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A Fruitful Parent of Injustice: Unilateral Service of Notice to Quit by a Joint Tenant

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Summary

‘A fruitful parent of injustice is the tyranny of concepts’ (Cardozo 1928). This warning seems apposite when reviewing the impact of the decision of the House of Lords in *Hammersmith and Fulham London Borough Council v Monk* [1992] 1 AC 478, HL. Since *Monk* the law is well settled that one joint tenant of a periodic lease can destroy the lease held by both joint tenants. This destructive ability is justified by a conceptual analysis that refuses to recognise the destructive effects of its utilisation. With a reform of the law on the horizon the time is ripe for a review of this peculiar area of law (see Law Com No 284).

If we are correct in our analysis, *Monk* has been productive of an unnecessary amount of mischief in the law. This is partially due to the deployment of inappropriate concepts in *Monk* itself, and partially due to an unfortunate subsequent tendency to allow these concepts to act as tyrants in dictating legal development. *Monk* has had an effect directly or indirectly across many different areas of the legal landscape. This has necessitated both an unwelcome length and a complex structure for this article. The article falls into three sections. First, an

introductory section deals with the legal and factual background to *Monk*, and finishes with a brief account of the case. The second section, the bulk of the article, is a review of the impact of *Monk*. This review is sub-divided into sections on: family law; commercial leases; trust law; Article 8 of the European Convention on Human Rights and Article 1 of the First Protocol to the Convention; and secure tenancies. Finally, there is a concluding section, which begins by outlining the statutory proposals for housing law and follows that with a critical analysis of *Monk*, which attempts to justify the criticisms made of the case and its subsequent applications, and to identify the source of the mischief the decision spawned. A general conclusion brings the article to an end.

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An Introduction to Monk

The Legal Context of *Monk*

Periodic Leases

The periodic tenancy, or periodic lease as it is generally described in this article, has always been an anomalous estate in land. Typically it has required no writing to create (see Law of Property Act 1925, s 54(2), Law of Property (Miscellaneous Provisions) Act 1989, s 2(5)(a)), and before the enactment of statutory protection for tenants had been terminable by notice, and yet it is capable of lasting for many years. Recognition of the periodic lease as a legal estate in land was a legal development of the eighteenth century (see Holdsworth 1937, pp 243-245, Simpson 1986 pp 253-254). By that time the requirement that a lease must be for a certain term had been established for at least 250 years. The requirement for certainty of term has produced a Janus-faced quality in the legal analysis of the periodic lease.

When viewed prospectively the periodic lease is limited until the end of the present period

(week, month, quarter, year) plus the notice period. Thus, normally the prospective term is never longer than the remaining part of the period plus one more period (as notice must be servable, and notice will be the length of the period or some shorter time at common law). Therefore, for example, a weekly periodic tenancy is viewed as a tenancy for two weeks at its commencement, the first week and the notice period of one week. The term certain is fixed by the period plus notice, but this period is extended if neither party serves a notice to quit. It is this artificial analysis - one which borders on fiction (see Simpson 1986, p 253 n.6)- which allows a periodic lease to satisfy the common law demand for certainty of term. This analysis of periodic leases, when viewed prospectively, was confirmed by the House of Lords in *Prudential Assurance Co. Ltd. v London Residuary Body* [1992] 2 AC 386, HL. The two-faced nature of the lease is displayed when it is viewed retrospectively, for then a periodic lease has been analysed as one continuous term from its commencement until the present, a term which grows from its commencement until it is brought to an end (see Webb 1983, *Gandy v Jubber* (1864) 5 B & S 485, *Gray v Spyerr* [1922] 2 Ch 22 at 38-39).

The law governing periodic leases is, in effect, a compromise between the doctrinal demand for certainty of term, and the later decision to recognise and protect the periodic lease terminable by notice as a legal estate. The logical tension this produces was most recently articulated by Lord Templeman in the *Prudential Assurance* case, by his use of the expression ‘as if’ in his description of the legal analysis of a periodic lease viewed prospectively (at 394F, our italics):

A tenancy from year to year is saved from being uncertain because each party has the power by notice to determine at the end of any year. The term continues until determined *as if* both parties made a new agreement at the end of each year for a new term for the ensuing year.

The absence of any actual new agreement is the reason for characterising the analysis as one that borders on fiction; there is a deemed grant at the end of each period. The analysis proceeds as if there were a fresh grant at the end of each period, without needing to concern itself with the fact that this is not so.

The doctrinal importance given to the requirement of certainty of term may be appreciated by considering that it is one of the only two necessary conditions for the existence of a lease, the other being the grant to the tenant of exclusive possession (see *Prudential Assurance* and *Street v Mountford* [1985] AC 809, HL). In *Prudential Assurance* the common law demand for certainty of term was upheld despite the strong reservations expressed by Lord Browne-Wilkinson (at 396F-397B).

Shared Ownership

The joint tenancy makes several individuals into a single legal entity for the purpose of co-ownership, a supra-being whose existence continues until all the individuals except one cease to exist, the survivor becoming the sole owner of the originally co-owned property (see Harpum 2000, Webb 1983). Since 1925 severance of a joint tenancy of a legal estate is impossible. Therefore, no action by a single joint tenant can be effective to deal with any legal estate, unless he acts on behalf of the other joint tenant. Consequently, it has been established that a single joint tenant cannot unilaterally surrender a lease (see *Leek and Moorlands B.S. v Clark* [1952] 2 QB 788, CA) nor exercise a break clause in a lease (see *Re*

Viola's Indenture of Lease [1909] 1 Ch. 244). This follows from the very nature of a joint tenancy. No one joint tenant has any legal interest of which he can dispose (sell, transfer, mortgage);, there is only one owner with powers of disposition (powers to deal with the lease) in the eyes of the law, the joint tenants acting together.

From 1925 onwards, the law has insisted that any legal estate in land owned by more than one person, including a periodic lease, must be held by the co-owners as joint tenants (see Law of Property Act 1925, s. 34). The Law of Property Act 1925, ss. 34 and 36, and the Settled Land Act 1925, s 36(4) provide that legal joint tenants must hold the legal estate upon a trust (see *Bull v Bull* [1955] 1 QB 234, CA). The beneficial interests under the trust may, or may not, reflect the joint tenancy of the legal estate.

To this complex legal foundation must be added the various statutory schemes governing periodic leases entered into for different purposes (e.g. residential, agricultural, business).,Finally the whole situation can be subject to the application of legal regimes that originate from the nature of the relationship between the co-owners (e.g. family law, the law of partnership). The end result is that the functionally straight-forward shared periodic lease is legally a nightmarishly complex institution. This is significant because such shared periodic leases are commonplace, and are economically and socially important.

Secure Tenancies

The periodic lease at the centre of *Monk* was a 'secure tenancy' introduced by the Housing Act 1980 and largely re-enacted in the current legislation, the Housing Act 1985 (see Housing Act 1980, s 28 and Housing Act 1985, ss 79-81). The legislative policy of the Housing Act 1980, in creating the secure tenancy, seems tolerably clear. The secure tenancy was to be restricted to public housing provided for residential use. Secure tenancies can arise only if the landlord is a local authority, or other entity satisfying the 'landlord condition' and only if the premises constitute 'a dwelling house let as a separate dwelling'. To become, or to remain, a 'secure tenant' a lessee must satisfy the 'tenant condition', he must occupy the dwelling 'as his only or principal home'.¹ A secure tenancy is not predicated upon the existence of a lease, as a licence given by a landowner who satisfies the 'landlord condition' to a residential occupier who satisfies the 'tenant condition' will create a 'secure tenancy' (see Housing Act 1980, s 48 and Housing Act 1985, s 79(3)). If, as is usual, the secure tenancy is founded upon a periodic lease, the secure tenant does not have the ordinary powers of alienation that the holding of a lease usually entails. The secure tenancy cannot be assigned or sub-let, subject to restricted exceptions (see Housing Act 1980, s 37 and Housing Act 1985, ss 91 and 93). The 'secure tenant' must continue to occupy the premises, or the secure tenancy ceases to exist.

The Factual Context For *Monk*

The introduction by the Housing Act 1980 of the secure tenancy restricted local authorities' freedom in two ways: it restricted their freedom to recover possession from tenants (see Housing Act 1980, ss 32-34, and Schedule 4), and it gave tenants a right to buy their homes (see Housing Act 1980, Part I, Chapter 1). This interference with the freedom of local authority landlords to manage their housing stock came on the heels of the imposition of statutory duties on them to house the homeless (see Housing (Homeless Persons) Act 1977, Housing Act 1996, Part VII), and financial restrictions upon them, which effectively

prevented the building of new houses for rent. In some areas there was a critical shortage of available local authority housing.

There has been an increase in the numbers of co-owned residential periodic leases over recent years. We can identify some of the factors that have caused this increase in co-ownership by couples of their homes. There has been a general acceptance that the relationship between heterosexual couples should be one of equality of status, which has encouraged co-ownership of assets. Women have become more economically active as a group within society. Married couples increasingly take joint responsibility in providing for the family financially. Children are often raised by one or both of their natural parents out of wedlock, and therefore, for many family units there is absolutely no room for any identification solely with the man. One problem such co-ownership raises is how to accommodate the breakdown of the relationship, the continuation of which formed the common assumption of the joint tenants when they entered the periodic lease.

The obvious place to look for the legal solution for such problems is family law. However, it was not in family law proceedings that the problems that followed upon the breakdown of joint tenants' relationship came before the courts. The litigation in which the problem was raised was an action for possession by a landlord against one of two joint tenants. The issue before the court was whether one joint tenant of a periodic lease could unilaterally bring the lease to an end by serving a notice to quit. If one joint tenant could destroy the lease by service of a notice to quit then the landlord was entitled to a possession order against the other joint tenant. The traditional answer of the law had been that a single joint tenant could terminate a periodic lease by serving a notice to quit (see Webb 1983, *Leek and Moorlands Building Society v Clark* [1952] 2 QB 788, CA, *Greenwich London Borough Council v McGrady* (1982) 46 P & C R 223, CA, *Parsons v Parsons* [1983] 1 WLR 1390). In 1991 the issue came up for consideration by the House of Lords.

Monk

In 1991 the House of Lords cut through the potentially debilitating complexity of the law concerned with co-owned periodic leases by insisting that one aspect of the periodic lease must be given analytical priority. *Hammersmith and Fulham London Borough Council v Monk* [1992] 1 AC 478, HL (affirming (1990) 61 P & C R 414, CA) confirmed the orthodox view that a single joint tenant of a periodic lease could terminate the lease by the service of a notice to quit. However, the decision was expressly reached without a consideration of its potential effect on statutory schemes regulating periodic leases, and left the potential effects of the trust of the periodic lease unexplored (see [1992] 1 AC 478, HL at 493). The potential effects of the decision on family law or commercial leases were not broached.

The facts of *Monk* were straightforward, and concerned a fact situation that has since become almost stereotypical in subsequent litigation. Mr Monk and his lover Mrs. Powell were secure tenants under the Housing Act 1985. The relationship broke down. Mrs. Powell left Mr. Monk and requested alternative accommodation from the local authority. The local authority agreed to rehouse her, but if, and only if, she first served a notice to quit the joint tenancy that she held with Mr. Monk, which she duly did. Neither Mrs. Powell nor the local authority made any attempt to contact Mr. Monk prior to the serving of the notice to quit. The local authority then took possession proceedings against Mr. Monk.

The quality of a periodic lease that was given absolute priority in *Monk* was the requirement that it must be terminable by either party (i.e. landlord or tenant) serving notice to quit. This requirement is the necessary consequence of the demand for certainty of term, and the very point later affirmed by *Prudential Assurance*. That the doctrinal demand for certainty of term, rather than any contractual analysis, forms the true basis of the decision needs emphasis. The language and reasoning of Lord Bridge, who gave the leading speech in *Monk*, has obscured the point.² It must be the basis of the decision, because the artificial analysis forms the only solid foundation for the House of Lords' solution to the problem posed by the unilateral termination of a periodic lease by a single joint tenant.

As has been noted, joint tenants do not hold any individual interest in the co-owned property and are treated as a single legal personality in respect of their ownership. Therefore, a single joint tenant cannot deal with the jointly owned property; joint action is required for any disposition of the lease. Obviously, if this logic is applied to the service of a notice to quit by a joint tenant of a periodic lease then unilateral termination of a periodic lease would be impossible. However, this conclusion can be avoided by leaning on an aspect of the prospective analysis of a periodic lease. If a periodic lease is for a term certain, ending at the latest upon the expiry of a notice to quit served at any time, then there must be some event which prevents the periodic tenancy terminating at the end of the term certain. That event, as we have seen, is the deemed renewal of the periodic lease for a further period. As the grant and acceptance of a lease are positive acts of the parties, the failure to so grant and accept may be characterised as inaction. Thus, the law can regard the service of a notice to quit as notice of unwillingness to enter into a future lease, rather than the destruction of an existing lease. The lease is not destroyed by the notice to quit, but comes to an end by the natural passage of time. It is the deemed, or fictional, renewal of the periodic lease which was relied upon to support the decision in *Monk*.

A Review of the Impact of *Monk*

1. Family Law

The implications of the ability of one joint tenant to terminate a periodic lease by serving a notice to quit are of particular significance in the area of family law. There are two linked functions of the family law jurisdiction, both of which are undermined by *Monk*. First, the jurisdiction is intended to secure the satisfaction of the urgent needs of the vulnerable, including any children of the relationship, a function that is most important in dealing with the short-term effects of relationship breakdown. Second, the jurisdiction is intended to achieve an optimal distribution of former matrimonial assets in all the relevant circumstances. However, the performance of these functions is jeopardised, if one party to the relationship is able to destroy assets that could otherwise be available to secure safe accommodation for the vulnerable in the short term, and be available for distribution in the long term. The statutory scheme that establishes the family law jurisdiction recognises this jeopardy and grants power to the courts to prevent one party from disposing of assets or to reverse the effects of such a disposal that has already occurred (see Matrimonial Causes Act 1973, s.37).

The protective function of family law operates within a context of structural imbalance of

power in heterosexual relationships and, for the purposes of this article it will be assumed it is the woman who needs protection from this power imbalance. Traditionally women have been the weaker party. Women are still largely the main carers for any children of the family. They are generally at a financial disadvantage to men. They are also physically weaker than men and thus more vulnerable to acts of domestic violence. Family law has responded to this power imbalance by developing systems to ensure that women, and the children they are caring for, are protected. Part of this protection has involved preserving their right to live in the family home, regardless of whether or not they have made any financial contribution towards its acquisition. Thus, in order to appreciate the deleterious impact of *Monk* it is first necessary to consider how family law is meant to operate.

Protection of the Vulnerable in the Short Term

The Family Law Act 1996, Part IV, is concerned with the issue of domestic violence and lesser forms of molestation. As the Act contains provisions regulating the occupation of the family home, in keeping with other areas of family law it could, but does not, elevate the interests of children above those of any other party³ But a party who terminates a periodic lease by serving notice to quit has the power to disrupt the normal mechanisms for deciding immediate occupation and to avoid a proper investigation into who should be in occupation of the home if the parties cannot live together under the same roof.

In their interpretation and application of the Act the family courts have recognised the importance of the property rights of the adult parties. As a crucial point of general application the courts look upon any order to exclude a person from the home as an exceptional and grave step to take. This principle was recently confirmed in *Chalmers v Johns* [1999] 1 FLR 392 by Thorpe LJ at p.397. Thus, the courts will not order a party to vacate the home in contravention of their property rights unless the needs of, or the danger to, the other party or the children are such that it is necessary. However, once a personal relationship has broken down the issue of who is to live in the family home may be crucial. Although the ultimate disposition of the property will be resolved in other proceedings where the parties wish to end their relationship altogether,⁴ in the meantime, rights of occupation can be a matter of urgency. The Family Law Act 1996 has responded to this urgency by developing a set of criteria to ensure that the vulnerable party is protected and is not simply at the mercy of the stronger party.

Where one of the parties to a marriage, usually the wife, does not possess any legal estate or interest in the property, she still has the right to occupy the matrimonial home. These occupation rights, called 'matrimonial home rights', are found in section 30, Family Law Act. Section 33 gives the court the power to regulate occupation. The section encompasses both married couples and unmarried cohabitants⁵ and covers all those cases where an applicant either has a proprietary right to live in the home, and is therefore an entitled applicant, or has matrimonial home rights. The court has very wide powers, as section 33(3) provides that orders can be made ranging from enforcing entitlement to enter or remain in the property, to excluding a party from the property altogether.

In practice, where there is serious violence by the respondent then, subject to the balance of harm test found in section 33(7), the court will have no hesitation in making an order requiring the respondent to leave. However, where there is no serious violence but perhaps

other forms of molestation, the draconian nature of regulation of occupation is a factor that the court will always bear in mind. In deciding whether or not to make an occupation order the court will look to the criteria found in section 33(6), which requires it to consider the housing needs of the parties and any children, their financial resources, the effect on both parties and any children of either making or not making the requested order, and the parties' conduct. Should the court make the order then, by virtue of section 33(10), the court has complete discretion as to the length of the order.

Securing an optimal distribution of assets in the long term

In the long term, the court has the power to make a property transfer order to either a spouse or a cohabitee under section 53 and schedule 7. In the case of a married couple the power to make a property transfer order arises after the making of a divorce order. In the case of an unmarried woman the court can make a property transfer order on her application for such an order. Whether the applicant is a wife or a cohabitant the court has criteria to which it must have regard in determining whether or not to exercise its powers to order a transfer. It will consider the circumstances in which the lease was granted, the factors in section 33(6) concerning housing, finance and the effect of making or not making an order, and the suitability of the parties as tenants (see schedule 7 para 5).

As the effect of a property transfer order is that any liability or obligation falling due to be discharged or performed on or after the date of transfer shall not be enforceable against the transferor spouse or cohabitant (see schedule 7, para. 7(2)). It may be that a landlord may wish to raise objections to the transfer. The landlord has the opportunity to be heard (see para. 14). There is little case law guidance as to how the court will make its decision in the face of objections raised by a local authority landlord. In the old case of *Buckingham v Buckingham* (1979) 129 NLJ 52 it was held that the court should carry out a balancing exercise, weighing the circumstances of the local authority against the position of the applicant. More recently, in *Vuong v Hoang* 11 January 1999, Family Division, [1999] C.L.Y. 3734, the housing duties of the local authority were in the forefront of the court's consideration.

It can thus be seen that, via the provisions of the Family Law Act 1996, the court has considerable control over occupation of the family home in both the short and long term. The provisions in the Act were enacted to ensure that appropriate consideration is given as to who should be in occupation of the property should parties be in dispute. Furthermore, family courts have recognised that excluding a party from the home is an extreme solution that should not be imposed unless circumstances truly require it. But, service of a notice to quit defeats the statutory purpose of the Act. It enables one party to avoid the mechanisms for ensuring that proper consideration is given as to who should live in the property. More seriously still, it enables one party to impose an even more draconian outcome than the court would be prepared to contemplate, for the net result may be that a woman will be permanently, rather than temporarily, excluded from the home.

The Protection of Matrimonial Assets

The central statutory provision conferring powers upon the family courts to safeguard matrimonial assets is section 37(2) of the Matrimonial Causes Act 1973⁶ which operates when proceedings for financial relief are brought, and some action is either contemplated or

carried out by a party to the proceedings with an intention of defeating such claim. The subsection is divided into two paragraphs. Paragraph (a) is a preventive paragraph, and it grants a jurisdiction to restrain any disposition, transfer out of the country, or other dealing with matrimonial assets. Paragraph (b) is a 'setting aside' paragraph, and it grants a jurisdiction to set aside a disposition where the court considers that: 'if the disposition were set aside financial relief or different financial relief would be granted to the applicant'.

An Expansive Application of Monk in Family Proceedings

The House of Lords has overruled the Court of Appeal twice in cases concerned with the protection in family law proceedings of a periodic lease, which qualified as a secure tenancy, held by joint tenants as a matrimonial asset. On both occasions the House has applied the decision in *Monk* in an expansive manner, stressing the artificial analysis of a periodic tenancy viewed prospectively. On both occasions the House has laid weight upon the analytically inactive nature of the service of a notice to quit. On both occasions the House has upheld the validity of the service of a notice to quit by a single joint tenant.

The first case was *Harrow LBC v Johnstone* [1997] 1 All ER 929, HL. *Johnstone* concerned the secure tenancy of the matrimonial home of Mr. and Mrs. Johnstone, which they held as joint tenants. Mrs. Johnstone left the home, taking the children of the marriage with her. Mr. Johnstone obtained an *ex parte* injunction against her, forbidding her 'to exclude or attempt to exclude the applicant from [the matrimonial home].' Mrs. Johnstone applied to Harrow LBC for a new tenancy. The authority, as a matter of policy, would not provide accommodation to an existing tenant, and suggested that she serve a notice to quit the joint tenancy. On receiving her notice to quit the authority sent a copy to Mr. Johnstone, who responded by sending it a copy of his injunction. Harrow LBC then brought possession proceedings against Mr. Johnstone, which he defended on two grounds. First, he argued that the authority had been complicit in a contempt of court committed by his wife when she served her notice to quit in breach of the injunction he had obtained. Second, he argued that the possession proceedings were an abuse of process as, if successful, they would destroy the secure tenancy that he was likely to request be transferred into his sole name in matrimonial proceedings.

Lord Mustill, who delivered the leading speech, concluded that the injunction granted against Mrs. Johnstone was concerned with the exercise of rights under the tenancy, and not with the continued existence of the rights themselves. Therefore, the destruction of the tenancy did not breach the injunction not to exclude Mr. Johnstone from the premises. As there had been no breach of the injunction Harrow LBC could not possibly have been complicit in such a breach, and thereby in contempt of court. For the court to dispose of the second ground of argument it was sufficient to note that there were no other proceedings in progress which could have led to the transfer of the secure tenancy to Mr. Johnstone.

Lord Hoffmann also gave a substantive speech in *Johnstone*. He was concerned that resting the decision on the narrow ground that Mr. Johnstone had obtained the wrong injunction might lead to unnecessary litigation when somebody obtained the right injunction. Lord Mustill expressly agreed with Lord Hoffmann's reasoning on the 'point' explored below. Lord Hoffmann stated (at 940e):

In my view, the existence of an injunction could not in itself vitiate the notice given by the wife. The principle laid down by this House in [*Monk*] is that the term created by the grant of a periodic joint tenancy is defined by reference to the absence of a notice by the landlord or one or other of the joint tenants signifying that he is not willing that it should continue. If this negative condition is not satisfied, the term comes to an end.

This analysis obscures the vital issues raised by the litigation. The key issues are personal accountability on the part of the injuncted, and complicity in breaches of that accountability on the part of third parties. In continuing, Lord Hoffmann properly drew attention to the lack of notice of the injunction to Harrow LBC at the time it requested the notice to quit, and to the fact that the authority was not a party to the proceedings that gave rise to the injunction. These factors clearly are of force when considering whether or not a local authority would be actionably complicit in a breach of an injunction, which breach consisted of the service of a notice to quit by a joint tenant of a periodic lease.

However, the appropriate remedy if a local authority were complicit in the breach of an injunction need not be: ‘... to deem the negative condition to be satisfied’ (at 940f *per* Lord Hoffmann), in other words to hold the notice to quit null and void, a course of action Lord Hoffmann considered inappropriate. Lord Hoffmann is correct to assert that a landlord served with a notice to quit by a joint tenant would have to accept the effectiveness of the notice. However, the question was whether a landlord that procured the service of a notice to quit, in breach of a court order of which it had notice, could escape from the consequences of its own complicity in the contempt. Complicity in the contempt would be a personal offence by the landlord. If the contempt were raised as a defence against possession proceedings (as in *Johnstone*) the obvious remedy would be to deny the local authority possession, and to order the grant of a new periodic lease, and to compensate any loss (for example to the right to buy discount acquired by the tenant) suffered as a result of the breach.

Contempt of court is a wrong that when committed should call forth an adequate remedy. Imprisoning the contemptuous joint tenant is not efficacious, and the availability of a remedy against the landlord is the crucial issue. Capacity of a joint tenant to act must not be confounded with the rectitude of so acting.⁷ In the course of his short speech Lord Hoffmann also invited an appeal by the Newlon Housing Trust, the next case we need to consider.

Newlon Housing Trust v Alsulaimen [1999] 1 AC 313, HL again concerned the service of a notice to quit by one of two joint tenants of a periodic lease that was a secure tenancy of a house. In *Alsulaimen* the joint tenants were a married couple and the wife served the notice to quit after leaving the matrimonial home. Newlon Housing Trust brought possession proceedings against the husband, who resisted them on the grounds that the service of a notice to quit by his wife was a reviewable disposition under section 37(2)(b) of the Matrimonial Cause Act 1973 which should be set aside because it was made with the intention of defeating the claim he intended to make for a transfer of the lease into his sole name under section 24 of the Act.

Lord Hoffmann made the sole substantive speech in the House of Lords. He expressly disavowed any reliance upon any distinction between the destruction of an asset and the disposition of an asset. He analysed the periodic lease in *Alsulaimen* in the same way that he had analysed the periodic lease in *Johnstone*, although his articulation of the analysis

differed. Lord Hoffmann relied upon the reasoning of Lord Bridge in *Monk*,⁸ holding that the service of a notice to quit was not a disposition as that word was used in section 37(2)(b) of the Matrimonial Causes Act 1973, because it was not an act of any type. The service of a notice to quit by Mrs. Alsulaimen was merely inaction, which allowed the periodic lease to expire by effluxion of time.

It is submitted that this extension of the analysis of *Monk* into questions of the courts' powers to restrain the actions of parties to family law litigation, and to reverse the wrongful actions of such parties, generates confusion and can thereby easily lead to injustice. Even if we accept, for the purposes of argument, that it was necessary to distinguish between the service of a notice to quit by a joint tenant and other actions which affected the jointly owned property (such as the surrender of the lease) for the purpose of upholding the doctrine of certainty of term in *Monk*, it does not follow that we must extend this analysis into the field of personal responsibility for destroying the lease (*Johnstone*), or the powers of the court to restore assets by setting aside dispositions (*Alsulaimen*). The House of Lords in extending the decision in *Monk* on the grounds of conceptual consistency has allowed the appropriate grounds for the decisions to be obscured. These grounds are not to be found in the arcane fictions of the old common law, but in the living purposes of the family law jurisdiction. The vital issue in *Alsulaimen* was whether the courts can act against the interests of landlords by reinstating periodic tenancies that have been terminated by the service of a notice to quit, in order to protect the interests of one party to family law proceedings. The decision in *Monk* was that such a notice to quit was effective. It did not entail the decision that such service was irreversible. That decision was justified upon grounds that obscured the legal problem, by the extension of an artificial analysis without considering whether the artificiality was serving a useful purpose in its extended role.

Reaction to the Expansive Application of Monk

In *Wandsworth L.B.C. v Osei-Bonsu* [1999] 1 FLR. 276, CA Simon Brown LJ, who gave the sole substantive judgment of the court, said, in rejecting an argument raised for Mr. Osei-Bonsu, that (at 288 B-C):

He suggested that the respondent could have obtained an injunction precluding his wife from serving a notice to quit ... pursuant to an application under s. 37 of the Matrimonial Causes Act 1973. It now seems plain ...neither course would have been available to him ... the House of Lords' decision in *Newlon Housing Trust v Alsulaimen* ... defeats the latter.

This dictum illustrates both the force of the concepts deployed in *Alsulaimen* and the tendency for them to continue to expand beyond the bounds of the decisions that enunciated them. Simon Brown LJ was assuming that the decision covered both paragraphs of section 37(2), although the reasoning of Lord Hoffmann was explicitly limited to the setting aside power contained in paragraph (b), which was expressly contrasted with the more liberal wording of the restraining power contained in paragraph (a).⁹

The difficulties posed to the family court's jurisdiction were explored at far greater length in *Bater v Greenwich LBC* [1999] 4 All E.R. 944, CA. The facts of *Bater* follow a by now familiar pattern. Mr. and Mrs. Bater were a married couple holding a joint tenancy of a periodic lease that constituted a secure tenancy. Mrs. Bater left the matrimonial home, and

served a notice to quit on the local authority landlord in order to obtain re-housing. Mr. Bater argued that his statutory right to buy the former matrimonial home could be resurrected under section 37(2)(b) of the Matrimonial Causes Act 1973. The Court of Appeal held that the right to buy was dependent on, and could not be severed from, the secure tenancy, following *London Borough of Sutton v Swann* (1985) 18 HLR 140, CA; *Jennings & Jennings v Epping Forest DC* (1992) 25 HLR 241, CA; and *Bradford City Metropolitan Council v McMahon* [1993] 4 All ER 237, CA. The tenancy had been destroyed on the wife serving her notice to quit. Also, following *Alsulaimen* there had been no disposition for the purposes of section 37, and therefore the court could not revive the tenancy.

As Thorpe LJ explained, this pattern of facts created a risk for joint tenants of periodic leases (at 952f):

The consequence of these two conclusions is to create what may be a substantial period of vulnerability for the joint tenant spouse who wishes to become sole tenant following separation. That period stretches from the date of separation to the court's determination of the application to transfer the tenancy to the spouse in occupation under the jurisdiction conferred upon the court by s 24 of the Matrimonial Causes Act 1973.

Given the undesirability of this situation Thorpe LJ considered whether a court would have jurisdiction under section 37(2)(a) of the Matrimonial Causes Act 1973 to restrain a spouse from giving notice to quit. Thorpe LJ prefaced his dicta with the comment (at 952g): 'As a family lawyer'. Presumably this reference was intended to emphasise the particular importance for the family law jurisdiction of the problems posed by unilateral service of notice to quit by a joint tenant. Thorpe LJ clearly thought section 37(2)(a) did grant jurisdiction to restrain a spouse from serving a unilateral notice to quit. The language of the section was sufficiently wide. Further, Thorpe LJ gave his opinion that the court could use its inherent powers to control the acts or omissions of a party to family law proceedings after, or immediately before, the issue of a petition of divorce. This inherent jurisdiction, arising whenever an act or omission would have the effect of harassing or molesting the wife or adversely affecting the child, empowers the court to prevent such an act if it would have the consequence of curtailing the court's powers on distribution. In relation to unmarried couples, Thorpe LJ commented that where the couple have children, the court has powers both under the Children Act 1989 schedule 1 and under its inherent powers in wardship to restrain the service of a notice to quit where an applicant is applying for an order of transfer of a periodic tenancy under schedule 1.¹⁰

In conclusion, Thorpe LJ considered that practitioners could and should protect the position of their client by seeking an undertaking, which could be served on the landlord, or apply to the court for an injunction, in order to prevent the other party from serving notice to quit. However, he also pointed out that this could only be achieved prior to the service of a notice to quit. Once notice has been given it would be too late. However, how this device could protect from the wrongful but effective service of notice to quit is far from clear. As we explained above, Lord Hoffmann has already drawn attention to the fact that a notice to quit is effective despite it being in breach of an injunction not to serve such a notice; *a fortiori* a notice to quit served in breach of an undertaking is also effective.

If the use of undertakings or injunctions is to be effective in family court proceedings concerned with periodic tenancies then the courts must develop principles under which the

landlord can be held liable if the undertaking or injunction is breached. Given the approach of the House of Lords in *Johnstone* it may be necessary to make local authority landlords parties to the proceedings. Even then it is difficult to see why they would be responsible for the service of a notice to quit by a single joint tenant which they had not procured. There is no reason to suppose that a landlord can refuse to accept a notice to quit served by a single joint tenant. If the common policy of refusing to rehouse applicants who already have a tenancy as a joint tenant followed by local authorities is valid, then local authorities must be under a duty to inform joint tenants seeking rehousing of the policy. If explaining the policy amounts to procuring the service of a notice to quit, and therefore contempt of court, the council would be in an impasse.

The possibility of such an impasse is created by the extension of the analysis in *Monk*. It is possible to overcome this impasse judicially in three ways, none of which are appealing. First, a further extension of the reasoning in *Alsulaimen* could be made by refusing to recognise the service of a notice to quit as any form of ‘other dealing’ with matrimonial property, and therefore outside section 37(2)(a) of the Matrimonial Causes Act 1973. This would accord with the initial view taken by the Court of Appeal on the effect of the decision, and vitally undermine the family law jurisdiction in cases concerned with periodic leases. Second, the question of effectiveness of remedy could be ignored and the law could refuse to make local authority landlords liable for procuring a breach of an injunction. This would leave vulnerable women between a rock and a hard place. If they serve a notice to quit they could suffer penalties for contempt of court, but if they refuse to serve such a notice they will not be eligible for rehousing by the local authority. Third, the policy of local authorities of denying applicants rehousing whenever they are joint tenants of another periodic lease could be challenged. Such policy would need to be subject to a caveat whenever an undertaking or injunction not to serve a notice to quit existed. The difficulty with this approach is that the issue would arise in family law proceedings, although it is essentially a public law question. We deal below with proposed legislative changes, which if implemented will avoid the impasse altogether (see ‘Statutory Reform of the Law’).

By giving notice, the non-occupying joint tenant is evading the usual mechanisms under which the disposition of property is considered. A joint tenant of a periodic lease may give notice to quit at any time once parties have separated. Therefore, a woman may have no warning that her husband (or former cohabitant) is intending to terminate the lease. Thus, although an application for legal proceedings may have been initiated by the woman, and she may reasonably consider that all matters will be resolved in those proceedings, this may not then happen. It remains to be seen how much difference such short-circuiting of family law proceedings makes to eventual outcomes.

Reliance Upon Serendipity

Substantial injustice is not necessarily entailed when one joint tenant serves notice to quit. The benefits of security of tenure and the right to buy are lost by the service of a notice to quit by a joint tenant and, in the context of the economic resources of the families concerned, this is a serious diminution of matrimonial assets. (See further below). However, if we ignore, for present purposes, the loss of the right-to-buy discount and security of tenure, then in terms of practical application the law often approximates to a resolution that would have followed from the exercise of a court’s powers under the family law jurisdiction.

The litigation arising from the decision in *Monk* has overwhelmingly been concerned with secure tenancies granted by local authority landlords. The identity of the landlords as local authorities is important for an appreciation of how the dynamic of the cases operates. Local authorities have duties under the Housing Act 1996 Part VII to secure that accommodation is made available to those homeless people who are not intentionally homeless and who have priority needs for housing. In the context of marriage or relationship breakdown this usually means the woman and children, as most men do not have a priority need for housing. A woman fleeing a violent partner is not considered to be intentionally homeless (see Housing Act 1996 ss. 175(3) and 177(1)). Local authorities have no power to obtain possession from a lessee with a secure tenancy merely because the house is under-occupied due to relationship breakdown.¹¹

When applying for rehousing a woman fleeing a violent partner will be met with the demand that she serve a notice to quit her existing lease before she can be rehoused. This enables the local authority to repossess the house formerly let to the family, which would otherwise be under-occupied by the deserted man. The woman and children can be rehoused and the man has to shift for himself. If the abused woman applied to a family law court then the court would probably protect her occupation in the short term, by excluding the man, and in the long term by ordering a transfer of the joint tenancy into her sole name. The advantages of the first scenario are: the woman can flee the presence of her violent partner, and the address of her new accommodation can be withheld from him to protect her from further violence; there is no need for the costs or delays that are involved in court proceedings; the local authority is able to secure suitable new accommodation for the now smaller family unit of the woman and children, and regain possession of scarce family housing to serve the needs of the local community. On the face of the matter the result appears to be a serendipitous resolution.

However, there are difficulties with such a sanguine view of the operation of the law. The law laid down in *Monk* makes no distinction between a blameless or a blameworthy joint tenant. Each has the power to serve a notice to quit. The factor that tends towards serendipity is the care of the children, which brings with it a priority need for housing. Men rarely seek to destroy the tenancy because they accept that their partner will keep the children, and if the man serves a notice to quit, the local authority will simply accept the notice and refuse to rehouse the man. This factor is not linked to blameworthy conduct. If the woman is violent but has control of the children, then she will have the priority need for rehousing and the blameless man will be left homeless, as appears to have been the case in *Johnstone*. If the man plans to seek joint residence of the children, then the serving of the notice to quit by the woman will leave him without appropriate accommodation to support his claim, which appears to have been the case in *Bater*. Furthermore, the local authority will rehouse the woman and children in accordance with its resources and policies, and there is a high chance that the social and educational environment of both the woman and children will be disrupted by relocation to what may be a less desirable house. Further, if the local authority supplies her with accommodation then it will grant her a less desirable form of tenure in fulfilling its duties under the Housing Act 1996.¹² Where there is no fear of uncontrollable violence by the man, this feature is wholly harmful to the family. Finally, the act of serving a notice to quit can be felt as an act of betrayal by the man, and can embitter the process of relationship breakdown.

A more worrisome scenario is the use of a notice to quit as a weapon of spite. If a woman successfully excludes her violent partner from their home the man can destroy the lease by serving a notice to quit. If the couple have no children then the woman will have no priority need for housing. Her recourse to the courts for justice would be futile. It is this prospect, no doubt, that excited the concern of Thorpe LJ in *Bater* and led him to identify the possibility of seeking undertakings or injunctions to safeguard leases during the vulnerable period pending a final resolution of judicial proceedings. As we have seen, the problem has not been convincingly settled in a satisfactory manner.

2. Commercial Leases

There are no reported English cases of one joint tenant lessee of a periodic lease occupied for commercial purposes serving a unilateral notice to quit on the landlord.¹³ Prior to the decision in *Monk* the validity of a notice to quit served by one joint tenant landlord was upheld in *Parsons v Parsons* [1983] 1 W.L.R. 1390. However, it appears that in the context of commercial leases, lessees are seldom tempted unilaterally to destroy the security of tenure over premises used for joint business enterprises. The most likely explanations are two linked factors. It is obviously wrong to destroy jointly owned property without consultation with the other owner, and there is a realistic threat of legal action for so doing in the commercial field.

The issue that has been litigated, however, has been the refusal of one joint tenant to serve a counter-notice upon the receipt of a notice to quit served by the landlord on the joint tenants. The response of the joint tenant who wishes to renew the lease has been to seek a mandatory order against the abstaining joint tenant, to force the serving of a counter-notice, and thus to protect the right to try and preserve the lease. Although the operative legislation governing the service of a landlord's notice to quit and the service of a lessee's counter-notice vary, the basic issues are the same (see *Harris v Black* (1983) 46 P & CR 366 at 374), whether the lease be a protected business tenancy that has expired through passage of time (*Harris v Black*), or an agricultural lease, fixed term (*Sykes v Land* (1984) 271 EG 1244, CA) or periodic (*Featherstone v Staples* [1986] 1 WLR 861, CA; *Cork v Cork* [1997] 1 EGLR 5). Analytically, the situation raises exactly the same issues as the service of a unilateral notice to quit by one joint tenant of a periodic lease, as was explicitly recognised by Slade LJ in *Featherstone v Staples* (at 876C-D):

at common law, if there is to be renewal of a periodic tenancy held by joint tenants at the end of one of its periods, then all tenants must concur. The substantial effect of a valid counter notice under the Act of 1977 (...) is to renew the tenancy.

Therefore, although the mechanism of landlord's notice and lessee's counter notice differs, the issue of whether a joint tenant has an unrestrained liberty to bring the tenancy to an end, is the same.

Prior to the decision in *Monk* the courts had accepted that they had the power to order an abstaining joint tenant to resist the termination of a lease which the joint tenant did not want to continue. However, this jurisdiction was not to be used unless the circumstances of the case called for its exercise. Thus, in *Harris v Black*, the court declined to order the abstaining joint tenant to join in serving a counter notice where the joint tenants' partnership had been dissolved, leaving a history of enmity between the ex-partners, and the majority of the

beneficial interest in the lease belonged to the abstaining joint tenant. However, in *Sykes v Land*, when one partner was attempting to exercise a right to buy out the interest of the abstaining joint tenant in the business the court ordered the service of the counter-notice to preserve the lease and the business.

The single case decided since *Monk* in which the court was asked to order a reluctant joint tenant to serve a counter notice to a landlord's notice to quit is *Cork v Cork* [1997] 1 E.G.L.R. 5. *Cork* concerned a periodic lease of agricultural land. Knox J. considered whether the decision in *Monk* was inconsistent with the earlier authorities and held that it was not (at 7K). He then proceeded to order the abstaining joint tenant to serve a counter-notice. In making this order he bore in mind the probable terms of a 'family arrangement' to which the abstaining joint tenant had been a party, the fact that the abstaining joint tenant had been out of occupation and had paid no rent for many years, and the fact that the occupying joint tenant undertook to indemnify the abstaining joint tenant from any liability that followed from the service of the counter-notice (at 7M-8F).

The crucial practical difference between the litigation over commercial leases and the litigation over residential leases has been the mechanisms for the termination of the leases that have been involved. In the commercial cases the service of notice and counter-notice has alerted the joint tenant who desires renewal to the threat and has allowed for an application to court as per Slade LJ in *Featherstone v Staples* [1986] 1 W.L.R. 861, at 875-876. Within the context of the litigation over residential leases there has been no opportunity, however short, to object to the service of a notice to quit, and the occupying tenant has been left without redress.

3. Trust Law

The decision in *Monk* left open the possibility that a vulnerable joint tenant might be able to seek recourse for the unilateral service of a notice to quit against the serving joint tenant for breach of trust (see (1990) 46 P & C R 414, CA at 427 and [1992] 1 AC 478, HL at 493). Indeed, if this option proved workable the way might have been opened to establishing liability against a landlord who procured the service of the notice, for dishonest assistance in a breach of trust (see *Royal Brunei Airlines Sdn. Bhd. v Tan* [1995] 2 AC 378, HL). Given the predilection of local authority landlords for refusing to rehouse a non-occupying joint tenant without first securing the service of a notice to quit the only impediment to such liability would have been the establishment of the necessary dishonesty (see *Twinsectra Ltd. v Yardley* [2002] 2 AC 164, HL). However, the possibility that one joint tenant owed a duty to his co-owner to consult before destroying the trust property was rejected by the Court of Appeal.

In *Crawley Borough Council v Ure* [1996] Q.B. 13, CA the Court of Appeal was faced with an argument based upon the Law of Property Act 1925, section 26(3). The section imposed a requirement upon trustees to consult with beneficiaries before exercising their powers as trustees. Mr. and Mrs. Ure were joint tenants of a periodic lease granted by Crawley Borough Council. Mrs. Ure left the matrimonial home, and applied for rehousing, but was advised that the Council would not provide her with housing unless she served a notice to quit in respect of her joint tenancy with Mr. Ure. Mrs. Ure complied, and the Council rehoused her and took possession proceedings against Mr. Ure. It was not argued in *Ure* that the notice to quit

served by Mrs. Ure amounted to a substantive breach of trust, only that she had been under a duty to consult with Mr. Ure before serving the notice, this duty being imposed by section 26(3).

The Court of Appeal stressed three factors in rejecting the argument that the service of the notice to quit without consultation was a breach of section 26(3). First, the similarity between the facts in *Ure* and the facts in *Monk* ([1996] QB 13, CA at 19). Second, the classification of a notice to quit as in substance negative or inaction, a refusal to consent to the continuation of the periodic lease, rather than a positive action destructive of the periodic lease (Ibid at 25 and 26). Third, the applicable law was of general application and not affected by the circumstance that the actual periodic lease involved was a secure tenancy. It was the second factor that was determinative, as the court considered that inaction could not be characterised as the exercise of any power by a trustee (Ibid at 25). It has since been held, in *Notting Hill Housing Trust v Brackley* [2002] HLR 10, CA, that the replacement of section 26(3) by the Trusts of Land and Appointment of Trustees Act 1996, section 11(1), does not affect this reasoning and conclusion.

There are three substantive issues that are implicitly raised by the service of a unilateral notice to quit by a joint tenant who is a trustee. The first issue concerns the capacity of a single joint tenant to serve an effective notice, the very issue in *Monk*. The distinction between 'could she' and 'should she' was expressly made by Lord Browne-Wilkinson ([1992] 1 AC 478, HL at 493):

But even if, contrary to my view, the giving of the notice to quit by Mrs. Powell was a breach of trust by her, the notice to quit was not a nullity. It was effective as between the lessor and the lessees to terminate the tenancy. The fact that a trustee acts in breach of trust does not mean that he has no capacity to do the act he wrongly did.

However, this question of capacity does not touch upon the second substantive issue raised by the trustee who serves a unilateral notice to quit, which is how should trustees view the renewal of the lease. As for the law, for equity, the periodic lease has a two faced nature. However, this Janus aspect of the lease is a product of the lease as valuable but onerous property, and is not intrinsically linked to questions of certainty of term. From the point of view of trustees, the lease is property, and as such they are under a duty to preserve it. But, also, from the point of view of trustees the lease is the source of onerous obligations, and as such they are under a duty to protect the trust fund from depletion, by quitting the lease.

The problem of burdensome property for trustees is an investment issue. The value of the lease, and the value of the chance of renewal, must be safeguarded if the lease is valuable. However, the value of the lease is uncertain, and its valuation must be a matter of weighing the continued cost of the lease against the benefits it brings the trust beneficiaries. This is not necessarily a simple matter even where both costs and benefits are monetary. Where, as is universally the case for residential leases when one or more beneficiary is in occupation, the costs and benefits are incommensurable, then the valuation must be a matter of art rather than science. The timing of the trustees' decision making is determined by the nature of the periodic lease, as disinvestment opportunities are regulated by the period of the lease and the requirements for notice to the landlord. Thus, there is no universal rule that trustees must always renew leases. Whether it is appropriate to renew a periodic lease, by not serving a notice to quit, depends upon the circumstances, which include the purposes of the trust and

the potential liabilities upon renewal.

There is ample support for this analysis in the case law. In the context of the service of a notice to quit by a joint tenant landlord, Donald Rattee Q.C. in *Parsons v Parsons* [1983] 1 WLR 1390 identified the nature of the decision to renew a periodic lease by inaction as a positive decision to be made (at 1399D):

...to say that one joint trustee cannot bind his co-trustees by serving notice to quit in respect of a periodic tenancy is equivalent to saying that one of several trustees cannot by refusing to consent to an investment of trust moneys proposed by his co-trustees prevent his co-trustees from making such an investment.

However, this is no unrestrained liberty in a trustee to disinvest (Ibid at 1400C):

It may be that in a particular case the service of a notice to quit by one joint tenant of the reversion to a periodic tenancy involved the joint tenants or some of them in a liability greater than the resultant increase in value of the reversion, those injured would have a claim in breach of trust against the joint tenant serving the notice ...

Judicial recognition of the potential for non-renewal of a lease to be a breach of trust is present in all of those cases concerning commercial leases and the service of a counter notice (see *Harris v Black* (1983) 46 P & C R 366, CA at 373 and 374; *Sykes v Land* (1984) 271 EG 1264, CA at 1266). The issue the courts have concerned themselves with has been whether in the circumstances it is likely to be a breach of trust to refuse to renew the lease (see *Harris v Black* at 373; *Sykes v Land* at 1266; *Cork v Cork* [1997] 1 EGLR 5 at 7M-8F). In a similar manner those dicta that have doubted that the service of a notice to quit by one joint tenant constitutes, *ipso facto*, a breach of trust have recognised that in certain circumstances such an action may be an actionable breach of trust (see *Monk* (1990) 61 P & C R 414, CA at 427, [1992] 1 AC 478, HL at 493; *Ure* [1996] QB 13, CA at 27). The trustees of a periodic lease are under a duty to consider whether to renew or not, and this duty is not avoided by being unaware of its existence (see *Turner v Turner* [1984] Ch 100). It is because of this positive duty to consider whether to disinvest or not that trustee inaction can constitute a breach of trust. There is no doubt that trustee inaction in the face of a positive duty can constitute a breach of trust (see *Ward v Ward* (1843) 2 HLC 777n; *Tempest v Lord Camoys* (1865) 21 Ch D 571; *In re Brogden*; *Billing v Brogden* (1886) 38 Ch D 546; *Re Greenwood*; *Greenwood v Firth* (1911) 105 LT 509; *Turner v Turner* Ibid) There is no doubt that trustees can be under a duty to seek the renewal of a lease (*Keech v Sandford* (1726) Sel. Cas. Ch. 61). The essential nature of the duty is not affected by the characterisation of the service of a notice to quit as in substance a negative action. This characterisation is a colourful way of describing an effect of the common law demand for certainty of term in leases, the practical effect described is the capacity of a single trustee to disinvest by terminating the lease. The question of whether any particular use of this capacity is lawful is untouched.

It was stated in *Ure* that the power of a single joint tenant to serve a notice to quit did not arise from 'the Settled Land Act 1925 and the Law of Property Acts, and the additional or larger powers conferred by the settlement upon the trustees or otherwise' (*In re Jones*; *Jones v Cusack-Smith* [1931] 1 Ch 375 at 378, adopted by the Court of Appeal in *Ure* and *Notting Hill Housing Trust v Brackley*). Rather, as found in *Monk*, the power to serve a notice to quit is a question of capacity at law (see [1992] 1 AC 478, HL at 493). It was not argued, and

there was no finding, on the issue of whether the actual notice to quit served in *Ure* was in breach of trust, although the possibility was doubted on the facts of the case (at 27). Therefore, it remains open to argue, in an appropriate case, that the service of a notice to quit by one joint tenant did constitute a breach of trust.

The third substantive issue raised by the trustee who serves notice to quit is what effect is entailed, if any, by the fact that a notice to quit was served in breach of trust. The possibility of a personal action against the joint tenant is unlikely to be worth considering within the context of a residential lease. Therefore, the key issue will be any potential effect upon the landlord. It is inconceivable that the courts will make findings of dishonesty against local authority landlords on anything but the most exceptional facts.¹⁴

4. Article 8 of the European Convention on Human Rights and Article 1 of the First Protocol

Article 8 of the European Convention on Human Rights provides that ‘Everyone has the right to respect for ...his home ...’. Article 1 of the First Protocol to the Convention provides that ‘Every ... person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions ...’. Section 6(1) of the Human Rights Act 1998 provides that ‘It is unlawful for a public authority to act in a way which is incompatible with a Convention right’. The case law we have been reviewing has overwhelmingly comprised court actions taken by public authorities for the possession of the home of one joint tenant. The basis for possession has been the destruction of the property interests of the occupying joint tenant in his home, caused by the service of a notice to quit by the other joint tenant. The service of the notice to quit has deprived the occupying tenant of his ‘possessions’ by bringing the periodic lease to an end (see Allen 2003, and *Wilson v Secretary of State for Trade and Industry* [2003] UKHL 40 at paras. 39, 106, 137, 168). The public authority has procured the service of the notice to quit, by requiring such a notice before taking steps to rehouse the non-occupying joint tenant. Therefore, there is a *prima facie* argument for the cases to be examined with a focus on the possibility of a violation of either Article 8 of the Convention, or Article 1 of the First Protocol.

Ure v United Kingdom Application No. 28027/95, 27 November 1996, was an application to the European Commission of Human Rights by Mr Ure, following the decision of the Court of Appeal in *Ure*. Mr. Ure complained of breaches of both Article 8 of the Convention and Article 1 of the First Protocol. The Commission dismissed both complaints on two grounds. The first ground must be considered to rest on the assumption that the nature of Mr. Ure’s ‘possessions’ was determined by the incidents of the periodic lease.¹⁵ One incident of the periodic lease is that when held by joint tenants the lease can be brought to an end by one joint tenant serving a notice to quit, as confirmed by the House of Lords in *Monk*. The second ground was that the repossession of the flat properly (or at least not in an arbitrary or unreasonable manner) balanced the interests of Mr. Ure, Mrs. Ure, and people on the waiting list for housing, bearing in mind that alternative accommodation had been obtained for Mr. Ure. One might add to this list of interests to be balanced the interest of the landlord as property owner (see *Harrow L.B.C. v Qazi* [2003] UKHL 43 at paras. 78 and 83, 101 and 108). The application was rejected as manifestly ill-founded.

In *Harrow L.B.C. v Qazi* [2003] UKHL 43 the House of Lords considered the possible

application of Article 8 on possession hearings against Mr. Qazi, an occupying joint tenant, that followed the service of a notice to quit by Mrs. Qazi. There was no consideration of whether the decision in *Monk* was in compliance with Article 8, on the basis that a court is a public authority (see s. 6(3)(a) Human Rights Act 1998, and *Qazi* at paras. 94 and 103). The House was unanimous that the house was Mr. Qazi's home for the purposes of Article 8 (see *Qazi* at paras 11, 29, 68, 99, and 147). Four of their Lordships agreed that Article 8 was 'engaged' by the possession hearings (see *Qazi* at paras. 23, 32, 70-71, and 100-103). The disagreement between the majority of three and the minority in the House was whether a county court hearing an application for possession needed to consider whether an order for possession would, in all the circumstances, constitute a breach of Article 8. The majority concluded that the essential issues in such possession proceedings were clear, and unrelated to the protection of the interests protected by Article 8. The landlord had a clear private law right to possession, and the courts must award possession on this basis. There was no arguable case for the balancing of interests to be considered by the county court, issues of proportionality did not arise in the enforcement of the legal right of the landlord to possession (see *Qazi* at paras 83-84, 109-110, 149-152).

Both the terms of the rejection by the Commission of Mr. Ure's application and the reasoning of all of their Lordships in *Qazi*, suggest that neither Article 8 nor Article 1 of the first Protocol operate at a level that will lead to a re-examination of the decision in *Monk*, and the subsequent judicial development of that decision. This is hardly surprising. There are two factors that militate against an enthusiastic revision of property law in the new legal context heralded by the Human Rights Act 1998.

First, the development of property law has involved, and always will involve, the balancing of conflicting legitimate interests. Therefore, any extension of the rights of one person will involve the diminution of the rights of another person, or group of people. This factor was articulated by Lord Millett, in the context of the granting of a possession order in *Qazi* [2003] UKHL 43, as follows (at para 108). 'The order is necessary to protect the right of the landlord; and making or enforcing it does not show a want of appropriate respect for the applicant's home.' The assertion of one party's legitimate interest is not even *prima facie* an attack upon the other party's human rights. The balancing of the interests of the parties is woven into the fabric of property law. There is no room for a subsequent tailoring of the cloth of property law to meet human rights requirements. Any changes to the law of property required to enhance human rights need to be made at a more fundamental level, by the explicit consideration of such rights in the process of legal growth. It is at this level that the courts will have to decide whether their newly imposed loyalty to the European Convention of Human Rights requires a change in their approach to the balancing of private interests.

It was asserted by Lord Hobhouse in *Wilson v Secretary of State for Trade and Industry* [2003] UKHL 40 that when considering legislation (at para 142): 'The questions of justification and proportionality involve a sociological assessment- an assessment of what are the needs of society.' The question of whether such a widening of the scope of legitimate argument in the context of the common law development of private law is called for has not yet been judicially considered. As has been noted above, the issue was not raised in *Qazi*.

Second, property law has an important facilitative function. Property law exists, in part, to allow people to manipulate their property in a legitimate manner in order to achieve their

purposes. This is usually articulated in terms of the need for certainty of title, the social and economic need for predictability in dealings with property. This factor expresses itself at the workaday level as an emphasis on the importance of the doctrine of precedent in property law. Certainty is at a premium because people can be expected to act in reliance upon the declared law. This factor militates against any radical re-assessment of the established authorities in property law. Radical action by the courts creates a risk of undermining the very interests protected by Article 1 of the First Protocol (see Allen 2003 at p 73). What is protected by Article 1 as a person's possessions are the property rights as defined, as they must be, by property law (see *Parochial Church Council of Aston Cantlow and Wilmcote with Billesley, Warwickshire v Wallbank* [2003] UKHL 37 at paras 69-72, and 124, 133-134).

5. Secure Tenancies

Although *Monk* did not alter the law, it did bring to the attention of landlords, and local authority providers of housing in particular, the possibility of sidestepping the restrictions originally placed upon them by the Housing Act 1980. The legislative policy was to regulate by a statutory institution - the secure tenancy - the relationship between owners and occupiers of public housing. The relationship was to be characterised by the grant of new and valuable private rights to occupiers; these rights were not dependent on the ownership of any common law estate. The inclusion of occupation licences within the category 'secure tenancies' was a clear signal of legislative intention not to rest the secure tenancy upon common law notions of the periodic lease and its character as a legal estate. The Housing Act 1980 provided a statutory scheme for the recovery of possession by landlords of houses subject to secure tenancies, and the grounds for recovery of possession have been subsequently enlarged.¹⁶ The secure tenancy restricts both secure tenants and their landlords. A secure tenant cannot assign, or sublet, or even allow a licensee to occupy whilst she is living elsewhere, without the loss of her statutory rights. A public landlord can regain possession of the premises subject to a secure tenancy only if it can show statutory grounds for repossession, and must accede to the exercise of the right to buy by a secure tenant. Several of the grounds for repossession also reflect the social welfare role of the providers of public housing. So, for example, under Housing Act 1980 Grounds 10, 11 and 12 repossession is allowed if the premises are adapted to cater for the special needs of an occupier, and no occupier with those special needs remains in occupation. The statutory scheme balances the interests of secure tenants and providers of public housing. The statutory safeguards of secure tenants' security of tenure were drafted on the assumption that tenants would need protection from landlords, not from their co-tenants.

Although it is now far too late for the purposes of practical legal argument, in the light of legal developments, this review of the secure tenancy allows us to raise explicitly an implicit feature of the decision in *Monk*. The arguments and decision in *Monk* rested upon an assumption that the secure tenancy was not *sui generis*, but was a type of periodic lease. However, given that a secure tenancy need not take the form of a periodic lease - it can be created upon the grant of a fixed lease or even a licence - it is clearly more logically coherent to view a periodic lease as a possible form of secure tenancy. Indeed, if one attempted to create a common law periodic lease with the same restrictions on the landlord as are imposed by the secure tenancy it would be void for uncertainty of term, as the ability of the landlord to serve a notice to quit is an essential characteristic of a periodic lease.¹⁷

The nature of the secure tenancy would become paramount if the secure tenancy was viewed as a free-standing institution. No question of any impact upon other residential agreements, or leases for agricultural or commercial use, would arise. The Housing Act 1980 s. 28(3) and Housing Act 1985 s. 81 expressly provided for the continuing existence of a secure tenancy where one joint tenant is not in occupation of the premises. The only sensible interpretation of these provisions must be that the statute was providing for the continuation of a secure tenancy upon the breakdown of the relationship between the two joint tenants. In addition an exception to the prohibition of assignments, in Housing Act 1985 s. 91(2)(b), is the transfer of a joint tenancy in pursuance of a court order following a divorce. The assumption was that the 'secure tenancy' is a tenancy (a word that usually means 'periodic lease'), which the statutes made secure, that is, a type of lease with special features. Unconsidered was the possibility that the 'secure tenancy' might not be a common law tenancy at all, 'tenancy' misleadingly indicating 'right to occupy a dwelling house' and not periodic lease.

Thus, the policy of the Housing Acts of 1980 and 1985 was to regulate the rights of owners and occupiers of public housing via a statutory scheme, the central institutional feature of which was the secure tenancy. In *Monk* the courts, taking their lead from the arguments of counsel, assumed that the existence of a secure tenancy was predicated upon a tenancy, meaning a type of periodic lease. Therefore, any decision made would govern common law periodic leases, and those periodic leases that are subject to other statutory regimes. This assumption explains why *Monk*, the leading case on the effect on a secure tenancy of a single joint tenant's notice to quit, ignored the statutory provisions governing the secure tenancy entirely. These provisions were ignored because it was accepted that the general law of periodic leases could not be distorted by considerations that were only relevant to secure tenancies (see *Monk* [1992] 1 A.C. 478, HL at 482-483, and (1990) 61 C.&P.R. 414 at 435).

The Requirements for a Valid Tenant's Notice to Quit

In *Hounslow L.B.C. v Pilling* [1994] 1 All E.R. 432, CA the Court of Appeal had to determine the effect of a purported notice to quit which the landlord had accepted as effective to bring the lease to an end. The Court of Appeal held that the form of a notice to quit served by a single joint tenant must comply with any common law and statutory requirements. The only important requirements for a notice to quit served by a tenant are concerned with the length of the period of notice. At common law, a weekly or monthly tenancy will require a week or month's notice respectively, unless some other period has been laid down in the lease. The Protection from Eviction Act 1977, section 5(1), requires a written notice giving a minimum period of four weeks' notice to terminate a periodic lease of a dwelling. Therefore, even though a single joint tenant can terminate a lease by serving notice on the landlord, the notice served must give at least four weeks' notice, allowing the occupying joint tenant four weeks' grace, although not four weeks' notice. There is no requirement in the Act for one joint tenant to give notice to the other. It was held in *Pilling* that a deficient notice, expressed to take effect immediately and which the landlord accepted as terminating the lease three days after it was served, did not terminate the lease.

The Court of Appeal also held that the landlord could not, by agreement with the single joint tenant serving the notice to quit, waive the statutory right to four weeks notice. Whilst it is submitted that this holding was welcome in the light of the purpose of the Act, which is concerned with the protection of tenants from oppressive behaviour by landlords, the

reasoning in support of the holding was not articulated. Nourse LJ gave the reasoning of the Court as follows ([1994] 1 All E.R. 432 at 439c):

Here the council are asking us to hold that the protection afforded by s. 5(1) can be brought to an end by an agreement made between them and only one of two joint tenants. It is obvious that such an agreement cannot deprive the other joint tenant of the protection to which he is entitled under the Act. That is not a point which can be further elaborated.

The problem with this reasoning is that it assumes, without argument or comment, that the period of notice required by the Act from tenants is intended to provide protection for the rights of tenants. This is contrary to any natural construction of statutory intention. It is probably a unique feature of this area of law that the requirement from one party of a minimum period of notice to be given to another party has been construed as a provision for the protection of the party upon whom the demand for notice is made. Notice is generally required to protect the interests of the receiver of the notice. This incongruity has importance beyond the decision in *Pilling*, because it highlights the practical effect of the law as established in *Monk*. Failure to protect tenants from each other was the statutory lacuna in the Housing Act 1980 that enabled the courts to ignore any statutory intention when considering the effects of the service by one joint tenant of a notice to quit. 'The Act of 1980 [Housing Act 1980] operates to give security where landlords give notice to quit; it does not give security where tenants give notice to quit' (see *Greenwich LBC v McGrady* (1982) 46 P & C R 223, CA at 224, and *Monk* [1992] 1 A.C. 478, HL at 483).

The result of this is that upon the service of a notice to quit by a single joint tenant, only statutory provisions designed to protect the interests of landlords can be relied upon by the other occupying joint tenant. On the face of it this proposition suggests an undesirable distortion in the development of the law in the courts of the legislative intention to provide security of tenure to lessees. Given that in the reported cases it is almost invariably the landlord who insists upon the service of a notice to quit by the non-occupying joint tenant, it is clear that the practical result of the decision in *Monk* is the evasion by local authority landlords of the statutory protection given to secure tenants. This is, of course, apparent to the courts. Yet the development of this area of law has been driven by the evasion of the statutory rights of occupying joint tenants of secure tenancies achieved through the refusal by local authorities to rehouse the non-occupying joint tenant (whether they are under a statutory duty to do so or not¹⁸) without the service of a notice to quit.

The result of the decision in *Pilling* will usually be that an occupying joint tenant will have a four-week period of grace between the service of a notice to quit and the termination of the lease. However, in the case of *Wandsworth LBC v Osei-Bonsu* [1999] 1 All ER 265, CA the effects of the local authority acting upon an ineffective short notice to quit was the award of substantial damages to the occupying joint tenant under the Housing Act 1988, sections 27 and 28.

Section 27 of the Act provides for a cause of action when a lessee is unlawfully evicted, and section 28 provides for the calculation of damages upon proof of a breach of section 27. The actual facts of *Osei-Bonsu* are unlikely to recur as Wandsworth LBC had accepted short notice to quit from Mrs. Osei-Bonsu, and had relied upon this notice to deny Mr. Osei-Bonsu entry to the house in respect of which he and his wife had enjoyed a secure tenancy as joint tenants. Upon the reporting of the judgment in *Pilling*, the authority realised its error, and

obtained an effective notice to quit from Mrs. Osei-Bonsu. Mr. Osei-Bonsu successfully claimed damages for his deprivation of his premises caused by Wandsworth LBC refusing him entry. However, the discussion in *Osei-Bonsu* over the appropriate approach to the estimation of damages to be awarded under section 28 are of wider interest, as they indicate the Court of Appeal's estimate of the potential devaluing effects of the law confirmed by *Monk* upon a secure joint tenant's lease. Section 28 provides that the damages to be awarded for a breach of section 27 are calculated by comparing the difference in value of the landlord's interest in the premises with and without the lease which the landlord has violated. Thus, the Act makes the measure of damages the defaulting landlord's profit. The damages are not for the loss of value to the lessee (compensation) but the wrongful gain to the landlord (disgorgement). Therefore, the discussion was not directly concerned with the value of the lessee's interest. If Mr. Osei-Bonsu had held a lease as sole secure tenant of the property the court felt £30,000 would have been an appropriate valuation of the landlord's gain by wrongfully evicting him from his home. However, because he was a joint tenant and the other joint tenant, his wife, was willing to serve a notice to quit if asked to do so by the landlord, the landlord's gain should have been valued at around £2,000.¹⁹ Thus, the availability to the local authority of the decision in *Monk*, combined with its ability to bring sufficient pressure to bear upon a non-occupying joint tenant of a secure tenancy, reduced the value of the lease by 93 per cent.

The Effect of a Notice to Quit on the Right to Buy

The value of the landlord's gain from the termination of a periodic lease cannot be realised by a secure tenant. However, the Housing Act 1980 introduced the practically valuable right to buy enjoyed by secure tenants. Originally under the Housing Act 1980 s.8, now under the Housing Act 1985 s.155A, a secure tenant accrues a discount on the price of the house she leases which can be realised by exercising the right to buy and then either re-mortgaging, or, after three years, selling the house. If the security of joint tenants of periodic leases is undermined by the possibility of one joint tenant serving a notice to quit then the right to buy, possibly the only capital asset held by the joint tenants, is also vulnerable.

In *Bater v Greenwich LBC* [1999] 4 All ER 944, CA the Court of Appeal was faced with one joint tenant serving a valid notice to quit upon the advice of a local authority landlord against whom the joint tenants were in the process of exercising their right to buy. The right to buy had a capital value of £24,640 (the statutory discount). The Local Authority had been informed by Mr. Bater's solicitor both that the parties had commenced divorce proceedings and that Mr. Bater intended seeking a transfer of the lease into his sole name. In these circumstances Mr. Bater sought an order under section 37 of the Matrimonial Causes Act 1973 avoiding the effects of the notice to quit. However, the right to buy is 'parasitic' upon the existence of a secure tenancy and not an independent right in the property. Therefore, the Court of Appeal concluded, following *Monk*, that the service of the notice to quit by Mrs. Bater left Mr. Bater with no valid claim against the local authority landlord. Although it seems clear from the facts that Greenwich L.B.C. did not procure the notice to quit from Mrs. Bater in order to destroy the right to buy there is an inherent conflict of interests between a person in Mr. Bater's position and his landlord. The vulnerability of Mr. Bater was a foreseeable result of the decision in *Monk* to disregard the statutory scheme of security of tenure that applied on the facts, and to substitute an analysis based upon the common law characteristics of the periodic lease.

Release as an Alternative to Notice to Quit

The speeches in the House of Lords in *Monk* laid stress on the need to allow a single joint tenant to escape the obligations she had undertaken by destroying the periodic lease (at 483, and 492; see also (1990) 61 P & C R 414, CA at 435). The suggestion in the academic literature that a unilateral notice to quit should be treated as a release by a joint tenant of any interest in the periodic lease was not explored (see Webb 1983, Dewar 1992, at 378-379 and Tee 1992, at 219-220). A release of an interest is the giving up of any claim derived from the interest. It has always been a recognised option in property law for a joint tenant to give up her rights under the joint tenancy to her fellow joint tenants. The effect is the same as the death of a joint tenant, the joint tenancy continues with one less member, unless only one joint tenant remains, in which case the joint tenancy comes to an end.

The issue of a single joint tenant releasing her interest in the co-owned lease was raised in *Burton v Camden London Borough Council* [2000] 2 AC 399 which concerned the effect of an express deed of release of her interest in a periodic lease by one of two joint tenants. The House of Lords decided by a majority (Lord Millett dissenting) that a joint tenant of a periodic lease that created a secure tenancy could not release her interest in the lease to her joint tenant. This was because the effect of such a release would be like an assignment of the periodic lease, and the assignment of a secure tenancy was prohibited by section 91(1) of the Housing Act 1985. Lord Nicholls did not find the distinction between an assignment and a release relevant to the issue, characterising it as 'an ancient distinction' (*Burton* Ibid at 404H). An approach based on the nature of the interest of one of a number of joint tenants was even less worthy of serious consideration being an: 'esoteric concept ... remote from the realities of life'. This decision was almost the mirror of the decision in *Monk*.²⁰ In *Monk* the statutory regime that applied to the lease was deemed irrelevant to the question of law, which was resolved by the application of old common law authorities. In *Burton* the common law was deemed irrelevant to the lease, which was to be dealt with solely under the statutory regime that governed such leases.

For the majority in *Burton*, the statutory provisions were primary. Indeed a strong purposive approach to their construction was necessary, in order to prevent joint tenants of a periodic lease, which subsisted as a secure tenancy, from eluding the statutory intention to protect local authority landlords from any dealings with the lease, other than those to which the landlord consented, or those which fell squarely within express statutory exceptions.

The peculiar result of the two cases, *Monk* and *Burton*, is that a single joint tenant can unilaterally destroy a periodic lease regardless of any statutory scheme of security of tenure, but is unable to release her interest if the periodic lease creates a secure tenancy. Thus, a joint tenant of a periodic lease which constitutes a secure tenancy is faced by a constant uncertainty over the continuation of the lease, but cannot obtain the release of her co-owner's interest, as that would interfere with the control of the landlord. The landlord may well use its position as provider of social housing to force a non-occupying joint tenant of a periodic lease to destroy the interests of an occupying joint tenant. In destroying the periodic lease the landlord will free itself from its obligations under the right to buy legislation.

Statutory Reform of the Law

The Law Commission has published *Renting Homes*, (Law Commission 2003), which sets out its recommendations for reform of housing law. The recommendations follow the publication of two consultation documents (Law Commission 2002a and 2002b) and an extensive consultation process (see Law Commission 2003 at 2.13-2.16). The report emphasises a contractual approach to occupation agreements between landowners and occupiers which provide for residential occupation (Ibid at 2.5, 2.38, 3.21, 3.70, 5.12, 6.31, 6.45(1), 7.29, 7.3, 7.4). The Commission attempts, through its proposed scheme, to jettison structural assumptions of the common law that have bedevilled housing law. Thus, for example, the report recommends that occupation agreements are to be of equal validity regardless of whether the common law would classify them as leases or licences.²¹ The emphasis on the agreement between the landowner and the residential occupier allows for the development of clarity in the law, and thereby both transparency of right and duty, and a consumer law approach to occupation agreements.²²

The recommendations aim for a radical simplification of the law, with two basic types of residential occupancy agreement. One type of agreement is designed for landowners whose involvement in the provision of housing is brought about by their interest in meeting social need, and this type is referred to here as the social housing agreement. The other type of agreement is designed for landowners whose principal motivation is the economic gain available from providing housing, and this type is referred to here as the private housing agreement. The two types are intended to cover 'all contractual agreements granting the right to occupy premises as a home' (Ibid at 6.17), subject to exceptions (Ibid at 6.27-6.29).

The social housing agreement, which is modelled on the secure tenancy, will be the predominant form for residential accommodation in the future, and its 'underlying feature is security for the occupier' (Ibid at 5.13). It will be for an indefinite term (Ibid 5.13(1)), allowing repossession only for a restricted number of reasons following a court order, and repossession will always be subject to the court deciding it is reasonable in all of the circumstances (Ibid at 9.17-9.37). Where appropriate the occupier will have the 'right to buy' (Ibid at 2.32 and 5.20), and the agreement will give limited rights to succession, but not testamentary disposition, in appropriate circumstances (Ibid at Part 14).

Under the standard terms of a social housing agreement landlords will be able to obtain possession for breaches of the occupation agreement by the occupier, and for 'property management' reasons (Ibid at 9.15-9.37). The existing particularised grounds for possession for property management reasons in secure tenancies will be retained, but a general power to seek possession for reasons of property management in exceptional cases will be introduced (Ibid at 9.30-9.35), and there will be a new ground that will apply when one of several joint tenant occupiers to an agreement quits the agreement (Ibid at 11.33-11.34).

A private housing agreement will be either for an indefinite period or for a fixed term (Ibid at 5.14(1)). The security of the occupier under an indefinite private housing agreement will be far less than under a social housing agreement. Unless the model agreement is altered, which will be possible,²³ the landowner will be able to obtain possession by the service of a notice to quit, which gives a right to a 'mandatory' order for possession, an order that the court must make automatically if the necessary facts are proved. Although a court order will still be

required, there will be no power in the court to refuse an order for possession on the grounds that it is unreasonable to make such an order in all the circumstances (Ibid at 3.33, 3.41, 3.46, 5.14, 9.39-9.41). The notice to quit will have to give two months notice to the occupier (Ibid at 9.57). In addition a court will have to order possession when there are serious rent arrears, by which is meant rent is two months in arrears. This further mandatory ground for possession will operate for both indefinite and fixed term agreements (Ibid at 3.41, 9.42-9.43, 9.60). Finally, for both indefinite and fixed term agreements, the landowner will be able to obtain an order for possession for other breaches of the agreement, if the court finds it reasonable in all the circumstances to make the order (Ibid at 9.23-9.28).

In the context of this contract based scheme the report recommends that a single joint tenant of an indefinite occupation agreement of either type (for private or social housing) cannot destroy an occupation agreement by serving a unilateral notice to quit (Ibid at 3.52, 3.63, 11.25-11.30). The service of a notice to quit by one joint tenant of an occupation agreement will operate to end that person's future rights and obligations under the agreement (Ibid at 11.28-11.29). Further, for fixed term private housing agreements it is recommended that the model agreement should provide that the operation of a break clause by a single joint tenant of an occupation agreement should have a similar effect, subject to any contrary express term (Ibid at 9.115-9.116, 11.28(3)).

The service of a notice to quit will free a former joint tenant from any future obligations under the housing agreement. The remaining joint tenant (or tenants) will become solely responsible for the obligations under the agreement. The remaining joint tenant can either continue as a sole tenant, or serve notice to quit on the landowner. A tenant must give at least one months notice (Ibid at 3.50, 9.109-9.112). However, as the landowner will be required to notify a remaining joint tenant of its receipt of a notice to quit served by the other joint tenant (Ibid at 11.28), the remaining joint tenant can act swiftly to minimise any exposure to sole responsibility for obligations under the agreement.

The landowner will be able to accept the variation of the occupation agreement (from two occupiers to a single occupier), or re-let the property if the remaining occupier serves a notice to quit. If the variation of the agreement to a sole tenancy is unacceptable to the landowner then the type of agreement involved becomes important. A landowner under a private housing agreement for an indefinite period will be able to serve notice to quit. A landowner under a fixed term private housing agreement on the terms of the model agreement will have to accept the new situation until the end of the term.²⁴ A landowner under a social housing agreement will be able to seek possession under a new discretionary ground for possession. Possession will be available on the grounds that:

- the landowner feels that the remaining occupier does not have housing needs that justify her continued occupation of the property; or,
- the departure of the joint tenant serving notice to quit has left the property under-occupied; or,
- the property is adapted to meet the special needs of an occupier, and an occupier with those special needs no longer resides at the property. The landowner will have to offer suitable alternative accommodation to the remaining occupier in order to obtain possession of the property on these grounds (Ibid at 11.33-11.35).

Thus, the proposed reform will meet many of the difficulties posed by the decision in *Monk*,

as the interests of all three parties (landowner, and each joint tenant) can be recognised, and the shared asset of the joint tenants can be preserved. However, on its own this framework does not allow for discrimination against wrongdoers, in this context the violent partner. The victim of an abusive joint tenant might serve a notice to quit, and seek emergency housing, leaving the abusive joint tenant with the more valuable and convenient occupation agreement for himself. The landowner may, or may not, be able to seek repossession on the new grounds for possession described above. However, even if possession on one of these grounds is possible it would not be available unless suitable alternative occupation was offered to the abuser. The family law jurisdiction may allow a more satisfactory resolution, by excluding the abuser and transferring the occupation agreement to the victim (Ibid at 3.72, 13.25). However, an action under this jurisdiction cannot be initiated by the landowner, who may be left with an unwanted sole occupier of its property.

The report has specific proposals which meet this problem, by the use of a special term dealing with anti-social behaviour in occupation agreements, whether private or social housing agreements.²⁵ By the special term the occupier will agree, *inter alia*, not to 'engage in conduct that ... involves the use, or threatened use, of violence or causes a risk of significant harm to a person within the home' (at 3.86, 15.22(1)). Upon breach of this term the landowner will be able either to seek possession, or to obtain an injunction against any further breach (at 15.20-15.23). In an action for possession for breach of the special term, or for possession following breach of an injunction obtained to prevent further breaches, the landowner will be able to obtain possession of the property, without making any offer of alternative accommodation to the person who breached the term or the injunction (at 3.81, 9.25, 15.20-15.21, 15.44). The court will be able to refuse to make a possession order if it would be reasonable in all the circumstances to do so, and the provision of accommodation to the victim of abuse will be a factor to weigh in deciding this issue. The victim could be either offered a new occupation agreement over the property, or suitable alternative accommodation (at 3.86, 15.47-15.48). Providers of social housing will also have freestanding powers to seek an injunction against anyone engaging in anti-social behaviour. If the anti-social behaviour involves violence, or threats of violence, or risk of significant harm, the injunction may have an attached power of arrest, or be combined with an exclusion order (at 3.82-3.83, 3.87, 15.25-15.31, 15.46).

A Critical Analysis of the Decision in Monk

In deciding *Monk*, [1992] 1 AC 478, HL the House of Lords accepted that it was faced with a dilemma. This dilemma was posed in terms of the rights and obligations of the joint tenants of a periodic lease. On one horn of this dilemma was the need of a non-occupying joint tenant to free herself from onerous obligations. On the other horn was the protection of the rights of the occupying joint tenant in his home. In accepting this as a true dilemma that had to be resolved by a choice between the two horns, the House committed itself to two highly questionable assumptions.

First, it was assumed that the real interests involved were those of the two joint tenants. This was palpably false. The dispute was between the landlord and the occupying joint tenant. The dispute had arisen after the local authority landlord had advised one joint tenant cohabitant that in order to be re-housed she should terminate her tenancy. The landlord was taking

possession proceedings against the remaining occupying cohabitant. By accepting the dilemma the House was accepting for the purposes of the argument that the landlord was acting altruistically in litigating the case, to free the non-occupying joint tenant from her liability. Second, it was assumed that the solution to the problem had to be sought in the law of property, that the key issues were the nature of the periodic lease and the nature of the joint tenancy. However, most joint tenancies are founded upon a relationship *inter se*. Where there is no pre-existing relationship *inter se* then any legal joint tenancy would be held upon trust by operation of law. Therefore, there would always be an alternative source of law to regulate any disagreement between the joint tenants, and no necessity to view the problem as primarily a question of property law. The imperative in the litigation for framing the issue as one of property law was, in reality, the interests of the landlord.

This framing of the issue as a dispute between the joint tenants distorted the reasoning of the House. In his leading speech Lord Bridge discounted any reliance upon the real relationships between the joint tenants, or between the landlord and the joint tenants. He then focussed upon an abstract hypothetical relationship between the joint tenants, which was regulated by a hypothetical contract. From this analysis he justified the choice between the two horns of the dilemma 'in principle'. The rest of Lord Bridge's speech was devoted to a review of the authorities, which confirmed that they were compatible with the conclusion already identified from 'first principles'.

It is submitted that his derivation of 'principle' was a rhetorical device which distorted the issues involved in the litigation, and which should have been considered as misleading obiter dicta in the subsequent development of the law. The dicta have the potential to distort legal development for two reasons. First, they appear to provide an ethical basis for the law, a principle of justice in regulating the relationship between joint tenants. This appearance is false. If conflict arises after a notice to quit it is invariably between the occupying joint tenant and the landlord. There are far more adequate and appropriate mechanisms for the resolution of conflicts between joint tenants *inter se* in the law governing their particular relationship. Second, the dicta obscure the true basis for the decision. The decision is based upon a necessary but unmeritorious doctrinal fiction, imposed three hundred years ago in order to protect tenants from the uncertainties and inadequacies of the tenancy at will. It is generally accepted that one should not extend a fiction beyond its necessary operation. Thus, the need for caution in applying *Monk* beyond its facts is apparent if its true foundation is appreciated. However, it is also generally accepted that 'principles' should be extended in their operation, particularly principles that effect justice. Therefore, if the dicta of Lord Bridge are accepted as a valid analysis of the situation then the law will develop upon a false principle, until the results of this development become so objectionable that reform becomes necessary.

It is submitted, the ratio of *Monk* should be articulated in a form that reflects the true nature of the decision. The case decided that a landlord could rely upon the service of a notice to quit a periodic lease given by one of two joint tenants. This was because a landlord could not force a new grant upon both joint tenants, when only one was willing to continue the periodic lease. The corollary of the landlord being able to rely upon the notice to quit is that the legal periodic lease is brought to an end by the notice to quit. It will be noticed that such a formulation of the ratio of the decision does not touch upon the lawfulness of the unilateral service of notice to quit by a single joint tenant. This is because the question was not in issue, and the House expressly decided the case without a full consideration of the question.

Such a formulation avoids another difficulty presented by the speech of Lord Bridge. His Lordship characterised the serving of a notice to quit as a substantially negative act, an omission. He derived support for this classification from two essentially disparate sources, the English authorities on the nature of a periodic lease and a principle, which seems to be the contractual 'principle', that he had propounded at the beginning of his judgment. Lord Bridge contrasted the 'substance' of a notice to quit with its 'form'. English law is constrained by the doctrinal demand for certainty of term, it cannot recognise any contract for an indeterminate term as a lease. Therefore, as a matter of law the serving of a notice to quit is, and must be, an essentially negative act. However, as a matter of social reality, as a matter of the actual intentions of the parties to a periodic lease, the contract is intended to be for an indefinite term until brought to an end by the actions of one of the parties. Therefore, in substance, as well as form, the service of a notice to quit is also positive, not as a matter of law, but as a matter of fact. The principle, which regards the service of a notice to quit as, in substance, an omission (a lack of consent), is a distortion of the true issues. The real issue before the House was whether a landlord could act in reliance upon a notice to quit from a single joint tenant: in form and substance the notice to quit brought to an end the periodic lease if the landlord could rely upon it. As a matter of legal doctrine, the notice is of an unwillingness to continue the lease beyond its present prospective term and as such can be characterised as a negative act, notice of a lack of consent, rather than a positive act, notice of the exercise of an ability to bring the periodic lease to an end. This legal technicality is derived from the doctrinal fiction that a periodic lease is for a fixed term, and has the same fictional quality. To describe the classification of a notice to quit as an omission as a principled classification which reflects the substance (reality) of the action is to invite confusion of a justifiable use of a legal fiction with a belief that the law is in alignment with justice and social reality.

Conclusion

The impact of *Monk* has been uneven across those areas of law and life it has touched. The attempt to frame the issue in the case in a contractual perspective, criticised above as both incoherent and productive of illusion, has been fruitful in encouraging a fresh judicial approach to the lease elsewhere (see *Hussein v Mehlman* [1992] 2 EGLR 87 and *Chartered Trust plc v Davies* [1997] 49 EG 135, CA). The statutory mechanisms for the protection of commercial leases have lent themselves to a defence of the position of an occupying joint tenant, and allowed the bringing of disputes to a judicial forum before irreparable damage could occur (see *Cork v Cork* [1997] 1 EGLR 5).

The impact upon the law of trusts has been barren, and may yet lead to damage. The difficulty, in part, is the old one caused by the introduction of the statutory trusts over legal estates in 1925. The extent to which legal co-owners acting as trustees for themselves should be treated in the same manner as other trustees remains unresolved, and the case law following *Monk* has not been productive of principles for the development of the law in this area. The apparent immunity of local authority landlords from any liability for procuring the service of notices to quit is disquieting, and suggests a lacuna in the law.

As *Monk*, and most of the cases that we have reviewed here, pre-dates the implementation of the Human Rights Act 1998, we are concerned with the impact of human rights on *Monk*, rather than the impact of *Monk* on human rights law. The impact of human rights upon this

area of law has been negligible. This has been because the private law we have been considering has provided the unquestioned foundation for the arguments of all the parties to litigation that has invoked the Convention rights following the service of a notice to quit by one of two joint tenants of a periodic lease. The importance of certainty in this field of law will preclude any re-opening of the decision in *Monk* on human rights grounds. Of theoretical interest is the hypothetical question of whether *Monk* might have been argued, and decided, differently had the Human Rights Act been in force at the time of the decision. Lord Browne-Wilkinson (at 493) indicated that he chose to affirm the law because, 'no sufficient reason has been shown for changing the basic law'. Given the emphasis on certainty and stability in property law this approach was justifiable. However, this decision was not reached easily because (at 491), 'the flat in question was the joint home of the appellant and Mrs. Powell: it therefore cannot be right that one of them unilaterally can join the landlords to put an end to the other's rights in the home.' It may be that explicit consideration of the effects of the established law on the rights protected by Article 8, and Article 1 of the First Protocol, would have added sufficient weight to the arguments for changing the law so as to tip the balance; or more productively, led to a rejection of the analysis of the law as a true dilemma. However, the needs for certainty rule out any such argument post *Monk*. Landlords, and joint tenants, are entitled to act in reliance of the continued validity of the declaration of law contained in the House of Lords' decision. The presumption of their reliance, a presumption which may well reflect reality in the case of landlords, precludes re-opening the issue for re-consideration in the light of the subsequent passage of the Human Rights Act.

It is in the area of family law that the impact of *Monk* has been most disquieting. Although lawyers may be able to comfort themselves with an analysis of a unilateral notice to quit as inaction on the part of a joint tenant, to the other joint tenant it is a clear act of betrayal. It seems some women have been subjected to violent retribution for serving a notice to quit (see Malos and Hague 1993, at p 73). It can hardly be doubted that the present practice of local authorities breeds rancour and resentment. There is no room under the present 'system' for a consideration of the merits of the parties, nor the needs of the family members. The family courts are left helpless spectators to actions that increase ill feeling, jeopardise the few assets owned by the couple, and disregard the welfare of the children caught up in the breakdown of the relationship. The family courts are impotent to act to preserve the jointly owned periodic lease in the face of a development in the House of Lords of a strictly conceptual approach to periodic leases. Inaction, which prevents property from ever coming into being, is not a disposition of property subject to section 37(2) orders (*Alsulaimen*). The destruction of the right to occupy is not an interference with any right to occupy (*Johnstone*). Landlords are not affected by injunctions issued against the joint tenants (*Johnstone*). The existence of a power to prevent the service of a notice to quit is doubted (*Osei-Bonsu*), and has to be proclaimed obiter in the hope that practitioners can through their advice prevent the collapse of the foundations of the jurisdiction given to the courts to distribute matrimonial assets in the light of the policies contained in the Family Law Act 1996 (*Bater*).

It seems peculiarly hard to subject families to the tyranny of concepts, not merely unknown, but barely comprehensible to them. If, as we submit, these concepts are actually the out-workings of an underlying fiction required 300 years ago then the injustice is offensive to both the parties and the law. Fictions are not meant to deceive anyone (Baker 2002, at p 202 n 49). However, it would appear they have deceived many in this area. This, we submit, is the baleful result of a decision in *Monk* that was both too persuasive and which gave too

little attention to the appropriate limitations required. If, as we accept, without legislative intervention the courts must uphold the common law as confirmed by *Monk*, then this should be done with a far more careful attention to the inherent limits of this law.

The assumption that the secure tenancy should be treated as a form of periodic lease, rather than as *sui generis*, led to the imposition of the common law fiction, that allowed the periodic lease to satisfy the doctrine of certainty of term, on the statutory institution. The recommendations of the Law Commission, if implemented, will mark a resounding re-assertion of the primacy of the statutory institution over the common law. *Monk* caused a profound erosion of the security of tenure of the secure tenant and seriously undermined the legislative scheme of 1980 and 1985. The statutory reforms proposed by the Law Commission to regulate the effects of a unilateral service of a notice to quit by a joint tenant of an occupation agreement for an indefinite term should determine unequivocally the position for the future. By denying to a sole joint tenant the ability to destroy the jointly held property the reform will also alleviate the problems *Monk* and the subsequent case law have posed to the family law courts.

We started the article with a quotation from a one famous American judge and jurist, Justice Cardozo. It seems appropriate to give the last word to an even more famous American judge and jurist, Justice Holmes. Our contention is that *Monk* is an aspect of the old common law doctrine that demands that a lease has certainty of term at its commencement. This may be a necessary feature of the law, however, we fear it reflects a vice in the law that such a doctrinal consideration should be allowed a determinative role in legal development. In the words of Justice Holmes (Holmes 1897):

‘It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.’

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¹ Housing Act 1980 s. 28; Housing Act 1985 s. 79-81. Both Acts clearly contemplate the continuing occupation by one joint tenant of the premises, and specifically enact that the occupation of one of two or more joint tenants suffices to satisfy the tenant condition, Housing Act 1980 s. 28(3), Housing Act 1985 s. 81.

² We return to the reasoning of Lord Bridge below, at 'A Critical Analysis of the Decision in *Monk*'. Several commentators on the decision in *Monk* seem to have been misled by the emphasis on 'will' and 'contract' in the speech of Lord Bridge into overlooking the doctrinal source of the law on the point. See Goulding 1992 at 281 –282, Tee 1992 at 219, Dewar 1992 at 378. The centrality of certainty of term is express in the argument of counsel for Hammersmith and Fulham: 'The notice to quit is the means whereby the wish not to continue is communicated. Were that not so, the letting would risk being void for indeterminacy.' [1992] 1 A.C. 478 at 481 *per* Stephen Sedley Q.C. and Beverly-Ann Rogers.

³ See e.g. the Children Act 1989, s.1 and the Matrimonial Causes Act 1973, s.25(1).

⁴ In the case of divorcing parties in ancillary relief proceedings under Part II of the Matrimonial Causes Act 1973. and in the case of unmarried couples by an application for a transfer of tenancy under the Family Law Act 1976, s.53 and sched.7. See further below.

⁵ For the purposes of the article we will be confining ourselves to considering the position of 'cohabitants' and 'former cohabitants', who are defined in s.62(1) as a man and a woman who although not married to each other are living together as husband and wife, and former cohabitants is to be read accordingly. The Domestic Violence, Crime and Victims Bill will amend the definition of cohabitants to include same sex couples if enacted.

⁶ There are also the statutory powers granted by the Children Act 1989 where applicable. There are

also inherent powers of the court, to prevent a breach of trust and derived from its wardship jurisdiction. See below, paragraph commencing 'The difficulties posed to the family courts jurisdiction were explored', and the review of the impact of *Monk* on commercial leases and trust law.

⁷ This tendency to run together efficacy and rectitude is visible in the argument of Arden Q.C. as reported, and on this point apparently accepted, by Simon Brown LJ in *Wandsworth L.B.C. v Osei-Bonsu* [1999] 1 FLR 276 at 283H: 'That decision [*Monk*], therefore, retrospectively sanctioned the practice which Wandsworth were following in the instant case of seeking such a notice from a joint tenant who required to be housed elsewhere.'

⁸ Reasoning considered below at 'A Critical Analysis of the Decision in *Monk*'.

⁹ No view was expressed by Lord Hoffmann on whether the giving of notice would be a 'dealing' with the tenancy which could be restrained: [1999] 1 A.C. 313 at 318-319. It was noted by Simon Brown LJ that the decision in *Alsulaimen* was given the day before the hearing of *Osei-Bonsu* by the Court of Appeal: *Ibid* at 288C.

¹⁰ On the inherent jurisdiction of the court to protect one spouse from the unscrupulous dealings by the other spouse by injunctive relief see: *Khreino v Khreino (No. 2)* [2000] 1 F.C.R. 80.

¹¹ Unless the under occupation has been brought about as a result of the occupying tenant's violence. The Housing Act 1966 introduced a new ground for possession against a tenant who uses violence against other occupiers of the premises: see Housing Act 1985, Schedule 2, ground 2A.

¹² The local authority cannot offer her a secure tenancy in carrying out its duty under Part VII Housing Act 1996. S. 207 of the Act prohibits it from doing so. See also Housing Act 1985, Schedule 1, para. 4, as amended by Housing Act 1996, Schedule 17, para. 3. The woman can obtain a new secure tenancy by application under Part VI Housing Act 1996 only. The legislation was drafted to avoid the mischief of those housed under the homelessness legislation 'jumping the queue' for public housing.

¹³ In the Scottish case of *Smith v Grayton Estates Ltd* 1961 S.L.T. 38 one joint tenant of a statutorily extended lease served notice to quit on the landlord in a commercial context (an agricultural lease).

¹⁴ The decision of the House of Lords in *Twinsectra v Yardley* [2002] 2 AC 164, HL to demand, in effect, the same quality of dishonesty in dishonest assistance in a breach of trust as is demanded by the criminal law for theft makes any attempt to seek redress from local authority landlords through dishonest assistance fanciful.

¹⁵ The only alternative interpretation of the decision would involve assuming the Commission misunderstood the relevant English law. The relevant paragraph follows. '... the Commission notes that the applicant and his wife were joint tenants and that, therefore, the right to use the apartment was to be exercised by them jointly [taken literally this does not reflect either the common law or the statutory scheme of the secure tenancy]. The applicant was not entitled, under the tenancy agreement, to use the flat as sole tenant [ditto]. It was therefore clear at the outset that in case one of the joint tenants decided to leave, the other could not claim a right to become a sole tenant [true, but there is no doubt that if Mrs. Ure had simply left the flat then Mr. Ure could have continued as joint tenant].' It seems the Commission was conflating use of the flat with the rights under the lease; a secure tenancy does terminate if both joint tenants stop occupying the premises. However, the periodic lease is not inherently linked to occupation by the lessee, and the Housing Acts 1980 and 1985 do not insist that both joint tenants remain in occupation for a secure tenancy to endure.

¹⁶ Housing Act 1980 ss. 32 to 34, Schedule 4; Housing Act 1985 s84, Schedule 2. A new ground 10A for possession was introduced by the Housing and Planning Act 1986 s.9(1) (and amended by the Housing Act 1988 Schedule 17) to facilitate re-development. Ground 2 was amended, and a new ground 2A was introduced, by the Housing Act 1996 ss. 144-146. Ground 2A provides for eviction of a violent man who forces his wife (or cohabitant) to leave the home. However, this ground is not used very often, because local authorities prefer the fleeing woman to serve a notice to quit: see Law Com. 284 at 15.40-15.42.

¹⁷ *Prudential Assurance* [1992] 2 A.C. 386. In the context of a secure tenants' powers of disposition the House of Lords has *de facto* endorsed this approach (of treating the secure tenancy as a *sui generis* institution) in *Burton v Camden L.B.C.* [2000] 2 A.C. 399, by deeming the well known common law distinction between an assignment and a release as inoperative when applied to dispositions by secure tenants.

¹⁸ Although in some circumstances the destruction of the non-occupying partner's interest would be necessary for them to qualify as homeless this would not be so if it were unreasonable for them to live with their joint tenant partner, for example in cases of domestic violence. See Housing Act 1996 ss. 175 and 177.

¹⁹ The Court of Appeal refused to reduce the damages awarded to Mr Osei-Bonsu from £30,000 to £2,000 due to the fact that the local authority had made a specific agreement as to quantum. However, it did reduce his award to £10,000 by virtue of the provisions in s.27(7)(a) for the mitigation of damages. It was Mr Osei-Bonsu's violent conduct towards his wife that had led to his eviction.

²⁰ The unintentional irony of counsel's argument in *Burton* is so compelling it deserves note. The local authority argued: 'that there is no contractual principle which entitles one party to the contract to free itself of its obligations without notice to the other party' (contra *Monk*, where a joint tenant must be allowed to serve notice without notice to the other joint tenant); 'It would be repugnant to the law of contract if one party could unilaterally deprive the other party of its rights' (contra *Monk* where this result was demanded by contractual principles). The authority for the applicability of these contractual principles is *Monk*! Finally: 'A secure tenancy is a creature of statute' (contra *Monk* where it is just a type of lease and must be subject to the general law and all statutory provisions were irrelevant).

²¹ Law Com No 284 at 3.12, 3.73, 4.8-4.11, 6.18, 6.19-6.20. The report provides for an alternative approach to the common law in several other particulars. As noted in the text below, it treats accommodation agreements as indefinite in term. It will be possible to have any number of joint tenants; it is recommended that the old restriction to four imposed by the s. 34(2) Law of Property Act 1925 should be abrogated: *Ibid* at 11.12.. It rejects the application of the formality requirements for the creation and transfer of legal and equitable interests in land to occupation agreements: *Ibid* at 7.4, 13.26-13.32. It detaches the giving of notice from the nominal periods of the periodic lease: *Ibid* at 9.52, 9.57, 9.112. The approach reaches its limits when questions of third party rights are in issue: *Ibid* at 3.102, 6.20, 13.29.

²² *Ibid* at 2.4, 2.10, 3.4(3), 4.3(1), 7.1(2) & (3), and at 2.11(3), 3.2-3.6, 3.28, Part 4, and Part 7. Particular emphasis is placed upon the application of the Unfair Contract Terms in Consumer Contract Regulations 1999 to occupation agreements.

²³ *Ibid* at 3.11, 5.8, 5.53. The alteration must be in favour of the occupier as the requirement of two months notice is a compulsory minimum term, i.e. a term that sets out the minimum rights of the occupier, *Ibid* at 3.29, 8.21-8.25, 8.94, 9.16, 9.41, 9.57.

²⁴ It should be remembered that the landowner would be free to change the statutory default term if this was considered unacceptable.

²⁵ *Ibid* at 3.80-3.81, 15.20-15.22, 15.44. The approach to anti-social behaviour to include violence and harassment in the home is recommended at 15.11. A 'special term' is one imposed for social policy reasons by the government, and the parties to the agreement will not be able to alter it or contract out: *Ibid* at 3.29(3), 8.70-8.73.