



## ***The Law Reform Commission***

### **DISCUSSION PAPER**

#### **THE LAW OF LANDLORD AND TENANT**

##### **1 INTRODUCTION**

- 1.1 Hurricane Ivan brought unprecedented destruction to the Cayman Islands on 12<sup>th</sup> September, 2004. Damage estimates given by the National Hurricane Committee of the Government in 2004 indicated that 95% of buildings on Grand Cayman sustained damage as a result of Hurricane Ivan- 10-15% beyond repair. In Breakers and East End, the areas hardest hit, 80% and 50% of homes respectively were lost and Bodden Town's coastal strip accounted for another 40% of destroyed homes.<sup>1</sup>
- 1.2 The damage to housing resulted in a shortage of accommodation, a steep increase in rents and an ongoing deterioration in the previously stable relationships between landlord and tenants on the Islands. As a result of the myriad social problems which arose, in October 2005 the Law Reform Commission was asked by Government to review the law governing the relationship between landlords and tenants.
- 1.3 The Commission has considered the matter in the light of legal research conducted by the Commission and written submissions received from Island Rental Services & Real Estate Ltd<sup>2</sup> and Mr. Stephen Hall-Jones.<sup>3</sup> We thank them for their input.

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<sup>1</sup> Government press release, 2<sup>nd</sup> October 2004

<sup>2</sup> Island Rental Services carry on business as property managers and rental agents. They submitted a report in which they recommended that residential rental properties should meet certain basic minimum standards so as to be fit for habitation and that the terms and

- 1.4 The purpose of this discussion document is to set out the Commission's current views and invite further comment, both from those professionally involved in the real estate industry and from the general public.
- 1.5 A copy of a draft Residential Tenancies Bill is annexed hereto for the purposes of consultation. The Commission emphasizes that this is a discussion document. It will not make any final recommendations to Government until it has obtained and considered the views expressed by the public.

## 2 **MAIN ISSUES**

The main issues relating to landlord and tenant relationships which have been highlighted in the media and otherwise brought to the attention of the Commission are as follows-

- (a) steep and sudden increases in rent which have resulted in calls for rent control legislation and the establishment of a housing authority;
- (b) uncertainty as to length of notice to quit especially in situation where tenant is holding over;
- (c) tenants refusing to vacate after being given due notice;
- (d) the unlawful eviction of tenants and harassment of tenants by landlords;
- (e) uncertainty as to the liability to repair damaged premises; and
- (f) allegations that some landlords are, without legal reasons, refusing to return deposits.

## 3 **SYNOPSIS OF THE CURRENT LAW REGULATING LANDLORD AND TENANT RELATIONSHIPS**

- 3.1 The legal relationship between landlords and tenants is governed by the Landlord and Tenant Law (1998 Revision), the Registered Land Law (2004 Revision) and common law rules.
- 3.2 The essential feature of a tenancy is that the tenant is granted exclusive possession of land and buildings. It is possible to grant a tenancy to one or more

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conditions implied into tenancy agreements be clearly defined. The Commission agrees with this approach.

<sup>3</sup> Mr Stephen Hall-Jones is a local lawyer. He submitted a detailed report in which he proposed a wide range of changes such a rent control and the establishment of a Government housing authority which would regulate the residential housing market.

persons jointly.<sup>4</sup> It is also possible to grant someone the right to share occupation of a residential property which does not amount to a tenancy at all because the occupier does not have a right to exclusive possession of any land or building. A person who merely has a personal right to share occupation of the whole or part of a residential property is referred to as a "licensee". Many single people employed in the construction and tourist industries share occupation of residential properties on the terms of unwritten licence agreements.

3.3 Part II, Division 2 of the Registered Land Law codifies most of the common law rules and sets out the circumstances in which tenancies are registrable. A tenancy can be created for a fixed term, or for life, or for an indefinite period which can be terminated on notice. If it is created for a fixed period, no matter how long or short, the tenant's interest in the land terminates automatically at the end of the period without the need for the landlord or tenant to take any positive steps to end it. Similarly, a life tenancy terminates automatically upon the death of the tenant. A periodic tenancy is terminated by notice given either by the landlord or tenant and section 45 re-states the common law rules about the length of notice required to be given. By section 46 any tenancy for a fixed term exceeding two years and any tenancy for life *must* be registered which means that the landlord and tenant must execute a document in the prescribed form. By section 63 any periodic tenancy *may* be registered provided that the landlord and tenant have executed the prescribed form. In practice periodic tenancies are rarely, if ever, registered.

3.4 Section 52 of the Registered Land Law imposes certain obligations upon all landlords.<sup>5</sup> These obligations are implied into every tenancy agreement, whether written or oral, unless it can be shown that the landlord and tenant expressly agreed something different. In other words, landlords can contract out of their implied obligations by inserting appropriate language in written tenancy agreements. Where the tenancy

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<sup>4</sup> It is technically possible to grant a tenancy to two or more persons (such as husband and wife) as joint tenants, in which case upon the death of one, the survivor automatically becomes sole tenant. Alternatively, it is possible to grant a tenancy to a number of people as tenants in common, who are each liable for a proportion of the rent and other obligations, although this is rarely done in practice.

<sup>5</sup> Section 52 did not change the law. In substance, it merely re-states the pre-existing common law rules.

agreement is an oral one, it will be impossible as a practical matter for the landlord prove that the tenant agreed to release him from these obligations. However, the scope of these implied obligations is very limited. It is also important to understand that the Registered Land Law has no application to licence agreements at all.

- 3.5 Section 53 of the Registered Land Law imposes various implied obligations upon tenants which apply unless the landlord and tenant expressly agree something different. These implied obligations are in substance a re-statement of the common law rules. Again, it is important to understand that these implied obligations are not imposed upon licensees whose right to share occupation of a residential property does not amount to a tenancy. Thus, at common law tenants have greater rights, but they also have greater burdens than licensees.
- 3.6 The Landlord and Tenants Law, Cap 80 (1998 Revision) was enacted as long ago as 1838. In general terms its purpose is to protect the interest of landlords by making it easier for them to collect rent arrears by streamlining the procedure for levying execution upon a tenant's good and chattels. The Law deals, among other things, with how a landlord may recover rent where there is no written lease; with the circumstances where the tenant leaves the premises with arrears of rent and where the tenant gives notice to quit but subsequently refuses to vacate the premises.
- 3.7 The Landlord and Tenants Law is archaic as can be seen in the fact that the amount of costs which a tenant can be ordered to pay to his landlord is limited to 30 cents. The Commission recommends that this Law be repealed.

#### 4 **THE IMPACT OF HURRICANE IVAN UPON COMMERCIAL TENANCIES**

- 4.1 Hurricane Ivan was an unprecedented event because such a large number of buildings were destroyed or damaged at the same time. Relatively few commercial buildings were wholly unscathed. A number of office buildings, hotels, retail shops and warehouses were so seriously damaged that they were wholly or partially unfit for use.
- 4.2 It is the Commission's view that the common law rules governing the relationship between landlords and tenants of commercial property played out satisfactorily in the unprecedented situation which existed in the aftermath of Hurricane Ivan.

- 4.3 Tenancies of offices and retail premises are usually granted for fixed periods on the terms of written agreements which are subject to compulsory registration. Historically, offices were usually let for fixed terms of three or five years, subject to an option to renew exercisable by the tenant. In recent years, there has been a tendency for tenants of office buildings to commit themselves to longer terms, in some cases as long as twenty years. It is the established practice for tenancies of commercial properties to impose express repairing covenants upon the landlord to the effect that he will have responsibility for repairing and maintaining the structure of the building and the service equipment (such as air conditioning systems; electrical systems, elevators etc).
- 4.4 Express repairing covenants are typically imposed upon the tenant to the effect that he will maintain and decorate the interior of the premises, which may well have been fitted out at the tenant's expense. Tenancy agreements relating to commercial buildings almost invariably impose an obligation upon the landlord to insure the building, but not the contents belonging to the tenant. Historically, the cost to the landlord of fulfilling his repairing and insuring obligations would be reflected in the headline rent and he would bear the risk of inflation. In recent years it has become increasingly common for landlords of commercial property to charge a lower headline rent and pass on the actual cost of maintenance and insurance to the tenants by way of an additional rent which is described as a "service" or "maintenance" charge.<sup>6</sup>
- 4.5 Such tenancy agreements usually include an express covenant which displaces the one implied by section 52(e) of the Registered Land Law. Typically, the landlord has an obligation to use the insurance proceeds for the purpose of re-instating or repairing the building and the tenant's obligation to pay rent is suspended during the repair period. Some leases impose a time limit (which may be as short as six months) by which the landlord must complete the repairs, failing which the tenant has the right to terminate the tenancy. The fact that a building has been so seriously damaged as to be unfit for use does not

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<sup>6</sup> When landlords of commercial property seek to impose service charges upon their tenants, best practice requires that the tenancy agreements set out details of the services to be provided and the basis upon which the landlord will charge for them. It follows that the landlord has a duty to account and well drafted tenancy agreements should expressly describe the landlord's obligation to produce accounts which fully disclose the basis upon which service charges are being made.

entitle the tenant to terminate the tenancy unless such a right has been specifically agreed. Typically, the tenancy continues but the tenant is relieved from the obligation to pay rent unless and until the repairs have been completed by the landlord. The landlord's loss of rent is covered under most commercial property insurance policies. Similarly, temporary relocation costs incurred by the tenant are normally covered by office renter's and/or business interruption insurance policies.

- 4.6 The Commission concludes that the terms of typical commercial tenancy agreements fairly balance the competing interests of landlords and tenants and does not recommend that any legislative change is necessary or desirable.

## 5 **RENT INCREASES AND RENT CONTROL**

- 5.1 The steep increases in rent of residential premises started as early as October 2004. The Consumer Price Index published by the Economics and Statistics Office on 17<sup>th</sup> October 2005 showed that the Consumer Price Index Basket increased by 8.4% in comparison with the third quarter of 2004. The housing group index registered the highest increase, with a rent increase of 34.4% over a period of one year.
- 5.2 The Cayman Economic report of March 2006<sup>7</sup> showed however that over the year from March 2005 to March 2006 rents have fallen in the areas studied i.e. in Prospect by 20%, in West Bay by 13.5% and in South Sound by 13%.
- 5.3 Nevertheless a recent poll carried out by the Caymanian Compass showed that 40% of the 368 persons surveyed were of the opinion housing costs were the costs which most adversely affected them. One respondent noted that his rent was nearly four times the mortgage on his home in Dallas. Another respondent re-iterated the widely held belief that landlords were taking advantage of tenants.<sup>8</sup>
- 5.4 Many parties to leases do not appear to appear to know that unless there is a review clause in a written lease a landlord has no right as a matter of law to increase the rent unilaterally. Conversely, a tenant has no right to decrease it unilaterally. If the landlord and tenant fail to agree upon a change in the rent, their

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<sup>7</sup> Release June 7, 2006 by the Economics and Statistics Office

<sup>8</sup> The Caymanian Compass, Wednesday August 9<sup>th</sup>, 2006

only remedy is to terminate the tenancy (a) in the case of a periodic tenancy by serving a valid notice to quit or (b) in the case of a fixed term tenancy, by waiting until the expiry date and then declining to renew it. Of course after Hurricane Ivan because of the shortage in accommodation many tenants could not refuse to agree to an increase in rent.

- 5.5 Notwithstanding the law some landlords increased rents at a time when tenants had little choice but to agree to the increase in rent. Many landlords have defended the high increases by citing higher interest rates and higher insurance costs. Yet the calls for regulation of the market have continued.

***The Price Gouging Control (Emergency Circumstances) Law, 2004***

- 5.6 Pursuant to repeated urgent public calls for an early remedy the Government in November 2004 enacted the Price Gouging Control (Emergency Circumstances) Law of 2004.

- 5.7 Section 4 of that Law provides that after the declaration of a state of emergency and during such period of time (as may be specified by the Governor in Cabinet by order) immediately following a natural disaster any person, his agent or employee is prohibited from renting, selling or offering to rent or sell at an unconscionable price any commodity. A "commodity" is defined to include a dwelling unit. The Law in section 4 (3) specifies what constitutes an unconscionable price.

- 5.8 The prohibition on unconscionable increases stays in effect-

- (a) until the declaration expires;
- (b) where no tropical storm or hurricane occurs to which the tropical storm or hurricane watch or warning related, until the tropical storm or hurricane watch or warning is discontinued;
- (c) for such longer period after the declaration has expired as may be specified by order of the Governor in Cabinet; or
- (d) for such other period as may be specified by order of the Governor in Cabinet.

- 5.9 Thus for a specified period there may in fact be a form of rent control in the Islands. A Commission is established under the Law and its purposes is to receive and investigate complaints regarding unconscionable increases during the specified period.

After investigation if the Commission has reason to believe that a person has engaged in, or is engaging in, an act or practice that violates section 4 it shall submit a report of the results of the inquiry and such supporting evidence as it has collected to the Attorney-General for prosecution of the person. A person guilty for example of an unconscionable increase in rent is liable on summary conviction to a fine of \$100,000.

- 5.10 There is no general long term rent control under this legislation and any complaints can only relate to issues which arise or arose during the limited period. The Law Reform Commission has been advised that although a Commission was appointed it has never met. The Legal Department has also indicated that it has never received any complaints under the Law. It is important to note that although the Law remains in effect, the complaints regime mentioned in paragraphs 7 to 9 above is not currently in effect and will only be reactivated upon another declaration of emergency.

### ***Rent control generally***

5.11 Some members of the public have proposed that, in order to avoid a similar rent crisis in the future, the Government should implement general rent control, not just the limited control provided for by the Price Gouging Control (Emergency Circumstances) Law, 2004.

5.12 Mr. Stephen Hall-Jones, in his submission to the Commission of 24<sup>th</sup> November, 2005 indicated that there was a need for rent control on leasehold properties let on periodic terms of one year or less where the monthly rent for the dwelling is CI\$1,000 or less, however payable and whether furnished or unfurnished. He opined that a housing authority should be set up to regulate the rents of such properties and to ensure their fitness for habitation.

5.13 Rent control places a maximum price or "rent-ceiling" on what landlords may charge tenants. Such control has been a major part of the economy of many American and Canadian states for decades but the research of the Commission shows that rent control is rejected by many economists as being counter productive. Studies have shown that rent control leads not only to shortage of dwelling spaces but diminution in the quality of dwelling houses.

5.14 With rent control the quality of rental accommodation diminishes because a rent controlled property is not generally viewed as prime investment. This results usually in poor maintenance and grudging provision of services to the tenant. The quantity of accommodation is adversely affected because one effect of government interference in the rental market is to retard investment in residential rental units as investors would prefer to place funds in an unregulated or less regulated industry.<sup>9</sup> According to one economist<sup>10</sup> "in many cases rent control appears to be the most effective technique presently known to destroy a city- except bombing".<sup>11</sup>

5.15 In a paper studied by the Commission entitled the "The High Cost of Rent Control"<sup>12</sup> which was published by the National Multi Housing Council of Washington D.C., the Council expressed the opinion that in an unregulated market, a housing shortage- the reason usually cited for imposing rent control- will be

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<sup>9</sup> The Concise Encyclopedia of Economics

<sup>10</sup> Assar Lindbeck, Swedish economist

<sup>11</sup> Rent Control, W. Block

<sup>12</sup> The National Multi Housing Council, Washington D.C., 1996

addressed in a two step process. Firstly, in the short term, rents on the margin will rise as consumers compete for available units. Secondly, over time these higher rents will encourage new investment in rental housing- through new construction, rehabilitation and conversion of buildings into non-residential to residential use- until the shortage of housing has been eliminated.

5.16 The Council also noted that rent control is accompanied by substantial administrative costs as rent controls require the creation of elaborate bureaucratic systems. Rental property must be registered, detailed information on the rental property must be collected and elaborate systems for determining rents and hearing complaints and appeals must be established."<sup>13</sup> The example is given that in Santa Monica, U.S.A. the Rent Control Board in 1996 had a budget of more than \$4 million to control rents on only 28,000 apartments.

5.17 The Commission based on its research does not support the call for general rent control legislation. The Commission however did however look closely at New Zealand's approach to controlling its spirally rents and wishes to share this approach for the purpose discussion.

5.18 In New Zealand the **Residential Tenancies Act 1986** regulates adjustments on rent for residential premises. Under that Act "residential premises" is defined to mean any premises used or intended for occupation by any person as a place of residence. Section 24 of the Act provides that the rent payable in respect of any tenancy may be increased by the landlord provided all of the following conditions are complied with:

- (a) the landlord shall give the tenant notice in writing of the increase; and
- (b) that notice shall specify the amount of the increased rent and the day upon which the increased rent shall become payable; and
- (c) the day upon which the increased rent shall become payable shall be not less than 60 days after the date on which that notice is given; and
- (d) the rent shall not be increased within 180 days after the

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<sup>13</sup> ibid

- date on which the last increase took effect;  
and
- (e) in the case of a tenancy which is not subject to annual rent adjustment, the rent shall not be increased within 180 days after the date of the commencement of the tenancy; and
  - (f) in the case of a tenancy which is subject to annual rent adjustment, no rent increase shall take effect—
    - (i) less than 60 days after the notice required by paragraph (a) is given; and
    - (ii) other than on the specified date in any year or with effect on the next day on which any rent is to be paid within 28 days after the specified date in any year; and
  - (g) a landlord under a fixed-term tenancy shall not increase the rent otherwise than as permitted by the agreement.

5.19 For the purposes of section 24, a tenancy is subject to annual rent adjustment where—

- (a) it is the landlord's practice (the proof of which shall lie on the landlord)—
  - (i) to review the rent annually; and
  - (ii) to adjust the rent on a specified day in each year; and
- (b) provision to that effect is included in the tenancy agreement or the tenant is otherwise informed of the practice in writing before the commencement of the tenancy.

5.20 A notice of an increase in rent lawfully given under section 24 of the Act shall, unless it is withdrawn by the landlord, have the effect of varying the tenancy agreement in accordance with the terms of the notice. Every notice shall be in writing, specifying the amount of the increased rent and the day upon which the increased rent shall become payable.

5.21 A Tenancy Tribunal under the Act has general jurisdiction to determine all disputes arising between landlords and tenants in relation to any tenancy to which the Act applies. A tenant is given a right under section 25 of the Act to apply to the Tribunal for an order reducing the rent paid by him on the grounds that the rent being paid under the lease exceeds the market rent by a substantial amount.

- 5.22 The market rent for any tenancy is for the purposes of the Act, the rent that, without regard to the personal circumstances of the landlord or the tenant, a willing landlord might reasonably expect to receive and a willing tenant might reasonably expect to pay for the tenancy, taking into consideration the general level of rents for comparable tenancies of comparable premises in the locality or in similar localities and such other matters as the Tribunal considers relevant.
- 5.23 Notwithstanding section 24 of the Act a landlord can at any time apply to the Tribunal for an order to increase rent where the landlord-
- (a) effects substantial improvements to the premises or provides more or better facilities or services for the tenant with the consent of the tenant; or
  - (b) incurs in respect of the premises expenses of a nature or an amount that could not reasonably have been foreseen when the rent was last fixed.
- 5.24 The approach taken under the Residential Tenancies Act does not prohibit the increase of rent. It does attempt to set out the frequency, circumstances and notification process by which rent increases can be effected by the landlord. This is designed to offer greater certainty to the process and protection to the tenant from arbitrary increases while at the same allowing for rents to be determined primarily by market forces.

## **6 NOTICE TO QUIT PREMISES**

- 6.1 Many tenants in the Islands occupy leased premises on a periodic basis, whether as a result of an oral agreement, a written lease or as a result of holding over after the expiration of a fixed term lease. Section 45 (3) of the Registered Land Law provides that the period of a periodic tenancy shall be the period by reference to which the rent is payable. A tenancy may be determined by either party giving to the other notice, the length of which shall, subject to any other law, be not less than the period of the tenancy and shall expire on one of the days on which rent is payable. Thus for example, in the absence of expressed stipulations, a weekly tenancy is determined by giving a week's notice, a monthly tenancy by a month's notice and a quarterly tenancy by a quarter's notice.
- 6.2 A weekly tenancy which begins, for example, on a Saturday and, therefore expires on midnight on Friday may be determined by notice to quit on a Friday or Saturday. Parties may however agree between themselves as to the terms of the notice to quit.

- 6.3 One of the more common complaints since 2004 relates to persons holding over after the end of their fixed term lease. In one situation related to the Commission the tenants had been living on the premises for 12 years, 11 years after the termination of the original lease for a year and the tenants assumed that they had continued to hold over subject to the original terms and conditions including those relating to the notice to quit. The tenants thought that the original 3 month period set out in the lease still applied. Two months after the passage of Ivan they were therefore dismayed to be given a one month's notice to vacate the premises.
- 6.4 Section 51 (1) of the Registered Land Law (2004 Revision) provides that where a person, having lawfully entered into occupation of any land as lessee, continues to occupy that land with the consent of the lessor after the termination of the lease he shall, in the absence of any evidence to the contrary, be deemed to be a tenant holding the land on a periodic tenancy on the same conditions as those of the lease so far as those conditions are appropriate to a periodic tenancy. For the purposes of this section, the acceptance of rent in respect of any period after the termination of the lease shall, if the former tenant is still in occupation and subject to any agreement to the contrary, be taken as evidence of consent to the continued occupation of the land.
- 6.5 Section 51 came up for consideration in the local case *Kelly and Powis v Lookloy*.<sup>14</sup> The plaintiffs in that case applied for various declarations and injunctions in relation to a tenancy of premises of which the defendant was the landlord. The second plaintiff signed a lease to an apartment from the defendant for 12 months at \$1,000 per month. The lease contained various covenants including one relating to holding over which stated that the periodic tenancy which would ensue would be on the same "covenants, conditions and provisions as are herein contained." At the end of the 12 month period the rent was in arrears but the defendant did not serve notice on the plaintiffs and subsequently accepted rent. Later he sent a letter purporting to serve notice (which was not in fact legally valid) though it did not refer to any alleged breaches.

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<sup>14</sup> 2004-5CILR 273

- 6.6 The plaintiffs sought declarations including a declaration that after the expiration of the lease they occupied the premises on a periodic tenancy of 12 months' duration and that the notice of termination purported to have been served on them by the defendant was null void and of no effect. They also sought injunctions restraining the defendant from unlawfully terminating the lease and preventing him from forcibly ejecting them from or restricting their access to the premises until the expiry of the 12 month periodic tenancy.
- 6.7 It was held at first instance<sup>15</sup> that the plaintiffs' holding over created a tenancy from year to year there being no conduct of the parties to rebut the presumption of such a tenancy based on the terms of the lease. According to the presiding judge, given the terms of the lease the fact that rent was expressed as being payable monthly was irrelevant. She further held that by accepting rent one month after the expiration of the lease, the defendant had consented to the plaintiffs' continued occupation at that time and had waived his right of forfeiture under section 55 (3) (b) of the Registered Land Law.
- 6.8 On appeal the Court of Appeal reversed this decision basing its conclusion on the case relied upon by the counsel *Adler v Blackman*<sup>16</sup>. The local Court of Appeal in *Kelly and Powis v Lookloy* noted that the rent in question was not expressed to be payable yearly. It was expressed to be payable monthly. The Court therefore held that the trial judge was in error in holding that the holding over created a year to year tenancy and the holding over created a monthly tenancy.
- 6.9 It has also been suggested to the Commission has suggested that section 51 of the Registered Land Law should be amended to make it clear that the period of any "holding over" should be for the same period as the original term of the lease. That is, if a tenant holds over after, for example, the expiry of a lease

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<sup>15</sup> Lever J. Grand Court

<sup>16</sup> [1952] 2 All E.R. 945. In that case Ormerod J. at first instance held that essential to the presumption of a yearly tenancy on the determination of a letting for a year or for a term of years is that the rent should be expressed as an annual sum; that presumption was rebutted where, as there, the rent was expressed to be payable as a weekly rent and not as an installment of the rent fixed for the one year's tenancy. His judgment was upheld on appeal.

for one year, he should be deemed to be holding over for a further period of one year notwithstanding that the rent is payable monthly rather than only holding over for a period equal to the period for which the rent is paid unless the lease contains an express term to the contrary. This would prevent the kinds of situation which occurred after Ivan where although both landlord and tenant had assumed that the holding over would be for a further periodic tenancy equal to the original term, because no new lease was signed, landlords took unfair advantage of section 51(1) to evict tenants to obtain a higher rent.

6.10 The Commission proposes that all residential tenancies should be in writing. Clause 15 of the Residential Tenancies Bill specifies the minimum information, terms and conditions which should be set out in an agreement. If this proposal is accepted the issues relating to holding over will not arise as only written agreements will be enforced.

6.11 Issues as to whether a lease for a fixed term for example for one year should contain a clause providing for early termination by giving 1 or 2 month's notice by the landlord have also arisen. Mr. Hall-Jones on this point has indicated that any provision in any lease providing for premature termination of a fixed term or periodic tenancy other than on the anniversary of the fixed term or period (the "one month notice to quit" provision in a fixed tenancy for one year is a typical example) should be declared void by statute unless a similar provision applies to both landlord and tenant and only where the right to terminate on earlier notice is contained in a clearly marked "box" in the lease. According to Mr. Hall-Jones the alternative would be to declare void any term inconsistent with the fixed term or period.

## **7 UNLAWFUL EVICTIONS; HARASSMENT OF TENANTS**

7.1 Where some tenants believed that their notice to quit was invalid they refused to vacate premises. Allegedly, altercations arose in some instances when landlords sought to exercise their rights of possession in a manner which sparked confrontation and resulted in police intervention. Some landlords in an effort to get possession allegedly also turned off utilities and harassed tenants into moving out.

7.2 The laws of the Islands do not condone violent entry for the recovery of possession of lands. Section 84 of the Penal Code (2006 Revision) provides in part that a person who, in order to take possession of any land or

tenements, enters such lands or tenements in a violent manner, whether such violence consists in actual force applied to any person or in threats or in breaking open any house or in collecting an unusual number of people, is guilty of forcible entry.

- 7.3 Where a lease has ended and the landlord has a contractual right to re-take possession he may simply re-enter as for example, where the tenant has abandoned possession or where there is no residential occupier and the landlord can effect entry without violence. A landlord could, in order to avoid conflict, opt instead to seek an order for possession from the court. Even after a landlord has decided to go to court and has obtained a judgement for possession he is not bound to call in the help of the bailiff to put him in possession if he can enter peaceably and lawfully without that help.
- 7.4 Where a tenant remains in possession of land contrary to the wishes of the landlord the landlord can also apply to the court for damages. A lease usually contains a covenant on the tenant's part to deliver up possession of the premises on the determination of the term. In the absence of such a covenant or of any express stipulation the tenant is under an implied contract to restore possession to the landlord.<sup>17</sup> The damages for breach of this express or implied obligation are not limited to the value of the land but are the amount of the real damage sustained by the landlord. This will include the rent of the premises during the time the landlord is kept out of possession; the reasonable damages and costs incurred by the landlord in respect of claims against him naturally arising out of the tenant's failure to deliver possession and also where a subtenant or assignee is in possession the cost of an action brought against him to recover possession.
- 7.5 It has been suggested that the unlawful cessation of the supply of utilities by a landlord and the persistent harassment of tenants into moving out of premises should be a criminal offence. In the UK, like the Cayman Islands, any person who, without lawful authority, uses or threatens violence for the purpose of securing entry into any premises for himself or for any person is guilty of an offence provided that there is someone present on those premises at the time who is opposed to the entry which the violence is intended to secure and the person using or threatening the violence

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<sup>17</sup> *Henderson v Squire* (1869) LR 4 Q.B 170 at 173.

knows that this is the case. A person guilty of such an offence in the UK is liable on summary conviction to imprisonment for a term not exceeding 6 months or a fine of £5000 or to both.<sup>18</sup>

7.6 The UK **Protection from Eviction Act 1977** however offers even more protection to people living in residential property against harassment and illegal eviction. That Act makes harassment and illegal eviction a criminal offence and enables a person harassed or legally evicted to claim damages through the civil court. It is an offence under the Act to-

- (a) do acts likely to interfere with the peace or comfort of a tenant or anyone living with him; or
- (b) persistently withdraw or withhold services for which the tenant has a reasonable need to live in the premises as a home.

7.7 Under the Act it is an offence to do any of the things described above intending, knowing or having reasonable cause to believe that they would cause the tenant to leave his home, or stop using part of it or stop doing the things a tenant should normally expect to be able to do. Harassment is defined broadly and includes withdrawal of services, withholding keys, anti-social behavior on the part of the landlord or his agent, demand for excessive repairs failure to carry out repairs, threats and physical violence. A tenant who is protected by the **Protection from Eviction Act** may go to court to claim damages if he is harassed or illegally evicted.

7.8 Under the **UK Housing Act 1988** for cases of illegal eviction and of harassment which cause a tenant to leave his home the court may award damages based on the profit made by a landlord from illegally evicting his tenant. The basis for the assessment of damages for the unlawful eviction is the difference in value, determined as at the time immediately before the residential occupier ceased to occupy the premises in question as his residence, between-

- (a) the value of the interest of the landlord in default determined on the assumption that the residential occupier continues to have the same right to occupy the premises as before that time; and

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<sup>18</sup> The Criminal Law Act 1977, section 6

(b) the value of that interest determined on the assumption that the residential occupier has ceased to have that right.<sup>19</sup>

7.9 Section 45 of the **Residential Tenancies Act of New Zealand** which sets out the responsibilities of a landlord provides that the landlord shall not interfere with the supply of gas, electricity, water telephone services or other services to the premises except where the interference is necessary to avoid danger to any person or to enable maintenance or repairs to be carried out.

7.10 That Act also provides that no person shall enter into possession of any residential premises in occupation of a tenant except with the consent of the tenant or pursuant to an order made by the Tribunal. A person who enters premises without an order or without such consent for the purposes of taking possession of that land or building commits an offence and is liable to imprisonment for a term not exceeding 3 months or a fine of \$1000.

7.11 The Commission has considered how the rights and obligations of landlords and tenants of residential property can be enforced, bearing in mind that there will normally be an inequality of bargaining power. A tenant who is facing unlawful eviction from his home is in an inherently weak position. The Commission recommends that the Cayman Islands should offer the wide range of protection offered to tenants in the UK and New Zealand. Any landlord who harasses his tenant with the intention of evicting him or dissuading him from exercising his rights under a residential tenancy agreement should be guilty of an offence.

## **8 REPAIR OF PREMISES; FIT PREMISES**

8.1 Some tenants walked away from damaged properties without taking any basic steps to secure them and prevent further damage. In the case of properties which were damaged but still habitable, there was often confusion about what, if any, repairing obligation was imposed upon the landlord and confusion about the tenant's right to remain in possession, perhaps at a reduced rent, unless and until the landlord served a valid notice to quit.

8.2 Under section 52 of the Registered Land Law where the tenancy comprises only part of a building, the landlord has an implied obligation to keep the roof, main walls,

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<sup>19</sup> Section 28

drains and common parts in repair, unless the tenant expressly agrees otherwise. This is a continuing obligation which applies throughout the tenancy and it applies to both commercial and residential tenancies. However, at common law the landlord of an entire building has no obligation to carry out any repairs and maintenance at all unless he expressly agrees with the tenant that he will do so.

- 8.3 In the case of residential properties which are let furnished, the landlord impliedly agrees that the house or apartment is fit for human habitation as at the commencement of the tenancy. This means that its roof must be watertight; it must have a safe supply of electricity; it must have a supply of clean water; it must have an hygienic drainage system; and it must have the minimum furnishings and equipment necessary to make it habitable by modern standards. However, this implied obligation is limited in important respects. First, it applies only as at the commencement of the tenancy which means that the landlord has no continuing obligation to ensure that the property remains fit for human habitation throughout the period of the tenancy. Second, it does not apply to tenancies of properties which are let unfurnished.
- 8.4 If a property is destroyed or damaged by a hurricane so as to be wholly or partially unfit for occupation or use, the tenant's obligation to pay rent is suspended. If the property is wholly destroyed, the tenant's obligation to pay rent is wholly suspended. If the property is only partially damaged, with the result that it is still capable of being occupied or used to some extent, then the tenant is still liable to pay a proportion of the rent. The landlord has no implied obligation to rebuild the property and, if he chooses not to do so, the tenant may terminate the tenancy by serving notice to quit. This rule applies to both commercial and residential tenancies unless the landlord and tenant have expressly agreed something different.
- 8.5 Due to the great damage caused by the hurricane many premises which were let after the hurricane were not fit for habitation. Repairs were slow in coming, houses were full of mold and failed to comply with the minimum standards of general construction.<sup>20</sup> It has been recommended to the Commission that the law should expressly require that all leased property should have at a minimum running water, indoor sanitation, a supply

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<sup>20</sup> See "Tenants scream 'living hell' in George Town," Cayman Net News, Wednesday August 2<sup>nd</sup> 2006

of electricity and minimum standards of general construction.

***The Public Health Law (2002 Revision) and unfit premises***

- 8.6 Currently complaints about defective and unfit premises can be made to the Chief Environmental Health Officer under the Public Health Law (2002 Revision) which provides for the abatement of nuisances by the Chief Environmental Health Officer. The Law provides that the Chief Environmental Health Officer may take such steps as he deems necessary to remove or secure the abatement of all statutory nuisances and, if the circumstances so warrant, proceed at law against any person committing any such nuisances.
- 8.7 Statutory nuisances are defined in section 7 of the Law to include-
- (a) premises or part thereof so situated or so constructed or so dilapidated or so damp or so defective in lighting or ventilation as to be prejudicial to health or a nuisance;
  - (b) premises which are occupied whether by day or night and not provided with, or so situated or constructed that they cannot be provided with, sufficient and sanitary latrines;
  - (c) premises or part thereof so overcrowded, verminous or dirty as to be prejudicial to health or a nuisance;
  - (d) building so constructed or any premises in such a state or condition as to harbour or be likely to harbour rats.
- 8.8 Section 8 of the Law provides that the Chief Environmental Health Officer shall, if satisfied of the existence of a statutory nuisance, serve notice on the person through whose act, default or sufferance the nuisance arises or continues or, if such a person cannot be found, on the occupier or owner of the premises on which the nuisance arises requiring him to abate the same within the time and date specified in the notice and to execute such works and do such things as may be necessary for that purpose, and if the Chief Environmental Health Officer thinks it desirable, specifying any works to be executed.
- 8.9 Where the nuisance arises from any want or defect of a structural character or where the premises are unoccupied, the notice shall be served on the owner.
- 8.10 If the person causing the nuisance cannot be found and it is clear that the nuisance does not arise or continue by the act, default or sufferance of the

occupier or owner of the premises, the Chief Environmental Health Officer may request the officer for the time being in charge of the Government Department of public works to abate the nuisance.

- 8.11 A person who has been served with a notice under section 8 (1) and-
- (a) the nuisance arose from his wilful act or default;  
or
  - (b) he makes default in complying with any of the requisitions of the notice within the time and date specified,
- is guilty of an offence and liable on conviction, to a fine of five hundred dollars for each offence and to a further fine of fifty dollars for each day during which the offence is continued after the date specified in the notice.

#### ***Fit premises***

- 8.12 The Commission has examined the provisions of the New Zealand Act previously cited<sup>21</sup> which govern the responsibilities of landlords and recommends the incorporation of similar provisions in a new Law. That Act provides that a landlord has the following responsibilities-
- (a) to provide the premises in a reasonable state of cleanliness;
  - (b) to provide and maintain the premises in a reasonable state of repair having regard to the age and character of the premises and the period during which the premises are likely to remain habitable and available for residential purposes;
  - (c) to comply with all requirements in respect of buildings, health and safety under any enactment so far as they apply to the premises;
  - (d) to compensate the tenant for any reasonable expenses incurred by the tenant in repairing the premises where-
    - (i) the state of disrepair has arisen otherwise than as a result of a breach of the tenancy agreement by the tenant and is likely to cause injury to persons or property or is otherwise serious and urgent;
    - (ii) the tenant has made a reasonable attempt to give the landlord notice of the state of disrepair.

- 8.13 In the review of the New Zealand Act<sup>22</sup> it was noted that a large number of complaints under the Act related

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<sup>21</sup> The Residential Tenancies Act, 1986

<sup>22</sup> The Department of Building and Housing, 2004

to the interpretation of the word "reasonable" as they relate to repairs by the landlord. What is considered a reasonable state of repair by a landlord is not always considered reasonable by a tenant. Further, when the Tribunal is asked to decide disputes related to maintenance it has regard to the age and condition of the property - with lower maintenance expectations for properties that are older and near the end of their economic lives.

8.14 The Commission is of the opinion that the words "reasonable state of repair" could be replaced by the words "in a state such that the premises are and remain fit for human habitation". It would then thereafter be helpful to define "fit for human habitation".

8.15 The **UK Housing Act 1985** contained a useful definition of fitness for human habitation. That Act provided that a dwelling house is fit for human habitation for the purposes of the Act if -

- (a) it is structurally stable;
- (b) it is free from serious disrepair;
- (c) it is free from dampness prejudicial to the health of the occupants;
- (d) it has adequate provision for lighting, heating and ventilation;
- (e) it has an adequate piped supply of wholesome water;
- (f) there are satisfactory facilities in the house for the preparation and cooking of food, including a sink with a satisfactory supply of hot and cold water;
- (g) it has a suitably located water closet for the exclusive use of the occupants;
- (h) it has, for the exclusive use of the occupants, a suitably located fixed bath and wash hand basin each of which is provided with a satisfactory supply of hot water and cold water; and
- (i) it has an effective system for the draining of foul, waste and surface water.

### ***Recommendation re Housing Authority***

8.16 As indicated previously, one of the recommendations to the Commission was for the establishment of a housing authority. It was proposed that such an Authority should have the following powers -

- (a) to serve repair notices under the Law;
- (b) to serve improvement notices under the Law;
- (c) to serve condemnation notices in respect of dwellings or areas unfit for human habitation;
- (d) to serve clearance orders in respect of areas unfit for human habitation;
- (e) to control and prevent overcrowding in dwellings otherwise fit for human habitation by abatement notices;
- (f) to control houses in multiple occupation;
- (g) to impose regulations regarding escape from fire;
- (h) to impose standards of management of dwellings in multiple occupation.

8.17 In the recommendations submitted to the Commission it was noted that such an Authority could however only work effectively if there was alternative accommodation available for the occupiers (owners and tenants) and therefore ready availability of an appropriate stock of low cost or low rental housing.

8.18 The Commission is not inclined to support the recommendation for housing authority. It is of the opinion that the problems relating to unfit premises can be better solved by widening the landlord's duty to repair and by giving more effect to the Public Health Law and regulations. However the Commission does see the utility in the establishment of a tribunal such as Residential Tenancies Commissioner who would have the responsibility of resolving conflicts and of imposing orders relating to repair of premises, the observance of the terms of a lease and such other issues which arise under the landlord and tenant relationship.

## **9 OTHER ISSUES**

9.1 There continues to be confusion about the tenant's right to sub-let or share his property with other people who had been made homeless by the hurricane. At common law any tenant, no matter how short his interest in the land, has an unrestricted right to assign his tenancy or grant a sub-tenancy for a period less than the period of his own tenancy, unless he has expressly agreed with his landlord not to do so. Section 53(i) of the Registered Land Law reverses this common law rule and provides that tenants may not sub-let without

the prior written consent of their landlords. However, it is important to understand that a tenancy or sub-tenancy means the grant of "exclusive possession" of a property to the tenant or sub-tenant. It follows that tenants were perfectly entitled under the common law rules to share their properties by taking in homeless friends or paying guests without reference to their landlords.

9.2 Complaints have arisen relating to the return and use of security deposits. The law does not regulate security deposits but most written agreements provide how deposits must be dealt with. It is usual to agree that the landlord will collect a security deposit before the tenant moves in and such deposit normally equals the amount of one month's rent under the lease. Landlords use the deposit to cover unpaid rent and to perform repairs and to clean the premises where this is necessary. However some landlords appear as matter of course to keep deposits even if premises are left in a satisfactory state by the tenant. It should be noted that unless chores are necessary because of the tenant's unreasonable use of the premises using the deposit to fix what is reasonable wear and tear is not proper.

9.3 The Commission proposes that the terms upon which landlords hold security deposits need to be regulated and should always be stated in written agreements. The proposed new law should provide not only for how a deposit may be used but should require a landlord to put a deposit in a separate account and to pay interest on such deposit when it is returned to the tenant.

## **10 PROPOSED LEGISLATIVE CHANGES**

10.1 The provisions of the Registered Land Law (2004 Revision) continue to work satisfactorily as between landlords and tenants of commercial properties. The Commission does not propose any legislative changes in this regard.

10.2 In addition to the other proposals for change set out in this paper the Commission submits that the following changes are required to the law-

- All residential tenancy agreements should be in writing and contain certain prescribed information
- All periodic tenancies should be subject to a minimum notice period of one month expiring on the last day of the next complete month

- All notices to quit should be in writing and contain certain prescribed information
- All residential tenancy agreements should be subject to implied terms which cannot be amended or excluded
- Landlords of residential property should have an obligation to repair and maintain it in a habitable condition.

10.3 In practice landlords of residential property are likely to insure their buildings against all usual risks, including the risk of hurricane damage. Typically, the sums insured will comprise the re-instatement cost of the building and one year's loss of rent (on the basis that it might well take as long a year to re-instate a building following its destruction by an insured risk). It is in the interests of individual tenants that their landlords should have insurance, otherwise they might not be able to perform their repairing obligations. Arguably, it is in the wider public interest that all landlords of residential property should have the benefit of insurance and that all property should not be let unless it is in an insurable condition. The Commission invites comment on this issue.

10.4 The attached Residential Tenancies Bill, 2006 was drafted taking into account the issues raised and the proposals made in this paper. The Bill provides for the appointment of a Residential Tenancies Commissioner. It is proposed that the Residential Tenancies Commissioner, a public officer, would have power to determine, in accordance with the legislation, most disputes arising between landlords and tenants in relation to any tenancy to which the legislation applies or to which the legislation did apply at any material time. Appeals from the decisions of the Commissioner would be to the summary court.

10.5 The Bill also provides for the following-

- the contents of a tenancy agreement;
- regulation of security deposits;
- regulation of rent increase;
- the keeping of records by landlords;
- the landlord's and tenant's responsibilities under a tenancy agreement;
- the landlord's right of entry;
- termination of tenancies and recovery of possession;

- mesne profits;
- registration of tenancy agreements;
- liability of tenant who abandons premises;
- liability of tenant for the damage to or for the destruction of premises;
- penalty for securing entry by violent means; and
- forms of notice to quit.

11 **CONCLUSION**

The Commission invites comment on this paper and the Residential Tenancies Bill from interested parties and the general public.

The Law Reform Commission  
September 30<sup>th</sup> 2006