

the occupier had engaged employees and relied on undisturbed occupancy until expiry of the agreement, but the government resumed the land;⁸⁸ and the exclusive use of part of a roof with the right to erect an advertisement sign.⁸⁹

An agreement for a tenancy or for a subtenancy is treated as a tenancy for purposes of the application of part IV.⁹⁰ This is because such agreements are enforceable in equity by an order for specific performance.⁹¹ Such an agreement need not be in writing unless for a term of longer than three years provided that it takes effect in possession and is at a market rent.⁹²

DOMESTIC TENANCY

Part IV applies to domestic tenancies only.⁹³ A domestic tenancy means a tenancy of premises let as a dwelling.⁹⁴

Purpose of the letting. Since the question is whether the premises were let as a dwelling, the determination of the nature of a tenancy depends initially upon the purpose of the letting. An indication of that purpose may be found in the tenancy agreement: there may be a statement of the reason for the tenancy or of the use to which the premises are intended to be put, or these may be deducible from the description or nomenclature of the premises (eg, 'Shop A on the ground floor' or 'all that domestic flat on the 21st floor'). Otherwise or additionally the agreement may contain restrictions upon the use of the premises, such as a covenant against using them for commercial purposes or a term that they are to be used as a private residence only. Where there is no written agreement, the parties may have agreed orally upon the use to which the premises are to be put or upon restrictions upon use, although there will almost inevitably be a clash of evidence about this which will have to be resolved. The agreement aside, assistance as to the purpose of the letting may be derived from the terms of the government grant and of the occupation permit.⁹⁵ The government lease or conditions of grant may contain restrictions upon use of the land such as a condition that the land be

88 *Tong Kwong Hong Co Ltd v Director of Public Works* [1981] HKDCLR 22.

89 *Sable Investments Ltd v Panafair Ltd* (1993) SCt. HCMP No 2880 of 1993. Concerning advertising signs see too: *King v David Allen & Sons, Bill Posting Ltd* [1916] 2 AC 54, HL; *Walton Harvey Ltd v Walker and Homfrays Ltd* [1931] 1 Ch 274, CA (Eng).

90 S 115(1).

91 *Walsh v Lonsdale* (1882) 21 ChD 9.

92 Conveyancing and Property Ordinance, Cap 219, ss 3 and 6(2).

93 S 116(1). Tenancy is defined in s 115(1).

94 S 116(1).

95 S 115A (2)(a) and (b).

used for industrial purposes only. In the absence of indications to the contrary in their agreement or other circumstances, it may be assumed that the parties did not intend that the premises would be used for purposes that conflict with the government grant for this would be against their interests in that it would render that grant liable to forfeiture and the land liable to re-entry by the authorities thus putting an end to the tenancy. Similarly, use of the premises for a purpose which is not stipulated in the occupation permit for the building in or at which the premises are situated may lead to enforcement action by the Buildings Department, a risk which the parties should not be presumed to have taken. An occupation permit is issued by the Buildings Department under section 21 of the Buildings Ordinance⁹⁶ following completion of the construction of a building. Although, as its name indicates, the permit gives permission for that building to be occupied, its contents invariably state the kind of occupation that is contemplated – shop, residential use or whatever. Occupation permits are not issued for certain types of property, particularly in the New Territories, but similar official permissions may be granted. Section 115A(2) does not mention these: it refers to an occupation permit in relation to the premises given under the Buildings Ordinance 'or under any Ordinance replaced thereby' but the legislation under which other permissions are given is separate from the Buildings Ordinance and, far from being replaced by it, in effect replaces it or cross-refers to it. Consequently it is thought that these other permissions are not included within the matters which may be taken into account under section 115A(2). It is possible however that section 115A(2) is not exhaustive of the matters which may be taken into account but is merely permissive so that other factors, including official permissions, could be referred to.

The uses to which the premises are actually being put can themselves be of little assistance in deciding whether the premises were let as a dwelling, for this question is concerned with the intention of the parties, and the time relevant to that intention is the time of the letting. So when section 115A(2)(c) mentions 'normal additional uses ... consistent with the domestic nature of a tenancy' as relevant to determining whether the premises 'were let, or are being used, as a dwelling', it appears that this consideration is more relevant to the question of whether the premises are being used as a dwelling than whether they were let as a dwelling. This paragraph is nevertheless a reminder that the presence of commercial or other business uses upon the premises does not lead to the conclusion that they could not have been let as a dwelling. The paragraph goes on to enumerate four factors to which regard should be had in assessing such normal additional uses: the floor area occupied part or full-time by these

96 Cap 123.

covenants which are not in fact contained in the lease¹⁷⁶ or refers to the wrong covenant.¹⁷⁷

It is not necessary that the notice should require payment of compensation in money,¹⁷⁸ nor, where the breach is incapable of remedy, need the notice require it to be remedied.¹⁷⁹ Certain breaches of covenant are, by their very nature, irremediable such as those which leave a stigma.¹⁸⁰ If the breach is capable of remedy and the notice fails to require its remedy, the notice will be insufficient.¹⁸¹ If there is any doubt as to whether the breach is or is not capable of remedy, it is sufficient in the notice to require the remedy of the breach 'if it is capable of remedy'.¹⁸² The notice may state a time within which the breach is to be remedied, but the landlord will not be entitled to re-enter at the end of the stated period unless the time is in fact reasonable.¹⁸³ Even if the breach is incapable of remedy, a reasonable time must be given to the tenant between the service of the notice and the beginning of proceedings against him.¹⁸⁴ In such a case the purpose of allowing to the tenant a period of time is to give him an opportunity to consider his position generally and in particular to consider such matters as whether he should apply for relief and offer compensation to the landlord.¹⁸⁵

176 *Guillemard v Silverthorne* (1908) 99 LT 584.

177 *Jacob v Down* [1900] 2 Ch 156.

178 *Lock v Pearce* [1893] 2 Ch 271, CA (Eng); *Civil Service Co-operative Society v McGrigor's Trustee*, above, n 146; *Rugby School Governors v Tannahill* [1935] 1 KB 87, CA (Eng).

179 *Rugby School Governors v Tannahill*, above. Any positive covenant is normally capable of remedy, whether continuing in nature or capable of only a once-for-all breach: *Expert Clothing Service & Sale Ltd v Hillgate House Ltd*, above, n 143.

180 *Rugby School Governors v Tannahill*, above (use of house for immoral purposes); *Hoffmann v Fineberg* [1949] Ch 245, [1948] 1 All ER 592 (use as gaming house); *Bickerton's Aerodromes Ltd v Young* (1958) 108 L Jo 218 (breaches of licensing laws); and *Ali v Booth* (1966) 110 Sol Jo 708, CA (Eng) (conviction under food and drugs regulations). *Scala House and District Property Co Ltd v Forbes* [1974] QB 575, [1973] 3 All ER 308, CA (breach of covenant not to assign, sublet or part with possession of the demised premises). In *Glass v Kencakes Ltd* [1966] 1 QB 611, [1964] 3 All ER 807, it was held that an immoral use by a subtenant was not a breach incapable of remedy by a head-tenant when the head-tenant did not know of it and took all reasonable steps to stop it when he found out.

181 *Glass v Kencakes Ltd*, above, n 180.

182 *Glass v Kencakes Ltd*, above, n 180.

183 *Horse Estate Ltd v Steiger*, above, n 84 at 92; *Civil Service Co-operative Society v McGrigor's Trustee*, above, n 146, where 14 days was held to be sufficient notice. A three months' notice will usually be reasonable (see *Penton v Barnett*, above, n 132; *Gulliver Investments v Abbott* [1966] EGD 299).

184 *Horse Estate Ltd v Steiger*, above, n 84.

185 In *Horse Estate Ltd v Steiger*, above, n 84, two days was held not to be a reasonable time. In *Scala House and District Property Co Ltd v Forbes*, above, n 180, 14 days was held to be sufficient.

Service of notice. The statutory notice as to a breach of covenant may be addressed to 'the lessee' by that designation without his name, or, generally, to the persons interested without any name and notwithstanding that any person to be affected by the notice is absent, under disability, unborn or unascertained.¹⁸⁶ It will be sufficiently served if it is left at the last-known place of abode or business in Hong Kong of the tenant or other person to be served,¹⁸⁷ and, if it is to be served on the tenant, it is sufficient to affix it or to leave it for the tenant¹⁸⁸ on the land or any house or building comprised in the lease.¹⁸⁹ So long as the notice is not returned through the post undelivered, sending it by ordinary or registered post is sufficient, and service will be deemed to have been effected at the time at which the letter would in the ordinary course be delivered.¹⁹⁰

Tenant's right to relief. The service of the statutory notice, and default under it, are essential preliminaries to the enforcement of a forfeiture,¹⁹¹ but, after the landlord has thus become qualified to take advantage of the forfeiture, and is proceeding, by action or otherwise, to enforce his right of re-entry or forfeiture, the tenant may apply to the court for relief.¹⁹² It is probable that a claim for relief may not be brought until the landlord has served a statutory notice for it is only when the landlord has served a statutory notice that he can be said to be proceeding to forfeit the lease.¹⁹³ The right to apply for relief is available in the Court of First Instance of the High Court or the District Court¹⁹⁴ as well as in the Lands Tribunal. In practice, in

186 Conveyancing and Property Ordinance, Cap 219, s 62(2).

187 If there is more than one lessee, all the lessees must be served: *Blewett v Blewett*, above, n 174.

188 The notice will be left for the tenant if it is left with some person on the premises provided there is reasonable ground for supposing that that person will pass it on to the tenant if possible: *Cannon Brewery Co Ltd v Signal Press Ltd* (1928) 139 LT 384.

189 Conveyancing and Property Ordinance, Cap 219, s 62(3).

190 Interpretation and General Clauses Ordinance, Cap 1, s 8.

191 If the notice has not been served the landlord's action to enforce the forfeiture will necessarily fail: *Greenfield v Hanson* (1886) 2 TLR 876; *Jacques v Harrison* (1884) 12 QBD 165, CA (Eng).

192 Conveyancing and Property Ordinance, Cap 219, s 58(2). Originally relief against forfeiture was a creation of the Court of Chancery. Relief against forfeiture for non-payment of rent would readily be granted although relief in other cases was rare, but in landlord and tenant the old equitable jurisdiction has been replaced by the statutory jurisdiction: *Billson v Residential Apartments Ltd* [1992] 1 AC 494, HL.

193 *Pakwood Transport v 15 Beauchamp Place* (1978) 36 P & CR 112 at 116, 117, CA (Eng). See also *Barton, Thompson & Co Ltd v Stapling Machines Co* [1966] Ch 499 at 508, [1966] 2 All ER 222 at 224.

194 The District Court has jurisdiction where the landlord is proceeding by action in that court to enforce the right of entry or forfeiture, or if the landlord is

continued on the next page

Tribunal can extend this period upon cause being shown.¹⁰⁴ Should there be a change of landlord during this period and before the old landlord has served a counter-notice, the new landlord may serve a counter-notice.¹⁰⁵ If the old landlord has already served a counter-notice which states grounds of opposition, the new landlord may if he wishes rely upon those grounds or some of them – in effect he ‘inherits’ those grounds.¹⁰⁶ Whether the new landlord can satisfy those grounds is of course a separate matter. Notices, once given, cannot be unilaterally withdrawn, nor has the Lands Tribunal the power to allow their amendment, so the grounds of opposition stated in the landlord’s response cannot be added to or deleted,¹⁰⁷ even within the period of two months from the making of the request for a new tenancy.

The statement of a ground of opposition in a landlord’s response must give the tenant notice of the case he has to meet; it must not be deceptive or misleading.¹⁰⁸ In this regard it would seem that the approach which the tribunal takes towards a landlord’s notice of termination, described earlier in this chapter, would apply.

As with a notice of termination, the landlord will be restricted to opposing any application which the tenant may subsequently make for the grant of a new tenancy to those grounds stated upon his counter-notice.¹⁰⁹ Hence care must be taken that all grounds upon which the landlord may possibly wish to rely are stated.

NOTICE REQUIRING TENANT TO APPLY FOR NEW TENANCY

After the expiry of two months from the giving of notice of termination¹¹⁰ or, as the case may be, the making by the tenant of a request for a new tenancy,¹¹¹ the landlord may give to the tenant a notice in the specified form (CR105) requiring the tenant to make an application to the Lands Tribunal, for the grant of a new tenancy.¹¹² The notice requires the tenant to make that application within two months of the giving of the notice, is addressed to the tenant, is signed by the

¹⁰⁴ Lands Tribunal Ordinance, Cap 17, s 10(2)(a).

¹⁰⁵ *XL Fisheries Ltd v Leeds Corp* [1955] 2 QB 636, CA (Eng).

¹⁰⁶ *Morris Marks v British Waterways Board*, above, n 2; *AD Wimbush & Sons v Franmills Properties* [1961] Ch 419. But in the case of one of those grounds, self-use, the change of landlord will ordinarily rule out reliance on that ground: see s 119E(2) and ch 5 below.

¹⁰⁷ *Tsui Wing Chung v Anna Ho*, above, n 36; *Betty’s Cafés v Phillips Furnishing Stores*, above, n 37.

¹⁰⁸ *Morris Marks v British Waterways Board*, above, n 2.

¹⁰⁹ S 119E(1).

¹¹⁰ Ie under s 119.

¹¹¹ Ie under s 119A.

¹¹² S 119D(3)(a) and (b).

landlord, gives the landlord’s name and address, and is dated.¹¹³ If the tenant does not apply for the grant of a new tenancy within two months from the giving of the notice, his application for a new grant cannot be entertained by the tribunal.¹¹⁴ The note on the rear of CR105, to the effect that the tenant within two months after the giving of the notice must apply to the Lands Tribunal but in any event such application must be made earlier than the date of determination specified in the landlord’s notice of termination, could be more clearly worded but does not give rise to an estoppel where the tenant, in reliance upon it, applies after expiry of two months after receipt of CR105 but before expiry of the notice of termination.¹¹⁵

SERVICE OF FORMS

The statutory forms must be sent to their intended recipient, a requirement treated as equivalent to service. The legislation talks of giving notice, of notification and of making request.¹¹⁶ Service of any notice under part IV may be effected, according to section 119Y:

- (1) by personal service;
- (2) by post, addressed to the last known place of business or residence of the person to be served;
- (3) in the case of service upon a tenant, by leaving the notice with an adult occupier of the premises in which the tenant resides and to which the notice relates; or
- (4) by affixing a copy of the notice to a prominent part of the premises to which it relates.

Postal Service. Service therefore may be effected by ordinary, as well as other forms of, post¹¹⁷ but there must be satisfactory evidence of posting such as a certificate of posting issued by the Post Office¹¹⁸ or an affidavit from the person who took it to the Post Office or placed it in the postbox and that the posted form has not been returned, so as to raise a presumption of service in ordinary course of post.¹¹⁹ That presumption may however be rebutted by satisfactory evidence

¹¹³ See the contents of form CR105, reproduced in appendix 3.

¹¹⁴ S 119D(3)(a)(ii); *Ram Isardas Mahtani v Wong Kwok Tai* [1989] 2 HKLR 296, [1989] 1 HKC 100.

¹¹⁵ *Lei Sau Fong v Tai Wai Ying* [1991] 1 HKC 61.

¹¹⁶ Ss 119(1), 119(4), 119A(1)(4) and (6). The giving of notice is the same as its receipt: *Sun Alliance and London Assurance Co Ltd v Hayman*, above, n 50.

¹¹⁷ S 119Y(1)(b).

¹¹⁸ *Sunic Consultants Ltd v Star Verve Co Ltd*, above, n 16.

¹¹⁹ Interpretation and General Clauses Ordinance, Cap 1, s 8.

repair. In the absence of such an assumption, the premises are surely to be valued as they stand. The definition of prevailing market rent in section 115(1) is consistent with this in that it refers to the rent at which premises which are the subject matter of the tenancy might reasonably be expected to be let, although it does qualify this by saying that the letting is to be on the terms of the new tenancy which may of course include repairing covenants.

EVIDENCE

The tribunal must determine the new rent in the light of the evidence which will often be, or include, facts revealed by and the opinion of experienced valuers. Expert valuation evidence is considered later in this chapter. The tribunal may also have regard to evidence of lettings gleaned from its own records or experience²⁷ or from information supplied by the Commissioner of Rating and Valuation from records kept by his department.²⁸ Evidence of advertised, asking or offered rents is of little assistance, especially where there is evidence of actual agreements, since such rents are at best an estimate of value by the landlord or his representatives²⁹ and give no more than a picture of the market.³⁰ An offer may also reflect the financial position of the offeror and his estimate of his bargaining position and other factors rather than an estimate of the real rental value of particular premises.³¹ So in a case in which the tenant of neighbouring premises made a conditional offer to take a lease of the suit premises at a certain rent, the English Court of Appeal observed that this offer was not a true reflection of rental values and required to be discounted and that the offeror might anyway withdraw or fail to complete.³² Similarly, evidence of a counter-offer from a tenant is of little value.³³ Evidence of the market drawn from property reviews or newsletters,

27 *Rhoades v Lee Wai Lee*, above, n 12; *Marie Dunn v New Estate Co Ltd* (1984) Lands Tribunal, Application LT No 104 of 1984; *Tsui Ah Fong v Cheung Bik Har* (1987) Lands Tribunal, Application LT No 2431 of 1987.

28 *Union Carbide*, above, n 2.

29 *Lee v Hong Kong and Shanghai Hotels Ltd* (1983) Lands Tribunal, Application LT No 15 of 1983, relying upon *McDonald v The Deputy Federal Commissioner of Land Tax for New South Wales* (1915) 20 CLR 231 at 237; *Rhoades v Lee Wai Lee*, above, n 12; *Shun Tak Enterprises Ltd v Tobermoray Investments Ltd* (1983) Lands Tribunal, Application LT No 22 of 1982; *Taylor v Hong Kong and Overseas Development Co Ltd* (1987) Lands Tribunal, Application LT No 740 of 1987.

30 *Nordic Asia v Strawberry Hill Development Ltd*, above, n 6.

31 *John H Lee v The Hongkong and Shanghai Hotels Ltd* (1983) Lands Tribunal, Application LT No 15 of 1983.

32 *Cardshops Ltd v Davies* [1971] 1 WLR 591 at 593, CA (Eng).

33 *Elvera Kwong Man Ling v Raymond K Hung*, above, n 16.

although admissible, is general and usually of little assistance.³⁴ The tribunal may itself inspect the premises and any comparable premises to which access is available.

METHOD OF VALUATION

The valuation of property has been described judicially as proceeding by means of analogy:

The valuer isolates those characteristics of the object to be valued which in his view affect value and then seeks another object of known or ascertainable value possessing some or all of those characteristics with which he may compare the object he is valuing. Where no directly comparable object exists, the valuer must make allowances of one kind or another, interpolating or extrapolating from his given date. The less closely analogous the object chosen for comparison is, the greater the allowances which have to be made and the greater the opportunity for error.³⁵

This describes the comparative method of valuation, which is the preferred method of assessment of the prevailing market rent under part IV. By this method a limited number of well-selected comparable transactions are analysed for their similarities to and differences from the letting of the premises in question, adjustments being made for the differences to arrive at a prevailing market rent for the premises in question as at the relevant date.³⁶ Other methods of valuation, such as the investment method, are not appropriate in assessments of rent.³⁷ Comparable transactions carried out both before and after the relevant date may be referred to, because although values must be calculated in the light of the circumstances which existed at the material date, subsequent circumstances can be taken into account in order to determine the proper weight to attach to such circumstances.³⁸ Usually the best comparable transactions, being those that exhibit the least differences from the property to be valued,³⁹ will be those

34 *Tam Shiu Hung v Commissioner of Rating and Valuation* (1985) Lands Tribunal, Application LT No 30 of 1984: a challenge to the commissioner's assessment of the prevailing market rent for purposes of a certified increase in rent of premises governed by part II of the Landlord and Tenant (Consolidation) Ordinance.

35 Forbes J in *GREA Real Property Investments Ltd v Williams* [1979] 250 EG 651 at 653.

36 *Union Carbide*, above, n 2.

37 *Financial Secretary Inc v Wing On Cheong Investment Ltd* (1986) Lands Tribunal, Application LT No 540 of 1985.

38 *PCM & Associates Ltd v Tai Wai Yin, Howard*, above, n 9; *Daandine Pastoral Co v Commissioner of Land Tax of Australia* (unreported) referred to with approval in *McCathie v Federal Commissioner of Taxation* [1944] 69 CLR 1 at 16. *Henkel Chemicals (HK) Ltd v Pokfulam Development Co Ltd* [1993] HKDCLR 147.

39 *Nordic Asia v Strawberry Hill Development Ltd*, above, n 6.

CHAPTER 17**LANDS TRIBUNAL**

To establish a Lands Tribunal and to provide for matters connected therewith.

[1 December 1974] *L.N. 246 of 1974*

1. Short title

This Ordinance may be cited as the Lands Tribunal Ordinance.

2. Interpretation

In this Ordinance, unless the context otherwise requires—
“President” (大法官) means the president of the Lands Tribunal appointed under section 4;

“presiding officer” (法官) means a presiding officer of the Lands Tribunal; (*Replaced 5 of 1991 s. 2*)

“qualified in law” (具有法律專業資格) means qualified for appointment as a District Judge under section 5 of the District Court Ordinance (Cap. 336);

“registrar” (司法常務主任) means the Registrar of the District Court; (*Added 21 of 1977 s. 2. Amended 49 of 1982 s. 2*)

“Tribunal” (審裁處) means the Lands Tribunal established under section 3.

3. Establishment of Lands Tribunal

There shall be a tribunal to be known as the Lands Tribunal which shall be a court of record.

(*Amended 49 of 1982 s. 3*)

4. Constitution of Tribunal

(1) The Tribunal shall consist of a president, presiding officers and such other members as may be appointed under subsection (4).

(2) The President shall be one of the Judges of the Supreme Court and shall be appointed by the Governor.

(3) Every District Judge and deputy District Judge shall by virtue of his office be a presiding officer. (*Replaced 5 of 1991 s. 3*)

(4) The other members shall be such other persons appointed by the Governor as are qualified in law or, in the opinion of the Governor, sufficiently experienced in the practice of land valuation or some other subject relevant

to the proceedings of the Tribunal to qualify them to sit as members of the Tribunal.

(*Replaced 49 of 1982 s. 4*)

5. Appointment of deputy of the President

(1) If the President is temporarily unable to exercise his functions as the president of the Tribunal, the Chief Justice may appoint any presiding officer of the Tribunal to act as the deputy of the President for such period as the Chief Justice may specify.

(2) A presiding officer of the Tribunal appointed under subsection (1) to act as the deputy of the President may exercise the powers and perform the duties of the President during the period of his appointment.

(*Amended 49 of 1982 s. 5*)

6. Acting appointments of President

(1) If the President is precluded by illness, absence from Hong Kong or any other cases from exercising his functions as the president of the Tribunal, the Chief Justice may appoint any presiding officer to act as the president of the Tribunal for such period as the Chief Justice may specify. (*Amended 49 of 1982 s. 6*)

(2) (*Repealed 49 of 1982 s. 6*)

7. (*Repealed 49 of 1982 s. 7*)**7A. Officers of the Tribunal**

(1) There shall be attracted to the Tribunal a registrar and such number of deputy registrars, assistant registrars, bailiffs, clerks, interpreters and other officers as the Governor may consider necessary.

(2) In addition to the powers and duties conferred or imposed by or under this Ordinance or any other enactment, the registrar, any deputy registrar, assistant registrar, bailiff, clerk, interpreter and other officer attached to the Tribunal may exercise such powers and perform such duties, insofar as the same are applicable to the business of the Tribunal, as those respectively exercised or performed by the registrar, deputy registrar, assistant registrar, bailiff, clerk, interpreter or other officer attached to the Supreme Court.

(3) Any act which by or under this Ordinance or any other enactment is required or authorized to be done by the registrar may be performed by a deputy registrar or assistant registrar of the Tribunal and any process of the Tribunal may be executed by any bailiff thereof notwithstanding that it may have been directed personally to some other bailiff.

(*Added 21 of 1977 s. 3*)

7B. Protection of registrar

(1) No action shall be brought against the registrar for—

(a) any act done or omitted to be done by any bailiff without directions from the registrar; or

(b) any directions given to any bailiff with regard to the execution or non-execution of process if—