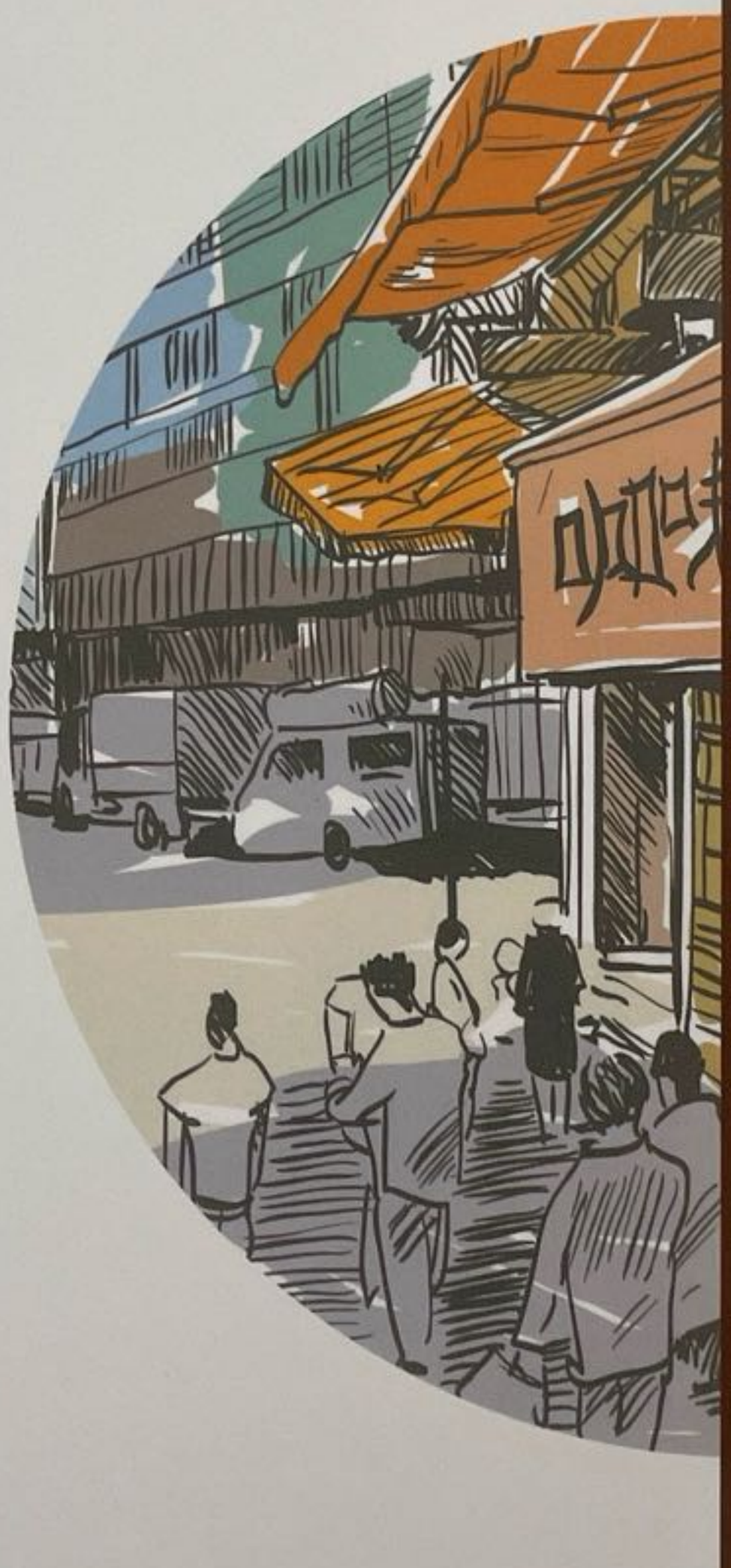

Hong Kong Tenancy Law

Student Edition

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Chapter 5

Contents of the Lease

The possible contents of the tenancy agreement are even more varied than the types of tenancy. Like any other contract, a tenancy agreement may be in writing, or purely oral, or partly in writing and partly oral. Most tenancy agreements are in writing, but even among written agreements the length and range is wide. The agreement might be home-made and handwritten. It might be in English or Chinese, or both. It might be in a printed form with the variable details such as the names of the parties and the premises typed in or written by pen. It might be drafted by a lawyer, in which case it will tend to be longer and more precisely worded and may be by deed.

It is sufficient to constitute a lease if a document identifies the landlord (by name and address, usually) as lessor, indicates that the land is being let, identifies the land (by description, or address, or lot number, for example), states the length of the letting, gives the date upon which it begins and expresses the amount of rental. These are basic or essential matters.

By contrast, a professionally-prepared lease of major business premises such as a restaurant or department store in a modern commercial building may run to 50 or more pages. This is because the terms of the lease usually originate with the landlord or his lawyers who wish to provide for every eventuality, however unlikely, and to exercise a great deal of control over the tenant's use of the premises. As a broad rule, the higher the rent and the longer the duration of the lease, the more complex the agreement will be.

Basics

Whatever its length, the agreement must contain the essentials if it is to constitute a lease: the parties, the premises, the commencement and duration (or 'term') and the rent. Although the law does not require them to be in any special order, these essentials are usually dealt with at the beginning of the written agreement or, where the document is in standard form, in a separate schedule or schedules at the end.

The agreements shown in the appendix illustrate the typical fashion in which the basic elements are set out. Most of them start by reciting the date of the agreement and the names and addresses of the parties: the landlord and the tenant. In the first clause they then set out (in different ways) the premises, the commencement and duration of the letting and the rent.

Premises

Premises ('the demised premises' or 'parcels') are usually described precisely so as to avoid misunderstanding. All that is required, however, is that there be sufficient information to be able to identify the property in question. The description can be as vague as 'my flat at Taikoo Shing' or 'the land in Sai Kung' but these will require to be given precision by oral evidence and may lead to disputes. To avoid this, at least the address should be given. However (if only out of caution) the property is often labelled as a flat, shop or whatever, and the lot number of the building and the Land Registry memorial number of any document mentioned may also be included. A plan may be attached as well, showing the premises coloured on a diagram – though this is often said to be 'for identification purposes only', in which case the plan is of less importance in delineating the premises than if the premises are said to be 'more particularly described' in the plan. The exact boundaries of the property may become important if, for example, a dispute arises about whether repairs are internal or external.

It is not usual to include the floor area of the premises in their description, which is just as well given the tendencies of landlords and their agents to exaggerate in this regard. The notorious distinction between gross area and net area and subjective phrases such as 'usable area' and 'lettable area' are a ready source of misunderstanding. Representations about floor areas are invariably made during pre-contractual negotiations. Once the tenancy agreement has been signed, it may be too late for the tenant to complain if he later discovers that the flat is not as large as he thought, especially if the dimensions of the premises are not given (eg on a plan) and the agreement contains a clause excluding the landlord from liability for misrepresentations. However, such exclusions are not always effective, and landlords and agents would be prudent to adopt the definition of 'saleable area' used in sales of units in new developments since 1986 as their description of what is being let. This includes the floor area inside the unit, internal partitions and columns, balconies and verandas, bay windows which extend to the floor and the whole of the enclosing walls (including those abutting common parts of the building) except where they separate two adjoining units, in which case half the width of the wall is included. It excludes: cocklofts, bay windows which do not extend to floor level, car park spaces and ports, yards, gardens, roofs and terraces.

There must be a grant of some horizontal surface before there can be any premises. The grant of the use of the outer surface of a vertical wall (for erection of an advertisement hoarding) has been held to create no lease because there is no defined portion of the soil to which the letting can be related. So long as there is a defined area of ground or floor, no matter how small, there can be a lease. An area of air space above the floor may be leased.[1]

In theory a letting of land includes the subsoil down to the centre of the earth and the airspace to the heavens above. However, in practice a typical unit in a Hong Kong building is confined by the inner surfaces of its floors, walls and ceilings. The extent of the premises let is a matter of interpretation of the description of the premises and other terms in the context of the physical and other relevant circumstances.[2]

The description of the premises is sometimes followed by exceptions and reservations. An exception is a clause by which the landlord keeps a part of the land which otherwise would pass to the tenant, for example, a landing or stairway or the right to take minerals from under the land. A reservation is the grant of a new right over the land in favour of the landlord, such as the right to lay water pipes under the land. The distinction, however, has tended to become blurred: clause 1 of the second agreement in the appendix contains an example of such a blurring: the landlord both excepting and reserving the passage of water and electricity.

Although the description of the premises in the agreement or accompanying plan is generally definitive of the area granted, in exceptional circumstances the area can be extended by virtue of encroachments upon neighbouring or nearby property. This more readily occurs in the letting of land surface than of floors, or parts of floors, of buildings. If the tenant in fact enjoys, with the premises, the use of other adjacent or nearby property not belonging to the landlord, the doctrine of encroachment presumes that the other property is let as part of the premises so that the tenant must hand over use of the other property with the demised premises at the end of the tenancy. This doctrine operates to prevent the tenant from retaining the other property which he obtained the use of only because of the tenancy, so that the landlord can have the benefit of the use of it along with the use of the premises. The doctrine does not make the landlord the owner of the other property, and the doctrine is only a presumption so it may not apply if there are other circumstances rendering it inapplicable. Such a circumstance might be that the area encroached upon has in fact been let to the tenant subsequently by the owner of the area or that the area is a common part of the building and so belongs to all the co-owners of the building (including the landlord) communally.[3]

The Hong Kong practice of holding buildings in common ownership (by tenancy-in-common) subject to a deed of mutual covenant means that individual units in the building are owned and usually abut upon parts of the building, such as external walls and roofs, passageways, corridors and lobbies, which are for common use and enjoyment by all owners. This affects not only the application of the doctrine of encroachment but also the question of whether and to what extent such surfaces are part of the premises let. Cases from England and other jurisdictions which do not have the same system of landholding as Hong Kong (to the effect that the outer surfaces of a property are part of the demise of the property) are of little assistance in such circumstances. Even so, these cases have been cited and occasionally applied in Hong Kong decisions in which the differences in the methods of landholding have been overlooked.[4]

The use of 'premises' to describe land granted under a lease arose in a curious way. A premise or premises is a previous statement, usually from which something can be inferred, so for example a conclusion based on 'false premises' is an irrational conclusion. Lawyers used (and still use) the phrase 'in the premises' to mean 'as a result of what has been previously stated' or 'accordingly'. They used the phrase in leases, following a description of the property, to mean 'the land and buildings previously stated'. Gradually, for convenience, 'the premises' was taken by non-lawyers and lawyers to mean not just the description of the property previously stated but also the property itself.

Term

A lease is a grant of exclusive possession of land for a certain time or 'term certain'. The clause which contains the commencement and duration of the term (in old-fashioned terminology, 'the habendum') must also be precise. It has been said that a lease must have a certain beginning and a certain ending, and that both the length of the term and its commencement date must be defined. This is somewhat of an exaggeration, as it is sufficient if the beginning and the ending can be reasonably inferred from the language used or by reference to something that will make it certain. That something may even be a contingency: an event which may or may not happen. Hence a grant 'from whenever the current tenant leaves the premises' would be acceptable, provided that the event has happened by the time of any attempt to enforce the agreement. Similarly, the duration of the term may be specified by reference to a thing or event so long as at the time the lease takes effect, that thing or event can be looked at to ascertain what the term is to be. So a term 'for the duration of the war' or 'until the landlord decides to redevelop the premises' or 'until the landlord returns to Hong Kong' would fail, for none of these events would be capable of being ascertained at the beginning of the lease.[5]

These difficulties can be avoided if, as is usual, the term is referred to by specific dates. Where a fixed-term is granted, the full term should be stated with the first and last days named; for example, 'two years, from the 1st day of January 2017 to the 31st day of December 2018, both days inclusive'. The term starts at the first moment of 1 January 2017 and ends at the last moment of 31 December 2018. If, however, the clause read 'two years, from the 1st January 2017', and did not give an ending date or stipulate that the date was inclusive, it seems the term would start at midnight on 1–2 January 2017 and last until midnight on 1–2 January 2019. This would however be subject to any indications elsewhere in the lease or in the context of the lease that the parties meant the term to commence at the first moment of 1 January. In one case the court considered evidence to resolve the ambiguity in the grant of a five-year term from 1st January in one year to 31st December in another.[6]

A periodic tenancy will merely be expressed to be weekly, monthly, quarterly, or whatever from a certain date. If there is no mention of any term, the lease, as we have seen, will usually be construed as a tenancy for the period by reference to which the rent is assessed.

There may be some difficulty in deciding whether the parties' intention is to create a fixed-term lease of one year's duration or a periodic yearly tenancy. If the phraseology is 'for one year' or 'for one year certain', that creates a fixed term of one year. If the words are 'from year to year' or similar, a periodic tenancy has been created. It is also possible to mix the two: to have a fixed-term, followed by a periodic tenancy. This would be useful, for instance, where the tenant knows she will require accommodation for, say, a year, but may not need it thereafter and so wishes to have the flexibility of subsequently leaving at short notice.

A usual length for residential leases in Hong Kong is two years. Often, however, the tenant (and sometimes both tenant and landlord) is given the option to end the lease on notice after one year has passed. Standard agreements in

Chinese create a 24-month tenancy with option to terminate after twelve months: this is sometimes called an 'open agreement'.[7]

The habendum contains the demise or grant of possession and enjoyment of the premises to the tenant. This means that the premises will be made available for occupation or use as of the date of commencement of the term. Unless the grant is in some way qualified, the landlord agrees to give vacant possession to the tenant as of that date. So, if the landlord is unable to hand over the premises on that date because, for instance, a previous tenant is still in occupation or has left his goods at the premises, the landlord will be liable to the tenant in damages for late delivery.[8]

The requirement for certainty as to term has been questioned but it is needed so as to avoid there being a perpetual lease tantamount to freehold. If the event until which the lease had purportedly been granted were never to occur, the lease would never end and would violate a primary principle of the law of landlord and tenant, that there must be a term to a lease or 'term of years'.

Rent

The rent is usually given in words and figures and stipulated to be payable without any deductions. The date upon which it is due will be stated. For both parties this (the 'reddendum') is usually the most vital part of the lease. Rent is, however, often not the only consideration given by the tenant for the grant of the leasehold interest. He also undertakes to abide by the terms of the agreement, including the (frequently onerous) tenant's covenants which are examined later, and may agree to pay a premium as well. Rent is examined in detail in the next chapter.

Grant

In exchange for that consideration, the landlord grants the leasehold interest in the land. The grant is contained in the 'operative words'. The most common operative words are 'demises' or 'lets'.

After the essentials, the bulk of a solicitor-drafted lease usually contains a large number of express obligations, called 'covenants', undertaken by the parties (mainly by the tenant), as well as other agreements and declarations. There is, though, no need for any of these express terms in order to constitute a tenancy. Even without them, there is sufficient for a lease. Such a lease would not, however, be adequate if trouble were to arise between landlord and tenant. Because of this, the law supplements the basic elements with certain implied rights and liabilities.

Implied Obligations

These obligations are the necessary minimum for the smooth and sensible operation of the lease. In the eyes of the law, the parties implicitly accept them when entering into the lease. These obligations are sometimes called 'implied covenants' although, strictly, a covenant is an obligation undertaken in writing.

Duties are impliedly imposed on both parties, though more and heavier duties are imposed on the tenant. Unfortunately, there is no agreement as to the number of these duties. The landlord is at least obliged to give the tenant quiet enjoyment of the premises and not to derogate from his grant. The tenant is at least obliged to pay rent and to pay tenant's rates and taxes. She must also keep the premises in a tenant-like manner and not commit waste. She must not disclaim the landlord's title and must surrender the premises at the end of the term.

In domestic tenancies, terms are implied by statute concerning payment of rent, nuisance, structural alterations and illegal or immoral use.

These implied obligations will now be examined more closely. Possible other implied terms will also be discussed briefly.

Landlord's implied covenant for quiet enjoyment

The landlord implicitly undertakes that he has good title to the premises and therefore will give possession to the tenant who shall be free from any disturbance to enjoyment of that possession within the landlord's control during the term. The tenant is thereby promised 'quiet enjoyment' of the premises. Enjoyment here has a technical meaning by which it refers to having the full benefit of a right rather than deriving pleasure from that right. 'Quiet' in this sense means peaceable and free from interference by the landlord. It is not limited to interference by noise. The undertaking is prospective: it is a promise at the beginning of the term that the tenant's enjoyment of possession and use of the premises for all usual purposes throughout the term will not be substantially interfered with.[9]

The covenant for quiet enjoyment can be invoked by the tenant to prevent acts of harassment by the landlord. For instance, in *Kenny v Preen* (1963), the landlord gave the tenant notice to quit, but the tenant refused to leave because legislation entitled her to security of tenure. The landlord tried to force her out by writing letters, shouting at her and banging on the door. He was held liable for breach of the implied covenant of quiet enjoyment. In other harassment cases the landlord has been held in breach where he cut off the electricity and where he put the tenant's belongings out on the street and changed the locks.[10]

However, the covenant is not limited to cases of harassment. In *Owen v Gadd* (1956) there was a lease of a shop for ten years. The tenant agreed to use the premises only as a shop. Three days after the lease had been granted, the landlord called building contractors in to repair the upper parts of the premises, which the landlord occupied. As a result, scaffolding obstructed access to the shop and its windows. Trade was affected for 11 days. The tenant was awarded damages for breach of, in fact, an express covenant for quiet enjoyment. Had there been no express covenant, there would undoubtedly have been a breach of the implied covenant. In a Hong Kong case, a tenant whose occupation of a shop had been affected by foul air from centralised air-conditioning supplied by the landlord was held to have a right of action under the implied covenant.[11]

Before there is a breach, there must be substantial disturbance to the tenant's possession and enjoyment of the premises. This will often involve physical interference with enjoyment of the premises demised but there is no requirement that there be physical interference: the interference can be with the comfort

of people occupying the premises. However, it must be more than a personal annoyance or inconvenience to the occupants. It must also be more than a merely temporary or intermittent interruption to enjoyment. In one case, the tenant complained that the landlord, who owned the whole building containing the demised cafe premises, failed to designate part of the walls for the café's advertising and closed a metal gate in the building after midnight when the cafe would be showing televised Premier League football. These matters were held to amount to no more than temporary inconvenience and to have no bearing upon the tenant's right to use the premises.[12]

In the context of commercial leases, the typical scenario in which breach of quiet enjoyment is alleged by a tenant is when the business of the tenant turns out to be disappointing and in searching for an explanation, the tenant identifies some defect with the premises or the building in which they are situated. This defect might be real or supposed. If real, its effect might be exaggerated or it might not be the responsibility of the landlord. So a broken down lift or stopped escalator is blamed for a reduction in customers to shops on an upper floor, or leakage of water from outside is said to deter diners from visiting a restaurant. The tenant protests and asks for a rent reduction. When the landlord proves not amenable to this, the tenant withholds rent and raises the complaint as a defence to the action for rent arrears.[13]

When it comes to domestic premises, a frequent source of complaint is disturbance by renovation works being carried on at the building. Few purchasers of flats in Hong Kong can, it seems, resist the temptation to improve their property with little consideration for the peace of their new neighbours. Owners' corporations and building managers may decide that the building's common areas need refurbishment. These works generate dust, dirt and dislocation, as well as noise. None of these is the responsibility of the landlord, but the tenant, facing the prospect of disruption for the greater part of a 24-month lease, may not view matters in that way. Only if the whole building is owned by the landlord, so that the flats and common parts are under renovation by his authority, will the landlord be responsible for the disturbance. Even then, the disturbance may too slight or too transient to constitute a breach.[14]

This covenant therefore protects the tenant from nuisances or interruptions caused, intentionally or by mistake, by the landlord or persons deriving title from him such as tenants of neighbouring property let out by the same landlord. So, for instance, if water escapes from premises controlled by the landlord into premises granted to the tenant, the implied covenant would, subject to anything expressed in the lease, give the tenant a right of action, provided that the escape was caused by the act of the landlord or those for whom he is responsible, and that it occurred during the term of the lease. This type of interference is particularly prone to occur because so many tenancies in Hong Kong are of units in multi-storey buildings owned by one landlord. Another example is interference by building work carried out on neighbouring premises by the common landlord or his tenant with his consent. Here the landlord may raise the 'this is Hong Kong' defence, in effect questioning whether the disturbance is sufficiently substantial to constitute a breach of the covenant, given the prevalence of and need for such building work and the SAR's generally noisy and crowded conditions. The outcome of this

Chapter 7

Distress for Rent

All section references are to the Landlord and Tenant (Consolidation) Ordinance (Cap 7) unless otherwise indicated

Distress, or distraint, certainly is old and extreme. It is a powerful weapon in the hands of the landlord; it can give rise to criminal consequences and affect the rights of third parties.[1] The name itself portrays the idea: to put pressure on the debtor to pay the money he owes. His goods are seized so as to make him satisfy his creditor — if he does not pay up, the goods are sold to meet his obligation. In fact, in most cases the debtor pays his debt before the sale.

The idea is crude, and the means only slightly less so. This has led to the abolition of distress for rent owed in respect of domestic tenancies in England. Yet the legislative council in Hong Kong has not thought fit to abolish distress and has actually made it available to the government as a remedy for unpaid rates and to owners' corporations for unpaid management charges (though it is not a remedy for other unpaid taxes). This, and the frequency of its use, indicates the usefulness of distress in Hong Kong. It is not unique as a harsh remedy, for example, the victim of a nuisance can enter his neighbour's land to stop ('abate') the nuisance, and imprisonment for debt is still allowed in certain circumstances.

Lawyers with experience of trying to extract rent arrears and other unpaid debts from the recalcitrant might say that distress for rent and imprisonment for debt serve largely similar purposes: to force the dishonest tenant or debtor to pay. Distress, however, goes further and provides a security to the unpaid landlord in the form of the right to receive the proceeds of the sale of the tenant's chattels.

In both cases, however, the law has stepped in to control the exercise of these rights. Ironically, the control in the case of imprisonment for debt is looser than in the case of distress. Part III of the Landlord and Tenant (Consolidation) Ordinance takes the levying of distress out of the hands of the landlord and puts it into the hands of the District Court bailiffs. It is illegal to levy distress for rent except under Part III, which prescribes the procedure for distraint.[2]

In a sense, a landlord is in a weaker position than most other creditors. Having lent the use of his land in exchange for rent, he cannot readily deny the debtor-tenant further benefit from the loan. A supplier of goods or lender of money can at least refuse to grant a debtor more credit. A landlord can prevent further use of his land only by re-entering (a risky business) or obtaining a possession order (a lengthy business). The summary remedy of distress makes up for this

disadvantage. It prevents the tenant from running up credit which may never be repaid.

Availability of Distress Procedure

Only a current landlord, and certain others effectively in the position of a landlord, can use the procedure. It is not available once the landlord ceases to own the land or to be entitled to receive rent. So a landlord who is owed rent loses the right to distrain once he assigns his reversion to another or once his land is resumed by the government.[3] The landlord's successor cannot distrain because the money is not owed to him.

Any person claiming to be entitled to arrears of rent or his agent may apply for a warrant. This has been interpreted to mean anyone in the position of a landlord. So, joint landlords can distrain, as can mortgagees in possession provided that they have accepted the tenant and the tenant has accepted them as landlord, executors and administrators of a deceased landlord and tenants against under-tenants. The government, however, cannot distrain even where it lets out property on short-term leases.[4]

The landlord can distrain only for rent, not for other charges such as management fees.[5] This is so even if the management fees are expressed to be part of the rent, since the landlord may distrain only for profits issuing out of the land, which management fees do not.

Similarly, failure to pay charges in respect of a licence to occupy land, not being rent at common law, does not normally render the licensee liable to distraint. However, if a statute defines licensees of premises to which it applies as tenants, it may be that the charges become rent and so the object of distress.[6]

The rent must be owing in respect of the lease under which the tenant at present holds the land. So, the landlord will lose the right to distrain for rent owed under an old lease if he grants the tenant a new lease. Likewise if the landlord exercises a right to forfeit the lease, he loses to the right to distrain because the lease is ended by the forfeiture and with it goes the right to receive rent. This is so even if the landlord later changes his mind and discontinues a claim for possession based on the forfeiture.[7] However, distress for arrears of rent is possible after termination of the tenancy if the tenant continues in possession. This is by virtue of section 102, which overrides the general rule that a landlord is not entitled to distrain once the lease is forfeit even if the rent accrued due before the date of forfeiture.

Distress is not available against a tenant at sufferance since such a 'tenant' in fact has no tenancy and hence any payments made are not rent. It is, however, available against a tenant at will, even after ceasing to be a tenant at will, provided he remains in possession of the premises — that is, after his tenancy at will has been converted into a periodic or fixed-term tenancy.[8]

Where there is an agreement for a lease but as yet no executed lease, the landlord may distrain provided the tenant is in possession and the court is willing to order specific performance of the agreement.[9]

Rent due from a tenant under a tenancy which falls within Part IV of the Landlord and Tenant (Consolidation) Ordinance can be distrained for.[10] A complication arising out of the ordinance is that increased rentals should be

notified to the Commissioner of Rating and Valuation. If they are not, they are irrecoverable by action; and such action presumably includes an action of distress. A complication which used to arise when the rent was controlled by the ordinance, but no longer does so, was that the landlord had to show that the amount claimed was legally recoverable. However, the landlord could distrain for the old rent, the amount recoverable before the increase.[11]

The rent must, of course, be in arrears. If the tenant pays or tenders the amount owing at any time before distress is carried out, the goods are saved from seizure. This is so even if the landlord has incurred costs in preparation for seizure. In *Wong Goom v Wong Wan Tong* (1932) the landlord refused to accept rents in arrears offered after a distress warrant had been issued, but before the warrant has been carried out. The distraint went ahead. The landlord's refusal of the arrears was wrongful and he had to pay the costs of the distress. Similarly, if the rent is not due because the tenant has a claim against the landlord which may be set-off against the landlord's claim for rent, distress is not available.[12]

There is a time limit on distraint. The rent arrears must not have been owing for more than 12 months at the time the landlord applied to the court.[13]

Distress is available in respect of rent owed for property in the built-up areas of the New Territories. Part III applies, provided the land is exempted from Part II of the New Territories Ordinance. In practice, all intensively developed land is exempted. Distraint by a landlord of a flat in one of the new towns, for instance, must be carried out in accordance with Part III. However, so-called 'small houses' in villages which have proliferated in rural parts of the New Territories during recent decades, are usually not on exempt land so the distress procedure would not be applicable.

Earlier judicial statements to the effect that the remedy of distress does not arise from the ordinance and that Part III does no more than prescribe the procedure by, and the limits within, which resort may be had to the common law remedy were overruled by the Court of Appeal. In *Fuleekoo Co Ltd v Spiral Tubes International Ltd* (1986), which is dealt with in more detail later in this chapter, Silke JA said of Part III's predecessor, the Distress for Rent Ordinance 1883:

> We have formed the view that this Ordinance, which is entirely a 'homemade' effort, was intended to, and did, do that which its purpose stated itself to be: that is 'to Consolidate and Amend the Laws relating to Distraint for Rent.' We are confirmed in this view by section 4(1) of the 1883 Ordinance, now section 78(1), which provides that 'no distress shall be levied for arrears of rent except under the provisions of this Ordinance'.

Since then, the Court of Appeal has described distress as a self-contained statutory remedy. This suggests that there is no room for distraint to be carried out except under Part III.[14]

There is nevertheless room to doubt whether all the law relating to distress is included in Part III. This arises in part from the provision in section 113 that nothing in Part III applies to the government, which suggests that if the government (as landlord) wishes to distrain, it has to do so under the common law. However, the doubt arises mainly from *Standard Chartered Bank v Grow Up Trading* (1999). The bank there had lent money to the landlord on the security of a mortgage over an industrial building at Kwai Chung. Parts of the building

were let to the defendant tenant. The landlord got into financial difficulties and assigned the rent to the bank. The tenant was told to pay future rent to the bank but did not do so because it had already given post-dated cheques for the rent to the landlord. After the landlord defaulted on the mortgage repayments, the bank took possession of the building and again demanded rent from the tenant. When it was not paid, the bank applied for warrants of distress. Section 106(f) in Part III says that a mortgagee in possession may apply for a warrant and section 81 says that anyone claiming to be entitled to arrears of rent may apply. Despite this, the court accepted that, although it was a mortgagee in possession, the bank could not distrain. This was because at common law the right to distrain vests only in a landlord of a tenant who is in arrears of rent and since in this case the tenant had not accepted the bank as its landlord, there was no landlord-tenant relationship. The court followed English authority even though there is no similar legislation to Part III there. Assuming the court's approach to be correct, this suggests that Part III (and before it, the 1883 Ordinance) is not comprehensive as to the law on distress, nor did it amend the common law right of mortgagees in possession to distrain.[15]

PROCEDURE

Application

Distraint is carried out by court bailiffs. The landlord (or his agent) must apply to the District Court for a distress warrant.[16] If he tries to distrain without a warrant, he, and anybody who helps him, is guilty of an offence and he may have to pay the tenant compensation. In Hong Kong distress for rent is not, in its full sense, a form of self-help.

The application is accompanied by an affidavit (a sworn statement) by the landlord or his agent, giving the essential details behind the application: the name and address of the tenant; the fact that rent is owed and amount of rent owing (not more than 12 months' worth); the premises and period in respect of which the rents due. Essential matters such as how the rent is calculated and complications such as the fact that the tenant has tendered some of the rent claimed should be brought to the attention of the judge at the subsequent hearing, otherwise the warrant may be set aside.[17]

The tenant has no right to be told that the application is being made. In legal language, the application is '*ex parte*', that is to say by one party only. Even if the tenant learns of it and attends the application, he should not be heard.

So long as the landlord establishes a *prima facie* case, the judge (or, less commonly, registrar) must issue the warrant. Before doing so, the judge can question the applicant if, for instance, he doubts the accuracy of the affidavit; but he cannot adjourn a decision and summon the tenant to hear his side of the story. Normally, therefore, the warrant is automatically granted.[18] Typically a warrant will be issued in about six days from the date of the landlord's application.

The one-sidedness of the distress procedure is explained by the need to avoid a dishonest tenant knowing of the application and dissipating his assets. Even so,

it might be thought that elementary justice requires that the landlord tell the court frankly all relevant facts, such as that (if it is the case) the tenant disputes liability to pay the rent demanded. Such a duty of full disclosure is generally required in *ex parte* court applications as a counterweight to the absence of the other party to the case. The existence of this duty in distraint proceedings has, however, been denied in *Lo Siu Yin v Ha Sheung Ping* (1994) by the Court of Appeal whose reasoning was that distress for rent is a self-contained statutory remedy and that if the legislature had intended that there be a duty of disclosure this would have been provided for in the ordinance or in the prescribed affidavit.[19] This reasoning seems narrow as it overlooks the fact that the Hong Kong law of distress was codified many years before the great development of the law of procedural fairness ('the rules of natural justice') which is of general application to judicial bodies. The reasoning also overlooks that the requirement of full disclosure has been imposed by judges despite it not being contained in rules of court, and that a tenant who learns that distraint is imminent may obtain a High Court injunction to prevent it — a procedure which certainly is not envisaged by Part III of the ordinance or any rules made under it. The duty of disclosure could, however, be introduced into the procedure by a small amendment to the rules or to the contents of the prescribed affidavit.

Warrant

This is a direction to the court bailiff to distrain upon the goods in the tenant's premises for a stated amount of rent. The bailiff is directed to carry out the distraint within six days of the warrant being issued, although demands upon the bailiff and his staff often result in the warrant being executed later than that. In practice the normal period between warrant and seizure of goods in a straightforward case is eight days. The landlord will have to pay fees for the carrying out of the distraint. If he is not yet able to pay the fees, or if he still hopes to negotiate amicably with the tenant for the rent arrears, he should not apply for the warrant. The warrant, which is given in form 2 of the fifth schedule to the ordinance, also reminds the bailiff to demand the overdue rent before seizing the tenant's goods.

The judge or registrar can refuse to issue the warrant. The landlord can appeal against a judge's refusal to the Court of Appeal and against a registrar's refusal to a judge.[20]

It is important to note that there is no right of appeal by the tenant against the issue of a warrant. Usually the tenant does not even know that the warrant has been applied for, although the landlord may have told him of the possibility. Once the landlord has the warrant, the tenant cannot prevent the distraint. However, before the application for the warrant, the tenant can apply for a court injunction restraining the landlord from seeking a warrant or taking any steps to distrain. The court has a discretion whether to grant such an injunction and will probably do so only if the tenant can show that there is a dispute about the amount of rent due and, even then, only on condition that the tenant pays the part of the rent which is not in dispute into court.

A weakness of the Part III procedure is that it provides no opportunity for the tenant to be heard before the command goes to the bailiff to seize his goods. There

is no obligation on the landlord to tell the registrar all the circumstances of the case, nor is there any obligation on the registrar to examine the landlord on those circumstances. In practice, some registrars do question the landlord or his lawyer and make an informal note that there is no dispute as to the rent, if that is the case. The court has no discretion to adjourn the application and summon the tenant to give him a chance to make representations. The only risk the landlord runs is that he may have to pay the tenant compensation if the distress is proved wrongful.

Although speed is vital in distress and there is always the fear that a dishonest tenant will move his valuables out once he knows that the bailiff has received instructions, it may be an improvement if a tenant were informed immediately before a warrant is issued and allowed to make representations in the few days before the warrant is carried out. Alternatively, the landlord could be required to do more than simply swear that the arrears are owed. He could be required to exhibit supporting documents and swear that there is no dispute as to the amount due.

As it is, the tenant can apply to have the warrant suspended only after the distress has been levied. This puts overwhelming pressure on the tenant to pay up even though he may dispute the amount due, and is said to be particularly unfair on a tenant who is in business, since the seizure of the stock deprives him of the very means of making the money to pay the rent. In practice, however, a landlord will rarely move for distress until he is sure that it is the only hope of receiving the money. Ironically, distress may be kinder to the trade tenant than allowing him to run up further rent arrears in that it forces him to close an unprofitable business.

Execution

Once the warrant has been issued, execution will normally take place a week or so later. On the date for making the distress the bailiff, provided he has received a deposit for costs from the landlord, will go with his staff to the premises and seize the goods. He must do this between 7am and 9pm, unless special permission is obtained from the court.[21]

The bailiff and the staff may have to use force in carrying out the distraint. They can break down outer doors, but can do so only with the court's permission and only after attempting to gain peaceful entry. However, once inside, they can break down inner doors without asking the court's permission.[22] The bailiff can, with certain exceptions, seize movable property in the apparent possession of the tenant found on the premises. He and his staff can also, with the court's permission, follow property which the tenant has removed from the premises hoping to avoid seizure. They need not take all such property: only sufficient to cover the rent due and the costs of the distress. There are many cases concerning what property is liable to seizure. They are examined later in this chapter.

The bailiff may seize the goods physically and take them away. Often, however, the goods will not be readily portable and the practice then is to impound the goods by leaving watchmen on the premises to guard them.[23] The English practice of taking 'walking possession', that is, a constructive or symbolic seizure and labelling of the goods which are then left on the premises after the tenant has

promised not to remove them, is not followed in Hong Kong. Presumably this is because tenants are felt not to be trustworthy.

The bailiff's staff then prepares an inventory and appraisal of value of the goods taken. A copy of this is given to the tenant, or other person on the premises acting on his behalf, together with a notice informing the tenant that the goods have been seized for the stated sum of rent due and that the goods will be sold on a certain day unless the tenant pays the rent and costs of distress or obtains a court order preventing the sale.[24] It was decided in *Simpson v Astor House Hotel* (1923) that the bailiff complies with the requirement that notice be given by leaving the notice with his staff on the premises: a convenient, but surprising, interpretation of the words of section 89. Another copy of the inventory and appraisement is then filed by the bailiff with the court.

Discharge of warrant

Often that is as far as the procedure goes. The tenant, spurred into action by the bailiff's appearance, will pay the rent and costs if he can. If he cannot, he may apply to the court for time to pay. The court has power to grant time to pay 'on such terms as it may think just and reasonable'. The landlord must be given reasonable notice of the application.[25] Presumably, both the landlord and the tenant can make submissions to the court and the tenant should support his claim that he will be able to pay with evidence of his income and of any extraordinary expenditure which has led to temporary financial difficulties. Probably the court will examine the tenant about his means. If such an order is made, the warrant will be discharged and the goods returned to the tenant.

The tenant may also obtain a discharge or suspension of the warrant by challenging the right of the person distraining to do so; or he may obtain the release of a specific article which has been seized by challenging the right to seize that article. This is governed by section 93. The tenant must apply at a hearing held before or within five days of the seizure, giving 24 hours' notice of the application to the bailiff and to the person who obtained the warrant. The notice must set out the facts on which the claim is based, for instance: that the person who obtained the warrant is not the landlord; that the rent alleged is not due, or that the wrong goods have been seized. These facts must be verified by affidavit. The court can discharge or suspend the warrant, or release the article, on such terms as it thinks just.[26]

Section 93 is available to third parties as well as a tenant, so the owner of goods which happened to be on the premises and are to be seized can act swiftly to prevent the goods being sold. We shall see, however, that the test of whether goods can be seized by the bailiff is not who owns them but whether they are in the apparent possession of the tenant.

An alternative method of challenge open to the third party (but not the tenant) is to inform the bailiff of his claim. Under section 95, the bailiff can then ask the court to summon the third party and the person who issued the warrant so that their dispute can be adjudicated upon. The third party's claim can even be made after the goods have been sold, that is, against the proceeds of sale.

For many years, most District judges and practitioners thought that the apparent possession test was also applicable in deciding whether the goods, once seized, were to be returned to their owner. In consequence, if the goods appeared to be in the possession of the tenant, a third party who actually owned them had to suffer their loss (unless the circumstances fitted one of the limited exceptions in section 88). However, in *Fuleekoo Co Ltd v Spiral Tubes International Ltd* (1986) the Court of Appeal explained that the matter was not so simple and that the District judge has discretion to order the return of goods even though they have been lawfully seized. There, third parties, who had left goods on premises rented by Spiral Tubes from Fuleekoo which goods had been distrained upon by Fuleekoo, successfully appealed against an order by the District Court refusing to release the goods to the third parties. The Court of Appeal held that both sections 93 and 95 give the judge a power to order that the goods be restored to the owner if the judge thinks fit, but accepted that ownership alone would not cause the power to be exercised in favour of the third party. Ownership is simply one of the factors to be considered, along with all the other circumstances, including the rights of the landlord. The judge can impose conditions on the return of the goods, including a term that the third party owner pay all or part of the unpaid rent.[27]

Challenges to distraint are usually made not by the tenant but by third parties. Those parties genuinely may have left goods with the tenant, such as when a supplier gives clothes or furniture to a shop on a sale-or-return basis. More often, however, the third party is a relative, friend or business colleague of the tenant and the alleged ownership is based on a concocted story or dubious papers.[28]

The common law provides other remedies for a tenant aggrieved by a distraint. Where the distress is illegal (where the tenant does not owe rent), he can rescue his goods by retaking them before they are impounded; or he can ask for a court order for the return of his goods ('replevy'); though the court will insist that he pay rent and costs into court and sue the landlord for trespass to, or conversion of, his goods. The latter ('replevin') has no advantages over an application under section 93. The tenant will rarely be able to rescue the goods before they are impounded. Section 93 was no doubt meant to replace rescue and replevin, but the ordinance does not expressly say so. This is part of a wider question: what is the extent to which the statutory scheme in Part III overrides and replaces the common law?

Sale

If there is no successful challenge under section 93 or 95, the goods will be sold on the prescribed day which typically will be about six days after the seizure. The registrar of the court usually directs how the sale shall be conducted. Almost always, the sale is by public auction, though the bailiff may find individual buyers for items and the debtor can insist on a different manner of sale, provided he gives security for any extra costs incurred.[29] The tenant might do this, for instance, if he thinks the bailiff's appraisement of the value of the goods is too low. The tenant may also apply to the Court of First Instance of the High Court for an injunction to restrain a sale if he says the distress is unlawful or irregular.

The landlord may bid at the sale. There is no risk of a conflict of interest since the court, not the landlord, is responsible for selling the goods. It has anyway long been the practice to allow the landlord to bid, in contrast to the position in England.[30]

The bailiff may owe a duty to the tenant, arising from the tort of negligence, to sell the goods for the best price reasonably obtainable. Sale at an auction open to the general public will prevent him from breaching this duty.[31]

The proceeds of sale are paid over to the court, which uses the money: first, to pay off the costs of the distress; and second, to pay the landlord the rent for which he distrained. The landlord is not entitled to more, even if in the meantime more rent has become due. Any surplus is given to the tenant.[32]

Property Seizable

Subject to exceptions, section 87 provides that the bailiff can seize 'the movable property found in or upon the house or premises mentioned in the warrant, and in the apparent possession of the person from whom the rent is claimed' sufficient to cover the amount of rent owing and the costs of distress. The bailiff also has a limited power to follow goods off the premises. There are therefore four principal questions to ask when considering whether property is liable to seizure: What are the exceptions? What is movable property? When is property in the tenant's apparent possession? When may the bailiff seize property which is not on the premises?

Exceptions

There are seven types of goods listed in section 88 which the bailiff 'shall not seize'. These are a mixed bag, but there are good public policy reasons for excluding them from seizure. Three are excluded so that the tenant/debtor will be left with a few basics and thus reduce the chance of his resisting the bailiffs: things in actual use in his hands at the time of seizure; tools and implements not in use; and his necessary wearing apparel. The idea seems to be to allow the tenant to keep articles of utility and at least a few clothes.

Things in actual use when the bailiffs appear are exempt from being seized, provided, it seems, that those things are in the tenant's hands. The exception is said to prevent fights between the tenant and the bailiffs. However, if strictly interpreted, it leads to queer results: the tenant could keep a diamond-studded pen if he happened to be writing with it when the bailiffs burst in, but not a vacuum cleaner, even if it were then being used by another member of his family. It seems that items which can be used (but not by hand) could be seized if they are being operated at the time of the distraint; though if they happened not to be in operation at the time, they might fall into the exception for 'tools and implements not in use'.

There is room for argument about what constitutes a tool or implement. The drafters of the law probably had in mind the common law exception for the tools of the tenant's trade, not wishing to deprive him of the means of earning a living