

Transfers of Residential Rental Property in the Nordic Countries – the Specific Danish Example

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1 Background – The Significance of the Underlying Law for the Obligation to Offer the Property to the Tenants and the Specific Danish Example

Just like any other assets, residential rental property can be transferred. However, consideration for the tenants can justify applying special rules. The Nordic countries' regulations on this issue, which is of practical importance, differ. In particular Section 102 of the Danish Rent Act (Lejeloven) is unique. This provision determines when a transfer of a residential rental property is subject to an obligation requiring the landlord to offer to sell the property to the tenants. The provision is brief and, on the face of it, easily understood. However, a more detailed analysis of the provision reveals that it gives rise to numerous complex problems of interpretation and the provision cannot be regarded as appropriate in all its aspects. In this article there is an analysis of the Nordic rules on the transfer of residential rental property on the basis of Section 102 of the Danish Rent Act and the general law of obligations.

In most cases a residential rental property will have a significant financial value. For various reasons the owner of a property may want to take advantage of this value by selling it or otherwise transferring it to a third party. On this point residential rental properties do not differ from other kinds of assets. However, a residential rental property is characterised by being real property and by a need to have special regard for the tenants who live in the property. There can also be political reasons for regulating transfers of residential rental property.

The primary focus of this article is on Danish law since it is here that special rules have been adopted on the landlord's obligations in connection with some forms of transfers of residential rental property. However, the law in Norway is also considered, since in Norway there is a special provision in Section 8.6 of the Norwegian Rent Act (*Husleieloven*); see below. The Swedish law on this is essentially based on the general principles of the law of obligations and thus it is not discussed in detail here, see further below note 9. Finally, the legal position in England and Germany is briefly described below section 3 for comparable reasons.

In Denmark, a residential tenancy agreement is covered by the Danish Rent Act as an ongoing agreement giving both parties both rights and obligations. The landlord is entitled to the rent that is agreed or laid down and they must maintain the property in accordance the agreement and the legal requirements. The tenant is entitled to have the property that is the subject of the tenancy agreement maintained and they must pay the rent agreed or laid down.¹ There is thus a mutually binding agreement.²

1 If the rent is too high, e.g. because it has not been determined in accordance with Section 5(1) of the Danish Regulation of Private Housing Act (*Boligreguleringsloven*), the tenant can refer the case to the Rent Tribunal (*Huslejenævn*); see Section 15(1) of the Danish Regulation of Private Housing Act. Thereafter the case can be brought before Housing Court (*Boligretten*); see Section 43(1) of the Danish Regulation of Private Housing Act (except in Copenhagen where the referral is to the Rent Appeal Tribunal; see Section 44(1)).

Under the general rules of Danish law there can in principle be a change of creditor (assignment) without consent.³ If one of the parties to a tenancy agreement wants to prevent an assignment without consent, they must agree this with their counterparty, otherwise the counterparty will be entitled to assign their rights in accordance with the general rule. There are many exceptions to this rule, but these exceptions are not generally relevant here.⁴

However, one of the exceptions should be considered. If there is an assignment of rights under a mutually binding agreement, the equivalence between the considerations of the parties can affect the right to assign the rights.⁵ Whether this is the case will depend on a concrete evaluation of the parties and the nature of the consideration (often performance in kind) in the mutually binding agreement. The rules in Chapter XII of the Danish Rent Act are important here, as these significantly restrict the tenant's right to pass their tenancy rights to another (allow another to use the rented property).⁶ The landlord's right to make a change of creditor (assignment) is not separately regulated in the Danish Rent Act. The general principle must therefore be that a landlord can assign to a third party their right to receive rent without the consent of the tenant.

As for the assignment of the parties' obligations under a tenancy agreement that is governed by the Danish Rent Act, the general property law principles on change of debtor apply in parallel with the special provisions in the Danish Rent Act. In Danish law there are no general statute rules on change of a debtor. The legal basis therefore consists primarily of case law and legal doctrine. On the basis of these authorities it can be stated in Danish law there is a general principle that a change of debtor requires consent.⁷ If a landlord

Both instances can determine a rent that is lower than that agreed. On the regulation of rent in general, see *Niels Grubbe & Hans Henrik Edlund: Boliglejeret* (2008) p. 174 ff.

2 *Halfdan Krag Jespersen: Lejeret 1* (1989) p. 13 f.

3 *Bernhard Gomard: Obligationsret, 3. Del, Ed. 2* (ed. Torsten Iversen) (2009) p. 71; and *Bo von Eyben, Peter Mortensen & Ivan Sørensen: Lærebog i obligationsret II* (2014) pp. 39 and 41. The law is the same in the other Nordic countries. For Norway see *Viggo Hagstrøm: Obligasjonsrett* (2011) p. 885. According to the *Principles of European Contract Law (PECL)*, Article 11:102(1) it is also the default position that rights can be assigned without consent: 'Subject to Articles 11:301 and 11:302, a party to a contract may assign a claim under it'. An assignment needs not take any prescribed form; see Article 11:104: 'An assignment need not be in writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses'.

4 An overview of the most important of these exceptions can be found in *Bo von Eyben, Peter Mortensen & Ivan Sørensen: Lærebog i obligationsret II* (2014) p. 46 ff.

5 *Bo von Eyben, Peter Mortensen & Ivan Sørensen: Lærebog i obligationsret II* (2014) p. 48 ff.

6 For further on mutually binding agreements (including on subletting which does not amount to a change of debtor) see *Bo von Eyben, Peter Mortensen & Ivan Sørensen: Lærebog i obligationsret II* (2014) p. 20 ff.

7 *Bernhard Gomard: Obligationsret, 3. Del, Ed. 2* (ed. Torsten Iversen) (2009) p. 153 ff.; and *Bo von Eyben, Peter Mortensen & Ivan Sørensen: Lærebog i obligationsret II* (2014) p. 22 and (on mutually binding agreements) p. 24. For the law in Norway, see *Viggo Hagstrøm: Obligasjonsrett* (2011) p. 869. The general principle that a change of debtor requires

wishes to sell a residential rental property to a third party, as a rule this can only be done with the consent of every tenant.⁸

In landlord and tenant relations there may be a special need to make it easier for landlords to assign their obligations to third parties without the consent of the creditors (tenants). Such a provision, which exists for example in *Norway*,⁹ could be justified by regard for the transferability of property. For the tenant the identity of the landlord is not usually important. As long as a new landlord fulfils the obligations undertaken by the former landlord a change of debtor is generally unproblematic.¹⁰ Obviously it is necessary to take account of cases

consent is also apparent from PECL Article 12:101 ('A third person may undertake with the agreement of the debtor and the creditor to be substituted as debtor, with the effect that the original debtor is discharged. A creditor may agree in advance to a future substitution. In such a case the substitution takes effect only when the creditor is given notice by the new debtor of the agreement between the new and the original debtor'). Section 7(1) of the Danish Rent Act also protects the tenants' rights under the Act without any registration in the land registry. 'Any' must be interpreted as including registration by creditors as well as assignees; see *Halfdan Krag Jespersen's* commentary on Section 7(1) of the Danish Rent Act in Karnov (2015) note 70, but see *Folketingstidende* 1978-79, Tillæg A, spalte 2438. Thus a tenant can address any claims under the Danish Rent Act to the new owner of the residential rental property and by virtue of Section 7(1) of the Danish Rent Act obtain significant mandatory protection; see Section 8 of the Danish Rent Act.

8 On the requirements for such consent and on change of debtor in general, see *Bo von Eyben, Peter Mortensen & Ivan Sørensen: Lærebog i obligationsret II* (2014) p. 22 ff.

9 *Christian Fr. Wyller: Boligrett* (2009) p. 313: 'In the case of the landlord's obligations, the general principle in contract law is that parties cannot free themselves from their obligations by putting another debtor in their place. According to this principle a landlord can only assign their obligations under a tenancy agreement if the tenant consents. However, upon the assignment of a rental property there is clearly a need for the seller to be able to extricate themselves from the relationship, and normally the landlord's obligations are such that it is less important who performs them. The main rule in Section 8-6, first indent, thus also covers the landlord's obligations; after assignment it is the assignee (buyer) and only the assignee that the tenant has a relationship with' (author's emphasis). See also *Viggo Hagstrøm: Obligasjonsrett* (2011) p. 869: 'With long-lasting tenancy contracts it must be assumed that when the subject of the tenancy agreement [the property] is assigned, the landlord's obligations with regard to future maintenance etc. can be transferred to the new owner so as to relieve the former landlord of responsibility, at least unless the tenant has proper grounds for refusing consent to the change of responsibility. The principal support for such a rule is Section 8-6 of the Norwegian Rent Act which allows the transfer of a landlord's obligations upon change of ownership unless the assignee's circumstances give reasonable grounds for requiring the assignor to continue to be responsible together with the assignee' (author's emphasis). 'Reasonable grounds' primarily means that there is significant risks that the new landlord will not fulfil its obligations; see *Viggo Hagstrøm* op. cit. The Swedish legislation on residential tenancies (Chapter 12 of the Land Law Code (*Jordabalken*)) contains no special rules on the landlord's assignment of rental property. Thus the general principles of the law of obligations apply.

10 See *Henry Ussing: Enkelte Kontrakter* (1946) p. 24: 'The landlord has a general right to assign ownership of property that is subject to a tenancy agreement, but in such a case the first landlord must ensure that the assignee is bound to respect the tenancy agreement'; and 'It is appropriate that the usual obligations of the landlord should be borne by the owner as the landlord alone, or at least most easily, can fulfil the obligations ... The tenants' interests do not require the responsibilities of the assignor to be upheld. On the contrary it is generally best for the tenants that the obligations should be borne by the owner of the

where the new owner is unwilling or unable to fulfil the obligations of the former owner.¹¹ But the question is whether regard for landlords' right to dispose of their property should lead to derogation from the general principle requiring the agreement of creditors to an assignment of rights.

It is clear that an inflexible requirement that all the tenants of a residential rental property must consent to the transfer of the former landlord's obligations could be very burdensome for the landlord, particularly if there are numerous tenants. On the other hand, consent could be given tacitly or, depending on the circumstances, it may be evidenced by a tenant's passivity (see below), which can make it easier for the landlord.

Neither the Danish Rent Act nor its *travaux préparatoires* expressly addressed the question of whether the provisions on the obligation to offer the property to the tenants are exhaustive. Nor does there appear to be any published case law on the subject. Instead, what is decisive is that restrictive rights associated with real property are normally transferred without consent.¹² The assignee must fulfil the obligations that were previously borne by the assignor and, in the case of tenants' rights under the Danish Rent Act, without the tenants' rights having to be registered in the land registry; see Section 7(1), first sentence. However, the assignment itself can take place without waiting for the consent of the individual tenants.¹³ Thus the general principle requiring consent for a change

property'. The obligations that Ussing refers to being borne by the assignees of a property are 'the future obligations, the fulfilment of which necessarily or naturally requires ownership of the rented property. The obligations also include at least ensuring the tenants undisturbed access to the property, the obligation to maintain the property and the obligation to reimburse the tenants for improvements to the property upon termination of the tenancy, where the landlord has such an obligation'. See also *Henry Ussing: Dansk Obligationsret – Almindelig Del* (1946) p. 351: 'Furthermore, it is assumed that *the landlord of real property can assign the property with such effect that the maintenance obligations and similar obligations under a tenancy agreement are transferred to the new owner*' (author's emphasis).

11 For Norwegian law see *Christian Fr. Wyller: Boligrett* (2009) p. 314.

12 *Bo von Eyben, Peter Mortensen & Ivan Sørensen: Lærebog i obligationsret II* (2014) p. 36.

13 Rights that the tenant has obtained under an agreement with the landlord are not protected under Section 7(1), first sentence, of the Danish Rent Act. These rights, e.g. non-termination (see *U.1983.626 I/V*) can thus lapse in accordance with the general rules on the extinction of rights and priority rules; see also Section 1 of the Danish Registration of Property Act (*Tinglysningsloven*). In relation to these specially agreed rights it can be argued that the obligation to offer the property to the tenants indirectly protect tenants, but this protection is not the purpose of the provisions and such protection could in any case be more appropriately given by expanding the scope of Section 7(1), first sentence, of the Rent Act so as to cover agreed rights. On Section 7 of the Danish Rent Act and its relation to the general principle of consent to a change of debtor, see *Bo von Eyben, Peter Mortensen & Ivan Sørensen: Lærebog i obligationsret II* (2014) p. 36 f. See also the general provisions in Section 3(1) of the Danish Registration of Property Act and Section 573(1) of the Danish Administration of Justice Act (*Retsplejeloven*) The latter provision, which applies to compulsory auctions of real property, states: 'If a property is subject to easements, user rights, payment of charges, annuities or similar obligations, which have priority above all mortgage debts, the property shall be offered for sale *subject to taking on such obligations* or redeeming the property of such burdens in addition to the amount bid at auction'

of debtor is modified here by another general principle on the transfer of restrictive rights attached to real property.

While a landlord can assign their rental property to a third party without the consent of the individual tenants, the rules on the obligation to offer the property to the tenants make it indirectly possible for tenants to hinder a change of debtor. However, if the tenants either cannot or will not take over the property with a view to changing the form of ownership into cooperative housing, the rules are not of much help. But the most important characteristic of the rules is probably that, pursuant to Section 105 of the Danish Rent Act, they provide mandatory protection for tenants.¹⁴ Consent to a change of debtor in accordance with the general principles can be agreed in advance, tacitly or, depending on the circumstances, by the passivity of the creditors.¹⁵ In contrast, a tenant cannot validly exclude the possibility of becoming a member of a cooperative housing association as long as the deadline for acceptance under the rules on the obligation to offer the property to the tenants has not expired; see *U 2006 3281 H (T:BB 2007 168)*.

This Danish case concerned a residential rental property with 22 rental apartments which was sold ‘or order’ by a conditional conveyance signed in November 2002. The purchase price was DKK 9.1 million and the conveyance was to be made final on 31 December 2002. The sale was conditional on the tenants not exercising their right to buy the property after setting up a cooperative housing association pursuant to the provisions in the Danish Rent Act on the obligation to offer the property to the tenants. Under the agreement between the seller and the buyer it was up to the buyer to carry out the offer procedure, and on 12 to 14 February 2003 a letter concerning the offer was distributed or sent to the tenants. On 20 February 2003 the buyer’s lawyer also sent a declaration to the tenants, according to which they could refrain from taking over the property on a cooperative basis. By 14 March 2003 12 of the tenants had sent back the declaration to the lawyer, indicating that they did not want to take over the property. On 7 April 2003 a cooperative housing association was formed and several of the tenants revoked their earlier declarations that they did not want to take over the property. When the buyer argued that the declarations were valid and could not be revoked, the cooperative housing association brought proceedings against the buyer claiming conveyance of the property in accordance with the terms on which the buyer had bought it.

The High Court ruled in favour of the buyer. However, the Supreme Court upheld the claim of the cooperative housing association that the seller, buyer and a company to which the buyer had transferred the right to the conveyance should each work towards the conveyance of the property to the cooperative housing association, arguing as follows:

(author’s emphasis). On the provision in general, see *Lars Lindencrone & Erik Werlauff: Dansk retspleje* (2011) p. 502 f.

14 The same applied to the original provisions on the obligation to offer the property to the tenants; see Section 57b(9) of the Danish Rent Act then in force.

15 *Bo von Eyben, Peter Mortensen & Ivan Sørensen: Lærebog i obligationsret II* (2014) p. 22 f. However, passivity in itself is not normally sufficient to result in change of debtor; on additional requirements see *op. cit.* p. 23.

‘An offer to the tenants pursuant to Sections 100 ff. of the Rent Act on the transfer of the property to cooperative ownership does not in itself give individual tenants a sufficient basis for deciding whether they have the possibility for and interest in becoming a member of a cooperative housing association to acquire the property. Section 103(1), third sentence, provides for a period of at least 10 weeks in order to ensure that the tenants have enough time to obtain expert advice and together develop a proper basis for the discussion and negotiation necessary to decide on the offer.

Against this background, Section 105 of the Rent Act, according to which the provisions in Sections 100-104 may not be derogated from to the disadvantage of the tenants, must be understood as meaning that *an individual tenant cannot validly exclude the possibility of becoming a member of a cooperative housing association to acquire the property as long as the deadline for acceptance under the rules on the obligation to offer the property to the tenants has not expired*. The declarations of the tenants given in this case were thus not binding on those tenants and the cooperative housing association’s acceptance of the offer of 11 April 2003 thus fulfilled the terms of Section 103(5) of the Rent Act in that at least half the tenants of the rental property were members of the association at the time of acceptance.

The obligatory offer to the tenants under the Rent Act was an obligation of the seller. The conveyance between the seller and the buyer, and later the buyer’s company was conditional on the tenants not exercising their right to take over the property on the basis of cooperative ownership. It was left to the buyer to carry out the offer procedure, and the buyer had control over the company formed by him. On this basis the case was correctly brought against both the seller and the buyer’ (author’s emphasis).

As can be seen, the Supreme Court regards compliance with the deadline for acceptance as a condition for validity. As the judgment shows, the legal effect of failing to comply with the deadline for acceptance can mean that the property must be transferred to the cooperative housing association. The judgment does not address the legal consequences in cases where a property is not offered to the tenants, i.e. where the obligation to offer the property to the tenants is not fulfilled. In other words, if the obligation to offer the property to the tenants is fulfilled, compliance with the deadline for acceptance of the offer in Section 103(1), third sentence, is a condition for validity and under Section 105 this is mandatory protection for the tenants. On the legal consequences if the obligation to offer the property to the tenants is not fulfilled, see section 2.4.6 below.

It can be argued that tenants are sufficiently protected since the new landlord must fulfil the obligations of the former landlord – at least those tenants’ rights which, pursuant to Section 7(1), first sentence, of the Danish Rent Act are protected without being registered. Naturally there can be no guarantee that the new landlord will fulfil all the former landlord’s obligations, but in this case the public law supervisory rules or the rules disqualifying a person from carrying on the business of renting out real property are more appropriate forms of regulation.¹⁶ In any case the rules on the obligation to

¹⁶ The Danish Rent Act already contains disqualification rules; *see* Chapter XVIII A. For example an owner can be disqualified if they ‘repeatedly and seriously disregard the

offer the property to the tenants do not in themselves give certainty that the new landlord either can or will fulfil their obligations. However, it is clear that if the purpose of the obligation to offer the property to the tenants is to promote property ownership by cooperative housing associations (on the purpose of the rules see above), then these provisions are necessary.

None of the other Nordic countries' legislation has rules on the obligation to offer the property to the tenants.¹⁷ As stated above, property can be transferred in accordance with the general principles of the law of obligations, and in the case of Norway there can be change of ownership even without consent of the creditors; see Section 8-6 of the Norwegian Rent Act.¹⁸ On this point to the Danish legislation stands alone. This is not necessarily a problem, but it does provoke questions. In a proposal for a Danish Act on tenancy agreements in 2005 it was proposed that the rules on the obligation to offer the property to the tenants and a number of other rules should be repealed, but this proposal has not (yet) resulted in amendments to the legislation on tenancies.¹⁹

provision of this Act or the Regulation of Private Housing Act'. This topic is discussed in more detail in section 2.4.6.

- 17 On the Norwegian Rent Act, *see Christian Fr. Wyller: Boligrett* (2009) p. 312: 'A landlord is free to sell their property even if this is not laid down in a contract or in law; the right to sell follows from the law of property'. And further at p. 313: 'Change of ownership does not normally represent a breach of the conditions of the tenancy agreement, and the principle in the Section 8-6, first sentence, of the Rent Act is thus that the landlord can assign *all* their rights to the buyer upon changes of ownership' (author's emphasis). As for the landlord's obligations, in Norwegian law, in contrast to Danish law, the starting point is the principle of creditor agreement (*see Christian Fr. Wyller op. cit.*, p. 313), however refusal of consent must be properly justified (p. 314), for example specific knowledge or a reasonable fear that the new landlord either will not or cannot fulfil their obligations.
- 18 Section 8-6 of the Norwegian Rent Act states: 'Upon change of ownership a landlord may assign to the assignee the rights and obligations under a tenancy agreement. If the circumstances of the assignee justify, a tenant can require that the assignor shall be jointly liable with the assignee for the proper fulfilment of the obligations under their tenancy agreement, unless adequate security is provided. The tenant's demand for the assignor to be liable for fulfilment of the obligations must be made to the assignor within six months after the tenant has become aware of or ought to have become aware of the change of ownership'. *See also note 9.*
- 19 The proposal was drawn up by *Peter Mortensen & Ulrik Rammeskov Bang-Pedersen*, and was published by Ejendomsforeningen Danmark with financial support from Margot og Thorvald Dreyers Fond and Frederiksberg Grundejerforening on 28 September 2005. The aim was to create a modern regulation of landlords' and tenants' rights which should not disturb the financial balance between landlords and tenants; *see the terms of reference of the then Ministry of Social Affairs.* This was immediately countered by the Danish Tenants' Union (*Lejernes LO*) and Denmark's Tenants' Association (*Danmarks Lejerforeninger*) which, in a joint but unpublished note, were highly critical of most of the proposals not least the proposal to do away with the rules on the obligation to offer the property to the tenants. *See also Karin Laursen & Lars Langkjær: Spot på lejelovene* (2006), reviewed by *Hans Henrik Edlund* in U 2006 B p. 336 f., in which it was stated on p.7 that in its present form the obligation to offer the property to the tenants 'is in dire need of revision'. This need for revision has not become any less pressing in the years that have elapsed since; *see below.* *Peter Mortensen & Ulrik Rammeskov Bang-Pedersen's* proposal of 28 September 2005 may be found (in Danish) at "www.ejendomsforeningen.dk/multimedia/web_lejelovsforslag1.pdf".

As can be seen, the regulation of an owner's right to transfer a residential rental property differs significantly between the Nordic countries. In particular the Danish regulation differs from the others. Since 1975 the Danish Rent Act (which only applies to residential housing and not e.g. goods) has contained rules on the obligation of a current owner of a residential rental property who wishes to sell it, to offer to sell the property to the existing tenants if they have formed a cooperative housing association for this purpose.²⁰ Since then the provisions have been amended several times, most recently in 1991. The provisions on the obligation to offer the property to the tenants are important since they limit the landlord's scope for disposing of the property. Among other things, the aim of the provisions is to protect the interests of the tenants by preventing a landlord from freely transferring the rental property to others. On the purpose of the rules on the obligation to offer the property to the tenants, see above.

However, the Danish Rent Act also contains other provisions that are similarly aimed at protecting tenants. Where the boundaries lie between these provisions is not always clear. Moreover, in a number of areas the general principles of property law supplement the special rules of landlord and tenant law. The interaction between these various legal sources gives rise to a number of problems, some of which are analysed in this article.

Chapter XVI of the Danish Rent Act contains a long list of provisions on the obligation to offer the property to the tenants, including the properties that are covered; see Section 100. While the definition of which properties are covered and which are not is important, the present article focuses on the specific issue of the transfer of property. On the obligation to offer the property to the tenants in general, including those made pursuant to Section 100, see the works referred to in note 1, among others.

2 The Concept of a Transfer in Section 102 of the Danish Rent Act

2.1 The Historical Background – the Aim of the Obligation to Offer the Property to the Tenants

On 2 October 1974 the Minister for Housing put forward a proposal for an Act to amend the Danish Rent Act with regard to protection of tenants from

20 For the historical development in Denmark see, among others, *Maria Elena Klüver*: 'Redegørelse for reglerne om tilbudspligt efter lejeloven', *Justitia* 1998/1, p. 1 ff. See also the general critical comments of *Halfdan Krag Jespersen* in *Juristen* (1979) p. 349 ff., including on the relationship between the text of the legislation, the *travaux préparatoires* and statements made during preparation of the legislation (p. 352). On the obligation to offer the property to the tenants in the Danish Rent Act in general, see *Finn Träff & Rasmus Juul-Nyholm*: *Andelsboliger* (2011) p. 75 ff.; and *Mogens Dürr, Timmy Lund Witte & Kristin Jonasson*: *Boliglejemaal* (2010) p. 1149 ff. For a critical view of the rules on the obligation to offer the property to the tenants in the 1975 Act, see *Chr. Arnskov*: '1975-lejelovene', *U* 1975 B p. 207.

termination of their tenancies, tenant democracy and the right to exchange etc. This proposal did not contain a provision on the obligation to offer the property to the tenants, but during the first reading in Parliament a demand arose for such a provision to be considered in connection with the subsequent committee proceedings.²¹ An intervening general election meant that the legislative proposal had to be re-submitted after the election, on 24 January 1975. In contrast to the earlier proposal, this proposal contained a new Section 57b on the obligation to offer the property to the tenants. Among other things this amendment was briefly discussed in the subsequent report of the Parliamentary Housing Committee of 10 March 1975.²² The proposal, with the new provision in its then Section 57b, passed into law on 14 March 1975.

The purpose of the obligation to offer the property to the tenants is not easy to determine from the printed *travaux préparatoires*. The legislator's aids to interpretation of the provision are generally not very extensive. The commentary of 24 January 1975 on the draft law merely states that:

“The provisions [on the obligation to offer the property to the tenants] are intended to ensure for tenants the possibility of taking over the property on a cooperative basis in the event of its sale.”²³

This statement seems to indicate that, apart from a general political interest in supporting the interests of tenants, a desire to promote the cooperative housing form of ownership was the main reason for the original provisions.²⁴ In other words, the main purpose of the obligation to offer the property to the tenants is to give the tenants the possibility of setting up a housing cooperative where the landlord freely gives up their ownership of the property. In any case, the

21 See e.g. the statement of the member of the Parliament for the Social Democrats Mr. *Knud Damgaard*, reported in *Folketingstidende, Forhandlingerne 1974-75, No 3, spalte 861*: ‘It is the view of the Social Democrats that it would be right to ensure the pre-emption rights of tenants to take over the property where financial reasons or neglect by the landlord justify it. Such an arrangement, which should be discussed in more detail in committee could be set up under a concept similar to a housing cooperative’. Later in the debate Mr. Knud Damgaard referred to an earlier Social Democrat proposal from 1973 to amend the Danish Rent Act: *see spalte 890*. The debate on the introduction of provisions on the obligation to offer the property to the tenants generated strong criticism from the other members of Parliament; *see in particular the statement of Mrs. Kirsten Jacobsen reported in Folketingstidende 1974-75, 2. samling, Forhandler, Bind I, spalte 493-494*.

22 See *Folketingstidende 1974-75, 2. samling, Tillæg B, spalte 21 ff*. However, the report does not contain any statement of the purpose of the provision. On the amendment in general *see Chr. Arnskov: 1975-lejelovene, U 1975 B s. 205ff*.

23 *Folketingstidende 1974-75, 2. samling, Tillæg A, Bind I, spalte 283*.

24 There is no help on the purpose in Circular No 45 of 25 March 1975 on the Rent Act, which contained a statement of the most important provisions of the Act. Point 31 of the Circular on the obligation to offer the property to the tenants is merely a brief description (little more than a repetition) of the content of the provision.

provision applies much more widely than to situations ‘where financial reasons or neglect by the landlord justify it’.²⁵

The provisions on the obligation to offer the property to the tenants were amended for the first time by Law No 237 of 8 June 1979. While the basic purpose of the provisions had previously been in doubt, it was now made somewhat clearer that the aim was to promote the cooperative housing ownership.²⁶ By this amendment tenants’ right to demand transfer of the property as cooperative housing was extended; for example there was no longer a requirement for there to be a residents’ representative body in the property.²⁷

The provisions were amended again in 1980 (by Law No 170), in 1986 (by Law No 300) and finally in 1991 (by Law No 378). The amendments in 1986 and 1991 in particular were significant since they laid down that transfers of shares in limited companies owning residential rental property should be regarded as transfers of the property if thereby the acquirer of the shares obtained decisive influence over the company (1986) or a majority of the voting rights (1991); see Section 102(1), second sentence, of the current Danish Rent Act and further on this provision in section 2.3 below.

In the *travaux préparatoires* (Folketingstidende 1985-86, Tillæg A, spalte 4676-77) the reason for the amendment in 1986 was stated as follows:

“The rules on the obligation to offer the property to the tenants cannot be made illusory by the transfer of shares in the company, as there will be an effective change of ownership if there is a transfer of shares to such an extent that the acquirer of them obtains a majority in the company”.

It was also stated that:

25 See note 21. In a few other places during Parliament’s handling of the draft law it is possible to find statements that seem to support the idea that the aim was a combination of a general desire to protect tenants and to promote the cooperative housing ownership. See e.g. the statement of the Minister for Housing, reported in Folketingstidende 1974-75, 2. samling, Forhandler, Bind I, spalte 507, according to which the Minister ‘would not be able to reject, in advance, the Social Democrats’ wish [to introduce provisions on the obligation to offer the property to the tenants], on the basis that it is natural that those who rent could become owners in this way.’ This statement lacks precision, but must at least be said to express a tenant-friendly approach. Also, a large part of rented housing was in a very poor state of maintenance at that time – a problem that converting rented housing into cooperative housing could help redress. Many urban regeneration projects were being carried out, particularly in the major cities, in the early 1970s, but this justification no longer seems to have the same weight.

26 See e.g. the report of a working group appointed by the Minister of Housing *Andelsboliger – Finansiering af nybyggeri (Redegørelse afgivet i februar 1980 af en arbejdsgruppe nedsat af boligministeren)*, Bind I. While this report did not expressly state that the aim of the obligation to offer the property to the tenants was to promote cooperative housing, on p. 4 f. it contains a review of the rules on the obligation then in force which, in the context, must be understood as expressing this purpose.

27 On the extension of the provisions in general, see the publication referred to in note 26.

‘Thus the proposed amendment is intended to ensure that the rules on the obligation to offer the property to the tenants also apply to property companies, as it would be entirely unreasonable for them to be excluded from the rules.’

The main rule in Section 102(1), first sentence, of the Danish Rent Act on sale etc. also applies to property companies; the wording covers all companies, not just property owning companies.

Finally it was stated that, as the then Section 102(1), first sentence, was formulated:

“it is tempting to draw the apparently clear conclusion *a contrario* that any transfer of a property to a legal person (such as a limited company) other than by inheritance, was not subject to the obligation to offer the property to the tenants. According to the wording, read with the general principles of legal interpretation, the transfer of a property from a natural person ... to a legal person ... should not be covered by the rules on the obligation to offer the property to the tenants. Naturally, such a result cannot be allowed. The previous provision is therefore transferred to paragraph 2(d) of the same Section (102) where it more naturally belongs in a form that does not allow for the possibility of an unintended and clearly unreasonable interpretation.”

However, there is still doubt about interpretation in a number of areas, and the current wording of the provision cannot be said to be appropriate in all areas or capable of clear interpretation. According to its *travaux préparatoires*, the aim of the 1991 amendment, in which Section 102(1), second sentence (the current provision), was adopted, was merely to clarify the law; see Folketingstidende 1990-91, Tillæg A, spalte 6422.

2.2 *The Transfer of the Landlord’s Obligations in Danish Law – the Starting Point*

By way of introduction, Section 102(1) of the Danish Rent Act states that the obligation to offer the property to the tenants ‘applies when the property or a part thereof is *transferred*’. The concept of a transfer is normally understood very broadly as covering any voluntary transfer of a right by agreement.²⁸ The transfer means that the transferor no longer has (full) legal control over the property – in other words the ownership rights have been passed in whole or in part to a third party, either permanently or temporarily. Thus the general principle covers transfers by sale, inheritance, lending and letting (rental). However, according to Section 102(1) of the Danish Rent Act only certain forms of transfer are subject to the obligation to offer the property to the tenants.

One can discuss whether Section 102(1) of the Danish Rent Act should be interpreted restrictively; see e.g. *U 1993 868 H*. This case concerned the applicability of the obligation to offer the property to the tenants upon the

28 On the transfer of property in general, see *Bernhard Gomard: Obligationsret, 1. Del* (2006), p. 235 ff.

transfer of shares; see Section 102(1), second sentence, of the Danish Rent Act and for more detailed discussion see section 2.3 below. In this case there had been a transfer of the majority of the shares in a parent company which, as a significant asset, owned the majority of a property company. The High Court denied that there was an obligation to offer the property to the tenants on the grounds that:

“According to its wording and the stated purpose for the provisions ... the obligation to offer the property to the tenants does not cover the transfer of the majority of shares in a parent company whose subsidiary owns real property that is subject to the obligation. Even in a case such as this, where the activities of the parent company have largely been linked to the subsidiary company’s ownership of real property, there is not such causal link that there is a basis for applying the obligation to offer the property to the tenants by analogy” (author’s emphasis).

By way of introduction, the Supreme Court stated that Section 102(1), second sentence, of the Danish Rent Act lays down an obligation to offer the property to the tenants and it does not merely provide for a pre-emption right, so the provision involves ‘a significant intervention in the usual rights of ownership’. It went on to state that:

“On that basis the scope of the provision cannot be extended beyond can be established with certainty by its wording and purpose. The Supreme Court therefore finds that the provision cannot be regarded as being applicable in the present case where there has not been a transfer of shares in the company that owns the property, merely a transfer of shares in that company’s parent company” (author’s emphasis).

It can be seen that both the High Court and the Supreme Court agreed that the wording and purpose of the provisions should be interpreted restrictively. While the judgment only concerns Section 102(1), second sentence, it can be argued that the reasoning of the High Court and the Supreme Court is also relevant to the interpretation of Section 102(1), first sentence, particularly the comment of the Supreme Court that the situation involved ‘a significant intervention in the usual rights of ownership’. On the other hand there is the distinction which the Supreme Court introduced between an obligation to offer the property to the tenants and a pre-emption right, particularly for share transfers, since the obligation to offer the property to the tenants covers the property whereas the third party acquired shares and not the physical property.²⁹ However, regardless of this distinction the starting point for the interpretation of Section 102(1) must generally be restrictive since a pre-emption right significantly intervenes in an owner’s usual rights of ownership.

Section 102(1) applies to transfers by sale, gift, merger or exchange. Inheritance is separately dealt with in Section 102(2)(d), according to which only heirs that are legal persons are subject to the obligation to offer the

²⁹ *Jesper Bøge Pedersen*: Visse problemstillinger i relation til tilbudspligt efter lejelovens Kap. XVI, T:BB 2006:167, section 1.4.

property to the tenants; see below. In other words, the specific statement of what is to be regarded as a transfer pursuant to Section 102(1) limits the scope of the obligation to offer the property to the tenants. According to the wording of the provision, a landlord's transfer to a third party under a leasing agreement, for example, will not be covered. This means that a landlord can lease the property to a third party, for example so that the third party takes on the obligations relating to the rental property (maintenance etc.) and receives the rent from the tenants, without having to comply with the obligation to offer the property to the tenants.³⁰ This possibility can be particularly relevant where the landlord does not wish to transfer ownership of the rental property but merely needs to be relieved of the obligations associated with the property for a period.

Chapter IV of the Danish Rent Act contains provisions on the landlord's obligation to maintain the property to a specified extent. Section 24 states that Sections 21-23 cannot be derogated from to the disadvantage of the tenant, other than by an agreement whereby the tenant takes over responsibility for maintenance. Chapter IV is thus partly mandatory. The wording of Section 24 means that Sections 19-20 are not mandatory. Thus Chapter IV does not prevent a landlord transferring their obligation to maintain the property to a third party (but the general principles governing change of debtor must be complied with; see immediately below). Next, it is debatable whether the wording of Section 24 gives landlords the possibility of having a third party fulfil their obligations under Sections 21-23 which primarily concern the maintenance accounts.

According to the wording, a landlord can at least agree with the tenant that the tenant should take on the obligation to maintain the property.

The maintenance account will then be reduced proportionately (see Section 22(2)), or even done away with entirely if the tenant takes on full responsibility for maintenance. However, the obligation to operate a maintenance account cannot be transferred to the tenant; see the wording of Section 24 'apart from the tenant agreeing to take on the maintenance obligation'. There is therefore a question as to whether the reference in Section 24 to Sections 21-23 should rather have been to Section 19 as it is this section that concerns the maintenance obligation and not Sections 21-23.

It is not clear whether the landlord can agree with a third party to operate a maintenance account. The fact that Sections 21-23 state that operation of a maintenance account is the obligation of the 'landlord' is not decisive since the third party will simply be the new landlord in relation to operating the maintenance account. What must be more important is whether the transfer to the third party is to the disadvantage of the tenant (see the wording of Section 24); in other words it is necessary to make a concrete evaluation of the third party's capacity and willingness to operate a maintenance account.

30 On Chapter IV of the Danish Rent Act in general, see *Niels Grubbe & Hans Henrik Eddlund: Boliglejeret* (2008) p. 96 ff. In the specific case there was a transfer of rights (to payment of rent) and obligations (property maintenance etc.). On the general principles applicable to changes of debtor and creditor, see section 1 and immediately below.

The property can also be lent or let out. Here too, according to its wording, Section 102(1) does not apply. Given the purpose of the obligation to offer the property to the tenants the courts must be expected to require strong evidence of a loan and not, for example, a gift. On the other hand a landlord may not exchange one rental property for another without following the obligatory offer procedure.³¹

The rules are not entirely convincing. It is difficult to see why an exchange is subject to the obligation to offer the property to the tenants if letting, lending or leasing are not subject to the obligation. One could consider the statement in Section 102(1) as an exemplification, but the wording of the provision and its *travaux préparatoires* do not support this view. There must thus be an overwhelming assumption that the listing in the provision is exhaustive; see the discussion on compulsory auctions in note 32.

A landlord's sale or transfer of property without consideration (gift) to a third party is thus unquestionably subject to the obligation to offer the property to the tenants. A pure sale seldom gives rise to legal problems, but doubt can arise if the rental property is sold with a view to buying it back at a later date; see further below. Similarly it can be questioned whether there is an obligation to offer the property to the tenants in cases where there is a sale and lease-back of the property. In the former case there will be, at least for a period, a change of debtor which must in principle be subject to the obligation to offer the property to the tenants, but this is not necessarily so in the latter case.

If the original landlord leases the rental property immediately after having sold it to a third party, the third party will not be another landlord, merely another owner of the property. In this situation there are strong arguments for not regarding this transfer as being subject to the obligation to offer the property to the tenants. There is no real change in relation to the tenants since the original landlord continues to be the party with obligations (the debtor) and the whole purpose of the arrangement is that the original landlord should ultimately be the owner of the property. On the other hand a sale with a view to subsequent repurchase must be regarded as subject to the obligation.³² In this case the buyer will be the new landlord until the original landlord may decide to exercise their right under the buy-back clause, or alternatively until the new

31 A compulsory auction was previously expressly named as an example of a transfer that did not trigger the obligation to offer the property to the tenants. Since 'a compulsory auction cannot be regarded as a transfer' (*see* Folketingstidende 1978-79, Tillæg A, spalte 2473), this part of the provision was omitted in 1979 (L 1979 237).

32 This is not altered by the fact that, according to the general rules of interpretation in Danish law, a sale with a buy-back clause must be regarded as a renting out (and thus in principle not subject to the obligation to offer the property to the tenants) (*see* the general statement in the commentary to Bill No 113 on amending the law of copyright, put forward on 13 December 1984, Folketingstidende 1984-85, Tillæg A, spalte 2009: 'It must be regarded as a consequence of the general rules of interpretation of Danish law that there will also be 'letting' ... in the case of a sale and buy-back clause'). What is key is that there is a (possibly temporary) sale. If the aim of the parties in characterising their transaction as letting is to get round the obligation to offer the property to the tenants, what matters is the real content of the transaction and not the parties' description of their relations.

landlord exercises their right under the agreement to have the original landlord buy back the property.³³

Likewise the giving of gifts seldom gives rise to legal doubts. What matters here is that in principle there must be an enduring transfer of property rights without consideration being given for the transfer. In practice it can be difficult to distinguish this from a loan, which is not subject to the obligation to offer the property to the tenants, even though the terms themselves are clear. Ultimately the parties' basis for entering into the transaction must be included in assessing whether there is a gift or a loan. While the concept of a gift means that the donor cannot demand to have the gift returned at some later date (in which case it would not be a gift but a loan), there is nothing in principle to prevent a donor receiving a donation of the property back again at some time in the future.

The implementation of a buy-back is subject to the obligation to offer the property to the tenants since it amounts to a sale. The same applies to a new transfer by a gift, but the original transfer is only covered if it can be documented that it is a gift and that the person who transferred the rental property intended it to be a gift at the date of transfer. As in similar cases it is thus the real content of the agreement that is decisive and not the parties' characterisation of their relations. If, due to a subsequent transfer back, the original transfer is regarded as not being a gift because the requirement for an enduring transfer is not fulfilled, the transfer must instead be categorised as a loan for a limited period which comes to an end when the original landlord buys back the property. Loans for a limited period are not subject to the obligation to offer the property to the tenants.

However, it is still possible that the courts would consider such an arrangement to be an avoidance of the obligation to offer the property to the tenants – in other words that the 'loan' was in fact a gift at the time of the transfer – and thus that the original transfer was a gift and subject to the obligation to offer the property to the tenants.³⁴

2.3 Transfers to or from Legal Persons³⁵

In many cases one or more residential rental properties are owned by a legal person. Many private rental properties are owned by pension funds. Sometimes a legal person may want to sell a rental property or alternatively to carry out an internal reconstruction of their business so that the rental property remains within the corporate group but gets a new owner. To some extent Section 102

33 The example is only given to illustrate the scope of the obligation to offer the property to the tenants. There is thus no regard for the problems to which a sale and lease-back arrangement can give rise in property law. For a general review of this, see *Peter Mortensen: Indledning til tingsretten – tredjemandskonflikter vedrørende løsøre* (2008) p. 409 ff.

34 On gifts in general, see *Eigil Lego Andersen: Gavebegrebet* (1988).

35 See *Søren Andersen: Krav til – og problemstillinger i forbindelse med – opfyldelse af reglerne om tilbudspagt efter lejeloven, T:BB 2006:155 ff.*, section 4.

of the Danish Rent Act governs the applicability of the obligation to offer the property to the tenants in these situations. Thus according to Section 102(1), first sentence, a merger is regarded as a transfer for the purposes of Chapter XVI of the Danish Rent Act. Thus merging several companies into a single company with ownership of a rental property will trigger the obligation to offer the property to the tenants.

The opposite situation, where a company is split or de-merged so that one company becomes two or more companies, is not covered by the wording of the provision and thus it must be assumed is not subject to the obligation to offer the property to the tenants.³⁶ However, depending on the circumstances the splitting up of a company can be covered by Section 102(1), second sentence, on the transfer of a share majority to a new owner; on this provision, see below.

In an answer of 31 October 2002 in Case MKI/ J. nr. 81-109, the then Ministry of Social Affairs answered two letters from a lawyer on the application of the obligation to offer the property to the tenants when there is a corporate split.³⁷ The Ministry stated that the transfer of a property from one company to another (i.e. an asset transfer, on which see further immediately below) ‘ought to be treated as equivalent to a sale’. Section 102(2)(c) was found not to be applicable since the acquiring company had not previously been a co-owner. The reason for this answer was not particularly strong (‘ought’), and it is strange that the Ministry did not just state that the situation involved a sale, provided consideration was paid; see below.

The Ministry also stated that:

“the transfer of the properties from the split company A/S A to A/S B is not covered by the exceptions in Section 102(2)(c) of the Rent Act, as A/S B had

36 Compare with *Søren Andersen: Krav til – og problemstillinger i forbindelse med – opfyldelse af reglerne om tilbudspligt efter lejeloven*, T:BB 2006:155, section 4.1, where it is stated that: ‘the rules on the obligation to offer the property to the tenants also apply in the event of the splitting up of a company as, in my view, a splitting up of a company is a sale in which the purchase price takes the form of shares and perhaps also cash. In this case the obligation to offer the property to the tenants will arise in relation to property that is split off from the original company’. If the rental property is only one asset among many involved in a business transfer, the property will not necessarily be independently valued, so it will not be the purchase price that forms the basis for making the offer to the tenants. There must be a survey and valuation of the property; see Section 103(2), second sentence. The same will apply in other cases where there is no purchase price, for example in the event of merger or inheritance. See *Finn Träff & Rasmus Juul-Nyholm: Andelsboliger* (2011) p. 77.

37 See *Søren Andersen: Krav til – og problemstillinger i forbindelse med – opfyldelse af reglerne om tilbudspligt efter lejeloven*, T:BB 2006:155 ff., section 4.1 and note 17 of the article. The Ministry’s answer is of course merely advisory since the final decision is a matter for the courts; see the Ministry’s own reservation in its answer. Nevertheless, since the Ministry of Social Affairs was the ministry responsible for the legislation (today it is the Ministry of Housing, Urban and Rural Affairs), its interpretation must be given some weight and must thus be taken into account in the present context. On the interpretative value, see note 43 below.

not previously been a co-owner of A/S A's property. The provision is applicable where a part of a property that is jointly owned by two or more owners is sold to a co-owner".

On Section 102(2)(c), see section 2.4.3 below.

The provisions in the Danish Rent Act on the obligation to offer the property to the tenants do not expressly take account of transactions that are purely internal within a corporate group. Thus, if a rental property is transferred from a parent company to a subsidiary there is not a merger and Section 102(1), first sentence, will not apply. Nor is Section 102(1), second sentence, applicable since there is not a transfer of shares but only of assets. However, a transfer of assets must be regarded as a sale and thus covered by Section 102(1), first sentence, if the subsidiary company pays consideration, otherwise it will be treated as a gift.³⁸ On the other hand, if the property is let or leased to the subsidiary company Section 102(1), first sentence, does not apply. In this case only Section 7 of the Danish Rent Act indirectly protects the tenants' rights under the Act as the new landlord/lessee must fulfil the obligations of the former landlord. If there is a transfer of shares, the obligation to offer the property to the tenants applies if the acquirer of the shares thereby acquires a majority of the voting rights in the company; see Section 102(1), second sentence.³⁹ The provision assumes that the share transfer takes place in a company that owns the rental property. If, for example, the transfer only relates to shares in the parent company, while the property is owned by a subsidiary company, there will no obligation to offer the property to the tenants; see *U 1993 868 H*, discussed in section 2.2 above.

As stated, the provision assumes that the acquirer of the shares obtains a majority of the voting rights; see e.g. *U 2004 2221 Ø (T:BB 2004 405)*.

This case concerned a private limited company which owned two residential rental properties (the 'property company'). On 1 January 2000, a public limited company that owned the shares in the property company transferred 37.5 % of the shares to a family trust, 37.5 % to another public limited company and 25 % to a private limited company. There was considerable overlap of personnel among the owners of these companies. Two tenants in the properties brought proceedings against the property company (which had since become a public limited company), claiming that the properties should be offered to the tenants in accordance with Chapter XVI of the Danish Rent Act. In the transfer of the shares none of the parties had individually acquired a majority of the voting rights in the property company.

38 *Søren Andersen*: Krav til – og problemstillinger i forbindelse med – opfyldelse af reglerne om tilbudspligt efter lejeloven, T:BB 2006:155 ff., section 4.1, and notes 16 and 17 of the article. However, the sale can be exempted from the obligation to offer the property to the tenants pursuant to Section 102(2)(c); on this see section 2.4.3 below.

39 On exchanges of shares see *Søren Andersen*: Krav til – og problemstillinger i forbindelse med – opfyldelse af reglerne om tilbudspligt efter lejeloven, T:BB 2006:155, section 4.1. Here it is assumed that the obligation to offer the property to the tenants also arises in the case of exchanges of shares.

The High Court dismissed the plaintiffs' claim for the following reasons:

“It is accepted that as per 1 January 2000 37.5 % of the shares in the property company were transferred to a family trust, 37.5 % to a public limited company and 25 % to a private limited company, and that these ownership proportions have not since been altered. It is also accepted that one third of the public limited company is owned by the family trust and two thirds by another company. Thus, none of those acquiring shares by this share transfer acquired a majority of the voting rights in the company.

There is thus *no basis for interpreting* Section 102(1), second sentence, of the Rent Act so as to apply its provisions to the share transfers in question.

On this basis, and since *it has not been established that the transfers of the shares amounted to an avoidance of the obligation to offer the property to the tenants* pursuant to Section 102(1), second sentence, the High Court upholds the judgment appealed against [which rejected the plaintiffs' claim]” (author's emphasis).

While it is not in itself surprising that the High Court attached weight to the fact that the purpose of the transfers was not to avoid the obligation to offer the property to the tenants, it is interesting that the High Court's assumptions are clearly expressed in its reasoning. In the light of the reasoning it is quite possible that the outcome would have been different if it had been proved that the transfers involved an avoidance of the obligation to offer the property to the tenants, regardless of whether the transfers resulted in the acquirers of the shares obtaining a majority of the voting rights in the company.

If none of the acquirers of shares obtains a majority from a share transfer (for example if three shareholders each obtain 33.3 % of the share capital), there will be no obligation to offer the property to the tenants.⁴⁰ Here too it is only Section 7 of the Danish Rent Act that gives the tenants some protection.

Among other things, the two cases referred to above make it possible to establish a holding structure without triggering the obligation to offer the property to the tenants for that reason alone.⁴¹ What is decisive is whether there is a transfer of shares in the company that owns the property. If share transfers only concern shares in that company's parent company, there will not be an obligation to offer the property to the tenants; see the reasoning of the judgment in *U 1993 868 H*, referred to above in section 2.2. However, with reference to the reasoning of the High Court in *U 2004 2221 Ø (T:BB 2004 405)*, it is possible that the courts will regard such conduct as an avoidance of the

40 The decision has previously attracted political interest; see *Folketingstidende* 2004-05 (2. samling), Question No S 1520 where, against the background of *U.2004.2221 Ø* the then Minister for Social Affairs was asked to give her interpretation of 'acquirer' "www.folketinget.dk/doc.aspx?/Samling/20042/spoergsmaal/S1520/index.htm". In her answer of 10 June 2005 (available on the website referred to here) the Minister stated that she 'agrees that, on the face of it, the legal position that follows from the decision can appear not entirely appropriate'. However the wording of the provision remains unchanged. Furthermore, following the decision it is not decisive whether there is an overlap of personnel between several shareholders owning a majority together.

41 *Jesper Bøge Pedersen*: *Visse problemstillinger i relation til tilbudspligt efter lejelovens Kap. XVI, T:BB 2006:167*, section 1.6.

obligation to offer the property to the tenants and consequently disregard the holding structure, for example where the main purpose of the holding structure must be assumed to have been that the obligation to offer the property to the tenants should not apply. However, there is no certainty about this. The starting point must instead be the opposite, according to which there is not necessarily anything legally objectionable about a holding structure.

It is not clear whether the provision covers legal persons other than public and private limited companies, for example partnerships and companies with limited liability. On the other hand the purpose of the provision is to establish the obligation to offer the property to the tenants where there is an effective change of owner.⁴² Such changes of ownership also occur in other companies if the acquirer of shares obtains a majority. The protection of interests is thus the same.

However, the problem is that other aids to interpretation in the *travaux préparatoires* indicate that the provision should be interpreted strictly in accordance with its wording. This would exclude partnerships, for example. The same must apply for other corporate forms not expressly referred to in the provision.⁴³ This view is also in line with the view advocated in section 2.2 above that Section 102(1) should generally be interpreted narrowly.

In the unusual and complex case in *T:BB 2011 35 Ø*, three tenants in a property with 15 rented apartments brought proceedings for a declaratory judgment against the current owner and the former owner. The tenants received judgment in their favour, according to which the obligation to offer the property to the tenants had not been complied with when there had been a transfer of the shares in the company that owned the property, even though the same company had a controlling influence in both the transferor company and the transferee company (compare with *U 1993 868 H* referred to in section 2.2 above).

However, a claim that the tenants in the property were entitled to enforcement of the obligation to offer the property to the tenants was rejected, since the plaintiffs, could not independently enforce this law as tenants in the property and it had not been proved that the owner had acted contrary to the law in the foregoing sale.⁴⁴ On this judgment see further in section 2.4.6.

42 See the comments referred to in note 40.

43 *Jesper Bøge Pedersen*: Visse problemstillinger i relation til tilbudspligt efter lejelovens Kap. XVI, T:BB 2006:167, section 1.3. Among other things, aids to interpretation include an answer given by the Minister for Housing. See *Halfdan Krag Jespersen's* justifiably critical attitude to the value of such statements as sources of law, *Juristen* (1979) p. 349 ff., and note 1. See also *Jesper Bøge Pedersen* op. cit., section 1.2 and note 2 of the article, which likewise expresses the view that great caution should be taken in attaching importance to statements of this kind. See also note 37 above on the use of *travaux préparatoires* as aids to interpretation. And see *Mads Bryde Andersen*: Ret og metode (2002) p. 144 f.; and *Morten Wegener*: Juridisk metode (2000) p. 87 ff.

44 The judgment was appealed to the Supreme Court which rejected the appeal (U 2011 448/1 H) since the property-owning company, which the High Court had acknowledged had not complied with the obligation pursuant to the Rent Act to offer the property in connection the transfer of shares in two properties and the transfer of the two properties, had been declared insolvent and the administrator of the insolvent estate did not want to take part in the proceedings. The shareholders in the defendant company had not made any independent

2.4 Exemptions to Section 102(1) of the Danish Rent Act

2.4.1 Where the Acquirer is the State, a Municipal Authority or an Approved Urban Renewal Company (Section 102(2)(a))

Section 102(2)(a) does not give rise to great problems of interpretation. However, according to its wording this exemption does not apply if the acquirer is a regional authority. Consequently the obligation to offer the property to the tenants must in principle apply to regional authorities. However, given that the purpose of the exemption is to exempt certain qualified acquirers a strong argument can be made that regional authorities should be regarded as being covered by the exemption. If the acquirer is some other body that is not part of the state hierarchy, there will be an obligation to offer the property to the tenants unless one of the other exemptions in Section 102(2) applies.⁴⁵ Compulsory purchase by the state or by a municipal authority does not trigger an obligation to offer the property to the tenants.⁴⁶

2.4.2 Where the Acquirer is the Spouse of the Owner Hitherto (Section 102(2)(b))

According to the wording of Section 102(2)(b) of the Danish Rent Act, in principle transfers to the spouse of the owner hitherto are exempt from the obligation to offer the property to the tenants. Since the registration of civil partnerships has the same legal effect as marriage,⁴⁷ transfers between civil partners are also exempt.

It is questionable whether Section 102(2)(b) applies to transfers between spouses in the event of their separation.⁴⁸ On the one hand most of the legal effects of marriage are suspended by separation; and on the other hand the marriage has not been finally terminated.⁴⁹ The fact that the marriage has not yet formally been terminated favours allowing transfers made during a period of separation to be covered by Section 102(2)(b) and thus not subject to the obligation to offer the property to the tenants. In support of this it can be

claim prior to the declaration of insolvency. Against this background the judgment of the High Court must be regarded as having the force of law. The case was highly complex and the High Court's comments are very extensive.

45 However, this is only the starting assumption; a decision whether or not there is an obligation to offer the property to the tenants must be made according to the circumstances of each case. The same applies to transfers to councils and tribunals etc.; on such bodies in general, see *Bent Christensen: Nævn og råd* (1958).

46 In such cases tenants are protected by the special rules in Section 83(1)(b) of the Rent Act; see Sections 85-85a-e. On these provisions see *Niels Grubbe & Hans Henrik Edlund: Boliglejeret* (2008) p. 345 f.

47 See Law No 938 of 10 October 2005 on the registration of civil partnerships, Section 3(1) and (2). On the registration of civil partnerships in general, see *Ingrid Lund Andersen & Irene Nørgaard: Familieret* (2012) p. 65 ff.

48 The following comments also cover civil partnerships; see Law No 938 of 10 October 2005 on the registration of civil partnerships, Section 5(1).

49 *Linda Nielsen & Annette Kronborg: Skilsmisseret – de økonomiske forhold* (2012) p. 28 f.

pointed out that a separation ends if the spouses resume their cohabitation.⁵⁰ It can be argued that it is inappropriate for a transfer that happens to be made during a period of separation not to be covered by Section 102(2)(b), however short the period may be.⁵¹ If a married couple is divorced following a separation, Section 102(2)(b) does not apply. Thereafter there will be an obligation to offer the property to the tenants pursuant to the general rule in Section 102(1), first sentence, if the now former spouses transfer the property between them by sale etc. If the property is transferred as part of the division of marital property, this will not be treated as a transfer; see note 58 below. Section 102(2)(b) also exempts transfers to those who are related with the owner by blood or by marriage in an ascending or descending line or in a lateral line as far as their siblings and their siblings' children. An owner's transfer of a rental property to their grandparents, parents, children or grandchildren is thus not subject to the obligation to offer the property to the tenants.⁵² The same applies to transfers to the owner's brothers or sisters and their children.⁵³ Transfers to a brother's or sister's spouse or civil partner are also not covered. If a property is transferred to a brother's or sister's spouse as separate property, there will not be an obligation to offer the property to the

50 See Section 30 of Law No 1052 of 12 November 2012; and on the ending of separation in general, see *Linda Nielsen & Annette Kronborg: Skilsmisseret – de økonomiske forhold* (2012) p. 30 ff.

51 If such transfers are regarded as not being covered, for example because following separation the marriage is only a formality, transfers made during the period of separation can nevertheless be regarded as being subject to the obligation to offer the property to the tenants if the separation has only been made in order to avoid the applicability of the rules in the Danish Rent Act.

52 In the case of adopted children, according to Section 16(1) of Law No 392 of 22 April 2013, upon adoption the same legal relations arise between the adoptive parent and the adoptive child as between natural parents and their children. This provision, which is carried forward unamended from the main Danish Adoption Act (L 1972 279), is primarily relevant to inheritance and is not in itself decisive for how Section 102(2)(2) of the Rent Act should be interpreted. See Report No 624/1971, *Kommentaren til Kapitel 2 – Kapitel i almindelighed*, where it was stated that 'the committee has considered whether by means of a general rule it should be established that, except where there are specific exceptions, adoptive relationships should have the same legal effects as the relationships between parents and their children *in every respect* in both public and private law' (author's emphasis). However, the committee decided not to propose the adoption of such a principle. However, it can be argued that the word 'related' indicates that only children to whom the owner of the property is related are covered. On the other hand, the intention behind the provision in the Danish Adoption Act referred to above suggests that as far as possible adoptive children should be given the same legal status as the owner's own children. On this basis a sale to an adoptive child must be regarded as exempt from the obligation to offer the property to the tenants. However, a sale to the owner's spouse's brother's or sister's children would presumably not be covered by the provision since such children would not be 'related' to the owner, and in this context there would not be the same protectable interest as for adoptive children. A sale to such a person would thus trigger the obligation to offer the property to the tenants.

53 See *Mogens Dürr, Timmy Lund Witte & Kristin Jonasson: Boliglejemaal* (2010) p. 1163, according to which sons and daughters-in-law are not covered by the exemption.

tenants, nor will there be such an obligation if a transfer is made as a brother's or sister's separate property.

If an owner transfers the property to a married couple jointly, the property will be part of their common property. According to the wording of Section 102(2)(b), only transfers to the owner's siblings are exempt from the obligation to offer the property to the tenants. If a brother or sister is only one among many acquirers, as in the case of a transfer to spouses jointly, where they have property in common, Section 102(2)(b) is not applicable. The same applies in other cases where a brother or sister is not the only acquirer and where, for other reasons, Section 102(2)(b) is not applicable (for example because the transfer is to a brother or the brother's child).

2.4.3 The Acquirer has been a Co-owner Hitherto (Section 102(2)(c))

Section 102(2)(c) concerns the transfer of assets when a rental property is transferred. If the property is jointly owned by two or more people, according to Section 102(2)(c) one or more of the existing co-owners can acquire shares in the property from one or more of those who have co-owned the property hitherto without triggering the obligation to offer the property to the tenants. In 1996 it was established in case law that Section 102(2)(c) does not apply to transfers from a partnership to one of the partners.⁵⁴ If the property is owned by two or more companies (for example public limited companies), there is nothing in principle to prevent the application of Section 102(2)(c) to transactions within the corporate group, for example if a parent company sells its share of a rental property to a co-owning subsidiary.⁵⁵ The obligation to offer the property to the tenants does not apply in either of these two cases.

The wording of Section 102(2)(c) does not indicate that co-owners of the property must be natural persons, and despite the ruling of the High Court referred to, which only concerned a transfer of a property from a partnership to

54 VLK 1996-02-27 (0086/96), discussed in Fuldmægtigen (1996) p. 60. However it is unclear whether the ruling applies to similar corporate structures, for example limited partnerships. The High Court seems to indicate broader applicability as its reasoning for not applying the provision to a transfer from a partnership to one of the partners included that 'the partner cannot be regarded as a co-owner of the property hitherto in a situation like the present, where the property is owned by a partnership, even if he is a member of the partnership.

55 See *Søren Andersen: Krav til – og problemstillinger i forbindelse med – opfyldelse af reglerne om tilbudspligt efter lejeloven*, T:BB 2006:155, section 4.4, according to which 'the provision must be understood as meaning that there is a direct share of ownership in the property that is transferred to the direct co-owner. This means that the provision cannot apply if the ownership of the property is only transferred indirectly, for example if the shares in a private limited company that owns 51 % of the property are transferred to the owner of a private limited company that owns 49 % of the property'. This latter situation is reminiscent of the case referred to in note 54; here the cases are merely private limited companies rather than partnerships, and there is little justification for applying a different assessment to private limited companies or public limited companies in this respect. This does not alter the fact that internal transactions within a corporate group between co-owning companies are covered by the exemption and thus in principle not subject to the obligation to offer the property to the tenants.

one of the partners, this ruling cannot be extended to apply to the internal transactions of a public or private limited company.

In respect of the above, an answer from the then Ministry of Social affairs stated as follows:

“In the view of the Ministry, the fact that [the acquirer] A/S B has been a co-owner of [the vendor] A/S A does not mean that A/S B has been a co-owner of A/S A’s property. In order for A/S B to be considered a co-owner, it must have had joint ownership with A/S A of the property sold.”

The Ministry’s view was based on a distinction between co-ownership of the company and joint ownership of the property. Joint ownership exists when ownership rights are owned by two or more people together,⁵⁶ and it is difficult to see how joint ownership differs from the meaning of co-ownership in Section 102 of the Danish Rent Act.

The Ministry stated further:

“Finally it is the Ministry’s view that the fact that after the transfer of the properties [i.e. after a transfer of assets] the shares in the acquiring company, A/S B, are transferred to the shareholders in the selling company, A/S A, does not mean that there is any identity between the two companies so that the transfer is covered by Section 102(2)(c) of the Rent Act”.

The Ministry’s view, which here concerns a share transfer that takes place in the wake of an asset transfer, is correct in so far as it cannot create an identity within the meaning of Section 102(2)(c), in other words after a transfer of the rental property has taken place. The assessment of whether the acquirer has hitherto been a co-owner must of course be made at the time when the property is transferred and not at some later point when this transfer of assets may have been supplemented by a share transfer between the companies involved.

As stated, Section 102(2)(c) concerns transfers of assets and thus cannot be used to support arguments relating to share transfers. Whether a subsequent transfer of shares triggers an obligation to offer the property to the tenants depends on whether this transfer falls within or without the scope of Section 102(1), first or second sentence, on the sale of (all or part of) the property or the transfer of shares; see section 2.4 above.

As stated above, Section 102(2)(c) does not cover transfers from a partnership to one of its partners. If the rental property is owned by one or more persons and if they choose to transfer ownership of the property to a new partnership, there can be a question as to whether the provision is applicable. Since the partnership is not the co-owner hitherto, but rather a newly created legal person, it is arguable that this transfer should not be regarded as being covered by the provision. The same must apply even if the partnership had already been established but did not participate in the acquisition of the

⁵⁶ On joint ownership in general, see *Bo von Eyben, Peter Mortensen & Ivan Sørensen: Lærebog i Obligationsret II* (2014) p. 283 f.

property.⁵⁷ There is thus an obligation to offer the property to the tenants in these cases. The same will be the case where the property is transferred to a limited company that has not hitherto been a co-owner of the property.

2.4.4 Where the Acquirer Acquires by Inheritance and is not a Legal Person (Section 102(2)(d))

In contrast to the decisions that an owner of rental property can make concerning the property while still alive (see in particular section 2.4.2 above), the owner can dispose of the property by their will to any natural person without having to comply with the obligation to offer the property to the tenants.⁵⁸ Only a testamentary disposition of the property to a legal person will trigger the obligation to offer the property to the tenants; this covers all legal persons. Section 102(2)(d) means, for example, that the property can be left to an adoptive child; on the equivalent situation during the life of the hitherto owner, see section 2.4.2. It is not a requirement that the testator should leave the property as the beneficiary's separate property. A beneficiary who has joint property with their spouse can inherit so that the property becomes part of their joint property without requiring the obligation to offer the property to the tenants to be complied with.⁵⁹

2.4.5 The Property has Previously been Owned by a Cooperative Housing Association (Section 2(2), fourth Sentence, of the Cooperative Housing Association Act (Andelsboligforeningsloven))

The Cooperative Housing Association Act contains a special provision on property that has been previously owned by a cooperative housing association. According to Section 2(2), fourth sentence, of the Act, the rules in the Rent Act on the obligation to offer the property to the tenants do not apply to property that has been owned by a cooperative housing association, a public limited housing company or a private limited housing company within the preceding five years. In the *travaux préparatoires* to the Cooperative Housing Association Act it was stated:⁶⁰

57 See the then Ministry of Social Affairs's answer in section 2.4 which must almost be understood correspondingly ('A/S B had not previously been a co-owner of A/S A's property').

58 As stated in Folketingstidende 1978-79, Tillæg A, spalte 2473, 'acquisition by inheritance or by the division of the estate of spouses ... is also not regarded as a transfer', and as in the case of compulsory auctions (see above note 31), the regulation of this was not covered by the provision.

59 This based on the fact that the acquirer (beneficiary) is a natural person. That the property then becomes part of the joint property of spouses cannot be so decisive, especially given that Section 102(2)(d) does not contain any restriction on the groups of natural persons to whom the property may be left in a will. On testamentary powers in general, see *Rasmus Kristian Feldthusen & Linda Nielsen: Arveretten* (2012) p. 139 ff.

60 Proposal for a Law amending the Law on cooperative housing associations and other housing associations, No 173 of 1 June 2005, commentary of Section 2.

“The suspension of the Rent Act’s rules on the obligation to offer the property to the tenants ... should follow the application of the prohibition of acquisition. The proposed paragraph 3 therefore means that the obligation to offer the property to the tenants is only set aside for properties which, at the time of the entry into force of the Act or subsequently have been owned by a cooperative housing association, a public limited housing company or a private limited housing company.

As for the proposed paragraph 2, it is proposed that there should be a transitional provision in paragraph 3 whereby ‘have been owned’ only refers to properties which, at some point following the entry into force of the Act, have been owned by a cooperative housing association, a public limited housing company or a private limited housing company.”

This means that a property is not required to be offered to the tenants in accordance with the obligation to offer the property to the tenants in connection with a transfer within five years of a cooperative housing association etc. being dissolved or disposing of the property.⁶¹

2.4.6 The Legal Consequences of Failing to Comply with the Obligation to Offer the Property to the Tenants

The Danish Rent Act does not contain any express rules on the legal consequences of a landlord not complying with the obligation to offer the property to the tenants. Section 104 of the Danish Rent Act merely states that the rules on the obligation in Sections 100-104 are mandatory in relation to tenants; see section 2.2 above. Under the general clause on Section 113a(1), owners of residential rental property a court can deprive a landlord of the right to administer property with rented residential apartments or decide who shall administer the landlord’s property with rented residential apartments. According to Section 113a(1) a court can make such an order if an owner has repeatedly and seriously disregarded the rules of the Danish Rent Act or the Danish Regulation of Housing Conditions Act (*Lov om midlertidig regulering af boligforholdene*).⁶²

61 *Mogens Dürr, Timmy Lund Witte & Kristin Jonasson: Boliglejemaal* (2010) p. 1163 f., where it is justifiably stated that: ‘It must be due to the lack of a consequential amendment that Chapter XVI of the Rent Act does not refer to the Cooperative Housing Association Act at this point.’

62 According to the *travaux préparatoires* to the Act (see Folketingstidende 1993-94, Tillæg A, spalte 7911), it will ‘typically be the rules for the calculation of rent, the rules for calculating rent increases and the carrying out of maintenance work’ that will be subject to the provision, but an owner could also be deprived of their control ‘by disregarding more specific rules in the legislation’. This means that, depending on the circumstances, a failure to comply with the obligation to offer the property to the tenants could lead to the landlord being deprived of control. However, it was stated that ‘it is typically the most serious and repeated circumstances that should be caught by the provision’. Finally it was emphasised generally that ‘it is expected that there will be very few cases’ of depriving landlords of control.

The wording of the provision indicates that the circumstances must be very serious before a landlord is deprived of control⁶³ and, as far as can be seen, so far no judgment has been given depriving a landlord of their control. Depriving a landlord of the right to administer their property will not put the tenants who have been deprived of their right to offer to buy the property in a better legal position, as it not make good the landlord's failure to comply with the obligation to offer the property to the tenants. The property will have been sold to a third party. However, if the landlord has other rental properties in their portfolio, depriving the landlord of control over these can benefit the tenants of these properties.

If a court finds that the obligation to offer the property to the tenants has been disregarded, the question arises as to whether the tenants can demand the obligation to be fulfilled *with retrospective effect*. In this situation the property has been transferred to a third party without the tenants having an opportunity to offer to buy the property in the form of a cooperative housing association.⁶⁴ Allowing the tenants to demand that the obligation to offer them the property should be enforced in this situation would effectively set aside the agreement between the landlord and the third party. It could be argued that the agreement between the landlord and the third party suffers from a legal defect⁶⁵ because of the failure to comply with the Danish Rent Act. Such legal defect could only be made good by the tenants being offered the opportunity to buy the property in accordance with the Danish Rent Act.⁶⁶ If the tenants do not accept the offer, the property can then be transferred to the third party. But if the tenants accept the offer then under the ordinary rules on compensation in the law of obligations the third party may claim compensation for the loss they may have suffered by not obtaining a right to the property; see below.

However, the Danish Rent Act does not make compliance with the obligation to offer the property to the tenants a condition for validity.⁶⁷ Also, the individual tenants cannot independently rely on the right; see *T:BB 2011 35 Ø*. The obligation to offer the property to the tenants 'concerns the individual and current tenant's right, at the time of the offer, *together with other tenants in the property*, to form a cooperative housing association with a view to *its* making an offer to acquire the property on a cooperative basis'; see the

63 See *Halfdan Krag Jespersen's* commentary on Section 113a(2) in Karnov (2015) at note 877, stating that 'the use of the terms "repeatedly" and "seriously disregarding" ... indicates that the level is set relatively high'.

64 In contrast to the normal practice where a conditional sales agreement is made with a third party; see *Finn Træff & Rasmus Juul-Nyholm: Andelsboliger* (2011) pp. 75 f. and 78 ff. on the usual offer procedure for tenants.

65 See generally *Bernhard Gomard: Obligationsret, 1. Del* (2006) p. 235 ff.

66 It is possibly thus that the plaintiffs' claim in *T:BB 2011 35 Ø*, that the tenants shall 'have the right to have the obligation to offer the property to them enforced' should be understood. As stated in the High Court's comments in *T:BB 2011 p. 56*, the main proceedings did not create clarity on this.

67 If the obligation to offer the property to the tenants is fulfilled, complying with the deadline for acceptance in Section 1033(1), third sentence, is regarded as a condition for validity (see *U 2006 3281 H (T:BB 2007 168)*); see section 1 above.

comments of the High Court in T:BB 2011 p. 56 Ø (author's emphasis) and Section 103(1), first sentence, of the Danish Rent Act ('a cooperative housing association formed by the residents can acquire the property'). The wording in Section 100(1) of the Danish Rent Act, according to which 'the tenants' shall be offered the right to take over the property on a cooperative basis is merely intended to make clear that it is *all* the tenants who should receive the offer and not, for example, merely the residents' representative body.

On this point the judgment should presumably be understood as meaning that a claim for fulfilment of the obligation to offer the property to the tenants can only be made if, at the time when the agreement between the landlord and the third party is entered into, there was a cooperative housing association that would have accepted an offer to take over the property.⁶⁸ Since the tenants cannot general be expected to have set up a cooperative housing association before the possibility of acquiring the property on a cooperative basis arises pursuant to the obligation to offer the property to the tenants,⁶⁹ and since in any case it must be very difficult to prove that the cooperative housing association would have accepted an offer if it had been made, on the basis of T:BB 2011 35 Ø it would be legally impossible to demand that the subsequent fulfilment of the obligation to offer the property to the tenants. For the same reason, it is overwhelmingly unlikely that the agreement between the landlord and a third party would be set aside as invalid merely because of the landlord's failure to comply with the obligation to offer the property to the tenants.

Setting aside an agreement between the landlord and a third party could also cause problems for tenants who may have moved into the property by agreement with the new owner (the third party). Since the new tenants' entitlement to their tenancy will be derived from the third party's right, and

68 On the practical implementation of the obligation to offer the property to the tenants, *see* also Section 103(1), second sentence, of the Danish Rent Act, according to which the terms of the offer 'must be such *that they can be fulfilled by a cooperative housing association*' (author's emphasis). According to Section 103(5) of the Danish Rent Act 'at least half the tenants of the residential rental property must be members of an association at the time of acceptance'. Except in the case of an obligation to offer the property to the tenants, pursuant to Section 2(1) of the Danish Cooperative Housing Association Act it is sufficient if one third of the tenants are members of the cooperative housing association at the time of acquisition. If a cooperative housing association has been formed, the landlord can reject the association's acceptance of their obligatory offer if fewer than half the tenants are members of the association. However, the landlord's rejection of such offer does not prevent the tenants instead acquiring the property pursuant to Section 2(1) of the Danish Cooperative Housing Association Act if its conditions are fulfilled. However, this possibility will only arise on the few occasions where at least one third of the tenants have set up a cooperative housing association with a view to acquiring the property and where the landlord wishes instead to transfer the property to a third party. If the cooperative housing association is set up *after* the landlord has made an offer to a third party there will be no obligation to offer the property to the tenants; *see* above. *See Finn Träff & Rasmus Juul-Nyholm: Andelsboliger* (2011) p. 74.

69 Unless, for other reasons, at least one third of the tenants have already set up a cooperative housing association with a view to acquiring the property pursuant to Section 2(1) of the Danish Cooperative Housing Association Act; *see* note 68.

since in this situation the third party would not have a right to rent out the property, in principle the new tenants would have to move out.

However, it could be argued that if a new tenant had acted in good faith with regard to the third party's right to rent out the residence, they would have obtained a right to the tenancy on the basis of reasonable assumptions. But this would mean that the existing tenants would lose the possibility of obtaining revenue from the sale of vacant apartments as cooperative apartments which they would otherwise have had if the obligation to offer the property to the tenants had been fulfilled and if a cooperative housing association set up by the tenants had taken over the property.

Naturally it will be very difficult to prove that there would have been such revenue if the existing tenants had taken over the property in accordance with the obligation to offer the property to the tenants and subsequently sold vacant apartments as cooperative apartments. While there must be regard for the existing tenants, there should probably be greater regard for the right of tenants who have moved into vacant rented apartments by agreement with a third party to retain their tenancies, even if the landlord has disregarded the obligation to offer the property to the other tenants.

The tenants' scope for demanding *compensation* will be based on the general principles of the law of obligations, since the Danish Rent Act does not contain any specific provisions on this. The landlord must thus have acted *culpably* by not offering the property to the tenants. As a rule, such a condition will always be fulfilled since the failure to comply with the mandatory provisions in Section s 100-104 of the Danish Rent Act will at least be regarded as grossly negligent. It will be more difficult to show evidence of loss. If a landlord has failed to offer the property to the tenants, and has instead sold it to a third party at its market price, it can be argued that the tenants will have suffered a loss if the property increases in value after being sold, as the tenants will have lost the opportunity to benefit from the increase in value.⁷⁰

However, it will be extremely difficult for the tenants to prove that they, as a cooperative housing association, would have bought the property if it had been offered. The purchase price between the landlord and the third party will probably not be publicly available, so it is almost a matter of pure speculation whether the price would have been accepted if it had been known. On this basis it is highly doubtful that the tenants could, in practice, claim compensation for the lost increase in value of the property.

70 On the other hand, if the value of the property falls after being sold, as has been the case in large parts of the property market in recent years, then no loss will have been suffered and thus for this reason there will be no basis for claiming compensation. See *Mogens Dürr, Timmy Lund Witte & Kristin Jonasson: Boliglejemål* (2010) p. 1175, with reference to, among others, GD 1990/04 Ø, where the High Court stated that in the case in question 'it was uncertain whether any loss was suffered or what the amount of the loss might be'. The High Court also stated that the landlord was obliged 'to acknowledge that he had disregarded [the obligation to offer the property to the tenants] and thus to that extent incurred liability to compensate the tenants'. The case shows that in principle a landlord will incur liability to pay compensation by failing to comply with the obligation to offer the property to the tenants, but in practice it is very difficult to prove any loss; see immediately below.

The legal consequence of failure to comply with the obligation to offer the property to the tenants is essentially reduced to the possibility of obtaining a *declaratory judgment*. Should such a claim be upheld it would also be possible to claim reimbursement of legal costs; see Section 312(1) of the Administration of Justice Act. But beyond this there is not much scope for enforcement of a claim in the event of failure to comply with the obligation. Apart from the rules depriving a landlord of the right to administer rental property it is difficult to see what can motivate a landlord to comply with the obligation to offer the property to the tenants if they want to avoid doing so.

3 Conclusion

The provision in Section 102 of the Danish Rent Act, which only governs the very specific issue of when a transfer of a residential rental property triggers and obligation to offer the property to the existing tenants, gives rise to countless problems, both practical and theoretical. It has only been possible to deal with a small part of these problems here. In itself this is not surprising; landlord and tenant law is characterised by its opacity and inconsistency.⁷¹ This can be said of many areas of the law today, but this does not make the complexity of landlord and tenant law any less regrettable.

It is extraordinary that an area of the law that originated in the general law of obligations should now appear so frequently to be so out of step with its principles that it must be questioned whether the application of the ideas and arguments derived from these principles is any longer relevant. The frequent changes to landlord and tenant legislation in Denmark make it difficult to get an overview of, let alone clarity and precision about, the rules. A major revision of landlord and tenant law is unlikely in the near future, even though in many areas it is more pressing than ever.

The specific provisions in Section 102 of the Danish Rent Act are an excellent example of the challenges which the legislator faces when seeking to introduce a detailed provision in landlord and tenant law. For example, the definition of what is regarded as a ‘transfer’ (sale, gift, merger or exchange) lead to the conclusion that other forms of transfer do not trigger the obligation to offer the property to the tenants. Unless this was the intention, which it is hard to believe, this means that the legislator has thereby given some tenants better rights than others, whether deliberately or not, leaving to some tenants merely the protection that follows from the general principles of the law of obligations to the extent that these are at all applicable. Furthermore there are

⁷¹ See note 1 and *Hans Henrik Edlund's* review of *Karin Laursen & Lars Langkjær: Spot på lejelovene* (2006) in U 2006 B p. 336f., where in support of a revision of landlord and tenant law he accurately wrote that “too often the existing rules are extremely complex and opaque.” A proposal to simplify and modernize the legislation was put forward by the Ministry of Housing, Urban and Rural Affairs in December 2014 (as bill no. 97). The proposal was adopted on March 24 2015 and can now be found as law no. 310 of March 30 2015 at “www.retsinformation.dk”. The law that comes into force on July 1 2015 intends to simplify the rules on property maintenance, among other things. The rules on the obligation to offer the property to the tenants will not be affected by the law.

the challenges concerning the legal consequence of failing to comply with the obligation to offer the property to the tenants; see section 2.4.6.⁷²

As for the obligation of landlords to offer the property to the tenants in the event of certain transfers of residential rental property, it is remarkable that none of the other Nordic countries have found it necessary to have regulations for this; see section 1. Nor are there corresponding rules in English⁷³ or German⁷⁴ law.

72 The rules on the obligation to offer the property to the tenants do not prevent the tenants buying a rental property at a higher price than the market price. The price determined by the landlord may not be subject to other conditions than those offered to others (including a higher price); see Section 103(1) of the Danish Rent Act. If it is possible to obtain above the market price by selling to a third party, the same price can be demanded from the tenants. If the landlord offers to sell a rental property to a third party at an artificially high price while buying another property that is not subject to the obligation to offer the property to the tenants at below the market price, if the tenants accept the artificially high price they risk paying more for the property than it is worth. In the current property market there is a considerable risk of buying rental properties at too high a price. The rules on the obligation to offer the property to the tenants provide no protection to tenants in these situations, but the rules on the validity of contracts, including Section 36 of the Danish Contracts Act, can sometime give some protection. On Section 36 in general, see *Lennart Lynge Andersen: Aftaleloven med kommentarer* (2014) p. 244ff. with references.

73 The sale of rental property under English law is regulated by the general principles of assignment of rights and obligations. Under this principle, rights are in general transferable whereas obligations are not. However, the landlord has the right to transfer a rental property (he may, in other words, e.g. sell it) even though the property is rented by the tenant but if such a transfer (sale) is performed, the tenant has the right to uphold the original tenancy agreement and stay in the rented property. The tenant is then referred to as a “sitting tenant” (sale with the tenant in situ) and the new landlord is said to be “standing in the shoes” of the vendor (the previous landlord). On assignment of rights and obligations in private law in general, see e.g. *Greg Tolhurst: The Assignment of Contractual Rights* (2006) pp. 121ff. on rights and pp. 287ff. on obligations (burdens).

74 Section 577(1) of the German Civil Code (BGB) states that if leased residential premises, apartment ownership of which has been established or is to be established after the lessee has been permitted to use it, is sold to a third party, then the lessee has a right of preemption with regard to it (the property goes from being “Wohnraum” to being “Wohnungseigentum”). However, this does not apply if the lessor sells the residential premises to a member of his family or a member of his household. Furthermore, the right of preemption does not apply either if the property consists of more than one apartment. In this case, the landlord may sell the property without the tenants having the possibility of buying the property in forehand – even if the seller has applied for authorization to split the property in “Wohnungseigentum” and the buyer afterwards in accordance with such an authorization decides to carry out the split. This is a consequence of the Supreme Court’s decision in the case BGH, 22.11.2013 - V ZR 96/12 in which the court interpreted Section 3 of the “Wohnungseigentumsgesetz” and the term “Teilungsvereinbarung.” As a consequence, the right of preemption may be seen as very limited indeed. If the right of preemption does not apply, the tenant has the right to uphold the tenancy agreement and stay in the apartment on the agreed terms and in the agreed period, see BGB Section 566 (1) according to which “...the acquirer, in place of the lessor, takes over the rights and duties that arise under the lease agreement during the period of his ownership”. This section corresponds with the more general principle in BGB Section 398: “A claim may be transferred by the obligee to another person by contract with that person (assignment). When the contract is entered into, the new obligee steps into the shoes of the previous obligee.” On BGB Section 398(1), 566 (1) and 577(1) in general, see e.g. (in German)

On its own this does not mean that the obligation is inappropriate, but it may be relevant that even in the countries with which we traditionally compare ourselves in large areas of property law (Norway and Sweden) have not found a need for corresponding rules, and have instead allowed such situations to be governed by the general principles of change of creditor and change of debtor. Even if there may be a politically motivated desire to spread the concept of cooperative housing associations, from a legal perspective one might very well consider adopting a corresponding solution in Denmark.