THE MODEL LEASE: A Comparative Study

William Bowe
Conference on Landlord-Tenant
Relationship
University of Chicago Law School
November, 1966

Copyright 1966 by William Bowe

INTRODUCTION

Changing the basic legal documents that govern the rights and obligations of landlords and tenants is the most direct and certainly one of the most effective ways to correct the serious imbalance which now exists in favor of landlords. The righting of this imbalance can be accomplished by the wide adoption of more tenant oriented "model leases." The model lease stands in contrast to the tenancies at will and lessor drawn form leases which at present predominate in cities over the entire country.

The inequities in the tenant's position as lessee have been brought about in large part by the inequality of bargaining power facing urban slum dwellers. Freedom of contract in this area has become largely a fiction. As one commentator has remarked, the oral tenancy at will and lessor drawn dorm lease give the tenant "the right to pay rent and precious little else."[1] One way in which this inequality of bargaining power may be changed is through the growth of well organized tenant unions. It is likely that tenant unions, through bargaining agreements with landlords, will be able to impose in model leases sensible obligations on lessors, while freeing tenants from unreasonable burdens.

In exploring the model lease this paper will first examine a typical lessor oriented form lease in wide use throughout the City of Chicago. The contrast between this document and potential model leases will become strikingly apparent as specific provisions are noted in one model lease currently in use.

THE LANDLORD ORIENTED FORM LEASE

Typical of leases weighted heavily in favor of landlords is the Chicago Real Estate Board's form lease for heated, unfurnished apartments. The form was copyrighted in 1936 and is in wide use throughout Chicago. The lease is a catalogue of do's and don'ts for tenants and exculpatory clauses for landlords. Although originally intended as a bargainable document, many of the provisions which were once negotiable have become standard and relatively inflexible boilerplate provisions. Undoubtedly this has resulted from practice; few residential lessees are in a position to bargain for the terms of the lease.

The form lease states that the lessee has examined the premises and is satisfied with the physical condition of the apartment. Unless otherwise indicated, his taking possession is conclusive evidence that he has received the premises in good order and is also an acknowledgment that the lessor has made no promise to make repairs or decorate. Illinois courts have held that the landlord is not responsible for defects in the premises at the time of letting unless they are latent and the landlord has been guilty of fraud and deceit.[2] It has also often been held that the landlord is under no duty to repair defects unless he has expressly contracted to do so.[3] Since there is no implied warranty of habitability[4] this clause effectively forecloses any later complaints by tenants that the premises are in disrepair.

The Real Estate Board form lease provides that the lessee may not sublet or assign the lease without the written consent

of the lessor. The lessee also agrees not to permit any radios or musical instruments in the apartment to disturb other occupants of the building. In what is surely a throwback to the middle 30's, the lessee agrees that he will not play the radio between the hours of 11:00 P.M. and 8:00 A.M. Presumably the lessee still remains free to watch the Late Late Show with the volume approaching the threshold of pain.

Upkeep and repairs during the term of the lease are made the exclusive responsibility of the tenant. He is required to keep the premises "in good repair and free from vermin and rodents, all at his own expense." Should the lessee fail to do so, the lessor may make the repairs, exterminate vermin and present the tenant with the bill. Although it is clear that a landlord may not transfer to the tenant obligations imposed by housing codes, he may successfully pass along the economic responsiblity for repairs made.

If a lessor sues a lessee for damages to the premises it is not a defense to assert that there was no evidence as to the state of repair at the beginning of the lease since, as mentioned above, the lessee has already stipulated that he has received the premises in good repair.[5] Thus, deterioration of an apartment, other than ordinary wear and tear or fire damage, can be charged to the tenant unless he meticulously lists all evidence of disrepair at the time he enters into the lease.

If the lessee is worried about the security of his family and personal property he may install locks and bolts, but only

with the lessor's permission. The lessor then may keep the locks and bolts when the tenant vacates.

One of the most important areas of concern for tenants is the extent of a landlord's tort liability. The Real Estate Board lease offers little solace for the tenant. The form provides that the lessor is free from liability for all damages suffered by reason of the building's disrepair, no matter how negligent the lessor may have been. Over the years it has been argued again and again that such an exculpatory clause is unconscionable and should be declared void as against public policy. In O'Callaghan v. Waller & Beckwith Realty Company,[6] the Illinois Supreme Court passed on the question. In spite of arguments that such a provision in a form lease was clear evidence of a gross inequality of bargaining power, the court in an opinion by Justice Schaefer upheld the validity of such clauses. A vigorous dissent by Justices Bristow and Daily condemned the majority's holding and protested "against the destruction of the common law rights of a significant proportion of the population of this State."[7] The dissent was sufficiently strong to result in the State Legislature's passage three months later of a bill making such exculpatory clauses void as against public policy and wholly unenforcible.[8] Yet, in spite of the fact that the clause has been voided, the Real Estate Board form lease still contains it. It is an open question as to how many seriously injured tenants have given up thoughts of a suit against a negligent landlord after having had the unenforcible clause in the fine print pointed out to them.

Another exculpatory clause in the form lease requires the lessee to waive all claims for injuries or damages resulting from the landlord's failure to furnish cold or hot water or heat. The lease only obligates the lessor to provide heat from the first day of October until the 30th day of April of the succeeding year. This is in spite of an explicit provision of the Municipal Code of Chicago requiring heat to be available when needed from September 15th to June 1st.[9]

If the lessee permits the premises to remain vacant for ten days, or if any covenant in the lease is breached, the lessee's right to possession terminates without notice or demand. Rents may continue to accrue, however, since the lessor has full power to determine whether or not the lease shall be terminated. The lessor also has power to use whatever physical force is necessary to remove such a tenant, with or without process of law.

The lessee is required to waive all notices of elections by a lessor, demands for rent, notices to quit, demands for possession, and any demands or notices required to be served under applicable state statutes. The acceptance of rent after it falls due, knowledge of a breach by the lessee, or other waivers of the lessor's right to act without demand or notice, are not binding on a landlord unless in writing.

If the tenant vacates or abandons the apartment it is provided that the landlord may, if he chooses, relet the apartment without in any way releasing the tenant from liability under the lease. If there is any rent deficiency in the reletting, the lessee must make it up and in addition pay all expenses for decorating,

repairs, replacements and commissions. Should the tenant breach the covenants of the lease he must pay all costs, expenses, and attorney's fees which may be incurred by the lessor. All of the lessor's rights and remedies are cumulative and the use of one or more remedy does not waive the right to use any other remedy.

The form lease also includes various rules and regulations, the violation of which constitutes a full breach of the lease. Among other things, it is a violation to beat rugs on the porch, sweep dirt into the halls, permit children to play in court areas, place flower pots on window sills, keep a parakeet, keep a baby carriage in the front hall, or, if you live on the first floor, to do your wash on any day of the week except Monday.

Finally, the Real Estate Board lease includes a confession of judgment by the lessee. The tenant agrees to make an irrevocable appointment of any attorney in the United States to waive, in the lessee's name, issuance of process, service and trial by jury, and to confess judgment in favor of the lessor.

One would be strained indeed to think up provisions favorable to landlords not included in the Real Estate Board form lease. As noted above, the lease even retains for psychological effect covenants long held to be unenforcible and void.

THE MODEL LEASE

One way to avoid the typical landlord-weighted form lease is to draft a model lease which allocates to the landlord some of the obligations now on the tenant. Such a lease would include

provisions and covenants which are designed to ease the burden on the tenants. At the same time the lease is designed to hold tenants to reasonably high standards of conduct. It should be noted, however, that due to widely varying conditions in the urban housing market, it is unlikely that any one form lease can ever be completely successful in meeeting all possible situations. Thus, the model lease should be thought of as a document which may be freely amended, as the case may warrant. It should not be elevated to the status of a constitution, with an inviolate mystique which deters any attempt to change its provisions. Ultimately, the purpose of a model lease is to secure tenants the most favorable living conditions possible and, in pursuit of this end, the model lease may in fact be most helpful when used as a bargaining tool, with tenant oriented clauses freely traded off where necessary in order to achieve more important concessions.

If a model lease is ever to achieve wide use it will probably come through the efforts of well organized tenant unions,[10] since unless there is a radical increase in tenant bargaining power there can be no hope of avoiding the typical landlord oriented clauses. Therefore, it is likely that in most model lease situations there will be "bargaining agreements" between landlords and tenant unions. These agreements generally recognize the union as the negotiating and bargaining agent of the tenants, but they also impose various other direct obligations on lessors. The model lease may incorporate by reference all the bargaining agreement's provisions. Thus, included in the lease would be all the grievance procedures and tenant remedies adopted in the bargaining agreement. The model lease, therefore, may be thought of as two parts, the bargaining agreement and the lease itself.

The Bargaining Agreement

Before considering the specific covenants of the model lease, it is necessary to consider the provisions likely to be found in the bargaining agreement, since this will often include the major tenant oriented provisions. In the bargaining agreement originally used in organizing the Old Town Garden Apartments in Chicago, the landlord had to recognize the union as the sole collective bargaining agent of the tenants. The landlord then had to agree to deduct from the rent of each tenant the tenant's union dues. The Lessor was given 90 days to bring the building into compliance with all applicable statutes, ordinances, rules and regulations. At the end of this period, the income and accounting records of the building had to be made available for inspection by the tenant union, presumably to allow a check to be made of the landlord's compliance with their provision of the agreement.

The landlord also was required to make a number of specific improvements. Among the landlord's obligations were the following:

1. Maintenance of an extermination service. This provision relieves the present burden on the tenant to exterminate insects and vermin where he is unable to show that other units in the building are similarly afflicted. Under the Chicago building code, the tenant is required to exterminate vermin unless he can show that the vermin is common to the entire apartment building.[11] The model lease is intended to shift this burden back to the landlord even when only single units are involved.
2. Redecoration of all apartments and common areas with

non-lead base paint as needed, but at least every two years and before each new tenancy.

3. Maintenance of adequate garbage cans and provisions for daily janitorial services, so that common areas are kept in a condition of order, cleanliness and safety.
4. Rewiring of the entire building so that the electrical installations meet the requirements of the electrical code of the City of Chicago for buildings constructed in 1966.
5. Installation of a two-way intercom system to connect each apartment with its entrance-way.
6. Maintenance of a guard service 24 hours a day, 7 days a week.
7. Installation of locks on all doors leading from entrance-ways to hallways and on the doors of all common areas including the rooftops, laundry rooms, and basement exits, and the replacement of locks at the tenant's expense when a key is lost or stolen; but at the landlord's expense when a tenant vacates an apartment, or when otherwise necessary.
8. Provision of landscaping, snow removal service, and adequate lights for all common grounds.
9. Institution of a tuck pointing program and installation of screens and window shades for all apartment buildings. (The Chicago Building Code at present contains no references to window shades and requires screens only for the first four floors of any building).[12]

lease will be permitted under the collective bargaining agreement will undoubtedly vary with each agreement. Certainly, this area poses one of the greatest problems for tenant unions and the model lease.

The bargaining agreement also protects the tenant from the vicissitudes caused by temporary interruptions in income. If the tenant is a regular recipient of funds from any public or private welfare agency, and funds have been withheld for any reason, or if the tenant is engaged in a duly authorized work stoppage called by a labor organization, the landlord can take no action against the tenant for nonpayment of rent for a period of 90 days from the date upon which the rent is due.

Also, in vivid contrast to the Real Estate Board form lease, the bargaining agreement states that the landlord warrants and guarantees that the premises are suitable for human habitation, and will not fall below this standard for the duration of the agreement due to negligence or inattention on the part of the landlord. Since an inexperienced tenant might miss some of the more latent deficiencies in an apartment,the tenant union has the right to examine all premises at the beginning of their occupancy.

Should the landlord default on any of the agreement's provisions, the tenants' remedies are broad and varied. They may deposit their rents with a union approved third party pending resolution of the dispute. The union is also accorded the right to sue on behalf of the tenants in order to compel the landlord to repair the building. Or, grievances may be presented to the landlord by tenants or the tenants' union steward. Then, if the

grievance remains unsettled it is submitted to a fact finding board of four members, with the landlord and tenant union each appointing two members. If there is still no settlement, a fifth person, approved by the union, is appointed as a Chairman. The board then makes its recommendations for settlement. All of the tenants' remedies are made cumulative and nonexclusive, as were the landlord remedies in the Real Estate Board lease. Unlike the Real Estate Board lease, there is no waiver of notices. Instead there is a provision that notices must be written and served on all parties to the agreement.

Finally, in what is clearly a significant provision (indeed, perhaps a concession), the tenant union covenants that it will initiate a thorough program of tenant education. Thus, the tenant union explicitly recognizes that the improvement of urban living conditions is not achieved solely by imposing greater obligation on the landlord. Rather, it is seen that tenant behavior is just as crucial as the landlord's in determining whether or not widespread improvement in housing conditions is possible.

The Lease

The lease itself is comparatively short and repeats many of the clauses and covenants found in the bargaining agreement. There is ample room for the listing of all damage to the premises prior to the tenant's occupancy. The signing tenants also authorize the union to bring suit or take whatever action is necessary to enforce the lease or bargaining agreement, and the landlord specifically covenants the tenant quiet enjoyment of the premises.

A separate list of "Rules and Regulations" is appended to the lease and incorporated therein. The rules and regulations pertain mostly to housekeeping functions, and are generally aimed at common areas, the upkeep of which is likely to benefit all of the tenants in the apartment building.

CONCLUSION

As can be seen from the foregoing discussion the development of the model lease concept can bring about a revolution in the traditional landlord-tenant relationship. At the present time, it would appear that tenants will have sufficient bargaining strength to work this revolution only when they are organized into effective tenant unions. Continuing organization of tenant unions at this point appears probable. This development raises serious questions as to the propriety of infringing on the existing prerogatives of the landlord. Moreover, the collective bargaining agreements must survive what will undoubtedly be severe tests in the courts. Ultimately, it is the court that will have to decide the extent to which collective bargaining agreements and the model lease can encroach upon the traditional prerogatives of landlord management.

One thing is certain. Any model lease, especially the major provisions must be well tailored to meet the needs of the specific housing situation involved. In this light, proponents of the model lease should take pains to insure that history does not repeat itself. The model lease must never become the unalterable document which characterizes the Real Estate Board's 1936 form lease. The

distinguishing element of the model lease is its flexibility. The model lease should be viewed as a negotiable document which ultimately will impose necessary obligations on the landlord, while relieving the tenants of unreasonable burdens.

FOOTNOTES

1. Levi, Julian, "The Legal Needs of the Poor" at p. 2, paper delivered at the National Conference on Law and Poverty, Washington, D.C. June 23, 1965.

2. Ciskoski v. Michalsen, 19 Ill. App. 2d 327, 152 N.E. 2d 479 (1958).

3. Moldenhauer v. Krynski, 62 Ill. App. 2d 382, 210 N.E. 809 (1965).

4. Eskin v. Freedman, 53 Ill. App. 2d 144, 203 N.E. 2d 24 (1964).

5. Pioneer Trust and Savings Bank v. Western Tire Auto Stores, Inc. 325 Ill. App. 575, 60 N.E. 2d 280 (1945).

6. 15 Ill. 2d 436, 155 N.E. 2d 545 (1959).

7. _Id_. at 552.

8. Ill. Rev. Stat. Ch. 80 § 15a (1966).

9. Chicago, Ill., Municipal Code ch. 96, § 4 (1965).

10. See Hillman, "Tenant Unions in the Common Law," paper presented to the Conference on the Landlord-Tenant Relationship, University of Chicago Law School, November 17-18, 1966.

11. Chicago, Ill., Building Code §§ 78-18.1 and 78-18.2 (1966).

12. Chicago, Ill., Building Code §§ 78-17.1 and 78-17.4 (1966).

New Self-Respect in Ghetto

Tenant Unions' Value Cited

By Robert Gruenberg

The rise of tenant unions will not only affect the economic bargaining power between landlord and renter, but serve to impart a new feeling of self-respect in the ghetto dweller.

That was the theme of an address to be delivered Thursday by Gilbert Cornfield, Loop attorney and a leader in negotiating tenant union contracts covering 5,000 to 6,000 apartment dwellers in Chicago.

A total of 10,000 persons here are covered by such contracts, with negotiations continuing among a number of real estate firms specializing in "inner city" properties.

CORNFIELD was among the speakers at the opening session of a two-day Conference o nthe Landlord-Tenant Relationship at the University of Chicago Law School.

The conference was organized by a number of third-year law students encouraged by the success of a similar meeting last year on consumer credit and the poor.

Approximately 250 persons — including civil rights leaders and mortgage bankers — are expected at the sessions.

Cornfield said the individual ghetto tenant is "impotent" in bargaining with a landlord not only because of obvious differences in economic strength but because the slum dweller lacks "the power and psychological contacts" outside his own community that the landlord possesses.

By organizing into unions, Cornfield said, the tenant gains strength to deal with the landlord on a more nearly equal status, and participates in decisions affecting his own future.

A PREDICTION that the courts will eventually take a liberal attitude toward tenant unions was made by Miss Peggy A. Hillman, one of the law students, in a paper prepared for delivery Thursday.

"Given the history of (labor) unions in the courts and the widespread publicity accorded housing problems, the courts will, albeit belatedly, permit direct action by the tenant unions," she wrote.

Another student, William Bowe, in a paper discussing the "model lease," pointed out that leases are "weighted heavily in favor of landlords" and cited the current Chicago Real Estate Board's form lease, dating to 1936, as typical. He suggested that a model lease, like a labor contract, must be drawn to meet specific situations in different buildings, and should be "amended" when necessary.

If it is to achieve wide use, he said, "it will probably come through the efforts of well-organized tenant unions."

CHICAGO SUN-TIMES
Fri., Nov. 18, 1966 11

Tenant Union Drive Brings Slum Sales

By Basil Talbott Jr.

The organization of slum dwellers into tenant unions to bargain with their landlords may lead to a new kind of property ownership in blighted areas of the city, a labor lawyer maintained Thursday.

In its brief experience, the Chicago-born tenant union movement has already caused some property owners to give up any thought of profit and seek buyers who are concerned only with rehabilitation, he said.

History of the movement spurred by Dr. Martin Luther King Jr. and the United Auto Workers, was traced by Gilbert A. Cornfield, during a conference on the landlord-tenant relationship at the University of Chicago.

Prefer To Sell

Cornfield, a partner in Kleiman, Cornfield and Feldman, said that faced with the pressures of tenant unions "several large landlords prefer withdrawal from this emerging set of new relationships." The property owners are seeking to sell large blocks of their property to not-for-profit organizations dedicated only to fixing up buildings, he said.

Cornfield explained that he was speaking from experience of the Union to End Slums organized in East Garfield Park and Lawndale on the city's West Side. He has been instrumental in negotiating "collective bargaining contracts" between renters and real estate interests in the West Side ghetto.

Under such contracts the landlord has agreed to provide better maintenance and to fix up his property. He has also agreed to respect rent strikes if his buildings are not refurbished within a set period of time.

"The bargaining agreement cannot turn the West Side into a neat model Swedish housing development," he continued, "but it can squeeze sufficient monies out of the present discriminating rent structure to rapidly make the buildings safe and liveable."

Seek Foundations

However, since landlords are not "out there to make a modest return on their investment," they are looking more and more to not-for-profit foundations.

This presents a challenge, Cornfield said. The trick is to merge the not-for-profit ownership concept with the advantages of grass-roots participation that have come from the tenant union movement.

This challenge is especially crucial, he said, because studies have shown the price tag on rehabilitation of the West Side would be only one-third the cost of replacing the current buildings with high-rises.

NEWS, Monday, Nov. 14

UC Parley On Tenant Rights Set

Tenants' rights will be explored Thursday and Friday at a conference sponsored by the University of Chicago Law School.

The meeting—first of its kind—will examine new legal, social and legislative approaches to a problem that has wracked Chicago's slum neighborhoods this year.

Topics will include formation, function and legal position of tenant unions, rights of public housing residents, building code enforcement and the legal status of landlord-tenant relationships.

AMONG the speakers will be Gilbert Cornfield, a labor lawyer who helped negotiate the nation's first tenant-landlord agreement last July.

The pact was signed at the time of the West Side riots by the East Garfield Park Union to End Slums and a real estate company, Condor and Costalis.

Others on the program are Julian Levi, U. of C. professor of urban studies, State Rep. Robert E. Mann (D-Chicago) and John Baird, president of Baird & Warner, a real estate company that was a target of civil rights marches in the west suburbs.

Questions of model leases, withholding rents, receiverships and activities of government and private institutions will be taken up in workshops.

IMMEDIATELY after the conference, the Legal Defense and Education Fund of the National Assn. for the Advancement of Colored People will open a three-day meeting on "Law and Poverty."

Topics here will include problems of credit abuse, and rights of welfare recipients and public housing residents.