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PROPERTY LAW GROUP

AUTUMN SEMINAR SERIES

Thursday 16th November

6pm to 7pm

**COMMERCIAL LEASES:
TENANT DEFAULT AND
LANDLORDS' REMEDIES**



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FORFEITURE

PRELIMINARY POINTS

- Definition: landlord's right to determine lease early following breach of covenant by tenant.
- Can be effected by physical re-entry or issue of court proceedings for possession.
- Tactical considerations: is forfeiture the best option?
- Does lease contain proviso for re-entry: if not, no right to forfeit except for breach of condition.
- The tenant is entitled to apply for relief from forfeiture.

FORFEITURE BY PHYSICAL RE-ENTRY

- Usually done by changing the locks; can also do constructively by letting to third party.
- Must be unequivocal: if change locks for another reason this may not be sufficient.
- At common law landlord is entitled to use reasonable force to regain possession BUT take care: it is a criminal offence to use violence to gain entry if there is a person physically on the premises who is opposed to the re-entry: see s.6 Criminal Law Act 1977; and unlawful if there is anyone residing on the premises or part of them: s.2 Protection from Eviction Act 1977.

- In practice this usually means the remedy of re-entry is restricted to commercial premises outside working hours.
- Will need permission of court in some cases: where tenant is insolvent; where tenant is enfranchising; or where the forfeiture is for breach of covenant to repair and tenant has claimed benefit of Leasehold Property (Repairs) Act 1938.

FORFEITURE BY ISSUE OF PROCEEDINGS

- Issue and service of claim for possession will operate to forfeit but must be served.
- Must be served on tenant for time being, not just person in possession of land with consent of tenant.
- Claim must be unequivocal: don't combine forfeiture with claim for injunction restraining breach of covenant or forfeiture may not operate.

WAIVER

Note: This section is important. Landlords often lose the right to forfeit by inadvertently waiving a breach.

Waiver I: General

- When there is a breach of covenant the landlord can choose whether to forfeit the lease, or whether to treat the lease as continuing and rely on alternative remedies such as a claim for damages or an injunction.
- Waiver takes place where the landlord treats the lease as continuing.
- Once the landlord has waived a breach he cannot forfeit.

- There is no need for the landlord to intend to waive the right to forfeit for waiver to operate.
- Key ingredients of waiver:
 - (i) Landlord's knowledge of the right to forfeit: imputed knowledge is sufficient.
 - (ii) Unequivocal recognition of the continued existence of the lease: the most common form of this recognition is a demand for or acceptance of rent which has accrued after the date when the right to forfeit arose.
 - (iii) Communication to the tenant of the recognition of the continued existence of the lease.
- Waiver by accepting rent: Accepting rent "without prejudice" to the right to forfeit will still operate as a waiver. Acceptance by the landlord's agent can operate as a waiver.
- Waiver by other acts: for example by distress, by pleading, by reliance on covenants in the lease.
- Importance of communicating to tenant: for example where the act of waiver relied on is the sending of a document, the waiver is not effective until the document is received.

Waiver II: once for all breaches and continuing breaches

- If the breach is a once for all breach, one waiver of the right to forfeit will prevent the landlord from forfeiting for that breach.

- If the breach is a continuing breach, it arises again each day and so the right to forfeit will continue even if there is an act of waiver.
- Common examples of once for all breaches:
 - (i) rent arrears;
 - (ii) assignment and sub-letting;
 - (iii) failure to carry out repairs by a specified date;
 - (iv) alterations.
- Any covenant requiring an act to be performed within a specified time or a reasonable time is broken once for all if the act is not performed within that time.
- Common examples of continuing breaches:
 - (i) failure to keep the premises in repair;
 - (ii) failure to keep the premises insured;
 - (iii) use of the premises in a way which is prohibited by the lease.

FORFEITURE FOR NON-PAYMENT OF RENT

- There is no need to serve a s.146 notice in order to forfeit for non-payment of rent.
- Check the lease: a well drafted modern lease will provide that the landlord has a right to re-enter and determine the lease for non-payment of rent whether formally demanded or not. If these words are not in the lease you

can only forfeit for breach of a condition and the rent will have to be formally demanded. However there is no need for a formal demand if there is at least half a year's rent in arrear, no sufficient distress on the premises, and a power to enter for non-payment: see s.210 Common Law Procedure Act 1852.

- If the lease does not dispense with the need for a formal demand, and s.210 CLPA 1852 does not apply, a formal demand will have to be made. This is unusual but there are strict requirements which must be complied with.
- Tenant may have a defence of set-off against rent arrears, though this can and usually will be excluded by the lease.

FORFEITURE FOR OTHER BREACHES: THE S.146 NOTICE

Forfeiture for other breaches and the s.146 notice I: General

- In order to forfeit for any breach other than non-payment of rent, the landlord must serve a notice under s.146 Law of Property Act 1925.
- It is not possible to contract out of the requirement to serve a s.146 notice.
- There are some exceptions to the rule that the landlord must serve a s.146 notice, though other than non-payment of rent they are not likely to arise often. They include:
 - (i) forfeiture for non-payment of rent (see above);
 - (ii) assignment or subletting before 1926;
 - (iii) mining leases;

- (iv) some cases of insolvency: see s.146(9) (e.g. agricultural land, mines, public houses);
 - (v) insolvency generally: a s.146 notice is required if the lessee's interest is sold within a year of the insolvency, but if it is not sold a s.146 notice is only required for the first year from the start of the insolvency.
- The notice must be served on the tenant for the time being. Even if the breach relied on is an unlawful assignment, the notice must be served on the new tenant (though check with the Land Registry whether the assignment has been registered).
 - If there are joint lessees, they must all be served.
 - The notice does not have to name the lessee and can simply be addressed to "the lessee".

Forfeiture for other breaches and the s.146 notice II: Service of the notice

- There are various methods of service which are sufficient:
 - (i) Leaving it at the last-known place of abode or business of the tenant in the UK.
 - (ii) Fixing it to or leaving it on the land or any house or building comprised in the lease: fixing the notice to the door of the property is sufficient.
 - (iii) Leaving it with a person on the premises, if there are reasonable grounds for supposing that that person will if possible pass it on to the tenant.

- (iv) Sending by registered post or recorded delivery addressed to the tenant at their last-known place of abode or business in the UK, provided it is not returned.

Forfeiture for other breaches and the s.146 notice III: Contents of the notice

- In summary, the notice must:
 - (i) specify the breach;
 - (ii) if the breach is capable of remedy, require the tenant to remedy the breach;
 - (iii) in any case, require the tenant to pay compensation in money for the breach.
- It is the breach which must be specified, not the remedy. However the notice must be such as will enable the tenant to understand with reasonable certainty what it is that he is required to do. It is not necessary for the notice to contain a detailed specification of the work required to be done.
- It is not necessary for the notice to refer to s.146.
- It is not necessary for the notice to refer to the covenant in question, provided that it adequately identifies the breach.
- If the breach can be remedied, the notice must require the tenant to remedy the breach. Consequently it must be served before the breach has been remedied.
- A breach that can be remedied must be capable of remedy within a reasonable time.

- If the breach cannot be remedied, the notice does not have to require the tenant to remedy it.
- It is good practice to require remedy of all breaches insofar as they may be remedied to avoid disputes about the notice if there is a question whether the breach can be remedied or not.
- Breaches that are not capable of remedy include:
 - (i) Assigning the lease without the landlord's consent.
 - (ii) Subletting without the landlord's consent.
 - (iii) Alterations (though sometimes these are capable of remedy: it is a question of fact and degree).
 - (iv) Breaches which have caused a stigma to be attached to the premises e.g. use as a brothel or for gambling, or for other activities which have resulted in criminal convictions.
- Although s.146 requires that the notice must ask for compensation, the notice is not bad if it does not require compensation in money.
- If more than one breach is alleged in the notice, failure to prove some of them will not usually invalidate the remainder of the notice.

Forfeiture for other breaches and the s.146 notice IV: Forfeiture after service of the notice

- The s.146 notice does not have to limit a time within which the breach must be remedied. The landlord must simply allow a reasonable time to elapse from service of the notice until exercise of the right of forfeiture.

- What is a reasonable time depends on the facts of each case. It must be sufficient for remedying the breaches complained of in the notice.
- If the tenant makes it clear that he has no intention of remedying the breach and is committing further breaches, a reasonable time has elapsed.
- If the breach cannot be remedied, the tenant needs time to consider his position and in particular whether to make an application for relief from forfeiture. Fourteen days is sufficient time for this, and five days has been held to be enough.
- If the right to forfeit is exercised by the issuing of proceedings, it is not necessary to allege specifically that a s.146 notice has been served.

OTHER RESTRICTIONS ON FORFEITURE

- Long residential leases: see ss.166 to 172 Commonhold and Leasehold Reform Act 2002.
- Insolvency: in general the landlord will need the permission of the court to forfeit a lease of a tenant who is in administration or who is insolvent. However no permission is required for peaceable re-entry as against a bankrupt.
- Disrepair: must prove service on lessee or under-lessee or person who last paid the rent and that sufficient time has elapsed to carry out the repairs since the notice came to the attention of that person: s.18(2) Landlord and Tenant Act 1927.
- Leasehold Property (Repairs) Act 1938. Notice must contain statement to effect that lessee is entitled to claim the benefit of the Act.

- War damage.

RELIEF AGAINST FORFEITURE

Relief against forfeiture for non-payment of rent: High Court

- Landlord is not bound to accept offer of payment from a third party.
- Court has power to grant relief against forfeiture in a summary manner under s.38(1) Supreme Court Act 1981 and may do so subject to same terms and conditions as to payment of rent, costs etc. as would have been imposed prior to the commencement of the Act.
- Tenant must apply for relief within six months of forfeiture.
- Court still has an equitable jurisdiction in a case not falling within s.38 e.g. where there has been a peaceable re-entry.
- Relief will almost invariably be granted on terms that the arrears and costs are paid.

Relief against forfeiture for non-payment of rent: County Court

- Jurisdiction under ss.138 and 139 County Courts Act 1984, no inherent jurisdiction.
- If forfeiture is by action and lessee pays into court not less than five clear days before the hearing day all the rent in arrear and the costs of the action, relief is automatic.
- If payment is not made before the hearing and the court is satisfied at the hearing that the landlord is entitled to forfeit, possession will be given to the

landlord after no less than four weeks unless the tenant pays into court all the arrears and costs within that period.

- The period for payment of arrears and costs can be extended at any time before possession of the land is recovered.
- If forfeiture is by re-entry there is a discretion to grant relief but the tenant must apply for relief within 6 months of the forfeiture.

Relief against forfeiture for breaches other than non-payment of rent

- Governed by s.146(2) Law of Property Act 1925. There is no remaining equitable jurisdiction.
- Tenant is entitled to apply for relief as soon as a s.146 notice is served and does not have to wait for landlord to re-enter or issue proceedings.
- Tenant can apply for relief by counterclaiming in the landlord's action or by bringing his own action for relief.
- The court has a very wide discretion as to whether to grant relief, but will generally take into account the following:
 - (i) Whether the breach was wilful: if so, the court will lean against granting relief.
 - (ii) Whether the breach involved immoral use or stigma: again the court will lean against granting relief in a situation of this kind.
 - (iii) Whether the breach was inadvertent e.g. caused by a mistake.
 - (iv) Whether the breach was caused by circumstances beyond the control of the tenant.

- (v) If the breach is having done something without the landlord's consent, whether consent could reasonably have been refused if asked for.
- (vi) Whether the tenant has made good the breach or intends to do so.
- (vii) Whether the tenant is able to fulfil his obligations in the future.
- (viii) Whether the damage sustained by the landlord is proportionate to the benefit he will obtain if no relief is granted.
- (ix) Conduct and interests of relevant third parties e.g. a beneficiary under a trust of the lease.
- (x) Personal suitability of the tenant, if relevant under the lease.
- (xi) Personal hardship to the tenant if relief is refused.
- (xii) Any remedy the tenant has against a third party.
- (xiii) Whether the tenant's defence has been put forward in good faith.
- (xiv) Rights of any third parties (e.g. if the landlord has re-let the property).
- (xv) Whether the breaches relate to payments analogous to rent, in which case the principles relating to non-payment of rent will usually be applied.

- (xvi) If the breach is of a negative covenant e.g. not to carry on a particular business, whether the tenant has undertaken to observe the covenant in the future.

Terms of relief

- The general principle is that the landlord is entitled to be put back into the position that he would have been in but for the forfeiture.
- There is no fixed rule that the tenant will be required to remedy the breaches as a condition of relief.
- If conditions are imposed for relief, the tenant cannot be compelled to comply but if he does not he will not be granted relief.
- One of the terms of relief from forfeiture will usually be that the tenant or sub-tenant must pay the costs of the forfeiture and of the application for relief.

Sub-tenants

- Where the landlord is proceeding to exercise a right to forfeit, the court may on application by any sub-tenant make an order vesting the premises or part of them in the sub-tenant for the remainder of the term or for a shorter period: s.146(4) LPA 1925.
- Whether relief should be granted to a sub-tenant and on what terms are matters for the discretion of the court.
- The court should bear in mind that if relief is granted to a sub-tenant this will usually compel the landlord to accept as a tenant a person whom he has not chosen.

Effect of grant of relief

- Effect is to continue with the lease as if the forfeiture had never happened: the lease is retrospectively reinstated.
- There is uncertainty as to the tenant's precise status when relief is granted subject to conditions and compliance with the conditions is not complete.
- If relief is granted to a sub-tenant this creates a new leasehold interest in the sub-tenant.

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DISTRESS FOR RENT

DEFINITION

- Distress for rent is the taking, without legal process, of goods or chattels to satisfy outstanding arrears of rent.
- Distress consists of entering onto premises, seizing goods, and securing the goods (“impounding”).
- If, following distress, the tenant does not pay the rent, the goods may be sold and the proceeds applied towards the arrears.

WHEN IS THERE A RIGHT TO DISTRAIN?

- The right to distrain for rent arises automatically in the relationship of landlord and tenant. There is no need for any express agreement. The lease can vary the right to distrain by enlarging or restricting it, though this is unusual.
- There must be a lease or an agreement for a lease. A licence is not sufficient.
- The tenancy must be subsisting. If the landlord has re-taken possession e.g. by forfeiture, he cannot distrain subsequently.
- Distress is a remedy for the recovery of rent. It cannot be used to recover other monies unpaid under the lease.
- In some cases the leave of the court is required before distraining, including those relating to:

- (i) dwelling-houses;

- (ii) service personnel;
 - (iii) insolvency.
- The Crown and diplomats are exempt from distress.
- The right to distrain is terminated by unconditional payment or tender of the exact amount of rent owing, though if the distress has started the tenant may also have to pay expenses. Tender may be made to the landlord himself or to any agent of the landlord, which can include the bailiff.

WHO MAY DISTRAIN?

- The person legally entitled to the immediate reversion on a lease is entitled to distrain.
- If the reversion is assigned, the right to distrain will pass to the assignee.
- One joint owner may distrain alone but must justify such distress in his own right and as bailiff of the others. If the other owners simply decline to act this does not prevent one from acting alone, provided that the others do not forbid him.
- A mortgagor can usually distrain.
- Executors and administrators can distrain on behalf of the estate.
- A receiver appointed by the High Court can distrain.
- Agents: an authority to tenants to pay rent to an agent does not usually give the agent the right to distrain.

WHAT CAN BE DISTRAINED?

Note: this area of the law is very complicated and archaic. You should always use a certificated bailiff.

- The landlord is not entitled to distrain for an amount which is in dispute.
- The landlord should not distrain for more rent than is in fact owing. If the landlord takes an unreasonably large amount of goods he may be liable to the tenant in damages. The landlord may seize what a reasonable man would think adequate to satisfy his claim.
- Only goods and chattels can be distrained. Intangible property such as intellectual property rights cannot be distrained.
- Some objects are the subject of absolute privilege and cannot be distrained. Some items are subject to qualified privilege and can only be distrained if there is nothing else available. These include:
 - (i) Buildings and fixtures (absolute).
 - (ii) Wild animals (absolute).
 - (iii) Things delivered to someone exercising a public trade where the things are to be wrought, worked-up or managed in the way of his trade (absolute). The justification for this rule is that trade could not be carried on if customers thought their goods would be at risk on the trader's premises. It does not extend to good left on the premises by the owner for his own convenience. Example: wine sent for bottling is privileged but wine sent for storage is not.

- (iv) Things in actual use e.g. clothes being worn (absolute). This is intended to prevent breaches of the peace. It is not clear whether this would apply to things that work without human interference e.g. a refrigerator.
 - (v) Perishables (absolute).
 - (vi) Goods in the custody of the law (absolute).
 - (vii) Personal effects, including such tools, vehicles etc. as are necessary for personal use in employment, business or vocation; and clothing, bedding, furniture, household appliances etc. as are necessary for satisfying the basic domestic needs of the debtor and his family (absolute).
 - (viii) Machinery and breeding stock (absolute).
 - (ix) Railway rolling stock (absolute).
 - (x) Gas, electric and water fittings (absolute).
 - (xi) Cattle and sheep and some other livestock (conditional).
 - (xii) Third party goods (if landlord has brought them onto the premises or they are there with the landlord's consent).
- The Law of Distress Amendment Act 1908 protects the following from distress:
 - (i) Goods of any undertenant who pays rent to the full value of the premises comprised in his tenancy and pays it quarterly or more frequently than that.

- (ii) Goods of any lodger.
 - (iii) Goods of any person not being a tenant or a person with any beneficial interest in the premises or any part thereof.
- In order to obtain the protection of the Act, the person who seeks protection must make a declaration in writing and serve it on the superior landlord, bailiff or other agent employed to levy the distress. It must be served after and not before the superior landlord has levied or authorised the distress. The declaration must include a statement that the goods are not within the exceptions to the Act (set out below). It must include if applicable a statement of rent due and reserved and an undertaking to pay rent to the superior landlord until the arrears of rent have been paid off. It must attach an inventory of goods referred to in the declaration.
- There are exceptions to the rules in the LDAA 1908 as follows:
 - (i) The goods of the husband or wife of the tenant whose rent is in arrears.
 - (ii) Goods comprised in any settlement made by the tenant.
 - (iii) Goods in the possession of the tenant with the consent of the true owner where the tenant is the reputed owner.
 - (iv) Livestock which is taken in by the tenant to be fed.
 - (v) Goods of a partner of the tenant.
 - (vi) Goods at a premises where any trade or business is carried on in which the immediate and the undertenant have an interest.

- (vii) Goods on premises used as offices or warehouses where the owner of the goods does not remove them within one calendar month of notice.
 - (viii) Goods belonging to and in the offices of any company where the tenant is a director, officer or employee.
- Goods on hire purchase are not protected under the LDDA 1908 except during the period between the service of a default notice under the Consumer Credit Act 1974 and the date when the notice expires or is complied with.

TIME FOR DISTRESS

- Distress cannot be made on the day when the rent is due as it is not in arrears until the next day.
- The right to distrain can be postponed by agreement.
- Goods cannot be distrained on a Sunday.
- Distress must be between sunrise and sunset.
- The landlord has a statutory right to distrain for arrears within six months after the determination of the lease if the tenant remains in possession.

PLACE FOR DISTRESS

- Distress must be made on the land from which the rent issues, and not elsewhere, save in the case of fraudulent removals or where the parties have enlarged the landlord's power of distress by express agreement.

- To prevent fraudulent removals, the Distress for Rent Act 1737 authorised landlords to follow and distrain the good within 30 days after such removal.
- Distress may be made upon any part of the land.

PROCEDURAL POINTS

- The bailiff must have a warrant or authority in writing.
- No person may act as a bailiff to levy any distress for rent unless he is authorised to act as a bailiff by a certificate in writing from a county court judge.
- If an unauthorised bailiff levies a distress, he and the person who asked him to do it are liable for trespass.
- The bailiff may not break the outer door of the building, but may enter an open door and may break an inner door or lock to find distrainable goods. He may climb over a fence and so gain access by an open door or window.
- Every bailiff levying a distress must produce his certificate to the tenant on entry.
- The tenant may not be excluded from the premises.
- Seizure of goods may be actual or constructive. Constructive seizure may be achieved by leaving notice that certain identified goods have been distrained.
- Goods may sometimes be impounded on the premises or made the subject of a “walking possession” agreement with the tenant.
- When levying distress and/or removing goods the bailiff must deliver to the tenant or leave at the premises the appropriate memorandum in Form 7 or 9

setting out the goods distrained and costs incurred, or the expenses of removal authorised under the Distress for Rent Rules 1988.

- Scales of charges for levying distress are set out in the Distress for Rent Rules 1988.
- The goods may not be sold for five days (or fifteen if the tenant asks for an extension in writing).
- The goods must be sold for the best price that can be obtained for them.

REMEDIES AGAINST SUB-TENANTS

- Under s.6 Law of Distress (Amendment) Act 1906 the superior landlord can serve notice on subtenants requiring them to pay the rent directly to him. There is no prescribed form for the notice though it must state the amount of arrears and require payment direct to the superior landlord until the arrears have been satisfied.
- Service of a s.6 notice operates as a waiver of the right to forfeit the headlease, as it affirms the existence of the landlord and tenant relationship.

TENANT'S SET-OFF

- If the tenant has an equitable right of set-off against the claim for rent he will probably be able to obtain an injunction to restrain distress.
- An equitable right of set-off can be excluded by clear words in the lease.

REMEDIES FOR WRONGFUL DISTRESS

- Injunction

- Replevin: two stage process where person who claims to be owner of goods obtains an order from the county court for their return and then proceeds to prove the illegality of the distress and his right to the goods.
- Damages: in cases where no rent was owing and the distress has been sold, the owner may recover double the value of the goods distrained. In cases of excessive distress the measure of damages will be the fair value of the goods less the rent due and the costs of the distress.

LIMITATION

- A valid distress cannot exceed six years' rent: s.19 Limitation Act 1980. In the case of an agricultural holding, only one year's arrears of rent can ordinarily be recovered by distress.

LEGISLATIVE DEVELOPMENTS

- The draft of the Tribunals, Courts and Enforcement Bill was published on 25th July 2006 and is available online at www.official-documents.co.uk (Cm 6885 of 2006). One of the proposals of the Bill is to abolish the commercial landlord's right to distrain for rent. In place of the remedy of distress will be a new system: commercial rent arrears recovery or CRAR. CRAR will only be available for rent payable under the lease for possession and use of the demised premises. It will not be available for any other payment under the lease, even if other payments are defined as rent. It will not be possible for an enforcement agent to take control of a debtor's goods unless the debtor has been given notice. If notice is given, the debtor can apply to the court to have it set aside. There is a useful article on the Bill by Jacqui Joyce of Lovells in the Estates Gazette for 7th October 2006 (number 0640 at pp.240-242).

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DAMAGES, INJUNCTIONS AND SPECIFIC PERFORMANCE

DAMAGES

Purpose

- To restore the landlord to the situation he or she would have been in had there been no breach of contract.

Remoteness

- Damages sought must not be too remote, so they must either have been expected to be in the reasonable contemplation of the parties or be fairly and reasonably considered as arising naturally.

Expenditure and loss suffered as a result of the breach

- The landlord is generally entitled to elect between claiming damages for the loss suffered as a result of the breach of contract and damages representing wasted expenditure incurred in anticipation of the contract if they were expenses likely to have been incurred.

Time for assessment of damages

- There is no fixed rule on when damages should be assessed. Normally damages would be assessed at the date of the breach of contract but the court has the power to substitute such other time as to avoid any injustice.

The effect of the Landlord and Tenants (Covenants) Act 1995

- In relation to leases granted after January 1, 1996 the Landlord and Tenant (Covenants) Act 1995 s. 3 applies. A covenant to pay rent is clearly within the ambit of that section. When a reversion to a lease was assigned, the

assignee, the new landlord, had the right to recover the rent under the lease in his own right and did not need to claim through the assignor, the original landlord. Whereas a tenant's right to claim damages against a predecessor in title of a current landlord, whether or not it arose under a covenant, was a personal right that was not an interest in land (see ***Edlington Properties v JH Fenner*** [2006] 13 EG 141).

Damages for breach of contract to lease

Delay in completion

- The primary measure of damages for a case of delay in completion will be the loss of rental income brought about by the delay.

Loss of bargain

- The measure of damages for a loss of bargain will be the difference between the true value of the property and the contract price that had been agreed. The price which a vendor obtains on a resale will be good evidence of the true value of the property.

Consequential losses

- A landlord should be able to recover a sum equal to his liability for empty rates, or where the contract was for a sub-lease, the amount of any outgoings which would have passed on as a liability to the sub-lessee.

Damages for holding over

- The tenant is liable for failure to give complete possession of the premises at the end of the tenancy even where a sub-tenant wrongfully holds over and refuses to quit. The tenant will be liable for the period of such holding over but not for the whole year's rent.

Mesne profits

- If the tenant holds over after the termination of his tenancy, he is liable to pay mesne profits (mesne profits are damages for trespass where the trespasser is a former tenant of the landowner). Mesne profits are not a compensatory, but a restitutionary measure of damages.
- The liability to pay mesne profits arises even where the landowner would have suffered no loss, for example because he would not have relet the premises during the occupation by the trespasser. The trespasser may also be liable for further damages, for example damages payable by the landlord to a person to whom he has agreed to relet the property but who has been kept out of possession by the tenant's holding over. The tenant may also be liable for the deterioration of the premises during the period when he held over.
- The amount of the mesne profits for which the trespasser is liable is an amount equivalent to the ordinary letting value of the property in question. Where the rent is less than the true letting value of the premises, then mesne profits may be awarded at a rate exceeding the rent. The valuation of the true rent should be on the basis of a short term letting.

Double value after landlord's notice

- Section 1 of the Landlord and Tenant Act 1730 entitles the landlord to double the yearly value of the premises from a tenant holding over after the landlord demands possession of the premises in writing: “...*in case any tenant . . . for any term . . . shall wilfully hold over any lands . . . after the determination of such term . . . and after demand made and notice in writing given for delivering the possession thereof by his landlords . . ., then and in such case, such person . . . so holding over shall, for and during the time he . . . shall so hold over or keep the person . . . entitled out of possession of the said lands . . ., pay to the person . . . so kept out of possession . . . at the rate of double the yearly value of the lands . . . for so long time as the same are detained, to be recovered in any of his Majesty's*

courts of record by action of debt...” However, it should be noted that, because the statute is penal in effect, its provisions must be construed strictly.

Double rent after tenant’s notice

- Section 18 of the Distress for Rent Act 1737 entitles the landlord to recover double rent if the tenant gives notice to quit but does not give up possession at the time when the tenancy expires pursuant to the notice: “...*in case any tenant or tenants shall give notice of his, her, or their intention to quit the premises by him, her, or them holden, at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, that then the said tenant or tenants, his, her, or their executors or administrators, shall from thenceforward pay to the landlord or landlords, lessor or lessors, double the rent or sum which he, she, or they should otherwise have paid, to be levied, sued for, and recovered at the same times and in the same manner as the single rent or sum, before the giving such notice, could be levied, sued for, or recovered; and such double rent or sum shall continue to be paid during all the time such tenant or tenants shall continue in possession as aforesaid.*” This Act forms a single code with the 1730 Act and its provisions should be construed similarly.

Aggravated damages

- Trespass to land accompanied by high-handed, insulting or oppressive conduct might warrant an award of aggravated damages. Conduct such as where a landlord does not demand immediate repossession, a landlord who ignores letters from the tenant will, despite oppressive behaviour by a tenant, not justify the award of aggravated damages (see ***Horsford v Bird*** [2006] UKPC 3).

Damages for breach of the repairing covenant

- Damages can be recovered for common law nuisance and negligence as well as under the express terms of a tenancy agreement or lease.

The measure of damages for breach of repairing covenant (before expiry of the tenancy)

- The landlord can recover a sum representing the diminution of the value of the reversion which results from the breach.
- The amount by which the market value of the reversion has been reduced by the tenant's failure to repair.
- Therefore if a tenancy has many years to run before it expires, the value of the reversion will be relatively low, consequently the amount of damages recoverable by the landlord will depend to a considerable degree upon the length of the unexpired term.
- The more obvious measure of damages, i.e. the cost of putting the premises into repair, is not used during the currency of the tenancy because there is no guarantee that the landlord would use the money to carry out the repairs, and in order to carry out the repairs the landlord would need the tenant's permission to enter.

The measure of damages for breach of repairing covenant (after the expiry of the tenancy)

- When the landlord brings an action for damages after the tenancy has been terminated, the measure of damages is the cost of carrying out the repairs necessary to put the premises into the state of repair required by the covenant. Here the landlord will be suing on the tenant's covenant to leave the premises in repair rather than on the covenant to keep the premises in repair.

The maximum damages for breach of repairing covenant

- Regardless of which measure of damages are used, the total amount of damages recoverable by a landlord will be subject to the upper limit imposed

by section 18 of the Landlord and Tenant Act 1927: the damages recoverable by the landlord are in no case to exceed the amount, if any, by which the reversion, whether immediate or not, in the premises is diminished by the breach.

- Therefore where the cost of putting premises into repair at the end of a tenancy is greater than the amount by which the breach of covenant has reduced the market value of the premises, the landlord will only be able to recover for the loss in market value.
- Where, as is often the case, the market is going up and there is no diminution in the market value of the property despite the fact that they have fallen into disrepair as a result of the breach of covenant, the landlord may not be able to recover any damages at all.
- Where the landlord intends to demolish or alter the premises at or shortly after the end of the tenancy, section 18(1) specifically states that no damages can be recovered.

Long leases and breach of the repairing covenant

- Where a lease was granted for a term of more than seven years and there are more than three years of the term unexpired, the Leasehold Property (Repairs) Act 1938 aims to prevent the landlord from terminating the lease mid-term by seeking to enforce a repairing covenant with which the tenant could not easily comply.
- In long lease cases the landlord will have to serve a notice under section 146 of the Law of Property Act 1925 informing the tenant of his or her rights under the Act. The tenant may then serve a counter-notice within 28 days claiming the benefit of the Act which will prevent the landlord proceeding further without the permission of the court.

- Leave will only be granted if the landlord can prove one of the following:
 - (a) the value of the reversion has been substantially diminished by the breach, or that the breach must be immediately remedied to prevent the value of the reversion being substantially diminished;
 - (b) that the breach must be immediately remedied in order to comply with a by-law, an Act of Parliament, a court order or the requirement of a local authority;
 - (c) that if the tenant is not in occupation of the whole premises the breach must be immediately remedied in the interests of an occupier of the premises or part of the premises;
 - (d) that the breach can be immediately remedied at relatively small expense in comparison with the probable cost of the work that would be needed if the repairs were postponed;
 - (e) that there are special circumstances which in the opinion of the court render it just and equitable to grant leave.

Right of entry to repair

- Where the landlord has an obligation to repair, the landlord will also have an implied right to enter and carry out the repairs for which he or she is liable. Some leases may also contain a provision entitling the landlord to enter and carry out repairs for which the tenant is responsible and then charge the tenant with the cost. Such a provision usually entitles the landlord to recover the cost of the repair work from the tenant as a debt due.

INJUNCTIONS

- An injunction can either be mandatory (requiring something to be done) or prohibitory (restraining someone from doing something). An injunction is best suited to those instances where the tenant covenants to do something and then does not do it, such as promising not to sell alcohol on the premises.
- An injunction will only be granted where the landlord can show that the tenant has or will commit a breach of contract or has or will commit a tort, most commonly nuisance.
- Damages in substitution for an injunction may be given where four criteria are satisfied: (1) if the injury to the plaintiff's legal rights is small, (2) and is one which is capable of being estimated in money, (3) and is one which can be adequately compensated by a small money payment, (4) and the case is one in which it would be oppressive to the defendant to grant an injunction. Actual awareness of the covenant that is sought to be enforced will be a good touchstone for determining oppression (see ***Small v Oliver & Saunders*** [2006] EWHC 1293 (Ch)).
- An application for an injunction should usually be made on notice to the tenant following the procedure set out at CPR Parts 23 and 25. It will be normal for the landlord to provide a surveyor's report or other expert evidence stating what works are needed.
- In extreme cases of disrepair it may be possible for a landlord to obtain an interim injunction requiring the tenant to carry out works. The remedy will only be available in exceptional circumstances as it requires the tenant to take action before the case has been fully argued at trial and can be granted even before proceedings have been commenced. Before granting an interim injunction requiring repair works to be carried out the court will need to be satisfied that there is an immediate need for the work to be done, for example where there is a risk to health and safety, and it must also be clear what work needs to be done.

- Often damages will be an insufficient remedy against a tenant who has breached a covenant against alterations or improvements because the value of the property will not have depreciated. Instead the landlord could seek an injunction requiring the tenant to reinstate the property.
- Where a tenant is in breach of a user covenant, the landlord will want to take proceedings to stop the unlawful user. This is best done by seeking an injunction, and often damages for the breach up until that point.

SPECIFIC PERFORMANCE

- This is a rare and discretionary remedy but can be awarded in appropriate circumstances. The remedy will only really be available if damages are not a sufficient remedy.
- If there is a concluded contract for the sale of land, then the court will often order specific performance for the sale of that specific parcel of land. Often the defences that need to be anticipated are that the contract was not concluded or that any agreement was too uncertain, or that there was delay, misrepresentation or deceit.
- Damages may be awarded alongside an order for specific performance in respect of loss caused in delay in performance of the contract. Also if an order for specific performance is made against a tenant who then fails to comply with it, the landlord can ask for the order to be discharged and seek damages instead.
- It will be more unusual that specific performance will be granted for breach of the covenant to repair. The tenant will need to be aware of exactly what works need to be done and a workable agreement for supervision of the works should be in place.

- The general availability of the right of forfeiture under both commercial and residential leases means that specific performance would rarely be an appropriate remedy for enforcing the covenant to repair, but would be used, for example, where the landlord faced substantial difficulties in effecting repairs and the property was in danger of deteriorating.
- An interesting recent case is *Kilmartin SCI v Safeway Stores Plc* [2006] 9 EG 184. The Agreement in that case provided that the premises should be of a specified minimum net internal area; if that was not achieved, Safeway would have the option to terminate the Agreement. However, the Chancery Division established that the net internal area had been achieved subject to a +1/-1% tolerance, and accordingly awarded specific performance of the Agreement.

PRE-ACTION PROTOCOLS

- There are no CPR protocols for claims relating to commercial leases but there is a Dilapidations Protocol (latest version dated 14th September 2006) which is commonly used by practitioners and which is available on the website of the Property Litigation Association: www.pla.org.uk

CHOOSING THE RIGHT COURT

- There is no upper limit on the jurisdiction of the county court to entertain an action for damages. Bringing a claim in the county court instead of the High Court will primarily help to keep costs low. It is also worth noting that the Central London County Court has a specialist Chancery list to deal with moderately complex landlord and tenant cases, without necessitating a claim in the High Court.

- An action for specific performance may be brought in the county court so long as the value of the property demised does not exceed £30,000. Otherwise the claim should be brought in the Chancery Division or the Queens Bench Division.

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