Land law – leases essay sample

1. Introduction

Leases in general may be the most valuable category of interest in land other than freehold estate. A lease may also constitute a legal estate. In some cases, such as flats, it may even replace freehold as the operational form of “ ownership”. On the other hand, a lease is also a contract between two parties. It serves important social functions, sometimes much more than land ownership, and therefore has been receiving unyielding attention from the legislature since early 20th century.

The full technical name of a lease is a “ term of years absolute”. However, unlike the counterpart in freehold, the “ fee simple absolute in possession”, this full name carries very little meaning with it. A term of years absolute may be for less than a year, and it may be terminable on certain conditions (i. e. not absolute). Also noticeable is the fact that it is not required to be “ in possession” (i. e. current). A reversionary or future lease may still be a legal estate, unlike a “ future freehold”. The only meaningful part to be remembered is the word “ term”, which will be explained below.

In some case the relationship or status created by a lease is also termed a “ tenancy”. For most purposes these two words can be used almost interchangeably. However, some concepts traditionally described as tenancies may not be leases in the strict legal definition of the word.

Historically leases started as a purely personal interest between the landlord, or “ lessor”, and the tenant, or “ lessee”. If the landlord sold the land, the tenant had no claim against a successor in title. The law was later changed to recognise the changing nature and the importance of leases. For many

centuries now leases have been accepted as proprietary interests, “ chattels real”, capable of binding purchasers. However, in the last decade or so, there seems to be the emergence of a new suggestion, the possibility of a personal or non-proprietary lease again.

2. Essential Characteristics

Possibly due to the sometimes versatile and hybrid nature of leases, for many years the law was uncertain as to what the defining features of a lease are. In other words, is the agreement between the parties decisive, or the actual relationship as viewed objectively? [This links back to the numerus clausas idea of property rights.]

By the 1980s, parties (or mostly landowners) have been manipulating the agreement to avoid statutory regulation on leases being applied to their particular arrangements. Somma v Hazelhurst was probably one of the extreme but not uncommon cases, where the lease of a one-bedroom flat to a couple was twisted into two separate licences entered into prima facie by two strangers who would accept any nomination of a replacement “ licensee” by the “ licensor”.

Then came the landmark case of Street v Mountford [1985] AC 809, which overruled all such cases before it. The House of Lords unequivocally decided that if an agreement satisfied all the elements of a lease as the law understood, it would be a lease regardless of the term used by or the understanding of the parties.

The two essential requirements from Street are exclusive possession and a determinable period. A possible third element, namely that of a rent, was referred to, as discussed below.

Exclusive possession is the occupation and complete control of the land. This is not just against any third parties, trespassers or other persons who may interfere with the land. More often, this is against the landlord. During the existence of a lease, the tenant must have a better right to use and control of the land than the landlord. The landlord cannot use or occupy the land, nor restricting the tenant’s use of it. Examples of interference will be where the landlord has extensive right of frequent access, or the imposition of rules such as relating to guest or the permitted activities by the tenant.

A term, or period, is sometimes also described as the certainty requirement of a lease. In theory this is the difference between leasehold and freehold estates. All freehold, whether fee simple or life estate, must be for an uncertain duration, however long or short that may be. On the contrary, all leasehold must be for a certain duration. The term can be as long as 3, 000 years or as short as a few days. But it cannot refer to an uncertain event, such as the end of an ongoing war, or a condition to be satisfied in the foreseeable future, such as the grant of a planning permission. Usually this is not a problem except for in relation to some periodic tenancies created with the specific understanding in expectation for the occurrence of such events. Prior to 1925 reform, it was also very common for leases to be granted for the life of a person or until the marriage of a person, neither is of course certain. Such leases are however statutorily converted into 90-year fixed term leases terminable on the fulfilment of the condition, if they are created

for value, LPA 1925 s 149. This rule became rather uncommon and unfamiliar in modern times, until the very recent Supreme Court decision in Berrisford v Mexfield Housing Co-operatives Ltd [2011] UKSC 52.

A periodic tenancy is automatically renewed every time it expires unless either party decides to end it. Therefore it may, and in practice often does, run for a very long period of time. Whether this is an exception to the general rule laid down in Street v. Mountford became the crucial issue in Ashburn Astalt [1989] Ch 1 and then Prudential Assurance [1992] 2 AC 386. In Ashburn a periodic tenancy was allowed by the Court of Appeal which can only be terminated by the landlord if a prescribed condition is satisfied (in this case the development of a shopping mall as planned). This was overruled by the House of Lords in Prudential. Periodic tenancies are not exceptions. They are certain by virtue of the fact that parties have the right to terminate them at the end of any period, thus we always know the maximum length of any tenancy. Therefore any restriction on this right to terminate cannot be effective otherwise the term becomes uncertain. Lord Browne-Wilkinson, while concurring with the ruling, was nevertheless critical of this principle as it seems to serve no purpose. [Is there any way in practice to work around the certainty principle?] In Berrisford the Supreme Court assembled a bench large enough to overrule Prudential if necessary. In the end this was not done, due to an ingenious interpretation advanced by one of the barristers in the case.

3. Creation and Formality

It is worth remembering that in addition to the special characteristics that an interest needs to satisfy in order to qualify as a lease, it is still an interest in land. Therefore it must comply with the general requirement in terms of creation or formality for any interest in land.

LPA 1925 s. 52, all interests in land must be created by deed. Therefore a legal lease must be " granted" [note the use of this word as discussed in land registration lectures] by deed. If the lease is required to be registered, then registration must be completed otherwise the interest either takes the form of a contract or does not operate in law.

If there is no grant, but merely an agreement for a grant, i. e. a contract for a lease, it must comply with the requirement of a land contract. LP(MP)A 1989 s. 2, a contract regarding an interest in land can only be effective it is on a single document incorporating all the terms of the agreement and signed by both parties. A contract for lease, if enforceable (subject to specific performance), is an equitable lease by the rule of Walsh v. Lonsdale.

There is, however, a significant exception to these formality requirements in the form of a lease by parol, or oral lease, in LPA 1925 s. 54. A lease not exceeding three years (whether fixed term or periodic), taking effect in possession immediately, at the best rent reasonably obtainable without a fine, does not have to be in writing.

Arguably a further exception exists with regard to incomplete or oral contract which enlisted the help of the principle of estoppel. This is not exclusive to leases but applicable to all interests in land. Some aspects of this approach will be discussed below.

4. Other Important Aspects

In addition to exclusive possession and a term, and the satisfaction of formality requirements, there are a number of important elements commonly shared by most leases.

The most prominent of these is the payment of a rent. A rent was referred to in Street as part of the definition of a lease. However, on the authority of s 205 LPA 1925, this reference was considered and dismissed as unintentional (or obiter at most) by the Court of Appeal in Ashburn Anstalt v Arnold [1989] Ch 1. Ashburn itself was overruled by the House of Lord three years later, but on a different point of law relating to periodic tenancy discussed above. So it seems that rent is indeed not absolutely necessary for the finding of a lease.

However, a rent can be extremely useful for a number of reasons. It helps to establish the intention of parties to be bound by the contractual relationship. It provides certainty of term if it is otherwise lacking. It enables the possibility of a lease by parol if other conditions are satisfied.

Another noticeable aspect of a lease is its contractual nature in addition to the proprietary characteristics. Much of the powers and duties of the landlord and tenants come from the contract. And covenants made under leases may be passed on to successors in title due to the ongoing contractual relationship in a way which would be impossible for freehold land.

Finally, leases serve important social functions and the influence of statutory regulation considerably alters the nature and practice of leasehold relationships. Different rules apply to residential leases, commercial leases

and agricultural leases. Some further rules and policies apply to leases for public sector housing. However this is a rather specialised part of land law and not usually discussed in the context of general law on leases.

5. Obligations of Landlords

When the lease is ongoing, landlords and tenants both have obligations under the contract. Some of these have to be explicitly stated, such as the obligation by the tenant to pay rent; others may be imposed by statute, or implied by common law.

The covenant of quiet enjoyment is implied by common law into every lease, regardless of the wording. The name is misleading and has led parties into chasing impossible remedies in the past. The essence of the covenant is that the landlord, or any person authorised by the landlord, shall not interfere with the title or possession of the tenant, or to cause detriment to the ordinary or agreed use of the demised property. Therefore, acts such as cutting off electricity and water supply to the property, or setting up scaffolding in front of a shop being leased, will amount to breach of the covenant. On the other hand, the issue of domestic noise from landlord or other tenants under the same landlord is much less likely to be breach of the covenant, as seen in Baxter v. Camden LBC (No. 2) [2001] 1 AC 1. Partly this is due to the difficulty of establishing nuisance from noises in the ordinary course of using a residential property. Fundamentally, it is not something which has aggravated or is deliberately caused after the grant of the lease.

The common law imposed little if any obligation as to repairs or maintenance of demised property, even those for residential uses. Intriguingly, statutory

response in this regard has also been inadequate and out of date. The Landlord and Tenant Act 1985 s. 11 is the most important statutory rule in this regard. Landlords have the duty to repair three categories of items of parts of a “ dwelling-house”, i. e. residential property, if it is leased for seven years or less. These include the structure and exterior, installation for the supply of water, gas and electricity and for sanitation (note inclusions and exclusions), and installation for space heating and heating water. However, this is a repair-duty. A properly repaired house is not necessarily fit for human habitation. A poorly designed or poorly constructed house is not in disrepair. An installation in proper working order is not necessarily useful or efficient.

In practice, almost all leases contain the provision that the tenant should not assign it or create a sub-lease without the consent of the landlord. This is a significant limitation of the “ proprietary-ness” of the lease. Consequently, it has to be expressly provided for and will not be implied just because it is virtually the universal practice for many years. Furthermore, Landlord and Tenant Acts 1927 and 1988 provide that consent shall not be unreasonably withheld and any request from the tenant shall be responded to within a reasonable period of time. Case law indicates weeks rather than months as being reasonable.

An assignment or sublease without consent is a breach of contract. However, on the proprietary side the assignment is still effective and the estate is now held by the assignee regardless of the landlord’s wish or loss. On the contractual side, the original tenant is still liable for contractual breach. This

may even be grounds for the landlord to forfeit the lease, as discussed below, against the new tenant.

6. Termination of Leases

A fixed term tenancy is automatically terminated at the originally agreed date. It does not require any party to do anything. The landlord is now entitled to possession of his land, but if he takes no action and the tenant remains in possession, this may be a tenancy at sufferance. (However, for many residential leases, statutes may automatically convert an expired fixed term tenancy into a statutory periodic tenancy.)

A periodic tenancy is automatically renewed for the same period on expiry if no action is taken by the parties. In order to terminate a periodic tenancy, notice must be served by either party on the other. For some residential leases such as assured tenancy or public sector tenancy, statutes may prohibit the serving of notice by landlord unless some conditions are satisfied. This is due to social policies and is to be distinguished from the conditions imposed privately such as in relation to Prudential Assurances.

Surrender is where the landlord and tenant agree to terminate the lease before the end of the current term, whether fixed or periodic. This is in effect conveying the leasehold estate to the freeholder and would require a deed under LPA 1925 s. 52, unless it is by operation of law as exempted by the section.

The opposite of surrender is merger. This is where the freehold interest, i. e. reversion, is conveyed or vested in the tenant. A lease is a contract and

requires two parties. If the same person has both the freehold and the leasehold, it is merged into a freehold and the lease and contract is extinguished.

By far the most controversial form of termination of a lease is forfeiture. This is where the landlord unilaterally repudiating the contract of the lease, hence destroying the basis of the lease, and then demanding the property back in his possession. The right of forfeiture is purely contractual and therefore it must be specifically provided in the contract. In essence and from a contract law perspective, one or more of the provisions in the lease contract are deemed material by the parties and if the tenant breached them the landlord has the right to repudiate the contract.

This is an extremely powerful weapon in the hands of the landlord. Perhaps it is fair to say that it has not always been used reasonably or fairly, which in turn earned leasehold estate a very bad name. Statutory control was inevitable given the public perception and feeling. More importantly the court has considerable power, as well as opinion regarding the issue.

Forfeiture procedures differ for breaches relating to non-payment of rent and breaches not involving rent. Forfeitures for rent-related breaches are reasonably formalistic and certain. Payment has to be demanded and if the demand is satisfied in full there is no forfeiture. If the tenant refuses to pay, or cannot afford to pay, or cannot come up with a solution to the satisfaction of the court, then forfeiture and eviction is likely.

Forfeitures based on non-rent breaches are far more controversial and complicated. Despite the clear contractual power of the landlord to do so, in

fact it is very much an uphill battle. The most important statutory requirement, which must be satisfied in all cases, is the s. 146 notice under LPA 1925. The landlord must serve this notice, 1) specifying the breach 2) requesting the tenant to remedy the breach within a given reasonable period of time 3) requesting compensation for any loss caused by the breach. If the notice is not served, or it is defective in some way, forfeiture will be denied.

One usual contention is whether a breach is capable of being remedied. In Rugby School v. Tannahill [1935] 1 KB 87, the property leased was used for habitual prostitution against the standard covenant of not using it for illegal or immoral purposes. This was held to be incapable of remedy within a reasonable period of time due to the stigma or harm caused. The landlord does not even have to include the request of a remedy in his s. 146 notice under such circumstances, because of the impossibility. On the other hand, in Expert Clothing v. Hillgate [1986] Ch 340, it was said that the breach of a positive covenant of building or repair can always be remedied by the tenant fulfilling the obligation.

Another possible obstacle for the landlord is the reasonably wide interpretation of a waiver. A waiver is the explicit or, more likely, implied intention of the landlord to treat the contract of the lease as ongoing despite a known breach. A demand for rent, whether the rent is actually paid or accepted and whether or not it is demanded “ without prejudice”, is likely to be a waiver, even if the demand is made by the mistake of an agent. Furthermore, if the landlord had reasonable ground to suspect the breach of a covenant, carrying on receiving rent without doing anything until the

breach is confirmed such as through a conviction may be a waiver, Van Haarlam v. Kasner (1992) 64 P&CR 214.

Finally, there is the equitable jurisdiction for the court to grant a relief from forfeiture. Here there is virtually no guideline or criteria and through the years it became completely discretionary for the court as a question of fact and conscience. An extensive list of factors, such as the value of the estate, the behaviours of the tenant in general, impact on its neighbours, seriousness of the breach, blameworthiness of the breach, and so on, have all been seen as relevant in cases.

7. Leases, Licences, Estoppel, Trusts, etc

The institution of leases has had probably one of the most colourful histories in land law, developing from a personal interest into a proprietary interest, and from a private law issue into an almost public law issue. It is unlikely that this organic growth will stop now, given the importance and prevalence of leases.

One movement is referred to as the “ contractualisation of leases”, i. e. treating a lease as a contract even this will lead to the sacrifice of its proprietary features. The landmark case is by the House of Lords in Bruton v. Quadrant Housing Trust [2000] 1 AC 406, where it was held that a licensee can effectively enter into a lease. This lease will not be binding on the landowner as it is not proprietary, Islingtong LBC v. Green [2005] EWCA Civ 56. However, if the licensee and “ landlord” then acquires the proprietary title to the land, they may not be able to deny the personal tenant, hence creating a lease by estoppel.

On the other hand, formerly personal or non-proprietary interests, such as licences or equity by estoppel, have been increasingly proprietary in modern cases. Yaxley v. Gotts [2000] 1 AER 711, the parties had an oral agreement for the transfer of a flat [is this valid?]. Because of estoppel, a 99-year lease was imposed by the court as a remedy.

Such an approach is not entirely novel. In the past, these estoppel claims were traditionally classified as and dealt with by the principle of constructive trust: promise or representation, detrimental reliance, and unconscionable denial. However, earlier remedies had a clearly personal nature attached to it, such as an unassignable licence to occupy for as long as the licensee wants, or for life, Greasley v. Cooke [1980] 1 WLR 1306. There was little consideration as to how such a personal interest will fare against a purchaser. However, in later cases such as Ungurian v. Lesnoff [1990] Ch 206, courts have started to see these as full proprietary interest such as the equivalent of that of a life tenant in settled land.

The proprietary status of equity by estoppel is almost confirmed in registered land by s. 116 of LRA 2002. So in theory now we can have in land a personal lease, while a proprietary licence. Not surprising that there has been repeated calls for the rationalisation of these occupancy rights.