Chapter 2: The Types of Tenancy and the Formal Requirements for the Creation of a Lease

Outline

Aims of this Chapter

This chapter will enable you to achieve the following learning outcome from the CILEx syllabus:

2 Understand the formal requirements for the creation of a lease

2.1 Introduction

This chapter will first outline the different types of tenancy that can exist and their key features. It will then consider the legal formalities that need to be satisfied if an agreement for a lease is to take effect at law. It will then consider whether equity may be used to enforce a lease if the necessary legal requirements have not been satisfied.

2.2 Types of tenancy

2.2.1 Fixed-term tenancy

A fixed-term tenancy can be of any duration, as discussed in **Chapter 1**. Fixed-term tenancies terminate automatically on the expiration of the fixed term by what is commonly referred to as "effluxion of time". A notice to quit is not required to bring a fixed-term tenancy to an end. Expressed another way, fixed-term tenancies automatically determine on the term date.

While it will depend on the express terms of the tenancy, fixed-term tenancies may, in fact, end before the term has run its course. For example, if a landlord reserves a right of forfeiture it may terminate the lease if the tenant acts in breach. Further, a lease may contain a break clause. Depending on its wording such a clause may grant a right to a landlord, a tenant or both, to terminate the lease before the end of the term.

2.2.2 Periodic tenancy

A periodic tenancy continues automatically from period to period until it is terminated by notice at the end of one period. The period may be of any duration, for example, weekly, monthly, quarterly or yearly. At common law, typically one

full period of notice is required to terminate a tenancy, but tenancies of six months or more require only six months' notice. Note, however, that in many circumstances a statutory notice period will take precedence over the common law notice requirements. For example, the **Protection from Eviction Act 1977** provides that a periodic tenancy of a dwelling-house requires a minimum of four weeks' notice.

At first sight, periodic tenancies appear to be inconsistent with the rule expressed in ***Lace v Chantler [1944]*** discussed in **Chapter 1**. This problem has been raised in the authorities, as can be seen by ***Ashburn Anstalt v Arnold [1989]*** which has since been overturned.

In ***Prudential Assurance Co Ltd v London Residuary Body [1992]*** Lord Templeman explained that a periodic tenancy *"is saved from being uncertain because each party has power by notice to determine at the end of any period"*. The term continues until determined *"as if both parties made a new agreement"* at the end of each period. It was restated that the rule expressed in ***Lace v Chantler*** only applies if neither party or only one party has the power to determine.

Periodic tenancies can arise either expressly or by implication.

Express periodic tenancies

Express periodic tenancies are those that are expressly agreed between the parties, whether by parol or in writing.

Implied periodic tenancies

Implied periodic tenancies arise whenever a person goes into possession and then pays rent in reference to a given period.

Typically, the length of the period will be inferred from the payment of rent. It was said in ***Javad v Aqil [1991]***, however, that while the rent calculation is the *"most important factor"* it is not the only factor and *"all the surrounding circumstances"* must be taken into account.

2.2.3 Tenancy at will

A tenancy at will arises when a tenant occupies land with the consent of the owner on the basis that either party can bring the tenancy to an end at any time. It can be created either expressly or by implication.

(1) **Express tenancy at will**

An example of an express tenancy at will can be found in ***Manfield v Botchin [1970]***, where the landlord created an express tenancy at will of business premises, so as to be sure of being able to regain possession immediately on being granted planning permission for redevelopment. Express creation, although rare, may thus be useful in order to avoid the creation of a periodic tenancy and the consequent need to give a long period of notice to terminate.

(2) Implied tenancy at will

An implied tenancy at will arises when a tenant holds over (remains in possession), with the consent of the landlord, after the termination of an existing tenancy.

In ***Wheeler v Mercer [1957]***, for instance, the landlord had given valid notice to quit the leased land. This notice had expired. The tenant nevertheless remained in possession while negotiations for a new lease were under way. These negotiations broke down. The House of Lords held that there was a tenancy at will, which could be terminated at any time by the landlord.

In fact, a tenancy at will is very rare in this situation, as some form of statutory tenancy usually comes into existence on the tenant holding over, for instance, under **RA 1977**.

Much more common and of far more importance is where a tenancy at will arises when a tenant enters into possession under an informal legal lease: for example, for lack of a deed.

When an implied tenant at will pays, or agrees to pay, rent, a periodic tenancy will arise.

In ***Javad v Aqil [1991]*** an express tenant at will paid rent monthly pending negotiations for the full grant of a lease. Negotiations broke down and the defendant claimed that he had a periodic tenancy. The Court of Appeal disagreed based on lack of intention and confirmed that the defendant had a tenancy at will.

In ***Arben Katana (1) and Dan Abraham (2) v Catalyst Communities Housing Ltd [2010]*** the Court of Appeal affirmed the principle that the law presumes the creation of a tenancy at will following the expiry of a fixed-term tenancy and declined to displace this presumption on the evidence of an alternative arrangement between the parties.

The housing association had acquired an old garage on which it intended to build social housing. It expected the process of obtaining planning permission to be arduous. It therefore let out the site to a third party, who in turn let it out to the two appellants on long leases. The third party subsequently vanished. Four years later, during which time the tenants had paid rent monthly, the housing association tried to obtain possession from the appellants. They resisted, saying that they were periodic tenants and, as they carried out their businesses from the site, had protection under the **Landlord and Tenant Act 1954** (**LTA 1954**).

The housing association maintained that they were merely tenants at will and pointed to a clause in the original agreement which said that the agreement was for a fixed term of three months and thereafter terminable on not less than a week's notice. Despite the length of time for which the appellants had occupied the site – some four years, paying rent monthly – with the housing association's knowledge, the Court of Appeal said that a periodic tenancy did not exist. It was a tenancy at will.

The Court of Appeal confirmed a similar approach in ***Barclays Wealth Trustees (Jersey) Ltd v Erimus Housing Ltd [2014]***, where a tenant was holding over after the expiry of a commercial lease that did not have security

of tenure under **LTA 1954**. There were ongoing negotiations for a renewal of the lease during the holding over period but the tenant eventually gave notice to quit. The question was whether a periodic tenancy arose (which would gain protection) or it was merely a tenancy at will (as the landlord consented to the arrangement). It was found that an intermediate contractual relationship was not intended because of the ongoing negotiations, a periodic tenancy would gain statutory protection but the negotiations were for a lease contracted out of the security of tenure provisions. The outcome had to be consistent with the intentions of the parties: a tenancy at will was found and so the tenant's notice to quit was valid.

2.2.4 Tenancy at sufferance

A tenancy at sufferance arises where a tenant occupies land without the landlord's consent or despite objection by holding over after the expiration of a lease. It is essential that the initial entry was lawful and with consent; on expiration of this initial right to occupy, there can be no agreement as to the tenancy, as the essence of a tenancy at sufferance is that the landlord does not agree to its existence.

Where there is a tenancy at sufferance, the landlord may recover possession and terminate the tenancy at any time. The tenant has rights in the land and can bring an action in trespass or ejectment against third parties. Subsequent events may result in the following occurring.

(1) If the landlord requires the tenant to quit, the tenant becomes a trespasser (the tenant may, as with a tenancy at will, have a statutory right to remain in possession).

(2) If the landlord signifies his consent, the tenant becomes a tenant at will and if the tenant then pays or agrees to pay rent, an implied periodic tenancy is created based on calculation of rent or intervals of payment.

(3) A tenant at sufferance who retains possession for the appropriate period without payment of rent may acquire title by adverse possession.

2.2.5 Tenancy by estoppel

If a person purports to grant a lease of land in which he has no estate, he is estopped (prevented) from denying the tenancy and the tenant is estopped from denying the landlord's title to the land. So there is a perfectly valid lease between them and neither the landlord nor the tenant can escape the burden of their covenants in the lease. The assignees of either party are similarly bound, but with respect to third parties there can be no lease. For instance, the tenant's rights cannot bind the actual estate owner or a mortgagee of the land.

If the "landlord" subsequently acquires an interest in the land sufficient to support the grant of a lease, this "feeds the estoppel": the tenancy is validated and the tenant acquires an estate in land binding on third parties.

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