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DENISE ROWE v NORMA FALCKE MATTHEWS (2001)

QBD (McCombe J) 22/3/2001

LANDLORD AND TENANT

RESIDENTIAL TENANCIES : PROTECTED : ASSURED : TRANSITIONAL PROVISIONS :
RESIDENT LANDLORD : RESTRICTED CONTRACTS : S.12 RENT ACT 1977 : VARIATION :
INCREASE IN RENT : RENT CONTROL : S.34 AND S.36(2) HOUSING ACT 1988

A consensual variation made after 15 January 1989 concerning the rent payable under what had until then been a restricted contract had the effect of creating a new assured tenancy under the Housing Act 1988.

Appeal by the defendant ('R') from an order of HH Judge Rose by which he ordered her to give up possession of a basement flat ('the premises') and gave judgment for the claimant ('M') for arrears of rent. R went into possession of the premises in about 1985. Her landlord lived in another flat in the building, and hence s.12 Rent Act 1977 applied so as to exclude R's tenancy from protection under that Act. In 1990, and again in 1993, R and the landlord consensually agreed an increase in the monthly rent. By 1997 the landlord had ceased to reside in his flat. He subsequently assigned the reversion to M. The issue for determination was whether at the material time R was an assured tenant under the Housing Act 1988, in which event R's appeal was bound to fail, or whether she was a protected tenant under the 1977 Act, in which event her appeal was bound to succeed. That issue in turn depended upon the effect of s.36 of the 1988 Act upon R's restricted contract in the light of the agreed variation as to the rent in 1990. By s.36(1) of the 1988 Act a tenancy or other contract entered into after 15 January 1989 could not be a restricted contract unless entered into in pursuance of a contract made before that date. By s.36(2) of the Act, where any variation was made after 15 January 1989 as to the amount of the rent payable under a restricted contract, the contract fell to be treated "as a new contract entered into at the time of the variation ..." R contended that the 1988 Act preserved protected tenant status for those whose interests potentially might become protected by some event after 15 January 1989, as in the instant case when the landlord went out of occupation of his flat.

HELD: (1) The scheme of the transitional provisions of the 1988 Act, and in particular s.36 in the context of the instant case, was properly to be read as depriving R of her restricted contract with effect from the 1990 rent variation and conferring upon her a new tenancy which, by reason of s.34 of that Act, was necessarily an assured tenancy. (2) R's contract had never been a protected tenancy, and when it lost its status as a restricted contract, s.34 of the 1988 Act simply ensured that it did not gain some other protection under the 1977 Act that it had never had and which the 1988 Act ordained should not be capable of arising after 15 January 1989.

Appeal dismissed.

Andrew Short instructed by Alan Edwards for the appellant. Jonathan Manning instructed by Bury & Walkers for the respondent.

LTL 26/3/2001 (Unreported elsewhere)

Judgment Approved subject to editorial corrections - 14 pages

Rowe v. Matthews

Queen's Bench Division

McCombe J.

March 22, 2001

(2001) 33 H.L.R. 81¹

Introduction

11 Under the provisions of section 12 of the Rent Act 1977 (*Encyclopedia*, para. 1-4203), a tenancy was not a protected tenancy if there was a "resident landlord", as defined. To qualify as resident, the landlord had to reside in another dwelling-house which was part of the same building (or flat) as that in which the tenant's premises were situated. Save where the premises in which both the landlord and the tenant reside were a flat, the building was not to be a purpose-built block.

12 On cessation of residence by the landlord, as defined so as to disregard certain periods of non-residence, a tenancy so excluded from protection would become fully protected: see Rent Act 1977, s.12 and Sched. 2.

13 Section 20 of the Rent Act 1977 provided that where a tenancy was excluded from protection by the resident landlord, it was to be treated as a restricted contract.

14 The Housing Act 1988 introduced assured tenancies to replace the former Rent Act regime. By section 34(1) of the Act (*Encyclopedia*, para. 1-2488), and subject to certain exceptions, a tenancy entered into on or after the commencement of the Act (January 15, 1989) could not be a protected tenancy.

15 The exceptions are set out in section 34(1) and include a tenancy:

"(a) . . . entered into in pursuance of a contract made before commencement of this Act; or

(b) . . . granted to a person (alone or jointly with others) who, immediately before the tenancy was granted, was a protected or statutory tenant and is so granted by the person who at that time was the landlord (or one of the joint landlords) under the protected or statutory tenancy . . . "

16 Likewise, by section 36(1) of the 1988 Act, no tenancy or other contract entered into after January 15, 1989, can be a restricted contract unless entered into in pursuance of a contract made before that date.

17 Sections 36(2) and (3) govern whether or not a variation of the terms of a restricted contract amounts to the grant of a new letting. Where the variation is of the rent payable, there will be a new contract unless either it results from the exercise of the Rent Tribunal's jurisdiction or it is by agreement in order to achieve a rent which has been registered by the Rent Tribunal.

¹ Paragraph numbers are as assigned by the court.

Facts

- H8 From 1985, the defendant was the tenant of a basement flat in a house. Her landlord lived in another flat in the house. In 1990, the landlord married the claimant. The defendant's rent was increased by agreement on two occasions: first, in April 1990 from £390 to £396 per calendar month and, secondly, in April 1993 to £472 per calendar month.
- H9 At some time between 1995 and 1997, the landlord and the claimant moved out of their flat. In 1997, the landlord transferred his title in the defendant's flat to the claimant. In July 1999, the claimant served a notice of increase in rent to £1,085 per month with effect from August 19, 1999. The notice was served on the basis that the defendant was an assured tenant under the Housing Act 1988.
- H10 The defendant fell into arrears and the claimant issued proceedings for possession. The defendant argued that, once the landlord and the claimant had moved out, she had become a protected tenant under the Rent Act 1977 rather than an assured tenant. Accordingly, the notice of increase in rent was of no effect and that there were accordingly no arrears. The judge held that the defendant was an assured tenant and granted an order for possession and a money judgment for the arrears of £7,567.
- H11 The defendant appealed to the High Court on the ground that she was a protected tenant.

Held (dismissing the appeal):

- H12 By section 36(2) of the Housing Act 1988, the effect of the rent increase in April 1990 was that defendant ceased to have a restricted contract; at that point, she entered into a new tenancy; as that tenancy was entered into after the commencement of the 1988 Act, by virtue of section 34 of the 1988 Act, it could not be a protected tenancy; accordingly, the defendant was an assured tenant.
- H13 *Andrew Short* for the appellant, instructed by Alan Edwards.

Jonathan Manning for the respondent, instructed by Bury & Walkers.

- 1 MCOMBE J.: I have before me an appeal, brought by permission of the learned judge below and, so far as necessary by Mr Justice Moreland, from an order of His Honour Judge Rose made in the Wandsworth County Court on December 6, 2000 whereby (as I understand it) the learned judge ordered the defendant to give up possession of premises at 6 Royal Park Crescent, Holland Park, London W11 by January 3, 2001 and gave judgment for the claimant in respect of rent arrears of £7,567.48. I say "as I understand it" because there is not before me a drawn copy of the order of the learned judge below. There is merely an agreed note of the judge's judgment in granting a judgment along the lines of that which I have indicated.
- 2 The sole question arising upon the appeal is whether, in the events that have happened, the defendant was at the material time an assured tenant within the meaning of the Housing Act 1988 or a protected tenant under the Rent Act 1977. It is accepted by both parties that if the former is the case, the claimant was entitled to possession and judgment for rent arrears as ordered; if the latter is the case, the appeal should be allowed, and the possession order and money judgment should be set aside.

- 3 There is no dispute on the facts. From about 1985 the defendant was the tenant of a flat in the basement of 6 Royal Park Crescent. The then landlord was a Mr John Falcke who resided in another flat at the premises. In February 1990, Mr Falcke married the claimant. They continued to reside for part of their time at the premises, but at some time between 1995 and 1997 they ceased to use their flat as a residence and, in the latter year, Mr Falcke transferred No. 6 (including of course the reversion expectant upon the defendant's tenancy) to the claimant.
- 4 During the course of the tenancy the rent was increased consensually on two occasions: first, in April 1990 from £390 to £396 per calendar month and then in April 1993 to £472 per calendar month. By a notice dated July 1, 1999, the claimant sought to increase that rent, with effect from August 27, 1999, to £1085 per calendar month. Whether she was entitled to do so or not depends upon the outcome of the issue that I have identified. That outcome turns upon a difficult exercise of statutory construction, upon which I have read and heard excellent arguments from Mr Andrew Short for the defendant and Mr Jonathan Manning for the claimant. I think that it is helpful to approach the problem on a chronological basis in an endeavour to ascertain how the statutory provisions in force, at each relevant time, impacted upon the circumstances of this tenancy.
- 5 When the defendant took her tenancy it was 1985 and the relevant enactment was the Rent Act 1977. Mr Falcke, the landlord, resided in another flat in the building. Section 12 of the 1977 Act provided as follows :

"12.—(1) Subject to sub-section (2) below, a tenancy of a dwelling house granted on or after 14 August 1974 shall not be a protected tenancy at any time if—

- (a) the dwelling house forms part only of a building and, except in a case where the dwelling house also forms part of a flat, the building is not a purpose built block of flats and;
- (b) the tenancy was granted by a person, who, at the time when he granted it occupied as his residence another dwelling house which—
 - (i) in the case mentioned in paragraph (a) above, also forms part of the flat; or
 - (ii) in any other case also forms part of the building; and
- (c) subject to paragraph 1 of Schedule 2 to this Act, that all times since the tenancy was granted the interest of the landlord under the tenancy has belonged to a person who at the time he owned that interest, occupied as his residence another dwelling house which—
 - (i) in the case mentioned in paragraph (a) above also formed part of the flat; or
 - (ii) in any other case, also formed part of the building."

Section 20 of the same Act provided

"20. If and so long as a tenancy is, by virtue only of section 12 of this Act, precluded from being a protected tenancy it shall be treated as a restricted contract notwithstanding that the rent may not include payment for the use of furniture or services."

- 6 At this stage, a short departure into the history of these two provisions is necessary. Section 12 was the provision in the 1977 Act which contained the well known "resident landlord" exception to Rent Act protection, introduced originally by the Rent Act 1974. That "exception" was introduced into the Rent Act scheme in 1974 by the insertion, into the Rent Act 1968, of a new section 5A which was in similar terms to section 12 of the 1977 Act. The effect of section 5A was to preclude

a tenancy that would otherwise be a protected tenancy from being so protected. Instead, the tenant of a resident landlord was given a more limited protection by way of regulation of rent and the potential postponement of the operation of a notice to quit served by his landlord. That more limited protection was originally afforded to certain occupants of premises who were granted, by contract, a right to occupy premises (not necessarily a tenancy) in consideration of a rent which included payment for the use of furniture or services. Such contracts were called "Part VI Contracts": see section 70 of the 1968 Act. That section provided as follows:

"70-(1) Subject to the following provisions of this section, this part of this Act applies to a contract whether entered into before or after the commencement of this Act, whereby one person grants to another person, in consideration of a rent which includes payment for the use of furniture or services, the right to occupy as a residence a dwelling to which this part of this Act applies. . . ."

- 7 In section 101 of the 1968 Act there is to be found another case to which the modified protection of Part VI applied. This was the case where a tenant, properly so called, having exclusive occupation of some accommodation, shared some other accommodation with the landlord or in common with the landlord or others. Section 101 provided as follows:

"101. Where under any contract—

- (a) A tenant has the exclusive occupation of any accommodation, and
- (b) the terms on which he holds the accommodation include the use of other accommodation in common with his landlord or in common with his landlord and other persons, and
- (c) by reason only of the circumstances mentioned in paragraph (b) above or by reason of those circumstances and the operation of section 5A of this Act, the accommodation referred to in paragraph (a) above is not a dwelling house let on a protected tenancy

Part VI of this Act shall apply to the contract notwithstanding that the rent does not include payment for the use of furniture or for services."

- 8 Thus, from the outset, the 1968 Act contained two classes of occupation that attracted the protection of Part VI of that Act, namely those provided within Part VI itself and those to which Part VI applied by virtue of section 101.
- 9 It was a feature of *both* those classes of case that they were never capable of becoming protected tenancies, with the additional security afforded elsewhere in the 1968 Act, by virtue of supervening circumstances. However, with the introduction of the resident landlord exception in 1974, Parliament also brought that type of tenancy within the limited protection of Part VI, but by a different legislative device from that applied by Part VI itself and by section 101. It did this by the insertion of section 102A, which provided for the tenancy to be "treated" as a contract to which Part VI applied for the purposes of that Part (and apparently for no other purposes), "if and so long as" the tenancy was precluded from being a protected tenancy by reason only of the resident landlord exception. That section reads:

"102A-(1) If and so long as a tenancy is by virtue only of section 5A of this Act, precluded from being a protected tenancy, it shall be treated for the purposes of Part VI of this Act as a contract to which that Part applied notwithstanding that the rents may not include payment for the use of furniture or for services."

- 10 With the enactment of the Rent Act 1977 these two legislative devices were carried forward into the Act by rather different words. The 1977 Act called the old Part VI contracts "Restricted Contracts." Section 19 of that Act provided:

"19.—(1) A contract which this section applies is, in this Act, referred to as a "restricted contract."

(2) Subject to section 144 of this Act, this section applies to a contract, whether entered into before or after the commencement of this Act, whereby one person grants to another person, in consideration of a rent includes payment for the use of furniture or services, the right to occupy a dwelling as a residence. . . ."

- 11 Section 21 provided that where a tenant shared accommodation with his landlord, "the contract is a restricted contract notwithstanding that the rent does not include payment for the use of furniture or services." (c.f. section 101 of the 1968 Act) (emphasis added).

- 12 The resident landlord exception was still catered for by "treating" the tenancy as a restricted contract. Section 20 read as follows:

"20. If and so long as a tenancy is, by virtue only of section 12 of this Act, precluded from being a protected tenancy it shall be treated as a restricted contract notwithstanding that the rents may not include payments for the use of furniture or for services."

- 13 Thus, while tenancies were subject to the resident landlord exception they would appear not to be restricted contracts but fell to be treated as such. Of course, the words "for the purposes of Part VI of this Act" that had appeared in section 102A of the 1968 Act had now been omitted and nothing similar was included.

- 14 This 1977 Act was a consolidating Act and an Act to "give effect to recommendations of the Law Commission": see the preamble. The relevant paper that led to such amendments being recommended was Law Commission Paper No. 81, presented to Parliament in April 1977. The Commission expressly addressed this point in paragraph 10 of the Paper, a copy of which is annexed to this judgment. It recommended that, in re-enacting section 102A of the Rent Act 1968, a tenancy falling within that section should be treated, for all purposes, as a contract to which Part VI of the 1968 Act applied. Effect was sought to be given to this recommendation by omission of the words (or anything like them) "for the purposes of Part VI" in the new section 20 of the 1977 Act. It is perhaps unfortunate that in attempting to indicate this intention the words were not harmonised to accord precisely with section 101 of the 1977 Act. I think, however that I must treat the enactment of section 20 in these circumstances as demonstrating the intention that, for all practical purposes of the 1977 Act, tenancies subject to section 20 were to be treated as restricted contracts notwithstanding the absence of any amendment to section 19 of the Act.

- 15 In these circumstances, first the Housing Act 1980 and then the Housing Act 1988 were enacted. The 1980 Act removed the power of the Rent Tribunal to defer the operation of a Notice to Quit, given in respect of a restricted contract entered into after 28 November, 1980, see *Woodfall, Landlord and Tenant* loose-leaf edition, Volume 3, Revision 30 January 1994, at paragraph 23.118. Then the 1988 Act introduced the provisions, with which this case is principally concerned, whereby the protections afforded by the Rent Acts were to be phased out for the future. Those provisions are to be found in Chapter 5 of the 1988 Act. The chapter phases out various regimes of statutory protection in sections 34 to 39 of the Act. In broad, those provisions prevent the creation of new interests, conferring protection under

the old regimes, on or after the commencement of the 1988 Act, namely January 15, 1989.

- 16 Protected tenancies are dealt with in section 34 which provides as follows: I quote only a short extract of sub-section (1) of that section to give the gist of what Parliament enacted.

“34.(1). A tenancy which is entered into on or after the commencement of this Act cannot be a protected tenancy, unless—

- (a) it is entered into in pursuance of a contract made before commencement of this Act; or
- (b) it is granted to a person alone or jointly with others who immediately before the tenancy was granted, was a protected or statutory tenant and if so granted by the person who at that time was the landlord (or one of the joint landlords) under the protected or statutory tenancy; or
- (c) it is granted to a person (alone or jointly with others) in the following circumstances. . . .”

and there then follow certain other immaterial exceptions.

- 17 “Restricted Contracts” were dealt with in section 36. Following the amendment, introduced by the 1977 Act and in enacting section 20 with the omission of words that had been used in section 102A of the 1968 Act, it seems to me that I must treat all such tenancies as restricted contracts for all purposes of the 1977 Act, however inelegantly that change was introduced.

- 18 Section 36 of the 1988 Act provides in its material parts as follows:

“36-(1) A tenancy or other contract entered into after the commencement of this Act cannot be a restricted contract for the purposes of the Rent Act 1977 unless it is entered into in pursuance of a contract made before the commencement of this Act.

(2) If the terms of the restricted contract are varied after this Act comes into force then, subject to sub-section 3 below,—

- (a) if the variation effects the amount of the rent which under the contract, is payable for the dwelling in question, the contract shall be treated as a new contract entered into at the time of the variation (and sub-section (1) above shall have effect accordingly); and
- (b) if the variation does not effect the amount of the rent which, under the contract is so payable, nothing in this section shall effect the determination of the question whether the variation is such as to give rise to a new contract. . . .”

- 19 It will be seen that no tenancy or other contract entered into after January 15, 1989 can be a restricted contract for the purposes of the Rent Act 1977, unless entered into in pursuance of a contract made before that date.

- 20 As at January 15, 1989 the defendant’s tenancy was long extant and therefore remained unaffected by these provisions at that stage. It remained a “restricted contract.” In April 1990, however, the rent payable was varied consensually—not by a variation within the meaning of section 36(3) of the 1988 Act.

- 21 Section 36 is concerned with contracts which are restricted contracts for the purposes of the Rent Act 1977. Having found that this tenancy was a restricted contract for all purposes of that Act, then it seems to me that when section 36(2) refers to a “restricted contract” it is in terms referring to contracts of the type that subsisted immediately before the 1990 rent increase in this case.

- 22 Thus, this “contract” is to be treated as a contract entered into at the time of the variation and, expressly sub-section (1) of section 36 had effect accordingly. Thus,

the contract can no longer be a restricted contract. The question now is whether section 34 has effect, because of section 36(2), as if the defendant's *tenancy* was "entered into" after January 15, 1989 and could not therefore become a protected tenancy when the landlord ceased to reside at the premises at some date between 1995 and 1997.

Clearly section 36(2) does not expressly so state. The question is whether the effect of section 36(2) was spent, in preventing a new restricted contract arising, or does its effect continue, so that, for all purposes of the 1988 Act, the contract treated as entered into in 1990, is treated also as also as being the contract whereby the defendant's *tenancy* was "entered into" for the purposes of section 34(1).

The competing arguments are essentially these. The defendant's submits:

- (1) Each of the transitional provisions in sections 34 and following of the 1988 Act deals with a separate species of tenancy or contract. It is not right, therefore, to transfer the provisions set out for one species of tenancy or contract to another provision, dealing with a different species of tenancy or contract, without an express cross-reference in the statute itself. Mr Short for the defendant points me, for example, to one such case: see section 34(1)(d) of the 1988 Act. Where such cross-references are not found, it is submitted, each statutory scheme should be seen as self-contained.
- (2) The words in brackets at the end of section 36(2)(a) are limiting provisions. It is said that, if the words do not limit the application of that paragraph to section 36(1) they have no purpose at all.
- (3) The approach to be detected in the 1988 Act (especially in section 34) is to preserve protection of protected tenancies for those who already have such tenancies or for those whose interests are capable of becoming protected tenancies, e.g. by a resident landlord vacating the premises.
- (4) The phasing out provisions are designed to take effect at different at speeds and there is no need to assume that by removing from a tenant "restricted contract" protection it was thereby intended to remove the *potential* for full protection as a protected tenant, in a case where a resident landlord goes out of occupation.
- (5) It is strange that a scheme whereby section 20 of the 1977 Act conferred some modified protection to a tenant, while there was a resident landlord, should be interpreted as removing rights when there was no longer a resident landlord.
- (6) It is arbitrary that a tenancy would be protected if the landlord went out of occupation the day before the relevant rent variation, but would be deprived of that status if the landlord moved the day after the variation.

For the claimant, it is argued as follows:

- (1) There is no reason why the sections of chapter 5 of the 1988 Act should be strictly compartmentalised as submitted by the defendant.
- (2) The policy of the Act was to phase out Rent Act protection. It is inconsistent with that policy to take a tenancy out of one category of such protection, leaving it potentially liable to fall into another.
- (3) The prime purpose of section 34 was to prevent the creation of new protected tenancies after January 15, 1989.
- (4) Anomalies of the type identified by the defendant in the point (6) of the submissions already summarised, if anomalous at all, often arise where cut-off dates arise under statutes.

(5) It would be strange if Parliament had intended the possibility that rent control might fall to be reimposed upon a tenancy after a significant period in which such control had not existed.

25 For my part, the points made on the part of the claimant, set out in the summarised points (1), (2) and (3) above weigh heavily with me. I think that the scheme of these transitional provisions is properly to be read as removing this tenancy from its status as a restricted contract with effect from the 1990 rent variation. The old contract went and the defendant must be regarded as having entered into a new contract of *tenancy* at the time of the variation. That tenancy, therefore, was entered into after the commencement of the 1988 Act. Thus, by virtue of section 34, it cannot be a protected tenancy. That is not, in my view, failing to have regard to the separate phasing provisions of chapter 5. This contract was never a protected tenancy. It was a "restricted contract" under the 1977 Act. When it lost its status as such, section 34 prevented it gaining some other 1977 Act protection, which it had never had, and which the 1988 Act ordained should no longer be capable of arising after January 15, 1989.

26 For the reasons given, I do not accept Mr Short's submission that the approach of the 1988 Act was to preserve protected tenants' status for those whose interests potentially might become protected by some event after January 1989: I think the approach was quite to the contrary. I see the force of Mr Short's submission, as to the effect, as a matter of language, of the words in brackets in paragraph (a) of section 36(2), but I do not think that that feature outweighs the other considerations which militate in favour of a conclusion opposite to that for which he contends. In my view therefore, for reasons which are essentially the same as those recorded as being given by the learned judge below, the claims properly succeeded in the County Court and this appeal must be dismissed.

Annex (see para. 14 above)

**The Law Commission
(LAW COM. No. 81)
RENT BILL**

Report on the consolidation of the Rent Act 1968, Parts III, IV and VIII of the Housing Finance Act 1972, the Rent Act 1974, sections 7 to 10 of the Housing Rents and Subsidies Act 1975 and certain related enactments

Presented to Parliament by the Lord High Chancellor

By Command of Her Majesty

April 1977

LONDON

HER MAJESTY'S STATIONERY OFFICE

Cmnd 6751

Page 10:

"10. Section 5A of the Rent Act 1968, which was added by Schedule 2 to the Rent Act 1974, provides that a tenancy of a dwelling-house granted by a resident landlord (broadly speaking, a landlord who resides in premises which are in the same building as the dwelling house) will not, in most cases, be a protected tenancy for the purposes of the Act of 1968. Section 102A of the Rent Act 1968, also added by Schedule 2 to the Rent Act 1974, provides that such a tenancy is to be subject to the provisions of Part VI of the Act of 1968 (which relate to furnished lettings) even though the rent does not include a payment in respect of furniture or services.

Section 102A(1) provides that the tenancy is to be treated "for the purposes of Part VI" of the Act of 1968 as a contract to which that Part applies. What is not quite clear is whether it is to be treated as a Part VI contract for other purposes, for example for the provisions of Part II of the Housing Finance Act 1972 about rent rebates and rent allowances.

Part II of the Act of 1972 provides, among other things, that rent rebates and allowances are available in respect of Part VI lettings. Section 26 of that Act defines "Part VI letting" as meaning a contract to which Part VI of the Rent Act 1968 applies. In the case of tenancies falling within section 102A, they will be tenancies (which for this purpose can be taken to be the same as contracts) to which Part VI applies, unless the words "for the purposes of Part VI," in section 102A(1), are read as limiting that section to attracting Part VI of the Rent Act 1968 but no other statutory provisions. In our view the courts would be most unlikely to adopt this construction of section 102A, but we accept that there is some ambiguity. We think it ought to be removed.

We recommend that in re-enacting section 102A of the Rent Act 1968 a tenancy falling within the section should be treated for all purposes, as a contract to which Part VI of the Rent Act 1968 applies. Effect is given to this recommendation in clause 20 of the Bill."