

**Tyneside Flats: A Paradigm Tenure
For Interconnected Dwellings**

Geoffrey James Wadsworth

THESIS SUBMITTED FOR THE DEGREE OF

DOCTOR OF PHILOSOPHY

NEWCASTLE LAW SCHOOL, NEWCASTLE UNIVERSITY

March 2011

Acknowledgements

This has been a longer journey than intended and many have helped on the way. I have really appreciated the support received from the academic, administrative and library staff at Newcastle Law School. There are far too many to name individually, but special thanks go to Chris Rodgers, who has supervised this project throughout. His constructive criticisms, helpful suggestions, patience and encouragement have been invaluable. I would also like to thank David Harte for originally encouraging me to undertake the project. Staff at Newcastle University's Robinson library and at the British and Northumbria University libraries have also been most helpful, as have many current and former students. I am also deeply indebted to those north eastern conveyancers who willingly gave up their valuable time and agreed to participate.

Many friends, neighbours and family members have been supportive. I would particularly like to mention Bronwyn Fitchett, Linda McGowan, Ann McNulty, Reinhold Stockle, Martin Taylor and especially Mike Beardsley for his particular interest. Thanks are also due to my children Tom and Kate, whose irreverent prediction as to how much longer the project would take has mercifully not been fulfilled. Above all I would like to thank my wife Anne for her long standing support, forbearance and understanding.

Newcastle upon Tyne,

March 2011

Abstract

‘Tyneside Flats’ are typically terraced buildings comprising pairs of self-contained flats and are particularly prevalent on Tyneside in north eastern England. This thesis examines the land tenure arrangements used for individual Tyneside Flats and the enforcement of land obligations between flat owners. This provides an interesting model for tenurial arrangements across England and Wales where there are interconnected buildings and other small blocks of self contained flats. The thesis includes an analysis of qualitative and quantitative research data obtained from north eastern conveyancers.

The first introductory chapter explains the background to the research project and the research objectives. It also contains the research questions and an overview of the literature and methodology used. Chapter two puts Tyneside Flats in their historical context and describes their architectural features. The judicial development of the law of positive freehold obligations from the nineteenth century onwards is analysed in chapter three. Past and present law reform proposals and the 2002 commonhold legislation are assessed in chapter four. In the 1980s a mixed freehold/leasehold arrangement for Tyneside Flat transfer was promulgated by Newcastle Law Society. This standard structure and other alternative freehold conveyancing devices are considered in chapter five. Chapter six contains a detailed and technical analysis of the impact of modern leasehold legislation on the standard form arrangement. The methodology used for data collection is described in chapter seven. Chapter eight examines how the standard Tyneside Flat documentation works in practice. This key chapter analyses qualitative and quantitative research data in detail.

The final concluding chapter contains an overview of the research questions and results. It includes recommendations for legislative reform and the future prospects for the standard form arrangement and a freehold land obligation alternative.

Abbreviations

Statutes

AEA 1925	Administration of Estates Act 1925
ANLA 1992	Access to Neighbouring Land Act 1992
CA 1882	Conveyancing Act 1882
CLRA 2002	Commonhold and Leasehold Reform Act 2002
C(RTP)A 1999	Contracts (Rights of Third Parties) Act 1999
DPA 1998	Data Protection Act 1998
HA 1936	Housing Act 1936
HA 1957	Housing Act 1957
HA1974	Housing Act 1974
HA 1980	Housing Act 1980
HA 1985	Housing Act 1985
HA 1988	Housing Act 1988
HA 1996	Housing Act 1996
HA 2004	Housing Act 2004
LCA 1925	Land Charges Act 1925
LCA1965	Law Commissions Act 1965
LPA 1925	Law of Property Act 1925
LRA 1967	Leasehold Reform Act 1967
LRA 1925	Land Registration Act 1925
LRA 2002	Land Registration Act 2002
LRHUDA 1993	Leasehold Reform Housing and Urban Development Act 1993
LRPG	Land Registry Practice Guide
LRRA 2006	Legislative and Regulatory Reform Act

LTA 1897	Land Transfer Act 1897
LTA 1954	Landlord and Tenant Act 1954
LTA 1985	Landlord and Tenant Act 1985
LTA 1987	Landlord and Tenant Act 1987
LGHA 1989	Local Government and Housing Act 1989
PAA 1964	Perpetuities and Accumulations Act 1964
PAA 2009	Perpetuities and Accumulations Act 2009
RA 1965	Rent Act 1965
RA 1977	Rentcharges Act 1977
SLA 1882	Settled Land Act 1882
SLA 1925	Settled Land Act 1925
TCPA 1932	Town and Country Planning Act 1932
TLATA 1996	Trusts of Land and Appointment of Trustees Act 1996

Other

Art	Article
BBC	British Broadcasting Association
BS	Building Society
BSA	Building Societies Association
CC	County Council
Ch(s)	Chapter(s)
Cl(s)	Clause(s)
CML	Council of Mortgage Lenders
DETR	Department of the Environment Transport and Regions
Ed(s)	Editor(s), Edition(s)

HIP	Home Information Pack
LA	Local Authority
LRPG	Land Registry Practice Guide
LVT	Leasehold Valuation Tribunal
N(s)	North, note(s) of footnote(s)
P(PP)	Page(s)
Para(s)	Paragraph(s)
Pt(s)	Part(s)
Q	Question
Reg(s)	Regulation(s)
RICS	Royal Institution of Chartered Surveyors
S(s)	Section(s) or South
Sch(s)	Schedule(s)
SLSA	Socio – Legal Studies Association
SRA	Solicitors Regulation Authority
Vol(s)	Volume(s)

Books Journals and Reports

C.L.J.	Cambridge Law Journal
CONV.	Conveyancer
CUP	Cambridge University Press
EUP	Edinburgh University Press
HMSO	Her Majesty's Stationary Office
J.P.L.	Journal of Planning and Environmental Law
JSPTL	Journal of the Society of Public Teachers of Law

Law Com	Law Commission
LH	Journal of Legal History
LS	Legal Studies
LS Gaz	Law Society's Gazette
LQR	Law Quarterly Review
MLR	Modern Law Review
NLJ	New Law Journal
OUP	Oxford University Press
POQ	Public Opinion Quarterly
SJ	Solicitors' Journal
YUP	Yale University Press

Contents

Acknowledgements.....	i
Abstract.....	ii
Abbreviations.....	iii

Chapter 1. Research Project

1.1 Background, Objectives and Research Questions

1.1.1 Tyneside Flats.....	1
1.1.2 Enforcement of Obligations	1
1.1.3 Law Reform and Leasehold Legislation.....	2
1.1.4 Individual Sales of Tyneside Flats.....	2
1.1.5 Research Aims and Objectives.....	3
1.1.6. Research Questions.....	4

1.2 Literature Overview

1.2.1 Introduction.....	5
1.2.2 Historical literature.....	6
1.2.3 Legal Literature.....	7
1.2.4. Positive Freehold Obligations.....	8
1.2.5 Housing and Landlord and Tenant.....	9
1.2.6 Conveyancing.....	9
1.2.7 Law Reform.....	10
1.2.8 Research Literature.....	11

1.3 Methodology Overview

1.3.1 Introduction.....	12
1.3.2 Doctrinal Research.....	12
1.3.3 Fieldwork Research.....	13
1.3.4 Principles of Sample Selection.....	13
1.3.5 Data Collection Strategies.....	14
1.3.6 The Research Sample Chosen.....	15
1.3.7 Questionnaires.....	16
1.3.8 Data Analysis.....	17
1.3.9 Outline of Thesis Structure and Contents.....	17

Chapter 2. Historical Background

2.1 Overview.....	19
-------------------	----

2.2 Victorian and Edwardian Tyneside

2.2.1 Introduction.....	1
-------------------------	---

2.2.2 The Industrial Revolution.....	20
2.2.3 Railways and Suburban Transport.....	21
2.2.4 Victorian Individualism.....	22
2.2.5 Population Growth.....	23
2.2.6 Health and Housing.....	24
2.3 Architectural features and Construction	
2.3.1 Origins of the Design.....	26
2.3.2 The Usual Layout.....	26
2.3.3 Evolving Styles.....	28
2.3.4 Alternative Terraced Layouts.....	29
2.3.5 Semi-Detached Tyneside Flats.....	30
2.4 Builders Lenders and Tenants	
2.4.1 Builders and owners.....	32
2.4.2 Lenders	33
2.4.3 Tenants.....	34
2.5 Numbers	
2.5.1 Numbers Built.....	36
2.5.2 Overcrowding and Slum Clearance.....	37
2.5.3 Demolition and Renovation.....	39
2.5.4 Existing Numbers.....	41
2.6 Location	
2.6.1 Geographical Spread.....	42
2.6.2 Explanation for Location.....	43
2.7 Tyneside Flats in the Twenty First Century	
2.7.1 Structural Quality.....	46
2.7.2 Student Districts.....	46
2.7.3 Non Student Areas.....	49
Chapter 3. Judicial Developments	
3.1 Overview.....	51
3. 2 Pre Tulk v. Moxhay	
3.2.1 Keppel v. Bailey.....	54
3.2.2 Whatman v. Gibson.....	57
3.2.3 Mann v. Stephens.....	59

3.3 Tulk v. Moxhay

3.3.1 Introduction..	60
3.3.2 Conscience and Notice.....	61
3.3.3 Private Property, Laissez-faire and the Control of Land Use.....	63
3.3.4 Positive and Restrictive Obligations.....	64

3.4 Application of Tulk v. Moxhay

3.4.1 Introduction.....	65
3.4.2 Immovable Property.....	66
3.4.3 Positive Obligations.....	66
3.4.4 Haywood v. The Brunswick Permanent Benefit Building Society.....	69
3.4.5 Increasing Legitimacy and Role of Parliament.....	70
3.4.6 Alienability of Land.....	71
3.4.7 Expenditure.....	72
3.4.8 London and South Western Railway Co v. Gomm.....	73
3.4.9 Austerberry v. Oldham Corporation.....	75
3.4.10 Expenditure of Money.....	76
3.4.11 Non Judicial Influences.....	77

3.5 Positive Obligations in the Twentieth Century

3.5.1 Introduction.....	78
3.5.2 The Need for Benefiting Land.....	78
3.5.3 Confirmation of Austerberry v. Oldham Corporation.....	81
3.5.4 Rhone v. Stephens.....	82

3.6 Review..... 85

Chapter 4. Law Reform

4.1 Introduction..... 88

4.2 Judicial Reform..... 89

4.3 The 1920s to the Wilberforce Report

4.3.1 The First World War to the early 1960s.....	91
4.3.2 The Wilberforce Report.....	94

4.4 The Law Commission, the Lawson Working Paper and the 1970s

4.4.1 The Law Commission and the 1960s.....	97
4.4.2 The Lawson Working Paper and the 1970s.....	99
4.4.3 Academic Input.....	100

4.5 The 1980s and the Gibson Report	
4.5.1 The 1980s.....	102
4.5.2 The Gibson Report.....	102
4.5.3 The Gibson Report and Tyneside Flats.....	104
4.5.4 Opposition to Gibson Report.....	105
4.6 Leasehold Reform.....	107
4.7 Commonhold	
4.7.1 The Aldridge Report.....	109
4.7.2 The Commonhold and Leasehold Reform Act 2002.....	110
4.7.3 Commonhold and Tyneside Flats - the number of units.....	112
4.7.4 Commonhold and Tyneside Flats - the lack of common parts.....	113
4.7.5 Commonhold and Tyneside Flats-the absence of any need for management.....	113
4.8 The 2008 Law Commission Consultation Paper	
4.8.1 Introduction.....	115
4.8.2 Terminology.....	115
4.8.3 The Easement Model.....	116
4.8.4 Labelling Land Obligations.....	118
4.8.5 The Need for Clear Identification.....	119
4.8.6 Range of Obligations.....	120
4.8.7 Enforceability.....	121
4.8.8 Land Registry.....	122
4.8.9 Summary.....	123

Chapter 5. Standard Tyneside Flat Documentation and Freehold

Conveyancing Devices

5.1 Introduction.....	125
5.2 Background to Individual Sales	
5.2.1 Traditional Sale and Letting Arrangements.....	125
5.2.2 The Commencement of Individual Sales.....	126
5.2.3 Increased Capital Return.....	127
5.2.4 Impact of Rent Act Legislation.....	127
5.2.5 Increased Desire for Owner Occupation.....	128
5.2.6 The Role of Estate Agents.....	129

5.3 Standard Documentation

5.3.1 Transfer before the Standard Documentation.....	129
5.3.2 Pressure for Standard Documentation.....	131
5.3.3 Drafting the Standard Documentation.....	132
5.3.4 The Mixed Freehold/leasehold Structure.....	134
5.3.5 The Leasehold Term.....	136

5.4 Freehold Conveyancing Devices

5.4.1 Freehold Devices Used.....	136
5.4.2 Enlargement of Long Leases.....	137
5.4.3 Chains of Indemnity Covenants.....	139
5.4.4 Compulsorily Renewed Covenants.....	140
5.4.5 Estate Rentcharges.....	142
5.4.6 Benefit and Burden.....	144
5.4.7 Summary.....	145

Chapter 6. Leasehold Legislation

6.1 Introduction.....	147
------------------------------	------------

6.2 Enfranchisement of Dwelling Houses

6.2.1 Introduction.....	149
6.2.2 The LRA 1967.....	150
6.2.3 The Sharpe and Malpas Cases.....	151
6.2.4 Relevance of the LRA 1967 for Tyneside Flats.....	152

6.3 Leasehold Extension of Houses and Flats

6.3.1 Introduction.....	154
6.3.2 LRA 1967.....	154
6.3.3 LRHUDA 1993.....	155
6.3.4 Application of LRHUDA 1993 to Tyneside Flats.....	156

6.4 Collective Enfranchisement of Flats

6.4.1 The Right to Collective Enfranchisement.....	158
6.4.2 Relevance for Tyneside Flat Leaseholders.....	158

6.5 Repair and Maintenance of Flats

6.5.1 Introduction.....	160
6.5.2 Service Charges and Tyneside Flat Leaseholders.....	162
6.5.3 Reasonableness of Service Charges and the Leasehold Valuation Tribunal.....	164
6.5.4 Consultation for Qualifying Works.....	165
6.5.5 Service Charge Information and Accounts.....	166
6.5.6 Insurance.....	167
6.5.7 Administration Charges.....	168
6.5.8 Charges for Consents.....	168
6.5.9 Charges for Breach of Covenant.....	169
6.5.10 Communication and Information.....	169
6.5.11 Landlord Information - Service and Administration Charges.....	170
6.5.12 Landlord Information - Transfer of Freehold Reversions.....	170
6.5.13 Right of Pre-emption.....	172
6.5.14 Appointment of a Manager.....	174
6.5.15 The Right to Manage.....	175
6.5.16 Compulsory Purchase.....	176

6.6 Enforceability of Obligations

6.6.1 Introduction.....	177
6.6.2 The LTCA 1995.....	177
6.6.3 Pre-1996 Leases.....	178
6.6.4 Post 1995 Leases.....	179

6.7 Overview

6.7.1 General Comments.....	181
6.7.2 Legislation Requiring Reform.....	183

Chapter 7. Data Collection

7.1 Introduction.....	186
------------------------------	------------

7.2 Research Strategies

7.2.1 Introduction.....	187
7.2.2 Dividing the Data Collection.....	187
7.2.3 Face to Face Data Collection.....	187
7.2.4 More Qualitative Data.....	188
7.2.5 Less Missing Data.....	188
7.2.6 More Certain Data.....	188
7.2.7 Additional Documentation.....	189

7.3 The Research Sample

7.3.1 Access.....	190
7.3.2 Selection Basis.....	191
7.3.3 Obtaining Participation.....	191
7.3.4 Pilot Study.....	192
7.3.5 Face to Face Interviews.....	193

7.4 Research Questions

7.4.1 Introduction.....	195
7.4.2 The problem of meaning.....	195
7.4.3 The order of the questions.....	196
7.4.4 Memory problems.....	197
7.4.5 Filter Questions.....	199
7.4.6 Technical Terms.....	199
7.4.7 Don't Know Option.....	200

7.5 Ethical Considerations

7.5.1 Introduction.....	202
7.5.2 Freely Given Consent.....	202
7.5.3 Informed Consent.....	203
7.5.4 Ongoing Consent.....	203
7.5.5 Evidence of Consent.....	204
7.5.6 Confidentiality.....	204
7.5.7 Anonymity of data.....	205
7.5.8 Factors affecting Confidentiality.....	206
7.5.9 Documentation.....	206

7.6 Generalisation and Quality of Results

7.6.1 Introduction.....	207
7.6.2 Sample Selection.....	207
7.6.3 Sample Size.....	208
7.6.4 Homogeneity.....	208
7.6.5 Representative Sample.....	210
7.6.6 Quality and Reliability.....	211

Chapter 8. Standard Tyneside Flat Documentation in Practice

8.1 Overview.....	213
--------------------------	------------

8.2 Conveyancers' Concept of Tyneside Flats

8.2.1 Introduction.....	215
8.2.2 Tyneside Flats, Maisonettes and Other Buildings.....	215
8.2.3 The Number of Units.....	216
8.2.4 The Necessity for a Terrace.....	218
8.2.5 Maisonettes.....	219
8.2.6 Other Buildings.....	220

8.3 Use of the Standard Tyneside Flat Documentation

8.3.1 Introduction.....	221
8.3.2 Extent of Use.....	221
8.3.3 North East Generally.....	222
8.3.4 South Shields.....	222
8.3.5 Amendments to the Standard Lease.....	223
8.3.6 Student Use.....	224
8.3.7 Business Use.....	225
8.3.8 Other Amendments.....	226

8.4 Mortgage Lenders

8.4.1 Introduction.....	227
8.4.2 Tenure Requirements.....	227
8.4.3 Freehold Flats.....	228
8.4.4 Mixed Freehold / Leasehold Structure.....	229
8.4.5 Leasehold Term.....	231
8.4.6 Notice of Mortgage.....	232

8.5 Costs

8.5.1 Introduction.....	234
8.5.2 Standard Documentation and Costs.....	234
8.5.3 Plans Costs.....	235
8.5.4 Land Registry Fees.....	236
8.5.5 Solicitors' Costs.....	237
8.5.6 Grant of the First Lease.....	238
8.5.7 Grant of the Second Lease and Transfer of Reversions.....	238
8.5.8 Later Transfers.....	240
8.5.9 Lease Extensions and Deeds of Variation.....	241
8.5.10 Review of Expected Additional Costs.....	242

8.6 Land Registration

8.6.1 Introduction.....	244
8.6.2 Approving Documentation.....	244
8.6.3 Processing Applications.....	245
8.6.4 Registration in Practice.....	247

8.7 Leaseholders' Obligations and Their Enforcement

8.7.1 Introduction.....	249
8.7.2 Joint Contributions or 'Service Charges'.....	249
8.7.3 Knowledge and Regularity of Contributions.....	250
8.7.4 Impact of the LTA 1985 on Joint Contributions.....	251
8.7.5 Disputes over Joint Contributions.....	253
8.7.6 Dispute Resolution.....	254
8.7.7 Insurance Obligation.....	255
8.7.8 The Impact of the LTA 1985 and the LTA 1987 on Insurance Obligations.....	257
8.7.9 Enforcement of Leaseholders' Obligations.....	258

8.8 Creating and Maintaining the Landlord and Tenant Structure

8.8.1 Introduction.....	260
8.8.2 Granting the Second Lease.....	260
8.8.3 Transfer of Freehold Reversions.....	261
8.8.4 Notice of Transfer.....	264
8.8.5 Summary.....	266

8.9 Reform

8.9.1 Introduction.....	266
8.9.2 Reform and the Transfer of Tyneside Flats.....	267
8.9.3 Conversion of Existing Titles.....	269
8.9.4 Expense of Conversion.....	270
8.9.5 Timing of Conversion.....	270
8.9.6 Problem Leases and Conversion.....	271
8.9.7 Third parties and Conversion.....	272
8.9.8 The South Shields Structure.....	273
8.9.9 The London Structure.....	275
8.10 Summary.....	277

Chapter 9. Conclusion

9.1 Overview of Research Questions and Results	280
---	-----

9.2 Suggested Legislative Amendments

9.2.1 Introduction.....	285
9.2.2 Suggested Amendments to the LTA 1985.....	286
9.2.3 Suggested Amendments to the LTA 1987.....	287
9.2.4 Suggested Amendments to the LTCA 1995.....	288
9.2.5 The Legislative and Regulatory Reform Act 2006.....	289

9.3 Future Prospects

9.3.1 The Standard Tyneside Flat Arrangement.....	290
9.3.2 Impact of Leasehold Legislation.....	291
9.3.3 Conveyancing Procedures.....	292
9.3.4 Land Obligations - A Freehold Future?.....	293

Appendices

Appendix A Standard Tyneside Flat Lease	295
Appendix B Solicitors' General Questionnaire	296
Appendix C Solicitors' Historical Questionnaire	297
Appendix D Letter to Newcastle Law Society	298
Appendix E Letter to Research Population	299
Appendix F Letter to Research Sample	300
Appendix G List of Participating Firms	301
Appendix H Analysis of Replies	302
Appendix I Newcastle and Gateshead Population figures	303
Table of Statutes	304
Table of Statutory Instruments	307

Table of Cases.....309
Bibliography.....312

Chapter 1. The Research Project

1.1 Background, Objectives and Research Questions

1.1.1 *Tyneside Flats*

Many terraced houses in the north east of England comprise pairs of purpose built, self contained flats. As they are a particularly widespread feature of Tyneside's built environment, they are often known locally as 'Tyneside Flats'.¹ The Industrial Revolution had led to a huge expansion in Tyneside's population and Tyneside Flats were originally built to house large numbers of skilled industrial workers and their families.² Most Tyneside Flats were built from the 1870s until the outbreak of the First World War in 1914.³

1.1.2 *Enforcement of Obligations*

In the later Victorian period, when Tyneside Flats were being built in large numbers, chancery judges established the current law on the enforceability of positive freehold obligations. Perhaps because this was predominately an era of laissez-faire, particularly in economic spheres, the judiciary were only prepared to intervene to a limited extent. In very oversimplified terms, it was held that restrictive freehold obligations, which require no 'positive' action, could bind the original covenantor's successors in title to the burdened land. Conversely, positive obligations, which usually necessitate some active response, often involving expenditure, could not do so.⁴ The inability of positive freehold obligations to bind or 'run' with the land was to have far reaching consequences when, in the next century, individual Tyneside Flats, and other horizontally divided dwellings, came to be sold in North East England and elsewhere.

¹ Local conveyancers interpret the term 'Tyneside Flat' more widely - see ch.8, s.8.2.

² See ch.2, para.2.4.1.

³ See ch.2, para.2.5.1.

⁴ Judicial developments are traced in ch.3.

1.1.3 Law Reform and Leasehold Legislation

Even before the First World War, the judiciary expressed concern over limitations on the enforceability of freehold obligations.⁵ As the twentieth century progressed, parliament intervened in limited circumstances and on an ‘ad hoc’ basis.⁶ The rise in owner occupation, in the second half of the twentieth century accompanied, and perhaps increased, the pressure for more fundamental reform. Despite the establishment of the Law Commission, a major new law reform body, in 1965,⁷ comprehensive freehold land obligation reform has remained elusive.⁸ One of the most effective means of enforcing positive obligations is to use a leasehold arrangement or ‘tenure’. Accordingly, when large numbers of horizontally divided units were sold off, particularly in the London area, in the decades following the end of the Second World War, a landlord and tenant structure was usually created.⁹ A typical arrangement in large blocks of flats was for a management company to grant long leases to individual flat owners and for the freehold interest in communal or ‘common’ parts, to be vested in the management company.¹⁰ Many problems arose from this structure and, particularly from the 1980s onwards, much landlord and tenant legislation has been passed to try and mitigate actual or perceived shortcomings.¹¹

1.1.4 Individual Sales of Tyneside Flats

Enforcement of obligations was of little consequence during the time when most Tyneside Flats were built, because pairs of flats were usually in single ownership, frequently with each flat being separately rented. As individual Tyneside Flats began to be sold from the 1970s onwards, the state of repair of the ‘other’ flat, and therefore

⁵ See ch.3, para.3.5.2.

⁶ See ch.4, para.4.3.1.

⁷ See ch.4, para.4.4.1.

⁸ Current Law Commission proposals for reform are discussed in ch.4, s.4.8.

⁹ See, e.g., *Report of the Committee of Inquiry on the Management of Privately Owned Blocks of Flats*, (Chairman E. Nugee) (the Nugee Report), (London: HMSO, 1985), Vol.1, para.2.5.

¹⁰ See Clarke D, ‘Occupying ‘Cheek by Jowl’’ in Bright S & Dewar J (Eds), *Land Law Themes and Perspectives*, 1st ed., (Oxford: OUP, 1998), pp.389 - 390 for a discussion of different management company structures. See also, e.g., Silverman F(Ed), *The Law Society’s Conveyancing Handbook*, 17th ed., (London: Law Society, 2010), para.K6.3.

¹¹ See ch.6 for a discussion of the impact of landlord and tenant legislation on standard Tyneside Flat documentation. This documentation is referred to in ch.1, para.1.1.4.

the enforcement of repairing and other obligations, became a matter of essential concern for flat owners, mortgage lenders and their professional advisers. In the early 1980s the Newcastle upon Tyne Law Society promulgated standard documentation for the transfer of Tyneside Flats.¹² In order to overcome difficulties over the enforcement of positive freehold obligations, that documentation creates a landlord and tenant structure. However, because pairs of Tyneside Flats are nearly always entirely self-contained, it was unnecessary to vest any freehold interest in a management company. Instead, each flat owner usually becomes the freeholder or landlord of the other. This is normally achieved by granting a long lease of each flat to separate owner occupiers and, once both flats have been sold, transferring the freehold reversions in the non occupied or ‘other’ flats to each leaseholder.¹³ The standard Tyneside Flat lease contains complex provisions to ensure that these transfers take place and that the structure does not subsequently break down.¹⁴

The standard Tyneside Flat documentation is, inevitably, of great interest and concern to north eastern conveyancers. Although widely accepted, there is a disparity of views on Tyneside as to whether the documentation creates the best structure for transferring individual flats. A different arrangement is generally in use in the South Shields area of Tyneside.¹⁵

1.1.5 Research Aims and Objectives

The thesis intends to treat the Tyneside Flat arrangement as a paradigm for interconnected building tenure of small blocks of units, which are usually self-contained. It is proposed to put Tyneside Flats in their historical context and to examine how practical conveyancing responses are conditioned by architectural layouts and the development of the law on positive obligations. A major objective is to test the practical arrangement promulgated by the Newcastle Law Society to see if it provides an effective means for enforcing repairing and other obligations between individual flat owners. This provides a model for private law enforcement of

¹² See further ch.5, paras 5.3.3 & 5.3.4. A copy of the standard Tyneside Flat lease is contained in Appendix A.

¹³ See ch.5, para.5.3.4.

¹⁴ Ibid.

¹⁵ See ch.8, para.8.3.4.

obligations not catered for by legislation. An analysis of the impact of landlord and tenant legislation on the local structure is intended to show how existing legislation could be amended to benefit the widespread use of different long leasehold arrangements created for small blocks of flats. The history of land obligation law reform will be examined, and existing law reform proposals assessed, with the intention of adding to current discussions on comprehensive land obligation reform.

1.1.6 *Research Questions*

In order to achieve the research aims and objectives the following ten specific questions have been formulated.

1. What is a ‘Tyneside Flat’?

2. What are the principal economic, social or other factors that have influenced the building, number and continued existence of Tyneside Flats?

3. What are the principal judicial developments that have influenced the creation or otherwise of freehold repairing and other obligations for individual Tyneside Flats?

4. What impact have law reform proposals and the enactment of commonhold had on the creation of freehold repairing and other obligations for individual Tyneside Flats?

5. What land tenure arrangements are used for:
 - a) Ownership and owner occupation of individual Tyneside Flats?

 - b) Enforceability of repairing and other obligations between interdependent owner occupied Tyneside Flats?

6. How effective are current arrangements for the ownership of interdependent Tyneside Flats in providing enforceable and effective reciprocal repairing and other obligations?

7. What relevance does modern landlord and tenant legislation have for the special tenurial arrangements often known by north eastern conveyancers as ‘Tyneside Flats’?
8. What reform of modern landlord and tenant legislation is required to take account of its impact on Tyneside Flats as a discrete form of land tenure?
9. What legal and practical difficulties arise from current conveyancing practice when buying and selling Tyneside Flats?
10. What law reform and conveyancing practice measures are required to obviate the legal and practical difficulties caused by the unusual tenurial status of Tyneside Flats?

An overview of the literature considered and used in addressing these questions is discussed in the next section.

1.2 Literature Overview

1.2.1 Introduction

There is no legal literature on Tyneside Flats as a form of tenure and the thesis will fill this gap in the research literature.¹⁶ In addition, despite an increasing interest in housing history from the 1970s onwards,¹⁷ there is no published definitive or standard historical work on Tyneside Flats, nor does there appear to have been any fully comprehensive historical or other study of them. Accordingly, a wide range of sources has been utilised in considering all historical aspects of this thesis.¹⁸ Historical and legal literature overlap and each covers a wide spectrum. Both primary and secondary sources have been considered although, generally, a higher proportion of secondary sources has been used in the historical literature.¹⁹ Where appropriate, references from

¹⁶ Some ‘conveyancing’ and, very occasionally, law reform literature, does refer to the same tenurial structure as that created by the standard Tyneside Flat documentation - see ch.1, para.1.2.6.

¹⁷ See further Sutcliffe A, ‘Preface’ in *Multi – Storey Living The British Working-Class Experience*, 1st ed., (London: Crook Helm, 1974), p.ix.

¹⁸ See ch.1, para.1.2.2.

¹⁹ For a discussion of primary legal sources, such as judicial and parliamentary legislation, which can be seen as stating the law as opposed to, e.g., articles, which analyse it, see, e.g., Chatterjee C,

past literature, particularly the nineteenth century, as well as present, have been incorporated. As the literature is discussed in some detail in later chapters, this section is restricted to a broad overview of the main sources. These usually fall within the following three categories:

1. The historical development of Tyneside Flats
2. Aspects of land law and its reform
3. Research methodology and data collection.

1.2.2 Historical Literature

In setting Tyneside Flats in their economic, historic and social context, particularly in chapter two, reliance has been placed on a combination of local and national sources over a range of disciplines.²⁰ Although most national sources,²¹ and sometimes regional ones,²² make no specific mention of Tyneside Flats, others have usefully put them in a national²³ or regional context.²⁴ Many local history and other sources have been used. Inevitably these have tended to focus on Newcastle upon Tyne and, to a lesser extent, Gateshead, the two areas which have, and probably always have had, the largest concentrations of terraced Tyneside Flats.²⁵ For Newcastle, Pearce's chapter on Newcastle's Tyneside Flats, contained in Lancaster's 1994 book on Tyneside's

Methods of Research in Law, 2nd ed., (London: Old Bailey Press, 2000), pp.20-21. See also, Clinch P, *Using a Law Library A Student's Guide to Legal Research Skills*, 2nd ed., (London: Blackstone, 2001), ch.3 and Dobinson I and Johns F, 'Qualitative Legal Research' in McConville M and Chui W (Eds), *Research Methods for Law*, 1st ed., (Edinburgh: EUP, 2007), pp.19, 31 & 32.

²⁰ The main subject areas covered were economic, housing, industrial and social history and also architecture.

²¹ E.g., Keynes J, *The General Theory of Employment Interest and Money*, 1st ed., (London: Macmillan, 1936), Jones R, *Economic and Social History of England 1770 - 1977*, new ed., (London: Longman, 1979) and Malpass P and Murie A, *Housing Policy and Practice*, 5th ed., (Basingstoke: Macmillan, 1999).

²² E.g., McCord N, *North East England The Region's Development 1760 - 1960*, 1st ed., (London: B.T.Batsford, 1979).

²³ See Muthesius, S, *The English Terraced House*, 1st ed., (New Haven: YUP, 1982). It has been suggested that this book is 'the *only* (my italics) published study to set the Tyneside Flat in the national context' - see Grundy J and McCombie G, 'Nineteenth and Twentieth Century Architecture' in Pevsner N and Richmond I (revised by Grundy J et al), *Northumberland* 1st ed., (New Haven: YUP, 2002), p.122.

²⁴ See, e.g., Dauntton M, *House and Home in the Victorian City -Working Class Housing 1850 -1914*, 1st ed., (London: Edward Arnold, 1983).

²⁵ Precise numbers are not known - see further ch.2, para.2.5.4.

working class housing has been particularly helpful.²⁶ For Gateshead, chapter three in English Heritage's 2004 booklet on Gateshead's architecture has provided a useful, comparatively recent, perspective on Gateshead's large stock of Tyneside Flats.²⁷ Changing methods of information storage and access are illustrated by two other useful sources, which merit specific mention. Firstly, from the nineteenth century, much use has been made of the paper 1885 Royal Commission Report on working class housing²⁸ and secondly, from the late twentieth century onwards, computerised registers of title have proved a valuable source.²⁹

1.2.3 *Legal Literature*

Most of the legal literature used relates to, or stems from, the difficulty of enforcing positive freehold obligations and usually falls within one or more of the following four interconnected aspects of land law:

1. Positive Freehold Obligations
2. Leasehold legislation
3. Conveyancing
4. Law reform.

Although there is an inevitable overlap between each aspect they are, for convenience, considered separately below.³⁰

²⁶ See Pearce K, 'Newcastle's Tyneside Flats 1850 - 1900 By-law Housing or Cultural Phenomenon?', in Lancaster B (Ed), 1st ed., *Working Class Housing on Tyneside 1850 -1939*, (Whitley Bay: Bewick Press, 1994). It has been said that the origins of the form of design of Tyneside Flats are 'obscure' and that Pearce gives the best account - see Faulkner T, 'Architecture in Newcastle' in Colls R & Lancaster B (Eds), *Newcastle upon Tyne A Modern History*, 1st ed., (Chichester: Phillimore, 2001), p.234, fn 63.

²⁷ See Taylor S and Lovie D, *Gateshead Architecture in a Changing English Urban Landscape*, 1st ed., (London: English Heritage, 2004).

²⁸ See *Royal Commission on the Housing of the Working Classes*, Vols I &11, (London: Eyre and Spottiswoode, 1885).

²⁹ Open access to all registered titles has been available since 3 December 1990 - see further ch.6, para. 6.5.12.

³⁰ The links between land law and conveyancing are referred to in ch.6, para.6.1, fn 2.

1.2.4. Positive Freehold Obligations

Gray's *Elements of Land Law* has been especially useful for giving a general grounding in land law,³¹ although other standard³² and sometimes less comprehensive, or less established, works³³ have also been consulted. It has been suggested that the coverage of positive obligations in legal literature is deficient³⁴ and more specific 'covenant' textbooks have also been used.³⁵ Because the law can only be properly understood in its historical context, literature from the nineteenth century,³⁶ and throughout the twentieth century,³⁷ as well as earlier editions of current standard works, has also been considered. Detailed analysis of the leading judicial decisions, such as *Tulk v. Moxhay*,³⁸ *Austerberry v. Oldham Corporation*³⁹ and *Rhone v. Stephens*⁴⁰ is to be found in numerous articles referred to in the discussion of those cases in chapter three.⁴¹ Chapter four considers the relevance for Tyneside Flats of The Commonhold and Leasehold Reform Act 2002. Textbooks on that legislation⁴² and on the many articles written before and after its passage have been much used.⁴³

³¹ See Gray K and Gray S, *Elements of Land Law*, 5th ed., (Oxford: OUP, 2009). This has been described as a work of 'considerable and remarkable' learning - see Hopkins N, 'The Library' [2009] 73 Conv.361, p.363.

³² E.g., Burn E, *Cheshire and Burn's Modern Law of Real Property*, 16th ed., (London: Butterworths, 2000), Burn E and Cartwright J, *Maudsley and Burn's Land Law Cases and Materials*, 9th ed., (Oxford: OUP, 2009), Harpum C et al (Eds), *The Law of Real Property by Megarry and Wade (Megarry and Wade)*, 7th ed., (London: Sweet and Maxwell, 2008).

³³ E.g., Cooke E, *Land Law*, 1st ed., (Oxford: OUP, 2006), Dixon M, *Modern Land Law*, 6th ed., (London: Routledge - Cavendish, 2008), Gardner S, *An Introduction to Land Law*, 2nd ed., (Oxford: Hart, 2009), Gravells N, *Land Law: Text and Materials*, 4th ed., (London: Sweet and Maxwell, 2010), Sparkes P, *A New Land Law*, 2nd ed., (Oxford: Hart, 2003), Stephens J et al, *Land Law*, 4th ed., (London: Sweet & Maxwell, 2008), Thompson M, *Modern Land Law*, 4th ed., (Oxford: OUP, 2009).

³⁴ See Scamell E, *Land Covenants, restrictive and positive, relating to freehold land, including covenants for title*, 1st ed., (London: Butterworths, 1996), preface, p.ix, where he says that 'the coverage of positive covenants in current legal literature tends to be either fragmentary or shallow.'

³⁵ E.g., Newson G, *Preston & Newson's Restrictive Covenants affecting Freehold Land*, 9th ed., (London: Sweet & Maxwell, 1998), Sabey D and Everton A, *The Restrictive Covenant in the Control of Land Use*, 1st ed., (Aldershot: Ashgate, 1999) as well as Scamell's *Land Covenants* (n.34).

³⁶ E.g. Digby K, *An Introduction to the History of the Law of Real Property*, 2nd ed., (London: Clarendon, 1876), Pollock F, *The Land Laws*, 2nd ed., (London: Macmillan, 1887).

³⁷ E.g., Dicey A, *Law and Public Opinion in England*, 1st ed., (London: Macmillan, 1914), Behan J, *The Use of Land as affected by Covenants and Obligations not in the Form of Covenants*, 1st ed., (London: Sweet & Maxwell, 1924), Hargreaves A, *An Introduction to the Principles of Land Law*, 1st ed., (London: Sweet & Maxwell, 1936) and Simpson A, *A History of Land Law*, 2nd ed., (Oxford: Clarendon, 1986).

³⁸ (1848) 2 Ph 774, 41 ER 1143.

³⁹ (1885) 29 ChD 750 CA.

⁴⁰ (1994) 2 AC 310 HL.

⁴¹ See ch.3, s.3.3 & paras 3.4.9 - 3.4.11 & 3.5.4.

⁴² E.g., Aldridge T, *Commonhold Law*, loose leaf ed., release 2, (London: Sweet & Maxwell, 2004), Clarke D, *Commonhold - The New Law*, 1st ed., (Bristol: Jordans, 2002), Clarke D (Ed), *Clarke on*

1.2.5 *Housing and Landlord and Tenant*

In addition to general land law books, standard landlord and tenant⁴⁴ and housing law⁴⁵ textbooks have been used to obtain a clearer understanding of the impact on long leaseholds of legislation passed from the 1960s onwards. The main statutory provisions comprise the Leasehold Reform Act 1967, the Landlord and Tenant Acts 1985 and 1987, the Leasehold Reform Housing and Urban Development Act 1993, the Landlord and Tenant (Covenants) Act 1995 and the Commonhold and Leasehold Reform Act 2002. Each of these statutes has generated a significant volume of academic comment, sometimes in book form,⁴⁶ but more usually in the numerous articles referred to in the discussion of leasehold legislation in chapter six.

1.2.6 *Conveyancing*

Standard land law textbooks together with Law Commission and other reports have been helpful in discussing the more practical conveyancing aspects of this project, such as the devices used to try and ensure the ongoing enforceability of positive freehold obligations.⁴⁷ *Ruoff and Roper on the Law and Practice of Registered Conveyancing* has been of particular help in considering the Registry's practice and approach to past and present land registration Acts and Rules.⁴⁸ Past 'conveyancing'

Commonhold – Law, Practice and Precedents, loose leaf ed., update 3, (Bristol: Jordans, 2006) & Furber J et al, *The Commonhold and Leasehold Reform Act 2002*, 1st ed., (London: Butterworths, 2002).

⁴³ See ch.4, s.4.7.

⁴⁴ E.g., Bridge S, *Residential Leases*, 1st ed., (London: Blackstone, 1994), Bright S, *Landlord and Tenant Law in Context*, 1st ed., (Oxford: Hart, 2007), Bright S (Ed), 1st ed., *Landlord and Tenant Law: Past, Present and Future* (Oxford: Hart, 2006), Davey M, *Landlord and Tenant Law*, 1st ed., (London: Sweet and Maxwell, 1999), Garner S and Frith A, *A Practical Approach to Landlord and Tenant*, 5th ed., (Oxford: OUP, 2008) and Sparkes P, *A New Landlord and Tenant*, 1st ed., (Oxford: OUP, 2001).

⁴⁵ E.g., Rodgers C, *Housing Law Residential Security and Enfranchisement*, revised ed., (London: Butterworths, 2002).

⁴⁶ E.g., Driscoll J, *Leasehold Reform: the new law a guide to the Leasehold Reform, Housing and Urban Development Act 1993*, 1st ed., (London: Sweet and Maxwell, 1999) and Hague N, *Leasehold Enfranchisement*, 1st ed., (London: Sweet and Maxwell, 1967). See also fn 42 for literature on the CLRA 2002.

⁴⁷ See ch.5, s.5.4.

⁴⁸ See Dixon M et al, *Ruoff & Roper on the Law and Practice of Registered Conveyancing*, loose leaf ed., (London: Thompson Reuters (Legal), 2010). Another useful 'conveyancing' source is Farrand J & Clarke A, *Emmet and Farrand on Title The Law and Practice of Registered and Unregistered Conveyancing*, loose leaf ed., (London: Sweet and Maxwell, 2008).

paper literature has been of help⁴⁹ as have current electronic sources, particularly the Land Registry and Council of Mortgage Lenders' websites.⁵⁰ The limited number of textbooks on the sale and management of flats⁵¹ has to some extent been compensated by a number of 'precedent' books, for example, different editions of George and George's *The Sale of Flats*⁵² used in discussing the background to the standard documentation in chapter five. Precedent books contain the most references to mixed freehold/leasehold arrangements, although occasionally articles orientated towards conveyancing practice also do so.⁵³

1.2.7 Law Reform

Literature associated with the process of law reform from the nineteenth century onwards has been utilised.⁵⁴ As the twentieth century progressed, that literature tended to focus more on reform of specific aspects of the law, especially after the establishment of the Law Commission in 1965.⁵⁵ Numerous Law Commission publications have been relied on, particularly the 1984 *Gibson Report*,⁵⁶ the 1987 *Aldridge Report*⁵⁷ and the 2008 *Consultation Paper*.⁵⁸ Other reports of particular significance have been the 1965 *Wilberforce Report*⁵⁹ and the 1984 *Nugee*⁶⁰ and

⁴⁹ E.g., Hood H and Challis H, *The Conveyancing Acts, 1881 & 1882 and the Settled Land Act, 1882 with commentaries*, 2nd ed., (London: Reeves and Turner, 1884) and Challis H, *The Law of Real Property: Chiefly in relation to Conveyancing*, 1st ed., (London: Reeves and Turner, 1885).

⁵⁰ The Land Registry's website gives quick access to practice literature and the CML website is particularly useful for their Handbook.

⁵¹ See the comments of Cawthorne J, *The Sale and Management of Flats*, 1st ed., (London: Butterworths, 1985), preface, p.ix, where he says that in view of the 'considerable' number of flats and maisonettes in this country, it is surprising that textbooks on their sale and management are so few.

⁵² See George E and George A, *The Sale of Flats*, 3rd, 4th & 5th eds, (London: Sweet & Maxwell, 1970, 1978 & 1984) and also Cawthorne's *The Sale And Management of Flats* (n.51), Aldridge T, *Law of Flats*, 1st & 3rd eds, (London: Longmans, 1982 & 1994), and Barraclough H, *The Sale and Management of Flats Practice and Precedents*, 2nd ed., (London: Butterworths, 1996).

⁵³ E.g., Prichard A, 'Making Positive Covenants Run' (1973) 37 NS Conv.194, p.195 and Clarke D, 'Occupying 'Cheek by Jowl'', (n.10), p.390.

⁵⁴ E.g. Bentham J, *Theory of Legislation*, translated from the French by Hildreth R, 1st ed., (London: Trubner, 1876), Dicey A, *Law and Public Opinion in England*, (n.37).

⁵⁵ See further ch.4 para.4.4.1.

⁵⁶ See Law Commission, *Transfer of Land The Law of Positive and Restrictive Covenants*, (Chairman Gibson J) (*Gibson Report*) (Law Com. No.127), (London: HMSO, 1984), discussed in ch.4, s.4.5.

⁵⁷ See Law Commission, *Commonhold, Freehold Flats, Report of a Working Group*, (Chairman T Aldridge) (*Aldridge Report*) (Law Com. No.179), (London: HMSO, 1987), discussed in ch.4, para. 4.7.1.

⁵⁸ See Law Commission, *Easements, Covenants and Profits à Prendre*, (Consultation Paper No.186) (*2008 Consultation Paper*), (London: HMSO, 2008), discussed in ch.4, s.4.8.

⁵⁹ See *Report of the Committee of Positive Covenants Affecting Land*, (Chairman Lord Wilberforce) (*Wilberforce Report*) (Cmnd 2719), (London: HMSO, 1965), discussed in ch.4, para.4.3.2.

⁶⁰ See *Nugee Report*, (n.9), discussed in ch.4, para.4.6.

BSA⁶¹ Reports. Two particularly significant reform articles are Wade's 1972 'Covenants, A Broad and Reasonable View'⁶² and Clarke's 1998 'Occupying 'Cheek by Jowl'.⁶³ In addition, much of the legal literature already reviewed contains suggestions for law reform.

1.2.8. Research Literature

Although some general research literature has been used for the whole research project⁶⁴ and some legal research literature considered for 'doctrinal' research,⁶⁵ most research literature relates to empirical research. It has overwhelmingly been the practical methodology sections of social science research literature that have been used in chapter seven.⁶⁶ Bryman's *Social Research Methods* has been especially helpful,⁶⁷ although numerous standard works have been also been relied on.⁶⁸ As those who supplied data were an elite professional group, literature on social 'elites' is a noticeable feature of the research literature used.⁶⁹ The ethical considerations referred to in all standard social science methodology works were carefully considered, with particular attention being paid to the *Statement of Principles of Ethical Research Practice* issued by the Socio Legal Studies Association.⁷⁰ An overview of the research methodology is contained in the next section.

⁶¹ BSA 'Leaseholds – Time for a Change' (*BSA Report*) (London: BSA, 1984), discussed in ch.4, para.4.6.

⁶² See Wade H, 'Covenants – A Broad and Reasonable View (1972 B) 31 C.L.J. 157, discussed in ch.4, para.4.4.3.

⁶³ See Clarke D, 'Occupying 'Cheek by Jowl', (n.10), p.377, which has been described as an 'excellent discussion' - see Thompson M, *Modern Land Law*, (n.33), p.542.

⁶⁴ E.g., Cryer P, *The Research Student's Guide to Success*, 2nd ed., (Buckingham: Open University Press, 2000) and Phillips E and Pugh D, *How to Get a PhD A handbook for students and their supervisors*, 3rd ed., (Buckingham: Open University Press, 2000).

⁶⁵ E.g., Chatterjee C, *Methods of Research in Law*, (n.19), Mc Conville M and Chui W, *Research Methods for Law*, (n.19).

⁶⁶ Exceptionally, philosophical literature has been considered, e.g., Wittgenstein L, (translated by Pears D and McGuinness B), *Tractatus Logico-Philosophicus*, 1st ed., (London: Routledge, 2001) - see ch.7, para.7.4.2, fn 63.

⁶⁷ See Bryman A, *Social Research Methods*, 3rd ed., (Oxford: OUP, 2008).

⁶⁸ E.g., De Vaus D, *Surveys in Social Research*, 5th ed., (London: Routledge, 2002), Neuman W, *Social Research Methods Qualitative and Quantitative Approaches* 6th ed., (London: Pearson, 2006) & Sarantakos S, *Social Research*, 3rd ed., (Basingstoke: Palgrave Macmillan, 2005).

⁶⁹ See ch.7, para.7.3.1.

⁷⁰ See <http://www.kent.ac.uk/nslsa/content/view/247/244/>, accessed 25 June 2010. See also ch.7, s.7.5.

1.3 Methodology Overview

1.3.1 Introduction

It was clear from the outset that the research objectives and questions necessitated a combination of doctrinal or ‘black letter’ legal research⁷¹ and fieldwork or data collection. This section explains the order in which those tasks were undertaken and the methodology used. The main focus is on the methodology employed for data collection, an account which is intended to supplement the more detailed discussion in chapter seven. This section concludes with a brief outline of the thesis structure and contents.

1.3.2 Doctrinal Research

A detailed review and analysis of the literature on positive obligations, the potential impact of leasehold legislation and law reform proposals was an inevitable and essential prerequisite for tackling doctrinal legal aspects of the research questions.⁷² Extensive doctrinal research was also required when considering the historical background to the building of Tyneside Flats.⁷³ Conveyancing literature was particularly necessary when examining the standard Tyneside Flat documentation and freehold conveyancing devices in chapter five.⁷⁴ Much of this doctrinal research and the first drafts of chapters two to six⁷⁵ were completed before any empirical research was undertaken. This was to ensure that:

- a) An informed judgment could be made on all aspects which needed to be clarified through data collection.
- b) A proper balance could be struck on how much empirical data should be sought on numerous historical, practical and legal points.

⁷¹ For a discussion of what constitutes ‘black letter’ or doctrinal law see McConville M and Chui W, ‘Introduction and Overview’ in McConville M and Chui W, *Research Methods for Law*, (n.19), pp.3-4.

⁷² See ch.1, paras 1.2.3 - 1.2.7 for an overview of legal literature.

⁷³ See ch.1, para.1.2.2 for an overview of historical literature.

⁷⁴ See ch.1, para.1.2.6 for an overview of conveyancing literature.

⁷⁵ See ch.1, para.1.3.3 for a summary of chapter contents.

c) Informed decisions could be made on how, and from whom, data should be collected.

d) Credibility could be maintained during any exchanges with participants as data was being collected.⁷⁶

1.3.3 *Fieldwork Research*

Contact was made at an early stage with a past chairman of the non-contentious subcommittee of the Newcastle Law Society. Useful information on the background to the introduction of the standard documentation was supplied, although it was apparent that this needed to be substantiated from other sources.⁷⁷ Initial doctrinal research and preliminary drafting also confirmed that fieldwork research would help fill significant gaps in the legal research literature. Viewing external layouts of Tyneside Flats was expected to be of some help,⁷⁸ but it was clear that most additional data would have to be obtained from practising conveyancing professionals.

1.3.4 *Principles of Sample Selection*

Conveyancers, estate agents, mortgage lenders and, to a lesser extent, owner occupiers were all expected to have an interest in, and views on, the mixed freehold/leasehold structure created by the standard Tyneside Flat documentation. However, it was considered that the research population, that is those from whom a sample, or segment, should be obtained, should be limited to north eastern conveyancers. This was because the standard Tyneside Flat documentation was central to the research project and this research population would generally:

a) Have a far greater understanding of any legal difficulties or implications arising from the documentation.

⁷⁶ A significant amount of interaction was anticipated. The standard Tyneside Flat documentation was known to be of great interest to local conveyancers. It was also known that both quantitative and qualitative data would be sought - see further ch.7, paras 7.1 & 7.2.1.

⁷⁷ See ch.7, para.7.4.4 (e).

⁷⁸ E.g., in ensuring that the 'definition' questions in the general questionnaire on conveyancers' concepts of Tyneside Flats were comprehensive – see ch.7, para.7.4.2.

b) Have the most experience of relevant practical aspects arising from, for example, registering the documentation in the Land Registry.

c) Have a clear view on how the documentation was understood by other conveyancing professionals and owner occupiers, to whom it would often need to be explained.

d) Be able, in the case of older conveyancers, to verify the background information given by the past chairman of the non-contentious sub-committee of the Newcastle Law Society.

The decision to obtain all data from this particular research population inevitably affected the strategies adopted for data collection, the selection of the research sample, that is, participating members of the research population, and the framing of questionnaires.

1.3.5 Data Collection Strategies

A substantial amount of data was being sought. This was both quantitative, or numerical, data, that could be represented in graph form, and qualitative data, for example, conveyancers' views, that required a more descriptive or interpretive approach.⁷⁹ It was decided that questionnaires should be used⁸⁰ and also that:

a) Whenever possible, the questionnaires should be completed face to face. This was particularly because it was felt that face to face data collection would provide more, and more reliable, information than less direct postal data collection.⁸¹ In the event this proved to be the case. More qualitative and more certain data was generated and additional documentation obtained.⁸² Sometimes there was less missing data⁸³

⁷⁹ See also ch.7, para.7.1, fn 2.

⁸⁰ See ch.7, paras 7.1 & 7.2.1.

⁸¹ For other reasons see ch.7, para.7.2.3.

⁸² See ch.7, paras 7.2.4, 7.2.6 & 7.2.7.

⁸³ See ch.7, para.7.2.5.

- b) The interviews should be ‘semi- structured. This would allow for open ended questions and give greater flexibility.’⁸⁴
- c) Data collection should be split into ‘general’ and ‘historical’ data. Two separate questionnaires, a ‘Solicitors’ General Questionnaire’ and a ‘Solicitors’ Historical Questionnaire’ were prepared. This enabled those younger conveyancers, who did not usually know about the early sale of individual Tyneside Flats, to ignore the Historical Questionnaire.⁸⁵
- d) Both questionnaires should be sent to participants in advance of any interviews. This was to facilitate accurate and comprehensive replies, for example, on those questions which relied on memory.⁸⁶

1.3.6 The Research Sample Chosen

In order to eliminate any possibility of bias, all firms of solicitors on Tyneside, and surrounding areas, which undertook conveyancing and associated categories of work, were given an opportunity to participate.⁸⁷ An initial letter was sent direct to all ‘relevant’ local firms⁸⁸ without the use of any intermediary or ‘gatekeeper’.⁸⁹ The letter was carefully drafted so as to:

- a) Provide potential participants with all necessary information about the research project⁹⁰
- b) Encourage a good response, and therefore enhance the possibility of extrapolating, or generalising, the results to the rest of the research population.⁹¹

⁸⁴ See also ch.7, para.7.2.1, fn 4. Flexibility meant that, e.g., although there was no specific question on the geographical range of Tyneside Flats, participants could be asked about their location. This geographical information was subsequently verified by inspection on the ground and/or viewing computerised land registers.

⁸⁵ See further ch.7, para.7.2.2. Copies of the general and historical questionnaires are contained in Appendices B & C respectively.

⁸⁶ See ch.7, para.7.4.4 (b).

⁸⁷ See further ch.7, para.7.3.3.

⁸⁸ See pro forma letter in Appendix E.

⁸⁹ See ch.7, para.7.3.1.

⁹⁰ See ch.7, para.7.5.3.

⁹¹ See further ch.7, paras 7.6.1 - 7.6.5.

c) Reassure respondents that the research would be undertaken ethically. Supplying information in advance and inviting participation was intended to ensure that informed consent was freely given.⁹² The letter also expressly stated that confidentiality and anonymity would be preserved.⁹³

A pilot study was then undertaken with three representative firms.⁹⁴ Minor amendments were made to the General Questionnaire and a second letter was then sent to the remaining participants, together with the questionnaires, with the intention of completing the questionnaires face to face. Although participants were given the opportunity of returning the questionnaires by post, nearly three quarters agreed to be seen personally.⁹⁵

1.3.7 Questionnaires

The research population was an elite professional group⁹⁶ and the research sample was therefore expected to be well - informed.⁹⁷ Accordingly, little difficulty was anticipated over the inclusion of technical terms in the questionnaires.⁹⁸ Knowledgeable participants were generally thought likely to have opinions, for example, on positive obligation law reform, so that it was unnecessary to offer a 'don't know' option.⁹⁹ Sending the questionnaires in advance was intended to help avoid memory problems.¹⁰⁰ However, care was still needed over the question order¹⁰¹ and, because participants had expressed concern over time constraints,¹⁰² 'filter' questions were used extensively.¹⁰³ Detailed questions were needed to clarify precisely what respondents understood by the term 'Tyneside Flat'.¹⁰⁴

⁹² See further ch.7, paras 7.5.2 & 7.5.3.

⁹³ See further ch.7, paras 7.5.6 & 7.5.7.

⁹⁴ See further ch.7, para.7.3.4.

⁹⁵ See ch.7, para.7.3.5. A copy of the second letter is contained in Appendix F.

⁹⁶ See ch.7, para.7.3.1.

⁹⁷ See ch.7, para.7.4.6 for a discussion of the evidence of self - selection, which suggests that only those who felt they had the necessary knowledge participated.

⁹⁸ See ch.7, para.7.4.6.

⁹⁹ See ch.7, para.7.4.7.

¹⁰⁰ See further ch.7, para.7.4.4.

¹⁰¹ See ch.7 para.7.4.3.

¹⁰² See ch.7, para. 7.3.5.

¹⁰³ See further ch.7, para.7.4.5.

¹⁰⁴ See further ch.7, para.7.4.2 & ch.8, s.8.2.

1.3.8 Data Analysis

After collection of the data, detailed analysis was undertaken and existing draft chapters revised. Much of the analysis from the General Questionnaires has been incorporated into chapter eight on the practical operation of the standard Tyneside Flat documentation and, to a lesser extent, elsewhere, for example, in chapter six on leasehold legislation. The analysis of the Historical Questionnaires was particularly useful when re-drafting chapter five on the standard Tyneside Flat documentation and freehold conveyancing devices.

1.3.9 Outline of Thesis Structure and Contents

The thesis is divided into nine chapters. The first four chapters are largely concerned with a chronological doctrinal and historical analysis. The standard Tyneside Flat documentation becomes more central from chapter five onwards. For convenience, all chapters are listed below together with a general indication of their contents.¹⁰⁵

Chapter One - The Research Project. This provides an overview of the research project, the literature used and the methodology employed.

Chapter Two - Historical Perspective. This seeks to explain the underlying reasons for the building and retention of large numbers of Tyneside Flats in North East England. It includes a description of the usual architectural features.

Chapter Three - Judicial Developments. This chapter analyses judicial development of the law on positive freehold obligations from the nineteenth century to the present time.

Chapter Four- Law Reform. This analyses the process of law reform, and law reform proposals, from the nineteenth century onwards. It includes a discussion of commonhold legislation.

¹⁰⁵ See pp. vii – xvii for a more detailed contents list.

Chapter Five - Standard Documentation and Freehold Conveyancing Devices. This discusses the main features of the standard Tyneside Flat documentation and considers the viability of freehold conveyancing devices. Historical data obtained from north eastern conveyancers has been incorporated.

Chapter Six - Leasehold Legislation. This focuses on the impact, or potential impact, of modern landlord and tenant legislation on the standard Tyneside Flat documentation. It includes general data obtained from north eastern conveyancers and contains an assessment of the key problem areas.

Chapter Seven - Data Collection. This contains a detailed description of the methodology used for data collection. It includes sections on ethical considerations and generalisation.

Chapter Eight – The Standard Documentation in Practice. This crucial chapter considers how the standard documentation works in practice, with a detailed analysis of the general quantitative and qualitative data collected. This is used to assess whether the documentation is acceptable to north eastern conveyancers and mortgage lenders. Leaseholders' obligations and their enforcement are discussed as are problem areas. An assessment is made on whether conveyancers appreciate underlying legal issues and on their attitudes towards law reform.

Chapter Nine - Conclusions. This summarises the results of the research in the light of the research questions. Detailed suggestions are made for legislative reform. The chapter concludes with an overview of future prospects.

Chapter 2. Historical Background

2.1 Overview

This chapter puts Tyneside Flats in their geographic, historic and social context. It commences with an overview of the economic and social conditions which led to a huge demand for housing in north eastern England in the nineteenth century. That demand was chiefly met by building large numbers of terraced Tyneside Flats, whose architectural design and its variants are described. The prevailing laissez faire ideology ensured that, as is discussed, building was largely undertaken by private builders mainly financed by emerging building societies. Most Tyneside Flats were built to rent in the decades leading up to the First World War. Precise numbers are not available, but some indication of their pre 1914 dominance is given, as well as those twentieth century factors which caused both their demolition and retention. Their geographical spread, which went beyond the main Tyneside conurbation, is also considered, together with some of the possible reasons for their past prevalence in North East England. The chapter concludes with a discussion of Tyneside Flats in the very different conditions of the twenty first century.

2.2 Victorian and Edwardian Tyneside

2.2.1 Introduction

This section looks at the background against which terraced Tyneside Flats began to be built in the second half of the nineteenth century. The starting point is the Industrial Revolution, which was particularly strong in North East England, and which was sustained first by the development of the railways and later by additional means of transport. The availability of public transport inevitably affected where Tyneside's rapidly expanding population could be housed. A particular characteristic of the North East's industrial development was the dominance of a powerful entrepreneurial elite, whose role is also briefly considered. Their influence may have added, in an age of laissez-faire, to the reluctance of North Eastern councils to tackle the North East's acute health and housing problems. These difficulties continued as an

unwelcome backdrop, albeit to a diminishing extent, throughout the period when most Tyneside Flats were built.

2.2.2 The Industrial Revolution

As elsewhere in Britain, the Agricultural and Industrial Revolutions had a transforming effect on North East England, with an increasingly rapid pace of change in its economic, political and social organisation during the period 1760 - 1850.¹ By 1850 what had previously been a society of small scattered largely agricultural communities had been transformed into an industrialised and urbanised society.² In national terms industrialisation came late to the North East but, during the second half of the nineteenth century, it became one of the cornerstones of the Industrial Revolution.³ In this period North East England was a 'principal beneficiary' of a remarkable increase in economic activity on a national and international scale, with a substantial proportion of international trade being taken by the North East.⁴

Coal had been shipped from Tyneside since medieval times.⁵ 'Black gold' beneath the ground was the North East's most important asset.⁶ In the mid nineteenth century the North East coalfield was the largest in the world.⁷ The need to export coal plus other goods and materials gave rise to the Tyne's second most important industry, shipping.⁸ The most rapid growth in coal shipments came in the years 1879-1908 with tens of thousands of men employed in mining and coal transport.⁹ By 1870 the Tyne had become the United Kingdom's third largest port.¹⁰ Fuelled by large nearby coal stocks, huge shipbuilding, chemical, iron, steel and engineering works developed

¹ See McCord N, *North East England An economic and social history*, 1st ed., (London: B.T.Batsford, 1979), p.25.

² Ibid.

³ See Edminson J & Edminson D, *Old Tyneside from Throckley to Walker*, 1st ed., (Catrine, Ayrshire: Stenlake Publishing, 2002), p.3.

⁴ See Mc Cord N, *North East England*, (n.1), p.112.

⁵ See Fraser C & Emsley K, *Tyneside*, 1st ed., (Newton Abbot: David & Charles, 1973), p.24 & see Atkinson F, *Victorian Britain The North East*, 1st ed., (Newton Abbot: David & Charles, 1989), p.11.

⁶ See Edminson J & Edminson D, *Old Tyneside*, (n.3), p.3.

⁷ Ibid.

⁸ Ibid.

⁹ See Mc Cord N, *North East England*, (n.1), pp.112 - 113.

¹⁰ See Morgan A, *Victorian Panorama A Visit to Newcastle upon Tyne in the Reign of Queen Victoria*, 1st ed., (Newcastle upon Tyne: Tyne Bridge, 2007), p.98.

along the Tyne and elsewhere in the North East together with many other industries.¹¹ River improvements resulted in large new docks being built along both sides of the Tyne. In 1876 the construction of a new swing bridge across the Tyne gave Armstrong's Elswick works, some two miles to the west of Newcastle, a gateway to the sea.¹² Armaments and shipbuilding later resulted in the Armstrong concern becoming one of the leading engineering works in the world.¹³ Improved transport for both goods and workers was an essential prerequisite for the expansion of industry.

2.2.3 Railways and Suburban Transport

In the first half of the nineteenth century the development of the railways was inspired by George and Robert Stephenson.¹⁴ Increased rail transport played a major role in stimulating engineering in the North East and in facilitating the export of coal by giving easy access to the sea.¹⁵ A major advance in railway transport was the building of the High Level Bridge across the Tyne in 1849 and the opening of Newcastle Central station in the following year. Although this rendered Gateshead's Greenesfield station redundant, the station site became the main locomotive works for the newly formed North Eastern Railway in 1854 and by 1909 was easily Gateshead's largest employer.¹⁶ In 1848 only 256 miles of the pre-1914 North Eastern Railway system had been opened. In the forty one years between this date and 1889, 1335 miles of new line were constructed, but in the next twenty five years, only 164.¹⁷ Successive extensions in the 1860s and 1880s greatly improved rail links between Newcastle and the coast.¹⁸ This led to the growth of Tynemouth and Whitley Bay as

¹¹ Ibid, p.10 for a list of major employers and industries in the early 1860s.

¹² See Smith K, *Emperor of Industry Lord Armstrong of Cragside 1810 - 1900*, 1st ed., (Newcastle upon Tyne: Tyne Bridge, 2005), p.17.

¹³ See Linsley S, 'Eighteenth to Twentieth Century: Agrarian Transformation and Industrial Revolution' in Pevsner N & Richmond I (revised by Grundy J et al,) *Northumberland*, 1st ed., (New Haven: YUP, 2002), p.98. See also Hepple C, *A History of Northumberland and Newcastle upon Tyne*, 1st ed., (Chichester: Phillimore, 1976), p.127.

¹⁴ For an account of the Stephensons and the railways, see Goulding C, *Hidden Newcastle*, 1st ed., (Newcastle: City of Newcastle upon Tyne, 1995), pp.35 - 36.

¹⁵ See Middlebrook S, *Newcastle upon Tyne Its Growth and Achievement*, 1st ed., (Newcastle upon Tyne: Newcastle Chronicle and Journal, 1950), p.191 & see McCord N, *North East England*, (n.1), p.145.

¹⁶ See Taylor S and Lovie D, *Gateshead Architecture in a Changing English Urban Landscape*, 1st ed., (London: English Heritage, 2004), pp.5 & 6 and see Brazendale A, *Gateshead History & Guide*, 1st ed., (Stroud: Tempus Publishing, 2004), p.27.

¹⁷ See Middlebrook S, *Newcastle upon Tyne*, (n.15), p.234.

¹⁸ See Mc Cord N, *North East England*, (n.1), p.145.

pleasure resorts and also enabled these and other places *en route* to develop as dormitory areas for Newcastle and the industrial belt along the Tyne.¹⁹

The beginning of the twentieth century saw a rapid development of the electric tram system both north and south of the Tyne and the arrival of motor buses.²⁰ The expansion of suburban transport facilities was to have important consequences for the location of Tyneside Flats. Previously workers had to live very close to work or face a long walk in all kinds of weather. The arrival of trams and buses, when added to the extension of suburban trains and higher wages, made it increasingly possible for many workers to live at some distance from their place of work.²¹

2.2.4 Victorian Individualism

The years 1825-1870 were characterised by Dicey as a period of Benthamism or individualism.²² By the time his monument was unveiled in 1862, George Stephenson, the ‘father of the railways’, had become a local hero.²³ Inventive individualism was one of the driving forces behind Tyneside’s industrial growth. Sir William (later Lord) Armstrong invented the hydraulic crane in 1846 and in 1855 a new type of field artillery (the breech loading gun). In 1852 Sir Charles Palmer designed the first sea going iron screw collier, which replaced wooden ships, and in 1854 he developed a new process for constructing iron warships. Palmers yards can also claim to have built the first oil tanker in 1872.²⁴ Charles Parsons was born in 1854 and thirty years later invented the steam turbine, during Dicey’s period of ‘collectivism’ (1865-1900).²⁵ All three inventors were to become major industrialists and major employers during the second half of the nineteenth century. This inevitably necessitated the building of nearby housing, often terraced Tyneside Flats, for their employees. Regional councils played little part in meeting those and other North East housing needs, partly perhaps because of their ‘almost inexhaustible faith’ in the values of private enterprise and

¹⁹ Ibid.

²⁰ Ibid, p.146.

²¹ Ibid.

²² See ch.3, para.3.1.

²³ See Morgan A, *A Victorian Panorama*, (n.10), p.13.

²⁴ See Middlebrook S, *Newcastle upon Tyne*, (n.15), p.237.

²⁵ See ch.3, para.3.1.

entrepreneurship, embodied by contemporary Tyneside heroes.²⁶ Local councils were also slow to intervene in Tyneside's interlinked public and private health problems, largely caused by a burgeoning population.

2.2.5 Population Growth

The vast increase in industry was inevitably accompanied by a correspondingly huge growth in population throughout Tyneside. The following figures illustrate the rapid population rise in Newcastle and Gateshead, which both still have particularly large concentrations of terraced Tyneside Flats:

Census	Newcastle	Gateshead
1841	70 504	19 843
1871	128 443	48 627
1911	266 671	116 917 ²⁷

In percentage terms, the respective populations of Newcastle and Gateshead increased by 82% and 145 % respectively in the thirty year period up to 1871, which was before many Tyneside Flats were built. In the next forty years, during which Tyneside Flats were built in substantial numbers, the population of these two conurbations increased by 108 % and 140 %. Newcastle's urbanisation was much larger than that of Gateshead and other surrounding districts, but the rate of increase was higher in Gateshead, particularly in three decades up to 1871.²⁸ This rapid increase in population led to chronic housing problems and associated disease.

²⁶ See Pearce K, 'Newcastle's Tyneside Flats 1850 -1900 By-law Housing or Cultural Phenomenon?' in Lancaster B (Ed), 1st ed., *Working Class Housing on Tyneside 1850 - 1939*, (Whitley Bay: Bewick Press, 1994), p.70. Pearce is referring specifically to Newcastle, but his comments also seem applicable to the whole of Tyneside.

²⁷ In 1904 the districts of Walker, Benwell, Fenham and part of Kenton were incorporated within Newcastle. See further Appendix I for the 1801 - 1911 census figures.

²⁸ See also Pearce K, 'Newcastle's Tyneside Flats 1850 - 1900, (n.26), where he uses the population figures to suggest, at p.44, that Newcastle's urbanisation was also more rapid than that of its neighbours. However, it appears that the rate of population increase was higher in Gateshead. See also Fraser C & Emsley K, *Tyneside*, (n.5), p.119.

2.2.6 Health and Housing

Newcastle's health and housing problems were notorious. In the first quarter of the nineteenth century the worst affected areas became known 'fatalistically' as the 'fever districts.'²⁹ Appalling conditions and overcrowding in the tenement buildings close to the river led to cholera epidemics, resulting in 412 deaths in 1849 and 1533 deaths in 1853.³⁰ In 1851, 433 people died in Gateshead.³¹ In 1865 Newcastle's death rate was the highest in the country and the rest of Tyneside was little better.³² In the last few decades of the nineteenth century and in the beginning of the twentieth century Tyneside towns regularly had some of the worst records for death rates, child mortality and overcrowding.³³ The overall position in Newcastle was summed up in a report on the study of health and illness in children in the middle of the twentieth century, when it was said that Newcastle has '*always* (my italics) been an overcrowded, ill-housed city' and that 'every historian, every social survey and every medical officer of health has borne witness to this fact.'³⁴

There are many graphic accounts of shocking local conditions caused by poor drainage and sanitation and the lack of adequate water supplies.³⁵ Although the worst conditions were in those areas which had seen substantial growth in economic activity and population, similar conditions also existed in less industrialised areas, such as Hexham, which lies some 18 miles along the Tyne to the west of Newcastle.³⁶ In 1845 Dr Reid's *Report on the State of Newcastle upon Tyne and other Towns* was published.³⁷ This comprehensive report lists, for example, over thirty streets in Newcastle without drains or sewers and states that, in some places, Gateshead

²⁹ See Middlebrook S, *Newcastle upon Tyne*, (n.15), p.204.

³⁰ See McCord N, *North East England*, (n.1), p.162 and Middlebrook S, *Newcastle upon Tyne*, (n.15), p.205.

³¹ See Atkinson F, *Victorian Britain*, (n.5), p.96.

³² See Mc Cord N, *North East England*, (n.1), p.160.

³³ Ibid.

³⁴ See Spence J et al, *A Thousand Families in Newcastle upon Tyne*, 1st ed., (London: OUP, 1954), p.21.

³⁵ See, e.g., Atkinson F, *Victorian Britain*, (n.5), pp.95 - 96.

³⁶ See Mc Cord N, *North East England*, (n.1), p.158.

³⁷ See Reid D, *Health and Towns Commission Report on the State of Newcastle upon Tyne and Other Towns*, (London: W. Clowes and Sons, 1845).

‘presents still more extreme and offensive accumulations arising from defective cleansing’.³⁸ This and other Reports led to the passage of the Public Health Act 1848. Although legal provisions in the 1848 Act for water supply, drains and the provision of water closets were ‘strong and prescriptive’,³⁹ laissez-faire attitudes prevailed for the next two decades. Only a few minor changes were effected in Newcastle, such as the erection of some public baths and wash houses for the use of the poor and the closing of church burial grounds.⁴⁰ Smallpox and typhus continued to ravage the poorer areas. During the period 1855-1873, the average number of typhoid cases admitted to Newcastle’s Fever hospital remained at the high figure of over 230 cases a year.⁴¹ However, in the early 1870s a change in public attitudes occurred, particularly as a result of the extension of the franchise to the urban working class by the 1867 Representation of the People Act.⁴² This was near the beginning of Dicey’s ‘Age of Collectivism’ (1865-1900)⁴³ during which, for example, the consolidating Public Health Act 1875 re-enacted earlier provisions in the 1848 Act by requiring that every house should have proper sanitation.⁴⁴ As a result, in Newcastle, the proportion of houses with water closets rose from 65.2% in 1883-5 to 88.6% in 1913.⁴⁵

The significance of public health legislative changes is that they began to be effective at the same time as large numbers of Tyneside Flats were being built.⁴⁶ Improved sanitation meant that Tyneside Flats were a considerable improvement on what had gone before.⁴⁷ At the same time, in some districts, appalling health and housing conditions continued to act as a reminder of what the alternative could be. It has been argued that these housing conditions, linked with the spectacular population increase,

³⁸ Ibid, pp.70 & 97.

³⁹ See Holder J and Lee M, *Environmental Protection, Law and Policy: Text and Materials*, 2nd ed., (Cambridge: CUP, 2007), p.470.

⁴⁰ See Middlebrook S, *Newcastle upon Tyne*, (n.15), p.206.

⁴¹ Ibid, p.274.

⁴² Ibid & see Jones R, *Economic and Social History of England 1770 - 1977*, new ed., (London: Longman, 1979), p.168. Importantly, at a time when most property was rented, the franchise was extended to include male tenants and lodgers as well as owners. For details of the conditions for urban voting, see ss 3 & 4 of the 1867 Act.

⁴³ See ch.3, para.3.1.

⁴⁴ See s.L1 of the 1848 Act and s.36 of the 1875 Act.

⁴⁵ See Dauntton M, *Wealth and Welfare An Economic and Social History of Britain 1851-1951*, 1st ed., (Oxford: OUP, 2007), p.426.

⁴⁶ See ch.2, para.2.5.1.

⁴⁷ See Taylor S and Lovie D, *Gateshead Architecture*, (n.16), p.48.

are important, though unquantifiable, factors in the acceptance of Tyneside flats as a solution to Newcastle's housing problem.⁴⁸

2.3 Architectural features and Construction

2.3.1 *Origins of the Design*

The origin of the design of terraced Tyneside Flats remains obscure.⁴⁹ The assertion that there is 'almost no doubt' that 'Tyneside Flats were 'almost certainly invented' on Tyneside much earlier than they appeared anywhere else⁵⁰ has not been established. One possibility is that they originated from, or were influenced by, model housing schemes. These schemes were undertaken by private philanthropic individuals who felt it was their duty, in the absence of any public initiatives, to become involved in the nation's housing problems and to try and persuade others to do the same.⁵¹ An early London example of model 'two storey flats' dates from 1846⁵² and it seems that a similar structure had been built in Edinburgh by 1860.⁵³ Model schemes were certainly being discussed in Newcastle by the early 1870s,⁵⁴ although by then numerous Tyneside Flats had already been built.⁵⁵ Whatever the origins, it is clear that most Tyneside Flats are, and always have been, an unusual form of terraced housing.

2.3.2 *The Usual Layout*

In the most common layout each terraced house consists of a purpose built pair of flats, one above the other. Each flat has its own separate front door, which is normally adjacent to the other flat door. Both flats have their own access to the rear yard, the upper flat via a flight of external steps. Sometimes the rear yard is physically divided.

⁴⁸ See Pearce K, 'Newcastle's Tyneside Flats 1850 - 1900', (n.26), p.47.

⁴⁹ See Faulkner T, 'Architecture in Newcastle' in Colls R & Lancaster B (Eds), *Newcastle upon Tyne A Modern History*, 1st ed., (Chichester: Phillimore, 2001), p.234, fn 63.

⁵⁰ See Grundy J, *Northern Pride the very best of northern architecture from churches to chip shops*, 1st ed., (London: Granada Media, 2003), p.191.

⁵¹ See Pearce K, 'Newcastle's Tyneside Flats 1850 - 1900', (n.26), p.48 and Tarn J, *Working - class Housing in 19th - century Britain*, 1st ed., (London: Lund Humphries, 1971), p.5.

⁵² See Tarn J *Working-class Housing in 19th - century Britain*, (n.51), p.6

⁵³ Ibid, p.33, where Tarn refers to the 'Pilrig' design in which each tenant had a separate front door.

⁵⁴ See Pearce K, 'Newcastle's Tyneside Flats 1850 - 1900', (n.26), p.48.

⁵⁵ See ch.2, para.2.3.3.

The photograph below is the front view of a fairly typical terrace of Edwardian Tyneside Flats believed to have been built in 1906.⁵⁶



In the photograph one pair of flats lies between the two chimney stacks in the middle. The blue door is the entrance to a stairway leading to the upper flat in the pair and the cream door is the entrance to a hall leading to the lower flat in the same pair. The main architectural characteristics, which have determined the structure of the standard Tyneside Flat documentation, are as follows:

- a) Each flat is interdependent on the other, the lower flat for shelter and the upper flat for support.
- b) Both flats are usually entirely self contained and together comprise the whole building. There are normally no common entrances or stairways, although occasionally the rear yard may be shared.

⁵⁶ A copy of the freehold register for the lower flat with the cream door shows that the land upon which this and adjoining flats were built was conveyed to builders on 29 January 1906. That conveyance required the purchasers to build 'four substantial dwellinghouses in flats.' It also provided that every flat should be 'self contained that is it should never be let or occupied in separate parts but should be occupied by one family only.' Similar wording is contained in the standard Tyneside Flat lease - see ch.8, para.8.3.6.

c) Each house almost invariably comprises just two flats.

When marketing Tyneside Flats, local estate agents regularly indicate that they are more than just ‘ordinary’ or ‘communal’ flats. An upper Tyneside Flat has, for example, been described as an ‘upper maisonette’, a ‘first floor flat Tyneside style’ or even a ‘maisonette style apartment’.⁵⁷ In other parts of the country, properties with a similar layout often seem to be called ‘maisonettes’.⁵⁸ George and George’s definition of a maisonette as a ‘self-contained flat possessing its own separate entrance from ground floor level,’ would include each flat in the photograph.⁵⁹ In addition, their observation that a maisonette is essentially a ‘semi-detached house divided horizontally instead of vertically from its partner’⁶⁰ emphasises their self contained nature, as does the suggestion that Tyneside Flats are the ‘equivalent of a small house.’⁶¹ If the contrast with other flats is worth making in the twenty first century, the difference between newly built Tyneside Flats in the 1870s and 1880s and overcrowded, disease ridden, communal tenements would have been immeasurably greater. Greatly increased privacy is, from the outset, likely to have been a significant factor in Tyneside Flats’ desirability. As time went by, additional improvements were incorporated.

2.3.3 *Evolving Styles*

Although the basic design of most terraced Tyneside Flats remained the same, their size increased during the later Victorian decades and the Edwardian era. Originally the lower flats had two rooms with a two or three roomed flat above. The earliest plans of such flats that Pearce was able to locate date from 1862, although he considers that many were ‘undoubtedly’ built earlier.⁶² A later design had three rooms on the ground floor and four above. These started to be built from at least the 1870s

⁵⁷ These descriptions have been taken from advertisements contained in the ‘Homemaker’ section of the local daily newspaper, the Journal.

⁵⁸ See, e.g., ch.6, para.6.2.3 & fn 26.

⁵⁹ See George E and George A, *The Sale of Flats*, 5th ed., (London: Sweet & Maxwell, 1984), p.29.

⁶⁰ Ibid. George and George do, of course, recognise that horizontally divided properties are more interdependent than those which are vertically divided - see p.30.

⁶¹ See Muthesius, S, *The English Terraced House*, 1st ed., (New Haven: YUP, 1982), p.104.

⁶² See Pearce K, ‘Newcastle’s Tyneside Flats 1850 - 1900, (n.26), p.49. See also Turnbull L and Womack S, *Home Sweet Home*, 1st ed. (Gateshead: Gateshead Metropolitan Borough Council, 1977), where they suggest that the ‘original’ design dates from the 1840s – see p.14.

and became the prevalent variety in the 1880s.⁶³ In some later houses the size of upper flats was increased by building into the attics. As their size increased, some architectural features and external layouts became more refined. Originally the front doors opened directly onto the street. Later versions had small front gardens and later still bay windows, an ‘attractive addition in dressed sandstone,’ were added.⁶⁴ Another feature likely to have appealed to Victorian concepts of ‘respectability’⁶⁵ was that a pair of Tyneside Flats appeared to be a terraced house.⁶⁶ This accords with one of the stated intentions of model houses in flats, namely that they should ‘look identical with the residence of some respectable member of the lower middle classes’.⁶⁷ Unsurprisingly, most surviving terraced Tyneside Flats are of the later designs. Their improved features have no impact on the applicability of the standard Tyneside Flat documentation, although more substantial changes in layout would do so.

2.3.4 Alternative Terraced Layouts

Occasionally Victorian terraced flats had three or four adjacent front doors opening directly onto the street pavement. The three door version is usually associated with a corner shop where the extra door often led to a large flat above the shop, which opened directly onto the pavement.⁶⁸ So long as this upper flat and the shop together comprise one pair, the standard documentation can be used for their transfer.⁶⁹ Some three door versions in the middle of a terrace were also built. With this layout, the two external doors each lead to a ground floor flat, whilst the middle door gave a common access to two upper flats above those on the ground floor.⁷⁰ No remaining buildings

⁶³ See Pearce K, ‘Newcastle’s Tyneside Flats 1850 - 1900’, (n.26), p.49.

⁶⁴ See Turnbull L and Womack S, *Home Sweet Home*, (n.62), pp.14-15.

⁶⁵ See generally Crossick G, *An Artisan Elite in Victorian Society, Kentish London 1840 - 1881*, (London: Croom Helm, 1978), pp.144 -145.

⁶⁶ See Pearce K, ‘Newcastle’s Tyneside Flats 1850 - 1900’, (n.26), p.50.

⁶⁷ See Fletcher B, *Model Houses for the Industrial Classes*, 1st ed., (London: Longmans/Green, 1871), p.9.

⁶⁸ See Pearce K, ‘Newcastle’s Tyneside Flats 1850 - 1900’, (n.26), p.50 and Taylor S and Lovie D, *Gateshead Architecture*, (n.16), p.46.

⁶⁹ But the user clause in the standard Tyneside Flat lease would need amendment. Some conveyancers prefer not to use the standard Tyneside Flats documentation for business use – see ch.8, para.8.3.3.

⁷⁰ See further Spence J et al, *A Thousand Families in Newcastle upon Tyne*, (n.34), plate 3 facing p.112.

with this layout are known to exist, but if they had done so the standard documentation would seem unsuitable for their transfer.⁷¹

The four door pattern is a feature of Tyneside Flats built in the 1890s and enables the back extensions of the two houses, each containing two flats, to be combined. This economical construction was not as important with earlier flats as they did not have a 'scullery' extension.⁷² Since each terraced house is a separate unit of two flats, the standard documentation can be used for their transfer.

2.3.5 Semi-Detached Tyneside Flats

The overwhelming majority of Tyneside Flats are in a terrace, a term which excludes semi-detached properties.⁷³ When historians describe Tyneside Flats they invariably seem to refer to their terraced form.⁷⁴ However, some later Tyneside Flats have been built with the usual terraced layout, but as semi detached houses.⁷⁵ In addition there appear to be substantially more semi detached properties, most of which were probably built in the 1930s, where each semi is divided into two flats. In the photograph below the front doors to the lower flats behind the tree face the road with each lower flat having another door at the side of the buildings. The doors to the upper flats lie to the side and rear of the building. The bay windows adjacent to the 'sold' sign belong to the lower flats and those above that sign to the upper flats.

⁷¹ The joint access way for the upstairs flats makes it difficult to see how reciprocal documentation for each pair could be confined to just two parties. Research data revealed that nearly all north eastern conveyancers think the standard Tyneside Flat documentation should not be used for more than two flats – see, e.g., ch.8, para.8.2.3.

⁷² See Pearce K, 'Newcastle's Tyneside Flats 1850 -1900', (n.26), p.50.

⁷³ See Muthesius, S, *The English Terraced House*, (n.61), p.249 where he stated, in 1982, that 'in common parlance today, 'terrace' refers to a row of common houses, those which are neither detached nor semi-detached.'

⁷⁴ See Atkinson F, *Victorian Britain*, (n.5), pp.103 - 104, Daunton M, *House and Home in the Victorian City Working – Class Housing 1850 - 1914*, 1st ed., (London: Edward Arnold, 1983), pp.39 - 41 and Pearce K, 'Newcastle's Tyneside Flats 1850 - 1900', (n.26), pp.49-54.

⁷⁵ There are examples of this construction in Tudor Wynd in the Heaton district of Newcastle.



Standard Tyneside Flat documentation is known to have been used for the upper and lower flats shown in the semi detached property directly behind the ‘sold’ sign.⁷⁶ This is unsurprising since quantitative research data revealed that 90% of conveyancers include purpose built semi-detached properties, each divided into two self contained flats, within their concept of a Tyneside Flat.⁷⁷ Some conveyancers have also used the standard Tyneside Flat documentation where houses have been converted into two properties.⁷⁸ As discussed in the next section, irrespective of the precise architectural layout, Tyneside Flats were usually built to rent by the private sector and often financed by building societies.

⁷⁶ This was when 19 and 21 Lealholm Road, Benton Park Estate, Newcastle were sold as individual flats in 1991 and 1995. The registers for both flats show that the property was conveyed on 2 May 1935. Restrictive obligations included a provision that no part of the site should be used for the erection of any building ‘except one but not more than one private dwellinghouse in flats to be used for the residence of one family only at a time in each flat.’

⁷⁷ See ch.8, para.8.2.4.

⁷⁸ See ch.8, para.8.2.6.

2.4 Builders Lenders and Tenants

2.4.1 Builders and Owners

In the mid Victorian era public housing was generally not even on the ‘horizon,’ as it was considered neither necessary nor desirable in a laissez-faire society,⁷⁹ an approach strongly endorsed by Newcastle Corporation.⁸⁰ State intervention was ridiculed both nationally and in the North East.⁸¹ House building therefore remained a matter for private enterprise, usually speculative builders with the aim of selling or letting for profit.⁸² The Victorian speculator was not a stereotype figure.⁸³ For example, in Gateshead the construction and letting of Tyneside Flats was often seen by many people of ‘moderate capital’, such as local manufacturers and tradesmen, as an excellent investment.⁸⁴ At the same time a significant amount of Gateshead property was owned by a small group of ‘specialist’ home owners.⁸⁵ In 1885 just five owners held 13% of all Gateshead property.⁸⁶

It also seems that from the 1870s a number of large Tyneside employers began to build homes for their workforce.⁸⁷ These employers included Lord Armstrong who, especially in the 1880s,⁸⁸ built terraces to house workers at the Elswick shipyards and engineering works near the river.⁸⁹ On the whole, Tyneside Flats further from the river, in Newcastle’s ‘suburbs’ were built ‘principally’ by speculative builders.⁹⁰ In

⁷⁹ See Malpass P and Murie A, *Housing Policy and Practice*, 5th ed., (Basingstoke: Macmillan, 1999), p.27.

⁸⁰ See Pearce K, ‘Newcastle’s Tyneside Flats 1850 -1900’, (n.26), p.48 & pp.69 -70.

⁸¹ Ibid, p.31 and see Barke M and Callcott M, ‘Municipal Interventions in Housing : Constraints and Developments in Newcastle upon Tyne 1835 - 1914’, in Lancaster B (Ed), *Working Class Housing on Tyneside 1850 - 1939*, (n.26), p.16 and Callcott M, ‘The Governance of the Victorian City in Colls R & Lancaster B (Eds), *Newcastle upon Tyne A Modern History*, (n.49), pp.87 - 88.

⁸² See Dixon R and Muthesius S, *Victorian Architecture*, 2nd ed., (London: Thames and Hudson, 1985), p.56. ‘Speculative’ building means not building for a specific client – see Muthesius S, *The English Terraced House*, (n.61), p.19.

⁸³ See Dixon R and Muthesius S, *Victorian Architecture*, (n.82), p.56.

⁸⁴ See Taylor S and Lovie D, *Gateshead Architecture*, (n.16), p.42.

⁸⁵ See Daunton M, *House and Home in the Victorian City*, (n.74), p.112.

⁸⁶ Ibid, p.108.

⁸⁷ See Barke M and Callcott M, ‘Municipal Intervention in Housing’, (n.81), p.13.

⁸⁸ See Middlebrook S, *Newcastle upon Tyne*, (n.15), p.265.

⁸⁹ See Sill M, ‘Growth of Newcastle in the 19th Century’ in Barke M and Buswell R (Eds), *Historical Atlas of Newcastle upon Tyne*, 1st ed., (Newcastle: Petras, Newcastle upon Tyne Polytechnic, 1980), p.23 and *The Royal Commission on the Housing of the Working Classes Vol II* (London: Eyre and Spottiswoode, 1885), Q.7387.

⁹⁰ See *The Royal Commission on the Housing of the Working Classes Vol II*, (n.89), Q.7383.

Newcastle, some large building societies also built ‘very freely,’⁹¹ for example, by building ‘working class dwellings,’ that is Tyneside Flats, in the district of Byker.⁹²

Newcastle Corporation did not become involved in house building until after the passage of the Housing of the Working Classes Act 1890, which gave them power, but not an obligation, to build for general needs.⁹³ Newcastle Corporation was characteristically slow to act. Although some ‘displaced labourers dwellings’ were built in 1904,⁹⁴ it was not until 1906 that the Corporation laid out its first ‘council estate’ in the Walker district of Newcastle, where 454 dwellings, including some Tyneside Flats, were built.⁹⁵ Such public initiatives were, however, exceptional. The overwhelming majority of Tyneside Flats built before 1914 were constructed by private builders. Private ownership was made possible by the development of building societies.

2.4.2 Lenders

The mid Victorian period was a time of considerable political uncertainty.⁹⁶ In the parliamentary papers of the 1860s and 70s, there is frequent emphasis on the value of the building societies as a stabilising device, by making ‘artisans’⁹⁷ into property owners.⁹⁸ In Gateshead the two largest building societies were established in the 1860s.⁹⁹ In 1871 the manager of the Newcastle upon Tyne Permanent Benefit Building Society suggested, in his evidence before the Friendly and Benefits Societies Commission, that borrowers preferred a building society mortgage.¹⁰⁰

⁹¹ Ibid, Q.7848 & Q.7849.

⁹² Ibid, Q.7802.

⁹³ See generally Malpass P and Murie A, *Housing Policy and Practice*, (n.79), pp.32 - 33.

⁹⁴ See Barke M and Callcott M, ‘Municipal Intervention in Housing’, (n.81), p.25.

⁹⁵ See Fraser C & Emsley K, *Tyneside*, (n.5), p.117 where they seem to suggest all the dwellings were Tyneside flats. However, Middlebrook in *Newcastle upon Tyne*, (n.15), states, at p.285, that the majority of the dwellings had only one room, which suggests most were not Tyneside Flats.

⁹⁶ See further ch.3, para.3.3.3, fn 86.

⁹⁷ I.e. the successful worker, skilled or able to acquire a skill - see Tarn J, *Working - class Housing*, (n.51), p.52.

⁹⁸ See Atkinson F, *Victorian Britain*, (n.5), p.106.

⁹⁹ The Newcastle and Gateshead and the North Tyne Permanent Benefit were established in 1863 and 1865 respectively - see Manders F, *A History of Gateshead*, 1st ed., (Gateshead: Gateshead Corporation, 1973), p.165.

¹⁰⁰ See *First Report of the Commissioners appointed to inquire into Friendly and Benefit Building Societies; together with evidence, appendix and index*, PP 1871 XXV, Q.4646.

It also seems that in Newcastle a ‘good many’ of the ‘better class of mechanics,’ the ‘provident ones’ were members of building societies.¹⁰¹ This was no doubt because, if ‘working men’ wished to buy property, the ‘majority’ required a loan from building societies or elsewhere.¹⁰² ‘Elsewhere’ presumably refers to the private mortgage market, which remained a significant factor until 1914.¹⁰³

One tactic which might have helped ‘artisans’ become property owners was the possibility that with a pair of Tyneside Flats, an owner could occupy one of the pair of flats and let the other. Although this was ‘not common practice’ in North Shields before 1914, the old rate books for North Shields record this kind of ownership.¹⁰⁴ Again, whilst the extent of this practice should ‘not be exaggerated’, examples of this arrangement, dating from 1885, are to be found in Gateshead.¹⁰⁵

It has been suggested that after 1870 the permanent building societies cut out the artisan home-owner and then used their funds for the more lucrative business of building artisans’ dwellings to rent.¹⁰⁶ By the end of the century building society finance was readily available for larger-scale landlords.¹⁰⁷ Before 1914, by which time nearly all terraced Tyneside Flats had been built, about 90% of all housing was rented.¹⁰⁸

2.4.3 Tenants.

There is inevitably a correlation between what workers can afford and the quality of housing.¹⁰⁹ Throughout the period when most terraced Tyneside Flats were being built,

¹⁰¹ See *The Royal Commission on the Housing of the Working Classes Vol II*, (n.89), Q.7803. The rates of subscription for membership of early building societies meant that they were not suitable for ‘poorer working men’ - see Gosden P, *Self - Help Voluntary Associations in the 19th Century*, 1st ed., (London: B.T.Batsford, 1973), p.143.

¹⁰² See Henry Broadhurst’s Memorandum to the 1885 Royal Commission Report, (n.89), p.74.

¹⁰³ See Daunton M, *House and Home in the Victorian City*, (n.74), pp.97 - 98.

¹⁰⁴ See Atkinson F, *Victorian Britain*, (n.5), p.106.

¹⁰⁵ See Daunton M, *House and Home in the Victorian City*, (n.85), p.113.

¹⁰⁶ See Atkinson F, *Victorian Britain*, (n.5), p.106.

¹⁰⁷ Ibid.

¹⁰⁸ See, e.g., Daunton M, *Wealth and Welfare An Economic and Social History of Britain 1851 - 1951*, (n.45), p 426 and Pawley M, *Home Ownership*, 1st ed., (London: Architectural Press, 1978), p.7.

¹⁰⁹ See Malpass P and Murie A, *Housing Policy and Practice*, (n.79), p.22.

the North East was an area of comparatively high wages.¹¹⁰ Rents were also relatively high when compared with other industrial towns or cities.¹¹¹ It is perhaps because Tyneside Flats were an improvement on what had gone before,¹¹² that rents were beyond the reach of, for example, the ‘considerable’ number of occasional dock workers and those even less well off.¹¹³ These workers preferred to continue living in occupied tenements close to their place of work near the river.¹¹⁴ In evidence before the 1885 Royal Commission on the Housing of the Working Classes, Newcastle Corporation’s city engineer and surveyor said that ‘houses in flats,’¹¹⁵ that is Tyneside Flats, suited ‘artisans very well,’ but they were too good for the ‘working men.’¹¹⁶

Some Tyneside Flats were better than others¹¹⁷ and this was reflected in the nature of their occupants. In 1885 Newcastle Corporation’s medical officer for health considered that an ‘ordinary mechanic’ and his family would usually live in a two roomed (Tyneside) Flat,¹¹⁸ but that ‘small clerks’ and the ‘better class’ of mechanic would live in four roomed flats.¹¹⁹ In Gateshead some of the more basic Tyneside Flats, ‘plain in appearance without front forecourts or projecting bays’ were rented by ‘skilled artisans, craftsmen and tradesmen.’¹²⁰ An example is Ripon Street where, of the seventy-eight dwellings listed in 1897/8, only two were occupied by unskilled labourers, the rest by such people as ‘policemen, engine drivers, joiners and fitters.’¹²¹ The growth of the Benwell district of Newcastle between the 1880s (South Benwell) and 1914 (North Benwell) was designed to house skilled workers in engineering and other trades who had previously lived in overcrowded conditions in the city centre.¹²² Research has suggested that the development is explained by a range of factors including speculation in rising land values, the growth of real money wages earned by

¹¹⁰ See Hunt E, *Regional Wage Variations in Britain 1850 - 1914*, 1st ed., (Oxford: Clarendon, 1973), pp.45 & 170.

¹¹¹ See Muthesius, S, *The English Terraced House*, (n.61), p.17.

¹¹² See ch.2, para.2.2.6.

¹¹³ See *The Royal Commission on the Housing of the Working Classes* Vol II, (n.89), Q.7496 and Q.7502.

¹¹⁴ Ibid, Q.7505 and Q.7511.

¹¹⁵ Ibid. Q. 8429 & 8431.

¹¹⁶ Ibid, Q.8425.

¹¹⁷ See ch.2, para.2.3.3.

¹¹⁸ See *The Royal Commission on the Housing of the Working Classes* Vol II, (n.89), Q. 7729.

¹¹⁹ Ibid, Q.7733. The word ‘tenement’ was used, but it is clear from an earlier question (Q.7725) that this is a reference to Tyneside Flats.

¹²⁰ See Taylor S and Lovie D, *Gateshead Architecture*, (n.16), p.43.

¹²¹ Ibid.

¹²² See Sill M, ‘Growth of Newcastle in the 19th Century’, (n.89), p.23.

an expanding working class elite able to pay higher rents and the desire of landowners and employers to ‘buy off’ this increasingly radicalised skilled working class hierarchy by the provision for them of decent housing removed from the crowded central tenements.¹²³

It has been said that the rent was calculated at about 4-7 % profit, or 10% in the case of working-class housing with their ‘shorter life expectancy.’¹²⁴ Atkinson has referred to the ‘handsome’ return of 6 ¼ % that could be expected on a pair of Tyneside Flats in North Shields in 1910.¹²⁵ Since this is comfortably less than a 10% return, it suggests that these dwellings were built to last, as is also evidenced by the substantial numbers and geographical spread of Tyneside Flats still subsisting, as discussed in the next two sections.

2.5 Numbers

2.5.1 *Numbers Built*

In evidence before the 1885 *Royal Commission on the Housing of the Working Classes*, the managing director of Newcastle Industrial Dwellings said that, although he could not say ‘exactly’ how many, ‘thousands’ of ‘little houses with up and down stairs of two rooms on each flat,’ had been built ‘within the last 10 or 15 years.’¹²⁶ Later commentators have been similarly imprecise, but have again emphasised the large numbers. Muthesius, for example, says that after 1870 ‘great numbers’ of Tyneside flats began to be built,¹²⁷ whilst Middlebrook considers that the ‘vast majority’ of new houses built in Newcastle in the 60 years before 1914 were of the ‘two-flat dwelling type.’¹²⁸

¹²³ Ibid. For a brief overview of the strikes and lockouts in the Armstrong Elswick works in 1871 and 1897 see Smith K, *Emperor of Industry Lord Armstrong of Cragside 1810 -1900*, (n.12), pp.32 - 34.

¹²⁴ See Muthesius, S, *The English Terraced House*, (n.61), p.17.

¹²⁵ See Atkinson F, *Victorian Britain*, (n.5), p.107.

¹²⁶ See *The Royal Commission on the Housing of the Working Classes* Vol II, (n.89), Q.7444 & Q.7445.

¹²⁷ See Muthesius S, *The English Terraced House*, (n.61), p.130.

¹²⁸ See Middlebrook S, *Newcastle upon Tyne*, (n.15), p.285.

The rise of the purpose built flat ‘prodded’ the census authorities in 1911 to number flats for the first time, as distinct from separate houses.¹²⁹ The census for that year reveals that only 2.9% of the entire population lived in flats and 3.7% of the urban population.¹³⁰ In Northumberland and County Durham the percentages are 25.4% and 14.6% respectively.¹³¹ This dramatic difference is even greater in the Tyneside conurbations. The breakdown for Newcastle was 55.67%, Gateshead 62.5% and South Shields 63.1%.¹³² After 1921 the census authorities stopped trying to distinguish individual flats¹³³ and, although they did so in 1961 and 1966, the number of Tyneside Flats at those dates ‘cannot be assessed’.¹³⁴ The greatest number of terraced Tyneside Flats probably existed just before 1914, although a few were built subsequently, even after 1945.¹³⁵ Overcrowding continued beyond the first half of the twentieth century. This ultimately led to some demolition, and a reduction in numbers, in the second half.

2.5.2 Overcrowding and Slum Clearance

Some witnesses before the 1885 *Royal Commission on the Housing of the Working Classes* had reservations about how well newly built Tyneside Flats compared with the older tenement buildings by the river. When it was suggested to the managing director of Newcastle Industrial Dwellings that those who moved into them were ‘much more comfortable’ he replied equivocally that they were ‘to some extent.’¹³⁶ Again, the medical officer for health for Newcastle Corporation was concerned at the degree to which Tyneside Flats were being ‘systematically packed together,’¹³⁷ resulting in a population density in the Byker district of Newcastle of 400 to the

¹²⁹ See Sutcliffe A, ‘Introduction’, in Sutcliffe A (Ed), *Multi - Storey Living The British Working - Class Experience*, 1st ed., (London: Crook Helm, 1974), p.14.

¹³⁰ See Daunton M, *House and Home in the Victorian City*, (n.74), pp.39 - 40.

¹³¹ *Ibid*, p.40.

¹³² See Pearce K, ‘Newcastle’s Tyneside Flats 1850 - 1900’, (n.26), p.39.

¹³³ See Sutcliffe A, ‘Introduction’, (n.129), p.15.

¹³⁴ See Gittus E, *Flats, families and the under-fives*, 1st ed., (London: Routledge & Kegan Paul, 1976), p.157.

¹³⁵ See Pearce K, ‘Newcastle’s Tyneside Flats 1850 -1900’, (n.26), p.77.

¹³⁶ See *The Royal Commission on the Housing of the Working Classes Vol II*, (n.89), Q.7386.

¹³⁷ *Ibid*, Q.7752.

acre.¹³⁸ When asked if he considered this density to be overcrowding ‘from a sanitary point of view,’ he replied ‘decidedly; ground overcrowding.’¹³⁹

Surveys after the First and Second World Wars showed that these reservations were prescient. In a social survey of industrial Tyneside in 1928, Mess, having earlier stated that Newcastle’s expanding population had been very largely housed in Tyneside Flats, ‘a form of housing ... setting a low standard of house room,’¹⁴⁰ took a bleak view of the overall position. He considered that a ‘great many’ existing dwellings were ‘worn out or hopelessly unsuitable,’ that a ‘great many more’ were too small, and that, if overcrowding were to be reduced, they must either be ‘converted or superseded’.¹⁴¹ Mess thought it was ‘no exaggeration’ to say that the majority of families on Tyneside ought to be re-housed¹⁴² and that the amount of house room was ‘deplorably below the standards of the rest of the country.’¹⁴³

Tyneside’s residential districts escaped relatively unscathed from the Second World War,¹⁴⁴ with much of its existing housing stock intact. A study of health and illness in children, published in 1954, revealed that almost half of the one thousand families studied lived in Tyneside Flats.¹⁴⁵ Of these, nearly 11% were overcrowded using the statutory standard of overcrowding¹⁴⁶ and nearly 28%, if all children were treated as adults.¹⁴⁷ In a summary of the housing conditions, the study said that it was noticeable how the ‘large mass’ of flats in houses were ‘prominent in deficiencies.’¹⁴⁸ They were old, had few rooms and a high proportion of overcrowding. Few Tyneside Flats had

¹³⁸ Ibid, Q.7753.

¹³⁹ Ibid, Q 7754.

¹⁴⁰ Mess H, *Industrial Tyneside A Social Survey*, 1st ed., (London: Ernest Benn, 1928), p.83.

¹⁴¹ Ibid, p.90.

¹⁴² Ibid.

¹⁴³ Ibid, p.91

¹⁴⁴ See Turnbull L and Womack S, *Home Sweet Home*, (n.62), p.56 and Faulkner T et al, *Newcastle & Gateshead Architecture and Heritage*, 1st ed., (Liverpool: Bluecoat Press, 2006), p.281.

¹⁴⁵ See Spence J et al, *A Thousand Families in Newcastle upon Tyne*, (n.34), pp.111 - 112.

¹⁴⁶ See ss.58, 68 and 5th Sch. HA 1936. S.58 (2), stipulated that a child between one and ten should be regarded as ‘one half’ a unit for assessing the amount of floor space required in a ‘dwelling house’. Although since repealed, a similar provision was retained in the HA 1985 for a ‘dwelling’ - see s.326 (2) (a). The 1985 Act also retained the same overall standards - see ss.324 - 326. The definition of ‘dwelling house’ in the 1936 Act means ‘any premises used as a separate dwelling ...’ (s.68) and ‘dwelling’ in the 1985 Act means ‘premises used or suitable for use as a separate dwelling’ (s.343). Both definitions seem to include self contained Tyneside Flats.

¹⁴⁷ See Spence J et al, *A Thousand Families in Newcastle upon Tyne*, (n.34), pp.114 - 115.

¹⁴⁸ Ibid, p.118.

baths or were ‘satisfactory in other respects’ and together they formed the ‘core of bad housing in Newcastle.’¹⁴⁹

It has been said that a Tyneside Flat with two bedrooms and an outside toilet, but without a bathroom, was the ‘dream home’ of many a family in late Victorian times.¹⁵⁰ In the second half of the twentieth century, improving living standards led to changing expectations, so that by the 1970s the ‘centrally heated semi-detached house with gardens and garage’ had become the ‘norm.’¹⁵¹ This led to significant numbers of Tyneside Flats being demolished as sub-standard housing.

2.5.3 Demolition and Renovation

In the 1960s the objectives of clearance and redevelopment went beyond a concern with poor physical housing conditions.¹⁵² It involved a rejection of the whole environment of nineteenth century terraced Tyneside Flats and the desire to create a housing environment that was a visual symbol of modernity.¹⁵³ As a result, ‘acres’ of ‘workers’ houses were replaced in the 1970s.¹⁵⁴ Substantial clearance took place in the Scotswood district to the west of central Newcastle and in Byker and Walker to the east.¹⁵⁵ Housing densities in the original Tyneside Flats of these redeveloped areas were so high that on site rebuilding could not accommodate existing populations.¹⁵⁶ Many of those rehoused were moved well away from the city centre. Decentralisation was made possible by the provision of extensive public transport and increased use of private motor cars.¹⁵⁷ In some areas close to factories, terraced flats were replaced with car parks.¹⁵⁸ Some on site redevelopment did occur. For example,

¹⁴⁹ Ibid, pp.118-119.

¹⁵⁰ See Turnbull L and Womack S, *Home Sweet Home*, (n.62), p.1.

¹⁵¹ Ibid.

¹⁵² See Cameron S and Crompton P, ‘Housing’ in Robinson F (Ed), *Post – Industrial Tyneside An Economic and Social Survey of Tyneside in the 1980s*, 1st ed., (Newcastle: Newcastle upon Tyne City Libraries and Arts, 1988), p.128.

¹⁵³ Ibid.

¹⁵⁴ See Fraser C & Emsley K, *Tyneside*, (n.5), p.9.

¹⁵⁵ See Byrne D, ‘The Reconstruction of Newcastle upon Tyne: Planning since 1945’ in Colls R & Lancaster B (Eds), *Newcastle upon Tyne A Modern History*, (n.49), p.347.

¹⁵⁶ Ibid.

¹⁵⁷ See Barke M, ‘Population in the 20th Century: Distribution and Density’ in Barke M and Buswell R (Eds), *Historical Atlas of Newcastle upon Tyne*, (n.89), p.53.

¹⁵⁸ See Phillips G, *Tyneside: Past and Present A Journey through Time and Tyneside*, 1st ed., (Durham: G P Electronic Services, 1993), p.70, which shows two photographs, one of a row of ‘terraced flats’

in the Westgate District of Newcastle, the ‘grid pattern of terraces...to the design of the basic Tyneside Flat’ was replaced by ‘modern estates with garden-like surroundings.’¹⁵⁹ In the ‘world famous’ 1970s redevelopment of Byker, where Tyneside Flats once filled the hillside between the shipyards below and the engineering works above, small houses were built with the ‘Byker Wall’ undulating behind them.¹⁶⁰

Unlike the national position, a substantial amount of clearance and redevelopment continued on Tyneside throughout the 1970s.¹⁶¹ Only in the 1980s did slum clearance substantially and dramatically decline. By 1985 clearance in Tyneside had virtually ceased.¹⁶²

At the same time as slum clearance was taking place, housing improvement also made a major contribution to housing renewal and to the retention of significant numbers of Tyneside Flats. The second half of the 1970s saw the very successful use in Tyneside of powers given by the 1974 Housing Act to declare ‘housing action areas.’¹⁶³ Their importance went beyond the number of houses involved in that they effectively restricted the redevelopment programmes.¹⁶⁴ Most of the houses in the housing action areas were Tyneside Flats, which was part of the reason for their particularly high rate of success, as pairs of flats could be improved together. Only one roof had to be renewed, only one damp-proof course installed and a two storey extension in the back yard provided a new kitchen and bathroom for each flat. Moreover two improvement grants were available, one for each flat.¹⁶⁵

looking towards C A Parsons steam turbine works and another, taken in 1990, showing that the flats had ‘long since disappeared.’

¹⁵⁹ See Walton A, *Bygone Arthur’s Hill & Westgate*, 1st ed., (Newcastle: Newcastle Libraries & Information Service, 1998), p.9.

¹⁶⁰ See Grundy J and McCombie G, ‘Nineteenth and Twentieth Century Architecture’ in Pevsner N and Richmond I, *Northumberland*, (n.13), p.117. See also Cameron S and Crompton P, ‘Housing’, (n.152), p.130.

¹⁶¹ See Cameron S and Crompton P, ‘Housing’, (n.152), p.133.

¹⁶² *Ibid.*

¹⁶³ *Ibid.*, p.134. The provisions were contained in ss 36 - 49 Pt 1V HA 1974 and were subsequently codified in ss 236 - 263 Pt V111 HA 1985. Local authorities no longer have the power to declare housing action areas, but can now declare renewal areas under Pt V11 LGHA 1989. For an overview of these provisions see, e.g., Halsbury’s Laws, Vol 22 Housing, 4th ed. (2006 reissue), para.588.

¹⁶⁴ See Cameron S and Crompton P, ‘Housing’, (n.152), p.133.

¹⁶⁵ *Ibid.* The idea of economical joint rear extensions was not new - it was one of the benefits of the ‘four door’ pattern of Tyneside Flats - see ch.2, para.2.3.4.

The 1970s policy of retaining and improving large sections of the nineteenth century housing stock completed the virtual elimination of houses lacking amenities, but was in sharp contrast to the ambitions of the 1960s and involved the acceptance of the ‘old cramped pattern of housing’ criticised by Mess.¹⁶⁶ It was suggested in 1980 that overcrowding existed ‘to a limited degree’ in some areas of ‘fairly high quality’ Tyneside Flats, located particularly in the Newcastle districts of Jesmond, Sandyford and Heaton.¹⁶⁷ However, as was pointed out in the late 1980s, the density then was much lower primarily because, in the old ‘inner city areas’, housing tends not to house families, but rather to provide for the growing number of small non –family households both young and old.¹⁶⁸ This may partly explain why nearly all terraced Tyneside Flats in Jesmond, Heaton and Sandyford are still standing, although in recent years there have been some proposals for limited demolition in less popular areas such as the Benwell district of Newcastle.¹⁶⁹

2.5.4 Existing Numbers

There are no precise figures available for the total number of surviving terraced Tyneside Flats. It has been suggested that the Bensham and Shipcote districts of Gateshead probably contain ‘the greatest remaining concentration of good-quality examples.’¹⁷⁰ In a report placed before the Development Control Committee of Newcastle City Council in 2001 the estimated number of Tyneside Flats in three Newcastle Districts favoured by students was as follows:

2,800 Heaton

1,700 Jesmond

¹⁶⁶ See Cameron S and Crompton P, ‘Housing’, (n.152), p.135. But Mess also contemplated that Tyneside Flats could be ‘converted’ - see ch.2, para.2.5.2.

¹⁶⁷ See Barke M, ‘Population in the 20th Century’, (n.157), p.53.

¹⁶⁸ See Cameron S and Crompton P, ‘Housing’, (n.152), p.135. It is presumed that the reference to ‘inner city areas’ included Jesmond, Sandyford and Heaton, since relatively few Tyneside Flats have ever existed very close to the city centre.

¹⁶⁹ In 2003 it was found that out of 194 terraced Tyneside Flats in the ‘West Benwell Terraces’ 71% were unfit for human habitation – see Newcastle City Council (Director of Community and Housing) ‘Scotswood and West Benwell Regeneration: Proposed Clearance of Housing in West Benwell’ Report 15 January 2003, para.3.3

www.newcastle.gov.uk/cab2002.nsf/0/37E7762F459DC9A780256CA90040CB9A?open_document-18k-2010-11-14-, accessed 15 November 2010.

¹⁷⁰ See Taylor S and Lovie D, *Gateshead Architecture*, (n.16), p.43.

2,000 Sandyford¹⁷¹

These numbers will not have changed since then. Although commentators usually resort to generalities, these can still be useful in giving an overall indication of numbers. For example, when talking of Tyneside architecture, it has been said that ‘What we do have is terraced flats, hundreds and thousands of them’.¹⁷² One difficulty in estimating numbers is that Tyneside Flats were often relegated to the less visible parts of an area and are also intermingled with ordinary terraced housing.¹⁷³ Another problem, as discussed in the next section, is that they are spread over a wide geographical area.

2.6 Location

2.6.1 Geographical Spread

It is broadly true that in the North East at the time of the 1911 census terraced Tyneside Flats were the *prevalent* house-type *only* in a narrow five mile band on each side of the River Tyne.¹⁷⁴ However, as Tyneside Flats were not just confined to the larger towns and cities by the river, the name tends to localise the style to too great an extent.¹⁷⁵ The 1911 census revealed that many smaller towns also had very high proportions of flats, with a total of sixteen local authority areas in Durham and twenty-one in Northumberland exceeding the national average.¹⁷⁶ Qualitative research data confirmed that terraced Tyneside Flats exist south of the river at least as far as Consett¹⁷⁷ and Sunderland¹⁷⁸ and as far west as Hexham.¹⁷⁹ Newspaper

¹⁷¹ See Newcastle City Council Development Control Committee Agenda 17 August 2001 Item 6.6 Report by the Head of Planning and Transportation - ‘Tyneside Flats -The Wolsely Gardens Appeal Decision’, para. 5.4. The report itself no longer appears to be readily available, but the Agenda can be viewed at

<[http://www.newcastle.gov.uk/cab2001.nsf/allbykey/633389D4A019C639580256AA70038ECDF/\\$FILE/DEVELOPM%20-%20Agenda.doc](http://www.newcastle.gov.uk/cab2001.nsf/allbykey/633389D4A019C639580256AA70038ECDF/$FILE/DEVELOPM%20-%20Agenda.doc)> , accessed 11 November 2010.

¹⁷² See Grundy J, *Northern Pride*, (n.50), p.191.

¹⁷³ See Taylor S and Lovie D, *Gateshead Architecture*, (n.16), p.47.

¹⁷⁴ See Daunton M, *House and Home in the Victorian City*, (n.74), p.39.

¹⁷⁵ See Rowe D, ‘The north – east’ in Thompson F (Ed), *The Cambridge Social History of Britain 1750 - 1950 Vol 1 Regions and Communities*, (Cambridge: CUP, 1990), p.447.

¹⁷⁶ See Sutcliffe A, ‘Introduction’, (n.129), p.14.

¹⁷⁷ Interview 15, GQ 23. An explanation of the citation of qualitative and quantitative data is given in note 2 to the list of participating firms in Appendix G.

¹⁷⁸ Interview 17, GQ13.

¹⁷⁹ Interview 9, GQ 23.

advertisements for the sale of north eastern properties show that they are to be found throughout the area of the former North Eastern coalfield, as far north as Ashington, and perhaps beyond, and as far south at least to Houghton-le-Spring and Washington.¹⁸⁰ Numbers are, however, relatively small outside the main Tyneside conurbation. The standard Tyneside Flat documentation is also known to have been used elsewhere, for example, in a development in Stockton on Tees.

Although some commentators have suggested that Tyneside Flats are a ‘peculiarity of North East England,’¹⁸¹ this is misleading. Muthesius suggested in 1982 that a small number of Tyneside Flats can or could also be found in Carlisle, Barrow and perhaps in Manchester.¹⁸² Case reports relating to the enfranchisement of houses under the LRA 1967 have shown that similarly designed houses were built in the Clapham and Collier’s Wood districts of London.¹⁸³ Significant numbers were also built in other parts of London, particularly in the Walthamstow area, where they were advertised as ‘self-contained half-house flats.’¹⁸⁴ Although the basic structure of the London flats remains the same, lower flats in the London area often seem to have reasonably sized rear gardens,¹⁸⁵ to which the upper flats sometimes have no access.¹⁸⁶ Despite the building of similar styles elsewhere the percentage of terraced flats was much higher on Tyneside, although the precise reasons remain unclear.¹⁸⁷

2.6.2 Explanation for Location

Despite much speculation, there has so far been no wholly satisfactory explanation as to why the huge demand for housing in the North East was met by building terraced

¹⁸⁰ The register for 4 St Oswald’s Terrace, Shiney Row, Houghton - le- Spring shows that the land on which two terraced Tyneside Flats were subsequently built was originally owned by a local coal company (The Lambton and Hetton Collieries Limited) and conveyed by them on 1 September 1914.

¹⁸¹ See Linsley S, ‘Eighteenth to Twentieth Century: Agrarian Transformation and Industrial Revolution’, (n.13), p.98 and also Faulkner T et al, *Newcastle & Gateshead Architecture and Heritage*, (n.144), p.195, which describes Tyneside Flats as ‘seemingly unique’.

¹⁸² See Muthesius S, *The English Terraced House*, (n.61), p.130.

¹⁸³ See ch.6, para.6.2.3.

¹⁸⁴ See Plummer P and Bowyer W, *A Brief History of Courtenay Warner and Warner Estate*, 1st ed., (London: Walthamstow, Walthamstow Historical Society, 2000), p.20 and see generally pp.17- 20.

¹⁸⁵ *Ibid*, pp.18 and 25.

¹⁸⁶ See Rowe D, ‘The north –east’, (n.175), p.447. It may be that the existence of rear gardens is what Taylor and Lovie, who also mention ‘the similar cottage flats’ developed in London, have in mind when they say that ‘true’ Tyneside Flats are ‘unique’ to a small area mostly in Newcastle & Gateshead - see Taylor S and Lovie D, *Gateshead Architecture*, (n.16), p.43.

¹⁸⁷ See Grundy J, *Northern Pride*, (n.50), pp.199 – 200.

Tyneside Flats.¹⁸⁸ Model housing schemes, and similar layouts in Edinburgh, may have influenced the design¹⁸⁹ but, as with other types, it is only possible to ‘speculate about their origins.’¹⁹⁰ The suggestion has been made that the design emerged as a result of physical constraints on the amount of land, caused by ‘certain natural obstacles’¹⁹¹ and the city’s relatively late fortifications.¹⁹² However, this explanation seems improbable since other cities or towns with similar constraints developed a different house style.¹⁹³

In parts of Gateshead some sales of land imposed obligations, which required dwelling houses to be built of good quality for no more than two families to inhabit, with separate arrangements as far as possible.¹⁹⁴ Although it has been suggested that this was a specific directive to build Tyneside Flats,¹⁹⁵ other layouts would have also complied with this obligation,¹⁹⁶ which appears to have been unusual, at least in the 1860s.¹⁹⁷ A more influential factor is likely to have been building regulations. These are closely interrelated to building types, although it is often difficult to disentangle cause and effect.¹⁹⁸ Newcastle’s bylaws of 1866, in effect, prevented the building of tenements, but did not specifically require the building of Tyneside flats.¹⁹⁹ Once enacted, bylaws were normally adhered to,²⁰⁰ and would have influenced many design features, such as the height of the rooms, 9 feet or 2.74 metres, the width of the front

¹⁸⁸ See Pearce K, ‘Newcastle’s Tyneside Flats 1850 -1900, (n.26), p.73.

¹⁸⁹ See ch.2, para.2.3.1.

¹⁹⁰ See Muthesius S, *The English Terraced House*, (n.61), p.130.

¹⁹¹ This is probably a reference to the city’s Town Moor on which building was forbidden and steep ravines from the river Tyne - see P Pearce K, ‘Newcastle’s Tyneside Flats 1850 -1900, (n.26), p.40.

¹⁹² See Sutcliffe A, ‘Introduction’, (n.129), p.11.

¹⁹³ See Pearce K, ‘Newcastle’s Tyneside Flats 1850 -1900’, (n.26), p.40.

¹⁹⁴ See Taylor S and Lovie D, *Gateshead Architecture*, (n.16), p.42.

¹⁹⁵ Ibid. Taylor & Lovie’s concept of Tyneside Flats appears to be confined to their usual terraced form, described in thesis ch.2, para.2.3.2.

¹⁹⁶ See, e.g., Darlington’s ‘front and back houses’ described in Atkinson F, *Victorian Britain*, (n.5), pp.107 - 108. However, since each ‘front and back’ building comprises just two units, north eastern conveyancers might well use the standard Tyneside Flat documentation to transfer individual dwellings – see ch.8, para.8.2.6.

¹⁹⁷ See Manders F, *A History of Gateshead*, (n.99), p.168. It later became quite normal to stipulate the building of dwelling houses in flats – see, e.g., ch.2, para.2.3.2, fn 56.

¹⁹⁸ See Muthesius, S, *The English Terraced House*, (n.61), p.5.

¹⁹⁹ See Daunton M, *House and Home in the Victorian City*, (n.74), p.21 and Pearce K, ‘Newcastle’s Tyneside Flats 1850 - 1900, (n.26), p.58.

²⁰⁰ See Muthesius S, *The English Terraced House*, (n.61), p.5.

streets, 40 feet or 12.19 metres or back streets, 20 feet or 12.19 metres and the amount of open space required.²⁰¹

The fact that land was sold on Tyneside on a freehold basis seems unlikely to have been material.²⁰² It also seems that the price of land would not have been conclusive,²⁰³ but may well have been a factor.²⁰⁴ As a generalisation it may be true that Tyneside Flats were a response to the need to improve local housing standards, perhaps within the constraints of relatively high-cost land.²⁰⁵ Evidence given to the 1885 *Royal Commission on the Housing of the Working Classes* by Newcastle Corporation's medical officer for health indicates that landlords employed 'clever' architects to prepare plans so as to 'utilize the ground fully.'²⁰⁶ This was presumably to minimize costs or maximise profits and is unsurprising in Tyneside's then prevailing entrepreneurial culture.²⁰⁷

Other cultural factors may have been relevant in the acceptance of Tyneside Flats. Northumberland and Durham were a considerable distance from the other great industrial districts of England, and their inhabitants were 'very tenacious' of habit and custom.²⁰⁸ The 'small and congested home' was said to have been accepted 'as a matter of course in this corner of England to a degree greater than elsewhere.'²⁰⁹ Very different cultural factors and social conditions have, as discussed in the next section, ensured their continued utility today.

²⁰¹ Ibid, p.135. For a discussion of the amount of open space required, see Pearce K, 'Newcastle's Tyneside Flats 1850 - 1900', (n.26), pp.56 - 57.

²⁰² See Pearce K, 'Newcastle's Tyneside Flats 1850 - 1900', (n.26), pp.60 - 61 and See Daunton M, *House and Home in the Victorian City*, (n.74), pp.65 - 66.

²⁰³ See Muthesius S, *The English Terraced House*, (n.61), p.85 and Mess H, *Industrial Tyneside A Social Survey*, (n.140), p.84 and See Rowe D, 'The north - east', (n.175), p.447.

²⁰⁴ See Grundy J, *Northern Pride*, (n.50), p.192.

²⁰⁵ See Rowe D, 'The north - east', (n.175), p.448.

²⁰⁶ See *The Royal Commission on the Housing of the Working Classes Vol II*, (n.89), Q.7749.

²⁰⁷ See ch.2, para.2.2.4.

²⁰⁸ See Mess H, *Industrial Tyneside A Social Survey*, (n.140), p.85.

²⁰⁹ Ibid, p.87. See also Pearce K, 'Newcastle's Tyneside Flats 1850 -1900', (n.26), p.76.

2.7 Tyneside Flats in the Twenty First Century

2.7.1 Structural Quality

As nearly all terraced Tyneside flats were built before 1914, most are already over 100 years old. It has been suggested that this is the usual lifespan of a building²¹⁰ and that buildings rarely have a useful life beyond it.²¹¹ As with most pre-1914 property, Tyneside Flats were usually built to rent.²¹² This may partly explain their continued existence, as it was said of their London equivalents that, because they were built to rent, they were built to last.²¹³ Building bylaws in the nineteenth century also ensured good quality standards of construction, such as the height of rooms.²¹⁴ These are likely to weigh in favour of their retention, since after the First World War building regulations were relaxed to allow for far lower ceiling heights and ‘less solid dwellings.’²¹⁵

Evidence of their ‘essentially sound construction’ was said in 1990 to be apparent from the fact that many Tyneside houses, which were below the national average in terms of space per dwelling, had lasted for a century and had ‘in recent years’ justified modernisation rather than demolition.²¹⁶ It was also suggested in the 1980s that Tyneside Flats had then found their ‘true métier’ fitting modern ‘family size’ without causing overcrowding.²¹⁷ That generalisation is not entirely accurate today, as they are often not occupied by traditional ‘families’, particularly in student areas.

2.7.2 Student Districts

Quantitative research data revealed that, although most conveyancers had not amended the standard Tyneside Flat lease to cater for student occupation, one

²¹⁰ See Turnbull L and Womack S, *Home Sweet Home*, (n.62), p.2.

²¹¹ See Sparkes P, *A New Land Law*, 2nd ed., (Oxford: Hart, 2003), p.65.

²¹² See ch.2, para.2.4.2.

²¹³ See Plummer P and Bowyer W, *A Brief History of Courtenay Warner and Warner Estate*, (n.184), p.8. See also ch.2, para.2.4.3.

²¹⁴ See ch.2, para.2.6.2.

²¹⁵ See Byrne D, ‘Working Class Owner – Occupation and Social Differentiation on Inter-War Tyneside’ in Lancaster B, *Working Class Housing on Tyneside 1850 - 1939*, (n.26), p.88.

²¹⁶ See Rowe D, ‘The north –east’, (n.175), p.452.

²¹⁷ Ibid.

participant had done so in hundreds of cases.²¹⁸ This is because many Tyneside Flats are in districts with easy access to Newcastle and Northumbria Universities.²¹⁹ In these areas the original nineteenth century pattern of renting most Tyneside Flats continues, as does the policy of maximising the space available.²²⁰ In recent years this has led to the conversion of many lofts in upper Tyneside Flats, so as to provide extra student bedrooms. An area of concern flagged up by Newcastle City Council was that loft conversion resulted in a higher density than originally intended.²²¹ Newcastle City Council's attempts to limit the number of loft conversions were rebuffed by the planning inspector in what was regarded as a test case involving a planning application for the installation of roof lights and two additional bedrooms in an upper Tyneside Flat in the Jesmond Vale district of Newcastle.²²² The Council wanted the inspector to impose a condition that the property would not be occupied at any time other than by a 'single person or by a family'.²²³ The inspector did not consider it necessary or reasonable to impose such a condition, which she thought would be onerous and 'uncertain of interpretation.'²²⁴ However, she did agree to the imposition of a condition requiring sound proofing between the flats, an important provision, which should potentially help conserve the existing housing stock.

In recent years increasing student numbers²²⁵ has led to more 'studentification.' This has inevitably given rise to environmental and other concerns, for example over noise, disturbance and parking problems.²²⁶ The latter may be helped by Victorian regulations stipulating the width of the front and back streets.²²⁷ Mess criticised the 'enormous amount' of space 'wasted' on Tyneside Flat back lanes.²²⁸ In the past,

²¹⁸ See ch.8, para.8.3.6.

²¹⁹ See ch.2, para.2.5.4.

²²⁰ See ch.2, para.2.6.2.

²²¹ See Newcastle City Council, Community and Housing Select Committee, Private Sector Housing Working Group Report, 25 July 2001, para.5.1, <<http://www.newcastle.gov.uk/cab2001.nsf/select?openview>>, accessed 11 November 2010.

²²² See Newcastle City Council, 'Tyneside Flats –The Wolsely Gardens Appeal Decision', (n.171).

²²³ Ibid, para.3.7. There appears to have been no suggestion that either the 'room' or 'space' standards had been contravened so as to cause overcrowding under ss 324 - 326 H A 1985.

²²⁴ Ibid, para. 3.11 & see ch.8, para.8.3.6 for the court's interpretation of 'family'.

²²⁵ See Newcastle City Council, Local Development Framework Draft Interim Guidance on Purpose Built Student Accommodation: Consultation Draft 24 April 2007, p.7 and Appendix A, <http://www.newcastle.gov.uk/core.nsf/a/ldf_purpose_built_student_housing_ipg>, accessed 15 June 2007.

²²⁶ See Newcastle City Council, Private Sector Housing Working Group Report, (n.221), para.5.1.

²²⁷ See ch.2, para.2.6.2.

²²⁸ See Mess H, *Industrial Tyneside A Social Survey*, (n.140), p.93.

when Tyneside Flats were occupied by families, back lanes were often used for recreational purposes.²²⁹ Now they could perhaps help alleviate parking problems, unless new parking restrictions, in part introduced because of ‘studentification’, prevent this.²³⁰ Another area of concern is the number of letting boards in student areas²³¹ as in the photograph below showing student Tyneside Flats being advertised to let in the Jesmond district of Newcastle.



The desire to increase Tyneside Flat occupancy in popular student areas²³² and the perceived need for increased regulation both illustrate the extent of the demand for, and use being made of, Tyneside Flats in student districts, where very few flats are untenanted. Not surprisingly therefore prices remain high and beyond the reach of ‘ordinary buyers’.²³³

²²⁹ See, e.g., Common J, *Kiddar’s Luck*, 1st ed., (London: Turnstile Press, 1951), p.24 where he says that ‘sometimes for days on end the children would spend all their time in the back lane’, a place where they could be ‘pavement free and pal-pleasured’ - see p.25.

²³⁰ Some recent parking schemes in Jesmond have completely forbidden parking in the back lanes of terraced Tyneside Flats and other properties.

²³¹ A voluntary code of practice has been agreed over their use.

²³² See Focus ‘Housing Action Continues, Did You Know?’ (Winter 2005 ed., published by McKeever L, Jesmond, Newcastle upon Tyne), p.1 which said that almost one hundred extra bedrooms had been installed in Jesmond upper Tyneside flats in the last year and that three hundred had been installed in three years.

²³³ See Newcastle City Council, Private Sector Housing Working Group Report, (n.221), para.5.1.

2.7.3 Non Student Areas

In 2004, Taylor and Lovie, whose work was supported by both English Heritage and Gateshead Metropolitan Borough Council said that the Gateshead stock of Tyneside Flats were ‘still doing the job they were designed to do, that is, provide a decent standard of affordable housing.’²³⁴ Affordability, when Tyneside Flats were originally built, meant that some ‘artisans’ could afford to rent them for themselves and their families.²³⁵ Now, in an age of owner occupation, many Tyneside Flats in non student areas are frequently advertised for sale at well below the average national sale price.

Taylor and Lovie considered that successful regeneration in Gateshead would come from neither ‘crude and insensitive clearance’ nor from dogmatic assertion that nothing must change.²³⁶ They considered that solutions lay in policies that respected local aspirations for a better standard of living within an environment that reflected the area’s distinctive evolution.²³⁷ An example of this approach can be seen in the grant of planning permission in 2008 for major improvements to streets of Tyneside Flats in the Bensham and Saltwell districts of Gateshead. These improvements include new boundary walls with stone copings, as well the reinstatement of iron railings and gates.²³⁸

The usefulness of Tyneside Flats in providing for the ‘growing number’ of small non-family households, both young and old was recognised in the late 1980s.²³⁹ In 1990 Tyneside Flats were said to be ‘highly useful for students, singles and couples.’²⁴⁰ When more space has been required, one form of modernisation that has been used is to combine both flats into one unit. Qualitative research data indicated that nearly a

²³⁴ See Taylor S and Lovie D, *Gateshead Architecture*, (n.16), p.43.

²³⁵ See ch.2, para.2.4.2.

²³⁶ See Taylor S and Lovie D, *Gateshead Architecture*, (n.16), pp.80 - 81.

²³⁷ *Ibid*, p.81.

²³⁸ See Gateshead Metropolitan Borough Council ‘Green Light for More Bensham Home Improvements’ 3 September 2008,

< <http://www.gateshead.gov.uk/Council%20and%20Democracy/news/News%20Article...> > accessed 12 December 2008. Iron railings were removed from nearly all Tyneside Flats and other buildings for scrap metal during the Second World War – see also Turnbull L and Womack S, *Home Sweet Home*, (n.62), p.14.

²³⁹ See Cameron S and Crompton P, ‘Housing’, (n.152), p.135.

²⁴⁰ See Lancaster B, ‘Introduction’, (n.129), p.3.

quarter of the participants seen personally had encountered this situation.²⁴¹ Sale advertisements in the local press regularly advertise properties where this has occurred and it is a procedure which has been used by Newcastle City Council when refurbishing Tyneside Flats in the ‘west end’ of Newcastle.

It has been suggested by a past President of the Royal Institute of British Architects that technology now allows us to ‘re-introduce’ traditional streetscapes without rebuilding slums.²⁴² Many such streetscapes already exist in the North East of England, although ongoing refurbishment, such as soundproofing, is often likely to be required. Overall, it still seems true that Tyneside Flats give the region an ‘added flexibility’ in meeting housing needs.²⁴³ Moreover, the affordability of many Tyneside Flats is likely to help government initiatives aimed at increasing or, when economic circumstances are difficult, maintaining, home ownership levels. All these factors suggest that most existing Tyneside Flats are likely to last for the foreseeable future.

²⁴¹ However, conversion of two individual leasehold flats into one house is unlikely to result in any applications for enfranchisement under the LRA 1967 if the standard Tyneside Flat lease had been created – see further ch.6, para.6.2.4.

²⁴² See Partridge C, ‘Back-to back to make a comeback’ *The Observer* (Property Section) 26 September 2004, p.20.

²⁴³ See Lancaster B, ‘Introduction’, (n.129), p.3.

Chapter 3. Judicial Developments

3.1 Overview

This chapter considers the principal judicial developments which influenced or prevented the creation of freehold repairing and other obligations for individual Tyneside Flats and, in so doing will address research question three.¹ Parliamentary reform had been ruled out by the Real Property Commissioners in 1832 and it was explicitly left to the courts of equity to determine how the law evolved.² Inevitably, judicial decisions, like the building of Tyneside Flats themselves, were heavily influenced by the Industrial Revolution and its aftermath.³ Perhaps because there was little private ownership in the Victorian era,⁴ none of the leading nineteenth century ‘obligation’ cases concerned horizontally divided property.⁵ Other limiting factors are the unsystematic manner in which cases are reported⁶ and the quality of those reports.⁷

A disputed area is the extent to which law reformers, especially Bentham, influenced the development of the law.⁸ In the doctrinal discussion reference is sometimes made to Bentham’s views as well as those of Dicey. For some *Law and Public Opinion*⁹ is regarded as possibly *the* point of reference, for any attempt to understand modern legal history.¹⁰

¹ See ch.1, para.1.1.6.

² See ch.4, para.4.2.

³ See ch.2, para.2.2.2.

⁴ Even by 1918 less than 10% of houses in England & Wales were owner occupied-see Pawley M, *Home Ownership*, 1st ed., (London: Architectural Press, 1978), p.7 & see ch.2, para.2.4.2 & fn 108.

⁵ There were comparatively few flats nationally - see ch.2, para.2.5.1. Where, as on Tyneside, large numbers of two flat houses did exist, both flats always appear to have been in single ownership - see ch.2, paras 2.4.1 & 2.4.3. Enforcement of obligations between horizontally divided flats would therefore not have arisen. Even if, nationally, any individual flats had been separately owned, it seems that only those who were ‘affluent or relatively affluent’ could have afforded litigation – see Simpson A, *Victorian Law and the Industrial Spirit*, 1st ed., (London: Selden Society, 1995), p.5.

⁶ See Sugarman D and Rubin G, ‘Towards a New History of Law and Material Society in England, 1750 - 1914’ in Rubin G and Sugarman D (Eds), *Law, Economy and Society, 1750 - 1914: Essays in the History of English Law*, 1st ed., (Abingdon: Professional Books, 1984), p.86.

⁷ If, e.g., the 1846 case of *Mann v. Stevens* had been more fully reported, it might well have supplanted *Tulk v. Moxhay* as a pre-eminent case - see ch.3, para.3.2.3.

⁸ See Manchester A, *A Modern Legal History of England and Wales 1750 - 1950*, 1st ed., (London: Butterworths, 1980), pp.14 -15 and Cornish W and Clark G, *Law and Society in England 1750 – 1950*, 1st ed., (London: Sweet & Maxwell, 1989), pp.65 – 66.

⁹ See Dicey A, *Law and Public Opinion in England*, 1st ed., (London: Macmillan, 1914).

¹⁰ See Cocks R, *Sir Henry Maine A Study in Victorian Jurisprudence*, 1st ed., (Cambridge: CUP, 1988), p.54. See also Cosgrove R, *The Rule of Law: Albert Venn Dicey, Victorian Jurist*, 1st ed., (North Carolina, USA: University of North Carolina Press, 1980), which appears to accept Dicey’s tripartite division of opinion - see

Accordingly, the formulation of the law in the nineteenth century is sometimes set against Dicey's suggested three main strands of public opinion.¹¹ As indicated below, these were of a roughly equal time span:

a) The Period of Old Toryism or Legislative Quiescence (1800-1830)

b) The Period of Benthamism or Individualism (1825-1870)

c) The Period of Collectivism (1865-1900)¹²

The middle period is perhaps the most clearly defined,¹³ although all eras overlap each other and were restrained by counter-currents of opinion.¹⁴ Another 'overlapping' factor of particular relevance to freehold land obligation decisions is that, as indicated in the list of leading cases below, the court was frequently asked to consider conveyancing documentation drafted many years earlier.

p.186. For criticism of both Cosgrove and Dicey see Sugarman D, 'The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science' (1983) 46 MLR 102, pp.102-111.

¹¹ For an assessment and criticism of Dicey's model see, e.g., Cornish W and Clark G, *Law and Society in England 1750 – 1950*, (n.8), pp.63 - 68. See also May T, *An Economic and Social History of Britain 1760-1990*, 2nd ed., (Harlow: Longman, 1996), pp.131 – 132 & thesis ch.3, para.3.6.

¹² See Dicey A, *Law and Public Opinion*, (n.9), pp.62- 67.

¹³ *Ibid*, pp.65 – 66.

¹⁴ *Ibid*, pp.36 – 38. Thus Dicey suggests, at p.38, that from 1830-1850 the Benthamite liberalism of the day was held in check by the older declining power of Toryism, but it was in this period that *Tulk v. Moxhay* was heard.

Case	Date of Decision	Date of Conveyancing Documentation
Keppel v. Bailey	1834	1785
Tulk v. Moxhay	1848	1808
Haywood v. Brunswick Permanent Benefit BS	1881	1867
Austerberry v. Oldham Corporation	1885	1837
London County Council v. Allen	1914	1868
Rhone v. Stephens	1994	1960

Thus, for example, because the conveyancing documentation in both the Haywood and London County Council cases was drafted in an age of individualism and after *Tulk v. Moxhay*, the parties might have contemplated greater enforceability of obligations against covenantors' successors in title, than the courts were prepared to countenance in an age of collectivism.¹⁵ This may help explain why judicial development of the law was so protracted.

The discussion mainly concentrates on the above cases, the first of which was heard shortly after the 1832 re-statement, in *Price v. Easton*,¹⁶ of the common law rule, that no one may be entitled to, or bound by, the terms of a contract to which he is not a party.¹⁷ As the cases and twentieth century discussion illustrate, much energy was subsequently devoted to 'patrolling the frontier' between property and contract and much fuss made whenever the conceptual border was realigned and rights of 'contract' are brought within the province of 'property'.¹⁸

¹⁵ See further ch.3, paras 3.4.4 & 3.5.2.

¹⁶ (1833) 4 B & Ad 433, 110 ER 518.

¹⁷ See further, e.g., Furmston M, *Cheshire, Fifoot and Furmston's Law of Contract*, 15th ed., (Oxford: OUP, 2007), pp.573 - 575 and Sabey D and Everton A, *The Restrictive Covenant in the Control of Land Use*, 1st ed., (Aldershot: Ashgate, 1999), p.7.

¹⁸ See Gray K, 'Property in Thin Air' [1991] 50 C.L.J. 252, p.302.

Section two reviews nineteenth century developments which preceded *Tulk v. Moxhay*, particularly Lord Brougham's influential judgment in *Keppel v. Bailey*. The next section considers *Tulk v. Moxhay* itself and, in section four is followed by its subsequent application, particularly in *Austerberry v. Oldham Corporation*. Section five considers positive obligations in the twentieth century, especially *Rhone v. Stephens*, where the House of Lords ruled out further judicial intervention. Section six concludes the chapter with a summary of the impact of judicial legislation on the current transfer of individual Tyneside Flats and on their future transfer should proposed land obligation reform be enacted.

3. 2 Pre *Tulk v. Moxhay*

3.2.1 *Keppel v. Bailey*

Keppel v. Bailey was heard in 1834,¹⁹ but concerned positive and restrictive obligations created in 1795. The documentation therefore arose during the first phase of the Industrial Revolution,²⁰ when the development of an iron and coal technology was a vital ingredient for the transformation of British Industry.²¹ The 1790s have been called the years of 'iron mania'²² and, in 1795, a company was formed for the construction of the Trevil Railroad under provisions contained in the Monmouthshire Canal Act 1792 (the 1792 Act). A comprehensive deed was also executed in 1795 (the 1795 deed) by lessees of the Beaufort Ironworks and others. In the 1795 deed the lessees covenanted that all limestone required for their ironworks would be procured from the Trevil Quarry and carried along the Trevil Railroad.²³ The toll charged in the 1795 deed exceeded that permitted by the 1792 Act. In 1833 the residue of the lease of the Beaufort works was sold to the Baileys. They knew of the 1795 deed but, in contravention of its provisions, proceeded to build a new railroad from the Beaufort Ironworks to other lime quarries. Shareholders in the Trevil Railroad obtained an injunction preventing the Baileys from using the new railroad. The Baileys applied to the Lord Chancellor, Lord Brougham, for the injunction to be dissolved.

¹⁹ (1834) 2 My & K 517, 39 ER 1042.

²⁰ See Gregg P, *A Social and Economic History of Britain 1760 - 1980*, 8th ed., (London: Harrap,1982), where she suggests that the first stage of the Industrial Revolution ran between 1760-1830 – see p.98.

²¹ See Berg M, *The Age of Manufacturers, 1700- 1820 Industry, innovation and work in Britain*, 2nd ed., (London:Routledge,1994), p.257.

²² See Jones R, *Economic and Social History of England 1770 -1977*, New ed., (London: Longman, 1982), p.69.

²³ For a description of the industrial processes, including the use of limestone, used in the iron industry at this time see, e.g., Meredith J, *The Iron Industry of the Forest of Dean*, 1st ed., (Stroud: Tempus, 2006), pp.94-96.

Lord Brougham held that the illegality alone was sufficient for the injunction to fail.²⁴ In addition, unlike the position between a lessor and lessee, there was no ‘privity,’ between the Baileys and the Trevil Railroad shareholders.²⁵ The Baileys were ‘strangers’ but, even if there had been privity, after what Simpson calls a ‘masterly’ review of the authorities²⁶, Lord Brougham decided that the obligation to use the railroad was not ‘real and inherent’ by which he presumably meant did not touch and concern the land.²⁷ Equity had followed the law. Without privity the covenant was plainly collateral, and did not bind the Baileys.²⁸ Moreover, a Court of Equity would not, by holding the ‘conscience’ of the purchaser to be affected by notice, give the covenant a more extensive operation than the law allowed.²⁹ Equity again followed the law. If notice were to affect the assignee’s conscience, then the illegality would be of ‘no consequence’.³⁰ Illegality clearly concerned Lord Brougham as did the broader principle of allowing landowners to burden their land indefinitely. In a much quoted passage Lord Brougham said:

‘But it must not therefore be supposed that incidents of a novel kind can be devised and attached to land at the fancy or caprice of any owner. It is clearly inconvenient both to the science of the law and to the public weal that such a latitude should be given... great detriment would arise and much confusion of rights if parties were allowed to invest new modes of holding and bestowing property, and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote.’³¹

Lord Brougham then gave examples of possible obligations that could be imposed on separate parcels of land, such as transporting limestone from a specified kiln, coal from a particular pit or employing a particular blacksmith’s forge and ended with the fear that there could be as many restraints of ‘as infinite a variety as the imagination can conceive’³² These examples reflect the particular facts of this case, which was heard during the second phase of

²⁴ At 533 & 548.

²⁵ At 533 - 534.

²⁶ See Simpson A, *A History of the Land Law*, 2nd ed., (Oxford: Clarendon, 1986), p.257.

²⁷ At.546.

²⁸ Ibid,

²⁹ At 517. For an account of the role of ‘conscience’ in the early development of the Lord Chancellor’s jurisdiction see, e.g., Mc Gee J (Ed), *Snell’s Equity*, 31st ed., (London: Thompson, 2005), p.7 and Pettit P, *Equity and the Law of Trusts*, 11th ed., (Oxford: OUP, 2009), p.5.

³⁰ At 547.

³¹ At 535 - 536.

³² Ibid.

the Industrial Revolution, at a time when new industrial processes were being applied.³³ The iron industry was of ever increasing importance³⁴ and it is understandable that the courts might instinctively feel reluctant to restrict the commercial use of land.

Simpson considered that Lord Brougham's argument was an 'extremely convincing' one, that the 'evils' which he envisaged were more obvious in the case of positive obligations and that, even in the case of negative obligations, there is a great deal to be said for his opinion.³⁵

Simpson takes the view that, in principle, it is not at all clear that a private landowner ought to be allowed to 'sterilize' the use of land permanently without public control of his activities.³⁶ A counter argument could be made that, in particular circumstances, ongoing positive and negative obligations might work in the public interest, for example, by facilitating the conservation of a worthwhile housing stock at a time of ever increasing shortages of building land.³⁷

Gardner maintains that Lord Brougham does not say that the court may not recognize new obligations of defined content – just that the law does not and cannot give the parties *carte blanche* to make proprietary obligations of whatever content they may fancy.³⁸ For Gardner, there is a public policy interest in an unencumbered title which 'has to be outweighed by the usefulness of any putative proprietary obligation before the latter can be received into the canon.'³⁹ Gardner therefore maintains that what Lord Brougham decided was that the particular obligation before him was not of a nature acceptable to public policy for proprietary treatment and that, given his comments on illegality, this was not surprising.⁴⁰ The case was heard at the beginning of Dicey's 'period of individualism'⁴¹ and, despite the broad terms in which some of Lord Brougham's comments were made, it is perhaps unlikely

³³ See Gregg P, *A Social and Economic History of Britain 1760 - 1980*, (n.20), where she suggests that the second stage ran between 1830 and 1850 - see p.98. However, the Industrial Revolution arrived later in North East England - see ch.2, para.2.2.2.

³⁴ See Landes, D, *The Unbound Prometheus*, 2nd ed., (Cambridge: CUP, 2003), p.96 where he illustrates that between the time when the 1895 deed was drafted and the time when the case was heard in 1834, pig iron output in Britain had increased more than five times.

³⁵ See Simpson A, *A History of the Land Law*, (n.26), p.257.

³⁶ *Ibid.*

³⁷ English Heritage consider that some of Gateshead's stock of Tyneside Flats should be preserved - see ch.2, para. 2.7.3. It is, of course, also possible to 'sterilize' land almost permanently by imposing obligations in, e.g., 999 year leases, as is done with the standard Tyneside Flat documentation - see ch.5, para.5.3.5.

³⁸ See Gardner S 'Proprietary Effect of Contractual Obligations' (1982) 98 LQR 279, p.318.

³⁹ *Ibid.*, where Gardner indicates that the public policy interest is also manifests itself in, e.g., the device of overreaching, and in the notion of privity of contract.

⁴⁰ *Ibid.*, p.319.

⁴¹ This ran from 1825 to 1870 - see further ch.3, para.3.1.

that such a highly committed champion of law reform,⁴² would have wished prevent the Chancery court from ever being able to ‘enforce an equity’ beyond what was allowed at common law.⁴³ Whatever Lord Brougham’s true intention, his observation that land owners should not be able to impose any obligation they fancy is still accepted as one of the essential parameters in current proposals for land obligation reform.⁴⁴

3.2.2 *Whatman v. Gibson*

It has been suggested, presumably because of subsequent cases, that there was a body of conveyancing opinion which remained opposed to *Keppel v. Bailey*.⁴⁵ As later cases were of a very different nature, it may have been more a question of conveyancers seeking to establish the boundaries of that decision. *Whatman v. Gibson*⁴⁶ was heard just four years after *Keppel v. Bailey*, but concerned a 1799 deed of mutual covenant (the 1799 deed). That deed related to land on the sea cliff in Ramsgate, Kent, which may well have been developed because of the vogue that had by then arisen for sea cures and seaside holidays.⁴⁷ The land was divided into lots for building a row of houses, with the front building line being shown on a ‘ground plan’.⁴⁸ It was expressly declared in the deed that it should be a:

‘...general and indispensable condition of the sale of all or any part of the land intended to form such row, that the several proprietors of such land respectively for the time being should observe and abide by the several stipulations and restrictions thereafter contained...’⁴⁹

Ramsgate was a fashionable resort in the 1830s⁵⁰ and in 1838 an injunction was granted, restraining Gibson from using his house as a hotel in breach of a restrictive obligation in the 1799 deed entered into by his predecessor. The Vice Chancellor, Sir Lancelot Shadwell, in

⁴² See Manchester A, *A Modern Legal History of England and Wales 1750 - 1950*, (n.8), pp.1, 15-16.

⁴³ In his judgement in *Tulk v. Moxhay*, some 14 years later, his successor, Lord Cottenham, thought this could not have been Lord Brougham’s intention - see ch.3, para.3.3.2.

⁴⁴ See ch.4, para.4.8.3.

⁴⁵ See Simpson A, *A History of the Land Law*, (n.26), p.257 & Cornish W and Clark G, *Law and Society 1750 – 1950*, (n.8), p.150.

⁴⁶ (1838) 9 Sim 196, 59 ER 333.

⁴⁷ See Jones R, *Economic and Social History of England 1770 - 1977*, (n.22), p.123. The dispute was between 6 & 7 Nelson’s Crescent, a terrace which is specifically named after a brief account of how Ramsgate became a seaside resort - see Huddleston J, *The Ramsgate Storey*, 1st ed., (Ramsgate: Michaels Bookshop, 2005), p.13.

⁴⁸ At 196.

⁴⁹ At 197.

⁵⁰ See Huddleston J, *The Ramsgate Storey*, (n.47), pp.17-18.

the following passage stressed the importance of notice and the effect on other adjoining properties:

‘I see no reason why such an agreement should not be binding in equity on the parties so coming with notice. Each proprietor is manifestly interested in having all the neighbouring houses used in such a way as to preserve the general uniformity and respectability of the row, and, consequently, in preventing any of the houses from being converted into shops or taverns, which would lessen the respectability and value of the other houses.’⁵¹

The 1799 deed established a communal access area in front of the houses and required that it should be maintained by adjoining owners.⁵² This would presumably have enhanced the ‘respectability’ of the whole row,⁵³ but it remains unclear whether Sir Lancelot Shadwell’s comments were intended to include these positive obligations.⁵⁴

This case is often regarded as an early example of the beginning of, or ‘backcloth’ to, what later came to be known as a building scheme or scheme of development.⁵⁵ In ‘broad terms’ this involves the laying out of an area of land in plots, its development in accordance with a plan and the maintenance of its character and amenities through a system of interlacing covenants.⁵⁶ Schemes of development became important because, if established, they can overcome many of the technical difficulties that ‘bedevil’ the enforceability of restrictive covenants.⁵⁷ The precise grounds of the Vice Chancellor’s decision remain unclear,⁵⁸ as was his reasoning in *Mann v. Stephens*⁵⁹ heard some eight years later.

⁵¹ At 207.

⁵² At 199.

⁵³ For a discussion of Victorian ‘respectability’ in the design of Tyneside Flats see ch.2, para.2.3.3.

⁵⁴ The injunction granted was restricted to the user of the building.

⁵⁵ See Sabey D and Everton A, *The Restrictive Covenant in the Control of Land Use*, (n.17), p.13 and Scamell E, *Land Covenants, restrictive and positive, relating to freehold land, including covenants for title*, 1st ed., (London: Butterworths, 1996), pp.110-111. For an account of the different terminologies used to describe these arrangements see, e.g., Newson G, *Preston & Newson’s Restrictive Covenants affecting Freehold Land*, 9th ed., (London: Sweet & Maxwell, 1998), pp.45-46. See also Gardner S, *An Introduction to Land Law*, 2nd ed., (Oxford: Hart, 2009), p.178, fn 12.

⁵⁶ See Sabey D and Everton A, *The Restrictive Covenant in the Control of Land Use*, (n.17), p.13. *Roper v. Williams* (1822) T & R 18, 37 ER 999 was one of the earliest cases involving a building scheme. In this case an injunction to restrain the breach of an obligation requiring buildings to be erected in accordance with a general plan was refused, because the plaintiff had acquiesced in a partial deviation from the plan.

⁵⁷ See Gray K and Gray S, *Elements of Land Law*, 5th ed., (Oxford: OUP, 2009), pp.282 & 286.

⁵⁸ For a discussion of the rationale see Scamell E, *Land Covenants*, (n.55), pp.111 & 115.

⁵⁹ (1846) 15 Sim 377, 60 ER 665.

3.2.3 *Mann v. Stephens*

The decade between 1831- 1841 saw the second highest percentage increase in house building in the nineteenth century.⁶⁰ In 1838, a builder sold one of the three houses he had built on a plot of land in Gravesend, Kent, a very favoured area with steamboats plying between Gravesend and London and huge numbers of visitors.⁶¹ In the conveyance the builder agreed with the purchasers, on behalf of himself, ‘his heirs and assigns’, that his adjoining piece of land (the ‘retained land’) should remain as a shrubbery or garden, that only a private house or ornamental cottage should be built on that part called the Dell, and even then only so as to be an ornament to the surrounding property. Both areas of land passed to new purchasers, the purchaser from the builder entering into a fresh covenant with the builder in similar terms to the builder’s covenant. Stephens, a later purchaser of the retained land started to build a beer-shop and brewery in breach of the covenant. Mann, a subsequent purchaser of the house, sought an injunction on the grounds that Stephens had purchased the land with notice of the covenant.

The case report is very brief, but Sir Lancelot Shadwell indicated that the erection of a beer-shop and brewery was a ‘gross violation of the covenant.’ He therefore granted an injunction to restrain Stephens from erecting on the retained land any brewery or other building except one private house or ornamental cottage, to be erected in The Dell, and so as to be an ornament, rather than otherwise, to the surrounding property.⁶² On appeal, the Lord Chancellor, Lord Cottenham considered that the injunction was properly granted, but directed that it should be varied, by omitting the words ‘and which shall be ornamental, rather than otherwise, to the surrounding property,’ as being ‘too indefinite’.⁶³

It may that, as Dicey’s period of ‘individualism’ advanced, the judiciary felt more inclined to judge each case on its merits.⁶⁴ Another possible factor is that Lord Cottenham had replaced Lord Brougham as Lord Chancellor in 1836 before either *Whatman v. Gibson* or *Mann v. Stephens* was heard, but it seems probable that the change in attitude towards notice had more

⁶⁰ See Burnett J, *A Social History of Housing*, 2nd ed., (London: Routledge, 1986), p.16.

⁶¹ Over one million visitors were said to have landed in 1840 - see Woods W, *The Gravesend Chronology Pt II 1701-1900*, 4th imp., (Great Malling, Kent: Kent CC, 1980), p.31.

⁶² At 378 & 379. There is no record that Sir Lancelot Shadwell based his decision on notice, but counsel for Mann relied on notice in their argument, at 378, and cited *Whatman v. Gibson* in support.

⁶³ At 379.

⁶⁴ The period began in 1825 and ended in 1870 - see ch.1, para.3.1.

to do with the nature of the property than with the change in Lord Chancellors.⁶⁵ As Gardner has pointed out, amenity protection is ‘ex facie’ a more meritorious object than the illegal arrangement in *Keppel v. Bailey*, and one which must have seemed particularly compelling in the Victorian era, when at once there was both great urbanisation and a middle class with rising expectations of a ‘commodious existence’.⁶⁶

It has been suggested that the only reason why *Mann v. Stephens* is not treated as the leading case is that Lord Cottenham’s reasons are not fully reported.⁶⁷ This seems likely, particularly if Lord Cottenham did in fact make detailed comments on why the ‘positive’ requirement of the injunction should be deleted. The baldly reported statement that this part of the injunction was ‘too indefinite’ implies that had more specific building obligations been stipulated in the documentation, they could have been included in the injunction. Nevertheless, *Mann v. Stephens* has been described as the watershed in the law’ and the case which ‘paved the way’ for *Tulk v. Moxhay*,⁶⁸ discussed in the next section.

3.3 Tulk v. Moxhay

3.3.1 Introduction

The last decades of the eighteenth century and early decades of the nineteenth century saw both a rapid increase in population and concentration in the industrial towns of northern England and major cities, particularly London. In each of the five decades between 1801 and 1851 London’s population increased by seventeen per cent.⁶⁹ Open spaces such as gardens, courtyards and corner sites were quickly built on by speculative builders anxious to make money from renting houses.⁷⁰ At the same time, and in opposition to a prevailing environment of slum housing and factories, an affluent urban middle class was anxious to

⁶⁵ The change in Lord Chancellors has been mentioned by a number of commentators implying, but not explicitly stating, that this may have accounted for the change in attitude- see, e.g., Bell C, ‘Tulk v. Moxhay Revisited’ [1981] 45 Conv. 55, p.55 & Simpson A, *A History of the Land Law*, (n.26), p.257.

⁶⁶ See Gardner S ‘Proprietary Effect of Contractual Obligations’, (n.38), p.319.

⁶⁷ See Simpson A, *A History of the Land Law*, (n.26), p.258.

⁶⁸ See Sabey D and Everton A, *The Restrictive Covenant in the Control of Land Use*, (n.17), p.15.

⁶⁹ See Wohl A, *The Eternal Slum Housing and Social Policy in Victorian London*, 1st ed., (London: Edward Arnold, 1977), p.1. See also Gardner S, *An Introduction to Land Law*, (n.55), p.179, fn 15. For details of the rise in population of Newcastle and Gateshead between 1801 & 1911, see thesis Appendix I.

⁷⁰ See Gauldie E, *Cruel Habitations A History of Working - Class Housing 1780-1918*, 1st ed., (London: George Allen & Unwin, 1974), pp.83 & 88 &, e.g., Englander D, *Landlord and Tenant in Urban Britain 1838-1918*, 1st ed., (Oxford: Clarendon, 1983), p.x.

create enclaves of middle class housing with a pleasant internal and external environment.⁷¹ An especially useful way of creating such an enclave was the building of a square,⁷² the central feature in *Tulk v. Moxhay*,⁷³ one of the ‘most influential’ decisions in real property law.⁷⁴ The case was heard in 1848, but concerned an 1808 conveyance by Charles Tulk to Charles Elms of a vacant piece of land in Leicester Square, London. In the conveyance Elms entered into the following obligation:

‘...that he, the said Charles Elms, his heirs and assigns, shall and will, from time to time and at all times hereafter, at his and their own proper costs and charges, keep and maintain the said piece of ground and square garden, and the iron railing round the same, in its present form, and in sufficient and proper repair, as a square garden and pleasure ground, in an open state and uncovered with any buildings, in a neat and ornamental order; ...’⁷⁵

The obligation went on to provide that the inhabitants of Leicester Square, namely Tulk, his father and their tenants should, on payment of a reasonable rent, be able to have keys and therefore access to the square garden. In 1848 the land was conveyed to Moxhay, who wished to make diagonal walks across the square and who claimed the right to remove the railings and trees and to erect buildings. Tulk still owned land in the vicinity and sought an injunction from the Chancery Court to restrain Moxhay, who knew of the obligation, from using the land in a manner ‘inconsistent with its use as an open garden and pleasure –ground.’ An injunction was granted by the Master of the Rolls, Lord Langdale, but he was not prepared to require that the land be kept ‘in a neat ornamental order’. On appeal, the Lord Chancellor, Lord Cottenham, upheld Lord Langdale’s judgement. The main argument, in effect, centred on the extent to which a purchaser’s ‘conscience’ should be affected by notice.

3.3.2 Conscience and Notice

Moxhay’s counsel said that the obligation did not run at law and, citing *Keppel v Bailey* in support, argued that notice did not give the equitable court jurisdiction to intervene.⁷⁶

Towards the end of his judgement, Lord Cottenham indicated that in his view Lord

⁷¹ See Gardner S, *An Introduction to Land Law*, (n.55), p.179.

⁷² Ibid.

⁷³ (1848) 11 Beav 571, 50 ER 937, affirmed (1848) 2 Ph774, 41 ER 1143.

⁷⁴ See Bell C, ‘Tulk v. Moxhay Revisited’, (n.65), p.29.

⁷⁵ (1848) 11 Beav 571 at 571

⁷⁶ (1848) 2 Ph 774 at 776.

Brougham, ‘...never could have meant’ to lay down that the Chancery Court would not enforce an ‘equity’ attached to land by the owner, ‘unless under such circumstances as would maintain an action at law.’⁷⁷ He then went on to hint that Lord Brougham’s intentions might not have been entirely clear by saying that ‘If that be the result of his observations, I can only say that I cannot coincide with it.’⁷⁸ For Lord Cottenham the question was not whether the obligation ran with the land, but whether ‘a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, and with notice of which he purchased.’⁷⁹ Notice was therefore all important for if ‘an equity’ is attached to property ‘no one purchasing with notice of that equity can stand in a different situation from the party from whom he purchased.’⁸⁰

Although the word ‘conscience’ does not appear in Lord Cottenham’s judgment, equity intervened because the conscience of the purchaser was affected by notice.⁸¹ Interlinked with a ‘conscious based’ interpretation of the decision are those which rely on a proprietary or ‘unjust enrichment’ analysis.⁸² As to the former, if a purchaser could disregard a known obligation he would ‘stand in a different situation from the party from whom he purchased.’⁸³ As to the latter, by granting an injunction, an unfair or unconscionable profit could be avoided and ‘nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.’⁸⁴ Simpson thought this reasoning was not ‘particularly convincing’. If a sale of the land to a person who took free of the obligation was objectionable because of unfair profit ‘this would be a reason for penalising the vendor, not the vendee, for the unfair profit was destined for his pocket.’⁸⁵ However, it is difficult to see in what sense either party can properly be said to be ‘penalised’, when both entered into the transaction knowing of the obligation. Different approaches to the decision tend to depend on what view is taken of the interaction between private property rights and laissez-faire on the control of land use.

⁷⁷ Ibid, at 779.

⁷⁸ Ibid. See ch.3, para.3.2.1, for a discussion of different interpretations of Lord Brougham’s judgment.

⁷⁹ (1848) 2 Ph 774 at 777 - 778.

⁸⁰ Ibid at 778.

⁸¹ ‘Conscience’ was explicitly discussed by Lord Brougham in *Keppel v. Bailey* - see ch.3. para.3.2.1.

⁸² See further Gray K and Gray S, *Elements of Land Law*, (n.57), paras 3.4.12 – 3.4.14.

⁸³ In other words, Lord Cottenham was relying on the principle *Nemo dat quod non habet* – see Simpson, *A History of the Land Law*, (n.26), pp.258-259.

⁸⁴ (1848) 2 Ph 774 at 778.

⁸⁵ See Simpson, *A History of the Land Law*, (n.26), pp.258-259.

3.3.3 Private Property, Laissez-faire and the Control of Land Use

Both the original hearing of *Tulk v. Moxhay* and its appeal were heard in December 1848, a turbulent year for Britain⁸⁶ and Europe.⁸⁷ However, in Britain, the more prosperous found some refuge in a widely accepted belief in the sanctity of private property, which provided a barrier against the rebellious, and feared, millions without property.⁸⁸ In this climate the courts might perhaps be expected to be sympathetic to private amenity rights,⁸⁹ although, to some extent, by imposing an obligation on Moxhay, the court's decision ran counter to a prevailing free market, laissez-faire ideology.⁹⁰ Free marketeers had obtained a 'symbolic free trade victory' with the abolition of the Corn Laws in 1846, just two years before *Tulk v. Moxhay* was heard.⁹¹ Lord Cottenham's decision to grant an injunction, which potentially restricted the use of Leicester Square indefinitely, appeared to run counter to the prevailing economic ethos. Ironically, however, by interfering with the free market, or alienability, of the square, Lord Cottenham 'freed up' the retained land itself. As he said, if the court could not intervene, 'it would be impossible for an owner of land to sell part of it without incurring the risk of rendering what he retains worthless.'⁹² This dichotomy reflects the complexity of laissez-faire and exemplifies both that 'one man's laissez-faire is another man's intervention'⁹³ and that maintenance of laissez-faire sometimes requires government, or in this case the court's, involvement.⁹⁴

⁸⁶ In this year the 'chartists', whose demands included an extension of the franchise, had finally been defeated when a mass gathering in London was disbanded. – see, e.g., Charlton J, *The Chartists The First National Workers Movement*, 1st ed., (London: Pluto Press, 1997), ch.5, Dicey A, *Law and Public Opinion*, (n.9), p.182, Hudelson R, *The Rise and Fall of Communism*, 1st ed., (Oxford: Westview Press, 1993), p.15. The artistic climate was also unsettled. The Pre-Raphaelite Brotherhood, which decided to overthrow the established order of the Royal Academy Schools, was founded in 1848 - see Batchelor J, *Lady Trevelyan and the Pre-Raphaelite Brotherhood*, 1st ed., (London: Chatto & Windus, 2006), ch.5.

⁸⁷ In 1848 revolutionary movements had swept through 'nearly all' European countries – see, e.g., Hudelson R, *The Rise and Fall of Communism*, (n.86), p.26.

⁸⁸ See Gaudie E, *Cruel Habitations*, (n.70), p.117, where she states that 'rights of property were supported 'quite as much' by the artisan. When Tyneside Flats came to be built later in the century, they were generally tenanted by 'artisans' –see thesis ch.2, para.2.4.3.

⁸⁹ At that time Leicester Square had locked gates. Dicey suggested that the judiciary are 'inevitably' influenced by the beliefs and feelings of their time - see Dicey A, *Law and Public Opinion*, (n.9), p.363.

⁹⁰ For a general account of laissez-faire in this period see Cornish W & Clark G, *Law and Society in England 1750 – 1950*, (n.8), pp.63 - 68.

⁹¹ See May T, *An Economic and Social History of Britain 1760 - 1990*, (n.11), p.208 & see pp.116 - 119 for an account of the build up to the abolition of the Corn Laws.

⁹² (1848) 2 Ph 776 at 777.

⁹³ See Taylor A, *Laissez-faire and State Intervention in Nineteenth – century Britain*, 1st ed., (London: Macmillan, 1972), p.12.

⁹⁴ Examples of legislation which increased laissez-faire are the 1846 repeal of the Corn Laws mentioned earlier in this section and the 1882 SLA which gave greater powers to tenants for life – see ch.3, para.3.4.11.

The case was heard in the middle of Dicey's period of Benthamism or individualism. Bentham's individualist leaning led him to insist that individual and private property were essential.⁹⁵ Maintaining the value of Tulk's retained land can be seen as being in accordance with this aspect of Bentham's views. However, the judgment has remained controversial in its implications for land use. For some *Tulk v. Moxhay* appeared to overlook the wider implications for the development of land,⁹⁶ whilst for others, far from leading to the sterilization of land use, it can be seen as promoting its commerciability.⁹⁷ The enforceability of restrictive obligations is likely to be of even more acute concern in the twenty first century for property owners living in close proximity in horizontally divided property.⁹⁸ The same is also true for positive obligations, another area where the implication of the judgment have been disputed.

3.3.4 Positive and Restrictive Obligations

If notice is the determining factor, this would result in successors in title being bound by positive as well as negative obligations. Simpson appeared to be in little doubt that this was the import of *Tulk v. Moxhay* and that all Lord Cottenham's reasoning would apply both to positive and negative obligations.⁹⁹

Conflicting academic arguments on the scope of *Tulk v. Moxhay* have tended to focus on whether a mandatory injunction, requiring the upkeep of the square, was an available remedy.¹⁰⁰ However, even if it is accepted that Lord Cottenham could have granted a mandatory injunction, it does not necessarily follow that, as has been suggested,¹⁰¹ he would have felt it necessary to do so. Even though, at first instance, Lord Langdale did not specifically direct that the gardens should be kept in a neat and ornamental order, he explicitly stated that Moxhay could not leave the square 'in that foul and disgraceful state'

⁹⁵ See Dias R, *Jurisprudence*, 5th ed., (London: Butterworths, 1985), p.428.

⁹⁶ See, e.g., Burns F, 'Lord Cottenham and the Court of Chancery' (2003) 24 LH 187, p.204 and Simpson A, *A History of the Land Law*, (n.26), p.259.

⁹⁷ See, e.g., Gray K and Gray S, *Elements of Land Law*, (n.56), pp.260 - 261 and Sabey D and Everton A, *The Restrictive Covenant in the Control of Land Use*, (n.17), p.10.

⁹⁸ See ch.8, para.8.3.6 for a discussion of the 'one family only' user clause in the standard Tyneside Flat lease.

⁹⁹ See Simpson, *A History of the Land Law*, (n.26), p.258.

¹⁰⁰ See Bell C, 'Tulk v. Moxhay Revisited', (n.65), p.59, Griffith R, 'Tulk v. Moxhay Reclarified' [1983] 47 Conv. 29, pp.32-34 and Bell C, 'Correspondence' [1983] 47 Conv. 327, p.328.

¹⁰¹ See Griffith R, 'Tulk v. Moxhay Reclarified', (n.100), p.32.

and that he would find that ‘he must now do something to prevent it.’¹⁰² It is not clear why Lord Langdale felt able to make this assertion, but it may help explain the apparent inconsistency between the broad tenor of Lord Cottenham’s reasoning and the more limited wording of the injunction he, in effect, approved. Lord Cottenham may simply have thought that no amendment was necessary. Academic opinion generally seems to lean towards the original decision applying to both positive and restrictive obligations, particularly in the light of subsequent cases discussed in the next section.¹⁰³

3.4 Application of *Tulk v. Moxhay*

3.4.1 Introduction

Tulk v. Moxhay is now seen as the definitive case which established the modern doctrine of restrictive obligations.¹⁰⁴ Subsequent cases suggest that, at the time, its scope was uncertain and that the ‘digestive process’ for this new proprietary interest was ‘long and uneasy.’¹⁰⁵ This section discusses that digestion from the 1850s to the 1880s, beginning in the middle of Dicey’s period of individualism, a confident era,¹⁰⁶ when *Tulk v. Moxhay* was applied both to immovable property and positive obligations. This broad application extended into Dicey’s period of collectivism¹⁰⁷ but, in the early 1880s, previous ‘gallant attempts’ to apply *Tulk v. Moxhay* to positive obligations were brought to an ‘abrupt halt’.¹⁰⁸ The leading 1880 cases, which culminated in what came to be known as ‘the rule in *Austerberry v. Oldham*

¹⁰² (1848) 11 Beav 571 at 586.

¹⁰³ See, e.g., Gray K and Gray S, *Elements of Land Law*, (n.57), pp.260 - 261 and Newsom G, *Preston & Newsom’s Restrictive Covenants*, (n.55), p.67, which suggests that the position was not ‘perfectly clear’ until *Haywood v. Brunswick Permanent Benefit Building Society*, discussed in thesis ch.3, para.3.4.4.

¹⁰⁴ See Manchester A, *A Modern Legal History of England and Wales 1750-1950*, (n.8), p.321. Although Sparkes concluded that ‘in truth’ *Tulk v. Moxhay* was a ‘clean break’ with the past (see Sparkes P, *A New Land Law*, 2nd ed., (Oxford: Hart, 2003), p.732), *Whatman v. Gibson* and *Mann v. Stephens*, to which he refers and which are discussed in thesis ch.3, para.3.2, suggest this is not so. Academic opinion has long considered that *Tulk v. Moxhay* was ‘no novelty’ – see, e.g., Behan J, *The Use of Land as affected by Covenants and Obligations not in the form of Covenants*, 1st ed., (London: Sweet & Maxwell, 1924), p.20 and Elphinstone L, *Covenants Affecting Land*, 1st ed., (London: Solicitors’ Law Stationary Society, 1946), p.71.

¹⁰⁵ See Wade H, ‘Licences and Third Parties’ (1952) 68 LQR 337, p.349.

¹⁰⁶ *De Mattos v. Gibson* was heard in 1859. This was in the same decade as the Great Exhibitions of 1851, which became a symbol of the ‘generation of great prosperity that lay ahead’ - see Jones R, *Economic and Social History of England 1770-1977*, (n.22), p.82. *De Mattos v. Gibson* is discussed in ch.3, para.3.4.2.

¹⁰⁷ *Cooke v. Chilcott* was heard in 1876 – see further ch.3, para.3.4.3. The extension of a broad application of *Tulk v. Moxhay* over more than one of Dicey’s periods of public opinion perhaps exemplifies how those periods overlap – see ch.3, para.3.1.

¹⁰⁸ See Burn E & Cartwright J, *Maudsley & Burn’s Land Law Cases & Materials*, 9th ed., (Oxford: OUP, 2009), p.753.

Corporation',¹⁰⁹ are considered in the light of possible non judicial influences, particularly increased parliamentary authority and the 'free land' movement.

3.4.2 Immovable Property.

Coal export was a significant feature of the industrial development in north eastern England in the second half of the nineteenth century¹¹⁰ and was central to the dispute in *De Mattos v. Gibson*.¹¹¹ In 1858 De Mattos chartered a ship from Currey for the transport of coal from the Tyne. Currey then mortgaged his ship to Gibson but, because Gibson knew of the charter, it was decided that the principles of *Tulk v. Moxhay* could apply. Accordingly, Gibson could be restrained by injunction from doing anything contrary to the terms of the charter. Although, at the time of the charter party, the parties should have, known of *Tulk v. Moxhay*, the application of *Tulk v. Moxhay* principles to immovable property can seem surprising.¹¹² However, when the *De Mattos* appeal was heard in 1859, individualism was at its height¹¹³ and the case has been used as an example of how the courts supported *that* aspect of Benthamite individualism, which involved throwing off any restraints on freedom of trade or contract.¹¹⁴ *De Mattos v. Gibson* encouraged the application of *Tulk v. Moxhay* principles to other cases that did not require appurtenant land.¹¹⁵ It may also have helped create a climate in which *Tulk v. Moxhay* came to be applied to positive obligations in the next decade.

3.4.3 Positive Obligations

*Morland v. Cook*¹¹⁶ was heard in 1868, but concerned a 1794 deed of partition of land in Romney Marsh on the Sussex and Kent coast. It is not clear why the land was partitioned at this time,¹¹⁷ but it is known that for centuries low lying land in this area had been protected

¹⁰⁹ See Newsom G, *Preston & Newsom's Restrictive Covenants*, (n.55), p.65.

¹¹⁰ See ch.2, para.2.2.2.

¹¹¹ (1858) 4 De G & J 276, 45 ER 108.

¹¹² See Simpson A, *A History of the Land Law*, (n.26), p.259.

¹¹³ See, e.g., Smiles S, *Self-Help*, IEA ed., (London: The Institute of Economic Affairs Health & Information Unit, 1996). This very influential book was originally published in 1859. It has been described as a 'bible of self-improvement' and encouraged qualities such as independence and individual effort – see May T, *An Economic and Social History of Britain 1760 - 1990*, (n.11), pp.231 – 232.

¹¹⁴ See Behan J, *The Use of Land as affected by Covenants and Obligations*, (n.104), p.23.

¹¹⁵ See ch.3, para.3.5.2.

¹¹⁶ (1868) LR 6 Eq 252.

¹¹⁷ But it may have been connected to the increase in agricultural cultivation and prices, which was largely caused by the 'peculiar conditions' of the French Wars (1793-1815) - see May T, *An Economic and Social History of Britain 1760 - 1990*, (n.11), p.113.

against sea encroachment.¹¹⁸ Accordingly, at the time of the partition, the freehold owners of five adjoining holdings mutually covenanted that an existing sea wall, which was for the common benefit of them all, should be repaired and maintained at the expense of the owners for the time being of the holdings, that the expenses should be born rateably, and that the expense of each owner should be a charge upon his holding. In 1862 Cook purchased part of the land comprised in the 1794 deed, but refused to contribute to the cost of previous repairs. An adjoining owner, Morland, brought proceedings to obtain a contribution.

Because a sea wall was involved, Cook was held to have constructive notice of the obligation.¹¹⁹ Lord Romilly MR emphatically considered that no distinction should be drawn between *Tulk v. Moxhay* and the present case, on the ground that in *Tulk v. Moxhay* the obligation was that the proprietor should *not* use the land in a particular manner, and that here the obligation was that he *should* contribute his quota to a ‘common benefit’.¹²⁰ Having said that in his opinion there was ‘no distinction between the two cases’,¹²¹ Lord Romilly said that if a distinction were to be made it favoured Morland because in *Tulk v. Moxhay* it was simply a burden imposed on the land without any corresponding advantage, whereas here the burden enabled the proprietor to obtain ‘the assistance of the adjoining owners to concur with him in doing that without which his land could not be enjoyed at all.’¹²² As has been pointed out, this can be seen as an early ‘benefit and burden’ case, namely that a person who wished to take the benefit of a deed had to submit to its burdens.¹²³

The ‘inconvenience’ of *Morland v. Cook* was later circumvented by the Court of Appeal in *Austerberry v. Oldham Corporation*,¹²⁴ on the basis that a rentcharge had been created.

¹¹⁸ See Tooley M, ‘Romney Marsh: The Debatable Ground’ in Eddison J (Ed), *Romney Marsh The Debatable Ground*, 1st ed., (Oxford: Oxford Committee for Archaeology, 1993), p.3.

¹¹⁹ At 267. This was because Cook was bound to enquire by whom the wall was maintained and must therefore be held to have had notice of all he would have learned, including the existence of the obligation, had he made enquiry.

¹²⁰ At 266. The common benefit here was for the five adjoining owners but, because the sea wall enabled the land to be more agriculturally productive, might also have then been perceived as being in the public interest. To some extent this resonates with Bentham’s basic principle of utility, namely that the public good ought to be the foundation of legislation - see Bentham J, *Theory of Legislation*, 1st ed., (London: Trubner, 1876), p.1.

¹²¹ At pp.265 - 266.

¹²² At 266.

¹²³ See Griffith R, ‘Tulk v. Moxhay Reclarified’, (n.100), pp.34 - 35. Support for this view is to be found in Lord Romilly’s comment that it was unnecessary for him to enquire if Cook had constructive notice of the obligation (at 266), although he later held that he did (at 267). See ch.5, para.5.4.6 for a discussion of benefit and burden cases as a Tyneside Flat conveyancing device.

¹²⁴ (1885) 29 ChD 750 CA & see ch.3, paras 3.4.9 – 3.4.11.

This was because the obligation required the parties to pay for the maintenance of the sea wall by way of an acre-scot,¹²⁵ which was ‘really’ a grant by each of the parties of a rentcharge of his proportion of the total expense of repairing the sea wall.’¹²⁶ As Lord Brougham had pointed out in *Keppel v. Bailey*, a rent ‘issuing out’ of the fee simple was one of the ‘known incidents’ to the enjoyment of property¹²⁷ and the partitioned lands in *Morland v. Cook* were themselves subject to apportioned rentcharges.¹²⁸ The Court of Appeal’s later construction therefore has the merit of according with what the drafter of the 1794 could reasonably be expected to have had in mind long before *Tulk v. Moxhay* was decided.

*Cooke v. Chilcott*¹²⁹ was heard in 1876, but concerned an obligation contained in an 1849 conveyance. Although the first Public Health Act had been passed in 1848, it proved easy for local authorities to evade their responsibilities for the supply of adequate water, sewage and waste disposal services.¹³⁰ These difficulties may have been anticipated by one of Cooke’s predecessors in title when, in 1849, he conveyed land, with a well or spring on it. Because Cooke’s predecessor had retained adjoining land intended to be used for building sites, he required his purchaser to enter into an obligation to erect a pump and reservoir on the conveyed land and, for an agreed sum, to supply water from the well to all houses to be built on the vendor’s retained land. In 1857, Chilcott bought the land with notice of the obligation and supplied water to the retained land for 19 years, before ceasing to do so. Cooke had built two houses on the retained land and sought an injunction to restrain Chilcott from leaving the houses without an adequate water supply.

Malins VC held that Chilcott was bound by the positive obligation. Although the Court would not decree specific performance directly, as it could not superintend the construction of works, it could be enforced indirectly by an injunction restraining Chilcott from allowing the work to remain unperformed. The Court of Appeal affirmed the decision of the Vice-Chancellor, apparently because Chilcott had admitted liability in the pleadings. Malins VC

¹²⁵ I.e. a payment or charge rated at so much per acre.

¹²⁶ Per Cotton LJ, at 775.

¹²⁷ (1834) 2 My & K 517, at 535.

¹²⁸ At 253. The case report refers to the lands being subject to ‘quit rents’ or ‘fee farm rents’, which have long been regarded as rentcharges – see Law Commission, *Transfer of Land Report on Rentcharges*, (Law Com. No.68), (London: HMSO, 1975), para.10. The statutory definition of a rentcharge is contained in thesis ch.5, para.5.4 .5, which also discusses rentcharges as a Tyneside Flat conveyancing device.

¹²⁹ (1876) 3 ChD 694.

¹³⁰ See Jones R, *Economic and Social History of England 1770-1977*, (n.22), p.108. The 1866 Sanitary Act subsequently required services to be provided and was strengthened by Disraeli’s 1875 Public Health Act - see Jones, *ibid.* For an account of Newcastle’s ‘laissez-faire’ approach to Public Health Acts see ch.2, para.2.2.6.

considered that the covenant ran with the land, but that this was ‘immaterial’ because Chilcott ‘took with notice of the obligation.’¹³¹ Griffith agrees that a positive covenant was enforced, but dismisses the case as being made by a ‘talkative judge who made numerous other mistakes’ and whose decisions were ‘frequently overruled’.¹³²

3.4.4 *Haywood v. The Brunswick Permanent Benefit Building Society*

*Haywood v. The Brunswick Permanent Benefit Building Society (Brunswick)*¹³³ was heard in 1881, but concerned an 1866 conveyance of land in the Manchester area. As was a common practice there, especially before the ready availability of building society funds, the purchaser financed his purchase by paying the vendor an annual rentcharge.¹³⁴ The purchaser also agreed to build and keep in repair buildings on the land to a specified value. In 1867 Haywood became entitled to the benefit of the rentcharge. The increasing role of the building society movement was evidenced when, in 1871, a later purchaser mortgaged the premises to the trustees of the Brunswick Building Society, subject to the rentcharge and obligations.¹³⁵ In 1874 the first comprehensive Building Societies Act was passed¹³⁶ and the Brunswick was incorporated under its provisions. The Brunswick subsequently took possession of the land and buildings under the provisions of its mortgage deed.¹³⁷ Although buildings of the required value had been erected, they had not been kept in repair. Haywood took action against the Brunswick for enforcement of the repairing obligation.

At the Manchester Winter Assizes, after referring to the ‘ordinary rule’ that those in possession of land were bound to perform land obligations of which they have notice, Stephen J said that he could see ‘no reason’ why there should be any distinction between an equity to use property, or to abstain from using it, in a particular way and a liability to repair.

¹³¹ At 701 & also 700.

¹³² See Griffith R, ‘Tulk v. Moxhay Reclarified’, (n.100), pp.36 - 37. *Cooke v. Chilcott* was overruled in *Austerberry v. Corporation of Oldham* - see ch.3, para.3.4.9.

¹³³ (1881) 8 QB 403 CA.

¹³⁴ See, e.g., Harpum C et al (Eds), *The Law of Real Property by Megarry and Wade*, 7th ed., (London: Sweet and Maxwell, 2008), p.1319 and Sparkes P, *A New Land Law*, (n.104), p.43. The payment was called a ‘chief rent’ which is how rentcharges are sometimes described - see Law Commission, *Transfer of Land Report on Rentcharges*, (n.127), para.10.

¹³⁵ See, e.g., Boddy M, *The Building Societies*, 1st ed., (London: Macmillan, 1980), ch.1 and Boléat M, *The Building Society Industry*, 1st ed., (London: George Allen & Unwin, 1982), ch.1 for a brief history of the origins and evolution of building societies. For an account of the role of building societies in the building of Tyneside Flats, see thesis ch.2, para.2.4.2.

¹³⁶ See Boléat M, *The Building Society Industry*, (n.135), p.4.

¹³⁷ Perhaps because the economy had faltered after 1874 - see Boddy M, *The Building Societies*, (n.135), p.10. However, the precise state of the economy has been questioned – see f.n.143 below.

Such a distinction would be ‘directly opposed’ to *Cooke v. Chilcott*.¹³⁸ Although the drafter of the 1866 conveyance could not have known of that case, he should have been aware of *Tulk v. Moxhay* and *De Mattos v. Gibson* and therefore might have expected subsequent lenders with notice to be bound. However, the decision was reversed by the Court of Appeal for what Bell has described as ‘rather unconvincing’ reasons.¹³⁹ The court was clearly concerned that, with the possible exceptions of *Morland v. Cook* and *Cooke v. Chilcott*, only restrictive obligations had been enforced.¹⁴⁰ Bell explains the decision by saying that the principle laid down in *Whatman v. Gibson*, *Mann v. Stephens* and *Tulk v. Moxhay* was still at a ‘formative stage’, that there was little authority upon which to assert that the burden of a positive obligation could run with freehold land in equity and that the court may have refrained from endorsing the latter principle because of an inability to comprehend fully the consequences which would flow from so doing.¹⁴¹ Brett LJ appeared to consider that the class of obligations ‘comprehended’ by *Tulk v. Moxhay* was limited to those ‘restricting the mode of using the land’ and that if they ‘enlarged’ the rule they would be making a ‘new equity’ which ‘we cannot do.’¹⁴² Apart from legal concerns about the intended scope of *Tulk v. Moxhay*, the court may also have felt constrained by the different atmosphere of the 1880s. Although a less buoyant economy may have tended to increase judicial caution,¹⁴³ the expanding role of parliament and the ‘free land’ movement’ may well have been more influential.

3.4.5 Increasing Legitimacy and Role of Parliament

In 1867 the Representation of the People Act extended the franchise to better-off urban workers. This has been said to have ‘touched off’ a series of major reforms in the ministries of Gladstone and Disraeli in the 1870s and 1880s.¹⁴⁴ In the years preceding *Haywood v.*

¹³⁸ At 404.

¹³⁹ See Bell C, ‘*Tulk v. Moxhay Revisited*’, (n.65), p.59.

¹⁴⁰ At 408 - 409, per Cotton LJ.

¹⁴¹ See Bell C, ‘*Tulk v. Moxhay Revisited*’ (n.65), pp.59 - 60. This was the concern of Lord Brougham in *Keppel v. Bailey* – see ch.3, para. 3.2.1 and is a criticism of Lord Cottenham’s comments in *Tulk v. Moxhay* – see Simpson A, *A History of Land Law*, (n.26), p.259.

¹⁴² At 408.

¹⁴³ It has been suggested that ‘at most’ there ‘may’ have been some slowing down in the rate of economic growth – see McCord N and Purdie B, *British History 1815 – 1914*, 2nd ed., (Oxford: OUP, 2007), p.353. However, the 1878 crash of the Bank of Glasgow is some evidence of less certain economic times – see Crick W and Wadsworth J, *A Hundred Years of Joint Stock Banking*, 2nd ed., (London: Hodder & Stoughton, 1936), p.33 and in *Haywood v. Brunswick* the building society had retaken possession.

¹⁴⁴ See Jones R, *Economic and Social History of England 1770-1977*, (n.22), p.168.

Brunswick, state regulation increased in many areas,¹⁴⁵ which often impacted on the rights of private citizens.¹⁴⁶ A further reminder of Parliament's role in promoting increased regulation came from the case itself, which revealed that the *Brunswick* had been incorporated under the 'regulatory' 1874 Building Societies Act. Although not explicitly expressed, increased parliamentary authority and activity might have made the court feel that it was more appropriate for parliament, rather than itself, to create new rights and burdens.¹⁴⁷

3.4.6 Alienability of Land

Creating any 'new equity' has the potential to hinder the alienability of land. Inalienability was then under attack from a number of quarters. It had long been considered an 'evil', since a society in which property was inalienable would be 'stagnant and unproductive.'¹⁴⁸ Evidence of the links between enduring obligations and perpetuities can be seen from contemporaneous textbooks. If these mentioned obligations at all,¹⁴⁹ they seemed to be discussed as an exception to the perpetuity rule,¹⁵⁰ which had been given its 'modern' formula in the 1830s.¹⁵¹ Inalienability had been vigorously attacked in the 'Free Trade in

¹⁴⁵ E.g., in elementary education, factory regulation, local government, public health and trade union reform – see, e.g., Jones R, *Economic and Social History of England 1770-1977*, (n.22), p.168 and Trevelyan G, *English Social History*, 2nd ed., (London: Longmans Green, 1946), p.552.

¹⁴⁶ In the year before *Haywood v. Brunswick* was heard, responsibility for industrial illnesses and accidents was, for the first time, placed on employers by the 1880 Employers Liability Act – see Jones R, *Economic and Social History of England 1770 -1977*, (n.22), p.169.

¹⁴⁷ See Dicey A, *Law and Public Opinion*, (n.9), p.363. These concerns were stated explicitly in the next century in *Rhone v. Stephens* – see ch.3, para.3.5.4.

¹⁴⁸ See Maudsley R, *The Modern Law of Perpetuities*, 1st ed., (London: Butterworths, 1979), p.220.

¹⁴⁹ Neither *Tulk v. Moxhay* or any of the other leading obligation case is mentioned in Williams J, *Principles of the Law of Real Property Intended for the Use of Students in Conveyancing*, 16th ed., (London: Sweet & Maxwell, 1887), even though Joshua Williams, who edited earlier editions, appeared in *Morland v. Cook*, discussed in thesis ch.3, para.3.4.3.

¹⁵⁰ See, e.g., Challis H, *The Law of Real Property: Chiefly in Relation to Conveyancing*, 1st ed., (London: Reeves & Turner, 1885), pp.151-152.

¹⁵¹ In *Cadell v. Palmer* (1833) 1 Cl & F 372, 6 ER 976 & see Maudsley R, *The Modern Law of Perpetuities*, (n.148), p.34. The rule, before 16 July 1964, when it was superseded by the PAA 1964, has been stated as being in two parts namely: (1) A future interest in any type of property will be void from the date that the instrument which attempts to create it takes effect, if there is any possibility that the interest *may* vest or commence outside the perpetuity period (2) For these purposes, the perpetuity period consists of one or more lives in being plus a period of 21 years and, where relevant, a period of gestation - see Law Commission, *The Rules Against Perpetuities and Excessive Accumulations*, (Law Com.No.251), (London: HMSO, 1998), para.1.7. At the time when data was collected the standard Tyneside Flat documentation used, for future easements, the eighty year perpetuity period, introduced by the PAA 1964 – see also ch.8, para.8.3.8, fn 100. S.5 (1) PAA 2009 stipulated a new mandatory period of 125 years, but it is clear from s.1 and the 'Introduction and General Note' to the 2009 Act that the Act only applies to future estates and interests in property that are held on trust. The perpetuities rule therefore no longer applies to commercial interests such as future easements.

Land' literature of the 1870s.¹⁵² In the year before *Haywood v. Brunswick*, one 'free land' author said that his objective was to make the ownership of land accord with the free operation of economic laws,¹⁵³ the ideal of 'Benthamite' reformers being that free trade in land should correspond with the free trade in corn established in the 1840s'.¹⁵⁴ Land registration, begun in the 1860s and improved in the 1870s¹⁵⁵ was expected to facilitate land transfer and was therefore seen as part of the 'free land' movement.¹⁵⁶ Although alienability was not mentioned in the judgment, potential expense, which could affect future alienability, was an explicit concern.

3.4.7 Expenditure

In *Cooke v. Chilcott* Malins VC had rejected any defence based on expense because Chilcott had bought with notice of the obligation to supply water and it was for him to decide if this was too great a burden.¹⁵⁷ Cotton LJ took the opposite view in *Haywood v. Brunswick*. Although the building society knew of the obligation to repair, it could only be enforced by making the owner 'put his hand into his pocket' and there was 'nothing' which would justify the court in going to 'that length.'¹⁵⁸ The suggestion that this is a 'weak' line of argument, because there seems to be no problem with leasehold obligations and no 'unfairness' in burdening a purchaser with notice,¹⁵⁹ was to some extent met by the comments of Lindley LJ. After saying that *Tulk v. Moxhay* and other cases had shown that the courts would only enforce obligations that did not require the expenditure of money, he commented that it would be 'absurd' to suppose that an obligation to repair would be enforced against a tenant from year to year.¹⁶⁰ In linking the expenditure of money with the extent of liability Lindley LJ raised an issue that is still under discussion in current land obligation reform proposals.¹⁶¹ The court was evidently concerned about the broader implications of its judgement, which

¹⁵² See Offer A, *Property and Politics 1870 - 1914*, 1st ed., (Cambridge: CUP, 1981), p.40. This movement was primarily concerned with the 'root evil' of primogeniture, under which the eldest son took the whole landed estate when his father died.

¹⁵³ See Arnold A, *Free Land*, 1st ed., (London: Kegan Paul, 1880), p.12.

¹⁵⁴ See Dicey A, 'The Paradox of the Land Law' (1905) 21 LQR 221, p.227. See also thesis ch.3, para.3.3.3.

¹⁵⁵ The first Land Registration Act was passed in 1867. Significant improvements were made in the 1875 Act. For an overview of land registration history see, e.g., Dixon M et al., *Ruoff & Roper on the Law and Practice of Registered Conveyancing*, loose leaf ed., (London: Thompson Reuters (Legal), 2010), paras 1.003-1.014. See also thesis ch.8, para.8.6.1.

¹⁵⁶ For a discussion of land registration & the standard Tyneside Flat documentation, see thesis ch.8, section 8.6.

¹⁵⁷ (1876) 3 ChD 694, at 700.

¹⁵⁸ (1881) 8 QB 403 at 409.

¹⁵⁹ See Gardner S 'Proprietary Effect of Contractual Obligations', (n.38), pp.294 - 295.

¹⁶⁰ At 410 & 411.

¹⁶¹ See ch.4, para.4.8.7.

inevitably vary depending on the circumstances. Although expenditure of money tends to be associated with positive obligations, an enforceable restrictive obligation preventing, for example, commercial use could prove far more costly than a positive obligation to repair.¹⁶²

3.4.8 *London and South Western Railway Co v. Gomm*

Although the ‘railway age’ is generally thought to have ended in the 1860s, nearly as many miles were built after then as before.¹⁶³ The continuing importance of the railway system was illustrated in *London and South Western Railway Co v. Gomm*.¹⁶⁴ The case was heard in 1882, but concerned an 1865 conveyance, in which the railway company sold and conveyed land adjoining the railway to a Mr Powell. Powell covenanted with the company that he, his heirs or assigns would, when requested by the railway company, re-convey the land. Gomm purchased Powell’s land with notice of the obligation, but refused to re-convey. The railway company sought specific performance of the obligation, as it wished to enlarge the ‘station works’ to meet increased traffic on the line. In contrast to what sometimes occurred in the developing law of nuisance, no suggestion appears to have been made that, because the nation’s transport infrastructure was involved, public interest or public policy considerations ought to be considered.¹⁶⁵

In the first instance, Kay J held that, because Gomm had bought with notice of the obligation, he was bound by it. The drafter of the 1865 conveyance might have anticipated this since Powell had purported to bind his ‘assigns’ and *Tulk v. Moxhay*, but not the cases applying it to positive obligations, had been heard some years previously. Nevertheless, the Court of

¹⁶² E.g., quantitative research data revealed that joint contributions for the repair of Tyneside Flat ‘common installations’ were only required spasmodically – see ch.8, para.8.7.3. Expenditure on repairs is therefore unlikely to be particularly burdensome, and no greater than under the present standard Tyneside Flat lease, if land obligation reform enabled Tyneside Flats to be sold on a purely freehold basis. However, if the ‘one family’ restriction in standard Tyneside Flat leases prevented student lettings, this would potentially have far more serious financial implications for some owners. For a discussion of Tyneside Flat student lettings see thesis ch.8, para.8.3.6.

¹⁶³ See Jones R, *Economic and Social History of England 1770 -1977*, (n.22), p.54. For a discussion of the development of the railways in north east England, see ch.2, para.2.2.3.

¹⁶⁴ (1882) 20 ChD 562 CA.

¹⁶⁵ Although the courts often upheld traditional property rights in nuisance cases, public interest issues were regularly raised throughout the second half of the nineteenth century - see Coyle S & Morrow K, *The Philosophical Foundations of Environmental Law*, 1st ed., (Oxford: Hart, 2004), pp.113 -114. For an indication of how the public interest might have been raised in *London and South Western Railway Co v. Gomm*, see the comments of Bramwell B in *Bamford v. Turnley* (1862) 3 B & S 62 at 85, where he said that ‘It is for the public benefit there should be railways, but it would not be unless the gain of having the railway was sufficient to compensate the loss occasioned by the use of the land required for the site.’ The Bamford case did not involve railways and, in the event, the court upheld private property interests.

Appeal reversed Kay J's decision and came down strongly in support of *Haywood v. Brunswick* which, in the words of Sir James Hannen, had put a 'wholesome restriction' upon the application of *Tulk v. Moxhay*.¹⁶⁶ These comments have been used to suggest that it was not until 1881 that it was conclusively established that only negative obligations came within the equitable doctrine.¹⁶⁷ However, the opposite could be argued from Lindley L J's 'exposition' view¹⁶⁸ that in *Haywood v. Brunswick* it had been sought to 'extend' the doctrine in *Tulk v. Moxhay* to a degree that was 'thought dangerous' and that, when 'properly understood,' *Tulk v. Moxhay* only ever applied to restrictive obligations.¹⁶⁹ *London and South Western Railway Company v. Gomm* has been cited as another case underlining the 'nervousness' of the courts that the principles of *Tulk v. Moxhay* might be 'extended' too far.¹⁷⁰ These conflicting approaches by the other Court of Appeal judges may help explain why Sir George Jessel MR felt the need to rationalise *Tulk v. Moxhay* by saying that the doctrine in that case was 'either an extension in equity of the doctrine of Spencer's case to another line of cases, or else an extension in equity of the doctrine of negative easements.'¹⁷¹ This rationalisation has been much discussed, and much criticised,¹⁷² with Simpson maintaining that, whilst the modern body of law can be viewed as Jessel MR suggests, there is no historical truth in the belief that the decision in *Tulk v. Moxhay* owes 'anything whatever' to these two analogies'.¹⁷³ Jessel MR's comments were, however, influential. This was because in both explanations retention of land by the person having the benefit of the obligation is required, either under Spencer's case as landlord, so that the obligation may run with the land, or as holder of a dominant tenement, the existence of which is a basic requirement for an easement.¹⁷⁴

¹⁶⁶ At 586.

¹⁶⁷ See Bell C, 'Correspondence', (n.100), p.138.

¹⁶⁸ See Griffith R, 'Tulk v. Moxhay Reclarified', (n.100), p.30, fn 9.

¹⁶⁹ At 587 and see also Lindley L J's comments at 586.

¹⁷⁰ See Sabey D and Everton A, *The Restrictive Covenant in the Control of Land Use*, (n.17), p.26. Simpson maintains that Lord Cottenham's broad reasoning in *Tulk v. Moxhay* suggests that it would be wrong to regard the application of *Tulk v. Moxhay* to positive obligations as an 'extension'- see Simpson A, *A History of the Land Law*, (n.26), p.259.

¹⁷¹ At.583. For examples of earlier cases where the analogy of Spencer's case had been used see, e.g., Scamell E, *Land Covenants*, (n.55), pp.8-9. See also pp.9 – 11 *ibid* for a detailed analysis of the analogy of negative easements.

¹⁷² See, e.g., Behan J, *The Use of Land as affected by Covenants and Obligations*, (n.104), pp.43-51, Gardner S 'Proprietary Effect of Contractual Obligations', (n.38), pp.300 - 310 and Sabey D and Everton A, *The Restrictive Covenant in the Control of Land Use*, (n.17), p.27.

¹⁷³ See Simpson A, *A History of the Land Law*, (n.26), p.260.

¹⁷⁴ See Bell C, 'Tulk v. Moxhay Revisited', (n.65), pp.60 – 61 and also the comments of Buckley LJ and Scrutton LJ in *LCC v. Allen*, ch.3, para.3.5.2. For a discussion of Spencer's case see, e.g., Gray K and Gray S, *Elements of Land Law*, (n.57), paras 4.5.34 – 4.5.37 & for a discussion of the need for easements to accommodate the dominant tenement see thesis ch.4 para.4.8.3.

3.4.9 *Austerberry v. Oldham Corporation*

Some of the typical changes that occurred in Britain during the nineteenth century were exemplified in the definitive case of *Austerberry v. Corporation of Oldham*.¹⁷⁵ Although heard in 1885, the case concerned one of five similar 1837 conveyances of strips of land which were then on the outskirts of Oldham. The owners of property adjacent to an old ‘circuitous highway’ decided, perhaps appropriately in Dicey’s period of individualism, that they themselves would construct a more direct route at their own expense. An earlier deed of settlement stated that the proposed new road would be of ‘great public advantage’, that trustees would hold the land on trust for a company and that the company would make up the land as a toll road.¹⁷⁶ The vendor of the strip of land conveyed in 1837 owned adjoining land on either side of it. In the 1837 conveyance, the purchasers covenanted with the vendor, his heirs and assigns that they, their heirs and assigns would make up the road and keep it in repair. The new road, later called Shaw Road, was constructed and maintained for many years by the trustees and their successors. No doubt as a result of Oldham’s rapidly increasing population¹⁷⁷ houses were built on either side of the road. In 1868 the vendor sold his adjoining lands to Austerberry. In 1880, Oldham Corporation, in a process that Dicey might have regarded as symptomatic in this ‘collectivist’ era,¹⁷⁸ purchased Shaw Road pursuant to powers contained in the 1880 Oldham Improvement Act. By this time the area served by Shaw Road had changed from its original agricultural character and become absorbed into the town of Oldham.¹⁷⁹ Austerberry, as a frontager to Shaw Road, was required to contribute to the Corporation’s expenses of making up the road under the Public Health Act 1875. Both Austerberry and the Corporation had bought with notice of the 1837 obligation and Austerberry claimed that he was entitled to enforce the obligation against the Corporation and thus extinguish or diminish his liability. After Austerberry’s claim was dismissed at first instance, he appealed to the Court of Appeal.

¹⁷⁵ (1885) 29 ChD 750 CA.

¹⁷⁶ Many toll roads earlier in the century had been built pursuant to private Acts of Parliament, which created ‘turnpike trusts’ –see, e.g., May T, *An Economic and Social History of Britain 1760 -1990*, (n.11), p.44 & also Trevelyan G, *English Social History*, (n.145), p.382.

¹⁷⁷ Oldham’s population nearly doubled between 1841 and 1871 – see Phillips C and Smith J, *Lancashire and Cheshire from AD 1540*, 1st ed., (London, Longman, 1994), tables 3.3 & 4.3, pp.136 & 229.

¹⁷⁸ See Dicey A, *Law and Public Opinion*, (n.9) p.257.

¹⁷⁹ At 756 &761.

The Austerberry case differed from *Haywood v. Brunswick* and *London and South Western Railway Co v. Gomm* because the deed creating the obligation had been drafted well before *Tulk v. Moxhay* and only shortly after Lord Brougham's judgment in *Keppel v. Bailey* that notice alone would not necessarily, be sufficient to affect the conscience of an 'assignee'. Accordingly, although the trustees in the 1837 conveyance purported to bind their 'heirs and assigns', there must then have been uncertainty as to whether repairing obligations would be enforceable against successors in title. In the event, both Cotton LJ and Lindley LJ ruled more assertively against positive obligations than they had in *Haywood v. Brunswick*. Cotton L J expressly disapproved *Cooke v. Chilcott*,¹⁸⁰ and Lindley L J now felt able to say that this case had been 'so shaken' that he could not rely on it as an authority 'at all.'¹⁸¹ It appears that the *Tulk v. Moxhay* argument that Oldham Corporation was bound by the 1837 obligation because it bought with notice of it was 'very properly' not pressed because of the recent decisions in *Haywood v. Brunswick* and *London & South Western Railway v. Gomm*.¹⁸² There was therefore relatively little discussion of the application of *Tulk v. Moxhay*, although further comments were made on the expenditure of money.

3.4.10 Expenditure of Money

Cotton LJ followed up his observations in *Haywood v. Brunswick* by stressing that the court did not and 'ought not' to require successors of the covenantor to expend sums of money in accordance with what the original covenantor bound himself to do.'¹⁸³ In this case it seems that the work undertaken by the Corporation was more extensive than that contemplated by the 1837 obligation.¹⁸⁴ Lindley LJ therefore considered that, irrespective of the merits of the case, the Corporation 'must be right' as to a 'great portion' of the charges made against Austerberry.¹⁸⁵ The Corporation was acting pursuant to powers given by two statutes, the Public Health Act 1875 and the Oldham Improvement Act 1880, which both have clear public interest connotations. As with *South Western Railway Co v. Gomm*, in contrast to contemporary nuisance cases,¹⁸⁶ such broader issues were not expressed, although in practical

¹⁸⁰ At 774.

¹⁸¹ At 782. This was further than he had been prepared to go in *Haywood v. Brunswick* at 411, when he had been reluctant to 'expressly overrule' *Cooke v. Chilcott*.

¹⁸² See Lindley LJ at 783 & Fry LJ at 785.

¹⁸³ At 774. See also his similar comments at 773 and those of Fry LJ at 785.

¹⁸⁴ At 780.

¹⁸⁵ *Ibid.*

¹⁸⁶ See the discussion of *Bradford v. Pickles* (1895) AC 587 HL (E) in Coyle S & Morrow K, *The Philosophical Foundations of Environmental Law*, (n.165), p.114. In this case Pickles proposed to divert a spring on his land

financial terms the public interest was served because the Corporation was able to recover the costs of sewerage, draining and paving Shaw Road from the road frontagers.

3.4.11 *Non Judicial Influences*

The free land movement and increased parliamentary authority were two non judicial pressures which may have influenced the judiciary in *Haywood v. Brunswick*.¹⁸⁷ The ongoing flow of those pressures was illustrated by legislation introduced between the time of that case and *Austerberry v. Corporation of Oldham*. In the first half of the 1880s, most land was settled,¹⁸⁸ a structure which tended to cause inalienability.¹⁸⁹ The SLA 1882 gave management responsibility for settled land to the tenant for life,¹⁹⁰ the intention being to render land a 'marketable article' notwithstanding the settlement'.¹⁹¹ If the court in *Austerberry v. Corporation of Oldham* had imposed an obligation to spend money this could have had implications for the future alienation of land and might have appeared against the tenor of the Settled Land Act which enabled, but did not compel, the tenant for life to improve his estate.

Parliamentary authority was increased in 1884 when the Representation of the People Act gave the vote to agricultural labourers.¹⁹² As in *Haywood v. Brunswick*, parliamentary authority was not explicitly mentioned in *Austerberry v. Corporation of Oldham*, although Dicey had no doubt not only that the current of legislation in 1885, the year that case was heard, was 'completely turned in the direction of collectivism',¹⁹³ but also that the

which fed one of Bradford Corporations reservoirs. The intention was to extract payment from the Corporation in exchange for not proceeding. Despite the very obvious public interest considerations at stake, both the Court of Appeal and the House of Lords refused to grant an injunction to prevent Pickles acting as he chose.

¹⁸⁷ See ch.3, paras 3.4.5 & 3.4.6.

¹⁸⁸ One contemporary estimate was that in 1880, 80% of all land in the United Kingdom was settled -see Arnold A, *Free Land*, (n.153), p.26.

¹⁸⁹ This was because there was often no beneficiary capable of exercising all the powers of a fee simple owner. For an account of the problems caused by the traditional structure of settlements, see Burn E, *Cheshire and Burn's Modern Law of Real Property*, 16th ed., (London: Butterworths, 2000), pp.72-76.

¹⁹⁰ I.e., the person beneficially entitled under the settlement to the settled lands for his life - S.2 (4) SLA 1882 later superseded by S.19 (1) SLA 1925. It is now no longer possible to create new settlements - see s.2 (1) TLATA 1996 & see, e.g., Burn E & Cartwright J, *Maudsley & Burn's Land Law Cases & Materials*, 9th ed., (n.108), pp.515 - 516 and Harpum C et al (Eds), *The Law of Real Property by Megarry and Wade*, (n.134), pp. 407- 408.

¹⁹¹ Per Chitty LJ in *Re Mundy and Roper's Contract* (1899) 1 Ch 275 CA at 288.

¹⁹² See Jones R, *Economic and Social History of England 1770-1977*, (n.22), p.168.

¹⁹³ See Dicey A, *Law and Public Opinion*, (n.9), p.257.

development of parliamentary authority had to a ‘certain extent’ curtailed the law- making function of the court.’¹⁹⁴

3.5 Positive Obligations in the Twentieth Century

3.5.1 Introduction

After *Austerberry v. Corporation of Oldham* litigants appear to have made no further attempt in the higher courts to argue that *Tulk v. Moxhay* should be applied to positive freehold obligations until *Rhone v. Stephens* almost one hundred years later. This section covers that long intervening period. It begins with an overview of leading early twentieth century cases, which established that *Tulk v. Moxhay* would only apply to restrictive obligations if the person claiming the benefit owned benefiting land. The need for appurtenance has been accepted as an essential precondition in current law reform proposals for the creation of freehold land obligations.¹⁹⁵ It is therefore of continuing significance for Tyneside Flats and other inter-dependent properties when considering their suitability for the future creation of freehold land obligations.¹⁹⁶

Much of the twentieth century was characterised by occasional judicial asides confirming that *Tulk v. Moxhay* did not apply to positive freehold obligations. These judicial comments are summarised briefly since they left drafters of the standard documentation in the 1980s little option other than to use a landlord and tenant structure for the sale of individual Tyneside Flats.¹⁹⁷ In 1994, in *Rhone v. Stephens*, discussed at the end of this section, the House of Lords declined to overrule *Austerberry v. Corporation of Oldham*. This, in effect, ensured the continued use of the standard documentation as well as the need for parliamentary reform.

3.5.2 The Need for Benefiting Land

In *Tulk v. Moxhay* Lord Cottenham reasoned that if the court did not intervene, the retained land might be rendered worthless.¹⁹⁸ This justification only occupies a very ‘minor position’

¹⁹⁴ Ibid pp.362 -363.

¹⁹⁵ See ch.4, para.4.8.3.

¹⁹⁶ Ibid.

¹⁹⁷ See further ch.5, para.5.3.3.

¹⁹⁸ See ch.3, para.3.3.3 and Simpson A, *A History of the Land Law*, (n.26), p.259.

in Lord Cottenham's judgment.¹⁹⁹ This may help explain why, in the individualistic period that followed, the courts appeared to act inconsistently by accepting that the person enforcing an obligation did not need to retain benefitting land.²⁰⁰ Evidence that at least some conveyancers in the 1860s did not regard appurtenance as essential can be seen from the facts of *Formby v. Barker*,²⁰¹ the second case discussed below.

Two 'appurtenant' cases, which involved conveyances drafted in the 1860s, but which were not heard until the early 1900s, may well have been precipitated by the 'building boom' which began in the mid 1890s and continued into the next century.²⁰² At the turn of the century, in *Rogers v. Hosegood*,²⁰³ the purchaser of a plot of land proposed to erect buildings on land originally conveyed in 1869. The 1869 Conveyance contained a restrictive obligation limiting the number of buildings that could be erected. In the event, appurtenance was shown and the obligation upheld, with Collins LJ maintaining, in the Court of Appeal, that, before the conscience of a purchaser of burdened could be affected by notice, it had to be established that the obligation was not merely 'personal and collateral', but that it was annexed to, or 'inhered in', that is 'touched and concerned', the benefitting land.'²⁰⁴

Formby v. Barker was heard two years later, but concerned an 1868 conveyance of land in Formby, Lancashire by Mr Formby and others. Formby's purchasers covenanted for themselves, their successors and assigns that they would not build a shop on part of the land.²⁰⁵ Barker, a successor in title of the original purchasers, had notice of the obligation, but started to build shops on the restricted land. Formby's personal representative sought an injunction to prevent building. This was rejected because it was clear that, at the time of the 1868 conveyance, Formby had conveyed his whole estate and had no 'contiguous estate' which would be benefited.²⁰⁶ In the leading judgement, Vaughan Williams LJ considered the

¹⁹⁹ See Bell C, 'Tulk v. Moxhay Revisited', (n.65), p. 58, and Simpson A, *A History of the Land Law*, (n.26), p.259.

²⁰⁰ See Gardner S 'Proprietary Effect of Contractual Obligations', (n.38), p.299, Sabey D and Everton A, *The Restrictive Covenant in the Control of Land Use*, (n.17), pp.23-25, Simpson A, *A History of the Land Law*, (n.26), p.259, and the cases of *Catt v. Tourle* (1869) 4 Ch App 654 CA & *Luker v. Dennis* (1877) 7 ChD 227 to which they refer.

²⁰¹ [1903] 2 Ch 539 CA.

²⁰² See, e.g., Mc Cord M and Purdie B, *British History 1815 – 1914*, (n.143), p.505 for details of the rapid increase in the number of building workers between 1891 and 1901.

²⁰³ (1900) 2 Ch 318.

²⁰⁴ At 407. For a detailed analysis and criticism of Collins LJ's comments, and the use made of them in *Formby v. Barker*, see Gardner S, 'Proprietary Effect of Contractual Obligations', (n.38), pp.299 -300.

²⁰⁵ [1903] 2 Ch 539 at 540.

²⁰⁶ Per Vaughan Williams LJ at 549 and see Stirling LJ at 555.

obligation to be ‘merely personal and collateral’, that there was no relation of ‘dominancy’ and ‘serviency’ and that Jessel MR, in *London and South Western Railway Company v. Gomm*, regarded the doctrine of *Tulk v. Moxhay* as something arising from the relation of two estates one to the other.²⁰⁷ In a concurring judgement, Romer LJ indicated that granting an injunction to any ‘assign’ would be to extend the principle of *Tulk v. Moxhay* ‘far beyond’ what was ‘justifiable’.²⁰⁸

Although building may have begun to be depressed from 1905 onwards,²⁰⁹ towns still grew fast during the Edwardian period.²¹⁰ Evidence of this building activity is apparent from the ‘landmark’²¹¹ decision in *London County Council v. Allen*²¹². In 1906, a builder, M J Allen, applied to the Council under a local Act for permission to lay out two new streets. Consent was given on condition that Allen entered into a deed of covenant not to build on a piece of land which lay across the end of two proposed streets, the aim being to enable the streets to be extended. In 1907 Allen covenanted with the Council not to ‘erect or place, or cause to be erected or placed any building, structure, or other erection’ upon the land coloured green on the plan. The green land was conveyed to Allen’s wife, Emily Allen, in 1911. By then Emily Allen had already built three houses on part of the green land and M J Allen had built a wall on another part. The Council applied for an injunction against the Allens.

The court found that the Council had no land adjoining or affected by the 1907 obligation.²¹³ Buckley LJ endorsed Jessel MR’s reasoning in *London and South Western Railway Company v. Gomm*, by saying that *Tulk v. Moxhay* did not ‘extend’ to cases where the person seeking the benefit retained no benefiting land.²¹⁴ Scrutton J considered that Lord Cottenham’s judgement in *Tulk v. Moxhay* was based ‘entirely’ on notice²¹⁵ and that *London and South Western Railway Company v. Gomm* was contrary to previous authorities.²¹⁶ However,

²⁰⁷ At 552 - 3. See also thesis ch.3, para.3.4.8.

²⁰⁸ At 554.

²⁰⁹ See Offer A, *Property and Politics 1870- 1914*, (n.152), p.145, Malpass P and Murie A, *Housing Policy and Practice*, 5th ed., (Basingstoke: Macmillan, 1999), p.33.

²¹⁰ See Jones R, *Economic and Social History of England 1770 -1977*, (n.22), p.185. Many Tyneside Flats were built at this time – see, e.g., ch.2, para.2.3.2.

²¹¹ Per Sabey D and Everton A, *The Restrictive Covenant in the Control of Land Use*, (n.17), p.33.

²¹² [1914] 3 KB 642 CA.

²¹³ At 653.

²¹⁴ At 660.

²¹⁵ At 664. Although notice was of major importance to Lord Cottenham, he was also concerned to ensure that the value of the retained land should not be rendered ‘worthless’ –see ch.3, para.3.3.3 and e.g. Behan J, *The Use of Land as affected by Covenants and Obligations*, (n.104), p.33.

²¹⁶ At 667.

because that case, in effect, treated retained land as essential and because this view had been adopted in *Formby v. Barker*, he felt constrained to hold that the Council's claim must fail.²¹⁷ This was despite his sympathy for public interest considerations which, in contrast to positive obligation cases involving public bodies in the 1880s,²¹⁸ had arisen in this case.²¹⁹ These public interest concerns may, at least in part, have stemmed from, or been influenced by, the increased role of the state resulting from a raft of early 'welfare state' legislation between 1906 and 1914.²²⁰ As the century progressed, it was to be parliament which, in particular circumstances enabled public bodies to enforce positive and negative obligations 'in gross'.²²¹ The Law Commission has proposed that these statutory powers should be preserved.²²²

3.5.3 Confirmation of *Austerberry v. Oldham Corporation*

The 1925 legislation left existing case law on the enforcement of positive obligations largely unchanged.²²³ Subsequent case law was similarly sparse. Judicial pronouncements on positive obligations for most of the twentieth century were usually spasmodic and incidental. In the 1930s, Farwell J, in giving the judgment of the Court of Appeal in *Zetland v. Driver*,²²⁴ where it was clearly accepted that the obligation in dispute was restrictive, said by way of an aside that no 'affirmative' obligation requiring the 'expenditure of money or the doing of some act can ever be made to run with the land'.²²⁵ In the 1950s in the 'benefit and burden' case of *Halsall v. Brizell*,²²⁶ Upjohn J said that a positive obligation did not run with the land.²²⁷ In

²¹⁷ At 672.

²¹⁸ See ch.3, paras 3.4.8 & 3.4.10.

²¹⁹ Public interest issues were raised by the Council at 650 and were received sympathetically by Scrutton J at 673. For criticism of Scrutton's comments see Behan J, *The Use of Land as affected by Covenants and Obligations*, (n.104), pp.38-39.

²²⁰ Areas covered included the provision of labour exchanges, child protection legislation, pension provisions and a national insurance scheme - see generally Jones R, *Economic and Social History of England 1770 -1977*, (n.22), pp.202 - 205 and Manchester A, *A Modern Legal History of England and Wales 1750 -1950*, (n.8), p.9.

²²¹ See Scamell E, *Land Covenants*, (n.55), pp.518-524 & ch.4, para.4.3.1.

²²² See Law Commission, *Easements, Covenants and Profits à Prendre*, (Consultation Paper No.186) (2008 *Consultation Paper*), (London: HMSO, 2008), paras 8.106, 8.107 & 8.112.

²²³ However, it did affect negative obligations by replacing 'notice' with a system of registration in the Land Charges Registry for unregistered land and in the Land Registry for registered land - see, e.g., Law Commission, *Transfer of Land Report on Restrictive Covenants*, (Law Com. No.11), (London: HMSO, 1967), para.15.

²²⁴ [1939] Ch 1 CA.

²²⁵ At 8.

²²⁶ [1957] Ch 169. The use of the 'benefit and burden' principle as a freehold conveyancing device is discussed in ch.5 para.5.4.6.

²²⁷ At 182.

the 1960s in *Jones v. Price*,²²⁸ which concerned a possible obligation to maintain a fence, Wilmer LJ stated that ‘an undertaking or covenant to perform positive acts of repair is not capable of running with the land so as to bind successors in title’.²²⁹ All these cases upheld what had come to be known as the ‘rule in *Austerberry v. Oldham Corporation*.’ In the 1990s, the enforceability of positive obligations was at last considered by the House of Lords in *Rhone v. Stephens*²³⁰, a case sufficiently definitive for it to be suggested that the *Austerberry* rule should ‘henceforth be known as the rule in *Rhone v. Stephens*.’²³¹

3.5.4 *Rhone v Stephens*.

Although heard in the 1990s, the court in *Rhone v. Stephens* was asked to consider documentation drafted in 1960. The then owner of Walford House in Combwich, Somerset decided to sell off part of the building, which later came to be known as Walford Cottage. The reason for the sale is not clear, but can, be seen as an example of rapidly expanding ownership²³² in an increasingly crowded environment.²³³ Because part of the roof of Walford House overlapped Walford Cottage,²³⁴ the vendor covenanted for himself and his ‘successors in title owner or occupiers for the time being’ of Walford House, to maintain in ‘wind and water tight condition’ to the reasonable satisfaction of the purchasers and their successors in title ‘such part of the roof of Walford House’ as lay above Walford Cottage. Although the 1960 conveyance sought to bind subsequent owners of Walford House, the drafters of that conveyance should have been aware of potential difficulties over its future enforcement because of the knowledge ‘imparted to every student of the law of real property’ that positive obligations affecting freehold land are not directly enforceable except against the original covenantor.²³⁵

Walford Cottage and Walford House changed hands several times. At the time of the hearing, Walford Cottage was owned by Mr and Mrs Rhone (the ‘Rhones’) and Walford House by

²²⁸ [1965] 2 QB 618 CA.

²²⁹ At 633.

²³⁰ (1994) 67 P & CR 9 CA, affirmed [1994] 2 AC 310 HL.

²³¹ See Newsom G, *Preston & Newsom's Restrictive Covenants*, (n.55), p.65.

²³² See Burnett J, *A Social History of Housing 1815 – 1985*, (n.60), p.282.

²³³ The general incapacity of positive freehold obligations to affect the covenantor’s successors in title has proved ‘remarkably inconvenient’ in a ‘crowded urban world’ – see Gray K and Gray S, *Elements of Land Law*, (n.57), p.247.

²³⁴ In the first instance the court had decided that the overlapping roof belonged, as both parties believed, to Mrs Stephens, but the Court of Appeal held that the leaking roof in fact belonged to the Rhones.

²³⁵ [1994] 2 AC 310 at 321 per Lord Templeman.

Mrs Stephens, the executrix of the original defendant, a Mrs Barnard. Each previous conveyance of Walford House had contained an obligation by the purchaser indemnifying the vendor against breaches of the repairing obligation and each previous conveyance of Walford Cottage had contained an express assignment of the benefit of the obligation. The Rhones acquired Walford Cottage in 1981 and in 1984 complained of severe leaks in the roof and resulting damage to one of their bedrooms. The Rhones commenced court proceedings after inadequate repairs by Mrs Barnard, and after she had refused them access to effect their own repairs.²³⁶

Mrs Stephens was clearly in breach of the obligation and the benefit had passed to the Rhones. The crucial question was whether the burden had passed to Mrs Stephens.²³⁷ Counsel for the Rhones apparently conceded that the Court of Appeal itself was unable to overrule its own decision in *Austerberry v. Oldham Corporation*.²³⁸ Nourse LJ said it was hard to justify the retention of the Austerberry rule where, as in this case, each successor in title of Walford House, by means of the indemnity that he is invariably required to give to his vendor, had the 'clearest possible' notice of the covenant and effectively agreed to perform it, although not with the owner of Walford Cottage.²³⁹ Nourse LJ therefore considered that in these circumstances *Tulk v. Moxhay* should apply to positive as well as restrictive obligations and thought it 'not impossible' that the House of Lords would feel able to 'abolish or modify' the Austerberry rule.²⁴⁰

Perhaps encouraged by Nourse LJ's comments, the Rhones appealed to the House of Lords. After reviewing the authorities and proposals for reform, Lord Templeman briefly rejected Nourse LJ's notice argument by simply saying that to overrule Austerberry would 'destroy the distinction between law and equity and convert a rule of equity into a rule of notice.'²⁴¹

²³⁶ The ANLA 1992 might now be of help - see, e.g., Goo S, 'Enforcement of Positive Covenants' [1993] 57 Conv. 234, pp.236 - 237 & Gravells N, 'Enforceability of Positive Covenants Affecting Land' (1994) 110 LQR 346, p.346.

²³⁷ If the burden had not passed to Mrs Stephens, it would have been futile to establish that the Rhones had the benefit - see Gray K and Gray S, *Elements of Land Law*, (n.57), p.246, para.3.3.24, f n.1 & pp.270 - 271.

²³⁸ (1994) 67 P & CR 9 at 14. Generally speaking the doctrine of judicial precedent means that the Court of Appeal is bound by its own decisions -see, e.g., Kiralfy A, *The English Legal System*, 8th ed., (London: Sweet & Maxwell, 1990), pp.89 - 90, Shears P & Stephenson G, *James' Introduction to English Law*, 13th ed., (London: Butterworths, 1996), p.16 and Ward R & Akhtar A, *Walker & Walker's English Legal System*, 13th ed., (Oxford: OUP, 2008), pp.96-97.

²³⁹ (1994) 67 P & CR 9 at14. The difficulties inherent in relying on chains of indemnity are discussed in ch.5, para.5.4.3.

²⁴⁰ (1994) 67 P & CR 9 at14.

²⁴¹ [1994] 2 AC 310, at 321.

Lord Templeman sought to justify the court's decision on the basis of the maxim that 'equity supplements but does not contradict the common law'.²⁴² Gardner characterises this reasoning as 'oracular' and 'opaque', used to avoid grounding the decision on 'humdrum and uncontroversial' considerations, namely that reform by judicial legislation was unsuitable, both because of the effect on past decisions and because of the 'fine print' needed.²⁴³ When speaking of these two aspects Lord Templeman considered it plain from the 'articles, reports and papers' to which the court was referred that judicial legislation to overrule the *Austerberry* case would create a number of 'difficulties, anomalies and uncertainties'.²⁴⁴ In addition, parliamentary legislation would require 'careful consideration of the consequences'. This was exemplified by referring to leasehold tenure where the enforceability of positive obligations had obliged parliament to intervene, so as to protect 99 year leaseholders at the end of their term from losing their homes and being 'saddled with the costs of restoring to their original glory buildings which had languished through wars and economic depression'.²⁴⁵ There are clear differences between positive obligations imposed on leaseholders whose property is a 'wasting' asset and those imposed on indeterminate freeholders. The example does, however, highlight the court's reluctance to intervene²⁴⁶ and perhaps, obliquely, reflects long standing judicial unwillingness, expressed in the *Austerberry* case and elsewhere, to subject freehold successors in title to monetary expenditure.²⁴⁷

The obligation in *Rhone v. Stephens* was drafted because Walford House and Walford Cottage were, in part, divided horizontally. In this respect the facts differed markedly from *Austerberry* and other leading positive and restrictive obligation cases. The difficulties caused by this architectural layout have similarities with those faced by the owners and occupiers of Tyneside Flats and other horizontally divided properties. However, neither the Court of Appeal nor the House of Lords sought to distinguish the case on the facts, perhaps because of the wide range of factual situations previously considered by the Court of Appeal in land obligation cases. If any such distinction had been made, then this might well have created the

²⁴² At 317.

²⁴³ See Gardner S 'Two Maxims of Equity' [1995] 54 C.L.J. 60, pp.67 - 68. See also Snape J, 'The Burden of Positive Covenants' [1994] 58 Conv. 477, p.481.

²⁴⁴ At 321. See also the comments of Snape J, 'The Burden of Positive Covenants', (n.243), p.481.

²⁴⁵ At 321.

²⁴⁶ The court also rejected arguments that the burden should run either under the 'benefit and burden' principle, as to which see thesis ch.5, para.5.4.6 or because of the effect of s.79 LPA 1925 - see further, e.g., Clarke P, 'Land Law and Trusts' [1994] All ER Rev 241, p.247 and Tee L, 'A Roof Too Far' [1994] 53 C.L.J. 446, p.447.

²⁴⁷ See ch.3, paras 3.4.7 & 3.4.10.

‘anomalies and uncertainties’ to which Lord Templeman referred and incurred the risk of future appeals on the basis that the facts were materially different.²⁴⁸

Despite some academic disappointment,²⁴⁹ and an apparent wish that the House of Lords should ‘pre-empt Parliament’,²⁵⁰ it is difficult to see that judicial intervention would have been appropriate, especially when there was then pressure for commonhold legislation²⁵¹ and an unimplemented *Gibson Report*.²⁵² It has been suggested that the Court had some doubts over the desirability of reform,²⁵³ which may explain why none of the Law Lords was prepared, unlike the Court of Appeal both in this case and subsequently,²⁵⁴ to press for parliamentary reform.

3.6 Review

The review of judicial developments covers a period of approximately 160 years, and has addressed a number of issues raised by research question three.²⁵⁵ It was during this period, for example, that it was established, in broad terms, that while freehold restrictive obligations would run, provided there was benefiting land, positive land obligations would not do so. As the same difficulty does not arise with leaseholds, it was inevitable, in view of the lack of legislative reform²⁵⁶ and the deficiencies of freehold conveyancing devices,²⁵⁷ that when individual Tyneside Flats and other horizontally divided, interdependent, properties came to be sold, a leasehold structure would be used.

Judicial law on land obligations was established in the nineteenth and early twentieth centuries in very different social and economic circumstances. Although none of the leading obligation cases of the nineteenth and early twentieth centuries involved the horizontal division of property seen in *Rhone v. Stephens*, some of the same underlying judicial

²⁴⁸ For a discussion on distinguishing cases on their facts see, e.g., Ward R & Akhtar A, *Walker & Walker’s English Legal System*, (n.238), p.92.

²⁴⁹ See, e.g., Clarke P, ‘Land Law and Trusts’, (n.246), p.245, Gray K and Gray S, *Elements of Land Law*, (n.57), p.247 & Tee L, ‘A Roof Too Far’, (n.246), p.447.

²⁵⁰ See. Clarke P, ‘Land Law and Trusts’, (n.246), p.246.

²⁵¹ See ch.4, para.4.7.2.

²⁵² Ibid, paras 4.5.2 - 4.5.4.

²⁵³ See Clarke P, ‘Land Law and Trusts’, (n.246), p.248.

²⁵⁴ See the comments of Gibson LJ in *Thamesmead Town Ltd. v. Allotey* (2000) 79 P & CR 557 at 566, endorsed by Butler-Sloss LJ also at 566.

²⁵⁵ See ch.1, para.1.1.6.

²⁵⁶ The Law Commission’s 2008 *Consultation Paper* is discussed in ch.4, section 4.8.

²⁵⁷ See further ch.5, section 5.4

concerns and tensions remain pertinent. In 1834 in *Keppel v. Bailey*, Lord Brougham was unhappy at the prospect of ‘incidents of a novel kind’ being devised and attached to land at the ‘caprice of any owner.’²⁵⁸ Although *Tulk v. Moxhay* in 1848 enabled restrictive obligations to run, the judiciary in *Austerberry v. Oldham Corporation* in 1885 returned to a more obviously ‘laissez-faire’ approach by declining to apply *Tulk v. Moxhay* to positive obligations. The motivating policy of keeping freehold land substantially unfettered for future generations²⁵⁹ ironically led, in the next century, to a complex conveyancing structure for the transfer of Tyneside Flats. This, by using a landlord and tenant mechanism, has ensured they are potentially ‘fettered’ with inappropriate leasehold legislation.²⁶⁰ The application of *Tulk v. Moxhay* was restricted further when *London County Council v. Allen* confirmed the need for appurtenance in 1914. Current land obligation reform proposals have retained the need for appurtenance for both positive and restrictive obligations, on a basis that very closely echoes Lord Brougham’s comments in *Keppel v. Bailey*.²⁶¹ Past judicial reasoning therefore remains relevant for the future freehold transfer of Tyneside Flats and other horizontally divided properties.

The increasing legitimacy and authority of parliament was a significant feature of the Victorian and Edwardian eras and may then have been one of the underlying and unexpressed constraints on the judiciary. Both *Austerberry v. Oldham Corporation* and *London County Council v. Allen* were decided when there was, or had recently been, substantial government legislation. Increased parliamentary activity is a feature of Dicey’s period of collectivism, although judicial developments do not correlate precisely with Dicey’s periods of individualism and collectivism.²⁶² However, these currents of opinion can help to put legal dichotomies faced by the judiciary in context and remain relevant. In *Rhone v. Stephens*, Lord Templeman expressly contemplated parliament’s role in positive land obligation reform when he said that parliamentary legislation ‘would require careful consideration of the

²⁵⁸ (1834) 2 My & K 517 at 535, discussed in ch.3, para.3.2.1.

²⁵⁹ See Gray K and Gray S, *Elements of Land Law*, (n.57), p.247 and thesis ch.3, para.3.4.6.

²⁶⁰ See further thesis ch.6, para.6.7.2 for a summary of legislation requiring reform & ch.9, paras 9.2.2 - 9.2.4 for reform proposals.

²⁶¹ See ch.4, para.4.8.3.

²⁶² For discussion of an alternative model which sees the development of government activity as a ‘continuum’ rather than as a dichotomy between individualism and collectivism see May T, *An Economic and Social History of Britain 1760 -1990*, (n.11), p.132 & Parris H, ‘The Nineteenth - Century Revolution in Government: A Reappraisal Reappraised’ in Stansky P (Ed) *The Victorian Revolution Government and Society in Victoria’s Britain*, 1st ed., (New York: New Viewpoints, 1973), p.55.

consequences.²⁶³ In the changed circumstances of the twenty first century that consideration is inevitably less concerned than the Victorian judiciary over imposing monetary expenditure on future freehold owners,²⁶⁴ but unresolved difficulties remain over the extent of that liability.²⁶⁵ Such on- going concerns help explain why, parliamentary reform, like judicial development, has proved so problematical. Since *Rhone v. Stephens* has breathed ‘new life and vigour’ into *Austerberry v. Oldham Corporation*,²⁶⁶ judicial legislation is clearly not on the agenda. Current Law Commission proposals offer the possibility of comprehensive legislative land obligation reform, a prospect that would have pleased Bentham, whose ultimate objective was an ‘ideal code’ and who remained ‘a life –long enemy of judge-made law.’²⁶⁷ It seems probable that if current land obligation reform proposals were to proceed as envisaged they could also, in some circumstances, make the adoption of freehold land obligations for Tyneside Flats more likely than would have been the case if there had been less all embracing 1990s judicial legislation.²⁶⁸

²⁶³[1994] 2 AC 310, at 321.

²⁶⁴ Since the 1950s substantial numbers of interdependent flats and maisonettes have been sold on a leasehold basis, with successive owners being liable for the costs of, e.g., repairing obligations - see *Report of the Committee of Inquiry on the Management of Privately Owned Blocks of Flats*, (Chairman E. Nugee) (*the Nugee Report*), (London: HMSO, 1985), Vol.1, para.2.6.

²⁶⁵ See further ch.4, para.4.8.7 for a discussion on who should be liable to incur expenditure.

²⁶⁶ Per Nourse LJ in *Westminster (Duke) v. Birrane* [1995] QB 262 at 269.

²⁶⁷ See Dias R, *Jurisprudence*, (n.95), p.343. But the judge made law in *Tulk v. Moxhay* occurred in an ‘individualist’ era which, paradoxically, may have been partly inspired by Bentham’s ideas, some elements of which can be seen in Lord Cottenham’s judgment – see ch.3, para.3.3.3.

²⁶⁸ E.g., the proposal that dominant and servient tenements need no longer be owned and occupied by separate persons could prove a useful incentive for the future adoption of land obligations—see thesis ch.4, para.4.8.3.

Chapter 4. Law Reform

4.1 Introduction

This chapter discusses law reform, a constant necessity for both the law and its institutions as society changes.¹ By tracing the process and progress of land obligation law reform the chapter addresses research question four which sought to establish the impact of law reform proposals on the creation of freehold land obligations for individual Tyneside Flats.² Section two provides a broad overview of reform up to the First World War, a period when, as discussed in chapter three, land obligation law reform was left to the judiciary. This judicial development can be seen as part of a more general trend in which ‘occasional bouts of change’ by reforming chancery judges obscured the need for systematic legislative reform.³

The third section covers the years from the 1920s to the 1965 *Wilberforce Report*. From the 1930s onwards, various statutes provided that, in the public interest, the burden of restrictive and then, later, *all* land obligations ran in certain special circumstances, usually in favour of public bodies. The *Wilberforce Report* came down firmly in favour of legislation making positive land obligations more widely enforceable and governed much subsequent thinking. The fourth section discusses the establishment of the Law Commission in 1965. This roughly coincided with an increase, from the 1960s onwards, in academic input and pressure for reform. Despite high expectations,⁴ inclusive land obligation reform has remained elusive. The Law Commission’s detailed reform proposals, contained in the 1984 *Gibson Report*, discussed in section five, were not implemented.

The absence of land obligation reform led conveyancers to create a landlord and tenant structure for the transfer of horizontally divided dwellings. In north eastern

¹ It is ‘as endlessly necessary as cleaning the streets, maintaining buildings, pruning trees and disposing of refuse.’ - see Kerr M, ‘Law Reform in Changing Times’ (1980) 96 LQR 515, p.516.

² See ch.1, para.1.1.6.

³ See Kerr M, ‘Law Reform in Changing Times’, (n.1), p.515.

⁴ ‘By far the most important development has been the establishment in 1965 of the Law Commission... without doubt the most important thing to have happened to the legal system since the massive shake-up in the mid-nineteenth century.’ - see Zander M, ‘Introduction’ in Zander M (Ed), *What’s Wrong with the Law*, 1st ed., (London: BBC, 1970), p.6.

England this resulted in the creation of the standard Tyneside Flat documentation.⁵ Freehold land obligation reform was then delayed, as Law Commission and other resources were deployed in remedying difficulties resulting from the landlord and tenant relationship, especially in large blocks of flats. The sixth section contains an overview of this leasehold legislation. Eventually commonhold legislation was passed in 2002. Section seven addresses a specific requirement of research question four by examining the relevance of this legislation for Tyneside Flat transfer.⁶ In its *2008 Consultation Paper*, the Law Commission introduced comprehensive proposals for land obligation reform.⁷ Section eight considers these proposals and, in so doing, addresses that aspect of research question ten which seeks to ascertain the law reform measures needed to obviate difficulties caused by the unusual tenurial status of Tyneside Flats.⁸

4.2 Judicial Reform

Proposals for the systematic reform of the law go back many centuries.⁹ In 1832, the Real Property Commissioners noted that doubts had been expressed over the efficacy of obligations imposed by vendors of freehold land to secure amenities to neighbouring properties without time limit.¹⁰ The Commissioners considered recommending legislation to settle these doubts, but instead decided to leave it to ‘...the Courts of equity to interfere by injunction or otherwise for enforcing the due observance of such covenants in all cases in which Courts may deem it proper to do so.’¹¹

⁵ See ch.5, para.5.3.3.

⁶ See further ch.4, paras 4.7.3 – 4.7.5.

⁷ See Law Commission, *Easements, Covenants and Profits à Prendre*, (Consultation Paper No.186) (2008 Consultation Paper), (London: HMSO, 2008).

⁸ See ch.1, para.1.1.6.

⁹ See Kerr M, ‘Law Reform in Changing Times’, (n.1), pp.518 - 519. For an account of proposals to set up a Commission made by the Chancery Commission in 1826 and by Robert Peel in 1827, see Buck A, ‘Property, Aristocracy and the Reform of the Land Law in Early Nineteenth Century England’ (1995) 16 LH 63, p.65.

¹⁰ See 3rd Report, PP 1831-32, XXIII (484) 321, p.372.

¹¹ *Ibid*, p.375 and see Polden P, ‘Law Commission: Transfer of Land -The Law of Positive and Restrictive Covenants’ (1984) 47 MLR 566.

The Real Property Commissioners were reporting shortly after Dicey's period of 'legislative quiescence' had come to an end¹² and were not looking for any utilitarian codification of property law.¹³ However, as Dicey's period of 'Benthamite individualism' advanced in the mid nineteenth century, so did judicial reform. *Tulk v. Moxhay*,¹⁴ its predecessors and successors, even as ultimately restrained, radically altered the law.¹⁵ It has been suggested that the 'prestigious location' of the land in *Tulk v. Moxhay* might have attracted considerable interest and publicity,¹⁶ although the significance of the case seems to have become more apparent in retrospect. At the time it appears to have generated little contemporary or nineteenth century academic comment. The 1887 edition of Pollock's *The Land Laws*¹⁷ appears to contain no reference either to *Tulk v. Moxhay* or *Austerberry v. Oldham Corporation*,¹⁸ reported only two years earlier. However, Challis did point out that the provisions for enlargement in the 1881 Conveyancing Act were a means of circumventing the limitations which *Tulk v. Moxhay* had imposed.¹⁹ In 1885 Challis considered that the 'whole principle' of *Tulk v. Moxhay*, rested upon 'dubious grounds' of equity, that it seemed to have been carried to some 'absurd lengths' in the 'courts below' and that it was destined to have its 'wings clipped' when it came before the House of Lords, a prediction repeated in the 1892 and 1911 editions of the book.²⁰

The piecemeal judicial development of the law on positive freehold obligations is traced in chapter three. That account illustrates the limitations of judge made law, limitations which clearly concerned Scrutton J in the leading 1914 case of *London County Council v. Allen*.²¹ In the same year Dicey drew attention to the hypothetical

¹² See ch.3, para.3.1.

¹³ See Buck A, 'Property, Aristocracy and the Reform of the Land Law in Early Nineteenth Century England', (n.9), p.76.

¹⁴ (1848) 11Beav 571, 50 ER 937; 2 Ph 774, 41 ER 1143.

¹⁵ This case is discussed in ch.3, s.3.3.

¹⁶ See Bell C, 'Tulk v. Moxhay Revisited' [1981] 45 Conv. 55, p.57.

¹⁷ See Pollock F, *The Land Laws*, 2nd ed., (London: Macmillan, 1887).

¹⁸ (1885) 29 Ch D 750 CA. For a discussion of this case, see ch.3, paras 3.4.9 - 3.4.11.

¹⁹ See Hood H and Challis H, *The Conveyancing Acts, 1881 & 1882 and the Settled Land Act, 1882 with commentaries*, 2nd ed., (London: Reeves and Turner, 1884), p.215 and also their comments, on p.235, on s.3 CA 1882 and the doctrine of notice. The provisions for enlargement are now contained in s.153 LPA 1925, but never appear to have been used to create enforceable freehold obligations for individual Tyneside Flats - see ch.5, para.5.4.2.

²⁰ See Challis H, *The Law of Real Property: Chiefly in relation to Conveyancing*, 1st ed., (London: Reeves and Turner, 1885), p.151, and p.173 in the 1892 ed. See also Sweet C, *Challis's Law of Real Property*, 3rd ed., (London: Butterworths, 1911), p.185. In the event it was the Court of Appeal that did the 'clipping' in *London County Council v. Allen* [1914] 3 KB 642 CA - see ch.3 para.3.5.2.

²¹ See ch.3, para.3.5.2.

nature of judge made law.²² As a Court of Appeal case in which Scrutton J had expressed the hope that the decision might be overturned, *London County Council v. Allen* can itself be seen as leaving the law in a hypothetical and uncertain state. In addition, the incapacity of the courts to change a rule on which they have themselves conferred the character of law, can lead to the legislative powers of the courts becoming exhausted.²³ That the ‘end of the road’ can be reached, even with Court of Appeal decisions, is illustrated by the 1885 decision in *Austerberry v. Oldham Corporation*.²⁴ When that decision eventually came to be considered by the House of Lords, the very antiquity of the case, and practical decisions taken in reliance on it, formed a legitimate part of the rationale for not changing the law.²⁵

The generalisation that many lines of authority have the effect of ‘stultifying progress for decades’²⁶ proved true for Victorian and pre 1914 land obligation law. As the twentieth century progressed, it was parliament, not a higher court, which met Scrutton J’s concerns, thus giving credence to Kerr’s view that the lesson of history is on the side of the Lord Chancellors and others, such as Bentham, who looked to parliament for the necessary initiative.²⁷

4.3 The 1920s to the Wilberforce Report

4.3.1 *The First World War to the early 1960s*

Although often dominated by extreme economic and social pressures,²⁸ the 1920s saw the introduction of many fundamental property law reforms. However, the 1925 legislation left existing case law on the enforcement of positive obligations almost entirely unchanged.²⁹ Despite uncertain times,³⁰ a considerable amount of both private

²² See Dicey A, *Law and Public Opinion in England*, 1st ed., (London: Macmillan, 1914), pp.490 - 491.

²³ Ibid, p.489.

²⁴ (1885) 29 ChD 750.

²⁵ See the discussion of *Rhone v. Stephens* in ch.3, para.3.5.4.

²⁶ See Kerr M, ‘Law Reform in Changing Times’, (n.1), p.517.

²⁷ Ibid.

²⁸ For a general overview see Black J, *Modern British History since 1900*, 1st ed., (Basingstoke: Macmillan, 2000), chs 6 & 9.

²⁹ Although s.79 LPA 1925 refers to positive covenants being made ‘by the covenantee on behalf of himself and his successors in title,’ this has been interpreted as no more than a ‘word-saving device’ - see the comments of Lord Templeman in *Rhone v. Stephens* [1994] 2 AC 310 at 322 &, e.g., Tee L ‘A

and public sector house building took place during the inter-war period.³¹ This activity no doubt led parliament in the 1930s to begin to address the pre First World War concerns raised in *London County Council v Allen*³² by providing that local authorities did not need to own benefiting land in order to enforce restrictive obligations contained in ‘planning agreements.’³³

In 1934 the Law Revision Committee, ‘the source of the modern machinery of law reform’³⁴ was established. No property law problems were referred to the Committee in the 1930s, presumably because it was felt that the 1925 property legislation needed time to consolidate.³⁵ During this period there seems to have been little contemporary academic pressure for wider reform.³⁶ Inevitably, the work of the Law Revision Committee fell into abeyance during Second World War (1939-1945).³⁷ In 1951 the case was made for the creation of a Ministry of Justice or ‘some other person or body’ with sufficient powers and adequate staff.³⁸ Instead, in 1952, the Law Revision Committee was superseded by the Law Reform Committee. Although in 1957 the

Roof Too Far’ [1994] 53 C.L.J.446, p.447. There was no provision for registration of positive obligations under the LCA 1925, whereas restrictive obligations could be registered. Registration usually binds future purchasers of the legal estate - see further Gray K and Gray S, *Elements of Land Law*, 5th ed., (Oxford: OUP, 2009), paras 8.3.4 & 8.3.5.

³⁰ Heavy unemployment in the 1930s was highlighted by the 1936 Jarrow march of unemployed Tyneside ship workers. In the same year Keynes published his highly influential book *The General Theory of Employment, Interest and Money*, which criticised the ideas of the classical economists and argued the case for economic management by the state - see Black J, *Modern British History since 1900*, (n.1), p.118 and see Keynes J, *The General Theory of Employment, Interest and Money*, 1st ed., (London: Macmillan, 1936), pp.377- 381.

³¹ See Sabey D and Everton A, *The Restrictive Covenant in the Control of Land Use*, 1st ed., (Aldershot: Ashgate, 1999), p.31. Building in this period included some Tyneside Flats. E.g., the computerised register for the freehold interest in 167 - 169 Delaval Road, Benwell, Newcastle upon Tyne shows that the land upon which that pair of terraced Tyneside Flats was to be built was conveyed in 1934. Some semi-detached Tyneside Flats were also built in the 1930s - see ch.2, para.2.3.5.

³² [1914] 3 KB 642 CA. This case is discussed in ch.3, para.3.5.2.

³³ See s.34 TCPA 1932. This legislation was superseded by a series of planning Acts which, by the 1970s, enabled local authorities to enforce positive obligations contained in planning agreements – see s.126 HA 1974 and Scamell E, *Land Covenants, restrictive and positive, relating to freehold land, including covenants for title*, 1st ed., (London: Butterworths, 1996), pp.521 - 522. For a discussion of the running of the burden of obligations under local Acts see p.52 of Scamell’s book and also the *Report of the Committee on Positive Covenants Affecting Land*, (Chairman, Lord Wilberforce) (*Wilberforce Report*) (Cmnd 2719), (London: HMSO, 1965), para. 8 (vii) (a) – (c).

³⁴ See Kilmuir Viscount, ‘Law Reform’ (1957) N.S.4 JSPTL75, p.78.

³⁵ See Farrar J, *Law Reform and the Law Commission*, 1st ed., (London: Sweet & Maxwell, 1974), Appendix A, pp.133 - 4 for details of the Law Revision Committee’s terms of reference, published reports and statutes implemented.

³⁶ E.g., Bailey, when talking of the burden of restrictive obligations, confines himself to a purely descriptive, and authoritative, account - see Bailey S, ‘The Benefit of a Restrictive Covenant’ [1938] 6 C.L.J., pp.339 - 341.

³⁷ See Kilmuir Viscount, ‘Law Reform’, (n.34), p.81.

³⁸ See Williams G (Ed), *The Reform of the Law*, 1st ed., (London: Victor Gollancz, 1951), pp.9-22 & 216.

Lord Chancellor seemed satisfied with the existing arrangements for law reform,³⁹ that year again saw the need for a special statutory provision enabling local authorities to enforce obligations against successors in title, even if they did not own benefiting land.⁴⁰ Disputes over the burden of positive obligations do not appear to have come before the higher courts during this period but, even if they had, it seems unlikely that the judiciary would have been prepared to intervene.⁴¹ Although academics hinted at defects in the law in the 1950s there appears to have been little demand for obligation law reform in this decade.⁴²

The political and social tone changed markedly in the 1960s. This was a decade of change, which gathered pace in 1963.⁴³ That year saw renewed pressure for a more structured system of law reform generally⁴⁴ and also for reform in numerous specific areas of the law, including the ‘vitaly important’ reform that all obligations, positive and restrictive, should pass with the land, provided they are ‘connected with the land’.⁴⁵ Pressure for reform was also, no doubt, increased by the rise in owner occupation. By 1964 half the population was living in owner-occupied housing as against a quarter in 1951.⁴⁶ In the 1960s, it seems to have been taken as axiomatic that

³⁹ See Kilmuir Viscount, ‘Law Reform’ (n.34), p.83, where he suggests that there was not then ‘any large number of serious proposals for reform awaiting consideration’.

⁴⁰ See s.151 HA 1957. The reference in s.151 to ‘covenants’ appears to include both negative and positive obligations.

⁴¹ See further Cretney S, ‘The Politics of Law Reform - A View from the Inside’ (1985) 48 MLR 493, p.495 and the comments of Lord Simonds in *National Anti-Vivisection Society v. Inland Revenue Commissioners* [1948] AC 31 HL at 62 - 63, to which he refers.

⁴² E.g., in 1951, whilst acknowledging that freehold flats are ‘clearly not satisfactory’, Glanville Williams did not call for any reform of the law on the running of the burden of positive obligations - see Williams G (Ed), *The Reform of the Law*, (n.38), p.114. Again, in 1954, Scamell, whilst saying that the law on the running of the burden of positive covenants was ‘obscure’ did not call for reform - see Scamell E, ‘Positive Covenants in Conveyances of the Fee Simple’ [1954]18 Conv.546, p.546.

⁴³ See Black J, *Modern British History since 1900*, (n.28), p.120.

⁴⁴ See ch.4, para.4.4.1, fn 65.

⁴⁵ See Dworkin G, ‘Land Law’ in Gardiner G and Martin A (Eds), *Law Reform Now*, 1st ed., (London: Victor Gollancz., 1963), p.89.

⁴⁶ See May T, *An Economic and Social History of Britain 1760 - 1990*, 2nd ed., (Harlow: Longman, 1996), p.431. May suggests, at p.433 that the reasons for increasing home ownership were ideological as the ‘embourgeoisment thesis’ suggests that manual workers increasingly took on middle-class life styles and values, which were reflected in more conservative and individualistic political views’. The link between housing and politics is long standing. It has been suggested that one of the reasons for building Tyneside Flats to rent in the Benwell district of Newcastle in the late nineteenth century was to ‘buy off’ an increasingly radicalised workforce –see ch.2, para.2.4.3.

many purchasers preferred freehold property,⁴⁷ which may have been one of the reasons for establishing the Wilberforce Committee in 1963.⁴⁸

4.3.2 *The Wilberforce Report*

In 1963 a Committee, under the chairmanship of Lord Wilberforce was appointed to consider:

‘whether and to what extent it is desirable to amend the law relating to the enforcement and assignability of positive covenants affecting land.’⁴⁹

The subsequent Report considered that the difficulties arose in two contexts, which it categorised in terms of modernity, firstly in the ‘normal traditional’ context of obligations between neighbours, such as fencing, boundary walls and the repair of roads and secondly in relation to ‘modern’ developments particularly the provision of flats, by conversion or new erection, and the planned laying out of housing estates with common facilities and amenities.⁵⁰ The reference to flats being a ‘modern’ development is presumably because the Committee was unaware of the substantial number of self contained Victorian and Edwardian terraced flats in Tyneside and London. Had this knowledge been to hand, it may be that the second very broad context could have been usefully split between those properties with common amenities and those without.⁵¹

The *Wilberforce Report* concluded that the time had come for broad based statutory intervention and recommended that generally, as with negative obligations, the burden of positive obligations should run with the land ‘encumbered’ and the benefit should run with the land ‘advantaged’.⁵² In order to run ‘covenants’ had to affect the use of

⁴⁷ See *Wilberforce Report*, (n.33), para.8 (i).

⁴⁸ Edell, a former law commissioner, simply suggests that the Wilberforce Committee was set up because of ‘pressure for reform’ and ‘public pressure’ - see Edell S, ‘Fundamental Reform of Positive and Restrictive Covenants?’ [1984] J.P.L.222 & 485, pp.222 & 495.

⁴⁹ See *Wilberforce Report*, (n.33), p.1.

⁵⁰ *Ibid*, para. 3.

⁵¹ A clearer distinction at the outset might have helped prevent discussion and legislation in subsequent decades focussing mainly on blocks of flats with common amenities.

⁵² See *Wilberforce Report*, (n.33), paras 9, 10 & 53.

one property for the benefit of another, and would only be considered as doing so if they satisfied the following two tests:

i) that the ‘covenant’ relates to work to be done on land or provides for a money contribution towards the expenses of work to be done on the land of another person, and

ii) that the ‘covenant’ is intended to inure to the advantage of specified land, and is capable of doing so.⁵³

Such obligations were to be ‘expressly declared’ as ‘covenants in ‘rem’, and would constitute legal interests passing with the land.⁵⁴ Obligations for the repair and maintenance by owners of individual Tyneside Flats would clearly fall within the first requirement. Such obligations could also comply with the second requirement since repair and maintenance of lower flats preserves the support of upper flats and repair and maintenance of upper flats preserves the shelter of lower ones.⁵⁵

The criticism made of the Law Reform Committee that it neglected foreign and Commonwealth law⁵⁶ could not be made of the *Wilberforce Report*, which recommended that a voluntary scheme should be made available for blocks of flats with common facilities, similar to that operating under the New South Wales Conveyancing (Strata Titles) Act, 1961 as well as a less elaborate Model Scheme.⁵⁷ Although the *Wilberforce Report* did not make any clear distinction between properties with common facilities and those, as is usually the case with Tyneside Flats, which have none, it did recognise that, where the number of units was very

⁵³ Ibid, para.11.

⁵⁴ Ibid, paras 16 and 18.

⁵⁵ When discussing model schemes, the *Wilberforce Report*, (n.33), linked covenants for repair and maintenance with the support, shelter and protection of other parts of the building - see para.44.

⁵⁶ See Farrar J, *Law Reform and the Law Commission*, (n.35), p.13.

⁵⁷ See *Wilberforce Report*, (n.33), paras.42 - 44 and see George E’s article on the New South Wales Conveyancing (Strata Titles) Act 1961 ‘Freehold Flats - An Australian Solution’ (1963) 27 NS Conv. 439 in which he says, at p.441, that ‘Perhaps, in a year or two England will have imported this excellent Commonwealth product and help the flow of our common legal heritage.’ Edward George was one of the signatories to the *Wilberforce Report*. The 1961 Act has since been replaced – see, e.g., Clarke D, *Leasehold Enfranchisement – The New Law*, 1st ed. (Bristol: Jordans, 1994), para.2.4.2, fn 24 & Gray K and Gray S, *Elements of Land Law*, (n.29), para.1.2.20.

small, there was little need for any form of management.⁵⁸ Accordingly, the Report recommended that certain minimum ‘obligations’ should in future apply compulsorily to any horizontal division of buildings or the erection of any horizontally divided units.⁵⁹ The obligations would be to provide and maintain shelter and support, to allow for free passage for all the usual services and a right, in default, to enter parts of the building occupied by others to effect repairs.⁶⁰ The statutory imposition of minimum obligations could have been useful for Tyneside Flats, particularly as a word saving device.⁶¹ The Report considered that there should be no automatic statutory imposition of obligations on existing multiple units, since this might cause their owners to face ‘potentially onerous financial burdens’.⁶² However, if at the time the legislation came into force all existing units were in the same ownership, there seems to be no reason why the obligations should not also have applied to future sales of individual flats. Whilst this situation might not apply to many large blocks of flats, it would certainly have applied, and no doubt would still apply, albeit to a lesser extent, to many pairs of Tyneside Flats and maisonettes elsewhere. The absence of any such provision is again presumably because the Committee were not aware of how many self contained two flat houses were in existence.

The Wilberforce Committee presented its Report in 1965. A measure of its significance is that all future Reports on the enforceability of freehold obligations, and the commonhold legislation, refer to, or stem from, its recommendations, which have been broadly welcomed and increased the pressure for reform.⁶³ Had its recommendations been enacted in the 1960s or early 1970s, and had mortgage lenders

⁵⁸ See *Wilberforce Report*, (n.33), para.46. Edward George, as the co-author of the influential conveyancing book *The Sale of Flats* first published in 1957, must have been well aware of the number of ‘maisonettes’ already in existence - see further ch.5 para.5.3.3.

⁵⁹ See *Wilberforce Report*, (n.33), para. 47.

⁶⁰ *Ibid*, paras 47 and 53 (xiii). Detailed wording of the ‘obligations’ was not specified, but the obligation to provide and maintain shelter and support would presumably also mean that flat owners had to maintain and repair their own flats.

⁶¹ Many of the proposed statutory obligations comprise easements which, as legal interests, would automatically bind third parties, provided they had all the essential characteristics of an easement – see, e.g., Gray K and Gray S, *Elements of Land Law*, (n.29), paras 5.1.19 - 5.1.59.

⁶² *Ibid*, para 48. For a different perspective see Flanagan T, ‘Flying Freeholds: The Hebden Royd Solution’ (1981) 78 LS Gaz 1254, where it is stated that there was no public outcry when local legislation, s.74 West Yorkshire Act 1980, imposed repairing obligations on the owners of ‘double-deck’ houses in the Hebden Royd (mainly Hebden Bridge) district of West Yorkshire.

⁶³ See Edell S, ‘Fundamental Reform of Positive and Restrictive Covenants?’, (n. 48), p.495, where he said, when speaking of whether positive obligations should be allowed to run with freehold land, that, ever since the *Wilberforce Report*, there had been ‘strong and consistent pressure to reform this glaring anomaly in the law.’

then been prepared to lend on freehold flats, the complex mixed freehold/leasehold conveyancing arrangements on Tyneside could well have been unnecessary.⁶⁴

4.4 The Law Commission, the Lawson Working Paper and the 1970s

4.4.1 *The Law Commission and the 1960s*

In July 1965 the Wilberforce Committee presented their Report to Lord Gardiner, the Lord Chancellor and the ‘main progenitor’ for the setting up of the Law Commission the previous month.⁶⁵ The Law Commission was given a wide statutory remit which included the ‘systematic development and reform’ of the law, the ‘the simplification and modernisation’ of the law and the submission of programmes for law reform to the Lord Chancellor.⁶⁶ Item 1X of the Law Commission’s First Programme required the commissioners to examine the system of conveying land with a view to its modernisation and simplification.⁶⁷

Although the Wilberforce Committee’s terms of reference excluded restrictive obligations,⁶⁸ its Report suggested that certain of its recommendations should also be applied to them.⁶⁹ In addition both the Council of the Law Society and the Chancery Bar Association thought that the reform of restrictive obligations should also be considered.⁷⁰ In 1966 Lord Gardiner told the Law Commission that he was seeking to introduce legislation to implement the *Wilberforce Report* and asked if, in their examination of the law relating to land transfer, the Commission could give special priority to those aspects of the law on negative obligations which ought to be dealt

⁶⁴ It has been suggested that the imposition of a statutory obligation to repair in West Yorkshire meant that building societies were prepared to lend on the security of ‘flying freeholds’ - see Flanagan T, ‘Flying Freeholds: The Hebden Royd Solution’, (n.62), p.1254.

⁶⁵ A blueprint for the Law Commission had been set out in 1963 - see Gardiner G and Martin A, ‘The Machinery of Law Reform’ in Gardiner G and Martin A (Eds), *Law Reform Now*, (n.45), ch.1. See also Chorley Lord and Dworkin G, ‘The Law Commissions Act, 1965’ (1965) 28 MLR 675, p.679 where it says that ‘it was rumoured, indeed, that Lord Gardiner had made the promise of early legislation for the establishment of a Law Commission a condition of his acceptance of the Lord Chancellorship’. See also Oerton R, *A Lament for the Law Commission*, 1st ed., (Chichester: Countrywise Press, 1987), p.7.

⁶⁶ S.3 (1) LCA 1965.

⁶⁷ See Law Commission, *First Annual Report 1965-1966* (Law Com. No.4), (London: HMSO, 1966), paras 68, 71 and 73.

⁶⁸ See *Wilberforce Report*, (n.33), p.1 set out in ch.4, para.4.3.2.

⁶⁹ See *Wilberforce Report*, (n.33), para.17.

⁷⁰ See Law Commission, *Transfer of Land Report on Restrictive Covenants* (Law Com.No.11), (London: HMSO, 1967), para.2.

with at the same time.⁷¹ The Law Commission published its Report in 1967 and, in a series of ‘propositions’, recommended the creation of a new interest in land called a ‘land obligation’.⁷² The Report considered that the substance of their proposals was applicable in principle to positive as well as restrictive obligations and used the term ‘land obligation’ with the possibility of a comprehensive code in mind.⁷³ The reforming mood of the times was reflected in the Report’s deliberate choice of language. Land obligation was preferred because it avoided the contractual connotation of the word ‘covenant’ and the ‘latinity and archaism’ of phrases such as ‘in rem’⁷⁴ used by the Wilberforce Committee.⁷⁵

A Bill was prepared, but foundered because Chancery practitioners considered that it failed to interact satisfactorily with the surrounding body of general law, particularly the 1925 property legislation.⁷⁶ Another Bill was drafted within the Lord Chancellor’s Department, but that too ‘ran into the ground’.⁷⁷ Both draft Bills were available when the project later came to be revived and ‘like rotting corpses left on a gibbet’ served as a warning of the possible fate of future bills.⁷⁸ The absence of substantive reform on the running of the burden of positive obligations inevitably had an impact on the drafting of other contemporary reform legislation. The LRA 1967, which enabled certain private sector leaseholders to acquire the freehold in their houses, made a distinction between flats on the one hand and terraced houses and dwellings arising by vertical division on the other.⁷⁹ The reason for this distinction was later suggested by Lord Wilberforce in the House of Lords when he said:

⁷¹ Ibid, para.3.

⁷² Ibid, para.27.

⁷³ Ibid, paras 30 and 31. The use of the word ‘obligation’ has long been associated with covenants and in the 1920s was distinguished from them in the title of Behan J’s 1924 book *The Use of Land as affected by Covenants and Obligations not in the Form of Covenants*, 1st ed., (London: Sweet & Maxwell, 1924). The *Wilberforce Report* itself frequently speaks of ‘obligations’ - see, e.g., paras.45, 47 & 48. The term was retained in the Law Commission’s *2008 Consultation Paper*, (n.7), para.1.12.

⁷⁴ See para.31. See also Scarman J, ‘Need the Law be Obscure?’ in Zander M (Ed), *What’s Wrong with the Law*, (n.4), pp.12-13 for an argument that the language of the law needs to be more accessible.

⁷⁵ See ch.4 para.4.3.2.

⁷⁶ See Law Commission, *Transfer of land: The Law of Positive and Restrictive Covenants* (Cmd 127) (Chairman, Gibson J) (*Gibson Report*), (London: HMSO, 1984), para.1.5 and see Oerton R, *A Lament for the Law Commission*, (n.65), p.94. In the late 1990s and early twenty first century land obligation reform was again delayed, in part, because of the need to await the introduction of commonhold and a new Land Registration Act- see ch.4, para.4.8.1.

⁷⁷ See Oerton R, *A Lament for the Law Commission*, (n.65), p.94.

⁷⁸ Ibid.

⁷⁹ Ss 1 & 2. For an assessment of the relevance of this Act to Tyneside Flats, see ch.6, para.6.2.4.

‘If one seeks a reason for this different treatment, it may lie in the difficulty, in relation to units arising by horizontal division, of providing , after they become freehold by enfranchisement, for the enforcement of necessary positive covenants-a difficulty which did not exist while they were leasehold. Possibly there were other reasons for the discrimination: at any rate it was clearly made in section 2(1) of the Act.’⁸⁰

The Act did, however, provide that positive obligations, such as maintenance and repair, should run if schemes of management were set up to protect standards of appearance and amenity which might otherwise be lost on enfranchisement⁸¹ The ‘individualistic’ political imperative of wishing to benefit particular leaseholders against their private sector landlords was therefore, in these limited circumstances, tempered by a broader ‘collectivist’ or community interest. In the 1960s it was felt that the reform of positive obligations had to be linked with the reform of restrictive obligations. The 1970s took the need for a more comprehensive approach still further.

4.4.2 The Lawson Working Paper and the 1970s

In 1971 a Consultative Group appointed by the Law Commission, and under the chairmanship of Neil, later Mr Justice, Lawson, published a Working Paper on *Rights Appurtenant to Land*.⁸² The Lawson Group’s general approach was stated in its opening paragraph when it said that the law had developed in the nineteenth century at a time when ‘the rights of private ownership were held sacrosanct to a degree not now regarded as consistent with the interests of the community as a whole’.⁸³ In considering those community interests it was felt that reform of the law on covenants should form part of a more comprehensive study of rights appurtenant to land. The rationale for this approach was that, if the subject was dealt with piecemeal, then

⁸⁰ See *Parsons v. Gage and Others* [1974] 1 All ER 1162 HL at 1165. As chairman of the 1963 Committee, Lord Wilberforce had particular insight into the difficulty of enforcing freehold positive obligations. The other law lords concurred with his views, which were later endorsed by Nourse LJ in the Court of Appeal in *Westminster v. Birrane* [1995] QB 262, p.269.

⁸¹ See s.19 and Scamell E, *Land Covenants*, (n.33), pp.523 - 524. For a summary of the arguments for and, particularly, against enfranchisement see George E and Scamell E (Eds) ‘Leasehold Enfranchisement’ (1965) 29 NS Conv. 249, pp.249 - 251.

⁸² See Law Commission, *Rights Appurtenant to Land, Report of a Working Group*, (Chairman, Mr Justice Lawton) (Law Com. No.36), (London: HMSO, 1971).

⁸³ *Ibid*, para.1.

overlapping problems, even if appreciated, might never be ‘dealt with’.⁸⁴ A piecemeal approach would also tend to preserve, between categories of rights, distinctions which are part of legal history, but which no longer have any rational justification.⁸⁵ The Lawson Group concluded that it was both ‘practicable and desirable to give the whole subject a coherent structure’, which included ‘certain minimum rights and obligations in relation to interdependent units of occupation’ and an assimilation so far as possible of all other appurtenant rights (easements, profits, restrictive and positive covenants).⁸⁶ This would have involved the implementation of the substance of the *Wilberforce Report* proposals.⁸⁷ These were early days for the Law Commission which, with hindsight, may have then been unduly optimistic about the possibility of such comprehensive reform at that time. Nevertheless, after some ‘hiving off’⁸⁸, and nearly forty years later, the Lawson Committee’s approach appears to have been vindicated, as the Law Commission is again seeking to link covenant and easement reform.⁸⁹

Although an analysis was made in 1972 of the responses to the Lawson Working Paper, the project then lay dormant ‘elbowed aside by other things’.⁹⁰ However, the 1970s was a period of ongoing academic pressure for reform, perhaps stimulated by the ‘unprecedented property boom’ between 1970 and 1973 as wage and price inflation accelerated.⁹¹

4.4.3 Academic Input

Academic criticism of the law on the running of the burden of positive covenants was already under way even before the 1965 Law Commissions Act contained the first statutory recognition of the qualification of academic lawyers to play an official part

⁸⁴ *Ibid.*, para.5.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*, para.6.

⁸⁷ *Ibid.*

⁸⁸ See ch.4, paras 4.7.2 – 4.7.5 for a discussion of the CLRA 2002.

⁸⁹ See ch.4, para.4.8.3.

⁹⁰ See Oerton R, *A Lament for the Law Commission*, (n.65), p.95. Amongst those other things was a project on Landlord and Tenant – for suggestions as to why this failed see Oerton, p.31.

⁹¹ See Briggs A, *A Social History of England*, 1st ed., (London: Book Club Associates, 1984), p.426 and Black J, *Modern British History since 1900*, (n.28), p.213.

in the law.⁹² As joint author of one of the leading textbooks,⁹³ and as a member of the consultative group on the Law Commission's investigation into restrictive obligations, which published its report in 1967,⁹⁴ Wade's was a significant and informed voice. It is therefore not surprising that Wade's influential 1972 article 'Covenants- A Broad and Reasonable View'⁹⁵ was one of the articles referred to in the leading positive obligation case of the twentieth century.⁹⁶ Wade described the distinction between positive and negative obligations as a 'hallowed principle' which 'appears arbitrary, and it impedes transactions in land which have become socially desirable.' Wade appeared to consider that the problem could no longer be circumvented by granting leases, because landlords had been made 'the objects of so much political odium, and of so much restrictive and confiscatory legislation, that leasehold development, if not a dying industry, is at any rate an ailing one.'⁹⁷ It appears that by 'development' Wade was principally thinking of the creation of new leasehold blocks of flats, but on Tyneside it was apparently 'restrictive' legislation, in the form of the 1965 Rent Act, that was partly responsible for the selling off of significant numbers of Tyneside Flats from the mid 1960s onwards and the subsequent creation of many new long leasehold interests.⁹⁸ In addition a vast amount of leasehold 'development' took place in the succeeding decades. Wade's hope that legislation based on the *Wilberforce Report* would not be 'much longer delayed'⁹⁹ has remained largely unfulfilled, although subsequent academic and other comment has been almost unanimous in following his call for reform.¹⁰⁰

⁹² See Kerr M, 'Law Reform in Changing Times', (n.1), p.522. S.1 of the 1965 Act provided that the Law Commission should consist of a Chairman and four other Commissioners to be appointed by the Lord Chancellor. They must be persons appearing to him to be suitably qualified by the holding of judicial office or by experience as a barrister or solicitor or *as a teacher of law in a university* [my italics]. For an example of earlier academic criticism see ch.4, para.4.3.1.

⁹³ See Megarry R and Wade H, *The Law of Real Property*, 3rd ed., (London: Stevens, 1966).

⁹⁴ See ch.4 para.4.4.2.

⁹⁵ See Wade H, 'Covenants – A Broad and Reasonable View (1972B) 31 C.L.J.157.

⁹⁶ See *Rhone v. Stephens* [1994] 2 A.C 310 HL at 312 A.

⁹⁷ See Wade H, 'Covenants – A Broad and Reasonable View, (n.95), p.157.

⁹⁸ See ch.5, para.5.2.4. See also *Report of the Committee of Inquiry on the Management of Privately Owned Blocks of Flats*, (Chairman, E. Nugee) (*Nugee Report*), (London: HMSO, 1985), Vol.1, paras 2.5 - 2.6, which indicated that many long leaseholds were also being created in existing blocks of flats, as individual flats were then being sold to sitting tenants.

⁹⁹ See Wade H, 'Covenants – A Broad and Reasonable View', (n.95), p.164.

¹⁰⁰ For a suggestion that positive and negative obligations should be kept separate and that it 'may be best' to resist the reformers' predilection for 'tidying the law' – see Sabey D and Everton A, *The Restrictive Covenant in the Control of Land Use*, (n.31), pp.189 – 190. Commonhold, which partly stems from the *Wilberforce Report's* proposals, has been enacted - see ch.4, para.4.7.2.

4.5 The 1980s and the Gibson Report

4.5.1 *The 1980s*

The lack of positive obligation reform resulted in a number of statutes being passed in the early 1980s which provided that the burden of positive obligations could run in favour of public bodies.¹⁰¹ Of particular significance was s.609 HA 1985 which, because it applied to all ‘right to buy’ disposals under the 1985 Act, and was not limited to restrictive obligations, significantly increased the number of both positive and negative obligations that could be enforced.¹⁰² As parliament, in effect, continued to recognise the need for reform, the early 1980s also saw a revival of the 1971 project. The main proposals of the 1971 Lawson Working Paper had been strongly supported in consultation but, when the project was revisited in 1981, the 1971 plan was seen as being too ambitious.¹⁰³ Accordingly, the scope of the resuscitated project was limited to dealing only with positive and restrictive obligations, but was assisted by the Working Paper consultation.¹⁰⁴ The ensuing 1984 Report and draft Bill under the chairmanship of Mr Justice Gibson (*Gibson Report*) ran to over 330 pages and represented ‘the first fully worked out proposals’ for obligation law reform.¹⁰⁵

4.5.2 *The Gibson Report*

The *Gibson Report* considered that the law of positive covenants was in ‘urgent need of radical reform’¹⁰⁶ and again recommended the use of the term ‘land obligation’ for a new interest intended to replace both positive and restrictive ‘covenants’.¹⁰⁷ It was

¹⁰¹ See Scamell E, *Land Covenants*, (n.33), pp.518 - 521, which sets out details of s.35 Highways Act 1980, s.39 Wildlife and Countryside Act 1981, s.33 Local Government (Miscellaneous Provisions) Act 1982 and s.62 Pastoral Measure 1983.

¹⁰² S.609 was introduced as a result of a Law Commission recommendation - see Law Commission, *Report on the Consolidation of the Housing Acts* (Law Com. No. 144) (Cmd 9515), (London: HMSO, 1985), recommendation 11(ii), pp.5-6 .

¹⁰³ See *Gibson Report*, (n.76), para.1.6.

¹⁰⁴ *Ibid.*

¹⁰⁵ See Edell S, ‘Fundamental Reform of Positive and Restrictive Covenants?’, (n.48), p.496.

¹⁰⁶ See *Gibson Report*, (n.76), para.4.16.

¹⁰⁷ See *Gibson Report*, (n.76), paras 4.21 and 4.22 and s.1 of the annexed draft Bill. The report of the *Royal Commission on Legal Services* (Chairman, Sir Henry Benson) (Cmd 7648), (London: HMSO, 1979) suggested, at para.2.4, that restrictive covenants ‘bedevil’ conveyancing. The *Gibson Report* considered this might be an ‘exaggeration’ and kept to its previous view that privately imposed restrictive covenants continued to have a useful role - see para.2.3. See also Law Commission, *Transfer*

anticipated that, like easements, land obligations would normally subsist as a legal interests in land, but would only be enforceable against the current owners of the dominant and servient land.¹⁰⁸ They therefore differed from freehold restrictive covenants, which remain enforceable against the original parties after they have parted with the land.¹⁰⁹ However, like restrictive covenants, land obligations would have been registrable in the Land Charges Registry for unregistered land or the Land Registry for registered land.¹¹⁰ Land obligations therefore took something from both easements and, to a lesser extent, restrictive covenants.¹¹¹

The *Gibson Report* and attached draft Bill would have created two classes of land obligation, namely ‘development’ and ‘neighbour’ obligations. Development obligations had to be created in pursuance of a development scheme and were designed primarily for cases where a substantial area of land was being developed by the creation of a number of separately owned, but interdependent, units such as flats.¹¹² Neighbour obligations were intended to be used either for two ‘horizontal’ neighbours side by side or for two ‘vertical’ neighbours, for example, where a house is divided into two flats.¹¹³

of Land Report on Restrictive Covenants, (n.70), para.19 and Law Commission, *Fifteenth Annual Report 1979 - 1980* (Law Com. No.107), (London: HMSO, 1981), Appendix 1, paras 9 & 10.

¹⁰⁸ See *Gibson Report*, (n.76), para.4.22.

¹⁰⁹ *Ibid* and see ss 6 & 7 of draft Bill. For a discussion of the relief given to original leaseholders under the LTCA 1995, see ch.6, para.6.6.2 - 6.6.3.

¹¹⁰ See *Gibson Report*, (n.76), para.9.1. The Report accepted the Registry’s view that it would not be possible to note the benefit of development obligations - see paras 9.21 - 9.24 - & that it might not be possible to note the benefit of neighbour obligations - see paras 9.25 - 9.26. See also Edell S, ‘Fundamental Reform of Positive and Restrictive Covenants?’, (n.48), p.224.

¹¹¹ The *Gibson Report*, (n.76), said that the law of easements formed the ‘kernel’ of their recommendations - see para.3.64.

¹¹² See *Gibson Report*, (n.76), paras 6.1 - 6.2 & 6.7 - 6.8 & Edell S, ‘Fundamental Reform of Positive and Restrictive Covenants?’, (n.48), pp.317 - 318.

¹¹³ See *Gibson Report*, (n.76), para.6.19 & explanatory note 5 to s.1 (2) of the draft Bill. The distinction made between horizontal and vertical neighbours supports the view that the *Gibson Report* had a ‘strong feel for the realities of legal practice’ – see Wilkinson H, ‘The Law Commission Report on Covenants -1’ (1984) 134 NLJ 459, p.459. The *Wilberforce Report* also had a practical feel by, e.g., drawing a distinction between developments which needed ‘management’ and those, with a small number of units, which did not - see ch.4, para.4.3.2.

4.5.3 *The Gibson Report and Tyneside Flats*

Since Tyneside Flats almost invariably comprise just two self-contained units,¹¹⁴ neighbour obligations would have been the appropriate mechanism for the creation of land obligations.¹¹⁵ The requirement that land obligations should be described as such¹¹⁶ ought not to have caused particular difficulty, especially if it had been incorporated into standard Tyneside Flat documentation. Again the need to identify both the dominant and servient land ‘whether or not by reference to a plan’¹¹⁷ could, as is already the case with the existing standard Tyneside Flat documentation, have easily been met by reference to the other flat in each pair. In words which echoed the comments of Lord Brougham in *Keppel v. Bailey*,¹¹⁸ the *Gibson Report* stated that it would ‘of course’ be wrong to allow a landowner to impose an obligation of any kind which might happen to take his fancy’.¹¹⁹ The Report therefore recommended that neighbour obligations should be limited to restrictive obligations, positive obligations to carry out works and provide services and reciprocal payment obligations to pay towards the cost of positive obligations.¹²⁰ The proposed obligation to carry out works would have included the covenants for repair and maintenance contained in the standard Tyneside Flat lease.¹²¹ The reciprocal payment obligation would have covered the leaseholder’s covenant to pay half the cost of repairing or renewing ‘common installations’.¹²² This restricted list of neighbour obligations would therefore have included the main positive obligations in standard Tyneside Flat leases. The scope of permitted positive development obligations also included a ‘positive user obligation’, but the Report considered that such an obligation could be used ‘oppressively’ if included in the list of permitted neighbour obligations.¹²³

¹¹⁴ See ch.8, para.8.2.3.

¹¹⁵ The *Gibson Report*, (n.76), considered that a development scheme and development obligations would not normally be needed for a house divided into two flats – see para.6.19.

¹¹⁶ See *Gibson Report*, (n.76), para.8.31.

¹¹⁷ *Ibid*,

¹¹⁸ (1834) 2 My & K 517.

¹¹⁹ See *Gibson Report*, (n.76), para.6.4. For a discussion of Lord Brougham’s very similar comments in *Keppel v. Bailey* see ch.3, para.3.2.1. See also ch.4, para.4.8.3 for similar comments in the *2008 Consultation Paper*.

¹²⁰ See *Gibson Report*, (n.76), para.6.

¹²¹ See cl.3 & 5th Sch., clauses (c) (e) (f) & (g) standard lease in Appendix A for leaseholder’s obligations & cl.5 (A) for landlord’s obligations.

¹²² *Ibid*, 5th Sch., cl.(d).

¹²³ See *Gibson Report*, (n.76), para. 6.12 for an indication of what this obligation would have allowed. The *2008 Consultation Paper* thought positive user obligations should be allowed for adjoining neighbours - see ch.4, para.4.8.6.

The Report recommended for optional adoption a special self-help remedy for the enforcement of the ‘more common types of positive land obligation’ whereby a dominant owner could carry out works required by a land obligation and require the servient owner to pay the cost, with provision for such costs to be a charge on the servient owner.¹²⁴ A clause along these lines would probably have been appropriate for Tyneside Flats, since it is roughly equivalent to the leaseholder’s covenant in the standard Tyneside Flat lease which permitted the landlord to enter and carry out works, which the leaseholder had failed to do, and recover the cost as a debt.¹²⁵

Although ‘neighbour’ obligations could have been used for Tyneside Flats, it may well be that, even if the *Gibson Report* had been implemented, they would not have been adopted. By the time the Report was published, standard documentation had already been promulgated by the Newcastle Law Society¹²⁶ and the *Report’s* proposals did not prevent those arrangements continuing. This is because, whilst future freehold obligations created after the commencement of the Act would no longer run with the land, landlord and tenant covenants could still continue.¹²⁷ Conveyancers are, however, well used to having different systems running simultaneously as, for example, with registered and unregistered land, and might have been susceptible to pressure from mortgage lenders, if they had pressed for single title documentation.¹²⁸

4.5.4 Opposition to Gibson Report

Oerton, in his insider’s account of the difficulties in producing the *Gibson Report*, characterised it as being a story of ‘brain-cracking work and of bogeymen’.¹²⁹ Two major ‘bogeymen’ were the Land Registry and the Building Societies Association (the

¹²⁴ See *Gibson Report*, (n.76), para. 4.26.

¹²⁵ See, cl.(h) 5th Sch. standard lease. For a discussion of self-help ideas in the nineteenth century, see ch.3, para.3.4.2, fn113.

¹²⁶ See ch.5, para.5.3.3.

¹²⁷ See *Gibson Report*, (n.76), paras. 24.9 & 24.11. It seems that the continued use of the standard Tyneside Flat documentation under the 2008 *Consultation Paper* proposals might be more problematical - see ch.8, para.8.9.9, fn 426. For an indication of conveyancers’ attitudes to reform see ch.8, s.8.9.

¹²⁸ Quantitative research data indicates that north eastern conveyancers have sometimes found it difficult to explain the standard Tyneside Flat documentation to mortgage lenders see ch.8, para.8.9.8.

¹²⁹ See Oerton R, *A Lament for the Law Commission*, (n.65), p.95.

BSA).¹³⁰ The *Gibson Report* considered that, as with easements, both positive and restrictive land obligations should appear on the registers for both the benefited and burdened land.¹³¹ This would have involved the Registry in extra work at a time when they were anxious to extend compulsory registration throughout the country.¹³² The Registry therefore fought against the proposals with ‘unrelenting determination’, unless they could obtain additional manpower which, ‘given the government’s general attitude towards public sector expenditure’, they knew they would not get.¹³³ The Report’s alternative suggestion that land obligations could, like restrictive covenants, only be entered on the servient title was not enough to save the Bill, particularly because of opposition from the BSA.¹³⁴ Much of the *Gibson Report’s* thinking has, however, been adopted by the Law Commission in its current proposals for land obligation reform.¹³⁵

The BSA considered that the Report was an ‘excellent and sensible document,’ that the reform of English covenant law was long overdue, but that the proposed development scheme left too much to chance.¹³⁶ For the BSA too much scope was left to developers and their advisers to concoct schemes which might in practice be unworkable, unfair, complex or otherwise against the public interest, just as in existing leasehold schemes, leases had been prepared which were ‘unworkable, unfair or even incomprehensible’.¹³⁷ The BSA therefore pushed for the creation of a compulsory Strata Title scheme on the Australian model for new flat/maisonette

¹³⁰ Ibid., pp.95 - 99.

¹³¹ See *Gibson Report*, (n.76), para.9.13.

¹³² See Polden P, ‘Law Commission: Transfer of Land’, (n.11), p.571, where he suggests that the Registry was under ‘heavy pressure’ to extend compulsory registration to the whole country at ‘great speed’.

¹³³ See Oerton R, *A Lament for the Law Commission*, (n.65), p.97. For a general indication of the government’s approach to public sector spending at that time see, e.g., Evans E, *Thatcher and Thatcherism*, 2nd ed., (London: Routledge, 2004), p.55. The registration programme has now been extended throughout England and Wales – see ch.4, para.4.8.8, fn 261. This may be a factor in the Registry’s subsequent change of approach towards making comprehensive register entries - see further ch.4, para.4.8.8.

¹³⁴ Entry of restrictive covenants in the charges register provides notice only of the covenants, in so far as they are subsisting and are capable of being enforced. It does not guarantee their validity - see Dixon M et al, *Ruoff & Roper on the Law and Practice of Registered Conveyancing (Registered Conveyancing)*, loose leaf ed., (London: Thomson Reuters (Legal), 2010), para.9.020 & S.32 (3) LRA 2002. See also *Gibson Report*, (n.76), paras 9.25 & 9.26.

¹³⁵ See ch.4, s.4.8.

¹³⁶ See BSA ‘*Leaseholds – Time for a Change*’ (*BSA Report*) (London: BSA, 1984), paras 16(a) & 16 (b).

¹³⁷ Ibid, para.16 (b).

developments.¹³⁸ The BSA's prime concern was with multi-unit developments which, for the next few years, became the main legislative focus of attention.

4.6 Leasehold Reform

Legislation relating to privately owned blocks of flats was passed from the mid 1980s onwards. Although the impact of statutory leasehold reform on Tyneside Flat tenurial arrangements is discussed in chapters 6 and 8, a brief overview of the major reforms is included here, as it provides the background to the eventual passage of commonhold legislation. Leasehold and commonhold legislation can be seen as either diverting attention away from land obligation law reform or, alternatively, as being necessary precursors.

Leasehold reform was informed, and to some extent driven, by the *James Report* (1982),¹³⁹ the *BSA Report* (1984),¹⁴⁰ and the *Nugee Report* (1985).¹⁴¹ The James Committee was set up by the Royal Institute of Chartered Surveyors and in 1982 reported on the most persistent complaints by tenants on the repair and maintenance of private residential blocks of flats. As a result of the *James Report's* recommendations, the LTA 1985 introduced limited measures to control abuses of service charge funds and to consult leaseholders before entering into major works contracts.¹⁴² The influence of the building societies in the property market was evidenced by the effect of their relatively short 1984 Report. In addition to giving a major push towards commonhold, the Report's comments on the 'wasting asset' problem helped create pressure for reform of the management of blocks of flats and for collective enfranchisement. The 1984 *BSA Report* pointed out that many leases in blocks of flats built since the Second World War were granted for terms of 99 years and by the mid 1980s were nearing the half way point of their lives.¹⁴³ This was

¹³⁸ Ibid, paras 25(c) - (e).

¹³⁹ See *Report of the Working Party on the Management of Blocks of Flats* (Chairman, J. James) (RICS) (*James Report*), published as Annex 1 to the *Nugee Report*, (n. 98).

¹⁴⁰ See n.136.

¹⁴¹ See n.98.

¹⁴² For details of the other *James Report* recommendations and for a discussion of the restricted definition of service charges in the LTA 1985, see Rodgers C, *Housing Law Residential Security and Enfranchisement (Housing Law)*, revised ed., (London: Butterworths, 2002), paras 1.36 & 1.42. For a discussion of the impact of the LTA 1985 on Tyneside Flats, see ch.6, s.6.5 & ch.8, para.8.7.4.

¹⁴³ See *BSA Report*, (n.136), para.5 (c).

damaging economically because once a lease had less than 40 years remaining, building societies were reluctant to lend,¹⁴⁴ and psychologically because the consequent decrease in the value of their property meant that leaseholders in unfashionable areas had little personal incentive to combat structural deterioration.¹⁴⁵ The 1984 *BSA Report*'s findings were strengthened by the 1985 *Nugee Report* which identified numerous management problems in blocks of flats and which was largely responsible for the passage of the 1987 L TA. In general terms the 1987 Act sought to ensure that tenants could insist on an efficient level of management and also gave them a right of pre-emption when landlords proposed to sell their interests.¹⁴⁶

The 1987 Act has been described as being largely conservative,¹⁴⁷ generally non-compulsory,¹⁴⁸ and of little impact.¹⁴⁹ Inevitably further legislation became necessary. Continuing unsatisfactory management arrangements, combined with the ongoing 'diminishing asset' problem and, an expressed wish to extend home ownership, eventually led to the passage of the Leasehold Reform, Housing and Urban Development Act 1993 (LRHUDA 1993).¹⁵⁰ Another underlying pressure for reform was that by the end of 1990 commonhold proposals had been accepted.¹⁵¹ If there were to be a new form of land holding for flats in the future, it would have been politically difficult for existing flat owners to be left dissatisfied and with a wasting asset.¹⁵² The LRHUDA 1993 continued the process of reform begun by the LRA 1967¹⁵³ and introduced a right of collective enfranchisement for certain leaseholders

¹⁴⁴ Ibid. ch.1, para.3. For an indication of mortgage lenders' current leasehold term requirements see ch.8, para.8.4.5.

¹⁴⁵ See Percival M, 'The Landlord and Tenant Act 1987' (1988) 51 MLR 97, p.98.

¹⁴⁶ For an analysis of the 1987 LTA's provisions see Percival M, 'The Landlord and Tenant Act 1987' (n.145) & Rodgers C, 'Residential Flats – A New Deal? The Landlord and Tenant Act 1987' [1988] Conv. 122. For a discussion of the impact of the 1987 LTA on Tyneside Flats, see ch.6, s.6.5.

¹⁴⁷ See Rodgers C, 'Residential Flats – A New Deal? The Landlord and Tenant Act 1987', (n.146), p.122 & *Housing Law*, (n.142), para.1.39.

¹⁴⁸ See Percival M, 'The Landlord and Tenant Act 1987', (n.145), p.99 and Bright S, 'Enfranchisement – A Fair Deal for All or for None?' [1994] 58 Conv. 211, p.213.

¹⁴⁹ See Clarke D, 'Commonhold - A Prospect of Promise (1995) 58 MLR 486, p.489.

¹⁵⁰ See Bright S, 'Enfranchisement – A Fair Deal for All or for None?' (n.148), p.211, Clarke D, 'Legislation Leasehold Enfranchisement: Leasehold Reform, Housing and Urban Development Act 1993, Pt 1' [1994] 58 Conv. 223, p.244 and generally Davey M, 'The Onward March of Leasehold Enfranchisement' (1994) 57 MLR 773.

¹⁵¹ See ch.4, para.4.7.2.

¹⁵² See Clarke D, 'Legislation Leasehold Enfranchisement', (n.150), p.224 and Clarke D, 'Commonhold - A Prospect of Promise, (n.149), p.493.

¹⁵³ See Davey M, 'The Onward March of Leasehold Enfranchisement', (n.150), p.773 and ch.4, para.4.4.1.

together with a right for long leaseholders to acquire a new 90 year lease.¹⁵⁴ The highly complex nature of the 1993 Act led most commentators at the time to predict that it would be ineffective,¹⁵⁵ a prediction which appears to have been fulfilled.¹⁵⁶ The proposals for collective enfranchisement had been closely linked to the proposals to introduce commonhold and may be seen as a ‘staging post’ towards that new structure.¹⁵⁷

4.7 Commonhold

4.7.1 *The Aldridge Report*

Whilst leasehold legislation was being passed, proposals for commonhold were also taking root. Responses to the 1984 *Gibson Report* had suggested that strata title or condominium legislation should be introduced.¹⁵⁸ As a result, in 1986, the Lord Chancellor asked the Law Commission to bring forward proposals for reform. An interdepartmental Working Group, under the chairmanship of Trevor Aldridge, was set up and completed its Report (*Aldridge Report*) the following year.¹⁵⁹ The *Aldridge Report* recommended that there should be a new scheme of freehold land ownership called commonhold, which would have to be registered in the Land Registry.¹⁶⁰ Within the commonhold, the emphasis is on co-operation between owners living within a defined area.¹⁶¹ Each occupier would be a ‘unit holder’ whose powers were

¹⁵⁴ For a discussion of the relevance of the LRHUDA 1993 to Tyneside Flats see ch.6, paras.6.3.4 & 6.4.2 & ch.8, para.8.3.6.

¹⁵⁵ See Bridge S, *Residential Leases*, 1st ed., (London: Blackstone, 1994), p.193, Bright S, ‘Enfranchisement – A Fair Deal for All or for None?’ (n.148), p.193, Clarke D, ‘Legislation Leasehold Enfranchisement’, (n.150), p.228 and Davey M, ‘The Onward March of Leasehold Enfranchisement’ (n.150), p.781. It has been suggested that the 1993 Act was made deliberately complex to prevent enfranchisement - see Kenny P (Ed), ‘Commonhold Again’ [1996] 60 Conv. 322, fn 8.

¹⁵⁶ See Sparkes P, *A New Land Law*, 2nd ed., (Oxford: Hart, 2003), p.432, where he says that the collective enfranchisement procedure is ‘tortuous and many attempted acquisitions fail’.

¹⁵⁷ See Clarke D, *Leasehold Enfranchisement: The New Law*, 1st ed., (Bristol: Jordans, 1994), paras 2.5.2 & 2.5.3, Davey M, ‘The Onward March of Leasehold Enfranchisement’, (n.150), p.783, Rodgers C, *Housing Law*, (n.142), para.1.32. The 1993 Act had a troubled passage through parliament. In 1995 it was suggested that if it was perceived as having caused great parliamentary effort but satisfied very few, then there would need to be a strong case for yet more property legislation - see Clarke D, ‘Commonhold - A Prospect of Promise’, (n.149), pp.489 - 490.

¹⁵⁸ See ch.4, para.4.5.4.

¹⁵⁹ See Law Commission, *Commonhold, Freehold Flats, Report of a Working Group*, (Chairman T Aldridge) (*Aldridge Report*) (Law Com. No. 179), (London: HMSO, 1987).

¹⁶⁰ *Ibid*, para.3.8. For a discussion of the origins of the term ‘commonhold’ see Roberts N, ‘Commonhold: A New Property Term - But No Property in a Term’ [2002] 66 Conv. 341, pp.341- 348.

¹⁶¹ See *Aldridge Report*, (n.159), para.1.10.

to be as close as possible to those of any other freeholder.¹⁶² The rights and obligations of each unit holder were to be laid down by statutory instrument and attached to each owner.¹⁶³ These regulations would be of both a positive and negative nature and enforceable by both the commonhold association and individual unit holders.¹⁶⁴ Accordingly, land obligations would not be required within a commonhold.¹⁶⁵ Unit owners would automatically be members of a commonhold association, which would be responsible for organising the common services and owning any common parts.¹⁶⁶ Communal management arrangements are an integral part of commonhold, but the Report recognised that there would be many circumstances where this would be inappropriate. In those cases, land obligations would provide a convenient alternative and it was expressly stated that the commonhold scheme should not be seen as a substitute for them.¹⁶⁷ It considered that, apart from some ‘minor modifications’, the two sets of proposals could be assimilated.¹⁶⁸

4.7.2 *The Commonhold and Leasehold Reform Act 2002*

The *Aldridge Report* formed the basis for a draft Commonhold Bill which was prepared by the Law Commission and published in 1990.¹⁶⁹ Although commonhold proposals quickly became settled policy¹⁷⁰, they were ‘sidelined and overtaken’ by the proposals for leasehold enfranchisement.¹⁷¹ Academic pressure for the enactment of commonhold continued throughout the 1990s, particularly from David Clarke, ‘the leading expert’.¹⁷² In the 1990s the commonhold proposals became bi-partisan and by

¹⁶² Ibid, para.6.1.

¹⁶³ Ibid, para.7.2.

¹⁶⁴ Ibid, para.7.25

¹⁶⁵ Ibid, para.17.2

¹⁶⁶ Ibid, para.8.1.

¹⁶⁷ Ibid, para.1.9.

¹⁶⁸ Ibid, paras 17.4 - 17.10.

¹⁶⁹ See Clarke D, ‘Commonhold - A Prospect of Promise’, (n.149), p.491.

¹⁷⁰ See Lord Chancellor’s Department, *Commonhold A Consultation Paper (with draft Bill annexed)* (Cm 1345), (London: HMSO, 1990), para.1.6.

¹⁷¹ See Clarke D, ‘Commonhold - A Prospect of Promise’, (n.149), p.493 where he gives an account of how commonhold became detached from leasehold enfranchisement.

¹⁷² See Sparkes P, *A New Land Law*, (n.156), p.60, para.4.16 See also Clarke D, ‘Legislation Leasehold Enfranchisement’, (n.150), p.232, ‘Commonhold - A Prospect of Promise’, (n.149), p.504 and ‘Occupying ‘Cheek by Jowl’ in Bright and Dewar (Eds), *Land Law: Themes and Perspectives*, 1st ed., (Oxford: OUP, 1998), p.405.

1998 had been detached from land obligation reform,¹⁷³ apparently because the Government wished to see how ‘future developments’ in property law might affect the *Gibson Report* recommendations.¹⁷⁴ Delay in the enactment of commonhold occurred because it was not a high political priority¹⁷⁵ but, ultimately, in 2002 the Commonhold and Leasehold Reform Act (CLRA 2002) was passed. Despite the passage of time since the *Aldridge Report* and the changes that had occurred in previous commonhold Bills, the influence of the *Aldridge Report* can be seen in many features of the final structure. The term commonhold is retained and the role of the Land Registry remains central since, if land is to be classified as commonhold, it has to be registered in the Land Registry as a freehold estate in commonhold land.¹⁷⁶ Commonhold is a specialised form of freehold ownership,¹⁷⁷ a freehold community.¹⁷⁸ Within that community of separate freeholders, the commonhold is divided into freehold units, each unit being held by the registered proprietor.¹⁷⁹ The remainder of the commonhold constitutes the common parts, which are vested in the commonhold association. The community is bound together by a ‘local law’ based on standard basic provisions, set out in a single document, the commonhold community statement.¹⁸⁰ The commonhold community statement contains the rights and duties of the commonhold association and of unit holders.¹⁸¹ Duties may be imposed on either the commonhold association or on a unit holder.¹⁸² Duties may be either ‘positive’

¹⁷³ In the 1990s the government twice consulted on draft bills to introduce commonhold, which it was intended should be combined with land obligations. In 1995 Clarke had argued that commonhold should be seen as a separate concept from land obligations - see Clarke D, ‘Commonhold - A Prospect of Promise’, (n.149), p.494.

¹⁷⁴ Written Answer, Hansard (HL) 19 March 1998, Vol. 587, col. 213. The Lord Chancellor’s answer did not say what future developments in property law he had in mind. The Law Commission has said that it was understood to be the ‘possible introduction of a system of commonhold’ - see Law Commission, *Seventh Programme of Law Reform* (1999) (Law Com. No. 259), (London: HMSO, 1999), p.13, fn 62. The Lord Chancellor might also have been thinking of land registration reform.

¹⁷⁵ See Clarke D, ‘The Enactment of Commonhold - Problems, Principles and Perspectives [2002] 66 Conv. 349, p.349, fn.4.

¹⁷⁶ See s. 1(1) (a) CLRA 2002 and see generally Dixon M et al, *Registered Conveyancing*, (n.134), para. 22.003.

¹⁷⁷ For a discussion of the legal nature of an interest in commonhold see Riddall J, ‘What is the nature of an interest in Commonhold Land?’ [2003] 67 Conv. 358, pp.358 - 359.

¹⁷⁸ See Clarke D, *Commonhold – The New Law*, 1st ed., (Bristol: Jordans, 2002), para.1.29, ‘The Enactment of Commonhold’, (n.175), p.350 & Clarke D (Ed), *Clarke on Commonhold – Law, Practice and Precedents (Clarke on Commonhold)*, loose leaf ed., Update 3, (Bristol: Jordans, 2006), para.1.15.

¹⁷⁹ *Ibid* and see ss 11-24 CLRA 2002.

¹⁸⁰ See Clarke D, *Commonhold – The New Law*, (n.178), para.1.30, ‘The Enactment of Commonhold’, (n.175), p.351, Clarke D (Ed), *Clarke on Commonhold*, (n.178), para.1.15 & ss.31-33 CLRA 2002.

¹⁸¹ See s.31 (1) (a) & (b) CLRA.2002.

¹⁸² *Ibid*, s.31 (3) (a) & (b).

such as to pay money, undertake works or grant access¹⁸³ or negative such as to refrain from using the whole or part of a commonhold unit for a specified purpose or to refrain from causing a nuisance or annoyance.¹⁸⁴ A right or duty imposed by a commonhold community statement will affect a new unit holder in the same way as it affected the former unit holder.¹⁸⁵ In other words, within a commonhold, the burden of positive obligations will automatically pass on a transfer of individual units.

Although it would be possible to set up a commonhold structure for pairs of Tyneside Flats,¹⁸⁶ the small number of units, the lack of common parts and the absence of any need for management mean that in practice it is not sensible to do so.

4.7.3 Commonhold and Tyneside Flats - the number of units

The *Aldridge Report* explicitly considered that it might not be thought worthwhile to establish a commonhold with just two units¹⁸⁷ and that land obligations would be valuable in situations where it would be ‘unnecessarily cumbersome’ to create a commonhold association.¹⁸⁸ Nearly all Tyneside Flats comprise residential pairs of flats in one terraced building¹⁸⁹ and, although most north eastern conveyancers include within their concept of Tyneside Flats other structural layouts, these also nearly always consist of only two units.¹⁹⁰ It has also been suggested that, in practice, commonhold may need a minimum of three units, because just two unit holders, each with an equal say in the commonhold association, is a recipe for deadlock in the event of disagreement.¹⁹¹

¹⁸³ Ibid, s.31 (5) (a) (b) & (c).

¹⁸⁴ Ibid, s.31 (5) (f) & (h).

¹⁸⁵ Ibid, s.16 (1) (a).

¹⁸⁶ Ibid, s.11 (2) (a) and, e.g., Cooke E, *Land Law*, 1st ed., (Oxford: OUP, 2006), p.175.

¹⁸⁷ See *Aldridge Report*, (n.159), para. 3.10, which also went on to point out that commonhold might be appropriate where there are substantial high rise office blocks which have been divided into just two units. The *Aldridge Report* therefore recommended that there should be a minimum of two units.

¹⁸⁸ Ibid, para.17.2.

¹⁸⁹ See ch.2, para.2.3.2.

¹⁹⁰ See ch.8 para.8.2.3.

¹⁹¹ See Clarke D, ‘The Enactment of Commonhold, (n.175), p.351, fn 13. Presumably this same danger will arise, perhaps to a lesser extent, whenever there is an even number of unit holders.

4.7.4 Commonhold and Tyneside Flats - the lack of common parts

Tyneside Flats are nearly always entirely self contained, without any jointly occupied areas. Where this is the case, the land transferred to the two flat owners inevitably comprises all the land in the building, which would mean there were no ‘common parts’ to vest in the in the commonhold association.¹⁹² The Registry’s practice is to file copies of the commonhold community statement and memorandum and articles of association of the commonhold association under the common parts title.¹⁹³ This has led to the suggestion that, with no common parts title, there would be nowhere publicly to record details of these documents.¹⁹⁴ However, since the statutory requirement is only to enter a note ‘in the individual register of the affected registered titles’,¹⁹⁵ this difficulty could, presumably, be overcome by filing copy documents under one of the individual flat titles.¹⁹⁶ Nevertheless; it remains extremely improbable that anyone would ever seek to register a pair of Tyneside Flats as a commonhold without a common parts title.¹⁹⁷ This is because it would seem pointless to establish a commonhold without common parts, since the communal management system is one of the prime purposes of the commonhold structure.¹⁹⁸

4.7.5 Commonhold and Tyneside Flats-the absence of any need for management

Both the *Aldridge Report* and the *2008 Working Paper* considered that the mere existence of common parts would not necessarily make commonhold the most

¹⁹² S.25 (1) CLRA 2002 defines ‘common parts’ in a commonhold as every part of the commonhold which is not for the time being a commonhold unit in accordance with the commonhold community statement. Cl.1 (E) of the standard Tyneside Flat lease defines Tyneside Flat ‘common installations’ to include pipes, chimney stacks etc – see further ch.8, para.8.7.2. Mapping difficulties would make it impracticable for the Land Registry to register the airspace for these common installations separately in a commonhold association.

¹⁹³ See LRPG 60 ‘Commonhold’, (London: Land Registry, 2009), para.6.1.1.

¹⁹⁴ See Aldridge T, *Commonhold Law*, loose leaf edition, release 2, (London: Sweet and Maxwell, 2004), para.3.4.2 quoted by the Law Commission in the *2008 Consultation Paper*, (n.7), para.7.64 & see also para.11.6.

¹⁹⁵ See *The Commonhold (Land Registration) Rules 2004* (SI 2004/1830), r.28 (1) (b).

¹⁹⁶ Para. 6.1.1, LRPG 60, (n.193), makes it clear that a note of the documents will be entered on the unit titles indicating that they are filed under the common parts title. There appears to be no statutory requirement stipulating under which title any copy documents should be filed.

¹⁹⁷ It appears that there is no statutory requirement that there must be ‘common parts’ in a common hold - see Aldridge T, *Commonhold Law*, (n.194), para.3.4.2 & Clarke D, *Clarke on Commonhold*, (n.178), para.7.20.

¹⁹⁸ *Ibid.*

suitable structure.¹⁹⁹ More important was the need for management. The standard Tyneside Flat lease requires joint contributions to be made for ‘common installations’, which include items such as gutters, spouts, chimney stacks and any yard or garden walls of any ‘shared land’.²⁰⁰ Quantitative research data revealed that normally joint contributions were required very infrequently and were usually for items of a comparatively minor nature.²⁰¹ It would therefore seem excessive to set up a commonhold structure for Tyneside Flats, and become embroiled in running a commonhold association, purely to try and ensure that contributions were made.²⁰² Even where, for example, there is a jointly used yard, the present mixed freehold/leasehold arrangement, where the yard is included in one lease and rights are granted over it to the other leaseholder, seems more appropriate.

In view of the above, it is unsurprising that none of the research participants implied or suggested that commonhold had ever been attempted for Tyneside Flats.²⁰³ All the above factors also militate against the possibility of conversion to commonhold in the future, which could usually only be contemplated if both flat owners agreed.²⁰⁴ The proposals for land obligations, discussed in the next section potentially provide a far more viable freehold alternative for Tyneside Flats and many other small blocks of horizontally divided units.

¹⁹⁹ See *Aldridge Report*, (n.159), para.17.2 and *2008 Consultation Paper*, (n.7), para.11.11.

²⁰⁰ See further ch.8, para.8.7.2.

²⁰¹ See ch.8, paras 8.7.3 & 8.7.4.

²⁰² ‘Excessive’ because of the necessity to hold meetings, prepare budgets and accounts etc-see generally Clarke D, *Commonhold – The New Law*, (n.178), chs 4 and 10 & Clarke D, *Clarke on Commonhold*, (n.178), chs 16 - 18. The *Aldridge Report*, (n.159), suggests that it would be ‘unnecessarily cumbersome’ to create a commonhold association for the upkeep of a private road, which is used by a number of properties, but where maintenance work may only be needed every few years - see para.17.2. A private road is normally likely to be a more substantial facility than any individual Tyneside Flat ‘common installation’.

²⁰³ As at 20 February 2008, according to Land Registry figures, only 14 commonhold titles had been registered in England and Wales - see *2008 Consultation Paper*, (n.7), para.11.4.

²⁰⁴ An application for registration of a freehold estate in commonhold land cannot be made without certain consents, including those of the *registered* proprietor of the freehold estate in the whole or part of the land and the *registered* proprietor of a leasehold estate in the whole or part of the land granted for a term of more than 21 years - see s.3 (1) (a) & (b) CLRA 2002. The consent of all *registered* standard Tyneside Flat freeholders and leaseholders, i.e. both flat owners, would therefore be required before their pair of Tyneside Flats could be converted to commonhold. As all four metropolitan districts on Tyneside were compulsorily registrable before the standard documentation was introduced, see ch.4, para.4.8.8, fn 261, nearly all Tyneside Flat owner occupiers will be registered proprietors.

4.8 The 2008 Law Commission Consultation Paper

4.8.1 Introduction

The Law Commission continued to recognise the need for comprehensive land obligation reform whilst commonhold proposals were being formulated.²⁰⁵ Following the enactment of the CLRA 2002, the Commission announced its intention to produce a coherent scheme of land obligations and easements which would be compatible with both the commonhold system and the system of registration introduced by the LRA 2002.²⁰⁶ By combining the reform of land obligations with the law of easements, the Commission adopted the logic behind the 1971 Lawson Committee proposals.²⁰⁷ In its *2008 Consultation Paper*, the Commission confirmed the ongoing need for legislative reform of positive and restrictive obligations.²⁰⁸ This section considers some of the Commission's main proposals and their applicability for the future transfer of Tyneside Flats.

4.8.2 Terminology.

The *2008 Consultation Paper* kept the term 'Land Obligation', but used the capitalised form to distinguish their proposals from those of the *Gibson Report*.²⁰⁹ The passage of commonhold legislation meant that it was no longer necessary to distinguish between neighbour and development obligations.²¹⁰ Land obligations therefore embraced a single class of obligation to replace positive and restrictive covenants but, unlike the Lawson Committee proposals, the distinction between land

²⁰⁵ See, e.g., Law Commission, *Seventh Programme of Law Reform*, (n.174), p.13, where the law on easements and land obligations was said to be of great practical importance to large numbers of landowners and where there was 'pressure for reform'.

²⁰⁶ See Law Commission, *Ninth Programme of Law Reform* (2005), (Law Com. No. 293), (London: HMSO, 2005), paras 2.25 - 2.26.

²⁰⁷ See further ch.4, para.4.4.2.

²⁰⁸ See *2008 Consultation Paper*, (n.7), paras 7.64, 7.65, 7.76 & 7.77 and Cooke E, 'To Restate or not to Restate? Old Wine, New Wineskins, Old Covenants, New Ideas' [2009] 73 Conv.448, p.472.

²⁰⁹ See *2008 Consultation Paper*, (n.7), para.7.71 & see thesis ch.4 paras 4.5.2 & 4.5.3. It now seems this term will not be used – see Cooke E, 'To Restate or not to Restate', (n.208), p.464. The capitalised form has therefore not been used in this discussion.

²¹⁰ If management provisions were required, then the *2008 Consultation Paper* considered that commonhold or leasehold should be used - see para.11.16. See also Harpum C et al (Eds), *The Law of Real Property by Megarry and Wade*, (Megarry and Wade), 7th ed., (London: Sweet & Maxwell, 2008), para.32 - 081.

obligations, easements and profits was maintained.²¹¹ Since the standard Tyneside Flat lease already makes some distinctions between positive and negative covenants and easements, either new or retained terminology should not, of itself, present any particular problems for north eastern conveyancers.

4.8.3 The Easement Model

The *2008 Consultation Paper* considered it ‘highly desirable’ that positive obligations should be enforceable against successors in title, but thought that the contractual model would obscure the proprietary nature of the right.²¹² It therefore proposed that, as with easements, land obligations should have dominant and servient tenements.²¹³ In a pair of Tyneside Flats each flat is the dominant or servient tenement of the other. Accordingly, an appurtenance requirement ought not to be an obstacle for the creation of freehold land obligations when a freehold owner owns both flats.²¹⁴

An additional requirement for easements is that they must ‘accommodate and serve’ the dominant land, so as to ensure that there is a nexus between the land and the right attached to it.²¹⁵ A similar requirement for covenants is that they should relate to or ‘touch and concern’ the land.²¹⁶ These requirements reflect the long standing concern of the judiciary that, as expressed in the *2008 Consultation Paper*, a land owner should not be able to impose ‘any obligation which might happen to take his fancy’.²¹⁷ The *2008 Consultation Paper* therefore proposed that a land obligation must ‘relate to’ or be for the benefit of dominant land. In order to determine if it did so, the *2008 Consultation Paper* adopted the ‘satisfactory working test’ suggested by Lord Oliver in *P & A Swift Investments v. Combined English Stores Group Plc*²¹⁸ for determining whether a covenant ‘touches and concerns’ the land. Accordingly, it was

²¹¹ See *2008 Consultation Paper*, (n.7), para.15.31. For some purposes it would be necessary to distinguish between negative and positive obligations - see ch.4, para.4.8.6.

²¹² See *2008 Consultation Paper*, (n.7), para.7.76.

²¹³ *Ibid*, para.8.63. See also Cooke E, ‘To Restate or not to Restate’, (n.208), p.468.

²¹⁴ If a standard Tyneside Flat lease had been granted, it would need to be surrendered before freehold land obligations could be created – see ch.8, para.8.9.5.

²¹⁵ See *2008 Consultation Paper*, (n.7), para.3.20.

²¹⁶ *Ibid*, paras 8.68 & 8.69.

²¹⁷ *Ibid*, para. 8.75. See also ch.4, para.4.5.3 for similar comments in the *Gibson Report* and ch.3, para.3.2.1 for Lord Brougham’s comments in *Keppel v. Bailey*.

²¹⁸ [1989]1 AC 632 HL at 642. See also Cooke E, ‘To Restate or not to Restate’, (n.208),p.458.

proposed that a land obligation would 'relate to' or be for the benefit of dominant land where it:

a) benefits only the dominant owner for the time being, and if separated from the dominant tenement ceases to be of benefit to the dominant owner for the time being. This requirement would be appropriate for pairs of Tyneside Flats, where the liability of original post 1995 standard Tyneside Flat leaseholders to their original landlords ceases on transfer as a result of the LTCA 1995.²¹⁹

b) it affects the nature, quality, mode of user or value of the land of the dominant owner. A land obligation requiring a Tyneside Flat owner to keep his flat in repair would clearly affect the quality and value of the other flat.²²⁰ This requirement would seem sufficiently broad for both Tyneside Flat owners for whom a primary concern is that the other flat should be kept in proper repair.²²¹

c) it is not expressed to be personal, that is, it is not given to a specific dominant owner nor is it in respect of an obligation only of a specific servient owner. This should not present a problem for Tyneside Flat conveyancers, where the standard Tyneside Flat lease covenants are not expressed in personal terms.²²²

In addition, the fact that a land obligation is to pay a sum of money will not prevent it relating to the land so long as the above three conditions are satisfied and the obligation is connected with something to be done on, to or in relation to the land. Tyneside Flat leaseholders make joint contributions towards the repair of 'common installations'²²³ and a similar land obligation would appear to be 'connected with something to be done on, to or in relation to the land.'²²⁴

²¹⁹ See ch.6, para.6.6.4.

²²⁰ This requirement is more restricted than the range of covenants in post 1995 leases which do not necessarily need to have any connection with the land, provided they are not expressed in personal terms - see *2008 Consultation Paper*, (n.7), paras 8.74 & 8.75. For further discussion on the range of Land Obligations see ch.4, para.4.8.6.

²²¹ Cl.3 and cl.(c) 5th Sch. Standard Tyneside Flat lease requires the leaseholder to keep his flat in 'good and tenantable' repair.

²²² If post 1995 leasehold covenants are expressed to be personal, they would not pass on transfer - see s. 3 (6) (a) LTCA 1995 and *2008 Consultation Paper*, (n.7), para.8.74.

²²³ See cl.3 and cl.(d) 5th Sch. standard Tyneside Flat lease.

²²⁴ See *2008 Consultation Paper*, (n.7), para. 8.23(2) (b) for a definition of a 'reciprocal payment obligation'. The same terminology was used in the *Gibson Report* - see ch.4, para.4.5.3.

One of the essential characteristics of an easement is that the dominant and servient tenements must be owned or occupied by separate persons.²²⁵ A very useful proposal for land obligations is that this should no longer be the case, provided the benefitted and burdened lands have separate title numbers.²²⁶ Since a similar proposal has also been made for the creation of easements,²²⁷ the combined effect of these proposals is that it would be possible to create all necessary documentation for the transfer of a pair of Tyneside Flats at the time of the first disposal. This is almost certainly not possible with the standard documentation²²⁸ and, if these proposals were implemented, they could act as a considerable incentive for the use of land obligations on future disposals of individual Tyneside Flats.²²⁹

4.8.4 Labelling Land Obligations

The Law Commission proposed that there should be two essential formalities for land obligations, firstly that they should be labelled as such and secondly that the benefitted and burdened land should be clearly identified.²³⁰ By recommending compulsory formalities the *2008 Consultation Paper* followed the ‘conveyancers’ view’,²³¹ previously suggested in both the *Wilberforce* and *Gibson Reports*.²³² Earlier compulsory labelling proposals have been strongly criticised because it was feared that they would cause many covenants to ‘fail’ for omitting to conform to the suggested formalities.²³³ It now seems that express labelling will not be required²³⁴ but, in any event, it would probably not have caused particular difficulty for Tyneside Flat conveyancers. Qualitative research data shows that, in their use of the standard Tyneside Flat documentation, north eastern conveyancers are generally, outside the

²²⁵ See *2008 Consultation Paper*, (n.7), para.3.5.6. See also, e.g., Gray K and Gray S, *Elements of Land Law*, (n.61), para.5.1.40 and *Megarry and Wade*, (n.210), paras 27.009 - 27.010.

²²⁶ See *2008 Consultation Paper*, (n.7), para.8.84.

²²⁷ *Ibid*, para.3.66.

²²⁸ See ch.8, para.8.9.9, fn 419.

²²⁹ North eastern conveyancers’ views on reform and the transfer of Tyneside Flats are discussed in ch. 8, para.8.9.2 Their approach to the conversion of existing titles is discussed in ch.8, paras 8.9.3 – 8.9.7.

²³⁰ See *2008 Consultation Paper*, (n.7), paras 8.28 & 8.40.

²³¹ For a discussion of the ‘conveyancers’ view and the less stringent ‘judicial view’ see Wade H, ‘Covenants – A Broad and Reasonable View’, (n.95), p.164.

²³² See *Wilberforce Report*, (n.33), paras 15 & 16 & *Gibson Report*, (n.76), paras 8.13 - 8.15 & 8.21-8.22.

²³³ See Wade H, ‘Covenants – A Broad and Reasonable View’, (n.95), p.171 and Polden P, *Law Commission: Transfer of Land*, (n.11), p.570.

²³⁴ See Cooke E, ‘To Restate or not to Restate’, (n.208), p.464.

South Shields area, willing to conform.²³⁵ It therefore seems probable that they would follow any local law society recommendations. In addition if, after reform, new or alternative standard documentation were promulgated, this could incorporate any required labelling.²³⁶ The second proposed formality, namely the need for clear identification, presents more difficulties.

4.8.5 The Need for Clear Identification

The *2008 Consultation Paper* proposed that the instrument creating a Land Obligation must have a plan clearly identifying all land benefitting from, and burdened by, the land obligation.²³⁷ Academic opinion on previous proposals for the explicit identification of both the benefitted and burdened land has been divided. Wade thought that the *Wilberforce Report* proposal that both the benefitted and burdened land should be plainly identified by a plan or ‘by an adequate description’ would cause covenants to fail ‘contrary to justice and common sense’,²³⁸ whereas Polden considered the *Gibson Report* requirement that the benefitted and burdened land should be ‘adequately’ described ‘whether or not by reference to a plan’ was ‘valuable.’²³⁹ With pairs of Tyneside Flats, both the benefitted and burdened land is easily identifiable and a requirement that it should be clearly identified would be unlikely to cause land obligations to fail. Standard Tyneside Flat leases always have a plan, and a plan would be required on the creation of new individual land obligation titles. However, many individual Tyneside Flats have already been registered and therefore already have a Land Registry title plan. If it were considered desirable to replace any existing mixed freehold/leasehold titles with a land obligation structure, then, since all the land in each separate title is likely to be benefitted or burdened, the affected land could simply be identified by reference to the registered extent or title plan. Insistence on a deed plan in all cases could be a disincentive to conversion.²⁴⁰ Difficulties could also arise in the future if a land obligation deed plan differed from a

²³⁵ See ch.8, paras 8.3.2 - 8.3.4.

²³⁶ See also ch.9, para.9.3.4 for the possible future role of the Newcastle Law Society.

²³⁷ See *2008 Consultation Paper*, (n.7), para.8.40.

²³⁸ See Wade H, ‘Covenants – A Broad and Reasonable View’, (n.95), p.171 and *Wilberforce Report*, (n.27), para.15.

²³⁹ See Polden P, Law Commission: ‘Transfer of Land’, (n.11), p.570 and *Gibson Report*, (n.76), para. 8.31.

²⁴⁰ E.g., because of the expense - see ch.8, para.8.9.4.

title plan, when all land in that title was intended to be affected.²⁴¹ It therefore seems that, for Tyneside Flats, it would be preferable if any legislation were to permit identification by reference to a registered title plan.²⁴²

4.8.6 Range of Obligations

Subject to the requirement that land obligations should be for the benefit of dominant land, the *2008 Consultation Paper* proposed that they should not be restricted to certain types.²⁴³ Unlike the *Gibson Report*, it therefore considered that it ought to be possible to create a ‘positive user obligation’ between adjoining neighbours.²⁴⁴ The example given, namely that a specified business, for example, a certain type of retail, should be carried on by the servient owner on his land,²⁴⁵ is unlikely to have much impact on Tyneside Flats in view of the small number that are used for business purposes.²⁴⁶ The alternative suggestion that obligations of a positive nature could be restricted to obligations to ‘repair and maintain’ or to ‘pay towards the cost of repair and maintenance’ would cover the main requirements for Tyneside Flat owner occupiers.²⁴⁷ The proposal that it should be possible to create ‘short-form’ land obligations by reference to a prescribed form of words set out in statute²⁴⁸ could be useful in simplifying documentation.²⁴⁹

Although the *2008 Consultation Paper* proposed that there should not be separate types of land obligation, it considered it would sometimes be necessary to distinguish between obligations of a positive and restrictive nature.²⁵⁰ This is particularly so when considering enforceability.

²⁴¹ This could happen if, e.g., there were some minor amendment to the registered extents of either or both flat titles. There were many plans and mapping problems when the standard Tyneside Flat documentation, and individual Tyneside Flats, began to be registered - see ch.8, para.8.6.2.

²⁴² This would also be helpful more generally for any adjoining registered owners who wished to create a land obligation which benefitted and/or burdened all the land in both their titles.

²⁴³ See *2008 Consultation Paper*, (n.7), para.8.22.

²⁴⁴ *Ibid*, para.8.19 & see ch.4, para.4.5.3, for a discussion of the *Gibson Report* proposals.

²⁴⁵ See *2008 Consultation Paper*, (n.7), para.8.19. For a discussion of the distinction between positive user obligations and restrictive obligations, which merely require the land not to be used in some specified manner, e.g., that premises should ‘only be used as a private dwelling house’, see para.8.19, fn 27 & *Gibson Report*, (n.76), para.6.12 & draft Bill Sch.1, note 20.

²⁴⁶ See thesis ch.8, paras 8.3.7.

²⁴⁷ See *2008 Consultation Paper*, (n.7), paras 8.22 & 8.23 (2) (a) (i) & (b).

²⁴⁸ *Ibid*, para.12.25.

²⁴⁹ This might also result in more comprehensive land registers - see ch.4, para.4.8.8.

²⁵⁰ See *2008 Consultation Paper*, para.8.23.

4.8.7 Enforceability

One of the main reasons why the Victorian judiciary declined to extend the principles of *Tulk v. Moxhay* to positive obligations was they required the expenditure of money.²⁵¹ It is clearly inappropriate that all those with an interest, however small, in the servient land should be liable to incur expenditure for performing a positive obligation.²⁵² One suggestion is that someone who has an interest in the land, for which he has paid a capital value, such as a long leaseholder, should have to observe and perform positive obligations just as a freeholder does.²⁵³ Such a proposal would equate comfortably with Tyneside Flat owner occupiers, who are almost invariably freeholders of the whole building or long leaseholders of an individual flat under the standard Tyneside Flat or South Shields documentation.²⁵⁴ The *2008 Consultation Paper* has not put forward any definitive proposals, but has invited comments on various alternatives, all of which seem unlikely to change the expectations and liability of existing Tyneside Flat owner occupiers.²⁵⁵

The *2008 Consultation Paper* made no firm proposals on the desirability of a supplementary self-help provision, which would give a right to enter the servient land to perform specified works on defined terms and conditions contained in the land obligation deed.²⁵⁶ However, it was considered that if consultees were in favour of any such right, notice should be given before entry, except in the case of emergencies, and it should only be available for a 'serious' breach.²⁵⁷ A modified self help remedy along these lines would probably be acceptable to Tyneside Flat owner occupiers, who are already used to a similar, and in some ways more stringent provision, in their

²⁵¹ See ch.3, paras 3.4.7 & 3.4.10.

²⁵² See *Gibson Report*, (n.76), para.4.25.

²⁵³ See Cooke E, *Land Law*, (n.186), p.199.

²⁵⁴ The vast majority of north eastern conveyancers, outside the South Shields area, use the standard documentation when creating a new lease of an individual Tyneside Flat – see ch.8, para.8.3.2.

²⁵⁵ See *2008 Consultation Paper*, (n.7), para.9.20 (1) - (3). Para.9.2.2 suggested that a 'very wide class of person' should be bound by a restrictive obligation. This would presumably include student occupiers of Tyneside Flats - see further ch.2, para.2.7.2.

²⁵⁶ *Ibid*, para 12.13. The *Gibson Report* recommended the adoption of a self help remedy, see ch.4, para. 4.5.3, but s.1 ANLA 1992 now enables a party who needs to perform work on a neighbouring property to apply to the court for an access order. It is not possible to contract out of that scheme - see s.4 (4) of the 1992 Act and *2008 Consultation Paper*, (n.7), para.12.13, fn 21.

²⁵⁷ See *2008 Consultation Paper*, (n.7), para.12.14.

standard lease.²⁵⁸ A specific provision of this nature might also make it easier for some conveyancers to recommend the title to their clients and mortgage lenders.²⁵⁹

4.8.8 *Land Registry*

The *2008 Consultation Paper* provisionally proposed that the creation of a land obligation, capable of comprising a legal interest, would have to be completed by making appropriate entries in the registers of both the benefitted and burdened estates.²⁶⁰ This would have required the registration of both Tyneside Flats and could have militated against the creation of new Tyneside Flat land obligations in those comparatively rare cases where the first flat was being transferred out of unregistered land and the other flat was, for example, being retained.²⁶¹ In this situation owners might simply have preferred to use the standard Tyneside Flat documentation rather than incurring the expense and trouble of either registering the whole building before the sale or registering the retained flat subsequently.²⁶²

The Land Registry has now indicated that it would no longer oppose the proposed registration requirements.²⁶³ In addition the Registry's other main concern, namely that the *Gibson Report* proposals might have lead to very lengthy land registry titles²⁶⁴

²⁵⁸ See cl.3 & 5th Sch.cl. (h). The landlord's right of entry is available for any 'necessary' repairs, which the leaseholder has failed to execute after being given written notice to do so.

²⁵⁹ When research data was collected, participants were not asked specifically about the right of entry in the standard lease, but it is apparent that, very occasionally, they found forfeiture, or the threat of forfeiture, useful - see further ch.8, para.8.7.9. The CML did not raise any points over enforceability of positive obligations in its response to the *2008 Consultation Paper*, presumably because its members will rely on conveyancers giving an unqualified 'certificate of title'.

²⁶⁰ See *2008 Consultation Paper*, (n.7), para.8.47.

²⁶¹ All parts of Gateshead, Newcastle and North and South Tyneside were compulsorily registrable on sale after 1 May 1974 - see LRP 51 'Areas served by Land Registry Offices' (London: Land Registry, 2010), pp.7, 9 & 11 for further details. The whole of England and Wales was similarly registrable after 1 December 1990 *ibid* pp. 5 – 15 & see Dixon M et al, *Registered Conveyancing*, (n.134), paras 1.009 and 8.002.

²⁶² The *2008 Consultation Paper*, (n.7), proposals seem to allow for the use of the standard Tyneside Flat documentation after the introduction of land obligations, but see ch.8, para.8.9.9, fn 426 for potential difficulties. The Law Commission is apparently now considering how proprietary positive obligations might be created in unregistered land - see Cooke E, 'To Restate or not to Restate', (n.208), p.462, fn 51.

²⁶³ See *2008 Consultation Paper*, (n.7), para. 8.12. See also ch.4, para.4.5.4. The reason is stated as being that it is an objective of the 2002 Land Registration Act that the register should be a complete and accurate reflection of the state of the title to the land so that it is possible to investigate title to land online - see Law Commission, *Land Registration for the Twenty-First Century. A Conveyancing Revolution*, (Law Com. No.271), (London: HMSO, 2001), para.1.5.

²⁶⁴ See *Gibson Report*, (n.76), paras 9.2.1 – 9.2.3.

may have been overcome by the proposal for a single class of land obligation.²⁶⁵ Land obligations have the potential to simplify standard Tyneside Flat registered titles. At present, once both flats have been transferred and registered, each Tyneside Flat owner occupier becomes the registered proprietor of two separate titles, a leasehold title for the flat he occupies and a freehold title for the other flat. The leasehold title gives particulars of the lease and indicates that the landlord's title is registered.²⁶⁶ The freehold title has both the lease of the other flat noted against it and also an entry showing that it is subject to the rights granted by the leaseholder's own lease. A single freehold title showing that the land has the benefit of, but is subject to, land obligations would be much easier to comprehend. 'Short form' land obligations might also mean that the Land Registry would be more willing to set out all entries on the face of the register, rather than referring to a filed copy of the land obligation deed.²⁶⁷

4.8.9 Summary

The Law Commission is at present reviewing responses to the *2008 Consultation Paper*.²⁶⁸ It now seems likely that the Land Registry will no longer be obstructive²⁶⁹ In addition, the enactment of commonhold and the *2008 Consultation Paper's* provisional view that land obligations are not suitable for developments that require managers²⁷⁰ should diminish, and perhaps overcome, opposition from mortgage lenders.²⁷¹ The easement model for land obligations seems to be readily adaptable to pairs of Tyneside Flats as do other reform proposals in the *2008 Consultation*

²⁶⁵ See *2008 Consultation Paper*, (n.7), para.8.11.

²⁶⁶ Provided the landlord's title to grant the lease has been shown, the leaseholder will usually be registered with an 'absolute' leasehold title - see *Registered Conveyancing*, (n.134), paras 6.003 - 6.003.02 and 9.005 and s.10 (2)(b) LRA 2002.

²⁶⁷ Short form entries proposed in the *2008 Consultation Paper*, (n.7), para.12.25 would reduce the amount of data entry required, if all entries were to be set out on the face of the register.

²⁶⁸ The Law Commission has said that it hopes to publish a final report and draft Bill in Spring 2011 - see 'Property, Family and Trust Law: Current News; Easements, Covenants and Profits à Prendre' <<http://www.lawcom.gov.uk/property.htm>>, accessed 10 October 2010.

²⁶⁹ See ch.4, para.4.8.8.

²⁷⁰ See *2008 Consultation Paper*, (n.7), para.8.18.

²⁷¹ See ch.4, para.4.5.4 for an outline of the BSA's response to the *Gibson Report*. The CML has responded to the *2008 Consultation Paper* by saying that it would 'welcome reform of the law of covenants - particularly restrictive covenants' see 'Easements, Covenants and Profits à Prendre Response by the Council of Mortgage Lenders to the Consultation by the Law Commission' 30 June 2008, <http://www.cml.org.uk/cml/policy/responses?keyword=&key_area=0&date=0&0&page=3>, accessed 18 June 2009.

Paper.²⁷² In the meantime, pending reform, the standard Tyneside Flat documentation is, as discussed in the next chapter, creating ever increasing numbers of mixed freehold/leasehold titles.

²⁷² See ch.8, paras 8.9.1 – 8.9.7 for a discussion of the likelihood, in practice, of land obligations being adopted by north eastern conveyancers.

Chapter 5. Standard Tyneside Flat Documentation and Freehold Conveyancing Devices

5.1 Introduction

This chapter addresses research question five by considering the land tenure arrangements used for the transfer of individual Tyneside Flats.¹ The first section looks at the background economic, social and other dynamics which led to the sale of individual Tyneside Flats from the 1960s onwards. The second section considers how they were transferred. After discussing the tenure used before and after separate Tyneside Flats began to be sold, the second section looks at the pressures which caused the Newcastle Law Society to promulgate standard documentation in the early 1980s. The main conveyancing features of the resulting freehold/leasehold structure are then considered. That documentation was inevitably determined by the legal difficulties of making freehold positive obligations enforceable against succeeding owners. The third section therefore considers whether any of the main contemporary freehold conveyancing devices could have provided a satisfactory alternative structure. Qualitative and quantitative historical research data has been incorporated throughout the chapter.

5.2 Background to Individual Sales

5.2.1 Traditional Sale and Letting Arrangements

Quantitative historical research data indicates that, when Tyneside Flats came on the market before they began to be sold individually, the freehold interest in the whole building comprising both flats was sold.² All respondents agreed this was so and also that, when both flats were sold together, vacant possession would usually be given of

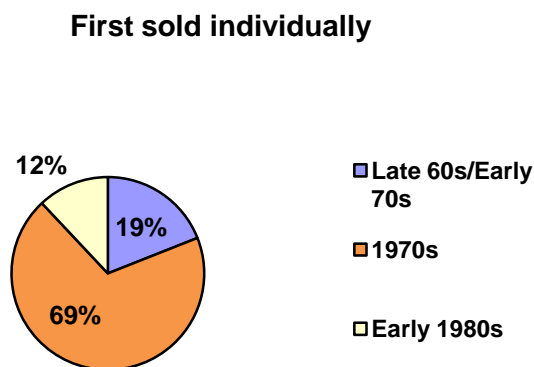
¹ See ch., para.1.1.6.

² See HQ 1 (a). The historical questionnaire refers to the 'pre 1960s sale arrangements' but, with some younger participants, this was changed in face to face interviews to the 'pre 1980s arrangements.' This was understood at the time to mean the position before flats started to be sold as individual units. Although the questionnaire referred to the freehold interest in the whole 'terraced building', the replies have been taken to include all buildings within the respondents' concepts of Tyneside Flats – see further ch.8, paras 8.2.2 - 8.2.6.

at least one flat which the purchaser would then occupy.³ Again, all but one confirmed that, in this situation, the ‘other’ flat would usually be occupied by a weekly ‘sitting’ tenant and that the purchaser would become his landlord.⁴ Even if vacant possession of both flats was obtained at the time of the sale, all respondents concurred that the purchaser would usually occupy one flat and all but one accepted that he would normally create a weekly tenancy of the other flat.⁵ One respondent qualified his response by saying that, if a vacant pair of flats was purchased, they were ‘often’ used for investment purposes and both flats would be let.⁶ Another made the point that a vacant pair would be bought as both a house and an investment with the rent being used to pay ‘the rates as they used to be called.’⁷

5.2.2 The Commencement of Individual Sales

The chart below indicates when participants thought Tyneside Flats first started to be sold individually.



As the chart illustrates, a minority of respondents thought that flats started to be sold separately in the late 1960s, early 1970s or early 1980s, but most considered that sales

³ See HQ 1 (b). The framing of historical questions is discussed in ch.7, para.7.4.4 (e).

⁴ See HQ 1 (c). One respondent, interview 13, HQ 1 (c), changed ‘usually’ be occupied to ‘often’ be occupied. The ‘sitting’ tenant would normally have been an existing tenant with security of tenure under the Rent Acts - see generally Bridge S, *Residential Leases*, 1st ed., (London: Blackstone, 1994), pp.84 - 154, Gray K & Gray S, *Elements of Land Law*, 5th ed., (Oxford: OUP, 2009), paras 4.7.2 – 4.7.16, Martin J, *Residential Security*, 2nd ed., (London: Sweet & Maxwell, 1995), pp.57- 81, Megarry R et al, *The Rent Acts*, 11th ed., (London: Stevens & Son, 1998), pp.1- 6 & 63 - 167, Pettit P, *Landlord and Tenant under the Rent Act 1977*, 1st ed., (London: Butterworths, 1978), pp.8 - 57, and Rodgers C, *Housing Law Residential Security and Enfranchisement*, revised ed., (London: Butterworths, 2002), pp.1-7 & 141-167.

⁵ See HQ 1 (d).

⁶ Interview 28, HQ 1 (d).

⁷ Interview 19, HQ 1 (d).

began in the 1970s.⁸ Although participants were asked whether individual sales started in some areas before others, no clear pattern emerged. It may therefore be that, as one respondent put it, ‘change was general’.⁹ Participants’ reasons for this change mainly fell into three broad interlinked categories. For owners and landlords, individual sales gave an increased capital return as well as freedom from Rent Act restrictions. For purchasers, buying a relatively cheap Tyneside Flat was an opportunity to step on the ‘housing ladder’ at a time of increasing enthusiasm for owner occupation.

5.2.3 Increased Capital Return

The early and late 1970s were times of rapid inflation in the residential property market.¹⁰ It is therefore unsurprising that over half, 56 %, of respondents said, or implied, that they thought that flats started to be sold individually because of the increased amount of capital that could be obtained or, as one respondent put it, capital rather than income was sought.¹¹ In the 1960s and 1970s many Tyneside Flats had been upgraded as a result of improvement grants.¹² Two participants mentioned this as being one of the factors which led to sales taking place,¹³ presumably because of the increased sale price for vendors and the greater appeal to purchasers.

5.2.4 Impact of Rent Act Legislation

Nearly a third, 31 %, of participants mentioned or implied that Rent Act restrictions or difficulties in dealing with tenants were an incentive to sell. In the words of one respondent, Tyneside Flats were seen as being a ‘pest, with the rent of the other flat pegged.’¹⁴ Historical data collection was largely based on information previously supplied by a former chairman of the non-contentious subcommittee of the Newcastle

⁸ The 1970s category has not been subdivided. One respondent, interview 2, HQ 2(a) (i), thought that flats started to be sold in the ‘mid to late 1970s’.

⁹ Interview 19, HQ 2 (b).

¹⁰ See *Report of the Committee of Inquiry on the Management of Privately Owned Blocks of Flats*, (Chairman E. Nugee), (*Nugee Report*), (London: HMSO, 1985), Vol.1, para.2.7.

¹¹ Interview 18, HQ 2 (a) (ii).

¹² See ch.2, para.2.5.3.

¹³ Interviews 2 & 8, both HQ 2 (a) (ii).

¹⁴ Interview 1, HQ 2 (a) (ii). The introduction of the ‘fair rent system’ by the RA 1965 was said to be one of the reasons why many ‘traditional’ landlords moved out of the residential property market in the 1960s and 1970s – see *Nugee Report*, (n.10), para.2.5.

Law Society.¹⁵ As indicated in the following extract, he too was convinced that purchasers did not wish to be embroiled in Rent Act complications:

‘So many regulations affected tenancies and the ability to charge a full market rent that many purchasers did not particularly want to be involved in the complication of being a landlord and the involvement of the Rent Acts, or of tribunals dealing with furnished tenancies.’¹⁶

At the same time there was an increase in the number of potential purchasers.

5.2.5 Increased Desire for Owner Occupation

From the mid 1960s householders and flat dwellers were becoming increasingly attracted to owner occupation.¹⁷ Changes in the incidence of personal taxation increased the number of people able to benefit from tax relief on mortgage interest and building societies became increasingly willing to accept leasehold flats as security for mortgage advances.¹⁸ Different expectations and a changed attitude in the mortgage market were mentioned by one Tyneside participant.¹⁹ Although not raised by any respondents, mortgage finance for Tyneside Flats may have been helped by the existence of some small locally based building societies, which would have been familiar with the Tyneside Flat architectural layout. Another respondent specifically referred to the demand for owner occupation,²⁰ whilst three others, 19%, referred to first time buyers or ‘younger ones’ getting on the housing market.²¹ The HA1980 ‘right to buy’ provisions, which enabled public sector tenants to buy their homes,²² may have helped create a climate where owner occupation was seen as a desirable

¹⁵ The past chairman had also conducted correspondence with the Land Registry over the form of the standard Tyneside Flat documentation before it was promulgated by the Newcastle Law Society - see ch.5, para.5.3.3.

¹⁶ Letter from the former chairman of the non contentious subcommittee dated 2 December 2004. After the HA1988 ‘deregulated’ the housing market, the courts insisted on the use of free market comparables for valuing fair rents, thus redressing the balance strongly in favour of landlords. Subsequent regulations limited the permitted increase in the first and later re-registrations - see Rodgers C, ‘Fair Rents and the Market: Judicial Attitudes to Rent Control Legislation’ [1999] 63 Conv. 201, pp.225 - 226.

¹⁷ See *Nugee Report*, (n.10), para.2.5.

¹⁸ *Ibid.*

¹⁹ Interview 2, HQ 2(a) (ii).

²⁰ Interview 11, HQ 2 (a) (ii).

²¹ Interviews 13, 14 and 21, all HQ 2 (a) (ii).

²² See ss 1 - 27 HA1980, now contained in ss 118 - 188 HA 1985.

goal. Greatly improved public transport may also have boosted Tyneside's economy and the demand for housing in the 1980s.²³ It also seems that local estate agents were a key driver for change.

5.2.6 *The Role of Estate Agents*

The former chairman of the non contentious subcommittee of the Newcastle Law Society was in little doubt that the 'main incentive' for change came from the recommendations of estate agents, who reckoned they could obtain 'much more in total' for the separate leases of the two flats with vacant possession than from 'traditional arrangements.'²⁴ When asked who led the drive for change nearly one third, 31%, of respondents mentioned estate agents. The practice, particularly in London, of selling to existing tenants from around the early 1960s onwards²⁵ may have brought home to Tyneside estate agents the 'tied up' capital value in each individual Tyneside Flat. However, only one participant spoke of any approach being made directly to Tyneside Flat tenants, when he said that the landlord's agent would go down the street saying that the landlord was prepared to sell and that 'someone' would buy.²⁶ It seems that the usual scenario was for owners to wait until a flat became vacant before selling.²⁷ The documentation used in individual sales is discussed in the next section.

5.3 Standard Documentation

5.3.1 *Transfer before the Standard Documentation*

Participants were asked to state on what tenurial basis individual flats were sold before the introduction of the standard documentation.²⁸ The chart below illustrates their responses.²⁹

²³ The Tyneside metro system was officially opened in 1981.

²⁴ See letter dated 2 Dec 2004, (n.16).

²⁵ See *Nugee Report*, (n.10), para.2.5.

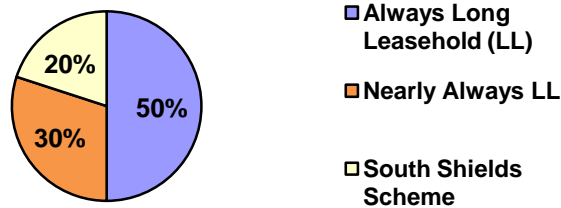
²⁶ Interview 2, HQ 4.

²⁷ See letter dated 2 December 2004, (n.16), and interviews 17 & 18, both HQ 2 (a) (ii).

²⁸ See HQ 3 (a).

²⁹ A little over half of the historical data participants answered questions on the tenure used & the lease term. The sample size is discussed in ch.7, para.7.6.3.

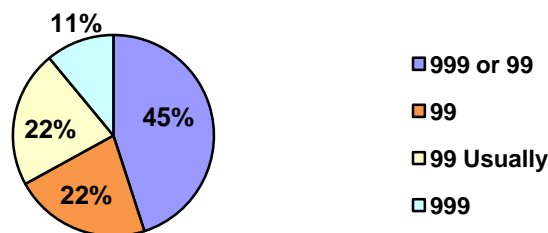
Tenure Used



As indicated, half of the respondents thought that a long leasehold structure was always used. The 30% segment represents those participants who considered that long leaseholds were nearly always used, but who also thought that occasionally individual Tyneside Flats had been sold on a freehold basis.³⁰ The 20% segment represents those who thought the South Shields structure was used. Since this involves the grant of a long lease of one flat,³¹ the combined responses reveal an overwhelming preference for a landlord and tenant structure. No respondents suggested that a mixed freehold/leasehold structure for each flat had been used before the introduction of the standard documentation.

When asked the length of term granted, if flats were sold leasehold, the following responses were given:

Term Granted



The only respondent who thought that, before the introduction of the standard Tyneside Flat documentation, 999 year leases were always granted came from

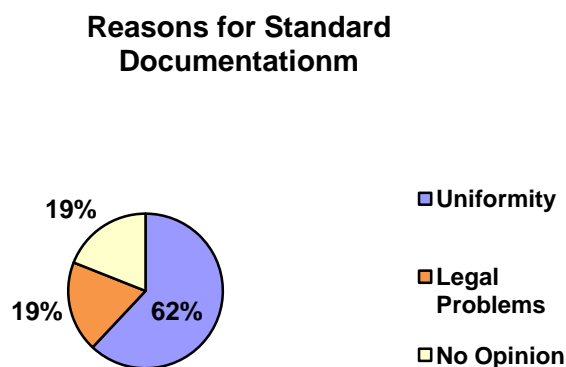
³⁰ See further ch.5, para.5.4.1.

³¹ See ch.8, para.8.9.8 for more details of this scheme.

Derwentside, a district with relatively few Tyneside Flats.³² Those who thought the term granted was either 99 or 999 years included respondents from Newcastle and both North and South Shields, all areas with substantial numbers of Tyneside Flats. It therefore seems that significant numbers of these ‘early’ 99 year terms may have been granted.³³

5.3.2 Pressure for Standard Documentation

Both the former chairman of the non contentious subcommittee of the Newcastle Law Society and one respondent³⁴ said that estate agents brought pressure to bear for the introduction of standard documentation. When participants were asked what, in their opinion, caused the Newcastle Law Society to promulgate a standard form arrangement, the most common reason given was, as indicated in the chart below, the need for uniformity.



Conveyancers’ difficulties before the introduction of standard forms were illustrated by respondents who spoke of the ‘hotchpotch’ of arrangements³⁵ and of the necessity of ‘doing something to stop mayhem.’³⁶ The topics raised by the three respondents, 19%, primarily concerned with legal problems, were the enforceability of

³² Interview 15, HQ 3 (b).

³³ Statutory lease extension is discussed in ch.6, paras 6.3.1 - 6.3.4. The possible conversion of ‘shorter’ term standard Tyneside Flat leases is discussed in ch.8, para.8.9.6.

³⁴ See letter dated 2 December 2004, (n.16), & interview 1, HQ 4.

³⁵ Interview 14, HQ 4.

³⁶ Interview 12, HQ 4.

obligations,³⁷ problems arising or anticipated with the South Shields structure³⁸ and difficulties caused by the lack of lease plans.³⁹ The ‘no opinion’ segment represents those participants who specifically indicated they had no idea. The above chart only illustrates the main reasons given. Two respondents, who both thought the need for uniformity was the prime reason, also hinted that legal problems were a factor. One spoke of the ‘proliferation’ of precedents, but also said that some were ‘ineffectual,’⁴⁰ whilst another, having mentioned the ‘multiplicity of arrangements’, said that lenders out of the area were ‘unhappy’.⁴¹

A particular conveyancing problem, raised by the former chairman of the non contentious subcommittee of Newcastle Law Society, concerned the difficulties that might arise when a landlord had granted two separate leases of Tyneside Flats, but had retained the freehold reversion in the whole building.⁴² If the landlord then died, it was thought that his family might be reluctant to take out a grant of probate or letters of administration if the only reason for doing so was to make title to a building which generated only nominal or peppercorn rents.⁴³ Accordingly, there was a danger that the freehold title might become lost. This could create problems, not just over the enforceability of obligations, but also in proving title to the local authority in the event of, for example, compulsory purchase of the building.⁴⁴

5.3.3 Drafting the Standard Documentation

Once Tyneside Flats started to be sold individually the usual practice in South Shields was, and still is,⁴⁵ to create a long lease of the first flat to become vacant and then to

³⁷ Interview 6, HQ 4.

³⁸ Interview 19, HQ 4.

³⁹ Interview 21, HQ 4.

⁴⁰ Interview 11, HQ 4.

⁴¹ Interview 14, HQ 4.

⁴² See letter 2 December 2004, (n.16).

⁴³ Ibid. See also George E and George A, *The Sale of Flats*, 5th ed., (London: Sweet and Maxwell, 1984), p.31, where they suggest that, when both ‘maisonettes’ are sold, the ground rents should be realistic enough to ensure that the landlord is always a ‘person of substance’ and thus able to carry out his obligations.

⁴⁴ See letter dated 2 December 2004, (n.16). Most demolition had already taken place before the standard documentation was introduced, but some clearance has occurred since then – see ch.2, para. 2.5.3.

⁴⁵ See ch.8, para.8.3.4.

sell the rest of the building on a freehold basis.⁴⁶ It seems clear that the form of lease used by South Shields conveyancers was taken as a ‘basic reference’, with many of the clauses being incorporated verbatim into the standard Tyneside Flat lease.⁴⁷ *The Sale of Flats* by George and George was also an ‘influence.’⁴⁸ This was no doubt because George and George explicitly stated that, in the case of ‘maisonettes’, positive obligations could be made enforceable ‘beyond any question’ by the grant of long leases coupled with the vesting of each freehold reversion in the other leaseholder, so that each leaseholder is the landlord of other.⁴⁹ However, the precedent for a long lease of a maisonette contained in *George and George* did not include any special provisions for transferring the freehold reversions.⁵⁰ Local lawyers were invited to contribute their ideas⁵¹ and, in 1982, specimen documents and guidance notes were circulated. The documentation was revised after one year and in 1983 new documentation and a comprehensive set of guidance notes was issued. After additional discussion and correspondence with the Land Registry in 1984, further revisions took place so that, by the mid 1980s, the form of documentation was largely settled.⁵² The documentation promulgated by the Newcastle Law Society followed the existing practice of north eastern conveyancers to the extent that it created a landlord and tenant structure. However, it broke with the past by making each leaseholder the landlord of the other. A further significant development was the suggested 999 year term.

⁴⁶ See further ch.8, para.8.9.8.

⁴⁷ See, e.g., ch.8, para.8.3.6, fn.73.

⁴⁸ See letter dated 2 December 2004, (n.16), and see also George E and George A, *The Sale of Flats*, 4th ed., (London: Sweet and Maxwell, 1978), the current edition at the time.

⁴⁹ See George E and George A, *The Sale of Flats*, (n.48), p.60 and note 78, precedent 14, long lease of a maisonette, p.266. The same points were made in the fifth edition, (n.43), p.30 and the note to precedent 14, p.333.

⁵⁰ See George E and George A, *The Sale of Flats*, (n.48), precedent 14, pp.266 - 269. Clarke, when speaking of the problems of living ‘cheek by jowl’ says that ‘cross-leasing devices *attempting* (my italics) to make one tenant the landlord of the other are sometimes found - see Clarke D, ‘Occupying ‘Cheek by Jowl’ in Bright & Dewar, *Land Law Themes and Perspectives*, 1st ed., (Oxford: OUP, 1998), p.390. Clarke does not say what he means by ‘attempting’, but it may be that he had in mind the absence in some precedents of any mechanism, or any satisfactory mechanism, for ensuring that freehold reversions are transferred.

⁵¹ See letter dated 2 December 2004, (n.16), and also interview 1, HQ 4, in which it was mentioned that a former North Tyneside solicitor had been involved in the original drafting.

⁵² Later amendments are discussed in ch.8, paras 8.3.5 - 8.3.8.

5.3.4 *The Mixed Freehold/leasehold Structure*

The standard Tyneside Flat lease contains many provisions similar to those usually found in residential leases of flats or houses.⁵³ Less familiar are the ‘conveyancing’ provisions designed to ensure that the landlord and tenant relationship between the *current* flat owners is always maintained, so that all covenants are directly and continuously enforceable between them. Here, as elsewhere, the effectiveness of land law is ‘inextricably linked’ with the practical process of conveyancing.⁵⁴ Because it is the leasehold interest which is occupied, the fear has always been that the freehold interest in the ‘non-occupied’ flat will be overlooked, a fear which led one contemporary textbook writer to cast doubt on this ‘cumbersome system’.⁵⁵ In the standard Tyneside Flat lease the landlord covenants ‘on the disposal of the first flat’ that, if at any time during the lease term he shall dispose of his interest in the ‘building’, he will on the same day:

- i) Grant a lease of the other flat on the same terms as the first lease and
- ii) ‘Convey’ to the first leaseholder the freehold estate in the other flat and
- iii) ‘Convey’ to the leaseholder of the other flat the freehold estate in the first flat.⁵⁶

At least one precedent book contains similar provisions,⁵⁷ but the difficulty remains that the scheme breaks down if the freehold reversions and leases become separate.⁵⁸ In case the landlord fails to observe his covenant to convey/transfer the freehold reversions then, by clause 6 of the standard Tyneside Flat lease, he appoints the

⁵³ See copy lease in Appendix A. Those provisions which cause, or might cause, particular difficulty are discussed in ch.8, e.g., paras 8.4.6 & 8.5.8.

⁵⁴ See Gravells N, *Land Law: Text and Materials*, 4th ed., (London: Sweet and Maxwell, 2010), p.2. ‘Conveyancing’ has been defined as the practice of creating and transferring estates and interests in land - see Burn E, *Maudsley and Burn’s Land Law: Cases and Materials*, 8th ed., (Oxford: OUP, 2004), p.4.

⁵⁵ See Cawthorn J, *The Sale and Management of Flats*, 1st ed., (London: Butterworths, 1985), p.69, fn 4. This disapproval was criticised in a book review – see ‘EFG’, ‘The Sale and Management of Flats’ (1985) 82 LS Gaz 3686. In the second edition, published in 1996, the ‘criss-cross’ scheme was described as a ‘neat and effective solution’ - see Barraclough H, *The Sale and Management of Flats Practice and Precedents*, 2nd ed., (London: Butterworths, 1996), p.112.

⁵⁶ See cl.5 (c) & 4th Sch. cl. (a) (i) – (iii). For a definition of the ‘building’ see ch.8, para.8.7.2, fn 245. Although the word ‘convey’ is used, as most land is, or will be, registered, a Land Registry transfer is nearly always used—see further ch.4, para.4.8.8, fn 261.

⁵⁷ See, e.g., Barraclough H, *The Sale and Management of Flats*, (n.55), cls 5 & 6 3rd Sch., precedent 1, p.456, and a similar clause in precedent 2, p.461.

⁵⁸ *Ibid*, p.113.

leaseholder in the flat he has sold as his attorney to execute, on his behalf, a conveyance of the freehold reversion in the leaseholder's own flat. Even if everything is done correctly at time of the original grant of the leases, the original leaseholders or their successors, when selling their leasehold interests, may omit to transfer their freehold reversions in the other flats. This is covered by clause (v) of the fifth schedule of the standard Tyneside Flat lease, whereby the leaseholder covenants not to assign the whole of his leasehold interest other than to someone who immediately beforehand has acquired the freehold interest in the other flat.⁵⁹ Again, additional provisions are inserted to cater for the possibility that the leaseholder, who is now the landlord of the other flat, fails to transfer the freehold reversion. By clause 4 of the standard lease he appoints the leaseholder of the other flat as his attorney to execute on his behalf a conveyance (transfer) of the freehold reversion in that other flat.

These complex power of attorney provisions can be summarised by saying that in the standard Tyneside Flat documentation each leaseholder has a power of attorney to remedy a breach of the covenant to transfer the freehold reversion in his own flat whether this is caused by:

a) the original landlord when the second lease is granted (power given in clause 6 of his lease) or

b) a subsequent landlord on a later transfer of the other flat (power given by clause 4 of the lease of that other flat).

The power of attorney provisions have proved useful in practice⁶⁰ and avoid a suggested, but far more drastic, provision that the leasehold term should cease in the event of the reversion in the other flat failing to remain vested in the leaseholder 'at all times'.⁶¹ No conveyancers indicated that any such provision ever had been, or should be, inserted. Since quantitative data research revealed that 88% of participants had acted in a purchase where the landlord's whereabouts were *unknown* and he had

⁵⁹ The word 'assign' is used, but the documentation will nearly always be a transfer - see n.56. For a similar clause see Barraclough H, *The Sale and Management of Flats*, (n.55), cl.19 2nd Sch., precedent 1, p.455 and cl.18 2nd Sch., precedent 2, p.460.

⁶⁰ See ch.8, para.8.8.3.

⁶¹ See Aldridge T, *Law of Flats*, 1st ed., (London: Oyez Longmans, 1982), cl. 4 (2) precedent A6, 'long lease of maisonette', p.158.

omitted to transfer the reversion,⁶² it seems unlikely that north eastern conveyancers would feel able to recommend such a provision to either their clients or mortgage lenders.

5.3.5 *The Leasehold Term*

The creation of a standard 999 year lease term was a considerable improvement for leaseholders and their lenders on what had previously been the case for a number of individual Tyneside Flat sales.⁶³ It was also a much longer term than that suggested in one contemporary precedent book.⁶⁴ As long as conveyancers do not alter the term,⁶⁵ the standard 999 year demise overcomes for the future the wasting asset problem highlighted by the BSA in its 1984 Report.⁶⁶

5.4 Freehold Conveyancing Devices

5.4.1 *Freehold Devices Used*

When the standard Tyneside Flat documentation was introduced, one established writer suggested that flats or maisonettes in a building divided into only two units were ‘particularly suitable’ for freehold disposal, above all if completely self contained.⁶⁷ Participants were asked what devices were used if Tyneside Flats had been sold on a freehold basis before the promulgation of the standard documentation. The chart below illustrates the replies in percentage terms.⁶⁸

⁶² See ch.8, para.8.8.3.

⁶³ See ch.5, para.5.3.1.

⁶⁴ See Aldridge T, *Law of Flats*, (n.61), where precedent A6, long lease of a maisonette, grants a 99 year term.

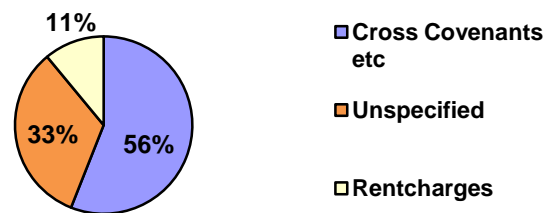
⁶⁵ See further ch.8, para.8.4.5.

⁶⁶ See BSA, *Leaseholds –Time for a Change*, (London: BSA, 1984), para.6 (a).

⁶⁷ See Aldridge T, *Law of Flats*, (n.61), p.87 and 3rd ed. (London: Longmans, 1994), p.108.

⁶⁸ A little over half of the historical data participants suggested that there might have been a freehold sale. Sample size is discussed in ch.7, para.7.6.3.

Freehold Devices



As the chart indicates, participants referred to only two devices, with ‘cross covenants’ being mentioned just over five times as often as rentcharges. The ‘cross covenants’ category included ‘deeds of covenant’, ‘cross covenants’ or ‘mutual covenants.’ The ‘unspecified’ category comprises those participants who said, or implied, that they had seen a conveyance or transfer of an individual freehold Tyneside Flat, but did not say what device had been used. Accompanying comments put the results in their numerical context by indicating that devices were seldom used. One experienced Newcastle conveyancer said that she had only seen one freehold⁶⁹ and another, equally well established respondent from North Tyneside, said ‘maybe’ one.⁷⁰ Two conveyancers specifically voiced their unease over past freehold arrangements. One who declined to specify what device might have been used said there were ‘no proper arrangements’,⁷¹ whilst the one participant who thought that rentcharges had ‘very occasionally’ been used said that some ‘early’ arrangements were ‘very suspect.’⁷²

5.4.2 Enlargement of Long Leases

S.153 LPA 1925 provides that leaseholders entitled to a term originally granted for at least 300 years may, subject to certain exceptions, declare by deed that the term should be enlarged into a fee simple.⁷³ The newly created fee simple is subject to all

⁶⁹ Interview 14, HQ 3 (c).

⁷⁰ Interview 1, HQ 3(c).

⁷¹ Interview 11, HQ 3 (c).

⁷² Interview 19, HQ 3 (c). Although not stated explicitly, it is presumed that these concerns included doubts over the enforceability of obligations.

⁷³ See ss.153 (1) & (2) LPA 1925 for the main exceptions.

lease covenants, both positive and negative, which touch and concern the land.⁷⁴ It has therefore been suggested that, if a suitably drafted long lease is created and subsequently enlarged, then, because of consumer preference for freehold property and pending land obligation reform, this device appears to offer ‘something of value’, particularly where there is an upper and lower ‘maisonette’.⁷⁵

Generally, however, this device has received little support, mainly because of its perceived uncertainty. The 1965 *Wilberforce Report* dismissed it as being ‘untried and artificial’⁷⁶ and the 1984 *Gibson Report* stated that the precise effect of S.153 (8) was ‘not entirely clear’ and that the efficacy of the device had never been tested.⁷⁷ *Megarry and Wade* have reflected these views by saying that it is an ‘artificial device of untried validity and subject to difficulties,’ comments which were quoted, and in effect endorsed, by the Law Commission in their *2008 Consultation Paper*.⁷⁸ At a practical level any attempt by conveyancers to try and explain the mechanics to purchasers or mortgagees would usually be very difficult. Queries might also arise on later sales. This is because the Land Registry would be unlikely to set out the covenants on the face of the register, but would instead simply reflect what had happened by referring in the property register to the lease, the deed of enlargement and s.153 (8) LPA 1925. Accordingly, the newly enlarged lease would, confusingly, form part of the freehold register.

⁷⁴ See s.153 (8) LPA 1925 and also, e.g., Scamell E, *Land Covenants, restrictive and positive, relating to freehold land, including covenants for title*, 1st ed., (London: Butterworths, 1996), p.558.

⁷⁵ Ibid pp. 557 - 558. See also Newsom, G, *Preston & Newsom’s Restrictive Covenants Affecting Freehold Land*, 9th ed., (London: Sweet & Maxwell, 1998), p.63, fn 1 for tentative support for this device.

⁷⁶ See *Report of the Committee of Positive Covenants Affecting Land*, (Chairman Lord Wilberforce) (*Wilberforce Report*) Cmnd 2719, (London: HMSO, 1965), para. 8 (vi).

⁷⁷ See Law Commission, *Transfer of Land The Law of Positive and Restrictive Covenants*, (Chairman Gibson J) (*Gibson Report*) (Law Com. No.127), (London: HMSO, 1984), para. 3.41. For an account of potential difficulties with enlargement, see Taylor T, ‘The Enlargement of Leasehold to Freehold’ (1958) 22 NS Conv.101, pp.101 - 119.

⁷⁸ See Law Commission, *Easements, Covenants and Profits à Prendre*, (Consultation Paper No.186) (*2008 Consultation Paper*), (London: HMSO, 2008), para.7.55 and Harpum C et al (Eds), *The Law of Real Property by Megarry and Wade (Megarry & Wade)*, 7th ed., (London: Sweet & Maxwell, 2008), para. 32- 023. The Law Commission quoted the same extract from the sixth edition of *Megarry & Wade*.

Although many north eastern conveyancers are familiar with the concept of enlargement,⁷⁹ the uncertainties and difficulties of this device make it unsurprising that none of the respondents to the historical data collection suggested that it had ever been attempted for Tyneside Flats before the introduction of the standard Tyneside Flat documentation. There is also no possibility of subsequent standard Tyneside Flat leases being enlarged, as they contain a right of re-entry for condition broken,⁸⁰ a provision which specifically prevents enlargement.⁸¹

5.4.3 Chains of Indemnity Covenants

Privity of contract means that original covenantors remain personally liable on their covenants even after they have parted with all interest in the land.⁸² They therefore often obtain indemnity covenants from their purchasers undertaking to indemnify them from any future breach of covenant.⁸³ Should the purchasers sell on, they can in turn take indemnities from their purchasers, so that a chain of indemnities is set up. Those seeking to enforce the covenants can potentially ensure that current owners perform their obligations imposed by original covenants, by threatening to sue the original covenantors, who will then seek indemnities from their purchasers and so on until the current owners of the burdened land are brought in.⁸⁴ It has been suggested that this enables even positive freehold covenants to be binding for ‘long periods’ provided successive owners are solvent.⁸⁵

Commentators usually emphasise the difficulties of relying on this method of circumvention because, as the 1965 *Wilberforce Report* said, sooner or later the device becomes ineffective because of the death or disappearance of the original

⁷⁹ Numerous seventeenth century leases in Durham and Cumbria have been enlarged. In cases where there is doubt as to whether enlargement is possible, e.g., because the lease is missing, the Registry usually makes a qualifying note in the property register.

⁸⁰ See cl.8.

⁸¹ See s.153 (2) (i) LPA 1925.

⁸² See, e.g., 2008 *Consultation Paper*, (n.78), para.7.47 & Farrand J & Clarke A, *Emmet and Farrand on Title The Law and Practice of Registered and Unregistered Conveyancing*, loose leaf ed., (London: Sweet and Maxwell, 2010), para. 19.016. For an explanation of the terms ‘privity of contract’ & ‘privity of estate’, in relation to leaseholds, see thesis ch.6, para.6.6.1 & fn 239.

⁸³ See Scamell E, *Land Covenants*, (n.74), p.559.

⁸⁴ See *Wilberforce Report*, (n.76), para. 8 (ii).

⁸⁵ See Farrand J & Clarke A, *Emmet and Farrand on Title*, (n.82), para.19.016, but the authors also stress some potential difficulties.

covenantor or because a break occurs in the chain of indemnities,⁸⁶ a chain which is ‘only as strong as its weakest link.’⁸⁷ The Land Registry’s past and present practices also mean that it can be difficult to ascertain whether all necessary indemnity covenants have been made. As no note is made on the register of indemnity covenants contained in the conveyance/transfer to the first registered proprietor, the original deed has to be checked.⁸⁸ In addition, although the Registry usually sets out indemnity covenants contained in subsequent transfers, it has only been its practice to do so ‘for some time’.⁸⁹ A further problem is that, because the original covenantor is no longer the owner of the land, and therefore unable to perform the contract specifically, the only available remedy is damages.⁹⁰ The redress Tyneside Flat owners would be more likely to seek is an order for specific performance of repairing covenants. In view of the difficulties and the ‘unwieldy and hazardous’ nature of this device,⁹¹ it is understandable that none of the respondents to the historical data collection suggested that it had ever been relied on.

5.4.4 Compulsorily Renewed Covenants

Compulsorily renewed covenants have been described as a more successful variant of the chain of indemnity covenants.⁹² This method requires the covenantor to covenant firstly that he will compel his successor to enter into a direct covenant with the covenantee, or his successor, in the same terms as the original positive obligation and secondly that he will impose the same obligation of direct covenant on his

⁸⁶ See *Wilberforce Report*, (n.76), para.8 (ii). The Law Commission followed this up in 1971 when it suggested that this device was effective ‘only while the original covenantor is both traceable and worth powder and shot’ - see Law Commission, *Rights Appurtenant to Land*, (Working Paper No.36), (London: HMSO, 1971), para.27. See also *Gibson Report*, (n.77), para.3.32 &, e.g., Thompson M, *Modern Land Law*, 4th ed., (Oxford: OUP, 2009), p.542.

⁸⁷ See Gray K & Gray S, *Elements of Land Law*, (n.4), para.3.3.29 & Law Commission, 2008 *Consultation Paper*, (n.78), para.7.48.

⁸⁸ See Dixon M et al, *Ruoff & Roper on the Law and Practice of Registered Conveyancing (Registered Conveyancing)*, loose leaf ed., (London: Thompson Reuters (Legal), 2010), para.20.006.

⁸⁹ *Ibid* and see Scamell E, *Land Covenants*, (n.74), pp.559 - 560 where he indicated that because the Registry previously only noted the last indemnity covenant, it was necessary to obtain past copy registers to see if previous proprietors had given indemnities.

⁹⁰ See, e.g., Scamell E, *Land Covenants*, (n.74), p.560 and Law Commission 2008 *Consultation Paper*, (n.78), para.7.48.

⁹¹ See Gray K & Gray S, *Elements of Land Law*, (n.4), para.3.3.29. See also Gravells N, ‘Enforceability of Positive Covenants Affecting Land’ (1994) 110 LQR 346, p.347, where he points out that, although there was apparently a chain of indemnities in the leading case of *Rhone v. Stevens*, (1994) 2 AC 310 HL, the plaintiffs appear not to have relied on it.

⁹² See Gray K & Gray S, *Elements of Land Law*, (n.4), para.3.3.30.

successor.⁹³ This establishes privity of contract, and therefore gives direct enforceability, between the two current owners.⁹⁴

As with indemnity covenants, there is always the danger that successive owners will not covenant.⁹⁵ The entry of a restriction on the register should help ensure compliance,⁹⁶ but is not full proof. The parties may not register⁹⁷ or, perhaps more likely, will submit an application for registration without complying with the restriction. The normal restriction in these circumstances is usually to the effect that there should be no registration without a certificate from the registered proprietor or his conveyancer that the provisions of the clause(s) in the deed requiring renewed covenants had been complied with.⁹⁸ Although the Registry may make an order dispensing with the certificate, provided satisfactory evidence is lodged of the attempts to obtain it, it will still require evidence that the deed of covenant itself had been executed.⁹⁹ Failure to submit that evidence would probably result in cancellation of the application.

In the 1970s an alternative suggestion was made that there should be one comprehensive ‘on-going’ deed rather than a series of deeds.¹⁰⁰ This also has the disadvantage that it has to be re-executed on every change of ownership.¹⁰¹ In addition, the proposal that the original deed could have been deposited at the Registry, with any necessary provisions for production whenever needed for execution or inspection, would, even if acceptable to the Registry, have involved complicated procedures.¹⁰² None of the respondents to the historical data collection suggested that

⁹³ Ibid.

⁹⁴ See, e.g., Scamell E, *Land Covenants*, (n.74), p.554.

⁹⁵ See, e.g., Law Commission, *2008 Consultation Paper*, (n.78), para.7.49.

⁹⁶ See Bright S, ‘Estate Rentcharges and the Enforcement of Positive Covenants’, [1988] 52 Conv. 99, p.100. The restriction would be entered in the proprietorship register.

⁹⁷ Ibid.

⁹⁸ For a more detailed outline of possible wording see *The Land Registration Rules 2003* SI 2003/1417, r.91, Sch 4, (Form L), as substituted by *The Land Registration (Amendment) Rules 2005* SI 2005/1766, r.11, Sch 2, para.3 - see also Dixon M et al, *Registered Conveyancing*, (n.88), para.44.009.16.

⁹⁹ See Dixon M et al, *Registered Conveyancing*, (n.88), para.44.019.

¹⁰⁰ See Prichard A, ‘Making Positive Covenants Run’ [1973] 37 Conv.194, pp.197- 202.

¹⁰¹ Ibid, p.198.

¹⁰² An order under Rule 90 of the (then) Land Registration Rules 1925, SR & O 1925/1093, would have been needed on each occasion for the release of the original deed. It is therefore likely that the Registry would have resisted such a proposal. ‘Dematerialisation’, i.e. processing applications without paper documentation, means that any such procedure is likely to be even less popular now. Dematerialisation is discussed in ch.8, para.8.6.3.

any such comprehensive deed had ever been attempted for Tyneside Flats. Although participants thought that some form of covenant, other than indemnity, was the most likely freehold device to have been used, no details were supplied. There is some evidence to suggest that north eastern conveyancers were sometimes confused as to when a deed of covenant was required.¹⁰³

5.4.5 Estate Rentcharges

Rentcharges are periodic sums charged on, or which issue out of, land.¹⁰⁴ Both rentcharges and the rights of entry usually associated with them are legal interests.¹⁰⁵ They are therefore enforceable against successors in title to the land charged.¹⁰⁶ If the rentcharge is supported by positive obligations to repair, insure etc they will be directly enforceable because they happen to support the rentcharge.¹⁰⁷ Although the Law Commission proposed in its 1975 Report that, in general, no new rentcharges should be created, it recognised their ‘covenant-supporting’ usefulness.¹⁰⁸ The resulting 1977 Rentcharges Act therefore permitted the creation of ‘estate rentcharges’ created for the purpose of enabling positive covenants to be directly enforceable.’¹⁰⁹

¹⁰³ The property register for the upper Tyneside Flat 4 St Oswald’s Terrace, Shiney Row, Houghton le Spring, Durham shows that the deed which induced first registration in 1978 was a freehold conveyance. That conveyance granted and reserved easements, which were supported by a renewable covenant. The easements had been entered on the register and a purchaser would therefore automatically take subject to them, without the need for any deed of covenant. For a contemporary reference see, e.g., Burn E, *Cheshire’s Modern Law of Real Property*, 12th ed., (London: Butterworths, 1976), pp.587 - 588. Even if not entered on the register, a purchaser would have been bound, since the easements were overriding interests under s.70 (1) (a) LRA 1925 see, e.g., Barnsley D, *Conveyancing Law and Practice*, 1st ed., (London: Butterworths, 1973), p.427. See also, e.g., Law Commission, *2008 Consultation Paper*, (n. 78), para.4.13. The registers for this and the other flat in the pair indicate that standard documentation was subsequently created for both flats in 1989.

¹⁰⁴ See s.1 RA 1977.

¹⁰⁵ See s.1 (2) (b) and S.1 (2) (e) LPA 1925.

¹⁰⁶ See, e.g., Law Commission, *2008 Consultation Paper*, (n. 78), para.7.50.

¹⁰⁷ Law Commission, *Transfer of Land, Report on Rentcharges*, (Law Com.No.68), (London: HMSO; 1975), para.49.

¹⁰⁸ *Ibid*, para. 51 and see. Bright S, ‘Estate Rentcharges and the Enforcement of Positive Covenants’, (n.96), pp. 101 - 102.

¹⁰⁹ See s.2 (4) RA 1977. The rentcharge deed needs to contain a right of entry exercisable on breach of positive covenant as s.121 LPA 1925 only gives rights of entry and distress for the rentcharge itself - see further Bright S, ‘Estate Rentcharges and the Enforcement of Positive Covenants’, (n.96), p.104. The right of entry is not affected by the rule against perpetuities - see s.11 PAA 1964. For a discussion of this rule see ch.3, para.3.4.6, fn 151.

It has been suggested that there is scope for 'far greater use' being made of estate rentcharges,¹¹⁰ and that they may be 'ideal for a pair of maisonettes,' as each owner could enforce positive covenants against the other by having vested in him the rentcharge issuing out of the other 'maisonette'.¹¹¹ It would be necessary to ensure that the maisonette and the appropriate rentcharge were transferred together.¹¹² As with the standard Tyneside Flat documentation, complex provisions would therefore be required to ensure that the structure did not subsequently collapse. The use of a restriction in each freehold property register might help but, as with compulsorily renewed covenants, would not guarantee compliance.¹¹³ In practice both flats and rentcharges would need to be registered, so as to reduce the possibility of the rentcharge being overlooked.¹¹⁴ Mortgage lenders would presumably wish to take a charge on both titles, so as to avoid problems in the event of their wishing to exercise their power of sale.¹¹⁵

The *Gibson Report* considered that estate rentcharges came 'closest' to providing an effective freehold solution, but thought that the connected remedy of re-entry was 'clumsy and draconian' and that the device was 'artificial and technical in the extreme'.¹¹⁶ Although many north eastern conveyancers are familiar with rentcharges,¹¹⁷ they were similarly unenthusiastic. This device appears workable, but the complications inherent in a dual freehold/rentcharge ownership may help explain why only one participant suggested that they had ever been used as a Tyneside Flat conveyancing device.¹¹⁸

¹¹⁰ See Bright S, 'Estate Rentcharges and the Enforcement of Positive Covenants', (n.96), p.107 & also Silverman F (Ed), *The Law Society's Conveyancing Handbook*, 17th ed., (London: Law Society, 2010), para. A 25.6.2.

¹¹¹ See Aldridge T, *Law of Flats*, 3rd ed., (n.67), p.61.

¹¹² *Ibid.*

¹¹³ See ch.5, para.5.4.4.

¹¹⁴ Newly created rentcharges out of unregistered land are not compulsorily registrable – see s.5 LRA 2002, but rentcharges and rights of entry created out of an existing registered title must usually be registered - see s.27 (1) and s.27 (2) (e) LRA 2002 and Dixon M et al, *Registered Conveyancing*, (n.88), paras 29.003 - 29.005.

¹¹⁵ Potential difficulties with mortgage lenders, caused by the failure to charge subsequently acquired freehold reversions when the standard Tyneside Flat documentation is used, are discussed in ch.8, para. 8.4.4.

¹¹⁶ See *Gibson Report*, (n.77), para.3.42.

¹¹⁷ Rentcharges were created in the twentieth century north of the Tyne in the Ponteland (Darras Hall Estate) and Seaton Delaval areas of Northumberland. In the second half of the nineteenth century many rentcharges were created in the Sunderland area south of the Tyne.

¹¹⁸ Interview 19, HQ 3 (c). See also Clarke D, 'Occupying 'Cheek by Jowl'', (n.50), p.385, fn 53, where he says that there seems to be 'little enthusiasm' in practice for the creation of estate rentcharges.

5.4.6 Benefit and Burden

The benefit and burden principle⁷ is based upon the ancient law that that someone who claims benefit of a deed must also discharge its burdens¹¹⁹ and is often known as the rule in *Halsall v. Brizell*.¹²⁰ In that case the purchaser of a house on a building estate had been granted the right to use the roads and sewers on the estate and had covenanted to pay a proportionate share of the cost of the maintenance of those facilities. It was held that the purchasers' successors in title could not exercise these rights without contributing appropriately to the costs of ensuring that they could be exercised. It was suggested in both the *Wilberforce and Gibson Reports* that the rule in *Halsall v Brizell* is one method of making positive covenants run,¹²¹ although both reports stressed the potential difficulties, particularly because of the need to show that a reciprocal benefit is given to the covenantor and because it will only be relevant as long as the benefit is valuable enough for the covenantor to go on claiming it.¹²²

In theory the benefit and burden principle could perhaps extend to the benefit of a lower Tyneside Flat to shelter and an upper flat to support, with the reciprocal burdens on both flat owners of keeping their own flats in repair. However, subsequent cases suggest that it could well have been very difficult to draft documentation establishing a sufficient link between the two. In *Rhone v. Stephens*,¹²³ it was decided that a clause in a conveyance which imposed reciprocal benefits and burdens of support was an 'independent provision' from the next clause which imposed an obligation on one of the parties to repair the roof.¹²⁴ There was no sufficient correlation between the burden and the benefit.¹²⁵ It was also held that the covenantor's successors in title must have a choice as to whether or not to accept the

¹¹⁹ See *Gibson Report*, (n.77), para.3.40 and see Law Commission, *2008 Consultation Paper*, (n.78), para.7.56.

¹²⁰ [1957] Ch 169.

¹²¹ See *Wilberforce Report*, (n.76), para.8 (iv) & *Gibson Report*, (n.77), para.3.40.

¹²² See *Wilberforce Report*, (n.76), para.8 (iv), *Gibson Report*, (n.77), para.3.40 & Law Commission, *2008 Consultation Paper*, (n.78), para.7.58.

¹²³ [1994] 2 AC 310 HL.

¹²⁴ Per Lord Templeman at 322. The clause which was interpreted as imposing 'reciprocal benefits and burdens of support' did not explicitly mention support, but provided in general terms that all easements and quasi – easements or rights in the nature of easements as then existed should continue for the benefit of the respective properties. *Rhone v. Stephens* is discussed in more detail in thesis ch.3, para. 3.5.4.

¹²⁵ See the comments of Gibson LJ in *Thamesmead Town Ltd. v. Allotey* (2000) 79 P & CR 557 CA, p.565.

benefit, which in the case of mutual rights of support they do not have in either theory or practice.¹²⁶ It seems clear from these two preconditions, as later summarised in *Thamesmead Town Ltd v Allotey*¹²⁷, that the courts have begun to construe the rule of reciprocity ‘extremely narrowly.’¹²⁸ This would appear to vindicate the unanimous decision of all respondents to the historical data collection not to rely on the benefit and burden principle as a conveyancing device.

5.4.7 Summary

All the above freehold conveyancing devices have drawbacks for the transfer of individual Tyneside Flats. The advent of land registration has generally been of little assistance, although the use of restrictions could potentially help reinforce the two least problematical devices, namely renewable covenants and rentcharges. Historical research data indicates that these were the only the two freehold devices used by north eastern conveyancers before the introduction of the standard Tyneside Flat documentation. Their use on only an occasional basis was broadly in line with national trends.¹²⁹

Only one participant explicitly mentioned the attitude of mortgage lenders towards freehold transfer when he said that building societies were ‘very suspicious’ of freehold flats.¹³⁰ However, the approach of mortgage lenders was, and is, crucial and seems to have hardened between the 1970s, when individual Tyneside Flats generally started to be sold,¹³¹ and the preparation of the standard Tyneside Flat documentation in the early 1980s. In 1970, George and George considered that, generally speaking, building societies preferred leasehold flats, but were not ‘so particular’ about

¹²⁶ Per Lord Templeman in *Rhone v. Stephens*, (n.123), at.323.

¹²⁷ See n.125.

¹²⁸ See Gray K & Gray S, *Elements of Land Law*, (n.4), para.3.3.38. *Rhone v. Stephens* is discussed in more detail in thesis ch. 3, para.3.5.4. See also Gray K & Gray S, *Elements of Land Law*, (n.4), para. 3.3.38, Harpum C et al (eds), *Megarry and Wade*, (n.78), para.32- 026 and Stephens J et al, *Land Law*, 4th ed., (London: Sweet & Maxwell, 2008), para.16- 041.

¹²⁹ See *Gibson Report*, (n.77), para.3.42. It has been suggested that the number of freehold flats and maisonettes was significantly increasing in the mid twentieth century - see Scamell E, ‘Positive Covenants in Conveyances of the Fee Simple’, [1954] 18 Conv.546, p.546.

¹³⁰ Interview 1, HQ 3(c). See also ch.5, para.5.3.2 for the comment, made by another participant, that mortgage lenders were ‘unhappy’ before the introduction of the standard Tyneside Flat documentation.

¹³¹ See ch.5, para.5.2.2.

‘maisonettes’,¹³² which they defined sufficiently widely to include Tyneside Flats.¹³³ By 1984 the same authors stated that building societies had resolutely set their faces against lending on freehold flats, that even in the case of maisonettes, they ‘preferred’ leaseholds and that most, if not all, would not lend on the security of an upper freehold ‘maisonette.’¹³⁴ This reluctance was, in effect, confirmed when, in the 1984 *BSA Report* on the problems of long leaseholds, the BSA opted for the introduction of a strata title system, rather than for the adoption of any freehold device.¹³⁵

The 1984 *Gibson Report* concluded that none of the freehold devices it had considered provided an effective *general* (my italics) solution to the problem caused by the rule that the burden of freehold positive obligations does not run with the land.¹³⁶ In addition, freehold conveyancing devices were only used sporadically by north eastern conveyancers. These factors, particularly when combined with the reluctance of mortgage lenders to advance money on freehold flats or maisonettes, left the Newcastle Law Society with little option other than to adopt a leasehold ‘device’.¹³⁷ The consequential involvement, or potential, involvement, of Tyneside Flat owners in a raft of landlord and tenant legislation is discussed in the next chapter.

¹³² See George E and George A, *The Sale of Flats*, 3rd ed., (London: Sweet & Maxwell, 1970), p.14.

¹³³ See thesis ch.2, para.2.3.2.

¹³⁴ See George E and George A, *The Sale of Flats*, (n.43), pp.22, 23 & 31. See also See Cawthorn J, *The Sale and Management of Flats*, (n.55), p.69.

¹³⁵ See BSA ‘*Leaseholds – Time for a Change*’ (*BSA Report*) (London: BSA, 1984), para.25 (c) - (e). See also ch.4, para.4.5.4. Mortgage lenders’ current approach towards lending on freehold flats is discussed in thesis ch.8, para.8.4.3.

¹³⁶ See *Gibson Report*, (n.77), para.3.42.

¹³⁷ Alternative landlord and tenant structures to the standard Tyneside Flat documentation are discussed in ch.8, paras 8.9.8 & 8.9.9

Chapter 6. Leasehold Legislation

6.1 Introduction

This chapter addresses research question seven by examining the relevance of modern leasehold legislation for the standard Tyneside Flat documentation.¹ That documentation has remained largely unchanged since its introduction in the early 1980s in contrast to the substantial volume of landlord and tenant legislation passed since then.² As the overview of leasehold legislation passed since the Second World War indicates, modern legislation mainly sought to overcome the ‘wasting asset’ problem of 99 year leases and difficulties caused by poor landlord management in large blocks of flats.³ Since most standard Tyneside Flat leases are granted for 999 years and the flats are usually self-managed, those objectives have little relevance for standard leaseholders. The legislation can, however, still have an impact which, as often tends to be the case,⁴ generally appears to be overlooked by north eastern conveyancers.⁵ It therefore seems likely that owner occupiers will be similarly unaware of the legislation⁶ and perhaps also their leasehold status.⁷

Leaseholds have a dual character in that they create both a proprietary and contractual interest at the same time.⁸ They can also be of any length.⁹ This flexibility increases their use and, inevitably, the volume of leasehold legislation affecting, or potentially affecting,

¹ See further ch.1, para.1.1.6.

² This is therefore the reverse of how the relationship between the ‘static’ legislative function of the law has been contrasted with the ‘dynamic’ function of conveyancing – see Hargreaves A, *An Introduction to the Principles of Land Law*, 1st ed., (London: Sweet & Maxwell, 1936), p.2. However, the law on the enforceability of freehold obligations has generally remained ‘static’ – hence the need for the standard Tyneside Flat documentation.

³ See ch.4, para.4.6. See also, e.g., Bright S, *Landlord and Tenant Law in Context*, 1st ed., (Oxford: Hart, 2007), p.13.

⁴ See, e.g., Clarke D, ‘Long Residential Leases: Future Directions’ in Bright S (Ed), *Landlord and Tenant Law: Past, Present and Future*, 1st ed., (Oxford: Hart, 2006), p.179.

⁵ See, e.g., ch.8, paras 8.3.6 & 8.7.4.

⁶ For an indication of the difficulty in explaining the standard documentation to owner occupiers see ch.8, para. 8.9.8.

⁷ As no rent is payable and Tyneside Flats are almost entirely self-contained, there will usually be little to remind owner occupiers that they are leaseholders. Data evidence indicates that contributions for ‘joint installations’ tend to be spasmodic, see ch.8, para.8.7.3, and, even when made for, e.g., guttering and ‘downcomers’, might well be paid without reference to the lease provisions.

⁸ See further ch.6, para.6.6.1.

⁹ But they must have a fixed maximum duration – see, e.g., Gray K and Gray S, *Elements of Land Law*, 5th ed., (Oxford: OUP, 2009), paras 4.1.32 & 4.1.37.

Tyneside Flat and other long leaseholders. The main statutory provisions are contained in the following enactments:

Leasehold Reform Act 1967 (LRA 1967)

Landlord and Tenant Act 1985 (LTA 1985)

Landlord and Tenant Act 1987 (LTA 1987)

Leasehold Reform, Housing and Urban Development Act 1993 (LRHUDA 1993)

Landlord and Tenant (Covenants) Act 1995 (LTCA 1995)

Commonhold and Leasehold Reform Act 2002 (CLRA 2002).

There has been much criticism of individual statutes and their supplementary rules¹⁰ and their combined effect has resulted in the law on residential leaseholds being ‘hugely complex’.¹¹ When discussing the effect of landlord and tenant legislation, most commentators presuppose a very different architectural layout and documentary structure from that familiar to standard Tyneside Flat and other similar leaseholders.¹² This chapter addresses that omission by considering those aspects of particular relevance to them. The discussion, which has sometimes been informed by data collected from north eastern conveyancers, is considered under the following topics:

6.2 Leasehold enfranchisement of dwelling houses

6.3 Leasehold extension of houses and flats

¹⁰ E.g., the rules for the collective and individual enfranchisement of flats have been described as ‘the most conspicuous mess’ – see Wood D, ‘Landlord and Tenant Law: Mapping the Recent Past’ in Bright S (Ed), *Landlord and Tenant Law: Past, Present and Future*, (n.4), p.18.

¹¹ See Bright S, *Landlord and Tenant Law in Context*, (n.3), p.13 and, e.g., Davey M, ‘The Regulation of Long Residential Leases’ in Cooke E (Ed), *Modern Studies in Property Law Vol III*, (Oxford: Hart, 2005), p.224.

¹² E.g., the discussion of service charges tends to assume, as will usually be the case, that there is a multi unit block of flats with common parts which are the landlord’s responsibility – see, e.g., Garner S and Frith A, *A Practical Approach to Landlord and Tenant*, 5th ed., (Oxford: OUP, 2008), pp.426 -7, Sparkes P, *A New Landlord and Tenant*, 1st ed., (Oxford: OUP, 2001), p.456, para. J1 and Wilkie M et al, *Landlord and Tenant Law*, 5th ed., (Basingstoke: Palgrave Macmillan, 2006), para.12.1.

6.4 Collective enfranchisement of flats

6.5 Repair and maintenance of flats including pre-emption and acquisition

6.6 Enforceability of obligations

Each section indicates whether any legislative amendment is needed because of its actual or potential impact on the standard documentation. The chapter concludes with an overall summary and assessment of those findings.

6.2 Enfranchisement of Dwelling Houses

6.2.1 Introduction

In addition to taking evidence on the Tyneside Flat housing stock,¹³ the 1885 *Royal Commission Report on the Housing of the Working Classes*¹⁴ also considered the national building lease system.¹⁵ This system does not appear to have been used for building many, if any, surviving Tyneside Flats but, because it was associated with poor quality housing,¹⁶ it led to a demand for enfranchisement, that is, the right of a leaseholder to purchase compulsorily his landlord's freehold interest.¹⁷ The history of subsequent enfranchisement proposals is contained in the 1950 *Jenkins Report*¹⁸ whose *Minority Report* ultimately led to a 1966 White Paper¹⁹ and the LRA 1967. Reform had by then become a matter of urgency because large numbers of 99 year building and other leases, granted in the second half of the

¹³ See thesis ch.2, paras 2.4.1 - 2.4.3.

¹⁴ *The Report of the Royal Commission on the Housing of the Working Classes* Vols I & II (London: Eyre and Spottiswoode, 1885).

¹⁵ See e.g. *Report of the Royal Commission on the Housing of the Working Classes* Vol I. (n.14), 'Supplementary Report', p.59. In a building lease the leaseholder undertook to pay a ground rent based on the value of the site, erect a specified building, keep it in repair and, at the end of the lease term hand over both the land and building to the landlord - see further *Leasehold Committee Final Report*, Chairman, Jenkins LJ (*Jenkins Report*) (Cmnd 7982), (London: HMSO, 1950), para.22.

¹⁶ *Ibid.*

¹⁷ *Ibid.*, para.32. See also, e.g., Rodgers C, *Housing Law Residential Security and Enfranchisement*, revised ed., (London: Butterworths, 2002), p.321 and Sparkes P, *A New Landlord and Tenant*, (n.12), p.387. For an account of other factors leading to the demand for nineteenth century enfranchisement, e.g., eighteenth century leases then expiring, see Offer A, *Property and Politics 1870 - 1914*, 1st ed., (Cambridge: CUP, 1981), pp.151-158.

¹⁸ See *Jenkins Report*, (n.15), paras. 43-52. See also Davey M, 'Long Residential Leases: Past and Present' in Bright S (Ed), *Landlord and Tenant Law*, (n.4), pp.154 -160.

¹⁹ See *Leasehold Reform in England and Wales*, (Cmnd 2916) (*1966 White Paper*), (London, HMSO, 1966).

nineteenth century, were beginning to reach their expiry date.²⁰ The limited circumstances in which the LRA 1967 might be relevant to the standard Tyneside Flat documentation are discussed in this section.

6.2.2 The LRA 1967

The LRA 1967 gave a ‘tenant of a leasehold house’ which he occupied as his residence, a right to acquire for ‘fair compensation’ the freehold or an extended lease of the house and premises provided certain conditions were fulfilled.²¹ Although those conditions have subsequently been amended,²² the statutory definition of a ‘house’ has remained the same. In s.2 LRA 1967, ‘house’ ‘includes any building designed or adapted for living in and reasonably so called, notwithstanding that the building is not structurally detached, or was not or is not solely designed or adapted for living in, or is divided horizontally into flats or maisonettes’.²³ The following two sub-sections deal with the internal division of buildings by providing that:

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

(b) where a building is divided vertically the building as a whole is not a ‘house’, though any of the units into which it is divided may be.’²⁴

²⁰ Ibid, para.3. Mortgage lenders usually require a minimum unexpired lease term before they are prepared to lend - see ch.8, para.8.4.5.

²¹ See s.1 (1).

²² For a detailed discussion of the circumstances in which the Act originally applied see Hague N, *Leasehold Enfranchisement*, 1st ed., (London: Sweet & Maxwell, 1967), chs 2 & 3. For a discussion showing how those conditions were amended by the LRHUDA 1993 see Bridge S, *Residential Leases*, 1st ed., (London: Blackstone, 1994), ch.5 and for an account of how the LRA 1967 has been amended by all legislation up to and including the CLRA 2002, see Rodgers C, *Housing Law*, (n.17), ch.12.

²³ It has been suggested that although the 1967 Act uses the word ‘includes’, the definition appears to be exhaustive - see Hague N, *Leasehold Enfranchisement*, (n.22), para.2-02. In *Gaidowski v. Gonville and Caius College, Cambridge* [1975] 2 All ER 952 CA the definition was described as being ‘fairly elastic’ by Ormrod LJ at 955.

²⁴ These sub sections reflect the observations of the *Jenkins Minority Report*, (n.15), para.93 that it was only when it was the *land* (my italics) that is divided that separate units for enfranchisement would be created and that they did not intend that flats should qualify as separate units. The division would have to be ‘vertical, not horizontal.’ See also, e.g., Macintyre D, ‘The Leasehold Reform Act 1967 [1968] 26 C.L.J. 38, pp.39 - 40 & Wilkinson H, ‘Leasehold Reform Act 1967’ (1968) 31 MLR 193, p.194.

Since Tyneside Flats are divided horizontally, the circumstances in which the LRA 1967 could affect the standard documentation are limited to those situations where the whole building comprising both flats can be regarded as a house under s.2 (a) above. The following two London area cases illustrate the position.

6.2.3 *The Sharpe and Malpas Cases*

In *Sharpe v. Duke Street Securities NV*²⁵ a leaseholder's personal representatives sought enfranchisement under the 1967 Act of a building in the Clapham district of London, with a layout almost identical to that of a typical pair of terraced Tyneside Flats. The building was constructed in the early 1900s and comprised two 'maisonettes',²⁶ one on each floor. Each maisonette had its own front door and entrance hall. Stairs led from the first floor maisonette to a rear concreted area. In 1979 the leaseholder moved into the downstairs maisonette and shortly afterwards acquired the leases of both maisonettes. After constructing a connecting door between the two ground floor hallways, the leaseholder and his family occupied both maisonettes together as their residence. The freeholders appealed against the county court decision to allow enfranchisement.

The freeholders argued that the whole building was divided vertically and therefore could not be a 'house' within s.2 (1) (b) of the LRA 1967 although the individual units might be. This submission was firmly rejected in the Court of Appeal where, in the leading judgement, Fox LJ stated that the division into units was horizontal and that the dividing wall between the lower maisonette and the hall and stairs of the upper maisonette was 'wholly subsidiary' to that 'fundamental' division.²⁷ Accordingly, because of the internal access arrangements and the continued user of both maisonettes as a single dwelling over several years, the whole building could reasonably be called a house for the purposes of the LRA 1967.

²⁵ (1987) 19 HLR 506 CA.

²⁶ An agreed Surveyors Report explained, at 508, that defining the properties as 'maisonettes' distinguished them from 'what the general public understand as flats, which are usually either purpose built or self-contained units of accommodation with a communal hallway and often other communal common parts.' The word 'maisonette' has been kept for the discussion of this case & also *Malpas v. St Ermin's Property Company Ltd* (n.28). For an account of how north eastern conveyancers define 'maisonettes,' see ch.8, para.8.2.5.

²⁷ At 510.

Five years later in *Malpas v. St Ermin's Property Company Ltd*,²⁸ the Court of Appeal again had to consider a building which had been similarly constructed as two 'maisonettes', although in this building each maisonette also had a separate back door. In this case Mrs Malpas held a long lease of both maisonettes, lived in one and had sublet the other. Dillon LJ, in the leading judgement, held that the whole building could reasonably be called a house, notwithstanding that it had two front and back doors and even though it could also reasonably be called a building divided horizontally into two flats or maisonettes.²⁹

Even if, improbably, the court had held in either the *Sharpe* or *Malpas* cases that the maisonettes were vertically divided and therefore potentially capable of individual enfranchisement under s.2 (b), enfranchisement would still have been impossible under s.2 (2) LRA 1967. This states that references to a 'house' do not apply to a house which is not structurally detached and if a 'material part' lies above or below a part of the structure not comprised in the house.³⁰ This was to prevent the acquisition of 'flying freeholds',³¹ and the potential difficulties of one freehold owner enforcing positive obligations against successors in title of the other'.³²

6.2.4 Relevance of the LRA 1967 for Tyneside Flats

Despite the wide range of architectural layouts included in local practitioners' concepts of 'Tyneside Flats',³³ in all the examples given the flats appeared to be divided horizontally, with a 'material part' of each flat lying above or below the other flat.³⁴ It therefore seems that

²⁸ (1992) 24 HLR 537 CA.

²⁹ At 539 and see LRA 1967, s.2 (1) (a) set out in ch.6, para.6.2.2.

³⁰ For a discussion of what constitutes a 'material part' see, e.g., Hague N, *Leasehold Enfranchisement*, (n.22), para. 2-03 and Furber J (Ed), *Hill and Redman's Law of Landlord and Tenant*, loose leaf ed., (London: Lexis Nexis, 2010), para. E 503. In *Gaidowski v. Gonville and Caius College*, (n.23), the leaseholder occupied a room which lay above and below parts of the building not comprised in his house. However, as the 'mere storeroom' (per Sir Gordon Wilmer at 959) was not occupied as part of his residence, enfranchisement of the house excluding the storeroom was allowed - see further Bridge S, *Residential Leases*, (n.22), p.180 and Rodgers C, *Housing Law*, (n.17), para.12.16.

³¹ Per Dillon LJ in *Malpas v. St Ermin's Property Company Ltd*, (n.28), at 538.

³² See the comments of Ormrod LJ in *Gaidowski v. Gonville and Caius College*, (n.23), at 955 and those of Nourse LJ in *Duke of Westminster and Others v. Birrane* [1995] QB 262 at 269. See also, e.g., Bridge S, *Residential Leases*, (n.22), p.180.

³³ See ch.8, para.8.2.6.

³⁴ In a typical pair of Tyneside Flats, the whole of the lower flat lies below the upper flat, apart from its rear yard and any outbuildings. Similar areas belonging to the upper flat, together with the rear staircase and a small part of the front bedroom, do not lie above the lower flat. For a description of a typical terraced Tyneside Flat layout see ch.2, para.2.3.2. For a typical layout plan see, e.g., Atkinson F, *Victorian Britain The North East*, 1st ed., (Newton Abbot: David and Charles, 1989), p.104.

where the standard documentation has been used for the transfer of individual Tyneside Flats they are not ‘houses’ capable of enfranchisement under the LRA 1967. It is only if both flats are occupied together in circumstances similar to those in either the *Sharpe* or *Malpas* cases, where ‘flying freeholds’ would not be created, that the combined flats could constitute a ‘house’ for the purposes of the LRA 1967. Although pairs of Tyneside Flats are occasionally converted into single dwellings,³⁵ if the standard documentation had been used to transfer both flats and they had come into single ownership, the LRA 1967 would be irrelevant since the leaseholder already would, or should, be the freehold owner of both flats.³⁶ North eastern conveyancers were asked whether they were aware of any cases of enfranchisement under the LRA 1967 when a pair of Tyneside Flats had been converted into a single dwelling house. All participants answered the question and, when their comments were taken into account, it was clear that none had heard of any LRA 1967 enfranchisement.³⁷ No amendments to the LRA 1967 therefore seem to be required because of any potential impact on Tyneside Flat leaseholders.

If the land obligation proposals in the *2008 Consultation Paper* were to be enacted,³⁸ then previous suggestions that the LRA 1967 should be extended to flats³⁹ might be resuscitated in order to facilitate freehold ownership for those, such as existing Tyneside Flat leaseholders, where commonhold is not appropriate.⁴⁰ Any such amending legislation would need to be carefully considered to ensure that any necessary land obligations were incorporated either statutorily or in any conveyancing documentation.⁴¹ Where Tyneside Flat leaseholders hold under the usual 999 year term, it is unlikely that they would seek enfranchisement but if, exceptionally, they held under a shorter term, such as 99 years, a statutory entitlement to enfranchisement of individual flats could prove useful.⁴²

³⁵ See ch.2 para.2.7.3.

³⁶ If the freehold reversions had not been transferred, this could be effected by using the standard power of attorney provisions – see ch.5, para.5.3.4. The fact that the flats had been let on separate long leases would not prevent enfranchisement, provided they both had the same landlord and leaseholder - see s.3(6) LRA 1967 & Hague N, *Leasehold Enfranchisement*, (n.22), para.3-04.

³⁷ Two respondents, Interview 2 & Interview 20, GQ 5, confused LRA 1967 enfranchisement with the acquisition of a pair of Tyneside Flats & the subsequent merger of the two leasehold interests into one freehold reversion - see further ch.7, para.7.2.6.

³⁸ The *2008 Consultation Paper* is discussed in ch.4, s.8.

³⁹ See Hague N ‘Leasehold Reform Bill’ [1967] 31 Conv. 187, p.187.

⁴⁰ See further ch.4 paras 4.7.2 - 4.7.5.

⁴¹ See Hague N, *Leasehold Enfranchisement*, (n.22), ch.6 for a discussion of the statutory and voluntary incorporation of land obligations in conveyances under the LRA 1967.

⁴² Quantitative research data suggests that a number of ‘shorter’ term leases have been granted - see ch.8, para. 8.4.5.

6.3 Leasehold Extension of Houses and Flats

6.3.1 Introduction

This section examines the impact on Tyneside Flat leaseholders of the leasehold extension provisions in the LRA 1967, applicable to houses, and the LRHUDA 1993, applicable to flats. One reason for excluding flats from the ambit of the 1967 Act was that long leases of flats had only been granted ‘in recent years’.⁴³ Long leases of individual Tyneside Flats were being granted from the late 1960s onwards.⁴⁴ By the mid 1980s the national ‘depreciating asset’ problem caused by expiring 99 year flat leases had been recognised.⁴⁵ The LRHUDA 1993 sought to address this problem, and any injustice felt by long leaseholders of flats, in comparison to those of houses,⁴⁶ by introducing a right of collective enfranchisement and a right to lease renewal.⁴⁷ Lease extension is irrelevant for the vast majority of standard Tyneside Flat leaseholders holding a 999 year lease. Where, unusually, shorter terms have been granted, it is only in wholly exceptional circumstances that the LRA 1967 might apply, but the LRHUDA 1993 could potentially be useful.

6.3.2 LRA 1967

As an alternative to enfranchisement, the LRA 1967 gave qualifying leaseholders the right to extend their leases for 50 years.⁴⁸ Since the LRA 1967 only applies to ‘houses’, lease extension could only apply to Tyneside Flat leaseholders if both flats together could be construed as a ‘house’.⁴⁹ Even if a shorter term(s) had been granted,⁵⁰ since the leaseholder

⁴³ See *1966 White Paper*, (n.19), para.8. Another major reason was to prevent the creation of ‘flying freeholds’ - see ch.6, para.6.2.3.

⁴⁴ See ch.5, para.5.2.2.

⁴⁵ See ch.4, para.4.6.

⁴⁶ See Bridge S, *Residential Leases*, (n.22), p.192. The reasons for introducing the legislation were mixed – see further Clarke D, *Leasehold Enfranchisement -The New Law*, 1st ed., (Bristol: Jordans, 1994), ch.2 and ‘Legislation Leasehold Enfranchisement: Leasehold Reform, Housing and Urban Development Act 1993, Pt 1’ [1994] 58 Conv. 223, p.224 and Davey M, ‘The Onward March of Leasehold Enfranchisement’ (1994) 57 MLR 773, pp.780 -781.

⁴⁷ During the passage of the legislation lease renewal changed from being a ‘secondary’ right to an alternative option, leading to the suggestion that it would be the more attractive right See Bright S, ‘Enfranchisement – A Fair Deal for All or for None?’ [1994] 58 Conv. 211, p.221, Clarke D, *Leasehold Enfranchisement*, (n.46), para.12.1 & ‘Legislation Leasehold Enfranchisement’, (n.46), pp. 224 & 228, Driscoll J, *Leasehold Reform – The New Law A Guide To The Leasehold Reform, Housing and Urban Development Act 1993*, (Croydon: Tolley,1993), paras 1.6 & 8.2.

⁴⁸ See s.14 LRA 1967.

⁴⁹ See ch.6, para.6.2.2.

of a house would hold leases of what had previously been two individual flats, he would be able to compel the transfer of the freehold reversion.⁵¹ The possibility of the LRA 1967 ever being applied to Tyneside Flat leaseholders is so remote that any potential impact of this legislation can be discounted. Even if the Act were to apply it would not seem to cause injustice to the landlord for a lease extension to be given, since a full premium is paid on the original grant of standard leases.

6.3.3 LRHUDA 1993

The LRHUDA 1993 gives a ‘qualifying tenant’ an individual right to an extension of the term of the lease of his flat for a further period of 90 years.⁵² A qualifying tenant, has essentially the same meaning for both lease extension and collective enfranchisement,⁵³ and must have held a long lease of the flat for at least two years.⁵⁴ The general interpretation section for Pt I LRHUDA 1993, which includes both lease extension and collective enfranchisement, defines a ‘flat’ as meaning a separate set of premises, whether or not on the same floor, and :

- a) which forms part of a building, and
- b) which is constructed or adapted for use for the purposes of a dwelling⁵⁵, and
- c) either the whole or a material part of which lies above or below some other part of the building;⁵⁶

The third element (c) above specifically includes those parts of a building which had been explicitly excluded from the definition of a house in the LRA 1967.⁵⁷ Accordingly, the same

⁵⁰ Quantitative research data indicates that a number of shorter term ‘standard’ Tyneside Flat leases have been created – see ch.8, para.8.4.5. The granting of two separate long leases would not prevent lease extension, provided they both had the same landlord and leaseholder - see s.3(6) LRA 1967 and Hague N, *Leasehold Enfranchisement*, (n.22), para.3-04.

⁵¹ As attorney of his landlord under the standard power of attorney provisions - see ch.5, para.5.3.4.

⁵² See s.56 (1) LRHUDA 1993.

⁵³ See s.39 (3) LRHUDA 1993. Collective enfranchisement is discussed in ch.6, paras 6.4.1 – 6.4.2.

⁵⁴ See s.39 (1) & (2) LRHUDA 1993, as substituted by s.130 CLRA 2002. See also Rodgers C, *Housing Law*, (n.17), para.12.98

⁵⁵ ‘Dwelling’ means any building or part of a building occupied or intended to be occupied as a separate dwelling - see s.101 (1) LRHUDA 1993.

⁵⁶ See s.101 (1) LRHUDA 1993.

⁵⁷ See ch.6 para.6.2.2.

structural features that prevent individual Tyneside Flats from being houses under the LRA1967 ensure they are flats under the LRHUDA 1993.⁵⁸

A long lease is defined in the LHRUDA 1993 as principally being one where the original term exceeds twenty one years.⁵⁹ The original requirement that the lease must be at a low rent was later removed⁶⁰ but, from the outset, standard Tyneside Flat leaseholders with a 99 year lease at a peppercorn rent have clearly been qualifying tenants. Such leaseholders are like ‘virtual freeholders’⁶¹ for whom the leasehold extension provisions are irrelevant. However, whenever standard residential leases⁶² of, for example, 99 years have been granted, the lease extension provisions are potentially useful.

6.3.4 Application of LRHUDA 1993 to Tyneside Flats

Research data reveals that a number of ‘shorter’, usually 99 year, standard leases have been created and some lease extensions sought.⁶³ Although the LHRUDA 1993 was primarily enacted with larger blocks in mind, some of its detailed provisions could facilitate the granting of Tyneside Flat lease extensions. For example, if the existing lease was granted after the landlord’s mortgage, then a new extended lease will be binding on the lender, even if he did not authorise the original lease.⁶⁴ However, where the existing lease was granted after the commencement of the LRHUDA 1993 without the authority of the lender, he will not be bound.⁶⁵ If, as will usually be the case, the leaseholder’s interest in an individual Tyneside Flat is mortgaged, then any lender’s interest will not be defeated, as any new lease will be subject to the existing mortgage.⁶⁶ Data analysis revealed that the whereabouts of Tyneside

⁵⁸ But see Clarke D, *Leasehold Enfranchisement*, (n.46), para.17.5.2 for a discussion on whether it is possible for a house to be a unit for the purposes of collective enfranchisement.

⁵⁹ See s.7 LRHUDA 1993 which details other examples of long leases. See also Driscoll J, *Leasehold Reform – The New Law*, (n.47), paras 2.17 & 8.5.

⁶⁰ See ss 5(1) & 39 (3) LRHUDA 1993, as amended by ss 117 and 131 CLARA 2002.

⁶¹ Under s.59 LRHUDA 1993 a qualifying lease can be renewed for further periods of 90 years with no rent payable. This has been described as a ‘virtual freehold’ with the form of a lease, but all the value with the leaseholder – see Clarke D, ‘Legislation Leasehold Reform’, (n.46), p.228 and also *Leasehold Enfranchisement*, (n.46), para.16.5.1.

⁶² A leaseholder under a ‘business lease’ cannot be a ‘qualifying tenant’ – see s.5 (2) (a) LRHUDA 1993. ‘Business lease’ is defined by s.101(1) LRHUDA 1993 as being a tenancy to which Pt II LTA 1954 applies and is defined in that Act in s.23(1). Only a small percentage of standard Tyneside Flat leases have been amended for business use – see ch.8, para.8.3.7.

⁶³ See ch.8, para.8.4.5.

⁶⁴ See s.58 (1) LRHUDA 1993. This provision should help reduce the costs of the landlord’s lender, which have been identified as being a difficulty in Tyneside Flat lease extensions – see ch.8, para.8.4.5.

⁶⁵ Ibid s.58 (2) and see, e.g., Rodgers C, *Housing Law*, (n.17), para.12.103.

⁶⁶ See s.58 (4) LRHUDA 1993. See further Driscoll J, *Leasehold Reform –The New Law*, (n.47), para.12.8.

Flat landlords are sometimes unknown.⁶⁷ Where this is the case, the court's power to make a vesting order if the landlord cannot be found could be useful.⁶⁸ If, unusually, one standard Tyneside Flat leaseholder held 'short' term residential leases in both flats, then he would be able to claim an individual extension on each flat.⁶⁹ However he would be unlikely to do so since he would then normally also own, or be able to acquire, the freehold reversions in both flats.⁷⁰

The potential application of the LRHUDA 1993 for Tyneside Flat leaseholders was extended when the original LRHUDA three year residence qualifications was removed by the CLRA 2002.⁷¹ Those who sublet residential flats or occupy them as second homes will be able to claim an extension,⁷² but must now have held the lease for not less than two years.⁷³ Many Tyneside Flats close to Newcastle and Northumbria Universities are occupied by university students.⁷⁴ If any 99 year standard leaseholds have been bought, for example, by parents or 'buy to let' investors for student residential occupation they could be able to claim a lease extension.

Overall, the leasehold extension provisions in the LRHUDA 1993 could become increasingly helpful for a significant, if relatively small, percentage of standard Tyneside Flat leaseholders. The LRHUDA does not appear to require amendment because of any possible adverse impact. The Act has been described as being 'dauntingly complex'⁷⁵ and, in practice, it could provide a framework against which negotiations take place.⁷⁶ This presupposes an appreciation of its application. Research data indicates that north eastern conveyancers do not

⁶⁷ See ch.8, para.8.8.3. This arose in relation to difficulties over transferring the freehold reversions.

⁶⁸ See s.50 (1) LRHUDA 1993. The 'court' is the county court – see ss.90 (1) & s.101 LRHUDA 1993. The LVT has similar powers - see Rodgers C, *Housing Law*, (n.17), para.12.102.

⁶⁹ See s.39 (4) LRHUDA 1993.

⁷⁰ See further ch.5, para.5.3.4. If a tenant served a notice of claim for a new lease as a means of exerting pressure on the landlord to transfer the freehold reversions, he would run the risk of being held responsible for the landlord's reasonable costs of a new lease under s.60 (1) (c) LRHUDA 1993 or of the costs incurred up to the time of any withdrawal, or deemed withdrawal, of the application under ss 52(3) or 60 (3) LRHUDA 1993.

⁷¹ See s.130 (3) CLARA 2002, which repealed s.39 (2) (b) (i) LRHUDA 1993. For an account of the original provisions see, e.g., Driscoll J, *Leasehold Reform –The New Law*, (n.47), para.8.3.

⁷² See Rodgers C, *Housing Law*, (n.17), para.12.98. The CLRA 2002 relaxed the qualifying rules for lease extension in order to reflect the more liberal rules which it introduced for collective enfranchisement - see Rodgers C, *Housing Law*, (n.17), para.12.97.

⁷³ See s.39 (2) (a) LRHUDA 1993, as substituted by s.130 (2) CLRA 2002 and, e.g., Driscoll J, 'Flats and houses: new rights for leaseholders' (2002) 146 SJ 564, p.564.

⁷⁴ See ch.2, para.2.7.2 & ch.8, para. 8.3.6 for research data on the number of standard Tyneside Flat leases amended for student use.

⁷⁵ See Bridge S, *Residential Leases*, (n.22), p.192.

⁷⁶ See further Driscoll J, *Leasehold Reform –The New Law*, (n.47), preface, p.iii.

yet connect the LRHUDA 1993 legislation with the standard Tyneside Flat documentation, although this may change as standard 99 year leases created in the early 1980s become increasingly unmortgageable.⁷⁷

6.4 Collective Enfranchisement of Flats

6.4.1 *The Right to Collective Enfranchisement*

The LRHUDA 1993 gives ‘qualifying tenants’ of flats the right of collective enfranchisement,⁷⁸ that is a collective right to acquire the freehold of the premises in which their flats are located.⁷⁹ There need to be at least two flats held by qualifying tenants⁸⁰ and some small blocks with residential landlords are excluded.⁸¹ The CLRA 2002 amended the LRHUDA 1993 by requiring the freehold to be acquired by a ‘RTE’ company on behalf of the qualifying tenants.⁸² As the term ‘collective’ implies, if there are only two units, both qualifying tenants need to be ‘participating’ members of the acquiring company.⁸³ This section considers the relevance of the collective enfranchisement provisions for Tyneside Flat leaseholders.

6.4.2 *Relevance for Tyneside Flat Leaseholders*

The definition of ‘flat’ and ‘qualifying tenant’ is the same for both collective enfranchisement and lease extension and clearly includes Tyneside Flat leaseholders.⁸⁴ Accordingly, if standard Tyneside Flat leases have been created for both flats, then the minimum number of

⁷⁷ See further ch.8, para.8.4.5.

⁷⁸ See s.1 (1) LRHUDA 1993.

⁷⁹ This is an oversimplification of the right - for further details of the right and its ‘unduly complex’ procedures see ,e.g., Rodgers C, *Housing Law*, (n.17), paras 12.43 - 12.96.

⁸⁰ See s.3 (1) (b) LRHUDA 1993.

⁸¹ See ch.6, para.6.4.2.

⁸² S.13 (2) (b) LRHUDA 1993, introduced by s.121 (2) CLRA 2002. S.121 CLRA 2002 has not yet been brought into force – see ‘Commonhold and Leasehold Reform Act 2002. Is it in Force?’

<<http://lexisnexis.com/uk/legal/frame.do?reloadEntirePage=true&rand=1288192...>>, accessed 27 October 2010.

⁸³ S.13 2ZA LRHUDA 1993, introduced by s.121 (3) CLRA 2002, provides that where there are only two qualifying tenants, both must be ‘participating’ members of the RTE company. To become a ‘participating’ member a ‘participation notice’ must be given – see s.4B(4) (a) & (b) LRHUDA 1993, introduced by s.122 CLRA 2002, See generally, e.g., Furber J et al, *The Commonhold and Leasehold Reform Act 2002*, 1st ed., (London: Butterworths, 2002), paras 4.12 – 4.21. The internet reference (n.82) shows that as at 27 October 2010 s.122 CLRA had only been brought into force in so far as it gave power to make regulations.

⁸⁴ See ch.6, para.6.3.3.

leaseholders required for collective enfranchisement will have been created. However, if the original landlord has complied with the standard lease terms,⁸⁵ then the collective enfranchisement provisions are irrelevant, as the landlord will have already transferred his whole freehold interest in the building. If, however, the original landlord has omitted to transfer the freehold reversions,⁸⁶ then it seems that, provided they are prepared to co-operate,⁸⁷ the leaseholders could exercise their right of collective enfranchisement. In practice, there seems little reason why either leaseholder would wish to use the statutory mechanism, with the added potential complication of vesting the freehold in a company,⁸⁸ and incurring relatively high costs⁸⁹ when they could simply transfer the freehold reversions to each other by using the powers of attorney in the standard lease.⁹⁰

The standard Tyneside Flat documentation is drafted on the assumption that there are only two flats. When data was collected, none of the participants said that they had amended the documentation for three flat properties, although it appeared this had occasionally occurred in the past.⁹¹ There may therefore be circumstances where two of the three leaseholders could theoretically invoke the collective enfranchisement provisions against the wishes of the third leaseholder,⁹² or perhaps a 'resident landlord'.⁹³ The 'resident landlord' exclusion⁹⁴ does not apply to a 'purpose built' blocks of flats,⁹⁵ so that if any 'three unit' purpose built Tyneside

⁸⁵ By transferring the freehold reversions in both flats to the leaseholders - see ch.8, para.8.8.3.

⁸⁶ See further ch.8, para.8.8.3.

⁸⁷ There can only be one qualifying tenant per flat - see s.5 (3) LRHUDA 1993.

⁸⁸ The corporate structure prescribed by the CLRA 2002 was identical to that for a commonhold association introduced in the same Act and was intended to enable leaseholders to enfranchise and then convert to commonhold-see, e.g., Rodgers C, *Housing Law*, (n.17), para.12.55 and DETR, *Commonhold and Leasehold Reform: Draft Bill and Consultation Paper*, (Cm 4843), (London: DETR, 2000), p.139. For a discussion of the disadvantages of commonhold for Tyneside Flat standard leaseholders see ch.4 paras 4.7.3 - 4.7.5.

⁸⁹ These will 'always' be 'significant' and could be 'substantial' see Clarke D, 'Legislation Leasehold Reform', (n.46), p.227. They are likely to be considerably more than those incurred in exercising standard lease powers of attorney - see further ch.8, para.8.8.3.

⁹⁰ When research data was collected, there was no suggestion that any collective enfranchisement of Tyneside Flats had ever been attempted.

⁹¹ See ch.8, para.8.2.3.

⁹² This would have been so even under the original provisions of the LRHUDA 1993, which required at least two thirds of the tenants in a block to participate - see, 13 (2) (b) (i). Now the qualifying leaseholders need only hold the leases of at least half of the total number of flats in the building - see s.13 (2) (b) LRHUDA 1993, as amended by the CLARA 2002, s.119 and see further Rodgers C, *Housing Law*, (n.17), para.12.53.

⁹³ The freehold owner will be a resident landlord if he, or an adult member of his family, occupies the flat in the premises as his only or principal home and has occupied it for a period of not less than 12 months - see s.10 (1) (c) LRHUDA 1993, as substituted by s.118 (1) & (2) CLRA 2002.

⁹⁴ This applies to premises which contain four or fewer units with a 'resident landlord' - see s.4 (4) LRHUDA 1993.

⁹⁵ See s.10 (1) (a) LRHUDA 1993, as substituted by s.118 (1) & (2) CLRA 2002. A building is a purpose built block if, as constructed, it contained two or more flats - see s.10 (6) LRHUDA 1993.

Flats still exist, this exclusion would not apply.⁹⁶ Even when, unusually, Tyneside Flats have been constructed out of converted houses⁹⁷ the resident landlord exclusion will only apply if the landlord, or a member of his family, owned the freehold before the flat conversion.⁹⁸ In view of the criticisms made by north eastern conveyancers of those who have previously used the standard Tyneside Flat documentation for more than two units,⁹⁹ any further use is likely to be very unusual. Some past attempts may also have been rectified.¹⁰⁰ If there are still any ‘three unit’ Tyneside Flat structures, where the freehold reversions have not been transferred,¹⁰¹ use of the collective enfranchisement provisions could result in a more satisfactory structure being substituted.¹⁰² In summary, therefore, it seems undesirable to attempt any amendment of the LRHUDA 1993 for any three unit Tyneside Flat buildings and unnecessary for the overwhelming majority of two flat structures, whose leaseholders already have, or can readily acquire, the benefits, which the collective enfranchisement provisions are intended to bestow.¹⁰³

6.5 Repair and Maintenance of Flats

6.5.1 Introduction

The promulgation of the standard documentation in the early 1980s was followed by a series of statutes aimed at regulating the management of blocks of flats nationwide.¹⁰⁴ A complex regulatory regime emerged and its impact and potential impact on Tyneside Flat leaseholders is examined in this section. The analysis of that impact is circumscribed by four inter-connected factors:

⁹⁶ See Taylor S and Lovie B, *Gateshead Architecture in a Changing English Urban Landscape*, 1st ed., (London: English Heritage, 2004), pp.42 - 43, which suggest that some three unit purpose built blocks may have then existed.

⁹⁷ Some north eastern conveyancers include such dwellings within their concept of Tyneside Flats – see ch.8, para. 8.2.6.

⁹⁸ See s.10 (1) (b), inserted by s.118 (1) & (2) CLARA 2002.

⁹⁹ See ch.8, para.8.2.3.

¹⁰⁰ Because conveyancers may advise their clients not to proceed where this has occurred - see further ch.8, para.8.2.3.

¹⁰¹ It is not known in whom the reversions in any three flat properties have been, or are intended to be, vested – see ch.8, para.8.2.3.

¹⁰² Once the freehold is acquired, inappropriate existing leases could be surrendered and, as presumed would happen under the collective enfranchisement provisions, new 999 year leases granted - see Clarke D, ‘Long Residential Leases: Future Directions’, (n.4), p.180.

¹⁰³ Such as securing the long term investment in their properties and the right to manage them - see Clarke D, ‘Legislation Leasehold Enfranchisement’, (n.46), p.225.

¹⁰⁴ For an overview of the legislation and the background to its introduction and revision, see ch.4, para.4.6.

1. The legislation primarily seeks to resolve problems arising from multi unit blocks of flats with communal facilities. Tyneside Flats are usually self-contained with few, if any, shared facilities, although they do have ‘common installations’.¹⁰⁵
2. The legislation generally leaves the parties free to make their own contractual arrangements. Apart from shared responsibility for ‘common installations’, standard Tyneside Flat leaseholders are directly responsible, not just for internal repairs, but also external repairs, maintenance and insurance, which in multi unit blocks are normally undertaken by the landlord or a management company.
3. Legislation aimed at wresting management control from the original landlord is irrelevant once the second standard lease has been granted, because the entire landlord’s interest in the building is then transferred by him either personally or through leaseholders using the powers of attorney given in the standard lease.¹⁰⁶
4. Leasehold management legislation often requires fifty per cent of the leaseholders or occupiers to agree, with a minimum of two. With pairs of Tyneside Flats, a much higher proportion of leaseholders or occupiers, namely one hundred per cent, need to co-operate.

The main legislative provisions are set out in the chart overleaf.

¹⁰⁵ Such as gutters, electric wires etc. These are likely to be much less expensive than structural repairs to, e.g., the roof or foundations, which are the individual responsibility of upper and lower flat leaseholders respectively. ‘Common installations’ are defined in cl.1 (E) of the standard lease, set out in ch.8, para.8.7.2.

¹⁰⁶ See ch.5, para.5.3.4.

Repair and Maintenance Legislative Framework

Statute	Problem addressed or remedy given
LTA 1985	Service Charge Consultation Service Charge Information and Accounting Insurance Communication and Information
LTA 1987	Right of Pre-emption Appointment of Manager Compulsory Acquisition Service Charge Information Service Charge Trust Funds
CLRA 2002	Right to Manage Administration Charge Information

In general terms the provisions of least impact for Tyneside Flat leaseholders are the insurance regulations introduced by the LTA 1985, all LTA 1987 remedies, other than service charge regulation, and the ‘right to manage’ introduced by the CLRA 2002.

Legislation which has a greater impact relates to:

- Service charges, other than insurance premiums
- Communication and information
- Administration charges

6.5.2 Service Charges and Tyneside Flat Leaseholders

The LTA 1985 strengthened and consolidated existing provisions.¹⁰⁷ Disputes over service charges are a ‘chronic problem’ and an ‘enduring feature of the long leasehold system’.¹⁰⁸

¹⁰⁷ For an account up to 1984 see *Report of the Committee of Inquiry on the Management of Privately Owned Blocks of Flats*, (Chairman E. Nugee), (*Nugee Report*), (London: HMSO, 1985), para.2.10.

¹⁰⁸ See Davey M, *Landlord and Tenant Law*, 1st ed., (London: Sweet & Maxwell, 1999), p.365.

Accordingly, while the LTA 1985 remains the core Act,¹⁰⁹ its provisions have subsequently been extended and strengthened.¹¹⁰ As amended, s.18 (1) LTA 1985 defines a service charge to mean:

‘an amount payable by a tenant of a dwelling as part of or in addition to the rent –

(a) which is payable, directly or indirectly, for services, repairs, maintenance, improvements,¹¹¹ or insurance or the landlord’s costs of management, and

(b) the whole or part of which varies or may vary according to the relevant costs.¹¹²

Tyneside Flat leaseholders are tenants for the purposes of the LTA 1985¹¹³ and Tyneside Flats seem to fall squarely within the definition of a ‘dwelling’.¹¹⁴ A landlord includes any person who has the right to enforce payment of a service charge.¹¹⁵ Where only one standard Tyneside Flat lease has been granted, the landlord will usually be the freeholder of the whole building comprising two flats, but once both leases have been granted and the freehold reversions transferred, each leaseholder becomes the other’s landlord.

In standard Tyneside Flat leases, leaseholders covenant with the landlord to pay half the cost of repairing or renewing any ‘common installations’ or shared land.¹¹⁶ Since the statutory definition of service charges includes an amount payable for repairs, maintenance and

¹⁰⁹ See ss 18 - 30.

¹¹⁰ For an account up to 1999, see Davey M, *Landlord and Tenant Law*, (n.108), p.365 and up to 2002 see, e.g., Furber J et al, *The Commonhold and Leasehold Reform Act 2002*, (n.83), para.7.1.

¹¹¹ The word ‘improvements’ was inserted by the CLRA 2002, s.150, Sch.9, para.7. For the effect of this omission from the LTA 1985, see *Sutton (Hastoe) Housing Association v. Williams* (1988) 20 HLR 321 CA.

¹¹² ‘Relevant costs’ are defined as being ‘costs or estimated costs incurred or to be incurred by or on behalf of the landlord, or a superior landlord, in connection with the matters for which the service charge is payable’ - see s. 18(2) LTA 1985.

¹¹³ Ss 18 - 30 LTA 1985 applies to all tenancies of dwellings apart from the exceptions contained in ss.26 & 27 LTA 1985 - see Furber J et al, *The Commonhold and Leasehold Reform Act 2002*, (n.83), para.7.1. S.26 LTA 1985 excludes tenants of certain public authorities, but this exclusion does not apply to long tenancies for a term certain exceeding 21 years, whether or not they are, or may become, terminable before the end of that term by notice given by the tenant or by re-entry or forfeiture - see s.26 (2) LTA 1985. When data was collected, there was no suggestion that any such ‘short term’ Tyneside Flat leases had been granted – see ch.8, para.8.4.5. Tyneside Flat standard leaseholders from public bodies are therefore not excluded by s.26 LTA 1985, nor are standard leaseholders excluded by s.27, which excepts certain 1977 Rent Act tenancies.

¹¹⁴ Defined by s.38 LTA 1985 to mean a ‘building or part of a building occupied or intended to be occupied as a separate dwelling, together with any yard, garden, outhouses and appurtenances belonging to it or usually enjoyed with it’.

¹¹⁵ See s.30 LTA 1985.

¹¹⁶ See cl.3 & cl.(d) 5th Sch.

improvements, it seems that these covenanted payments are technically ‘service charges.’ The charges are not pre-determined by the standard lease and are therefore of a variable nature as required by s.18 (1) (b) LTA1985.¹¹⁷

The following sections begin with an analysis of service and administration charge regulation arising from the LTA 1985, the LTA 1987 and the CLRA 2002. This is followed by an examination of provisions regulating landlord information, rights of pre-emption, manager appointment, the right to manage and compulsory purchase. This examination will be specifically directed at those areas where legislation could be problematic for the standard Tyneside Flat arrangements and begins with the statutory requirement of reasonableness for service charge costs.

6.5.3 Reasonableness of Service Charges and the Leasehold Valuation Tribunal

The LTA 1985 limits the amount of relevant costs that a landlord can recover to the extent that those costs were ‘reasonably incurred’ and were carried out to a ‘reasonable standard’.¹¹⁸ Jurisdiction on the reasonableness of service charges was conferred on the leasehold valuation tribunal (LVT) by the HA 1996.¹¹⁹ The CLRA 2002 repealed,¹²⁰ and then supplemented those provisions by enabling the LVT to determine whether a service charge is payable,¹²¹ although some limits still remain on the LVT’s enlarged jurisdiction.¹²² An agreement by the tenant of a dwelling, other than a post-dispute arbitration agreement, is void in so far as it purports to provide for determination in a particular manner, or on particular evidence.¹²³ It therefore seems clear that the standard Tyneside Flat lease requirement that any dispute relating to repairs, or contributions towards them, ‘shall’ be referred to a surveyor nominated by the president of the Newcastle upon Tyne Law Society, and that his decision shall be final and binding, is unenforceable.¹²⁴ Although the lease procedure might

¹¹⁷ Quantitative research data confirmed that the payment of joint contributions was sporadic - see ch.8, para. 8.7.3.

¹¹⁸ See s.19 (1) (a) & (b) LTA 1985.

¹¹⁹ See s.83 (1) which inserted sub ss 19 (2) (A)-2(C) into the LTA 1985.

¹²⁰ See s.180, Sch.4.

¹²¹ See ss.27A (1) & 27 A (3) LTA 1985, inserted by s.155 (1) CLRA 2002 for the extent of the tribunal’s jurisdiction.

¹²² See, e.g., Furber J (Ed), *Hill and Redman’s Law of Landlord and Tenant*, (n.30), para. A.3929.

¹²³ See s.27A (6) LTA 1985, inserted by s.155 (1) CLRA 2002.

¹²⁴ See cl.7 standard lease for the full text. For comments on such clauses see, e.g., Rodgers C, *Housing Law*, (n.17), para.13.83 & Furber J et al, *The Commonhold and Leasehold Reform Act 2002*, (n.83), para.7.16.

appear to be more in accord with recent policy trends toward mediation,¹²⁵ and more appropriate for small scale Tyneside Flat disputes, the LVT jurisdiction could be useful as an alternative back up mechanism.¹²⁶ If, following implementation of the land obligation proposals in the *2008 Consultation Paper*,¹²⁷ individual flats could be sold more readily on a freehold basis, an appropriate procedure for resolving small scale disputes needs to be considered.¹²⁸ It appears that, in practice, the lease dispute mechanism has been used very rarely.¹²⁹ Data evidence suggests this may sometimes be because the threat of using it is a sufficient incentive to promote a resolution or because the small amount involved means it is not worthwhile persisting with any request for a joint contribution.¹³⁰ Where larger contributions are required, Tyneside Flat landlords need to comply with the regulatory ‘consultation’ code strengthened by the CLRA 2002.

6.5.4 Consultation for Qualifying Works

A landlord is required to consult if he wishes to either:

- a) enter a long term agreement for the provision of services , such as long term maintenance contracts or
- b) instigate ‘qualifying’, that is major, works and the contribution by way of service charge exceeds a fixed amount prescribed by regulations made under the LTA 1985 as amended.¹³¹

¹²⁵ E.g., the ‘tenants deposit scheme’ introduced by the HA 2004 provides for a non - compulsory third party arbitration scheme to resolve disputes over deposits – see s.212 (2) (b) and Sch. 10 paras 10 (1) and (2). See also, e.g., Carr H et al., *The Housing Act 2004 A Practical Guide*, 1st ed., (Bristol: Jordans, 2005), para.10.33. S.42(2) (a) CLRA 2002 also provides for the reference of disputes between the commonhold association and unit holders to an ombudsman scheme – see, e.g., Gray K and Gray S, *Elements of Land Law*, (n.9), para.3.2.8.

¹²⁶ The lease provides for a single adjudicator, whereas a LVT tribunal may comprise a panel of three. For details of the LVT procedures, see *Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003* SI 2003/2099, as amended. There is, however, evidence to suggest that even a single arbitrator can prove disproportionately expensive for Tyneside Flat contribution disputes - see ch.8, para.8.7.6. For suggestions on possible amendments to existing dispute legislation, see thesis ch.9, para.9.2.2.

¹²⁷ See Law Commission, *Easements, Covenants and Profits à Prendre*, (Consultation Paper No.186) (*2008 Consultation Paper*), (London: HMSO, 2008), discussed in ch.4, s.4.8.

¹²⁸ Para.16.80 *2008 Consultation Paper* contains provisional proposals for supplementary provisions relating to ‘reciprocal payment obligations’, which may be included in the instrument creating a land obligation. These proposals do not include any dispute resolution provisions. However, as consultees’ views are invited in para.16.81 of the *Consultation Paper*, further proposals may emerge.

¹²⁹ See ch.8, para.8.7.6.

¹³⁰ *Ibid.*

¹³¹ See ss.20 and 20 ZA LTA 1985, substituted by s.151 CLRA 2002.

In the normal Tyneside Flat structure where the original landlord owned both flats and has sold one or both of them by way of long lease, it is very unlikely there will be any long term maintenance agreements for the relatively few ‘common installations’ paid for jointly.¹³² However, very occasionally, repairs required to ‘common installations’ may be major ‘qualifying’ works requiring consultation and estimates.¹³³ If a Tyneside Flat landlord failed to consult in such a case, he might be unable to recover any amount above the consultation threshold.¹³⁴ This seems reasonable and no amendment to this particular provision appears necessary for Tyneside Flat leaseholders.

6.5.5 Service Charge Information and Accounts

Landlords are required to provide a summary of rights and obligations with each demand for the payment of service charges.¹³⁵ Unless a summary is provided, leaseholders may withhold service charge payments.¹³⁶ This has the potential to complicate the payment of informal Tyneside Flat joint contributions unnecessarily as do, for example, the provisions enabling leaseholders to request a summary of costs incurred¹³⁷ and to inspect accounts.¹³⁸ When they come into force,¹³⁹ strengthened provisions will require landlords to provide written statements of account automatically and an accountant’s certificate.¹⁴⁰ All these provisions, and the criminal liability imposed for failure to comply with them without reasonable

¹³² For consultation to be necessary the contribution for an individual tenant has to exceed £100 in any 12 month accounting period - see *Service Charge (Consultation Requirements) (England) Regulations 2003* SI 2003/1987, regs 4 (1) & (2). When research data was collected, north eastern conveyancers were not specifically asked about long term agreements, but there was never any hint of their existence.

¹³³ The amount prescribed by regulation is £250 per tenant – see SI 2003/1987, (n.132), reg.6. The only ‘joint installation’ repair mentioned in the course of data collection which might have been this expensive was the repair of a drain in the back yard – see ch.8, para.8.7.8. The procedures for obtaining estimates are set out in reg.7 (4) (b) & Pt 2, Sch.4 SI 2003/1987.

¹³⁴ See s.20 (1) (a) & (b) & s.20 (7) LTA 1985, substituted by s.151 CLRA 2002.

¹³⁵ See s.21B LTA 1985, introduced by s.153 CLRA 2002. The form and content of the summary are set out in s.3 *Service Charges (Summary of Rights and Obligations and Transitional Provision) (England) Regulations 2007*, SI 2007/1257. These regulations came into force on 1 October 2007- see reg.1.

¹³⁶ See s.21 B (1) – (3) LTA 1985 & reg. 3 (b) (1) SI 2007/1257, (n.135).

¹³⁷ See s.21 LTA 1985. Since 1 October 2007 leaseholders should theoretically be more likely to know of this right as it is mentioned in the summary of rights and obligations, which should be sent with any service charge demand - see reg. 9 SI 2007/1257, (n.135), & Garner S and Frith A, *A Practical Approach to Landlord and Tenant*, (n.12), para.22.49.

¹³⁸ See s.22 LTA 1985.

¹³⁹ As at 27 October 2010, those parts of ss 152 & 156 CLRA 2002 cited in ns 140, 144 & 145 below had not been brought into force – see ‘Commonhold and Leasehold Reform Act 2002. Is it in Force’, (n.82).

¹⁴⁰ See ss 21, 21A and 21B LTA 1985, introduced by s.152 CLRA 2002. See also n.139, Rodgers C, *Housing Law*, (n.17), para.13.92 & Garner S and Frith A, *A Practical Approach to Landlord and Tenant*, (n.12), paras 22.58 - 22.60. A proposal to dispense with an accountant’s certificate for blocks of four or fewer dwellings - see para. 22.60 of Garner & Frith - would probably exclude all standard Tyneside Flat landlords and a proposed ‘under £5,000’ relief, also mentioned in para.22.60, nearly all of them – see ch.8, para.8.7.4.

excuse,¹⁴¹ seem wholly disproportionate for Tyneside Flat joint contributions.¹⁴² The same is true for the highly regulated accounting structure, which requires service charge costs to be held in a trust fund,¹⁴³ in a proposed designated account at a ‘relevant financial institution’,¹⁴⁴ again with criminal liability for default.¹⁴⁵

6.5.6 Insurance

The LTA 1985 as amended gives leaseholders a right to information about the insurance on their flats,¹⁴⁶ together with a right to inspect and make copies of the policy.¹⁴⁷ As these provisions only apply where a service charge includes insurance premiums,¹⁴⁸ they are neither necessary nor applicable to Tyneside Flat leaseholders, who are directly responsible for the insurance of their individual flats.¹⁴⁹ Other irrelevant provisions are those enabling leaseholders to challenge the reasonableness of the premium¹⁵⁰ or the choice of insurer.¹⁵¹ Because of their mutual interdependence Tyneside Flat leaseholders, and their lenders,¹⁵² may wish to check the insurance on the ‘other’ flat. As the standard lease requires leaseholders to produce their flat insurance policy to their landlords on demand,¹⁵³ they can check the other flat’s insurance, when they become their landlords, after the grant of the second lease.¹⁵⁴ When only one lease has been granted leaseholders should be able to obtain details of their landlords’ insurance, as original landlords are bound by similar provisions.¹⁵⁵

¹⁴¹ See s.25 (1) & (2) LTA 1975.

¹⁴² For suggested legislative amendments see ch.9, paras 9.2.2 & 9.2.3.

¹⁴³ See s.42 LTA 1987.

¹⁴⁴ See s.42A LTA 1987, incorporated by s.156 (1) CLRA 2002 & n.139.

¹⁴⁵ See s.42B LTA 1987, incorporated by s.156 (1) CLRA 2002 & n.139. Legislative amendments are suggested in ch.9, para.9.2.3.

¹⁴⁶ See s.30A LTA 1985 and Sch., inserted by s.43 (1) & (2) and Sch.3 LTA 1987.

¹⁴⁷ See para. 3 Sch.LTA 1985 as amended by s.157 & para.9 Sch.10 CLRA 2002.

¹⁴⁸ See para.2 (1) Sch. LTA 1985 and, e.g., Garner S and Frith A, *A Practical Approach to Landlord and Tenant*, (n.12), para. 22.187.

¹⁴⁹ See cl.(j) 5th Sch. standard lease.

¹⁵⁰ See ch.6, para.6.5.3.

¹⁵¹ See para.8 Sch. LTA 1985, substituted by s.83 (2) HA 1996 & amended by s.165 (1) - (3) CLRA 2002. Standard Tyneside Flat leaseholders can choose their own insurance, which has to be in some ‘reputable’ insurance office - see cl.(j) 5th Sch. standard lease.

¹⁵² The BSA has written of the need to ensure the whole ‘block’ is not under insured - see thesis ch.8, para. 8.7.7.

¹⁵³ See cl.(j) 5th Sch. standard lease. This clause relates to insurance on the leasehold interest. There is no right to inspect the insurance on the freehold reversion.

¹⁵⁴ See ch.5, para.5.3.4. In practice it seems that leaseholders are seldom asked to produce details of their insurance – see ch.8, para.8.7.7.

¹⁵⁵ Landlords covenant to perform covenants ‘mutatis mutandis’, i.e. making the necessary alterations, to the leaseholders’ covenants until the disposal of the freehold in the other flat - see cl.5 (A) standard lease. The landlord’s insurance will presumably include the freehold reversion in the leaseholder’s own flat. However,

before the grant of the first lease landlords would no doubt readily supply insurance details in order to facilitate a sale, but might have less incentive to do so subsequently. Although in practice details of the landlord's insurance are seldom sought,¹⁵⁶ leaseholders could, if necessary, exert pressure by threatening to apply to the LVT for the lease to be varied.¹⁵⁷ This could be on the basis that the insurance is defective because, for example, there is no single policy for the whole building.¹⁵⁸ This helpful backup should be left available to Tyneside Flat leaseholders and, when combined with the standard lease provisions, should make it unnecessary to seek further statutory regulation.

6.5.7 Administration Charges

The CLRA 2002 introduced new statutory restrictions on a landlord's right to charge an 'administration charge'. The statutory regime is similar to that relating to service charges with, for example, a requirement for an accompanying summary of tenants' rights and obligations, and with jurisdiction on the amount payable being given to the LVT.¹⁵⁹

Administration charges are 'very broadly' defined,¹⁶⁰ as an amount payable by a tenant of a dwelling, as part of, or in addition to, the rent which is payable, directly or indirectly in four specified situations.¹⁶¹ The two situations apparently relevant for Tyneside Flat leaseholders are charges for consents and for breaches of covenant.

6.5.8 Charges for Consents

Any amounts payable by a tenant for or in connection with the grant of approvals under his lease, or applications for such approvals, are administration charges.¹⁶² No sum is payable by Tyneside Flat leaseholders for consents to repairs or alterations.¹⁶³ Although no consent is

once both standard leases have been granted, the lease does not allow leaseholders to check the insurance of the freehold reversion of his flat, but as nearly all leases are for 999 years the value will usually be nominal.

¹⁵⁶ See ch.8, para.8.7.7.

¹⁵⁷ See s.35 LTA 1987, as amended by ss.162 &163 CLRA 2002.

¹⁵⁸ See s.35 (2) (b) LTA 1987, as substituted by s.162 (2) CLRA 2002. See also Rodgers C, *Housing Law*, (n.17), paras 13.75 & 13.95. The BSA has said that it is unsatisfactory to have individual insurance policies for each flat – see thesis ch.8, para.8.7.7, fn 284.

¹⁵⁹ See s.158 & paras 4 &5 Sch.11 CLRA 2002. The form and content of the summary are set out in reg.2 *Administration Charges (Summary of Rights and Obligations) (England) Regulations 2007* SI 2007/1258, which came into force on 1 October 2007 – see s.1 (1).

¹⁶⁰ See Rodgers C, *Housing Law*, (n.17), para.13.89.

¹⁶¹ See s.158 and para.1(1) (a) – (d), Sch.11 CLRA 2002.

¹⁶² *Ibid*, para.1 (1) (a).

¹⁶³ See cl.(c) 5th Sch.standard lease.

required for any licence to assign, standard leaseholders covenant to produce assignments and other documentation to the landlord's solicitor and to pay him 'such reasonable registration fee as he may require'.¹⁶⁴ However, since *registration* is not the same as consent or approval, these costs appear to fall outside the statutory regime.

6.5.9 Charges for Breach of Covenant

Sums payable by a tenant in connection with a breach, or alleged breach, of a covenant or condition in his lease are administration charges.¹⁶⁵ Standard leases provide that if at any time any of the leaseholder's covenants are not performed and observed, then it shall be lawful for the landlord to re-enter and determine the term.¹⁶⁶ Before this clause can be enforced, the notice specified in s.146 LPA 1925 has to be served.¹⁶⁷ Leaseholders also have a right to apply for relief against re-entry or forfeiture.¹⁶⁸ Under the standard form of lease, leaseholders covenant to pay all s.146 charges,¹⁶⁹ which appear to fall within the definition of administration charges.¹⁷⁰ In practice forfeiture and even the threat of forfeiture seem to arise very infrequently under the standard Tyneside Flat documentation.¹⁷¹ The LVT's jurisdiction could, however, be helpful in exceptional circumstances, particularly as forfeiture costs might be high and the standard lease dispute resolution procedure is restricted to repairs.

6.5.10 Communication and Information

The *Nugee Report* contained recommendations for improving tenants' rights to information.¹⁷² As a result, the provisions of the LTA 1985 were strengthened by Pt IV LTA 1987. 'Information' legislation is most likely to affect standard leaseholders if requests are made for service or administration charges or if the freehold reversion is transferred.

¹⁶⁴ See cl. (l) 5th Sch. standard lease. For a discussion of the fees charged in practice see ch.8, para.8.5.8.

¹⁶⁵ See s.158 & para.1 (1) (d), Sch.11 CLRA 2002.

¹⁶⁶ See cl.8 standard lease. For criticism of forfeiture clauses see, e.g., Clarke D, 'Commonhold – A Prospect of Promise' (1995) 58 MLR 486, p.488 & ch.8, para.8.7.9.

¹⁶⁷ See s.146 (1) LPA 1925.

¹⁶⁸ *Ibid*, s.146 (2).

¹⁶⁹ See cl. (r) 5th Sch. standard lease.

¹⁷⁰ See Furber J et al, *The Commonhold and Leasehold Reform Act 2002*, (n.83), para.7.20.

¹⁷¹ See further ch.8, para.8.7.9.

¹⁷² See *Nugee Report*, (n.107), para.7.1.5.

6.5.11 Landlord Information - Service and Administration Charges

Any demand for payment of service or administration charges must give the landlord's name and address.¹⁷³ In addition, unless an address in England and Wales is given where notices can be served, any demand for service or administration charges will nearly always be inoperative.¹⁷⁴ In practice these provisions are ignored by Tyneside Flat landlords, apparently without adverse consequences.¹⁷⁵ The provisions appear unnecessary whenever landlords are the owner occupiers of the other flat and there appears to be a good case for exempting such landlords from them.

6.5.12 Landlord Information - Transfer of Freehold Reversions

If a tenancy of premises, which consists of, or includes, a dwelling is assigned, the new landlord must give notice in writing of the assignment,¹⁷⁶ and of his name and address, to the tenant within specified time limits.¹⁷⁷ If any such landlord fails, without 'reasonable excuse' to give the required notice then he commits a summary offence.¹⁷⁸

Tyneside Flats are clearly dwellings for the purposes of the LTA 1985.¹⁷⁹ In practice, written notice is not given in nearly 90% of transfers.¹⁸⁰ This apparently gives rise to few difficulties,¹⁸¹ no doubt because 'new' Tyneside Flat landlords will normally become owner occupiers, known to leaseholders of the 'other' flats. In addition, their identity can sometimes be confirmed or gleaned because the standard Tyneside Flat lease requires:

a) Landlords to transfer the freehold reversions in both flats at the time when the second lease is granted. The standard form for the first transfer of each reversion gives the date and parties of the other, usually contemporaneous, transfer. These leaseholders will therefore know their landlord's name. Even if his address is not explicitly given in the transfer, it will normally be apparent that it is the other flat.

¹⁷³ See s.47 (1) and s.47 (2) LTA 1987, as amended by s.158 and para.10 (1) & (2) Sch.11 CLRA 2002.

¹⁷⁴ See s.48 LTA 1987, as amended by s.158 & para.11 Sch.11 CLRA 2002.

¹⁷⁵ See ch.8, para.8.7.4.

¹⁷⁶ 'Assignment' includes any conveyance other than a mortgage or charge – see s.3 (4) (b) LTA 1985.

¹⁷⁷ See s.3 (1) LTA 1985.

¹⁷⁸ Ibid s.3 (3).

¹⁷⁹ See ch.6, para.6.5.2 & fn 114.

¹⁸⁰ See ch.8, para.8.8.4.

¹⁸¹ Ibid.

b) Leaseholders to produce any transfer of their flat to their landlords' solicitors within one month.¹⁸² Once the full Tyneside Flat structure has been established, those solicitors will also be the solicitors for the other leaseholder. He should then know that the freehold in his flat has, or should have, been transferred to the 'other' new leaseholder at the same time.¹⁸³ The ability to make this deduction is limited because in practice only 62% of practitioners serve or sometimes serve, notice of leasehold transfers.¹⁸⁴ In addition, if notice is served on solicitors, they may feel it unnecessary to pass on any information to their clients, although research data suggests notice is sometimes served direct on the landlord.¹⁸⁵

c) Leaseholders to produce evidence of their leasehold and freehold ownerships at the request of the leaseholder of the other flat.¹⁸⁶

Apart from these contractual provisions, evidence of landlords' ownership is obtainable from the Land Registry either because the transfer has to be registered, if it is a transfer out or registered land,¹⁸⁷ or because it has been registered for the first time.¹⁸⁸ The register of title is open to public inspection on payment of any prescribed fee.¹⁸⁹

Landlords remain liable to leaseholders for any breach of any of their obligations, not just those which 'touch and concern'¹⁹⁰ the land, until leaseholders receive written notice of the transfer and particulars of the new landlord's name and address from either the old or new

¹⁸² See cl.(l) 5th Sch. standard lease.

¹⁸³ Ibid, cl. (v) 5th Sch.

¹⁸⁴ See ch.8, para.8.4.6, which indicates that local conveyancers interpret the standard clause as requiring notice to be served rather than production of the original deed.

¹⁸⁵ See ch.8, para.8.5.8.

¹⁸⁶ See cl. (w) 5th Sch. standard lease, which states that this is so that they can establish compliance with the preceding obligation (v) to only transfer the leasehold flat to someone who has immediately beforehand become the freehold owner of the 'other' flat.

¹⁸⁷ See s.27 (2) (a) LRA 2002 and, e.g., Dixon M et al, *Ruoff & Roper on the Law and Practice of Registered Conveyancing*, loose leaf ed., (London: Thompson Reuters (Legal) 2010), para.16.004.

¹⁸⁸ A transfer has to be registered if it is a transfer for valuable or 'other' consideration - see s.4 (1) (a) (i) LRA 2002. Although for the purposes of the LRA 2002 'valuable consideration' does not include nominal consideration (see s.132 (1) LRA 2002) the standard one pound fee payable for the reversion may still constitute 'other' consideration for the purposes of compulsory registration of title - see Dixon M et al, *Registered Conveyancing*, (n.187), para.8.004.01. In any event, since any new standard lease would have to be registered, (see thesis ch.8, para.8.5, fn 149), it would simplify future transfers if the freehold reversion in the other flat were registered at the same time.

¹⁸⁹ See s.66 (1) (a) and s.66 (2) (b) LRA 2002.

¹⁹⁰ See further ch.6, para.6.6.4, fn 258.

landlord.¹⁹¹ Since new standard landlords usually ignore their statutory obligation to give notice,¹⁹² ‘old’ landlords may sometimes prefer to give notice themselves, although they could also obtain a contractual obligation from their successors to do.¹⁹³ The LTA 1985 does not prescribe the form of notice and, where applicable, ‘old’ landlords might seek to argue that the first transfer of the reversion is itself sufficient notice.¹⁹⁴ Although formal notice of the transfer of reversions may often be superfluous for standard leaseholders, the statutory notice requirement should perhaps be retained, since it might help act as a reminder that reversions need to be transferred.¹⁹⁵ It does, however, seem unnecessarily burdensome that, when both flats are owner occupied, new landlords, who are long leaseholders of the other flat, should face potential criminalisation for failing to supply formal details of their ownership.¹⁹⁶

6.5.13 Right of Pre-emption

The LTA 1987 gave effect to *Nugee Report* recommendations by giving tenants a right of first refusal.¹⁹⁷ Under P1 LTA 1987, a landlord may not make a ‘relevant disposal’ of his interest in a block of flats unless he has first served a notice on his qualifying tenants indicating both his intention to sell and the proposed sale price.¹⁹⁸ The notice constitutes an offer by the landlord to dispose of the block to the tenants on the same terms as agreed with the prospective purchaser.¹⁹⁹ The right applies to the whole or part of a building, whether purpose built or not which contains two or more flats held by qualifying tenants who together must hold more than 50 per cent of the flats.²⁰⁰

¹⁹¹ See s.3 (3A) & 3(3B) LTA 1985, inserted by s.50 LTA 1987 and see, Law Commission, *Landlord and Tenant Law Privity of Contract and Estate*, (Law Com. No.174) (Chairman, Bedlam R) (*Bedlam Report*), (London: HMSO, 1988), para.2.28.

¹⁹² See ch.8, para.8.8.4

¹⁹³ See Furber J et al, *Hill and Redman’s Law of Landlord and Tenant*, (n.30), para.A 1444. Landlords who have only disposed of one flat are particularly at risk because they are contractually bound by similar obligations to leaseholders on the remaining flat until the reversion in that flat has been transferred - see ch.6, para.6.5.5, fn 155.

¹⁹⁴ But this might only be sustainable if the new landlord’s ‘last known address’, (see s.3 (3A) LTA 1985), is included in the transfer - see ch.6, para.6.5.12 (a).

¹⁹⁵ Ch.8, para.8.8.3 indicates how often Tyneside Flat landlords refuse to transfer reversions.

¹⁹⁶ For suggested legislative amendments, see ch.9, para.9.2.2.

¹⁹⁷ See *Nugee Report*, (n.107), paras 7.9.14 - 7.9.19.

¹⁹⁸ See ss.1 & 5 LTA 1987, as amended.

¹⁹⁹ *Ibid*, s.5A (3), substituted by s.92 (1), Sch.6 HA 1996.

²⁰⁰ *Ibid*, s.1 (2).

Although the LTA 1987 does not define a ‘building’,²⁰¹ it seems clear that in a terrace each vertically divided building containing at least two flats is a building.²⁰² The Act can therefore apply to typical pairs of Tyneside Flats which both have qualifying tenants. ‘Qualifying tenants’ include long leaseholders and also protected and statutory tenants with interests protected by the Rent Act 1977.²⁰³ The right comes into effect if there is a ‘relevant disposal’, which in general includes the disposal of any legal or equitable estate or interest in the premises, other than the grant of a tenancy of a single flat.²⁰⁴

In practice, it is extremely unlikely that any ‘relevant disposal’, of a Tyneside Flat block would ever occur once a standard lease has been granted. In these leases landlords covenant that they will only dispose of their interest in the building by granting a lease of the other flat in similar terms to the existing lease.²⁰⁵ When data was collected, none of the respondents knew of any instances where landlords had failed to comply with this obligation.²⁰⁶ Landlords also covenant to transfer the freehold reversions on the same day the second lease is granted.²⁰⁷ Although landlords have sometimes failed to transfer the reversions,²⁰⁸ no research data participants suggested that this was because they had sold them, or had attempted to sell them, to a third party.²⁰⁹

Even if, improbably, a third party sale were to take place without the standard leaseholders or other qualifying tenants being informed, they would have the right to adopt the transaction

²⁰¹ See Furber J et al, *Hill and Redman’s Law of Landlord and Tenant*, (n.30), para.A 20433.1 & also Smith P, ‘A Nasty Measure – Part I of the Landlord and Tenant Act 1987 (1992) 12 LS 42, p.49.

²⁰² See Radevsky A and Clark W, *Tenants Right of First Refusal*, 2nd ed., (Bristol: Jordans, 2008), para.2.4 & see *Saga Properties Ltd v. Palmeira Square Nos 2 - 6 Ltd* [1995] 1 EGLR 199.

²⁰³ See Rodgers C, *Housing Law*, (n.17), para. 13.15, Davey M, *Landlord and Tenant Law*, (n.108), p.369 & Garner S and Frith A, *A Practical Approach to Landlord and Tenant*, (n.12), para.23.69. Excluded tenancies are defined in s.3 (1) (a) – (d) LTA 1987. Data evidence suggests that in the past a number Tyneside Flat ‘Rent Act’ tenancies were created – see ch.5, para.5.2.1 & 5.2.4.

²⁰⁴ See s.4 (1) LTA 1987. This means that if any three flat Tyneside Flat buildings exist with two standard leases, the grant of a third standard lease would not be a relevant disposal, requiring the landlord to serve an offer notice on the two existing leaseholders.

²⁰⁵ See cls 5 (c) & (a) (i) 4th Sch. standard lease.

²⁰⁶ See ch.8, para.8.8.2.

²⁰⁷ See cls 5 (c) & (a) (ii) 4th Sch. standard lease. This provision is re-enforced by (a) a further obligation by landlords not to dispose of part of the building in any way which would prejudice its performance - see cl. (b) 4th Sch. & (b) by a provision stating that the landlord’s agreements constitute an estate contract registrable by the leaseholder - see cl. (c) 4th Sch.

²⁰⁸ See further ch.8, para.8.8.3.

²⁰⁹ Third parties would presumably insist on seeing copies of any standard Tyneside Flat leases and would thus become aware of all lease terms including landlords’ obligations and powers of attorney given to leaseholders. Since 13 October 2003 leases registered or noted in the Land Registry have automatically been available for public inspection - see s.66 (1) (b) LRA 2002 &, e.g., Dixon M et al, *Registered Conveyancing*, (n.187), para. 31.001. S.66 LRA 2002 was brought into force by s.2 (1) *The Land Registration Act 2002 (Commencement No.4) Order*, SI 2003/ 1725.

and compel the sale to them.²¹⁰ A further disincentive for landlords to act in contravention of the Act is the imposition of criminal liability if, without reasonable excuse, they make a disposal without serving notice on qualifying tenants.²¹¹ Criminal liability is also imposed on a third party who fails to notify qualifying tenants of the transaction and their rights.²¹²

The LTA 1987 right of pre-emption is generally regarded as being ineffective²¹³ and, because of the standard lease provisions, is unlikely ever to be used by, or cause difficulty to, Tyneside Flat leaseholders or their landlords. No amendment therefore seems necessary.

6.5.14 Appointment of a Manager

Part II LTA 1987 enables tenants of two or more flats in a building, or part of a building, to apply to the LVT for an order appointing a manager of those flats.²¹⁴ A flat is defined as a separate set of premises, whether or not on the same floor, which form part of a building, is divided horizontally from some other part of the building and is constructed or adapted for use as a dwelling.²¹⁵ North eastern conveyancers' concepts of Tyneside Flats seem to fall within this definition.²¹⁶ There is no requirement under the 1987 Act that tenants should be long leaseholders.²¹⁷ Accordingly, if only one standard lease has been granted and the other 'qualifying tenant' is, for example, a pre-existing leaseholder for a term of less than seven years granted after 24 October 1961,²¹⁸ and the landlord fails to comply with his statutory repairing obligations on that leaseholder's flat,²¹⁹ an application to the LVT could in theory be made. Although the onus is on the tenants to make out a case of mismanagement²²⁰ and both qualifying leaseholders would need to agree to any application, the right could exceptionally

²¹⁰ See generally, e.g., Garner S and Frith A, *A Practical Approach to Landlord and Tenant*, (n.12), para.23.84 & Rodgers C, *Housing Law*, (n.17), para.13.36.

²¹¹ See s.10A LTA 1987, inserted by s.91 HA 1996.

²¹² See s.3A (3) LTA 1985, inserted by s.93 (1) HA 1996.

²¹³ See, Clarke D, 'Commonhold - A Prospect of Promise' (n.166), p.489 where it was said to be of 'little impact', Rodgers C, *Housing Law*, (n.17), para.13.5 where it said to be of 'limited utility' & Sparkes P, *A New Landlord and Tenant*, (n.12), p.427 where its significance was said to be reduced by the 1993 LRHUDA collective enfranchisement provisions, which enable leaseholders to take the initiative.

²¹⁴ See s.21 (1) (2) & (4) LTA 1987, as amended by s.86 (1) & (2) HA 1996 and, e.g., Rodgers C, *Housing Law*, (n.17), para.13.67.

²¹⁵ See s.60 (1) LTA 1987.

²¹⁶ See generally ch.8, paras 8.2.2 - 8.2.6.

²¹⁷ See, e.g., Garner S and Frith A, *A Practical Approach to Landlord and Tenant*, (n.12), para.22.101.

²¹⁸ See s.13 (1) LTA 1985.

²¹⁹ See further ss 11, 13 & 14 LTA 1985 discussed in, e.g., Garner S and Frith A, *A Practical Approach to Landlord and Tenant*, (n.12), paras 7.81 - 7.95.

²²⁰ See, e.g., Garner S and Frith A, *A Practical Approach to Landlord and Tenant*, (n.12), para.22.101.

prove useful. No amendment therefore seems desirable because of the potential impact on Tyneside Flats even though, when data was collected, there was never any suggestion that a manager had ever been appointed for a Tyneside Flat building. This may partly be explained because, in a pair of Tyneside Flats, once two standard leases have been granted, the appointment of a manager becomes irrelevant as the leaseholders are individually responsible for the 'management' of their own self-contained flat and can compel the transfer of the freehold reversions.²²¹

6.5.15 *The Right to Manage*

The CLRA 2002 gives long leaseholders the right to take over the management of the building in which their flat is situated, without having to prove shortcomings on the part of their landlord.²²² The criteria for deciding which premises are subject to the right to manage mirror those for the right to collective enfranchisement.²²³ The premises must be a self-contained building or part of a building containing two or more flats held by qualifying tenants and the total number of flats held by such tenants must be not less than two thirds of the total number of flats in the building.²²⁴ A flat is defined as meaning a separate set of premises, whether or not on the same floor, which forms part of a building, which is constructed or adapted for the purposes of a dwelling and either the whole or a part, or a material part of which, lies above or below some other part of the building.²²⁵ North eastern conveyancers' concepts of Tyneside Flats seem to fall within this definition.²²⁶ Crucially, the right to manage differs from the right to appoint a manager, as qualifying tenants must hold a long lease, for example, for a term exceeding twenty one years, whether or not terminable before the end of the term.²²⁷ Although the right to manage could theoretically apply to a typical pair of Tyneside Flat standard leaseholders,²²⁸ it will be irrelevant. If the provisions of the lease have been complied with then, on the grant of the second lease, the landlord will have transferred his freehold reversions. If the reversions have not been transferred the

²²¹ Under the power of attorney provisions – see ch.5, para.5.3.4.

²²² See ss 71 - 113 CLRA 2002 and, e.g., Furber J et al, *The Commonhold and Leasehold Reform Act 2002*, (n.83), para.3.1 and Garner S and Frith A, *A Practical Approach to Landlord and Tenant*, (n.12), para.22.137.

²²³ See, e.g., Furber J et al, *The Commonhold and Leasehold Reform Act 2002*, (n.83), para.3.3 & Garner S and Frith A, *A Practical Approach to Landlord and Tenant*, (n.12), para.22.138.

²²⁴ See s.72 (1) (a) – (c) CLRA 2002.

²²⁵ See s.112 CLRA 2002.

²²⁶ See generally ch.8, para.8.2.2 – 8.2.6.

²²⁷ See s.75 (2) & s.76 (2) (a) CLRA 2002.

²²⁸ Standard leases are granted for 999 years. When shorter terms have been granted this has usually been for 99 years - see ch.8, para.8.4.5.

leaseholders, who already have responsibility for the ‘management’ of the whole building under the lease provisions, could compel the transfer of the reversions under the power of attorney clauses.²²⁹

It is not known if any three Tyneside Flat buildings still exist,²³⁰ but if they do, and if two standard, and therefore ‘qualifying’, leaseholders wished to take over the management of the whole building they might prefer to opt for collective enfranchisement under the LRHUDA 1993, rather than seek to take over the management of the building, as this would also enable them to put their tenure arrangements on a more satisfactory basis.²³¹ When data was collected there was no suggestion that any right to manage application had been made, but since the provisions appear to have no adverse impact on Tyneside Flat leaseholders, it seems this alternative remedy should be left available to them.²³²

6.5.16 Compulsory Purchase

Part III LTA 1987 enables qualifying tenants to acquire their landlords’ interests compulsorily, if they are guilty of persistent bad management. The criteria for determining which premises are affected are very similar to those for the right to manage,²³³ and qualifying tenants must likewise hold long leases.²³⁴ Although it seems the right could apply to standard leaseholders in the same way as the right to manage, it has the disadvantage of being fault based and is therefore an even more ‘unattractive’ option.²³⁵ An acquisition order can only be made if the landlord is in breach of his maintenance obligations²³⁶ or if a manager has already been appointed under Pt II LTA 1987 at least two years before the application.²³⁷ No evidence of any LTA 1987 compulsory purchase arose during the course of data collection. As with the right to manage, it seems this remedy could only conceivably apply if there are any three unit Tyneside Flat buildings in existence and that this option should, similarly, be left available to Tyneside Flat leaseholders.

²²⁹ See ch.5, para.5.3.4.

²³⁰ See ch.8, para.8.2.3.

²³¹ See ch.6, para.6.4.2.

²³² A right to manage (RTM) company must be set up – see s.71 (1) CLRA 2002. The ‘resident landlord’ exclusion is effectively the same as for collective enfranchisement – see Garner S and Frith A, *A Practical Approach to Landlord and Tenant*, (n.12), para.22.141 & ch.6, para.6.4.2.

²³³ See s.25 (2) LTA 1987, as substituted by s.85 (1) & (2) (a) LRHUDA 1993.

²³⁴ See s.26 (1) & s.59 (3) (a) LTA 1987.

²³⁵ See Rodgers C, *Housing Law*, (n.17), para.13.106.

²³⁶ See s.29 (2) LTA 1987, as amended by s.150 & Sch.9, paras 9 (1) – (3) CLRA 2002.

²³⁷ See s.29 (3) LTA 1987, as amended by s.88 HA 1996 & s.160 (1) & (5) CLRA 2002.

6.6 Enforceability of Obligations

6.6.1 Introduction

It has been axiomatic for many centuries that a lease in land creates both an estate in the land and a contract between the original parties.²³⁸ The contractual relationship between the original landlord and tenant, or ‘privity of contract’, means that, unless the parties have agreed otherwise, they remain liable to perform their obligations for the whole lease term, even after they have transferred their respective interests.²³⁹ This led to acute difficulties for some commercial leaseholders, which were highlighted in a number of high profile cases in the early 1980s, when the standard documentation was first being promulgated.²⁴⁰ Those problems eventually led to the passage of the LTCA 1995. This section examines the impact of that legislation on Tyneside Flat leaseholders.

6.6.2 The LTCA 1995

The LTCA 1995 abolished privity of contract for leaseholders by providing that when they transfer their whole leasehold interest they are released from their obligations and cease to be entitled to the benefit of their landlords’ obligations.²⁴¹ Although the LTCA 1995 uses the language of landlord and tenant, it is clear that standard Tyneside Flat leases are ‘tenancies’ for the Act’s purposes.²⁴² Because the legislation is not retrospective,²⁴³ different rules apply

²³⁸ See, e.g., Davey M, ‘Privity of Contract and Leases – Reform at Last’ (1996) 59 MLR 78, p.79, Davey M, *Landlord and Tenant Law*, (n.108), p.155, Gray K and Gray S, *Elements of Land Law*, (n.9), paras 4.1.8 & 4.1.17 & see generally Law Commission, *Landlord and Tenant Privity of Contract and Estate Duration of Liability of Parties to Leases*, (Working Paper No.95), (London: HMSO, 1986), para.2.1 & *Bedlam Report*, (n.191), also para.2.1.

²³⁹ See, e.g., *Bedlam Report*, (n. 191), para 2.1. Privity of contract can be contrasted with ‘privity of estate’ i.e. where the parties stand for the time being in the relationship of landlord and tenant – see further *Bedlam Report*, para.2.2.

²⁴⁰ See Law Commission Working Paper No.95, (n.238), para.2.18, Davey M, ‘Privity of Contract and Leases’ (n.238), p.81 & Wilkinson H, ‘An Underdog’s Charter? Privity of Contract and Estate’ [1989] 53 Conv. 145, p.146.

²⁴¹ See ss.5 (2), 7 and 11(1) LTCA 1995.

²⁴² S.28 (1) LTCA 1995 defines a ‘tenancy’ as any lease or other tenancy including a sub-tenancy and an agreement for a tenancy, but not a mortgage term. Describing all leases as tenancies has been implicitly criticised - see Sparkes P, *A New Landlord and Tenant*, (n.12), p.745, where he says the LTCA 1995 refers ‘inelegantly’ to post 1995 leases being ‘new tenancies’.

²⁴³ See the comments of Baroness Hale in *London Diocesan Fund and another v. Phithwa and others (Avonridge Property Co.Ltd, Pt 20 defendant)* (2006) 1 All ER 127 HL at 136.

to leases granted before the LTCA 1995 came into force on 1 January 1996²⁴⁴ and those granted afterwards.

6.6.3 Pre -1996 Leases

Large numbers of pre 1996 standard Tyneside Flat leases have been created. After the grant of the first standard lease, landlords have similar contractual obligations to leaseholders until they grant a lease of the remaining flat and transfer the freehold reversions.²⁴⁵ Although there was no inequality of bargaining power when the standard lease was drafted, original leaseholders are not similarly released on transfer of their interests. The LTCA 1995 grants original leaseholders some relief by providing that if any claim for a payable ‘fixed’ charge²⁴⁶ were to be made, it could be resisted by them, unless the landlord had first served a notice on the tenant detailing the arrears owing within six months of their becoming due.²⁴⁷ Although it has been suggested that this has ‘significantly modified’ continuing contractual liability,²⁴⁸ it is unlikely to be of great help to original Tyneside Flat leaseholders, because ‘service charges’, that is joint contributions, are usually payable infrequently.²⁴⁹

When research data was collected, only one, questionable response indicated any awareness by north eastern conveyancers of original leaseholders being called upon to contribute towards an obligation because of default by a later leaseholder.²⁵⁰ However, enduring contractual liability for unliquidated damages, for example, unquantified damage for failure by subsequent leaseholders to perform their repairing obligations, remains a danger.²⁵¹ This risk might increase in the future, for example, if at a time of recession Tyneside Flat business

²⁴⁴ Or after that date pursuant to a pre 1996 contract or court order - see s.1 (3) (a) and (b) LTCA 1995. The LTCA 1995 was brought into force by *The Landlord and Tenant Covenants Act 1995 (Commencement) Order* SI 1995/2963.

²⁴⁵ See cl.5 (A) of the standard lease and ch.6, para.6.5.6, fn155. See also ch.6, para.6.5.12 for a discussion of ‘old’ landlords continuing statutory liability until leaseholders are informed of a change in ownership.

²⁴⁶ A ‘fixed’ charge is defined by s.17 (6) LTCA 1995 as including any service charge as defined in s.18 LTA 1985. For the LTA 1985 definition & its relevance to Tyneside Flat standard leaseholders see ch.6, para.6.5.2.

²⁴⁷ See s.17 (2) (a) & (b) LTCA 1995. The original period of nine months, was reduced to six in the package deal which led to the passage of the Act - see Davey M, ‘Privity of Contract and Leases’, (n.238), p.92 & Davey M, *Landlord and Tenant Law* (n.108), p.181.

²⁴⁸ See Gray K and Gray S, *Elements of Land Law*, (n.9), para.4.5.26.

²⁴⁹ See ch.8, para.8.7.3.

²⁵⁰ See further ch.7, para.7.2.6.

²⁵¹ See Gray K and Gray S, *Elements of Land Law*, (n.9), paras 4.5.27 & 4.5.31. One of the data participants , Interview 3, GQ 14, recognised the danger when, having said that he was not aware of any pre-1996 leaseholders being called upon to contribute to, e.g., joint repairs because of default by a later leaseholder, explicitly said that ‘it is a possibility’.

leases began to fail²⁵² or if ‘buy to rent’ Tyneside Flats prove more likely to fall into disrepair than owner occupied flats.²⁵³ Original leaseholders might be surprised to hear of their potential liability,²⁵⁴ and there remains a good argument for relieving original pre 1996 leaseholders of their almost indefinite liability.²⁵⁵

6.6.4 Post 1995 Leases

The LTCA 1995 provided that the benefit and burden of all landlord and tenant obligations are to be annexed and incident to the whole and each and every part of the premises and the reversion and will pass on any transfer of the lease or reversion.²⁵⁶ Landlord and tenant obligations are broadly defined,²⁵⁷ so that former requirements that leaseholder obligations had to ‘touch and concern’ the land or landlord obligations must ‘have reference to the subject matter of the lease’ becomes irrelevant.²⁵⁸ The benefit and burden of the original landlord’s obligations in Tyneside Flat standard leases relating to the disposal of the remainder of the building will therefore pass,²⁵⁹ but this is not automatic unless any statutory registration requirements have been met.²⁶⁰ In practice this change makes little difference, since it is highly improbable that, after the grant of the first standard lease, any new landlord would ever have purchased the reversions.²⁶¹

²⁵² But Tyneside Flat business leases are unusual - see ch.8, para.8.3.7. See also Bridge S, ‘Former Tenants, Future Liabilities and the Privity of Contract Principle The Landlord and Tenant (Covenants) Act 1995’ [1996] C.L.J. 313, p.326.

²⁵³ For a discussion of Tyneside Flats in student districts see ch.2, para.2.7.2.

²⁵⁴ For comments on leaseholders’ general lack of understanding, see, e.g., Law Commission Working Paper No.95, (n.238), paras 1.1, 3.8 & 3.9.

²⁵⁵ See further ch.6, para.6.7.2 (c) & ch.9, para.9.2.4. The liability extends to their estates - see Gray K and Gray S, *Elements of Land Law*, (n.9), para.4.5.10.

²⁵⁶ See s.3 (1) (a) & (b) LTCA 1995.

²⁵⁷ A ‘landlord covenant’ in relation to a tenancy is defined as meaning a covenant falling to be complied with by the landlord of premises demised by the tenancy and a ‘tenant covenant’ is similarly defined as a covenant falling to be complied with by the tenant - see s.28 (1) LTCA 1995 .

²⁵⁸ For a discussion of obligations which ‘touch and concern’ and ‘have reference to the subject matter of the lease’ see, e.g., Law Commission Working Paper No.95, (n.238), paras 2.2 & 2.3 respectively.

²⁵⁹ See Gray K and Gray S, *Elements of Land Law*, (n.9), para.4.5.74 & see para.4.5.69 for the pre - 1996 position.

²⁶⁰ See s.3 (6) (b) LTCA 1995, as amended by s.133 & Sch.11, paras (1) & (2) LRA 2002, and Gray K and Gray S, *Elements of Land Law*, (n.9), para.4.5.62. Cl. (c) 4th Sch. standard lease provides that the landlord’s agreements are estate contracts registrable by the leaseholder.

²⁶¹ See ch.6, para.6.5.13.

Although the LTCA 1995 abolished the original leaseholder's privity of contract, there was no corresponding statutory release for the landlord.²⁶² The landlord therefore remains bound, unless he first serves the required notice on the tenant seeking a release.²⁶³ The LTCA 1995 contains comprehensive anti-avoidance provisions,²⁶⁴ but the House of Lords held in *London Diocesan Fund and another v. Phithwa and others (Avonridge Property Co.Ltd, Pt 20 defendant)*²⁶⁵ that there is nothing in the language or scheme of the LTCA 1995 to suggest the statute was intended to exclude the parties' ability to limit their liability from the outset.²⁶⁶ That case involved a similar limitation to the standard lease provision releasing Tyneside Flat landlords from their obligations on the transfer of the reversions.²⁶⁷ Former Tyneside Flat landlords are therefore spared them from having to comply with the detailed LTCA 1995 provisions,²⁶⁸ but will still not be released from their obligations until new leaseholders are notified in writing of the name and address of the new landlord.²⁶⁹

As is usual with long leases at a premium,²⁷⁰ Tyneside Flat leaseholders do not have to obtain their landlords' consent to a transfer. If consent had been necessary they could have been required to enter into an 'authorised guarantee agreement' in which they guaranteed the performance of their obligations by their successors.²⁷¹ This might have rendered much of the Act nugatory,²⁷² but because this possibility does not arise, the LTCA 1995 is beneficial to

²⁶² The rationale for this being that a landlord can often protect himself because, if he has to give a license to assign, then he can control the identity of a new tenant, whereas a tenant will usually have no corresponding control over the identity of a new landlord – see Davey M, 'Privity of Contract and Leases', (n.238), p.88.

²⁶³ See s.8 (1) LTCA 1995.

²⁶⁴ See s.25 (1) (a) LTCA 1995. See sub-sections (2) and (3) for provisions relating to covenants against assignment and authorised guarantee agreements.

²⁶⁵ [2006] 1 All ER 127 HL.

²⁶⁶ *Ibid*, at 133 and see the concurring judgement of Baroness Hale at 136 - 137. This was particularly persuasive because, as she pointed out, she had been a member of the Law Commission at the time of the *Bedlam Report*, (n.191), & earlier Working Paper No.95, (n.238).

²⁶⁷ See the comments of Lord Nicholls at 132 and cl.5 (A) standard lease.

²⁶⁸ See ss 8 (1) – (3) LTCA 1995 which specifies the information required in the notice, the time limits and the procedures for objection.

²⁶⁹ See s.26 (2) LTCA 1995, which preserves the operation of s.3 (3A) LTA 1985, discussed in ch.6 para. 6.5.12. The preservation of s.3 (3A) LTA 1985 was recommended by the *Bedlam Report*, (n.191), paras 4.63(b) & 5.1 (18) (b).

²⁷⁰ See Sparkes P, *A New Landlord and Tenant*, (n.12), p.378.

²⁷¹ See generally s.16 LTCA 1995 and Davey M, *Landlord and Tenant Law*, (n.108), pp.180 - 181.

²⁷² It has been suggested that because landlords will put onerous conditions on licences to assign, tenants will be forced to sublet and therefore retain their contractual liability - see Walter P, 'The Landlord and Tenant Act 1995: A Legislative Folly' [1996] 60 Conv. 432, p.440. See also Davey M, *Landlord and Tenant Law*, (n.108), p.186.

original post 1995 standard leaseholders, who are now placed in a similar position to original landlords.²⁷³

6.7 Overview

6.7.1 *General Comments*

The review of landlord and tenant legislation has examined various issues raised by research question 7.²⁷⁴ The chart overleaf outlines the impact of individual statutes on the standard Tyneside Flat documentation and indicates whether or not that impact is beneficial or necessitates reform. The chart is preceded by some general points on the findings and is followed by more specific comments on those provisions where reform is needed.

The absence of relevant case law involving self-contained two flat properties restricts analysis of the legislation, but supports the assessment that, generally, it has so far had little adverse impact. Research data obtained from north eastern conveyancers has been of particular help in assessing legislative impact by balancing theoretical possibilities with practical reality.²⁷⁵ Legislative impact is heavily restricted by the provisions of the standard Tyneside Flat documentation. Standard leaseholders usually already have, or can obtain, the tenurial status that much legislation seeks to confirm. Accordingly, the LRA 1967 rights of enfranchisement and leasehold extension, the LTA 1987 rights of pre-emption and acquisition and the LRHUDA 1993 right of collective enfranchisement have all been assessed as having very little impact and require no amendment.²⁷⁶ Standard Tyneside Flat leaseholders are individually responsible for undertaking their own insurance and managing their flats.²⁷⁷ Consequently, insurance provisions in the LTA 1985, manager appointment provisions in the LTA 1987 and right to manage provisions in the CLRA 2002 are largely irrelevant and again require no amendment.

²⁷³ Unlike landlords, leaseholders are not statutorily required to give notice of any change in their ownership, but are required to do so by the standard lease. For a discussion on how often the lease provisions are compiled with, see ch.8, para.8.4.6.

²⁷⁴ See ch.1, para.1.1.6.

²⁷⁵ See, e.g., the discussion on the impact of The LRA 1967, ch.6, para.6.2.4, the LRHUDA 1993, para.6.4.2, & the LTCA 1995, para.6.6.3.

²⁷⁶ Exceptionally the leasehold extension provisions in the LRHUDA 1993 could be beneficial - see ch.6, para.6.3.4.

²⁷⁷ But they have joint responsibility for 'common installations' - see ch.8, para.8.7.2.

In contrast to the above, legislation which regulates the exercise of management functions, such as the service charge accounting and information provisions in the LTAs 1985 and 1987 and the LTA 1985 landlord information provisions could have a much greater impact.²⁷⁸

These provisions all appear to require reform as, ideally, do the LTCA 1995 obligation provisions.²⁷⁹

Legislative Impact on Standard Documentation

Statute	Problem/Remedy*	Impact**	Beneficial***	Reform Needed***
LRA 1967	Enfranchisement	VL	Y	N
	Lease Extension	VL	Y	N
LRHUDA 1993	Lease Extension	L	Y	N
	Enfranchisement	VL	Y	N
LTA 1985	SC Consultation	VL	Y	N
	SC Information	M	N	Y
	S C Accounting	M	N	Y
	Insurance	L	Y	N
	Transfer Information	H	N	Y
LTA 1987	Right of Pre-emption	VL	Y	N
	Manager Appointment	VL	Y	N
	Compulsory Acquisition	VL	Y	N
	SC Information	M	N	Y
	SC Funds	M	N	Y
LTCA 1995	Obligation Enforcement	M	Y	Y
CLRA 2002	Right to Manage	VL	Y	N
	A C Information	VL	Y	N
*	AC = Administration Charge, SC = Service Charge			
**	H = High, M = Medium, L=Low, VL = Very Low			
***	Y = Yes, N= No			

²⁷⁸ The CLRA 2002 administration charge information provisions are likely to have very little impact on Tyneside Flat conveyancing because administration charges are so infrequent – see ch.6, paras 6.5.7 – 6.5.9.

²⁷⁹ See ch.9, paras 9.2.2 – 9.2.4.

In the above table the process used for assessing the broad impact of the legislative provisions and whether they are beneficial or need reform is a combination of the analysis of those provisions described in this chapter and the research data results discussed in chapter eight. A similar process, but with a tendency for greater emphasis on practical research data has been used in assessing the extent of the legislative impact.

6.7.2 Legislation Requiring Reform

The following legislation regulating service charges, transfer information and obligation enforceability all appears to require reform.

a) Service Charges.

- i) The LTA 1985 requirement that demands for service charges should be accompanied by a detailed summary of rights and obligations in relation to service charge costs.²⁸⁰
- ii) The current LTA 1985 provisions enabling leaseholders to request a written summary of costs and to inspect accounts and, when they come into force and the final form of the regulations is settled, provisions requiring landlords to supply a statement of account and an accountant's certificate.²⁸¹
- iii) The LTA 1987 requirement that any demand for the payment of service charges will not be treated as due unless the demand contains the landlord's name and address and an address for service.²⁸²
- iv) The LTA 1987 accounting structure requiring service charge costs to be held in a trust fund, in a separate client account at a 'relevant financial institution' with criminal liability for default.²⁸³
- v) The LTA 1985 compulsory involvement of the LVT to resolve disputes over service charges.²⁸⁴

²⁸⁰ See ch.6, para.6.5.5.

²⁸¹ Ibid.

²⁸² See ch.6, para.6.5.11.

²⁸³ See ch.6, para.6.5.5.

The Royal Institution of Chartered Surveyors (RICS) has introduced a Code of Practice, which applies to leases of all lengths where variable service charges are payable.²⁸⁵ The Code advises that, when taking ‘management decisions’, factors such as cost effectiveness, efficiency and reasonableness should be considered in addition to statutory requirements.²⁸⁶ The difficulty for standard Tyneside Flat landlords is that these and other practical common sense considerations conflict with their statutory obligations. The first four service charge provisions listed above seem disproportionate for occasional joint payments, usually of small amounts, especially when both Tyneside Flats are owner occupied, with each leaseholder being the others’ landlord. The LVT dispute resolution procedure supplants the contractual dispute mechanism found in Tyneside Flat leases and, rather than being compulsory, should perhaps be kept as an alternative option.²⁸⁷

b) Transfer Information Provisions

The LTA 1985 requirement that new landlords must notify leaseholders of a change of freehold ownership has been assessed as having a high impact as it applies on every Tyneside Flat transfer. Failure to comply renders new landlords potentially liable to criminalisation.²⁸⁸

There is some benefit in these information provisions.²⁸⁹ However as standard leaseholders will often know, or can easily ascertain, their new landlords’ identity²⁹⁰ then, as with the LTA 1985 & 1987 accounting provisions and structure, the imposition of criminal liability for default seems overbearing when the standard Tyneside Flat documentation has been used.

c) Contractual Liability

The LTCA 1995 is beneficial for original post 1995 standard leaseholders, but leaves original pre 1996 leaseholders with indefinite future liability after they have transferred their interests.

²⁸⁴ See ch.6, para.6.5.3.

²⁸⁵ See RICS, *Service Charge Residential Management Code*, 2nd ed., (Coventry: RICS, 2009), p.1.

²⁸⁶ Ibid.

²⁸⁷ See ch.9, paras 9.2.2 – 9.2.3 for suggested statutory amendments.

²⁸⁸ See ch.6, para.6.5.12.

²⁸⁹ Ibid.

²⁹⁰ Ibid.

Standard leases relieve both pre and post 1996 landlords of their contractual liability once they have transferred their freehold reversions and there appears to be a strong case for putting original pre 1996 leaseholders on an equal footing.

Data evidence suggests that in practice service charge and landlord information legislation is largely ignored and that original leaseholders' continuing liability is not yet a problem. However, each of the above legislative provisions can be seen as presenting a 'trap for the unwary.'²⁹¹ The legislation has the potential to disrupt the smooth running of standard Tyneside Flat conveyancing and amendment would seem to be beneficial.²⁹²

²⁹¹ See Furber J et al, *Hill and Redman's Law of Landlord and Tenant*, (n.30), para.A 3827.1 This phrase was used when discussing the statutory service charge regime, but seems equally applicable to transfer information and contractual liability regulation.

²⁹² See ch.9, para.9.2.4 for suggested amendments.

Chapter 7. Data Collection

7.1 Introduction

Chapter one of the thesis contained a broad overview of the methodology used for data collection and of the reasons why north eastern conveyancers were chosen as the research population from whom a research sample should be obtained.¹ This chapter gives a more detailed account of the research methodology and begins, in section two, with a discussion of the research strategies. These were largely determined by the amount of qualitative and quantitative data being sought.² Section two explains why it was decided to use two separate questionnaires and why semi structured interviews were preferred. The next section looks at the tactics used for ensuring that the research sample was random and for obtaining maximum participation. Section three also discusses the pilot study used to trial the questionnaires and the procedures adopted in the face to face interviews. The questionnaires are considered in more detail in section four, which explains the various factors considered in, for example, framing the questions and deciding the order in which they were asked. Conveyancers work within an ethical framework³ and were expected to appreciate the ethical considerations involved in this research project. Those of particular relevance, namely that consent to participate was freely given and, more importantly, that anonymity and confidentiality would be preserved, are discussed in section five. The chapter concludes with a discussion on the extent to which the results from the research sample can be generalised, that is, applied to the research population as a whole, together with a summary of the steps taken to improve the quality and reliability of the research data.

¹ See ch.1, para.1.3.4.

² See ch.1, para.1.3.5 for a brief discussion of these two kinds of data. For a general discussion of quantitative and qualitative methodologies see, e.g., Sarantakos S, *Social Research*, 3rd ed., (Basingstoke: Palgrave Macmillan, 2005), pp.31 – 50 and for a summary of the contrasts and similarities between them see, e.g., Bryman A, *Social Research Methods*, 3rd ed., (Oxford: OUP, 2008), pp.393 - 395. Any absolute distinction between quantitative and qualitative research approaches has long been rejected – see, e.g., Silverman D, *Qualitative Methodology and Sociology Describing the Social World*, 1st ed., (Aldershot: Gower, 1985), pp.ix, 17 & 19. In this project both qualitative and quantitative data were obtained at the same time without any distinction being made between them, although there are differences in the presentation of the results – see ch.1, para.1.3.5.

³ See ch.7, para.7.5.6.

7. 2 Research Strategies

7.2.1 Introduction

The required data covered a wide range from, for example, practical conveyancing procedures and costs, the practical impact of landlord and tenant legislation, the role of the Land Registry and mortgage lenders, participants' views on law reform and historical information. Because of the amount and nature of the data being sought, it was decided firstly that the questionnaire should be split into two and secondly that, whenever possible, the questionnaires should be conducted face to face using 'semi- structured' interviews.⁴

7.2.2 Dividing the Data Collection

Most of the data sought related to the current use of the standard Tyneside Flat documentation. Data verifying information previously obtained on the past user and transfer of Tyneside Flats was also sought.⁵ Because younger participants were unlikely to know about this past history, the historical questions were separated into a clearly distinguished 'Solicitors' Historical Questionnaire'.⁶ When the questionnaires were sent to conveyancers, they were, in effect, asked to ignore the historical questionnaire if they were not familiar with the pre 1960s sale arrangements,⁷ leaving them free to concentrate on the main 'Solicitors' General Questionnaire'.⁸ In the event, of those who participated, a higher number than expected, 55 %, also completed the historical questionnaire.

7.2.3 Face to Face Data Collection

Face to face interviews take longer to set up and conduct, but were expected to be more appropriate particularly because of the overall length of the questionnaires,⁹ the

⁴ So called because of the inclusion of open questions and, when undertaken personally, greater flexibility in the way they are conducted - see Bryman A, *Social Research Methods*, (n.2), pp. 196 & 699.

⁵ See ch.5, para.5.2.4.

⁶ See Appendix C. The historical questionnaire was clearly distinguished with the letter 'H'. The questionnaires were called solicitors' questionnaires because they were sent to firms of solicitors, although not all participants were qualified lawyers.

⁷ See Appendix F for a copy of this letter.

⁸ See Appendix B.

⁹ See Bryman A, *Social Research Methods*, (n.2), p.219, De Vaus D, *Surveys in Social Research*, 5th ed., (London: Routledge, 2002), p.129, Neuman W, *Social Research Methods Qualitative and Quantitative*

inclusion of open ended questions,¹⁰ and the technical nature of some questions.¹¹ It was, of course, neither possible nor desirable to try and compel conveyancers either to participate or to agree to face to face interviews.¹² Nevertheless, over two thirds, 72%, of those who participated also agreed to face to face interviews.¹³ As anticipated, these generally proved the more beneficial, as they generated more qualitative, less ‘missing’ and more certain data as well as additional documentation.

7.2.4 More Qualitative Data.

A fixed set of questions was asked, usually in the same order including a number of closed questions.¹⁴ The amount of quantitative research data obtained did not differ greatly between postal and personal data collection, but those seen personally often supplied more qualitative data both from, as expected, open ended questions and also from additional comments made when answering closed questions.¹⁵

7.2.5 Less Missing Data

It is self evident that greater control of the process can be achieved when data is collected personally and that it will usually be possible to ensure that all questions are answered. Some postal questions had a higher ‘non response’ rate.¹⁶

7.2.6 More Certain Data

The ability to ask questions is a major advantage not just for social scientists,¹⁷ but also for those whom they interview.¹⁸ It was possible with personal interviews to prevent

Approaches(Social Research Methods), 6th ed., (London: Pearson, 2006), p.301 & Sarantakos S, *Social Research*, (n.2), p.286.

¹⁰ See De Vaus D, *Surveys in Social Research*, (n.9), pp.122 & 129.

¹¹ For a general discussion of the advantages and disadvantages of face to face interviews see, e.g., Bryman A, *Social Research Methods*, (n.2), pp.217- 219, De Vaus D, *Surveys in Social Research*, (n.9), pp.122 - 132 & Sarantakos S, *Social Research*, (n.2), pp. 285 - 286.

¹² See, e.g., ch.7, para.7.5.2.

¹³ See Appendix G for an anonymous list of participating firms.

¹⁴ To this extent the interview ‘schedule’ resembled a structured interview, which is generally more prescribed - see Bryman A, *Social Research Methods*, (n.2), p.193.

¹⁵ See also ch.7, para.7.4.7.

¹⁶ E.g., in answer to GQ1(c) all face to face respondents said whether or not they found the standard Tyneside Flat documentation useful for transferring ‘any other building’, but two postal respondents, interviews 26 & 28, did not answer this question. Again, all face to face respondents answered the question, GQ10 (d), on LTA 1985 notices, but one postal respondent, interview 24, did not do so.

misunderstandings, which occasionally occurred with postal interviews, particularly with technical legal questions. For example, question five of the general questionnaire asked respondents whether they were aware of any cases of enfranchisement under the LRA 1967, after of a pair of Tyneside Flats had been converted into a single dwelling house. One postal respondent answered positively, albeit with a question mark, and also included additional comments.¹⁹ These made it clear that this was not a case of statutory enfranchisement but simply the situation, also mentioned by five, 24%, of personal respondents, where one person had bought both flats and then merged the leasehold interests.²⁰ Sometimes it was not clear if postal respondents had misunderstood the position. Question 14 of the General Questionnaire asked participants if they were aware of any original pre-1996 standard form leaseholders being called upon to contribute to, for example, joint repairs because of default by a later leaseholder to whom the property had been transferred. The only positive response to this question was from one postal respondent.²¹ This respondent did not answer a supplemental question asking about the circumstances of the enfranchisement and doubts remain as to whether it was correctly answered.²²

7.2.7 Additional Documentation

By seeing participants face to face it was possible to build up a rapport and judge whether it would be possible to seek copy documentation. The converse was also true in that practitioners could judge whether or not to volunteer documentation. Copy documentation was provided by a number of conveyancers seen personally, including three firms who supplied a pro forma of the standard form of lease they used.²³ No documentation was received from postal respondents.

¹⁷ See May T, *Social Research – Issues, Methods and Process*, 3rd ed., (Maidenhead: Open University Press, 2001), p.8 and Giddens A, *Sociology*, 5th ed., (Cambridge: Polity, 2006), p.78.

¹⁸ See Sarantakos S, *Social Research*, (n.2), p.286.

¹⁹ Interview 23, GQ5.

²⁰ One personal respondent, interview 5, who had partially completed the general questionnaire before being seen, had similarly confused the two situations but, again because she had included additional comments, it was clear this was not a LRA 1967 enfranchisement. Another personal respondent, interview 13, required the question to be explained before answering. For a discussion of the LRA 1967, see ch.6, s.6.2 & para.6.3.2.

²¹ Interview 27, GQ 5.

²² See ch.6, s.6.6 for a discussion of the LTCA 1995.

²³ Interviews 1, 6 & 14.

7.3 The Research Sample

7.3.1 Access

The research population comprised qualified lawyers, licensed conveyancers and experienced legal executives employed by north east firms of solicitors. Their heavy work responsibilities means they can legitimately be classified as being ‘elites’²⁴, a group sometimes seen as being difficult to study because of the ‘barriers’ they set up.²⁵ It was therefore considered whether to use a ‘gatekeeper’ to gain access.²⁶ The most obvious candidate for this role was the Newcastle Law Society (the Society) because of its promulgation of the standard Tyneside Flat documentation in the early 1980s. However, it was felt that using the Society as a gatekeeper would have been counter-productive and might have restricted access to some firms. Not all firms, or individuals within firms, are necessarily members of the Society and, more significantly, it was known that some conveyancers disagreed with the stance taken by the Society.

Since local conveyancers are not a ‘closed world’²⁷ and were known to be interested in the standard Tyneside Flat documentation,²⁸ it was decided that a suitably large and representative research sample could be obtained by contacting local firms direct. However, it was also thought politic to inform the Society in advance of the proposed data collection.²⁹ This gave the Society an opportunity to make representations, and was intended to forestall any obstruction³⁰ and reassure the research population.³¹

²⁴ See Rubin H & Rubin I, *Qualitative Interviewing The Art of Hearing Data*, 1st ed., (London: Sage, 1995), p.113, Bottomore T, *Elites and Society*, 1st ed., (Harmondsworth: Penguin, 1964), p.14 adopted by Wakeford F and Wakeford J ‘Universities and the study of elites’ in Stanworth P and Giddens A (Eds), *Elites and Power in British Society*, 1st ed., (London: CUP, 1974), p. 187. Some studies clearly regard lawyers as elites – see, e.g., Pierce J, ‘Reflections on Fieldwork in a Complex Organization’ in Hertz R & Imber J (Eds), *Studying Elites Using Qualitative Methods (Studying Elites)*, 1st ed., (London: Sage, 1995), pp.94 - 109.

²⁵ See Hertz R & Imber J, ‘Introduction’ in Hertz R & Imber J (Eds), *Studying Elites*, (n.24), p.viii.

²⁶ As is sometimes done with other groups, such as those involved in anti social or criminal activities - see Bryman A, *Social Research Methods*, (n.2), pp.407 - 408.

²⁷ See Hertz R & Imber J, ‘Introduction’ in Hertz R & Imber J (Eds), *Studying Elites*, (n.24), p.viii.

²⁸ This was apparent from the large response to a talk on the standard Tyneside Flat documentation given by the Land Registry - see ch.8, para.8.6.3, fn 5.

²⁹ See Appendix D for a copy of the letter sent to the Society.

³⁰ No response was received from the Society.

³¹ See further ch.7, para.7.3.3.

7.3.2 Selection Basis

There is an obvious need to try and eliminate bias in any research sample.³² Accordingly, rather than make any selection of particular firms, *all* firms that undertook a ‘relevant’ category of work, within the ‘appropriate’ geographical areas, were contacted. The chosen geographical areas were those local authority areas in the north east of England where Tyneside Flats are known to exist.³³ ‘Relevant’ firms were taken as being all firms listed in the 2006 edition of Waterlows Directory,³⁴ which indicated that they undertook any of the following categories of work:

Commercial Proper

Housing, Landlord and Tenant

Planning, Compulsory Purchase, Lands Tribunal

Residential Conveyancing

Commercial Conveyancing

Housing Association Law

7.3.3 Obtaining Participation

It was felt that the best way to obtain a good response was to write an initial letter to all relevant firms inviting them to participate.³⁵ Unsurprisingly, the covering letter sent with postal questionnaires has been recognised as one of the factors that influences the response rate.³⁶ Similar considerations applied with this first letter, which endeavoured to be as inclusive as possible by emphasising that the research was completely independent and self financed.³⁷ In order to reassure any participants who might have been uncertain whether it was appropriate to respond to the questionnaires without ‘clearance’ from the Society, the letter indicated that the Society was aware of the research.

³² See Bryman A, *Social Research Methods*, (n.2), p.169 & De Vaus D, *Surveys in Social Research*, (n.9), p. 128.

³³ See para.3 Analysis of Replies, Appendix H, for a list of local authority areas.

³⁴ See *Waterlow's Solicitors' and Barristers' Directory* 2006, 162nd ed., (London: Waterlow, 2006).

³⁵ See Appendix E for a copy of the first letter sent. Letters were addressed to ‘The Senior Partner, Conveyancing Section’ for those firms, the vast majority, which indicated they undertook residential conveyancing and to ‘The Senior Partner’ for all other firms.

³⁶ See Sarantakos S, *Social Research*, (n.2), p.240. The letter was sent on Newcastle Law School’s headed notepaper so as to be as persuasive and authoritative as possible.

³⁷ See further ch.7, para.7.5.8.

There is always a risk that ‘bias’ might creep in from those firms that chose to respond.³⁸ In this project the process of self-selection resulted in positive responses only being received from firms which included residential conveyancing as one of their specialisms. In addition, there was a surprisingly high response from firms in Tynedale, which has relatively few Tyneside Flats, and also from firms in South Shields which, because they generally use a different conveyancing structure in their area, was anticipated.³⁹ The positive response rate from all conveyancing firms received within the stipulated one month period was 16%. This was considered more than sufficient, and no follow up reminders were sent before the pilot study was undertaken.⁴⁰

7.3.4 Pilot Study

In order that the pilot study was itself representative,⁴¹ it included one firm from Newcastle, which has by far the largest number of practices and one each from North and South Tyneside, which have a medium number. All pilot firms were, like most participating firms, of medium size. Care was taken to ensure that the pilot study included two firms that were generally presumed to use the standard Tyneside Flat documentation and one that was expected to use the South Shields structure.

A particular concern with the questionnaires was their length and range. The pilot study was therefore used to trial the idea of sending the questionnaires to conveyancers in advance of their being seen. This was intended to help speed up the process and improve the quality of the responses by giving participants the opportunity of thinking about the questions beforehand. In the pilot study one respondent had written in all the answers before being seen, one appeared to have been through the questionnaires, but had not written in any answers, and one had not had time to look at them. The length of the subsequent face to face interviews varied according to how much ‘preparation’ had been done. Generally it was felt that sending the questionnaires in advance had been helpful and that the overall timing was acceptable, particularly when effective use was made of the ‘filter’ questions.⁴²

³⁸ See ch.7, para.7.6.4 for a discussion of the potential conflict between voluntary participation and representative sampling.

³⁹ See analysis of replies, Appendix H. The South Shields structure is discussed in ch.8, para.8.9.8.

⁴⁰ See ch.7, para.7.6.3 for a discussion of the response rate.

⁴¹ See De Vaus D, *Surveys in Social Research*, (n.9), p.117.

⁴² *Ibid* and see ch.7, para.7.4. 5.

The review of the questionnaires did not result in any amendments to the historical questionnaire, but did involve some minor amendments to the general questionnaire. For example, one superfluous question was deleted, one question clarified, one question altered and the order of a sub question changed.⁴³ As no major amendments were made, the answers in the pilot study have been included in the analysis.

7.3.5 Face to Face Interviews

After the questionnaire had been reviewed, a second letter was sent to participating firms, enclosing both questionnaires and saying that they would be contacted with a view to going through the questionnaires face to face.⁴⁴ It has been said that ‘elites’ often limit the length of the interview because their time is ‘too valuable to spend in long discussions.’⁴⁵ In this research 17% of participants in face to face interviews had explicitly or implicitly mentioned time constraints before being seen and a quarter of those who wrote saying they could *not* participate said or implied that they could not spare the time. These time concerns were explicitly recognised in the second letter which told participants that, if they preferred, the questionnaires could be returned by post. Of those who participated, 72% were seen face to face and 28% returned the questionnaires in the post.⁴⁶ For the same reasons as in pilot study, both questionnaires were sent in advance of the proposed meeting.

A possible advantage of interviews is that the interviewer has the opportunity to control the ‘environment’, that is the conditions under which the questions are answered.⁴⁷ In this research, this was only true to the limited extent that participants were told that all interviews would take place at their offices.⁴⁸ Inevitably respondents determined where in their offices the interviews took place and whether or not they would accept interruptions during the interviews. Since all interviews were conducted in the ‘natural setting’ of the respondents, they were more likely to reflect the reality of how the standard Tyneside Flat documentation

⁴³ For an indication of those matters that should be evaluated or reviewed, see Sarantakos S, *Social Research*, (n.2), pp.257 - 8 & De Vaus D, *Surveys in Social Research*, (n.9), p.116.

⁴⁴ A copy of the second letter is contained in Appendix F.

⁴⁵ See Rubin H & Rubin I, *Qualitative Interviewing*, (n.24), p.113.

⁴⁶ Just under one tenth, 9%, of respondents, who had agreed to participate, did not do so.

⁴⁷ See Sarantakos S, *Social Research*, (n.2), p.285.

⁴⁸ It would have been unreasonable to suggest any other location to busy conveyancers.

works in practice than if they had been held elsewhere, thus giving them ‘ecological validity.’⁴⁹

All interview appointments were made either directly with participants or via their secretaries or assistants. This procedure complied with the ‘rule’ that interviews should be conducted at a time most suitable to the respondents.⁵⁰ However, it was not always the case that participants were able to have an ‘unhurried talk without disturbance,’⁵¹ as a few respondents, perhaps to keep the time down, or simply because of work pressures, kept their telephone lines open during the interviews. One participant expressly limited the time at the beginning of the meeting.⁵²

As all interviews were carried out by the researcher personally, it was possible to minimise ‘interviewer bias’ by ensuring that the same interviewer appearance, question order, and general approach was used on each interview.⁵³ Apart from one instance where two respondents had contacted each other on receipt of the second letter, and were subsequently seen together,⁵⁴ all respondents were seen alone, thus avoiding the danger of any ‘third party’ ‘distortion.’⁵⁵ Respondents’ answers were, as one commentator considers is the norm for face to face interviews, recorded on paper questionnaires.⁵⁶ Written answers were used since it was felt that conveyancers might, like public officials, be less forthcoming if answers were tape recorded.⁵⁷ In addition, the main concern was with *what* was being said rather than, as with some types of study, with the *way* it was being said.⁵⁸ As is recommended, all comments were written down at the time⁵⁹ and then checked over and considered afterwards. No more than one interview per day was arranged in order to allow sufficient time for this to be done.

⁴⁹ See Bryman A, *Social Research Methods*, (n.2), p.33.

⁵⁰ See Sarantakos S, *Social Research*, (n.2), p.277.

⁵¹ Ibid.

⁵² Interview 20.

⁵³ See Neuman W, *Social Research Methods*, (n.9), pp.301 & 309.

⁵⁴ Interviews 4 & 5.

⁵⁵ See De Vaus D, *Surveys in Social Research*, (n.9), p.130.

⁵⁶ Ibid, p.122. See also Bryman A, *Social Research Methods*, (n.2), p.202, when talking of structured interviews.

⁵⁷ See Rubin H & Rubin I, *Qualitative Interviewing*, (n.24), p.126.

⁵⁸ See further Bryman A, *Social Research Methods*, (n.2), p.451.

⁵⁹ See De Vaus D, *Surveys in Social Research*, (n.9), p.134.

7.4 Research Questions

7.4.1 Introduction

The wording of research questions is ‘fundamental’ if clear, unambiguous and useful questions are to be asked.⁶⁰ The questionnaires were therefore drafted over a number of months in order to iron out errors in the wording.⁶¹ Interpretation of questions by respondents is an area of particular concern in question construction⁶² and was central in this project, especially in the need to clarify what participants had in mind when they spoke of ‘Tyneside Flats’. This is considered in section two below in relation to the problem of meaning. The discussion of question order and memory problems in the third and fourth sections illustrate another underlying feature of the research questions, namely that some normal construction ‘rules’ were wholly or partially inappropriate because of the specialised nature of the research sample. Filter questions, mentioned in section five, proved helpful because of the amount of information being sought. Some of that information was technical and the use of technical terms, where ‘normal’ concerns over interpretation were tempered by the specialised knowledge of the participants, is discussed in section six. The chapter concludes with an account of why the ‘don’t know’ option was not offered to participants. Most of the discussion centres on the much longer general questionnaire, but different considerations, arising from the shorter historical questionnaire, are also covered.

7.4.2 The problem of meaning

The limits of language determine what we can discuss.⁶³ Even when discussion is possible, analytical errors may arise if respondents interpret questions in different ways, for example, because they vary in how they define certain terms.⁶⁴ Accordingly, early questions in the general questionnaire sought to clarify precisely how respondents defined a ‘Tyneside Flat’ and what they considered were its essential physical characteristics. The need for precision

⁶⁰ Ibid, p.97.

⁶¹ Ibid, pp.97 - 98, for a general discussion on question construction. See also Neuman W, *Social Research Methods*, (n.9), pp.272 - 282 & Sarantakos S, *Social Research*, (n.2), pp.252 - 254.

⁶² See De Vaus D, *Surveys in Social Research*, (n.9), pp.96 - 97.

⁶³ See Wittgenstein L, (translated by Pears D and McGuinness B), *Tractatus Logico-Philosophicus*, 1st ed., (London: Routledge, 2001), p.89, Plochmann G and Lawson J, *Terms in their Propositional Contexts in Wittgenstein’s Tractatus An Index*, 1st ed., (Illinois: Southern Illinois University Press, 1962), p.91 & Pears D, *Wittgenstein*, 2nd ed., (London: Fontana, 1997), p.55.

⁶⁴ See De Vaus D, *Surveys in Social Research*, (n.9), pp.97 - 98.

was apparent from the pilot study, which revealed diverging views on whether, for example, a ‘Tyneside Flat’ is always part of a terrace. Whilst the pilot respondent in North Tyneside thought this was the case⁶⁵ those in South Tyneside and Newcastle thought the term also included some flats in semi-detached houses.⁶⁶ These different concepts probably resulted more from varying architectural layouts in different districts of Tyneside⁶⁷ combined with the geographical range of individual practices, rather than from any locally accepted view of what terms mean or the ‘social construction’ of language.⁶⁸

7.4.3 The order of the questions

The first question in the general questionnaire relates to the standard Tyneside Flat documentation and therefore accords with the recommendation that early questions should be both salient to respondents⁶⁹ and also directly related to the research topic.⁷⁰ It also has the merit of being relatively simple to answer⁷¹ and was therefore put ahead of the definition questions.⁷²

As tends to be recommended, questions were grouped into sections so as to improve the flow and avoid confusion,⁷³ but ‘normal’ question order ‘rules’ were not always followed. It has, for example, been suggested that questions dealing with opinions and attitudes should precede questions to do with behaviour and knowledge, as opinion and attitude questions are the more likely to be affected by question order.⁷⁴ As against this, it might be desirable for opinions to be shaped by knowledge. For example, in the pilot study one respondent was strongly in favour of the standard documentation and indicated quite early on in the general

⁶⁵ Interview 1, GQ 3(b).

⁶⁶ Interviews 2, GQ 3(b) & 3 GQ 3(b) & (c).

⁶⁷ See ch.2, paras 2.3.2 – 2.3.5.

⁶⁸ Other later respondents in both North and South Tyneside interpreted the architectural features of Tyneside Flats differently - see further ch.8, para.8.2.2. For a discussion of the ‘social construction’ of language see, e.g., Sarantakos S, *Social Research*, (n.2), p.39.

⁶⁹ See Bryman A, *Social Research Methods*, (n.2), p.204.

⁷⁰ Ibid & see De Vaus D, *Surveys in Social Research*, (n.9), p.111.

⁷¹ See De Vaus D, *Surveys in Social Research*, (n.9), p.110 & Neuman W, *Social Research Methods*, (n.9), p.293.

⁷² Although it might have been more logical to ask the definition question first, this was discounted to avoid the risk of immediately discouraging participants with a more complicated question.

⁷³ See Bryman A, *Social Research Methods*, (n.2), p.204, De Vaus D, *Surveys in Social Research*, (n.9), p.111 and Neuman W, *Social Research Methods*, (n.9), p.293.

⁷⁴ See Bryman A, *Social Research Methods*, (n.2), p.205. This point was made in relation to ‘structured’ interviewing, with which the research methodology used in this research has some similarities - see ch.7, para. 7.2.4, fn. 14.

questionnaire that he did not like the South Shields structure, but had ‘occasionally’ continued with it, if it had already been set up.⁷⁵ Subsequent ‘knowledge’ or factual questions examined the more complicated standard Tyneside Flat documentation in some detail, which may, at least in part, have led him to agree, in a question towards the end of the questionnaire, that the South Shields scheme was ‘possibly’ easier to explain to clients, lenders and solicitors, although he again repeated that he did not like it.⁷⁶ It was also thought sensible to leave ‘opinion’ questions about law reform⁷⁷ to the end so that they could be answered in the light of the preceding exploration of how the standard Tyneside Flat documentation works in practice and participants’ ‘knowledge’ of the impact of landlord and tenant legislation.⁷⁸

7.4.4 Memory problems

Some questions in the general questionnaire required respondents to think of particular examples, some of which might have taken place at any time since the standard Tyneside Flat documentation was set up in the early 1980s. All questions in the historical questionnaire require respondents to recall what happened before then. This heavy reliance on memory carries with it the obvious danger that answers might be inaccurate.⁷⁹ However, it was felt that even long term memory questions were justified for the following reasons:

- a) Only those conveyancers who had initially expressed an interest in answering the questionnaires were involved, without any additional pressure being applied.⁸⁰ This self selection means that all respondents were likely to be enthusiastic and helpful.
- b) The questionnaires were sent out in advance. This gave respondents a chance to recall past cases and, if required, consult their records.⁸¹

⁷⁵ Interview 1, GQ 7 (b).

⁷⁶ Interview 1, GQ 20 (b) (ii). In the pilot study this was question 18 (b) (ii), but the question was put further towards the end, partly as a result of this participant’s response.

⁷⁷ ‘Hypothetical’ questions are discussed in ch.7, para.7.4.7 (a), fn 110.

⁷⁸ See also ch.8, para.8.9.2.

⁷⁹ See Bryman A, *Social Research Methods*, (n.2), p.243 and Neuman W, *Social Research Methods*, (n.9), p.281.

⁸⁰ See ch.7, para.7.3.3.

⁸¹ See Neuman W, *Social Research Methods*, (n.9), p.28, which suggests that, to aid recall of past events, respondents should be given ‘extra thinking time’.

c) The participants all worked within a framework which makes regular use of precedents, often many years old. In their daily work conveyancers rely heavily on their own past experience of similar situations and are well used to thinking back over time.

d) Inevitably the cases that conveyancers are most likely to remember are those that are awkward or exceptional. Some of the questions in the general questionnaire, which required participants to think back over a long period, fell into this category. For example, question five of the general questionnaire asked participants if they were aware of any cases of enfranchisement under the LRA 1967. After two postal misunderstandings had been taken into account,⁸² the result was that none of the respondents were aware of any such cases, an outcome that is likely to be accurate.⁸³ Again, there is no reason to doubt the accuracy of the finding that only one participant, 3% of the sample, was aware of any s.146 notices being served on a standard Tyneside Flat leaseholder.⁸⁴

e) The first four questions in the historical questionnaire were framed differently from those in the general questionnaire, partly because this questionnaire goes back such a long way. In order to help jog memories, each question states what is believed to have been the situation and asks participants if this was their understanding of the position. If respondents thought that the statements were wrong, they were invited in each case to explain what was the normal position or usual arrangement. This was to discourage respondents from feeling they ought to give a particular answer, which would have made the questions suggestive or leading.⁸⁵ The questions did not mention that they were based on information provided by a past officer of the Newcastle Law Society, as this might have led to the possibility of 'prestige bias,' which can occur if respondents are asked to follow the views of 'important' people.⁸⁶ In the event almost all respondents agreed with the historical 'propositions', which has enabled them to be asserted with greater authority.⁸⁷

⁸² See ch.7, para.7.2.6.

⁸³ See further ch.6, para.6.2.5.

⁸⁴ Interview 15, GQ 17. See further ch.8, para. 8.7.9.

⁸⁵ See Bryman A, *Social Research Methods*, (n.2), p.242, De Vaus D, *Surveys in Social Research*, (n.9), p.279 and Sarantakos S, *Social Research*, (n.2), p.252.

⁸⁶ See De Vaus D, *Surveys in Social Research*, (n.9), p.98, Neuman W, *Social Research Methods*, (n.9), p.278 and Sarantakos S, *Social Research*, (n.2), p.252.

⁸⁷ See, e.g., ch.5, paras 5.3.2 (transfers before the standard Tyneside Flat documentation) & 5.3.3 (pressure for standard documentation).

7.4.5 Filter Questions

Filter questions aim to elicit, for the first time in a study, information relating to general aspects of the research topic. They are then followed by other more specific or ‘contingency’ questions.⁸⁸ They were used extensively in the general questionnaire partly because to ask a contingency question without a filter question is methodologically incorrect⁸⁹ and particularly to save respondents having to read or think about questions that were not relevant to them.⁹⁰ This was particularly important in the general questionnaire because of the amount of detailed information being sought and participants’ expressed concerns over time constraints.⁹¹ The filter question at the beginning of question 16, which asked respondents whether they had ever known of any joint contributions for repairs being required, was particularly helpful. Nearly half of the respondents answered this question negatively,⁹² which then meant they could skip the next page and a quarter of contingency questions.

7.4.6 Technical Terms

The general rule that technical terms are to be avoided⁹³ was not followed for some questions in the general questionnaire. The initial letter sent to all firms explained the nature of the research project and 38% of those who declined to participate said, in effect, that this was because they did not have the necessary knowledge.⁹⁴ Almost a third, 31%, of letters written by firms confirming that they were willing to participate expressly or impliedly mentioned their writers’ credentials, namely the length of their experience,⁹⁵ their greater experience within the firm⁹⁶ the volume of transactions seen⁹⁷ or their particular interest.⁹⁸ Respondents were therefore expected to have a high degree of technical expertise. In addition the questionnaires were mainly focused on the standard Tyneside Flat documentation which itself uses technical terms. For example, the standard form of lease employs familiar legal shorthand when it refers to notices served under section 146 LPA 1925, without explaining

⁸⁸ See Sarantakos S, *Social Research*, (n.2), p.245.

⁸⁹ Ibid.

⁹⁰ See De Vaus D, *Surveys in Social Research*, (n.9), pp.108 - 109.

⁹¹ See ch.7, para.7.3.5.

⁹² See further ch.8, para.8.7.3.

⁹³ See Bryman A, *Social Research Methods*, (n.2), p.243 & De Vaus D, *Surveys in Social Research*, (n.9), p.97.

⁹⁴ 4 % of the research population explained why they were unable to participate.

⁹⁵ Interviews 12, 21 & 28.

⁹⁶ Interviews 10 & 15.

⁹⁷ Interview 26.

⁹⁸ Interviews 1, 2 & 13.

those statutory provisions in any detail.⁹⁹ Question 17 of the general questionnaire is similarly concise when asking respondents whether they have ever served any notices under this section. The question was therefore, as has been recommended, formulated in the language of the respondents.¹⁰⁰

The tactic of adding an explanation to some technical questions, which has been adopted in, for example, consultation papers by the Law Commission¹⁰¹ and the Land Registry¹⁰² was rejected. This was partly so as not to appear condescending, but mainly because of the length of the general questionnaire and a wish to avoid long questions.¹⁰³ In addition the intention was to conduct as many face to face interviews as possible when explanations could be given. Despite the anticipated knowledge of the participants, there is evidence to suggest that some postal respondents misunderstood some technical questions.¹⁰⁴

7.4.7 Don't Know Option

The interview schedules contained a mixture of open, closed and partially closed filter questions.¹⁰⁵ Many of the latter were 'yes/no' questions followed by contingency questions, especially if a 'yes' answer was given. The fully closed questions were few in number and limited to asking about further questions and to respondents' approaches to law reform. When asking about attitudes, an issue which arose was whether to offer a 'don't know' or 'no opinion' option.¹⁰⁶ Although one of the pilot respondents had no opinion on one of the law reform questions,¹⁰⁷ it was, on balance, thought better *not* to offer a 'don't know' option because:

⁹⁹ See cl.(r) 5th Sch.

¹⁰⁰ See Sarantakos S, *Social Research*, (n.2), pp.252 - 253.

¹⁰¹ See, e.g., the *2008 Consultation Paper, Easements, Covenants and Profits à Prendre* (Consultation Paper No. 186) (2008 Consultation Paper), (London: HMSO, 2008).

¹⁰² See, e.g., *Land Registration Rules 2003 A Land Registry Consultation*, (London: HM Land Registry, 2002).

¹⁰³ See De Vaus D, *Surveys in Social Research*,(n.7), p. 97, Robson C, *Real World Research A Resource for Social Scientists and Practitioner - Researchers*, 2nd ed., (Oxford: Blackwell, 2002), p.275.

¹⁰⁴ See ch.7, para.7.2.6.

¹⁰⁵ For an indication of the problems of a 'wrong' balance between open/closed questions see Bryman A, *Social Research Methods*, (n.2), p.244. See also Sarantakos S, *Social Research*, (n. 2), pp.244 - 246.

¹⁰⁶ See Bryman A, *Social Research Methods*, (n.2), p.244.

¹⁰⁷ Interview 2, GQ 21 (a).

- a) An explicit don't know option does not need to be asked with 'face to face' interviews since, if respondents do not have an opinion, this can be taken into account in the analysis.¹⁰⁸ This is, of course, more problematic with postal respondents, who were somewhat less willing to respond to the law reform questions.¹⁰⁹ The range of responses given was taken into account by introducing a 'sometimes' category when conducting the analysis of law reform. This was particularly necessary for the 'conversion' question where nearly one third of all respondents preferred to say they thought conversion would sometimes be desirable following law reform, rather than give a straight yes/no answer.¹¹⁰
- b) The closed opinion questions on law reform were deliberately left to the end so that the respondents' answers would be informed by the previous discussion.¹¹¹ Laziness or weariness can arise as the questionnaire progresses and it was thought better to avoid the possibility that participants would pick an easy 'don't know' option.¹¹²
- c) All participants had volunteered to participate and were expected to have an opinion on positive obligation law reform, which has been an ongoing issue for most, if not all, of their professional lives. They were not being asked questions beyond their expected knowledge or capabilities.¹¹³
- d) The interview schedules were not 'sprung' on the respondents. They all had time to think about them as they had received them in advance of being seen.¹¹⁴

¹⁰⁸ See De Vaus D, *Surveys in Social Research*, (n.9), p.106.

¹⁰⁹ A little over one tenth of face to face interviews, 12 %, declined to answer question 21(a) about law reform, as opposed to one quarter, 25 %, of all postal respondents. The only respondent who did not answer question 21 (b) (conversion of titles) was a postal respondent.

¹¹⁰ See ch.8, para.8.9.3. It has been suggested that questions should not be asked about what people would do under hypothetical circumstances - see Neuman W, *Social Research Methods*, (n.9), p.280. However, for the reasons given in ch.7, para.7.4.7 (c) below, it was thought both appropriate and useful to ask the hypothetical 'conversion' question.

¹¹¹ See ch.7, para.7.4.3.

¹¹² See Bryman A, *Social Research Methods*, (n.2), p.244.

¹¹³ See further Bryman A, *Social Research Methods*, (n.2), p 243, De Vaus D, *Surveys in Social Research*, (n.9), p.98 & Neuman W, *Social Research Methods*, (n.9), pp.279 - 280.

¹¹⁴ See ch.7, paras 7.3.4 - 7.3.5.

7.5 Ethical Considerations

7.5.1 Introduction

The ethical principles of the Socio Legal Studies Association (SLSA), now contained in their ‘*Statement of Principles of Ethical Research Practice*’,¹¹⁵ were followed in this research project. That statement indicates that socio-legal researchers enter into a personal and moral relationship with those whom they study closely.¹¹⁶ In this research the main ethical considerations were, firstly, that respondents’ consent should be freely given and informed¹¹⁷ and, secondly, that their replies would remain confidential.¹¹⁸ Confidentiality requires that all data is presented anonymously throughout the thesis.¹¹⁹ Confidentiality and anonymity were expected to be of particular concern to participants because of their professional obligations to their clients, their commercial and professional relationships with mortgage lenders, the Land Registry and each other and their differing attitudes towards the standard Tyneside Flat documentation.

7.5.2 Freely Given Consent

All relevant firms in the research population were sent an initial explanatory letter asking if they were willing to participate.¹²⁰ Since the letter was sent direct to potential participants, the possibility of coercion being exercised by a gatekeeper did not arise.¹²¹ In addition, because a good response was received, no pressure was put on those who had failed to reply.¹²² Conveyancers are used to negotiating on behalf of their clients and, unlike some more vulnerable groups, are likely to have little difficulty in upholding their true wishes.¹²³ The credentials supplied by nearly a third of all respondents to the initial letter are evidence,

¹¹⁵ See SLSA, ‘*Statement of Principles of Ethical Research Practice*’ (*Statement of Principles*) (January 2009), < <http://www.kent.ac.uk/nslsa/content/view/247/244/>> , accessed 25 June 2010.

¹¹⁶ Ibid, Principle 6, para.6.1.

¹¹⁷ Ibid, Principle 7.

¹¹⁸ Ibid, Principle 8.1.

¹¹⁹ Ibid, Principle 8.2.

¹²⁰ See ch.7, para.7.3.3 & Appendix E.

¹²¹ See Miller T & Bell L, ‘Consenting to What? Issues of Access, Gate-keeping and Informed Consent’ in Mauthner M et al, *Ethics in Qualitative Research*, 1st ed., (London: Sage, 2002), p.55. See ch.7, para.7.3.1, for a discussion as to why a gatekeeper was not used in this research.

¹²² See ch.7, para.7.3.3.

¹²³ The ‘educated, literate and aware know that they can refuse and they know how to...’ – see Homan R, *The Ethics of Social Research*, 1st ed., (London: Longman, 1991), p.95 and see generally Carlson R ‘The Issue of Privacy in Public Opinion Research’ (1967) 31 POQ 1.

not just of a willingness to take part, but of enthusiasm to do so.¹²⁴ Participation by firms was therefore clearly voluntary.¹²⁵

7.5.3 Informed Consent

In order that consent should be ‘informed’ the research needs to be explained in terms that are ‘meaningful’ to participants and as ‘fully as possible.’¹²⁶ Because prospective participants were an elite professional group being asked to talk about a subject familiar to them, they were expected to understand the terminology being used, including technical terms,¹²⁷ but they did, of course, still need to be supplied with sufficient information. Commentators differ on precisely what information should be provided, but all the topics and issues that Bryman suggests should be included in an ‘introductory statement’ were, in effect, contained in the initial letter.¹²⁸ The contents of that letter, combined with the subsequent conduct the research, also meant that all Sarantakos’s ‘ten commandments on ethics’ were complied with.¹²⁹

7.5.4 Ongoing Consent

Once respondents had agreed to participate they were sent a second letter which enclosed both questionnaires.¹³⁰ This letter said that they would be contacted with a view to going through the questionnaires face to face, but also made it clear that they could be returned by post if they did not have time for personal discussion. This alternative was explicit because the first letter had not mentioned face to face interviews and some respondents had referred to time constraints.¹³¹ It could also be argued that when participants responded to the initial letter, they did not really know what they were agreeing to as they had not seen the actual questions.¹³² By sending the questionnaires with the second letter respondents had the opportunity of declining to proceed further, if they were unhappy with what they were being

¹²⁴ See ch.7, para.7.4.6.

¹²⁵ This can have implications for generalisation- see ch.7, para.7.6.4. In one case, interview 16, the participant had clearly been asked to respond by one of the firm’s partners but, as with all other participants, appeared to be completely autonomous in his working arrangements.

¹²⁶ See SLSA, *Statement of Principles*, (n.115), Principle 7, para.7.1.1.

¹²⁷ See ch.7, para.7.4.6.

¹²⁸ See Bryman A, *Social Research Methods*, (n.2), p 201.

¹²⁹ See Sarantakos S, *Social Research*, (n.2), p.23.

¹³⁰ See Appendix F.

¹³¹ See ch.7, para.7.3.5.

¹³² See De Vaus D, *Surveys in Social Research*, (n.9), p.61.

asked.¹³³ Giving respondents an opportunity to return the questionnaires by post and sending them in advance both complied with the suggestion that consent should be ongoing.¹³⁴ It also meant that by the time respondents did participate, their consents were particularly well informed.

7.5.5 Evidence of Consent

Since all participants had written agreeing to take part, there was no need to obtain a signed consent form as evidence of their agreement, thus avoiding any difficulty and loss of limited time that could have arisen if they had been presented with a formal form to sign when being interviewed.¹³⁵

7.5.6 Confidentiality

The initial letter sent to participants indicated, as is required by the SLSA, that their replies would remain confidential.¹³⁶ Confidentiality requires that data should be kept secret from ‘the public’, and that no one else can link the data to particular individuals.¹³⁷ Accordingly, steps were taken throughout the collection and processing of data to ensure that confidentiality was not broken, a task made easier by the lack of any third party involvement in the data collection. Nearly all correspondence from respondents was sent to Newcastle Law School and collected unopened by the researcher personally, thus preventing any unintended disclosure.¹³⁸ In order to ensure that no one else would have access to their names,¹³⁹ no lists of participating individuals or firms have been stored electronically.¹⁴⁰

Confidentiality is essential both to protect the identity of participants and also those for whom they act, an issue familiar to all participants because of the general duty of confidentiality

¹³³ Three firms, which had initially agreed to participate, did not subsequently complete a questionnaire, but none said this was because of the nature of the questions.

¹³⁴ See Miller T & Bell L, ‘Consenting to What?’, (n.121), p.53.

¹³⁵ See further Sarantakos S, *Social Research*, (n.2), pp.20 - 21.

¹³⁶ See SLSA *Statement of Principles*, (n.1), Principle 8, para.8.1. By way of reinforcement the letter stated that the replies would be ‘completely’ confidential.

¹³⁷ See Neuman W, *Social Research Methods*, (n.9), p.139.

¹³⁸ For an example of how disclosure can occur on receipt of questionnaires see De Vaus D, *Surveys in Social Research*, (n.9), p.67.

¹³⁹ *Ibid*, p.62.

¹⁴⁰ See Bryman A, *Social Research Methods*, (n.2), p.120 & see p.119 for a discussion of researchers’ obligations under the DPA 1998.

they owe to their clients.¹⁴¹ Although well used to discussing issues of law and practice without mentioning clients' names, or giving sufficient details to enable identification possible, one firm used 'client confidentiality' as a reason for not participating. If confidentiality is to be maintained, then statements made by respondents should not be attributed to them without permission.¹⁴² Accordingly, all quotations by individuals have only been attributed to a numbered interview, which protects both confidentiality and anonymity.

7.5.7 Anonymity of data

Respondents were being invited to participate and it was therefore clear, as is usually the case with face to face interviews, that they would not be anonymous.¹⁴³ The initial letter did, however, state that whilst it was expected to incorporate the overall tenor of the replies, anonymity would be maintained, that is that participants would remain nameless. The SLSA requires that appropriate and practical methods for preserving the anonymity of data should be used.¹⁴⁴ Although a schedule of participating firms has been prepared, they are listed by number only.¹⁴⁵ In addition, although the geographic area where firms practice has been given, since this is relevant to generalisation,¹⁴⁶ care has been taken to ensure this is not confined to an identifiable locality. Firms' locations have therefore been given by local authority district, which covers a much wider area than particular towns.¹⁴⁷ A further aid to anonymity is that personal data such as the age, sex and marital status of respondents was not required,¹⁴⁸ and has therefore not been included in the schedule of participants or elsewhere.¹⁴⁹

Because it was known that some firms did not agree with the promulgation of standard Tyneside Flat documentation by the Newcastle Law Society, the first letter emphasised that

¹⁴¹ See Rule 4.01 Duty of confidentiality' *Solicitors Code of Conduct 2007*, available from the SRA at <<http://www.sra.org.uk/solicitors/code-of-conduct/rule4.page>>, accessed 21 October 2010 and, e.g., Powell J et al, *Jackson & Powell on Professional Liability*, 6th ed., (London: Sweet & Maxwell, 2007), para.11-026.

¹⁴² See *SLSA Statement of Principles*, (n.115), Principle 8, para.8.1.

¹⁴³ See further De Vaus D, *Surveys in Social Research*, (n.9), p.62.

¹⁴⁴ See *SLSA Statement of Principles*, (n.115), Principle 8, para. 8.2.1.

¹⁴⁵ See Appendix G.

¹⁴⁶ See ch.7, para.7.6.5.

¹⁴⁷ See Bryman A, *Social Research Methods*, (n.2), p.118 and Neuman W, *Social Research Methods*, (n.9), p.139 for an example of how individuals became identifiable in the study of a fictitious American town. Although it has been necessary to refer to the South Shields area throughout the thesis because different documentation is used there for Tyneside Flat transfer, (see ch.8, para.8.3.4), there are a sufficient number of conveyancing firms in that locality for individual identification to be impossible.

¹⁴⁸ See Sarantakos S, *Social Research*, (n.2), p.258.

¹⁴⁹ See De Vaus D, *Surveys in Social Research*, (n.9), p.63.

particular care would be taken to ensure that the identities of individuals *and* firms would not be revealed. The need for this reassurance was brought home by the fact that despite these assurances, and the stated independence of the research, one participant returned the general questionnaire anonymously by post.¹⁵⁰

7.5.8 Factors affecting Confidentiality

Whenever possible, research relationships should be characterised by trust.¹⁵¹ As is to be expected, the more reassured respondents are of confidentiality and anonymity the more likely they are to answer questions.¹⁵² One way of establishing trust is to be open about all aspects of the research project. Respondents were therefore not misled about the amount of time likely to be involved in answering the research questionnaires.¹⁵³ In addition they were informed at the outset about the researcher's Land Registry background¹⁵⁴ and also that the Newcastle Law Society was aware of the research. In order to reassure participants that neither of these bodies would have any influence, or that there was any possibility of their somehow getting to know of individual attitudes or responses, they were specifically informed that the research was wholly independent and self financed. This should have removed any suspicion that the independence of the research, or its results, could be compromised by any sponsor.¹⁵⁵

7.5.9 Documentation

Questions of confidentiality arose in connection with documentation. In one case a respondent supplied copy correspondence in order to illustrate the amount charged by a property management company for the registration of documents, but blacked out all property details which ensured that neither their clients nor their address was disclosed.¹⁵⁶ Another

¹⁵⁰ Interview 22.

¹⁵¹ See SLSA, *Statement of Principles*, (n.115), Principle 6, para. 6.

¹⁵² See Sarantakos S, *Social Research*, (n. 2), p.260.

¹⁵³ See further Bryman A, *Social Research Methods*, (n.2), p.121.

¹⁵⁴ Taking account of the relationship between the researcher and respondents or 'methodological self - consciousness', is one aspect of research 'reflexivity' - see Bryman A, *Social Research Methods*, (n.2), p.688.

¹⁵⁵ See further Neuman W, *Social Research Methods*, (n.9), pp.142 - 143. Respondents appeared quite frank in their comments on, e.g., the difficulty of explaining the standard Tyneside Flat documentation to mortgage lenders (see ch.8, para.8.4.4), but might have been less forthcoming if, e.g., the research had been funded by a bank or building society.

¹⁵⁶ See further ch.8, para.8.5.8 & fn 192. Guidance Note 8 (b) to Rule 4, *Solicitors Code of Conduct*, (n.141), states that a client's address must not be disclosed without the client's consent.

participant asked that care be taken not to disclose the names on a copy document supplied. This was perhaps understandable as the document had been replaced, but for current documentation any concern over confidentiality is to some extent misplaced if, as will usually be the case, the property is registered at the Land Registry. This is because all documents referred to on the register, such as standard Tyneside Flat leases, are now automatically available for public inspection.¹⁵⁷ Three firms supplied a pro forma of their standard Tyneside Flat lease. Since no names are inserted in the documentation supplied, issues of confidentiality do not arise.

7.6 Generalisation and Quality of Results

7.6.1 Introduction

This section is concerned with the extent to which quantitative data from the research sample can be generalised, that is, taken as applying, to the research population. The section begins with a discussion of the three main pre conditions for generalisation or ‘external validity’,¹⁵⁸ namely that the research sample is random, of an appropriate size and representative. These pre conditions also affect the quality and reliability of all data. Quality and reliability are interconnected with generalisation and may determine whether it is worthwhile. The section therefore concludes with a brief overview of the steps taken to improve these aspects.

7.6.2 Sample Selection

All north east firms of solicitors within the research population were invited to participate.¹⁵⁹ Since no criteria were applied in selecting particular firms within this population, the possibility of bias, and consequent sample error, was kept to a minimum.¹⁶⁰ The basic requirement for random or probability sampling, namely that each unit of the research population has an equal probability of being included was clearly met.¹⁶¹

¹⁵⁷ See s.66 LRA 2002, which came into force on 13 October 2003. Before this provision became law, leases and charges were not normally available for public inspection.

¹⁵⁸ See Bryman A, *Social Research Methods*, (n.2), p.33.

¹⁵⁹ See further ch.7, para.7.3.2.

¹⁶⁰ See Bryman A, *Social Research Methods*, (n.2), pp.168 - 170.

¹⁶¹ *Ibid*, p.171 & see Sarantakos S, *Social Research*, (n.2), p.154.

7.6.3 Sample Size

There is no definitive answer as what size a sample should be.¹⁶² The basic ‘rule’ that it is the absolute number rather than the relative size that is important¹⁶³ can largely be ‘discounted’ in this research, particularly because of the small size of the research population. The research sample comprised 29 firms out of a total of 201, which was 14% of the research population. Only firms that undertook residential conveyancing responded. If the research population is taken as being residential conveyancing firms, then the total number of firms is reduced to 178 with a 16% uptake. If duplicate offices of the same firms are excluded, the uptake is 17%. It seems to be accepted that ‘slightly’ smaller samples will still produce accurate results when the sample is a sizeable proportion, such as 10%, of the research population.¹⁶⁴ The suggested ‘sizeable proportion’ of 10% is comfortably below the percentage of participating firms, whether or not the research population is adjusted to exclude duplicate and non residential conveyancing firms. The homogeneity of the research population also reduced the need for any larger number or greater percentage of participants.

7.6.4 Homogeneity

When a population is relatively homogeneous, the amount of variation in the quantitative research data results is likely to be less.¹⁶⁵ Accordingly, the greater the homogeneity of the research population, the smaller the sample needs to be.¹⁶⁶ In this project there was clearly a great deal of homogeneity, since it was clear from the initial letter,¹⁶⁷ and from those to whom it was directed,¹⁶⁸ that the research population was restricted not to all solicitors’ firms,

¹⁶² See Bryman A, *Social Research Methods*, (n.2), p.179. Sarantakos S, *Social Research*, (n.2), p.173 gives specific sample sizes, which are subject to various qualifications. The high number suggested would have been unnecessary for this research and impossible to achieve.

¹⁶³ See Bryman A, *Social Research Methods*, (n.2), p.171 & see De Vaus D, *Surveys in Social Research*, (n.9), p.81.

¹⁶⁴ See De Vaus D, *Surveys in Social Research*, (n.9), p.81.

¹⁶⁵ Ibid & see Bryman A, *Social Research Methods*, (n.2), p.182.

¹⁶⁶ See De Vaus D, *Surveys in Social Research*, (n.9), p.81 & Sarantakos S, *Social Research*, (n.2), p.171.

¹⁶⁷ See Appendix E.

¹⁶⁸ See ch.7, para.7.3.2.

or even all conveyancing in north eastern England,¹⁶⁹ but to those conveyancing firms in that area with experience of using the standard Tyneside Flat documentation.¹⁷⁰

In addition, the promulgation of standard Tyneside Flat documentation, the almost universal acceptance of that documentation, apart from the South Shields area,¹⁷¹ the willingness of conveyancers to adapt it to a wide variety of circumstances¹⁷² and the pressure to conform¹⁷³ are all likely to lead to greater homogeneity, or less variability. The degree of uniformity in the quantitative research data was variable, but was very apparent in some results, for example, the replies to question one of the historical questionnaires,¹⁷⁴ question 14 of the general questionnaire on the enforcement of the original leaseholder's covenants¹⁷⁵ and question 17 of the general questionnaire on forfeiture proceedings.¹⁷⁶

Although computer programmes have not been employed for the main analysis of the data, a computer programme has sometimes been used to indicate how confident we can be that the quantitative results from the research sample would be reflected in the research population. This can be done because the research sample has been chosen at random¹⁷⁷ and, when this is the case, sampling theory can be used to give the boundaries or 'confidence interval' within which the research sample is expected, statistically, to fall within the research population.¹⁷⁸

The small research population, its homogeneity, the specialised nature of the research and the number of face to face interviews, with advance warning of the questions,¹⁷⁹ all support the view that the size of the research sample was more than sufficient.

¹⁶⁹ See also Ryan B et al, *Minitab Handbook*, 5th ed. (London: Thompson, 2005), p.253, which states that people from the same part of the country tend to be more alike than people from different regions.

¹⁷⁰ All participants confirmed that they were aware of the standard Tyneside Flat documentation (GQ1) and also that they had acted in a sale of an individual Tyneside Flat since the time that documentation was first promulgated – see ch.8, para.8.3.2.

¹⁷¹ See ch.8, para.8.3.4.

¹⁷² See ch.8, paras 8.3.5 - 8.3.8.

¹⁷³ See ch.8, paras 8.3.3 & 8.9.10.

¹⁷⁴ See, e.g., ch.5, para.5.2.1.

¹⁷⁵ See further ch.7, para.7.2.6.

¹⁷⁶ See ch.8, para.8.7.9.

¹⁷⁷ See Bryman A, *Social Research Methods*, (n. 2), pp.177 - 179.

¹⁷⁸ The figure is usually expressed as a percentage by saying that we can be 95% certain that the outcome or percentage in the research sample will fall within two specified percentages of the research population - see Bryman A, *Social Research Methods*, (n. 2), pp.177 - 179. The 'Minitab' software programme has been used in this research project. For further details and an example of how the 'Minitab' programme can be applied using proportions arising from 'yes/ no' questions, as were asked of the research sample in this project, see Ryan B et al, *Minitab Handbook*, (n.170), pp.251 - 252.

¹⁷⁹ See ch.7, para.7.3.5.

7.6.5 Representative Sample

Participants included firms from all those districts with the largest concentration of Tyneside Flats.¹⁸⁰ The bias that would have arisen if, for example, respondents were confined to South Shields or, to a lesser extent, if that district had been excluded, was therefore avoided.¹⁸¹ The overwhelming majority of solicitors' firms were, like the research population, of a small or medium size.¹⁸² No two branches from any one firm were included. This conformed to the suggestion that firms should be 'independent' of each other and should only appear once in the sample population.¹⁸³ All firms which volunteered to participate were invited to do so, thus complying with the requirement that once selected, or in this study self selected, all participants or 'units of the target population' must be included.¹⁸⁴

Ethically participation has to be voluntary,¹⁸⁵ which conflicts with the methodological principle of representative sampling.¹⁸⁶ Some of those who participated and some who wrote saying they could not do, so mentioned time constraints.¹⁸⁷ It therefore seems reasonable to assume that conveyancers who felt particularly busy or pressurised, were less likely to participate. Any such self exclusion should have improved the quality of the results.¹⁸⁸

Only one conveyancer from each firm responded, but it seems likely that the practices adopted and, in most cases, the views expressed, were similar throughout the firm, or branch of the firm. Where firms have more than one branch, then the comments made may also be typical of other branches unless, as happened with one interview, one of those branches was in South Shields.¹⁸⁹ Where the participant was the only, main or acknowledged Tyneside Flat expert within the firm, then the individual responses are more clearly representative of the firm.

¹⁸⁰ See Appendix H for a breakdown of participants by local authority area.

¹⁸¹ See further Bryman A, *Social Research Methods*, (n.2), p.187.

¹⁸² Only two firms, 7%, were listed as having more than six partners. Sarantakos S, *Social Research*, (n.2), p.154, suggests that 'units' should be of the 'same size'. In this research the firms were of different sizes, but only one member from each firm participated.

¹⁸³ See Sarantakos S, *Social Research*, (n.2), p.154.

¹⁸⁴ Ibid.

¹⁸⁵ See ch.7, para.7.5.2.

¹⁸⁶ See De Vaus D, *Surveys in Social Research*, (n. 9), p.59.

¹⁸⁷ See ch.7, para.7.3.5.

¹⁸⁸ See De Vaus D, *Surveys in Social Research*, (n.9), p.59, where he points out that compulsion will undermine the quality of the responses.

¹⁸⁹ Interview 4. See ch.8, para.8.9.8 for a discussion of the South Shields structure.

Voluntary participation seems unlikely to have resulted in any major bias in this research and was more than offset by the steps taken to ensure the research sample was representative. As indicated below, that sample was also particularly well equipped to provide high quality data.

7.6.6 Quality and Reliability

Although the preconditions for generalisation of the quantitative data appear to have been met, of equal or even greater importance, especially for qualitative data, were the steps taken to improve quality and reliability. These aspects, which have been considered in previous sections of this chapter, are summarised below.

- **Research Strategy.** Face to face data collection resulted in more qualitative and more certain data.¹⁹⁰
- **Research Tactics.** Sending the questionnaires in advance saved time and helped with memory questions.¹⁹¹
- **Self Selection by Participants.** The quality of data should have been improved if those who participated felt less pressurised.¹⁹² The experience of participants, evidenced by the high proportion that completed the historical questionnaire¹⁹³ and the evidence they supplied of their expertise¹⁹⁴ should have been beneficial.
- **Framing the questions.** Questions on, for example, meaning, the question order, the exclusion of the ‘no opinion’ option and additional information given on historical questions all sought to improve quality and reliability.¹⁹⁵
- **Time constraints.** Steps taken to reduce the adverse effects that time pressures might have had on quality included splitting the questionnaires,¹⁹⁶ sending the questionnaires in

¹⁹⁰ See ch.7 paras 7.2.4 & 7.2.6.

¹⁹¹ See ch.7 para.7.4.4 (b).

¹⁹² See ch.7, para.7.6.5.

¹⁹³ See ch.7, para.7.2.2. Demographic details were deliberately not asked - see ch.7, para.7.5.7. However, it has been possible to verify from Waterlow’s Directory (see ch.7, para.7.3.2, fn 34) that 12 participants qualified as solicitors more than 20 years before the research data was collected.

¹⁹⁴ See ch.7, para.7.4.6.

¹⁹⁵ See ch.7, paras 7.4.2, 7.4.3, 7.4.7 & 7.4.4 (e).

advance,¹⁹⁷ use of filter questions¹⁹⁸ and interviewing respondents at times convenient to them¹⁹⁹ and when they were likely to be less busy.²⁰⁰

- Confidentiality and Anonymity. Assurances of confidentiality were given²⁰¹ and can improve the quality and honesty of responses, especially on sensitive issues.²⁰² The relatively high response from South Shields, for whom the standard documentation is particularly sensitive, suggests that they felt sufficiently reassured to participate.²⁰³ The lack of any tape recorder may also have helped improve confidence.²⁰⁴
- Independence of Research. Assurances that the research was ‘completely independent’ were re-enforced by respondents being told it was self-financed.²⁰⁵ This should have helped respondents to speak frankly about the standard documentation and, for example, mortgage lenders.²⁰⁶

The above factors all helped to increase confidence in the quality, reliability and truthfulness of the data. If, very occasionally, any unease has been felt, this has been mentioned.²⁰⁷

Qualitative and quantitative research data is considered in greater detail in the next chapter.

¹⁹⁶ See ch.7, para. 7.2.2.

¹⁹⁷ See ch.7, paras 7.3.4 & 7.3.5.

¹⁹⁸ See ch.7, para.7.4.5.

¹⁹⁹ See ch.7, para.7.3.6.

²⁰⁰ Accordingly, Mondays, when clients often telephone after the weekend, and Fridays, when completions traditionally take place, were generally avoided.

²⁰¹ See ch.7, para.7.5.6.

²⁰² De Vaus D, *Surveys in Social Research*, (n.9), p.62.

²⁰³ See ch.7, para.7.3.3.

²⁰⁴ See ch.7, para.7.3.5.

²⁰⁵ See ch.7, para.7.5.8.

²⁰⁶ See ch.7, para.7.5.8, fn 155.

²⁰⁷ See, e.g., ch.8 para.8.8.4, fn 343.

Chapter 8. Standard Tyneside Flat Documentation

in Practice

8.1 Overview

This chapter considers the practical operation of the standard Tyneside Flat documentation by analysing qualitative and quantitative research data obtained from conveyancers practising in north eastern England in 2007.¹ The analysis broadly follows the sequence of questions in the general questionnaire.² The chapter begins, in section two, with a discussion of north eastern conveyancers' concepts of Tyneside Flats, which helps address research question one.³ The circumstances in which the standard Tyneside Flat documentation is used, and in which amendments are made to broaden or adapt its use, are considered in section three. This examination of current land tenure arrangements for Tyneside Flats addresses research question five.⁴ As expected, quantitative and qualitative research data confirmed that conveyancers in the South Shields area usually adopt a different structure for transfers in their area.⁵ The relative merits of the standard Tyneside Flat structure, the South Shields arrangement and a possible freehold 'Land Obligation' alternative⁶ are considered in much of the ensuing discussion.

Section four examines the crucial role and approach of mortgage lenders. This section is also relevant to research question five, since the ability to obtain mortgage finance inevitably affects the tenure used. The analysis in section four and in section five on costs, section six on land registration, section seven on leaseholders' obligations and section eight on maintaining the landlord and tenant structure, all reveal practical and/or legal complications with current conveyancing practice, the concern of research question nine.⁷ The discussion in these sections also addresses, or is relevant to, research question ten which is concerned with

¹ For an account of Tyneside Flat transfer before the introduction of the standard Tyneside Flat documentation see ch.5, paras 5.3.2 – 5.3.3.

² Question order is discussed in ch.7, para.7.4.3.

³ See ch.1, para.1.1.6. Research question one is also addressed by the architectural description of Tyneside Flats in ch.2, para.2.3.2.

⁴ See ch.1, para.1.1.6.

⁵ This is outlined in ch.8, para.8.9.8.

⁶ See Law Commission, *Easements, Covenants and Profits à Prendre*, (Consultation Paper No. 186) (2008 Consultation Paper), (London: HMSO, 2008), discussed in ch.4, s.4.8.

⁷ See ch.1, para.1.1.6.

the conveyancing practice and law reform measures needed to prevent those difficulties.⁸ Although most of the examination in this chapter centres on current concerns, the commentary shows how closely some contemporary issues resonate with the past.⁹

The analysis in section seven of leaseholders' obligations and their enforcement also addresses research questions six, seven and eight. Those questions relate to the effectiveness of current arrangements for the enforceability of repairing obligations, the relevance of modern landlord and tenant legislation for the standard Tyneside Flat tenurial arrangement and the reform measures needed to take account of its impact.¹⁰ The interplay between theoretical legal problems and practical conveyancing is particularly apparent in sections seven and eight. Section eight, which examines the creation and maintenance of the landlord and tenant Tyneside Flat structure, is of particular relevance to research question six. Sections seven and eight also highlight another recurrent theme, namely that north eastern conveyancers generally seem to have a better understanding of 'surface' conveyancing difficulties and the steps needed to overcome them, than of underlying legal requirements.¹¹

Section nine looks to the future by examining participants' attitudes towards land obligation law reform. Qualitative and quantitative research data has been considered in the light of the Law Commission's *2008 Consultation Paper*¹² and has been used when addressing research question ten. This question is concerned with the law reform measures needed to overcome the legal and practical difficulties caused by the standard Tyneside Flat structure.¹³ The South Shields arrangement and an alternative 'London' structure form part of this discussion. The chapter concludes with a summary of the qualitative and quantitative research data and of some of the main themes to have emerged.

⁸ Ibid.

⁹ E.g., the provision of mortgage finance, conveyancing costs and land registration were all live issues in the later decades of the nineteenth century - see ch.8, paras 8.4.1, 8.5.1 & 8.6.1.

¹⁰ See ch.1, para.1.1.6. See also ch.6 for a discussion of leasehold legislation. The relevance of landlord and tenant legislation is also discussed in, e.g., ch.8, paras 8.2.3 & 8.3.6.

¹¹ Compare, e.g., the apparent failure to appreciate the need to give notice of the transfer of freehold reversions, discussed in ch.8, para.8.8.4 with the widespread understanding of how the lease power of attorney provisions can be used to overcome landlords' failures to transfer those reversions, discussed in ch.8, para.8.8.3.

¹² See n.6.

¹³ See ch.1, para.1.1.6.

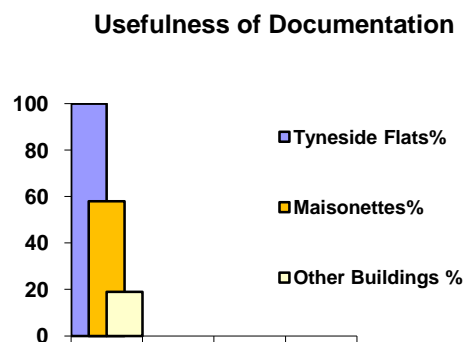
8.2 Conveyancers' Concept of Tyneside Flats

8.2.1 Introduction

Difficulties can arise in data analysis if respondents define terms differently.¹⁴ Early questions in the general questionnaire therefore sought to establish what participants had in mind when they referred to Tyneside Flats and other structures.¹⁵ The responses to these definition questions affect, for example, the impact of landlord and tenant legislation on the standard Tyneside Flat documentation,¹⁶ the formulation of proposals for its reform¹⁷ and the analysis of the *2008 Consultation Paper*.¹⁸

8.2.2 Tyneside Flats, Maisonettes and Other Buildings

All participants said that they found the standard Tyneside Flat documentation useful for the transfer of 'Tyneside Flats'. In addition, as indicated below, more than half, 58%, said they found it useful for the transfer of 'maisonettes' and just under one fifth, 19%, for 'other buildings.'¹⁹



Participants were asked whether they defined Tyneside Flats by their physical layout, the documentation used on their transfer or a combination of both. As illustrated below, there

¹⁴ See ch.7, para.7.4.2.

¹⁵ See GQ 2 & 3.

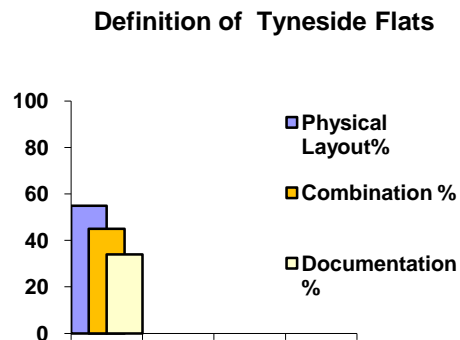
¹⁶ See ch.6, para.6.7.

¹⁷ See ch.9, paras 9.2.2 – 9.2.4.

¹⁸ See ch.4, s.4.8.

¹⁹ See GQ 1 (a) – (c).

was some overlap in the responses given, with some participants choosing more than one alternative:



A little over half, 55 %, of all participants said they defined Tyneside Flats by their physical layout, just over a third, 34 %, by the documentation used and a little under half, 45 % , by a combination of the two. It is clearly often the case, as a participant who chose the ‘combination’ option put it, that ‘the physical comes in’.²⁰ When asked to state what they considered were the essential characteristics of a typical Tyneside Flat, the most common feature concerned the number of units.²¹

8.2.3 The Number of Units

Just over three quarters, 76 %, of participants expressly or impliedly stated that there should be only two units. This ties in with other comments, such as it ‘doesn’t work for three or more’,²² which were made when participants were asked whether the Tyneside Flat documentation could be used for ‘other buildings.’ The remaining quarter, 24 %, of participants, who did not specifically or impliedly mention the ‘two unit’ requirement, might also have agreed this was an essential, or at least usual, characteristic had they been specifically asked. Such a response would have been likely because the standard Tyneside Flat documentation is clearly drafted on the assumption that there are only two flats.

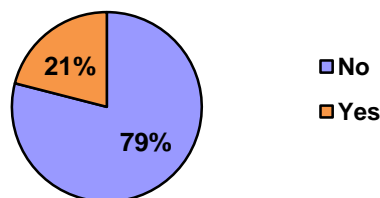
²⁰ Interview 13, GQ 2(iii).

²¹ This was in response to GQ 3 (a). Their mainly or usually self contained nature was mentioned by 59% of participants. This is particularly relevant when considering leasehold obligations – see, e.g., ch.8, para.8.7.2

²² Interview 14, GQ 1 (c).

At one time some terraced buildings are known to have been constructed with three self contained Tyneside Flats each with their own separate entrances.²³ It is not known whether any such buildings still exist, but it was partly with this structure in mind that participants were asked whether they, or to their knowledge their firm, had ever transferred an individual flat within a building comprising three or more ‘Tyneside Flats’. As indicated in the chart below, over three quarters, 79 % gave a negative response, whereas nearly a quarter, 21 %, replied positively.

Transferred Individual TF Flat In Three Flat Building?



The 21% positive response was higher than expected and needs to be treated with some caution. Although participants were asked if they had ever *transferred* such a flat, the positive response includes those, over half of the 21%, who said they had ‘seen’ such a flat. A supplementary question, which asked how many such flats had been transferred, suggested, as one participant said, that these transfers were a ‘very infrequent’ occurrence.²⁴ The highest number appeared to have been encountered by two South Tyneside conveyancers who referred to the ‘odd few’ in South Tyneside and one seen in Gateshead.²⁵ Three of the seven ‘positive’ respondents said they had only seen²⁶ or transferred²⁷ one such flat, whilst another participant said he had seen three.²⁸ Some of the accompanying comments from positive respondents were highly critical. For example, one participant described one such

²³ See ch.6, para.6.4.2, fn 96. One such building looked very similar to the normal two flat terraced layout, (see ch.2, para. 2.3.2), but with an additional basement flat having its own entrance at basement level.

²⁴ Interview 16, GQ 4.

²⁵ Interviews 7 & 8, GQ4. These two participants were the only two seen together – see ch.7, para.7.3.5.

²⁶ Interviews 4 & 18, GQ 4.

²⁷ Interview 29, GQ 4.

²⁸ Interview 23, GQ 4.

arrangement as a ‘mess’ and advised his clients not to proceed.²⁹ The two positive South Tyneside participants said they had seen some ‘terrible ones’.³⁰ Two of those who said they had not transferred an individual flat in a building of three or more Tyneside Flats also indicated that it was not ‘appropriate.’³¹ No participants suggested that the standard Tyneside Flat documentation could or should be adapted for a three flat building and, in answer to a different question about amendments,³² none said they had ever done so.

It may be that criticism of the past use of the standard Tyneside Flat documentation for three flat buildings has led to some titles being rectified and curtailed future use.³³ Despite this, one postal participant said that he had transferred such a flat in ‘about 2004’,³⁴ and another postal respondent that he had transferred three such flats between 2004 and 2006.³⁵ Neither of these participants responded to a follow up enquiry asking in whom the freehold was vested, perhaps signifying unease that the use of standard Tyneside Flat documentation might have been inappropriate. Two different participants suggested that, in buildings with three or more flats, the freehold should be vested in a management company³⁶ in which each flat owner owned a share³⁷ with, presumably, each leaseholder being granted a long lease. None of the participants mentioned the collective enfranchisement provisions of the LRHUDA 1993, which could be helpful if any ‘three unit’ Tyneside Flat structures had been created and the freeholds had not been transferred.³⁸

8.2.4 *The Necessity for a Terrace*

A very high proportion of participants, 90%, said that their concept of Tyneside Flats was *not* limited to flats forming part of a terrace. All these participants included semi-detached houses, each divided into two flats, within their concept of Tyneside Flats. None of the participants made any distinction between those semis that have adjacent front doors and

²⁹ Interview 4, GQ 4.

³⁰ Interviews 7 & 8, GQ 4.

³¹ Interviews 3 & 19, GQ 4.

³² See GQ 8 (i).

³³ See further ch.6, para.6.4.2.

³⁴ Interview 29, GQ 4.

³⁵ Interview 23, GQ 4.

³⁶ Interview 18, GQ 1 (b) & interview 21, GQ 4.

³⁷ Interview 18, GQ 1(b).

³⁸ See further ch.6, para.6.4.2.

those that do not.³⁹ Local conveyancers therefore differ from housing historians who, when talking of Tyneside Flats, generally speak of them as forming part of a terrace.⁴⁰ The inclusion of horizontally divided semi-detached buildings within their concept of ‘Tyneside Flats’ enables local conveyancers to increase the use of the standard Tyneside Flat documentation, both in north eastern England and elsewhere, where such buildings, may often be called ‘maisonettes’.⁴¹

8.2.5 *Maisonettes*

Over two thirds of participants, 69 %, considered that the essential characteristic of a maisonette is that it is a property on two levels, with nearly all participants expressly or impliedly indicating that it only forms part of a building. One definition given, which seems to sum up the general view, is that it is ‘a flat within a building on more than one floor’.⁴² Many terraced upper Tyneside Flats could fall within this definition, since they comprise the top two floors of a building, either because they were originally built into the roof space or through loft conversion.⁴³ However, none of the participants, in contrast to some descriptions of Tyneside Flats, mentioned any necessity for maisonettes to have a separate external entrance.⁴⁴ It may be therefore that, when north eastern conveyancers refer to maisonettes, they often have in mind converted terraced houses with a common joint hallway and/or staircase. The use of standard Tyneside Flat documentation for such conversions appears to be relatively rare. This is because, if there is a shared internal access, the property description in the standard Tyneside Flat documentation would need amendment, but it appears that, in practice, amendments are seldom made for this purpose.⁴⁵

In contrast to north eastern conveyancers, local estate agents regularly describe upper Tyneside Flats as ‘maisonettes’,⁴⁶ perhaps because they are sometimes marketing Tyneside

³⁹ See further ch.2, para.2.3.5 for a photographic example of a semi - detached Tyneside Flat.

⁴⁰ See ch.2, para.2.2.1.

⁴¹ It seems that the original Tyneside Flat documentation was partly based on a ‘nationwide’ precedent for ‘criss cross’ leases of ‘maisonettes’ - see ch.5, para.5.3.3.

⁴² Interview 18, GQ 2 (b).

⁴³ See ch.2, para.2.7.2.

⁴⁴ See ch.8, para.8.2.2, fn 21.

⁴⁵ See ch.8, para.8.3.8.

⁴⁶ See ch.2, para.2.3.2.

Flats to buyers from other parts of the country.⁴⁷ Describing upper Tyneside Flats as maisonettes also accords with the description used by the Court of Appeal for similarly constructed London buildings in cases coming before it under the LRA 1967.⁴⁸

8.2.6 Other Buildings

Approximately one fifth of participants said they used the standard Tyneside Flat documentation for ‘other buildings’. The architectural and geographical range is very varied. For example, the documentation has been used by one local solicitor for a detached property which had been converted into two flats on the south coast of England.⁴⁹ Other examples given were its use for a farmhouse with a ‘flying freehold’,⁵⁰ a shop with a flat above,⁵¹ a maisonette with a flat below,⁵² adjacent houses that would have had ‘flying freeholds’,⁵³ a flat that ‘went round the corner’⁵⁴ and a pair of flats each on separate streets.⁵⁵ Perhaps the possible range is best summed up by one conveyancer who indicated that the documentation could be used for any format provided there were two dwellings.⁵⁶

When, in November 1983, the Newcastle Law Society issued ‘Notes for Guidance’ for the use of standard Tyneside Flat documentation, no definition of a ‘Tyneside Flat’ was included, nor was any indication given as to the range of buildings for which the documentation might be used. The documentation is, however, clearly drafted on the assumption there are only two flats in the building⁵⁷ and most north eastern conveyancers appear to restrict their use of the documentation to this situation. Within their concepts of Tyneside Flats nearly all north eastern conveyancers include horizontally divided semi detached houses, with a significant minority giving examples of how they use the standard Tyneside Flat documentation for ‘other buildings’. The extent to which the standard Tyneside Flat documentation is used in practice is considered in the next section.

⁴⁷ This is particularly likely in districts near the two Newcastle universities, where many Tyneside Flats are occupied by students (see ch.2, para.2.7.2), and some may well be bought by parents for their student children.

⁴⁸ See ch.6, para.6.2.3 & fn 26.

⁴⁹ Interview 17, GQ 1 (c).

⁵⁰ Interview 5, GQ 1(c).

⁵¹ Interview 11, GQ 1 (c).

⁵² Interview 21, GQ 1 (c).

⁵³ Interview 23, GQ 1 (c). See ch.6, para.6.2.3 for judicial reference to ‘flying freeholds’ under the LRA 1967.

⁵⁴ Interview 29, GQ 1 (c).

⁵⁵ Interview 21, GQ 1 (c).

⁵⁶ Interview 20, GQ 1(c).

⁵⁷ See Appendix A for copy standard lease.

8.3 Use of the Standard Tyneside Flat Documentation

8.3.1 Introduction

This section examines the extent to which the standard Tyneside Flat documentation is used in practice by north eastern conveyancers. That use range is potentially increased by conveyancers extending their concept of Tyneside Flats beyond terraced dwellings⁵⁸ and by amendments they make to the standard Tyneside Flat lease. This section considers those amendments, which primarily relate to the user clause and which, in some areas, reflect major Tyneside Flat demographic changes.

8.3.2 Extent of Use

All participants to the general questionnaire confirmed that they had acted in the sale of individual Tyneside Flats since the time when the standard Tyneside Flat documentation was first promulgated.⁵⁹ When then asked whether they *always* used that documentation, there was a striking difference between conveyancers from within and outside the South Shields area. If South Shields respondents are excluded, some 88% of participants *always* used the standard form arrangement when creating a new standard Tyneside Flat lease. In South Shields *none* of the respondents always did so. This stark difference is illustrated below:

Always Use Documentation



North East Generally

South Shields

⁵⁸ See ch.8, para.8.2.4

⁵⁹ See GQ 7 (b).

In both cases the fact that some, or all, participants did not always use the standard documentation does not, of course, mean that they never did so, although again there is a marked difference in approach between the two areas.

8.3.3 North East Generally

The 12 % of participants who did not always use the standard Tyneside Flat documentation came from three widespread practices in Tynedale, Sunderland and Newcastle.⁶⁰ These participants only made an exception when Tyneside Flats were being used for business purposes, which appears to be a rare occurrence. Precise figures are not available but, for example, one of these participants, who at the time of the interview had been a qualified solicitor for over 20 years, said that he could only remember two occasions, out of an unknown total number, when he had *not* used the standard Tyneside Flat documentation.⁶¹ Use of the standard documentation was, for him, ‘an absolute fact of life’ despite his personal preference for the South Shields procedure. This was not the only indication that, whilst many conveyancers appeared enthusiastic in their support of the standard form arrangement, the high degree of user may occasionally be maintained by pressure from other conveyancers to conform.⁶²

8.3.4 South Shields

Of the four South Shields participants who responded to the general questionnaire, two gave no estimate of their lack of use,⁶³ one said he did not use the standard Tyneside Flat documentation in 85% of Tyneside Flat transactions⁶⁴ and another in 99%.⁶⁵ However, it seems that this non use is largely confined to transfers of Tyneside Flats in the South Shields area. Three quarters of the South Shields respondents expressly said that they used the

⁶⁰ Interviews 9, 17 & 18.

⁶¹ Interview 9, GQ 7 (b). Neither of the other two participants gave any estimate of their non use, but the comments of those who have amended the standard documentation for business use suggest that such amendments are very exceptional - see ch.8, para.8.3.7.

⁶² See, e.g., ch.8, para.8.9.9.

⁶³ Interviews 7 & 8.

⁶⁴ Interview 19, GQ 7 (b) (i).

⁶⁵ Interview 2, GQ 7 (b) (i). The 99% figure may be exaggerated, as apparently some 25 % of this participant’s practice was from outside the South Shields area, where he indicated that he did use the standard Tyneside Flat documentation for Tyneside Flat transfers.

standard Tyneside Flat documentation for ‘north of the river’⁶⁶ adopting what one called a ‘horses for courses’ approach.⁶⁷ In addition, half of the South Shields participants considered that the standard documentation should be adopted throughout Tyneside including South Shields.⁶⁸

If, after law reform, positive freehold obligations were to become more readily enforceable, it would be easier to convert registered titles which had used the South Shields procedure than those which had used the standard Tyneside Flat documentation.⁶⁹ If South Shields conveyancers were to prove more willing to convert,⁷⁰ land obligation law reform might result in there being a much higher proportion of individual freehold flats in South Shields than in the rest of north eastern England, causing South Shields to continue with its own distinctive land holding profile for many years to come.⁷¹

8.3.5 Amendments to the Standard Lease

Over two thirds of participants, 69 %, said they had amended the standard form of lease. A major amendment, which appears to be so widespread that it has, in effect, become part of the standard Tyneside Flat documentation, gives lenders additional rights in the event of the lease being forfeited.⁷² Apart from this, the most frequent amendments were made to the user clause, when flats were being sold for student or business use. Although a smaller number of participant firms had made amendments for student use, the total number of student amendments appears to be much greater. Numerous other amendments were made, particularly to the property description, but also in miscellaneous circumstances often on a ‘one off’ basis.

⁶⁶ Interview 2, GQ 8 & interviews 7 & 8, GQ 7 (b). The river is the River Tyne. South Shields is on the southern side. The ‘three quarters’ response represents one third of all firms in South Shields. It therefore seems likely that use of the standard Tyneside Flat documentation by South Shields conveyancers is the usual practice outside their area. This may partly be because some non South Shields conveyancers dislike the South Shields structure – see, e.g., ch.7, para.7.4.3.

⁶⁷ Interview 2, GQ 8.

⁶⁸ Interviews 7 & 19, GQ 7 (b). This appeared to be mainly because of difficulties with mortgage lenders – see further ch.8, para.8.4.3.

⁶⁹ See ch.8, para.8.9.8.

⁷⁰ There is some evidence to suggest this is so - see ch.8, para.8.9.8.

⁷¹ Although one potential benefit from land obligation reform might be the gradual replacement in north eastern England of two different landlord and tenant structures with one freehold structure – see ch.9, para.9.3.4.

⁷² See further ch.8, para.8.4.6.

8.3.6 Student Use

In the standard Tyneside Flat lease, leaseholders covenant to ‘use the Demised Premises for the purpose of a private residence in the occupation of one family only at a time’.⁷³ In recent years there has been a substantial increase in the number of terraced Tyneside Flats that have been let to students.⁷⁴ Some 14% of respondents said they amended the standard form of lease for student lettings. Although most conveyancers seemed to make amendments on a fairly infrequent basis, one conveyancer said he made student amendments in some 25% of cases, totalling hundreds in all.⁷⁵ The user obligation requires flats to be used as ‘a private residence in the occupation of one family at a time.’ As this wording does not require flats to be occupied by leaseholders personally, it is not broken merely because a leaseholder lets the flat to another person.⁷⁶ In addition, use by a group of students does not appear to break the ‘private residence’ requirement.⁷⁷ It has also been argued that it does not break the ‘family’ requirement. In *Roberts v. Howlett*, in response to the suggestion by counsel for the claimant, Mr Morgan, that a group of students could not be a family, Judge Langan said:

‘They lived together in as integrated a fashion as do many members of families who are all related by blood. This in my judgment disposes of Mr Morgan’s ‘not a family’ point.’⁷⁸

One participant maintained that he had always been able to use *Roberts v. Howlett* to persuade other conveyancers that student lettings are permitted by the standard user clause,⁷⁹ although it seems doubtful whether the courts would necessarily agree with this suggestion.⁸⁰ Moreover, the solicitor concerned, when drafting new Tyneside Flat leases for student lettings, and to avoid any ‘arguments’, said that he always amended the wording to read that

⁷³ See cl.(m) 5th Sch. standard lease. This obligation is identical to that used in the earlier South Tyneside form of lease, on which much of the standard lease was based – see ch.5, para.5.3.3.

⁷⁴ See ch.2, para.2.7.2.

⁷⁵ Interview 6, GQ 8 (iv).

⁷⁶ See *Roberts v. Howlett and Others* [2002] 1 P & CR 234 at 239 following the Court of Appeal judgment in *C & G Homes Ltd v. Secretary of State for Health* [1991] Ch 365 CA at 384G - 385A.

⁷⁷ See the comments of Lord Donaldson in *C & G Homes*, (n.76), at 389 F - G.

⁷⁸ At 241.

⁷⁹ Interview 18, GQ 8,

⁸⁰ The covenant in the *Roberts* case, did not mention the word ‘family’ but required only that the house in question should not be used ‘other than as a single private dwelling house.’ See also *Wrotham Park Settled Estates v. Naylor* (1990) 62 P & CR 233 at p.238 where, on distinguishable facts but a more similar covenant, Hoffmann J said that he had to look at what the word family may have been intended to mean having regard to the ‘social conditions’ at the time the lease was granted. Only some parts of the North East are in student areas and other older Tyneside Flat leases now in student areas would have been created before the districts became identifiably ‘student’.

the premises will be used ‘for private residential accommodation only’.⁸¹ The suggestion by another participant that the promulgated standard Tyneside Flat lease should be amended to include this or similar wording⁸² is likely to be controversial in those areas where both large numbers of students and Tyneside Flats exist and where there is tension between students and permanent residents.⁸³ It is perhaps significant that the only case where a participant said that forfeiture proceedings had actually been commenced concerned an objection to student use in breach of the standard user obligation.⁸⁴

As indicated in chapter 6, the scope of the LRHUDA 1993 was extended by the CLRA 2002 so that, in effect, those who let to students may be able to claim a lease extension in any case where a ‘short term’ standard Tyneside Flat lease has been granted.⁸⁵ Some 46 % of respondents said that they were aware of shorter term, normally 99 years, Tyneside Flat leases having been granted usually in the early 1980s, before the promulgated Tyneside Flat documentation introduced a general 999 year term.⁸⁶ The apparent number of 99 year leases, combined with the number of student lettings, means that this legislation could be useful, perhaps quite regularly, in any case where a landlord refuses to co-operate voluntarily in extending a 99 year ‘student’ lease. However, since none of the respondents mentioned either the LRHUDA 1993 or the CLRA 2002, the potential use of this legislation is likely to be negated until such time as conveyancers make a connection between landlord and tenant legislation and standard Tyneside Flat leases.

8.3.7 Business Use

Some 28% of participants said they had amended the standard form of lease for business use. Half of that number expressly or impliedly made the point that these amendments were only made, as one participant put it, ‘very rarely’,⁸⁷ so that, as two other long established participants said, there had only been ‘one or two altogether’⁸⁸ or only ‘a very few’.⁸⁹ If those who had not personally amended the standard form, but had seen amendments made by

⁸¹ Interview 18, GQ 8.

⁸² Interview 11, GQ 23.

⁸³ See ch.2, para.2.7.2.

⁸⁴ See ch.8, para.8.7.9.

⁸⁵ See ch.6, para.6.3.4.

⁸⁶ See further ch.8, para.8.4.5.

⁸⁷ Interview 11, GQ 8.

⁸⁸ Interview 13, GQ 8.

⁸⁹ Interview 3, GQ 8.

others, are included then the figure increases to 34%, but this increase may be explained by an overlap with the 28%. In contrast to the student amendments, these amendments do not appear to reflect any recent demographic changes, since many Tyneside Flat terraces originally included a purpose built corner shop.⁹⁰

Nineteenth century cases established that any user of premises for trade or business is a breach of a covenant to use them solely as a private dwelling house.⁹¹ Amendment of the standard user clause therefore seems essential if flats are to be used for business use. None of the respondents mentioned amending the lease *term* for business use, although three firms outside the South Shields area used the South Shields structure for business lettings.⁹² Since the standard Tyneside Flat lease grants a term of 999 years, and since even shorter term leases, usually granted for 99 years, will not expire for many years, the security of tenure given to business leaseholders on expiry of their lease by Part II of the LTA 1954 is unlikely to be relevant for a considerable time.⁹³

8.3.8 Other Amendments

Some 21% of respondents said they had amended the standard Tyneside Flat lease to adjust the property description, for example, where it did not accord with the floor levels on the ground.⁹⁴ 24% of respondents had amended the standard lease for a wide variety of other reasons ranging from creating an additional restrictive obligation to prevent parking in a particular area⁹⁵ to adjusting the wording for properties which have no gas.⁹⁶ No participants gave any examples of amendments made, for example, for joint entranceways, despite the fact that some 14 % of participants said or implied that ‘Tyneside Flats’ might have them.⁹⁷

⁹⁰ See Taylor S & Lovie D, *Gateshead: Architecture in a Changing English Urban Landscape*, 1st ed., (London: English Heritage, 2004), pp.44 & 46. See also ch.2, para.2.3.4.

⁹¹ See generally Halsbury’s Laws, Landlord and Tenant 4th ed., reissue Vol 27(1), para.504 and the cases there cited, and, e.g., Garner S and Frith A, *A Practical Approach to Landlord and Tenant*, 5th ed., (Oxford: OUP, 2008), para.6.54.

⁹² See ch.8, para.8.3.3.

⁹³ For an overview of the LTA 1954 Pt II as amended see, e.g., Gray K and Gray S, *Elements of Land Law*, 5th ed., (Oxford: OUP, 2009), paras 4.7.41 – 4.7.46 & see generally Garner S and Frith A, *A Practical Approach to Landlord and Tenant*, (n.91), ch.25.

⁹⁴ Interview 16, GQ 8.

⁹⁵ Interview 21, GQ 8.

⁹⁶ Interview 25, GQ 8.

⁹⁷ This is probably because shared entrances for two flat buildings are relatively unusual on Tyneside. This is implied by the response of two participants, interviews 2 & 11, GQ 3(a), when they said that Tyneside Flats would ‘usually’ have separate ones.

The number of amendments should not be exaggerated. Just under one third of respondents had never made any amendments. Of those who had, just over half, 55%, said they made amendments in less, and often much less, than one in four cases. One experienced participant considered that the standard Tyneside Flat documentation is ‘locally comprehensively recognised’⁹⁸ and that it is ‘not necessary to check clauses/mechanisms each time’.⁹⁹ The clear danger in this assumption is that if any amendments or errors have been made they may remain undetected, possibly for many years.¹⁰⁰

The widespread use of the standard Tyneside Flat documentation is only possible because, as discussed in next section, the documentation is generally acceptable to mortgage lenders.

8.4 Mortgage Lenders

8.4.1 Introduction

The provision of adequate mortgage finance is, and always has been, an essential prerequisite for the sale of most Tyneside Flats.¹⁰¹ The extent to which mortgage lenders are satisfied with the security being offered therefore has a major influence in determining the tenurial arrangements. This section looks at how far in practice lenders’ tenure, charging and notice requirements are met by conveyancers using the standard Tyneside Flat documentation and also at the particular difficulties lenders’ tenure requirements cause those using the South Shields structure.

8.4.2 Tenure Requirements

The only reference book referred to by participants in relation to mortgage lending was the *Lenders’ Handbook (CML Handbook)* published by the Council of Mortgage Lenders (CML).¹⁰² If the instructions from an individual mortgage lender indicate that a conveyancer

⁹⁸ Interview 11, GQ 23.

⁹⁹ Ibid.

¹⁰⁰ One pro forma ‘standard’ lease in general use contained errors, some of which could be significant, e.g., the perpetuity period was stated throughout as being eight years rather than, as was clearly intended, the eighty year period introduced by s.1 (1) PAA 1964. See ch.3, para. 3.4.6, fn 151 for amendments made by the PAA 2009.

¹⁰¹ See ch.2, para.2.4.2.

¹⁰² The current version of the *CML Handbook*, published in June 2007, can be viewed on line at < <http://www.cml.org.uk/cml/handbook/england> > , accessed 20 October 2010. The BSA published a similar set of instructions for its members with effect from 1 January 2010 – see

is being instructed in accordance with the *CML Handbook*, then the general provisions in Part 1 and any specific requirements of the instructing lender in Part 2 must be followed.¹⁰³ Even if purchasers' mortgage instructions are not directly tied to the *CML Handbook*, or they do not require a mortgage, conveyancers are still likely to follow the line given in the *CML Handbook*, as they will be aware that, when their clients come to sell, or if they require a later or different mortgage,¹⁰⁴ compliance with the *CML Handbook* may then be required. The *CML Handbook* provides guidance on mortgage lending on freehold flats, mixed freehold/leasehold arrangements and on the minimum length of any leasehold term.

8.4.3 Freehold Flats

Part 1 of the *CML Handbook* does not rule out the possibility of lending on freehold flats altogether, presumably because positive freehold obligations can be made enforceable by using various conveyancing devices.¹⁰⁵ However, the unsatisfactory nature of those devices is well documented¹⁰⁶ and this is reflected in the widespread refusal of individual mortgage lenders to contemplate lending on individual freehold flats.¹⁰⁷ It is no doubt for this reason that none of the participants said they had created an individual freehold Tyneside Flat since the introduction of the promulgated documentation.¹⁰⁸

The dislike of freehold flats by mortgage lenders causes particular difficulty to users of the South Shields arrangement when seeking mortgage finance on the second flat in a pair, after a long lease has been granted on the first flat. The security then being offered is usually a terraced or, occasionally, semi detached freehold house, subject to a long lease of one flat.

< http://www.bsa.org.uk/mortgageinstructions/print.htm?handbook=england_and_wale... >, accessed 4 November 2010.

¹⁰³ See Pt 1, para.1.1.

¹⁰⁴ The CML figures show that in, e.g., May 2010, 26,000 out of 68,000, i.e. 38%, of new loans were remortgages – see 'Movers spend lowest ever average proportion of income on their mortgages' < <http://www.cml.org.uk/media/press/2664> >, accessed 14 July 2010.

¹⁰⁵ See further ch.5, paras 5.4.1 – 5.4.7.

¹⁰⁶ Ibid.

¹⁰⁷ E.g., in 2006 none of the then top five lenders (HBOS/Halifax, Abbey National/Santander, Lloyds TSB, Nationwide and Northern Rock), who accounted for more than half of all mortgage lending (see CML Statistics, Table MM 10, < <http://www.cml.org.uk/cml/statistics> >, accessed 7 January 2008) would lend purely on individual freehold flats – see para. 5.5.1, Pt 2 *CML Handbook* under the names of the individual mortgage lenders. In July 2010 these five mortgage lenders took the same view, although Nationwide made an exception for 'coach house flats'. In addition all said they would lend on a structure similar to the South Shields arrangement – see para.5.5.3, Pt II under the names of the separate mortgage lenders.

¹⁰⁸ It also seems that only a few freehold flats were created before the introduction of the standard Tyneside Flat documentation - see ch.5, para.5.4.1.

Since there will always be a landlord and tenant relationship between the owner of the freehold interest and the long leaseholder, all landlord and leaseholder covenants will be enforceable.¹⁰⁹ Despite this, some mortgage lenders see the proposed security as simply being an individual freehold flat rather than the whole building and refuse to lend in these circumstances, or will only do so after much persuasion.¹¹⁰ It is because of these difficulties that half of the South Shields participants were in favour of the standard Tyneside Flat structure being applied to their area.¹¹¹

8.4.4 Mixed Freehold / Leasehold Structure

The standard mixed freehold/leasehold arrangement is clearly contemplated in the *CML Handbook* Part 1, which states that where the security will comprise ‘one of two leasehold flats in a building where the borrower also owns the freehold reversion of the other flat and the other leaseholder owns the freehold reversion in the borrower’s flat’, then users of the *CML Handbook* should check Part 2 to see if the security will be acceptable and, if so, the lenders’ requirements.¹¹² It seems clear that leading mortgage lenders are prepared to advance money on such a security with some lenders explicitly saying that they require a charge on both interests.¹¹³ Despite these clear directions, over three quarters of participants, 79%, said they had experienced difficulty in explaining the mixed freehold/leasehold structure to mortgage lenders.¹¹⁴ An illustration of the practical consequences was given by one conveyancer who said that, because one of the major lenders ‘could not get their heads round the fact that two properties were being mortgaged’, completion was delayed for four or five days.¹¹⁵

An additional complication arises whenever the leasehold interest in the first flat that has been sold is charged by the purchaser at the time of purchase but, because both flats in a pair are not sold contemporaneously, the freehold reversion in the other flat is not transferred to

¹⁰⁹ See ch.6, para.6.6.1.

¹¹⁰ This is despite the fact that the *CML Handbook*, (n.102), Pt 1, para.5.5.3 appears to contemplate lending in these circumstances in a building ‘converted into not more than four flats’.

¹¹¹ Interviews 7 & 19, GQ 7 (b).

¹¹² See *CML Handbook*, (n.102), Pt 1, para.5.5.4.2.

¹¹³ *Ibid*, Pt 2, paras 5.5.4.2, under the names of the five lenders detailed in n.107. Halifax, Nationwide & Northern Rock all require a charge on the freehold reversion in the ‘other’ flat.

¹¹⁴ The high positive response to the question, GQ 18 (a) (ii), which asked participants if they had encountered difficulty in explaining the standard documentation to lenders means that statistically we can be 95% certain that between 60% & 92% of north east conveyancers will have experienced that difficulty.

¹¹⁵ Interview 21, GQ 20 (a) (ii).

the first purchaser until some time, perhaps many years, later.¹¹⁶ This is clearly a common occurrence with 97 % of participants saying that they had acted for a purchaser in this situation.¹¹⁷ On the face of it, surprisingly few, 17 %, said that this had led to difficulty in charging the freehold interest in the other flat, a figure that might be partly explained by some ambiguity as to whether or not individual mortgage instructions require a charge in these circumstances. Nationwide, which appears to be fairly typical, says that it requires:

‘the borrowers leasehold interest in the flat they occupy to be charged and we also require a charge over the borrowers freehold interest in the other flat subject to the lease in favour of its occupier.’¹¹⁸

Although not asked directly, nearly a quarter, 24%, of all participants said, or implied, that they did not take a charge on subsequently acquired freeholds, apparently because they consider that their duties to lenders do not extend beyond charging whatever the borrower ‘owned or acquired’ at the time.¹¹⁹ One participant, who always takes out a supplemental charge, said he had speculated with another local conveyancer on how long solicitors’ duties to lenders last.¹²⁰ Two other participants obtained a charge on the freehold reversion at the time the leasehold is acquired and keep it ‘on file’ until the reversion is transferred.¹²¹ None of the participants volunteered the possibility of simply including the freehold reversion in the charge of the leasehold and relying on estoppel to create a legal charge when the freehold estate is later transferred.¹²²

Conveyancers are likely to face practical problems whatever view they take of their duties to lenders. If they accept their clients ought to take a legal charge on subsequently acquired

¹¹⁶ The landlord covenants to transfer both reversions at the time of the second sale - see cl. (a) (iii) 4th Sch. standard lease & also thesis ch.5, para.5.3.4.

¹¹⁷ This scenario is likely to decrease over time, as more individual flats come on the market. One respondent, Interview 2, GQ18 (b), suggested it was now a less common phenomenon than in the past.

¹¹⁸ See *CML Handbook*, (n.102), Pt 2 Nationwide, para.5.5.4.2.

¹¹⁹ Interview 18, GQ 18 (b). Cl. (c) 4th Sch. standard lease provides that the landlord’s covenant to transfer the reversion in the ‘other’ flat is a registrable estate contract. Borrowers who charge their leasehold interest therefore have an equitable interest in the freehold reversion in the other flat that could be equitably charged - see Clarke W (Ed), *Fisher & Lightwood’s Law of Mortgage*, (*Fisher & Lightwood*), 11th ed., (London: Butterworths, 2001), para.1.19.

¹²⁰ Interview 21, GQ 18 (b).

¹²¹ Interviews 17, GQ 18 (b) (ii) & 25, GQ 18 (b).

¹²² See *First National Bank v. Thompson* [1996] Ch 231CA and, e.g., Gray K and Gray S, *Elements of Land Law*, (n.93), para.6.1.1. It is believed that the Land Registry will register such a charge substantively on registration of the transfer of the reversion in the other flat to the borrower - i.e. when the estoppel is fed - see Clarke W, *Fisher & Lightwood*, (n.119), para.3.20.

freehold reversions, they may find it difficult to obtain signatures and/or additional Land Registry fees at a later date. If these are obtained in advance, their clients might object that they are paying for something that might never happen. If conveyancers consider that a legal charge is not required, this could result in future difficulties should the lender later wish to exercise its power of sale and is unable to transfer the borrowers' uncharged freehold reversion in the other flat. Nearly half, 46%, of all participants said they had acted in a transaction where this problem had arisen. In all cases, a pre-condition for obtaining a legal charge on the freehold reversion in the 'other' flat is that the reversion should in fact be transferred to the borrower, a further source of potential difficulty.¹²³

8.4.5 Leasehold Term

Since leaseholds are by their nature of limited duration, the *CML Handbook* specifies the minimum lease term acceptable to particular lenders granting loans on leasehold estates. This is often in the region of 25-30 years longer than the mortgage.¹²⁴ The current standard 999 year Tyneside Flat lease is clearly not a problem, but nearly half of all participants, 46 %, said they were aware of shorter term leases having been granted. It seems that nearly all of these shorter leases are for 99 years and were created in the early 1980s, before the standard Tyneside Flat scheme became established.¹²⁵ Most respondents did not estimate the percentage of 'shorter' leases granted, but those who did put the figure at between one and five per cent. As one participant put it, there could be 'quite a few'.¹²⁶

There is already unease amongst some north east conveyancers over existing 99 year Tyneside Flat leases. One participant said he would advise his clients against buying such a lease¹²⁷ and another said he would do so if they intended to stay 'more than a couple of years'.¹²⁸ This trend is likely to increase since, even if most 99 year Tyneside Flat leases are at present still mortgageable, this may not be the case when current purchasers come to sell.¹²⁹

¹²³ See ch.8, para.8.8.3.

¹²⁴ See, e.g., *CML Handbook*, (n.102), Pt 2, para. 5.10.1 under the names of the five mortgage lenders referred to in n.107.

¹²⁵ See ch.5, para.5.3.3.

¹²⁶ Interview 17, GQ 11 (b).

¹²⁷ Interview 9, GQ 21(a).

¹²⁸ Interview 18, GQ 11 (d) (ii).

¹²⁹ From 2020, a 99 year lease granted in 1980 will be unacceptable to a mortgage lender who grants a 30 year mortgage and requires a lease term of 30 years longer than the mortgage. Such a lease would already be

Just over one third of all participants, 35 %, said they were aware of cases where lease extensions had been sought and of those nearly two thirds, 63 %, said difficulties had been encountered, most often involving, as one participant said, ‘time and expense’.¹³⁰ None of the respondents mentioned the possibility of using the LRHUDA 1993 lease extension provisions,¹³¹ which might have helped the participant who considered she was just ‘stuck with’ a 99 year lease.¹³² The detailed mortgage provisions of the LRHUDA 1993, which, in certain circumstances, ensure that a new LRHUDA 1993 lease is binding on a landlord’s lender,¹³³ might have helped another participant who identified the costs of the landlord’s lender as being a particular difficulty.¹³⁴ So far, north eastern conveyancers do not seem to see the statutory mechanisms for extending lease terms as being relevant to the standard Tyneside Flat documentation. However, they may be more inclined to do so as the problem of diminishing lease terms becomes more acute, particularly if, as has happened with some of the South Shields 99 year leases, landlords seek to extract a large premium for extending the lease term.¹³⁵ Under the standard Tyneside Flat scheme, premiums are unlikely to be sought once both leases have been granted.¹³⁶

8.4.6 Notice of Mortgage

The *CML Handbook* requires notice of the mortgage to be served on the landlord whether or not the lease requires it.¹³⁷ If a receipt of the notice cannot be obtained then, as a last resort, suitable evidence of the service of notice on the landlord should be provided.¹³⁸ The standard Tyneside Flat lease requires leaseholders to produce any mortgage, and other named

unacceptable to the Halifax, which in July 2010 required a minimum period of 70 years from the date of the mortgage – see *CML Handbook*, (n.102), Pt II Halifax, para.5.10.1.

¹³⁰ Interview 1, GQ 11 (d) (ii).

¹³¹ See ch.6, para.6.3.4.

¹³² Interview 5, GQ 11 (b) (i).

¹³³ See ch.6, para.6.3.4.

¹³⁴ Interview 1, GQ 11 (d) (i). In cases where lenders are automatically bound by a new LRHUDA 1993 lease, this would presumably reduce lenders’ involvement and costs.

¹³⁵ One participant, interview 19, GQ 11(d) (i), said this was a particular difficulty. It has been suggested that, at least in London, premiums for acquiring freeholds rise ‘dramatically’ once the lease term drops below 80 years - see Qureshi H, ‘If the price is too good, measure the lease’, *The Observer* 13 January 2008 <<http://www.guardian.co.uk/business/2008/jan/13/property1>>, accessed 20 October 2010. Under the LRHUDA 1993 the premium payable is calculated in accordance with Schedule 13, incorporated by S.56 (1) (b). Under s.48 LRHUDA 1993 either party can apply to the LVT for the terms to be determined.

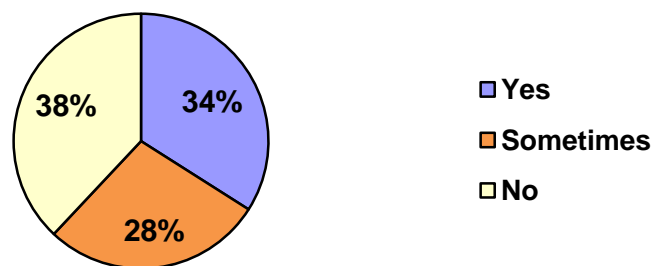
¹³⁶ Landlords covenant to grant leases on the same terms - see cl.5 (c) & cl. (a) (i) 4th Sch. standard lease & ch.5, para.5.3.4. Both leases are therefore likely to need extending. If, as will usually be the case, each flat owner is the others’ landlord, the parties will be on an equal footing.

¹³⁷ See *CML Handbook*, (n.102), Pt 1, para.5.10.11.

¹³⁸ *Ibid.* As mortgage lenders no longer receive the title deeds, which in the past often included receipted notices, they may now be less likely to question their absence – see ch.8, para.8.6.3.

documents, to ‘the solicitor for the time being of the lessor’.¹³⁹ Although the clause requires the documentation itself to be produced, the most that any participants did was to serve notice directly on the landlord or his solicitor. As indicated in the chart below, a little over one third of respondents said that they did serve notice, under one third said that they sometimes did so and over one third that they never did so.

Service of Notice



Over three quarters of participants considered that failure to serve notice did not cause any difficulty. However, the lack of notice could potentially prejudice some mortgage lenders in the operation of the standard lease clause giving landlords a right of re-entry for breach of an obligation. A number of conveyancers have modified the effect of that clause by providing that the landlord will not exercise his right of re-entry unless 28 days written notice has been given of the landlords intention to do so ‘*to any mortgagee whose interest in the demised premises...has been notified to the lessor*’ (my italics).¹⁴⁰

In practice forfeiture proceedings are extremely rare,¹⁴¹ but the mismatch between conveyancers’ willingness to accommodate lenders in principle by amending their pro forma standard Tyneside Flat lease and then not always taking practical steps to comply with that amendment,¹⁴² is of general significance. It appears to be a further example of how some

¹³⁹ See cl. (1) 5th Sch. standard lease.

¹⁴⁰ It is not known how many practices have incorporated this clause in their pro forma standard lease, but one participant, interview14, GQ 8 (d) (iv), thought that the majority had done so.

¹⁴¹ See ch.8, para.8.7.9.

¹⁴² One conveyancer, whose firm has amended the pro forma lease, said that he only complied with the obligation to register deeds with landlords ‘very rarely’ (Interview 1, GQ 12 (a) (i)).

conveyancers do not fully appreciate the implications or requirements of the on-going ‘landlord and tenant’ relationship created by the standard Tyneside Flat documentation.

The attitude of mortgage lenders towards lending on freehold flats, and their approach to commonhold¹⁴³ emphasises the need for any new land obligation proposals to be acceptable to them.¹⁴⁴ In the meantime, the standard mixed freehold/leasehold arrangement is, in principle, an acceptable security for mortgage lenders but, inevitably, complicates conveyancing procedures. This in turn leads to an increase in costs discussed in the next section.

8.5 Costs

8.5.1 Introduction

Conveyancing costs were of great concern in the second half of the nineteenth century when Tyneside Flats were first being built.¹⁴⁵ The atmosphere is less vitriolic now, but costs remain an issue. As the standard Tyneside Flat documentation is complicated, some ‘costs’ questions were raised directly and, significantly, participants also mentioned costs in other contexts.

8.5.2 Standard Documentation and Costs

Participants were asked if they considered that the mixed freehold/leasehold structure increased the conveyancing costs for their clients.¹⁴⁶ All participants answered this question and, as indicated below, the replies fell into three groups of roughly one third each.

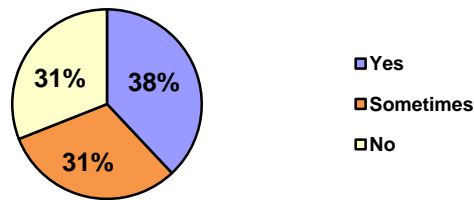
¹⁴³ One of the main reasons why, so far, so few commonholds have been set up are lenders’ concerns, particularly over the liquidation of commonhold associations - see Clarke D ‘Long Residential Leases: Future directions’ in Bright S (Ed), 1st ed., *Landlord and Tenant Law: Past, Present and Future*, (Oxford: Hart, 2006), p.185. See also ch.9, para.9.3.1, fn72. For a discussion of the relevance of commonhold for Tyneside Flats, see ch.4, paras 4.7.3 – 4.7.5.

¹⁴⁴ The CML has said it would welcome reform of the law – see ch.4, para.4.8.9, fn 271.

¹⁴⁵ See, e.g., Offer A, *Property and Politics 1870 - 1914*, (Cambridge: CUP, 1981), pp. 24 & 29 & the references there cited.

¹⁴⁶ See GQ 9.

Costs Increase?



These bold percentages need to be seen in the light of the accompanying comments. The research question left open the scope of what was included in the term ‘conveyancing costs’. This appears to have caused some inconsistencies,¹⁴⁷ but had the benefit of casting the net wide. The responses revealed that, unsurprisingly, additional costs are mainly likely to arise from charges made by conveyancing firms for their own work, but were also said to be caused by the need for detailed plans and land registry fees.

8.5.3 Plans Costs

When asked specifically about conveyancing costs, three participants drew a distinction between plans and legal costs.¹⁴⁸ Standard Tyneside Flat leases require a plan and, since they all have to be registered in the land registry,¹⁴⁹ registry plans requirements have to be met.¹⁵⁰ One participant said that clients ‘don’t want to pay’ plans costs which can run into three or four hundred pounds,¹⁵¹ a cost which presumably falls on the first landlord when preparing the original lease(s). One participant, who considered that plans were the main problem with

¹⁴⁷ E.g., participants 3, 13, 22 & 25 all said that the mixed freehold /leasehold structure did *not* increase conveyancing costs. However in answer to GQ 12(b) (i) participant 3 considered that fees for the registration of documents with landlord’s solicitors were sometimes required and participant 22 mentioned a fee of £23.50 as being the norm. Again, in response to GQ 10(c), participants 13 and 25 said that the person requiring the power of attorney to be exercised, i.e. the ‘other’ leaseholder, paid the costs.

¹⁴⁸ Interviews 12, 14 and 21, all GQ 9.

¹⁴⁹ Usually as a ‘registered disposition’ out of a registered title under s.27 (1) (2) (b) LRA 2002 or requiring first registration if out of unregistered land under s.4 (1) (c) (i) LRA 2002 and see, e.g., Gray K and Gray S, *Elements of Land Law*, (n.93), paras 4.2.37 – 4.2.38.

¹⁵⁰ A ‘clear and reliable title plan’ is said to be one of the ‘great advantages’ of the registered system - see Dixon M et al.(Eds), *Ruoff & Roper on the Law and Practice of Registered Conveyancing, (Registered Conveyancing)*, loose leaf ed., (London: Thompson Reuters (Legal), 2010), para.5.020. For details of the Registry’s requirements, see Land Registry Practice Guide 40, ‘Land Registry Plans’, (London: Land Registry, 2005), paras 6.1- 6.8. One participant, (interview 14, GQ 9), has said that the land registry are ‘now more fussy’ over plans. Even if Tyneside Flats did not have to be registered, a detailed plan would still be needed, e.g., to illustrate any division of the front access and rear yard.

¹⁵¹ Interview 17, GQ 19.

Tyneside Flats, said that he had gone on site and prepared plans himself, no doubt with a view to saving surveyor's costs.¹⁵²

Plans costs were explicitly raised as a significant factor by only a small proportion, 17%, of participants, perhaps because most accepted that detailed plans are always likely to be needed, and can always cause difficulties, whenever a building is divided horizontally.¹⁵³ Even if individual flats could be sold on a purely freehold basis, two plans would still be required,¹⁵⁴ although with the South Tyneside Scheme a plan is only needed on the grant of the first lease.¹⁵⁵ Unless any later amendment is required to the registered extent, plans costs usually only arise once and are therefore likely to be of diminishing concern in the future as more individual flats are sold.¹⁵⁶

8.5.4 Land Registry Fees

The Land Registry charges a minimum fee to register any dealing.¹⁵⁷ This has the potential to cause difficulties under the standard Tyneside Flat documentation, particularly for a first leaseholder who, having paid a fee to register his leasehold interest at the time of acquisition is required to pay a further fee to register a later transfer of the freehold reversion in the other flat. One participant considered this to be a particular problem, as clients asked why they should pay any more,¹⁵⁸ a difficulty which could be overcome by obtaining the registration fee in advance. This was the practice of another participant who, at the time of the leasehold purchase, obtained both an 'advance' legal charge on the yet to be acquired freehold reversion of the other flat and an extra £40 registration fee.¹⁵⁹ This participant expressed the

¹⁵² Interview 10, GQ 23. Some conveyancers are apparently also prepared to absorb power of attorney costs – see ch.8, para.8.8.3.

¹⁵³ When the standard Tyneside Flat documentation was first promulgated, plans problems led to many mapping difficulties in the Land Registry - see ch.8, para.8.6.2.

¹⁵⁴ With the standard Tyneside Flat documentation, plans are only required on original leases, not on transfers of their reversions, as the reversion extent is defined as being that comprised in the lease.

¹⁵⁵ The second flat is sold by transferring the whole building subject to the first lease.

¹⁵⁶ But plans costs could become an issue if land obligation deeds required a plan - see ch.4, para.4.8.5.

¹⁵⁷ Transfers of freehold reversions are usually for the nominal sum of £1 and are therefore classified as transfers other than for monetary consideration - see *The Land Registration Fee Order 2009*, (SI 2009/845) art.1 (2). They attract a minimum fee of £50 under art. 4 (1) (a), art.7 & Sch.2, Scale 2.

¹⁵⁸ Interview 7, GQ 10 (a) (i).

¹⁵⁹ Interview 17, GQ 18 (b) (ii). If a charge is registered at the same time as another dealing, on which a scale fee is paid, no extra fee is usually payable for registration of the charge - see *Land Registration Fee Order 2009*, (n.157), art.5 (2) and see Dixon M et al., *Registered Conveyancing*, (n.150), para.27.031.

hope that the minimum Land Registry fee would not increase in the future, a further potential problem of general application.¹⁶⁰

Participants were not asked directly about land registry fees and only two, 7%, mentioned them as an incidental consequence and possible difficulty with the standard Tyneside Flat documentation. It therefore seems they are not considered a significant problem by most conveyancers. This may be because many Tyneside Flat reversions have now been transferred to leaseholders and any subsequent combined transfers of their freehold and leasehold interests could be registered at the same time.¹⁶¹ Difficulties over the payment of later fees would not normally arise either under the South Shields structure or if land obligation reform enabled individual Tyneside Flats to be transferred on a purely freehold basis.

8.5.5 Solicitors' Costs

Since a mixed freehold/leasehold structure is more complicated than a single title, it is inherently likely to generate more work for conveyancers. Participants' comments suggest that this additional work does not always result in higher charges. A few participants made a virtue of this, for example, one commented that they 'should' charge more, but that they 'just charge the standard rate'¹⁶² whilst another said that the structure costs firms more, not necessarily the client.¹⁶³ The underlying reason constraining higher charges is probably market competition, explicitly mentioned by the participant who spoke of the 'yoke of the blind quote.'¹⁶⁴ Some other participants appeared to charge more for Tyneside Flat transactions as a matter of course with one firm stating that their firm was 'not the cheapest'¹⁶⁵ and another saying that he 'added a premium, as there was 'more work' and that, in practice, only 30% of Tyneside Flat 'conveyances' were 'correctly done.'¹⁶⁶ No consistent pattern emerges from these generally expressed views or from comments made

¹⁶⁰ Interviews were conducted in 2007. In 2009 the fee was increased to £50 – see ch.8, para.8.5.4, fn 157.

¹⁶¹ See ch.8, para.8.5.8.

¹⁶² Interview 13, GQ 9.

¹⁶³ Interview 1, GQ 9. See also interview 23, GQ 9, which amplified a negative response by saying 'only because we don't charge any extra!'

¹⁶⁴ Interview 2, GQ 9. Two other South Tyneside firms, interviews 7 & 8, both GQ 9, also said they were 'basically stuck with' their quotations.

¹⁶⁵ Interview 6, GQ 9.

¹⁶⁶ Interview 15, GQ 9.

when charges arise on specific occasions, such as on the grant of the first and second leases, on later transfers and on deeds of variation.

8.5.6 *Grant of the First Lease*

Although local firms sometimes find some standard Tyneside Flat lease provisions difficult to follow,¹⁶⁷ most north east conveyancers are likely to be familiar with their terms. This can be a mixed blessing reflected in the differing views of participants ranging from one who considered that it was ‘not necessary to check clauses ...each time’,¹⁶⁸ which would help reduce time and expense to another who said that you have to read the lease, thus making it more expensive.¹⁶⁹ The latter comment was made by a South Tyneside participant suggesting that there is likely to be little difference in leasehold costs between the standard Tyneside Flat documentation and the South Shields structure when the first flat is sold. If land obligation reform enabled individual flats to be sold on a freehold basis, some detailed provisions would still be required. However, the number could be significantly reduced from those contained in the present standard Tyneside Flat lease, particularly if a ‘short form’ of words were to be used.¹⁷⁰ If new standard freehold documentation emerged,¹⁷¹ conveyancers would no doubt, as at present, take differing views on how much checking was required. Law reform would probably make little difference for those who, at present, charge the same for leaseholds as freeholds.¹⁷²

8.5.7 *Grant of the Second Lease and Transfer of Reversions*

Similar considerations apply on the grant of the second lease as on the first lease. No participants suggested that there was any need to check that the first lease was in similar form. This approach is supported by the *CML Handbook* which suggests that checking other

¹⁶⁷ One South Tyneside participant, interview 2, GQ 10 (a), said that he did not understand the power of attorney provisions and relied on the ‘kindness’ of Newcastle solicitors to help him.

¹⁶⁸ Interview 11, GQ 23.

¹⁶⁹ Interview 19, GQ 9.

¹⁷⁰ See ch.4, para.4.8.6.

¹⁷¹ See ch.9, para.9.3.4.

¹⁷² One participant, interview 4, GQ 9, said that he charged the same for both leaseholds and freeholds, but that he knew that some conveyancers charge more for leaseholds.

leases is unnecessary if, as with the standard Tyneside Flat lease, there is a provision in the lease that leases of other flats in the ‘block’ will be in ‘substantially similar form’.¹⁷³

When the second standard Tyneside Flat lease is granted, the two freehold reversions also have to be transferred.¹⁷⁴ One participant considered that persuading the freeholder to accept the responsibility and expense of transferring both reversions was the ‘main’ Tyneside Flats problem.¹⁷⁵ Although obtaining a transfer of the reversion clearly involves additional work, only two participants explicitly indicated they might charge more.¹⁷⁶ Another participant said that he would ‘occasionally’ charge for the freehold ‘if a lot of work was done.’¹⁷⁷ An exceptional example of a ‘non-legal’ cost arising from the transfer of a reversion was where a lender insisted on valuing the freehold reversion and charging the borrower for that valuation.¹⁷⁸ Overall only a small percentage, 17%, mentioned additional costs arising from the transfer of freehold reversions, perhaps because, with the passage of time, many reversions have now been transferred.¹⁷⁹

The South Shields structure does not involve any ‘split’ of the reversions and therefore additional work and potential cost for their transfer does not arise. The transfer of the second flat is effected by transferring the whole building subject to the existing lease of the first flat to be sold.¹⁸⁰ South Shields conveyancers use their own standard lease. Conveyancers in that area will have different views on how carefully this needs to be read on the sale of the second flat and on the cost implications of doing so. If land obligation reform enabled individual flats to be sold on a purely freehold basis this should reduce the costs of those few firms which currently charge extra for transfers of the reversions.

¹⁷³ See *CML Handbook*, (n.102), Pt 1, para.5.10.6.2. The standard Tyneside Flat lease provides that the landlord will grant a lease of the other flat in ‘like terms’ – see cl. (a) (i) 4th Sch. & thesis ch.5, para.5.3.4. There can be dangers in assuming that the first lease is in order – see ch.8, para.8.3.8 & fn 100.

¹⁷⁴ See cl.5 (c) & 4th Sch., cls (a) (i) & (ii) standard lease. See also ch.5, para.5.3.4.

¹⁷⁵ Interview 5, GQ 23.

¹⁷⁶ Interviews 5 & 18, both GQ 9.

¹⁷⁷ Interview 1, GQ 9.

¹⁷⁸ Interview 12, GQ 20 (a) (ii).

¹⁷⁹ This was suggested in interview 2, GQ 18 (b) & see ch.8, para.8.4.4, fn 117.

¹⁸⁰ See also ch.8, para.8.9.8.

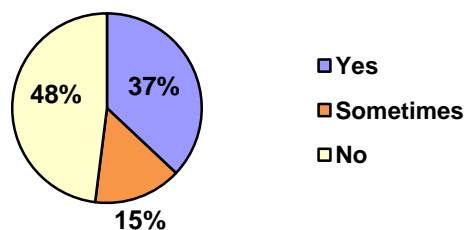
8.5.8 Later Transfers

Standard Tyneside Flat leaseholders covenant that they will not transfer their leasehold flat unless they also transfer the freehold reversion in the other flat if they have acquired it.¹⁸¹ No questions were asked about this provision and no participants suggested that it had caused any difficulty.¹⁸² However, two firms specifically indicated that, once all was ‘sorted’,¹⁸³ they would not then charge any extra, as there could then be a ‘simple transfer’ of both titles.¹⁸⁴

The standard Tyneside Flat lease requires that within one month of any assignment, mortgage etc., leaseholders will produce the deed to landlord’s solicitor and will pay such reasonable fee as he may require for registration of the deed.¹⁸⁵ This clause is often completely ignored in practice and at most is only ever interpreted as requiring notice to be served.¹⁸⁶ One participant specifically said that he served notice direct on the landlord rather than his solicitor in order to ‘avoid costs’.¹⁸⁷

Even when notice is served on solicitors, the general questionnaire revealed that, as indicated below, nearly half of all participants thought that in practice a fee was not required.

Are Registration Fees Required ?



¹⁸¹ See cl. (v) 5th Sch. standard lease & ch.5, para.5.3.4.

¹⁸² A large amount of data was being sought – see ch.7, para.7.2.1. It was therefore necessary to restrict questions to those areas of known difficulty.

¹⁸³ Interview 4, GQ 9.

¹⁸⁴ Interview 5, GQ 9. Another participant, interview 18, GQ 9, also implied that there would be little difference if both titles were registered and ‘all’ was ‘in one transfer’.

¹⁸⁵ See cl. (l) 5th Sch.

¹⁸⁶ See ch.8, para.8.4.6.

¹⁸⁷ Interview 13, GQ 12 (b) (i).

Participants were not asked to state the amount of any registration fees, although some volunteered a figure. The most frequently mentioned amount was £23.50, including VAT,¹⁸⁸ with evidence to suggest that some conveyancers refund the fee if it is not used.¹⁸⁹ When asked if this clause gave rise to any difficulty one participant replied in financial terms by saying that they sometimes have to ‘take a hit on it’,¹⁹⁰ while another said that difficulties arise when a mortgage lender insists on a receipted notice.¹⁹¹ The registration fee position could be summarized by saying that fees are often not charged and when they are, they are usually of a modest amount. This is in stark contrast to the approach of those landlords who see the ‘management’ of services as a means of making a profit.¹⁹² The local approach to registration fees in effect recognizes the artificiality of the conveyancing device being used, although amendment to the standard form of lease seems desirable.¹⁹³ Registration fees will only arise under the South Shields structure for the original leaseholder and his successors¹⁹⁴ and would not be required if individual flats could be sold on a purely freehold basis.

8.5.9 Lease Extensions and Deeds of Variation

Participants were asked whether any difficulties had been encountered over extending ‘shorter’ term standard leases.¹⁹⁵ One conveyancer mentioned the costs of mortgage lenders as a particular difficulty,¹⁹⁶ while another referred more broadly to costs especially the ‘other persons’.¹⁹⁷ Two other participants said that they would ‘sometimes’ or ‘occasionally’ charge more if a deed of variation was required.¹⁹⁸ Lease extension deeds are also likely to be

¹⁸⁸ Interviews 6 & 21, both GQ 12 (b) (i) and interview 22, GQ 12 (b) (iii). Another participant, interview 14, GQ12 (b) (i), said that registration fees used to be £10, but now might be £100. It was not clear who she was suggesting charged this amount. Other responses indicate that such a high sum is unlikely to be charged by north eastern conveyancers for Tyneside Flat registrations.

¹⁸⁹ Interviews 6 & 21, both GQ 12 (b) (i) said they refunded unused fees.

¹⁹⁰ Interview 1, GQ 12 (b) (iii). The ‘hit’ presumably arises because a fee has not been obtained in advance.

¹⁹¹ Interview 22, GQ12 (b) (iii). See also ch.8, para.8.4.6.

¹⁹² See Davey M, ‘Long Residential Leases Past and Present’ in Bright S (Ed) *Landlord and Tenant Law: Past present and Future*, (Oxford: Hart, 2006), p161. The high fees charged by some property management companies were raised as an aside by a number of respondents. In 2007 the standard fee charged by Simarc Property Management Limited for notice of an individual document was £ 99.88, including VAT, and for notice of an assignment and charge was £199.75, also inclusive of VAT.

¹⁹³ See ch.9, para.9.3.3, fn 88 for a suggested amendment.

¹⁹⁴ Only one lease is granted under the South Shields structure – see ch.8, para.8.9.8.

¹⁹⁵ See GQ 11 (c).

¹⁹⁶ Interview 1, GQ 11 (c) & see further ch.8, para.8.4.5.

¹⁹⁷ Interview 17, GQ 11 (c).

¹⁹⁸ Interviews 7 & 8, both GQ 9.

necessary with South Shields leases,¹⁹⁹ but the difficulty would plainly not arise if individual flats could be sold on a freehold basis. Additional costs for lease extensions are likely to become more frequent in the future as existing early standard Tyneside Flat 99 year leases become unacceptable to mortgage lenders.²⁰⁰

8.5.10 Review of Expected Additional Costs

The following table summarises the analysis in sections 8.5.2 to 8.5.9 on when additional costs are likely to arise. Column 1 specifies likely ‘triggers’ or events generating additional costs and columns 2, 3 and 4 the standard Tyneside Flat structure, the South Shields structure and a possible new freehold land obligation structure respectively.

1	2	3	4
Event	Standard	South Shields	Land Obligation
First lease plan	Yes	Yes	Yes
Second lease plan	Yes	No	Yes
Transfer of reversion	Yes	No	No
Land Registry reversion fee	Yes	No	No
Solicitors’ registration charges	Yes	Yes *	No
Lease extension charges	Yes	Yes*	No
* With the South Shields structure, solicitors’ registration and lease extension charges would only arise on dealings with the first flat.			

¹⁹⁹ Three quarters of the South Shields participants, interviews 7,8 & 19, all GQ 7(b) (ii), mentioned that the early form of the South Shields lease was for 99 years.

²⁰⁰ See ch.8, para.8.4.5.

The above only paints a broad brush, but in general terms shows that the standard Tyneside Flat documentation is likely to generate additional costs more frequently than the South Shields scheme and even more often than would happen if land obligation reform enabled individual flats to be sold on a purely freehold basis.²⁰¹ However, conversion to a freehold land obligation structure could be costly.²⁰² As previously illustrated, when participants were asked whether they thought the mixed freehold /leasehold structure increased conveyancing costs only 38% definitely thought that it did so.²⁰³ In answer to supplementary questions all of that 38% thought that costs would be less if flats could be sold on a purely freehold basis and 55% though they would be less if the South Shields scheme were used, figures which roughly accord with the above table.²⁰⁴ The reason for the discrepancies probably stem from a lack of definition as to what was covered by the term ‘conveyancing costs’,²⁰⁵ by conveyancers’ different experiences and perhaps by reluctance on the part of some conveyancers outside the South Shields area to admit to possible merits in the South Shields scheme.²⁰⁶

Costs questions are always likely to be present, but do not appear to be a major disadvantage with the standard Tyneside Flat scheme. Over 60% of participants said that the standard Tyneside Flat documentation either did not result in their charging more or only sometimes did so.²⁰⁷ There is also evidence to suggest that many north eastern conveyancers seek ways to avoid costs.²⁰⁸ Both sellers and purchasers are free to shop around, with the added flexibility of using licensed conveyancers or acting for themselves. The position today is very different from the second half of the nineteenth century when Tyneside Flats were first being built, when the legal profession was alleged to have an ‘iron grip’ on the title deeds,²⁰⁹ and when in some cases the cost of transferring small properties could exceed the purchase

²⁰¹ However, plans costs are often particularly high (see ch.8, para.8.5.3) and will normally arise only once with the South Shields scheme, but twice with both the other two structures.

²⁰² See ch.8, para.8.9.4.

²⁰³ See ch.8, para.8.5.2.

²⁰⁴ Only positive respondents were asked to answer supplementary questions, since it was assumed that negative respondents would automatically say that the other two schemes would not reduce costs. However, in view of the discrepancies in some of the other answers by negative respondents, see ch.8, para.8.5.2, fn 132, it might have been instructive to ask them. Filter questions are discussed in ch.7, para.7.4.5.

²⁰⁵ See ch.8, para.8.5.2.

²⁰⁶ See ch.7, para.7.4.3.

²⁰⁷ See ch.8, para.8.5.2.

²⁰⁸ E.g., by preparing their own lease plans (see ch.8, para.8.5.3), absorbing costs (see ch.8, paras 8.5.5. & 8.8.3) & disbursements (see ch.8, para.8.5.8) & not sending notices to solicitors (see ch.8, para.8.5.8).

²⁰⁹ See letter dated 22 September 1885 from the Duke of Marlborough to the Times quoted in Offer A, *Property and Politics 1870 -1914*, (n.145), p 42.

price.²¹⁰ Moves to reduce costs then were closely associated with attempts to establish an effective Land Registry, whose impact is considered in next section.

8.6 Land Registration

8.6.1 Introduction

Complexity and cost were major obstacles to the transfer of land throughout the nineteenth century. In the last decades of the Victorian era registration of title was seen as part of the answer and as an element in the ‘free trade in land’ movement of the time.²¹¹ Ultimately, in the major property reforms of 1925, a comprehensive Land Registration Act was passed and was to survive, largely unscathed, until the LRA 2002.²¹²

This section outlines the Registry’s role in approving and processing applications and participants’ views on whether, in practice, the mixed freehold /leasehold structure complicates registration. The accounts reveal a far more co-operative approach between the legal profession and the Land Registry than existed when compulsory first registration was originally introduced in the late 1890s.²¹³

8.6.2 Approving Documentation

Applications to the Registry based on early versions of the standard Tyneside Flat documentation generated a substantial volume of pre-prepared ‘standard’ land registry requisitions. These mainly arose as a result of mapping difficulties, such as a failure to include the whole of the landlord’s registered title in the two lease plans, by conflicts between those plans and, above all, by inconsistencies within individual leases, particularly between the extents transferred and the easements granted and reserved. Further discussions and correspondence between the Land Registry and local conveyancers resulted in detailed

²¹⁰ See Perkin H, ‘Land Reform and Class Conflict in Victorian Britain’ in Butt J and Clarke I (Eds), *The Victorians and Social Protest*, 1st ed., (Newton Abbot: David & Charles, 1973), p 193.

²¹¹ Ibid, p.191. See also ch.3, para.3.4 6.

²¹² For an overview of the history of land registration see, e.g., Dixon M et al., *Registered Conveyancing*, (n.150), paras 1.003 -1.014.

²¹³ See s.20 LTA 1897. The setting up of an effective Land Registry was then vigorously opposed by the Law Society - see Offer A, *Property and Politics 1870 -1914*, (n.145), p.46 & pp.68-84.

amendments to the standard Tyneside Flat form of lease.²¹⁴ Mapping problems were mentioned by one participant who thought that the mixed freehold /leasehold structure did complicate registration because, *at one time* (my italics), instead of four registrations for each pair of flats, each building would end up with six, with small areas like coal houses included in separate titles.²¹⁵ This participant implied this was a past problem and as no other participants mentioned similar difficulties, it seems these mapping difficulties are no longer a significant problem. At the time when data was collected the standard Tyneside Flat lease had remained largely unaltered for over 25 years,²¹⁶ although it now has to contain certain ‘prescribed clauses’.²¹⁷

8.6.3 Processing Applications

Generally the Registry’s approach when processing applications to register transactions based on the standard Tyneside Flat documentation is the same as for any other application. Accordingly, knowledge that the mixed freehold/leasehold structure has been set up as a conveyancing device is simply one of the background factors that assists the Registry in exercising its discretion. The Registry claims to exercise that discretion ‘in the light of its practical experience and on good insurance principles,’ which enable it to ‘disregard flaws in a title that it considers unlikely to give rise to a claim for compensation under the provisions of the LR A 2002’.²¹⁸ The Registry’s long standing willingness to accept, usually without question, transfers pursuant to powers of attorney granted in standard leases²¹⁹ seems to fall comfortably within the scope of this discretion.²²⁰

²¹⁴ In 1984 the Registry gave a talk to a meeting of over 100 local conveyancers, when the then standard Tyneside Flat documentation was discussed. After that meeting the Registry wrote to the Newcastle Law Society suggesting amendments to the wording of the standard Tyneside Flat lease, which were adopted. See also ch.5, para.5.3.3.

²¹⁵ Interview 10, GQ 19.

²¹⁶ See ch.8, para.8.3.3 for amendments that conveyancers have made.

²¹⁷ See *Land Registration Rules 2003* SI 2003/1417, r.58 A (4), inserted by *The Land Registration (Amendment) (No 2) Rules 2005* SI 2005/1982, r.5, & see Dixon M et al *Registered Conveyancing*, (n.150), para.25.003.

²¹⁸ See Dixon M et al *Registered Conveyancing*, (n.150), para.9.011.

²¹⁹ See ch.8, para.8.8.3 & fn 333.

²²⁰ It is difficult to see what ‘loss’ a freeholder could claim to have suffered, even if a power of attorney or its use, is technically flawed. The landlord is under a duty to transfer the reversions and their value is minimal. Moreover, if a leaseholder exercises a power of attorney it is likely to be at the expense of the other leaseholder, thus saving the landlord costs - see further ch.8, para.8.8.3.

It has long been the Registry's practice to disregard technical defects if the registrar believes that the applicant nevertheless has a good holding title which is unlikely to be disturbed.²²¹ The Registry's current stated policy of endeavouring to cure defective titles by registering an absolute freehold, absolute leasehold or good leasehold title is also long standing.²²² In the past the Registry regularly had to adopt this policy when personal representatives granted standard 999 year leases of Tyneside Flats. Personal representatives had all the powers of trustees for sale²²³ and therefore, unless those powers had been extended, they were limited to the powers of a tenant for life and trustees under the SLA 1925.²²⁴ This in turn meant that technically they could only grant Tyneside Flat, and other 'residential', leases for 50 years.²²⁵ The Registry's practice in such cases was to offer a good leasehold title.²²⁶ These concerns became redundant for post 1996 leases when trustees were given 'all the powers of an absolute owner'.²²⁷ From then onwards, provided satisfactory evidence of the landlord's title was shown, the Registry could automatically grant an absolute leasehold title for new 999 year leases by trustees, a more acceptable outcome for both leaseholders and their lenders.²²⁸

'Dematerialisation', or the process of effecting transactions electronically without paper documentation, is another more recent area where law reform has already had, and should continue to have, an impact on Tyneside Flat conveyancers. This was illustrated by one participant who said that her practice of not giving notice of transactions to landlord's solicitors had not caused any difficulties, but that it used to do so when lenders took title deeds and asked 'where is it?' i.e. where is the receipted notice.²²⁹ The fact that Land and Charge Certificates will no longer be evidence of title²³⁰ should mean that past registration

²²¹ See ss 9 (3) & 10 (4) LRA 2002, replacing s.13 (c) LRA 1925.

²²² See Dixon M et al *Registered Conveyancing*, (n.150), para.9.011.

²²³ See s.39 AEA 1925.

²²⁴ See s.28 (1) LPA 1925.

²²⁵ See s.41 SLA 1925. S.41 included a power to grant 999 year 'building' leases, but it seems clear that a standard Tyneside Flat lease could not be construed as a 'building' lease – see ss.44(1), 117 (1) (i) SLA 1925 and Megarry R and Wade H *The Law of Real Property*, 4th ed., (London: Stephens and Sons, 1975), pp.334 -335.

²²⁶ An absolute title was granted if the consents of all beneficiaries under the trust were produced.

²²⁷ See s.6 (1) TLATA 1996, which was brought into force on 1 January 1997 by the *Trusts of Land and Appointment of Trustees Act 1996 (Commencement) Order 1996* SI 1996/2974, made under s.27 (2) of the 1996 Act. For a detailed commentary on these provisions see, e.g., Farrand J and Clarke A, *Emmet and Farrand on Title* loose leaf ed., (London: Sweet and Maxwell, 2008), paras 22.012 & 22.015.

²²⁸ See *CML Handbook*, (n.102), Pt 1, para.5.4.2, which states those circumstances where a good leasehold title is acceptable and which indicates that in some circumstances indemnity insurance may be needed.

²²⁹ Interview 12, GQ 12 (a) (ii). In recent years, even before the passage of the LRA 2002, mortgage lenders increasingly left the charge certificate on deposit at the Registry until after the charge was cancelled - see ss 63(1) & 65 LRA 1925 and Dixon M et al, *Registered Conveyancing*, (n.150), para.4.010.

²³⁰ See Dixon M et al *Registered Conveyancing*, (n.150), para.4.010.

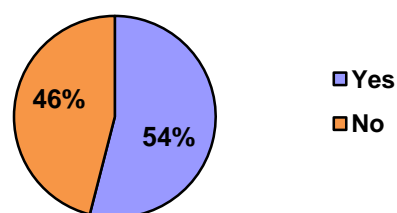
delays because of requisitions for missing or lost certificates, often relating to a subsequently acquired freehold reversion in the ‘other’ flat, will no longer be necessary.

The passage of time has smoothed land registration problems but, if difficulties do arise, they are still likely to be more complicated if the standard Tyneside Flat documentation is used rather than the South Shields structure. Potentially registration would also be easier if land obligation reform enabled individual flats to be sold on a purely freehold basis. This is particularly true for mapping difficulties. For example, if there is an error in a standard Tyneside Flat lease plan and all flats are registered, four title plans will need amendment whereas, with either of the other structures, only two title plans would be involved.

8.6.4 Registration in Practice

Participants were asked whether they considered that the mixed freehold/leasehold system complicates registration in the Land Registry.²³¹ A very high percentage of respondents answered this question and, as can be seen from the chart below, a small majority thought that complications did arise.

Complicates Registration?



Of the 54% who gave a positive response, the overwhelming majority, 80%, thought that registration would be simpler if individual flats could be transferred either on a purely freehold basis or under the South Shields structure. Although only positive respondents were specifically asked if registration would be easier under alternative structures, nearly a quarter,

²³¹See GQ19.

23%, of those who thought the standard Tyneside Flat scheme did not complicate registration volunteered that registration on a purely freehold basis would be simpler.

It seems self evident that dual registration is likely to be more complicated than a single registration. It therefore seems surprising that more respondents did not instinctively consider this to be the case, particularly given that all but one had said that they had acted in a transaction where the freehold reversion in the other flat was not acquired contemporaneously with the leasehold transfer.²³² Even those who thought that mixed freehold/leasehold documentation complicated registration expressed little anxiety. For example, one participant who thought that complications were increased said that they were not for him because he understood the structure.²³³ The reason for the lack of any actual or perceived difficulty may partly lie in the attitude of the land registry said by one participant as ‘generally’ being very helpful²³⁴ and by another as making registration as ‘easy as possible’.²³⁵ No adverse comments about the registry’s approach were made.²³⁶ A more substantial explanation may be that, with the passage of time, many initial difficulties have been ironed out. This was hinted at by the participant who, although she thought the standard documentation made registration more complicated, considered there were ‘no problems once set up’.²³⁷ This presumably refers to the reversions being transferred, after which they could each be included in the same transfer as the leasehold interest in the other flat, a factor which two respondents said had resulted in their not charging any extra costs.²³⁸ Once this stage has been reached additional land registry fees, and complications over their collection, will no longer arise.²³⁹ By then most plans problems would also have been resolved.²⁴⁰

Ever since the standard Tyneside Flat documentation was first promulgated a close, even symbiotic, relationship has existed between local conveyancers and the Land Registry.²⁴¹

²³² See ch.8, para.8.4.4.

²³³ Interview 15, GQ 19.

²³⁴ Interview 21, GQ 19.

²³⁵ Interview 16, GQ 19.

²³⁶ The initial letter to possible participants (see Appendix E) informed them of the researcher’s past Land Registry employment, but made it clear that the research project was completely independent – see ch.7, para. 7.3.3.

²³⁷ Interview 14, GQ 19.

²³⁸ See ch.8, para.8.5.8.

²³⁹ See ch.8, para.8.5.4.

²⁴⁰ See also ch.8, para.8.5.3. One respondent, interview 29, GQ23, considered that the plan to the lease was ‘the key to its success or otherwise’.

²⁴¹ For a criticism of ‘double-decker’ conveyancing, ‘private below, official above,’ see Offer A, *Property and Politics 1870 - 1914*, (n.145), pp.86 - 87.

This has helped smooth or improve the registration process as have recent property law reforms such as the TLATA 1996 and the LRA 2002. Close links seem likely to increase with the advent of electronic conveyancing and associated initiatives aimed at providing a ‘permanent connection’ between conveyancers and the Registry so that, for example, conveyancing professionals and their clients will be able to check the progress of a particular transaction.²⁴² An increased knowledge of ownership could be helpful for the enforcement of leaseholders’ obligations discussed in the next section.

8.7 Leaseholders’ Obligations and Their Enforcement

8.7.1 Introduction

Chapter six considered the impact and potential impact of leasehold legislation on the standard Tyneside Flat documentation. This section considers the extent to which legal and practical complications arise in practice. The obligation most likely to cause difficulty is the leaseholder’s obligation to pay half the costs of ‘joint installations’ and also, to a lesser extent, the interlinked obligations and provisions for dispute resolution, insurance and forfeiture.

8.7.2 Joint Contributions or ‘Service Charges’

In the standard Tyneside Flat lease, each leaseholder covenants to keep his flat in ‘good and tenantable’ repair.²⁴³ In addition, leaseholders covenant to pay half the cost of repairing or renewing any ‘common installations’ or shared land.²⁴⁴ Common installations are defined in the standard lease as meaning:

‘ ... all spouts gutters downcomers and other things conveying rainwater from the Building any yard or garden walls of any Shared Land chimney stacks and the gas and water pipes

²⁴² See further Dixon M et al *Registered Conveyancing*, (n.150), para.19.010.

²⁴³ See cl.3 & cl. (c) 5th Sch. standard lease. For an account of how ‘common’ repairing obligations are construed, see, e.g., Garner S and Frith A, *A Practical Approach to Landlord and Tenant*, (n.91), paras 7.09 – 7.18.

²⁴⁴ See cl.3 & cl. (d) 5th Sch. standard lease.

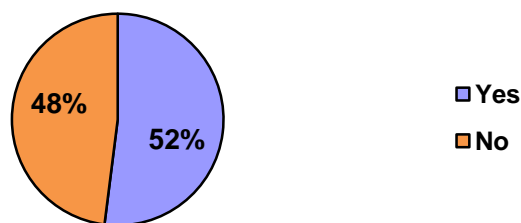
conduits and electric wires and other gas water and electrical installations in under or upon the Building or its curtilage the use of which is common to the Lessor and Lessee’²⁴⁵

Since each flat is almost entirely self contained and since the two flats together comprise the whole building, nearly all major repairs are the direct responsibility of the individual leaseholders.²⁴⁶ For example, the roof and ‘roof void’ are specifically included in the upper flat and the foundations in the lower flat.²⁴⁷ This need not have been the case. When the standard lease was originally drafted, one participant suggested that both the roof and the foundations should be defined as ‘joint installations’, as he felt that responsibility for their repair and maintenance should not fall wholly on individual flat owners.²⁴⁸

8.7.3 Knowledge and Regularity of Contributions

The relative insignificance of joint repairs is illustrated in the chart below which shows that only just over half of all respondents said that they had known of joint contributions for repairs to ‘common installations’ being required.²⁴⁹

Heard of Joint Contributions?



²⁴⁵ See cl.1 (E). ‘Building’ is defined in cl.1 (A) 1st Sch. standard lease as ‘the house in two flats known as numbers...together with any land ‘used and enjoyed therewith’.

²⁴⁶ One participant, interview 20, GQ 16 (c), provided an exceptional example of a substantial ‘joint repair’ affecting both flats, but which was not a ‘common installation’. This was for new tiles on an end gable wall costing ‘a few thousands’.

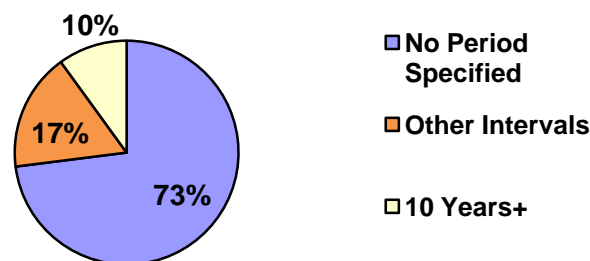
²⁴⁷ See 1st Sch. standard lease for definitions of ‘the demised premises’ and ‘the other flat’.

²⁴⁸ Interview 21, GQ 16 (e). If substantial repairs, particularly for the roof/roof void, had been the joint responsibility of both leaseholders, it is likely that statutory provisions for ‘major’ repairs would play a much more significant role - see ch.8, para.8.7.4. However, it seems right that upper flat leaseholders should be responsible for the roof/roof void, since the loft space has the potential for residential use - see ch.2, para.2.7.2.

²⁴⁹ This was in response to GQ 16.

Nearly half of those who had not known of any joint contributions were from participants in Derwentside, Morpeth and Tynedale, areas with relatively few Tyneside Flats. Of those who had heard of joint contributions, the repairs most often mentioned were to gutters and ‘downcomers’, sometimes coming to light on a purchaser’s survey.²⁵⁰ The spasmodic nature of the repairs was apparent from the replies of participants. There was no suggestion that any repairs were required within any of the four specific periods of less than 10 years mentioned in supplemental questions²⁵¹, with just three postal respondents, 10 %, saying they were required at intervals of more than 10 years.²⁵² If responding at all, participants seemed more comfortable answering the less precise ‘other intervals’ option with comments such as ‘ad hoc when required’²⁵³ or ‘as and when required’.²⁵⁴ The chart below illustrates how often respondents thought contributions were required.

Regularity of Contributions



8.7.4 Impact of the LTAs 1985 and 1987 on Joint Contributions

The significance of leaseholders’ ‘joint contributions’ is that technically they appear to be ‘service charges’ falling within the provisions of the LTA 1985.²⁵⁵ The LTA 1987, as subsequently amended, provides that any demand for service charges, will not be treated as due unless the demand contains the landlord’s name and address for service.²⁵⁶ Participants

²⁵⁰ Interviews 6 & 18, both mentioned this in response to GQ 16 (b) (vi).

²⁵¹ See GQ 16 (b) (i) – (iv).

²⁵² Interviews 23, 25 & 27, all in response to GQ 16 (b) (v).

²⁵³ Interview 6, GQ 16 (b) (vi).

²⁵⁴ Interview 11, GQ 16 (b) (vi).

²⁵⁵ See ch.6, para.6.5.2.

²⁵⁶ See ch.6, para.6.5.11.

were asked whether in practice these provisions were complied with.²⁵⁷ All who replied said that this was not so.²⁵⁸ In addition, only one participant thought that the failure to provide this information would give rise to any difficulty.²⁵⁹ As another participant put it, ‘they live one above the other... [they] just call round’.²⁶⁰ The widespread lack of compliance with the legislation, combined with the apparent absence of any resulting difficulty, support the view that, in all cases where *both* Tyneside Flats are owner occupied, the owners should be exempted from what, in any event, appears to be superfluous legislation.²⁶¹

The amended LTAs 1985 and 1987 also contain detailed accounting provisions for service charges.²⁶² Some were in force when data was collected, some have since been brought into force and some have yet to take effect.²⁶³ All seem inappropriate for owner occupied, self contained two flat buildings.²⁶⁴

The overwhelming majority of repairs are of a comparatively minor nature. The LTA 1985, as amended, requires a landlord to consult if he wishes to instigate ‘qualifying’ that is major, repairs above a fixed amount.²⁶⁵ Major repairs are at present almost unheard of, but the age of most Tyneside Flats means that they may become a more regular occurrence in the future.²⁶⁶ On balance, given the obvious desirability of consultation, especially for substantial repairs, and in the absence of any requirement for consultation in the standard Tyneside Flat lease, the consultation provisions of the LTA 1985 should perhaps be left to stand as an encouragement or ‘back up’ of last resort.²⁶⁷

²⁵⁷ See GQ 16 (c) (i).

²⁵⁸ Just under half, 46%, of all participants replied to this question.

²⁵⁹ Interview 27, GQ 16 (ii). This response has to be treated with some caution, as other replies by this postal respondent were not shared by any other participants.

²⁶⁰ Interview 1, GQ 16 (c) (ii). But they will not usually live next to each other in those districts, particularly student areas, where flats are sublet.

²⁶¹ Superfluous because, if really necessary and not already known, landlords’ names and addresses can usually be obtained from other sources - see ch.6, para.6.5.12. For suggested legislative amendments, see ch.9, para. 9.2.2.

²⁶² See ch.6, para.6.5.5.

²⁶³ Ibid.

²⁶⁴ Ibid and see ch.9, paras 9.2.2 & 9.2.3 for suggested legislative amendments.

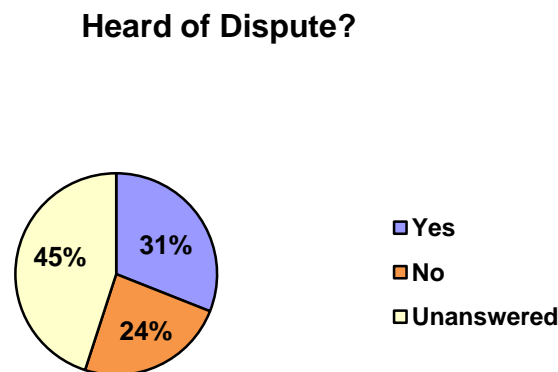
²⁶⁵ See ch.6, para.6.5.4.

²⁶⁶ The only definite major repair for a ‘common installation’ that any participant mentioned, interview 6, GQ 15 (b), was the repair of a drain in the back yard – see ch.8, para.8.7.8. It may also be that the only case involving the lease dispute mechanism (see ch.8, para.8.7.6) was for a major repair, but this was not clear. If climate change results in more extreme weather patterns, this may also increase the likelihood of damage to, e.g., chimney stacks, listed as a ‘common installation’ in the standard lease and mentioned as a possible item for repair by two participants (interviews 18 & 19, both GQ 16 (a)).

²⁶⁷ But participants would need to be aware of the legislation. In reality, it is likely that flat owners would consult on major repairs. There is evidence that they already do so for minor ones - see ch.8 para.8.7.6.

8.7.5 Disputes over Joint Contributions

Just over half of all participants had heard of any joint contributions being required.²⁶⁸ It is therefore not surprising that, as shown below, less than one third of all respondents said they had heard of any disputes over joint contributions.



The high percentage of unanswered responses mainly arose because most, 71%, of those who had *not* heard of joint contributions²⁶⁹ would necessarily not know of disputes relating to them and therefore did not answer the supplementary question about contribution disputes.²⁷⁰ In reality therefore most of these unanswered responses can legitimately be regarded as being a ‘No’ response.²⁷¹ The figures seem to suggest, as shown below, most of those who had heard of joint contributions had also heard of a dispute relating to them.

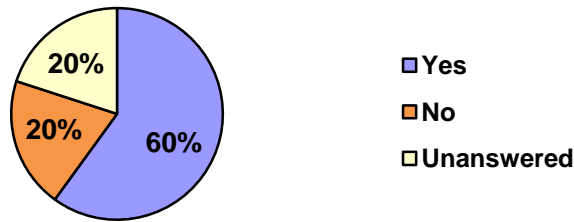
²⁶⁸ See ch.8, para.8.7.3.

²⁶⁹ Ibid.

²⁷⁰ See GQ 16(e). The remaining 29% of those who had not heard of joint contributions, but who did choose to answer the supplementary dispute question all said they had not heard of any disputes.

²⁷¹ If those who had heard of joint contributions, but did not answer the question about disputes are excluded, the percentages would only be slightly different, namely ‘Yes’ (35%), ‘No’ (27%) & ‘Unanswered’ (38%).

Heard of Joint Contributions and Dispute?



It therefore seems likely that knowledge of joint contributions sometimes arises just because there is a dispute. No precise figures are available as to how many disputes arise, but comments made suggest they are very infrequent. Two experienced participants, who had each been in practice for some decades, indicated that they had only heard of disputes once²⁷² and another that he had only heard of them very occasionally.²⁷³

8.7.6 Dispute Resolution

The standard Tyneside Flat lease provides a mechanism whereby disputes relating to repairs or contributions to repairs are referred to a surveyor nominated on the application of either party by the president of the Newcastle upon Tyne Law Society.²⁷⁴ Only one participant said that she had known of a case where this mechanism had been used. Her recollection was that the outcome was unsatisfactory for both parties, as the procedure was ‘so expensive’.²⁷⁵ Another participant said that the threat of using the lease dispute mechanism had ‘assisted’,²⁷⁶ although he and two other participants²⁷⁷ maintained that disputes over joint contributions were resolved by letter. The dilemma over how far it is worth pursuing any claim was illustrated by a participant who said that she currently had a case where the owner of the ‘other’ flat had rented it and refused to contribute. Her client was considering whether to take court proceedings or just do the work himself.²⁷⁸ Further evidence of self help was apparent

²⁷² Interview 14, GQ 16(e) and interview 17, GQ 16(e) (i).

²⁷³ Interview 19, GQ 16(e).

²⁷⁴ See cl.7 & thesis ch.6, para.6.5.3.

²⁷⁵ Interview 14, GQ 16 (e) (i). Extensive schedules were apparently prepared with each party paying half the costs, including those of the surveyor.

²⁷⁶ Interview 6, GQ 16 (e) (ii).

²⁷⁷ Interviews 23 & 25, both GQ 16(g).

²⁷⁸ Interview 17, GQ 16(e) (i). As this participant put it, ‘No point in suing, if you get nowt’.

form the comment, made by one third of all participants who had heard of a dispute, that disputes were resolved directly between flat owners. As another participant said, ‘They knock on door. Sometimes ‘yes’, sometimes ‘no’ and, if ‘no’, is it worth getting done? They do it themselves often’.²⁷⁹

As a result of amendments made to the LTA 1985, all disputes relating to service charges now have to be referred to the LVT.²⁸⁰ Although the LVT procedure could be useful, it is considered that the relatively informal Tyneside Flat lease mechanism should also remain available to standard Tyneside Flat and other similar leaseholders.²⁸¹ None of the respondents mentioned the LVT, so that its involvement at present appears to be largely, if not entirely, theoretical.

8.7.7 Insurance Obligation

The *CML Handbook* requires ‘adequate’ obligations and arrangements for buildings insurance.²⁸² In the standard Tyneside Flat lease, each leaseholder covenants to insure his own flat in the joint names of himself and his landlord and to produce the policy to the landlord, or his agent, on demand.²⁸³ Although mortgage lenders have for some time expressed concern over ‘individual’ policies,²⁸⁴ as indicated below, less than one fifth of all participants said that this clause had given rise to any difficulty.²⁸⁵

²⁷⁹ Interview 18, GQ 16 (e) & (g).

²⁸⁰ See ch.6 para.6.5.3.

²⁸¹ *Ibid.* It has been suggested that, as a result of an overhaul in organisation and training, the LVT can now offer a ‘speedy and cheap’ dispute resolution service with provision for a paper determination which reduces costs - see Davey M ‘The Regulation of Long Residential Leases’ in Cooke E (Ed), *Modern Studies in Property Law Vol 111*, 1st ed., (Oxford: Hart, 2005), p.222. For suggested legislative amendments, see ch.9, para.9.2.2.

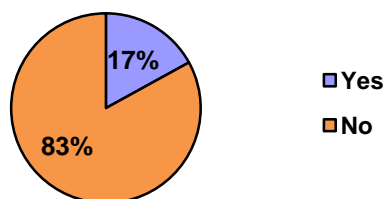
²⁸² See *CML Handbook*, (n.102), Pt 1, para.5.10.4.2. None of the five major mortgage lenders mentioned in n.107 have any special requirements.

²⁸³ See cl. (j) 5th Sch. standard lease. One participant, interview 9, GQ 8 (i) & (ii), considered this clause to be outdated and that leaseholders ‘never’ abide by the requirement for insurance to be in joint names.

²⁸⁴ See BSA ‘*Leaseholds – Time for a Change*’ (BSA Report) (London: BSA, 1984), Appendix C, para.5 (a) which says that an individual insurance policy for each flat is ‘now recognised to be unsatisfactory.’ It seems unlikely that mortgage lenders would be any less concerned now.

²⁸⁵ See GQ 15 (a).

Insurance Covenant Difficulty?



Comments made by over one third of all participants suggest that difficulties over the production of insurance policies had not arisen because many conveyancers were only concerned with the insurance on their clients' own flat, summed up by the identical phrase, used by two participants, that they were 'never asked to produce [their client's policy] and never asked to see [the other policy]'.²⁸⁶ Some 17% of participants indicated that they were only occasionally involved in producing insurance details, with rather more, 21%, suggesting that they only became involved when conveyancers from outside the area were acting, an underlying 'them and us' approach, which surfaced elsewhere.²⁸⁷ Whilst local conveyancers are apparently prepared to 'take a lot on trust',²⁸⁸ it seems that some 'external' conveyancers are more mindful of the danger, mentioned in the 1984 *BSA Report*, that there is little point in making sure a lender's security is fully covered, if there is major damage to the rest of the 'block' and that turns out to be is underinsured.²⁸⁹ The lack of common parts in most pairs of Tyneside Flats probably means that mortgage lenders will not usually require a single policy for the whole building.²⁹⁰

A general lack of concern with the insurance on the 'other' flat was again apparent from the finding that, as indicated below, just under one third of all participants said that in practice they sought details of their landlord's insurance.²⁹¹

²⁸⁶ Interviews 15 & 18, both GQ 15(a).

²⁸⁷ E.g., in the requirement for new landlords to serve notice of the transfer to them - see ch.8, para.8.8.4.

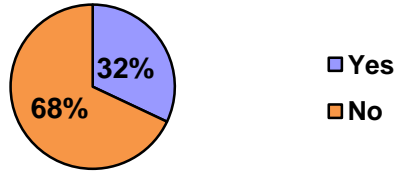
²⁸⁸ Interview 12, GQ.15 (a).

²⁸⁹ See *BSA Report*, (n.284), Appendix C, para.4. See also ch.6, para.6.5.6.

²⁹⁰ See *BSA Report*,(n.284), Appendix C, para.3 and *Report of the Committee of Inquiry on the Management of Privately Owned Blocks of Flats* (Chairman E. Nugee) (*Nugee Report*), (London: HMSO, 1985), para.7.5.3.

²⁹¹ See GQ 15 (b).

Landlords Insurance Details Sought?



Accompanying comments suggest that, in practice north eastern conveyancers seldom seek details of their landlord's insurance. One experienced participant said that she had done so only once²⁹² and three others said they did so 'only very occasionally'.²⁹³ Again, it seems that outside firms sometimes act as a spur to enquiries being made, if they cannot be dissuaded from pursuing them by being told, as one participant maintained he told those 'outside', that we 'never bother up here'.²⁹⁴ As most Tyneside Flats were built before 1914,²⁹⁵ lack of repair resulting in inadequate shelter or support may become an increasing problem.²⁹⁶ This might necessitate a more concerned approach towards the insurance of the 'other' flat.²⁹⁷

8.7.8 *The Impact of the LTA 1985 and the LTA 1987 on Insurance Obligations*

Landlord and tenant 'insurance' legislation has little relevance to standard Tyneside Flat leases, mainly because insurance premiums fall outside service charge regulation.²⁹⁸ In addition, as both flat owners are able to see each others' insurance details under the

²⁹² Interview 17, GQ 15(b).

²⁹³ Interviews 4, 7 & 8, all GQ15 (b). Over one quarter, 28%, suggested that enquiries about the landlord's insurance were very infrequent.

²⁹⁴ Interview 3, GQ 15 (b). 17% of respondents mentioned outside firms in response to GQ 15(b).

²⁹⁵ See ch.2, para.2.5.1.

²⁹⁶ The *CML Handbook*, (n.102), Pt 1, para.5.10.4.1 stipulates that there should be 'satisfactory legal rights' for support, shelter and protection and other matters. Cl.2, cl. 3, 2nd & 3rd Schs standard lease grants/reserves rights of support and shelter.

²⁹⁷ This need not necessarily be difficult. If a search at the Land Registry shows that the 'other' flat is mortgaged, then 'adequate' insurance could often safely be assumed, especially with well known lenders. If the 'other' flat is not mortgaged then, even if policy details are not requested, as they could be under cl. (j) 5th Sch. standard lease, enquiry could be made of the other leaseholder to confirm his insurance arrangements.

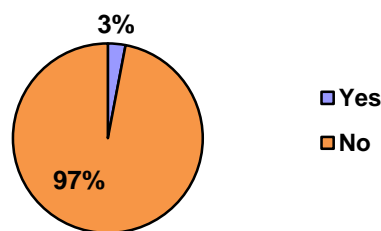
²⁹⁸ See further ch.6, para.6.5.6.

provisions of the standard Tyneside Flat lease,²⁹⁹ they would usually have no need to seek the assistance of the LV T for amendment to the lease.³⁰⁰ However, difficulties may arise from the prevailing tendency of north eastern conveyancers to see Tyneside Flats as individual units, rather than as part of a two storey block. One participant who thought that he should really see the insurance on the other flat, but that it was not ‘realistic’ to ask for it, gave as an example a case where a drain, a ‘common installation’ had collapsed in the back yard.³⁰¹

8.7.9 Enforcement of Leaseholders’ Obligations

The standard form of lease contains the usual provision for forfeiture for breach of obligation,³⁰² but before this can be enforced a ‘s.146 Notice’ must be served.³⁰³ Participants were asked whether they were aware of this having been done.³⁰⁴ As indicated below, this was an extremely rare occurrence.

Aware of S.146 Notices?



The positive response represents just one participant who could recall a single occasion when a s.146 Notice had been served.³⁰⁵ This occurred where a flat had been occupied by students in breach of the user obligation. The action was compromised by the leaseholder agreeing not to re-let in breach of the obligation at the end of the student tenancy. Another respondent mentioned a case where s.146 proceedings had been threatened because business leaseholders

²⁹⁹ See cl.(j) 5th Sch. standard lease.

³⁰⁰ See further ch.6, para.6.5.6.

³⁰¹ Interview 6, GQ 15 (b). The freehold in the yard was held by the upper flat and the leasehold by the lower flat. The participant considered that both insurers should pay. Two other firms, interviews 1 & 19, both GQ 15 (b), also expressed concern that they did not check the insurance details of the other flat.

³⁰² See cl.8 standard lease.

³⁰³ See further ch.6, para.6.5.9.

³⁰⁴ See GQ 17.

³⁰⁵ Interview 18, GQ 17. All participants answered this question, so that statistically we can be 95% certain that between 82% - 100% of north east conveyancers are not aware of any s.146 Notices being served.

were using a flat as a betting shop and making substantial unauthorised repairs.³⁰⁶ No cases of actual forfeiture of a Tyneside Flat lease were reported.³⁰⁷

It is sometimes argued, or implied, that forfeiture is inappropriate for long term residential leases.³⁰⁸ The additional proposal that, because of the disparity of interest between freeholder and leaseholder, leaseholders should have a corresponding right to 'forfeit' the freehold,³⁰⁹ would often be superfluous in the case of Tyneside Flats. Once both standard Tyneside Flat leases have been created and the reversions transferred, there is then no 'disparity of interest', as each leaseholder then becomes the other's landlord with the capacity to forfeit the other lease. Even when only the first lease has been granted, and the first leaseholder does not have a right to forfeit as such, he is protected to the extent that the landlord covenants to perform and observe 'covenants stipulations and restrictions' in like terms to the leaseholder's covenants, the burden of which is explicitly stated to attach to the other flat until the freehold reversion in that other flat is transferred.³¹⁰

Neither of the two cases where the question of forfeiture has arisen was for a 'trivial' breach nor, perhaps surprisingly, for repair.³¹¹ It may generally be true that, as one participant said, there are 'different perceptions for long leaseholders', that everyone takes a 'sensible' view and therefore that you 'don't see litigation'.³¹² Another participant thought that forfeiture, or the threat of forfeiture, was beneficial as it helped 'keep everyone in line'.³¹³ If forfeiture is considered too drastic a remedy for long term residential leases, the rare cases when it has been used or threatened with standard Tyneside Flat leases suggest that there still needs to be a satisfactory alternative mechanism for ensuring compliance with obligations.³¹⁴

³⁰⁶ Interview 11, GQ 19 (b).

³⁰⁷ Forfeiture is generally a 'somewhat rare' occurrence despite the 'aggressively terminal tone' of most leasehold forfeiture obligations - see Gray K and Gray S, *Elements of Land Law*, (n.93), para.4.4.50. See also paras 4.4.51 - 4.4.89 for a general discussion of relief from forfeiture.

³⁰⁸ See Clarke D, 'Occupying 'Cheek by Jowl' in Bright S & Dewar J (Eds), *Land Law Themes and Perspectives*, 1st ed., (Oxford: OUP, 1998), pp. 392 - 393 and Davey M, 'Long Residential Leases Past and Present', (n.192), p.162.

³⁰⁹ See Davey M 'The Regulation of Long Residential Leases', (n.281), pp.222 - 223.

³¹⁰ See cl.5 (A) standard lease.

³¹¹ One participant, interview 4, GQ 17, who had not heard of any s.146 Notices being served, thought that forfeiture would only be likely for repair. In those parts of Newcastle where large numbers of Tyneside Flats have been sublet, e.g., to students, see ch.2.para.2.7.2, poor repair is perhaps more likely to arise.

³¹² Interview 12, GQ 17.

³¹³ Interview 11, GQ 19 (b). This phraseology brings to mind other pressures to conform - see further ch.8, paras 8.3.3 & 8.9.9.

³¹⁴ Davey suggests that landlords should be left to pursue 'normal civil remedies' for breach of obligations or perhaps that they should have a power of sale out of which they could recoup their losses and pay the balance to the leaseholder - see 'The Regulation of Long Residential Leases', (n.281), p.222.

Tyneside Flat leaseholders covenant to pay all s.146 LPA 1925 costs charges and expenses.³¹⁵ As a result of the CLRA 2002, these are now ‘administration charges’ regulated by a statutory regime similar to that applicable to service charges.³¹⁶ These administration charges are only likely to arise in wholly exceptional circumstances, but could be high. There seems little reason to exclude them from statutory requirements, such as the need to give the landlord’s name and address and an address for service.³¹⁷

Enforcement of obligations between current Tyneside Flat leaseholders depends on there being a direct landlord and tenant relationship between them. The mechanism for establishing and maintaining this relationship is discussed in the next section.

8.8 Creating and Maintaining the Landlord and Tenant Structure

8.8.1 Introduction

A criticism of many leasehold arrangements in multi storey blocks is that third party intervention is needed to enforce leasehold obligations.³¹⁸ The standard Tyneside Flat lease includes a number of special provisions designed to ensure that a direct landlord and tenant relationship is created and maintained between the two flat owners,³¹⁹ thus enabling them to enforce obligations directly against each other. This section examines how these ‘conveyancing’ provisions work in practice.

8.8.2 Granting the Second Lease

In standard Tyneside Flat leases landlords are under an obligation to grant a lease of the second flat on the same terms as the first lease if they dispose of their interest in the ‘building’ during the lease term.³²⁰ It is not known to what extent north eastern conveyancers

³¹⁵ See cl.(r) 5th Sch. standard lease.

³¹⁶ See further ch.6, para.6.5.9.

³¹⁷ Ibid.

³¹⁸ See Clarke D, ‘Commonhold: A Prospect of Promise’ (1995) 58 MLR 486, pp.488 - 489. The C(RTP)A 1999 does not provide a ‘satisfactory solution’ as it does not enable the burden of obligations to be passed to successors – see Silverman F(Ed), *The Law Society’s Conveyancing Handbook*, 17th ed., (London: The Law Society, 2010), para. K 6.3.7 and also, e.g., Gravells N, *Land Law: Text and Materials*, 4th ed., (London: Sweet & Maxwell, 2010), p.725.

³¹⁹ See ch.5, para.5.3.4.

³²⁰ See cl.5 (c) & 4th Sch. cl.(a) (i) – (iii). For the lease definition of the ‘building’ see ch.8, para.8.7.2, fn 245.

check the first lease,³²¹ or how often not doing so causes problems,³²² but all participants said they had never known of an instance where a landlord had refused to comply with his obligation to create a second lease in similar terms to the first one.³²³

This apparently universal compliance means that in two flat buildings, where both flats have standard Tyneside Flat leases, the collective enfranchisement provisions available to those leaseholders under the LRHUDA 1993, will be redundant.³²⁴ This is because, under the standard Tyneside Flat lease, if the landlord fails to comply with his obligation to transfer the reversions, leaseholders can do so by using the powers of attorney granted to them.³²⁵

8.8.3 *Transfer of Freehold Reversions*

Standard Tyneside Flat landlords are under an obligation to transfer the freehold reversions on the grant of the second lease.³²⁶ If both leases are created at the same time, it is improbable that this obligation will be overlooked, as all legal advisers are likely to insist on compliance. Difficulties are more likely if there is a long time span between the grant of the two leases, especially as the first leaseholder will not usually then be instructed or directly involved. In either case there could still be difficulties if, for some reason, the landlord refuses to comply with his obligation, As indicated below, nearly one quarter of all participants said they had acted in a purchase where this difficulty had arisen even when the landlord's whereabouts were known.³²⁷

³²¹ See ch.8, para.8.5.7 for the requirements of mortgage lenders.

³²² See further ch.8, para.8.3.8 and fn 100.

³²³ This was in response to GQ 11 (a). But conveyancers may need to think carefully about how the terms of the first lease may affect their retained flat as both original landlords and new leaseholders are in effect bound by the terms of the first lease-see cl.5 (A) standard lease. One participant, interview 20, GQ (i) & (ii), mentioned a case where her client wished to amend the provision in the lease which requires consent for structural alterations (clause (c) 5th Sch. standard lease) as her client thought that she might wish to alter the retained flat and wanted to avoid difficulties in having to obtain the consent of the first leaseholder.

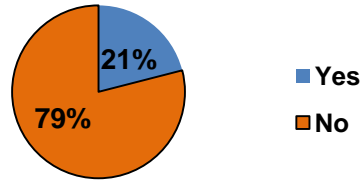
³²⁴ See further ch.6, para.6.4.2.

³²⁵ Ibid & see ch.5, para.5.3.4.

³²⁶ See cl.5 (c) & 4th Sch. cl. (a) (i) – (iii) standard lease & see ch.5, para.5.3.4.

³²⁷ See GQ 10 (a).

Landlord's Whereabouts Known- Refusal to Transfer



It seems clear that this was an infrequent occurrence, perhaps because conveyancers and their clients try to make the system work.³²⁸ Participants generally declined to give any percentage estimate where a difficulty in these circumstances had arisen on a purchase. The highest percentage given was ‘5% or less’³²⁹ and the lowest ‘less than 1%’³³⁰. Verbal estimates such as ‘very few’³³¹ and ‘not very often’³³² were typical. A high percentage of those who had experienced difficulty, 86 %, said this was overcome by making use of the power of attorney provisions, although not always immediately. One participant considered that there ‘tends to be a failure to do anything about it’, that the situation was ‘just left’ and that ‘eventually’ the power of attorney was used.³³³ Although not explicitly stated, it is likely that, if the failure to transfer the freehold reversion is not addressed at the time when the second lease is granted, it will be when the leaseholder comes to sell and purchasers’ solicitors insist on the position being remedied.

As is to be expected, far more respondents, 88 %, said they had acted in a purchase where the landlord’s whereabouts are *unknown* and he had omitted to transfer the reversion.³³⁴

³²⁸ E.g., one participant, interview 1, GQ 10 (a), said that ‘people tend to respond’, that if they did not do so the ‘scheme won’t work’, but that there was ‘sometimes difficulty in finding them.’

³²⁹ Interview 6, GQ 10 (a) (i).

³³⁰ Interview 13, GQ 10 (a) (i).

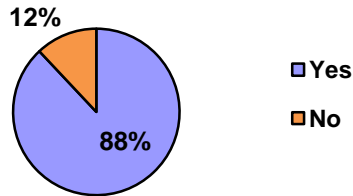
³³¹ Ibid.

³³² Interview 20, GQ 10 (a) (i).

³³³ Interview 13, GQ 10 (a) (i) and (ii).

³³⁴ See GQ 10 (b).

Landlord's Whereabouts Unknown- Refusal to Transfer



Just over half of those who had experienced problems were prepared to give a percentage estimate, but most were still relatively infrequent, falling within a bracket of either 5% or 5% or less, with two of the latter going as low as 'less than 1%'.³³⁵ However, three participants did give a higher estimate.³³⁶ All who had experienced difficulty where the landlord's whereabouts were unknown said, or implied, that the problem had been overcome by using a power of attorney, with over one fifth mentioning the cooperative approach of the Land Registry, which two participants considered was 'great at accepting' powers of attorney.³³⁷

The person asking for a power of attorney to be exercised will normally be the leaseholder of the other flat, usually because the landlord has failed to transfer the reversion.³³⁸ It is therefore to be expected that, as indicated below, nearly two thirds of the participants suggested that it was this 'other' leaseholder who pays the costs.

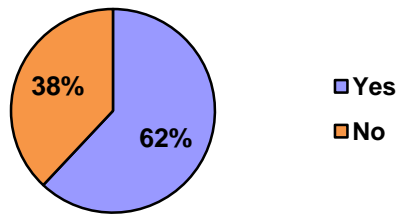
³³⁵ Interviews 13 & 15, both GQ10 (b) (i).

³³⁶ Interview 5, 10%, interview 18, 'Max' 10% & interview 23, 15% 'approx', all GQ 10(b) (i).

³³⁷ Interviews 7 & 8, both GQ 10 (b) (ii). No adverse comments were made about the Registry in relation to powers of attorney. Although no participants gave any details as to precisely how the Registry helped, it is known that the Registry usually accepts powers of attorney as being effective and does not, e.g., require any evidence that, as is required by cl.6 of the standard Tyneside Flat lease, the form of transfer of the freehold reversion had previously been specified to the landlord. It would, in any event, be impossible to specify the form of transfer to a landlord, whose whereabouts were unknown. For a discussion of the Registry's approach to processing applications, see ch.8, para.8.6.3.

³³⁸ But it might also be required if a leaseholder, who has acquired the reversion in the 'other' flat, fails to comply with his obligation in cl.(v) 5th Sch. standard lease to transfer that reversion at the same time as he transfers his leasehold interest. See ch.5, para.5.3.4 for details of the provision giving the 'other' leaseholder a power of attorney should this occur.

Does 'Other' Leaseholder Pay Costs?



Additional power of attorney costs are clearly a potential disadvantage of the promulgated Tyneside Flat scheme, although almost one third, 31%, of those who gave a positive response to the above also indicated that in practice costs were not always paid by the other leaseholder. One firm said, for example, that they were ‘not always insisted on’³³⁹ and another maintained that their firm ‘absorb a lot’.³⁴⁰ Over half, 63%, of those who gave a negative response said or implied that they absorbed the costs, with all but one mentioning that a fixed price had already been given.³⁴¹

8.8.4 Notice of Transfer

The LTA1985 requires new Tyneside Flat landlords to give written notice to their leaseholders of a transfer of the freehold reversion and of their name and address.³⁴²

Participants were asked whether in practice notice was given. As indicated below, the overwhelming majority said this was not the case with just over one tenth saying notice was sometimes given.³⁴³

³³⁹ Interview 20, GQ 10 (c).

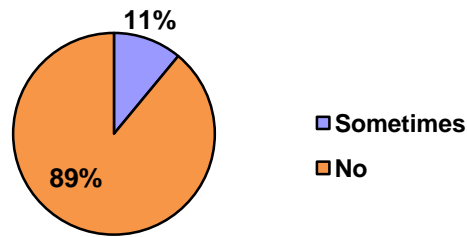
³⁴⁰ Interview 13, GQ 10 (c).

³⁴¹ See ch.8, paras 8.5.3 & 8.5.8 for examples of how some conveyancers seek to reduce costs.

³⁴² See ch.6, para.6.5.12.

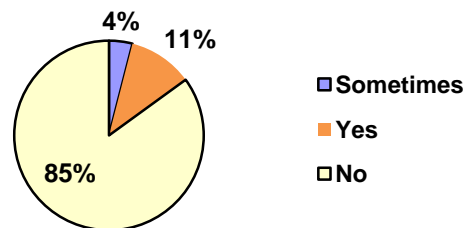
³⁴³ The percentage of those who said that notice *is* sometimes given has to be treated with some caution. Two of the three firms falling within this category gave the impression that they only said they gave notice, as they did not wish to admit that they ignored statutory requirements.

Notice Given?



As shown below, the vast majority of participants maintained that the failure to serve notice did not cause any problems.

Problems if Notice not Served?



This is another area where the influence of ‘outside’ firms is sometimes apparent.³⁴⁴ One of the three firms, who thought that failure to serve notice ‘sometimes’ caused problems, mentioned outside solicitors,³⁴⁵ as did another firm who thought failure to serve notice might cause problems as ‘occasionally solicitors out of the area require this.’³⁴⁶

Although the overwhelming majority of participants say that new landlords do not serve formal notice of their acquisition and maintain that in practice this does not give rise to any difficulty, the notice requirement could act as a reminder that the reversions need to be

³⁴⁴ See also ch.8, para.8.7.7.

³⁴⁵ Interview 2, GQ 10 (d) (iii).

³⁴⁶ Interview 11, GQ 10 (iii).

transferred.³⁴⁷ However, criminalisation imposed by the LTA 1985 for failure to give notice seems disproportionate in any case where both flats are owner occupied.³⁴⁸

8.8.5 Summary

Quantitative research data indicates that the overwhelming majority of landlords comply with their obligation to transfer the reversions. If they fail to do so, for example when their whereabouts are unknown, conveyancers usually make use of the complementary power of attorney provisions. These provisions are complicated but, in contrast to some statutory provisions,³⁴⁹ they generally appear to be understood and well used by conveyancers. There is evidence that some conveyancers are prepared to absorb costs in order to ensure that the structure is maintained and that transactions proceed. It may be that special entries in the Land Registry could help re-enforce ‘conveyancing’ obligations and reduce the need to rely on the power of attorney provisions.³⁵⁰ However, whatever refinements are made, it seems inevitable that dual ownership is inherently more complicated than would be the case if land obligation reform enabled a single freehold structure to be created. Participants’ attitudes towards reform are discussed in the next section.

8.9 Reform

8.9.1 Introduction

While the qualitative and quantitative research data was being obtained, the Law Commission was working on its ‘substantial’ project for the reform of land obligations and easements.³⁵¹ The Commission’s subsequent proposals are discussed in chapter four.³⁵² This section considers how north eastern conveyancers viewed the prospect of reform both for the future transfer of individual Tyneside Flats and the conversion of existing titles. Possible obstacles to conversion are discussed as well as alternative structures raised by participants.

³⁴⁷ See ch.6, para.6.5.12.

³⁴⁸ Ibid & see ch.9, para.9.2.2 for suggested amendments to the legislation.

³⁴⁹ See, e.g., ch.8, para.8.7.4.

³⁵⁰ E.g., by entering a restriction in the proprietorship registers of the landlord’s title after the grant of the first lease, so as to prevent the registration of any second lease without evidence being supplied that both reversions had also been transferred. However, restrictions are seldom full proof – see further ch.5, para.5.4.5.

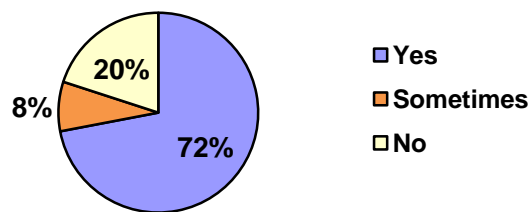
³⁵¹ See *2008 Consultation Paper*, (n.6), para.1.1.

³⁵² See ch.4, section 4.8.

8.9.2 Reform and the Transfer of Tyneside Flats

Questions on the difficulty in explaining documentation immediately preceded law reform questions.³⁵³ A substantial majority of those who had experienced problems in explaining the standard Tyneside Flat documentation thought there would be less difficulty if individual flats could be sold on a purely freehold basis.³⁵⁴ This may help explain why, as indicated below, nearly three quarters of the participants, 72 %, responded positively when asked if, as result of reform, positive obligations were to become more readily enforceable, this would in their view potentially facilitate the transfer of Tyneside Flats.³⁵⁵

Would Reform Facilitate Transfer?



One of the participants in the ‘sometimes’ category understandably suggested that the potential of reform to facilitate the transfer of Tyneside Flats ‘may depend on the specifics of legislation’.³⁵⁶ Another participant, who thought reform would be beneficial, said that he hoped they ‘got it right’ and, by way of analogy, referred to difficulties which had been encountered with one large local landowner whose agent was said to look round developed estates to see if he could find any ‘minor’ breach of restrictive obligations. If any were found, substantial sums were charged for retrospective consent.³⁵⁷ This is not a potential problem with the standard Tyneside Flat lease since, although it requires consent for structural

³⁵³ See GQ 20 discussed in ch.8, para.8.9.8. Law reform questions were deliberately left to the end of each interview – see ch.7, para.7.4.3.

³⁵⁴ Some 72% thought a purely freehold structure would be easier to explain. This is the same percentage as those who thought reform would facilitate the transfer of Tyneside Flats.

³⁵⁵ See GQ 21 (a). The high response rate to this question means that statistically we can be 95% certain that between 51% - 88% of north eastern conveyancers agree with the research sample.

³⁵⁶ Interview 29, GQ 21(a).

³⁵⁷ Interview 1, GQ 21(a). It was suggested that this particular agent charged £400 for retrospective consent to put up a garden shed. Another participant from a different area and in response to a different question, interview 10, GQ 12 (a), said that the same agent charged £600 + VAT for the retrospective consent for plans extensions & that this practice was a ‘hobby horse’ of his.

additions and alterations, no payment is required for that consent. Even if any suggested statutory provision were to suggest a payment for consent, the attitude of north eastern conveyancers towards costs for the registration of documents suggests that any charges would be reasonable.³⁵⁸ This is probably because, with the standard Tyneside Flat documentation, once both leases have been created and the reversions transferred, both flat owners are likely to exercise restraint, as they are in an equally strong bargaining position. This inbuilt ‘equality of bargaining power’ may have been what another participant had in mind when, although he was concerned about the ‘impact’ of reform on freehold conveyancing generally, saw ‘no problem’ if reform were confined to a ‘Tyneside Flat type case’.³⁵⁹

The general reluctance of mortgage lenders to advance money on freehold flats³⁶⁰ was raised by two participants, with one suggesting that lenders were ‘very nervous’ about lending on freehold flats³⁶¹ and another saying that any reform would have to be ‘cleared with’ mortgage lenders who, as he saw it, ‘created problems’.³⁶² One fifth of respondents definitely felt that reform would not facilitate the transfer of Tyneside Flats. One participant based his stance on the ‘narrow’ view that legal proceedings would still be needed to enforce freehold obligations,³⁶³ while two were based on ‘status quo’ views that the present scheme is ‘all right as it is’³⁶⁴ or that it ‘works as it is’³⁶⁵ and that repair contributions are ‘de minimis’.³⁶⁶ These comments reflect the existing widespread acceptance and use of the standard structure.³⁶⁷ It is perhaps consistent with that acceptance that participants were less enthusiastic about conversion of existing titles than reform in general.³⁶⁸

³⁵⁸ See ch.8, para.8.5.8.

³⁵⁹ Interview 15, GQ21 (a). Suggested reform of existing landlord and tenant legislation has been so limited - see ch.9, paras 9.2.2 – 9.2.4.

³⁶⁰ See ch.8, para.8.4.3.

³⁶¹ Interview 4, GQ 21(a).

³⁶² Interview 10, GQ 21(a). The CML has said it would welcome reform of the law – see ch.4, para.4.8.9, fn 271.

³⁶³ Interview 11, GQ21 (a). ‘Narrow’ because evidence suggests proceedings are extremely rare - see ch.8, para. 8.7.9.

³⁶⁴ Interview 9, GQ 21(a).

³⁶⁵ Interview 18, GQ 21(a).

³⁶⁶ Ibid.

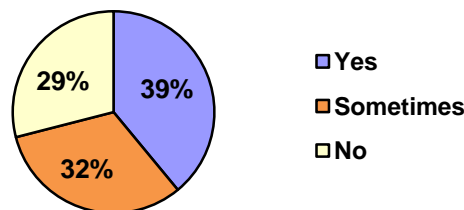
³⁶⁷ See ch.8, para.8.3.2.

³⁶⁸ A large number of standard Tyneside Flat titles have already been created. Accordingly, following reform, the possibility of conversion is likely to arise more often and more immediately than the use of any new land obligation documentation.

8.9.3 Conversion of Existing Titles

Participants were asked whether, if it were possible for Tyneside Flats to be transferred more easily on a purely freehold basis, they thought it would be desirable to convert existing mixed freehold/leasehold titles into a single freehold ownership.³⁶⁹ The responses were as follows:

Conversion Desirable?



The fact that 39% of participants positively thought that conversion would be ‘desirable’ does not mean that they think it probable. Over half of this positive category had some reservations, sometimes of a general nature, such as those who thought it would not be practicable.³⁷⁰ Other qualifications were more specific, for example, one participant emphasised that conversion would be desirable as long as ‘legal performance’ of the covenants would work.³⁷¹ Other areas of concern, for those participants who were generally or sometimes in favour of conversion, were expense, timing, problem leases and the role of third parties.

³⁶⁹ See GQ 21 (b).

³⁷⁰ Interviews 1 & 14, GQ 21(b).

³⁷¹ Interview 16, GQ 21(b). Effective enforceability of positive obligations is, of course, one of the main objects of reform. The Law Commission has described the failure of the burden of positive obligations to run as the ‘greatest and clearest deficiency in the law of positive covenants’ - see *2008 Consultation Paper*, (n.6), para. 7.3.9.

8.9.4 Expense of Conversion

Two participants in the positive category mentioned expense,³⁷² an issue expressly raised by just over one fifth, 21 %, of all participants.³⁷³ The transfer of an existing standard Tyneside Flat leasehold title does not normally involve the active participation of the landlord,³⁷⁴ but conversion of the title would do so since, in addition to the surrender of the existing lease,³⁷⁵ the landlord would have to transfer his freehold interest. It seems inevitable that the creation of this additional documentation would significantly increase conveyancing costs, even if that documentation were to become standardised.³⁷⁶ Despite the likelihood of further costs, it is perhaps significant that expense was not raised by any participants who firmly believed that conversion was *not* desirable. Participants therefore seem to be saying that, whilst costs might prevent conversion, they would not automatically do so. One potential difficulty with the current proposals for a new form of land obligation is the suggestion that each instrument should have a plan.³⁷⁷ Plans costs are already an issue when standard Tyneside Flat leases are first prepared³⁷⁸ and the unnecessary insistence on a plan on every land obligation instrument could act as a deterrent to conversion.³⁷⁹

8.9.5 Timing of Conversion

The timing of conversion, raised by 17 % of all participants, was the second most commonly expressed concern. One participant suggested that conversion could occur ‘on turnover’³⁸⁰ and another when the property ‘changed hands’.³⁸¹ This would clearly be a convenient time, since conveyancers would normally be in contact with the owners of one or both flats.³⁸² Usually conversion would only be likely if just one standard Tyneside Flat lease had been granted and it was that lease that was being transferred. As one participant put it, when only

³⁷² Interviews 12 & 13, GQ 21(b).

³⁷³ See also ch.8, para.8.5.10 for a comparison of costs under different structures.

³⁷⁴ But he will be ‘passively’ involved if notice of the transfer is served on him – see ch.8, paras 8.4.6 & 8.5.8.

³⁷⁵ If the landlord’s title is registered, notice of the lease needs to be deleted.

³⁷⁶ See also ch.9, para.9.3.4.

³⁷⁷ See ch.4, para.4.8.5.

³⁷⁸ See ch.8, para.8.5.3.

³⁷⁹ See further ch.4, para.4.8.5.

³⁸⁰ Interview 12, GQ 21(b).

³⁸¹ Interview 17, GQ 21(b).

³⁸² But not, e. g., if the parties were acting personally and no new mortgages were required. If mortgage funds were needed, the mortgage providers would normally require legal representation.

one lease had been created, conversion ‘might be ok’³⁸³ and it would usually put both flat owners on a more equal footing, as they would both then be freehold owners. If the second flat were about to be transferred then, because the landlord covenants in the first lease to transfer the second flat by creating a second lease in similar terms,³⁸⁴ the second flat could only be sold on a freehold basis, if the first lease had previously been surrendered. It may be that this is what one participant had in mind when she said that both flats should be done together.³⁸⁵ In normal circumstances conversion of the first title on the grant of the second lease seems unlikely to happen, so that most leaseholders would just ‘leave it’³⁸⁶ or ‘probably not bother’.³⁸⁷ This is even more likely to be so if both leases had been granted and the reversions transferred, since conveyancers may well then agree with the participant who considered that, if the ‘full structure’ had been set up, there would seem to be ‘no point in changing it’.³⁸⁸ This presumes that the leases are satisfactory, which will not always be the case.

8.9.6 Problem Leases and Conversion

One participant who thought that conveyancers would generally not bother to convert, said that she thought they would do so if there were ‘a problem’.³⁸⁹ No ‘problem’ details were given, but one likely possibility is when either or both standard Tyneside Flat leases had originally been granted for, for example, 99 years and the residue of the lease term has diminished to such an extent that it is no longer mortgageable.³⁹⁰ The fact that some standard lease terms are unsatisfactory, such as those requiring the payment of fees for the registration of documents, seems unlikely of itself to prompt conversion, at least as long as conveyancers continue to exercise restraint in the charging of fees.³⁹¹ Conveyancers are generally likely to carry on as now by striving to make the documentation work in practice, particularly for residential leases. Two participants, who generally thought that leaseholders would not bother

³⁸³ Interview 4, GQ 21(b). Conversion may therefore be more likely with the South Shields structure - see ch.8, para.8.9.8.

³⁸⁴ See cl.5 (C) & cl. (a) (i) 4th Sch. standard lease.

³⁸⁵ Interview 12, GQ 21(b). See also ch.4, para.4.8.3 on the need for a dominant and servient tenement.

³⁸⁶ Interviews 7 & 8, both GQ 21(b).

³⁸⁷ Interview 20, GQ 21(b).

³⁸⁸ Interview 4, GQ 21(b).

³⁸⁹ Interview 20, GQ 21 (b).

³⁹⁰ See ch.8, para.8.4.5.

³⁹¹ See ch.8, para.8.5.8.

to convert, considered that business leaseholders might do so.³⁹² No reasons were given, but it may be that they considered that adapted standard Tyneside Flat leases are unsatisfactory for business use and also that any additional expense might be less of a deterrent for commercial leaseholders.

Since north eastern conveyancers often appear to ignore, or be unaware of, the impact of existing landlord and tenant legislation,³⁹³ it is unlikely that its potential impact will stimulate conversion.³⁹⁴ However, it must always be a possibility that intended or unforeseen consequences of future landlord and tenant legislation might do so.

8.9.7 Third parties and Conversion

One complicating factor, which would militate against any mass conversion of existing titles, is the number of parties involved. One participant thought that having to ‘pull in’ lenders would be a ‘nightmare’, although she thought conversion might be possible when flats changed hands.³⁹⁵ Conversion should not, in principle, present any particular difficulties to the Land Registry, which is very used to conversion of titles, for example, under the LRA 1967.³⁹⁶ Recent moves on ‘dematerialisation’ should help, as past difficulties over missing freehold reversion land certificates will no longer arise.³⁹⁷ The suggestion made by one participant that the Registry should take on a more regulatory role and refuse to register unless both conversions were done together³⁹⁸ is likely to be too prescriptive. Unless all relevant parties agreed, for example, by placing a restriction on the registers of all relevant titles, there seems to be little justification for the Registry being required to ‘police’ conversion in this way and it is unlikely that it would wish to do so.³⁹⁹ In addition any requirement that both titles had to be converted together is likely to discourage the conversion of titles when only one standard Tyneside Flat lease has been granted.

³⁹² Interviews 7 & 8, both GQ 21 (b).

³⁹³ See, e.g., ch.8, para.8.7.4.

³⁹⁴ There might be even less inclination to convert if the legislative amendments suggested in ch.9, para.9.2.2 were enacted.

³⁹⁵ Interview 17, GQ 21 (b).

³⁹⁶ See generally Dixon M et al, *Registered Conveyancing*, (n.150), paras 26.00 - 26.008. The relevance of the LRA 1967 for Tyneside Flats is discussed in ch.6, para.6.2.4.

³⁹⁷ See further ch.8, para.8.6.3.

³⁹⁸ Interview 5, GQ 21 (b).

³⁹⁹ ‘Right to buy’ purchases under the 1980 HA (now HA 1985) were compulsorily registrable, but the Registry did not wish to consider whether the right to buy had been properly exercised or in investigating the Councils’ titles, preferring instead to rely on their certificates of title.

There seems little prospect of legislation requiring compulsory conversion. Compulsion is unlikely to be acceptable politically and conversion is not discussed in the current proposals for land obligation reform.⁴⁰⁰ Accordingly even if acceptable land obligation reform were to be enacted, conversion of existing titles seems unlikely on any mass scale, but would probably take place, in the words of one participant, ‘over a period of time.’⁴⁰¹

8.9.8 The South Shields Structure

As firms in South Shields were known to use a different conveyancing structure for the transfer of Tyneside Flats, a South Shields firm was included in the pilot study.⁴⁰² In addition, three supplementary questions in the general questionnaire were drafted with that alternative structure in mind.⁴⁰³ Under the South Shields structure, a long leasehold term is created when the first flat is sold. At the time of the second sale the freehold interest in the whole building is transferred subject to the existing lease

The use of the South Shields structure is largely confined to South Shields⁴⁰⁴ and occasionally elsewhere for business leases.⁴⁰⁵ The South Shields structure has, or is perceived to have, some benefits over the standard Tyneside Flat documentation. For example, the review of costs indicates that additional costs are more likely to arise with the standard documentation than with the South Shields structure.⁴⁰⁶ In addition, most of the 54% who thought that the standard Tyneside Flat documentation complicated land registration also thought that land registration would be simpler with the South Shields structure.⁴⁰⁷ When asked whether they, or to their knowledge, anyone in their firm had ever encountered difficulty in explaining the effect of the standard Tyneside Flat documentation, the number of

⁴⁰⁰ This may be because of a lack of appreciation of the large number of ‘artificial’ leases that have been created in small ‘blocks’. No estimate is made of their number in the *2008 Consultation Paper*, (n. 6), which says, in para. 11.6, that there are clearly ‘some’ circumstances where commonhold would not be suitable. It is clear that in the north east of England there are many such circumstances - see generally thesis ch.8, paras 8.3.2 – 8.3.3. The total number of registered leases is given in Appendix A to the *2008 Consultation Paper*.

⁴⁰¹ Interview 6, GQ 21 (b).

⁴⁰² See ch.7, para.7.3.4.

⁴⁰³ See GQ 9(b), 19(b) & 20 (b) (ii).

⁴⁰⁴ See ch.8, para.8.3.2.

⁴⁰⁵ See ch.8, paras 8.3.3 & 8.3.7.

⁴⁰⁶ See ch.8, para.8.5.10.

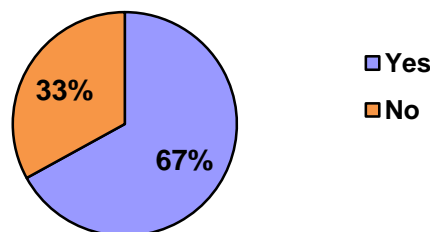
⁴⁰⁷ See ch.8, para.8.6.4.

positive responses for the groups mentioned below was as follows:

Clients	72%
Lenders	79%
Solicitors	89%
Estate Agents	85%

Participants who said they had experienced difficulty in any of the above categories were asked, in effect, whether they thought there would be less difficulty if individual flats had been transferred under the South Shields structure.⁴⁰⁸ The responses are set out in the chart below:

South Shields Easier to Explain?



Despite these positive advantages over the standard Tyneside Flat documentation, none of the participants suggested that the South Shields structure might be a preferable alternative to substantive law reform, perhaps because of its restricted use⁴⁰⁹ or its lack of acceptability to some mortgage lenders.⁴¹⁰ Even in South Tyneside half the participants thought that South Shields conveyancers should now switch to the standard Tyneside Flat documentation.⁴¹¹ For the future, all South Tyneside participants who answered the general question about law

⁴⁰⁸ See GQ 20(b) (ii).

⁴⁰⁹ See ch.8, paras 8.3.2 - 8.3.4.

⁴¹⁰ See ch.8, para.8.4.3.

⁴¹¹ Ibid. South Shields is the largest town in the South Tyneside local authority area.

reform answered positively.⁴¹² Again South Tyneside participants appeared to be more enthusiastic about conversion of existing titles, with half thinking that conversion would generally be desirable⁴¹³ and the other half thinking it would desirable for business leases.⁴¹⁴ This greater enthusiasm for conversion may be because only one lease is created under the South Shields structure and, as with the standard Tyneside Flat documentation, conversion is always likely to be easier in these circumstances.⁴¹⁵

8.9.9 The London Structure

Two participants also mentioned another structure, which, for convenience, has been called the London Structure.⁴¹⁶ Under this arrangement, after two long leaseholds have been created, the freehold in the whole building is transferred to both leaseholders as tenants in common.⁴¹⁷ One participant, when asked if she had always used the standard Tyneside Flat documentation when creating a new lease said that on one occasion she had intended to use this alternative structure.⁴¹⁸ In this case the original landlords had granted a 999 year lease of the flat being transferred and had covenanted that, if they granted a lease of the other flat, they would require that leaseholder to enter into similar obligations to those contained in the existing lease. Later lease provisions made it clear that, when the second lease was granted, the freehold in the building would be transferred to the leaseholders of both flats.⁴¹⁹ Despite her enthusiasm for this alternative structure, the solicitors on the other side apparently refused to accept this arrangement. Ultimately, she was required to surrender the existing lease and substitute it with a standard Tyneside Flat lease, a further example of the pressure to conform.⁴²⁰

⁴¹² Interviews 7, 8 & 19, GQ 21 (a). Interview 2 did not express a view. See ch.8, para.8.9.2 for details of the question.

⁴¹³ Interviews 2 & 19, both GQ 21 (b).

⁴¹⁴ Interviews 7 & 8, both GQ 21 (b).

⁴¹⁵ See ch.8, para.8.9.5.

⁴¹⁶ This terminology has been used on the assumption that there are likely to be more of these structures in the London area than elsewhere. However, it is known that there are significant numbers of Tyneside Flat style terraces in the Walthamstow area of London, where the freehold is held by one commercial landlord – see ch.9, para.9.3.2, fn 92.

⁴¹⁷ The freehold is held in this capacity, so as to ensure that there is no ‘right of survivorship’, which would arise if they held as joint tenants – see, e.g., Gray K and Gray S, *Elements of Land Law*, (n.93), paras 7.4.8 & 7.4.30.

⁴¹⁸ Interview 14, GQ 7 (b).

⁴¹⁹ Since both flat owners hold the freehold, this arrangement should not run into any difficulties, e.g., in enforcing obligations or creating a fresh lease, which might arise from the rule that you cannot grant a lease to yourself. The position, however, is not entirely clear - see Gray K and Gray S, *Elements of Land Law*, (n.93), para.4.2.4 & the cases there cited. It is the Land Registry’s established practice to register leases from A & B to either A or B – see also Gray para. 4.2.4, fn 6.

⁴²⁰ See also, e.g., ch.8, paras 8.3.3 & 8.7.9.

The reluctance of the other conveyancer to accept this alternative structure is understandable. While it has the advantage over the South Shields arrangement of ultimately putting the parties on an equal footing, the conveyancing becomes more complicated than with the South Shields structure or the standard Tyneside Flat documentation. This is because, once the freehold in the building has been transferred to both flat owners, if either flat owner transfers his leasehold flat, both he *and* the ‘other’ flat owner, and possibly his lender,⁴²¹ would have to join in the transfer of that freehold interest to the remaining flat owner and the new one. Only the selling flat owner needs to be a party to the documentation under either the South Shields structure or, once the freehold reversions have been transferred, under the standard Tyneside Flat structure. This case related to a Tyneside Flat in north east England, although another participant seemed to think that this alternative structure was ‘quite common’ elsewhere.⁴²²

The Newcastle Law Society (the Society) has clearly been very successful in promulgating the standard Tyneside Flat documentation.⁴²³ If reform were to have any chance of being embraced fully by north eastern conveyancers, then the widespread acceptance of the existing arrangements and reluctance to accept alternatives suggest this would need the active endorsement of the Society, presumably with new, alternative standard documentation being promulgated.⁴²⁴ For that to happen, the Society would need to be convinced of the potential benefits of reform,⁴²⁵ especially as current reform proposals do not completely prevent the continuation of the standard Tyneside Flat documentation.⁴²⁶

⁴²¹ In 2006 only one of the then top five mortgage lenders, the Halifax, explicitly dealt with this situation by saying that it required a mortgage of the leasehold interest, but not of the borrower’s share of the freehold – see *CML Handbook*, (n.102), Pt II Halifax, para. 5.5.4.1.

⁴²² Interview 10, GQ 23 in which its existence in Hull and North London was mentioned.

⁴²³ See ch.8, para.8.3.2.

⁴²⁴ See ch.9, para.9.3.4.

⁴²⁵ See, e.g., ch.4, para.4.8.3.

⁴²⁶ It is provisionally proposed that the intended new rule prohibiting the creation of new obligations running with the land (see *2008 Consultation Paper*, (n.6), para.109) should not apply to landlord and tenant covenants ‘so far as relating to the demised premises’ see *2008 Consultation Paper*, para. 8.111. The standard Tyneside Flat documentation could therefore readily continue to be used if the first sale of both flats occurred at the same time. However, there could potentially be difficulties if there is a time lapse between the sale of the first and second flats. This is because it seems that the landlord’s covenants in the standard Tyneside Flat lease relate to retained land and might only be able to run with that land if a formal land obligation deed were created - see ch.4 para.4.8.4.

8.10 Summary

The qualitative and quantitative research data revealed that north east conveyancers have differing concepts of ‘Tyneside Flats.’⁴²⁷ However, the overwhelming majority, outside the South Shields area, always use the standard Tyneside Flat documentation for the transfer of terraced and semi detached residential two flat buildings.⁴²⁸ A key element in this acceptance and user is the acceptability of the standard Tyneside Flat structure to mortgage lenders.⁴²⁹ Some of those lenders are apparently reluctant to lend on the second flat to be transferred, if the South Shields structure is being used.⁴³⁰ Consequently, even in the South Shields area, with its own localised sense of identity and practice, half the research participants wished to switch to the standard Tyneside Flat documentation.⁴³¹ This external pressure appears to be reinforced by internal pressure to conform from north eastern conveyancers evidenced by, for example, the refusal to accept a ‘London’ alternative structure⁴³² and from the comment that the standard Tyneside Flat documentation is ‘locally comprehensively recognised.’⁴³³ These pressures seem to be supplemented by adaptability in the use of the standard Tyneside Flat documentation,⁴³⁴ cooperation between north eastern conveyancers⁴³⁵ and a wish to make the system work.⁴³⁶ These contemporary factors resonate with the suggestion that interaction within Newcastle’s ‘entrepreneurial elite’ was central to the development of the regional economy during the period when most Tyneside Flats were built and that failure to integrate with that elite could put an entrepreneur at a ‘serious disadvantage’.⁴³⁷ This widespread use of the standard Tyneside Flat documentation and its greater acceptability to mortgage lenders are strong, perhaps compelling, arguments in its favour.

Analysis of the research data has confirmed that the mixed freehold/leasehold structure tends to complicate conveyancing procedures. This results in higher conveyancing costs than under

⁴²⁷ See ch.8, paras 8.2.2 – 8.2.6.

⁴²⁸ See ch.8, para.8.3.2 & see para.8.3.7 for a discussion of business use.

⁴²⁹ See ch.8, para.8.4.4.

⁴³⁰ See ch.8, para.8.4.3.

⁴³¹ Ibid.

⁴³² See ch.8, para.8.9.9.

⁴³³ See ch.8, para.8.3.4. See also the comments of another participant who, despite his preference for the South Shields structure, accepted that the standard Tyneside Flat documentation was ‘an absolute fact of life’ – see ch. 8, para.8.3.3.

⁴³⁴ See ch.8, paras 8.3.6 – 8.3.8.

⁴³⁵ See ch.8, para.8.5.6, fn 167.

⁴³⁶ E.g., by forgoing legal fees - see ch.8, para.8.8.3.

⁴³⁷ See Lendrum O, ‘An Integrated Elite Newcastle’s Economic Development 1840 - 1914’ in Colls R and Lancaster B (Eds), *Newcastle upon Tyne A Modern History*, 1st ed., (Chichester: Phillimore, 2001), p.46. North eastern conveyancers can be seen as an ‘elite’ professional group - see ch.7, para.7.3.1.

the South Shields scheme or than would be likely if individual flats could be transferred more readily on a purely freehold basis.⁴³⁸ Both these alternative structures make it easier to process some applications in the Land Registry⁴³⁹ and both would avoid the problems inherent in creating and maintaining the landlord and tenant structure under the standard Tyneside Flat documentation.⁴⁴⁰ Despite some practical conveyancing advantages in the South Shields structure, no participants, outside the South Shields area, expressed any wish to switch to that structure. It also seems that, even if land obligation reform were to be enacted, there is unlikely to be any systematic conversion of existing titles,⁴⁴¹ many of which are therefore destined to remain subject to the impact of leasehold legislation almost indefinitely.⁴⁴²

A significant finding is that generally north eastern conveyancers are either unaware of the potential application of landlord and tenant legislation, or that they simply ignore it.⁴⁴³ This may be because the standard Tyneside Flat documentation is perceived primarily as a conveyancing device aimed at granting a long term proprietary interest.⁴⁴⁴ Where leasehold legislation is inappropriate, especially in relation to payments for joint contributions, there is a strong argument for reform.⁴⁴⁵ Where the legislation could be beneficial there appears to be a need for a greater appreciation of its usefulness.⁴⁴⁶

Quantitative and qualitative research data illustrates that some of the standard Tyneside flat lease obligations are inappropriate for owner occupiers of self-contained flats. This was particularly apparent in the requirement for leaseholders to produce *original* documents for almost all dealings to the landlords' solicitors and to pay their 'reasonable' registration fees. In practice, research data showed that conveyancers never went beyond serving notice of transactions, often did not serve notice at all⁴⁴⁷ and sometimes served notice directly on the

⁴³⁸ See ch.8, para.8.5.10.

⁴³⁹ See ch.8, para.8.6.4.

⁴⁴⁰ See, e.g., ch.8, para.8.8.3.

⁴⁴¹ See ch.8, paras 8.9.3 - 8.9.7.

⁴⁴² A summary of legislative impact on the standard Tyneside Flat documentation is contained in ch.6, para. 6.7.1. See ch.9, paras 9.2.2 – 9.2.4 for proposed legislative reforms.

⁴⁴³ See, e.g., ch.8, paras 8.3.6 & 8.7.4.

⁴⁴⁴ One participant, interview 1, GQ 20 (a) (i), said that when explaining the documentation to his clients he referred to there being a 'technical landlord' to enforce covenants. Such phraseology might make explanation easier, but tends to understate the true legal position.

⁴⁴⁵ See ch.8, para.8.7.4.

⁴⁴⁶ Ibid.

⁴⁴⁷ See ch.8, para.8.4.6.

landlord.⁴⁴⁸ This broad interpretation of the lease terms is a further example of a more general thread to emerge from the data, namely a readiness to make the standard Tyneside Flat documentation work. This flexibility was seen in, for example, participants' willingness to amend the standard lease⁴⁴⁹ and also in the practical steps conveyancers take to mitigate difficulties caused by the mixed freehold /leasehold structure.⁴⁵⁰

Conveyancing adaptability is not new and was one of the arguments used against making the burden of positive obligations run in *Austerberry v. Oldham Corporation*.⁴⁵¹ That decision was perhaps influenced by prevailing influences of *laissez faire* and self-help. Although it has been suggested that self help is one of the mainstream Victorian notions that travelled least well into the twentieth century,⁴⁵² north east conveyancers in effect demonstrated self help in creating the standard Tyneside Flat documentation. Enthusiasm for that documentation has not usually caused them to argue that reform is unnecessary. A substantial majority of research participants, perhaps in part as a result of actual or potential practical and legal difficulties revealed in the course of data collection, thought that land obligation reform would potentially facilitate the transfer of Tyneside Flats.⁴⁵³

As indicated at the beginning of this chapter, the qualitative and quantitative research data has addressed research question one and questions five to ten.⁴⁵⁴ It has also informed the proposals for legislative amendments and the consideration of future prospects discussed in the next and final thesis chapter.

⁴⁴⁸ See ch.8, para.8.5.8. A possible amendment is suggested in ch.9, para.9.3.3, fn 88.

⁴⁴⁹ See ch.8 paras 8.3.5 - 8.3.8.

⁴⁵⁰ E.g., by obtaining signed charges and Land Registry fees in advance - see ch.8 paras 8.4.4 & 8.5.4 respectively.

⁴⁵¹ (1885) 29 Ch D 750 CA. For a detailed discussion of this case, see ch.3, paras 3.4.9 - 3.4.10.

⁴⁵² See Gilmour R, 'Dickens and the Self Help Idea' in Butt J and Clarke I, *The Victorians and Social Protest*, (n.210), p.71.

⁴⁵³ See ch.8, para.8.9.2.

⁴⁵⁴ See ch.8, para.8.1.

Chapter 9. Conclusion

9.1 Overview of Research Questions and Results

The research aims, objectives and questions have been addressed by undertaking and then analysing a combination of historical, doctrinal and qualitative/quantitative research data. That research has been directed at ‘Tyneside Flats’ but, as indicated throughout the thesis, many of the issues and outcomes are also applicable to other small blocks of interconnected buildings, especially when each unit is self-contained. Even the first fundamental question, which sought to establish precisely what comprises a ‘Tyneside Flat’,¹ has broader implications than the question suggests. In purely material terms, as indicated in chapter two, most Tyneside Flats typically comprise pairs of self-contained terraced flats.² Qualitative research data, discussed in chapter eight, reveals that, conceptually, while a little over half of north eastern conveyancers think of Tyneside Flats by reference to their architectural layout, the remainder define them wholly or partly by the standard legal documentation used in their transfer.³ In practice, that documentation is confined neither to terraced buildings nor to Tyneside.⁴

The progression of history, both past and future, is evident throughout the thesis, but is most apparent in chapters two to five. However they are conceived, the legal status of Tyneside Flats can only be fully understood when seen in its historical context. Research question two therefore explored the principal economic, social or other factors that influenced their building, number and durability. Chapter two considered these aspects, primarily in relation to north eastern England, and showed that most Tyneside Flats were built in substantial numbers before the First World War.⁵ Many still exist and continue to serve a useful, if sometimes different, purpose from when they were first built.⁶ They are therefore destined to

¹ See ch.1, para.1.1.6 for this and other research questions. See also ch.7, para.7.4.2 for a discussion on the problem of meaning.

² See ch.2, paras 2.3.2 – 2.3.5. When found elsewhere similar structures are known differently, e.g., as ‘Warner Houses’ in the Walthamstow district of London - see ch.2, para.2.6.1.

³ See ch.8, para.8.2.2.

⁴ See, e.g., ch.8, para.8.2.6.

⁵ See ch.2, para.2.5.1.

⁶ See ch.2, para.2.7.2.

last for many years to come.⁷ Accordingly, the mechanism used for their transfer will be of continuing concern in the future, but is conditioned by judicial developments in the past.

Those judicial developments are discussed in chapter three. This doctrinal chapter addresses research question three by tracing the principal judicial decisions that have influenced or hindered the creation of freehold repairing and other obligations for individual Tyneside Flats. This chapter showed how a combination of pressures caused a Victorian judiciary to decide in cases such as *Tulk v. Moxhay*⁸ and *Austerberry v. Oldham Corporation*⁹ that, in general terms, while freehold restrictive land obligations could bind an original covenantor's successors in title, positive obligations could not do so. As the chapter shows, many factors, for example, a laissez-faire ideology, the increasing authority of parliament and the time lag between the date of documentation and judicial decision upon it all played a part in that outcome. The case law discussion has been contextualised in some detail because the background economic, political and social circumstances help explain why judicial developments were so protracted and why, towards the end of the twentieth century, in the definitive case of *Rhone v. Stephens*, the House of Lords, in a very different environment, felt unable to overrule Victorian case law.¹⁰

Parliamentary law reform directed towards freehold land obligations has proved equally difficult. The process of law reform is discussed chronologically in chapter four which deals with research question four by examining the impact of law reform proposals and the enactment of commonhold on the creation of freehold repairing and other obligations for individual Tyneside Flats. Since its establishment in 1965 the Law Commission has played a pivotal role in bringing forward law reform proposals and the introduction of commonhold in 2002. Although within a commonhold framework the burden of positive freehold obligations will automatically pass, as this chapter illustrates, commonhold does not provide a viable alternative to the standard Tyneside Flat documentation.¹¹ However, the Law Commission's proposals for a new form of land obligation, contained in their *2008 Consultation Paper*, could well do so.¹²

⁷ See ch.2, para.2.7.3.

⁸ See ch.3, paras 3.3.1 - 3.3.4.

⁹ See ch.3, paras 3.4.9 - 3.4.11.

¹⁰ See ch.3, para.3.5.4.

¹¹ See ch.4, paras 4.7.4 - 4.7.5.

¹² See ch.4, s.4.8.

A recurring theme of the thesis is the interplay between developments in land law and conveyancing practice. An inescapable feature of the case law and law reform chapters, this connection becomes more crucial in chapter five. This chapter addresses research question five by examining the land tenure arrangements used for the ownership and owner occupation of individual Tyneside Flats and the enforceability of obligations between them. Legal difficulties over the enforceability of positive freehold obligations led conveyancers to devise a number of special freehold conveyancing arrangements but, as shown in chapter five, none of these provides a wholly satisfactory means for transferring individual Tyneside Flats.¹³ As both positive and restrictive obligations are far more readily enforceable between landlords and tenants,¹⁴ it was inevitable that, when the Newcastle Law Society devised standard documentation in the early 1980s, a leasehold conveyancing structure was used. ‘Historical’ data obtained from north eastern conveyancers has been included to explain the background to an unusual mixed freehold/leasehold arrangement in which, after similar long leases for both flats have been granted, each leaseholder becomes the others’ landlord. The detailed conveyancing provisions in the standard lease, which are used to create and maintain this structure, are described. This regional arrangement becomes more central from chapter five onwards and is used as a model for the enforcement of private land obligations.

The relationship between theory and practice lies behind research question six. This seeks to establish the efficacy of the standard Tyneside Flat documentation in providing enforceable and effective reciprocal repairing and other obligations. In theory the standard Tyneside Flat arrangement ensures that, once the full structure has been established, obligations are directly enforceable between leaseholders.¹⁵ In practice direct enforcement is only possible as long as a mutual landlord and tenant relationship is maintained between current owner occupiers. Chapter eight uses qualitative and quantitative data, collected from north eastern conveyancers, to describe the practical operation of the standard Tyneside Flat lease conveyancing provisions. Those provisions are intended to ensure that each leaseholder not only becomes, but always remains, the others’ landlord.¹⁶ As chapter eight shows, although

¹³ See ch.5, paras 5.4.2 – 5.4.7.

¹⁴ See ch.5, para.5.3.3.

¹⁵ This is because each leaseholder is the freeholder of the other flat. A criticism of many leasehold arrangements, particularly in large blocks of flats, is that there is no direct right of enforcement by one leaseholder against another, as all action must be through the medium of the person or corporate personality that holds the freehold or an intermediate leasehold interest in the whole block – see Clarke D, ‘Commonhold: A Prospect of Promise’ (1995) 58 MLR 486 pp.488 - 489.

¹⁶ See ch.8, para.8.8.3.

the standard lease power of attorney provisions are complex, they are well understood by north eastern conveyancers, and have provided an essential back up to other standard form conveyancing obligations.¹⁷ In reality, because Tyneside Flats are usually owner occupied, self-contained and mainly self-repaired, the practical effectiveness of repairing and other obligations is seldom put to the test.¹⁸

The relationship between law and history, law and conveyancing and law and practice are all intertwined in research question seven, which seeks to determine the relevance of modern landlord and tenant legislation on the Tyneside Flat tenurial arrangement. As chapter six illustrates, although many of the mischiefs which the legislation seeks to remedy are not suffered by standard Tyneside Flat leaseholders, some legislation could still potentially have an adverse effect. The impact of this highly complex legislation¹⁹ is assessed and an indication given of those areas, particularly in relation to service charges, where amending legislation would be beneficial for standard Tyneside Flat leaseholders and leaseholders of other similar small interconnected blocks.²⁰ Specific legislative amendments have been suggested in response to research question eight,²¹ which asks what reform of modern landlord and tenant legislation is required to take account of its impact on the standard form arrangement.

As indicated above, the thesis analysis and discussion is often supported by qualitative and quantitative research data obtained from north eastern conveyancers. The methodology deployed is outlined in chapter seven, which also discusses the steps taken to ensure that all ethical considerations were fully addressed²² and that the results of the data could be generalised to all north eastern conveyancers.²³ Chapter eight analyses the data obtained and, in so doing, addresses research question nine, which is concerned with the legal and practical difficulties that arise when buying and selling Tyneside Flats, In addition to the problems of maintaining the landlord and tenant structure, particularly relevant to research question six and the impact of leasehold legislation, the subject of research question seven, the chapter

¹⁷ Ibid.

¹⁸ See, e.g., ch.8, para.8.7.9, which discusses the rarity of s.146 proceedings.

¹⁹ It has been suggested that a student cannot get very far into landlord and tenant law before 'drowning in its practical complexity' - see Wood D, *Landlord and Tenant Law: Mapping the Recent Past* in Bright S (Ed), *Landlord and Tenant Law: Past, Present and Future*, 1st ed., (Oxford: Hart, 2006), p.18.

²⁰ See ch.6, para.6.7.2.

²¹ See ch.9, paras 9.2.2 – 9.2.4.

²² See ch.7, s.7.5.

²³ See ch.7, paras 7.6.1 -7.6.5.

highlights numerous other complications, often of a practical nature. Some of these arise because a South Shields form of lease was adopted by the Newcastle Law Society as the standard conveyancing ‘device’²⁴ without sufficient amendment. For example, the standard lease provisions for registration of documents and paying fees for that registration seem inappropriate for owner occupiers of self-contained flats.²⁵ Complications inherent in a mixed freehold/ leasehold system, which impact on, for example, mortgage lenders and the Land Registry are analysed,²⁶ as are the difficulties in explaining the documentation to conveyancing professionals and owner occupiers.²⁷

Chapter eight also addresses that part of research question ten which is concerned with the conveyancing practice measures needed to overcome the practical difficulties caused by the unusual tenurial status of Tyneside Flats. The discussion shows that suggestions of possible practice alterations can often be counter-balanced by alternative arguments. For example, the difficulty of ensuring that a subsequently acquired freehold reversion in the other flat is charged, could perhaps most easily be overcome by charging the reversion in advance,²⁸ but some practitioners consider this to be beyond their remit.²⁹ Again, difficulties in the payment of solicitors’ fees for the registration of documents could be overcome by serving notice direct on landlords,³⁰ but this does not accord with the standard Tyneside Flat lease provisions. Difficulties in obtaining payment of land registry fees for registration of subsequently acquired freeholds could be circumvented by obtaining fees in advance,³¹ but this might not be acceptable to leaseholders, who move, or expect to move, before the freehold is acquired. Some practice difficulties could be overcome for future owner occupiers by amending the standard form of lease.³² Conveyancing practice difficulties lead to the second arm of research question ten, which is concerned with the law reform measures needed to overcome tenurial problems. The best prospect for future freehold obligation law reform lies with the Law Commission’s proposals for a new form of land obligation, contained in their *2008 Consultation Paper*.³³ In the meantime some potential difficulties

²⁴ See ch.5, para.5.3.3.

²⁵ See ch.8, para.8.5.8.

²⁶ See, e.g., ch.8 paras 8.4.4 & 8.6.4

²⁷ See ch.8, para.8.9.8.

²⁸ See ch.8, para.8.4.4.

²⁹ *Ibid.*

³⁰ See ch.8, para.8.5.8

³¹ See ch.8, para.8.5.4.

³² See ch.9, para.9.3.3 & fn 88.

³³ See ch.4, s.4.8 & ch.9, para.9.3.4.

with the existing leasehold structure, which were identified in chapter six, could be alleviated by the legislative amendments specified in the next section.

9.2 Suggested Legislative Amendments

9.2.1 Introduction

Existing landlord and tenant legislation is already highly complex,³⁴ caused in part by successive amendments³⁵ some of which are not yet in force.³⁶ Further modifications should therefore be avoided as far as possible but, for Tyneside Flats and other similar structures, this need for restraint is counterbalanced by the following factors:

a) Some existing legislative provisions have the potential to disrupt the smooth working of the standard Tyneside Flat arrangement.³⁷

b) Unnecessary criminalisation and regulation could be removed.³⁸

c) Legislating the amendments would ensure that if, as seems highly desirable, a ‘true’ code of protection for long leaseholders were eventually to be prepared,³⁹ useful amendments would have already been worked through and would be included in that code. It is recommended that any long leasehold code of protection should contain a special section on mixed freehold/leasehold arrangements.⁴⁰

³⁴ See ch.6, para.6.1

³⁵ See, e.g., ch.6, para.6.5.2, fn110 for LTA 1985 service charge amendments.

³⁶ See ch.6, para.6.5.5 for service charge provisions which are not yet operative.

³⁷ Ibid.

³⁸ This should accord with the general approach of the current conservative / liberal democrat government. For example, the Coalition Agreement of 11 May 2010 refers in s.10 (Civil Liberties) to the creation of a new mechanism to prevent the proliferation of unnecessary new criminal offences - see Butler P et al ‘The Coalition Agreement’ *The Guardian* (Pull Out Section) 15 May 2010, p.4. Again, the abolition of ‘HIPS’, introduced in 2007 and intended to speed the house buying process, has been presented as the first of many moves to cut away the swathes of ‘pointless red tape’ - see Obiter, ‘Sinking of Hips’ (2010) 110 LS Gaz 31.

³⁹ See Davey M, ‘The Regulation of Long Residential Leases’ in Cooke E (Ed), *Modern Studies in Property Law Vol III*, 1st ed, (Oxford: Hart, 2005), p.224. See also Clarke D, ‘Long Residential Leases: Future Directions’ in Bright S (Ed), *Landlord and Tenant Law: Past Present and Future*, 1st ed., (Oxford: Hart, 2006), p.189 where he suggests there may be a case for the ‘review’ of legislation applicable to long residential leases.

⁴⁰ See also ch.9, para.9.3.2.

d) Even if Land Obligation reform were to be enacted, it seems likely that substantial numbers of existing mixed freehold/leasehold structures will subsist, and be subject to existing legislation, almost indefinitely.⁴¹

The analysis in chapters six and eight has shown that much landlord and tenant legislation is largely irrelevant for Tyneside Flat leaseholders.⁴² However, some provisions, such as those requiring consultation for major works⁴³ or the LVT's jurisdiction to hear disputes,⁴⁴ could occasionally provide a useful addition or alternative to standard leaseholders' contractual or practice arrangements. This complicates the proposed amendments since it prevents a recommendation that mixed freehold /leasehold tenurial arrangements should simply be excluded altogether from service charge regulation.

It seems inappropriate to speak of 'tenants' and 'tenancies' in amendments intended to benefit long leaseholders. However, this language has been used so as to accord with the existing statutory phraseology.⁴⁵ The suggested amendments have been restricted to the situation where they are expected to be of most benefit, that is, where a full mixed freehold/leasehold structure has been set up.

9.2.2 Suggested Amendments to the LTA 1985

Details of the notice of transfer, service charge information, inspection, and dispute jurisdiction provisions that require reform to address the special case of Tyneside Flats, and the reasons why they do so, have previously been given in chapter six.⁴⁶ The LTA 1985 already contains a supplementary provision excluding business tenancies from the notice of transfer provisions⁴⁷ and certain categories of secured and assured Rent Act tenancies are excluded from the service charge provisions.⁴⁸ Only post arbitration agreements are excluded from the provisions which render void any agreement by leaseholders for the determination of service charge liability.⁴⁹ In order to exclude standard Tyneside Flat leaseholders, and

⁴¹ See ch.8, para.8.9.3 – 8.9.7.

⁴² See, e.g., ch.6, para.6.5.1

⁴³ See ch.6, para.6.5.4.

⁴⁴ See ch.6, para.6.5.3.

⁴⁵ For implied criticism of this terminology see ch.6, para.6.6.2, f n 242.

⁴⁶ See ch.6, para.6.7.2.

⁴⁷ See s.32 LTA 1985. Business tenancies are comparatively infrequent for Tyneside Flats – see ch.8, para.8.3.7.

⁴⁸ See ss 26 & 27 LTA 1985.

⁴⁹ See s.27 (6) LTA 1985 & ch.6, para.6.5.3.

other similar owner occupiers, from these provisions a further supplementary provision along the following lines is suggested:

‘Provisions not applying to tenancies of certain buildings comprising no more than two dwellings

The following provisions do not apply to a tenancy in a building comprising two leasehold dwellings where the tenant of one dwelling also owns the freehold title in the other leasehold dwelling comprised in the building-

Section 3 (3) (penalty for failure to give notice of transfer)

Section 21 (service charge information)

Section 22 (requests for inspection)

Section 27 A (6) (service charge dispute jurisdiction)⁵⁰

9.2.3 Suggested Amendments to the LTA 1987

Details of the service charge accounting and information provisions that require reform to address the special case of Tyneside Flats, and the reasons why they do so, have already been given in chapter six.⁵¹ Both relevant sections contain exceptions⁵² and a further exception could be made for Tyneside Flat owner occupiers by the following supplementary provision, similar to that suggested for the LTA 1985:

‘Provisions not applying to tenancies of certain buildings comprising no more than two dwellings

The following provisions do not apply to a tenancy in a building comprising two leasehold dwellings where the tenant of one dwelling also owns the freehold title in the other leasehold dwelling comprised in the building-

⁵⁰ S.25 makes it an offence not to comply with ss 21 & 22 LTA 1985. This seems disproportionate for joint contributions (see ch.6, para.6.5.5), but it is unnecessary to include this provision in the list, as it will not apply to Tyneside Flat owner occupiers if they are unaffected by ss 21 & 22.

⁵¹ See ch.6, para.6.7.2.

⁵² ‘Exempt landlords’ ,defined as certain public bodies in s.58 (1), are excluded from s.42 (service charge accounting) by s.42 (1) LTA 1987. Business tenancies are excluded from s.47 (service charge information) by s.46 (1) LTA 1987.

Section 42 (service charge accounting)

Section 47 (service charge information)

9.2.4 Suggested Amendments to the LTCA 1995

The problem of continuing contractual liability for original pre 1996 standard Tyneside Flat leaseholders has already been discussed, as has the statutory relief given for ‘fixed’ charges.⁵³ The LTCA released post 1995 leases, which the Act calls ‘new tenancies’ by the following provision:

‘1. Tenancies to which the Act applies

- (1) Sections 3- 16 and 21 only apply to new tenancies.
- (2) Sections 17 – 20 apply to both old and new tenancies’

‘New tenancies’ are defined in section 1 (3)⁵⁴ and the interpretation section states that a “new tenancy” means a tenancy which is a new tenancy for the purposes of section 1.⁵⁵ Original pre 1996 Tyneside Flat leaseholders could be released by adding the words in italics below to section 1 (1) above:

‘1. Tenancies to which the Act applies

- (1) Sections 3- 16 and 21 only apply to new tenancies *and small block tenancies*’.

An additional section could then be inserted in section 1 along the following lines:

‘ For the purposes of this section a tenancy is a small block tenancy if it is a tenancy in a building comprising two leasehold dwellings where the tenant of one dwelling also owns the freehold title in the other leasehold dwelling comprised in the building.’

⁵³ See ch.6, para.6.6.3.

⁵⁴ See further ch.6, para.6.6.2

⁵⁵ See s.38 LTCA 1995.

As with ‘new tenancies’, the interpretation section could then state that a ‘small block tenancy’ means a tenancy which is a small block tenancy for the purposes of section 1.

The LTCA 1995 was the result of a hard fought compromise⁵⁶ and any amendment to that legislation is likely to be difficult to achieve, even if limited to the situation where a full mixed freehold/leasehold structure has been created.⁵⁷ Lack of parliamentary time is often a barrier to legislative reform. If it is not possible to include the proposed amendments to the LTAs 1985 and 1987 as part of some other landlord and tenant legislation,⁵⁸ reform might be easier to accomplish by making use of the 2006 Legislative and Regulatory Reform Act (the LRA 2006).

9.2.5 The Legislative and Regulatory Reform Act 2006

Amendments to the LTAs 1985 and 1987 were suggested primarily because it seems inappropriate and unnecessary for occasional and often small contributions towards ‘joint installations’ to be subjected to too much regulation.⁵⁹ Evidence suggests that contributions are likely to be made informally between adjoining flat owners,⁶⁰ probably in much the same way as occurs between owner occupiers of vertically divided freehold terraced houses, which are not usually subject to this amount of regulation. Criminalisation for breach of the regulations in these circumstances seems disproportionate.⁶¹ Freeing owner occupiers of Tyneside Flat and other similar structures from this degree of regulation and from criminalisation for its breach appears to resonate with the wide ranging provisions of sections

⁵⁶ See Davey M, ‘Privity of Contract and Leases – Reform at Last’ (1996) 59 MLR 78, pp.83 - 87.

⁵⁷ An amendment to relieve original leaseholders of ‘small block tenancies’ might be met with the objection that other original pre 1996 leaseholders also ought to be released. The Law Commission originally recommended that privity of contract should be abrogated for all leases - see Law Commission, *Landlord and Tenant Privity of Contract and Estate Duration of Liability of Parties to Leases*, (Working Paper No. 95), (London: HMSO, 1986), paras. 6.2 & 6.18, but their subsequent report accepted the arguments against complete abrogation - see Law Commission, *Landlord and Tenant Law Privity of Contract and Estate*, (Law Com.No.174) (Chairman, Bedlam R) (*Bedlam Report*), (London: HMSO, 1988), para.3.37.

⁵⁸ In 2006 the Law Commission published a major report on the law relating to leasehold tenure - see Law Commission, *Renting Homes: The Final Report Volume 2: Draft Bill*, (Law Com. No. 297) (Cm 6781-11), (London: HMSO, 2006). The bill was not brought forward because of the then state of the property market - see Law Commission, *Annual Report 2008 - 09*, (Law Com. No.316), (London: HMSO 2009), para.2.11. In June 2010, the present coalition government indicated that it does not intend to introduce new regulations on private landlords - see Shapps G, ‘Shapps promise to landlords: no more red tape’ <http://www.communities.gov.uk/news/housing/1612019> , accessed 15 October 2010.

⁵⁹ See, e.g., ch.6, para.6.5.5.

⁶⁰ See ch.8, para.8.7.4.

⁶¹ See ch.6, para.6.5.5. Criminalisation for failure to comply with transfer information provisions also seems disproportionate - see ch.6, para.6.5.12.

1 and 2 of the LRRRA 2006. S.1 allows a minister to make an order for the purposes of removing burdens, which are defined broadly to include administrative inconvenience and criminal sanctions.⁶² Alternatively, an order could perhaps be considered under Section 2 which enables a minister to make an order, which ensures that regulatory functions are exercised so as to comply with the ‘five Principles of Good Regulation.’⁶³ These principles include the need for regulatory activities to be carried out in a way which is proportionate and which is targeted only at cases in which action is needed.⁶⁴ It is therefore recommended that a regulatory reform order be used to implement the proposed changes to the LTA 1985 and the LTA 1987.

9.3 Future Prospects

9.3.1 *The Standard Tyneside Flat Arrangement*

The promulgation by the Newcastle Law Society of a mixed freehold/leasehold structure for the transfer of Tyneside Flats can be seen as an example of an ongoing entrepreneurial tradition that was very much to the fore when large numbers of Tyneside Flats were originally being built in the Victorian era.⁶⁵ A major pressure leading to the introduction of the standard Tyneside Flat arrangement was the perceived need for uniformity⁶⁶ and, in practice, the promulgated documentation is very widely accepted by north eastern conveyancers.⁶⁷ The only other arrangement in regular use for Tyneside Flat transfer is largely confined to the South Shields district of Tyneside.⁶⁸ Even here quantitative research data suggests that approximately half the local conveyancers wish instead to adopt the standard Tyneside Flat scheme.⁶⁹ No alternative leasehold structures to either the standard Tyneside Flat documentation or the South Shields structure now appear to be used.⁷⁰

⁶² See s.1 (3) (b) and (d) LRRRA 2006. Other ‘burdens’ are detailed in s.1 (3).

⁶³ See ‘Main navigation: The Legislative and Regulatory Reform Act’ issued by the Cabinet Office, <<http://www.cabinetoffice.gov.uk/regulation/reform/bill/>>, accessed 16 March 2007, and the guidance for departments to which it refers and which is contained in the link to the ‘pro forma for the analysis of potential orders to be made under the LRRRA 2006’ issued by the Better Regulation Executive.

⁶⁴ See s.2 (3) (a) and (b) LRRRA 2006.

⁶⁵ See ch.2, paras 2.2.4 & 2.4.1.

⁶⁶ See ch.5, para.5.3.2.

⁶⁷ See ch.8, para.8.3.2.

⁶⁸ *Ibid.*

⁶⁹ See ch.8, para.8.3.4.

⁷⁰ See ch.8, para.8.9.9 for an example of an alternative leasehold structure that had apparently been used, but was later rejected.

A leasehold structure was adopted because of legal difficulties over the ongoing enforceability of positive freehold obligations. The subsequent introduction of commonhold enables freehold obligations to run, but this tenure seems inappropriate for self-contained, individually managed, two flat buildings.⁷¹ No commonholds appear to have been created for Tyneside Flats and it seems improbable that they will be, even if amending legislation were to make commonholds more acceptable to mortgage providers.⁷² The attitude of mortgage lenders has always been crucial for the transfer of Tyneside Flats and other horizontally divided buildings.⁷³ It is therefore a major advantage for standard Tyneside Flat documentation that a mixed freehold/leasehold arrangement is recognised in the *CML Handbook*⁷⁴ and that leading mortgage lenders are willing to lend on it.⁷⁵ All the above factors suggest that, in the absence of comprehensive land obligation reform, the existing large stock of mixed freehold/leasehold titles will continue to exist. It is also likely to increase whenever an individual north eastern Tyneside Flat, which is outside the South Shields district, is transferred for the first time.

9.3.2 Impact of Leasehold Legislation

Qualitative research data indicates that north eastern conveyancers are often unaware of all the legal implications of the leasehold conveyancing device they are using.⁷⁶ The leasehold legislative amendments that have been suggested could help alleviate some future potential difficulties, particularly over contributions for ‘joint installations’.⁷⁷ Greater awareness of the impact of existing leasehold legislation could be beneficial for Tyneside Flat and other similar long leaseholders. This benefit is likely to increase in the future, for example, when 99 year leases near their expiry date.⁷⁸ There appears to be scope here for Newcastle and other local law societies to take on an educational role.⁷⁹ The chapter on the impact of

⁷¹ See ch.4, paras 4.7.3 - 4.7.5.

⁷² See, e.g., Clarke D, ‘Long Residential Leases: Future Directions’, (n.39), pp.181 - 183 for an indication of the problems commonhold legislation presents to mortgage lenders. Ironically it was pressure from the BSA for some form of strata title that was instrumental in the eventual enactment of commonhold – see further BSA ‘*Leaseholds – Time for a Change*’, (London: BSA, 1984), paras 19 - 23 & thesis ch.4, para.4.6

⁷³ See ch.2, para.2.4.2 & ch.8, s.8.4.

⁷⁴ See ch.8, para.8.4.4.

⁷⁵ Ibid.

⁷⁶ See, e.g., ch.6, paras 8.3.6 & 8.7.4.

⁷⁷ See ch.9, paras 9.2.2 – 9.2.3.

⁷⁸ See ch.6, para.6.3.4.

⁷⁹ See Davey M, ‘The Regulation of Long Residential Leases’, (n.39), p.223 where he indicates that leaseholders will find it impossible to negotiate the law without professional help that seems to be so ‘manifestly missing’.

leasehold legislation illustrates its complexity and brings home the need for the codification and simplification of legislation affecting residential long leases.⁸⁰ Codification, particularly if there were a separate section on mixed freehold/leasehold structures,⁸¹ also ought to help in understanding and imparting the impact of leasehold legislation.⁸²

9.3.3 Conveyancing Procedures

Much of the qualitative and quantitative research data illustrated the complications inherent in a mixed freehold/ leasehold structure. Some practical steps could be taken to overcome conveyancing difficulties,⁸³ although it seems that many have been ironed out over time.⁸⁴ Local standardisation clearly has advantages for conveyancers⁸⁵ and meets the past criticism that, if leaseholds are to remain, then professional resistance to standardisation needs to be overcome.⁸⁶ Qualitative and quantitative research data presented in this thesis does, however, show that inappropriate standardisation can cause extensive and unnecessary complications for many leaseholders. This has been caused by incorporating unsuitable provisions into the standard Tyneside Flat lease from a previous South Shields form of lease.⁸⁷ Expense would probably rule out the promulgation by Newcastle Law Society of an agreed deed of variation for all existing standard Tyneside Flat leases, although if any particular lease needed modification for another reason, other amendments could then be made. Some practical difficulties could be avoided for the future if a revised standard Tyneside Flat lease were to be promulgated.⁸⁸ It is therefore recommended that this possibility should be considered by the Newcastle Law Society. It would, of course, always be possible for individual firms to amend their standard Tyneside Flat lease, but a ‘preference for the familiar’⁸⁹ perhaps makes this unlikely, unless the Newcastle Law Society were to be involved. The need for care in the

⁸⁰ See ch.9, para.9.2.1 (c) & f.n. 39 & see Clarke D, ‘Long Residential Leases: Future Directions’, (n.39), p.189, where he suggests that a review of legislation affecting long leases is perhaps most needed when they have been used as a conveyancing device.

⁸¹ See ch.9, para.9.2.1 (c).

⁸² See Davey M, ‘The Regulation of Long Residential Leases’, (n.39), pp.223 - 224.

⁸³ See ch.9, para.9.1.

⁸⁴ See ch.8, para.8.4.4, fn117.

⁸⁵ See ch.8, para.8.3.8.

⁸⁶ See Percival M, ‘The Landlord and Tenant Act 1987’ (1988) 51 MLR 97, p.105.

⁸⁷ See ch.5, para.5.3.3.

⁸⁸ This could, e.g., replace the existing obligation to register original documents with the landlord’s solicitors and pay their reasonable registration fees, with a requirement to give notice only either directly on the landlord or on his agent /solicitor.

⁸⁹ See Clarke D, ‘Long Residential Leases: Future Directions’, (n.39), p.185 where this phrase was used to describe an anticipated reluctance by developers to switch to commonhold, even if the factors governing the choice between commonhold and long leasehold for new developments were entirely neutral.

preparation of standard or pro forma documentation was illustrated by qualitative research data, which showed how a simple undetected typing error can have widespread and potentially serious implications for many leaseholders.⁹⁰

9.3.4 Land Obligations - A Freehold Future?

The standard Tyneside Flat lease is for a 999 year term and therefore already complies with the suggestion that future legislation should prescribe that all long residential leases should either be for that term or for less than 21 years.⁹¹ In many ways the mixed freehold/leasehold arrangement also seems better tailored to north eastern conditions than other tenurial arrangements,⁹² but is inherently more complicated than single freehold ownership. It is also questionable whether a leasehold tenure, even for 999 years, is appropriate for twenty first century home ownership.⁹³ This is particularly so if, under the standard Tyneside Flat arrangement, only one lease has been granted or if the South Shields structure has been used. In both these situations the long leaseholder is on a less equal standing with his landlord than when a full Tyneside Flat structure has been set up and each leaseholder is the other's landlord.

Unlike commonhold, the Law Commission's proposals in their *2008 Consultation Paper* for a new form of land obligation would realistically provide a freehold alternative to the mixed freehold /leasehold structure on Tyneside⁹⁴ and also to other leasehold arrangements created elsewhere for small, horizontally divided, blocks of flats. However, for a new form of land obligation to be widely used, it would probably need the active encouragement of the Newcastle Law Society, presumably with fresh standard documentation being promulgated. Quantitative research data suggests that local conveyancers might well support such an initiative, since a strong majority considered that positive obligation reform would facilitate

⁹⁰ See para.8.3.8, fn 100.

⁹¹ See Clarke D, 'Long Residential Leases: Future Directions', (n.39), pp.186 – 189.

⁹² It appears that on Tyneside, before flats were sold individually, most two flat buildings were separately owned. This contrasts with the large number of similarly constructed buildings in the Walthamstow district of London, where the freehold ownership of whole terraced streets was apparently retained by the original building company and its successors. Examination of Walthamstow titles registered in the land registry suggests that the original builders intended to retain management control and consequential financial benefits. Accordingly, unlike standard Tyneside Flat leases where only a 'peppercorn' rent is charged, Walthamstow leases have progressively increasing ground rents - see also ch.2, para.2.6.1.

⁹³ See, e.g., see BSA '*Leaseholds – Time for a Change*', (n.72), para.14, Clarke D, 'Long Residential Leases: Future Directions', (n.39), p.190 & Gray K and Gray S, *Elements of Land Law*, 5th ed., (Oxford: OUP, 2009), para.4.1.3.

⁹⁴ See further ch.4, s.4.8.

the transfer of Tyneside Flats.⁹⁵ This was probably because of the legal and practical problems in transferring both titles and in trying to explain a dual ownership structure to their clients and other conveyancing professionals.⁹⁶ With support from the Newcastle Law Society, revised Land Obligation documentation might be widely used for ‘new’ transfers of individual flats, but north eastern conveyancers were less positive about the conversion of existing titles.⁹⁷ As with some past conveyancing and land law initiatives,⁹⁸ conversion would be likely to take place over time, for example, if existing leases require amendment.⁹⁹ Conversion might also be given a ‘nudge’¹⁰⁰ if, following legislative amendment, commonhold eventually became more widespread for multi storey blocks and this different environment caused existing Tyneside Flat leaseholders to seek a freehold title.¹⁰¹ If, as qualitative research data suggests, conversion would be more acceptable to South Shields conveyancers,¹⁰² then this raises the prospect that the two separate landlord and tenant Tyneside Flat structures might gradually be replaced by one single freehold alternative. The proposed land obligation reforms are generally expected to be helpful for Tyneside Flat owner occupiers and are to be welcomed.¹⁰³ If enacted, they could well prove to be a major step on the long road to putting owner occupiers of horizontally and vertically divided buildings on a more equal footing with each other.

⁹⁵ See ch.8, para.8.9.2.

⁹⁶ Ibid.

⁹⁷ See ch.8, paras 8.9.3 – 8.9.7.

⁹⁸ E.g., unregistered land has systematically been converted to registered land under various LRA Acts and Rules and most rentcharges have, or will be, phased out under the RA 1977 – see, e.g., Gray K and Gray S, *Elements of Land Law*, (n.93), para.6.6.4. However, ‘estate rentcharges’ are still permitted. Their use as a device for the enforcement of positive freehold obligations is discussed in ch.5, para.5.4.5.

⁹⁹ See ch.8, para.8.9.6.

¹⁰⁰ For a discussion of the appeal of ‘libertarian paternalism’ or ‘nudge’ principles to the present coalition administration see Chakraborty A, ‘The Nudge phenomenon From Obama to Cameron, why do so many politicians want a piece of Richard Thaler?’ *The Guardian* 12 July 2008, p.16 & see generally Thaler R & Sunstein C, *Nudge, Improving Decisions about Health, Wealth, and Happiness*, 1st ed., (New Haven: YUP, 2008).

¹⁰¹ See Clarke D, ‘Long Residential Leases: Future Directions’ (n.39), p.185, where he suggests that if commonhold eventually becomes the ‘tenure of choice’ for new developments, then it will be ‘inevitable’ that existing long leaseholders will wish to have an easier mechanism to convert long leasehold developments into commonhold.

¹⁰² See ch.8, para.8.9.8.

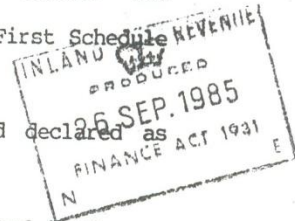
¹⁰³ See ch.4, para.4.8.9.

Appendix A

Standard Tyneside Flat Lease

THIS LEASE is made on the date stated in the First Schedule BETWEEN
THE LESSOR named in the First Schedule (hereinafter called "the
Lessor") of the one part and THE LESSEE named in the First Schedule
(hereinafter called "the Lessee")

NOW THIS DEED WITNESSETH and it is hereby agreed and declared as
follows:-



1. (A) "THE BUILDING" means the whole Building as described in the First Schedule of which the Demised Premises as hereinafter defined form part
(B) "THE DEMISED PREMISES" means the Demised Premises as described in The First Schedule
(C) "THE OTHER FLAT" means the Other Flat as described in the First Schedule
(D) "SHARED LAND" means any land shown hatched black on the Plan
(E) "COMMON INSTALLATIONS" means all spouts gutters downcomers and other things conveying rainwater from the Building any yard or garden walls of any Shared Land chimney stacks and the gas and water pipes conduits and electric wires and other gas water and electrical installations in under or upon the Building or its curtilage the use of which is common to the Lessor and Lessee
(F) IF two or more persons parties hereto comprise the Lessee they shall be jointly and severally liable on the covenants on the part of the Lessee herein contained and shall be beneficially entitled to the Demised Premises as joint tenants and pending the sale of the Demised Premises the trustees for the time being of this deed shall until the expiration of Eighty years from the date hereof have the same full and unrestricted power of mortgaging leasing or otherwise dealing with the Demised Premises as an absolute owner
2. IN consideration of the Purchase Price stated in the First Schedule

paid to the Lessor by the Lessee (the receipt whereof the Lessor hereby acknowledges) and of the rents and covenants on the part of the Lessee hereinafter reserved and contained the Lessor hereby demises unto the Lessee ALL THOSE the Demised Premises TOGETHER WITH the rights mentioned in the Second Schedule but SUBJECT to the rights mentioned in the Third Schedule TO HOLD the same unto the Lessee for the term of years specified in the First Schedule PAYING THEREFOR yearly during the said term the rent at the rate and on the dates therein mentioned

3. THE Lessee hereby covenants with the Lessor to observe and perform the covenants contained in the Fifth Schedule

4. THE Lessee (in whom the freehold of the Other Flat has been or is to be vested) hereby irrevocably by way of security appoints the Lessee for the time being of the Other Flat at attorney in the name of the Lessee to execute such conveyance or transfer of the freehold reversion in the Other Flat as shall be requisite to remedy any breach of the provisions of Clause (v) of the Fifth Schedule. THE form of any intended conveyance or transfer shall be specified to the Lessee not less than twenty-one days prior to its execution and any difficulty or dispute as to the form of such conveyance or transfer shall be determined by such solicitor as the President for the time being of the Newcastle upon Tyne Incorporated Law Society shall appoint on the application of either party

5. THE Lessor hereby covenants with the Lessee as follows:-

(A) To perform and observe for the benefit of the Demised Premises covenants stipulations and restrictions (mutatis mutandis) in like terms to the Lessee's covenants contained in this Lease the burden of which will attach to the Other Flat until the freehold reversion of the Other Flat is disposed of in accordance with the provisions of the covenants contained in the Fourth Schedule

(B) That the Lessee paying the rent hereby reserved and performing

and observing the covenants hereinbefore contained shall peaceably hold and enjoy the Demised Premises for the term hereby granted without any interruption by the Lessor or any person lawfully claiming through under or in trust for him

(C) To observe and perform the covenants contained in the Fourth Schedule PROVIDED ALWAYS that for the purposes of the covenants therein contained the statutory vesting of the Building in the Official Referee a Trustee in Bankruptcy the President of the Family Division of the High Court or a personal representative shall not be considered a disposal

6. THE Lessor (in whom the freehold in the Demised Premises has been or is to be vested) hereby irrevocably by way of security appoints the Lessee for the time being of the Demised Premises as attorney in the name of the Lessor to execute such conveyance or transfer of the freehold reversion in the Demised Premises as shall be requisite to remedy any breach of the provisions of the covenants contained in the Fourth Schedule. THE form of any intended conveyance or transfer shall be specified to the Lessor not less than twenty-one days prior to its execution and any difficulty or dispute as to the form of such conveyance or transfer shall be determined by such solicitor as the President for the time being of the Newcastle upon Tyne Incorporated Law Society shall appoint on the application of either party

7. IF at any time during the term of this Lease any dispute shall arise between the parties hereto or their successors in title relating either to any repairs or to contributions towards repairs then such dispute shall be referred (at the joint expense of the parties to the dispute) to a surveyor nominated on the application of either party by the President for the time being of the Newcastle upon Tyne Incorporated Law Society who shall act as an expert and whose decision on the matter in question shall be final and binding

8. PROVIDED ALWAYS and it is hereby agreed and declared that if any of the covenants on the part of the Lessee herein contained shall not be observed and performed then and in any such case it shall be lawful for the Lessor or any person or persons authorised by him in that behalf at any time thereafter to re-enter upon the Demised Premises or any part thereof in the name of the whole and thereupon the term hereby created shall cease and determine but without prejudice to any right of action or remedy of the Lessor in respect of any antecedent breach of the covenants by the Lessee hereinbefore contained

9. IT IS HEREBY CERTIFIED that the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration other than the rent exceeds the sum stated in the First Schedule

IN WITNESS whereof the parties hereto have hereunto set their respective hands and seals or (being corporations) have caused their Common Seals to be hereunto affixed on the date mentioned in the First Schedule

THE FIRST SCHEDULE
(on the disposal of the upper flat)

DATE OF LEASE

The 30th day of August 1985

THE LESSOR

ESTHER ELLINSON of 15 Gresham Gardens, London. NW11 8NX

THE LESSEE

and MARGARET
GEORGE RIDLEY /RIDLEY of 366 Simonside Terrace, Heaton,
Newcastle upon Tyne.

THE PURCHASE PRICE

EIGHTTHOUSAND POUNDS (£8,000)

THE SUM STATED FOR
THE PURPOSES OF THE
CERTIFICATE OF VALUE

THIRTYTHOUSAND POUNDS (£30,000)

THE BUILDING

The house in two flats known as Numbers 364/366 Simonside Terrace, Heaton, Newcastle upon Tyne together with any land used and enjoyed therewith

THE DEMISED PREMISES

(a) ALL THAT portion of the Building above the level of the top of the brickwork supporting the joists upon which the floor of the first floor flat rests together with the staircase and ground floor hall leading thereto and including without prejudice to the generality of the foregoing the roof and the roof void of the Building and which is shown edged blue on the plan annexed hereto (hereinafter referred to as "the Plan") and (b) such other areas of land enjoyed exclusively therewith (if any) as are shown edged round with red on the Plan all of which premises are known as Number 366 Simonside Terrace, Newcastle upon Tyne

THE OTHER FLAT

(a) ALL THAT portion of the Building below the level of the top of the brickwork supporting the joists upon which the floor of the Demised Premises rests (with the exception of the Staircase and ground floor hall leading thereto) but including the foundations of the Building and (b) any other areas of land enjoyed exclusively therewith and (c) (if any) the shared land which is shown hatched black on the Plan all of which premises are known as No. 364 Simonside Terrace, Heaton, Newcastle upon Tyne

TERM

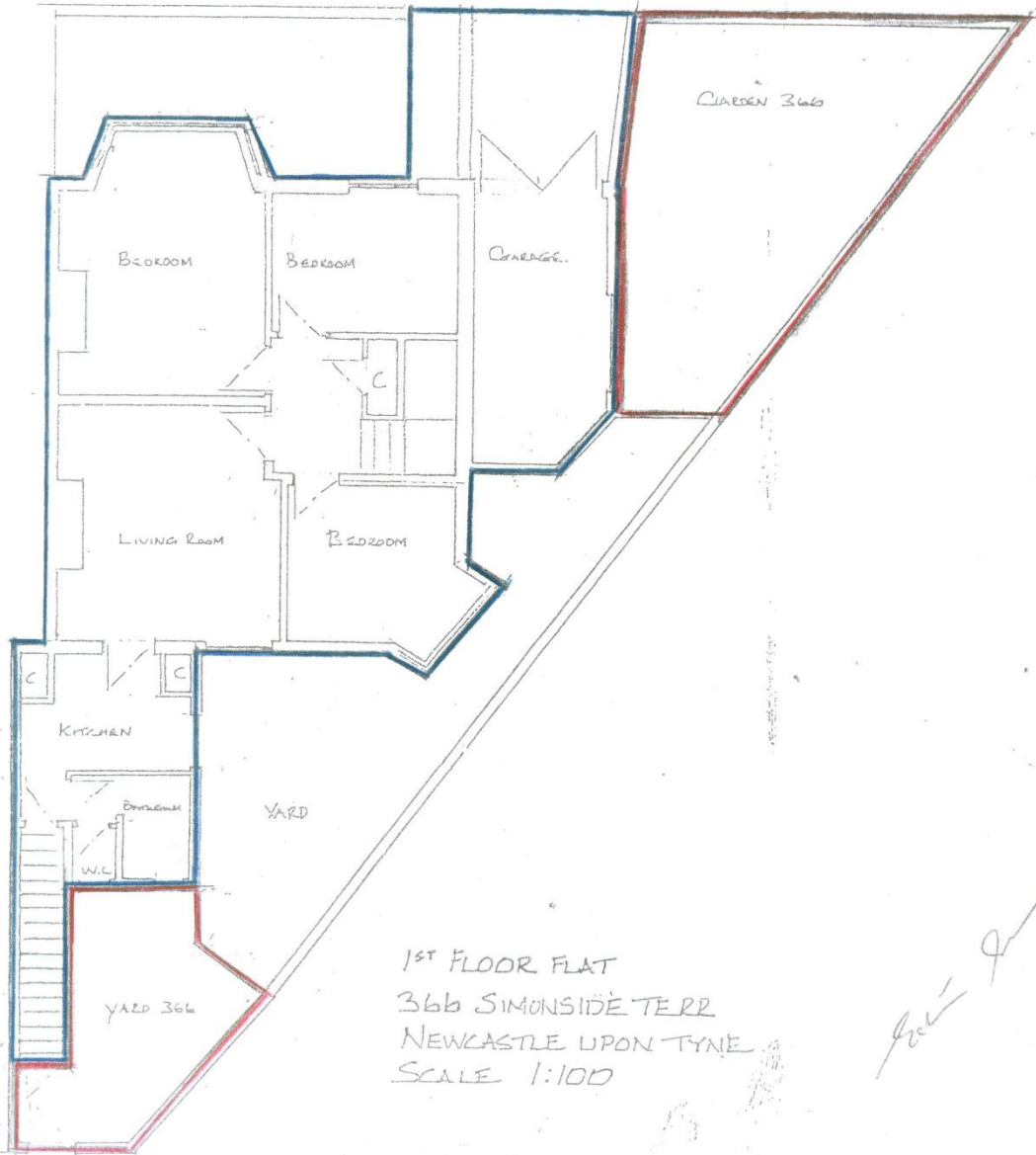
Nine hundred and ninety nine years from the date hereof

ANNUAL RENTS AND
DATES OF PAYMENT

One peppercorn if demanded on the Twenty-fifth day of March in every year

DOCUMENTS (IF ANY)
REFERRED TO IN
CLAUSE (t) OF THE
FIFTH SCHEDULE:

Conveyance dated 7th February 1933 and made between the Rt. Hon. Lord Armstrong by the direction of Messrs. Storey & Reid (1) and Elkan Levey (2)



1ST FLOOR FLAT
366 SIMONSIDE TERR
NEWCASTLE UPON TYNE
SCALE 1:100

John A

THE SECOND SCHEDULE

(Rights granted to the Lessee)

1. THE free passage and running of water soil gas electricity and fumes in common with all other persons entitled to a like right through all watercourses drains pipes wires cables meters and flues now or at any time within Eighty years hereafter to be laid or constructed to serve the Demised Premises and passing over under or through the Other Flat
2. THE right with or without workmen servants and others at all reasonable times on notice (except in the case of emergency) to enter upon the Other Flat for the purpose of constructing inspecting cleansing repairing or renewing any electricity meter cistern or other apparatus serving the Demised Premises or any Common Installation now or at any time within Eighty years from the date hereof installed in under or above the Other Flat and used and enjoyed in common therewith or any other structure or thing which cannot otherwise reasonably be inspected cleansed repaired or renewed the person exercising such rights doing as little damage as possible and making good all damage thereby caused with all due dispatch
3. THE right of shelter where the Demised Premises are a lower flat or the right of support where they are an upper flat together with all other similar rights and benefits as the Demised Premises have in the past enjoyed and also the right for the Lessee or occupier for the time being of the Demised Premises with or without servants workmen and others at all reasonable times on notice (except in the case of emergency) to enter in or upon the Other Flat for the purpose of repairing maintaining or renewing altering or rebuilding any part of the Other Flat giving support or shelter as the case may be to the Demised Premises causing as little damage as possible and making good any damage caused to the reasonable satisfaction of the Lessor

4. THE benefit of the covenants stipulations and restrictions affecting the Demised Premises imposed by any existing or future Lease of the Other Flat and the right in the name of the Lessor or otherwise to enforce the same

5. IF the shared land hatched black (if any) is not included in the description of the demised premises in the First Schedule the right in common with the Lessor to use any Shared Land for the purpose of access to and egress from the Demised Premises and for all other domestic purposes connected with the proper enjoyment of the Demised Premises but subject to the covenants relating thereto herein contained

6. THE right to enter upon the gardens paths or yards (if any) of the Other Flat necessary to allow the painting decorating and cleaning of the exterior of the Demised Premises

7. THE right in common with the Lessor to erect maintain and use a television aerial on the chimney stack or in the roof void of the Building

THE THIRD SCHEDULE

(Rights and things excepted and reserved out of this Lease in favour (save where otherwise stated) of the Lessor and adjacent owners and lessees and their successors in title)

1. THE free passage and running of water soil gas electricity and fumes in common with all other persons entitled to a like right through all watercourses drains pipes wires cables meters and flues now or at any time within Eighty years hereafter to be laid or constructed to serve the Other Flat and passing over under or through the Demised Premises
2. THE right with or without workmen servants and others at all reasonable times on reasonable notice being given to the Lessee (except in the case of emergency) to enter upon the Demised Premises for the purpose of constructing inspecting cleansing repairing or renewing any electricity meter cistern or other apparatus serving the Other Flat or any Common Installation now or at any time within Eighty years from the date hereof installed in under or above the Demised Premises and used and enjoyed in common therewith or any other structure or thing which cannot otherwise reasonably be inspected cleansed repaired or renewed the person exercising such right doing as little damage as possible and making good all damage thereby occasioned with all due dispatch
3. THE right of support where the Other Flat is an upper flat or the right of shelter if it is a lower flat together with all other similar rights and benefits as the Other Flat has in the past enjoyed and also the right for the Lessor or occupier for the time being of the Other Flat with or without servants workmen and others at all reasonable times on notice (except in the case of emergency) to enter in or upon the Demised Premises for the purpose of repairing maintaining or renewing altering or rebuilding any part of the Demised Premises giving support or shelter as the case may be to the Other Flat causing as

little damage as possible and making good any damage caused to the reasonable satisfaction of the Lessee

4. UNTO the owner or owners thereof all mines and minerals within and under the Demised Premises with all such powers and liberties for winning working and carrying away the same and any other mines or minerals as such owner or owners is or are entitled to use and exercise but so that the Lessee shall be entitled to the benefit of all (if any) rights of compensation so far as they relate to the Demised Premises which the Lessor may have in respect of damage caused by the exercise of such powers and liberties whether such damage has accrued before or after the date hereof

5. THE right in common with the Lessee to erect maintain and use a television aerial on the chimney stack or in the roof void of the Building

6. THE right to enter upon the gardens paths or yards (if any) of the Demised Premises necessary to allow the painting decorating and cleaning of the exterior of the Other Flat

7. IF the shared land hatched black (if any) is included in the description of the demised premises in the First Schedule the right in common with the Lessee to use any shared land for the purpose of access to and egress from the other Flat and for all other domestic purposes connected with the proper enjoyment of the other Flat

THE FOURTH SCHEDULE

(Lessor's covenants on the disposal
of first flat)

(a) That if at any time hereafter during the continuance of the term hereby granted he shall dispose of his interest in the Building then he will do so only on the same day:

(i) Granting a lease of the Other Flat for a term equal to the then residue of the term hereby granted such lease to include covenants stipulations and restrictions (mutatis mutandis) in like terms to those contained in this Lease with the exception of this present Clause: and

(ii) Conveying to the Lessee for the sum of One Pound the freehold estate in the Other Flat subject to the restrictions and covenants referred to in Clause (t) of the Fifth Schedule and to the lease granted in accordance with sub-clause (a) (i) of this Clause but otherwise free from incumbrances: and

(iii) Conveying to the Lessee of the Other Flat for the sum of One Pound the freehold estate in the Demised Premises subject to the Lease hereby granted and subject to the restrictions and covenants referred to in Clause (t) of the Fifth Schedule

(b) That he will not dispose of any part of the Building or of any interest in the Building in any way which will prejudice the performance of Clause (a) of this Schedule

(c) That the agreements set out in Clause (a) of this Schedule shall constitute an estate contract registrable by the Lessee

THE FIFTH SCHEDULE

(Lessee's covenants)

- (a) To pay the yearly rent specified in the First Schedule.
- (b) To pay and discharge and to indemnify the Lessor against all outgoings imposed in respect of the Demised Premises or any part thereof
- (c) To keep the Demised Premises in good and tenantable repair and condition throughout the term and if necessary to rebuild any parts that require to be rebuilt and not to make any structural additions or alterations except with the consent in writing of the Lessor (such consent not to be unreasonably withheld) and to yield up the same in such repair and condition on the determination of the term hereby granted
- (d) To pay one half of the cost of repairing or renewing any Common Installations or shared land
- (e) To paint in at least every fourth year such parts of the exterior of the Demised Premises as are usually or ought to be painted in the same colours as previously painted or such other colours as shall be agreed by the Lessor and Lessee
- (f) To sweep and thoroughly cleanse the chimneys serving the Demised Premises (if any) at such times as may be necessary
- (g) To keep in repair and replace when necessary all storage tanks cisterns pipes wires ducts radiators and other things installed for the purpose of supplying or storing water (hot or cold) gas electricity or oil for the purpose of draining away water and soil from the Demised Premises in so far as such things are installed only for the use of the Demised Premises and for the purpose of such repairs the Lessee and his workmen shall have access to such

installations where they are in upon or under the Other Flat on reasonable notice being given to the Lessor except in the case of emergency

- (h) To permit the Lessor and his duly authorised agents at reasonable times and on giving reasonable notice to enter upon and examine the condition of the Demised Premises and thereupon the Lessor may serve upon the Lessee notice in writing specifying any repairs necessary to be done and require the Lessee to execute the same forthwith and if the Lessee shall not within One month after the service of such notice proceed diligently with the execution of such repairs then to permit the Lessor to enter upon the Demised Premises and execute such repairs and the cost thereof shall be debt due to the Lessor from the Lessee and forthwith recoverable by action
 - (i) To permit the Lessor and his duly authorised agents with all necessary workmen and appliances upon giving one week's notice in writing at all reasonable times to enter upon the Demised Premises to cleanse maintain repair or alter the Other Flat the Lessor making good any damage occasioned thereby to the Demised Premises to the reasonable satisfaction of the Lessee
 - (j) To ensure that the Demised Premises are insured at all times throughout the term in the joint names of the Lessor and the Lessee (and any mortgagee) against loss or damage by fire flood and other risks and special perils normally insured under a Householder's Comprehensive Policy in some reputable Insurance Office in a sum equal to the full reinstatement value thereof together with architects' and surveyors' and other professional fees and to make all payments necessary for the above purpose immediately the same have become due and to produce to the Lessor or his agent on demand the policy or policies of such insurance
-

and the receipt for each such payment payable thereunder PROVIDED
THAT if the Lessee shall at anytime fail to keep the Demised
Premises insured as aforesaid the lessor may do all things
necessary to effect or maintain such insurance and any moneys
expended by him for that purpose shall be repayable by the Lessee
on demand and be recoverable forthwith by action

- (k) To use all insurance money received to make good the damage or
destruction for which the money has been received and if that
money shall not be sufficient to make up the deficiency from his
own money PROVIDED ALWAYS that if the re-building or reinstatement
of the Demised Premises shall be frustrated all such insurance
moneys relating to the Demised Premises or the part thereof in
respect of which the frustration occurs shall (after deduction of
all moneys due to any mortgagee of the Demised Premises) be
apportioned between the Lessor and the Lessee in accordance with
the value of their respective interests
- (l) Within One month after any assignment or after any devolution by
will or otherwise or mortgage re-conveyance or vacating receipt
affecting the Demised Premises or any part thereof to produce to
the Solicitor for the time being of the Lessor the deed or
instrument affecting the same and pay him such reasonable fee as
he may require including any tax for the registration thereof
- (m) To use the Demised Premises for the purpose of a private residence
in the occupation of one family only at a time
- (n) Not to do or permit or suffer anything to be done in or upon the
Demised Premises or any part thereof which may become a nuisance
or annoyance or cause inconvenience to the Lessor or the tenants
or occupiers of the Other Flat or neighbouring dwellings
- (o) Not to throw down dirt or rubbish or rags or allow any other form
of refuse or waste material to accumulate in the Shared Land or


the Common Installations or any part of the Demised Premises and at all times to keep free of all such material the sinks baths lavatories cisterns waste soil or ventilation pipes of the Demised Premises

- (p) Not to permit any musical instrument television radio loudspeaker mechanical or other noise-making instrument of any kind to be played or used or any singing to be practised in the Demised Premises so as to cause annoyance to the Lessor or to any neighbouring owners or occupiers or so as to be audible outside the Demised Premises between the hours of midnight and 7 a.m .
- (q) Not to permit or suffer to be done in or upon the Demised Premises anything whereby any insurance for the time being effected on the Other Flat or any contents thereof may be rendered void or voidable or whereby the rate of premium may be increased
- (r) To pay to the Lessor all costs charges and expenses (including solicitors' or surveyors' fees) which may be incurred in or in contemplation of any proceedings under Section 146 of the Law of Property Act 1925 notwithstanding forfeiture is avoided otherwise than by relief granted by the Court
- (s) At the determination of the term hereby granted to yield up the Demised Premises and all additions thereto and all fixtures and fittings in tenantable repair in accordance with the Lessee's covenants herein contained
- (t) To perform and observe such restrictions and covenants affecting the reversion immediately expectant on the term hereby created as are contained or referred to in the Conveyance or Lease mentioned in the First Schedule as are still effective and relate to the Demised Premises and to indemnify the Lessor against any liability resulting from their breach or non-observance
- (u) Not to assign part only of the Demised Premises

- (v) Not to assign the whole of the Demised Premises save to such person as immediately prior to such assignment shall have become the estate owner in respect of the freehold estate in the Other Flat and for the purposes of this clause "assign" shall include vesting by assent disclaimer or any mode of devolution or disposal other than a mortgage or charge PROVIDED ALWAYS that this sub-clause shall not apply unless the freehold estate in the Other Flat shall have become vested in the Lessee
- (w) At the request of the lessee for the time being of the Other Flat to produce such evidence of the ownership of the Demised Premises and of the freehold estate in the Other Flat (subject to the same proviso contained in Clause (v) above) as shall be reasonably required to establish compliance with the provisions of the preceding sub-clause
- (x) To perform and observe such additional covenants and conditions (if any) as are mentioned in the First Schedule

SIGNED SEALED AND DELIVERED)
 by the said ESTHER ELLINSON)
 in the presence of)




 Whitley Bay

SIGNED SEALED AND DELIVERED)
 by the said)
 in the presence)
 of)

Appendix B

Solicitors' General Questionnaire

Tyneside Flats

Solicitors' General Questionnaire

Please tick where appropriate and write on back sheets if more space needed

1. Land Tenure Structure

The Newcastle upon Tyne law society promulgated a land tenure structure in the early 1980s using a reciprocal freehold tenure with 999 year leases. Are you aware of the existence of this tenure?

Yes No

If 'No', please go to question 2 and continue with the remainder of this questionnaire omitting questions 8-20 inclusive.

If 'Yes', do you consider this tenure to be useful in the transfer of:

- a) Tyneside Flats Yes No
- b) Maisonettes Yes No
- c) Any Other Building Yes No

If the answer to 1 (c) is 'Yes', please specify the type of other building where this tenure has been used.

2. Definitions

a) What do you understand by the term 'Tyneside Flats'? Do you define them by:-

i) Their physical layout? Yes No

OR

ii) The documentation and tenure used on their transfer? Yes No

OR

iii) A combination of i) and ii)? Yes No

b) What do you understand by the term 'Maisonette'?

3. Physical Layout

a) What do you consider are the essential characteristics of a typical Tyneside Flat?

b) Does your concept only include flats forming part of a terrace?

Yes No

If 'Yes', skip to question 4.

c) **If 'No'**, does your concept also include semi-detached houses where each semi is divided into two flats one above the other?

Yes No

If 'No', omit question 3 (d) and go to 3 (e).

d) **If 'Yes'** (i.e. if your concept includes some semi-detached houses), does your concept only include those semi-detached houses where, in each semi, the two flats have *adjacent* front doors?

Yes No

OR does your concept also include those semi-detached houses where the two flats have a different front door layout, for example, where one front door faces the street and the other 'front' door is at the side or rear?

Yes No

If 'No', how do you describe such properties?

e) What other, if any, type of building does your concept of Tyneside Flats include?

4. Three flat Form

Have you, or to your knowledge has your firm, ever transferred an individual Tyneside Flat within a building comprising three or more Tyneside Flats?

Yes No

If 'Yes', please state:

a) How many such flats have been transferred

b) When they were transferred

c) Their location.

5. Conversion into a Single dwelling House

Are you aware of any cases of enfranchisement under the Leasehold Reform Act 1967 when a pair of Tyneside Flats has been converted to a single dwelling house?

Yes No

If 'Yes', please give full details.

6. Pre 1960s Sale Arrangements

Are you aware of any pre 1960s sale arrangements?

Yes No

If 'Yes', please also complete the enclosed separate historical questionnaire and then continue with this questionnaire.

If 'No', please ignore the historical questionnaire and continue with this questionnaire.

7. The Newcastle upon Tyne Standard Form Arrangement - use of Conveyancing Documentation.

a) Have you acted in the *sale* of any individual Tyneside Flats since 1980?

Yes No

If 'No', skip to question 9.

b) If 'Yes', and you have created a new lease, have you *always* used the Newcastle upon Tyne standard form arrangement (see question 1 above)?

Yes No

If 'No', please state:

i) In approximately what percentage of sales have you used other forms of documentation

ii) On what tenurial basis were individual flats sold e.g. long leasehold (99 years or 999 years), freehold etc and

iii) If sold on a *leasehold* basis, the length of term granted and

iv) If sold on a *freehold* basis, what, if any, special conveyancing devices (e.g. deeds of covenant or rentcharges) were used to secure the enforceability of positive covenants.

8. Standard Documentation - Amendment

If you have used the standard form of tenure /documentation on a *sale*, have you ever amended it?

Yes No

If 'Yes', please state

i) What amendments have been made

ii) Why they were made

iii) When they were made

iv) Whether they have been made:

- Occasionally (approximately one in four) Yes No

- Regularly (approximately one in two) Yes No

- Always Yes No

- Other (please specify).

9. Standard Documentation - Legal Costs.

Do you consider the use of a mixed freehold/leasehold structure increases the conveyancing costs for your clients?

Yes No

If 'Yes', do you consider these costs would be less if:

a) Individual flats could be transferred more easily on a purely freehold basis?

Yes No

AND/OR

b) Individual flats were transferred by creating a long lease of one flat and transferring the remainder of the building on a freehold basis?

Yes No

10. Standard Documentation –Transfer of Freehold Reversions

a) Landlord's covenant to transfer the reversions-*landlord's whereabouts known*.

Have you, or to your knowledge has anyone in your firm, ever acted in a *purchase* where the whereabouts of the landlord is *known*, but he has refused to comply with the standard covenant to transfer the freehold reversions to the leaseholders after the creation of the second Tyneside Flat lease?

Yes No

If 'Yes', please state:

i) In approximately what percentage of purchases has this difficulty arisen?

ii) How, if so, has the difficulty been overcome?

b) Landlord's covenant to transfer the reversions-*landlord's whereabouts unknown*.

Have you, or to your knowledge has anyone in your firm, ever acted in a *purchase* where the landlord's whereabouts are *unknown* and he has omitted to transfer the freehold reversions after the creation of the second lease?

Yes No

If 'Yes', please state:

i) In approximately what percentage of purchases has this difficulty arisen?

ii) How, if so, has the difficulty been overcome?

c) Exercise of Power of Attorney. When a leaseholder exercises the power of attorney given to him in the lease in order to transfer the freehold reversion in his flat, in practice does the other leaseholder bear the legal costs?

Yes No

If 'No', who does pay the costs?

d) Notice of Transfer. The Landlord and Tenant Act 1985 requires a new *landlord* of a dwelling to give written notice to his leaseholder(s) of a transfer of the freehold reversion and of his name and address.

i) In practice is formal notice given by 'new' Tyneside Flat landlords after the reversions have been transferred to them?

Yes No

If 'Yes', in approximately what percentage of transfers is notice given?

ii) If 'No' (i.e. if notice is not given), does this cause any problems?

Yes No

iii) If 'Yes' (i.e. if failure to give notice causes problems), please give full details

11. Standard Documentation – Creation and Extension of Leaseholds

a) Creation of a second standard lease. Have you ever known of any instances where, having created one Tyneside Flat lease, a landlord has refused to comply with his covenant to create a second lease in similar terms?

Yes No

If 'Yes', how, if so, was this difficulty overcome?

b) Term granted. Are you aware of standard form leases being granted for terms of substantially less than 999 years i.e. for less than 200 years?

Yes No

If 'Yes', please state:

i) What shorter terms have been granted

ii) In approximately what percentage of standard form leases have shorter terms been granted?

iii) Why a shorter term was granted.

c) Lease extensions. Are you aware of any instances where extensions of shorter term standard leases have been sought?

Yes No

If 'Yes', have any difficulties been encountered?

Yes No

d) If 'Yes' (i.e. if there have been difficulties in extending standard leases), please state:

i) The nature of the difficulties

ii) How, if so, the difficulties were overcome.

12. Standard Documentation - Registration of Deeds with Landlords

a) Registration of deeds. The standard form of lease stipulates that within one month of any assignment, mortgage etc leaseholders will produce the deed to the landlord's solicitors.

i) In practice is this covenant complied with? Yes No

If 'Yes', in approximately what percentage of transactions is the covenant complied with?

ii) If 'No' (i.e. the covenant is not complied with), does this cause any difficulties?

Yes No

iii) If 'Yes' (i.e. failure to register causes difficulties), please give full details.

b) Fees for registration. The standard form of lease provides that, on producing original documents to the landlord's solicitor (see 12 (a) above), leaseholders will pay such reasonable fee as he may require for the registration of the deed.

i) In practice is any fee required? Yes No

If 'Yes', please:

ii) State in approximately what percentage) of transactions a fee is required and

iii) Give full details of any difficulties that have arisen.

13. Standard Documentation – Sub Leases

Are you aware of any sub-leases of Tyneside Flat leases being created?

Yes No

If 'Yes', please state:

i) Why the sub leases were created

ii) When the sub leases were created

iii) The length of terms granted

iv) Whether sub leases have been granted

- Occasionally (approximately one in four cases) Yes No

- Regularly (approximately one in two cases) Yes No

- Other (please specify).

14. Standard Documentation - Enforcement of Original Leaseholder's Covenants

Are you aware of any original pre 1996 standard form leaseholders being called upon to contribute to e.g. joint repairs because of default by a later leaseholder to whom the property has been transferred?

Yes No

If 'Yes', please supply full details.

15. Standard Documentation - Insurance Details

a) In the standard form of lease, leaseholders covenant to produce their insurance details to their landlord on demand. To your knowledge, has this clause ever given rise to any difficulty?

Yes No

If 'Yes', please give full details.

b) In practice do leaseholders or their transferees seek details of their landlords' insurance?

Yes No

If 'Yes', please give full details of any difficulties encountered.

16. Standard Documentation - Joint Repairs

a) Standard Tyneside Flat leases require leaseholders to pay one half of the costs of repairing or renewing any 'common installations', as defined in the leases. Have you ever known of any joint contributions being required?

Yes No

If 'No', please skip to question 17.

b) If 'Yes', please state whether such contributions are usually required:

i) More than once a year Yes No

ii) Yearly Yes No

iii) Every 2-5 years Yes No

iv) Every 5-10 years Yes No

v) At intervals of more than 10 years Yes No

vi) At other intervals (please specify).

c) Joint contributions for repairs technically appear to be ‘service charges’ as defined by the Landlord and Tenant Act 1985. Subsequent legislation provides that any demand for the payment of service charges will not be treated as due unless the demand contains the landlord’s name and address and an address for service.

i) In practice are these requirements complied with? Yes No

ii) **If ‘No’** (i.e. if the landlord’s details are not given), does this give rise to any difficulty?

Yes No

iii) **If ‘Yes’** (i.e. difficulties do arise), please give full details.

d) The Landlord and Tenant Act 1985, as amended, contains detailed accounting provisions for service charges, such as a requirement for a written statement of account, an accountant’s certificate, a summary of rights and obligations and payment into a separate client account.

i) In practice are these requirements complied with? Yes No

ii) **If ‘No’** (i.e. statements etc are not given), does this give rise to any difficulty?

Yes No

iii) **If ‘Yes’** (i.e. difficulties do arise), please supply full details.

e) Have you ever known of disputes arising over contributions for joint repairs?

Yes No

If ‘Yes’, please:

i) Give full details

ii) State whether the standard lease dispute mechanism (i.e. that disputes relating to repairs or contributions to repairs should be referred to a surveyor nominated on the application of either party by the President of the Newcastle Law Society) has been used.

Yes No

f) **If ‘Yes’** (i.e. the lease dispute mechanism has been used), please:

i) State when this occurred

ii) Give full details of the outcome

g) **If ‘No’** (i.e. the lease dispute mechanism was not used), how, if so, was the dispute resolved?

17. Standard Documentation - s.146 LPA 1925 Notices

Are you aware of any s.146 LPA 1925 Notices being served on standard form leaseholders?

Yes No

If 'Yes', please supply full details.

18. Standard Documentation - Legal Charges

a) Leasehold flat charged - freehold acquired later.

Have you, or to your knowledge has anyone in your firm, acted in the purchase of an individual flat where the leasehold interest in the flat being acquired and occupied was charged at the time of purchase, but the freehold interest in the other flat was not acquired until later?

Yes No

b) If 'Yes', has this led to difficulty in charging the freehold interest in the other flat?

Yes No

If 'Yes', please state:

- i) In approximately what percentage of such cases has a difficulty arisen
- ii) How, if so, were the difficulties overcome.

c) Leasehold flat charged-sale by lender.

Have you, or to your knowledge has anyone in your firm, ever acted in a transaction where a lender has found it difficult to exercise its power of sale because, although the borrower owns, or should own, the freehold interest in the 'other' flat, only the leasehold interest has been charged?

Yes No

If 'Yes', please state:

- i) In approximately what percentage of sales by lenders has this difficulty arisen
- ii) How, if so, were the difficulties overcome.

19. Standard Documentation - Registration in the Land Registry

Do you consider the use of a mixed freehold/leasehold structure complicates registration in the Land Registry?

Yes No

If 'Yes', do you consider registration would be simpler if:

a) Individual flats could be transferred more easily on a purely freehold basis

Yes No

AND/OR

b) Individual flats were transferred by creating a long lease of one flat and transferring the remainder of the building on a freehold basis

Yes No

20. Standard documentation - explanation

a) Have you, or to your knowledge has anyone in your firm, ever encountered difficulty in explaining the effect of the standard documentation to:

i) Clients Yes No

ii) Lenders Yes No

iii) Solicitors Yes No

iv) Estate Agents Yes No

b) If 'Yes' to any of 20 (a) (i)-(iv) above, do you consider there would be less difficulty if:

i) Individual flats could be transferred more easily on a purely freehold basis

Yes No

AND/OR

ii) Individual flats were transferred by creating a long lease of one flat and transferring the remainder of the building on a freehold basis

Yes No

21. Reform Impact

a) The Law Commission intends to produce a Consultation Paper on easements and covenants later this year. If, as a result of reform, positive covenants were to become more readily enforceable, would this, in your view, potentially facilitate the transfer of Tyneside Flats?

Yes No

b) If it were possible for individual Tyneside Flats to be transferred more easily on a purely freehold basis, do you consider it would be desirable to convert existing mixed freehold/leasehold ownerships to a single freehold ownership?

Yes No

22. Follow Up

Would you be prepared to answer any follow up questions? Yes No

23. Additional Comments

Please add any additional comments you wish to make on the above or on any points that have not been covered.

24. Your Details

Please supply the following details:

Name

Ref

E-mail address

Thank you for your time.

Appendix C

Solicitors' Historical Questionnaire

H

Tyneside Flats

Solicitors' Historical Questionnaire

Please tick where appropriate and write on back sheets if more space needed

1. Pre 1960s Sale Arrangements

a) It is believed that usually, when Tyneside Flats came on the market before the 1960s, the freehold interest in the whole terraced building comprising both flats was sold.

Is this your understanding of the position? Yes No

If 'No', please state what was the usual arrangement.

b) It is believed that when, as in 1(a) above, both flats were sold together, vacant possession would usually be given of at least one flat which the purchaser would then occupy.

Is this your understanding of the position? Yes No

If 'No', please state what was the normal position.

c) It is believed that when, as in 1 (b) above, a purchaser bought a pair of Tyneside Flats and occupied one of them, the other flat would usually already be occupied by a weekly sitting tenant. The new purchaser would then become the existing tenant's landlord.

Is this your understanding of the position? Yes No

If 'No', please state what was the normal position.

d) It is believed that if, before the 1960s, a purchaser bought a pair of Tyneside Flats, both of which were vacant, he would usually occupy one flat and would also normally create a weekly tenancy of the other flat.

Is this your understanding of the position? Yes No

If 'No', please state what was the normal arrangement.

2. Sale of Individual Flats before the Standard Form Arrangement-General

a) Please state:

- i) When flats started to be sold individually rather than in pairs
- ii) What, in your opinion, led to this change taking place
- iii) Who, in your opinion, led the drive for change.

b) Did the sale of individual flats start in some areas before others?

Yes No

If 'Yes', please state:

- i) Which areas started first
- ii) Why some areas started before others.

3. Sale of Individual Flats before the Standard Form Arrangement - Documentation

If you were involved in the sale of individual flats before the Newcastle upon Tyne law society promulgated a standard form arrangement (see Question 1 of the general questionnaire), please state:

- a) On what tenurial basis were individual flats sold e.g. long leasehold (99 years or 999 years), freehold etc and
- b) If sold on a *leasehold* basis, the length of term granted and
- c) If sold on a *freehold* basis, what, if any, special conveyancing devices (e.g. deeds of covenant or rentcharges) were used to secure the enforceability of positive covenants.

4. The Standard Form Arrangement

What in your opinion caused the Newcastle upon Tyne Law Society to promulgate a standard form arrangement in the early 1980s?

5. Follow Up

Would you be prepared to answer any follow up questions? Yes No

6. Additional comments

Please add any other comments you wish to make on the above or on any 'historical' points that have not been covered.

7. Your Details

Please supply the following details:

Name

Ref

E-mail address

Thank you for your time.

Appendix D

Letter 17 May 2007 to Newcastle Law Society

17th
May 2007

UNIVERSITY OF
NEWCASTLE UPON TYNE



Newcastle Law School

University of Newcastle upon Tyne
21-24 Windsor Terrace
NE1 7RU

Dear Mr Robson

Transfer of Tyneside Flats – Research Project and Questionnaire

I am writing to you as I believe that, in addition to being the current Newcastle upon Tyne Law Society ('the Society') Vice President, you are also chair of the non-contentious sub committee. I have also been told of last February's meeting with the Land Registry to discuss Tyneside Flat documentation.

In view of the Society's past and present involvement in Tyneside Flat standard documentation, I thought I ought to inform you of a research project in which I am involved and to let you know, in advance, of a forthcoming questionnaire. Please see the enclosed draft letter for more details. A letter along the lines of this draft will be sent, in the next month or two, to all local firms of solicitors (including, of course, your own) who are likely to have been involved in the transfer of Tyneside Flats.

My interest in this topic stems from the early 1980s when, on behalf of the Registry, I was in correspondence with the Society on the proposed standard form of Tyneside Flat lease. I was, and remain, broadly sympathetic to the pro-active stance taken by the Society which, on the current available evidence, seems generally to have been beneficial. Finally, I should perhaps mention that although the Registry is aware of my research project, it is completely independent.

Yours sincerely,

Geoff Wadsworth,
Doctoral Researcher,
Newcastle Law School,
Newcastle University,
21-24 Windsor Terrace,
Newcastle upon Tyne,
NE1 7RU

Home telephone no: 0191 281 1817
E-mail: G.J.Wadsworth @ ncl.ac.uk

Switchboard • 0191 222 6000
General Enquiries • 0191 222 7624
Fax • 0191 212 0064

May/June 2007

UNIVERSITY OF
NEWCASTLE UPON TYNE



Newcastle Law School

University of Newcastle upon Tyne
21-24 Windsor Terrace
NE1 7RU

Dear Sir/Madam,

Transfer of Tyneside Flats – Research Project and Questionnaire

In November 2003 I retired from working as a lawyer in the Durham (Southfield House) Land Registry and am now undertaking a research project in the Law School at Newcastle University. The project concerns the documentation used in the transfer of Tyneside Flats. The Newcastle upon Tyne law society originally promulgated the use of standard documentation in the early 1980s and is aware of this research. However, I would stress that this project is completely independent and self-financed.

The main aim of the research is to try to establish whether the standard documentation used in the transfer of Tyneside Flats is the most appropriate one for ensuring the mutual enforceability of covenants for repair, maintenance etc. In order to put the research in context, the historical and legal background is also being considered. The research is expected to re-enforce existing calls for the substantive reform of the law, particularly on the enforceability of positive covenants. If reform occurs, it should increase the options available to practitioners as to how Tyneside Flats, and other similar properties, are transferred.

I hope the research will be of real practical use and would like to benefit from the knowledge and experience of your firm. I would, therefore, please like to send you a questionnaire. I anticipate that it will take up between one and two hours of your time. Your replies will, of course, remain completely confidential. Whilst I expect to incorporate the overall tenor of the replies into the written research, anonymity will be maintained. Particular care will be taken to ensure that the identities of individuals and firms are not revealed.

I am aware how busy all solicitors are, and would be extremely grateful if you, or someone else in your firm with experience of transferring Tyneside Flats, would be willing to participate in this research. Please reply within one month of the date of this letter, and confirm to whom the questionnaire should be sent. A stamped addressed envelope is enclosed for your use.

Yours sincerely,

**Geoff Wadsworth,
Doctoral Researcher,**

Newcastle Law School,
Newcastle University,
21-24 Windsor Terrace,
Newcastle upon Tyne,
NE1 7RU
Home telephone no: 0191 281 1817
Email: G.J.Wadsworth @ ncl.ac.uk

Appendix E

Letter 4 June 2007 to Research Population

4th June 2007

UNIVERSITY OF
NEWCASTLE UPON TYNE



Newcastle Law School

University of Newcastle upon Tyne
21-24 Windsor Terrace
NE1 7RU

Dear Sir/Madam

Transfer of Tyneside Flats – Research Project and Questionnaire

In November 2003 I retired from working as a lawyer in the Durham (Southfield House) Land Registry and am now undertaking a research project in the Law School at Newcastle University. The project concerns the documentation used in the transfer of Tyneside Flats. The Newcastle upon Tyne law society originally promulgated the use of standard documentation in the early 1980s and is aware of this research. However, I would stress that this project is completely independent and self-financed.

The main aim of the research is to try to establish whether the standard documentation used in the transfer of Tyneside Flats is the most appropriate one for ensuring the mutual enforceability of covenants for repair, maintenance etc. In order to put the research in context, the historical and legal background is also being considered. The research is expected to re-enforce existing calls for the substantive reform of the law, particularly on the enforceability of positive covenants. If reform occurs, it should increase the options available to practitioners as to how Tyneside Flats, and other similar properties, are transferred.

I hope the research will be of real practical use and would like to benefit from the knowledge and experience of your firm. I would, therefore, please like you to answer a questionnaire. I anticipate that it will take up between one and two hours of your time. Your replies will, of course, remain completely confidential. Whilst I expect to incorporate the overall tenor of the replies into the written research, anonymity will be maintained. Particular care will be taken to ensure that the identities of individuals and firms are not revealed.

I am aware how busy all solicitors are, and would be extremely grateful if you, or someone else in your firm with experience of transferring Tyneside Flats, would be willing to participate in this research. Please reply within one month of the date of this letter, and let me know who I should contact. A stamped addressed envelope is enclosed for your use.

Yours sincerely,

**Geoff Wadsworth,
Doctoral Researcher,**

Newcastle Law School,
Newcastle University.

Home telephone no: 0191 281 1817
Email: G.J.Wadsworth @ ncl.ac.uk

Switchboard • 0191 222 6000
General Enquiries • 0191 222 7624
Fax • 0191 212 0064

Appendix F

Letter 2 August 2007 to Research Sample

2nd August 2007

UNIVERSITY OF
NEWCASTLE UPON TYNE



Newcastle Law School

University of Newcastle upon Tyne
21-24 Windsor Terrace
NE1 7RU

Dear

Transfer of Tyneside Flats-Research Project and Questionnaires

Thank you for your positive response to my letter of 4th June.

I enclose a general questionnaire for you to look at. I also enclose a historical questionnaire (lettered H), but please do not worry about this unless you know about the pre 1960s sale arrangements. It would be preferable, and helpful to both of us, if I could come and see you to complete the questionnaire(s). This should help avoid any misunderstanding and would enable either of us to raise additional points, if any. I will therefore telephone, as soon as possible, to see if I can make an appointment to call on you. I anticipate that the general questionnaire will take approximately one hour to complete.

A number of participants in the research project have, understandably, mentioned time constraints. If you would prefer to complete the questionnaire(s) and post them back to me, please let me know, either when I telephone or beforehand.

I am most grateful for your help.

Yours sincerely,

**Geoff Wadsworth,
Doctoral Researcher,**

Newcastle Law School,
Newcastle University.

Home telephone no: 0191 281 1817
Email: G.J.Wadsworth@ncl.ac.uk

Switchboard • 0191 222 6000
General Enquiries • 0191 222 7624
Fax • 0191 212 0064

Appendix G

List of Participating Firms

List of Firms with whom semi - structured interviews were conducted, or from whom postal questionnaires were received, between 11 July and 17 October 2007

Semi - Structured Interviews

Firm	Date	Area	General (G)	Historical (H)
1	11 July	N Tyneside	G	H
2	17 July	S Tyneside	G	H
3	18 July	Newcastle	G	H
4	14 August	Newcastle	G	
5	15 August	Gateshead	G	
6	16 August	Newcastle	G	H
7	21 August	S Tyneside	G	H
8	21 August	S Tyneside	G	H
9	29 August	Tynedale	G	
10	30 August	Tynedale	G	
11	3 September	Morpeth	G	H
12	4 September	Newcastle	G	H
13	17 September	Newcastle	G	H
14	18 September	N Tyneside	G	H
15	20 September	Derwentside	G	H
16	24 September	Derwentside	G	
17	26 September	Sunderland	G	H
18	27 September	Newcastle	G	H
19	28 September	S Tyneside	G	H
20	1 October	Newcastle	G	

Semi-Structured Interviews (Cont)

Firm	Date	Area	General (G)	Historical (H)
21	17 October	N Tyneside	G	H

Postal Questionnaires

22	3 August	N Tyneside	G	
23	8 August	Gateshead	G	
24	8 August	Tynedale	G	
25	13 August	Tynedale	G	
26	17 August	Morpeth	G	
27	20 August	N Tyneside	G	
28	27 August	Newcastle	G	H
29	14 September	Gateshead	G	

Note 1: The date for the postal questionnaires is the date of any covering letter or, if none, the date of posting.

Note 2: An example of the citation used in the text of the thesis is:

‘Interview 21, GQ 19 (a).’

This refers to firm 21 interviewed on 17 October 2007 and to the answer given by that firm in response to question 19 (a) of the General Questionnaire (GQ). If the answer had been given in response to question 1(a) of the Historical Questionnaire (HQ), the citation would have been:

‘Interview 21, HQ 1 (a).’

Appendix H

Analysis of Replies

Analysis of Replies to Letter of 4 June 2007 to Research Population

1. Letters sent	201				
2. Replies Received	39				
Positive	32	16 %	Participants*	29	14 %
Negative	7	3 %			
No response	162	81 %			
Totals	201	100%			

3. Participating firms by Local Authority Area

Area	Letters Sent	Participants	LA %**	All %***
Blyth Valley	12	0	0	0
Derwentside	7	2	29	7
Gateshead	20	3	15	10
Morpeth	8	2	25	7
Newcastle	72	9	13	31
North Tyneside	21	4	19	14
South Tyneside	13	4	31	14
Sunderland	32	1	3	3
Tynedale	9	4	44	14
Wansbeck	7	0	0	0
Totals	201	29		100

* 32 positive responses were received, but three firms did not participate either at all or not fully. This reduced the number of participants to 29.

** This column shows the percentage of participating firms in each local authority. For example, in Derwentside two out of the seven firms to whom letters were sent, i.e. 29%, participated.

*** This column shows the response in each local authority as a percentage of all participating firms. Thus the two Derwentside participating firms represent 7% of the 29 participating firms

Appendix I

Newcastle and Gateshead Population Figures

Populations of Newcastle upon Tyne and Gateshead

Census	Newcastle	Gateshead
1801	28 294	8 597
1811	27 587	8 782
1821	35 181	11 767
1831	53 613	15 177
1841	70 504 *	19 843
1851	87 784	25 570
1861	109 108	33 589
1871	128 443	48 627
1881	145 359	65 845
1891	186 345	85 692
1901	215 328	109 888
1911	266 671**	116 917

* In 1835 the districts of Westgate, Elswick, Jesmond, Heaton and Byker were incorporated within Newcastle.

** In 1904 the districts of Walker, Benwell, Fenham and Kenton (part of) were incorporated within Newcastle.¹

¹ The figures have been taken from Middlebrook S, *Newcastle upon Tyne, Its Growth and Achievement*, 1st ed., (Newcastle upon Tyne: Newcastle Chronicle and Journal, 1950), p.321, Appendix A and Manders F, *A History of Gateshead*, 1st ed., (Gateshead: Gateshead Corporation, 1973), pp. 342 -343 Appendix One.

Table of Statutes

Access to Neighbouring Land Act	1992
Administration of Estates Act	1925
Building Societies Act	1874
Commonhold and Leasehold Reform Act	2002
Contracts (Rights of Third Parties) Act	1999
Conveyancing Act	1882
Data Protection Act	1998
Employers Liability Act	1880
Highways Act	1980
Housing Act	1936
Housing Act	1957
Housing Act	1974
Housing Act	1980
Housing Act	1985
Housing Act	1988
Housing Act	1996
Housing Act	2004
Land Charges Act	1925
Land Registration Act	1925
Land Registration Act	2002
Land Transfer Act	1897
Landlord and Tenant Act	1954
Landlord and Tenant Act	1985

Landlord and Tenant Act	1987
Landlord and Tenant (Covenants) Act	1995
Law Commissions Act	1965
Law of Property Act	1925
Leasehold Reform Act	1967
Leasehold Reform Housing and Urban Development Act	1993
Legislative and Regulatory Reform Act	2006
Local Government and Housing Act	1989
Local Government (Miscellaneous Provisions) Act	1982
Perpetuities and Accumulations Act	1964
Perpetuities and Accumulations Act	2009
Public Health Act	1848
Public Health Act	1875
Rent Act	1965
Rent Act	1977
Rentcharges Act	1977
Representation of the People Act	1867
Representation of the People Act	1884
Sanitary Act	1866
Settled Land Act	1882
Settled Land Act	1925
Town and Country Planning Act	1932
Trusts of Land and Appointment of Trustees Act	1996
Wildlife and Countryside Act	1981

Local Statutes

Monmouthshire Canal Act	1792
Oldham Improvement Act	1880
West Yorkshire Act	1980

Other Statutes

New South Wales	
Conveyancing (Strata Titles) Act	1961

Measures

Pastoral Measure	1983
------------------	------

Table of Statutory Instruments

Administration Charges (Summary of Rights and Obligations) (England) Regulations 2007	SI 2007/1258
Commonhold (Land Registration) Rules 2004	SI 2004/1830
Landlord and Tenant (Covenants) Act 1995 (Commencement) Order 1995	SI 1995/2963
Land Registration Act 2002 (Commencement No.4) Order 2003	SI 2003/1725
Land Registration Rules 1925	SR & O 1925/1093.
Land Registration Rules 2003	SI 2003/1417
Land Registration (Amendment) Rules 2005	SI 2005/1766
Land Registration (Amendment) (No 2) Rules 2005	SI 2005/1982
Land Registration Fee Order 2009	SI 2009/845
Leasehold Valuation Tribunals (Procedure) (England) Regulations 2003	SI 2003/2099
Service Charge (Consultation Requirements) (England) Regulations 2003	SI 2003/1987

Service Charges (Summary of Rights and Obligations, and Transitional Provision) (England) Regulations 2007	SI 2007/1257.
Trusts of Land and Appointment of Trustees Act 1996 (Commencement) Order 1996	SI 1996/2974

Table of Cases

Austerberry v. Oldham Corporation (1885) 29 ChD 750 CA

Bamford v. Turnley (1862) 3 B & S 62, 122 ER 27

Bradford v. Pickles [1895] AC 587 HL (E)

Cadell v. Palmer (1833) 1 Cl & F 372, 6 ER 956

Catt v. Tourle (1869) 4 Ch App 654 CA

C & G Homes Ltd v. Secretary of State for Health [1991] Ch 365 CA

Cooke v. Chilcott (1876) 3 ChD 694

De Mattos v. Gibson (1858) 4 De G & J 276, 45 ER 108

First National Bank v. Thompson [1996] Ch 231 CA

Formby v. Barker [1903] 2 Ch 539 CA

Gaidowski v. Gonville and Caius College, Cambridge [1975] 2 All ER
952 CA

Halsall v. Brizell [1957] Ch 169

Haywood v. Brunswick Permanent Benefit Building Society
(1881) 8 QB 403 CA

Jones v. Price [1965] 2 QB 618 CA

Keppel v. Bailey (1834) 2 My & K 517, 39 ER 1042

London County Council v. Allen [1914] 3KB 642 CA

London Diocesan Fund and another v. Phithwa and others (Avonridge
Property Co Ltd, Pt 20 defendant) [2006] 1 All ER 127 HL

London and South Western Railway Co v. Gomm (1882) 20
ChD 562 CA

Luker v. Dennis (1877) 7 ChD 227

Malpas v. St Ermin's Property Company Ltd (1992) 24 HLR 537 CA

Mann v. Stephens (1846) 15 Sim 377, 60 ER 665

Morland v. Cook (1868) LR 6 Eq 252

National Anti - Vivisection Society v. Inland Revenue Commissioners
[1948] AC 31 HL (E)

P & A Swift Investments v. Combined English Stores Group Plc
[1989] 1 AC 632 HL

Parsons v. Gage and Others [1974] 1 ALL ER 1162 HL

Price v. Easton (1833) 4 B & Ad 433, 110 ER 518

Re Mundy and Roper's Contract (1899) 1 Ch 275 CA

Rhone v. Stevens [1994] 2 AC 310 HL, (1994) 67 P & C.R 9 CA

Roberts v. Howlett and Others [2002] 1 P & CR 234

Rogers v. Hosegood [1900] 2 Ch 388 CA

Roper v. Williams (1822) T & R 18, 37 ER 999

Saga Properties Ltd v. Palmeira Square Nos 2-6 Ltd [1995] 1 EGLR
199

Sharpe v. Duke Street Securities NV (1987) 19 HLR 506 CA

Sutton (Hastoe) Housing Association v. Williams (1988) 20 HLR
321CA

Thamesmead Town Ltd. v. Allotey (2000) 79 P & CR 557 CA

Tulk v. Moxhay (1848) 11 Beav 571, 50 ER 937; 2 Ph 774, 41 ER
1143

Westminster (Duke) v. Birrane [1995] QB 262

Whatman v. Gibson (1838) 9 Sim 196, 59 ER 333

Wrotham Park Settled Estates v. Naylor (1991) 62 P & CR 233

Zetland (Marquess) v. Driver [1939] Ch 1 CA

Bibliography

- Aldridge T, *Law of Flats*, 1st & 3rd ed., (London: Longmans, 1982 & 1994)
- Aldridge T, *Commonhold Law*, loose leaf ed., release 2, (London: Sweet and Maxwell, 2004)
- Arnold A, *Free Land*, 1st ed., (London: Kegan Paul, 1880)
- Atkinson F, *Victorian Britain: The North East*, 1st ed., (Newton Abbot: David and Charles, 1989)
- Bailey S, 'The Benefit of a Restrictive Covenant' [1938] 6 C.L.J. 339 - 366
- Barke M, 'Population in the 20th Century: Distribution and Density' in Barke M and Buswell R (Eds), *Historical Atlas of Newcastle upon Tyne*, 1st ed., (Newcastle: Petras, Newcastle upon Tyne Polytechnic, 1980) 52 - 53
- Barke M and Callcott M, 'Municipal Intervention in Housing: Constraints and Developments in Newcastle upon Tyne 1835-1914' in Lancaster B (Ed), *Working Class Housing on Tyneside 1850-1939*, 1st ed., (Whitley Bay: Bewick Press, 1994) 7 - 38
- Barnsley D, *Conveyancing Law and Practice*, 1st ed., (London: Butterworths, 1973)
- Barraclough H, *The Sale and Management of Flats Practice and Precedents*, 2nd ed., (London: Butterworths, 1996)
- Batchelor J, *Lady Trevelyan and the Pre-Raphaelite Brotherhood*, 1st ed., (London: Chatto & Windus, 2006)

Behan J, *The Use of Land as affected by Covenants and Obligations not in the Form of Covenants*, 1st ed., (London: Sweet & Maxwell, 1924)

Bell C, 'Tulk v. Moxhay Revisited' [1981] 45 Conv. 55 - 61

Bell C, 'Correspondence' [1983] 47 Conv. 327 - 328

Bentham J, *Theory of Legislation*, 1st ed., (London: Trubner, 1876)

Berg M, *The Age of Manufacturers, 1700 - 1820 Industry, innovation and work in Britain*, 2nd ed., (London: Routledge, 1994)

Black J, *Modern British History since 1900*, 1st ed., (Basingstoke: Macmillan, 2000)

Boddy M, *The Building Societies*, 1st ed., (London: Macmillan, 1980)

Bol at M, *The Building Society Industry*, 1st ed., (London: George Allen & Unwin, 1982)

Bottomore T, *Elites and Society*, 1st ed., (Harmondsworth: Penguin, 1964)

Brazendale A, *Gateshead History & Guide*, 1st ed., (Stroud: Tempus Publishing, 2004)

Bridge S, *Residential Leases*, 1st ed., (London: Blackstone, 1994)

Bridge S, 'Former Tenants, Future Liabilities and the Privity of Contract Principle The Landlord and Tenant (Covenants) Act 1995' [1996] 55 C.L.J. 313 - 357

Briggs A, *A Social History of England*, 1st ed., (London: Book Club Associates, 1984)

Bright S, 'Estate Rentcharges and the Enforcement of Positive Covenants', [1988] 52 Conv. 99 - 107

Bright S, 'Enfranchisement-A Fair Deal For All Or For None?' [1994] 58 Conv. 211 - 222

Bright S, *Landlord and Tenant Law in Context*, 1st ed., (Oxford: Hart, 2007)

Bryman A, *Social Research Methods*, 3rd ed., (Oxford: OUP, 2008)

Buck A, 'Property, Aristocracy and the Reform of the Land Law in Early Nineteenth Century England' (1995) 16 LH 63 - 93

Building Societies Association, *Leaseholds –Time for a Change*, (London: BSA, 1984)

Building Societies Association, Mortgage Instructions

< http://www.bsa.org.uk/mortgageinstructions/print.htm?_handbook=england_and_wale... >, accessed 4 November 2010

Burn E, *Cheshire's Modern Law of Real Property*, 12th & 16th eds, (London: Butterworths, 1976 & 2000)

Burn E, *Maudsley and Burn's Land Law: Cases and Materials*, 8th ed., and, with Cartwright J, 9th ed., (Oxford: OUP, 2004 & 2009)

Burnett J, *A Social History of Housing 1815 - 1985*, 2nd ed., (London: Routledge, 1986)

Burns F, 'Lord Cottenham and the Court of Chancery' (2003) 24 LH 187 - 214

Butler P et al 'The Coalition Agreement' The Guardian (Pull Out Section) 15 May 2010, pp. 1 - 4

Byrne D, 'Working Class Owner – Occupation and Social Differentiation on Inter-War Tyneside' in Lancaster B (Ed), *Working Class Housing on Tyneside 1850 -1939*, 1st ed., (Whitley Bay: Bewick Press, 1994) 86 – 114

Byrne D, 'The Reconstruction of Newcastle upon Tyne: Planning since 1945' in Colls R & Lancaster B (Eds), *Newcastle upon Tyne A Modern History*, 1st ed., (Chichester: Phillimore, 2001) 341 – 360

Cabinet Office, 'Main navigation: The Legislative and Regulatory Reform Act', <<http://www.cabinetoffice.gov.uk/regulation/reform/bill/>>, accessed 16 March 2007

Callcott M, 'The Governance of the Victorian City' in Colls R & Lancaster B (Eds), *Newcastle upon Tyne A Modern History*, 1st ed., (Chichester: Phillimore, 2001) 71 – 92

Cameron S and Crompton P, 'Housing' in Robinson F (Ed), *Post – Industrial Tyneside An Economic and Social Survey of Tyneside in the 1980s*, 1st ed., (Newcastle: Newcastle upon Tyne City Libraries and Arts, 1988) 120 - 155

Carlson R 'The Issue of Privacy in Public Opinion Research' (1967) 31 POQ 1 - 8

Carr H et al, *The Housing Act 2004 A Practical Guide*, 1st ed., (Bristol: Jordans, 2005)

Cawthorn J, *The Sale and Management of Flats*, 1st ed., (London: Butterworths, 1985)

Chakraborty A, 'The Nudge phenomenon From Obama to Cameron, why do so many politicians want a piece of Richard Thaler?' *The Guardian* 12 July 2008, pp.16 - 17

Challis H, *The law of Real Property: Chiefly in relation to Conveyancing* 1st & 2nd eds., (London: Reeves and Turner, 1885 & 1892). See Sweet for 3rd ed.

Charlton J, *The Chartists The First National Workers Movement*, 1st ed., (London: Pluto Press, 1997)

Chatterjee C, *Methods of Research in Law*, 2nd ed., (London: Old Bailey Press, 2000)

Chorley Lord and Dworkin G, 'The Law Commissions Act, 1965' (1965) 28 MLR 675 - 688

Clarke D, 'Legislation Leasehold Enfranchisement: Leasehold Reform, Housing and Urban Development Act 1993, Pt.1' [1994] 58 Conv. 223 - 232

Clarke D, *Leasehold Enfranchisement – The New Law*, 1st ed., (Bristol: Jordans, 1994)

Clarke D, 'Commonhold-A Prospect of Promise' (1995) 58 MLR 486 - 504

Clarke D, 'Occupying 'Cheek by Jowl' in Bright S & Dewar J (Eds), *Land Law Themes and Perspectives*, 1st ed., (Oxford: OUP, 1998) 377 - 405

Clarke D, 'The Enactment of Commonhold - Problems, Principles and Perspectives' [2002] 66 Conv. 349 - 386

Clarke D, *Commonhold - The New Law*, 1st ed., (Bristol: Jordans, 2002)

Clarke D (Ed), *Clarke on Commonhold – Law, Practice and Precedents*, loose leaf ed., Update 3, (Bristol: Jordans, 2006)

Clarke D, 'Long Residential Leases: Future Directions' in Bright S (Ed), *Landlord and Tenant Law: Past, Present and Future*, 1st ed., (Oxford: Hart, 2006) 171 - 190

Clarke P, 'Land Law and Trusts' [1994] ALL ER Rev 241 - 248

Clarke W (Ed), *Fisher & Lightwood's Law of Mortgage*, 11th ed., (London: Butterworths, 2001)

Clinch P, *Using a Law Library A Student's Guide to Legal Research Skills*, 2nd ed., (London: Blackstone, 2001)

Cocks R, *Sir Henry Maine A Study in Victorian Jurisprudence*, 1st ed., (Cambridge, CUP, 1988)

Common J, *Kiddar's Luck*, 1st ed., (London: Turnstile Press, 1951)

Cooke E, *Land Law*, 1st ed., (Oxford: OUP, 2006)

Cooke E, 'To Restate or not to Restate? Old Wine, New Wineskins, Old Covenants, New Ideas' [2009] 73 Conv.448 - 473

Cornish W and Clark G, *Law and Society in England 1750 – 1950*, 1st ed., (London: Sweet & Maxwell, 1989)

Cosgrove R, *The Rule of Law: Albert Venn Dicey, Victorian Jurist*, 1st ed., (North Carolina, USA; University of North Carolina Press, 1980)

Council of Mortgage Lenders Handbook, (June 2007)

< <http://www.cml.org.uk/cml/handbook/england>>, accessed 20 October 2010

Council of Mortgage Lenders Statistics, Table MM 10, <

<http://www.cml.org.uk/cml/statistics>>, accessed 7 January 2008)

Council of Mortgage Lenders 'Easements, Covenants and Profits à Prendre Response by the Council of Mortgage Lenders to the Consultation by the Law Commission' 30 June 2008,

<http://www.cml.org.uk/cml/policy/responses?keyword=&key_area=0&date=0&page=3>, accessed 18 June 2009

Council of Mortgage Lenders, 'Movers spend lowest ever proportion of income on their mortgages' 12 July 2010, < <http://www.cml.org.uk/media/press/2664>>, accessed 14 July 2010

Coyle S & Morrow K, *The Philosophical Foundations of Environmental Law*, 1st ed., (Oxford: Hart, 2004)

Cretney S, 'The Politics of Law Reform - A View from the Inside' (1985) 48 MLR 493 – 517

Crick W and Wadsworth J, *A Hundred Years of Joint Stock Banking*, 2nd ed., (London: Hodder & Stoughton, 1936)

Crossick G, *An Artisan Elite in Victorian Society, Kentish London 1840 - 1881*, 1st ed., (London: Croom Helm, 1978)

Cryer P, *The Research Student's Guide to Success*, 2nd ed., (Buckingham: Open University Press, 2000)

Daunton M, *House and Home in the Victorian City Working - Class Housing 1850 - 1914*, 1st ed., (London: Edward Arnold, 1983)

Daunton M, *Wealth and Welfare An Economic and Social History of Britain 1851 - 1951*, 1st ed., (Oxford: OUP, 2007)

Davey M, 'The Onward March of Leasehold Enfranchisement' (1994) 57 MLR 773 - 787

Davey M, 'Privity of Contract and Leases – Reform at Last' (1996) 59 MLR 78 - 94

Davey M, *Landlord and Tenant Law*, 1st ed., (London: Sweet and Maxwell, 1999)

Davey M, 'The Regulation of Long Residential Leases' in Cooke E (Ed), *Modern Studies in Property Law Vol III*, 1st ed., (Oxford: Hart, 2005) 203 - 224

Davey M, 'Long Residential Leases: Past and Present' in Bright S (Ed), *Landlord and Tenant Law Past, Present and Future*, 1st ed., (Oxford: Hart, 2006) 147 – 169

Department of the Environment Transport and Regions, *Commonhold and Leasehold Reform: Draft Bill and Consultation Paper* (Cm 4843), (London: DETR, 2000)

- De Vaus D, *Surveys in Social Research*, 5th ed., (London: Routledge, 2002)
- Dias R, *Jurisprudence*, 5th ed., (London: Butterworths, 1985)
- Dicey A, 'The Paradox of the Land Law' (1905) 21 LQR 221 - 232
- Dicey A, *Law and Public Opinion in England*, 1st ed., (London: Macmillan, 1914)
- Digby K, *An Introduction to the History of the Law of Real Property*, 2nd ed., (London: Clarendon, 1876)
- Dixon M, *Modern Land Law*, 6th ed., (London: Routledge - Cavendish, 2008)
- Dixon M et al, *Ruoff & Roper on the Law and Practice of Registered Conveyancing*, loose leaf ed., (London: Thompson Reuters (Legal), 2010)
- Dixon R and Muthesius R, *Victorian Architecture*, 2nd ed., (London: Thames and Hudson, 1985)
- Dobinson I and Johns F, 'Qualitative Legal Research' in McConville M and Chui W (Eds), *Research Methods for Law*, 1st ed., (Edinburgh: EUP, 2007) 16 – 45
- Driscoll J, *Leasehold Reform – The New Law A Guide To The Leasehold Reform, Housing and Urban Development Act 1993*, 1st ed., (Croydon: Tolley, 1993)
- Driscoll J, 'Leasehold reform (2) Flats and houses: new rights for leaseholders' (2002) 146 SJ 564 - 565
- Dworkin G, 'Land Law' in Gardiner G and Martin A (Eds), *Law Reform Now*, 1st ed., (London: Victor Gollancz., 1963) 79 - 121
- Edell S, 'Fundamental Reform of Positive and Restrictive Covenants?' [1984] J.P.L. 222 – 225, 317 – 324, 401 – 409, 485 - 496

Edminson J & Edminson D, *Old Tyneside from Throckley to Walker*, 1st ed., (Catrine, Ayrshire: Stenlake Publishing, 2002)

‘EFG’, ‘The Sale & management of Flats’ (1985) 82 LS Gaz 3686 - 3689

Elphinstone L, *Covenants Affecting Land*, 1st ed., (London: Solicitors’ Law Stationary Society, 1946)

Englander D, *Landlord and Tenant in Urban Britain 1838 - 1918*, 1st ed., (Oxford: Clarendon, 1983)

Evans E, *Thatcher and Thatcherism*, 2nd ed., (London: Routledge, 2004)

Farrand J & Clarke A, *Emmet and Farrand on Title The Law and Practice of Registered and Unregistered Conveyancing*, loose leaf ed., (London: Sweet and Maxwell, 2010)

Farrar J, *Law Reform and the Law Commission*, 1st ed., (London: Sweet & Maxwell, 1974)

Faulkner T, ‘Architecture in Newcastle’ in Colls R & Lancaster B (Eds), *Newcastle upon Tyne A Modern History*, 1st ed., (Chichester: Phillimore, 2001) 213 - 244

Faulkner T et al, *Newcastle & Gateshead Architecture and Heritage*, 1st ed., (Liverpool: Bluecoat Press, 2006)

Flanagan T, ‘Flying Freeholds: The Hebden Royd Solution’ (1981) 78 LS Gaz 1254

Fletcher B, *Model Houses for the Industrial Classes*, 1st ed., (London: Longmans/Green & Co., 1871)

Focus ‘Housing Action Continues, Did You Know?’ (Winter 2005 ed., pub. by McKeever L, Jesmond, Newcastle upon Tyne), p.1

Fraser C & Emsley K, *Tyneside*, 1st ed., (Newton Abbot: David & Charles, 1973)

Furber J et al, *The Commonhold and Leasehold Reform Act 2002*, 1st ed., (London: Butterworths, 2002)

Furber J (Ed), *Hill and Redman's Law of Landlord and Tenant*, loose leaf ed., (London: LexisNexis, 2010)

Furmston M, *Cheshire, Fifoot and Furmston's Law of Contract*, 15th ed., (Oxford: OUP, 2007)

Gardiner G and Martin A, 'The Machinery of Law Reform' in Gardiner G and Martin A (Eds), *Law Reform Now*, 1st ed., (London: Victor Gollancz, 1963) 1 - 14

Gardner S 'The Proprietary Effect of Contractual Obligations' (1982) 98 LQR 279 - 323

Gardner S 'Two Maxims of Equity' [1995] 54 C.L.J. 60 - 68

Gardner S, *An Introduction to Land Law*, 2nd ed., (Oxford: Hart, 2009)

Garner S and Frith A, *A Practical Approach to Landlord and Tenant*, 5th ed., (Oxford: OUP, 2008)

Gateshead Metropolitan Borough Council 'Green Light for More Bensham Home Improvements' Press Release 3 September 2008,
<[http://www.gateshead.gov.uk/Council%20and%20Democracy/news/News%20Article...>](http://www.gateshead.gov.uk/Council%20and%20Democracy/news/News%20Article...) , accessed 12 December 2008

Gauldie E, *Cruel Habitations A History of Working - Class Housing 1780 - 1918*, 1st ed., (London: George Allen & Unwin, 1974)

George E, 'Freehold Flats-An Australian Solution' (1963) 27NS Conv. 439 – 441

George E and George A, *The Sale of Flats*, 3rd, 4th, & 5th eds, (London: Sweet & Maxwell, 1970, 1978 & 1984)

George E and Scamell E (Eds), 'Leasehold Enfranchisement' (1965) 29 NS` Conv. 249 - 251

Giddens A, *Sociology*, 5th ed., (Cambridge: Polity, 2006)

Gilmour R, 'Dickens and the Self Help Idea' in Butt J and Clarke I (Eds), *The Victorians and Social Protest*, 1st ed., (Newton Abbot: David & Charles, 1973) 71 – 101 and 229 - 230

Gittus E, *Flats, families and the under - fives*, 1st ed., (London: Routledge & Kegan Paul, 1976)

Goo S, 'Enforcement of Positive Covenants' [1993] 57 Conv. 234 - 238

Gosden P, *Self-Help Voluntary Associations in the 19th Century*, 1st ed., (London: B.T.Batsford, 1973)

Goulding C, *Hidden Newcastle*, 1st ed., (Newcastle: City of Newcastle upon Tyne, 1995)

Gravells N, 'Enforceability of Positive Covenants Affecting Land' (1994) 110 LQR 346 - 350

Gravells N, *Land Law: Text and Materials*, 4th ed., (London: Sweet & Maxwell, 2010)

Gray K, 'Property in Thin Air' [1991] 50 C.L.J. 252 - 307

Gray K & Gray S, *Elements of Land Law*, 5th ed., (Oxford: OUP, 2009)

Gregg P, *A Social and Economic History of Britain 1760 - 1980*, 8th ed., (London: Harrap, 1982)

Griffith R, 'Tulk v. Moxhay Reclarified' [1983] 47 Conv. 29 - 39

Grundy J, *Northern Pride the very best of northern architecture from churches to chip shops*, 1st ed., (London: Granada Media, 2003)

Grundy J and McCombie G, 'Nineteenth and Twentieth Century Architecture' in Pevsner N and Richmond I (revised by Grundy J et al), *Northumberland* 1st ed., (New Haven: YUP, 2002) 104 - 122

Hague N 'Leasehold Reform Bill' [1967] 31 Conv. 187 - 197

Hague N, *Leasehold Enfranchisement*, 1st ed., (London: Sweet & Maxwell, 1967)

Halsbury's Laws, Vol 22 Housing & Vol. 27 (1) Landlord and Tenant
4th ed. (2006 reissue), (London: Butterworths, 2006)

Hargreaves A, *An Introduction to the Principles of Land Law*, 1st ed., (London: Sweet & Maxwell, 1936)

Harpum C et al (Eds), *The Law of Real Property* by Megarry R and Wade W, 7th ed., (London: Sweet & Maxwell, 2008). See Megarry for 3rd & 4th eds

Hepple C, *A History of Northumberland and Newcastle upon Tyne*, 1st ed., (Chichester: Phillimore, 1976)

Hertz R & Imber J, 'Introduction' in Hertz R & Imber J (Eds), *Studying Elites Using Qualitative Methods*, 1st ed., (London: Sage, 1995) vii - ix

Holder J and Lee M, *Environmental Protection, Law and Policy: Text and Materials*, 2nd ed., (Cambridge: CUP, 2007)

Homan R, *The Ethics of Social Research*, 1st ed., (London: Longman, 1991)

Hood H and Challis H, *The Conveyancing Acts, 1881 & 1882 and the Settled Land Act, 1882 with commentaries*, 2nd ed., (London: Reeves and Turner, 1884)

Hopkins N, 'The Library' [2009] 73 Conv. 361 - 363

Huddleston J, *The Ramsgate Story*, 1st ed., (Ramsgate: Michaels Bookshop, 2005)

Hudelson R, *The Rise and Fall of Communism*, 1st ed., (Oxford: Westview Press, 1993)

Hunt E, *Regional Wage Variations in Britain 1850 - 1914*, 1st ed., (Oxford: Clarendon, 1973)

Jones R, *Economic and Social History of England 1770 - 1977*, new ed., (London: Longman, 1979)

Kenny P (Ed), 'Commonhold Again' [1996] 60 Conv. 321 - 322

Kerr M, 'Law Reform in Changing Times' (1980) 96 LQR 515 - 533

Keynes J, *The General Theory of Employment Interest and Money*, 1st ed., (London: Macmillan, 1936)

Kilmuir Viscount, 'Law Reform' (1957) N.S.4 JSPTL 75 - 85

Kiralfy A, *The English Legal System*, 8th ed., (London: Sweet & Maxwell, 1990)

Land Registry, *Land Registration Rules 2003, A Land Registry Consultation* (London: HM Land Registry, 2002)

Landes, D, *The Unbound Prometheus*, 2nd ed., (Cambridge: CUP, 2003)

Law Commission, *First Annual Report 1965-1966*, (Law Com. No. 4), (London: HMSO, 1966)

Law Commission, *Transfer of Land Report on Restrictive Covenants*, (Law Com. No. 11), (London: HMSO, 1967)

Law Commission, *Rights Appurtenant to Land, Report of a Working Group*, (Chairman, Lawton J) (Law Com. No. 36), (London: HMSO, 1971)

Law Commission, *Transfer of Land, Report on Rentcharges*, (Law Com. No. 68), (London: HMSO, 1975)

Law Commission, *Fifteenth Annual Report 1979 – 1980*, (Law Com.No.107), (London: HMSO, 1981)

Law Commission, *Transfer of Land The Law of Positive and Restrictive Covenants*, (Chairman Gibson J) (Law Com. No.127), (London: HMSO, 1984)

Law Commission, *Report on the Consolidation of the Housing Acts*, (Law Com. No. 144) (Cmnd 9515), (London: HMSO, 1985)

Law Commission, *Landlord and Tenant Privity of Contract and Estate Duration of Liability of Parties to Leases*, (Working Paper No. 95), (London: HMSO, 1986)

Law Commission, *Commonhold, Freehold Flats, Report of a Working Group*, (Chairman T Aldridge) (Law Com. No. 179), (London: HMSO, 1987)

Law Commission, *Landlord and Tenant Law Privity of Contract and Estate*, (Law Com. No.174), (London: HMSO, 1988)

Law Commission, *The Rules Against Perpetuities and Excessive Accumulations*, (Law Com.No.251), (London: HMSO, 1998)

Law Commission, *Seventh Programme of Law Reform (1999)*, (Law Com. No. 259), (London: HMSO, 1999)

Law Commission, *Land Registration for the Twenty –First Century. A Conveyancing Revolution*, (Law Com. No.271), (London: HMSO, 2001)

Law Commission, *Ninth Programme of Law Reform (2005)*, (Law Com. No. 293), (London: HMSO, 2005)

Law Commission, *Renting Homes: The Final Report Volume 2: Draft Bill*, (Law Com. No. 297) (Cm 6781-11), (London: HMSO, 2006)

Law Commission, *Easements, Covenants and Profits à Prendre*, (Consultation Paper Law Com. No.186), (London: HMSO, 2008)

Law Commission, *Annual Report 2008-09*, (Law Com. No. 316), (London: HMSO 2009)

Law Commission, 'Property, Family and Trust Law: Current News; Easements, Covenants and Profits à Prendre', <<http://www.lawcom.gov.uk/property.htm>>, accessed 10 October 2010

Leasehold Committee Final Report, (Chairman, Jenkins LJ) (Cmnd 7982), (London: HMSO, 1950)

Leasehold Reform in England and Wales, (Cmnd 2916), (London, HMSO, 1966)

Lendrum O, 'An Integrated Elite Newcastle's Economic Development 1840 - 1914' in Colls R and Lancaster B (Eds), *Newcastle upon Tyne A Modern History*, 1st ed., (Chichester: Phillimore, 2001) 27 – 46

LexisNexis 'Commonhold and Leasehold Reform Act 2002 Is it in Force?' <<http://.lexisnexis.com/uk/legal/frame.do?reloadEntirePage=true&rand=1288192...>>, accessed 27 October 2010.

Linsley S, 'Eighteenth to Twentieth Century: Agrarian Transformation and Industrial Revolution' in Pevsner N & Richmond I (revised by Grundy J et al,) *Northumberland*, 1st ed., (New Haven: YUP, 2002) 84 - 104

Lord Chancellor's Department, *Commonhold A Consultation Paper (with draft Bill annexed)* (Cm 1345), (London: HMSO, 1990)

Mc Conville M and Chui W, 'Introduction and Overview' in McConville M and Chui W (Eds), *Research Methods for Law*, 1st ed., (Edinburgh: EUP, 2007) 1- 15

McCord N, *North East England The Region's Development 1760 - 1960*, 1st ed., (London: B.T.Batsford, 1979)

McCord N and Purdie B, *British History 1815 – 1914*, 2nd ed., (Oxford: OUP, 2007)

McGee J (Ed.), *Snell's Equity*, 31st ed., (London: Thompson, 2005)

Macintyre D, 'The Leasehold Reform Act 1967 [1968] 26 C.L.J. 38 – 42

Malpass P and Murie A, *Housing Policy and Practice*, 5th ed., (Basingstoke: Macmillan, 1999)

Manchester A, *A Modern Legal History of England and Wales 1750 -1950*, 1st ed., (London: Butterworths, 1980)

Manders F, *A History of Gateshead*, 1st ed., (Gateshead: Gateshead Corporation, 1974)

Marlborough (Duke), Letter to the Times 22 September 1885, quoted in Offer A, *Property and Politics* (see below) 72

Marr A, *A History of Modern Britain*, 1st ed., (London: Macmillan, 2007)

Martin J, *Residential Security*, 2nd ed., (London: Sweet & Maxwell, 1995)

Maudsley R, *The Modern Law of Perpetuities*, 1st ed., (London: Butterworths, 1979)

May T, *An Economic and Social History of Britain 1760 - 1990*, 2nd ed., (Harlow: Longman, 1996)

May T, *Social Research – Issues, Methods and Process*, 3rd ed., (Maidenhead: Open University, 2001)

Megarry R et al, *The Rent Acts*, 11th ed., (London: Stevens, 1998)

Megarry R and Wade H, *The Law of Real Property*, 3rd ed., (London: Stevens, 1966), 4th ed., (London: Stewart & Sons, 1975). See Harpum C above for 7th ed.

Meredith J, *The Iron Industry of the Forest of Dean*, 1st ed., (Stroud: Tempus, 2006).

Mess H, *Industrial Tyneside A Social Survey*, 1st ed., (London: Ernest Benn, 1928)

Middlebrook S, *Newcastle upon Tyne Its Growth and Achievement*, 1st ed., (Newcastle upon Tyne: Newcastle Chronicle and Journal, 1950)

Miller T & Bell L, ‘Consenting to What? Issues of Access, Gate-keeping and ‘Informed Consent’’, in Mauthner M et al, *Ethics in Qualitative Research*, 1st ed., (London: Sage, 2002) 53 - 69

Morgan A, *Victorian Panorama A Visit to Newcastle upon Tyne in the Reign of Queen Victoria*, 1st ed., (Newcastle upon Tyne: Tyne Bridge, 2007)

Muthesius, S, *The English Terraced House*, 1st ed., (New Haven: YUP, 1982)

Neuman W, *Social Research Methods Qualitative and Quantitative Approaches*, 6th ed., (London: Pearson, 2006)

Newcastle City Council Newcastle City Council Development Control Committee
Agenda 17 August 2001

<[http://www.newcastle.gov.uk/cab2001.nsf/allbykey/63389D4A019C639580256AA70038ECDF/\\$FILE/DEVELOPM%20-%20Agenda.doc](http://www.newcastle.gov.uk/cab2001.nsf/allbykey/63389D4A019C639580256AA70038ECDF/$FILE/DEVELOPM%20-%20Agenda.doc)> ,accessed 11 November 2010

Newcastle City Council (Director of Community and Housing) 'Scotswood and West Benwell Regeneration: Proposed Clearance of Housing in West Benwell' Report 15 January 2003,

<[www.newcastle.gov.uk/cab2002.nsf/0/37E7762F459DC9A780256CA90040CB9A?open document - 18k-2010-11-14-](http://www.newcastle.gov.uk/cab2002.nsf/0/37E7762F459DC9A780256CA90040CB9A?open%20document%20-%2018k-2010-11-14-)> , accessed 15 November 2010

Newcastle City Council, Community and Housing Select Committee, Private Sector Housing Working Group Report, 25 July 2001,

<<http://www.newcastle.gov.uk/cab2001.nsf/select?openview>> , accessed 11 November 2010

Newcastle City Council, Local Development Framework Draft Interim Guidance on Purpose Built Student Accommodation Consultation Draft 24 April 2007,

<http://www.newcastle.gov.uk/core.nsf/a/ldf_purpose_built_student_housing_ipg > , accessed 15 June 2007

Newcastle Law Society, Letter 16 December 2004 (unpublished)

Newsom, G, *Preston & Newsom's Restrictive Covenants Affecting Freehold Land*, 9th ed., (London: Sweet & Maxwell, 1998)

Obiter, 'Sinking of Hips' (2010) 110 LS Gaz 31

Oerton R, *A Lament for the Law Commission*, 1st ed., (Chichester: Countrywise Press, 1987)

Offer A, *Property and Politics 1870 - 1914*, 1st ed., (Cambridge: CUP, 1981)

Parris H, 'The Nineteenth - Century Revolution in Government: A Reappraisal Reappraised' in Stansky P (Ed) *The Victorian Revolution Government and Society in Victoria's Britain*, 1st ed., (New York: New Viewpoints, 1973) 29 – 57, 359 - 363

Partridge C, 'Back-to back to make a comeback' *The Observer* (Property Section) 26 September 2004, p.20

- Pawley M, *Home Ownership*, 1st ed., (London: Architectural Press, 1978)
- Pearce K, 'Newcastle's Tyneside Flats 1850-1900 By-law Housing or Cultural Phenomenon?', in Lancaster B (Ed), 1st ed., *Working Class Housing on Tyneside 1850-1939*, (Whitley Bay: Bewick Press, 1994) 39 - 85
- Pears D, *Wittgenstein*, 2nd ed., (London: Fontana, 1997)
- Percival M, 'The Landlord and Tenant Act 1987' (1988) 51 MLR 97 - 108
- Perkin H, 'Land Reform and Class Conflict in Victorian Britain' in Butt J and Clarke I (Eds), *The Victorians and Social Protest*, 1st ed., (Newton Abbot: David & Charles, 1973) 177 – 217, 235 - 239
- Pettit P, *Equity and the Law of Trusts*, 11th ed., (Oxford: OUP, 2009)
- Pettit P, *Landlord and Tenant under the Rent Act 1977*, 1st ed., (London: Butterworths, 1978)
- Phillips C and Smith J, *Lancashire and Cheshire from AD 1540*, 1st ed., (London, Longman, 1994)
- Phillips E and Pugh D, *How to Get a PhD A handbook for students and their supervisors*, 3rd ed., (Buckingham: Open University Press, 2000)
- Phillips G, *Tyneside: Past and Present A Journey through Time and Tyneside*, 1st ed., (Durham: G P Electronic Services, 1993)
- Pierce J, 'Reflections on Fieldwork in a Complex Organization' in Hertz R & Imber J (Eds), *Studying Elites Using Qualitative Methods*, 1st ed., (London: Sage, 1995) 94 - 110
- Plochmann G and Lawson J, *Terms in their Propositional Contexts in Wittgenstein's Tractatus An Index*, 1st ed., (Illinois: Southern Illinois University Press, 1962)

Plummer P and Bowyer W, *A Brief History of Courtenay Warner and Warner Estate*, 1st ed., (London, Walthamstow: Walthamstow Historical Society, 2000)

Polden P, 'Law Commission: Transfer of Land-The Law of Positive and Restrictive Covenants' (1984) 47 MLR 566 - 576

Pollock F, *The Land Laws*, 2nd ed., (London: Macmillan, 1887)

Powell J et al, *Jackson & Powell on Professional Liability*, 6th ed., (London: Sweet & Maxwell, 2007)

Prichard A, 'Making Positive Covenants Run' [1973] 37 Conv. 194 – 202

Qureshi H, 'If the price is too good, measure the lease' *The Observer* 13 January 2008 < <http://www.guardian.co.uk/business/2008/jan/13/property1>>, accessed 20 October 2010

Radevsky A and Clark W, *Tenants Right of First Refusal*, 2nd ed., (Bristol: Jordans, 2008)

Reid D, *Health and Towns Commission Report on the State of Newcastle upon Tyne and Other Towns*, (London: W Clowes and Sons, 1845)

Report of the Committee of Inquiry on the Management of Privately Owned Blocks of Flats Vols. 1 & 11, (Chairman E Nugee) (*Nugee Report*), (London: HMSO, 1985)

Report of the Committee of Positive Covenants Affecting Land, (Chairman Lord Wilberforce) Cmnd 2719, (London: HMSO, 1965)

Report of the Royal Commission on the Housing of the Working Classes Vols 1 & II, (London: Eyre and Spottiswoode, 1885)

Report of the Royal Commission on Legal Services, (Chairman, Sir Henry Benson) (Cmnd 7648), (London: HMSO, 1979)

Report of the Working Party on the Management of Blocks of Flats, (Chairman, James J), published as Annex 1 to the Nugee Report above

Riddall J, 'What is the Nature of an Interest in Commonhold Land?' [2003] 67 Conv. 358 – 359

Roberts N, 'Commonhold: A New Property Term-But No Property in a Term' [2002] 66 Conv. 341 - 348

Robson C, *Real World Research A Resource for Social Scientists and Practitioners*, 2nd ed., (Oxford: Blackwell, 2002)

Rodgers C, 'Residential Flats - A New Deal? The Landlord and Tenant Act 1987' [1988] Conv. 122 - 137

Rodgers C, 'Fair Rents and the Market: Judicial Attitudes to Rent Control Legislation' [1999] 63 Conv, 201 - 231

Rodgers C, *Housing Law Residential Security and Enfranchisement*, revised ed., (London: Butterworths, 2002)

Rowe D, 'The north – east' in Thompson F (Ed), *The Cambridge Social History of Britain 1750 -1950 Vol 1 Regions and Communities*, (Cambridge: CUP, 1990) 415 – 470

Royal Institution of Chartered Surveyors, *Service Charge Residential Management Code*, 2nd ed., (Coventry: RICS, 2009)

Rubin H & Rubin I, *Qualitative Interviewing The Art of Hearing Data*, 1st ed., (London: Sage, 1995)

Ryan B et al, *Minitab Handbook*, 5th ed., (London: Thompson, 2005)

Sabey D and Everton A, *The Restrictive Covenant in the Control of Land Use*, 1st ed., (Aldershot: Ashgate, 1999)

Sarantakos S, *Social Research*, 3rd ed., (Basingstoke: Palgrave Macmillan, 2005)

Scamell E, 'Positive Covenants in Conveyances of the Fee Simple', [1954] 18 Conv. 546 - 564

Scamell E, *Land Covenants, restrictive and positive, relating to freehold land, including covenants for title*, 1st ed., (London: Butterworths, 1996)

Scarman J, 'Need the Law be Obscure?' in Zander M (Ed), *What's Wrong with the Law*, 1st ed., (London: BBC, 1970) 8 - 14

Shapps G, 'Shapps promise to landlords: no more red tape',

<<http://www.communities.gov.uk/news/housing/1612019>> , accessed 15 October

2010

Shears P and Stephenson G, *James' Introduction to English Law*, 13th ed., (London: Butterworths, 1996)

Sill M, 'Growth of Newcastle in the 19th Century' in Barke M and Buswell R, *Historical Atlas of Newcastle upon Tyne*, 1st ed., (Newcastle: Petras, Newcastle upon Tyne Polytechnic, 1980) 22 - 23

Silverman D, *Qualitative Methodology and Sociology Describing the Social World*, 1st ed. (Aldershot: Gower, 1985)

Silverman F (Ed), *The Law Society's Conveyancing Handbook*, 17th ed., (London: Law Society, 2010)

Simpson A, *A History of the Land Law* 2nd ed. (Oxford: Clarendon, 1986)

Simpson A, *Victorian Law and the Industrial Spirit*, 1st ed., (London: Selden Society, 1995)

Smiles S, *Self-Help*, IEA ed., (London: The Institute of Economic Affairs, 1996)

Smith K, *Emperor of Industry Lord Armstrong of Cragside 1810-1900*, 1st ed., (Newcastle upon Tyne: Tyne Bridge, 2005)

Smith P, 'A Nasty Measure – Part I of the Landlord and Tenant Act 1987' (1992) 12 LS 42 - 53

Snape J, 'The Burden of Positive Covenants [1994] 58 Conv. 477 - 483

Socio – Legal Studies Association, '*Statement of Principles of Ethical Research Practice*' (January 2009), < <http://www.kent.ac.uk/nslsa/content/view/247/244/>>, accessed 25 June 2010

Solicitors Regulation Authority, 'Rule 4: Confidentiality and disclosure' *Solicitors Code of Conduct 2007*, <<http://www.sra.org.uk/solicitors/code-of-conduct/rule4.page>>, accessed 21 October 2010

Sparkes P, *A New Landlord and Tenant*, 1st ed., (Oxford: OUP, 2001)

Sparkes P, *A New Land Law*, 2nd ed., (Oxford: Hart, 2003)

Spence J et al, *A Thousand Families in Newcastle upon Tyne An Approach to the Study of Health and Illness in Children*, 1st ed., (London: OUP, 1954)

Stephens J et al, *Land Law*, 4th ed., (London: Sweet & Maxwell, 2008)

Sugarman D, 'The Legal Boundaries of Liberty: Dicey, Liberalism and Legal Science' (1983) 46 MLR 102 - 111

Sugarman D and Rubin G, 'Towards a New History of Law and Material Society in England, 1750 - 1914' in Rubin G and Sugarman D (Eds), *Law, Economy and Society, 1750-1914: Essays in the History of English Law*, 1st ed., (Abingdon: Professional Books, 1984) 1 – 123 and Notes i - lxiii

Sutcliffe A, 'Preface' and 'Introduction', in Sutcliffe A (Ed), *Multi-Storey Living The British Working-Class Experience*, 1st ed., (London: Crook Helm, 1974) ix – x, 1 - 18

Sweet C, *Challis's Law of Real Property*, 3rd ed., (London: Butterworths, 1911)

Tarn J *Working-class Housing in 19th – century Britain*, 1st ed., (London: Lund Humphries), 1971)

Taylor A, *Laissez-faire and State Intervention in Nineteenth –century Britain*, 1st ed., (London: Macmillan, 1972)

Taylor S and Lovie B, *Gateshead Architecture in a Changing English Urban Landscape*, 1st ed., (London: English Heritage, 2004)

Taylor T, 'The Enlargement of Leasehold to Freehold' (1958) 22 NS Conv. 101 - 119

Tee L 'A Roof Too Far' [1994] 53 C.L.J. 446 - 448

Thaler R & Sunstein C, *Nudge, Improving Decisions about Health, Wealth, and Happiness*, 1st ed., (New Haven: YUP, 2008)

Thompson M, *Modern Land Law*, 4th ed., (Oxford: OUP, 2009)

Tooley M, 'Romney Marsh: The Debatable Ground' in Eddison J (Ed), *Romney Marsh The Debatable Ground*, 1st ed., (Oxford: Oxford Committee for Archaeology, 1995) 1 - 7

Trevelyan G, *English Social History*, 2nd ed., (London: Longmans Green, 1946)

Turnbull L and Womack S, *Home Sweet Home A Look at Housing in the North East from 1800 to 1977*, 1st ed., (Gateshead: Gateshead Metropolitan Borough Council Department of Education, 1977)

Wade H, 'Licences and Third Parties' (1952) 68 LQR 337 - 352

Wade H, 'Covenants - "A Broad and Reasonable View"' [1972B] 31 C.L.J. 157 - 175

Walter P, 'The Landlord and Tenant Act 1995: A Legislative Folly' [1996] 60 Conv. 432 - 440

Ward R & Akhtar A, *Walker & Walker's English Legal System*, 13th ed., (Oxford: OUP, 2008)

Wakeford F and Wakeford J 'Universities and the study of elites' in Stanworth P and Giddens A (Eds), *Elites and Power in British Society*, 1st ed., (London: CUP, 1974) 185 - 197

Walton A, *Bygone Arthur's Hill & Westgate*, 1st ed., (Newcastle: Newcastle Libraries & Information Service, 1998)

Waterlow's Solicitors' and Barristers' Directory 2006, 162nd ed., (London: Waterlow, 2006)

Wilkie M et al, *Landlord and Tenant Law*, 5th ed., (Basingstoke: Palgrave Macmillan, 2006)

Wilkinson H, 'Leasehold Reform Act 1967' (1968) 31 MLR 193 - 197

Wilkinson H, 'The Law Commission Report on Covenants - 1' (1984) 134 NLJ 459 - 461

Wilkinson H, 'An Underdog's Charter? Privity of Contract and Estate' [1989] 53 Conv. 145 - 151

Williams G (Ed), *The Reform of the Law*, 1st ed., (London: Victor Gollancz, 1951)

Williams J, *Principles of the Law of Real Property Intended for the Use of Students in Conveyancing*, 16th ed., (London: Sweet & Maxwell, 1887)

Wittgenstein L, (translated by Pears D and McGuinness B), *Tractatus Logico-Philosophicus*, 1st ed., (London: Routledge, 2001)

Wohl A, *The Eternal Slum Housing and Social Policy in Victorian London*, 1st ed. (London: Edward Arnold, 1977)

Wood D, 'Landlord and Tenant Law: Mapping the Recent Past' in Bright S (Ed), *Landlord and Tenant Law: Past, Present and Future*, 1st ed., (Oxford: Hart, 2006)
1 - 18

Woods W, *The Gravesend Chronology Pt II 1701-1900*, 4th imp., (Great Malling, Kent: Kent CC, 1980)

Zander M, 'Introduction' in Zander M (Ed), *What's Wrong with the Law*, 1st ed., (London: BBC, 1970) 1-7

Parliamentary Papers

First Report of the Commissioners appointed to inquire into Friendly and Benefit Building Societies; together with evidence, appendix and index, PP 1871 XXV

Lord Chancellor Written Answer, Hansard (HL) 19 March 1998, vol. 587, col. 213

Real Property Commissioners Report, PP 1831-32, XXIII (484) 321

Land Registry Practice Guides

(London: Land Registry)

Land Registry Practice Guide 40, 'Land Registry Plans', (2005)

Land Registry Practice Guide 51 'Areas served by Land Registry Offices' (2010)

Land Registry Practice Guide 60 'Commonhold', (2009)