

Tam Mo Yin and another v Attorney General and others (1995) HCl MP
No 1868 of 1994

FACTS

A Crown lease lot was granted north of Yuen Long in 1931 for a term of 45 years from 1 July 1928 with a right to renew for a further 24 years (less three days). A term of the grant required the Crown lessee to construct a wall or bund and sluice gates or *get-wai* on the seaward side of the lot. The Crown lessee sold off a part of the land but a dispute arose between the Crown and the plaintiffs, the original Crown lessee's successor in title, as to the area of the lot. The plans and surveys at the time of the grant were indecisive and thus the plaintiffs also based their claim to the disputed area on adverse possession — their predecessors in title had erected the wall and sluice gates and had been in possession of the land for over 60 years.

JUDGMENT

The disputed land, if not within the Crown lease lot, was an encroachment to it and held on the same terms as the original Crown lease. The deemed exercise of the renewal in 1973 pursuant to the *New Territories (Renewable Crown Leases) Ordinance* stopped time running so that the plaintiffs failed to establish that they had been in adverse possession of the land against the Crown for the requisite 60 years.

The presumption that an encroachment onto adjoining land is held on the same terms as the original grant is rebuttable but the tenant's occupation must be clearly separate and adverse to form an independent claim.⁵⁵

If the land encroached on by the tenant does not belong to his landlord but to a third party, then the tenant's possession will not work to his own benefit but to his landlord's because upon expiration of the limitation period it is the landlord and not the tenant who can claim title to the land and, on the expiry of his tenant's lease, possession of it.⁵⁶

⁵⁵ *Lord Hastings v Sadler* (1898) 79 LT 355

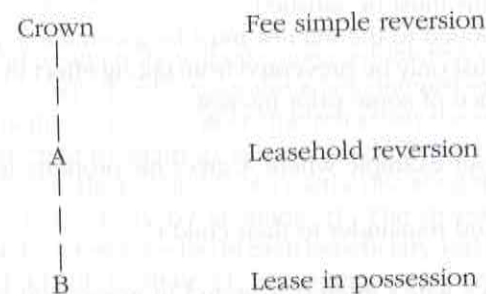
⁵⁶ *Kingsmill v Millard* (1855) 11 Exch. 313

8 Future Interests

8.1 Introduction

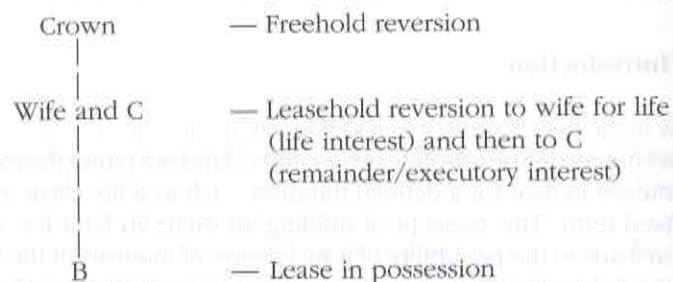
We saw in the first chapter, when looking at the doctrine of estates, that the law does not recognise absolute ownership of land but rather the ownership of an interest in land for a defined duration, such as a life estate or a lease for a fixed term. This concept of holding an estate in land for a defined duration leads to the possibility of a succession of interests in the land. For instance, if A owns a Crown or Government lease of land on Hong Kong Island for a term of 75 years which he leases to B for a term of 5 years, the Crown or Government, A, and B all have an estate in the land. But only one of them is entitled to enjoyment of the land at any one time. B has a fixed-term lease that gives him a present right to use the land for five years. He enjoys a lease 'in possession'. A also has a fixed-term lease, but A does not have a present right to use the land: he has granted that right to B. A's right to use the land does not arise until B's lease terminates, when the land will revert to A. A's interest is a 'reversion'. The Crown also has a reversion — a fee simple reversion that it has agreed to relinquish to Chinese sovereignty in 1997; thereafter, the reversion on the Crown leases will vest in the Government of the Special Administrative Region of Hong Kong.

Fig 8.1



Likewise, if A provides in his will that his 75-year Crown lease should pass to his wife to enjoy during her lifetime and after her death it is to pass to their only child C, then on A's death both his wife and their child C have an interest in the property. His wife has an interest vested in possession, for she is now entitled to the rents and profits arising on B's lease and on the expiry of B's lease will be entitled to possession of the land. During the lifetime of A's wife, their child C also has an interest in the land. C's right to the land is not a right to immediate possession. His right to possession will only arise in the future on his mother's death. The interest of A's child is either a 'remainder' or an 'executory interest', depending on how exactly it has been created.

Fig 8.2



Where an interest gives an immediate right to enjoyment of the land it is said to be 'held or vested in possession'. Where an interest gives a right to enjoyment of the land in the future it is known as a 'future interest'. There are three types of future interest that we must consider: reversions, remainders, and executory interests. First, however, it is important to appreciate the distinction between vested and contingent future interests.

8.2 Vested and Contingent Interests

8.2.1 Conditions of Vesting

A future interest may be either vested or contingent. For an interest to be vested, two conditions must be satisfied:

- 1 the person entitled to the interest must be ascertained; and
- 2 the interest must only be prevented from taking effect in possession by the existence of some prior interest.

If we look again at our example where A gives his property to:

- his wife for life and remainder to their child C,

we have seen that A's wife's interest is vested in possession since she is entitled to the present enjoyment of the property. Indeed, her interest is not a future interest. C's interest, although it is not vested in possession as it only gives him a right to enjoy the land in the future, is vested in interest, for both the conditions are satisfied: C is in existence and identifiable, and his right to possession is only delayed by his mother's prior interest.

But if the gift was to:

- A's wife for life with remainder to their only child C when he attains the age of 21,

not only would the enjoyment of the interest depend on the death of A's wife but also upon the fact that C must reach the age of 21. Although C satisfies the first condition, he is in existence and ascertainable, the gift

cannot vest until he is 21 and thus the second condition is not satisfied. His interest is contingent until he attains 21, when it will vest in interest.

If A had more than one child and the gift was to:

- A's wife for life with remainder to their first child to marry,

neither of the conditions for vesting are satisfied. The remainder will only be vested when A's first child marries. Prior to that time all A's children hold a contingent interest, for it is impossible to say which one of his children will qualify before the contingency is satisfied. The potential beneficiary is not ascertainable nor is their right to possession merely delayed from taking effect in possession by a prior interest — it is also dependent upon the satisfaction of a further condition.

It does not matter if it is very unlikely that a future interest is going to vest in possession. That will not prevent it vesting in interest. For instance, if A had made his gift the other way around:

- to my only child C for life with remainder to my wife,

the fact that C is more than likely to outlive his mother does not prevent his mother's interest from being vested in interest.

The fact that the size of the interest is not finally quantified will not prevent the gift from vesting. For instance, if A made his gift to:

- my wife for life with remainder equally between all our children who attain the age of 21,

the first child to attain 21 will take a vested interest even though it is not possible to say whether he takes the whole interest or only a portion until it is clear whether or not A's other children satisfy the condition by attaining 21. The first child to attain 21 is accordingly treated as taking the whole interest subject to the possibility of a partial divesting should any other child within the class qualify by attaining 21. The divesting only affects the quantum of the interest vested in each beneficiary and not the fact of vesting itself. If a child fails to attain 21, his contingent interest fails and his estate has no interest in the property.

Although the quantification of a beneficiary's share will not prevent vesting, we will see that it is significant when we come to test the validity of a class gift for the purpose of the rule against perpetuities.

The law leans in favour of vesting, and a gift, which on its face appears contingent, may be construed as vested subject to a possibility of it being divested. For instance, a gift:

- to my wife for life with remainder to such of our children as my wife may appoint, and in default of appointment to all our children in equal shares

is construed as granting all the settlor's children a vested interest subject to divesting in the event of the settlor's wife exercising her power of appointment.

8.2.2 Assignability of Vested and Contingent Interests

A vested future interest is a future right in the sense that it only gives a right to enjoyment of the property in the future, but it is a present interest in the sense that it is an existing right that can be either alienated *inter vivos* or pass on death. A contingent future interest, on the other hand, is in some ways not an interest at all. It is only a possibility that an interest may arise should the contingency be satisfied. As such, the common law regarded contingent interests as inalienable. It is thought that a contingent interest may now be left by will by virtue of the provisions of s 3 of the *Wills Ordinance*.¹ But there is no statutory means in Hong Kong whereby a contingent interest may be assigned *inter vivos* at law. In England, s 4(2) of the *Law of Property Act 1925*, permits the assignment of contingent remainders, but this section has not been enacted in Hong Kong. The assignment of a contingent remainder may be enforced in equity, for equity will require an assignor of a contingent interest to assign the property to an assignee who has given valuable consideration should the contingent interest vest both in interest and possession.²

8.3 Reversions

A reversion comprises that part of the grantor's estate that is not disposed of by the grant and which will thus revert to the grantor on the expiration of a lesser interest disposed of by the grant.

8.3.1 Leasehold Reversions

The most common reversions in Hong Kong are leasehold reversions. The tenant's assignment of his lease will dispose of the whole of his interest in the land and thus no reversion arises, but if the tenant grants a sublease then a reversion will arise in respect of the balance of the head-lease term. In our first example A's leasehold reversion represents the balance of his 75-year term which he does not dispose of when he grants the 5-year lease to B, i.e. 70 years. A leasehold reversion may be of a very short duration. For instance, when the Crown first granted leases in the New Territories they granted Crown leases for 99 years less the last three days from 1 July 1898. These Crown leases were just three days shorter than the lease of the New Territories that the Crown was granted. The three days represented the Crown's reversion.

A leasehold reversion gives a future as opposed to a present right to possession, but for historical reasons, a fee simple owner who grants a lease is said to hold his leasehold reversion in possession. This apparent anomaly arises because the common law, following feudal principles, continues to

recognise the fee simple owner, being the holder of seisin, as the owner in possession subject to the lease. In England the *Law of Property Act 1925* continues to define a leasehold reversion as 'an estate in possession'.³ Although in Hong Kong it is only the Crown, or from 1 July 1997 the Government of the special Administrative Region of Hong Kong, as the fee simple owner of land in Hong Kong Island and Kowloon which technically remains in possession, it is common to talk of the Crown or Government lessee who has granted a lease as also being in possession to the extent that he is entitled to the rents and profits of the land.

8.3.2 Settled Reversions

A reversion may also arise where an owner of an interest in property settles either a lesser interest upon another or a contingent interest that fails to vest. For instance, if A makes a gift on trust to:

- my wife for life,

on his wife's death the property will revert to A, or to his estate if he is dead. Likewise, if A makes a grant on trust to:

- my wife for life and then equally to our children who attain 21,

a reversion to A or his estate will arise if A has no children who attain 21. A's intended gift to his children, which would have disposed of his whole interest in the property, has failed. But the interest must pass to someone and as A has not indicated any one else who should take in these circumstances, the interest reverts to him or, if he has died, his estate.

8.3.3 Legal and Equitable Reversions

In England only a leasehold reversion can exist at law. The *Law of Property Act 1925* provides that a settled reversion in England can only exist in equity behind a trust.⁴ However, in Hong Kong there is no similar statutory limitation. A leasehold reversion will be legal unless the lease out of which it is created is equitable. A settled reversion may be either legal or equitable, depending first on the interest out of which it is created, and second on the means by which it is created. For instance, in our examples if the interest in property which A settles is equitable, his reversion will also be equitable. Furthermore, if he settles the life interest to his wife and the remainder to his children by use of a trust, then his reversion will also be equitable — as we have seen a trust operates only in equity.

¹ Cap 30, which superseded the *Wills Acts 1837* and *1530* to which liberal interpretations had been given to permit the devise of contingent interests.

² *Crofts v Middleton* (1856) De GM and G 192

³ See s 205(1) (xix).

⁴ See ss 1 (1) and (3) LPA.

8.3.4 Nature of Reversions

A reversion arises by operation of law rather than by express grant. As we have seen, in neither of our examples does A indicate by express words that his property is to revert to him or his estate; but the property must pass somewhere on the determination or failure of the prior estate and the law dictates that it reverts to the grantor.

A reversion is always vested since it is that part of the estate which the grantor has failed to dispose of. Applying the tests of a vested interest, it can be seen that the grantor is always identifiable and his right to enjoyment is only subject to the failure or termination of a prior interest or interests.

Although a reversion is initially held by the grantor it need not continue to be held by him. He can deal with his interest as he wishes. For instance if, instead of settling his property to his wife for life with remainder to his children, A had initially settled his property on his wife for life and then, by a separate and subsequent disposal, he had granted the balance of his interest to his children, his children's interest would be a reversion and not a remainder. They would have taken a transfer of A's reversion that arises on the grant of the life interest to his wife rather than a separate and distinct interest.

8.4 Remainders

A remainder is a future interest that arises in favour of a person other than the settlor after the natural determination of a prior interest of limited duration. The interest remains away from the settlor rather than reverting back to him. For instance, if after the grant of a life interest the settlor directs that the interest should pass to a third person, a remainder is created. The estate of limited duration which takes effect in possession prior to a remainder is usually, in the Hong Kong context, a life estate, since it is not possible at common law to create an entailed interest of a leasehold estate. The life interest, together with the remainder and any reversion to the settlor, comprises the whole original estate of the settlor.

8.4.1 Nature of Remainders

In contrast to a reversion, a remainder does not arise by operation of law but by express grant. Furthermore, while a reversion is always vested a remainder may be either vested or contingent.

In England the *Law of Property Act 1925* now provides that all remainders are equitable.⁵ They can only exist in equity behind a trust. There is no similar legislative limitation in Hong Kong, but nevertheless all remainders in Hong Kong are equitable. The reason for the equitable nature of remainders in Hong Kong lies not in legislation but in history.⁶

⁵ See ss 1 (1) and (3).

⁶ For greater detail on the historical aspects of future interests see Simpson: *An Introduction to the History of Land Law*, Chapters 8 and 9 and Holdsworth: *A History of English Law*, Volume VII Chapters 3, 4, 6, and 7.

8.4.2 Remainders at Common Law

The common law had little difficulty in accepting vested remainders over freehold land. A limited estate followed by a vested remainder did little more than carve up the grantor's estate into smaller portions, and presented no problems in identifying who was entitled to the estate at any given time. Contingent remainders gave rise to greater problems, for it was possible for there to be a period when no one was entitled to possession. For instance if A grants freehold land to:

- B for life with remainder to C when he marries

a period when no one was entitled to an interest in possession could arise if C was not married at B's death. The estate would then be left in abeyance until C married. If C failed to marry, then the estate would revert to A. However, it would be impossible to know whether C's remainder would fail until C died, which could leave the estate in abeyance for a considerable period of time. The common law abhorred an abeyance of a right to possession by a freehold owner, or to use its technical expression, seisin, for it was the person who was seised of the land who was responsible if the feudal services were not performed. As a result the common law was only prepared to accept contingent remainders if they conformed to a number of strict rules that were intended primarily to ensure there was no abeyance of seisin. For instance, the common law would only uphold a contingent remainder if it vested during or upon the determination of the prior estate. Thus, in our example C's remainder would only be valid if C's interest vested, ie he married, during or on the determination of B's life estate.

Leaseholds fell outside the feudal structure. They do not qualify as real property but as chattels real, a distinct category of personal property. At common law it is not possible to create a life or entailed interest in a lease or any other personal property. Life and entailed interests are freehold interests, and their creation was originally dependent on the transfer of seisin, a concept confined to the feudal system. It was thus not possible to create a freehold interest in leasehold property where seisin had no place. At common law a grant inter vivos of leasehold or other personal property by A to B for life with remainder to C operates as an absolute gift of the property to B. The common law refuses to recognise the limitation on B's estate to the period of his life, and accordingly the remainder fails. It has been said that 'a gift of a chattel for an hour is a gift forever'.

8.4.3 Remainders in Equity

The Courts of Chancery did not follow the common law's refusal to recognise life and future interests in leases or other personal property. By adopting the vehicle of the 'use' or 'trust', equity gives effect to life interests, but not entailed interests, in leasehold or other personal property as well as the remainders that may follow them. Thus A could achieve his purpose by the transfer of his property to trustees to hold on trust for B for life,

14 Leasehold Covenants

14.1 Introduction

We have looked at the type of covenants commonly found in leases in Hong Kong. Now we consider the extent to which these covenants may affect someone to whom a tenant may transfer his lease, on the one hand, and someone to whom the landlord may transfer his reversion, on the other.

14.1.1 Assignment

Where a lease or a leasehold reversion is assigned, the original lessee or lessor, as the case may be, for all practical (but not necessarily all legal) purposes drops out of the picture and ceases to be concerned with the property. His assignee steps into his shoes. There remains only one lease affecting the land: it is the parties to the lease that change.

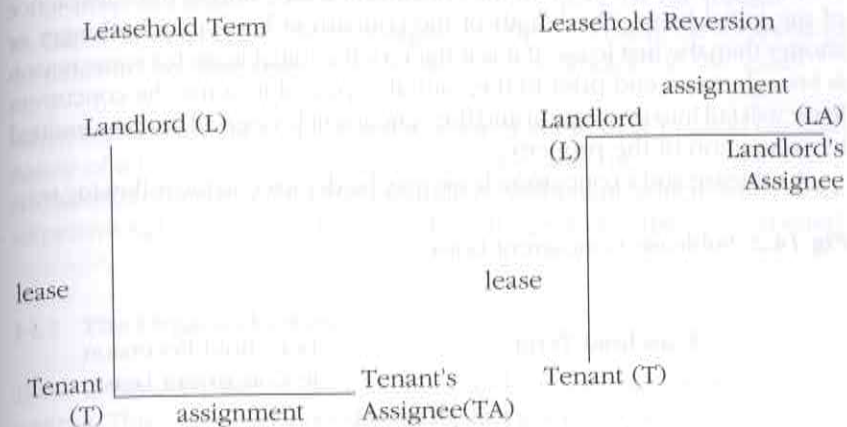
14.1.1.1 Assignment of the Leasehold Term

A lessee who disposes of his lease by way of assignment transfers the whole of the term he enjoys to the purchaser. When one speaks of land being 'sold' in Hong Kong, what is referred to is the residue or balance of the Government lease term that is being assigned by the Government lessee to the purchaser. For instance, an owner, who holds a Government lease of land for 75 years of which there are 65 years still to run, will sell that land by assigning the 65-year residue of his Government lease to the purchaser. He then has no further interest in the land. The assignment of short-term leases is less common, for most of these leases will contain a covenant prohibiting the tenant from assigning his interest.

14.1.1.2 Assignment of the Leasehold Reversion

A landlord may also wish to dispose of his interest in a piece of land. This does not arise in the case of Hong Kong's largest landlord, ie, the Crown, or, after 1 July 1997, the Government of the Special Administrative Region of Hong Kong. But a Government lessee who has let his property may wish to do so. A lessee, in these circumstances, holds his Government lease in reversion consequent upon the short-term lease he has granted. When he sells his interest in the land he will assign his Government lease term, which he holds in reversion, subject to and with the benefit of the short-term lease. The assignment of a leasehold term and a leasehold reversion can be depicted in the following way:

Fig 14.1 Assignment



14.1.2 Subletting

In contrast to the assignment of a lease, the lessee remains in the picture when he sublets. He is on the one hand a lessee under his own 'head lease', and on the other a landlord under the sublease. There is not one estate but two, with their respective rights and obligations.

14.1.2.1 Sublease on a Leasehold Term

A lessee may decide that he does not wish to sell all his interest under his Government or other lease. Perhaps he requires the property for his own occupation in the future or he wishes to use the property to generate income by way of rental. A disposal for a period shorter than the residue of the term of the lease creates a new lease that is a separate interest or estate from the lease out of which it is created. The rental, term, and covenants are distinct and need not be the same as the terms of the head lease. For instance, if a lessee holding a Government lease of 75 years wishes to allow another to have possession of the land for only 5 years of his 75-year term, he will create a sublease giving the right to exclusive possession of the land for 5 years. At the end of the 5-year term, possession of the land will revert to the Government lessee who may take up possession himself or grant another sublease.

Most subleases in Hong Kong are created consequent upon the Government lease and are for considerably shorter terms than the Government lessee himself enjoys. The reason for the short length of subleases is purely economic. In the volatile Hong Kong property market, landlords often prefer to retain the freedom that shorter terms afford.

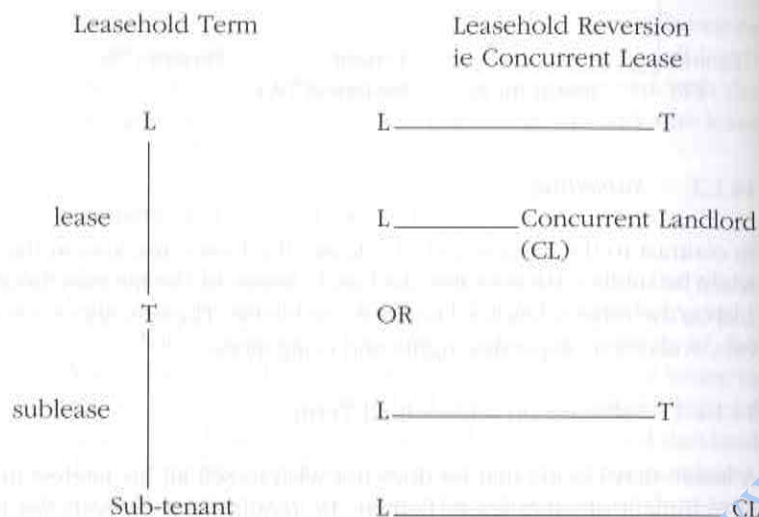
14.1.2.2 Concurrent Leases

It is possible, but not common, for a landlord to grant a sublease of his reversion. Such a disposal is known as a 'concurrent lease'. A concurrent

lease passes the right to receive rent and the other rights and obligations of a landlord under the lease to the concurrent lessee during the subsistence of the initial lease. The length of the concurrent lease may be longer or shorter than the first lease. If it is longer, or the initial lease for some reason is brought to an end prior to the natural expiry of its term, the concurrent lease will fall into possession and the concurrent lessee will become entitled to occupation of the property.

A sublease and a concurrent lease may be depicted in the following way:

Fig 14.2 Sublease/Concurrent Lease



What is the effect of either an assignment or a subletting upon the obligations of the landlord and the tenant contained in the lease? There are a number of different situations to consider:

- Is the original lessee still bound by his contractual obligations set out in the lease even after he has disposed of his interest?
- Can the original lessee still enforce his contractual rights against the landlord even after he has disposed of his interest?
- Is a new assignee of the lease or sublessee bound by the covenants the original lessee entered into?
- Can the new assignee or sublessee enforce the covenants the landlord gave to the original tenant?
- Is the original landlord still liable for breach of the contractual obligations he entered into under the lease even after he has disposed of his interest?
- Can the original landlord sue for rental or for the performance of any other covenants made for his benefit even after he has disposed of his interest?

- Is a new landlord as assignee of the reversion able to sue for the rental, or otherwise directly enforce the covenants made by the tenant?
- Can a new landlord, as an assignee of the reversion, be required to perform the covenants given by the original landlord in the lease?

When considering these questions it is important to bear in mind the dual nature of a lease: it is both the grant of an estate in the land to the tenant and a contract between the original landlord and tenant, which defines their respective rights and liabilities throughout the period of the estate granted.

14.2 The Original Parties

There is between the original landlord and the original tenant privity of contract. This privity continues despite the fact that either or both of them may dispose of their interest in the land. Accordingly, at common law the original parties remain bound by and entitled to enforce their respective covenants. It does not matter if the original parties have not been personally responsible for the breach of covenant. They have agreed to observe and perform the covenants throughout the leasehold term, and this liability continues even though the terms of the original covenant may be varied. For instance, in *Centrovincial Estates Plc v Bulk Storage Ltd*¹ a tenant became liable to pay the higher rent agreed by a subsequent assignee under the rent review. The original landlord or tenant, therefore, cannot escape liability at common law by assigning their respective interests. They may step out of the picture for all practical purposes, but legally their contractual responsibilities continue. They, in effect, become sureties for the continued performance of the covenants by subsequent assignees. It is thus prudent for a landlord or tenant to try and check the financial standing of their assignees. However, it appears that where the lease is continued by the operation of statute, for instance under Part IV of the *Landlord & Tenant (Consolidation) Ordinance*,² the liability of the original parties may not extend to the renewed or extended term, at least not unless the terms of the original lease so provide.³ It is the precise terms of the parties' contractual bargain which govern their liability. In addition, statute may have a role to play in the limitation of liability.⁴

14.2.1 The Tenant

On the one hand, the tenant will have the burden and be liable for the breach of the covenants that he has given to his landlord; on the other hand, he will enjoy the benefit and be entitled to enforce the obligations that his landlord has agreed to perform and observe.

¹ (1983) 46 P&CR 393 and *Selous Street Properties Ltd v Oronel Fabrics Ltd* (1984) 270 Estates Gaz 643

² Cap 7

³ *City of London Corporation v Fell* [1993] 3 WLR 1164 and *Herbert Duncan Ltd v Cluttons* [1993] 3 WLR 1164

⁴ In England, the recently enacted *Landlord & Tenant (Covenants) Act 1995* effects far reaching changes in the enforcement of leasehold covenants.

14.2.1.1 Liability for Breach

There are a number of ways in which a tenant may seek to protect himself from liability for a breach of covenant committed by someone to whom he has assigned his interest.

(a) Contractual exclusion of liability

A tenant may seek expressly to provide in the covenants he gives to his landlord that his liability should be limited to breaches committed while he is the tenant. Unfortunately, a landlord rarely will agree to such a limitation of liability. Certainly Government leases in Hong Kong contain no such limitation.

(b) Chain of covenants

Alternatively the tenant may require the person to whom he assigns the lease to promise to perform and observe the covenants. If the new tenant in turn assigns his interest, he will also require his assignee to give a similar covenant, so that a chain of covenants is built up to protect the original tenant and pass on liability to the party who is guilty of the breach of covenant. The practice of giving such covenants has become so widespread that, in the case of the assignment of a Government lease, they are automatically implied.⁵

(c) Section 41(8) of the *Conveyancing and Property Ordinance*

This section provides:

... that a covenant shall not bind a person after he has ceased to have any estate or interest in the land affected by that covenant except in respect of a breach of that covenant committed by him before that cessation.

The intention is clearly that a lessee who assigns his leasehold term should cease to be liable on the leasehold covenants once he has ceased to have any connection with the land, save only for breaches that were committed while he still held the lease. However, s 41 only applies to covenants that fulfil the conditions set out in sub-s 41(2). We will look at these conditions more closely when considering the enforceability of land covenants.⁶ Suffice it to say at this stage that the leasehold covenants given by a lessee should be capable of satisfying these conditions so as to release an original lessee from liability for any breach committed after he has disposed of his interest.⁷

⁵ See s 35(1)(a) and Part I First Schedule of the *Conveyancing and Property Ordinance* Cap 19.

⁶ See Chapter 15.

⁷ In England, s 5 of the *Landlord & Tenant (Covenants) Act 1995* releases a tenant, under a lease entered into after 1 January 1996, from liability for breach of any leasehold covenants committed after their assignment of the lease.

(d) Disclaimer

The trustee of a bankrupt or the liquidator of a company may disclaim onerous property. A lease, particularly where the rental is high and the tenant cannot escape the obligation to pay that rent because of a prohibition on assignment or sub-letting in the lease, may well be considered onerous and a target for the trustee or liquidator's power to disclaim. The effect of a disclaimer on the original tenant's liability to pay the rent and perform the other covenants in the lease will depend upon whether the lessee who is seeking to disclaim is the original tenant or an assignee of the original tenant. Where the tenant is the original tenant the disclaimer will indeed extinguish the tenant's liability to pay the rent or perform the other leasehold covenants. The effect of the disclaimer is to determine the lease.⁸ However, where the tenant is not the original tenant but an assignee, the disclaimer will not extinguish the liability of the original tenant under their contractual liability to pay the rent and perform the other covenants. The disclaimer operates to terminate the liability of the assignee to the landlord and under any chain of indemnity covenants to the previous tenant or tenants. The lease itself continues to exist and with it the liability of the original tenant to the lease.⁹

14.2.1.2 Right to Sue

A tenant, once he has disposed of his leasehold term, will generally have no wish to rely on the covenants given to him by the landlord: after all, he is unlikely to suffer any damage upon which to base a claim when he has no connection with the land. But a tenant may wish to sue in respect of a breach that occurred before he assigned his lease. His right to do so is unaffected by s 41(8) of the *Conveyancing and Property Ordinance* and will continue despite his subsequent disposal of the lease.

City & Metropolitan Properties Ltd v Greycroft Ltd
[1987] 1 WLR 1085

FACTS

The plaintiff acquired the residue of lease of a flat. The landlord, the defendant, was in serious breach of its covenant to repair. After the plaintiff failed in his attempts to resell the property, the plaintiff forced the defendant to carry out the needed repairs. The plaintiff then assigned the lease at a profit but sought damages for breach of covenant against the defendant, including the lost costs of his earlier attempts to sell.

⁸ *Stacey v Hill* [1901] 1KB 660

⁹ *Hindcastle Ltd v Barbara Attenborough Associates Ltd* [1994] 4 All ER 129

JUDGMENT

The plaintiff was entitled to seek recovery of damages against the defendant despite his disposal of his interest in the lease.

Where the breach of covenant continues after the date of the assignment, there appears to be a possibility that both the tenant and his assignee may have a right to sue in respect of the same breach.

14.2.2 *The Landlord*

An original landlord also continues to be affected by privity of contract after he has assigned his leasehold reversion. Similar questions arise as to whether he will be liable for a breach of the landlord's covenants or may rely on the benefit of the tenant's covenants, once he has no further interest in the property.

14.2.2.1 Liability for Breach

At common law a landlord will remain liable on his covenants even after he has assigned his reversion,¹⁰ but he too can limit his liability by using the same methods as the tenant. Indeed, it is far more common to find a contractual limitation of a landlord's liability than it is of a tenant's liability.¹¹

14.2.2.2 Right to Sue

A landlord will be unable to sue in respect of breaches that have occurred after he has disposed of his reversion because he will suffer no damage, but he may wish to continue to be able to sue in respect of breaches that occurred before he disposed of his reversion. It is now well established that the effect of s 31 of the *Conveyancing and Property Ordinance*¹² is to deprive the original landlord of his right to sue his tenant for breach of covenant once he has assigned his reversion, regardless of whether the breach was committed before or after the assignment. The leading case is:

Re King [1963] Ch 459

FACTS

Mr King was entitled to a lease of a factory. The lease required him to keep the premises in repair, to insure the premises and lay out any insurance monies in the rebuilding of the premises, and to make good any deficiency

¹⁰ *Celsteel Ltd v Alton House Holdings (No 2)* [1987] 1 WLR 291

¹¹ In England, a landlord under a lease entered into after 1 January 1996 may apply to be released from liability under the landlord's covenants—see ss 6, 7 & 8 *Landlord & Tenant (Covenants) Act* 1995.

¹² The equivalent of s 141 of the *Law of Property Act 1925*

as required. During the Second World War the factory was destroyed by fire, and could not be rebuilt due to building restrictions. After the war the land was resumed and redeveloped as a housing estate, and Mr King's estate sought directions from the court as to whether they remained liable for breach of covenant to the original landlord despite the resumption.

JUDGMENT

The original landlord's right to take action ceased on his assignment of the reversion.

The reasons given by the English Court of Appeal judges for their decision differed. Lord Denning MR was of the view that the section was merely declaratory of the common law, while the majority felt the section amended or at least clarified the law. The majority view of the Court of Appeal has been approved in England in *London & Country (A&D) Ltd v Wilfred Sportsman Ltd*,¹³ where the right of an assignee to claim arrears of rental accrued prior to the assignment was at issue. The court declined to follow the case of *Flight v Bentley*,¹⁴ and held that an assignee, and not the landlord, was entitled to recover the arrears. They were of the view that the section had changed the law to pass the right to sue for arrears of rent to the purchaser upon the assignment of the leasehold reversion.¹⁵

14.3 Assignees¹⁶

There is no privity of contract between a landlord and a tenant's assignee, nor between a tenant and a landlord's assignee, but there is 'privity of estate'. Privity of estate arises where the relationship of landlord and tenant exists between the parties. When a landlord assigns his reversion, his assignee steps into his shoes and becomes the landlord in his place. Likewise, when a tenant assigns his leasehold term his assignee steps into his shoes and becomes the tenant in his place. A landlord and tenant and their respective assignees are thus all affected by the same estate, namely the lease. They are said to be in privity of estate. In the diagram below, the dotted lines show the relationships of privity of estate. Thus:

¹³ [1971] Ch 764

¹⁴ (1835) 7 Sim 149

¹⁵ See also *Arlesford Trading Co Ltd v Servansingh* [1971] 1 WLR 1080

¹⁶ See Lord Templeman's judgment in *City of London Corporation v Fell* [1993] 3 WLR 1164 at 1167 for a clear explanation of the doctrine of privity of estate.