**Chapter 7**

**Question 1: What are the key differences between a lease and a licence?**

It is vitally important to be able to distinguish between a lease and licence. A lease is (almost always) a property right which is capable of binding third parties – whilst a licence is a personal right which is only binding on the parties to the licence. There are other reasons why the distinction is important: for example, some statutory protection is given to parties with leases, but not to those with only a licence – see **7.1-7.4**.

**Question 2: What are the two key requirements of a lease?**

The leading case of *Street v Mountford* (1985) explains the key tests for distinguishing between a lease and a licence: a lease requires B to have a right to exclusive possession of land for a term. Note that a rent, whilst of course very common in practice, is not actually necessary – see **7.40**. There are thus two key requirements: a right to exclusive possession and a term.

The concept of exclusive possession is explored at **7.8-7.15** and its exercise in practice, including in the cases where more than one person has rights to occupy the land, at **7.16-7.27**. The essential feature is that a right to exclusive possession means that B has, for the period of the lease, powers of ownership and so has a general power to decide who has access to, or may be excluded from, the land.

It should be noted that there are a limited number of exceptions, acknowledged by Lord Templeman in *Street v Mountford*,where there may be a right to exclusive possession but nevertheless no lease: see **7.47**.

The concept of a term is explained at **7.28-7.39**. The need for a term distinguishes the lease from a freehold estate. A freehold has no time limit, but a lease must have a defined duration even if that duration is for a very long period for example for 999 or 3,000 years. The requirement for certainty of term is also met where a tenancy, usually for a relatively short period, automatically renews for the same period unless one or other the parties gives a notice to say that they do not want it to renew. This is known as a periodic tenancy. At the start of the periodic tenancy it is not possible to say exactly when it will end but the parties are able to render it certain by the service of that notice. The periodic tenancy has however been described as ‘something of a puzzle’ (see Lady Hale in *Berrisford v Mexfield Housing Co-operative Ltd* (2012) (see **7.33**).

**Question 3: How, in practice, can a court tell if an agreement gives an occupier a right to exclusive possession?**

Often legal tests as to the content of a right are easier to state than they are to apply. This is true with determining whether an occupational arrangement confers a right to exclusive possession.

The first step is to look at the terms of the agreement that the parties have made. The next step is to determine whether the right to exclusive possession is conferred remembering that what the parties have labelled the agreement is not decisive. Lord Templeman in *Street v Mountford* (1985)made the analogy that a five-pronged implement is a fork (and always will be a fork) even though the parties between themselves may agree to call it a spade (see **7.43**). It is thus the substance of the rights and liabilities agreed between the parties that is important. That said it may be that the parties have inserted a term that they do not intend to abide by or indeed it may be impossible for them to exercise the right conferred. In such cases the court may strike down such terms as ‘a sham’ or more accurately ‘a pretence.’ (see **7.22**). This approach is illustrated by the case of *Antoniades v Villers* (1990)(see **7.18**).

*Antoniades*  is also a case where the court read the two agreements entered into separately by Ms Bridger and Mr Villiers as in fact creating one legal relationship between Ms Bridger & Mr Villiers, acting together as joint tenants of the lease, with Mr Antoniades, as landlord. The court was able to do so because the lease displayed the four unities necessary to create a joint tenancy (see **7.25** and **6.7**). There have been cases, for instance *AG Securities v Vaughan* (1990) (see **7.24**),where the court has been unable to construe separate agreements as creating a joint tenancy because the four unities are not present.

**Question 4: Does the Supreme Court’s decision in Berrisford v Mexfield mean that there is no longer a rule that a lease must be for a certain term?**

The decision in *Mexfield* (2012) is discussedat **7.33-7.39**. It should be noted from the outset that the Supreme Court was not invited to discard the rule that a lease must have a certain term: the traditional rule, applied in *Prudential Assurance v London Residuary Body* (1992) (see **7.30**), has been fully retained. However, several Justices expressed their views as to the rule’s lack of merit, and so future statutory or judicial reform is a possibility.

The real significance of the case is not as to the rule itself, but is rather as to the consequences of applying the rule. Given that the purported lease was void as nit did not have a certain term, the consequence appeared to be that Mrs Berrisford only held an implied periodic tenancy, and therefore Mexfield could refuse to renew that tenancy and evict Mrs Berrisford. Instead, the Supreme Court found a way to avoid this seemingly unjust result (see **7.34**). First, the Supreme Court decided that, applying a common law principle which existed before LPA 1925, Mrs Berrisford’s right was a right to exclusive possession for life. Secondly, the Supreme Court applied section 149(6) of LPA 1925, which transformed Mrs Berrisford’s lease for life into a lease for 90 years, determinable only on her death, or on the grounds set out in her agreement with Mexfield. As none of those grounds applied, Mexfield was not entitled to evict Mrs Berrisford.

The decision significantly affects the consequences of a purported lease being void for uncertainty. However, it is important to note that this solution only applies where the tenant is a natural person. The case therefore provides no assistance if a lease with an uncertain term is granted to a company. It is also important to note that this solution is of no use to the tenant where the original tenant has died, since the landlord would in any case have the right to end the lease. These points mean that the decision may well be a prompt for legislative reform, and such reform could, in principle, attack the basic rule that a lease must be for a certain term.

**Question 5: Does the House of Lords’ decision in Bruton v London and Quadrant Housing Trust mean that a lease is not an estate in land?**

*Bruton* (2000) is a controversial decision which is considered fully at **7.49-7.58**. One of the consequences of *Bruton* is to lead to two categories of leases. The traditional lease, which gives the tenant an estate in land and a property right capable of binding third parties; and the *Bruton* lease, which gives the tenant only contractual rights against the landlord. So the short answer to the question is that *Bruton* means that it is possible for B to have a lease without having an estate in land. This will however happen only in the rare cse where A, the party purporting to give B a right to exclusive possession of the land, does not him- or herself have such a right to exclusive possession.

The difference between the *Bruton* lease and a licence is that, in the former case, the terms of the agreement between the parties *would* give B a right to exclusive possession, and hence a traditional lease, *if* A had an estate in the land out of which to create the lease.

The difficulty with *Bruton* is that it challenges some of our fundamental understandings of a lease. This has led a number of commentators to give different explanations for the decision – see **7.53-7.57**.

**Question 6: What are the key differences between a legal lease and an equitable lease?**

The differences between a legal and equitable lease arise as a result of how each are created – ie they flow from the acquisition question: see **7.59-7.72**.

The creation of a legal lease requires a deed, save where the lease meets the requirements set out in section 54(2) LPA 1925 ie it is for three years or less, takes effect in possession and is for a market rent (see **7.61**). Where the lease is for more than seven years, registration is also required if the tenant is to acquire a legal lease (see **7.62**).

If B’s claim to an equitable lease depends on there being a contract between A and B, placing a duty on A to grant B a lease, or to transfer a lease to B, the parties’ agreement will need to meet the formal requirements set out in section 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 (see **4.5-4.17**). It is however possible for B to acquire an equitable lease through other means, which do not require any writing, such as the doctrine of proprietary estoppel (see **4.26-4.31** and **5.93-5.138**).

The key difference in the effect of a legal and an equitable lease relates to the defences question, ie the issue of priority (see **7.73-7.76**). For example, an equitable lease can only be an overriding interest if B is in actual occupation of the land, whereas a legal lease of seven years or less will always be overriding: see Sch 3, para 1 of the LRA 2002. Other differences of detail can also arise: for example in relation to the passing of the benefit and burden of leasehold covenants in leases that pre-date the coming into force of the Landlord & Tenant (Covenants) Act 1995.

**Question 7: Explain what we mean by ‘privity of estate’ making reference to which parties fall within privity of estate.**

The relevant landlord and tenant relationships and the concept of privity of estate, which is central to the enforcement of leasehold covenants, are discussed at **7.87- 7.93**.

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, if a landlord assigns his freehold reversion, there is privity of estate between the assignee of the leasehold reversion and the original tenant. If then, the original tenant assigns their lease, there is privity of estate between the landlord’s assignee and the new assignee of the lease itself. You should note that the original landlord and tenant remain within privity of contract but, having disposed of their respective estates, they are not within privity of estate.

A sub-lessee also 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 at **7.112-7.113**.

**Question 8: How has the contractual liability of the original parties to a lease been affected by the Landlord and Tenant (Covenants) Act 1995?**

The contractual liability of the original parties to a lease is discussed at **7.94-7.97** (in relation to Pre-1996 leases) and **7.98-7.101** (in relation to Post-1996 leases).

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.

An original landlord of a lease governed by the 1995 Act, is not automatically released from liability but may request a release from liability by serving a notice on the tenant at least 4 weeks before the assignment of their reversion – see section 6. If the tenant disagrees, then the matter is resolved by the court. An original landlord under a pre-1996 lease remains contractually liable under their landlord’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 9: When does a covenant ‘touch and concern’ the land? Does this concept continue to have relevance after the Landlord and Tenant (Covenants) Act 1995?**

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 **7.105**. 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 - see **7.110-7.111**.

At first sight this seems an attractive reform but there are lurking dangers – see for instance *BHP Petroleum Great Britain Ltd v Chesterfield Properties* (2002) (see **7.110**). 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. Strangely, this seems possible even if the covenant patently has a close connection with the land.

**Question 10: When is a leasehold covenant capable of remedy?**

Before a landlord can forfeit a lease, other than for the non-payment of rent, they must servie a notice on the tenant pursuant to section 146(1) LPA 1925. These statutory notice requirements 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 when a covenant is capable of being remedied.

A positive covenant eg to repair or insures is generally considered capable of remedy. It is negative covenants which have presented more of an issue. Negative covenants restrict or prohibit certain behaviour – see **7.121**. 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.

A number of decisions have examined this question (see **7.121**). Certain negative covenants are accepted as incapable of remedy because they carry a continuing stigma. Controversy continues in relation to other negative covenants. The Court of Appeal in *Scala House & District Property Co Ltd v Forbes* (1974) 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* (1986) subsequently doubted the width of their view in *Scala House*, which was limited to covenants against sub-letting. Their current approach is illustrated in *Akici v LR Butlin L*td and *Telchadder v Wickland (Holdings) Ltd* (2006) which suggests a more sympathetic approach to the question of whether negative covenants are capable of remedy.

**Question 11: 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 **7.115-7.116**. 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 forfeiture. Lastly, the tenant is granted a right to apply to the court to seek relief from forfeiture. Waiver is considered at **7.117**, the requirements for notice at **7.118-7.122** and the tenant’s right to relief at **7.123-7128**.

In addition, there have been calls for the reform of forfeiture – see **7.129**.

**Question 12: Is there a pressing need for commonhold?**

The short answer to that question is no. Recent legislative reform has addressed, at least in some measure, some of the problems with the long leasehold system which in any event are less problematic where the flat owners themselves own the freehold through a management company. That said, the long lease has been adapted to provide a vehicle for flat ownership where positive obligations are mutually enforceable and as such it will always feel inferior to freehold by many flat owners. Commonhold is thus a logical development for any mature system of land holding. The experience of other jurisdictions has shown that commonhold can be a success, but the present English model, as yet, has not attracted much attention of either developers, prospective flat owners or their respective financiers.

However, recent scandals regarding the sale of long lease, particularly of houses, has reignited the Government’s interest in commonhold and, as a result, the Law Commission are looking into Commohold once again.

The ownership of flats, including the concept of commonhold, is considered at **7.131-137**.