

Tenant Default in a Downturn (Again)

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Part 1: Before the tenant becomes insolvent.

A. The landlord and tenant relationship at common law.

The problems which arise, where landlord and tenant law meets insolvency law, are usually problems which result from a conflict between contractual and proprietary rights, for a lease is a mixture of contract and property, and whilst property rights are normally preserved in an insolvency, contractual rights are not.

At common law, the lease is a contract between the original landlord and the original tenant, by which the original landlord usually agrees to perform the landlord's covenants throughout the term, and the original tenant always agrees to perform the tenant's covenants throughout the term. When the original tenant assigns the lease, the assignee of the term can enforce the benefit of the lease, but the original tenant remains liable as a matter of contract to the landlord to perform the burden of tenant's covenants. Likewise, if the original landlord assigns the reversion, the new landlord can enforce the benefit of the tenant's promises in the agreement, but the original landlord remains bound to perform the burden of the landlord's promises. This is orthodox contract law, for generally speaking, the benefit of a contract can be assigned to a third party, but the burden of its performance remains with the original contracting party.

As between the landlord for the time being and the original tenant, therefore, the liability of the original tenant is primary not secondary. The original tenant is not a surety for the assignee,¹ and consequently defences which are available to a surety are not available to an original tenant. Nor does a landlord owe the original tenant any duty to pursue anyone else liable on the tenant covenant, rather than the original tenant. The landlord's remedies are cumulative.²

Where landlord and tenant law is different from ordinary contract law is that the burden of the promises in the tenancy agreement can be enforced between the current landlord and the current tenant too. The contract, blessed with

¹ *Allied London Investments Ltd v Hambro Life Assurance Plc* (1985) 50 P. & C.R. 207, [1985] 1 E.G.L.R. 45, (1985) 274 E.G. 81, (1985) 135 N.L.J. 184

² *Norwich Union Life Insurance Society v Low Profile Fashions Ltd* (1992) 64 P. & C.R. 187, [1992] 1 E.G.L.R. 86, [1992] 21 E.G. 104, [1992] N.P.C. 131

the estate, takes on an “existence as a species of property independently of the contract”³ with the result that the contractual obligations can be enforced, not only against the original contracting party, but also against the landlord or the tenant current at the time the obligation accrued due for performance. This is what is meant by the burden “running”. The person who takes the benefit of the contract (the estate), can also have the burden of it enforced against him, for the period during which the estate is vested in him, but only then.

At common law, it follows, landlords have no cause of action against intermediate assignees for breaches which occur after the term has been assigned on, because there is neither privity of contract nor privity of estate between them. The intermediate assignee is not an original contracting party and the estate is vested in the ultimate tenant. In order to complete the landlord’s armoury, in the mid-nineteenth century it became the invariable practice in all commercial leases to include a covenant prohibiting assignment, except to an assignee who had first entered into a direct covenant with the landlord, contained in the licence to assign, to pay the rents and perform the covenants in the lease throughout the rest of the term.⁴ The landlord’s arsenal thus became complete: the landlord could bring an action against the original tenant, on the covenant contained in the lease; or against any intermediate assignee, on the covenant given when that person had been the incoming tenant, usually in the licence to assign; and the ultimate assignee would be liable, both on that covenant, and also in debt, as the current tenant.

If everyone was solvent, it did not matter very much whether the landlord brought the action against the original tenant, the intermediate assignee or the ultimate tenant; the liability would ultimately lie with the ultimate tenant. If the landlord brought the action against the original tenant, or an intermediate assignee, then that defendant would have a right of

³ Per Nourse LJ in *City of London v. Fell* [1993] QB 589.

⁴ The practice of obtaining a fresh covenant from the incoming assignee was prompted by the extraordinary rule in *Dumport’s Case* (1603) 4 Co Rep 119b, that a covenant or condition against assignment without consent could only ever be enforced on the first assignment. By requiring the incoming assignee to enter into a deed, the landlord obtained a fresh covenant which could be enforced on the next assignment. See T.Platt, *Law of Leases*, Maxwell, London, 1837, vol.2 275.

indemnity over against the person to whom he had assigned the lease,⁵ and, on paying the landlord's claim, would be subrogated to all the landlord's rights in respect of that sum against everyone else further down the chain than him, including sureties⁶ and even the next assignee where the usual right of indemnity had been expressly excluded from the assignment.⁷ On payment, anyone further down the chain would then be sub-subrogated⁸ to the landlord's rights against those who were even further down the chain, until, ultimately, the liability came to rest with the ultimate assignee.

Similarly, if the landlord made the claim against a surety, the surety would have an implied right of indemnity against his principal, and the same rights of subrogation that his principal would have had, if the landlord had made the claim against him.⁹

This contractual liability at common law is all subject to one overriding qualification, which is not always explained, but which is inherent in the nature of the estate. That is this. At common law, the contract cannot exist without the estate. So if, for example, the landlord destroys the estate by forfeiture, contractual liabilities which have accrued due at the moment when the estate is destroyed remain enforceable, but all future contractual liabilities are discharged. So too if a landlord accepts a surrender from the ultimate assignee, the contractual liability of the original tenant and intermediate assignees is destroyed, as from that date, because the contractual

⁵ As late as 1833, it was not the invariable practice for the indemnity to extend beyond the period during which the lease was vested in the assignee: *Wolveridge v. Stewart* (1833) 2 Cr & Mees 645, 659. But by 1925 an indemnity for the remainder of the term of the lease had become a standard implied covenant: s.77(1)(C) Law of Property Act 1925. (s.24 Land Registration Act 1925 for registered leases) Those indemnity covenants are not, however, generally implied into an assignment of a lease granted after 1995 (s.14 Landlord and Tenant (Covenants) Act 1995). Normally, in such a case, an indemnity covenant is not needed because a lawful assignment discharges the liability of the outgoing tenant, but an indemnity might still be needed on an unlawful assignment. There is no need to serve a s.17 notice in order to recover on a right of indemnity: *Kellogg v. Tobin* [1999] L&TR 513

⁶ *Moule v. Garrett* (1871-72) L.R. 7 Ex. 101, [1861-73] All ER Rep 135; *Electricity Supply Nominees Ltd v. Thorn EMI Retail Ltd* (1992) 63 P. & C.R. 143, [1991] 2 E.G.L.R. 46, [1991] E.G.C.S. 48, *Selous Street Properties v. Oronel Fabrics* (1984) 270 E.G. 743, (1984) 134 N.L.J. 886; *Becton Dickinson v. Zwebner* [1980] QB 208.

⁷ *Burnett v. Lynch* (1826) 5 B & C 569; *Re Healing Research Trustee* [1992] 2 All ER 481.

⁸ There is no conceptual difficulty with sub-subrogation; see *Castle Phillips v. Piddington* [1995] 1 FLR 783

⁹ *Selous Street Properties v Oronel Fabrics* (1984) 270 E.G. 643, (1984) 270 E.G. 743, (1984) 134 N.L.J. 886.

liability is dependent upon the continuing existence of the estate.¹⁰

The rule only applies to the estate. A release of the estate necessarily releases the contract, but a release of the contract has no effect on the estate. If a landlord releases an intermediate assignee from liability under the lease, that does not release the ultimate tenant, nor even the original tenant (notwithstanding that the original tenant has a right of indemnity against the released intermediate assignee).¹¹

B. The landlord and tenant relationship as modified by statute.

The first point to make about landlord and tenant legislation is that none of it provides a complete code. When the Law Commission was created in 1965, one of the first tasks with which it was charged was the complete codification of the law of landlord and tenant. Thirty years later it gave up; the task was just too difficult.

Consequently, all landlord and tenant statutes operate by way of overlay over the general common law. To solve any landlord and tenant problem, it is therefore necessary first to determine what the rights of the parties are at common law, and then ask the question in what way statute changes or alters the parties common law rights.

So far as the contractual relationship between the parties is concerned, the most significant changes are all to be found in the Landlord and Tenant (Covenants) Act 1995. For the purpose of this Act, leases are either “old” leases or “new” leases (the parliamentary draftsman being incapable of providing more imaginative descriptions). A lease is an old lease if it was granted before 1st January 1996; otherwise, with a few exceptions, it is a “new” lease.

For new leases, the purely contractual liability of an original tenant, and of any intermediate assignee who has given a contractual covenant, is determined after a lawful assignment over by that tenant; in other words, after a lawful assignment, the estate continues to exist, but the contractual liability of the assigning party is discharged.¹² Thereafter, the assigning

¹⁰ *Clements v. Richardson* (1888) 11 LR Ir 535

¹¹ *Sun Life Assurance Society Plc v Tantofex (Engineers) Ltd* [1999] L. & T.R. 568, [1999] 2 E.G.L.R. 135, [1999] E.G.C.S. 50.

¹² s.5

tenant can generally be made to guarantee the liability of his assignee under an authorised guarantee agreement, but on the next lawful assignment over, that guarantee is discharged too.

So far as “old” leases are concerned, in order to recover a debt¹³ from an original tenant, who is liable as an original contracting party to the lease, or an intermediate assignee, who is liable by virtue of a covenant contained in a licence to assign or otherwise, or a surety for either of those persons, a landlord must notify that person of the ultimate assignee’s default within six months of the debt becoming due using the prescribed form of notice. Upon payment, that person may call for and require the landlord to grant him an overriding lease.¹⁴

An overriding lease is a concurrent lease. A concurrent lease is a lease of the landlord’s reversion, subject to the rights of the occupational tenant. It differs from a headlease, in that it has subsequently been carved out of the reversion upon an existing occupational lease, whereas a headlease is a lease out of which an occupational lease has been carved. The practical difference is that if a headlease is forfeited, the sub-lease falls with it, because the sub-tenant’s rights have been created out of the headlease, whereas if a concurrent lease is forfeited, the occupational lease is preserved, and takes effect once again as a direct lease of the head-interest. Nonetheless, for so long as the concurrent lease is in existence, the concurrent tenant is the landlord of the occupational lease, and is able to exercise all the rights of the landlord of that lease, including the right to receive the rent or forfeit the term.

The 1995 Act does not affect a landlord’s rights to recover against the ultimate assignee, nor any guarantor for the ultimate assignee (other than a former tenant who is an authorised guarantor under a new tenancy). Nor does it alter the common law where a landlord is seeking to recover an unliquidated sum under an old lease; in other words, damages for breach of covenant rather than a sum of money payable as a debt. So, for instance, s.17 applies if a landlord enters and repairs, and seeks to recover the costs of

¹³ In *Scottish & Newcastle v. Raguz* [2008] UKHL 65 the House of Lords decided that there was no need to serve the s.17 notice until the debt became due for payment.

¹⁴ s.17

doing so as a debt pursuant to a *Jervis v. Harris*¹⁵ clause. But if he simply brings an action for damages for interim or terminal dilapidations, he does not need to serve a s.17 notice at all.

Service of a s.17 notice is merely a procedural bar on bringing an action, rather than a condition precedent to liability. Consequently, an action can be brought against a surety on whom a s.17 notice has been served, notwithstanding that no notice has been served on his principal.¹⁶

It does, however, affect rights of subrogation. Suppose a landlord serves a s.17 notice on an original tenant. Is the original tenant subrogated to the landlord's right to serve a s.17 notice on an intermediate assignee further down the chain, so that the original tenant can exercise his right to recover over against that intermediate assignee? Probably not, for then the intermediate assignee could demand an overriding lease, and subsequently forfeit the occupational lease, destroying forever the landlord's right to recover future sums from the original tenant. In any event, in many cases, the issue will be academic, because by the time the original tenant has paid, the six month period for serving a s.17 notice will have expired, so even if the original tenant could be subrogated to the landlord's right to serve a s.17 notice on someone further down the chain, it would be too late to do so.

In addition to the restrictions under the 1995 Act, there are restrictions on a landlord's ability to recover rent under residential tenancies. For all such tenancies, the obligation to pay rent is suspended until the landlord has given the tenant a notice which complies with s.48 Landlord and Tenant Act 1987. Furthermore, in order to recover ground rent from a tenant of a long lease of a dwelling, the landlord must first serve a notice in the prescribed form on the tenant.¹⁷

C. Enforcement by a landlord with a solvent tenant whilst the relationship continues.

1. Distraint.

If the relevant provisions of the Tribunals Courts and Enforcement Act 2007 are ever brought into force, the right to levy distress will be abolished, and

¹⁵ [1996] Ch. 195, [1996] 2 W.L.R. 220, [1996] 1 All E.R. 303, [1996] 1 E.G.L.R. 78.

¹⁶ *Cheverell Estates v. Harris* [1998] 1 EGLR 27

¹⁷ s.162 Commonhold and Leasehold Reform Act 2002.

replaced with a new statutory process called commercial recovery of rent arrears.

In the meantime, distress is the process by which a landlord seizes and impounds chattels present on a property as security for rent.¹⁸ If the rent is not then paid, the landlord can sell the chattels and apply the proceeds of sale towards his debt. It is not available after a tenancy has been determined by forfeiture,¹⁹ so a distraint will be a waiver of a forfeiture (except for non payment of rent where the available distress is insufficient), and it is not available against an assignee in respect of arrears of rent accruing before the assignment.²⁰

It is not possible to distrain against the crown and diplomats. Permission of the court is needed to distrain against protected or statutory tenants under the Rent Acts²¹ (and their agricultural equivalents) assured tenants (including assured shorthold tenants) under the Housing Act 1988,²² and tenants who are full-time servicemen.²³

Only an individual landlord personally or a certified bailiff may distrain. Generally, distress may only be levied on the property let, and force cannot be used to secure entry.²⁴ Distrainting landlords must either enter through an unlocked door, or be invited in by their victims. Distraintors, however, are not allowed out after dark.

Once entry is achieved, the Distress for Rent Rules 1988 provide that a statutory form of notice is to be given to the person apparently in charge of the property. The notice will identify the goods distrained. The landlord or bailiff may then either carry away the goods or impound them on the

¹⁸ The limitation period for distress is six years except in the case of an agricultural holding when it is one year; s.19 Limitation Act 1980 and s.16 Agricultural Holdings Act 1986.

¹⁹ In other cases, distress is available up to six months after determination of the lease; Landlord and Tenant Act 1707.

²⁰ *Wharfland v. South London Co-operative Building Co* [1995] 2 E.G.L.R. 21, [1995] E.G.C.S. 19, Times, April 25, 1995

²¹ s.147 Rent Act 1977.

²² s.19 Housing Act 1988.

²³ Reserve and Auxiliary Forces (Protection of Civil Interest) Act 1951.

²⁴ If the tenant fraudulently removes goods from the premises to another place with a view to avoiding distress. In those circumstances, the landlord or his bailiff may within 30 days break into that other place with the purpose of seizing the goods; Landlord and Tenant Act 1707. The presence of a police constable when doing so is essential, and where the other place is a dwelling-house, an oath must first be sworn before a justice of the peace that there are reasonable grounds to believe the goods are in that dwelling-house.

premises. If he impounds them on the premises, he must either leave someone in close possession of the goods or enter into a walking possession agreement with the tenant.²⁵ In practice, bailiffs rarely bother to complete walking possession agreements properly; the goods distrained upon are only identified in the most general terms, with the result that if the tenant subsequently breaches the agreement (a pound breach) by disposing of the goods elsewhere, it is impossible to prove that he has done so.

The landlord may sell five clear days after the distress.²⁶ If a request in writing is made by the tenant or owner of the goods, then this is extended to 15 days.²⁷ The landlord is under a duty to obtain the best price.

Some leases contain covenants by tenants to indemnify the landlord against the full costs of a distraint. Such a covenant is almost certainly unenforceable, because the Distress for Rent Rules 1988 prescribe the maximum recoverable sum²⁸ and that cannot be excluded by agreement.

Various classes of goods are privileged, and cannot be distrained upon. The most important are (i) business papers (ii) crown property (iii) items of public trade (iv) equipment let by or belonging to statutory undertakers; (v) hired machinery or breeding stock of an Agricultural Holding (vi) perishable goods (vii) personal effects of the tenant or his family (viii) things already in the custody of the law (ix) things in actual use at the time of distraint.

It is possible, though by no means decided, that the remedy of distraint is a breach of the Human Rights Act 1998.²⁹

2. *Court Action.*

At common law, those liable on the tenant covenant, against whom an action may be brought, are: —

- (i) the person in whom the estate in the lease was vested at the time that covenant should have been performed;
- (ii) the original tenant;

²⁵ Form 8. Distress for Rent Rules 1988

²⁶ s.1 Distress for Rent Act 1869.

²⁷ s.6 Law of Distress Amendment Act 1888.

²⁸ r.10

²⁹ *Fuller v. Happy Shopper* [2001] 1 W.L.R. 1681, [2001] 2 Lloyd's Rep. 49.

(iii) any intermediate assignee who has given a covenant in a licence to assign or otherwise to perform the covenants in the lease throughout the residue of the term; and

(iv) the guarantor (or surety) of any of those persons.

The common law rules on contractual liability have been partly abrogated by the Landlord and Tenant (Covenants) Act 1995 (for the extent of the abrogation, see Page 6 above).

Unless the lease or guarantee expressly provides otherwise, the contractual liability of those liable on the tenant covenant expires on the contractual expiry date of the lease, even if statute continues the estate in favour of the ultimate assignee,³⁰ or gives the ultimate assignee some other right to remain.

D. Ending the relationship with a solvent tenant at common law.

A lease vested in a solvent tenant may determine in one of five ways: —

- (1) expiry of time;
- (2) surrender or merger;
- (3) enlargement;
- (4) forfeiture; and
- (5) (perhaps) acceptance of a repudiatory breach.

By statute, there is a sixth method by which a lease may end, which is disclaimer by a liquidator or trustee in bankruptcy or the crown, but this can only occur after the tenant has become insolvent or ceased to exist, and so is considered at Page 53 below. A lease cannot escheat.

1. Expiry of time

At common law, a lease may end by expiration of time in one of three ways: if it is a periodic tenancy, by expiry of a notice to quit served by either party; if it is a fixed term tenancy, automatically on the contractual expiry date; and in either case, on a particular date, by the exercise of an option to determine on that date (a break option).

Where a lease expires, but statute continues the relationship of landlord

³⁰ *City of London v. Fell* [1994] 1 A.C. 458, [1993] 3 W.L.R. 1164, [1993] 4 All E.R. 968, (1995) 69 P. & C.R. 461, [1993] 49 E.G. 113.

and tenant (see Page 26), or the tenant is at least asserting that the relationship is continuing, then there is no question of a new periodic tenancy being created by demand for and acceptance of rent accruing due after the contractual expiry date. If the old relationship is continuing, the acceptance of rent is attributable to the continuation of that relationship, and it is therefore impossible to infer that the parties must have necessarily agreed to create any new relationship.³¹

Similarly, if a tenant who has no security of tenure holds over after the expiry of the lease, and pays rent whilst the parties are negotiating the terms of a new lease, it will be impossible to infer that the parties have reached any agreement, other than that the tenant shall be a tenant at will whilst those negotiations continue.³² A tenancy at will may be determined by either party without notice at any time.

But if a tenant has no arguable claim to security of tenure holds over after expiry of the lease, and the landlord simply continues to accept rent in return for the tenant's occupation, then court will be driven to the conclusion that the landlord has impliedly granted the tenant a new periodic tenancy, because the payment of rent cannot otherwise be explained.³³

This commonly causes a problem for business tenancies which are duly contracted out of the 1954 Act (see Page 29). The lease expires on its contractual termination date. The tenant then holds over, and pays rent. The landlord accepts the rent without attempting to negotiate the terms of a new tenancy. The only conclusion which the court can draw is that the landlord has impliedly created a new periodic tenancy, which necessarily, has the protection of the 1954 Act, because there is no contracting out order in respect of that new tenancy, and because a periodic tenancy cannot be contracted out in any event.

The same problem used to occur with *Gladstone v. Bower*³⁴ agreements (in other words, a tenancy for a fixed term of more than a year but less than two years) under the Agricultural Holdings Act 1986, but that problem is

³¹ *Stirling v. Leadenhall Residential* [2001] 3 All ER 645.

³² *Javad v. Aqil* [1991] 1 W.L.R. 1007, [1991] 1 All E.R. 243, (1991) 61 P. & C.R. 164, [1990] 41 E.G. 61

³³ *Morrison Low v. Patterson* [1985] SLT 255

³⁴ [1960] 2 Q.B. 384, [1960] 3 W.L.R. 575, [1960] 3 All E.R. 353

becoming historic, because it has not been possible to create new *Gladstone v. Bower* agreements since 1st September 1995. More often, however, in the agricultural context, the problem arises with grazing licences, which are renewed seasonally for many years. The point is best explained by Brian Gill, in his book on the Law of Agricultural Holdings in Scotland, *viz.*³⁵—

The prudent advice to landlords, endlessly repeated but frequently ignored, is to ensure that on the expiry of a seasonal let the tenant removes his stock from the land, even if the let is soon to be renewed. Many such lets are concluded between neighbours and often the tenant is given informal permission to remain on the land pending a sale of his stock or the conclusion of a new grazing let. Such permissions seldom fail to end in trouble. The effect of the permission to occupy beyond the period of the let may be that the tenant obtains a full year's occupancy and sometimes several successive years' occupancy. . . . If the occupancy extends to successive years, it is almost certain that in Scotland the court would hold that at the expiry of the seasonal let a new lease from year to year was established.

In England, the law in respect of grazing agreements is in all material respects the same. That may not matter very much if the court concludes that the yearly periodic tenancy was granted after 1st September 1995, because then it can be terminated as a farm business tenancy, but if it was created before that date, then it will be an agricultural holding under the 1986 Act having full security of tenure.

2. Surrender & Merger

A surrender may be express or by operation of law. Both involve an agreement to deliver up the term in the lease to the immediate landlord so that it may be swallowed up in the reversion. A merger is the same thing the other way round: it is the extinguishment of the term when the tenant acquires the reversion. Since 1875, it has not occurred automatically, but depends on the intentions of the parties, like a surrender. If a reversion has been mortgaged by way of legal mortgage, the mortgagee has all the rights and remedies of a concurrent landlord, and consequently the tenant cannot surrender to the landlord without the mortgagee's consent, except in very limited circumstances.³⁶ A surrender to the landlord, that is ineffective for this reason, takes effect an assignment of the term to the landlord

³⁵ at para.69.

³⁶ See s.100 Law of Property Act 1925.

mortgagor.³⁷

Express surrender.

An express surrender is an agreement between the landlord and the tenant that the tenancy should immediately be surrendered up to the landlord. It cannot be made to take effect in the future and must be made by deed.³⁸ Landlords are often keen to avoid express surrenders, because an express surrender is stampable, whereas a surrender by operation of law is not. However, anti-avoidance measures mean that it is now almost impossible to effect a surrender by operation of law without producing at least one stampable document, with the result that landlords are experimenting with forfeiture instead. A consensual forfeiture is, nonetheless, a surrender.

Surrender by operation of law.

A surrender by operation of law occurs when the landlord and tenant agree that the tenancy shall be surrendered up to the landlord and that agreement is then acted upon. It is a mixture of contract (an offer to surrender and an acceptance of that offer) and estoppel (performance of that contract). The most common circumstance in which there is a surrender by operation of law is when a tenant hands back his key. The tenant, by his conduct in offering up the key, offers to surrender his tenancy, and the landlord, by taking back the key, both accepts the offer and acts upon. Delivery of keys has deep symbolic significance in English land law, and a surrender by operation of law in this way is but a faint echo of the Norman system of conveyancing, known as livery of seisin.

If an existing tenant agrees to take a new lease in substitution for an existing lease, the existing lease is surrendered by operation of law when the new lease is granted. A lease cannot be varied so as to increase the length of the term, nor so as to take in new property. So a “variation” which does either of those things takes effect as a surrender and re-grant.

Surrenders by operation of law are problematic when the tenant abandons the premises. The question which then arises is whether the abandonment can be treated as an offer to surrender the premises to the landlord which the landlord can accept by conduct in re-entering the property? The answer

³⁷ s.63 Law of Property Act 1925; *Thellusson v. Liddard* [1902] 2 Ch 635

³⁸ s.54 Law of Property Act 1925.

appears to be generally that it is not³⁹ though it may be where substantial rent arrears are owing.⁴⁰

3: *Enlargement*

There are two types of enlargement.

The first occurs when a landlord 'releases' a reversion to the tenant. At common law, a vested interest for life,⁴¹ or years, or even at will,⁴² either in possession or in reversion, may be enlarged by a release, which is no more than a grant of the reversion to the tenant, rather than to a stranger. This was the standard method of conveying freeholds between the sixteenth and nineteenth centuries.

The alternative means of enlarging a term is by statute. The problem was that, in the past, long leases were often granted at a ground rent, without any provision for review. When the value of money fell, due to inflation, it ceased to be worth the landlord's while to collect the rent, and, eventually, the lease would be lost or forgotten, and the tenant's successors would assume that they held in fee simple. But the landlord did not always forget, and the tenant would have a nasty surprise at the end of the term.⁴³

Before 1845, the landlord's right to recover possession at the end of the term could be barred by a tortious feoffment: in other words, if the tenant had conveyed the land openly⁴⁴ as if it were a fee simple, by a feoffment with livery of seisin, and if the landlord had failed to take steps to recover it within the relevant limitation period,⁴⁵ then the landlord was barred. That form of conveyance, however, was made impossible by s.4 Real Property Act 1845. The legislative response, in s.65 Conveyancing Act 1881 was to give tenants of terms granted for 300 years or more, where at least 200 years

³⁹ *Preston v. Fairclough* (1982) 8 HLR 70, Times, December 15, 1982

⁴⁰ *R. v. Croydon LBC ex parte Toth* (1986) 18 HLR 493, (1988) 20 H.L.R. 5

⁴¹ Co Litt 273b

⁴² Litt 460

⁴³ This example is given under 'Canterbury' in Blount's Tenures of Land and Customs of Manors, 5th ed. 1909 (W.Hazlitt ed) : 'In 1887 the Corporation claimed a private residence in the city, which had been held on a 300 year lease, granted about 1598, at a peppercorn rent of eightpence a year. This rent had never been paid within memory. The municipal authorities only then became aware of their right, and were advised that non-payment of the nominal rent was no bar.'

⁴⁴ *Weller v. Stone* (1885) 54 LJ Ch 497

⁴⁵

of the term remained, at a nominal rent or no rent, the right to enlarge the term to a fee simple by deed. That right is now found in s.153 Law of Property Act 1925, but it is not clear whether this is a statutory form of subinfeudation, or whether it is a statutory conveyance or extinguishment of the former landlord's fee simple.⁴⁶

4. Forfeiture.

Forfeiture is the process by which a landlord unilaterally exercises a contractual right to determine a lease prematurely by reason of the tenant's breach of covenant or condition (sometimes called a right of re-entry). A right of forfeiture is an alienable proprietary interest,⁴⁷ exercisable by any person, subject only to the rule against perpetuities.⁴⁸ In an oral tenancy, a forfeiture clause for breach of covenant will be implied as a usual condition,⁴⁹ unless the parties have expressly agreed to the contrary. But where a lease is in writing, that will generally be taken as being the whole agreement, and so if a right to re-enter is not expressly reserved, it will not be implied.⁵⁰

Rental breach.

Rent is a periodic sum paid in return for the use or occupation of land issuing out of the land. It is sometimes said that rent has an additional characteristic, namely that it is a payment for which the remedy of distraint is available. But this is entirely circular, and adds nothing to the definition: the remedy is a consequence of the payment being rent; not a characteristic of the payment. Service charge is rent if it is expressly reserved as such and payable to the landlord; otherwise, it is not rent.⁵¹ The same rule applies to payments made to the landlord for the cost of insurance.

At common law, it is precondition of a forfeiture for non-payment of rent

⁴⁶ Challis's Law of Real Property, pp.333-335

⁴⁷ s.1(2)(e) Law of Property Act 1925.

⁴⁸ s.4(3) Law of Property Act 1925.

⁴⁹ *Chester v. Buckingham Travel* [1981] 1 W.L.R. 96, [1981] 1 All E.R. 386, (1981) 42 P. & C.R. 221

⁵⁰ There is an exceptional case where a forfeiture clause is not needed. Where a tenant, by his conduct, intentionally denies that his landlord is his landlord, he commits an act entitling the landlord to forfeit his interest. The landlord has an election. He can accept the denial, and put an end to the tenant's estate by re-entering, or he can waive the denial. The provisions of s.146 Law of Property Act 1925 apply to a determination by denial of title: *Abidogun v. Frolan Health Care Ltd* [2001] EWCA Civ 1821.

⁵¹ *Escalus Properties Ltd v. Cooper-Smith* [1996] Q.B. 231, [1995] 3 W.L.R. 524, [1995] 4 All E.R. 852, (1996) 28 H.L.R. 338, (1996) 71 P. & C.R. 47, [1995] 2 E.G.L.R. 23

that the landlord makes a formal demand. This is a thoroughly entertaining medieval pantomime, which requires the landlord to attend, usually at the front door of the property, between sunrise and sunset, and again at sunset, on the last day before a forfeiture could be made, and demand the exact amount due. There is no need to make a formal demand if the re-entry clause expressly dispenses with it (a well drafted re-entry clause does so) nor if the landlord is forfeiting through the court, six months rent is in arrears and the landlord has attempted to distrain but has not been able to satisfy the arrears from the distraint.⁵²

By s.81 Housing Act 1996 a landlord cannot forfeit a lease of a dwelling for non payment of service charge (including service charge reserved as rent) until the expiration of 14 days after the tenant has either admitted the arrears, or the amount of the arrears has been determined by a court or an arbitration award made pursuant to a post-lease arbitration agreement. A default judgment suffices as an admission for this purpose, even if it is not a “determination” .⁵³

Non-rental breach

In order to forfeit for most non-rental breaches it is necessary for the landlord first to serve a notice under s.146 Law of Property Act 1925. The notice must state the particular breaches complained of; in practice, this means reciting the covenant or condition and the conduct which is alleged to have breached the covenant or condition. It must also require the tenant to remedy the breach if it is capable of remedy. If it is not capable of remedy, then there is no need to require remedy in the notice.⁵⁴ It is important to know whether the breach is remediable or not, because if it is remediable and the s.146 notice fails to require it to be remedied, then any subsequent forfeiture based on that s.146 notice will fail. Many covenants that were previously thought to be irremediable are now treated as being remediable,⁵⁵ so the form of wording usually adopted is that the landlord “requires the tenant to remedy the breach if it is capable of remedy.” The notice may, but does

⁵² s.139(1) County Courts Act 1984; s.210 Common Law Procedure Act 1852.

⁵³ *Cribb v. Freyberger* [1919] WN 22.

⁵⁴ *Rugby School v. Tannahill* [1935] 1 K.B. 87.

⁵⁵ *Savva v. Hussein* (1997) 73 P. & C.R. 150, [1996] 2 E.G.L.R. 65.

not have to, require compensation in money for the breach.⁵⁶ It does not have to make specific reference to s.146 of the Law of Property Act 1925, provided that it complies with the substance of the section.⁵⁷

By s.82 Housing Act 1996 the effect of s.81 must be set out in any s.146 notice where the breach complained of is non-payment of residential service charge. But it does not require a s.146 notice to be served where it would not otherwise be necessary, and so does not apply if the service charge has been reserved as rent.

A landlord cannot serve a s.146 notice upon the tenant of a long lease of a dwelling unless a court or arbitrator (appointed pursuant to a post-lease arbitration agreement) has already decided that a breach has occurred and 14 days have since expired.⁵⁸

Where the forfeiture is for failure to keep in repair during the term, and more than 3 years of the term remain, the s.146 notice must contain a statement, in characters no less prominent than those in the rest of the notice, informing the tenant of his right to and the means by which he can serve a counter-notice under the Leasehold Property (Repairs) Act 1938. If such a counternotice is served, permission of the county court is needed to forfeit.⁵⁹

A s.146 notice should be served in the name of the immediate legal reversioner upon the lease intended to be forfeited. So if the reversion is registered land, then the s.146 notice should be served in the name of the registered proprietor.⁶⁰ It should be addressed to “the tenant”, rather than to a particular tenant by name. This is necessary because if there has been an assignment (even an unlawful one) that is sufficient to vest the estate in

⁵⁶ *Lock v. Pearce* [1893] 2 Ch 271.

⁵⁷ *Van Haarlam v. Kasner* (1992) 64 P. & C.R. 214, [1992] 36 E.G. 135, [1992] 2 EGLR 59.

⁵⁸ s.163 Commonhold and Leasehold Reform Act 2002.

⁵⁹ s.1(3) Leasehold Property (Repairs) Act 1938.

⁶⁰ If the reversion is in the process of being transferred, but the new landlord has not yet been registered at the Land Registry, then the section 146 notice should be served in the name of the previous landlord if the transfer has not yet been lodged at the registry, but if it has been lodged, the section 146 notice should be served in the name of the new landlord, because registration is retrospective to the date upon which the transfer was lodged; *Brown & Root Technology Ltd v. Sun Alliance and London Assurance Co Ltd* [2001] Ch. 733, [2000] 2 W.L.R. 566, (1998) 75 P. & C.R. 223, [1997] 1 E.G.L.R. 39.

the assignee, and so invalidate the s.146 notice.⁶¹

Having served the s.146 notice, the landlord must wait a reasonable time before forfeiting. The length of time depends upon whether the breach complained of is remediable or not. If it is remediable, then a reasonable time depends upon how quickly a tenant could reasonably be expected to remedy the breaches of which complaint is made should he be minded to do so. If he does so, then the right to forfeit is lost. If the breach is incapable of remedy, then notwithstanding the words of the statute, the landlord must still leave enough time to enable the tenant to take advice and apply for relief if desired.⁶² Fourteen days is sufficient for this purpose.

Waiver, election and entry.

A lease is never forfeited automatically, even though the forfeiture clause might appear to say so in terms.⁶³ A right to forfeit may therefore be waived, even if the lease purports to contain an “anti-waiver” provision, because waiver, in this context, simply refers to the doctrine of election, and the doctrine of election is something that operates outside the contractual agreement between the parties.

The doctrine of election requires a person, who has more than one remedy for a wrong, to choose between those remedies, if they are inconsistent.⁶⁴ If he brings an action claiming inconsistent remedies, he is forced to make the choice when the judgment comes to be drawn, for the court cannot give judgment for conflicting remedies.⁶⁵ He cannot otherwise be forced to choose until then, but he is free to make his choice at any time after the wrong has been done, and once he has done so, it is irrevocable. As soon as he has

⁶¹ *Old Grovebury Manor Farm Ltd v. W Seymour Plant Sales & Hire Ltd (No.2)* [1979] 1 W.L.R. 1397, [1979] 3 All E.R. 504, (1980) 39 P. & C.R. 99.

⁶² *Horsey Estates v. Steiger* [1899] 2 QB 79 cf. s.146(1) “the lessee fails within a reasonable time thereafter to remedy the breach if it is capable of remedy ...”

⁶³ Originally, a proviso that a lease would be ‘void’ for breach was held to mean exactly that (*Browing v. Beston* (1553) Plowden 135, *Pennant’s Case* (1596) 3 Co Rep 64b, *Anonymous* 3 Salk 4) unless the lease was lease for life. Lord Ellenborough objected to that, in 1817, on the grounds that, a tenant who wished to end a lease, might deliberately commit a breach, and thereby take advantage of its own wrong (*Rede v. Farr* (1817) 6 M & S 265) with the result ‘void’ has always held to mean ‘voidable at the election of the landlord’ ever since: *Doe d. Bryan v. Bancks* (1821) 4 Barn & Ald 401, *Doe d. Nash v. Birch* (1836) 1 M & W 402, *Alghussein v. Eton College* [1988] 1 WLR 587

⁶⁴ See per Lord Blackburn in *Scarff v. Jardine* (1882) 7 App Cas 345 at 360, [1881-5] All ER Rep 651 at 658.

⁶⁵ *Tang Man Sit v. Capacious Investments* [1996] 1 All ER 193.

communicated⁶⁶ his choice to the wrongdoer, whether by words or conduct, he cannot change his mind, even though the other may not have relied upon the choice or altered his position in any way.⁶⁷

If, therefore, a landlord by words or conduct does something which informs the tenant that he has decided to affirm the lease (for instance, if he, with knowledge of the breach, demands and accepts rent which has fallen due since the breach was committed) he thereby waives the right to forfeit for that breach, although not for any breach which may be committed or continue subsequently. Likewise, if a landlord chooses to forfeit a lease, he cannot later affirm it. Before he can be said to have made a choice between affirmation and forfeiture, the landlord needs to know not merely that a breach has been committed, but also that the law gives him a right to choose whether the forfeit or affirm.⁶⁸ He does not, however, need to know that his choice is irrevocable.⁶⁹

Making an election in favour of forfeiture does not, in itself, end the lease. The lease ends by an entry, either notional or actual. Simply writing to the tenant saying “I hereby elect to forfeit your lease” is, therefore, not sufficient to forfeit it, because that does not amount to an entry. But it does amount to an election to forfeit, which prevents the landlord changing his mind subsequently. Having chosen to forfeit, the tenant can compel the landlord to do so.

It is important to know when the entry was made, because the tenant’s estate in the lease, and the right to possession under that lease, determines at the moment when the entry is made, and the landlord’s reversion is accelerated from that date. Subject only to the possibility of relief, the landlord becomes entitled to possession of his estate free from the lease with effect from that

⁶⁶ *China National Foreign Trade Transportation Corp v. Evlogia Shipping Co SA of Panama, The Mihaios Xilas* per Lord Diplock ([1979] 2 All ER 1044 at 1049-1050, [1979] 1 WLR 1018 at 1024): It is trite law that in such circumstances to constitute an election to pursue one remedy so as to preclude the person making the election from subsequently resorting to the other remedy there must be an unequivocal act or statement by him communicated to the person against whom the two mutually exclusive remedies are available and showing that he intends to pursue one of them.

⁶⁷ Per May and Slade LJ in *Payman v. Lanjani* [1984] 3 All ER 703.

⁶⁸ Per Stephenson LJ in *Peyman v. Lanjani* [1985] Ch 457; Per Lord Atkin in *Evans v. Bartlam* [1937] 2 All ER 646 at 649, [1937] AC 473 at 479; Per Lord Wright; [1937] 2 All ER 646 at 653, [1937] AC 473 at 485.

⁶⁹ Per Stephenson LJ in *Peyman v. Lanjani* [1985] Ch 457.

moment, and when the court makes an order for possession in a forfeiture claim, it is deciding that the lease ended on the date that the entry took place. Consequently, if the tenant remains in possession, the landlord's claim for mesne profits runs from that date.

Often, however, the entry and the election to forfeit are made at the same time.

The election and entry may be made by peaceable re-entry (ie physical re-entry without a court order). The rule here, is simple. Peaceable re-entry is necessarily both an actual re-entry upon the lease, and an election to forfeit, communicated by the act of re-entering. For this reason, re-entry onto only part of the premises is effective to forfeit the whole lease. A re-entry on a part is just as effective a communication of an election to determine the lease as re-entry on the whole.

Alternatively, the entry and election may be made by issue and service of an originating process⁷⁰ seeking relief solely on the footing that the lease has come to an end, electing immediately and unequivocally to forfeit and claim possession. Service of those proceedings is a notional entry on the land (because that is how it was treated in the old action of ejectment) and it also a communication of the election to forfeit. Consequently, the lease determines as soon as the originating process is served.⁷¹

The more complicated situation is where the landlord brings a claim seeking, in the alternative, both forfeiture and enforcement of the terms of the lease. Then the landlord does not make his election, and does not enter, until he does something in the proceedings to make his choice clear, or until judgment, when he is forced to chose whether he wants a possession order or not.⁷²

If the landlord re-lets the property to a new occupational tenant, the election and entry are made when the new tenant physically enters, or when proceedings are served against the former tenant seeking to recover possession.⁷³

⁷⁰ Formerly a writ in the High Court, or a possession summons in the County Court; now, in either court, a claim form in form N.5.

⁷¹ *Canas Property Co v. KL Television Services* [1970] 2 Q.B. 433, [1970] 2 W.L.R. 1133, [1970] 2 All E.R. 795, 21 P. & C.R. 601

⁷² *Tat Man Sit v. Capricious Investments* [1996] 1 All ER 193.

⁷³ *Canas Property Co v. KL Television Services* [1970] 2 Q.B. 433, [1970] 2 W.L.R. 1133, [1970] 2 All E.R. 795, 21 P. & C.R. 601

Peaceable re-entry.

Peaceable re-entry is the process by which a landlord physically re-enters without the assistance of the court. The general rule is that peaceable re-entry is not available against residential tenants unless the tenancy has come to an end, or can be put to an end by the re-entry, and the tenant is no longer living in the property or any part of it.⁷⁴ As a matter of civil law (apart from the insolvency restrictions considered at Page 52 below), there is nothing to prevent landlords using force to re-enter non-residential premises, but there are criminal sanctions if there is someone present on the premises at the time who is opposed to the entry.⁷⁵

Relief from forfeiture.

The jurisdiction to grant relief to the tenant in each case is set out in the table below: —

	High Court	County Court
Peaceable - rent only	Inherent	s. 139(2) CCA 84
Peaceable - other breaches	s.146(2) LPA 25	s.146(2) LPA 25
High Ct. forfeiture - rent only	s.38 SCA 81 & Inherent	None
High Ct. forfeiture - other breaches	s.146(2) LPA 25 (& perhaps Inherent)	None
County Ct. forfeiture - rent only	None	s.138 CCA 84
County Ct. forfeiture - other breaches	None	s.146(2) LPA 25

Key: CCA 84 - County Courts Act 1984; LPA - Law of Property Act 1925; SCA 81 - Supreme Court Act 1981.

Relief can be granted both for remediable and irreparable breaches. There is no rule that an irreparable breach is also irremediable breach. Relief, however, will not normally be granted to a person who has used the property for some illegal or immoral purpose.⁷⁶ Nor will relief usually be granted to a person who has wilfully committed a very serious breach of covenant.⁷⁷ Nor can relief be granted so as to prejudice the rights of any person who,

⁷⁴ This is the combined effect of ss.2 and 3 Protection from Eviction Act 1977. There are exceptions in s.3A

⁷⁵ s.6 Criminal Law Act 1977.

⁷⁶ *BP Pension Trust v. Behrendt* (1986) 18 H.L.R. 42, (1986) 52 P. & C.R. 117, [1985] 2 E.G.L.R. 97

⁷⁷ *Southern Depot v. British Railways Board* [1990] 2 EGLR 39.

between forfeiture and relief, has *bona fide* been granted a legal interest in the property for value without notice⁷⁸ of the tenant's right to relief.

This poses a particular problem where the third party interest not to be prejudiced is a legal lease. Notwithstanding that as against the landlord, relief must be treated as having been granted with retrospective effect, as against the third party, relief cannot be granted so as to take effect prior to grant of his lease. If the tenant has delayed unreasonably in applying for relief, the court might refuse to grant relief at all.⁷⁹ If relief is granted, it has to be granted to take effect subject to all the rights of the new third party lessee, and the only way in which that can be done is by the grant of a concurrent lease of the reversion;⁸⁰ otherwise, a subsequent forfeiture of the relieved lease would also forfeit the new lease.

Relief from forfeiture by proceedings for non-payment of rent can be obtained automatically in the County Court by paying the rent in arrears and the costs of the action five clear days before the first return day on the front of the claim form.⁸¹ Similarly, in High Court proceedings for forfeiture for non-payment of rent, where at least six months rent is in arrears,⁸² relief can be obtained automatically by paying into court and tendering all the arrears and the costs of the action before the trial.⁸³ In either case, contractual (but not statutory) interest will be payable as well.

In other cases, the terms are in the discretion of the court, but there are four overriding principles.

The first is that the person applying for relief must do whatever is necessary to remedy the breach of covenant for which the landlord forfeited, in so far as it is capable of being remedied; and if it is not capable of being remedied, then he must pay the landlord appropriate compensation for the breach.

⁷⁸ In the case of a registered lease, the mere fact that the leasehold title has not been vacated is probably sufficient notice. The Land Registry will normally wait six months before closing the title because of the possibility of an application for relief. In the case of an unregistered lease, notice will depend upon a variety of factors.

⁷⁹ *Silverman v. AFCO* [1988] 1 EGLR 51, (1988) 56 P. & C.R. 185.

⁸⁰ *Fuller v. Judy Properties* [1992] 1 EGLR 75, (1992) 64 P. & C.R. 176.

⁸¹ s.138(2) County Courts Act 1984. The "return" day means the date specified on the front claim form; *Swordheath v. Bolt* [1992] 2 EGLR 68.

⁸² *Standard Pattern v. Ivey* [1962] Ch 432, [1962] 2 W.L.R. 656, [1962] 1 All E.R. 452. Where six months rent is not in arrears, then relief can be sought on the same terms pursuant to s.38 Supreme Court Act 1981.

⁸³ s.212 Common Law Procedure Act 1852.

There is, however, generally no obligation on the tenant to remedy breaches of covenant for which the landlord did not forfeit. So a landlord cannot forfeit for non-payment of rent, and then demand as a term of relief that the tenant remedy a non-rental breach.⁸⁴

The second is that, in the case of a retrospective relief from forfeiture (in other words, relief in the name of the tenant rather than by vesting order in favour of a sub-tenant) the person applying for relief must do whatever is necessary to perform the covenants in the lease that fall due for performance after the date of forfeiture but before the date upon which relief is granted.

The third principle is that, in the case of a deliberate rather than an inadvertent breach of covenant, the landlord must be given appropriate security for the tenant's future conduct.⁸⁵ In a rental case, this may include a rent deposit deed. In a non-rental case, it may involve undertakings being given to court.

The fourth principle is that the person applying for relief normally has to pay the costs of the action as a condition of obtaining relief. This is true even if that person has the benefit of a public funding certificate, for requiring someone to pay costs as a condition of granting relief is not "enforcement" of a costs order against him; if the court offers him relief on those terms, he does not have to take it at all.⁸⁶ It is therefore vital, in cases where the court is likely to find that there has been a breach for which the landlord can forfeit, to make an early offer under CPR part 36, for unless the tenant is protected in this way, he will have to pay the costs of the action even though he succeeds in obtaining relief. Where the lease contains a covenant to pay costs on an indemnity basis, then that will normally be the appropriate basis of assessment.⁸⁷ Otherwise, the appropriate basis of assessment is the standard basis.⁸⁸

⁸⁴ *Gill v. Lewis* [1956] 2 QB 1, [1956] 2 W.L.R. 962, [1956] 1 All E.R. 844; cf. *Essex Furniture Plc v. National Provident Institution* [2001] L. & T.R. 3

⁸⁵ There is no longer an absolute rule that relief will only be granted for a deliberate breach in exceptional circumstances; *Mount Cook Land v. Hartley* [2000] EGCS 26, 2000 WL 345123.

⁸⁶ *Factors (Sundries) Ltd v. Miller* [1952] 2 All ER 630, [1952] 2 T.L.R. 194; *Three Stars Property Holdings v. Driscoll* [1988] C.L.Y. 2795

⁸⁷ *Church Commissioners v. Ibrahim* [1997] 1 EGLR 13.

⁸⁸ *Billson v. Residential Apartments* [1992] 1 AC 494, [1992] 2 W.L.R. 15 [1992] 1 All E.R. 141 (1992) 24 H.L.R. 218 (1992) 63 P. & C.R. 122 [1992] 1 E.G.L.R. 43; *Billson v. Residential Apartments (No.3)* [1995] EGCS 155.

Where a court grants relief from forfeiture to the tenant (including on an application made by the sub-tenant in the name of the tenant)⁸⁹ relief takes the form of a retrospective reinstatement of the original lease. In the meantime there is inevitably a twilight period of some uncertainty. During this period the landlord is precluded from treating the terms of the lease or the covenants in the lease as on foot as against the tenant, but the tenant who has not elected to determine the lease can seek to rely on and enforce the covenants in the lease against the landlord.⁹⁰

The limitation period for granting relief to the tenant in each case is set out in the table below: —

	High Court	County Court
Peaceable - rent only	Unlimited	Six months from re-entry
Peaceable - other breaches	Unlimited	Unlimited
High Ct. forfeiture - rent only	Six months from execution	N/A
High Ct. forfeiture - other breaches	Date of execution	N/A
County Ct. forfeiture - rent only	N/A	Six months from execution
County Ct. forfeiture - other breaches	N/A	Date of execution.

Although there is no limitation period for applying for relief in the High Court after a peaceable re-entry, in practice the court applies a six month period from the date of re-entry.

Where the time limit is calculated from execution of a judgment, the time limit will be extended if the judgment upon which the execution was based is set aside, for if the judgment is set-aside, the execution falls with it. Even if the judgment is sound, if the execution has been carried out in an oppressive or deceitful manner, then it is possible to set-aside the execution alone, and thereby start time running again.⁹¹

5: Repudiatory Breach.

May a tenancy be determined by acceptance of a repudiatory breach?

This is one of those issues that exposes the fissure between a contractual

⁸⁹ See Page 36 below.

⁹⁰ *Peninsular Maritime Ltd v. Padseal* (1981) 259 EG 860 at p.866; *Associated Deliveries Ltd v. Harrison* (1984) 272 EG 321, (1985) 50 P. & C.R. 91

⁹¹ *Peabody Donation Fund v. Hay* (1986) 19 HLR 145; *Hammersmith & Fulham LBC v. Hill* (1995) 27 HLR 368, [1994] 35 EG 124.

analysis of the relationship of landlord and tenant and a proprietary analysis. If a lease is really just a contract, with the special (but not unique) characteristic that the burden can be enforced against assignees too, why should it not be able to determine in this way? If, on the other hand, a lease is really a proprietary estate in land, how can it possibly do so? Although the law is far from settled,⁹² it seems likely that a tenant, at least, may elect to determine a lease by reason of his landlord's repudiatory breach.⁹³ If the breach is of a promissory condition, then no matter how slight the breach, the tenant is entitled to exercise the remedy. But the tenant cannot exercise the remedy for breach of a warranty. Nor can he exercise the remedy for breach of an innominate term, unless the breach is so serious that it deprives him of the substantially the whole benefit of the letting.⁹⁴

E. Statutory continuation of the relationship with a solvent tenant.

1: Rent Acts:

Most private residential lettings granted for a short term to individuals⁹⁵ before 15th January 1989 fall within the Rent Act 1977 (or the Rent Agriculture Act 1976, if the tenancy was granted in connection with agricultural employment). During the contractual period of the tenancy, it is called a "protected tenancy". Nothing in the Rent Acts prevents the determination of a protected tenancy, whether for a fixed or periodic term, in accordance with ordinary common law rules. In addition, it is deemed to determine on the first occasion when the landlord exercises his statutory power to increase the rent.⁹⁶ But if the protected tenancy comes to an end at common law whilst the tenant is occupying the property as his residence, then a "statutory tenancy" is automatically created in its place.⁹⁷ In order to

⁹² The doctrine of repudiatory breach, where the lease is made by deed, is inconsistent with Lord Mansfield's decision in *Boone v. Eyre* (1779) 2 W Blac 1312 fn.t

⁹³ *Highway Properties Limited v. Kelly Douglas & Co* (1971) 17 DLR (3d) 710; *Shevill v. Builder's Licensing Board* (1982) 56 ALJR 793; *Ripka Property v. Maggiore Bakeries* [1984] VR 629; *Lyons v. Anderson* (1886) 13 R 1020; *Hussein v. Mehlman* [1992] 32 EG 59; *Chartered Trust plc v. Davies* [1997] 2 EGLR 83, (1998) 76 P. & C.R. 396

⁹⁴ *Nynehead Developments v. Fibreboard Containers* [1999] 02 EG 139.

⁹⁵ Lettings to companies had the protection of the rent restrictions, but not security of tenure; *Hilton v. Plustitle* [1988] 3 All ER 1051.

⁹⁶ s.49(4)

⁹⁷ s.2 Rent Act 1977.

recover possession thereafter, the landlord will have to prove one or more of various statutory grounds in the local County Court. This is so even if the protected tenancy determines by deliberate act of the tenant; for instance, exercise of a break option or service of a tenant's notice to quit. A statutory tenancy, not being an interest in land but rather a statutory right of immovability, cannot be forfeited.⁹⁸ Nor can it be determined by express surrender.⁹⁹ But if the tenant does an act equivalent to a surrender by operation of law, that does determine the statutory tenancy or prevent it arising in the first place, because a statutory tenancy subsists only for so long as the tenant is occupying the property as his residence, and once he ceases to do so, it cannot revive again. He need not, however, occupy the property as his only home, and even relatively long absences, if explicable, may not break the continuity of the thread of occupation.

2. Assured tenancies.

Most private sector residential lettings granted for a short term to individuals on or after 15th January 1989 fall within the assured tenancy regime, as do most housing association tenancies. Where a fixed term assured tenancy (including an assured shorthold tenancy) expires by effluxion of time or by the exercise of a landlord's option to determine, a periodic assured tenancy automatically arises.¹⁰⁰ A landlord's notice to quit has no effect on an assured periodic tenancy,¹⁰¹ and nor can an assured tenancy be brought to an end by forfeiture.¹⁰² Instead, the landlord must bring an action to recover possession on a statutory ground, and the tenancy continues as an assured tenancy until the order for possession is made. A tenancy is not assured, however, during any period when the tenant is not occupying the

⁹⁸ Consequently, there are two different county court forms of order when a rent act tenancy is forfeited: N.27(1) for a contractual forfeiture only; N.27(2) where the court decides both that there has been a contractual forfeiture and that an order for possession ought to be made on a statutory ground terminating the statutory tenancy too.

⁹⁹ *Bolnore Properties Ltd v Cobb* (1997) 29 H.L.R. 202, (1998) 75 P. & C.R. 127, [1996] E.G.C.S. 42; *Woolwich BS v. Dickman* [1996] 3 All E.R. 204, (1996) 28 H.L.R. 661, (1996) 72 P. & C.R. 470, [1996] E.G.C.S. 33.

¹⁰⁰ s.5 Housing Act 1988.

¹⁰¹ s.5(1) Housing Act 1988

¹⁰² It follows that there is no jurisdiction to grant relief from forfeiture either; *Artesian Residential Investments v. Beck* [2000] Q.B. 541, [2000] 2 W.L.R. 357, [1999] 3 All E.R. 113, (2000) 32 H.L.R. 107, [1999] L. & T.R. 278, [1999] 2 E.G.L.R. 30

property as his only or principal home.¹⁰³ So a forfeiture, or an expiry, after the tenant has ceased to occupy as his only or principal home will be effective.¹⁰⁴ Additionally, the tenant may bring the assured tenancy to an end, by service of a tenant's notice to quit or the exercise of a tenant's option to determine.¹⁰⁵ An assured tenant who holds over after the expiry of such a notice is a trespasser.

3. *Secure tenancies.*

Most short term residential tenancies granted by local authorities are secure tenancies under the Housing Act 1985. The scheme of security is similar to the assured tenancy regime. So a secure tenancy cannot be forfeited,¹⁰⁶ nor determined by a landlord's notice to quit.¹⁰⁷ A fixed term secure tenancy cannot be brought to an end by the exercise of a landlords option to determine.¹⁰⁸ When a fixed term secure tenancy expires by effluxion of time, a periodic secure tenancy automatically arises.¹⁰⁹ A periodic secure tenancy may determine by tenant's notice to quit,¹¹⁰ and a periodic or fixed term secure tenancy may be determined by the exercise of a tenant's option to determine. But a secure tenancy likewise ceases to be secure if the tenant is not occupying the property as his only or principal home, and so may be forfeited or expire during non-secure periods.

4. *Long residential tenancies (terms granted for more than 21 years).*

Most long residential leases granted by private sector landlords do not have security of tenure either under the Rent Acts or the Housing Act 1988. The reason is that most long leases are granted for a large premium at

¹⁰³ s.1(1)(a) Housing Act 1988.

¹⁰⁴ A forfeiture clause should always be included in an assured tenancy for this reason. If the tenant fails to pay rent and vacates, the tenancy can then be determined by peaceable re-entry immediately. Otherwise, it will be necessary to serve a notice to quit, and the tenant may reacquire security by resuming occupation before the notice to quit expires.

¹⁰⁵ These are "other action[s] on the part of the tenant" within s.5(2) Housing Act 1988.

¹⁰⁶ s.82(1) Housing Act 1985.

¹⁰⁷ s.82 Housing Act 1985.

¹⁰⁸ s.82 Housing Act 1985.

¹⁰⁹ s.86 Housing Act 1985.

¹¹⁰ A valid notice to quit may be served by only one of several joint tenants. To do so is not a breach of trust; *Crawley BC v. Ure* [1996] Q.B. 13, [1995] 3 W.L.R. 95, [1996] 1 All E.R. 724, [1995] 1 F.L.R. 806. The landlord cannot be restrained from acting upon it, even if it is served by the tenant in breach of a non molestation injunction in matrimonial proceedings; *Harrow LBC v. Johnstone* [1997] 1 WLR 459. It makes no difference that the trust under which the lease is held is a trust of land, rather than a trust for sale; *Notting Hill Housing Trust v. Brackley* [2001] L. & T.R. 34, [2001] 35 E.G. 106, [2001] 18 E.G.C.S. 175

the beginning of the term, and reserve a small ground rent during the term, and they therefore fall into the exclusions from security of tenancies at a low rent.¹¹¹ Similarly, long residential leases granted by local authorities (usually under “the right to buy”) are excluded from being secure tenancies.¹¹² If a long residential lease expires by effluxion of time, the tenant normally has a right to require the landlord thereafter to grant him a new assured tenancy at a market rent.¹¹³ But this does not prevent the long lease being forfeited during its term, or surrendered.

5. *Business tenancies.*

Part II of the Landlord and Tenant Act 1954 gives most business tenants security of tenure by continuing their tenancies after the contractual expiry date.¹¹⁴ If the tenant is in business occupation on the contractual expiry date,¹¹⁵ the term of the estate is stretched beyond that date, first to the termination date specified in a s.25 notice or a s.26 request for a new tenancy,¹¹⁶ and then, if the tenant makes an application for a new tenancy, to the date which is three months after those proceedings are finally disposed of.¹¹⁷ The parties, however, have a power, which is frequently exercised, to contract fixed term leases out of this protection.¹¹⁸ A contracted out lease expires on the contractual termination date, without the need for any notice to be served.

Nothing in the Act prevents the exercise of a common law right of forfeiture. Accordingly, a business tenancy may be forfeited in accordance with its terms both during the contractual term of the tenancy and during any continuation period. As a corollary, an application for relief from forfeiture can be made during a continuation period too.¹¹⁹

A business tenant protected by the Act cannot surrender his tenancy by an instrument executed, or executed in pursuance of an agreement made,

¹¹¹ s.5 Rent Act 1977; para 3 sch. 1 Housing Act 1988.

¹¹² Sch.1 Housing Act 1985.

¹¹³ s.186 Local Government and Housing Act 1989.

¹¹⁴ Section 43 of the Act contains various exceptions.

¹¹⁵ *Surrey County Council v. Single Horse Properties* [2002]19 EG 150

¹¹⁶ s.24

¹¹⁷ s.64

¹¹⁸ s.38

¹¹⁹ *William Skelton v. Harrison & Pinder* [1975] Q.B. 361, [1975] 2 W.L.R. 238, [1975] 1 All E.R. 182, (1974) 29 P. & C.R. 113

before he has been in occupation in right of the tenancy for one month.¹²⁰

6. *Agricultural holdings.*

Most lettings of land for the purpose of agriculture, where the grant was made before 1st September 1995, are agricultural holdings under the 1986 Act. An agricultural holding for a fixed term of less than two years but more than one year expires automatically at the end of the contractual term, unless continued by an act of the parties.¹²¹ Tenancies for a fixed term of two years or more are continued as periodic annual tenancies. Periodic tenancies, where the period is less than a year, are, in general, converted into annual tenancies too. The tenant can always terminate the tenancy by service of an ordinary notice to quit. But a landlord can, generally, only terminate the tenancy by giving at least 12 months notice to quit. Unlike an ordinary notice to quit (called, in the agricultural context, a “plain” notice) a statutory ground for serving the notice to quit an agricultural holding will normally appear on the face of a landlord’s notice. The reason is that the tenant has the right to serve a counternotice, and if the tenant does so, the landlord will have to prove the ground stated in the notice in order to obtain possession. Depending upon the ground stated, the landlord will either have to prove that ground before a private arbitrator, or before the agricultural lands tribunal, and if the ground is one where the reference is to the tribunal, then the landlord will also have to prove that it is reasonable to make an order for possession.

In theory, an agricultural holding may be forfeited, but the forfeiture clause ought to provide on its face that the tenant is to be given more than a month’s notice before it can be exercised; otherwise, there is some authority that it is not a valid forfeiture clause.¹²² In practice, agricultural holdings are rarely forfeited.

An agricultural holding may be surrendered. A technical surrender and regrant (as happens where additional land is added to the demise or the term of the lease is extended) does not result in the loss of the protection of the 1986 Act.¹²³ But if a tenant, after 1st September 1995, otherwise accepts a

¹²⁰ s.24(2) Landlord and Tenant Act 1954.

¹²¹ See Page 12

¹²² *Parry v. Million Pigs* (1981) 260 E.G. 281.

¹²³ s.4(1)(f)

new lease of his holding, the new lease will be a farm business tenancy (see below) and the protection of the 1986 Act will be lost.

7. Farm business tenancies.

Most lettings of land for the purpose of agriculture where the grant was made on or after 1st September 1995 are farm business tenancies under Agricultural Tenancies Act 1995. A farm business tenancy for a fixed term of two years or less determines automatically at the end of the term, or by exercise of a break option during that term. A farm business tenancy for a fixed term of more than two years continues after the expiry of the contractual termination date as a yearly tenancy, unless either party has given more than one year but less than two years notice to terminate it on the contractual expiry date.¹²⁴ A yearly periodic tenancy (including one arising on the expiry of a fixed term of more than two years) can be brought to an end by notice to quit, but only if more than one year and less than two years notice is given.¹²⁵ A periodic farm business tenancy, where the period of the tenancy is less than a year, determines on the expiry of a common law notice to quit, or the exercise of a break option. The normal common law rights of forfeiture apply to a farm business tenancy. A farm business tenancy may also be surrendered.

F. The relationship between the landlord and the sub-tenant whilst the lease subsists.

There is no privity of estate between a landlord and a sub-tenant. Normally, there is no privity of contract either. A sub-lease is an estate carved out of the headlease, giving the sub-tenant a better right to possession of the property than the landlord for so long as the headlease subsists, even if the sub-lease is unlawful, but without any direct relationship of privity of contract or estate between them.

It is a well-established, albeit peculiar, unsatisfactory and not properly worked-out, rule that if a tenant for a fixed term grants a co-terminus or longer underlease,¹²⁶ that automatically takes effect as an assignment of the

¹²⁴ s.5

¹²⁵ s.6

¹²⁶ There is an exception if the tenancy is a business tenancy within the 1954 Act and the purported sub-lease is only of part.

lease, and not as an underlease,¹²⁷ albeit an assignment which is subject to the covenants and conditions¹²⁸ contained in that instrument.¹²⁹

G. Methods of enforcement against the sub-tenant whilst the lease subsists.

1. Distraint.

Where a landlord distrained for rent due under the headlease, at common law he was allowed to take the goods found on the premises, even though they might belong to the sub-tenant. The sub-tenant's only remedy was to claim over against the headtenant, his direct landlord. This rule was partly abrogated for goods not belonging to the tenant by the Law of Distress Amendment Act 1908, but the protection only applies to a sub-tenant if the sub-lease is lawful, and the rent reserved is a rack rent payable quarterly or more frequently. In that event, a sub-tenant may serve a written declaration on the landlord or his bailiff stating that the tenant has no property or beneficial interest in the goods and the goods are goods to which the protection of the 1908 Act applies. He must, in the notice, give details of his own rent and agree to pay it to the landlord until the head-tenant's arrears are cleared. The notice must be signed by the tenant or his solicitor, and must specify the goods which are his. The effect of the notice is that the goods cannot be distrained against, or sold if they have already been impounded. The sub-tenant can recover them by complaint to the magistrate's court or can apply without notice to the district judge of the county court to repleve the goods.¹³⁰ If, however, the goods have already been sold when the notice is served, it is too late.

Instead of distraining, however, the landlord has a more direct remedy against the sub-tenant. He may serve a notice under s.6 Law of Distress Amendment Act 1908, which provides as follows:—

In cases where the rent of the immediate tenant of the superior landlord is in arrear it shall be lawful for such superior landlord to serve upon any under tenant or lodger

¹²⁷ What happens if it is a parol grant for less than three years at a market rent, which is formally valid as an underlease but void as an assignment, is not clear (s.52, s.54(2) Law of Property Act 1925.

¹²⁸ *Baynes v. Lloyd* [1895] 1 QB 820. Per contra *Porter v. French* 9 Ir LR 514.

¹²⁹ *Milmo v. Carreras* [1946] KB 306, *Grovesnor Estates v. Cochran* [1991] 2 EGLR 83

¹³⁰ sched.1 County Courts Act 1984

a notice (by registered post addressed to such under tenant or lodger upon the premises) stating the amount of such arrears of rent, and requiring that all future payments of rent, whether the same has already accrued due or not, by such tenant or lodger to be made direct to the superior landlord giving such notice until such arrears shall have been duly paid, and such notice shall operate to transfer to the superior landlord the right to recover, receive, and give discharge for such rent.

By serving the notice, the landlord effects a statutory assignment of the right to receive the sub-rents direct to himself, until the arrears of the head rents are paid.

A fresh notice can be served as each gale of head-rent becomes due.

2. *Action*

Some leases prohibit sub-lettings unless the prospective sub-tenant first enters into a direct covenant with the landlord to observe the non-rental covenants in the lease throughout the sub-term. A sub-lease created in breach of such a covenant is effective to vest the sub-estate in the sub-tenant, but puts the headlease at risk of forfeiture. When a headlease is forfeited, all sub-terms are forfeited too. Where the covenant is given, there is, of course, a direct, enforceable contractual relationship between the landlord and the sub-tenant.

Even where there is no direct contractual relationship between the landlord and the sub-tenant, all the negative covenants restrictive of the user of the land contained head-lease may be enforced by injunction against the sub-tenant. The reason is that those covenants are restrictive covenants, and restrictive covenants contained in a lease do not have to be registered; they are enforceable against anyone who has notice of them, except a *bona fide* purchaser of a legal estate for value without notice.¹³¹

H. **Ending the landlord and tenant relationship - the effect on the sub-tenant.**

1: *Expiry of time.*

When a head tenancy expires, then at common law, any sub-tenancy must fall with it.

¹³¹ *Hemingway Securities Ltd v. Dunraven Ltd* (1996) 71 P. & C.R. 30, [1995] 1 E.G.L.R. 61, [1995] 09 E.G. 322

By statute, however, Rent Act protected and statutory tenancies, and assured tenancies, but not secure tenancies, which are lawful at the time of expiry, are preserved and continued against the head-landlord on expiry of the head-lease.¹³²

A business sub-tenancy, other than one which has been duly contracted out of the 1954 Act, is continued as against the head-landlord on expiry of the head-lease, even if the head-lease was itself contracted out of the 1954 Act, and the sub-lease unlawful. For this reason, a landlord of a business tenancy with an unlawful sub-tenant should consider carefully whether it is worth effecting a technical forfeiture of the fag-end of the head-lease, in order to prevent the sub-lease continuing.¹³³

An agricultural sub-tenancy, protected under the 1986 Act, generally expires automatically if the head-landlord effectively determines the head-tenancy by service of a statutory notice to quit. The same applies where the head-tenant serves a notice to quit on the head-landlord.¹³⁴

2: *Surrender and merger.*

Sub-tenancies are preserved on a surrender. A sub-tenant is in the same position as if the head-lease had been assigned, subject to the sub-lease, to the head-landlord.¹³⁵ A sub-lease is deemed to continue as a sub-lease on a surrender and re-grant of the head lease.¹³⁶

3: *Forfeiture.*

At common law, forfeiture destroys all sub-terms created out of the forfeited lease. So if a landlord forfeits a head-lease, all sub-leases created out of that lease fall at the same time.

But if the landlord forfeits a concurrent lease (in other words, a lease of the reversion created after the sub-lease) the sub-lease survives, and the only effect of the forfeiture is that the sub-lease once again becomes a direct lease of the reversion. Whilst the concurrent lease subsists, however, the concurrent tenant can forfeit the sub-lease. An overriding lease granted

¹³² s.137 Rent Act 1977; s.18 Housing Act 1988

¹³³ See Page 35

¹³⁴ *Barrett v. Morgan* [2000] 2 A.C. 264, [2000] 1 All E.R. 481, (2001) 81 P. & C.R. 1, [2000] L. & T.R. 209, [2000] 1 E.G.L.R. 8

¹³⁵ s.139 Law of Property Act 1925

¹³⁶ s.150 Law of Property Act 1925

pursuant to the Landlord and Tenant (Covenants) Act 1995 is a concurrent lease for this purpose.

By statute, Rent Act protected and statutory tenancies, and assured tenancies, but not secure tenancies, which are lawful at the time of forfeiture, are preserved and continued against the head-landlord on forfeiture of the head-lease.¹³⁷

The ordinary common law rule applies to agricultural holdings (albeit that it may not be possible to forfeit an agricultural holding unless the forfeiture clause is in special terms)¹³⁸ and business tenancies.

Forfeiture is, therefore, a useful weapon for a landlord of a business tenant who has unlawfully sub-let. There is a problem with part II of the 1954 Act, in that it continues even an unlawful sub-tenancy against a head-landlord at the end of the term of the head-tenancy. Although the landlord can eventually recover possession, relying on the s.30(1)(c) ground of opposition, there will be at least 12 months delay (and probably more) between service of the s.25 notice and the trial of the ground of opposition, and in the meantime the unlawful sub-tenant is entitled to remain in possession on the terms of his sub-tenancy.¹³⁹ The head-landlord can avoid this problem by forfeiting the head-lease on the last day of the term, thereby preventing an continuation tenancy arising in favour of the sub-tenant.

Where a landlord forfeits a head-lease, the court has jurisdiction to grant relief from forfeiture on an application made by the sub-tenant. The jurisdiction is set out in the table below: —

	High Court	County Court
Peaceable - rent only	s.146(4) LPA 25 & Inherent	s. 139(3) CCA 84 & s.146(4) LPA 25
Peaceable - other breaches	s.146(2) & (4) LPA 25	s.146(4) LPA 25
High Ct. forfeiture - rent only	s.38 SCA 81 & s.146(4) LPA 25	None
High Ct. forfeiture - other breaches	s.146(2) & (4) LPA 25	None
County Ct. forfeiture - rent only	None	s.138 CCA 84
County Ct. forfeiture - other breaches	None	s.146(2) & (4) LPA 25

¹³⁷ s.137 Rent Act 1977; s.18 Housing Act 1988

¹³⁸ SeePage 30

¹³⁹ A landlord, serving the shortest possible s.25 notice, is however entitled to claim an interim rent after the first six months.

Key: CCA 84 - County Courts Act 1984; LPA - Law of Property Act 1925; SCA 81 - Supreme Court Act 1981.

In each of the non-rental cases where there is jurisdiction to grant relief to a sub-tenant under section 146(4) of the Law of Property Act 1925, the application can, in the alternative, be made under section 146(2).¹⁴⁰ This is of some practical importance, because relief under section 146(4) takes the form of a vesting order, vesting a new lease directly in the undertenant taking effect from the date of the order, whereas relief under section 146(2) takes the form of a retrospective reinstatement of the original lease. So, for the period between forfeiture and relief, the applicant under section 146(2) has to pay the rent reserved by the lease, whereas the applicant under section 146(4) must pay mesne profits for his use and occupation.¹⁴¹ These amounts are not necessarily the same, because mesne profits are assessed by reference to the open market letting value of the property (even if the landlord would not, in fact, have let it) which may, or may not, be equivalent to the rent reserved by the head-lease. Mortgagees normally prefer relief to be granted under section 146(2) for a more mundane reason: if a new lease is granted directly to them, then they have to show the potential liability on the covenants in the lease in their accounts; but if the former lease is reinstated, then there is no additional liability.

On an application for relief by a sub-tenant under the inherent jurisdiction of the court, the original head-tenant and the ultimate assignee must normally be made a party, because their liability under the head-lease will be revived too.¹⁴² But where the head-lease is a new lease for the purpose of the 1995 Act¹⁴³ it is only necessary to join the last head-tenant, because restoring the head-lease will not restore the contractual liability of the original head-tenant.

Where relief is granted for a rental breach under s.139(3) County Courts Act 1984, relief can be granted so as to restore the head-lease, rather than by

¹⁴⁰ *Escalus Properties Ltd v. Cooper-Smith* [1996] Q.B. 231, [1995] 3 W.L.R. 524, [1995] 4 All E.R. 852, (1996) 28 H.L.R. 338, (1996) 71 P. & C.R. 47, [1995] 2 E.G.L.R. 23.

¹⁴¹ *Leeds Permanent BS v. Manyfield* (unrep) Dyson J. 16.6.93.

¹⁴² *Hare v. Elms* [1893] 1 QB 604; *Abbey National v. Maybeech* [1985] Ch 190; cf. *Barclays Bank v. Prudential* [1998] 1 EGLR 44, [1998] B.C.C. 928, [1998] B.P.I.R. 427. The court is generally keen to overlook the problem.

¹⁴³ See Page 6

way of vesting order in favour of the sub-tenant. Furthermore, it is common for mortgages to contain a power of attorney to allow the mortgagee (who would otherwise be in the same position as a sub-tenant) to apply in the name of the tenant in any event.

The court has jurisdiction to grant relief by way of vesting order to a sub-tenant of part. The advantage to the sub-tenant is that the covenants and arrears can be apportioned, so that (in order to obtain relief) he will only have to remedy the breaches and pay mesne profits for his apportioned part.¹⁴⁴

The limitation periods for granting relief to an undertenant depend on whether the undertenant is applying in the name of the tenant or in his own name. If he is applying in the name of the tenant, then the periods are as set out at Page 25 . If he is applying in his own name, then the limitation periods are set out in the table below: —

	High Court	County Court
Peaceable - rent only	Unlimited	Six months from re-entry
Peaceable - other breaches	Unlimited	Unlimited
High Ct. forfeiture - rent only	Date of execution	N/A
High Ct. forfeiture - other breaches	Date of execution	N/A
County Ct. forfeiture - rent only	N/A	Six months from execution
County Ct. forfeiture - other breaches	N/A	Date of execution

Again, the time limits calculated from execution of a judgment will be extended if the judgment or execution is set aside,¹⁴⁵ and the court is often willing to stretch the point for a meritorious sub-tenant or mortgagee.

4: *Enlargement.*

Enlargement has the same effect on sub-tenancies as surrender.

5: *Repudiatory Breach*

It is, at present, quite impossible to say what the effect that a determination by repudiatory breach of a head-lease might be on sub-tenants.

I. **The solvent tenant’s mortgagee - rights and remedies.**

In these notes, the expression “mortgagee” includes a “chargee”, except

¹⁴⁴ *Chatham Empire v. Ultrans* [1961] 1 WLR 817, [1961] 2 All E.R. 381

¹⁴⁵ See Page 25

where the contrary is expressly stated.

A legal mortgage of a lease may be created in one of two ways.

The first is by granting a sub-lease with a proviso for cesser on payment. If, after 1st January 1926, an attempt is made to create a mortgage of a lease by way of outright assignment, the mortgage is treated as if it were sub-lease, with a proviso for cesser upon payment.¹⁴⁶ Now, for registered land, even this is prohibited. An attempt to create a mortgage term automatically creates a legal charge.¹⁴⁷

The second is by a charge by deed expressed to be by way of legal mortgage. A charge by way of legal mortgage over a lease does not, in fact, create any sub-term. It does not make the mortgagee a sub-tenant, or grant him a notional term.¹⁴⁸ It simply gives the mortgagee the same protection, powers and remedies as if an underlease had been granted.

The practical effect of this is that a legal mortgagee, whilst he is out of possession, has precisely the same protection and rights as a sub-tenant, irrespective of whether the mortgage was created by the grant of an actual sub-term with a proviso for cesser on redemption, or whether it was created by way of charge by way of legal mortgage; invariably the latter, nowadays. A legal mortgagee in possession is in the same position as an assignee of the lease. As soon as he takes possession, the landlord can enforce the covenants against him, and can continue to do so until he goes out of possession.

The key to determining whether the mortgagee has taken possession is dominion and control. A mortgagee who has excluded the mortgagor from dominion and control of the lease has thereby taken possession,¹⁴⁹ but, having taken possession, there is nothing to stop a mortgagee going out of possession again; for instance, by appointing a receiver.

A legal lease may also be mortgaged in equity, so as to create an equitable mortgage. This occurs where there is a contract to create a legal mortgage, which is not completed, or where an instrument intended to take effect as a legal mortgage cannot do so because of some formal defect. In the

¹⁴⁶ s.86(2) Law of Property Act 1925.

¹⁴⁷ s.23 & s.51 Land Registration Act 2002

¹⁴⁸ *Weg Motors v. Hales* [1962] Ch 49 at pp. 73,74, 77.

¹⁴⁹ *Noyes v. Pollock* (1886) 32 ChD 53.

past, equitable mortgages were often created quite informally simply by the deposit of the title deeds or a land certificate, but it has not been possible to create a new equitable mortgage in this way since 15th September 1989.¹⁵⁰ More common, in an insolvency context, nowadays, are equitable mortgages securing a judgment debt imposed by a charging order pursuant to the Charging Orders Act 1979, for a charging order over the legal estate in the lease takes effect as an equitable charge. A charging order over a beneficial share in the lease,¹⁵¹ however, only takes effect as a charge of that share, and will consequently be overreached by most dispositions of the legal estate in the lease.¹⁵²

An equitable mortgagee of the lease does not have any immediate right to possession of the lease. He must first obtain an order for possession from the court.¹⁵³

An equitable mortgagee of lease may apply for relief from forfeiture pursuant to section 138 of the County Courts Act 1994¹⁵⁴ but not, in his own name, pursuant to section 146 of the Law of Property Act 1925,¹⁵⁵ nor pursuant to the inherent jurisdiction of the court.¹⁵⁶ He may, however, obtain relief indirectly, by joining the tenant to the claim (as defendant, if necessary) and compelling the tenant to apply for relief.¹⁵⁷ There is no jurisdiction to grant relief from forfeiture to the holder of a charging order over a beneficial share in a lease, as opposed to the legal estate.

Part 2: After the tenant becomes insolvent.

J. Enforcement by a landlord with an insolvent tenant whilst the relationship continues.

1. Private receivership

¹⁵⁰ *United Bank of Kuwait Plc v. Sahib* [1997] Ch. 107, [1996] 3 All E.R. 215, [1996] 2 F.L.R. 666

¹⁵¹ For the difference, see *Clark v. Chief Land Registrar* [1994] Ch 370.

¹⁵² *City of London BS v. Flegg* [1988] AC 54.

¹⁵³ *Barclays Bank v. Bird* [1954] Ch 274.

¹⁵⁴ *Croydon (Unique) Ltd v. Wright* [2000] L & TR 20; *Bland v. Ingram's Estate (No.2)* [2001] 3 EGLR 34.

¹⁵⁵ *Bland v. Ingrams Estates Ltd* [1999] 2 EGLR 49.

¹⁵⁶ *Bland v. Ingrams Estates Ltd* [2001] 2 EGLR 23.

¹⁵⁷ *Bland v. Ingrams Estates Ltd* [2001] 2 EGLR 23.

The appointment of a Law of Property Act receiver or (in those rare cases where they can still be appointed)¹⁵⁸ an administrative receiver has no effect on the landlord's power to distrain, nor on the ability of the landlord to commence or continue proceedings to enforce the lease.

The receiver is not personally liable on the covenants contained in the lease, unless the lease is made after the receivership has commenced, and the receiver neglects to exclude his personal liability.¹⁵⁹

A mortgagee, who appoints a receiver, does not thereby enter into possession, making himself liable on the covenants in the lease as an assignee of the term. Although there could hardly be any greater displacement of the mortgagor's dominion and control over the lease than the appointment of a receiver by the mortgagee, a receiver is, nonetheless, normally deemed to be the agent of the mortgagor, and not the mortgagee. This is provided for by statute,¹⁶⁰ and is normally reinforced by the terms of the mortgage deed or debenture. Consequently, although the receiver acts almost exclusively for the benefit of the mortgagee, he is treated as doing so on behalf of the mortgagor. Indeed, if a mortgagee who actually is in possession appoints a receiver, the mortgagee normally thereby goes out of possession, for the appointment of a receiver restores possession to the mortgagor, whose agent the receiver is deemed to be.¹⁶¹

There are, however, circumstances when the receiver simply cannot act as agent for the mortgagor. A mortgagor who becomes bankrupt cannot appoint an agent to manage his bankrupt estate, and any existing agency relationship is automatically terminated on the making of the bankruptcy order. Once a bankruptcy order is made, first the official receiver, and then the trustee in bankruptcy, have the exclusive right to manage the bankrupt's estate. Likewise, if a winding up order is made against a company, or a company passes a resolution for voluntary winding up, all existing agency relationships come to an end, and the only the liquidator can appoint new ones.

Where an event does occur which prevents the receiver from acting, or continuing to act, as the agent of the mortgagor, that does not revoke the

¹⁵⁸ s.72A-F Insolvency Act 1986

¹⁵⁹ s.37 Insolvency Act 1986

¹⁶⁰ Section 109(2) Law of Property Act 1925; s.44 Insolvency Act 1986.

¹⁶¹ *Refuge Assurance v. Pearlberg* [1938] Ch. 687.

appointment of the receiver, nor the right of the receiver to continue to receive rent and profits, it simply determines the receiver's agency: although, in his dealings with third parties, the receiver still has authority to deal with the property in the name of the mortgagor,¹⁶² including authority to bring proceedings in the name of the mortgagor;¹⁶³ as between the parties, he is normally treated as having become the agent of the mortgagee, with the consequence that the mortgagee will be treated as having entered into possession.

The receiver does not, however, invariably become the agent of the mortgagee on determination of his power to act as agent for the mortgagor. The mere fact that he is the mortgagee's agent for the purpose of paying over the rents and profits once received does not necessarily make him the mortgagee's agent for the purpose of possession. So, when the mortgagor's agency determines, there is no conceptual difficulty in the receiver acquiring possession in his own right, albeit that his obligation to account to the mortgagee for the rents and profits remains.

The appointment of a receiver over the ultimate tenant has no effect on the liabilities of others liable on the tenant covenant.

2. *Court appointed receiver*

Permission is needed to distrain against a court appointed receiver, for a distraint is an interference with the receiver's possession, and the receiver having been appointed to take possession by the court, interference with his possession is therefore a contempt.

For the same reason, permission is needed to enforce a judgment against a court appointed receiver, although not, of course, to commence proceedings.

Permission can be given with retrospective effect.¹⁶⁴

Permission is not needed to serve a notice on a sub-tenant under s.6 Law of Distress (Amendment) Act 1908.

3. *Voluntary arrangements.*

¹⁶² *Sowman v. David Samuel Trust Ltd* [1978] 1 WLR 22.

¹⁶³ *Goughs Garages v. Pugsley* [1930] 1 KB 615.

¹⁶⁴ *Re Saunders* [1997] Ch 331; *Brenner v. Rose* [1973] 1 WLR 65

Whilst the interim (or “moratorium”) order is in force, the landlord cannot distrain or commence or continue any proceedings against the tenant, except with the permission of the court.¹⁶⁵

Thereafter, if the arrangement is approved by 75% by value of the creditors at the creditors’ meeting,¹⁶⁶ the bar is lifted, but the landlord becomes bound by the arrangement (even if he voted against it) and can only recover what is due to him in the arrangement. So if, as a term of the arrangement, one half of the arrears of rent are to be forgiven, and the arrangement is approved, then the landlord is thereafter free to distrain or to bring proceedings if the tenant pays fails to pay the half which is due in the arrangement, but he cannot recover the rest, for that has been forgiven by the arrangement, and so is no longer owed by the tenant.

If, on the other hand, the arrangement is not approved, the parties are restored to the same position as they were in prior to the interim order.

Permission is not needed to serve a notice on a sub-tenant under s.6 Law of Distress (Amendment) Act 1908 whilst the interim order is in force, but if an arrangement is approved, the landlord can only recover by this means what is due in the arrangement.

A voluntary arrangement may, by its terms, be confined to the tenant’s accrued liability for past rent, leaving the lease, and the landlord’s rights and remedies, in respect of future rent unaffected by the arrangement. In those circumstances, the landlord’s voting power at the meeting is confined the amount of the existing arrears of rent. But it is common, nowadays, for arrangements to cover future rent too. If it is contemplated that the tenant will continue to trade from the property, then the landlord can object to any attempt to treat future rent as part of the arrangement, for it should properly be treated as an expense of the arrangement, and therefore paid in full.¹⁶⁷ Otherwise, for the purpose of determining the landlord’s voting power, he should be treated as a contingent creditor for future rent, and the chairman of the meeting should attempt to put a value on that claim, bearing in mind the possibility that the lease might not run to its full term,

¹⁶⁵ s.252 Insolvency Act 1986

¹⁶⁶ r.5.18 IR 1986

¹⁶⁷ *Thomas v. Ken Thomas Ltd* [2007] 1 EGLR 31

and discounting the claim for early receipt.¹⁶⁸ The landlord can accept a surrender on terms that its right to prove in the arrangement on this basis will be preserved.¹⁶⁹

As a matter of legal principle, a voluntary arrangement ought not to affect the landlord's rights of recourse against other's liable on the tenant covenant, for a "voluntary arrangement", is, in truth, neither "voluntary" nor an "arrangement" – it is a statutory contract imposed on the dissentient minority by law for the benefit of the majority – and the normal rule is that contracts imposed by operation of law do not affect any rights other than those of the deemed contracting parties.¹⁷⁰ Legal principle, however, yields to entirely practical considerations, with the result that the effect on others liable on the tenant covenant is, instead, a pure question of construction of the terms of the arrangement,¹⁷¹ subject to the landlord's right to have it set-aside as being unfairly prejudicial.¹⁷²

A release by accord and satisfaction releases not only those who are jointly liable with the party released, but also those jointly and severally liable, and even those who are merely severally liable,¹⁷³ so if it is a term of the arrangement that the ultimate tenant will be released in this way, the arrangement also enures for the benefit of everyone else who might be liable on the tenant covenant.

A voluntary arrangement which expressly reserves rights against others cannot operate by accord and satisfaction, and so does not discharge others liable on the covenant.¹⁷⁴ Nor does a voluntary arrangement which is expressed only to take effect between the parties.¹⁷⁵

But a voluntary arrangement that contains a full and final settlement clause

¹⁶⁸ *Doorbar v. Alltime Securities* [1996] 1 W.L.R. 456, [1996] 2 All E.R. 948, [1995] B.C.C. 1149, [1996] 1 B.C.L.C. 487, [1996] B.P.I.R. 582.

¹⁶⁹ *Threadneedle Pensions v. Ashler Miller* [2009] EWHC Ch 1151

¹⁷⁰ *Re Garner's Motors Ltd* [1937] 1 Ch. 594; *Sydney v. Gaty* [1978] 2 N.S.W.L.R. 271.

¹⁷¹ *Johnson v. Davies* [1999] Ch. 117, [1998] 2 All E.R. 649, [1999] B.C.C. 275, [1998] 2 B.C.L.C. 252, [1998] B.P.I.R. 607.

¹⁷² *Prudential v. PRG Powerhouse* [2007] BCC 500

¹⁷³ *Deanplan v. Mahmoud* [1993] Ch 151, [1992] 3 All E.R. 945 (1992) 64 P. & C.R. 409 [1992] 1 E.G.L.R. 79

¹⁷⁴ *Burford Midland Properties v. Marley Extrusions* [1994] B.C.C. 604, [1995] 1 B.C.L.C. 102, [1995] 2 E.G.L.R. 15

¹⁷⁵ *RA Securities Ltd v Mercantile Credit Co Ltd* [1995] 3 All E.R. 581 [1994] B.C.C. 598 [1994] 2 B.C.L.C. 721

does, for the landlord could not pursue anyone else for the balance of the debt without committing a breach of terms of the arrangement, and that would be restrained by injunction.¹⁷⁶ A “full and final settlement” with the ultimate assignee releases the estate to the extent of the settlement, and thereby releases everyone else liable on the tenant covenant to the same extent.

4. *Administration*

Where there is a pending application¹⁷⁷ to appoint an administrator, that prevents the landlord bringing any action against the company in administration, pending the determination of the application, unless the landlord obtains permission from the court.¹⁷⁸

For as long as the tenant is in administration, the landlord is similarly restrained from acting without the permission of the court or of the administrator.¹⁷⁹ Where the landlord seeking to enforce the lease (rather than forfeit it) the granting of permission depends on a delicate balancing exercise, and the landlord is not entitled to be put any better position than any other creditor.¹⁸⁰

The administrator makes use of the premises, then he is obliged to treat rent falling due for that period as a ‘necessary expense’ of the administration,¹⁸¹ and the fact that the ultimate tenant is in administration does not affect the liability of anyone else liable on the tenant covenant, nor restrict the landlord’s rights and remedies against those persons. Consequently, a landlord may serve a notice on a sub-tenant under s.6 Law of Distress (Amendment) Act 1908 without obtaining permission.

5. *Bankruptcy*

A landlord may distrain, notwithstanding the presentation of a bankruptcy petition against the tenant and the subsequent making of a bankruptcy

¹⁷⁶ *Mytre Investments Ltd v. Reynolds* [1995] 43 EG 131.

¹⁷⁷ If the appointment is made by the holder of a floating charge, it is pending for this purpose from the time when a copy of the notice of intention to appoint is filed with the court: para.44(2) sch.B1 Insolvency Act 1986.

¹⁷⁸ Para.44 sch.B1 Insolvency Act 1986.

¹⁷⁹ Para.43 sch.B1 Insolvency Act 1986.

¹⁸⁰ *Re Atlantic Computers* [1992] 2 WLR 367

¹⁸¹ r.2.67 IR 1986, *Re Toshoku Finance plc, Exeter City Council v. Bairstowse* [2007] EWHC CH 400

order. But a landlord cannot distrain for arrears accruing due earlier than six months before the bankruptcy order was made,¹⁸² and if the landlord has done so between presentation of the petition and the making of the order, he holds the balance for the bankrupt's estate.¹⁸³ Furthermore, if the landlord distrains within the period of three months prior to the making of the order, the whole of the proceeds of the distraint are, in any event, deemed to be charged with payment of the preferential creditors in the bankruptcy.¹⁸⁴ So, by distraining in the three months prior to the making of the order, the landlord only obtains priority over the unsecured creditors.

An action to enforce the covenants contained in a lease cannot be brought after a bankruptcy order has been made, without first obtaining permission from the court,¹⁸⁵ and any existing action can be stayed. The action will initially be against the bankrupt, in his own name, though the defence of it will be managed by the official receiver. Once a trustee in bankruptcy is appointed, the trustee will be substituted as the defendant, for the bankrupt has no standing to defend the claim in his own right.¹⁸⁶ The effect of the bankruptcy order is to discharge the bankrupt from all his personal liability on the covenants contained in the lease, and convert that liability in to a right to prove in the bankruptcy. So the only purpose of bringing proceedings is to quantify the amount of the disputed debt or liability for the purpose of proving for that amount in the bankruptcy.

But this does not apply to assured tenancies, rent act protected and statutory tenancies, their agricultural equivalents, and secure tenancies. The reason is that they are exceptions to the rule that a bankrupt's property vests in his trustee in bankruptcy.¹⁸⁷ Accordingly, unless the trustee elects to call in tenancy,¹⁸⁸ any action to enforce the terms of the tenancy will be an action by, or against, the bankrupt, and not the trustee, notwithstanding the bankruptcy, and may be commenced without permission.

¹⁸² s.347(1) Insolvency Act 1986

¹⁸³ s.347(2) Insolvency Act 1986

¹⁸⁴ s.347(3) Insolvency Act 1986

¹⁸⁵ s.285(3) Insolvency Act 1986

¹⁸⁶ *Heath v. Tang* [1993] 1 W.L.R. 1421 [1993] 4 All E.R. 694; *Royal Bank of Scotland Plc v. Farley* [1996] B.P.I.R. 638

¹⁸⁷ s.283(3A) Insolvency Act 1986

¹⁸⁸ s.308A Insolvency Act 1986.

A trustee in bankruptcy cannot elect to call in a statutory tenancy under the Rent Acts, because a statutory tenancy is merely a personal right of irremovability.¹⁸⁹ It is not an estate in the land at all. But he can call in a protected tenancy, and if he does so, and the protected term subsequently expires, no statutory tenancy can arise.

A bankruptcy order made against the ultimate tenant does not affect the liability of anyone else liable on the tenant covenant. A trustee in bankruptcy who fails to exercise his power to disclaim, unlike a liquidator, is personally liable as an assignee on the covenants contained in the lease, for the trustee becomes the tenant of the lease.¹⁹⁰ So he can be made personally liable on the covenants contained in the lease that accrued due for performance after his appointment. If a trustee in bankruptcy does disclaim, then the trustee retrospectively ceases to have any personal liability for the rent or on the covenants contained in the lease, and the bankrupt's estate is discharged from all further liability upon the lease with effect from the date of the disclaimer.¹⁹¹ But that has no effect on the liability of third parties. As between the landlord and any anyone else liable on the tenant covenant (including a guarantor for the disclaiming tenant), the disclaimer is of no effect.¹⁹² The same is true as between the landlord and the sub-tenant. Consequently, and landlord may serve, or continue to recover rent under, a notice served under s.6 Law of Distress (Amendment) Act 1908 even after a disclaimer.

Any person suffering loss as a result of the disclaimer may prove in the bankruptcy for the amount of the loss.¹⁹³ But the person suffering the loss is not necessarily be the landlord. For example, if the first assignee under an old lease disclaims, but the original tenant is a blue-chip company, then all the loss will be suffered by the original tenant, because the disclaimer will not affect the landlord's ability to recover the rent from the original tenant, but it will prevent the original tenant recovering over on the indemnity contained in the transfer.

¹⁸⁹ *Sutton v. Dorf* [1932] 2 KB 304

¹⁹⁰ s.306(1) Insolvency Act 1986

¹⁹¹ s.315(3) Insolvency Act 1986

¹⁹² *Hindcastle v. Barbara Attenborough Associates* [1997] AC 70, [1996] 1 All ER 737

¹⁹³ s.315(5) Insolvency Act 1986

6. *Winding up*

Permission is not needed to distrain, nor to bring nor continue with proceedings to enforce the covenants contained in a lease, against a tenant which is in the process of being wound up voluntarily, but the court could stay the distraint or the proceedings on any application made by the liquidator, or any contributory or any creditor.¹⁹⁴

Permission is needed to distrain against a company if a winding up order is made, and this is retrospective to the presentation of the petition.¹⁹⁵ In addition, the proceeds of any distraint which was levied within the period of three months prior to the making of that order are deemed to be charged with the payment of the preferential creditors.¹⁹⁶ So, as with a bankruptcy, the landlord only obtains priority for this period over unsecured creditors.

Following presentation of a petition, the court may stay any proceedings against the company.¹⁹⁷ Once a winding up order is made, permission is needed to commence or continue any proceedings against the company.¹⁹⁸

A winding up of the current tenant has no effect on the landlord's rights and remedies against others liable on the tenant covenant. Even if the liquidator subsequently disclaims, this does not release third parties (including a guarantor). If the liquidator disclaims the lease, then the position as between the landlord, tenant and third parties is the same as for bankruptcy considered above.¹⁹⁹

A winding up may affect a landlord's right of recourse against a rent deposit. The relationship between the bank, where the deposit is placed, and the account holder, is simply one of debt. The debt, however, does not normally belong to the account holder absolutely, even when the account holder is the landlord. Instead, the debt is held beneficially in accordance with the terms of the rent deposit deed. As a matter of construction, the deed may declare that the debt is held upon trust for the tenant absolutely, but that the tenant charges his beneficial interest in the trust to the landlord to

¹⁹⁴ s.112 Insolvency Act 1986

¹⁹⁵ s.128(1) Insolvency Act 1986

¹⁹⁶ s.176(2) Insolvency Act 1986

¹⁹⁷ s.126 Insolvency Act 1986

¹⁹⁸ s.130(2) Insolvency Act 1986

¹⁹⁹ Page 46

secure his obligations to the landlord under the deed. If so, the charge is void against the liquidator of the tenant unless it was registered within 21 days of its creation,²⁰⁰ and the deposit will have to be repaid in full on a winding up of the tenant, leaving the landlord to prove for the rent. The deed may, alternatively, declare that the account holder holds the debt on a *Quistclose*²⁰¹ type purpose trust to pay the landlord whatever is due under the deed, and to pay the balance to the tenant on expiry of the deposit. This type of deed does not involve the creation of any charge, and so it does not need to be registered in order to be effective.²⁰² The neatest drafting solution however, for the landlord, is to provide that the debt owed by the bank belongs to the landlord absolutely, and the landlord charges it to the tenant with repayment of any sums due under the agreement. That puts the onus of registration on the tenant, but is not likely to be commercially acceptable to many tenants.

Permission is not needed to serve a notice on a sub-tenant under s.6 Law of Distress (Amendment) Act 1908.

7. *Dissolution.*

It is not possible to distrain against a dissolved company, because all the property of a dissolved company vests in the Crown as *bona vacantia*,²⁰³ and distraint against the crown is prohibited. If, however, the crown exercises its statutory power of disclaimer, the property is deemed never to have vested in the crown,²⁰⁴ distraint is once again permitted, and any unlawful distraint in the meantime is retrospectively validated.

Nor is it possible to bring proceedings against a dissolved company, for a dissolved company does not exist. Proceedings against the crown, to whom the undisposed property of the dissolved company passes, will normally be pointless, as the crown will probably exercise its power to disclaim the property. In cases where it is absolutely necessary to obtain a judgment

²⁰⁰ s.395 Companies Act 1985

²⁰¹ [1970] AC 567

²⁰² *Re Chelsea Cloisters* (1981) 41 P & CR 98. This is also, probably, the proper explanation for the decision in *Obaray v. Gateway (London) Limited*. [2001] L. & T.R. 20, [2000] E.G.C.S. 149

²⁰³ s.654 Companies Act 1985

²⁰⁴ s.657 Companies Act 1985

– for instance, in order to be able to enforce over against an insurer under the Third Parties (Rights Against Insurers) Act 1930 – an application must thus first be made to the Companies Court to restore the company to the register for the purpose of properly winding it up.

The dissolution of the current tenant has no effect on the landlord’s rights and remedies against others liable on the tenant covenant. It does, however, frequently affect the landlord’s power to require a guarantor to take a new lease, for standard form surety covenants often provide that the landlord can compel the guarantor to take a new lease in his own name in the event that a liquidator or trustee in bankruptcy disclaims the lease, but do not state that the landlord can do so if the crown disclaims the lease.

K Ending the landlord and insolvent tenant relationship.

1. Private receivership.

The appointment of a Law of Property Act or administrative receiver does not prevent the determination of the lease by expiry, surrender, forfeiture or repudiation. Nor does it affect, in any way, the landlord’s remedies consequent upon the determination of the lease. All it does is vest in the receiver the right to deal with the lease, in the name of the tenant. The instrument under which the receiver is appointed will normally give him power to surrender, forfeit and serve notices to quit in the name of the tenant. An administrative receiver has power to do those things in any event, but a Law of Property Act receiver does not.²⁰⁵ If the receiver holds over after the lease has expired, the receiver in occupation is liable for mesne profits, like any other trespasser.

2. Court appointed receiver.

The position of a court appointed receiver is the same as a Law of Property Act receiver, with one difference: forfeiture by peaceable re-entry, or enforcement of a possession order, without the permission of the receiver or the court is a contempt of court.

3. Voluntary arrangements.

²⁰⁵ s.109(4) Law of Property Act 1925

A voluntary arrangement does not prevent the determination of the lease by expiry, surrender or repudiation. Nor does it revive a lease that has already been forfeited. But it does affect a landlord's right to forfeit in two ways.

First, for so long as the interim order is in force, the landlord requires the permission of the court before re-entering peaceably or commencing or continuing with forfeiture proceedings²⁰⁶

Thereafter, there is no restriction if the arrangement is not approved in the creditors meeting. But if it is approved, then whilst the landlord is once again permitted to re-enter, either by service of proceedings or peaceably, he can only re-enter for what is due in the arrangement, and not the full contractual rent.²⁰⁷

4. Administration.

Neither a pending application for administration, nor an administration itself, prevents the determination of the lease by expiry, surrender or repudiation. Nor does it revive a lease that has already been forfeited. But it does affect a landlord's right to forfeit, or determine for denial of title, in two ways.

First, where there is a pending application²⁰⁸ to appoint an administrator, that prevents the landlord exercising a right of peaceable re-entry, or commencing or continuing with forfeiture proceedings, pending hearing of the application, unless the landlord obtains permission from the court.²⁰⁹

For as long as an administration is continuing, the landlord is similarly restrained from acting without the permission of the court or of the administrator.²¹⁰ Permission will normally (but not invariably)²¹¹ be given to bring proceedings to forfeit a lease, because a right of forfeiture is analogous to a security remedy, and it is not the purpose of an administration to defeat

²⁰⁶ s.252(2)(aa) & para.12(1)(f) sched.A1 Insolvency Act 1986; reversing *Re a Debtor No.13A-IO-1995* [1995] 1 WLR 1127

²⁰⁷ *In Re Naeem (A bankrupt)* [1990] 1 WLR 48; In *March Estates v. Gunmark* [1996] 2 EGLR 38 Lightman J suggested the contrary, but recanted in *Razzaq v. Pala* [1997] 1 W.L.R. 1336 [1998] B.C.C. 66 [1997] B.P.I.R. 726 [1997] 2 E.G.L.R. 53

²⁰⁸ If the appointment is made by the holder of a floating charge, it is pending for this purpose from the time when a copy of the notice of intention to appoint is filed with the court: para.44(2) sch.B1 Insolvency Act 1986

²⁰⁹ Para.44 sch.B1 Insolvency Act 1986.

²¹⁰ Para.43 sch.B1 Insolvency Act 1986.

²¹¹ *Re Atlantic Computers* [1992] 2 WLR 367

securities. The application to forfeit, and the forfeiture order itself, can be made at the same time.

5. *Bankruptcy.*

The making of a bankruptcy order does not prevent the determination of the lease by expiry. But it does prevent the lease determining by surrender or acceptance of a repudiation, unless the surrender or acceptance is done by, or with the consent of, the official receiver pending the appointment of a trustee in bankruptcy, or by the trustee in bankruptcy after his appointment. The reason is that the making of the bankruptcy order prevents the bankrupt tenant dealing with the property on his own account, retrospectively to the date of presentation of the petition,²¹² although a landlord, taking a surrender for money or monies worth, is protected if the petition has not be registered under the Land Charges Act 1972, in the case of an unregistered lease, or protected by a creditor's notice or inhibition, in the case of a registered lease.

There is no restriction on bringing forfeiture proceedings against a bankrupt tenant,²¹³ including, presumably, an action based on a denial of title. The action is initially against the bankrupt but is managed by the official receiver down to the appointment of a trustee in bankruptcy. Thereafter, the action is against the trustee personally. Where the bankrupt is occupying the property, the best course is to join the trustee to the action with the bankrupt, rather than substitute him, for otherwise there may be difficulties in enforcing the possession order against the bankrupt later on.

Nor does a bankruptcy order, in itself, prevent the landlord exercising a right of peaceable re-entry. But in *Razzaq v. Pala*²¹⁴ it was suggested that peaceable re-entry, before a trustee was appointed, could, in some circumstances, be a contempt, on the grounds that it was an interference with the possession of the official receiver, who is an officer of the court.

Where a lease has been forfeited on the grounds of the bankruptcy of the tenant, an application for relief must be made within one year of the

²¹² s.284 Insolvency Act 1986

²¹³ *Ezekiel v. Orakpo* [1977] QB 260, [1976] 3 All E.R. 659.

²¹⁴ [1997] 1 W.L.R. 1336, [1998] B.C.C. 66, [1997] B.P.I.R. 726, [1997] 2 E.G.L.R. 53

bankruptcy, unless the lease has been sold within that year.²¹⁵

In addition to termination by expiry, forfeiture, surrender, or repudiation, a lease vested in a trustee in bankruptcy may also be determined by disclaimer. A disclaimer is a statutory determination of the lease, which operates so as to discharge the disclaiming tenant from all further liability under or in connection with the lease, without affecting the liability of anyone else. So as between a landlord and a disclaiming tenant, the lease is treated as if it had been surrendered on the day the disclaimer took effect. As between the disclaiming tenant and any guarantor of that tenant, the guarantee is treated as having been discharged on the date of the disclaimer, and as between the disclaiming tenant and the penultimate assignee, any indemnity covenant in the transfer is likewise treated as having been discharged. But, as between everyone else, the disclaimer is of no effect. So the landlord can (subject to the 1995 Act)²¹⁶ continue to enforce the original tenant's contractual liability, the liability of any intermediate assignee contained in a licence to assign, and the liability of any guarantor or surety, including a guarantor or surety for the ultimate, disclaiming assignee.²¹⁷

There are also provisions in the Insolvency Act 1966 enabling anyone liable on the tenant covenant to regularise the title by obtaining a vesting order in respect of the disclaimed lease. This type of vesting order is entirely distinct from a vesting order by way of relief from forfeiture under s.146(4) Law of Property Act 1925.

A lease re-vests in the bankrupt on annulment, but not on discharge.

6. *Winding up.*

The fact that the tenant is in the course of being wound up does not prevent the determination of the lease by expiry. Nor, in the case of a voluntary liquidation, does it prevent the lease determining by surrender or acceptance of a repudiation. In the case of a compulsory liquidation, however, the company cannot surrender the lease, or accept a repudiation, without the

²¹⁵ s.146(10) LPA 25.

²¹⁶ See Page 6

²¹⁷ *Hindcastle v. Barbara Attenborough Associates* [1997] A.C. 70, [1996] 1 All E.R. 737, [1996] B.C.C. 636, [1996] 2 B.C.L.C. 234, [1996] B.P.I.R. 595, [1996] 1 E.G.L.R. 94. This is so even if the guarantee is an authorised guarantee agreement for a new lease: *Doleman v Shaw* [2009] EWCA Civ 283

consent of the liquidator, or unless the transaction is subsequently validated by the court, at any time after the winding up petition has been presented.²¹⁸

On a voluntary liquidation, the landlord may re-enter peaceably or commence forfeiture proceedings (including proceedings based on a denial of title), without the need to obtain any permission from the court, though the court could subsequently stay the re-entry.

If the liquidation is compulsory, then the landlord is free to re-enter peaceably or by court process between presentation of the petition and the making of the winding up order, subject to the overriding power of the court to stay the re-entry. Once the winding up order has been made, permission is needed either to re-enter peaceably or to commence or continue with forfeiture proceedings.²¹⁹ In those circumstances, it is generally pointless to ask for leave to re-enter peaceably, because a landlord can obtain an order for possession on the same application and evidence and at the same time as the permission application.²²⁰ If it can be obtained just as quickly and for the same cost, an order for possession is always preferable to an order permitting the landlord to re-enter peaceably, because, unless it is successfully set-aside or appealed, an order for possession can be taken as conclusive proof by third parties²²¹ that the re-entry was lawful as against the tenant, whereas an order permitting peaceable re-entry gives no such guarantee.

A liquidator, like a trustee in bankruptcy, may determine a lease by disclaimer.²²²

7. Disclaimer

The power to disclaim property is a statutory power, which may be exercised

²¹⁸ s.127 Insolvency Act 1986

²¹⁹ s.130 Insolvency Act 1986

²²⁰ *Re Blue Jeans* [1979] 1 W.L.R. 362, [1979] 1 All E.R. 641

²²¹ In fact, there is a good argument for saying it is no such thing. See Warner J.'s explanation of *Doe d. Whitfield v. Roe* ([1893] 1 QB 604) in *Ladup Ltd v. Williams & Glyn's Bank* [1985] 2 All ER 577 at p.583. In *Minet v. Johnson* [1886-90] All ER 586 at 587, however, Lord Esher MR said that "if Hartley had been a tenant of Johnson's of course he must go out". It is unclear what, precisely, Lord Esher meant by this, but he probably meant no more than if Hartley's interest had been created after the judgment out of Johnson's, then Hartley would be bound by the judgment. See also Per Lightman J. in *G S Fashions v. B & Q plc* [1995] 4 All ER 899 at p.906 "Confirmation or validation of a forfeiture by the lessee alone may not prejudice the entitlement of a sublessee or mortgagee to challenge the validity of the forfeiture and accordingly to maintain the continued subsistence of their interests."

²²² s.179 Insolvency Act 1986

in three circumstances only.

First, a trustee in bankruptcy may disclaim property comprised within the bankrupt's estate,²²³ including leaseholds.²²⁴ If the trustee does so, then the property is deemed never to have vested in the trustee in bankruptcy at all.²²⁵ The result is that the trustee is retrospectively released from the personal liability which otherwise attaches by virtue of the statutory vesting of that property in the trustee. The trustee does, however, remain liable to administer the bankrupt's estate as if that property had continued to exist down to the date of disclaimer, and as if liabilities had continued to accrue under it down to that date. Furthermore, anyone suffering loss consequent upon the disclaimer may prove for it in the bankruptcy as an unsecured creditor.

So, if the property is a lease, the effect of the disclaimer is that the trustee is retrospectively discharged from personal liability to pay the rent and to perform the other covenants in the lease. But the landlord may prove in the bankruptcy for any unpaid rent up to the date of the disclaimer, and may also prove for any future loss caused by the disclaimer, credit being given for the likelihood of reletting.²²⁶ Furthermore, if, in the meantime, the trustee has entered into possession of the lease, he or she must treat the unpaid rent for that period as an expense of the bankruptcy, rather than simply as an unsecured debt, so that it must be paid in full before anything is paid to the general body of unsecured creditors.

Secondly, where a company is in the course of being wound up, the liquidator may disclaim property belonging to it,²²⁷ including leaseholds,²²⁸ on behalf of the company, whether the winding up is compulsory or voluntary. The disclaimer is made on behalf of the company, there being no equivalent in

²²³ s.315 Insolvency Act 1986

²²⁴ s.317 Insolvency Act 1986

²²⁵ s.315(3) Insolvency Act 1986. Before a trustee had statutory power to disclaim, he was treated as an involuntary assignee. Unless the trustee actually joined in the assignment of the lease made to him by the commissioners in bankruptcy (*Copeland v. Stephens* (1818) 1 Barn & Ald 593, 601), he could reject the assignment as *damnosa haereditas*, but if he accepted the assignment by entering into possession of the property or otherwise, he became liable upon the covenants contained in the lease as if he were an ordinary assignee: *Hanson v. Stephenson* (1818) 1 Barn & Ald 308

²²⁶ *Re Park Air Services* [2000] 2 AC 172

²²⁷ s.178(2) Insolvency Act 1986

²²⁸ s.179 Insolvency Act 1986

liquidation of the statutory vesting of the bankrupt's estate in a trustee in bankruptcy. Consequently, the liquidator never acquires any personal liability, and so the disclaimer makes no difference to the liquidator's personal position. Otherwise, the effect of the disclaimer so far as it concerns the administration of the company's property in the liquidation is the same as the effect on a bankrupt's estate of a disclaimer by a trustee in bankruptcy. Thirdly, where property is still vested in a company on its dissolution, and so would otherwise vest in the Crown as *bona vacantia*,²²⁹ the Crown may subsequently disclaim it,²³⁰ with the result that it is deemed never to have vested in the Crown at all,²³¹ and is otherwise treated as if a liquidator had disclaimed the property immediately before the dissolution.²³²

8. *Dissolution.*

A lease may still be vested in a tenant company at dissolution for one of two reasons. It may be that the company has been dissolved without having been wound up, as, for instance, happens when a company is struck off the register for failing to file an annual return. Or it may be that the company has been wound up, but the liquidator was unaware that the lease was vested in the company, and so has failed to assign or disclaim it. In either event, on dissolution, the lease vests in the crown as *bona vacantia*,²³³ but the crown then has the same power of disclaimer as a liquidator would have had, if the company had been wound up,²³⁴ and if the power is exercised (as it usually is) the lease is deemed to have been disclaimed at the moment of dissolution and never to have vested in the crown.²³⁵

A crown disclaimer following a dissolution has no effect on the rights or liabilities of third parties. Nor does it prevent forfeiture or expiry of the lease. It does, however, prevent a determination by surrender. Only a tenant in whom the estate in the lease is for the time being vested may surrender the lease, and after a disclaimer, there is no-one in whom the

²²⁹ s.654 Companies Act 1985

²³⁰ s.656 Companies Act 1985

²³¹ s.657 Companies Act 1985

²³² It is not so treated for the purpose of a contractual covenant to take a new lease following a disclaimer by a liquidator or trustee in bankruptcy: *Re Yarmarine* [1992] BCLC 276

²³³ s.654 Companies Act 1985

²³⁴ s.654 Companies Act 1985

²³⁵ s.657 Companies Act 1985

lease is vested. For the same reason, it seems unlikely that a lease may determine by acceptance of a repudiatory breach after a disclaimer.

L. Ending the landlord and insolvent tenant relationship – the effect on sub-tenants.

1. Private receivership

The position of a sub-tenant under the general law upon the determination of the head-lease or sub-lease is not affected in any way by the head-tenant's receivership.

2. Court appointed receivers

The position is the same as for private receivership.

3. Voluntary arrangements.

The position of a sub-tenant under the general law upon the determination of the head-lease or sub-lease is not affected in any way by the head-tenant's voluntary arrangement.

4. Administration.

The position of a sub-tenant under the general law upon the determination of the head-lease or sub-lease is not affected in any way by the fact that the head-tenant is in administration.

5. Bankruptcy.

The position of a sub-tenant under the general law upon the determination of the head-lease or sub-lease is not affected in any way by the head-tenant's bankruptcy. There is a statutory vesting of the head-term (the immediate reversion upon the sub-lease) in the trustee in bankruptcy, once appointed. If the trustee disclaims the headlease, then the position changes (see the section 'Disclaimer' below).

6. Winding up.

The position of the sub-tenant is the same as for bankruptcy considered above.

7. Disclaimer

A disclaimer only ever affects the rights and liabilities of the disclaiming party directly. It has no effect on the rights and obligations of third parties as between themselves. So if an estate is disclaimed, the obligations attached to the estate can no longer be enforced against the disclaiming party, and nor can the disclaiming party any longer enforce the rights attached to the estate against anyone else; for, so far as the disclaiming party is concerned, the disclaimer has destroyed the estate. But the disclaimer does not have any wider effect. In so far as the rights and obligations of third parties, as between themselves, depend upon the continued existence of the estate, it is treated as if it were still extant; and, similarly, in so far as the rights and obligations of third parties, as between themselves, depend on the continuing liability of the disclaiming party, that liability is treated as continuing. So a disclaimer acts entirely in personam between the disclaiming party and anyone else. It does not have any effect in rem.

An example will help to make this clear. Suppose that the disclaimed property consists of a lease. As between the landlord and the disclaiming tenant, the effect is the same as if the estate in the lease had been destroyed by a surrender at the moment when the disclaimer took effect. So existing rights and liabilities are preserved, but contingent and future rights and liabilities are extinguished.²³⁶ So too, as between the disclaiming tenant and any sub-tenant, the sub-lease is treated as if it had been surrendered on that date, for the lease is the reversion upon the sub-term, and the lease, as between the disclaiming tenant of it and anyone else, is treated having been extinguished by the disclaimer.

Yet, as between the head-landlord and the sub-tenant (as third parties), the disclaimed head-lease and the disclaimed sub-lease are both treated as if they were still extant,²³⁷ with the result that the head-landlord cannot evict the sub-tenant except by going through the charade of doing whatever would have been necessary to determine those leases if they had not been

²³⁶ If the disclaimer is by a trustee in bankruptcy, it also has the effect of releasing the trustee from any personal liability (see above).

²³⁷ *Re A E Realisations* [1988] 1 WLR 200; *Re Thompson and Cottrell's Contract* [1943] 1 All ER 169

disclaimed.²³⁸

Similarly, as between a disclaiming tenant and any surety for that tenant, the guarantee is treated as having been discharged on the date of the disclaimer, with the result that surety's implied right of indemnity against the disclaiming tenant is discharged too. Likewise, as between the disclaiming tenant and the penultimate assignee, any indemnity covenant in the transfer is treated as having been discharged, for these are all direct liabilities of the disclaiming party to someone else. But, as between third parties, the disclaimer is disregarded. So, subject to the ordinary statutory restrictions contained in the Landlord and Tenant (Covenants) Act 1995, the landlord can continue to enforce the original tenant's contractual liability, the liability of any intermediate assignee contained in a licence to assign or other contractual instrument, and the liability of any surety, including a surety for the ultimate, disclaiming assignee.²³⁹

Consequently, in order to recover possession from a sub-tenant, following a disclaimer of the head-term, a landlord must go through the charade of doing whatever would have been necessary, under the general law, to give him a right to recover possession if the head-lease had not been disclaimed. The landlord can, however, usually rely on the events leading up to the disclaimer as a breach of the lease entitling him to forfeit, and doing something that would forfeit the head-term (were it still in existence) also forfeits the sub-term, unless the sub-tenant has a statutory right to remain on forfeiture of the head-lease.²⁴⁰

The sub-tenant is entitled to apply for relief from forfeiture by way of vesting order under the statutory (but not, apparently, the inherent) jurisdiction of the court to grant relief to a sub-tenant.²⁴¹

The sub-tenant may, alternatively, apply for a vesting order pursuant to

²³⁸ The same point applies where a liquidator or the Crown disclaims property held on trust (the issue does not arise with a trustee in bankruptcy, because trust property does not form part of the bankrupt's estate). As between the trustee and the beneficiary, the trust relationship is destroyed. But as between the beneficiary and everyone else, the beneficiary is still treated as having all the rights of a beneficiary of that trust.

²³⁹ *Hindcastle v. Barbara Attenborough Associates* [1997] AC 70, [1996] 1 All ER 737, [1996] 1 EGLR 94.

²⁴⁰ See Page 35

²⁴¹ *Pelicano v. MEPC* [1994] 1 EGLR 104; *Hill v. Griffin* [1987] 1 EGLR 81; *Barclays Bank v. Prudential Assurance* [1998] B.C.C. 928, [1998] B.P.I.R. 427, [1998] 1 E.G.L.R. 44.

s.320 Insolvency Act 1986.²⁴²

8. *Dissolution.*

The position of the sub-tenant is the same as for bankruptcy considered above.

M. **The insolvent tenant's mortgagee – rights and remedies.**

There are three principal means by which an insolvent tenant's mortgagee may enforce the mortgage. The first is by appointment of a receiver. The second is by taking possession of the tenant's estate. The third is by exercising his power of sale.

The consequences of appointing a receiver are considered above.²⁴³ A mortgagee needs permission from the court to appoint a receiver over a lease where the court has already appointed a receiver, otherwise the mortgagee commits a contempt. A mortgagee does not need permission to appoint a receiver where some other secured lender has already appointed a receiver; the receivers rank in the same priority as the mortgages under which they were appointed. A mortgagee does not need permission to appoint a receiver over a lease where the tenant has obtained an interim order whilst he makes proposals for a voluntary arrangement or who has applied for or obtained an administration order.²⁴⁴ A bankruptcy order does not affect the right of a mortgagee of the tenant to appoint a receiver. Nor does it terminate an existing receivership. But it does mean that the receiver can no longer act as agent for the bankrupt.²⁴⁵ The position is the same for a winding up. A receiver, likewise, cannot act as agent for a dissolved company, but dissolution does not terminate any existing receivership, nor prevent the mortgagee appointing a receiver.

If the mortgagee wishes to sell out of court, the position is the same as for receivership; so is it too if the mortgagee is able to take possession out of court. A power of attorney, given to the mortgagee as security, survives the

²⁴² r.6.186 Insolvency Rules 1986

²⁴³ See Page 39

²⁴⁴ *McMullen v. Cerrone* [1994] 1 EGLR 99; *Re Debtors 13A10 and 14A10 of 1994* [1995] 2 EGLR 33. The actual decisions in those cases have been reversed by the amendments made by the Insolvency Act 2000, but those amendments do not affect mortgagees.

²⁴⁵ See Page 40

bankruptcy, winding up or dissolution of the tenant.²⁴⁶ So, notwithstanding those events, a mortgagee, with such a power, may convey the lease in the name of the tenant, and give good title to the purchaser, rather than conveying in his own name.

There are some differences, however, if the mortgagee wishes to or needs to exercise a right or remedy by court process. A mortgagee does not need permission to bring proceedings, or enforce a judgment, against a tenant simply because some other mortgagee has appointed a receiver. A mortgagee does need permission to enforce any judgment against a tenant where the court has appointed a receiver, for otherwise the mortgagee commits a contempt. But the mortgagee is otherwise free to bring proceedings. So far as administration and voluntary arrangements are concerned, the restrictions are the same as for landlords, although a mortgagee will obtain permission rather more easily, since neither an administration nor a voluntary arrangement can affect secured rights. A bankruptcy order does not affect the right of a secured creditor to enforce his security.²⁴⁷ Corporate winding up is different. A mortgagee needs permission to enforce its security through the court once a winding up order has been made,²⁴⁸ and (in theory) enforcement could be stayed as soon as a petition has been presented.²⁴⁹ But, in practice, permission is always given, and the power to stay is rarely exercised, because secured rights are preserved on a winding up. On a voluntary winding up there is also a theoretical power to stay.²⁵⁰ A mortgagee cannot, of course, bring proceedings against a dissolved tenant, but the dissolution does not prevent the mortgagee bringing proceedings against third parties.

²⁴⁶ s.4 Powers of Attorney Act 1971.

²⁴⁷ s.285(4) Insolvency Act 1986.

²⁴⁸ s.130 Insolvency Act 1986

²⁴⁹ s.126 Insolvency Act 1986

²⁵⁰ s.112 Insolvency Act 1986