that the Landlord and Tenant 1954 Act is an established part of the commercial property market and, as the practices of that market develop and change over the years, it is appropriate for the statutory provisions to be reviewed from time to time to ensure that they are still fulfilling their intended purpose. Furthermore, the Commission identifies some features which experience has shown could benefit from change. The Law Commission keeps the whole of the law of England and Wales under review. Parliament has directed the LC to concentrate on the systematic development and reform of the law, and has drawn particular attention to the desirability of codification, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and, generally, the simplification and modernisation of the law.

In 1988, the LC published the Working Paper 2<sup>170</sup> in which it highlighted nineteen aspects of the legislation that might merit reform. Mrs. Sandi Murdoch, LL.M. Lecturer in Law at the University of Reading, assisted the LC in identifying these issues, and the LC received a considerable response, mainly from people and organisations that were professionally concerned with commercial property. This was particularly helpful, as the strong representation of practical users of the Act, whether as landlords, tenants or professional advisers, suggests that the LC can rely on their views with some confidence when seeking to discover how the operation of the legislation could be improved. The replies the LC received were analysed by Sir Wilfrid Bourne<sup>171</sup>, K.C.B, Q.C, who also helped the LC in the preliminary stages of their project.

In the LC Working Paper, the LC took the view that, on the whole, the Act was working well. This was consistent with the view of the Parliamentary Under-Secretary of State at the Department of the Environment who in 1985, after reviewing the responses to a departmental circular inquiring what issues

---

<sup>170</sup> Landlord and tenant HC 224

<sup>171</sup> Ibid

concerning the legislation should be reconsidered, concluded<sup>172</sup> that the balance between landlords and tenants of business premises was being properly maintained. However, the LC also said that, there are some matters causing concern to the users of the Act which, while they do not go to the heart of the legislation, but could be reformed.

Generally, those who responded<sup>173</sup> to the LC Working Paper had similar views: they supported the objectives of the Act and believed that it generally worked satisfactorily, although there were details that could be usefully amended. The LC should note, however, that a small minority argued that the legislation was no longer needed and that as there was no shortage of commercial property, a security of tenure regime imposed by statute was unnecessary.

The LC accepts the majority view that the Act should be retained and improved by adjusting its provisions. The LC proposals, therefore, concentrate on particular, and often technical, detailed areas that need improvement, rather than reconsidering the fundamental justification for, and structure of, this scheme. The LC reform proposals are designed to reinforce the smooth working of this practical piece of legislation, the fundamental principles of which would remain unaltered. Over two thirds of the LC law reform reports have been implemented in full or in part, and the Bills connected with all LC reports on consolidation and statute law revision have been implemented. In the Law Commission Programme of Law Reform<sup>174</sup>, the LC noted that of all the parts of the law on which the Law Commission had worked, Landlord and Tenant law had been the least successful in terms of implementation. For that reason, the LC did not recommend that any new work be undertaken in this field except to complete one outstanding project and to undertake what was necessary to facilitate the implementation of existing

---

<sup>172</sup> Ibid

<sup>173</sup> Ibid 169

<sup>174</sup> Law Commission Programme of Reform  
<[www.lawcommission.justice.gov.uk/docs/lc311\\_10th\\_Programme](http://www.lawcommission.justice.gov.uk/docs/lc311_10th_Programme)> accessed 19/11/2011

reports. The one item of work that fell into the latter category was the Consultative Document on Termination of Tenancies by Physical Re-entry<sup>175</sup>. This was prompted by concerns arising from earlier proposals on termination of tenancies, and, in particular, the proposal to abolish peaceable re- entry. In light of the responses that the LC received to that paper, the LC anticipates completing a revised version of the Termination of Tenancies Bill during the first year of the Seventh Program<sup>176</sup>.

The Law Commission recommends that an examination be made of the obligations of landlords and tenants in relation to the state and condition of the property let, and of the law of waste so far as it applies to tenants and licensees. To facilitate the implementation of the reports that the LC have previously published, the LC also recommends that an examination be made of such parts of the basic law of landlord and tenant as may appear appropriate with a view to their modernisation, simplification, and codification.<sup>177</sup>

The Commission's work is based on the research and analysis of case law, legislation, academic and other writing, law reports, and other relevant sources of information both in the United Kingdom and overseas. Its preliminary research seeks to establish the existing legal position here and, if appropriate, in comparable jurisdictions. It highlights the current shortcomings, and considers ways in which other jurisdictions have tried to overcome them, and ways in which commentators have suggested overcoming them. Usually the LC looks to the law of other common law jurisdictions and can often gain considerable assistance from the reports of their respective Law Commissions. The process of law reform draws out many new legal principles in accordance with the values of society. A systematic approach to law reform is necessary to ensure consistency in the law. The Commission takes full account of both of the European Convention on Human Rights and of European Community law. The European Convention has had a considerable effect on LC

---

<sup>175</sup> Consultation on Termination of Tenancies, Law Commission  
[http://lawcommission.justice.gov.uk/docs/cp174\\_Termination\\_of\\_Tenancies\\_Consultation.pdf](http://lawcommission.justice.gov.uk/docs/cp174_Termination_of_Tenancies_Consultation.pdf)  
accessed 06/12/2011

<sup>176</sup> Ibid 168

<sup>177</sup> Ibid

work for some years and it is taken into account when formulating LC recommendations. Anticipating human rights issues has become more important for the LC's work following the implementation of the Human Rights Act 1998. The Law Commission is conscious of the increasing significance of legal initiatives within the European Union. For example, the LC seek to reflect the increasing momentum towards the harmonisation of legal principles within the European Union by focusing more on civil law jurisdictions when undertaking comparative studies in their publications. In the past, the Commission has also played a significant role in the reform of private international law and, subject to resources, is available should its assistance be sought with respect to the Hague Conventions or other similar matters.

Once the Commission has published its report, if the department is minded to recommend to Ministers to reject a significant part of it, the department now generally gives the Commission their reasons, and the opportunity to comment before they finalise their advice for the Ministers. The department also endeavours to ensure that decisions about implementation of the report are made as soon as possible. The Commission has been playing an increasingly larger part in assisting the Government, not only when it is considering the Commission's recommendations, but also when the Commission's Bills are being prepared for implementation by Parliament and in support of the legislation during the legislative process. The Commission and the draftsmen at the Commission frequently assist the Government department responsible for the Bill. The LC believes that this is an important contribution that they should make as a permanent law reform body. It also helps to minimise duplication of work. The Commission provides high quality, relevant, and timely legal advice on law reform to the Lord Chancellor and the Government.

### **3.3 Government led reform**

In contrast with residential property, legislative intervention in the commercial property market has been rather limited. Save as a small number of brief measures introduced to cope with supply imbalances, there have been no attempts to control

rents of commercial premises in the same way that successive Residential Rent Acts have been used to regulate, the rents that private landlords may charge in respect of residential premises. Legislation addresses the weakness of business tenants on the expiry of their leases and restricts the way landlords may seek to control tenants' powers of disposition. However, the general tendency has been to leave the regulation of commercial leases to market forces and, more recently reliance to the voluntary codes of practice, without much success. Nevertheless, tenant dissent has, on occasion, been voiced, particularly during recessionary periods.

### **3.3.1 Chronology of Government led Regulatory Reform Order 2004**

The following, are the main milestones in the evolution of Government led Regulatory Reform Order 2004:<sup>178</sup>

- a) In 1954, the Landlord and Tenant Act was enacted
- b) In 1969, the Act was amended, primarily to allow contracting out and to provide for interim rent
- c) No evidence of significant attempts at reform followed over the next twenty years, apart from some small changes arising out of rating revaluations
- d) The Law Commission conducted a consultation on reforming the Act in 1988
- e) In 1992, the Law Commission reported with recommendations (paper HC 224),<sup>179</sup> including draft amendments to the Act.
- f) In November 2000, the Minister for Housing and Planning, Nick Raynsford MP, announced the Government's intention to use the Regulatory Reform Act<sup>180</sup> to implement a number of the Law Commission's recommendations.

---

<sup>178</sup>Regulatory Reform Order 2004 N0 208 <<http://www.official-documents.gov.uk/document/hc9293/hc02/0224/0224.pdf>> accessed 17 November 2011

<sup>179</sup> Landlord and tenant HC 224  
<[www.official-documents.gov.uk/document/hc9293/hc02/0224/0224](http://www.official-documents.gov.uk/document/hc9293/hc02/0224/0224.pdf)> accessed 28/11/2011

- g) In March 2001, the Government conducted a public consultation.
- h) Subsequently, the Government at that time started work on the regulatory reform process, including setting up a sounding board of experienced property and legal professionals to help them on the more technical details.
- i) In July 2002, the Regulatory Reform Order proposals were put before the appropriate Parliamentary Committees.
- j) In December 2002, the House of Lords Committee insisted that research be conducted to determine whether the court process afforded protection to tenants who had agreed to take “contracted out” leases.
- k) In August 2003, the results of that research were published by the University of Bristol and Sheffield Hallam University. Their findings revealed that no protection to the tenant was evident.
- l) The Regulatory Reform Order (RRO) was re-presented to Parliament in September 2003.
- m) The RRO was passed on 1 December 2003.
- n) The RRO came into force on 1 June 2004.

On 1 June 2004, the Regulatory Reform (Business Tenancies) (England and Wales) Order 2003, SI number 2003/3096 (“the Order”)<sup>181</sup> came into effect, reforming the procedures for renewing and terminating business tenancies in England and Wales under Part II of the Landlord and Tenant Act 1954 (“the 1954 Act”). During

---

<sup>180</sup> Ibid 178

<sup>181</sup> Regulatory Reform Order, ‘Regulatory Reform of LAT Act 1954 Part II’  
<<http://www.legislation.gov.uk/ukSI/2003/3096/made>> accessed 15 November 2011

consideration by the House of Commons Regulatory Reform Committee<sup>182</sup>, the Office of the Deputy Prime Minister (ODPM) undertook to review the impact of the reforms once they had been in effect for one year, and to report back to the Committee. The ODPM, now the Department for Communities and Local Government, has reviewed the impact of the reforms with the assistance of a panel comprising commercial property stakeholders, professional bodies, property lawyers and practitioners. This report deliberates the effectiveness of the reforms in the light of panel's considerations and other feedback, which makes certain recommendations for further improvements. The Department has also received some useful feedback from a forum hosted by Lovell's<sup>183</sup> on behalf of the Property Litigation Association<sup>184</sup>, held on 22 November 2005. The Forum was held after Lovell's had carried out a survey of members of the Property Litigation Association, the Royal Institution of Chartered Surveyors, and the Chancery Bar Association<sup>185</sup>, from which they received 231 responses almost evenly split between lawyers and surveyors.

Current Government policy is that business tenants should normally have a statutory right to renew their tenancies (security of tenure). There is however no objection to the parties agreeing to exclude security of tenure provided that the tenant is aware of the implications of doing so. The provisions for excluding security of tenure (also known as "contracting out") are intended to achieve that end. The 2004 reform order abolished the need for landlords and tenants to obtain prior court approval for agreements to exclude security of tenure. Research commissioned<sup>186</sup> by the ODPM in 2003 confirmed that, beyond checking that applications were legally and technically sound and that the tenant (if not legally represented) have had the opportunity to take legal advice, the courts did not exercise any discretion in deciding whether or not to approve agreements to exclude security of tenure. Earlier,

---

<sup>182</sup> House of Common, 'Regulatory Reform Committee' <<http://www.parliament.uk/business/committees/committees-archive/odpm/>> accessed 15 November 2011

<sup>183</sup> Hogan Lovell, 'Legal Practice' <<http://www.hoganlovells.com/zena-canale>> accessed 15 October 2011

<sup>184</sup> Property Litigation Association, 'Mediation' <[http://www.pla.org.uk/directories/registered\\_mediators](http://www.pla.org.uk/directories/registered_mediators)> accessed 15 November 2011

<sup>185</sup> Chancery Bar Association, 'Regulatory Reform 2004' <<http://www.chba.org.uk>> accessed 16 November 2011

<sup>186</sup> Ibid 182

the Law Commission had concluded that the court process did not afford a real scrutiny of the circumstances, fairness or integrity of application and that application to the court, to approve agreements that the statutory renewal rights, should not apply to leases about to be granted were not an effective, filter, to prevent abuse of what is generally assumed, to be the landlord's dominant position.

The reforms<sup>187</sup> substituted a new procedure for validating agreements to contract out, providing new safeguards for tenants. The landlord now has to serve a warning notice on the prospective tenant before she is committed to taking the lease. The notice warns the tenant of the implications of agreeing to give up statutory renewal rights. Before signing the lease or tenancy agreement, the tenant must sign a declaration that she has received the warning. The Order provides for alternative types of declaration by way of a simple declaration that may be used where the tenant is given at least fourteen days advance warning. The tenant (or a duly authorised representative) merely has to sign a declaration confirming that he has had fourteen days advance warning, has read the notice and accepts the consequences of entering into an agreement to exclude security of tenure. The intention was that wherever possible, tenants would be given the full fourteen days advance notice, so that they would have a realistic opportunity to consider possible alternative arrangements if, on reflection, they decided that they would prefer to obtain lease renewal rights. A Statutory Declaration could be used without any requirement for the tenant to have had fourteen days advance warning. This is a more onerous procedure, as it requires the tenant (or a duly authorised representative) to sign the declaration before an independent solicitor or other person qualified to administer, referred to as commissioner of oaths. The tenant has to declare that he has received and read the warning notice and accepts its consequence.

---

<sup>187</sup> Ibid 182

### 3.4 Code for Leasing Business Premises 2007

A revised Code of Practice was launched in March 2007 called the Code for Leasing Business Premises 2007.<sup>188</sup> The Code mainly consists of three parts: The Landlords Code, The Tenant's (Occupier) Guide, and the recommended Heads of Terms. The Code focuses on recommendations for the landlord in the negotiation and drafting of commercial leases. A Commercial Lease (business lease) remains a binding contract between the legal landlord, who is usually the owner, and the tenant, who is the occupier. Disputes will arise as the result of any party's failure to comply with the terms of the agreement.

In January 2009, the Government reiterated<sup>189</sup> its commitment to monitoring the use and impact of the Code. The Government remains committed to lease reform and have not ruled out legislation as an option. The Communities and Local Government (CLG) published initial research on the impact of the Code in July 2009, monitoring the 2007 Code for Leasing Business Premises<sup>190</sup>.

The aim of the research into the impact of the 2007 Code was to establish:

- a) To what extent the 2007 Code for leasing business premises has been disseminated into the market, as demonstrated by awareness of it among landlords and tenants and their advisors;
- b) The extent to which the Code is being used in negotiations;
- c) Sources of advice to tenants on the Code; and
- d) The perceptions of landlords, tenants, and their advisors on the impact of the code on leasing

---

<sup>188</sup> Ibid 20

<sup>189</sup> Business Tenancies Rent Review [Parliament.uk/briefing-papers/SN00849](http://Parliament.uk/briefing-papers/SN00849)

<sup>190</sup> Ibid 20

Disappointingly, the findings of the above mentioned report stated that there was no evidence that the awareness levels of the 2007 Code are any better than they were for the 2002 Code. In fact, significant difference tests on the questionnaire results suggested that Code awareness has slipped back for small business tenants, while also showing poor awareness of the 2007 Code within the small landlord sector. In the previous survey, over 90 per cent of all landlords knew about the 2002 Code and there were no significant differences in the answers from small and large landlords. But, in the current study, less than 40 per cent of regional landlords surveyed professed to knowledge of the Code, setting them apart from the more aware major landlords and local authority respondents.

It is rather confusing and difficult to determine the reason for this lack of progress, but it is apparent that there is a major distinction between large and small businesses rather than between landlords and tenants. The code has failed to reach small businesses and achieve any improvement in the dissemination and awareness of the code. The survey carried out by Reading University, appointed by the Government team although, interviewed limited number of solicitors and agents, nevertheless, some clear findings emerged which further confirm the lower impact of the 2007 Code than the 2002 edition. Representatives of these professions suggest<sup>191</sup> that there is a lack of knowledge and use of the 2007 Code among the property industry as a whole. A clear majority seemed to be unaware of the introduction of the new Code. Their Code knowledge appeared to stem from the previous Code and the extensive property press discussion that accompanied that document. This is despite the efforts of their professional institutions to inform and disseminate information about the new Code 2007. In that report<sup>192</sup> as stated, the vast majority of interviewees suggested that the number of times the Code is specifically referred to in negotiations is very small, ranging from none to a handful of cases. In the report<sup>193</sup>, the findings further highlighted that the tenant survey confirmed the lack of use of the Code, suggesting that out of the 226 tenants who negotiated<sup>194</sup> their own

---

<sup>191</sup> Ibid 46

<sup>192</sup> Ibid

<sup>193</sup> Ibid

<sup>194</sup> Ibid

leases, 19 per cent knew about the Code but less than 10 per cent said it was specifically referred to in negotiations. The landlords confirm that small business tenants rarely refer to the code in negotiations, and suggest that larger tenants are more likely to do so.

Tenants use a variety of sources for business advice and, specifically, more detailed property advice. Although 62 per cent of the tenants surveyed<sup>195</sup> use solicitors, the solicitor interviewees suggested that they generally were not involved until after the tenant had agreed the heads of terms with the landlords. Therefore, new tenants would only be aware of the Code if reluctant letting agents informed them of it or if other sources were used. The questionnaire survey of tenants justifies the fact that few people gain information about the Code from wider sources. 25 per cent of landlords suggested that they always or usually tell tenants about the Code. Although this is more than would be suggested by the tenant's survey, this may be explained by the number of major landlords contained in the landlord's survey, who may refer to the Code in their particulars. Along with local authorities, major landlords claim to tell tenants about the Code more often than the regional landlords, who virtually never tell their tenants.

Both interviewees and tenant respondents suggested<sup>196</sup> that letting agents did sometimes act as a source of advice or information for tenants. However, the majority of letting agent interviewees did not see it as their responsibility to advise or disseminate the Code to tenants, nor did the solicitors. The representatives of their professional bodies made it clear that it was not in the remit of either organisation to make mandatory the use or dissemination of a voluntary code by their members. While the RICS is promoting its use by members as best practice, the interests of clients are seen as paramount by both the RICS and the Law Society. This would seem to limit the Code's dissemination, despite being written and agreed by a wide range of interested parties.

---

<sup>195</sup> Ibid 46

<sup>196</sup> Ibid

### **3.4.1 How Landlords and Tenants view 2007 Code?**

The Code is not a primary tool used in the negotiation of new leases between landlords and tenants. The exception to this was found to be in the hands of certain solicitors acting for major tenants. Otherwise, it is occasionally used by tenants to reinforce a specific term or issue being negotiated at the legal stage. Letting agents in particular expressed the view that, at the time of the interviews, tenants could negotiate good terms with landlords. Lease terms were seen by landlord and tenant as market driven, and landlords as being flexible to induce tenants, to take leases in a difficult market. This was allied to the general opinion<sup>197</sup> that the Code was unnecessary as the market could achieve its own balance and that leases were now flexible and fair! However, a small set of interviews do suggest that the Code informs the leases of major landlords and provide the parameters for tenants' amendments. Some interviewees saw it as a symbol of the move to more flexible lease terms for tenants.

### **3.4.2 Trade, press, and legal publications views of the Code 2007**

Well in advance of the publication of the 2007 Report, the Code was substantially discussed and debated in the professional and trade press and in property-related sectors. The debates and discussions focused on the analysis of the Code's provisions,<sup>198</sup> particularly the points of disparity with the second edition of the Code<sup>199</sup> and the probable brunt in practice, together with the possibility of legislative intervention. Due to the disappointment of the two earlier editions of the Code, most of debate followed the same prototype. Following an initial deliberation of the 2007 edition of the Code, the predictable question has been raised asking if the 2007 version of the Code was more successful than the former codes and is it time for

---

<sup>197</sup> Ibid 46

<sup>198</sup> Theresa Edmund, 'A ticket to effective negotiations' Article EG (18 April 2003)

<sup>199</sup> J Joyce, 'Key Changes of leasing business premises in England and Wales'  
<<http://www.bpf.org.uk/whoweare/commercialleases>> accessed on 25 October 2011

legislative intervention<sup>200</sup>. Legal<sup>201</sup> and other journals<sup>202</sup> have taken on a similar<sup>203</sup> approach.<sup>204</sup> Specific and detailed study of the Code's requirements have been insignificant, albeit Clark did carry out a detailed study of authorised and unauthorised alterations and repairing covenants in the context of their relationship with the Code.<sup>205</sup> Mostly, the main commentaries on LAT law have formed an opinion about the Code 2007 seemingly without some in-depth deliberation. Hill and Redman<sup>206</sup> contends' that the Code "is designed to be particularly of use to small businesses." Notwithstanding, this claim may reproduce concerns regarding the earlier editions of the Code, which accordingly failed to make an impact on Small to Medium Enterprises (SMEs), thus ignoring the helpful role of organisational landlords and larger tenants, particularly retailer chains, in the production and distribution of the Code 2007. While it refers to the second edition of the Code as being a significant factor in ensuring that landlords do not adopt an irrational stance in offering heads of terms or drafting leases, it is careful in advising landlords and their advisers in making leases Code compliant. Though it considers that the full repairing and insuring lease under which the landlord receives a clear rent with all obligations having been handed over to the tenant continues to set the standard, reports on title and certificates of title remain in forms that highlight departures from this arrangement. Wellings fails to make any reference to the Code at all,<sup>207</sup> whilst, elsewhere, consideration of the Code is also fleeting, despite a comprehensive discussion of drafting issues that takes full account of the likely concerns of any

---

<sup>200</sup> Mark Jansen, 'Accredit where it's due' Property Week (27 July 2007)

<sup>201</sup> Mark Shepherd, 'Clause and effect' Property Week (29 September 2006)

<sup>202</sup> Richard Daffern, 'New Commercial Lease Code —third time lucky'  
<[www.pinsentmasons.com/PDF/RetailLawIssue3](http://www.pinsentmasons.com/PDF/RetailLawIssue3)> accessed 21 November 2011

<sup>203</sup> Pinsent Masons, 'Retailaw, "Third time lucky for lease code?"' Wright Hassall Spring/Summer 2007

<sup>204</sup> Katherine Fenn, 'New commercial lease code' (2007) 11(1) L. & T. Review 1-2;

<sup>205</sup> Paul Clark, "L. & T. Review: Precedent's page (September/October)" (2008) 12(5) L. & T. Review 180-187

<sup>206</sup> Michael Barnes, *Hill & Redman's Guide to Rent Review* (Butterworths Publishing 2001)

<sup>207</sup> V G Wellings, *Law of Landlord and Tenant* (Sweet & Maxwell, 2007)

prospective tenant.<sup>208</sup> Other, more customer facing publications have taken a more positive stance. Abbey and Richards, for example, make reference throughout their text to the Code, advising that tenants' should expect confirmation during negotiations that the terms are Code-compliant.<sup>209</sup> Similarly, Bell<sup>210</sup> stresses the importance of the Code, advising landlords that they risk getting a lower rent on grant, review, or renewal if they fail to take account of its recommendations, and suggesting tenants use it as leverage in negotiations. Works aimed specifically at tenants, their advisers, or others amending draft leases perhaps predictably,<sup>211</sup> also offer better coverage. Bamford<sup>212</sup>, acknowledging the fourth recommendation of the second edition of the Code for flexibility, states that the landlord should consider offering tenants a choice of length of term, including break clauses where appropriate, and options to exclude or include protection under Part II of the 1954 Act. Detailed consideration is given to how the Code impacts on particular covenants and lease terms, including insurance, repair, alienation, break clauses, and rent reviews.

The overwhelming evidence<sup>213</sup> suggests that awareness of the 2007 Code of practice is not high. It does not appear to match even the limited awareness of the previous Code. However, where there is awareness,<sup>214</sup> the 2007 Code is thought to be a more useful document than previous editions that can be used in negotiations. The problem of dissemination to small tenants and small landlords remains. There is no coherent strategy in place for disseminating the lease Code to these individuals, yet we have

---

<sup>208</sup> J Bignell, *Drafting Business Leases* (7<sup>th</sup> edn Sweet & Maxwell 2007)

<sup>209</sup> R Abbey and M Richards, *A Practical Approach to Commercial Conveyancing and Property* (4<sup>th</sup> edn, Oxford University Press 2009) para. 1.4, p. 24

<sup>210</sup> T Bell, *Drafting and Negotiating Commercial Leases* (5<sup>th</sup> edn, loose-leaf update to November 2008, Butterworth's 1995) para. A75

<sup>211</sup> *Ibid*

<sup>212</sup> Karl Bamford, *Amending a Commercial Lease* (3<sup>rd</sup> edn, Tottel Publishing 2007)

<sup>213</sup> *Ibid* 46

<sup>214</sup> *Ibid*

found general agreement that they would benefit most. General sources<sup>215</sup> of advice to business start-ups and small tenants do not appear to be being used for leasing information, nor is the 2007 code always readily available on websites. It appears the first property contact, for a prospective small business tenant, who typically does not take property advice, would be a letting agent or a landlord. Neither of these is bound to give out copies of the Code at the outset of contact. The RICS, although recommending that their members give out the Code to prospective tenants, have argued that they cannot make such actions mandatory. It is difficult to see any major improvement to the situation.

Organisations responsible for larger landlords, corporate tenants, and professional advisors have put in place mechanisms<sup>216</sup> by which they have fully endorsed the Code and ensured that their members are fully aware of the Code and its contents. However, despite this, it would appear that many, possibly a majority of, transactions take place in complete ignorance of the Code's existence, and while the majority of transactions take place in the small business sector, there appears little prospect of this improving.<sup>217</sup> However, there are still indications that upwards-only rent reviews have not been consigned to history. Lease lengths are reportedly<sup>218</sup> getting shorter and break-clauses are becoming more common. Writing for *Estates Gazette*, William Boss, real estate partner with SJ Berwin LLP, remarked on market conditions at the end of 2009:

...tenants, both new and existing, seem to accept that the upward-only rent review is a necessary part of the property market. The market has found other ways to adapt to allow the parties to find deal terms that reflect market conditions. The well-rehearsed arguments in favor of upward-only reviews, namely security and certainty, are winning the day.<sup>219</sup>

---

<sup>215</sup> Ibid

<sup>216</sup> Ibid

<sup>217</sup> Ibid

<sup>218</sup> Ibid

<sup>219</sup> *Estates Gazette*, 'Come on down the price is right' (28 November 2009) <<http://www.estatesgazette.com/egi>> accessed 14/11/2011

The above does not come as surprise and remains disappointing as the main objective and aim of the Code in its original form was to promote fairness in commercial leases and bring about an increased “*awareness*” of property issues, especially among small businesses at the same time, ensuring that occupiers of business premises have the information necessary to negotiate the best deal available to them. Most importantly, the Code was launched with an objective to ensure that parties to a lease have easy access to information explaining the commitments that they are making in clear English. The Code claims that it encourages trades, professional bodies, lenders and the government at all levels to ensure small businesses are made aware of the Code and the advisory pages which accompany it. Notwithstanding the fact that the Code primarily applies to new business leases, the British Property Federation (BPF)<sup>220</sup> declaration also applies to existing leases, specifically in relation to applications for consent to sublet where there is an existing lease covenant requiring subleases to be at the higher of the passing rent and the market rent. The Code’s was also designed to help the industry in its pursuit of promoting efficiency and fairness in Landlord and Tenant relationships by simplifying commercial leases.<sup>221</sup> The Code did attempt to address this mainly through The Landlords Code, The Tenant’s (Occupier) Guide, and the recommended Heads of Terms, evidently with not much success.

Some other efforts spearheaded by organisations like The British Retail Consortium<sup>222</sup> have been launched in support of monthly rather than quarterly rent payments in an effort to make terms of commercial leases easier. Notwithstanding the fact that upwards-only rent reviews remain divisive, earlier editions of the Code failed miserably to make any significant impact on the commercial property market.<sup>223</sup>

---

<sup>220</sup> British Property Federation, ‘Business leases’ <<http://www.bpf.org.uk/>> accessed 20 October 2011

<sup>221</sup> Ibid 20

<sup>222</sup> British Retail Consortium ‘Rent Payment Commercial Leases’ <[http://www.brc.org.uk/brc\\_home.asp](http://www.brc.org.uk/brc_home.asp)> accessed 19 October 2011

<sup>223</sup> RICS Research Foundation, ‘The Cutting Edge 2000’ <<http://www.rics.org/site/download>> accessed 20 October 2011

The monitoring reports by the Office of the Deputy Prime Minister<sup>224</sup> and DETR have indeed reported on the low impact of the previous Codes, albeit they assert that some improvement in flexible leasing had been achieved.

However Peta Dollar suggests that the impact of the latest edition of the Code has achieved simpler and more flexible lease documentations.<sup>225</sup> Would this be the case if the Code was applied to start with or is this grey area?

The majority of interviewees in the 2009 report suggested that the number of times the code is specifically referred to in negotiations is very small, ranging from none to a handful of cases since the Codes were introduced. The exception to this is use by certain solicitors advising major tenants. This lack of use is confirmed by the tenant survey in the above report which suggests that out of the 226 tenants who negotiated their own lease, 19 per cent knew about the Code but less than 10 per cent said it was specifically referred to in negotiations. The landlords confirm that small business tenants rarely refer to the Code in negotiations, but suggest that larger tenants are more likely too. However, even within larger tenant's category, around 60 per cent of landlords suggested that it was seldom or never referred to in negotiations. Overall, references to the Code in negotiations were usually general and often to the Landlord Code. Tenants obviously use a variety of sources for business advice. Although 62 per cent of the tenants surveyed use solicitors as the first source of advice, the solicitor interviewees suggested that generally they were not involved until after the tenant had agreed heads of terms with landlords. Therefore, new tenants would only be aware of the Code if letting agents informed them of it or if other sources were used. The questionnaire survey of tenants suggests that few people gain information about the Code from wider sources. 25 per cent of landlords suggested that they always or usually tell tenants about the code. Although this is more than would be suggested by the tenants' survey, this may be explained by the number of major landlords contained in the landlords' survey, who may refer

---

<sup>224</sup> ODPM 'Consultation Paper on Upward Only Rent Review Clauses in Commercial Leases Summary of Responses June 2005.'  
<<http://www.communities.gov.uk/documents/regeneration/pdf/131333.pdf>> accessed on 20/10/ 2011

<sup>225</sup> Peta Dollar, 'Looking Back' (2007) 11(6), L. & T. Review 175-176

to the code in their particulars. Along with local authorities, major landlords claim to tell tenants about the code more often than the regional landlords, who virtually never tell their tenants.

The above report further suggests that letting agents did sometimes act as a source of advice or information for tenants. However, the majority of letting agent interviewees in the report did not see it as their responsibility to advise or disseminate the Code to tenants, nor did the solicitor interviewees. The representatives of their professional bodies made it clear that it was not in the remit of either organisation to make mandatory the use or dissemination of a voluntary code by their members. While the RICS promotes its use by members as best practice, the interests of clients are seen as paramount by both the RICS and the Law Society. This would seem to limit its dissemination, despite being a code written and agreed by a wide range of interested parties. The evidence suggests that small business tenants are unlikely to receive any substantive information on the Code from any source, particularly where the landlord is also a small business.

The 2009 report<sup>226</sup> further confirms that the code is not a primary tool used in the negotiation of new leases. The exception to this is where certain solicitors act for major tenants. Tenants also occasionally use it to reinforce a specific term or issue being negotiated at the legal stage. Letting agents in particular expressed the view that, at the time of the interviews, tenants could negotiate good terms with landlords. Lease terms were seen as market driven and landlords as being flexible to induce tenants to take leases in a difficult market.

### **3.5 Law Society Business Lease**

A new edition of the Law Society Business Lease was published in 2008.<sup>227</sup> It is designed to comply with the latest Code for Leasing Business Premises. The advent

---

<sup>226</sup> Ibid 46

<sup>227</sup> Law Society Business Lease  
<<http://www.lawsociety.org.uk/newsandevents/news/view=newsarticle.law?NEWSID=314002>>  
accessed 21 November 2011

of the voluntary Law Society Business lease in 2008 has contributed to simplifying certain short leases and raised awareness of the Code for leasing business premises. However, the Law Society does refrain from making, their, own lease compulsory and contends that the Solicitor's Code of Practice would suffice, thus giving lawyers a free license to continue unregulated lease drafting in the traditional voluntary manner. The Law Society lease follows and relies upon the precedents, principles, and procedures of the early Acts. The Law Society has prepared the new versions of the standard business leases, primarily to also accommodate the prescribed clauses leases referred to in the Land Registration (Amendment) (No 2) Rules 2005<sup>228</sup>, although there are a number of other minor changes. The new and different versions of the lease documents are:

- a) The Law Society Business Lease (Part of Building) (Unregistered) 2006
- b) The Law Society Business Lease (Part of Building) (Registered) 2006
- c) The Law Society Business Lease (Whole of Building) (Unregistered) 2006
- d) The Law Society Business Lease (Whole of Building) (Registered) 2006

The leases were first published by the Law Society in 1991. Since then, the leases have been revised in 1996, following the Landlord and Tenant (Covenants) Act 1995, and in 2006, following the Land Registration (Amendment) (No 2) Rules 2005, which introduced prescribed clauses in registerable leases. The current editions of the Law Society leases were updated in 2008, with amendments to allow the leases to comply with the Code for Leasing Business Premises. The Law Society leases are drafted and are intended to be concise, fair, and acceptable to both parties. They are suitable for lettings of up to ten years duration, where the nature of the property and the amount of rent makes it appropriate to use a concise standard form. Certain leases are registerable under the Land Registration Rules. If a lease is registerable, it must contain prescribed clauses. The Law Society Business Lease can be used for office space and warehousing, and there is also the option of using the Law Society Business Lease of Part, which, as the name suggests, is for when a part

---

<sup>228</sup> The Land Registration (Amendment) (No 2) Rules 2005  
<<http://www.legislation.gov.uk/ukSI/2005/1982/contents/made>> access 23/11/2011

of a premises is being let, for example a floor of a building. In the circumstances when a lease is seven years or over, the lease needs to be registered. This is in the tenants' interest as it will protect their tenancy at the Land Registry.

The Landlord and Tenant Act 1954's main provision is in relation to security of tenure. It was decided that when a business tenancy was entered into, the tenant should have the automatic right to renew the tenancy at the end of the term. This is on the basis that if a business has built up goodwill by virtue of its location, the landlord should not be able to take advantage of that goodwill and hold the tenant to ransom in subsequent lease negotiation. If, however, at the start of the lease negotiation process, it is decided that a lease should be 'excluded' from the security provisions of the Act, the tenant can sign a waiver by means of a statutory declaration to give up the right to automatic renewal. If this process is not followed correctly, then the lease will automatically be 'included' within the Act and the tenant will have the automatic right to renew the lease at the end of the term.

### **3.6 British Property Federation (BPF) Lease**

The British Property Federation is a trade association for the property industry and represents owners and investors in commercial and residential property. It is a membership organisation representing the interests of all those involved in property ownership and investment. The BPF's aim is to create the conditions in which the property industry can grow and thrive for the benefit of their members and of the economy as a whole.<sup>229</sup> The membership includes the biggest companies in the property industry: property developers and owners, institutions, fund managers, investment banks and professional organisations that support the industry. The BPF asserts<sup>230</sup> that they are able to provide the knowledge and expertise needed by legislators (the UK government) and regulators, including various financial, planning and environmental bodies, in taking their decisions. BPF members can help the government deliver many of its policies, particularly those involving urban

---

<sup>229</sup> British Property Federation 'Business Lease'  
<[http://www.bpf.org.uk/en/about\\_us/who\\_we\\_are.php](http://www.bpf.org.uk/en/about_us/who_we_are.php)> accessed 11 November 2011

<sup>230</sup> Ibid

regeneration, sustainable communities, social inclusion, tax efficient property investment, savings and pensions reform, carbon reduction, and environmental improvement.

The BPF short term commercial lease was designed to make life easier for landlords, tenants, and their advisers. The lease can be used by businesses wishing to occupy commercial property for a relatively short period. The lease used to be available in a software form, allowing a bespoke lease to be built for individual tenants. However, this service is no longer available from the firm that used to provide it. Commercial leases are agreements struck between landlords and occupiers for the provision of commercial property space. It is essential that these agreements are both fair and flexible for both parties, so they can operate their businesses successfully. Although there have been a number of developments in recent years covering the terms and lengths of leases, issues still remain. The BPF releases an annual lease review, together with other changes in the market<sup>231</sup>, such as the greater use of break clauses and flexible leasing products. There is now a greater degree of flexibility within the commercial property market than has existed before. The recession has brought to a head the difficulties some occupiers, particularly retailers, are facing with their cash flow. Rent, traditionally paid quarterly in advance, can take a big bite out of their available cash, which has pushed many occupiers to seek ways to manage, and even reduce, their rent payments.

Occupiers, who have had to show greater understanding and flexibility to retain and win customers in the current economic climate, are increasingly expecting the same from their landlords. Monthly rents are one of the major areas that retailers have been pushing for, as they would enable them to more evenly balance their cash flow. While landlords may be able to accommodate these wishes in some circumstances, it is not always an easy process. The landlords themselves will have payment obligations to keep, which may be dependent on receiving rent on a quarterly basis. The rent level would have been set taking account of the interest the landlord would earn on the rent received, so moving to monthly payments would result in a loss of interest. This would probably need to be reflected in a recalculated monthly rent.

---

<sup>231</sup> BPF Annual Lease Review 2012

<[http://www.bpf.org.uk/en/files/bpf\\_documents/commercial/BPF\\_IPD\\_Annual\\_Lease\\_Review\\_2012.pdf](http://www.bpf.org.uk/en/files/bpf_documents/commercial/BPF_IPD_Annual_Lease_Review_2012.pdf)> accessed 22/05/2012

However, the impact of the recession, particularly on retailers, has meant that some occupiers have long leases signed many years ago that are not as flexible as they would now wish. This can be a cause of discord between the occupiers and their landlords.

The British Property Federation's short-term commercial lease,<sup>232</sup> with the related agreement for lease, aims to provide landlords and tenants with straightforward, industry standard documentation, to cover short term commercial lettings of property, typically a few months but possibly up to two or three years. With a short term commercial letting, the landlord should be in a position to use his knowledge and experience of the property to produce a package which, so far as is possible, does not give rise to any unexpected costs to be paid by the tenant. Accordingly, the BPF short term commercial lease provides an option for the rent to be inclusive of rates. It also contains no service charges and places the obligation to repair the premises on the landlord. The BPF asserts<sup>233</sup> that landlords will be increasingly willing to offer such an all-inclusive product with short term commercial lettings. Some of those terms include: to keep the tenant's obligations short and to the point; the lease deliberately omits a number of the typical provisions found in longer leases. For example, there is no obligation on the landlord to insure the premises, which obviously creates a risk, due to the possibility of the tenant's failure to insure. The BPF demands<sup>234</sup> that landlord remains contractually obliged to repair the property, and many are likely to wish to insure against the costs of repairs arising from accidental damage; others may wish to carry this risk themselves. Whichever option the landlord prefers, the costs will be included within the proposed rent, which will remain fixed for the period of the lease.

The BPF lease (and the related agreement for lease) provide for the letting to be granted without security of tenure. This means that when the lease expires, the tenant will not have the legal right he would normally have under the Landlord and Tenant Act 1954 to apply to the Court for a new tenancy. The removal of this right does not

---

<sup>232</sup> British Property Federation, 'short term leases' <[www.bpf.org.uk/.../commercial/Short term commercial lease](http://www.bpf.org.uk/.../commercial/Short%20term%20commercial%20lease)> accessed 12 November 2011

<sup>233</sup> British Property Federation (BPF) Revised draft - 23:11:98  
<[www.bpf.org.uk/en/files/.../Short\\_term\\_commercial\\_lease\\_2\\_2.doc](http://www.bpf.org.uk/en/files/.../Short_term_commercial_lease_2_2.doc)> accessed 15/11/2011

<sup>234</sup> Ibid

stop the landlord and the tenant from agreeing to a new lease at the end of the tenancy, but this can only occur if both the landlord and the tenant so wish. Landlords must note that, if the tenant remains in occupation after the end of the tenancy, there is a possibility that a new tenancy will be created and that the new tenancy will have security of tenure under the 1954 Act.

Tenants wanting the guarantee, that they can remain in the same business premises once the initial lease has expired, should consult their professional advisers about seeking other premises where such terms are on offer. In such cases, the terms and conditions in the lease are likely to be substantially different from those in the BPF short term commercial lease, particularly with regard to the nature and extent of the obligations placed on the tenant. Careful reading of commercial property leases in England and Wales, and seeking appropriate professional advice, remain vital for both sides. The BPF short term commercial lease has been designed to be capable of being used for the temporary occupation of all types of property, from a temporarily vacant shop in a parade, to a short lease of office premises pending redevelopment. The lease has been drafted for flexibility, being capable of being used for whole buildings as well as parts of buildings and units on an estate.

The short term commercial lease contains a number of blanks that landlords and tenants must ensure are completed before the lease is signed. Similarly, for business rates, two options are provided. Landlords and tenants must ensure that the clause that will NOT apply is deleted. The short term commercial lease and agreement for lease have been published following extensive consultation with a number of bodies representing property interests, including tenants.

### **3.7 Land Registry Prescribed Clauses “Leases”**

The Land Registry issued a consultation document entitled Presentation of Prescribed Information in Registerable Leases in September 2004.<sup>235</sup> That document itself derived from responses the Land Registry had received to a consultation that it had undertaken in advance of the Land Registration Act 2002 coming into force. The

---

<sup>235</sup> Land Registry, ‘Prescribed Clauses Leases’  
<<http://www1.landregistry.gov.uk/publications/consultation-papers>> accessed 15 November 2011

replies the LR received at that time allowed them to refine their original proposals before issuing them for the further consultation in 2004. A total of 248 replies were received, a substantial number of which ran to many pages. Responses came from a wide range of Land Registry customers and staff. Replies<sup>236</sup> to the consultation paper resulted in changes that LR made to the form of prescribed information. Some of the changes are minor, while others reflect major alterations in LR policy towards the presentation of prescribed information and arose directly as a result of customer comments. Only as a result of the quality and quantity of the responses to the latest consultation have LR been able to arrive at the final version of the rules and prescribed information.<sup>237</sup>

The Land Registration Act 2002 (LRA 2002) lowered the threshold for compulsory registration to apply to leases granted for more than seven years, thus many more leases became subject, to compulsory registration. As leases are often lengthy and take many different forms, the Land Registry was spending considerable time reading through each lease to find the information required to make the necessary entries on the register. In the future, the Land Registry may have even more lease applications to deal with. The Land Registry's ultimate aim is that all leases granted for more than three years will become compulsorily registerable, and the LRA 2002 contains the power for statutory instruments to be made reducing the period from seven years after consultation (section 118(1), LRA 2002).<sup>238</sup> The Land Registry 10 Year Strategic Plan<sup>239</sup> contains proposals to research how many leases are granted for terms between three and seven years, with a view to making them compulsorily registerable.

The Land Registry therefore considered a number of ways to speed up lease registration and to reduce the potential for errors being made during the registration

---

<sup>236</sup> Ibid

<sup>237</sup> Land Registry, 'Report on consultation, Presentation of prescribed information in Register-able leases' (London, HM Land Registry 2005) para. 9

<sup>238</sup> Land Registration Act 2002 <<http://www.legislation.gov.uk/ukpga/2002/9/contents>> accessed 15 November 2011

<sup>239</sup> Practical Law Company, 'The Land Registry 10 Year Strategic Plan' <[www.practicallaw.com/9-106-8607](http://www.practicallaw.com/9-106-8607)> accessed 15 November 2011

process. It originally intended that the Land Registration Rules 2003 (SI 2003/1417) (LRR 2003)<sup>240</sup> would require leases to be in a prescribed form. However, the majority of the respondents to the consultation paper on the draft LRR 2003 opposed the proposed prescribed forms.<sup>241</sup> The Land Registry therefore decided to withdraw the prescribed lease forms from the LRR 2003, and to review its approach. This was explored by the researcher by referring to legal update; Land Registry drops prescribed lease forms.<sup>242</sup>

In September 2004, the Land Registry published a consultation paper, setting out alternative proposals for presenting prescribed information in leases. The two approaches<sup>243</sup> on which the Land Registry sought views were:

- i. The implementation of a new lease form with a lease front sheet attached to each registerable lease.
- ii. The use of prescribed clauses in registerable leases.

Following this consultation, the Land Registry decided to adopt the second of these two approaches. The Land Registration (Amendment) (No 2) Rules 2005 (SI 2005/1982) (2005 (No 2) Rules) amended the LRR 2003 and provided for most registerable leases granted out of registered land to contain prescribed clauses. The Land Registration (Amendment) Rules 2008 (SI 2008/1919) (LRAR 2008) made amendments to the LRR 2003, which came into effect on 10 November 2008. The LRAR 2008 amended the side heading to LR3 of a prescribed clauses lease to make this consistent with changes to rule 217(1) of LRR 2003 to refer to overseas, rather than foreign, companies. As a result of the Land Registration (Amendment) Rules

---

<sup>240</sup> The Land Registration Rules 2003  
<<http://www.legislation.gov.uk/uksi/2003/1417/contents/made>> accessed 18 November 2011

<sup>241</sup> Practical Law Company 'Consultation paper on the Land Registration Rules 2003 (HMLR)' <[www.practicallaw.com/1-106-5599](http://www.practicallaw.com/1-106-5599)> accessed 21 November 2011

<sup>242</sup> Practical Law Company 'Land Registry drops prescribed lease forms' <[www.practicallaw.com/1-107-0416](http://www.practicallaw.com/1-107-0416)> accessed 24 November 2011

<sup>243</sup> Practical Law Company 'Consultation on prescribed information in register-able leases' <[www.practicallaw.com/4-107-3244](http://www.practicallaw.com/4-107-3244)> accessed 25 November 2011

2009 (SI 2009/1996), further amendments to LR3 took effect from 1 October 2009. The amendments related to changes in the regime for registering overseas companies that establish a place of business in the United Kingdom made by the Companies Act 2006 and the secondary legislation made under it. Legal update changes to Land Registry Rules came into force on 1 October 2009.<sup>244</sup> Use of the prescribed clauses was initially voluntary for registerable leases received by the Land Registry from 9 January 2006. However, use of the prescribed clauses became compulsory on 19 June 2006 for almost all leases that are dated on or after 19 June 2006, granted out of registered land, and compulsorily registerable, such as leases granted for more than seven years.

Table 2 below shows Land Registry Prescribes Clauses Leases.

---

<sup>244</sup> Practical Law Company, “Changes to Land Registry rules from 1 October 2009” <[www.practicallaw.com/0-386-8936](http://www.practicallaw.com/0-386-8936)> accessed on 26 November 2011

**Table 2: Land Registry Prescribes Clauses Leases**

<b>Prescribed clauses consist of</b>
<b>LR1.</b> Date of lease
<b>LR2.</b> Title number(s)
<b>LR3.</b> Parties to this lease
<b>LR4.</b> Property
<b>LR5.</b> Prescribed statements
<b>LR6.</b> Term for which the Property is leased
<b>LR7.</b> Premium
<b>LR8.</b> Prohibitions or restrictions on disposing of this lease
<b>LR9.</b> Rights of acquisition
<b>LR10.</b> Restrictive covenants given in this lease by the Landlord in respect of land other than the Property
<b>LR11.</b> Easements
<b>LR12.</b> Estate rent-charge burdening the Property
<b>LR13.</b> Application for standard form of restriction
<b>LR14.</b> Declaration of trust where there is more than one person

### 3.8 Conclusion

Evidence<sup>245</sup> suggests that the awareness of voluntary codes, the Law Society business lease, and the British Federation lease are not significant within the property

---

<sup>245</sup> Ibid 46

industry. Indeed, there is no evidence<sup>246</sup> of those having made any noteworthy impact on the standardisation of leases. The compelling evidence suggests that small business tenants are unlikely to receive any substantive information on the code from any source, particularly where the landlord is also a small business.

The Law Society Business Lease is a lease designed by The Law Society for only relatively short terms of simple buildings, which helps to speed up the negotiation process. The Law Society has done this by creating a lease purporting to be fair to both landlord and tenant. That said it is still normal for a certain amount of customisation to be made to that lease, particularly on smaller premises where for example, the repairing obligations may change or the rent review provisions may be altered. Literature review into historical attempts at reform of commercial property leases evidences many challenges in commercial property lease reform. Evidently, for the past twenty-five years, no significant improvement has been made. The traditional lease documents will eventually develop complications and disputes due to their nature of concealing conditions, their lack of simplicity, and their complicated terms.

Different Government Departments responsible for review of commercial lease matters have transformed several times without steps taken to consider proper reform. The upwards-only rent review is virtually universal and the incidence of alternative review types is still rare. Rent review patterns remain the same with five-yearly reviews standard in the institutional market, while three-yearly reviews are still more common in secondary and tertiary property on shorter leases. There is no evidence that choice is being offered or sought in respect of rent review types. Where a lease is to contain a rent review, it appears to be accepted by both parties that it will be a standard upwards only review to market rent. Landlords are not offering either the threshold review or any other alternative, but there is equally no evidence that tenants are asking for it or would be prepared to pay rent or any other payment for the relaxation of this term. Research carried out by Reading University in *Monitoring the Codes for Leasing Business Premises*<sup>247</sup> highlights the lack of awareness or implementation of the Codes. The aim of the research into the Codes by the Reading

---

<sup>246</sup> Ibid

<sup>247</sup> Ibid

University was to investigate how far the 2007 Code for Leasing Business Premises has been disseminated into the market, as demonstrated by awareness of it among landlords and tenants and their advisors. The extent to which the Code is being used in negotiation, as source of advice, is low. The findings of that research highlight the fact that awareness and application of the Code in the industry is low.

Regulatory Reform of Landlord and Tenant Act 1954 Part II only contributes to the Government policy that business tenants should normally have a statutory right to renew their tenancies (security of tenure). There is however no objection to parties agreeing to exclude security of tenure provided that the tenant is aware of the implications of doing so. The provisions for excluding security of tenure, also known as contracting out, are intended to achieve that end. The 2004 Reform Order abolished the need for landlords and tenants to obtain prior court approval for agreements to exclude security of tenure.

The courts, beyond checking that applications were legally and technically sound and that the tenant, if not legally represented, had the opportunity to take legal advice, did not exercise any discretion in deciding whether or not to approve terms of leases. On 1 June 2004, the Regulatory Reform of Business Tenancies in England and Wales Order 2003, SI number 2003/3096 (the Order) came into effect, reforming only the procedures for renewing and terminating business tenancies in England and Wales under Part 2 of the Landlord and Tenant Act 1954 (the 1954 Act).<sup>248</sup> During consideration by the House of Commons Regulatory Reform Committee, the Office of the Deputy Prime Minister undertook to review the impact of the reforms once they had been in effect for one year, and to report back to the Committee. The ODPM, now the Department for Communities and Local Government, has reviewed<sup>249</sup> the impact of the reforms with the assistance of a panel comprising commercial property stakeholders, professional bodies, property lawyers, and practitioners. This report<sup>250</sup> considers the effectiveness of the reforms in the light of panel's considerations and other feedback, which makes certain recommendations

---

<sup>248</sup> Landlord and Tenant Act 1954 'security of tenure' <http://www.legislation.gov.uk/ukpga/Eliz2/2-3/56/contents> accessed 20/12/2011

<sup>249</sup> Ibid 43

<sup>250</sup> Ibid

for further improvements. The Department has also received some useful feedback from a forum hosted by Lovell's on behalf of the Property Litigation Association, held on 22 November 2005.<sup>251</sup> The Forum was held after Lovell's had carried out a survey of members of the Property Litigation Association, the Royal Institution of Chartered Surveyors, and the Chancery Bar Association, from which they received 231 responses almost evenly split between lawyers and surveyors.

The Law Commission was set up by the Law Commission Act 1965, and has made certain recommendations in the law of landlord and tenant, including that an examination be made of the obligations of landlords and tenants in relation to the state and condition of the property. To facilitate the implementation of the recommendations which L C have previously published, an examination be made of such parts of the basic law of landlord and tenant as may appear appropriate with a view to their modernisation, simplification and codification. The LC reports on new regulations on unfair commercial practices, explaining that on 26 May 2008, the Unfair Commercial Practices Directive (UCPD) was implemented into UK law by the Consumer Protection from Unfair Trading Regulations (the CPRs). These regulations radically overhauled consumer protection legislation. They repealed provisions in twenty two pieces of legislation and replaced them with a broad standards approach. The LC has explained the private right of redress, stating that the regulations do not confer on consumers a private right to redress where they have suffered from an unfair commercial practice.

The Law Commission, in its report of 1992<sup>252</sup>, states that the 1954 Act is an established part of the commercial property market and the practices of that market develop and change over the years. The LC stated that it is appropriate for the statutory provisions to be reviewed from time to time to ensure that they are still fulfilling their intended purpose. On this occasion, the Commission have identified some features which experience has shown to make improvements.

---

<sup>251</sup> Landlord & Tenant Act 1954 - Practical Conveyancing,  
<http://www.practicalconveyancing.co.uk/protected/lawguides/lta1954.pdf> accessed 01/12/2011

<sup>252</sup> Ibid 43

In investigating the relevant commercial tenancy Acts, rules, procedures and issues in this chapter, it was established that that unlike residential tenancies, most relevant Acts affect business tenancies when they come to an end. At this stage, the Landlord and Tenant Act 1927 Part I and the Landlord and Tenant Act 1954 Part II may apply. It was important for this chapter of the research to explore the LAT Act 1954 Part II and its rent review reform. The RRO (Rent Review Order) reform of 1954 Act also covers easier contracting out; thus, instead of the joint application to the court, the landlord gives the tenant a Warning Notice in a prescribed form at least fourteen days before the tenant enters into the lease or becomes legally bound to do so. The tenant signs a simple declaration, in a prescribed form, acknowledging receipt of the Warning Notice. The fourteen day cooling off period can be waived if the tenant (or someone authorised on his behalf) instead makes a statutory declaration in a prescribed form.

The RRO reform also covers the aspect of ownership and control. Where the tenant is one or more individuals, they will have a right of renewal where business is carried on in the premises, either by themselves or by a company that they control. Where the tenant is a company controlled by one or more individuals, it will have a right of renewal where business is carried on. Under the severed reversions, the reform covers where different persons own parts of premises let on a single tenancy; they will collectively contact the landlord so that collectively they can serve s.25 notice or be given s.26 request or apply to the court. The court may order the rent under the new tenancy to apportioned, between the landlords of the different parts. The RR Reform covering the notices requiring information deliberates that more information must be given in response to s.40 notice, including more details about sub lettings and about severed reversions. Provision is made for cases where the party is giving or receiving notices. In the circumstances where the surrenders and agreements for surrender are being considered, the tenant in occupation will no longer have to wait until he has occupied for a full month before he can surrender his tenancy by instrument.

## **CHAPTER 4- STAKEHOLDERS ATTITUDE**

### **4.1 Introduction**

This chapter sets out stakeholder attitudes, the particulars of the research questions, and the methods employed to answer them. The literature review explored previous attempts at reform of commercial property leases and made inquiry into causes of landlords' and tenants' disputes. Those provided the basis to the research questions, recognising the subject fields within which the thesis is grounded, and critically reviewing the relevant bulk of literature. The methodology section of this research set out the landscape and implications of methodology in general. The underpinning reasons for the particular philosophical directions implemented by the researcher and the choice of research methods were also considered.

Assertions or rejections of reform of commercial leases through legislative intervention are highlighted in the key findings of the research and rely on the proven good example of Australian reform of commercial property leases. Commercial property has a wide range of different stakeholders, ranging from individual property owners to organisations with an interest and involvement in the commercial property leases. This element of the research focused on stakeholders who could be regarded as "key influencers" given their interest and involvement in issues relating to the commercial property market and, specifically, commercial property leases. The semi-structured interviews focus primarily on expert individuals that are active within the commercial property industry, while the focus groups involve people with an interest in commercial leases at a more local level.

The general purpose of pilot testing is to refine the interview so that respondents would be more likely to give to the point answers, and also to demonstrate that the interview would be capable of generating useful responses from the target population. In this research, the pilot study is an integral part of finalising the construction of the interview instrument, as well as rehearsing the data collection procedures. Accordingly, the pilot study fulfils the role of identifying the most useful semantic scales for inclusion in the finalised instrument. Removals of the scales that are less useful in terms of, mapping a concept's semantic space also have the effect

of reducing the number of scales and shortening the time required to complete the interviews. This is a practical consideration given the limited time that the respondents likely allocated to the interviews. Table three below lists the relevant stakeholders in commercial property leases.

**Table 3: Stakeholders, Actors, Their Interests & Roles**

Stakeholders	Actors	Interests & Roles
The Community and Local Government	Community & Local Government, Law Commission	Economic and Political interest, protection of property industry
Law Society	Lawyers, practitioners, Conveyancers	Application of law, justice and public interest
RICS, BPF, L&T Groups	Surveyors, Agents	Financial, Commercial, Applying rules and Standards
Business Owners Groups	Landlords, Tenants, Occupiers	Security, Financial, Commercial Growth
Ethnic Minority Groups	Landlords, Tenants, Occupiers	Growth, survival, Financial, Commercial interests and roles

Stakeholder identification offers a way of understanding commercial property leases and patterns of interaction between stakeholders, identifying conflicts and ways to resolve them. In considering reform of commercial leases, stakeholder analysis can help to identify trade-offs between different stakeholders' objectives and conflicts. It highlights the needs and interests of powerless people, such as Ethnic Minority

Business Owners. In commercial property leases, there are numerous different types of stakeholders:

- a) Key stakeholders are those actors who are considered to have significant influence on the commercial property leases.
- b) Primary stakeholders are the intended beneficiaries of the commercial property lease.
- c) Secondary stakeholders are those who perform as intermediaries.
- d) Active stakeholders are those who affect or determine a decision or action in the commercial property leases.
- e) Passive stakeholders are those who are affected by decisions or actions of others.
- f) Duty-bearer stakeholders are responsible for implementing any reform and can significantly influence the potential for change. They include: the government and related law-making institutions, such as the Law Society, judges, legislators, landlords' groups, tenants' groups, and EMBO. They may put political pressure on duty-bearer stakeholders who do not fulfil their responsibilities.

## **4.2 Survey Methodology**

In this research, the researcher identified 400 participants by random selection. These were drawn from a wide range of organisations, such as the Law Society data base, the Royal Institute of Chartered Surveyors data base, the landlord and tenant associations and the SME association's data bases. Participants included lawyers, surveyors/agents, landlords, tenants, and business owners. For a variety of reasons, it was only possible to interview ninety of these stakeholders. The interviews were held in London and the South East of England. The interviews covered a number of common themes that reflected the key questions.

The selection of participants, were carefully considered to ensure that respondents had relevant expertise and involvement within the field of commercial property leases. Researcher utilised his own experience and contacts collated over 25 years to

carefully select appropriate participants. Specific effort was also made to ensure that a selection of Asian and African ethnic minority participants were included so that the results generated, would be representative.

Following an extensive literature review, combined with 25 years of vocational work in the phenomenon under inquiry, the researcher chose a set of five questions presented to the participants in a specific format for a number of reasons. Firstly, the questions chosen would permit the collection of good and rich qualitative data. Secondly, given the cost and time constraints, it would allow for a relatively large number of participants to be contacted to obtain information across the full spectrum of a heterogeneous field. Thirdly, it would permit a large degree of data standardisation.

Initially, the questionnaire was either e-mailed or posted to participants. There are, of course, a number of disadvantages to this approach<sup>253</sup> an e-mailed, faxed or posted questionnaire is unlikely to generate detailed responses or to facilitate the exploratory probing that an interview based survey would permit. In addition, it makes detecting, and clarifying ambiguities or lack of clarity in the questions harder. However, researcher considered that e-mailing and posting the questionnaire in advance would give an opportunity to receive replies from willing participants who have an interest in the commercial property leases. Limiting the research to those participants most amenable to being interviewed produced acceptable responses.

Notoriously, e-mailed, faxed, or postal requests for interview may suffer from a low response rate. I sought to mitigate this risk in a number of ways. Each letter or email was addressed to a named person, and initial enquiries, which I obtained through contacts, were made by telephone or via the internet. The interviews comprised five questions.

---

<sup>253</sup> Colin Robson, *Real World Research* (2<sup>nd</sup> edn, Blackwell Publishers Ltd 2002) Ch. 8; and Tim May, *Social Research, Issues, methods and process* (Open University Press 2001) 111-116

#### 4.2.1 Research questions

Question 1: What is your opinion of Commercial Property Leases? Do you believe that they are consistent, easy to understand, and uniform in style, drafting, presentation, or not? Please explain

Question 2: What are your views about the voluntary Code for Leasing Business Premises in England and Wales 2007, the Law Society Business Lease, and the British Property Federation Business Lease? Are you aware of these? If so, have you ever used any of the above leases? Please explain

Question 3: Would you support reform of commercial property leases through legislation to achieve a uniform, standard and easy to understand lease? Please explain

Question 4: In Landlord and Tenant Disputes, would you prefer “mediation,” which is a form of Alternative Dispute Resolution (ADR), to resolve disputes or going to Court? Please explain

Question 5: Would you support production of a simple short “guide” explaining the meanings of legal terms of Commercial Property Leases in English and other main languages for the benefit of ethnic minorities? Please explain

In investigating reform of commercial property leases, this research applied an interpretive perspective. Researcher pre-tested the draft questionnaire on fifteen participants from the sample populations, who were asked to give interviews and answers to the questions. They were also asked to consider whether the questions were unambiguous, biased, or made implicit but incorrect assumptions, and given the opportunity to comment generally on the questions and format. As a result of the pilot and pre-test research, a number of amendments were made to the questionnaire and the average time to interview, which transpired to be about 30 minutes, was generally acceptable to most participants.<sup>254</sup> Running a pilot also helped to mitigate the risk of ambiguity in the questions. The questionnaire in the context of interviews was therefore rephrased to make the interview quicker.

---

<sup>254</sup> Tony Proctor, *Essentials of Market Research* (4<sup>th</sup> edn, Financial Times/Prentice Hall 2005) 125

The main objective and general purpose of pilot testing interviews was to refine the interview, and to demonstrate that the interview would be capable of generating useful responses from the target population. A pilot test can also provide evidence regarding the validity and reliability of the data to be collected. In this research, the pilot study was an integral part of finalising the construction of the interview instrument, as well as rehearsing the data collection procedures.

#### **4.2.2. Sample**

Anglia Ruskin Code of practice for ethical standards in research involving human participants were fully observed and implemented. Pursuance to the introduction of the Data Protection Act (1998)<sup>255</sup> which came into effect on 1 March 2001, the consideration of anonymity and privacy is no longer simply a matter of ethics; it can also have legal implications. (See 1.4.1 chapter 1)

In this research some of the intended participants in the target sample could not give interviews. This consequently led to adopting an alternative method of random, stratified probability selection. The alternative method of selection was achieved through the data bases of the registered lawyers with the Law Society, chartered surveyors on RICS, landlords, tenants and business owners registered with their associations, other commercial property organisations and groups. The random and stratified probability selection method provides the most valid or credible results because they reflect the characteristics of the population from which they are selected<sup>256</sup>. This method of selection reinforces the validity that the sample is representative which rules out the researchers intended target choice and possible bias. Probability samples as in this research eventually implemented were selected in such a way as to be representative of the population.

---

<sup>255</sup> Data Protection Act (1998) <<http://www.legislation.gov.uk/ukpga/1998/29/contents>> accessed 23/01/2012

<sup>256</sup> Populations, Samples, and Validity  
<[http://www.sahs.utmb.edu/pellinore/intro\\_to\\_research/wad/pop&samp.htm](http://www.sahs.utmb.edu/pellinore/intro_to_research/wad/pop&samp.htm)> accessed 19/12/2011

In this research the representative sample, is one that has strong external validity in relationship to the target population the sample is meant to represent. As such, the findings from the survey have been generalized by an experienced mature researcher with confidence to the population of interest. When using a sample survey to make inferences about the population from which the sampled elements were drawn, researchers must judge whether the sample is actually representative of the target population. In this study the best way of ensuring a representative sample, have been that the researcher had a complete list of sampling frame of all elements in the population, and knew that each and every element within commercial property.

In this study what is meant by random stratified sample is a mini reproduction of the population. Before sampling, the population was divided into five specific categories of Lawyers, Surveyors, Landlords, Tenants, and Business Owners with relevant characteristics of importance for the research. The key to selecting a valid sample is making sure to select groups of respondents who accurately represent the larger target survey population. In most research projects it is not possible to include all the study population in the research design. Therefore, the researcher needed to look at a sample of individuals who gave the necessary information that the researcher could then apply to everyone in the study population.

In this research, the sample as selected, using probability sampling methods, are representative samples and their findings can be generalised to the whole study population from which the sample was taken. This is because the individual participants or informants in the sample are NOT chosen by 'hand picking' and therefore the people in the study population do each have an equal chance of being selected.

The researcher in this study has been working with qualitative data, and the main objective has been to find out more about the particular problem but without seeking to generalise the findings to the entire study population. Therefore the size of the sample does not matter, albeit 90 active participants giving extensive interviews in this research, is reasonably satisfactory. In qualitative research the sheer size of a sample is not a guarantee of its ability to accurately represent a target population. Large unrepresentative samples can perform as badly as small unrepresentative samples.

Samples for qualitative studies are generally much smaller than those used in quantitative studies. Ritchie, Lewis and Elam 2003<sup>257</sup> provide reasons for this. There is a point of diminishing return to a qualitative sample as the study goes on, more data does not necessarily lead to more information. This is because one occurrence of a piece of data, or a code, is all that is necessary to ensure that it becomes part of the analysis framework. Frequencies are rarely important in qualitative research, as one occurrence of the data is potentially as useful as many in understanding the process behind a topic. This is because qualitative research is concerned with meaning and not making generalised hypothesis statements. In qualitative research if the sample is too large then the data becomes too repetitive and, eventually, superfluous. If a researcher remains faithful to the principles of qualitative research, sample size in the majority of qualitative studies should generally follow the concept of saturation Glaser & Strauss, 2009<sup>258</sup> when the collection of new data does not shed any further light on the issue under investigation.

When respondents are categorised according to responses to the substantive assertion, statistically significant relationships between interpretations of concepts and responses to the substantive assertion emerge. Thus, responses to the substantive assertion are related to how concepts are interpreted. Interpretations of concepts are therefore sufficiently shared by respondents across respondent groups. Furthermore, the stability of the interpretations of concepts for each respondent group falls within the scope of the statistical threshold required to conclude that within group interpretive frameworks are stable. Thus, there is sufficient support to assert that each respondent group's interpretations of concepts are stable and representative.

An appropriately worded covering e-mail, or in case of postal invitations a letter and stamped addressed envelope for reply, accompanied each invitation. The covering letter sought to allay concerns over confidentiality and offered respondents the opportunity to receive a copy of the research findings. The covering letter and email clearly set out a finite time limit for response. Non-respondents were followed up

---

<sup>257</sup> J Ritchie and J Lewis, *Qualitative Research Practice*, (sage publishing 2003)

<sup>258</sup> G Barney and L Strauss, *The Discovery of Grounded Theory Strategies for Qualitative Research* (Transaction Publishers 2009)

two weeks and three weeks after issue. Researcher wanted to obtain as broad views as possible about the commercial property leases across the full range of the profession, including among ethnic minorities. Ethical considerations were implemented to ensure appropriateness of the behaviour of the researcher in relation to the rights of those who are affected by the research. In general, ethical codes that address the appropriateness of research behaviour typically refer to principles such as:

- a) Professional competence;
- b) Integrity;
- c) Professional and scientific responsibility;
- d) Respect for people's rights, dignity, and diversity; and
- e) Social responsibility and justice (Beins 2004, p.32; Dorsten & Hotchkiss 2005<sup>259</sup>, p.339).

For some researchers, the challenging practicalities of research can tempt the falsification or fabrication of data, the publication of analysis that is designed to mislead, or plagiarism (Beins 2004, p.30)<sup>260</sup>. However, honest and transparent reporting of research practice is an ethical duty of those participating in research. Researcher ensured that obtaining informed consents from the participants. This was of particular relevance to this study from an ethical perspective. The identification of potential participants was undertaken by reference to explicit and objective criteria to ensure that participants had the requisite knowledge to participate.

The invitation to take part in the interview included:

- a) An explanation of the objectives of the research;
- b) Reference to the privacy policy
- c) Pertinent information about the researcher;

---

<sup>259</sup> L E Doreston and L Hotchkiss, *Research methods and society: foundations of social inquiry* (Sage Publishing 2005)

<sup>260</sup> B Beins, *Research Methods A Tool For Life* (Pearson Publishing 2004)

- d) Identification of research supervisors at the Anglia Ruskin University; and
- e) Participants consent form and their rights

Strydom defines ethics as a:

‘set of moral principles which is suggested an individual or group, is subsequently widely accepted, and that provides the rules and behavioural expectations about the most correct conduct towards experimental subjects and respondents, employers, sponsors, other researchers, assistants and students’.<sup>261</sup>

During the course of this study, legal and ethical requirements were adhered to and the Faculty Research Ethics Panel granted this study appropriate ethics approval. The study did not expose respondents to any harm, whether physical, emotional, or psychological. Each of the respondents were given a consent form to read and which was explained to them, and the respondent was required to sign each section of the form as a way of indicating their willingness to be part of the research process. To ensure privacy the researcher has taken into consideration the issues of confidentiality and ensured anonymity (See 1.4.1 chapter 1), refraining from mentioning respondents by name. All respondents were also informed that they were under no obligation to participate in the research and that they could withdraw their participation at any time.

Reliability and validity of the procedures used to collect data was paramount. The reliability of an instrument is the degree to which the same scores can be repeatedly produced over time. Reliability is therefore about consistency. If an instrument is reliable, repeated measurements on the same subject should return consistent data each time. The validity of an instrument is a matter of whether it actually measures what it supposed to measure and whether the instrument is useful for what is specifically required.

---

<sup>261</sup> H Strydom, *The pilot study* (Sage Publishing 1998) 183

In this research, the two significant considerations regarding reliability are statistical reliability of the instrument and reliability of responses from the participants. The objective of reliability testing is to provide statistical evidence that the data collected is more likely to reflect the true scores of respondents and less likely to be attributable to measurement error. Measurement error includes errors in data that are attributable to individuals being less than perfect in responding to questions in the interviews. In investigating the reform of commercial property leases, the respondent reliability is a matter of whether a respondent provides consistent answers in respect of similar scales. Data may be reliable but this does not automatically mean that it is valid or, in other words, fit for the purpose for which it is collected. An assessment of the validity of a measuring instrument was achieved by comparison of the outcome and content of interviews with respondents.

#### **4.2.3 Interviews, methods and procedures**

Initially, the purpose of the interview was to probe the ideas of the interviewees about the phenomenon under inquiry. Collecting their opinions was achieved in several ways, of which face-to-face interviews were the most common. Besides Face-to-Face (FtF) interviews, interviewing by e-mail and telephone was essential to elicit responses from those participants who preferred those modes of communication. Interviewing using the internet was essential, and was facilitated due to developments in computer technology; many kinds of computer mediated communication (CMC) tools have been developed. Efforts were made to achieve as many FtF interviews as possible in the first place, but due to some constraints this was not always possible. Also, doing research on virtual teams, where some participants did not prefer FtF communication to other forms of communication, paved the way for the use of other interview techniques. One participant commented that we could do the interview by an instant messaging tool. The focus of this research was mainly semi structured interviews. Researcher made sure that three types of interview techniques were compared: FtF interviews, telephone interviews, and e-mail interviews. The three interview techniques differ from each other, thus highlighting the advantages and disadvantages. In this research, semi-structured interviews were particularly useful in helping researcher to gather data on the

participants' perspectives. Individuals can construct very perceptive language and meanings. Semi structured interviews gave the respondents freedom to express their views. The main aim and objective of qualitative interviewing is to capture how those being interviewed view their world, to learn their terminology and judgments, and to capture the complexities of their individual perceptions. This approach made it possible to gain insight into the participants' and perspectives, on support or rejection of reform of commercial property leases. In order to gain a deeper perspective of the participants' views on reform of commercial property leases, a broad and general interview guide was put together. This provides topics of the questions to be examined in detail. The challenge was to ask questions in a clear, open ended way that would let the participants respond appropriately without causing confusion. The questions were based on the themes identified in the literature review. One of the main challenges for qualitative researchers is to ensure that they avoid inventing data or misrepresenting the participant's perspectives.

#### Face-to-face interviews

Out of 90 interviews, 50 were face to face (ftf). FTF Interviews are synchronous (real time) communication of time and place. Social signals, such as voice, pitch, and body language of the interviewee can give the interviewer a lot of extra information that can be added to the verbal answer of the interviewee to a question. Of course the value of social signals also depends on what the interviewer wants to know from the interviewee.

#### Telephone interviews

Fifteen of the interviews had to be implemented by telephone call. Some participants made telephone interviewing a specific condition of their participation, thus making it essential. Telephone interviews are a synchronous communication of time and asynchronous communication of place. Due to the asynchronous communication of place, one of the advantages of telephone interviewing was the extended access to participants, compared to FtF interviews, including diverse geographical access if they had access to a telephone or computer. Although the interviewer could interview

people that are not easy to access, one of the disadvantages of asynchronous communication of place by telephone is the reduction of social signals. The interviewer does not see the interviewee, so body language cannot be used as a source of extra information. But social cues such as voice and pitch are still available. While social cues are reduced, enough social cues remain for terminating a telephone interview without a problem. Another disadvantage of asynchronous communication of place is that the interviewer has no influence on the situation in which the interviewee is situated; because of this, the interviewer has less possibility to create a good interview ambience.

#### E-mail interviews

Twenty five of the participants expressed that they would only give e-mail interviews. E-mail interviews are asynchronous communication of time and place. As with the telephone, one of the advantages of e-mail interviewing is the extended access to participants, compared to FTF interviews, due to asynchronous communication of place. A disadvantage of using e-mail was the complete lack of social signs. Therefore, e-mail interviewing provided a limited register for communication. Using emoticons can diminish the effects of this disadvantage. However, I was aware that the use of emoticons is not always appropriate according to the interviewee, because each interviewee has his own communication style, and researcher had to adapt his own personal communication style online accordingly. E-mail interviewing did give the researcher, the extra advantage that he could formulate the approach better. This also enabled the interviewee to answer the questions at his or her own convenience without noise disturbance due to independence of place and time. With an e-mail interview, synchronous communication of time was impossible; although the advantage was that the interviewee does not hesitate in giving a socially undesirable answer. But the chance of a spontaneous answer to a question became smaller, because the interviewee had more time to reflect on the question. However, spontaneity can be the basis for the richness of data collected in some interviews.

### **4.3 Analysis of findings**

The objectives of this section are to analyse the data using appropriate techniques, and document the significant findings to conclude on the research questions. Summary of responses to the substantive assertions are presented in Charts 1-5 below. Respondent interpretations of each of the concepts included in the substantive assertions are constructed, and respondents are categorised based on their groups, category and interpretations. With reference to the main objectives of the thesis, whether responses to the substantive assertion are related to interpretations of concepts is determined based on the respondent categorisations. The possibility of significant relationships between responses to the substantive assertion and other categorical variables such as specific profession, involvement, expertise and experience is also investigated. The main conclusions arising from the analysis and findings are that a majority of survey respondents profess to support reform of commercial property leases through legislative intervention. The purpose of the research is to interpret and analyse meanings that are held by participants involved with commercial property leases and to determine whether meanings are collectively held. An interpretive perspective provides a suitable platform upon which to base an investigation of reform of commercial property leases.

#### **4.3.1 Rationale for bar charts and discussions**

In this qualitative research bar chart graph scale can be used to capture the extent to which survey respondents agree or disagree with substantive assertions. A bar chart displays the data visually. Data is displayed either horizontally or vertically. This allows the viewers to compare items displayed. The bar chart displays information in a way that helps to make generalizations and conclusions quickly and easily. The bar charts have a label, axis, scales and bars. The variables are categorical and not quantitative. Horizontal axis represents categories, while vertical axis represents either counts frequencies or percentages which relative frequencies. Those are used to illustrate the differences in percentages or counts between categories. The presentation of findings employed in this examines

graphical methods for displaying the results of the interviews. It will show some general lessons about how to graph data that fall into a small number of categories. This also shows how to graph numerical data in which each observation is represented by a number in some range. All of the graphical methods shown in this section are derived from frequency answers interpreted.

Bar charts are often used for qualitative or categorical data. A bar chart plots the number of times a particular value or category occurs in a data set, with the height of the bar representing the number of observations with that score or in that category. The axis could represent any measurement unit, relative frequency, raw count, percentage, or whatever else is appropriate for the situation. In this research the bar charts represent the number of people and percentage of their views belonging in one of the five categories of participants in this research.

Bar charts can also be used to represent frequencies of different categories. Bar charts are often excellent for illustrating differences between opinions of different groups of participants. In this study the bar charts show, what the frequencies of the opinion and the percentage of lawyers, chartered surveyors, landlords, tenants and business owners are. A bar chart contains a bar for each category of a set of qualitative data. The bars are arranged in order of frequency, so that more important categories are emphasized.

Therefore bar charts as utilised in this research are effective methods of portraying qualitative data. Bar charts are more effective and better method of portraying qualitative data when, there is more than just one category of interviewees, and for comparing two or more groups of participants, as is the case in this research. A variable is simply a measured attribute of opinions that varies over time or subjects. The actual value of a variable is its data value, and the set of data values from each subject in the sample is the data that in this research was analysed. For the researcher it was important to know what type of variable he was dealing with, because this will determine the type of statistical analysis that he was able to apply.

Question one:

The participants were asked: what is your opinion of Commercial Property Leases? Do you believe that they are consistent, easy to understand and uniform in style, drafting, presentation, or not? Please explain:

Lawyers Group:

In total, 152 property lawyers were invited for interviews. Seventeen interviews were undertaken thus 11.5%, response rate. The lawyers consisted of commercial property experts, some more experienced than others in the field of commercial property leases. One of the lawyers is a barrister and Chief of staff at the House of Lords. Some lawyers were property and litigation (disputes) experts. Their selection and subsequent interviews ensured a wider range of expertise within the commercial property industry.

C F, The Chief of Staff for the House of Lords, provided the following response to question one:

I do not believe that Commercial Property Leases are consistent or easy to understand, there are too many. Standardisation is long overdue

Comment:

The above answer, from a lawyer who is an expert barrister, clearly states that commercial property leases are not consistent or easy to understand and there are too many of them. Expressing that, leases come in different styles, presentations, with too many varied terms and clauses. He recommends that standardisation of the leases is long overdue. His remarks undoubtedly are pointing at the need for reform.

Lawyer C A expressed that:

The leases are very varied, and some are archaic lengthy disasters, some are relatively short and easy to follow. There has never been an appetite across the legal industry to produce standard leases and only limited willingness to agree standard leases. None of which

has taken off particularly e.g. the City of London Law Society model clauses for service charges.

### Comments

This participant has been involved with the production of Clear Let Lease<sup>262</sup> on behalf of Land Securities, which was co launched by the said land security and Clarity. She also has had input in drafting the British Property Federation Lease (See chapter 3). This expert lawyer said that the leases are wide ranging. Whilst she asserted that there has never been an appetite across the legal industry to produce a standard lease, she content's that leases are ancient lengthy disasters. Some leases can be relatively short and easy to follow for her as a lawyer. From a lawyer's perspective, she says that only limited willingness exists to agree on standard leases.

This lawyer, referring to the previous attempts at reform through voluntary means, namely the city of London Law Society model clauses for service charges, comments that none has taken off particularly. Her comments concur with researchers comment as stated in chapter 3 under attempts at reform though voluntary codes and others with not much success.

Lawyer N B said:

Leases are different as they have to be. You cannot have one lease fits all as all property in England and Wales differ. There is a standard Law Society lease but no one will use it as it does not cover half of the terms of a standard lease produced by a solicitor.

### Comments

This lawyer says that leases are different, as they have to be, and you cannot have one lease that fits all. However, he asserts that all properties in England and Wales differ, and refers to the standard Law Society Lease, stating that no one will use it as it does not cover half of the terms of a standard lease produced by a solicitor.

---

<sup>262</sup> Land Securities Retail: 'Clear-let leases written in plain English'  
<<http://www.landsecuritiesretail.com/about-us/our-approach/clearlet>> accessed 7 January 2012.  
Clear-let is the result of detailed consultation with several of key UK retail customers and the leading property law firms.

In essence, this view only reaffirms the fact that solicitors are not under any obligations to use the Law Society Lease and each can draft their own version. This is one of the main reasons why there are too many different types of commercial property leases.

Over 89% of the lawyers expressed that commercial property leases are complex, and not standardised, not uniform, and not easy to understand. Some stated that the leases could also be too lengthy. Some expressed that the commercial property leases suffer from lack of punctuation, they have illogical layout, and remain difficult to follow. Leases tend to be different as each legal firm has their own style of drafting. However, they declared that leases are essential part of commercial property activity.

#### Surveyors/Agents Group:

Out of 82 surveyors/agents invited, eleven commercial property surveyors and agents were interviewed. Their responses/comments to the first question are detailed below. Over 72% of the surveyors/agents did express that, generally, leases are too varied, hard to understand, and complex.

Surveyor A H referring to commercial property leases, said:

It depends who prepared them. Some Landlords/Solicitors are progressive and fair and their leases reflect such. Others remain draconian, old fashioned etc. The end lease in any letting situation usually comes down to the nature of the landlord, the negotiating position of both the landlord and the tenant and the quality of the advice received by the tenant.

#### Comments

Andrew says that the complexity and/or simplicity of the leases depend entirely upon who prepares the lease. He further comments that in any property letting situation, what is paramount is the nature of the landlord, the negotiating situation of both parties to the lease (landlord and tenant), and the quality of advice by the tenant.

Landlords Group:

132 landlords were asked to participate in an interview. In total, fifteen landlords were interviewed. In reply to question 1, in excess of 89% of landlords expressed that the commercial property leases are complex, and difficult to understand and follow. Some landlords were reluctant to answer to the questions in broad terms and opted for short and concise answers.

N K who is a landlord, said:

Commercial leases are a very necessary tool to aid business transaction, but can be complex and slow to respond to the challenging business needs'. Leases are very difficult, too much technical jargon and solicitor's interpretation leading to misunderstanding and disputes

Comment:

N K recognising the importance of commercial property leases, confirms that said leases are complex, and do not meet the challenging needs of business. She also says that leases contain too much jargon and are open to misinterpretations, which can give rise to future disputes.

Tenants Group:

189 tenants were asked to participate in the interviews. Thirty one of them accepted and participated. In reply to question 1, nearly 98% stated their concern with commercial property leases. This is remarkable as this result suggests that nearly all of the tenants were unhappy with the commercial property leases.

C H said:

I think it would be better to have the system a little bit simplified

Comment:

C H, who is an ethnic minority tenant, expresses in a simplistic way his view that the commercial property leases system will better serve the tenants if they are simplified.

M R said:

I have always had problems with understanding leases. Even my solicitor cannot explain the meaning of the terms of my lease to me properly. It is time for the government to intervene and do something about this. We need a legal binding uniform lease with clear terms, so both landlord and tenant know exactly where they stand. At the moment when in dispute, I have to go to my solicitor who charges me so much and encourages me to go to court. I think there is something wrong here.

Comment:

The concern of this tenant resonates throughout and concurs with the key findings of this research. M R says that in addition to the complexity of his lease, he has to resort to courts when in dispute. He believes that legislative intervention is needed.

Business Owners Group:

Out of sixty one commercial business owners approached, a total of sixteen of them were interviewed. Some were ethnic minority business owners as they represent a 22% of small to medium size business owners in England. 76% of those interviewed suggested that commercial leases are far from satisfactory.

Ethnic Minority Business Owner SN said:

It's very complicated document, there is no consistency in a commercial property lease. This is due to the different situation to every property lease. [...] No, I am not familiar with the language. Finding it unclear and difficult to understand, what I am reading

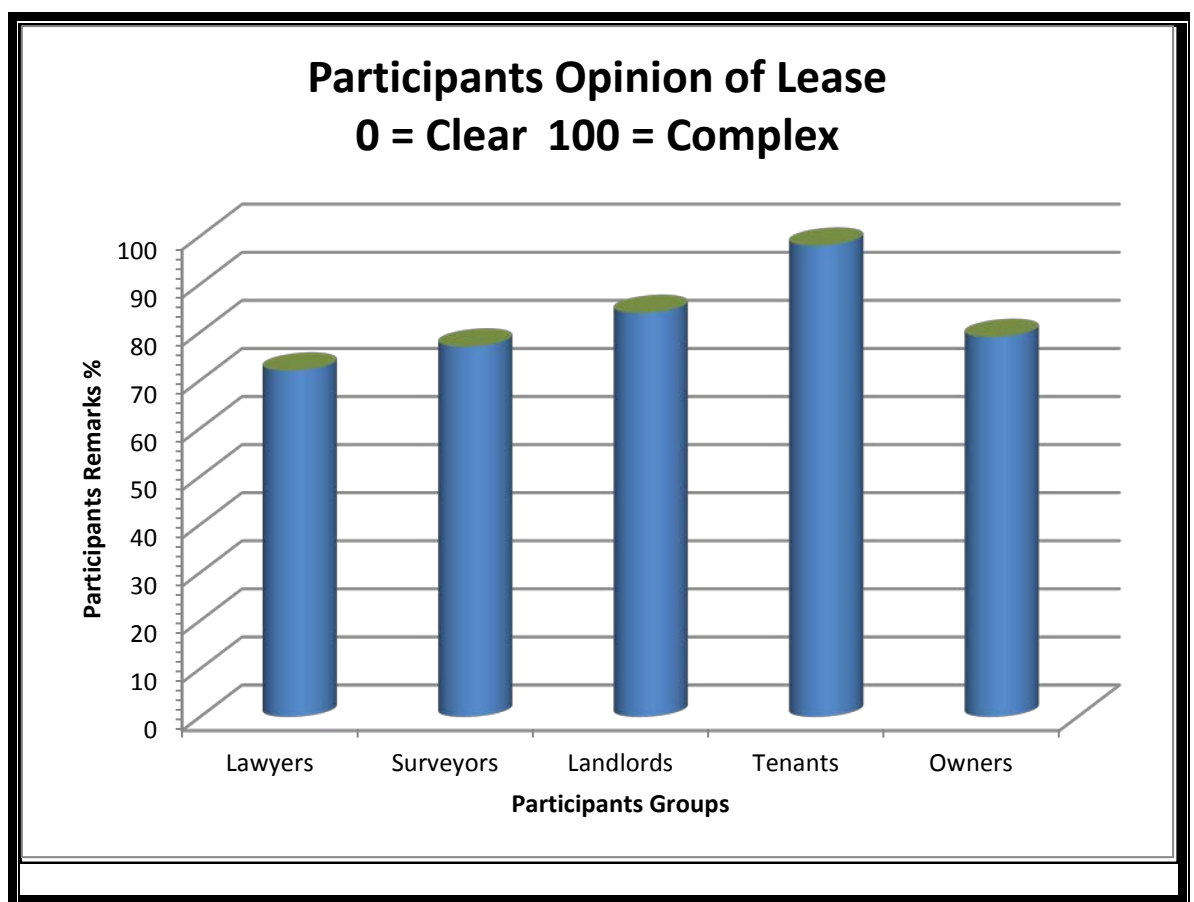
Comment

Referring to commercial property leases, S N said that the leases are rather complicated and far from being consistent. He argues that the blame rests with

different situations with different properties. He also said that he is not familiar with the language of leases and finds them difficult to understand whilst reading them.

Chart one below shows the result of the participants' views and comments in response to question 1 above.

**Chart 1: Participants' Opinion of Commercial Property Leases**



Question two:

What are your views about the voluntary Code for Leasing Business Premises in England and Wales 2007, the Law Society Business Lease, and the British Property Federation Business Lease? Are you aware of these? If so, have you ever used any of the above leases? Please explain.

The vast majority of the lawyers (over 80%) interviewed stated that they have never used the Code, the Law Society Lease or the BF lease. Some stated that the aforementioned are not benefiting the tenants that they are intended to do so.

Lawyer's Response to question 2:

Lawyer C A said:

Views on the Code, some of our landlord clients make great play of being Code compliant - but I've yet to see leases with up and down rent reviews, although we do see rent increases according to the retail price index. The Code doesn't reach the little tenants which it is meant to protect - they just don't know enough to ask for Code compliance [...]

Code...mm.. if there is reference to it or negotiations in the light of the Code those take place before the deal gets to us to put in place. It would be dealt with by agents [...]

Law Soc business lease - never used and I seem to remember technical reservations about it but so long ago I can't remember what they were [...]

BPF lease - not bad and we have used it in the past - but only for short, cheap lettings as there is not a full form rent review.

### Comments

C A said the voluntary codes are not being applied in the leases. In commercial property leases, the rent increases nowadays are more frequently linked to the RPI, which is the retail price index. She strongly asserts that the Code does not reach the tenants that the Code is meant to protect. The venerable tenants, specifically the

ethnic minority tenants, just don't know about the code. This concurs with the findings of the literature review that the awareness of the code is quite low. She expresses her reservations about using the Law Society Business Lease. She says that they use the British Property Federation lease only for cheap lettings with no rent review.

Lawyer KR said:

I am sceptical about the value of codes and sometimes see as a "one size fits all" solution and as such can be a substitute for thinking about how best to deal with particular circumstances [...]

It is okay but in very limited circumstances where it is not cost- effective to negotiate documentations in detail and both parties understand and accept its limitations [...]

The Law society Business Lease? Yes but very rarely and not at my instigation.[...]

The British Property Federation Business Lease? I don't remember it.

### Comment

K R expressed that due to extreme time constraints upon him, he would only give a short answer to each question. Referring to the Code, he said that he was sceptical about the value of the Code. Referring to ADR (alternative dispute resolution), he asserts that they can be cost effective in circumstances when it is not cost effective to negotiate through solicitors and court. He very rarely has used the Law Society Lease and he does not even remember what the British Property Federation Lease is.

Surveyors/Agents Group:

Over 70% of the surveyors/agents categorically stated that they either had not used the Codes, the Law Society lease, or the British Federation lease, or have come across them. In particular, some were blatantly using the word NO to the question.

Surveyor N A said:

In the real world of small businesses and smaller transactions the Code is not even mentioned. My view is that it is interference with market forces. If the institutions want to use it then fine

Comment

During the interview, N A expressed resentment against the code. He asserted that all the voluntary code does is unnecessary interfere with the market forces in the commercial property industry.

Landlords Group response to question 2:

Over 84% of the landlords said that they did not know about the Codes, the Law Society Lease or BF lease and/or had never come across them.

Ethnic Minority Landlord A N said:

I have no awareness of any code. I will look them up' 'I, never neither used the code, nor the Law Society Lease nor the BP Federation lease

Comment:

Mr A N response to and awareness of the use of the codes, the Law Society Lease and the British Federation Lease is quite similar to other ethnic minority participants within the groups.

Lawyer M regarding the Law Society Lease:

It appears to be a good standard contract, which complied with the code and could save both parties time and money during the negotiation process. It would probably be more

beneficial in low value, short term lease with no unusual circumstances.

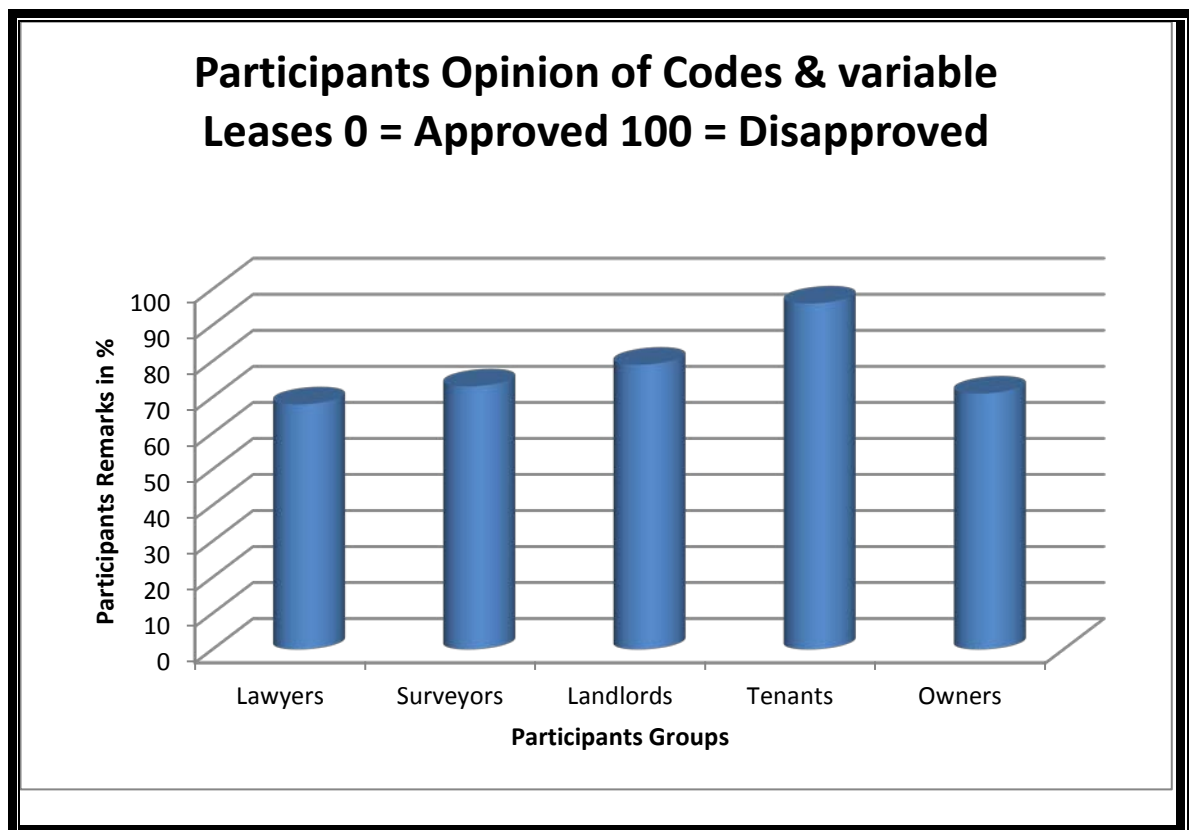
#### Tenants Group:

Out of the twenty-eight tenants interviewed, twenty-six confirmed that they have never heard of or use the Codes, the LS Lease or the BPF Lease.

#### Business Owners Group

Out of fourteen business owners interviewed, only four stated that they knew about the Code, the LS Lease and the BPF Lease, although three were only aware of it. Eleven of the participants neither knew of them, nor ever used them. Chart 2 shows the participants' response to question 2 above.

**Chart 2: Participants Opinion of Codes and Variable Leases**



Question 3:

Would you support Reform of Commercial Property Leases through legislation to achieve a uniform, standard, and easy to understand Lease?

Please explain

Lawyers Group:

53% of expert lawyers interviewed indicated their support for reform, albeit with some conditions, requirements, and caveats.

Lawyer C A said:

Reform - limited appetite. First upwards only rent reviews were threatened with legislation, then that threat went away when research showed that smaller tenants were more concerned with being able to dispose of their lease when they no longer wanted it rather than rent review. So the push for reform ebbs and flows. Leases are now shorter, there are limits on how long a tenant is liable under them, break rights are more rife, things have improved for tenants generally.

### Comment

Lawyer C A expresses no appetite for reform. She also says that the upwards-only rent review legislation does not work. She confers that the leases are now shorter and the liability of the tenants is limited, with potential for break rights. She asserts that things have improved for the tenants in general. However, she said that smaller tenants are generally more concerned with being able to dispose of their lease when they no longer want it.

Lawyer C F in his exact words said:

Yes, I would support reform. I am chief of staff to a member of the House of Lords'

Comment:

Lawyer CF, who expressed robust views in support of the reform at the interview, highlights his position at the House of Lords when advocating the reform.

Lawyer M said:

If this could be introduced in the similar fashion to the LMA finance documentation, ie: where standard documentation is agreed but which can tailored as required. It may be the case that a number of different style leases will need to be prepared as I suspect it is unlikely that “one will fit all

Lawyer K said:

Not necessarily. The current system is not perfect but I would need to understand what is proposed in order to form a meaningful view as to whether this is better than addressing problem issued in a more limited way,

Lawyer P said:

No, as the legislation would probably be drafted without consulting the high street lawyer, legislation is usually drafted without consultation of those who have to deal with such issues as part of their day to day activities. For example the HIPS fiasco was introduced in the face of stiff opposition on the professionals in the field.

Lawyer H F said:

I understand that the Business Lease Code was a precursor to legislative reform and that if the industry does not react quickly enough to adopt the principles then at some point it will be taken up by Parliament. I think legislative reform is essential to the development of this area of the law. I do not think that the business code is enough to protect the interest of tenants against landlords.

Surveyors/Agents Group:

In the surveyor/agent group, approximately 67% declared support for reform.

Surveyor/Agent A said:

No. Like all this type of legislation, it is driven by consumerism and the desire to tick boxes. All it will do is mean less work for property professionals so should be resisted.

Landlords Group:

82% of landlords clearly confirmed their support and desire for the reform of commercial property leases.

Landlord A said:

Yes, uniformity and easy to understand will enable clarity and in fact in the long term helps lawyers too as they can explain to clients well

Landlord R said:

Yes. I would. These laws and legislations are not accessible.  
Reform would be educational

Tenants Group:

In accordance with the responses observed, 96% of tenants said that they definitely support the reform of commercial property leases to make them easy to read and more flexible, as well as standardisation through legislative intervention.

EM Tenant C said:

Removing the complications seems like a good idea to me

EM Tenant P said:

I think it will be a good idea making it easier for everybody to understand.

EM Tenant M said:

Yes. In this case it will help all the people to understand and unify all of relevant terms'

EM Tenant N said:

Yes. I think they should be changed. They are old fashioned and not for modern society

EM Tenant M said:

I don't think we need a reform, why fix something that is not broke

Business Owners Group:

Approximately 97% of the business owners surveyed expressed their desire for the reform of commercial property leases. Specifically, some stated that is about time that the Reform takes place.

Business Owner R said:

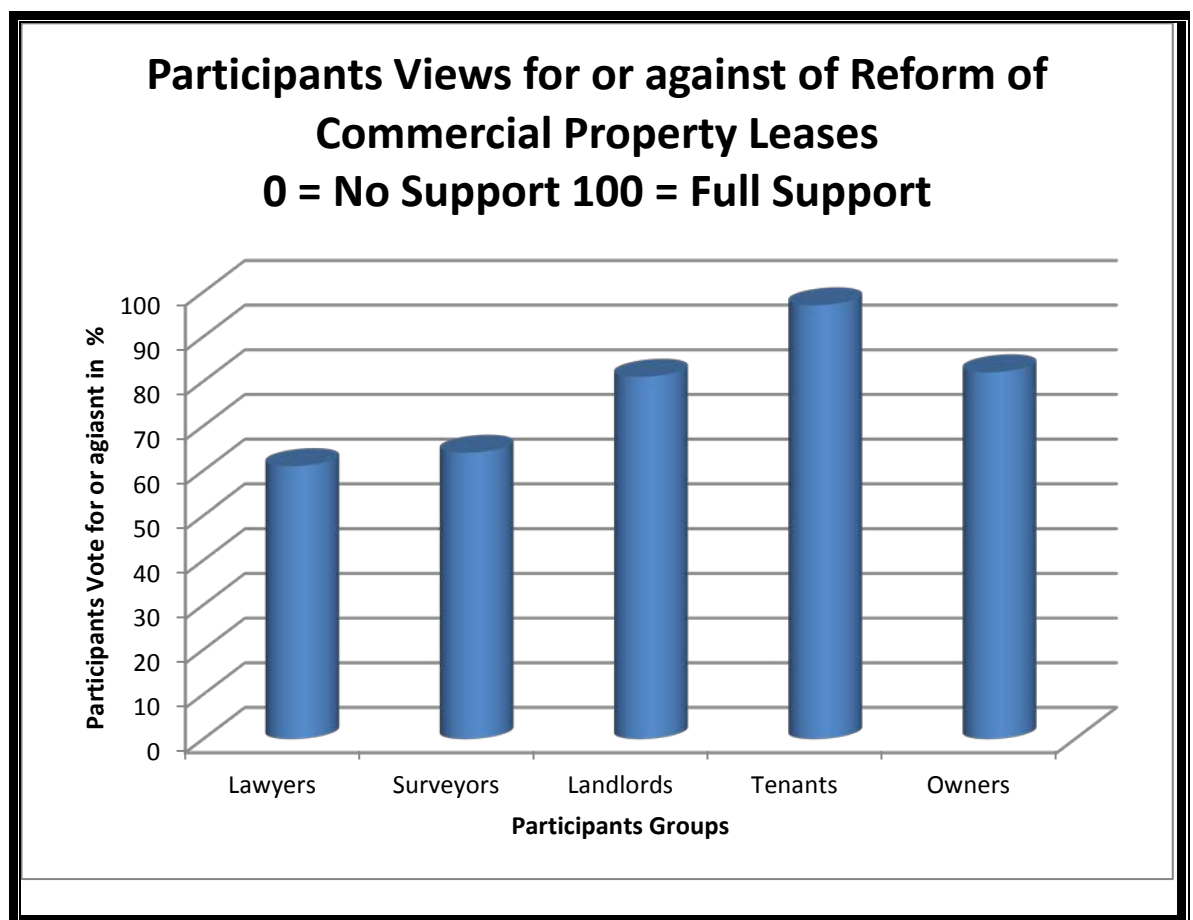
Yes it makes all the difference, when a tenant, landlord or business owner, actually understand what they are reading and/or signing

Business Owner T said:

Yes, I would. It would be great to have some consistency between leases this would make it easier for end users. However, I doubt we would see the positive effects of this in our lifetime

Chart three below shows the participants' response to question 3 above.

**Chart 3: Participants Views on Reform of Commercial Property Leases**



Question 4:

In Landlord and Tenant Disputes, would you prefer mediation, which is a form of Alternative Dispute Resolution (ADR), to resolve disputes or going to Court? Please explain

Lawyers Group:

The interviews established that the vast majority of lawyers (82%) recommend and support ADR.

Lawyer M said:

This would need to be determined on a case by case basis. If there is a means of avoiding a court process in the first instance (and such process is considerably cheaper and more straightforward for all parties concerned) then this can only be a useful tool in landlord and tenant disputes

Lawyer K said:

In favour in principle where there is reason to believe that a court judgement not needed, and/or not cost effective or time-effective to go to court.

Lawyer P said:

Yes as this is much cheaper and less lengthy procedure. Disputes should be settled either by ADR or by a new form of Tribunal similar to the Land Valuation Tribunal.

Lawyer S said:

ADR can often be a more effective tool than the court proceedings. The main benefit being (a) more cost effective and (b) can sometime preserve the relationship between the landlord and the tenant

Lawyer B said:

No – More work for surveyors and unnecessary. The actual amount of cases which ever reach court is so small compared to matrimonial etc. and mediation has clearly failed to reach the impact in that type of work

Lawyer H said:

I think it is a helpful alternative and hopefully less costly to both parties, however, because access is easier and costs lower it could lead to more litigious behaviour at an earlier stage that would otherwise be the case

Surveyors/Agent Group:

Surveyor/agent Mr N A said:

ADR nearly every time as it is quicker and cheaper. Court is a lottery as to whether you get a judge who has any experience of the matter before him. May have to go to court, on point of law still. Mediation is only one form of ADR. Sometimes that is appropriate but otherwise, agree to PACT/Arbitration<sup>263</sup>

Surveyor/agent M H said:

I have no experience of ADR. Whilst it seems a good idea in principle all cases we have been involved with have gone

---

<sup>263</sup> Professional Arbitration on Court Terms (PACT) is a scheme offered by the RICS and the Law Society as a form of alternative dispute resolution (ADR) for lease renewal disputes. According to RICS, PACT offers a quick, efficient, and cost effective solution to commercial lease renewal disputes without the need to go to court. The scheme provides the opportunity for landlords and tenants to have the terms and rent payable under their new lease decided by a surveyor or solicitor acting as either an arbitrator or independent expert. The professionals appointed are experienced specialists who have been specifically trained on commercial lease renewals under the PACT scheme. It is important to note that any decision made by either an arbitrator or independent expert is legally binding. The objective of the scheme is to increase the effectiveness and flexibility of the legal system and to give a greater choice to landlords, tenants, and their advisers through the lease renewal process. The Regulatory Reform Order 2003 abolished the need for the tenant to make an early originating application to the courts. In effect, the parties can now agree to refer their lease renewal matter to arbitration or determination and be bound by the result. Parties are no longer required to obtain a consent order from the courts, in all circumstances. The Civil Procedures Rule (CPR) determines that ADR must be considered before litigation or the parties risk a punishment of costs by the courts.

down the court route. (at our clients choice rather than ours). Invariably nearly all such cases get settled before going to Court. I like the idea of ADR but the more I work in the industry the more I feel that people only really compromise when they have some sort of a gun to their head. The Court route provides a bit of a gun a most people want, ultimately, to avoid the cost and time involved in going to court.

Landlords Group:

Apart from one exception, all of the other landlords expressed their desire for ADR, specifically mediation, prior to instigating legal action.

Landlord K said:

I believe ADR can work for smaller disputes where parties want a quick and low cost resolution with a continuing working relationship at the end of it. It will however require willingness to compromise on both sides, which could result in waiving of the legal rights usually reinforced through courts.

Tenants Group:

91% of the tenants interviewed stated that they would certainly choose and support Alternative Dispute Resolution rather than going to court. Only one tenant stated that he could not see the point and another confirmed that he was indifference to ADR.

Tenant R said:

Mediation would help deal with majority of issues in a sufficient level, without needing taking issues to the court'

Tenant P said:

I see it can help, depends how the mediation will work. Mediation may be able to resolve many issues

Business Owners Group:

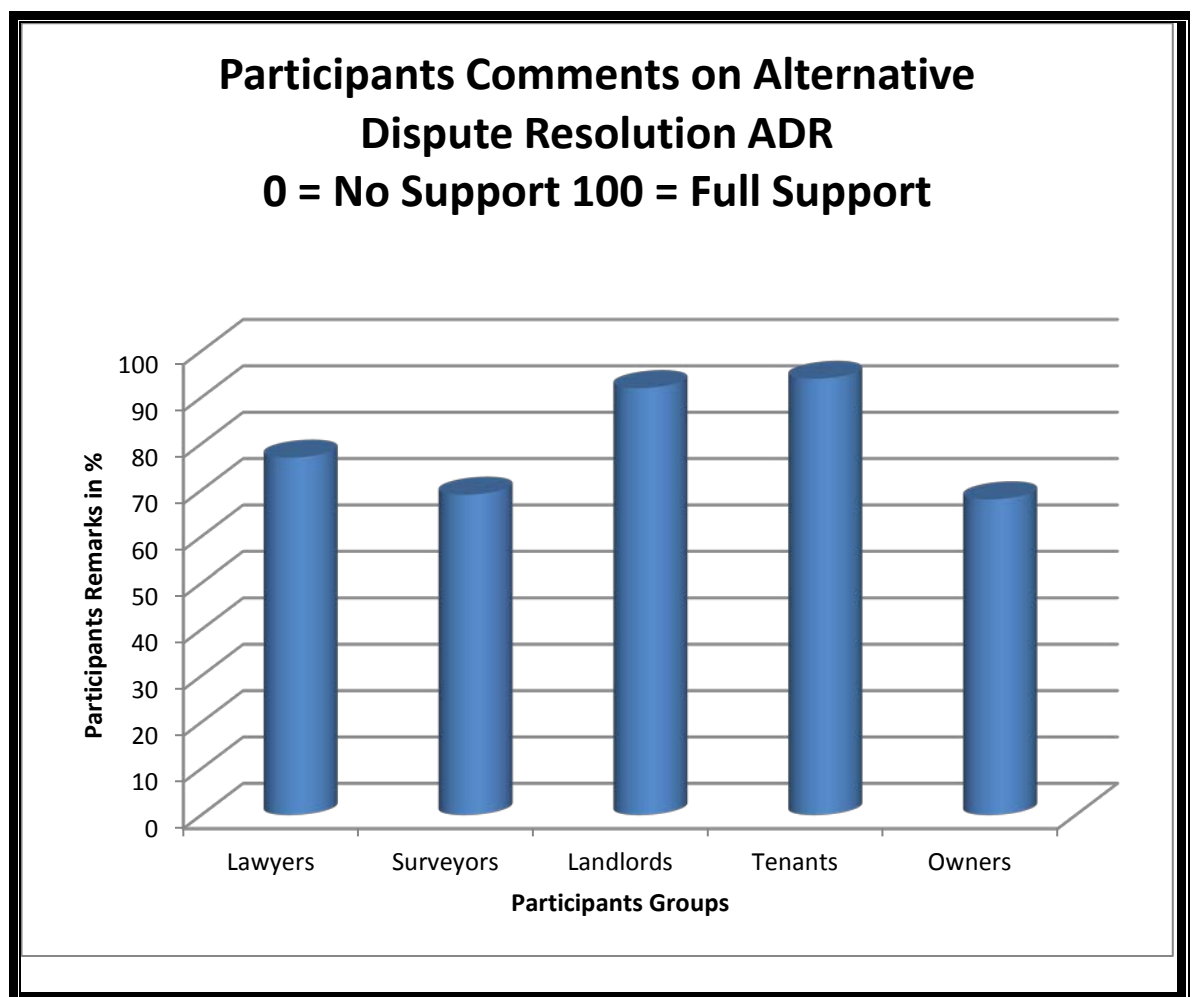
68% of business owners indicated support for ADR in contrast with other groups who preferred ADR at a much higher rate.

Business Owner R said:

Mediation, as it is not an easy thing to do (going to court), so wherever possible disputes should be kept out of court

Chart four shows the participants' response to question 4.

**Chart 4: Participants' Comments on Alternative Dispute Resolution (ADR)**



#### Question 5:

Would you support production of a simple short “guide” explaining the meanings of legal terms of Commercial Property Leases in English and other main languages for the benefit of ethnic minorities. Please explain?

#### Lawyers Group:

Approximately 71% of the lawyers stated that they believe that a glossary guide explaining legal terms of commercial property leases in different languages including English would benefit speakers of other languages, and in particular, ethnic minority groups.

#### Lawyer C A said:

Translation can only be a good idea, although some archaic English common law principles might be difficult to translate as they may not have an exact equivalent. I think you would have to have an English lease and a translation side by side - I don't suppose the Land Registry would take leases not written in English if the leases were long enough to need registration.

#### Comment

C A lawyer's initial perception and misinterpretation of the question led to her to assert that the researcher's question suggests translation of lease documents. The researcher clarified this confusion and misinterpretation by asking the lawyer participant to review the question. The question clearly asks for comments regarding a guide explaining the meaning of legal terms of commercial property leases in English and other main languages to be published, and not translation of lease documents.

Lawyer C F (Chief of Staff at The House of Lords) said:

I would welcome such a guide it would depend on what type of support is sought

Lawyer H said:

This is not something I have come across in practice but I can only see that it would be a benefit and make business easier for ethnic minorities in UK

Lawyer F said:

Having acted for tenants in a high street context with language difficulties I think it would be useful

Lawyer M said:

If it is a guide for tenants and landlords to provide them with a better understanding of commercial leases then this may have a benefit. However it would need to be drafted in such a way as to avoid landlords taking matters in their own hands and preparing commercial leases without legal advice which will not be up to standard

Surveyor/Agents Group:

Over 69% of surveyor/agents support the guide and expressed that it would be good practice to have one.

Surveyor/Agent N A said:

Yes so long as it is only a guide as to terminology. The definitions agreed in the lease may be different though to those in a guide which could add to the confusion

Surveyor/Agent H said:

In principle yes, but various law and property firms already provide this. At the end of the day, if you are signing a lease/contract and don't deal with this sort of thing day in / day out then its best to get proper legal representation and let the solicitors advice you.

Landlords Group:

84% of the landlords confirmed that they support the guide. 16% of the landlords declared that they were not sure as to whether the guide would provide meaningful help or cause further confusion.

Landlord K said:

I would go further than just translation of the key legal terms. Understanding of the agreement is essential to be legally binding, could be detrimental to the business and recommended by the Code, Law Society Business Lease and the British Property Federation Business Lease as a starting point. This would be a one-off translation cost, which could raise the awareness of the complexity and significance of the commercial leases and save on future disputes and potentially failed businesses.

Tenants Group:

Overwhelming 100% of the tenants interviewed expressed their wish and desire for a guide translating the key legal terms of commercial property leases into English and ethnic minority languages. They insisted that the guide would help.

Tenant C said:

Indeed a guide explaining and translating the complex and tedious ancient terms of ambiguous business leases will be very helpful for us ethnic minorities. No one in the legal

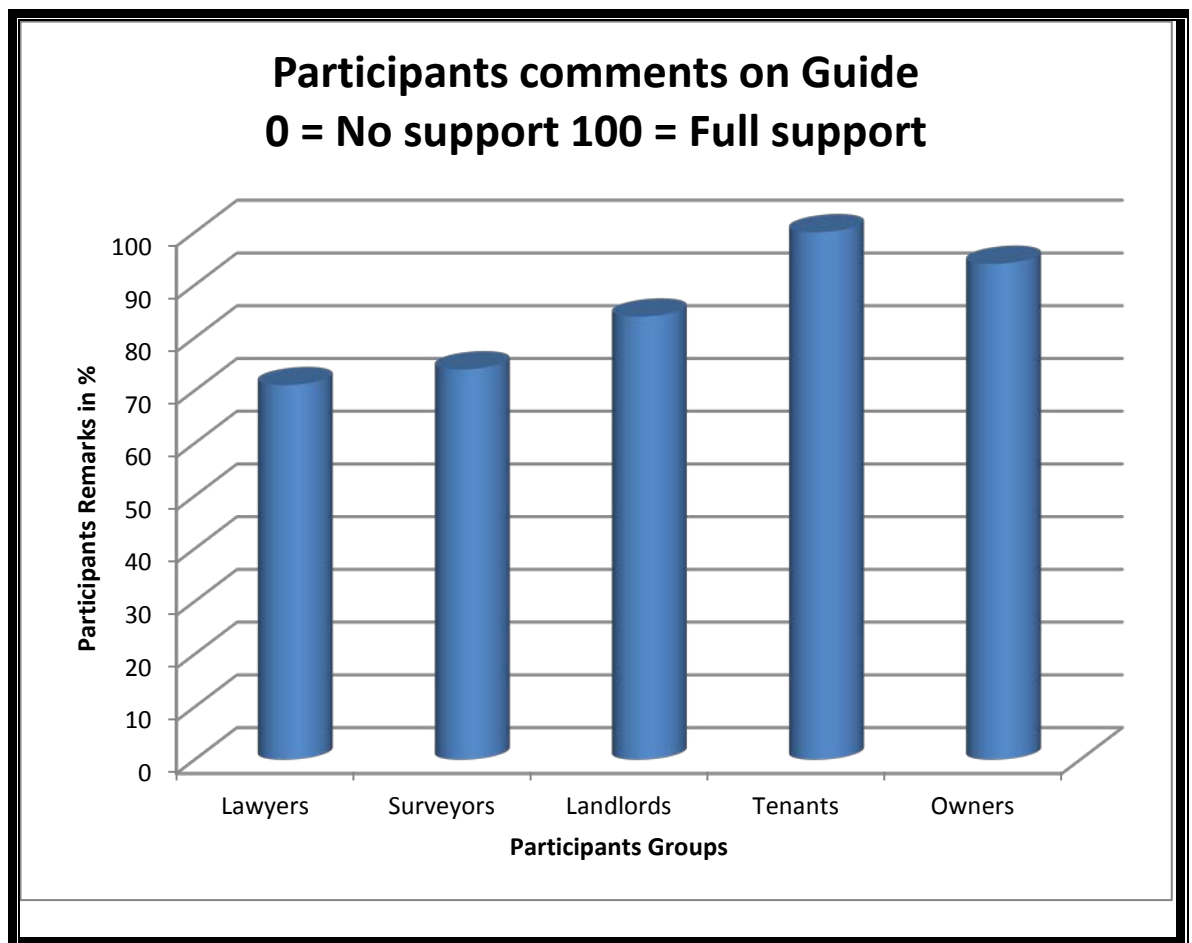
industry think of us, when they draft those nightmare leases. The guide will be great idea for people who feel they may not fully understand lease. At the moment due to our misunderstanding of the lease, we have to go to solicitors who charge an arm and a leg to explain the basics. Even using dictionary does not make the leases terms clear and they are of a specific ancient law language.

#### Business Owners

The business owners group's reaction to the idea of the guide was quite positive and many expressed their support. Over 94% essentially said yes.

Chart 5 shows the participants' response to question 5.

**Chart 5: Participants' Comments on the Guide**



#### 4.3.2 Summary of key findings

The majority of respondents declared that commercial property leases are complex. Their awareness of codes, and voluntary leases were low, and they would prefer alternative dispute resolution instead of going to court. Participants did express their clear support for reform of commercial property leases thorough legislative intervention, and production of a guide explaining, and translating, the key legal terms of commercial property leases in other main alternative languages, mainly for the benefit of ethnic minorities. These summary key findings concur with the findings of extensive literature review, exploring causes of landlords and tenants case law disputes, analysis of lease clauses and comparable studies. Those reaffirm the self-regulated commercial property leases are complex, non-standardised, and hard to understand. Leases contain torturous terms, and are poorly drafted in too many different styles and presentations. Some lawyers and surveyors commented that even for them, leases can be difficult to understand, let alone for the ordinary people entering lease contracts, in particular ethnic minorities.

The interviews yielded quality data that was systematically analysed and recognised by a credible and experienced researcher. In an effort to adhere to high ethical standards while carrying out qualitative research, a useful approach was to remain aware that the interviewer is in effect the analytical instrument and must demonstrate competence, credibility, and professionalism. Researcher appreciated and learned more about the phenomenon under investigation and described what was learned with a minimum of interpretation. It was important for the researcher to stay close to the participants' feelings, thoughts, and actions as they broadly related to the specific focus of the enquiry. This research argues that the method of data analysis devised by Glaser and Strauss (1967)<sup>264</sup> and refined by Lincoln and Guba (1985)<sup>265</sup> is a robust way to conduct an inductive analysis of qualitative data. In this chapter, the principal stage of the data analysis focused on developing a set of narratives composed of raw data, including quotes from mainly interviews. Data reduction process was then utilised to develop the five categories, which are broad enough to

---

<sup>264</sup> B G Glaser and A L Strauss, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Aldine Publishing 1967)

<sup>265</sup> Yvonna S Lincoln and Egon G Guba *Naturalistic Inquiry* (Sage Publishing 1985)

capture issues related to the thesis' main topic, which is the reform of commercial property leases, and publication of a guide, explaining and translating, the key legal terms of the commercial property leases in English and other languages. As established by the findings, such a guide would benefit the Ethnic Minority speakers of other languages in England. This process made it possible to develop a list of themes and situation specific factors directly connected to views about reform and the guide. These themes were used to write brief descriptors of situations commonly described by the respondents, which comprised the first stages in gathering the data. These themes represented more abstract and robust descriptions of the views regarding the assertion or rejection of lease reform in commercial leases.

The key challenges were to allow the respondents to reveal themselves through their words and actions, to capture the interrelatedness of these revelations despite their complexity and diversity, and to impartially create an explanation based on their responses. Strauss and Corbin 1998<sup>266</sup> campaign the need to maintain an attitude of disbelief as a means of maintaining objectivity. There is also a need to be aware of the term insider research, where the researcher has a direct involvement with the research setting. Yet if the research process is transparent, honest, and professional, then it is possible to reduce bias. As the result of the fact that this research and the methods needed to generate realistic results, no specific pre requisites in terms of level of expertise were set, with the exception of lawyers and surveyors, who needed to be experts in the field. However, participants had to be involved in the commercial property leases regardless.

## **4.4 Conclusion**

The main concern in this qualitative research was the validity (also referred to as credibility and/or dependability) of the findings, therefore many different ways of establishing validity were applied, including: member check, interviewer corroboration, peer debriefing, prolonged engagement, negative case analysis, auditability, confirm ability, bracketing, balance, and supporting documentary evidence. Some of the issues linked with qualitative research are assertions about the

---

<sup>266</sup> A L Strauss and J M Corbin, *Basics of Qualitative Research* (Sage Publishing 1998)

independence and rigor of the approach, plus the validity and reliability of the findings. Researcher was sure to apply Angen's (2000)<sup>267</sup> strategy of validating a piece of research by two methods to ensure that it proves to be trustworthy and effective, which are described as ethical and substantive validation. Generally validity is defined as whether an instrument measures what it is supposed to measure Sarantakos (2005)<sup>268</sup>. This study employed the semi- structured interview in conjunction with field notes, and some observations, which made it possible to gather evidence from multiple sources.

In this hypothesis, a common approach to judging qualitative research has been the generalisability of the findings; yet the objective for researchers has been to assess the extent to which the findings can be theoretically replicated or applied to other contexts. The key to achieving this transferability is the generation of thick descriptions and purposive sampling. These thick descriptions have been described by Byrne (2001)<sup>269</sup> as richly described data that provide the research consumer with enough information to judge the appropriateness of applying the findings to other settings. Semi structured interviews in this research contributed to the threat of respondent's bias, which may provide an inaccurate reflection of the participants' experience. However, it offered a longitudinal perspective, which contributed to a more in depth understanding of this phenomenon. While social phenomena are too variable and context-bound to allow for significant generalisations, there is a need to do a good job of particularisation before looking for patterns across cases. Researcher adopted a constant comparative method to generate a list of first order concepts associated with how the assertion or rejection of reform of commercial leases is viewed. Patton (2002: 491)<sup>270</sup> describes constant comparative analysis as making theoretical comparisons methodically, and creatively engages the analyst in raising questions and discovering properties and dimensions that might be in the data by increasing researcher sensitivity. Maykut and Morehouse (1994)<sup>271</sup> states, that the

---

<sup>267</sup> Maureen Jane Angen, *Evaluating Interpretive Inquiry* (Sage Publishing 2000)

<sup>268</sup> Sotirios Sarantakos *Social Research* (Palgrave Macmillan, 2005)

<sup>269</sup> Barbara M Byrne, *Structural Equation Modelling with Amos* (Routledge Publishing 2001)

<sup>270</sup> M Q Patton, *Qualitative Research and Evaluation Methods* (Sage Publishing 2002)

<sup>271</sup> Pamela S Maykut and Richard Morehouse, *Beginning qualitative research: A philosophic and practical guide* ( Falmer Press 1994)

researcher must understand more about the phenomenon under investigation and describe what was learned with a minimum of interpretation. Thus, it was important for the researcher to stay close to the participants' feelings, thoughts, and actions as they broadly relate to the specific focus of enquiry.

Researcher did also follow the Maykut and Morehouse<sup>272</sup> recommendations and therefore photocopied all the data and pre-coded each page of the data by including a code for the type of data, the source of the data, and the page number of the particular data set, such as pages of notes, on the corner of each page. This approach was very useful in the analysis and prevented confusion and replication of the data. Consideration was given to using a software package, to analyse the information. However, as the sample was relatively compact and manageable, researcher chose the manual method of analysing the results, which, as turns out, is more user - friendly and appropriate. Although this hands-on method was more time consuming, it gave me the opportunity to engage better and provided a degree of personal control over the data.

The next stage of the research was unitising the data, a process of classifying the pieces or elements of meaning in the data (Lincoln and Guba).<sup>273</sup> This was a method of removing meaning from the words of the study participants, framed by the process of enquiry (Maykut and Morehouse, 1994)<sup>274</sup>. In this research, the principal stage of the data analysis focused on developing a set of narratives composed of raw data, including quotes from interviews and documents. A data reduction process was then used to develop a set of five categories broad enough to capture issues related to commercial property leases.

This process made it possible to develop a list of themes or situation specific factors directly connected to views about reform of commercial property leases. These themes were used to write brief descriptions of situations, commonly described by

---

<sup>272</sup> Ibid

<sup>273</sup> Yvonna S Lincoln and Egon G Guba, *Naturalistic Inquiry* Qualitative Research (Sage Publishing 1985)

<sup>274</sup> Pamela Maykut and Richard Morehouse, *Beginning qualitative research: A philosophic and practical guide* (Falmer Press 1994)

the respondents, which were the first stage of gathering the data. These themes represented more abstract and robust descriptions of the views regarding the lease reform in commercial property law. Upon completion of the analysis of the data, the next stage was writing up the research. This is also an important part of the analytical process, during which researcher considered the substance and sequence of the report.

Methodological choices included considerations of whether the data to be analysed and interpreted was quantitative or qualitative in nature. Qualitative research as opted for in this research has much in common with subjectivist perspectives. Investigating the richness of data in what may be an unstructured piece of research, with a view to working on emergent theoretical relationships, is the essence of qualitative thinking. In this thesis, researcher aimed to gather an in-depth understanding of participants' views and behaviour, and the reasons that governs those in respect of reform of commercial property leases.

## **CHAPTER 5 – COMMERCIAL LEASES IN OTHER JURISDICTIONS AND ALTERNATIVE DISPUTED RESOLUTION (ADR)**

### **5.1 Introduction**

In this research in addition to exploring commercial leases in other jurisdictions, particularly the Australian commercial lease reform is explored as a model. The rationale for this is due to the fact that the policy objective of the Australian State Government is similar to that of England (see 5.2 below). The Australian government's response to the on-going disputes between landlords and tenants has been to ignore self-regulation and voluntary codes (as adopted in England) and implement legislation. This legislative intervention creates an enforceable compulsory framework for both negotiations of the commercial lease, actual lease document, the standard terms and disputes resolution. (see 5.2 below)

Through legislative intervention and compulsory terms, the Australian Retail and Commercial Leases Act 1995 (see 4.5 below) regulate the leasing of business premises. The Australian legislation related to commercial leases includes the use of compulsory low cost dispute resolution (ADR), which is often mediation. Government funded lease registrars or commissioners undertake the investigation of non-compliance under the Acts. They also run the mediation service and attempt to educate small businesses on the dangers of signing leases without due consideration. If the landlord and tenant have a dispute and they have been unable to settle through negotiation, they may wish voluntarily to consider using an alternative dispute resolution scheme (ADR) rather than taking court action. These schemes use a third party such as an arbitrator or an ombudsman to help them to reach a solution. Parties in the lease may have to pay a fee for using the ADR scheme, which are legally binding. This means that parties cannot take court action if they aren't satisfied with the decision, except to enforce an award. The landlord and tenants are advised to look at the pros and cons of ADR, against small claims actions through court, and decide which would be the best course of action.

This chapter also investigates commercial property leases in other jurisdictions. In the USA, leases dealing with commercial property are strictly regulated by statute. In Canada, commercial property leases differ significantly from residential leases. Residential leases are highly regulated in contrast to commercial leases, which are very loosely regulated. Canadian commercial property leases are quite similar to self-regulated English system.

This chapter also explores the European Union commercial property lease laws and the comments on comparative law of the current legal situations in Member States. In Europe, property law is to-date one of the few legal branches that has remained essentially national, and in which differences among national laws remain greatest<sup>275</sup>. Following the establishment of the internal market and the common area of freedom, security, and justice, European citizens, businesses, and capital have become increasingly mobile.

## **5.2 Australian lease reform**

Many of the laws and policy objectives of the Australian state governments are similar to England. The Australians' response to on-going disputes between landlords and tenants has been to ignore voluntary solutions and implement mandatory statute. The statute creates enforceable frameworks, for both negotiations and the lease document. Researcher completed an in-depth research and explored the mandatory Australian Retail and Commercial Leases Act 1995<sup>276</sup>, which the Australian Government introduced. The legislation across the Australian States has many similar features to English law. This research's aim is to investigate the effectiveness of Australian legislation, to could help to improve the commercial property leases in England.

Only through legislative intervention and compulsory terms of the Australian Retail

---

<sup>275</sup> Ibid 22

<sup>276</sup> South Australian Legislation 'Commercial Leases'  
<<http://www.legislation.sa.gov.au/LZ/C/A/Retail%20and%20Commercial%20Leases%20Act%201995.aspx>> accessed 29 November 2011

and Commercial Leases Act 1995, proper regulation of leasing business premises has been achieved. In Australia during the 1970s, the growth of retail within commercial property industry centralised retail property ownership within a few major developer and investors. Small business tenants operating commercial premises in the centres began to complain of abuse of power by landlords. There was no statutory right to a new lease and the shopping centre managers were charged with aggressive treatment of tenants at renewal negotiations, and also failure to disclose charges that were included after the lease was signed. Small shopkeepers were obliged to pay for inappropriate items in service charges, complete refits at renewal, design fees for the fit out, and, where major anchor stores refused to pay for certain items in service charges, these were spread around the remaining tenants. These led to a call for intervention by the Eight States of Territories of the Commonwealth Federation of Australia that eventually approved legislation, leading to all States and Territories having legislation.

The objective of the Australian Commercial property lease is to achieve, an appropriate balance between reasonable, expectations and to ensure as far as practicable fair dealing between lessor and lessee. Standard terms of the Australian commercial property lease, includes: end of term rules, when a lessor of premises in a retail premises proposes to re-let the premises; preferential rights, when the existing lessee of premises in a retail shopping centre has a right of preference, and the lessor must, at least 6 months (but not more than 12 months) before the end of the term, begin negotiations with the existing lessee for a renewal or extension of the lease.

If a dispute arises, either the landlord or tenant can lodge a notice of dispute with the Commissioner setting out their grounds of complaint and applying for mediation of the dispute or may apply to the Magistrates Court for orders resolving the dispute. Any landlord wishing to terminate the lease upon its expiry must give no less than 6 months, and no more than 12 months official notice before the end of the term of a lease. If the landlord wants to offer the lessee a renewal or extension of the lease or inform the tenant that he does not propose to offer a renewal or extension of the lease, this must also be in a form of official notice, 6 months prior to the termination date of the lease. The landlord cannot demand a premium for renewal or extension of time. If the landlord fails to negotiate or give a notification to the tenant as required

by the Act, and the tenant by notice in writing to the landlord given before the end of the term of the lease, requests an extension of the lease under this section, then the term of the lease is extended until the end of six months after the landlord begins the required negotiations or gives the required notice.

Under Australian commercial property laws, it is a criminal offence if any landlord or an agent acting for him makes threats to discourage a tenant from exercising a right or option to renew or extend his lease. The landlord has fit out obligations under the lease if he is required to provide finishes, fixtures, fittings, equipment, or services before the tenant enters into possession of the premises. The Rent Review clauses under the Australian commercial property leases are similar to the same commercial property lease rent review in England with one exception that the inclusion of a standard rent review clause in Australian leases are compulsory. If the landlord and tenant do not agree, the amount of the rent is to be determined by valuation carried out by a person appointed by agreement between the parties to the lease or, failing agreement, appointed by the person for the time being holding or acting in the office of President of the Australian Institute of Valuers and Land Economists.

Legislative terms of Australian commercial property lease resolve the current market rent under options to renew. Therefore, any business premises that provides an option to renew or extend the lease at current market rent, is leased to include a provision to the effect that the current market rent of the premises is the rent. A request from the tenant for the landlord's consent to an assignment of the lease must be made in writing. The tenant must provide the landlord with information that he reasonably requires, about the use to which the proposed assignee proposes, regarding the business premises, the financial standing and business experience of the proposed assignee.

The Commissioner in compliance with the Act must arrange for mediation of disputes between landlord and tenant. The Commissioner is responsible for making arrangements to facilitate the resolution of disputes between parties to a business lease. Either the landlord or tenant can apply to the Commissioner for mediation of a dispute arising from, or related to, the lease, or a dispute related to any other matter

relevant to the occupation of the premises, or to a business conducted at the premises. The Act has provision for the Commissioner to intervene in proceedings before a court concerning a dispute about a commercial property lease. If the Commissioner intervenes in proceedings the Commissioner becomes a party to the proceedings and has all the rights including rights of appeal of a party to the proceedings. The Australian commercial property lease has good provisions for reliance and referring cases to the Advisory Committee. The Advisory Committee is established and will be constituted in the manner prescribed by the regulations. The regulations may also provide for the procedures of the Committee and other matters relevant to the functions or operation of the Committee.

This Act regulates the leasing of business premises; amends the Landlord and Tenant Act 1936, and for other purposes, overrides leases. The Act operates despite the provisions of a lease; a provision of a lease or a collateral agreement is void if it is inconsistent with the Act. The Act becomes enforceable when the lease is entered into and both parties have executed the lease; or a person enters into possession of the business premises as lessee under the lease; or a person begins to pay rent as lessee under the lease.

The Australian Retail and Commercial Leases Act 1995 Act regulates<sup>277</sup> the commercial property leasing of business premises. In commercial property lease contracts, the Commissioner is responsible for the administration of this Act. Ministerial control includes the administration of this Act, subject to control and directions by the Minister. The functions of the Commissioner include investigating and researching matters affecting the interests of parties to business leases. The Minister is also responsible for publishing reports and information on subjects of interest to the parties to business leases. His office gives advice (to an appropriate extent) on the provisions of this Act and other subjects of interest to the parties involved in the business leases. The office also investigates suspected infringements of the Act and takes appropriate action to enforce the Act. The Commissioner report's to the minister on questions referred to the commissioner by the minister and other questions of importance affecting the administration of this Act, and administers the funds.

---

<sup>277</sup> Ibid

In Australia the Commissioner is responsible for making arrangements to facilitate the resolution of disputes between parties (or former parties). Any party (or former party) to a retail shop lease may apply to the Commissioner for mediation of a dispute arising from, or related to, the lease, or a dispute related to any other matter relevant to the occupation of the premises or to a business conducted at the premises. A fee prescribed by regulation is payable on an application under this section. If a dispute between parties (or former parties) to a retail shop lease is the subject of proceedings before a court, the court may refer the dispute to the Commissioner for mediation under this Division. The court may stay the proceedings while an attempt is made to settle the dispute by mediation.

The Commissioner may intervene in proceedings before a court concerning a dispute about a retail shop lease or rights or obligations under a retail shop lease. If the Commissioner intervenes in proceedings, the Commissioner becomes a party to the proceedings and has all the rights (including rights of appeal) of a party to the proceedings.

The Act provided that an advisory committee is established. The advisory committee is constituted in the manner prescribed by the regulations. The regulations may also provide for the procedures of the committee, and other matters relevant to the functions or operation of the committee. A member of the Committee will not be taken to have a direct or indirect interest in a matter for the purposes of the Public Sector (Honesty and Accountability) Act 1995 by reason only of the fact that the member has an interest in a matter, that is shared in common with lessors generally or lessees generally, or a substantial section of lessors or lessees. The functions of the commercial property leases Advisory Committee are to keep the administration of this Act under review and make reports to the Minister on subjects that, in the Committee's opinion, justify a report, or on which the Minister requests a report.

Annual reports are done by the Commissioner and not voluntary organisations and other individuals who may interpret the findings differently. The Commissioner for Consumer Affairs must, on or before 31 October of each year, deliver to the Minister an annual report containing information on the administration of the Act<sup>278</sup> during the financial year ending on 30 June of that year, and the administration of the fund

---

<sup>278</sup> Ibid 276

during the financial year ending on 30 June in that year, containing a copy of the accounts of the fund last audited by the Auditor General.

**Table 4: Australian State/Territory current legislation**

Australian State	Act	Date	Last
Australian Capital Territory (ACT)	Leases (Commercial and Retail) Act 2001	01/07/2002	04/03/2003
New South Wales (NSW)	Retail Leases Act 1994	01/08/1994	01/01/2006
Northern Territory (NT)	Business Tenancies (Fair Dealings) Act 2003	01/07/2004	
Queensland (QLD)	Retail Shop Leases Act 1994	28/10/1994	03/04/2006
South Australia (SA)	Retail and Commercial Leases Act 1995	30/06/1995	06/12/2001
Tasmania (TAS)	Fair Trading (Code of Practice for Retail Tenancies) Regulations	01/09/1998	
Victoria (VIC)	Retail Leases Act 2003	01/05/2003	23/11/2005
Western Australia (WA)	Commercial Tenancy (Retail Shops) Agreements Act 1985 incorporating the Commercial Tenancy (Retail Shops) Agreements Amendment	01/09/1985 01/07/1999	28/06/2001 Presently under further review

Sources: Philips Fox (2004), Clayton Utz (2005) and Minter Ellison (2006)

In contrast with the above, in England and Wales, there has been reliance on self-regulation of commercial property leases. It is interesting to note that all States in Australia have resorted to legislation to resolve their commercial business lease issues for the benefit of landlords and tenants. In Australia, virtually all States

ignored a voluntary solution, although New South Wales (NSW) first attempted to produce a mandatory code. This was not agreed so a voluntary code was put in place with the support of all sides of the industry, with the hope that it would become agreed as a mandatory code in time. In the event, individual landlords and tenants did not comply with it and it was decided that a voluntary code would not work and the parties would not agree to it becoming mandatory. Following experiments and having decided that voluntary codes were ineffective the Australian Government did intervene and legislate. The cause of the intervention in Australia was the behaviour of business managers, landlords, and tenants, and on-going disputes in line with England. In Australia conventional leases did stifle innovation and illustrate the difficulties in drafting leases that enable a responsive approach to building management to be adopted.<sup>279</sup> The concentration on indicators that relate to the premises rather than the tenants suggests that in many States the legislation is in fact a smaller retail premises Act rather than a small business tenant Act, with some small commercial premises included in some States. Most States have founded some form of lease registrar or commissioner and in Victoria it is the Small Business Commissioner (SBC).<sup>280</sup>

### **5.3 Commercial property leases in other jurisdictions**

In addition to the Australian lease, it was essential and prudent to study and compare commercial property (leases), in other developed foreign legal systems, to acquire an insight to possible solutions for this research problem. Placing legal systems into different legal families has for long been used as a conceptual framework to be utilised by legal researchers and lawyers.<sup>281</sup>

---

<sup>279</sup> Craig Roussac and Susan Bright, (2012) 'Improving environmental performance through innovative commercial leasing' An Australian case study, *International Journal of Law in the Built Environment*, Vol. 4 Iss: 1, pp.6 – 22

<sup>280</sup> Office of the Victorian Small Business Commissioner 'Lease Registration'  
<<http://www.sbc.vic.gov.au/>> accessed 28 November 2011

<sup>281</sup> J Banakas, *The Method of Comparative Law and the Question of Legal Culture Today* (1994 Sage Publishing)

### 5.3.1 United States of America

In all states, leases dealing with commercial property are strictly regulated by statute. Commercial lease laws govern the rights and duties of lessors and lessees in leases that involve commercial property. Most states have enacted section 2A of the Uniform Commercial Code, which is a set of exemplary laws formulated by the National Conference of Commissioners on Uniform State Laws and by the American Law Institute.<sup>282</sup>

In all states in the USA, a court may void unconscionable leases. A lease is unconscionable if it unduly favours one party over the other. For example, assume that a small business owner leases a property for thirty years for the operation of a gas station. The lease contains a clause stating that the lessor may revoke the agreement without cause and without notice. If the lessee performs his or her obligations under the lease, but the lessor revokes the lease without notice, the clause allowing termination without notice may be found to be unconscionable. A determination of unconscionability must be made by a judge or jury based on the facts of the case. The fact finder may consider factors such as the relative bargaining power of the parties, the other terms in the lease, the purpose of the lease, and the potential loss to either party as a result of the terms of the lease.<sup>283</sup>

American commercial property leases must contain certain guarantees. If they do not, a court may read assurances into them. One such warranty is the warranty of merchantability. Generally, this warranty requires that all leased property be fit for general purpose. Another warranty implied in commercial leases is the warranty of fitness for a particular purpose. This warranty applies only if the lessor knows how the lessee plans to use the property and the lessee is relying on the lessor's expertise in choosing the best goods or services. A lessee may assign a lease to a third party or assignee. An assignment conveys all rights under the lease to the assignee for the remainder of the lease term, and the assignee assumes a contractual relationship with the original lessor. However, unless the lessor agrees otherwise, the first lessee still

---

<sup>282</sup> G Brennan, *Landlord and Tenant Law* (Oxford University Press Publishing 2002)

<sup>283</sup> R Korona, *Landlord and Tenant Law* (5<sup>th</sup> edn, West Group Publishing 2001)

retains the original duties under the lease agreement until the lease expires. Generally, an assignment is valid unless it is prohibited by the lessor. An assignment differs from a sublease. In a sublease, the original lessee gives temporary rights under the lease to a third party, but the third party does not assume a contractual relationship with the lessor. The original lessee retains the same rights and obligations under the lease, and forms a second contractual relationship with the sublessee. Similar to assignments, subleases generally are valid unless they are prohibited by the lessor. If a lessor defaults on his obligations under the lease, the lessee may sue the lessor for damages.<sup>284</sup>

### **5.3.2 Canada**

In Canada, in contrast to residential leases, commercial property leases are very loosely regulated<sup>285</sup>. The rights and obligations of the landlord and tenant are mainly a matter of contract between the parties. What is agreed to in the lease is of key importance. Therefore, contacting a Canadian real estate lawyer at an early stage is important. As a commercial lease is a matter of agreement, each lease is somewhat unique and every landlord will have its own form of lease. Nevertheless, there are standard components found in almost all forms of lease. These include provisions relating to the premises and term of the lease. These provisions describe the space being rented, the time for which the tenant will rent it, and the tenant's monetary obligations under the lease. These obligations usually include the rent, the tenant's share of operating costs for the building, the tenant's share of municipal taxes for the building, and the tenant's utilities. The tenant's physical obligations under the lease is a broad category covering restrictions upon the use which the tenant intends to make of the space, the specific on-going maintenance which the tenant is required to carry out, and the alterations which the tenant is allowed (or required) to make to the space itself. Insurance provisions relate to the requirements of the tenant's insurance policy relating to inside the premises, and in some cases, the requirements of the

---

<sup>284</sup> Robert Mc Curley, 'Landlord and Tenant Act' *The Alabama Lawyer* (November 1997) 63

<sup>285</sup> H Haber, *Assignment, Subletting and Change of Control in a Commercial Lease* A Practical Guide Canada Law Book, ( Sage 2002)

landlord's insurance policy relating to the entire building generally.<sup>286</sup>

Lease assignment and subletting rights provisions describe restrictions regarding the transfer of the rental space to other parties. Registration, subordination, and non-disturbance rights sections describe the rights of the tenant as against the landlord's creditors and/or future purchasers of the landlord's building. Default provisions set out in detail the landlord's remedies in the event of tenant default under the lease. The special rights are the specific terms agreed to by the tenant and landlord regarding future rights such as renewal, expansion, or termination, and regarding the work and inducements, the landlord agrees to provide to the tenant, as an incentive to enter into the lease.

Often in Canada the leasing process is done in two stages. First, an offer to lease is signed containing all of the essential business terms of the agreement, and later a full lease is signed in the landlord's form. The offer stage is usually the best chance for each side to negotiate its business points, conditions, and deal breakers. Once the offer is signed and all conditions have been satisfied, the lease is then drafted containing the modifications required by the offer.

In Canada, landlords exercise most of the negotiating power in commercial property leasing, unless the tenant is taking a large amount of space or is a potential anchor in a retail setting. As a result, most forms of offer and forms of lease will inherently favour the landlord. However, generally landlords in Canada are also prepared to be fair in negotiating most points, provided they are points of significant importance to the tenant. The tenant must therefore plan ahead and be clear on his critical business points. Provided a tenant knows his or her needs, they will be in a better position to focus the negotiations on its important issues.

Every case will be unique, and the complications involved in negotiating any Canadian lease should be handled by a property lawyer on behalf of each party. However, both parties will benefit from knowing the basics behind the leasing

---

<sup>286</sup> R Williams and G Rhodes, *Canadian Law of Landlord and Tenant*, (6th ed Toronto: Carswell, 1988)

process in order to focus and properly instruct their lawyers and to arrive at a final document that all parties can live with for years to come.<sup>287</sup>

### 5.3.3 Europe

In Europe, the law of property is an area of law which remain essentially national, and where differences among national laws remain greatest<sup>288</sup>. The EU commercial property law encompasses the Member States and candidate countries, as well as the comparative law of the current legal situations in all Member States and some candidate countries.<sup>289</sup>

In Europe<sup>290</sup> the land law, as generally in property law, there is not only a channel, but an ocean between the continental legal systems on one side and the common law systems on the other side<sup>291</sup>. A lot of land law practice in Britain is about equitable interests or trusts. Real property law has developed in Europe on the basis of tribal/feudal and Roman law. Its general contemporary sources are spread over continental codifications and the British Common Law, whereas specific fields such as the registration of land, ownership and commercial leases are dealt by, special local and national statutes. Philosophically, real property law is influenced strongly everywhere in Europe by liberalism which relies on individual land ownership. Whereas this origin is significantly reflected in national constitutional law, the influence of supranational constitutional law has shown to be only limited.

---

<sup>287</sup> Canadian Lawyers Publication 'Commercial Leases' <<http://canadian-lawyers.ca/Understand-Your-Legal-Issue/Business-Law/Leasing-Commercial-Space-in-Canada.html>> accessed 08 November 2011

<sup>288</sup> Ibid 42

<sup>289</sup> European University Institute Department of Law 'Property Law' <<http://www.eui.eu/DepartmentsAndCentres/Law/ResearchAndTeaching/ResearchThemes/ProjectRealPropertyLaw.aspx>> accessed 09 November 2011

<sup>290</sup> Ibid

<sup>291</sup> Ibid

European contract law, in particular, consumer credits, and unfair terms, already generates far-reaching, though generally unintended, interferences into real estate transactions. General contract rules to be uniformly monitored by the European Court of Justice, such a codification would need to co-exist with widely different national property law regimes. This juxtaposition would, in turn, leave different regulatory functions to contract law, which may adversely affect its desired uniformity. In comparative land law from a variety of traditions within legal scholarships<sup>292</sup> simplification is not only unavoidable, but generally even desirable.

In Europe different legal families consists the legal system of the Code Napoleon, in France, Belgium, Italy, Luxembourg, Portugal and Spain. The common law countries are mainly England, Wales, Ireland, and in many respects also Scotland. In Europe for land law, there are some important differences. The Portuguese and Spanish land law system differs from the French system. The Netherlands are somewhere in between the various systems. In Eastern European countries, the rupture with the former communist system has been much more profound than in other areas of civil law. Therefore, one might doubt whether the Eastern European transformation states still are a group linked by some common features in land law or whether the return to pre-war traditions has not been more important, so that we should rather lump Slovenia in one family together with Austria and, may be, the Czech republic, Hungary and Slovakia or Poland together with France and the family of the Code Napoleon.

Some important instruments such as notarial deeds (*actes authentiques*) are only used in continental Europe, with the effect that their recognition and may pose problems in other Member States. Apart from the economically marginal directive on time sharing rights in immovable, the European Union has to-date never become active in real property law. However, European legislation in other areas has had several important effects on real estate transactions. In Europe, many aspects of real estate transactions are protected by the basic freedoms.

---

<sup>292</sup> Susan Bright and John Dewar *Land law themes and perspectives* (Oxford Press Publishing 1998)

## **5.4 Alternative Disputes Resolution (ADR)**

In ADR, there is a distinct shortage of guidance and material relating to landlord and tenant disputes as compared with, for example, family law, construction disputes or general commercial disputes. It is well known that legal advisors are key players in commercial property disputes. It is argued that lawyers are not neutral advisors but take a more active role, and correspondingly, the opinions of these lawyers carry real weight, which will typically result in their advice being followed by their clients. It is therefore contended that lawyers are essential to disseminating any course of dispute resolution, litigation or otherwise, with mediation being no exception. This leads, then, to the hypothesis that a principal reason why mediation is rarely used as a method of commercial dispute is because of reticence or hostility or ignorance on the part of the lawyers themselves. The reasons that are offered as possible suggestions for these prevailing attitudes, which will be classified as “negative viewpoints,” include the nature of legal “culture” in England and Wales, namely that litigation and the confrontational system that remains deep-rooted in many lawyers, mean that alternatives to litigation are not naturally sought after, and lack of awareness of the role, possibilities, or availability of mediation particularly in the commercial sector is also another factor.

This strongly suggests that the vast majority of commercial landlord and tenant clients know little about dispute resolution options and are therefore reliant on the advice of their lawyers. The attitude that lawyers take towards ADR is thus clearly of particular importance in any future growth of mediation in commercial landlord and tenant disputes. There is also evidence that demonstrates significant user satisfaction with mediation and wide, although not universal, support among commentators. Despite this, it appears that the judiciary, the courts, and parliament have reservations about the future growth of mediation even though they have taken a broadly encouraging approach

ADR provides a voluntary alternative to the accepted practice of using the courts to settle civil disputes, and specifically LAT disputes. The principle forms of ADR are mediation, adjudication, arbitration, and reconciliation. The best known and most commonly used forms of ADR in the UK are arbitration and mediation, but

adjudication is rapidly becoming established as a valued method of settling disputes quickly, fairly, and cheaply. ADR has become popular in some quarters, in particular among lawyers and mediation service providers, who regard conciliation, negotiation and mediation alone as ADR. For these people, a negotiated settlement is an alternative to having a dispute brought to an end by a third party, such as an adjudicator, an arbitrator, or a judge. This narrow definition ignores the significance of the voluntary aspect of private dispute settlement and the role that is played in all forms of ADR processed by experts and professionals outside the legal profession. Since 1996, Central London County Court has run a voluntary mediation scheme. During the first two years, it was a pilot scheme, and an evaluation by Hazel Genn was published in 1998.<sup>293</sup> From 1998, the scheme became a permanent part of the court process. Since then, information about the mediation scheme has been sent to both parties once a defence has been received by the court. The choice of whether or not to use the scheme is entirely voluntary. If both parties agree to try mediation, the court fee for mediation is £100 per party. This covers a three hour mediation session in mediation rooms on the court premises from 4:30pm to 7:30pm, after court business is over for the day.

A review of ADR was published in May 2007.<sup>294</sup> It looked at the numbers and types of cases mediated since the 1998 evaluation, the outcome of the cases, and what has happened to the settlement rate at mediation during this time. The report also explored the views of parties and their lawyers about the mediation process. The research was based on a statistical survey of cases from 1999 to 2004, and the questionnaires were sent to parties taking part in the scheme in 2003. A range of empirical work on the subject of ADR has been undertaken by a number of scholars, for example, Hazel Genn, 1998<sup>295</sup> Brooker and Lavers, 2000, 2001, 2002<sup>296</sup>.

---

<sup>293</sup> Hazel Genn, 'Report on ADR' Central London County Court Mediation Scheme: Evaluation Report (1998)

<sup>294</sup> Community Legal Service 'Recent Developments in Alternative Dispute Resolution' <<http://www.asauk.org.uk/fileLibrary/pdf/adr21.pdf>> accessed 25 October 2011

<sup>295</sup> Ibid 293

<sup>296</sup> Penny Brooker, 'Commercial Lawyers Attitudes and Experience with Mediation' (Web Journal of Current Issues) <<http://webjcli.ncl.ac.uk/2002/issue4/brooker4.html>> accessed 25 October 2011

Whilst some forms of ADR, most notably adjudication in construction disputes, have received official sanction and a statutory framework, this has not been the case for either mediation or dispute resolution generally within the commercial landlord and tenant sector. Interestingly, residential as opposed to commercial landlords and tenants have seen statutory intervention in the form of the Housing Act 2004 (Sections 212-215),<sup>297</sup> where tenancy deposits are now protected and where disputes are usually settled by an adjudicator rather than a county court action. Despite receiving the approbation of professional bodies active in commercial property disputes, mediation has yet to make a substantial impact.

A major area where a distinct alternative dispute procedure has been used in property matters by the RICS has been the use of professional arbitration on court terms (PACT).<sup>298</sup> This is a procedure that is designed for renewals of qualifying business tenancies under Part II of the Landlord and Tenant Act 1954. The PACT scheme allows a suitable appointee to have the same authority as a judge in dealing with lease renewal matters under Sections 29-35 of the Act. Despite what appear to be its numerous advantages and a high user satisfaction score of 85 per cent according to a survey carried about by the Property Litigation Association<sup>299</sup> (PLA, 2009), it has yet to be widely used. This is undoubtedly partially because of the widespread ignorance on the part of small business tenants, but an additional or alternative explanation may be resistance. With the exception of dilapidations and a landlord's application opposing renewal, there is usually an implicit understanding that the tenancy, and therefore the relationship between the landlord and tenant, is supposed to or is expected to continue. Much commentary has noted that mediation may be particularly suitable for dispute resolution where there is an on-going relationship to maintain, Kurtzberg and Henikoff, 1997<sup>300</sup> and Lowenstein, 2000.<sup>301</sup> It is for this

---

<sup>297</sup> Housing Act 2004 <[www.legislation.gov.uk/ukpga/2004/34/contents](http://www.legislation.gov.uk/ukpga/2004/34/contents)> accessed 17/11/2011

<sup>298</sup> RICS 'Lease renewals made simple' Royal Institute of Chartered Surveyors <[http://www.rics.org/site/scripts/documents\\_info.aspx?documentID=508](http://www.rics.org/site/scripts/documents_info.aspx?documentID=508)> accessed 02/11/2012

<sup>299</sup> Property Litigation Association, 'Alternative Dispute Resolution' <<http://www.pla.org.uk/>> accessed 02 February 2012

<sup>300</sup> Law Journal, 'Freeing the Parties from the Law Landlord and Tenant' <<http://law.jrank.org/pages/8065/Landlord-Tenant-FURTHER-READINGS.html>> accessed 03/02/2012

reason that mediation is premised as an appropriate method of dispute resolution for many commercial property disputes as there are often sound business reasons for maintaining on-going relationships where parties can sometimes be contractually bound together for decades.

Many Ethnic Minority tenants lack awareness of their rights, remedies, and the forms of dispute resolution available to them. The small business occupier is an important class of commercial tenant. They are typically the shopkeeper, the family business, the small manufacturer, and the restaurateur. They comprise a very large part of the entire sector. The Small Business Service (2004)<sup>302</sup> found that 99 per cent of British business is officially classified as small business users, and yet out of these, 70 per cent are sole traders and a further 20 per cent employ fewer than five employees. The report describes, therefore, the need for dissemination of the various rights and options available to small business tenants, including the possibility of ADR. This class of tenant typically is unrepresented by professional surveyors and is thereby more dependent on the advice of their solicitors. Whilst they may instruct solicitors to engage in the actual lease preparation, the solicitor in question typically restricts their involvement, to matters of drafting and a small number of core terms, rather than busying themselves with the actual bargain *per se*, which has invariably already been agreed, under a heads of term document, by the time that they are approached and asked to act by their client. Widespread ignorance of many aspects of the mechanics of the lease including possible remedies and dispute resolution mechanisms is, therefore, an important matter.

There has been distinct resistance to any suggestion that mediation ought to be compulsory or enforced in certain circumstances in many quarters. This has been largely due to worries over any potential breach of Article 6 rights granted under the European Convention on Human Rights<sup>303</sup> and because of fundamental concerns

---

<sup>301</sup> Lowenstein Sandler, 'Alternative Disputes Resolution'  
<[www.lowenstein.com/files/...57dd.../ADR\(April%202007\).pdf](http://www.lowenstein.com/files/...57dd.../ADR(April%202007).pdf)> accessed 04 February 2012

<sup>302</sup> Small Business Service Department of Trade and Industry, 'British Businesses'  
<<http://www.dti.gov.uk/files/file38250.pdf>> accessed 12 February 2011

<sup>303</sup> Council of Europe 'European Convention on Human Rights'  
<<http://conventions.coe.int/treaty/en/treaties/html/005.htm>> accessed 26 November 2011

over the quality of justice administered. The situation in Scotland is broadly similar to that of England and Wales. Furthermore another point that may well be seen as a hindrance to the judicial encouragement and thereby growth of mediation in the commercial sector can be seen in the recent case of *Farm Assist*<sup>304</sup>. In this case, the dealings of a mediator between parties in a dispute were not deemed to be confidential and thereby protected in the same way as solicitor client confidentiality or without prejudice negotiations are. Whilst not commenting on the role of mediation and the policies behind its use, this, nonetheless, could be viewed as being seriously unhelpful to the encouragement of the wider use of mediation in commercial leases contexts.

## 5.5 Conclusion

In America, commercial property leases are strictly regulated by statute and there are set rules and procedures for both the landlord and tenant in entering and operation of the leases. In Canada, in line with England, there are no compulsory statute legislations governing the commercial property lease. The rights and obligations of the landlord and tenant are mainly a matter of contract between the parties. What is agreed to in the lease is of key importance. In Europe, real commercial property laws are different to English property law. The regulations concerning the commercial property leases serve different purposes and require many different forms and procedures.

The Australian Government introduced complete reform of commercial leases through legislative intervention. In Australia during the 1970s, the growth of retail within commercial property industry centralised retail property ownership within a few major developer/investors, and small business tenants operating shops in these centres began to complain of abuse of power by landlords. There was no statutory right to a new lease and the shopping centre managers were charged with aggressive treatment of tenants at renewal negotiations, and failure to disclose charges that were

---

<sup>304</sup> *Farm Assist Limited (in liquidation) v Secretary of State for Environment, Food and Rural Affairs* (DEFRA) (no. 2) [2009] EWHC 1102 (TCC)

included after the lease was signed. Small shopkeepers were obliged to pay for inappropriate items in service charges, complete refits at renewal, design fees for the fit out, and, where major anchor stores refused to pay for certain items in service charges, these were spread around the remaining tenants. These led to a call for Australian Public Service Commission for intervention, by the Eight States of Territories of the Commonwealth Federation of Australia that eventually approved legislation leading to all States and Territories having mandatory regulations. The objective of the Australian Commercial property lease is to achieve an appropriate balance between landlord and tenant, to ensure as far as practicable fair dealing. Under Australian commercial property laws, it is a criminal offence if any landlord or an agent acting for him makes threats to discourage a tenant from exercising a right or option to renew or extend his lease. The landlord has fit out obligations under the lease if he is required to provide finishes, fixtures, fittings, equipment, or services before the tenant enters into possession of the premises. The Rent Review clauses under the Australian commercial property leases are similar to rent review in England with one exception that the inclusion of a *standard* rent review clause in Australian leases is compulsory but in England is self-regulated.

Legislative terms of Australian commercial property lease resolve the current market rent under options to renew. Thereby, any business premises that provides an option to renew or extend the lease at current market rent is leased to include a provision to the effect that the current market rent of the premises is the rent. The Commissioner in compliance with the Act must arrange for mediation of disputes between landlord and tenant. The Commissioner is responsible for making arrangements to facilitate the resolution of disputes between parties to a business lease. The Act has provision for the Commissioner to intervene in proceedings before a court concerning a dispute about a commercial property lease. If the Commissioner intervenes in proceedings the Commissioner becomes a party to the proceedings and has all the rights including rights of appeal of a party to the proceedings. The Australian commercial property lease has good provisions for reliance and referring cases to the Advisory Committee. The Advisory Committee is established and will be constituted in the manner prescribed by the regulations. The regulations may also provide for the procedures of the Committee and other matters relevant to the functions or operation of the Committee.

In England, in commercial property leases disputes, there is a lack of proper encouragement for the parties to seek alternative dispute resolution (ADR), and mainly arbitrations as means of resolving disputes RICS provide such a service, which is often used for lease contract disputes, rent reviews, and other types of disagreements. The Small Claims procedure in the County Courts is an arbitration service. The courts are one means of resolving disputes between individuals, companies, landlords and tenants, but they are not necessarily the most effective, particularly where the parties previously enjoyed and may well want to continue to enjoy a close relationship. The main problem with the court system is that it is primarily an antagonistic process. It pits one party against the other in order to ultimately determine a winner and a loser. As a consequence, the court system tends to emphasise and heighten the tension and conflict between the parties as each tries to show the other in the worst possible light, rather than trying to reach an amicable compromise.

The courts themselves recognise the effectiveness and increasing importance of alternative means of resolving disputes, and indeed judges will sometimes suggest this course of action prior to a court hearing. Arbitration is a procedure where the parties to a dispute refer the issue to a third party, usually an expert in the field for resolution, rather than taking the matter to the law courts. The Arbitration Act 1996 section 1<sup>305</sup> states that the object of arbitration is to obtain the fair resolution of disputes without unnecessary delay or expense. The parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest. In commercial property, many lease agreements make provision for disputes arising between landlord and tenants to be dealt with by arbitration as opposed to a court of law, and usually specify how the arbitrator is to be appointed, often with ultimate reference to the President of RICS. If one party seeks to start a court action in the face of a prior agreement to arbitration, the other party can request a stay of litigation from the court. If, on the other hand, both parties opt for court action the arbitration agreement can be ignored. In arbitration, there is a limited right of appeal after an arbitration decision is made and may only be allowed at the discretion of the courts on a point of law.

---

<sup>305</sup> The Arbitration Act 1996 <<http://www.legislation.gov.uk/ukpga/1996/23/contents>> accessed 27 November 2011

## **CHAPTER 6 - CONCLUSION**

### **6.1 Introduction**

The aim and structure of this chapter is to intertwine together the threads of the research to provide an overview of the research's key findings, the contribution those findings make to the literature, the limitation of the research, the implications of this research, the way forward, and recommendations. It reflects the research questions drawn from the literature review, the methods and procedures employed to answer those questions, and the analysis of key findings of the research for the wider reflections that are set out in this study.

This study did investigate the main research problems which are self-regulated and often poor drafting of commercial property leases, which can lead to landlord and tenant disputes. UK government's policy, to address apparent market challenges in the area of commercial property leases, has largely been pursued through industry self-regulation. In England commercial tenancy law is a complex mix of law of contract, property laws, and statutory rules. The commercial property environment is affected and controlled by the market, regulatory rules and procedures, hence its complexity. Complex terms of commercial leases can cause landlord and tenant disputes, where legal actions are brought regardless of their merits.

The research aim explored the problems with commercial property leases enquiring as to why little development or improvement has been made to leases, and examining what can be done through legislative intervention. This study explored as how numerous previous attempts at reform through voluntary codes have brought about little success. Additional aim of this research was to investigate the potential need for the production of a guide explaining the key legal terms of commercial property leases in English and also in other main languages for the benefit of ethnic minorities involved with the commercial property industry.

Different interpretations and misunderstandings of confusing terms of leases, lack of in-depth grasp, and knowledge of the meaning of those terms, causes vexatious litigation. Conceivably few professional or personal relationships ever rival landlord/tenant in terms of complication and personal involvement. Both sides have

certain expectations from the other, and occasionally conflicts arise when these expectations are not met. There are legal courses of action that can be taken to settle these conflicts, but these solutions can prove to be costly and more final than either side really wanted. Re-possession procedures can be financially and emotionally draining, while court cases can actually damage the landlord/tenant relationship even further. This study focused on the causes of landlord and tenant disputes, therefore relevant court cases were explored regardless of their outcome or date.

The Law Commission has conducted two periodic reviews of the landlord and tenant Act. In 1969<sup>306</sup>, recommending some amendments. Those were implemented by the Law of Property Act 1969. In 1992, the Commission published a further report<sup>307</sup> proposing the amendments which form the basis of proposal. The Law Commission's report of 1992 states that the 1954 Act is an established part of the commercial property market and the practices of that market develop and change over the years, so it is appropriate for the statutory provisions to be reviewed periodically to ensure that they are still fulfilling their intended purpose. On this occasion, the Commission have identified some features which experience has shown could benefit from change.

Successive Law Commission papers continued to consider the desirability of some degree of codification of the complex law governing the relations between landlord and tenant.<sup>308</sup> The Commission's concerns were primarily simplification, the production of a restatement of the general law regulating the relationship between landlord and tenant, and plugging the gaps where the common law was unclear and the agreement failed to cover the issue. It was not until 1987 in its report<sup>309</sup>, Landlord and Tenant Reform of the Law that the Commission gave any serious and

---

<sup>306</sup> Landlord and tenant HC 224 - Official Documents

<sup>307</sup> Law Commission Proposal for amendments to LAT 1954 Act, <<http://www.publications.parliament.uk/pa/cm200203/cmselect/cmdereg/182/18205.htm>> accessed 24/02/2012

<sup>308</sup> Law Commission, 'Provisional Proposals Relating to Obligations of Landlords and Tenants', (Working Paper No. 8) (London, HMSO, 1967), Law Commission, Landlord and Tenant: Reform of the Law, (Report 162), (London, HMSO)

<sup>309</sup> Ibid

sustained consideration to the possible linkage between inequality in the landlord/tenant relationship and the legal environment in which that relationship was constructed. The Commission found a very large body of landlord and tenant law which had developed haphazardly over the centuries. The law was hard to ascertain and sometimes confused, justifying criticism that it was unduly complicated and liable to produce unjust results. The Commission found a precedent, particularly in the sphere of forfeiture, not only for simplification, but also for readdressing the balance between landlord and tenant. Quoting Pollock, it acknowledged:

The truth is....that the law of landlord and tenant has never, at least  
Under any usual conditions, been a law of free contract.<sup>310</sup>

Over the years, the Commission concluded<sup>311</sup>, there had been an imbalance in bargaining power between landlords and tenants.

The Commission did not put forward any definitive proposals beyond the desirability of rationalisation and the need to pursue further reform. It found standardisation of lease terms, whether by legislation or adopted voluntarily from authoritative recommendations, an immediately attractive proposition. At the same time, though, it admitted that standardisation was not without its difficulties. Whilst both the Royal Commission on Legal Services and the Conveyancing Committee had offered support for the idea,<sup>312</sup> the Commission found the response to a voluntary attempt by the Law Society and the RICS to encourage the adoption of standard terms for rent review provisions discouraging. Following Law Commission report number 162, the Commission returned to the possibility of statutory intervention to imply covenants on the part of the landlord, in default of agreement to the contrary, in the context of liability for repair.<sup>313</sup> However, the Commission no longer viewed this as part of an overall project to rationalise lease terms and, in doing so, to readdress imbalances between landlord and tenant.

The overwhelming evidence suggests that awareness of the 2007 Code of Practice is

---

<sup>310</sup> Fredrick Pollock, *The Land laws*, (MacMillan Publishing 1883) 143 -144, quoted at Law Com 162, *op. cit*, para. 2.6

<sup>311</sup> *Ibid* 307

<sup>312</sup> Royal Commission on Legal Services, Final Report, (Cmnd 7648) (London, HMSO, 1979), Annex 21.1, para 13, 'Second Report of the Conveyancing Committee' (London, HMSO, 1985) para 8.11

<sup>313</sup> Law Com 238, *op. cit*, para. 7.10.

not high. The 2007 Code does not appear to match even the limited awareness of the previous codes. The problem of dissemination of the Code to small tenants and small landlords remains. There is no coherent strategy in place for disseminating the lease code. In commercial property leasing, it would appear that many, possibly the majority, of transactions take place in complete ignorance of the Code's existence. While the majority of transactions take place in the small business sector, there appears to be little prospect of this improving. During the market downturn, new commercial tenants have been able to negotiate better terms in their lease agreements. However, there are still indications that upward only rent reviews have not been consigned to history. The well-rehearsed arguments in favour of the upward only rent reviews, namely security and certainty, are winning the day.

Land Registry prescribed clauses template do not provide a framework to produce a standard lease with compulsory clauses. They are primarily there to facilitate better filing and indexing for the benefit of the LR. They do not influence the key legal terms of leases. Use of the prescribed clauses was initially voluntary for registerable leases received by the Land Registry. However, use of the prescribed clauses became compulsory on 19 June 2006 for almost all leases.

From 1st June 2004, the Regulatory Reform for business tenancies in England and Wales Order 2003, SI number 2003/3096 came into effect, reforming the procedures for only renewing and terminating business tenancies in England and Wales under Part II of the Landlord and Tenant Act 1954. During consideration by the House of Commons Regulatory Reform Committee<sup>314</sup>, the Office of the Deputy Prime Minister (ODPM) undertook to review the impact of the reforms once they had been in effect for one year, and to report back to the Committee. The ODPM, now the Department for Communities and Local Government, has reviewed the impact of the reforms with the assistance of a panel comprising commercial property stakeholders, professional bodies, property lawyers, and practitioners. This report considered the effectiveness of the reforms in the light of the panel's considerations and other feedback, which made certain recommendations for further improvements. Current

---

<sup>314</sup> Ibid 146

Government policy<sup>315</sup> is that business tenants should normally have a statutory right to renew their tenancies (security of tenure). There is, however, no objection to parties agreeing to exclude security of tenure provided that the tenant is aware of the implications of doing so. The provisions for excluding security of tenure, also known as contracting out, are intended to achieve that end. The 2004 Reform Order abolished the need for landlords and tenants to obtain prior court approval for agreements to exclude security of tenure. Beyond checking that applications were legally and technically sound, and that the tenant if not legally represented has had the opportunity to take legal advice, the courts do not exercise any discretion in deciding whether or not to approve agreements to exclude security of tenure. In the absence of a standard commercial lease supported by legislation, the leases are self-regulated, and presented in many different styles.

In landlord and tenant disputes, there is limited use of ADR due to practitioner's resistance to this alternative disputes resolution (ADR) provides a voluntary alternative to the accepted practice of using the courts to settle civil disputes, specifically in LAT disputes. The principle forms of ADR are mediation, adjudication, arbitration, and reconciliation. The best known and most commonly<sup>316</sup> used forms of ADR in the UK are arbitration and mediation but adjudication is rapidly becoming established as a valued method of settling disputes quickly, fairly, and cheaply.

Many of the laws and policy objectives of the Australian State Governments are similar to England and Wales. In this research, it was essential to carry out an in-depth study of Australian commercial property lease terms pursuant to the Australian Retail and Commercial Leases Act 1995<sup>317</sup>. The Act regulates the leasing of commercial premises.

---

<sup>315</sup> The Landlord and Tenant Act 1954 (2 & 3 Eliz 2 c 56)

<sup>316</sup> Nationwide academy for dispute resolution (UK) ltd <http://www.nadr.co.uk/background/what.php> accessed 12/01/2012

<sup>317</sup> Ibid 276

In recent years in the UK, there have been noticeable increases in the number of ethnic minorities who go on to set up their own businesses and enter into commercial leases. It is estimated that members of ethnic minority communities own 20 per cent of the 241,000 businesses in London alone<sup>318</sup>. Many of the ethnic minorities in England possess excellent business ethics and professional skills, but are speakers of other languages and do not fully understand the meanings of the legal terms in commercial property leases. Throughout the UK<sup>319</sup>, more than a quarter of a million ethnic minority enterprises are contributing around £35 billion a year to the British economy.

The literature review provided the basis to the research questions, in terms of recognising the subject fields within which the study progressed, and critically reviewed the relevant bulk of literature. The research methodology and methods covered the philosophical and theoretical approach in structure to the research methodology. The main objective of this research has been to explore reform of commercial property leases. Any research should be guided by a research philosophy. The study explored the methodological foundations of its research and related them to the research methods used to collect the data. The methodology also sets out the particulars of the research questions and the methods employed to answer them, as well as the landscape and implication of methodology in general, the underpinning reasons for the particular philosophical directions implemented by the researcher, and the choice of research methods considered. The research design was defined in order to demonstrate how the methodological strategies were implemented and have been relevant to the hypothesis. In this study the qualitative method of research was ultimately determined to be the most appropriate. The qualitative method investigated the why and how related to the phenomena, not just the what, where, and when. Whereas the methodology sets out the philosophical orientation of a research project, research methods details, the ways in which data were collected and analysed.

The data collection instruments applied in this research was the semi-structured

---

<sup>318</sup> Ibid 119

<sup>319</sup> Ibid 121

interviews conducted by face to face, by e-mail, and by telephone. The sample included those individuals who are knowledgeable about commercial property law and specifically commercial property leases in the context of the business lease. The participants included: lawyers, surveyors, landlords, tenants, and business owners. The nature and method of the research do not require sampling and selection of far-reaching samples nationwide, participants were located either in London or the South East. The results and discussions highlight the significant aspects of the key findings. In this study a common approach to judging qualitative research has been the generalisability of the findings. Yet the objective for researchers has been to assess the extent to which the findings can be theoretically replicated or applied to other contexts. The key to achieving this transferability is the generation of thick descriptions and purposive sampling.

In an effort to adhere to high ethical standards while carrying out qualitative research, the approach was to remain aware that the interviewer was effectively the analytical instrument and must demonstrate competence, credibility, and professionalism. Researcher therefore endeavoured to remain neutral and worked on demonstrating trustworthiness and authenticity in order to achieve balance and fairness. It was deemed necessary to assure the participants that the research material would remain confidential. The interpretive approach adopted in this thesis promotes research rigour versus relevance. Generally, any research conducted within a positivist framework is usually observed to be stronger on rigour, whereas interpretive research is conventionally thought as more relevant to practice due to a contextual grounding.

## **6.2 Summary of research findings**

The key findings of this research represent opinions and comments of those individual participants, with direct involvement and day-to-day dealings with commercial property leases. A mean average 77 per cent of the participants interviewed declared their support for the reform of commercial property leases through legislative intervention to put an end to the problematic self-regulation. 80

per cent of the participants confirmed that they would benefit from ADR (alternative dispute resolution), would certainly support and prefer it as opposed to going to courts. 84 per cent of the participants stated that they support publication of a guide explaining and translating the key legal terms of commercial property leases into English and other main languages for the benefit of ethnic minority speakers of other languages. The participants reaffirmed that such guide would definitely help Ethnic Minorities to better understand leases terms. 89 per cent of the lawyers expressed that commercial property leases are complex, not standardised, not uniform, and not easy to understand. Some participant lawyers stated that the leases can be too lengthy, though they tend to be different as each firm has its own self-regulated style of drafting. Some lawyers expressed that the leases in their current form suffer from lack of punctuation, illogical layout, and remain difficult to follow.

While most of the stakeholders who participated in the research, expressed strong support for the need for regulation, however there were mixed views about whether the reform will receive support from the government, and will eventually be implemented. Some stakeholders placed strong emphasis on intrinsic protection of landlords and tenants and their interests. Others were more likely to emphasise the value of balancing the landlords and tenant's powers in the leases. Some stakeholders, particularly those from the ethnic minority group, placed most emphasis on making leases simple and clear to understand. These different perspectives about commercial property leases were inevitably reflected in different attitudes towards the approach that should be taken towards reform. Those stakeholders who emphasised intrinsic protection of landlords, tenants, and their interest were more likely to support reform thorough legislative intervention. Others, however, were more likely to place an emphasis on only modernising leases. A number of stakeholders said that they felt more emphasis had to be given to the terms of the leases to bring them into 21<sup>st</sup> century and balance the power in favour of tenants. They argued that it was also essential to have a guide translating and explaining terms of commercial leases.

A number of stakeholders questioned the use of the term reform, as they felt it placed too much emphasis on legislative intervention. Many of these stakeholders who came from surveyor's profession did not fully reflect on the significance and importance of

reform through legislation. Other stakeholders felt that the use of the term reform suggested that a clear distinction could be made between the reform and self-regulation. They suggested that in practice it was not possible to make such a clear-cut distinction and that it was important to see modernising leases in the context of the commercial property industry. While some stakeholders raised doubts about the use of the term reform, however there were few suggestions of suitable alternative phrases.

Many stakeholders said that they felt that those involved within the commercial property sector were generally supportive of the reform. Some stakeholders said, they thought there was strong natural support amongst landlords and tenants for protecting their interests through reform, and cutting legal intervention, resulting in less cost. Some said that the need for reform often only became apparent when a particular lease causes difficulties between parties. A number of stakeholders felt that there was a need for raising awareness about ambiguous terms in leases and the importance of reform in general.

Some stakeholders felt that ultimately landlords, tenants and, organisations involved within the commercial property industry would only support the reform if they could be convinced of the wider economic and social benefits of doing so. To some, this meant being able to clearly demonstrate that reform, could bring benefits that would bring economic and social profits to current generations, as well as preserving their interests. The stakeholders who participated in the research were selected on the basis of their interest and involvement in the commercial property. It was, therefore, expected that they would place a high level of importance on the consideration of the reform of commercial property leases. This proved to be the case with all of the stakeholders, regardless of their interest or level of involvement, emphasising the importance of the reform.

There was also support for the production of a short, simple guide explaining and translating the key legal terms of commercial property leases. The vast majority of the stakeholders who were interviewed agreed that commercial property leases were difficult to understand. Almost all of the stakeholders interviewed, said that they had had to resort to contacting a solicitor, for even the most basic aspects of leases, as they were not confident of what action to take. Whilst most stakeholders welcomed

the opportunity to express their views on reform, they also confirmed that they did not have perfect relationships with either their tenants or their landlords. Some stakeholders said that they had built up reasonable working relationships with their tenants over a number of years, only through making compromises, and that it helped. These stakeholders said that it might not be easy for someone who does not understand terms of leases to comply with them, or realise that they may have breached a term of the lease. Stakeholders identified a wide range of strengths and weaknesses that they felt commercial property leases exhibited. When these were analysed it became apparent that these could be clustered into a number of clear themes that were identified by a substantial number of stakeholders. Some of these emergent themes apply to certain business tenancies as a whole, while others are more relevant to specific terms of leases. This reflects the fact that some stakeholders only felt able to comment on those parts of the lease with which they had had dealings with as the result of a dispute.

In exploring landlord and tenant disputes through studying a number of selected court cases, the common theme of disputes became apparent, which is, self-regulated poor drafting<sup>320</sup>. Commercial property leases are complex, non-standard, difficult to understand, and filled with tortuous terms. Leases are drafted in too many different styles with ambiguous presentations. Some lawyers and surveyors commented that even for them, leases can be difficult to understand, let alone for the ordinary parties entering lease contracts, especially ethnic minorities speakers of other languages. The key findings also proclaim that former attempts at reform of commercial property leases through voluntary codes have been without much success. The vast majority of the participants expressed that they do not have any awareness of the Codes 2007<sup>321</sup>, the Law Society Lease<sup>322</sup>, the British Property Federation Lease<sup>323</sup>, or understood, how those could benefit them.

---

<sup>320</sup> Ibid 1

<sup>321</sup> Ibid 20

<sup>322</sup> Ibid 14

<sup>323</sup> Ibid 23

This research investigated:

- a) Whether commercial property leases are consistent, easy to understand, and uniform in style, drafting, and presentation, or not
- b) Awareness and use of the voluntary Code for Leasing Business Premises in England and Wales 2007, the Law Society Business Lease, and the British Property Federation Business Lease
- c) Reform of commercial property leases through legislation, to achieve a uniform, standard and easy to understand Lease.
- d) In landlord and tenant disputes, the potential for mediation, which is a form of Alternative Dispute Resolution to resolve disputes rather than going to Court
- e) Support for production of a short, simple guide, explaining the meanings of the legal terms used in commercial property leases in English and other main languages for the benefit of ethnic minorities

Extensive literature review of substantial documents, reports, reviews, journals, books, Acts of parliament, other jurisdictions, published dispute cases involving landlords and tenants directly affected by commercial property leases, and researchers direct experiences in the phenomena for over 25 years, plus views of seventeen lawyer experts, eleven surveyors, fifteen landlords, thirty one tenants, and sixteen commercial property business owners evidence the problems that self-regulated leases cause and the need for legislative intervention. The findings of this research in highlighting difficulties with self-regulated commercial leases in England, recommends that rather than exploring improvements to failed voluntary Codes as studied by others, the appropriate course of action would be modification in line with Australian lease reform. This research is also original in that it also investigated the production of a guide explaining and translating the key legal terms of commercial leases for the benefit of ethnic minorities in England.

## 6.3 Limitation of the research

In this research the principle limitations were:

### a) Sample

In this study there became a concern over the representativeness of the sample as (see Chapter 4 sample) some of the intended lawyer's participants in the target sample could not give interviews. However this led to an alternative random stratified probability selection of the participants, from the legal and professional data basis available in public domain. The random and stratified probability selection method as adopted, provides the most valid or credible results because they reflect the characteristics of the population from which they are selected<sup>324</sup>. This reinforces the validity that the sample is representative which rules out the researchers intended target choice and possible bias.

### b) Research topic

While attempts at reform (see Chapter 3) have been examined in the literature in detail, however the subject of the research remained a very broad topic and quite generic in nature. In order to address the theoretical challenges in this research, it was appropriate to examine a number of pertinent theories to create a robust theoretical lens to gain an insight and understanding of commercial property leases reform in context.

### c) Qualitative approach

In this research, the qualitative approach generated large amounts of data, researcher had to process and analyse into a coherent plan. The research design involved a

---

<sup>324</sup> Populations, Samples, and Validity  
<[http://www.sahs.utmb.edu/pellinore/intro\\_to\\_research/wad/pop&samp.htm](http://www.sahs.utmb.edu/pellinore/intro_to_research/wad/pop&samp.htm)> accessed 19/12/2011

conceptual framework, which served as a robust qualitative methodological guide to support in analysing and filtering the essence of the data.

#### d) Interviews limitation

Some participants' and specifically ethnic minority participants, lacked understanding the research questions, which needed to be explained and translated to them impartially. However, this lack of understanding of the questions became relevant to further reinforce and highlight ethnic minority's disadvantageous position in entering legal leases and the need for translation of the key legal terms of the said lease. Also, some other members of the five groups of participants dealing with commercial property industry had not many dealings with the Codes and other voluntary self-regulated leases

In this research, certain delimitations were a deliberate part of the research design from the outset. Delimitations of the research relate to the deliberate varied selection of participants interviewed to ensure wider meanings elicited. For example, the study was delimited in terms of sex, and ethnicity, so long as they had involvement with commercial leases that was adequate.

#### f) Validity and credibility

Another limitation was the validity of the research, also referred to as the credibility and/or the dependability. Member check, interviewer corroboration, peer debriefing, prolonged engagement, negative case analysis, confirm ability, bracketing, balance, and supporting documentary evidence were done to ensure validity and credibility.

## **6.4 The way forward**

This study makes a number of important methodological and theoretical contributions and evidences rigour and originality. The difficulties of ethnic minority

groups in dealing with commercial property leases have not been explored before (see Chapter 1). Therefore this adds to the body of the knowledge as supported by key findings of this research, confirming the need and desire, for production of a guide, explaining and translating, the key legal terms of commercial property leases. Ethnic minorities own over 20% of the small to medium size businesses in England.

This research also makes significant contribution to the body of the knowledge, thereby, instead of focusing and reviewing voluntary failed codes and the self-regulated lease, (as previously studied by others), studied the phenomena through comprehensive literature review and wide-ranging methodology to explore the reform of leases through legislative intervention in line with Australian lease reform.

One of the strengths of this study is that it offers a foundation for subsequent research. Methods and procedures as adopted did require regular refinements on an ongoing basis in order to elicit sensitive and precise interpretations. This research paradigm, accepts the changing nature of commercial property industry, and therefore looks to utilise research instruments that handle the dynamic nature of reality. The interpretations of reality may shift over time as circumstances, purposes, and communities change. This type of research undertaken can complement simultaneous empirical work.

Reform of commercial property leases, leading to standardisation and uniformity through legislative intervention, may result in a reduction in contentious dispute cases between the landlords, tenants or the occupiers. The reform shall inevitably lead to less legal work for lawyers, and courts. Through reform by legislative intervention, leases shall become uniform and standard with set procedures. Regulations supported by statute, advisory committees, commissioner and appropriate Government department dealing with commercial leases would need to be in place, similar to the Australian commercial lease system. The implementation of reform shall require proper consultation, and the bringing together of the relevant stakeholders, including EMBOs. There will also be a potent necessity for involvement of property organisations, such as RICS, BPF, Community and Local Government, the Law Society, the Bar Council, the Land Registry, the Law Commission, and others. Obviously, extensive consultations shall followed by a

series of proposed draft bills and propose standard lease. Flexible and easy to understand commercial lease, to suit different applications, would need to be prepared and drawn, through joint collaboration between the designated government department, parties and organisations involved. The standard lease proposal would require further consultation, pending a general consensus reached on a final standard lease, containing compulsory terms, supported by legislation to ensure compliance.

The reform of commercial property lease shall have the likely effect of improving landlord and tenant relationships, requiring less intervention from lawyers and courts. It shall also have implications for the Government's policy and attitude towards the commercial property industry. The reform shall also influence the values and viability of business premises, subjected to lease or sale of leaseholds.

The issue of statutory reform and standardisation of leases has fallen largely off the political agenda. The Land Registry notably dropped<sup>325</sup> its plans to introduce a standard lease in light of an overwhelmingly negative response to its consultation paper, preferring instead the introduction of prescribed clauses that deal primarily with the information required for registration purposes. Tenants' dissatisfaction appears to have reached a critical mass, resulting in a more critical analysis of the way legal principles and current market practices may reflect the underlying inequalities between landlord and tenant.

Millions of people in England and Wales are living under "quasi-feudal" leasehold laws which allow them to be exploited<sup>326</sup>. Tribunal and Court disputes between leaseholders and freeholders have quadrupled in the past decade, with a significant rise in cases involving inflated service charges and the activities of connected companies, such as those that provide buildings insurance. Calls for reform of leases are finding cross-party support<sup>327</sup>.

The overwhelming key findings of this research validate convincing support for the

---

<sup>325</sup> Ibid 242

<sup>326</sup> Leasehold property laws in need of sweeping reform, says think tank  
<<http://www.guardian.co.uk/money/2012/aug/20/leasehold-property-laws-sweeping-reform-thinktank>> accessed 03/02/2012

<sup>327</sup> Ibid

reform of commercial property leases through legislative intervention, and production of a guide explaining and translating, the key legal terms of leases for the benefit of ethnic minorities. This research recognises that it is still worth investing time and effort to bring leases into the present times.

***Commercial Property Leases, Time To Move On . . .***

## BIBLIOGRAPHY

Abbey R and Richards M, *A Practical Approach to Commercial Conveyancing and Property* (4<sup>th</sup> edn Oxford University Press 2009)

Adler M, 'Legal Writing' *clarity Journal* 34 (January 1996)

Angen M J, *Evaluating Interpretive Inquiry* (Sage Publishing 2000)

Arbitration Act 1996

Atiyah P, *An Introduction to the Law of Contract* (Clarendon 2000)

Babbie E and Mouton J, *The practical social research* (Wadsworth Publishing 2001)

Baker T, *Doing Social Research* (McGraw-Hill 1999)

Bamford K, *Amending a Commercial Lease* (3<sup>rd</sup> edn Tottel Publishing 2007)

Banakas D, *The Method of Comparative Law and the Question of Legal Culture Today* (Sage Publishing 1994)

Barnes M, *Hill and Redman's Guide to Rent Review* (Butterworth's 2001)

Beins B, *Research Methods A Tool For Life* (Pearson Publishing 2004)

Bell T, *Drafting and Negotiating Commercial Leases*, (Fifth Edition London Butterworth's 1995)

Bernard H, *Research Methods in Cultural Anthropology* (Rowman and Littlefield Publishers 1988)

Bignell J, *Drafting Business Leases*, (seventh edition London Sweet & Maxwell 2007)

Black and Minority Ethnic (BME) Small Business Owners, The University of Manchester < <http://www.train2000.org.uk/research-reports/pdfs/BME-report.pdf>> accessed 14/11/2011

Brand O, 'Conceptual Comparison' 32 Brooklyn Journal of International Law 409 (2007)

Brennan G, *Landlord and Tenant Law* (2d ed Oxford University Press Publishing 2002)

Bright S, *Landlord and Tenant Law in Context* (Hart Publishing 2007)

Bright S and Dewar J, *Land law themes and perspectives* (Oxford Press Publishing 1998)

British Property Federation (BPF) 'short-term commercial lease'  
<[www.bpf.org.uk/en/files](http://www.bpf.org.uk/en/files)> accessed 15/11/2011

British Property Federation BPF / IPD 'Annual Lease Review 2012'  
<<http://www.bpf.org.uk/en/files/bpf>>

British Property Federation 'Business Lease'  
<[http://www.bpf.org.uk/en/about\\_us/who\\_we\\_are.php](http://www.bpf.org.uk/en/about_us/who_we_are.php)> accessed 11 November 2011

British Property Federation 'Upward Only Rent Review'

<[http://www.bpf.org.uk/en/files/bpf\\_documents/commercial/Upward\\_only\\_rent\\_reviews.pdf](http://www.bpf.org.uk/en/files/bpf_documents/commercial/Upward_only_rent_reviews.pdf)> accessed 7/12/2011

British Retail Consortium, 'Rent Payment Commercial Leases'

<[http://www.brc.org.uk/brc\\_home.asp](http://www.brc.org.uk/brc_home.asp)> accessed 19 October 2011

Brooker P, 'Commercial Lawyers Attitudes and Experience with Mediation' Web Journal of Current Legal Issues (2002)

<<http://webjcli.ncl.ac.uk/2002/issue4/brooker4.html>> accessed 11/11/2011

Bryan A, *Quantity and Quality in Social Research* (Unwin Publishing 1988)

Business Tenancies 'Rent Reviews' Parliament HC Deb 24 (March 2003), cc82-3W

Business tenancies 'rent reviews' <[www.parliament.uk/briefing-papers/SN00849](http://www.parliament.uk/briefing-papers/SN00849)> accessed 17/11/2011

Canadian Lawyers Publication 'Commercial Leases' <<http://canadian-lawyers.ca/Understand-Your-Legal-Issue/Business-Law/Leasing-Commercial-Space-in-Canada.html>> accessed 08 November 2011

Castle R and Castle J, 'it is time leases moved with the times' (7428 New Law Journal 2010)

Hughes C, Crosby N 'The challenge of self-regulation in commercial property leasing: a study of lease codes in the UK', *International Journal of Law in the Built Environment*, (Vol. 4 Iss: 1, pp.23 – 44 2012)

Centre for Enterprise and Economic Development Research,, 'Ethnic Minorities' (CEEDR 2000)

Chancery Bar Association, 'Regulatory Reform 2004' <<http://www.chba.org.uk>> accessed 16 November 2011

Clarity 'clear legal language' <[www.clarity-international.net/](http://www.clarity-international.net/)> accessed 24 November 2011

Clark P, 'Precedent's Page L. and T. Review 180-187 (September/October 2008)

Code of Practice for Commercial Leases,  
<[www.bpf.org.uk/.../commercial/Code\\_of\\_practice\\_for\\_commercial](http://www.bpf.org.uk/.../commercial/Code_of_practice_for_commercial)> accessed 12/11/2011

Collins H, 'Methods and Amis of Comparative Contract Law' (Oxford Journal of Legal Studies 396-405 1989)

Collinson P, Guardian 'Leasehold property laws in need of sweeping reform, says think tank' <<http://www.guardian.co.uk/money/2012/aug/20/leasehold-property-laws-sweeping-reform-thinktank> accessed> 03/02/2012

Common Auction Conditions, 3rd edition – RICS  
<<http://www.rics.org/uk/knowledge/more-services/guides-advice/common-auction-conditions-3rd-edition/>> accessed 12 November 2011

Community Legal Service 'Recent Developments in Alternative Dispute Resolution' <<http://www.asauk.org.uk/fileLibrary/pdf/adr21.pdf>> accessed 25 October 2011

Construction Design and Management 'CDM Regulations 2007' HSE Health and Safety Executive <[www.hse.gov.uk/construction/cdm.htm](http://www.hse.gov.uk/construction/cdm.htm)> accessed 19 October

Council of Europe 'the European Convention on Human Rights'  
<<http://conventions.coe.int/treaty/en/treaties/html/005.htm>> accessed 26 November 2011

Crabb L and Seidler J, *Leases: Covenants and Consents* (Second Edition London Sweet & Maxwell 2008)

Creswell J W, *Qualitative Inquiry and Research Design* (Sage Publications 1998)

Crosby N and Hughes C, 'Monitoring the Code for leasing Business Premises 2007' Community and Local Government  
<<http://www.rmd.communities.gov.uk/project.asp?intProjectID=12576>> accessed 14/11/2011

Crosby N, Hughes C, and Murdoch S, 'Monitoring the 2002 Code of Practice for Commercial' <[www.reading.ac.uk/rep/leasefinal.pdf](http://www.reading.ac.uk/rep/leasefinal.pdf)> accessed 12/11/2011

Crosby N, 'can we learn anything from Australia about the awareness of small business tenants' University of Reading School of Real Estate and Planning  
<[www.reading.ac.uk/REP/Aboutus/Staff/neil-crosby.aspx](http://www.reading.ac.uk/REP/Aboutus/Staff/neil-crosby.aspx)> accessed 11/11/2011

Cruz P, *Comparative Law in a Changing World* (Cavendish Publishing 1999)

Davy J, 'Upward-only rent review clauses may be banned' The Times (London 24 November 2003)

Department of Trade and Industry (DTI), 'Ethnic Minority Business Forum' "Monitoring the Code of Practice for Commercial Leases" (Volume 1), April 2000, para 2.1

Dollar P 'Looking Back' Landlord and Tenant Review (11(6) 2007)

Doreston L E and Hotchkiss L, *Research methods and society: foundations of social inquiry* (Sage Publishing 2005)

Edmund T, 'A ticket to effective negotiations' Article EG (18 April 2003)

Edwards C and Krendel P, *Institutional Leases in the 21st Century* (London EG Books 2006)

Encyclopedia of Forms and Precedents

<<http://lexisweb.co.uk/guides/sources/encyclopaedia-of-forms-and-precedents>>  
accessed 21 November 2011

Estate Gazette, 'Business Leases' <<http://www.estatesgazette.com>> accessed 21 October 2011

Estates Gazette, 'Come on down the price is right' (28 November 2009)

Ethnic Minority Business Forum, (DTI)

European Commission Eurostat Population in Europe 'Nationals and Non-Nationals'  
<<http://epp.eurostat.ec.europa.eu/portal/page/portal/eurostat/home/>> accessed 09 October 2011

European Commission, 'Small and medium-sized enterprises' (SMEs)  
<[http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-definition/index\\_en.htm](http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/sme-definition/index_en.htm)> accessed 16 November 2011

European Real Estate Society< <http://www.eres.org/eres2010/contents/Abstracts-Programme.pdf>> accessed 14/11/2011

European University Institute Department of Law 'Property Law'  
<<http://www.eui.eu/Departments>> accessed 09 November 2011

Fenn K, 'New commercial lease code' *Landlord and Tenant Review* (11(1) 1-2 2007)

Flick U, *An Introduction to Qualitative Research* (Sage Publications 2006)

Freedman P, '1954 Act part II and its Reform' (Property Litigation Association 2004)

Genn H, 'Report on ADR' (Central London County Court Mediation Scheme Evaluation Report 1998)

Gibson B and Morgan G, *Sociological Paradigms and Organizational Analysis*, (Heinemann Publishing 1979)

Glaser BG & Strauss AL, *The Discovery of Grounded Theory: Strategies for Qualitative Research* (Transaction Publishers 2009)

Global Entrepreneurship Monitor (GEM) 'Ethnic Minorities'  
<<http://www.gemconsortium.org/>> accessed 14 October 2011

Guardian 'Ethnic Minority Population Growth'  
<<http://www.guardian.co.uk/uk/2010/jul/13/uk-population-growth-ethnic-minorities>> accessed 01 December 2011

Haber H, *Assignment, Subletting and Change of Control in a Commercial Lease A Practical Guide* Canada Law Book (Sage 2002)

Hammersley M, *Social Research Philosophy Politics and Practice* (Sage Publications 1993)

Hassall W, 'Third time lucky for lease code?' <[www.wrighthassall.co.uk](http://www.wrighthassall.co.uk)> accessed on 25 October 2011

Hazell G, 'Report on ADR' Central London County Court Mediation Scheme Evaluation Report (1998)

Hitchcock G and Hughes D, *Research and the Teacher* (Routledge Publishing 1989)

Hope C, Rents fight renewed after Prescott's climb-down' *Daily Telegraph* (London 18 April 2005)

House of Common, 'Regulatory Reform Committee'  
<<http://www.parliament.uk/business/committees/committees-archive/odpm/>>  
accessed 15 November 2011

House of Commons, 'Business Tenancies Rent Review' HC Deb (24 March 2003 cc82-3W)

Housing Act 1988

Hudson A S, *New Perspectives on Property Law and Human Rights* (Cavendish Publishing London 2004)

Hudson AS, *The Unbearable Lightness of Property New Perspectives on Property Law Obligations and Restitution* (Cavendish Publishing London 2004)

Hughes C and Crosby N, 'European Real Estate Society'  
<<http://www.eres.org/eres2010/contents/Abstracts-Programme.pdf>> accessed 14/11/2011

Institute for Small Business and Entrepreneurship, 'Ethnic Minority Businesses: Challenges' (ISBE) <<http://www.isbe.org.uk/EthnicMinorityBusinesses>> accessed 28/11/2011

International Centre for Research in Agriculture ICRA, 'Stakeholders Analysis'  
<[http://www.icra-edu.org/page.cfm?pageid=ardhomeandloginas=anon\\_e](http://www.icra-edu.org/page.cfm?pageid=ardhomeandloginas=anon_e)> accessed  
16 December 2011

Jacque J, 'Key Changes of leasing business premises in England and Wales'  
'<<http://www.bpf.org.uk/whoweare/commercialleases>> accessed on 25/10/ 2011

Jansen M, 'Accredit where it's due' *Property Week* (London 27 July 2007)

Johnson A, *Ethnic Minority Business Owners*,  
<<http://webarchive.nationalarchives.gov.uk/20070205153521/dti.gov.uk/ministers/speeches/>> accessed 12 October 2011

Joint working Group on Commercial Leases 2007, 'The Code for Leasing Business  
Premises in England and Wales' (2007)

Kamba W, 'Comparative Law' *International Journal of Law Quarterly* 485(1974)

Kiekaeu D, 'Comparative Law' (*Electronic Journal of Comparative Law*, 2003)  
<<http://www.ejcl.org/73/art73-2.html>> accessed 12 October 2011

Korona R , *Landlord and Tenant Law* (5<sup>th</sup> edn West Group Publishing 2001)

Kumar R, *Research Methodology* (Sage Publishing 1999)

Doreston LE and Hotchkiss L, *Research methods and society: foundations of social  
inquiry* (Sage Publishing 2005)

Land Registration Act 2002

Land Registry Land Registry 'Prescribed Clauses Leases'

<<http://www1.landregistry.gov.uk/publications/consultation-papers>> accessed 15 November 2011

Landlord and Tenant Act 1954

Land Registry 'Report on consultation, Presentation of prescribed information in Register-able leases' (London, HM Land Registry, 2005)

Land Registration Rules 2003

<<http://www.legislation.gov.uk/ukSI/2003/1417/contents/made>> accessed 18 November 2011

Land Securities Retail, 'Clear-let leases written in plain English'

<<http://www.landsecuritiesretail.com/about-us/our-approach/clearlet>> accessed 7 January 2012

Landlord & Tenant Act 1954

Landlords and Tenants, (Working Paper No. 8) (London, HMSO, 1967), Law Commission, Landlord and Tenant: Reform of the Law, (Report 162), (London, HMSO)

Law Commission 'Consultation on Termination of Tenancies'

<[http://lawcommission.justice.gov.uk/docs/cp174\\_Termination\\_of\\_Tenancies\\_Consultation.pdf](http://lawcommission.justice.gov.uk/docs/cp174_Termination_of_Tenancies_Consultation.pdf)> accessed 06/12/2011

Law Commission Programme of Reform

<[www.lawcommission.justice.gov.uk/docs/lc311\\_10th\\_Programme.pdf](http://www.lawcommission.justice.gov.uk/docs/lc311_10th_Programme.pdf)> accessed 19/11/2011

Law Commission 'Regulatory Reform' N0 208 <<http://www.official-documents.gov.uk/document/hc9293/hc02/0224/0224.pdf>> accessed 17/11/2011

Law Commission, Seventh Programme of Law Reform (Law Com No 259, 1999) 435

Law Commission, 'Provisional Proposals for Amendments to the Landlord and Tenant Act 1954' (Working paper No 7) (London, HMSO, 1969)

Law Commission, Landlord and Tenant 'Report on the Landlord and Tenant Act' 1954, Part II (Law Com No 17) (HC 38) (London, HMSO, 1969)

Law Journal, Freeing the Parties from the Law Landlord and Tenant  
<<http://law.jrank.org/pages/8065/Landlord-Tenant-FURTHER-READINGS.html>>  
accessed 03 February 2012

Law of Property Act 1969

Law Society, 'Business Lease'  
<<http://www.lawsociety.org.uk/newsandevents/news/view=newsarticle.law?NEWSID=314002>> accessed 21 November 2011

Lexis Law 'Landlord and Tenant Disputes Cases' (Butterworth)  
<[www.lexisweb.co.uk](http://www.lexisweb.co.uk)> accessed 9 December 2011

Licensing Act 2003

Lincoln Y S and Guba E G, *Naturalistic Inquiry* (Sage Publishing 1985)

Lovell H, 'Legal Practice' <<http://www.hoganlovells.com/zena-canale/>> accessed 15 October 2011

Lowenstein S 'Alternative Disputes Resolution'

<[www.lowenstein.com/files/...57dd.../ADR\(April%202007\).pdf](http://www.lowenstein.com/files/...57dd.../ADR(April%202007).pdf)> accessed 4 February 2012

Mason J, *Qualitative Researching* (Sage Publications 2000) 179

Mason P, 'Retailaw' Spring/Summer 2007

<<http://www.pinsentmasons.com/PDF/RetailLawIssue3.pdf>> accessed 17/11 2011

May T, *Social Research, Issues, methods and process* (Open University Press 111-116 2001)

Maykut P S and Morehouse R, *Beginning qualitative research: A philosophic and practical guide* (Falmer Press 1994)

McCurly R, 'Landlord and Tenant Act' Commercial Lease in America, *The Alabama Lawyer Journal* 63: 348–49 (November 2008)

Megarry R, Harpum W and Bridge S, *A Manual of the Law of Real Property* (7<sup>th</sup> edn Sweet & Maxwell 2008)

Mellinkoff B, *The Language of the Law*. (Boston: Little, Brown & Co Publishing 1963)

Merriam S B, *Qualitative Research* (Wiley Publication 1988)

Michaels R, 'The Functional Method of Comparative Law' *Duke Law School of Legal Studies* (2005)

Miller R and Brewer J, *The A-Z of Social Research* (Sage Publishing 2003)

Minority Entrepreneurs and Co-Entrepreneurs in the European Union and Central and Eastern Europe <<http://ec.europa.eu/enterprise/entrepreneurship/craft/craft-minorities/minorities.htm>> accessed 06 November 2011

Misrepresentation and unfair commercial practices, (SI No 1277, 2008)  
<[www.legislation.gov.uk/ukxi/2008/1277/contents/made](http://www.legislation.gov.uk/ukxi/2008/1277/contents/made)> accessed 25 November 2011

Mouton J, *Introduction to qualitative research* (Sage Publishing 1998) 37

Nationwide academy for dispute resolution (UK) ltd  
<<http://www.nadr.co.uk/background/what.php>> accessed 12/01/2012

ODPM 'Consultation Paper on Upward Only Rent Review Clauses in Commercial Leases Summary of Responses June 2005.  
<<http://www.communities.gov.uk/documents/regeneration/pdf/131333.pdf>> accessed 20 October 2011

ODPM 'Regulatory Reform Business Tenancies'  
<[www.odpm.gov.uk/businessstenancies](http://www.odpm.gov.uk/businessstenancies)> accessed 19 November 2011

ODPM, 'Commercial property leases Options for deterring or outlawing the use of upward only rent review clauses' (consultation paper June 2004).

Office of the Victorian Small Business Commissioner 'Lease Registration'  
<<http://www.sbc.vic.gov.au/>> accessed 28 November 2011

Parliament Publications Select Committee on 'Regulatory Reform Second Report'  
<<http://www.publications.parliament.uk/>> accessed 26 November 2011

Partington D, *Research Process Detail* (Ashgate Publishing 2002)

Party Wall Act 1996

Patton M, *Qualitative Research and Evaluation Methods* (Sage Publishing 2002)

Pollock F, *The Land laws*, (MacMillan Publishing 1883)

Populations, Samples, and Validity

<[http://www.sahs.utmb.edu/pellinore/intro\\_to\\_research/wad/pop&samp.htm](http://www.sahs.utmb.edu/pellinore/intro_to_research/wad/pop&samp.htm)>

accessed 19/12/2011

Practical Law Company 'Consultation on prescribed information in register-able leases' <[www.practicallaw.com/4-107-3244](http://www.practicallaw.com/4-107-3244)> accessed 25 November 2011

Practical Law Company 'Consultation paper on the Land Registration Rules 2003 (HMLR)' <[www.practicallaw.com/1-106-5599](http://www.practicallaw.com/1-106-5599)> accessed 21 November 2011

Practical Law Company 'Land Registry drops prescribed lease forms'

<[www.practicallaw.com/1-107-0416](http://www.practicallaw.com/1-107-0416)> accessed 24 November 2011

Practical Law Company, 'Changes to Land Registry rules from 1 October 2009'

<[www.practicallaw.com/0-386-8936](http://www.practicallaw.com/0-386-8936)> accessed on 26 November 2011

Practical Law Company, 'The Land Registry 10 Year Strategic Plan'

<[www.practicallaw.com/9-106-8607](http://www.practicallaw.com/9-106-8607)> accessed 15 November 2011

Proctor T, *Essentials of Market Research* (4<sup>th</sup> end, Financial Times/Prentice Hall 2005)

Professional Arbitration on Court Terms (PACT) RICS and the Law Society

Property Litigation Association, 'Alternative Dispute Resolution'

<<http://www.pla.org.uk/>> accessed 02 February 2012

Property Litigation Association, 'Mediation and ADR'

<[http://www.pla.org.uk/directories/registered\\_mediators](http://www.pla.org.uk/directories/registered_mediators)> accessed 15 November 2011

Rees P, 'International Migration publication'

<[www.gemconsortium.org/download.asp?fid=532](http://www.gemconsortium.org/download.asp?fid=532)> accessed 28 November 2011

Regulatory Reform of LAT Act 1954 Part II

<<http://www.legislation.gov.uk/ukxi/2003/3096/made>> accessed 15 November 2011

Reitz J, 'How to do Comparative Law' 46 The American Journal of Comparative Law 620-622 (1998)

Reuters T, 'Practical Lease Precedent' Sweet and Maxwell

<<http://www.sweetandmaxwell.co.uk/Catalogue>> accessed 24 November 2011

RICS 'Dispute Resolution Service' (DRS) is the world's largest providers of alternative dispute resolution services to the property and construction industries.

RICS 'Lease renewals made simple'

<[http://www.rics.org/site/scripts/documents\\_info.aspx?documentID=508](http://www.rics.org/site/scripts/documents_info.aspx?documentID=508)> accessed 02 February 2012

RICS Research Foundation 'The Cutting Edge 2000' <

<http://www.rics.org/site/download>> accessed 20 October 2011

Ritchie J and Lewis, J. *Qualitative Research Practice* (Sage publishing 2003)

Rossini C, *English As a Legal Language* (Kluwer Publishing 1998)

Roussac C, Bright S, 'Improving environmental performance through innovative commercial leasing: An Australian case study', *International Journal of Law in the Built Environment*, Vol. 4 Iss: 1, pp.6 – 22 (2012)

Royal Commission on Legal Services, 'Second Report of the Conveyancing Committee' Final Report, (Cmnd 7648 London, HMSO, 1979)

Royal Institute of Chartered Surveyors 'Taking a Lease what is a lease?'  
<[http://www.rics.org/site/scripts/documents\\_info.aspx?categoryID=281&documentID=11](http://www.rics.org/site/scripts/documents_info.aspx?categoryID=281&documentID=11)> accessed 1 November 2011

Sacco R, *Legal Formants: 'A Dynamic Approach to Comparative Law'* The American Journal of Comparative Law (1991)

Sarantakos S, *A tool kit for quantitative data analysis* (McMillan 2007)

Section 35s of the Landlord and Tenant Act 1954  
<[www.legislation.gov.uk/ukpga/Eliz2/2-3/56/section/35](http://www.legislation.gov.uk/ukpga/Eliz2/2-3/56/section/35)> accessed 18 November 2013

Shepherd M, 'Clause and effect' Property Week (London, 29 September 2006)

Silverman D, *interpreting qualitative data* (Sage Publications 1993)

Singleton R, *Approaches to social research* (Universal Publishers 1988)

Small Business Service (SBS), 'Report of Ethnic Minorities'  
<[www.bis.gov.uk/files/file38308.pdf](http://www.bis.gov.uk/files/file38308.pdf)> accessed 10 November 2011

Small Business Service Department of Trade and Industry, 'British Businesses'  
<<http://www.dti.gov.uk/files/file38250.pdf>> accessed 12 February 2011

Sotirios S, *Social Research* (Palgrave Macmillan, 2005 )

Sotirios S, *A tool kit for quantitative data analysis* (McMillan 2007)

South Australian Legislation ‘Commercial Leases’

<<http://www.legislation.sa.gov.au/LZ/C/A/Retail%20and%20Commercial%20Leases%20Act%201995.aspx>> accessed 29 November 2011

Sparks P, *European Land Law* (Hart Publishing 2007)

Sparkes P, *A New Land Law* (2nd Ed Hart Publishing 2003)

Strauss AL and Corbin JM, *Basics of Qualitative Research* (Sage Publishing 1998)

Strydom H, *The pilot study* (Sage Publishing 1998)

Thomson Reuters Legal, ‘Practical Lease Precedent’ Sweet & Maxwell

<<http://www.sweetandmaxwell.co.uk/Catalogue>> accessed 24 November 2011

Sweet R, *Commercial Leases, Tenant’s Amendments*, (Sixth Edition London Sweet & Maxwell 2009)

Total Entrepreneurial Activity <<http://www.internationalentrepreneurship.com/total-entrepreneurial-activity/>> accessed 14/11/2011

Tran M, ‘Ethnic Minority Population Growth’ *The Guardian* (Tuesday 13 July 2010 London)

Unfair Terms in Contract

<[http://lawcommission.justice.gov.uk/docs/lc292\\_Unfair\\_Terms\\_In\\_Contracts.pdf](http://lawcommission.justice.gov.uk/docs/lc292_Unfair_Terms_In_Contracts.pdf)> accessed 22/11/2011

University of Reading School of Real Estate and Planning,  
<[www.reading.ac.uk/REP/Aboutus/Staff/neil-crosby.aspx](http://www.reading.ac.uk/REP/Aboutus/Staff/neil-crosby.aspx)> accessed 11/11/2011

Upward-only rent review clauses may be banned, *The Times* (24 November 2003)

Village Greens Legislation Common Act 2006

Wellings V G , *Law of Landlord and Tenant* (Sweet and Maxwell 2007)

Whitehead E, Purdy D and Mascarenhas S, report on Small and Medium Enterprises'  
Small Business Service March 2006 URN 06/958  
<[www.bis.gov.uk/files/file38339.pdf](http://www.bis.gov.uk/files/file38339.pdf)> accessed 11 November 2011

Wilson W, 'Business Tenancies Rent Reviews' (2010) House of Commons  
Parliamentary Report Social Policy Section

Yvonna S, Lincoln J, Guba G, *Naturalistic Inquiry* Qualitative Research (Sage  
Publishing 1985)

Zweigert K and Kotz H, *Introduction to comparative law* (Clarendon Press 1998)

## **Cases**

*Anglia Building Society v Sheffield City Council* [1982] 266 E.G. 311

*Broadway Investments Hackney Ltd -v- Grant* [2006] and *Tan and Another -v- Sitkowski* [2007]

*Chartbrook v Persimmon Homes* [2009] UKHL 38, [2009] All ER (D) 12 (Jul)

*Dunnett v. Railtrack PLC* [2008] CA

*Estafnous v LLBC Ltd* [2011] CA

*Farm Assist Limited (in liquidation) v Secretary of State for Environment, Food and Rural Affairs (DEFRA) (no. 2)* [2009] EWHC 1102 (TCC)

*Gutteridge v. Munyard* (1 Moo and R 336, [1834]

*Halsey v. Milton Keynes HNS Trust Limited* [2004] EWCA Civ 576

*Haq-v-Island Homes Housing Association* [2011] CA

*Iqbal v Thakrar* [2004] 3 E.G.L.R. 21

*Jenkins v Price* [1908] 1 Ch. 10

*Lister v. Lane and Nesham* [1893] 2 QB 212

*Norwich Union v. British Railways Board* [1987] 2 EGLR 137)

*Oriel Property Trust v Kidd* 154 E.G. 500

*Post Office v. Aquarius Properties Ltd* [1987] 1 All ER 1055)

*Proudfoot v. Hart* [1890] 25 QBD 42)

*Ravenseft v. Davstone* [1980] 1 QB 12)

*Robert Alfred Hurst v Ian Leeming* [2002] ADR.L.R. 05/09

*Sargeant v Macepark (Whittlebury) Ltd* [2004] 4 All E.R. 662

*Scales v. Lawrence* [1860] 2 F&F 289

*The Governors of Bridewell Hospital v Fawkner & Rogers* [1892] 8 TLR 637

*Welsh v London Borough of Greenwich* [2000] 3 EGLR 41

## SCHEDULE OF INTERVIEWS

### Appendix 1 - Interviews with Lawyers

Int N0	Name	Position	Date	Location	Method
1. E M	C F	House of Lords Chief of Staff and Commercial Law Barrister	10/2/2012	London	Face to Face
2.	C A	Land Securities Legal Representative, Clear let and BPF Lawyer	1/2/2012	London	Face to Face
3.	M D	Commercial Property Lawyer	12/3/2012	London	Face to Face
4.	K H	Associate Commercial Property Solicitors	25/1/2012	London	Face to Face
5.	S K	Associate Commercial Property Solicitors	5/3/2012	London	Face to face
6.	H F	Legal Expert Solicitor Commercial Property	22/2/2012	London	Face to Face
7.	S M	Commercial Lawyer	22/2/2012	London	Face to Face
8.	P K	Commercial Property Solicitor	2/2/2012	London	Face to Face
9.	D P	Expert Commercial Property Lawyer	16/2/2012	London	Face to Face
10.	C B	Associate Commercial Lawyer	16/1/2012	London	Face to Face
11.	N B	Commercial Property Lawyer	12/2/2012	Lancing	By email

12.	AS	Commercial Lawyer	27/1/2012	London	Face to face
13.	J G	Property Lawyer	20/2/2012	London	By phone
14.	A C	Commercial Lawyer	10/2/2012	Basingstoke	By email
15.	J S	Commercial Solicitor	17/1/2012	London	Face to Face
16. E M	N F	Expert Mediation Lawyer Commercial Property	10/2/2012	London	Face to Face
17.	C S	Commercial Business Associate Lawyer	25/1/2012	London	Face to Face

EM = Ethnic Minorities

## Appendix 2 – Interviews with Surveyors/Agents

Int N0	Name	Position	Date	Location	Method
18.	N A	Senior Commercial Property FRICS Surveyor	16/2/2012	Luton	Face to Face
19.	V W	Senior C.P. Estate Agent/Surveyor	6/2/2012	London	By email
20. E.M	M F	Senior Commercial Property Surveyor	21/2/2012	Luton	Face to Face
21.	A H	Commercial Property Surveyor	14/2/2012	London	By email
22.	C C	Commercial Property Estate Agent	20/2/2012	London	By Phone
23. E.M	S D	Commercial Property Estate Agent	20/2/2012	London	Face to Face
24.	A R	Commercial Property Estate Agent	12/2/2012	London	By email
25.	L S	Surveyor Commercial Pr0perty	20/2/2012	London	By Phone
26.	D A	Surveyor Commercial Property	10/2/2012	London	Face to Face
27.	D K	Commercial Property Estate Agent	20/2/2012	London	By email
28.	K D	Commercial Property Estate Agent	20/2/2012	London	Face to Face

### Appendix 3 – Interviews with Landlords

Int N0	Name	Position	Date	Location	Method
29. E.M	A A	Commercial Landlord and Fellow Chartered Accountant	14/2/2012	London	Face to Face
30.	R R	Landlord and Commercial Business Owner	25/2/2012	London	Face to Face
31. E.M	N K	Landlord and Chartered Accountant	20/2/2012	London	By email
32. E.M	M A	Landlord and House wife	19/2/2012	London	By phone
33. E.M	P F	Landlord and Author	15/2/2012	London	Face to Face
34. E.M	S S	Landlord and Financial Consultant	7/3/2012	London	Face to Face
35.	M W	Landlord of many commercial properties	20/2/2012	London	Face to Face
36. E.M	M J	Landlord and Psychologist	10/2/2012	London	Face to Face
37. E.M	K J	Landlord and Managing Director	19/2/2012	London	By phone
38. E.M	M P	Landlord and MD	10/2/2012	London	Face to Face
39. E.M	N D	Landlord and House Manager	19/2/2012	London	Face to Face
40. E.M	F F	Landlord and IT Consultant	18/2/2012	London	Face to Face

41. E.M	J V	Landlord and Medical Doctor	19/2/2012	London	Face to Face
42. E.M	A M	Landlord and IT Manager	11/3/2012	London	By email
43. E.M	A A	Landlord and Director	11/3/2012	London	By phone

## Appendix 4 – Interviews with Tenants

Int N0	Name	Position	Date	Location	Method
44. E.M	C H	Commercial Property Tenant	2/3/2012	London	By phone
45. EM	J I	C.P. Tenant and Business Owner	2/3/2012	London e	Face to Face
46.	P D	C.P. Tenant and Company Director	10/1/2012	Luton	By email
47. E.M	B D	C.P. Tenant and Business Owner	2/3/2012	Luton	By phone
48. E.M	M P	C.P. Tenant and Company Director	22/2/2012	Luton	Face to Face
49. E.M	N M	C.P. Tenant and Journalist	1/3/2012	London	By phone
50. E.M	M C	C.P. Tenant	15/3/2012	London	Face to Face
51. E.M	P R	C.P. Tenant and Teacher Counsellor	9/3/2012	London	Face to face
52. E.M	M S	C.P. Tenant and Assistant Manager	2/3/2012	London	By phone
53. E.M	V W	C.P. Tenant and Post Graduate Student	26/02/12	London	By email
54. E.M	A H	C.P. Tenant and Medical Nurse	4/12/2012	London	By phone
55.	M H	C.P. Tenant and Business Manager	25/2/2012	London	By email

56. E.M	H B	C.P. Tenant	1/3/2012	London	Face to Face
57. E.M	G S P	C.P. Tenant and Director	3/3/2012	London	By email
58.	B W	C.P. Tenant	7/3/2012	London	By phone
59. E.M	J G	C.P. Tenant and Administrator	9/3/2012	London	By email
60.	M J	C.P. Tenant and P.A.	9/3/2012	London	By email
61. E.M	N N	C.P. Tenant, Business Owner and psychologist	19/2/2012	London at his home	Face to Face
62. E.M	M S	C.P. Tenant and Accountants Practice Owner	9/3/2012	London at her office	Face to Face
63. E.M	B P	C.P. Tenant and Accountants Practice Owner	9/3/2012	London	By phone
64. E.M	E M	C.P. Tenant and Researcher	9/3/2012	London	By email
65. E.M	S V	C.P. Tenant and Retail Manager	8/3/2012	London	By email
66.	B R	C.P. Tenant	20/2/2012	London	Face to Face
67. E.M	S M	C.P. Tenant and Business Owner	2/3/12	London	Face to Face
68. E.M	R S	C.P. Tenant and Business Manager	2/3/2012	London	Face to Face
69. E.M	K T	C.P. Tenant and Doctors Practice Owner	20/2/2012	London	By phone

70. E.M	R T	C.P. Tenant and Hotel Manager	20/2/2012	London	By phone
71. E.M	M H	C.P. Tenant and Broker	4/2/2012	London	By email
72.	F M	C.P. Tenant and Business Manager	9/3/2012	London	By email
73. E.M	A A	C.P. Tenant and P.G. Student	26/2/2012	London	By email
74. E.M	B K	C.P. Tenant and Restaurant/Café Owner	22/2/2012	Brighton	Face to Face

## Appendix 5 – Interviews with Business Owners

Int N0	Name	Position	Date	Location	Method
75. E.M	B B	Restaurant Owner	29/2/2012	London	Face to Face
76. E.M	N I	M.D. Travel Agents Owner	10/2/2012	London	Face to Face
77. E.M	A Sh	M.D. Management Consultant B.O.	6/2/2012	London	Face to face
78. E.M	M E	B.O. Sales, Retails	5/3/2012	London	By email
79. E.M	A A	B.O. Restaurant	28/2/2012	London	Face to Face
80. E.M	S Sh	B.O. Shop	24/2/2012	London	Face to Face
81. E.M	B E	B.O. Finance	25/3/2012	London e	Face to Face
82. E.M	T S	B.O. Accountancy	9/3/2012	London	Face to Face
83.	S W	B.O. Shop Manager	19/2/2012	London	By phone
84.	D R	B.O. Recruitment Consultancy	17/2/2012	London	By email
85.	K T	B.O. Retail	8/2/2012	London	By email
86.	A P	B.O. Accountants Practice	14/2/2012	London	Face to Face
87. E.M	R K	B.O. Property Management	11/2/2012	London	By email

88. E.M	Z N	B.O. Director Retail	16/2/2012	London	Face to Face
89. E.M	S A	B.O. Catering	29/2/2012	London	By phone
90. E.M	R Z	B.O. Retail	29/2/2012	London	By phone