

## Chapter 21

### **Question 1: Explain what we mean by 'privity of estate'? Why does a sub-lessee fall outside the privity of estate matrix of the head lease and does this matter?**

We discuss the concept of privity of estate which is central to the enforcement of leasehold covenants in section 1.2. Privity of contract refers to the parties to the original lease contract whilst privity of estate defines the parties that are the current parties to the leasehold estate created by that lease contract. Thus an assignee of the leasehold reversion and an assignee of the lease will fall within privity of estate.

A sub-lessee is not within the privity of estate of the head lease. They hold a separate leasehold estate created by the sub-lease. The fact that a sub-lessee does not fall within the privity of estate of the head lease does matter because the covenants in the head lease cannot be enforced against or by the sub-lessee on this basis; we have to find alternative routes to enforcement. We consider the position of sub-lessees in Section 5 where we discuss the three mechanisms commonly employed to enforce the head lease covenants against a sub-lessee. First, a well drafted sub-lease should include a covenant requiring the sub-lessee to observe the head lease covenants and to confer upon the head landlord the benefit of this covenant. Secondly, a breach of the head lease covenants may trigger forfeiture of the head lease and automatic extinction of the sub-lease. A sub-lessee thus has every incentive to observe the head lease covenants. Lastly, the doctrine in *Tulk v Moxhay* may be employed to enforce the restrictive head lease covenants against a sub-lessee, a route that now has statutory force in s3(5) of the Landlord and Tenant (Covenants) Act 1995.

### **Question 2: Why is the contractual liability of the original parties to a long lease unfair? How does the Landlord and Tenant (Covenants) Act 1995 address the problem? In any event did this contractual liability present so much of a problem for long leases of flats?**

We consider the contractual liability of the original parties to a lease in section 2.

At common law the contractual liability of the original parties to the lease continues throughout the term of the lease despite the fact that they may have sold and assigned their interest. This liability may thus operate unfairly where for instance some years after the original tenant has disposed of the lease the current tenant fails to pay the rent, or breaches some other covenant, and the landlord pursues the original tenant for the rent arrears or damages because for instance the current tenant is insolvent. The vulnerability of the original tenant is compounded by the fact that their liability may be increased by a variation of the lease terms made in pursuance of the terms of the original lease. An upward rent review is a common example of such a variation. This position has been criticised by the courts and the Law Commission which led to reform in the shape of the Landlord and Tenant (Covenants) Act 1995.

It is necessary to distinguish between pre-1996 and post-1995 leases to assess how the Landlord and Tenant (Covenants) Act 1995 has addressed this problem.

The original tenant's liability under a pre-1996 lease is only marginally limited by sections 17 and 18 of the Act. Section 17 provides that the landlord must give notice of the amount to be recovered from the original tenant within six months of the sums falling due and where the original tenant pays those sums they are entitled to claim an overriding lease, enabling the original tenant to enforce the tenant's covenants against the current tenant. The original tenant thus is warned of his or her liability which is limited to six months' rent or other sums due and is provided with a mechanism by which they can try and recover the sums they have been forced to pay from the real culprit, the defaulting current tenant. Section 18 provides that the original tenant's liability is not affected by a subsequent variation of the lease.

The original tenant's liability under a post-1995 lease is governed by section 5 which provides that the original tenant is released from their contractual liability upon their assignment of the lease. The landlord thus has no continuing right to seek recovery against the original tenant. However, there is an important limitation to this

principle where the landlord's consent is required for the tenant to assign their interest. In these circumstances the landlord may refuse their consent unless the tenant enters into an authorised guarantee agreement (AGA) which guarantees their assignee's performance of the tenant's covenants, including the covenant to pay rent. This AGA thus effectively reinstates the original tenant's liability for a subsequent breach of the tenant's covenants.

The issue of an original tenant's contractual liability is more controversial in the commercial than the domestic context merely because the rent payable under a commercial long lease is generally set at market levels and is often subject to periodic review whilst under a residential long lease the rent payable is usually only a nominal sum, known as a ground rent. The consideration for the lease is paid upon its grant by way of an up front premium.

**Question 3: Is it easier for the benefit and burden of a tenant's and landlord's covenants to pass in a post 1995 lease than in a pre-1996 lease?**

The benefit and burden of the landlord's and the tenant's covenants have long passed to their assignees. Under pre-1996 lease these means are provided by a combination of statutory and common law rules found in sections 141 and 142 LPA 1925 and the sixteenth century decision in *Spencer's Case*. The Landlord and Tenant (Covenants) Act 1995 provides purely statutory rules governing post 1995 leases. We consider both these regimes in section 3.

The principle distinctions relate to the types of covenants subject to each regime, which we consider in question 4 below, and the treatment of the passing of the burden of a tenant's covenants in equitable leases which do not pass under *Spencer's Case*. In practice this latter distinction is not significant.

**Question 4: The Landlord and Tenant (Covenants) Act 1995 abandons the concepts of a covenant 'touching and concerning' and 'having reference to the subject matter of the lease'. Is it sensible to do so?**

The concepts of a covenant which 'touches and concerns' the land or 'has reference to the subject matter of the lease' which are found in the rules governing pre-1996 leases have proved to be rather elusive to pin down. There also have been some rather unfortunate and inconsistent decisions reached on those covenants that do qualify and those that do not – see section 3.1.3. The Landlord and Tenant (Covenants) Act 1995 abandons both concepts and instead provides that the benefit and burden of all covenants in a lease will pass unless they are expressed to be personal to the original parties.

At first sight this seems an attractive reform but there are lurking dangers – see for instance *BHP Petroleum Great Britain Ltd v Chesterfield Properties*. Merely by expressing a covenant to be personal it seems that it may be possible to exclude it from the statutory framework not only of the passing of the benefit and burden of covenants but also the statutory release of the original parties' contractual liability. This seems possible even if the covenant patently has a close connection with the land.

**Question 5: How draconian a remedy is forfeiture?**

Forfeiture is a draconian remedy because it may bring the lease to a premature end as a result of a comparatively minor breach – see section 6.4.1. However, this draconian effect is tempered first by the fact that a right to forfeit a lease may be easily waived by the landlord acting in some way which recognises the continued existence of the lease e.g. by accepting the payment of rent by the tenant. Secondly, the process of forfeiture is subject to statutory control. In particular, notice must be given to the tenant of the landlord's intention to forfeit. Lastly, the tenant is granted a right to apply to the court to seek relief from forfeiture. These three measures are outlined by Lord Templeman in his judgment in *Billson v Residential Apartments Ltd* which is extracted in section 6.4.1.

We consider waiver in section 6.4.3, the requirements for notice in section 6.4.4 and the tenant's right to relief in section 6.4.6.

**Question 6: Why does a ‘twilight period’ occur during the process of forfeiture?**

We explain the effect of forfeiture in section 6.4.2.

A landlord may elect to exercise his or her right to re-enter and forfeit the lease upon a breach of covenant by the tenant. This election will bring the lease to an end and, where the tenant is still in possession, they will become a trespasser liable not to pay rent but mesne profits. The landlord will then have to take steps to recover possession of the property either peacefully or, more usually, by application to court, and the tenant may also apply to court in order to seek relief from forfeiture. The period between the landlord’s exercise of their right of re-entry and the court’s determination of the landlord’s claim for delivery of possession or the tenant’s claim for relief has been described as a twilight period because although the lease is technically at an end the question of whether or not it will be revived or finally laid to rest awaits the outcome of the court.

**Question 7: Can a negative leasehold covenant be remedied?**

A negative covenant restricts or prohibits certain behaviour. Examples include a covenant against the tenant assigning, sub-letting or otherwise disposing of his or her interest, or a covenant against certain types of user.

The statutory notice requirements contained in section 146(1) LPA 1925, with which a landlord must comply before being able to forfeit the lease, call not only for the breach to be specified but also require the landlord to call for the tenant to remedy the breach if it is capable of remedy so that the tenant knows what they must do to avoid forfeiture. The question has thus arisen as to whether a negative covenant is capable of being remedied.

A number of decisions, which we consider in section 6.4.4, have examined this question. Certain negative covenants are accepted as incapable of remedy because they carry a continuing stigma – see *Rugby School (Governors) v Tannahill*. Controversy continues in relation to other negative covenants. The Court of Appeal in *Scala House & District Property Co Ltd v Forbes* suggested that a breach of a negative covenant was incapable of remedy. However, the Court of Appeal in *Expert Clothing Service & Sales Ltd v Hillgate House Ltd* subsequently doubted the width of their view in *Scala House*, which was limited to covenants against sub-letting. Their current approach is illustrated in the extract from *Akici v LR Butlin Ltd* and *Telchadder v Wickland (Holdings) Ltd* which suggests a more sympathetic approach to the question of whether negative covenants are capable of remedy.

**Question 8: Is there any role for equity’s inherent jurisdiction to provide relief from forfeiture or does the statutory right to relief provided by s146 LPA 1925 provide a complete code?**

A tenant’s statutory right to relief is contained in section 146(2) LPA 1925 whilst section 146(4) provides a right for the holders of a derivative interest, for instance a tenant’s mortgagee or sub-lessee to apply for relief. We consider these statutory rights to relief in section 6.4.6.

There are however gaps in this statutory framework, most notably where the holder of a derivative interest has failed to apply for relief before the landlord has obtained an order for repossession of the property. In these circumstances the statutory right to relief is lost but the inherent jurisdiction of the court to grant relief from forfeiture might come into play. The question whether or not the court’s inherent jurisdiction is still available turns upon whether or not the rights to relief found in section 146 provide a complete statutory code. The courts have yet to provide a clear answer to this question.