THE LAW
OF
LANDLORD AND TENANT PRINCIPLES (LEASES)

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For use with the following modules:
PLAN 10382 Leases and Letting
PLAN 41002 and PLAN 60342 Real Estate Law in Practice

Contents

1. THE GENERAL LAW

Section A

Synopsis: *Objects of Study, Division of the Subject,' The General Law,' Residential Lettings; Business Premises; Agricultural Holdings and Tenancies.*

1.1. Objects of Study

1. The objects of the study of the law of landlord and tenant are

   (a) to acquire a knowledge and understanding of the nature of leasehold tenure and the rights and liabilities of parties to a lease; and

   (b) to build on the knowledge and understanding of land law and enhance its appreciation as a practical subject; and

   (c) to be able to distinguish between different types of tenancies and the rights and duties of the parties to them.

2. The study of the law of landlord and tenant is concerned with the rights and liabilities of the parties to the lease and their respective duties and liabilities to third parties.

1.2. Division of the Subiect

1. The law of landlord and tenant can conveniently be divided into four areas, although it must be remembered at all times that the interrelationship of these areas is of crucial importance and that they are not independent. These are:

   (a) the general law of the rights and obligations of parties to a lease, as amended by statutory provisions;

   (b) security of tenure of occupiers of business premises;

   (c) security of tenure of residential occupiers;

   (d) agricultural tenancies and lettings

A brief description of these four subject areas is now given to further an outline of the module.

1.3. The General Law

1. This element of landlord and tenant law is concerned with the types of, and creation of, tenancies as well as with the rights and liabilities of both the landlord and the tenant. Where a person enters into a lease he will have exclusive possession of those premises throughout the term of the lease subject only to whatever rights the landlord has reserved to himself in. the lease, e.g. to enter and inspect the state of repair.

2. The obligations of the tenant will usually consist of paying the rent, repairing the premises, complying with all his covenants such as not to create a nuisance or to use the premises for any immoral or illegal use. The landlord's obligations are much less onerous but include an obligation to give quiet enjoyment to the tenant.

3. The covenants that can be found in leases will, subject to other implied obligations, determine the parties' rights and liabilities on, *inter alia*

   (a) rent and periodic rent review;

   (b) repair and insurance of the premises;

   (c) assignment, sub-letting or parting with possession;

   (d) forfeiture of the lease and remedies of the landlord for failure to comply with the covenants.

4. The landlord's basic right is for the premises to revert back to him at the termination of the lease and to receive the rent reserved in the lease at the stated intervals. The tenant can expect to "quietly enjoy" the premises during his tenancy i.e. not to suffer interference from the landlord.

1.4. Business Premises

1. Tenants of business premises, e.g. shops, warehouses and factories, are granted security of tenure by the *Landlord and Tenant Act 1954 Part II* in the form of an automatic right to a renewal of their lease on its expiration, If the landlord desires possession of the premises he must oppose the grant of a renewed lease on one or more of the grounds provided in the Act. There is no statutory restriction on rents of business premises. The 1954 Act has been substantially amended by the *Regulatory Reform (Business Tenancies) (England and Wales) Order 2003* as from 1 June 200Please note that, at present, none of the standard student texts on the area cover the new changes.

2. If the landlord is successful in opposing a grant of a renewed tenancy on one or more of the grounds specified in the 1954 Act, the landlord may have to compensate the tenant for disturbance to his business caused by the termination of the lease, pursuant to s37 of the 1954 Act. In addition, compensation may also be payable, by the landlord to the tenant, under the Landlord and Tenant Act l927where the tenant has undertaken improvements to the property. Such compensation is payable at the termination of the lease.

1.5. Residential Lettings

1. The common law rights of the landlord and tenant have been supplemented and often over-ridden principally by the provisions of the *Rent Act 1977* and *Housing Act 1988*. The 1977 Act provides for both (i) security of tenure for tenants of those dwellings coming within its ambit, and (ii) restriction on the amount of rent which can be charged for the dwelling.

2. Other statutes have also conferred rights on tenants of residential property by conferring either security of tenure (depending on the details of the tenancy) or the right to enfranchisement. Thus the basic aim of the *Leasehold Reform Acts 1967 and 1979* was to give tenants of dwelling houses held on long tenancies at low rents the right to acquire the freehold or an extended lease of the property.

3. These various Acts have significantly altered the general law position of both the landlord and tenant of dwellinghouses by greatly improvising the legal position of the tenant.

1.6. Agricultural Holdings and Tenancies

1. These are two unique aspects of landlord and tenant law which are applicable only to agricultural land. The combined effect of the *Agricultural Holdings Act 1986* and the *Agricultural Holdings (Notices to Quit) Act 1977* is to provide a form of security of tenure for lettings of agricultural land. This is achieved by converting all interests of less than a yearly tenancy into a tenancy from year to year and then providing that tenancies of more than two years are to continue as tenancies from year to year on their termination. The 1977 Act then proceeds to alter the methods of termination of tenancies from year to year.
2. The 1986 Act enables both the landlord and the tenant to apply for compensation on the termination of the tenancy of agricultural land.
3. In the case of agricultural workers who occupy dwellings owned by the farm owner/ employer the *Rent (Agriculture) Act 1976* provides for security of tenure against eviction. This protection is similar to that afforded to tenants under the *Rent Act 1977*, but, in this case, there are no provisions for rent restriction.
4. The *Agricultural/ Tenancies Act 1995* gives a protection akin to the 1954 Act to farm business tenants.

1.7. Self-examination question

1. What are the objects of the study of the landlord and tenant law?
2. Is the subject divided into strict compartments or are there complex interrelationships?
3. What types of rights and obligations are commonly found in the general law of landlord and tenant?
4. What is the effect of the *Landlord and Tenant Act 1954 Part II*?
5. Is there any statutory protection for residential tenancies?
6. Is there any statutory protection for agricultural tenancies?
7. What is the basic aim of the *Leasehold Reform Acts 1967 and 1979*
8. Why was the *Agricultural Tenancies Act 1995* introduced?

2. THE RELATIONSHIP OF LANDLORD AND TENANT

Section A

Synopsis: The Historical Context; Term of Years; The Relationship Defined; Subject matter of the Lease; Flexibility of the System.

2.1. The Historical Context

1. The law regulating the -relationship of landlord and tenant has its historical origins in feudal times when the king was the "landlord" and the barons were his Tenants in Chief. Since then the law has evolved into its present day complexity by development of common law principles and as a result of numerous enactments especially

   (a) Landlord and Tenant Act 1927

   (b) Landlord and Tenant Act 1954

   (c) Rent (Agriculture Act 1976

   (d) Rent Act 1977

   (e) Protection from Eviction Act 1977

   (f) Landlord and Tenant Act 1985

   (g) Agricultural Holdings Act 1986

   (h) h) Housing Act l988

   (i) 1) Landlord and Tenant (Covenants) Act 1995

   (j) j) Agricultural Tenancies Act 1995

   (k) k) HousingAct l996

2. Reference to the above list and especially the years in which these statutes were enacted illustrates that the context of the relationship is also highly political, especially where residential lettings are concerned. The recent history of protection of residential tenants reveals attempts by landlords to avoid the legislation, some of which as will be seen have been rejected by the courts.

2.2. Term of Years

1. As a result of sl (1)(b) of the *Law of Property Act 1925* the term of years absolute is the only form of leasehold tenure capable of existing as a legal estate.

2. A term of years absolute means a term that is to last for a certain fixed period, even though it may be liable to come to an end before the expiration of that period. It includes a term of less than a year or for one year, or for any number of years, or for a fraction of a year. These definitions are important as they affect the statutory protection given to a tenant.

2.3. The Relationship Defined

1. The relationship of landlord and tenant arises "where one person being possessed of an estate in real property grants, or is deemed to have granted, to another, an estate therein, which is less than freehold and which is less than the estate of the grantor."

2. (a) The grantor is the landlord or lessor and is usually the freehold owner. His remaining interest is the freehold reversion. Where the landlord is himself a tenant holding for a term of years absolute he is known as the mesne landlord and his tenant is the sub-tenant.

   (b) The grantee is the tenant or lessee. His right to occupy and enjoy the property will be granted only for a definite period of time and is dependent on the (the leaseholder) paying rent to the landlord. The tenant's interest is known as either the term or the term of years.

   (c) The "lease" is the legal document which, subject to any overriding statutory provisions, governs the rights and liabilities of the parties. The "tenancy" is the interest held by the tenant.

   (d) The chain of relationships may be described in its simplest form as follows:

   Landlord (Freeholder)

   Tenant (Mesne Landlord)

   Sub-tenant

   (e) In all cases the interest granted to the sub-tenant must be less than that of the mesne landlord. If the mesne landlord - transfers all his estate that amounts to an assignment, e.g. A, the freeholder, lets premises for 21 years to B and at the end of the 7th year B sub-lets the same premises to C for 16 years; this is more than the residue of B's term and therefore in law amounts to an assignment.

2.4. Subject Matter of the Lease

1. The subject-matter of the lease must be 'land' which is defined in s205(1)(ix) of the *Law Property Act 1925* to include *inter alia* land and any tenure, mines, minerals, buildings or parts of buildings and other corporeal and incorporeal hereditaments (i.e. physical items and also rights in land).

2. The definition is of importance as it will include the fixtures in the premises let by the landlord. A fixture may be defined as anything which has become so attached to the land as to form part of the land itself. Where the property let is furnished an inventory of the contents of the premises will usually accompany the lease. This inventory will list items of furniture but may also include the fittings with which the property is supplied.

2.5. Flexibility of the System

1. The outstanding feature of the system of landlord and tenant law is the flexibility it offers. The tenant can assign his interest or sub-let the whole or part of the premises of which he has taken a lease. If the landlord attempts to control such dealings in the property by a clause in the lease, in general his consent will not be unreasonably refused. The landlord

can also transfer his estate to an assignee of the reversion who will then become the tenant's new landlord.

2. The lease is an effective method of managing property and of controlling the physical environment. What sometimes cannot be achieved under the Town and Country Planning legislation can frequently be achieved through an appropriate clause in a lease specifying the uses to which the property may be put or those excluded.

3. CREATION AND GRANTING OF LEASES

Section A

Synopsis: Introduction; Agreement for a Lease; Part Performance.

3.1. Introduction

1. It is usually the case that the parties to a lease enter directly into a formal lease on the completion of negotiations. They can, however, firstly enter into an agreement for a lease. This is a contract in which one party agrees to give and the other agrees to take a lease. Rights which arise under an agreement for a lease are not the same as when the lease is formally granted.

3.2. Agreement for a Lease

1. There are no special formalities for an agreement for a lease but there must be final agreement on all the terms, i.e. parties, property, rent, duration and other essential terms.
2. Under section 2(1) of the *Law of Property Act (Miscellaneous Provisions)Act 1989* a contract for the sale of land "can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where the contracts are exchanged in each".
3. Terms may be incorporated in the contract either by setting them all out in one document or "by reference" to some other document. It is no longer possible for a contract of sale to be constructed out of an exchange of letters. Contracts for the grant of leases of three years or less are outside the scope of these provisions.

3.3. Lack of Formality

In many cases of residential property the parties enter into an oral agreement which is not properly documented. This can cause future problems and has been overcome to some extent by the introduction of Assured and Assured Shorthold Tenancies.

Section B

Synopsis: Essential Requirements; Certainty of the Term; Exclusive Possession; Lease/Licence Distinction; Formalities; Absence of Formalities.

3.4. Essential Requirements

1. There are three essential requirements for a valid legal lease:
   (a) certainty as to the term granted;
   (b) exclusive possession must be given of the demised promises; and
   (c) formalities must have been compiled with.

3.5. Certainty the Term

1. The general rule is that the maximum duration of the lease must be certain.

   In *Lace v Chantler (1944)* a lease "furnished for the duration of the war" was held uncertain as it could not be said at the outset how long it would last. A periodic tenancy is not caught by this rule as even though it repeats itself e.g. from year to year and so on the duration of the lease is certain from the outset as it is treated as a grant for the initial period; *Centaploy Ltd v Madodge Ltd (1974)*.

2. A term expressed to begin from the date of the lease is called a lease in possession. A term which is limited to commence at some future date is called a reversionary lease.

3. A term at a rent or in consideration of a fine limited to take effect more than 21 years from the date of the instrument purporting to create it, is void, and any contract made to create such a term is likewise void. *(LPA 1925s149(3))*.

4. The above provision relates to the period of 21 years to the date of the lease, not to the date of the contract. Therefore a contract in a lease for 35 years giving the tenant an option to renew it for a further period of 35 years to be exercised twelve months before the expiration of the current term is not void, since the option if exercised, will result in a term to begin upon the expiration of the second lease. It is immaterial that it will be more than 21 years before the contractual right is exercised. Similarly if L contracts with T that he will execute a lease in 30 years time to take effect in possession on its execution, the contract will be valid.

5. The date upon which the lease is to terminate is generally fixed at the outset but it can be made to depend on an uncertain event so long as the event occurs before the law takes effect. Except in the case of periodic tenancies, the lease will be void if date of its termination remains uncertain after its commencement. See *Re Midland Railway Company's Agreement (1971)* and *Centaploy v Madlodge (1974)*.

6. Under s149(6) LPA 1925 a lease for life which is taken at a rent or in consideration of a fine is converted into a 90 year term determinable after the death of the original lessee by one month's notice by either the landlord or tenant.

3.6. Exclusive Possession

1. Exclusive possession is the right to exclude all other persons, even the landlord, from the premises. It is essential to a lease .that this exists though this test is not by itself conclusive as to the creation of a lease.

2. If a person has, bona fide, exclusive possession for a term at a rent (with the landlord providing neither attendance nor services) the result is a tenancy even though the agreement is called a licence by both parties. See *Street v Mountford (1985)* (discussed post). As a result of the decision of the House of Lords in this case an exclusive licence is now to be construed as a tenancy.

3. The right of exclusive possession is not infringed by a proviso in the lease for the landlord to enter the premises to inspect the state of the repair.

3.7. Lease/Licence Distinction

1. A licence can be described as a permission given by the owner or occupier of the land to the licensee to allow him to do some act which would otherwise be a trespass; *Thomas v Sorrell (1963)*. If the occupier enjoys exclusive possession of the premises the agreement is a tenancy. If there is no exclusive possession the agreement cannot be a lease.

2. The following appear from the authorities to be relevant guidelines for the determination of the lease/licence dichotomy if there is no exclusive possession.

   (a) the terminology used in the document;

   (b) the intention of the parties;

   (c) the nature of the relationship between the parties;

   (d) whether a commercial 'charge' is being made. Of these, (and (are the most important.

3. Use of words such as 'tenancy', 'rent' or 'repairing covenant' is prima facie evidence of a lease. The terminology of the agreement should not be allowed to disguise its true substance; *Addiscombe Garden Estates v Crabbe (1958)*.

4. In *Street v Mountford (1985)* the defendant had been occupying a single furnished room under a licence agreement and, by agreement with the 'landlord', extended her occupation to the whole of the top floor under an exclusive residential licence. This agreement contained several conditions, which stated, *inter alia*, that the licence placed an obligation upon the occupier to pay for 'damages and breakages' and prohibited the keeping of children and pets. The bottom of the agreement contained a declaration that "I understand and accept that a licence in the above form does not and is not intended to give me a tenancy protect by the Rent Acts'.

   The Court of Appeal held that it is possible in law for the owner of a building to grant a right of exclusive possession without creating a tenancy if he ensures that there is manifested the clear intention of both parties that the rights granted are merely those of a personal right of occupation and not those of a tenant. In the instant case, the defendant held under an exclusive possession licence. The House of Lords reversed this decision and held that where residential accommodation was granted with exclusive possession for a term at a rent (the landlord providing neither attendance nor services) the result was a tenancy even though the agreement was called a licence and the occupier had signed a declaration that it did not give a tenancy protected by the Rent Act.

5. In *Bruton v London & Quadrant Housing Trust (1999)* the House of Lords held that when a housing trust which had a licence from the local authority to use a council property as short-term accommodation for homeless people, made an agreement granting the right to exclusive possession of a self-contained flat on the property at a weekly rent, that amounted to a lease even thought the agreement expressly stated that it was creating a licence.

   The House of Lords held that the meaning of an agreement as to the extent of possession depends upon the intention of the parties to be objectively ascertained by reference to the language and the relevant background. On the facts the following circumstances were

insufficient to displace the prima facie conclusion based on *Street v Mountford (1985)*
(i) the trust was a responsible landlord performing socially valuable functions;
(ii) the trust had agreed not to grant tenancies;
(iii) the appellant had agreed he was not to have a tenancy and
(iv) the trust had no estate out of which it could grant a tenancy.

6. The previous decisions of the Court of Appeal in *Somma v Hazlehurst (1978)*, *Aldrington Garages v Fielder (1978)* and *Sturolson v Weniz (1984)* have been overruled by the House of Lords *Street v Mountford*.

7. It is still possible to create licences to occupy premises provided they do not, when created, grant exclusive possession. There may be a different conclusion in the case of business premises where *Street v Mountford* does not seem to apply with the same rigour; *Dresden Estates v Collinson (1989)*.

8. If an employee is provided with living accommodation by his employer and his occupation is required as part of his agreement he will be a service licensee or occupant . In *Dobson v Jones (1844)* a surgeon who lived for 19 years in a house in the hospital grounds was held to be a licensee because the location made it easier to call him in emergencies.

   If the occupation is merely convenient and not essential for the better undertaking of the employee's duties it will be a tenancy *(Hughes v Oversees of Chatham (1843)*.

9. The consequences of the lease/licence dichotomy may be summarised as:

   (a) Residential licences are not entitled to the full protection of the Rent Act 1977.

   (b) Licences of business premises fall outside the Landlord and Tenant Act1954 Part1I.

   (c) A licence is personal as between the parties and cannot be assigned.

10. In *Antoniades v Viliers (1988)* an unmarried couple occupied a bedroom, bedsitting room, kitchen and bathroom and each had signed a detailed agreement stating it was a personal licence. The House of Lords held that the two agreements were interdependent and created tenancies. In *A & Securities v Vaughan (1988)* four individuals had short term "licence" agreements. The House of Lords held that the periods of occupation did not create a joint tenancy.

3.8. Formalities

1. All leases must, in general, be granted by deed. Section 52(1) LPA 1925 provides "all conveyances of land or any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed". By s205 of the LPA 1925 'conveyance' includes a lease.

2. Section 21(1) does not apply to leases or tenancies not required by law to be made in writing (s52(2)(d). In this context s54(2) of the LPA 1925 is relevant as it provides that nothing "shall affect the creation by parole of leases taking effect in possession for a term not exceeding three years (whether or not the lessee is given power to extend the term) at the best rent which can be reasonably obtained without taking a fine". This means that for a lease to satisfy s54(2) of the LPA 1.925 it must

(a) take effect in possession, and

(b) to be for a term not exceeding 3 years, and

(c) be at the best rent obtainable.

3.9. Absence of Formalities

1. A lease made in writing when it should have been made by deed had a different effect in equity as compared to the common law before 187As a result of the *Judicature Act 1873* the conflict between equity and the common law was settled in favour of equity. The effect is that a person who holds under an informal lease has an agreement for a lease.

2. This was confirmed in *Walsh v Lonsdale (1882)*. W took a seven year lease of a mill from L under which L could demand one year's rent in advance from W. The parties failed to execute a deed but W was let into possession and paid rent quarterly in advance for eighteen months. L then demanded a year's rent and distrained for the amount due. It was held that as a result of the provision in the *Judicature Act 1873* to the effect that where the rules of equity and common law conflict, the rules of equity prevail, the view could not be taken that the plaintiff held two separate interests — i.e. a legal periodic tenancy and an equitable lease. He held under the agreement for a lease under the same terms in equity as if the lease had been formally granted. He was thus bound to pay rent in advance on the landlord's demand and the distress was therefore lawful.

3. Is a contract for lease as good as a lease? The answer is "no" for a number of reasons:

   (a) The grant, of specific performance is a discretionary remedy and will not be granted in all cases with 'the effect that the doctrine of Walsh v Lonsdale would be excluded. See Coats worth v Johnson (1886) (breach of tenant's covenant).

   (b) A contract for a lease is not a "conveyance" so the provisions of s62 of the LPA 1.925 do not apply, but the rule in Wheeldon v Burrows (1879) does apply.

   (c) A lease may confer a legal estate on the lessee and his assignment of the lease may pass to the assignee the lessee's rights and obligations. An agreement for a lease does not confer a legal estate and the benefits but not the burdens of any covenant are assignable.

   (d) A contract for a lease is an estate contract and will only be enforceable against third parties if registered as a land charge. A person who has failed to register may still enjoy some protection against third parties if he has gone into possession and has thus acquired a legal periodic tenancy.

3.10. Self-examination questions

1. Are there any formalities for an agreement for a lease?

2. Explain the provisions of s40 LPA 1925.

3. What do you understand by part performance?

4. What are the essential requirements of a valid legal lease?

5. Is a lease “for duration of the war” valid?
6. What do you understand by the term “exclusive possession”?
7. What are the key issues after Street?

4. TYPES OF TENANCIES AND LEASES

Section A

Synopsis: PerIodic Tenancies; Fixed Term Tenancy; Tenancy at Will; Tenancy at Sufferance; Tenancy by Estoppel; Perpetually Renewable Leases.

4.1. Periodic Tenancies

1. The total duration of a periodic tenancy is not fixed from the outset but it continues automatically from period to period until it is terminated at the end of the period. This period may be weekly, monthly, quarterly, or yearly.
2. They are regarded by the law as being for a fixed period, e.g. a 'yearly lease' is a lease for one year and if it is not terminated it is regarded as being for another fixed period of one year, and so on (See *Re Midland Railway Company's Agreement (1971)*.

   Expressly

   (a) This can be by the use of such words as "from year to year" or "to T as a yearly tenant". A lease "to T at £250 per year" would be a yearly lease and a lease "to T at £150 per year payable monthly" would also create a yearly rather than a monthly lease.

   (b) Impliedly

   i) A tenant who holds over after the expiration of a fixed term tenancy becomes at common law a tenant at will or on sufferance, but when he pays, or agrees to pay, rent on the same terms as under the former lease a periodic tenancy will arise in relation to the period in respect of which rent is being paid.

   ii) The implied tenancy will be on such of the terms of the previous tenancy which are not inconsistent with a periodic tenancy. See *Alder v Blackman (1953)* and *Pinero v Judson (1829)* (covenant to paint every three years is inconsistent).

4.2. Fixed Term Tenancy

1. A fixed term tenancy can be of any length and comes to an end automatically on the expiration of the term. No notice to quit is required to bring the tenancy to an end. This is the most common form of tenancy currently encountered, especially in respect to business premises.

4.3. Tenancy at Will

1. A tenancy: at will arises when a tenant occupies land with the consent of the owner on the terms that either party can bring the tenancy to an end at any time. It can be created either expressly: *(Manfleld vBotchin (1970))*, or impliedly: (*Wheeler v Marcer (1957)*) but express agreement is the normal means of creation so as to avoid creation of a periodic tenancy.
2. The landlord is entitled to monetary compensation for the 'occupation and use' of the premises (*Howard v Shaw (1841)*). If the landlord accepts payment of rent the tenancy at

will is converted into a legal periodic tenancy unless it has been expressly created: (*Manfield v Botchin (1970)*).

3. It is uncertain whether a tenancy at will is within the definition of a term of years for the purposes of s1 LPA 1925 and may therefore be an equitable interest. A tenant is entitled to the protection of the Rent Act 1977 where applicable (see Chamberlain v Farr (1942), but a business occupant is not entitled to the protection of the Landlord and TenantAct 1954 Part II (See Wheeler v Mercer (1957)).

4. The tenancy at will may be determined by:

   (a) death of either party;

   (b) conversion into a periodic tenancy;

   (c) any act inconsistent wit a tenancy at will, e.g. if the landlord demands possession of the premises.

4.4. Tenancy at Sufferance

1. A tenancy at sufferance arises where a tenant occupies land without his landlord's consent by holding over after the expiration of the lease. It cannot be created by agreement since it is of the essence of a tenancy at sufferance that the landlord does not agree to its existence.

2. The landlord can claim possession at any time and the tenant can bring an action in trespass or ejectment against third parties. Subsequent events may result in the following:

   (a) if the landlord requires the tenant to quit the tenant becomes a trespasser;

   (b) if the landlord signifies his consent the tenant becomes a periodic tenant;

   (c) if the tenant retains possession for twelve years without paying rent, he defeats the landlord's rights.

   They are extremely rare in practice because most tenants are given some form of statutory protection once the agreed tenancy is terminated.

4.5. Tenancy by Estoppel

1. If a person purports to grant a lease of land in which he has no estate, he is estopped from repudiating the tenancy, and the tenant is estopped from denying that the landlord had title to grant the tenancy. Thus the tenant cannot escape the burden of his covenants by showing that the landlord could not grant the lease. See *Industrial Properties (Barton Hill) Ltd v Associated Electrical Industries (1977)*. The assignees of either party are also bound.

2. Once the landlord acquires an interest in the land sufficient to support the grant of the lease this "feeds the estoppel" and the tenant acquires a legal tenancy. See *Church of England Building Society v Piskor (1954)*.

4.6. Perpetually Renewable Leases

1. If a grant is made or a contract is made after 1925 which provides for the grant of a lease with a covenant for perpetual renewal it operates as a lease for 2,000 years. *(LPA 1922 s145 and Sch. 15).*

2. In *Caerphily Concrete Products v Owen (1972)* a lease was granted in 1963 for a five-year term which contained a clause "the landlord will on the written request of the tenant grant to him a lease of the demised land for a further term of five years at the same rent and containing the same terms." Held — the grant took effect as a lease for 2,000 years.

3. If a lease is classified as perpetually renewable and converted to a 2,000-year term, the following statutory provisions apply:

   (a) (The lessee or his successor in title may terminate them by giving at least ten days notice in writing before any date at which, but for its conversion, it would have expired if no renewal had taken place:

   (b) (The lessee is bound to register with the lessor every assignment or devolution of the term within six months of its taking place:

   (c) (A lessee who assigns the term to another thereafter ceases to be liable on the covenants contained in the lease. See s145 of the LPA 1922.

4.7. Self-examination questions

1. What is a periodic tenancy and what are the methods of its creation?
2. In what way does a fixed term tenancy differ from a periodic tenancy?
3. What are the essential characteristics of a tenancy at will?
4. How can a tenancy at will be determined?
5. When does a tenancy at sufferance arise?
6. What do you understand by a "tenancy by estoppel"?
7. In what circumstances does a perpetually renewable lease arise?

5. COVENANTS IN LEASES

Section A

Synopsis: Introduction; Express Covenants; Implied Covenants; Usual Covenants.

5.1. Introduction

1. Covenants can be created upon entering into a lease in two ways, either
   (a) expressly, or
   (b) by application.

   In the former the covenants are set out in the lease between the parties whilst in the latter case covenants are implied by the general law or by statute.

5.2. Express Covenants

1. An express covenant will stipulate the rights and obligations of both the landlord and the tenant; the covenants imposed will vary according to the subject-matter of the lease. In modern leases, especially of commercial property, the parties wish to know their exact rights and liabilities and, for this purpose, they will be expressly stated, frequently at considerable length.
2. The main express covenants normally found in leases are those dealing with the basic terms of the agreements:
   (a) rent
   (b) repairs
   (c) sub-letting and assignment
   (d) mode of user
   (e) alterations or improvements

5.3. Implied Covenants

1. In general the parties to a lease will incorporate the specific covenants mentioned above but sometimes there are no express covenants or some are omitted. In such circumstances, where the lease is silent, the law will imply only such covenants as are needed to give effect to the lease.
2. In the absence of an express covenant the following covenants will be implied into the lease:
   (a) Covenants by the landlord
      (i) Quiet enjoyment
      (ii) Not to derogate from grant
   (b) Covenants by the tenant

(i) Pay rent

(ii) Pay rates and other outgoings

(iii) Use the building in a tenant-like manner

(iv) Not to question the landlord's title

(v) Not to commit waste

3. The law will not imply any other covenants and is always reluctant to do so. See, for example, *Duke of Westminster v Guild (1983)*. However, it may do so to make the lease workable or for "business efficacy".

5.4. Usual Covenants

1. Where the lease is preceded by an agreement for a lease there is an implied term that the lease, when executed, shall include the "usual covenants" which will, on execution, become express covenants. (See also *Chester v Buckingham Travel Ltd 1981)*).

2. The usual covenants are as follows:

   (a) Usual covenants by the tenant:

   (i) to pay rent

   (ii) to pay rates and taxes

   (iii) to keep and deliver up the premises in repair

   (iv) to allow the lessor to enter and view the state of repair

   (b) Usual covenants by the landlord:

   (i) quiet enjoyment

3. It is clear from *Chester v Buckingham Travel Ltd (1981)* that all the circumstances of the case need to be considered including evidence of conveyancers, precedents, the character of the property and local customs.

Section B

Synopsis: Quiet Enjoyment; Not to Derogate from Grant

5.5. Quiet Enjoyment

1. The tenant can recover damages from the landlord if his enjoyment of the land is substantially disturbed by the acts of either the landlord or someone claiming under him. The landlord's liability determines with his interest: *Baynes and Company v Lloyd and Sons (1916)*.

2. The disturbance complained of must be actionable and must be "so substantial or intolerable as to justify the tenant in leaving the demised premises." In *Browne v Flower (1911)* the landlord was held not liable when he erected a fire escape affording a view into the tenant's bedroom; the interference must be of a physical nature and not merely an

interference with comfort or privacy. (See also *Jenkins v Jackson (1888)* and *Phelps v City of London Corporation (1916)*.

3. A landlord was held liable in damages to the tenant when he obstructed the windows and doors to the tenant's shop by erecting scaffolding:

   Owen v Gadd (1956), and for threats of physical violence and eviction in *Kenny v Preen (1963)*. Cutting off gas and electricity is a breach of the covenant: *Perera v Vandiyar (1953)*. There may be circumstances in which the covenant of quiet enjoyment also covers the acts of a superior landlord. In *Queensway Marketing Ltd v Associated Restaurants Ltd (1984)* superior landlords were held to be in breach of covenant to sub-underlessee by the erection of scaffolding.

1. Exemplary damages may be awarded for breach of covenant where appropriate: *Asghar v Ahmed (1985)*, in which the Court of Appeal approved of the award of £1,000 damages to a tenant who had been wrongfully evicted by this landlord.

2. A landlord is not liable under this covenant for lack of sound proofing in flats and houses; *Mills v Southwark LBC (2000)*.

5.6. Not to Derogate from Grant

1. If the landlord lets land he must not do anything which makes the land unfit for the purpose for which it is let. In *Aldin v Latimer Clark (1894)* premises were let as a drying house and it was held that the landlord could not build so as to divert the flow of air to the premises.

2. The carrying out of alterations that will make demised flat less comfortable to live in is not a derogation from grant: *Kelly v Bettershell (1949)*, neither is letting adjoining premises for the carrying on of a competing business: *Port v Griffiths (1938)*.

5.7. Self-examination questions

1. What are the two main types of covenants in leases?
2. In what circumstances will a covenant be implied in a lease?
3. What are the "usual covenants" and when will they be implied into a lease?
4. What do you understand by a covenant for quiet enjoyment?
5. What types of disturbance are actionable under the covenant for quiet enjoyment?
6. Explain the landlord's covenant not to derogate from his grant?

6. COVENANTS: RENT AND RENT REVIEW

Section A

Synopsis: Payment of Rent; Rent Review Clauses

6.1. Payment of Rent

1. It is usual for the tenant's liability to pay rent to be in the form of an express covenant but where it is not, a covenant to pay the agreed rent will :be implied. The express covenant will be inserted to reinforce the formal reservation of the rent in the 'reddendum' which is inserted in the lease by the use of such words as 'yielding and paying up.
2. The payment of rent is traditionally regarded as compensation to the landlord for the tenant's exclusive possession of the land but it was said in *Bailey v Memorial Enterprises (1974)* to refer to any contractual sum to which a landlord becomes entitled for the use of his land.
3. Rent is always payable in arrears unless it is expressly agreed to be payable in advance. Rent may be payable in kind (though not tendered in kind without express agreement) but it must be certain or must be so stated in a formula that it can be ascertained with certainty:
4. Rent continues to be payable unless the lease contains a rent suspension clause, e.g. on account of physical destruction of the premises, or can be said to be frustrated: *National Carriers v Panalpina (Northern) Ltd (1981)*.
5. Rates paid by the tenant to the local authority do not constitute rent.

6.2. Rent Review

1. Most modern leases, especially of business premises, contain a rent review clause, the purpose of which is to ensure that the rent keeps pace with inflation. In *United Scientific Holdings v Burnley Borough Council (1977)* Lord Salmon stated "Tenants who are anxious for security of tenure require a term of reasonable duration, often twenty one years or more. Landlords, on the other hand, are unwilling to grant such leases unless they contain rent revision clauses ..."
2. There are several essential matters that must be stipulated in such a clause in order that it shall be effective:
   (a) Stipulation as to time in the service of notices
   (b) Interval(s) of rent review
   (c) Formula and machinery for determining the new rent
   (d) Provisions in event of disagreement
3. The rent review procedure is usually activated by the service of a 'trigger' notice. This will be served by the landlord on the tenant by an agreed date and the main problem is

whether a failure to keep strictly to the timetable set in the rent review clause will result in the landlord losing his rights to a reviewed rent.

In *United Scientific Holdings v Burnley Borough Council (1977)* the general rule was laid down by the House of Lords that time is not of the essence in the service of such a notice. To this rule the following exceptions apply:

(a) Where time is expressly made of the essence;

(b) Where there is an inter-relationship between the rent review clause and some other clause: *Al Saloom v Shirley James Travel(1981)*

(c) Where there are contra-indications in the surrounding circumstances of the lease. A provision that if the tenant failed to serve a counternotice on the landlord's 'trigger' notice the increase specified by the landlord was "deemed to be the increased rent" was held to be a contra-indication in *Henry Smith's Charity Trustees v A WADA Trading and Promotion Services Ltd (1983)*. Contrast with *Mecca Leisure Ltd v Renown Investment (Holdings) (1984)*. The decision in the Henry's Smith's and Mecca Leisure cases gave rise to conflicting decision in *Greenhaven Securities Ltd v Compton (1985)* and *Taylor Woodrow Property Co Ltd v Lonrho Textiles Ltd (1985)*. In *Starmark Enterprises Ltd v CPL Distribution (2000)* the Court of Appeal held that *Mecca* was incorrect.

4. Where time is not of the essence extreme delay will not prejudice the landlord's rights. Thus in *Amherst v James Walker (Goldsmiths and Silversmiths) (1983)* a delay of three years was not fatal to the landlord and it was an express finding of the Court of Appeal that the notice need not be served within a 'reasonable' time.

5. The interval of rent review should be expressly stated, e.g. on a 21 year lease the rent review clause may become operative in the seventh and fourteenth years. If this is not stipulated the rent review clause may be inoperable. (See also *Brown v Gould (1972*)).

6. The formula for ascertaining the reviewed rent (usually by reference to the open market rent) and the machinery for its implementation must be stipulated, e.g. by agreement in writing. It is not clear whether the courts are willing to intervene in the absence of such stipulations: contrast *Beer v Bowden ('1981)* with *King v King (1980)*.

7. Some other clauses in the lease sometimes have an effect on the determination of the new rent under a rent review clause, namely:

   (a) improvements undertaken to the premises, irrespective of who carried them out: *Ponsford v HMS Aerosols (1978)*; *GREA v Williams (1979)*;

   (b) user clause: *Plinth Property Investments v Mott, Hay and Anderson (1978)*. See also *Law Land Co Ltd v Consumers Association Ltd (1980)*.

8. A well-drafted lease should always provide for a procedure in the event of disagreement between the landlord and the tenant on the new rental level. This will commonly take the form of a provision of negotiation by the parties (who may be assisted by their surveyors) and in the event of disagreement for the appointment by the President. of the Royal Institution of Chartered Surveyors of a surveyor to act either as an arbitrator or as an independent expert.

9. The rent review clause may stipulate that the revised rent is to be on the basis that there is no rent review clause in the hypothetical lease.

10. If the lease is silent on the matter and the premises are in a state of disrepair due to a breach of the tenant's covenant the diminishing effect on the rent of the failure of the tenant to repair should be disregarded: *Harmsworth Pension Funds Trustees Ltd v Charrington Industrial Holdings Ltd (1985)*.

11. 1Some rent review clauses provide that the revised rent should be determined on the basis of the assumption that the un-expired term does not contain any provisions for rent review. In *National Westminster Bank plc v Arthur Young McCleIland Moores & Co (1984)* the revised rent was determined on the basis that there were no provisions for review in the un-expired term. A different conclusion was reached in *Equity & Law Life Assurance Society plc v Bodfield Ltd (1985)* and *Datastream International Ltd v Qakeep Ltd (1985)*. The law is now as stated in *British Gas Corporation v Universities Superannuation Scheme (1986)*.

6.3. Rent Review: Modern Lease Practice and Problems

1. The modern commercial lease will contain a rent review clause which provides that the rent review is to be on the basis of the "hypothetical lease" the terms of which may, or may not, be similar to the terms of the actual lease.

2. In interpreting the "hypothetical lease" the following are a selection of the useful cases to which reference must be made:

   (a) *FR Evans (Leeds) Ltd v English Electric Co Ltd (1978)* The court held that the "willing lessee" was an abstraction, a hypothetical person seeking qualities which those premises could fulfill, but unaffected by personal difficulties.

   (b) *British Gas Corporation v Universities Superannuation Scheme Ltd (1986)*. The court held that in the absence of any clear words indicating the parties' intention to enter into an unusual bargain the correct construction was that the hypothetical letting was to be on the terms of the actual lease excluding only the rent payable before the review date but including the provisions for rent review.

   (c) Other issues to consider include:

      (i) Assumption as to vacant possession *Laura Investment Co Ltd v Havering LBC (No. 2) (1993)*.

      (ii) Assumption as to fitting out: *London & Leeds Estates Ltd v Paribas Ltd (1993)*.

      (iii) Assumption as to length of term: *Lynnthorpe Enterprises Ltd v Sidney Smith (Chelsea) (1990)*.

      (iv) Assumption as to rent-free periods: *Co-operative Wholesale Society v National Westminster Bank plc (1995)* (four cases were heard on this appeal).

      (v) Disregard tenant's improvements: *Ponsford v HMS (Aerosols) Ltd (1978)*.

6.4. Self-examination Questions

1. How is the tenant's liability to pay rent usually expressed?

2. How is ‘rent’ defined?
3. Is rent always payable after the destruction of the premises?
4. What is the purpose of a rent review clause?
5. What essential elements must such a clause generally contain?
6. When is time not of the essence in a rent review clause?
7. How willing are the courts to imply terms into a rent review clause?
8. What effect can other clauses in a lease have on such a clause?
9. What do you understand by the term ‘contra-indication’?

7. REPAIR OF THE PREMISES

Section A

Synopsis: Introduction; Meaning of Repair, Repair, Improvement and Renewal; Standard of Repair; Fair Wear and Tear

7.1. Introduction

1. Leases usually contain a covenant by the tenant to repair and keep the tenanted property in repair during the term of the lease. It is also usual to include a distinct covenant by the tenant to repair defects within a specified time of being requested by the landlord to do so. These will generally be coupled with a covenant by the tenant to permit the landlord or his agents to enter and view the state of repair of the premises.

2. In leases of residential property of less than seven years there is implied into the lease an obligation on the landlord to repair the premises: s11 of the *Landlord and TenantAct 1985*, but the fact that one party to a lease may not be bound to repair does not in itself place an obligation on the other party and therefore there may be deadlock between the parties.

3. The fact that one party is liable to undertake repairs does not release the other party from liability to third parties: *Brew Bros v Snax (1970)*. Where the landlord is an institution it will normally favour a 'clear lease' with all the repairing obligations placed on the tenant.in return for a lower rental (see also *O'May v City of London Real Property Co (1982)*.

7.2. Meaning of Repair

1. The tenant's (or landlord's) liability will depend on a number of factors the most important of which is the meaning of the word 'repair'. The following are examples of 'standard' covenants:

   (a) Keep in repair' — binds the tenant to keep the premises in repair at all times during the currency of the tenancy and to put the premises into repair at the outset: *Luxmore v Robson (1818)*.

   (b) 'Leave in repair' — the tenant must put the premises in repair before leaving the premises regardless of their prior state.

   (c) 'Put in repair' the tenant must put the premises in repair at the beginning of the lease.

   (d) 'Good habitable or tenantable repair' — in *Proudfoot v Hart (1890)* Lord Esher stated that there was no difference between these phrases.

   The standard of repair required is considered in paragraph 7.4 below.

7.3. Repair, Improvement and Renewal

1. The main practical difficulty is often to distinguish between a repair and a renewal or improvement. If the works required exceed 'repair' then the tenant will not be liable, if he

has covenanted only to repair. An examination of the following cases illustrates the problem well: *Brew Bros v Snax (Ross) Ltd (1970)*. The flank wall of premises began to tilt because foundations have been undermined. Underpinning work was to cost £8,000 and the premises were worth only £7,500 - £9,500 after rebuilding. Held — work amounted to renewal and was not within the covenant to repair. In *Lurcott v Walkeley (1911)*, the court held that rebuilding as wall with concrete foundations, footings and a damp proof course in accordance with the *London Building Act* was a repair.

2. In *Ravenseft Properties Ltd v Davstone (Holdings) Ltd (1979)* Forbes J. said that it was always a question of fact and degree whether what the tenant was being asked to do was a repair or whether it would involve giving back to the landlord something wholly different from that which he demised. (See also *Sotheby v Grundy (1947*). In *Elmcroft Developments v Tankersely-Sawyer (1984)* the insertion of a damp proof course was held to be a repair since it did not involve the provision of a wholly different thing from that which was demised.
3. Disrepair has been defined as a "physical deterioration in the state of the premises"; *Post Office v Aquarius Properties Ltd (1992)*.
4. In *Mason v Tota/ Fina Elf (UK) Ltd (2003)* the court held that there was no authority for the proposition that work which is purely anticipatory, namely, where no damage or deterioration in the condition of the subject matter of the covenant has occurred (or has yet occurred to an extent sufficient to constitute a breach of covenant) can be called for or the cost of doing it recovered.

7.4. Repair Works and Non-Repair Works

Examples of works held to be outside the covenant

1. *Lister v Lane and Nesham (1893)*
   Tenant's covenant to substantially repair and keep the demised premises in repair had not to require the underpinning of the walls which were erected on rotting foundations.
2. *Wright v Lawson (1903)*
   Tenant covenanted to "substantially and effectually repair, maintain, uphold ...". A bay window developed cracks and it was held that erecting a new bay window with columns could not be regarded as repair of the old bay window.
3. *Sotheby v Grundy (1947)*
   Underpinning and removal and replacement of the foundations held to be so extensive as to be outside the covenant to repair.
4. *Pembrey v Lamdin (1940)*
   Landlord's covenant to keep the external walls in good and tenantable repair. Held that repair did not require the insertion of a damp proof course (DPC) where none had previously existed; all that was required was the remedy of the resulting dry rot.
5. *Wates v Rowland (1952)*
   Obligation was only to keep the premises in repair in the condition in which they were then demised and, as they were old premises, it did not extend to preventing a recurrence of the trouble.

6. *Collins v Flynn (1963)*
   Tenant covenanted to sell and substantially repair, amend, renew etc. Held not to require the rebuilding of foundations where the disrepair was caused by subsidence.

7. *Brew Bros Ltd v Snax (Ross) (1970)*
   Underpinning, rebuilding a tilting flank wall and replacing the drains at a cost of £8,000 (with market value of building in repair between £7,500 and £9,500) held to be renewal.

8. *Yanover vRomford Finance & Development Co Ltd (1983)*
   Proposed remedial work of the installation of a DPC held to be a major building operation outside the landlord's covenant.

9. *Halhard Property Co Ltd v Nicholas Clarke Investments Ltd (1983)*

   Rebuilding of a jerry-built structure at the rear of the premises held to be outside the scope of repair.

Examples of works held to be within the covenant

1. *Lurcott v Wakely and Wheeler (1991)*
   Tenants held liable to rebuild the front wall of a 200 year old house under a covenant "well and substantially to repair and keep in thorough repair and good condition."

2. *Morcom v Campbell-Johnson (1956) 1 QB 106*
   Replacement of the old drainage and cold water systems by their modern equivalents, although resulting in making the dwelling-house better than it was before held to be a repair and not an improvement.

3. *Ravenseft Properties Ltd v Da vstone (Holdings) Ltd (1979)*
   Repair of displaced cladding held to include replacement with expansion joints even though no expansion joints were previously inserted.

4. *Smedley v Chumley & Hawke Ld (1982)*
   Landlords who covenanted to "keep the main walls and roof in good structural repair and condition throughout the term and promptly to make good all defects due to faulty materials or workmanship in the construction of the premises" held liable for extensive underpinning and rebuilding restaurant premises.

5. *Elmcroft Developments Ltd v Tankersley-Sawyer (1984)*
   Landlord's covenant to "maintain and keep the exterior of the building and the roof, the main walls, timbers and drains thereof in good and tenantable repair." Repair to damp basement in refurbished flat held to require insertion of effective DPC in place of old ineffective slate DPC.

6. *Elite Investments Ltd v TI Bainbridge Silencers Ltd (1986)*
   Tenants who covenanted to "well and substantially repair, replace" etc. held liable to replace a roof at the end of its useful life where the cost of replacement was £84,364 and the value of the premises in repair was £140,000 to £150,000.

7. *Stent v Monmouth District Council (1987)*
   Landlord who covenanted to "repair and maintain the structure and exterior of the dwelling-house" held liable to replace a rotting wooden door with an aluminium door.

7.5. Standard of Repair

1. Whatever the wording of the particular covenant the standard of repair is as stated by Lopes L J in *Proudfoot vHart (1980)* as "such repair as having regard to the age, character and locality as would make it reasonably fit for the occupation of a reasonably minded tenant of the class likely to take it."

2. The standard of repair remains fixed throughout the currency of the lease. In *Calthorpe v McOscar (1980)* a former country house was converted, after the grant of the lease, into lower market apartments. Held the tenant has to repair to the earlier standard. A new standard is set when a periodic tenancy arises at the termination of a fixed term tenancy: *Richardson v Gifford(1834).*

7.6. Fair Wear and Tear

1. An express proviso of exemption for 'fair wear and tear' is frequently

2. found in leases. Such a proviso will not be implied.

3. Where the covenant is inserted in a lease it exempts the party from liability to repair caused by the normal action of time and weather and from the normal and reasonable user for which the premises are let:

   Gutteridge v Munyard (1834). The exception for "fair wear and tear" does not, however, relieve the tenant of his obligation to take steps to avoid further damage: *Regis Property Co Ltd cDudley(1954)*

7.7. RICS Guidance Note on Dilapidations

1. The RICS produces a guidance note on dilapidations. Now in its fourth edition, it provides practical guidance on the inter-relationship between dilapidation principles, procedure and practice.

Section B

Synopsis: Landlord and Tenant Act1985; Tenant-like User

7.8. Landlord and Tenant Act 1985 s8

1. The *Landlord and TenantAct 1985* offers two exceptions to the general rule that a landlord incurs no contractual liability or obligation to repair unless he expressly undertakes to do so.

2. The *Landlord and Tenant Act 1985 s8* applied to contracts made after 1957 for the letting of a house or part of a house at a rent not exceeding £80 per annum in inner London and £52 per annum elsewhere. The provisions do not apply where the house is let for three years or more and the tenant has undertaken to make the house reasonably fit for habitation.

3. Where the section applied a condition is implied that the house is fit for human habitation at the commencement of the tenancy and that the landlord will keep the house in such a

condition during the tenancy. The duty may be wider than a duty to repair as the landlord may be liable for the presence of pests, but once the house is fit for human habitation further repair will depend on the provisions of the lease. (See also *Summers v Salford Corporation (1943)*.

7.9. Landlord and Tenant Act 1985 sections 11-16

1. In the case of dwelling houses let after October 1961 for a term of less than seven years sections 11–16 of the *Landlord and Tenant Act 1985* imply a covenant by the landlord:

   (a) to keep in repair the structure and exterior of the dwelling house (including drains, gutters and external pipes); and

   (b) to keep in repair and proper working order installations for the supply of water, gas and electricity.

2. The landlord cannot contract out of these obligations and can either by sued by the tenant for damages for breach or be subject to action by the local authority. The lease will, however, fall outside the provisions in the following cases even though granted for less than seven years:

   (a) the building's main use is not as a dwelling house;

   (b) the lease gives the tenant an option to renew for a term which together with the original terms amounts to seven years or more;

   (c) the tenancy is within the *Agricultural Holdings Act 1986*,

   (d) the lease is granted by renewal under the *Landlord and Tenant Act 1954 Part II*.

3. In *Campden Hill Towers v Gardner (1977)* there was some disrepair to the installations involved in servicing the flat but it was held that the landlord's duty was only to the repair of the specified installations in the flat and therefore did not extend to repair installations outside the flat. Changes made by the *Housing Act 1988* now cover this situation by providing that the covenant covers installations situated outside the demised premises but affecting the same.

   In *Quick v Taff- Ely Borough Council (1985)* the Court of Appeal held that the carrying out of repairs under the *1961 Act* (now the 1985 Act) could involve curing an inherent defect if that was the only way to repair the premises.

   In *Nfazi Services Ltd v Van der Loo (2004)* the Court of Appeal held that on a proper interpretation of section 11 (1A) (b) (i) of the *Landlord and Tenant Act 1985* a landlord's liability for maintenance and repair extended only to an installation, or the defective portion of an installation, in that part of the building in which the landlord had an estate or interest.

   The implied covenant to repair did not extend to installations located in parts of a building in which the lessor did not have an estate or interest, even if the lessor had an estate or interest in other parts of the same building. In the instant case, the landlord had no estate or interest in any part of the building except the top floor flat. Thus, if the tenant suffered damage as a result of some structural disrepair in the lower part of the building, he had no remedy against the landlord under the 1985 Act.

4. The covenant does not oblige the landlord to do any work for which the tenant is liable by virtue of his duty to use the premises in a tenant-like manner.

5. The landlord's duty does not arise under any implied or express covenant unless he has had notice of the want of repair. In *O'Brien v Robinson (1973)* a landlord was held not liable for personal injuries caused by the collapse of a ceiling having received no complaint for three years. The professional knowledge of a skilled servant may be imputed to the landlord: *Sheldon v West Bromwich Corporation (1973)*. In *McGreal v Wake (1984)* the Court of Appeal stressed the need to give the landlord notice of want of repair to enable the enforcement of obligations under the 1985 Act. In *Bradley v Chorley Borough Council (1985)* the Court of Appeal held that a landlord's obligation to effect repairs carries with it an obligation to make good any consequential damage to decorations.

6. The case law discussed in relation to the tenant's covenants is as applicable to the landlord's covenants.

7.10. 2.3 Tenant-Like User

1. One of the tenant's implied covenants is that he will use the premises in a tenant-like manner. The tenant must take proper care of the premises: *Marsden v Edward Heyes Ltd (1927)*. When he is a yearly periodic tenant he must keep the premises wind and water tight: *Webb v Porter (1916)*.

2. In *Warren v Keen (1954)* Denning L J (as he then was) commented that the tenant "must take proper care of the place. He must, if he is going away for the winter, turn off the water and empty the boiler. He must clear the chimneys, when necessary, and also the windows. He must unstop the sink when it is blocked by his waste. In short, he must do the little jobs about the place which a reasonable tenant would do." In Wycombe Health Authority v Barnett (1982), the tenant was held not liable for damage caused by a burst pipe while away from the house during a cold weather. Neither was it the landlord's responsibility to lag the pipes.

Section C

Synopsis: Introduction to Landlord's Remedies; Damages; Forfeiture; Self-Help; Leasehold Property (Repairs) Act 1938

7.11. Introduction to Landlord's Remedies

1. If the tenant defaults on his repairing obligations the landlord has, depending on the circumstances, a choice of remedies available to him. He may bring an action .for damages against the tenant or he may seek forfeiture of the lease. He may also do the necessary repairs himself and recover costs from the tenant. At the end of the term damages are the only available remedy.

7.12. Damages

1. An action for damages for disrepair may be commenced by the landlord at any time during the currency of the tenancy or after its expiry. During the term the damages may amount

to the diminution in the value of the freehold reversion but thereafter the actual cost of the repair is the pertinent factor.

2. The *Landlord and TenantAct 1927 s18(1)* imposes a limit on damages for disrepair on all covenants to put, keep, or leave in repair. The section has two effects in that (i) whenever the action is commenced the landlord cannot recover more than the amount of diminution in the value of the reversion and (ii) no damages are recoverable for failure to put or leave the premises in repair at the termination of the lease if it is shown that the premises are at, or shortly after, termination to be demolished or altered so as to render the repairs valueless. The onus of proof is on the tenant: *Hibernian Property Co Ltd v Liverpool Corporation (1973)*

3. In considering the measure of damages and section 18 of the *Landlord and Tenant Act 1927* regard should be had to the following:

   (a) Damages cannot exceed the amount by which the value of the reversion is diminished. The reversion is valued at the date of termination: Jacquin v Holland 1960).

   (b) No account should be taken of any increase in value to the landlord by virtue of the fact that there is an accelerated reversion; *Hanson v Newman (1934)*.

   (c) If one lease is immediately followed by another there must always be a notional moment when the unencumbered freehold is vested in the landlord so that the value of the reversion is as it came back into the hands of the landlord before re-letting: *Jacquin v HoIland*.

   (d) "Cost of Works" is still the starting point in ascertaining the measure of damages but future events can be taken into account insofar as they throw light on the value of the reversion at the-appropriate time *Smiley v Townsend (1950)*. Cannot claim as damages for damage occurring to premises - after lease has terminated: *Associated Deliveries v Harrison (1984)*.

   (e) The fact that the landlord has an undertaking from a new tenant to do the repairs does not go in diminution of damages *Haviland v Long (1952)*.

   (f) If a sub-lessee is in breach of his repairing covenant, the measure of damages is the diminution in the value of the sub- lessor's reversion, If the sub-lessee has notice of a superior landlord, the sub-lessor's liability to the superior landlord should be taken into account: *Lloyds Bank Ltd v Lake /1961)* and *Ebbetts vConquest(1895)*.

   (g) There may be no damage to the reversion because of the presence of sub-lessees under full repairing obligations to the head lessee (the sub-lessees being protected by the 1954 Act): *Family Management v Gray (1970)*.

7.13. Forfeiture

1. Forfeiture is the legal process by which the landlord forfeits the tenant's lease, e.g. because of lack of repair of the property. A proviso for re-entry and forfeiture must be present in the lease and no such proviso will be implied. There are technical rules for forfeiture and these are explained in detail later.

7.14. Self-Help

1. The landlord may wish to enter the premises and undertake the repairs himself. This he can do provided the right to enter and undertake repairs is reserved in the lease. The provision must allow for the money expended to be recoverable as a debt. If the clause stipulates the amount be recovered as 'T damages the landlord is subject to the *Leasehold Property (Repairs) Act 1938* and is unlikely to have satisfied the requirements of that Act; *Jervis v Harris (1996)*.

7.15. 3.5 Leasehold Property (Repairs) Act 1938

1. This applied to all proceedings for damages or forfeiture where the lease was granted for seven years or more and three years or more are un-expired at the date of the s146 notice. The Act applies to a "covenant or agreement to keep or put in repair during the currency of the tenancy" (see *Starrokate Ltd v Burry (1982)*). Where the *Leasehold Property (Repairs)Act 1938* applies the landlord cannot proceed without first serving a notice under *s146 of the LPA 1925* which must inform the tenant of his right to serve a counter-notice. If the tenant serves a counter-notice no further proceedings can be taken without leave of the court.
2. A notice under s146 of the *LPA 1925* must contain the following information:
   (a) specify the breach of covenant complained of; and
   (b) if the breach is capable of remedy, require the tenant to remedy the breach; and
   (c) in any case, require the tenant to make monetary compensation for the breach.
3. The court may not give leave under the *1938 Act* unless the landlord shows that the immediate remedying of the breach is required:
   (a) prevent substantial diminution in the value of the reversion;
   (b) by any Act of by law;
   (c) in the interest of any sub-tenant;
   (d) because it can be remedied at an expense that is relatively small in comparison with the much greater expense if the work was postponed;
   (e) because it would be just and equitable to grant leave.
4. In *Associated British Ports v C H Bailey plc (1990)* it was held that the landlord must prove both the breach and the availability of one of the grounds under the 1938 Act on a balance of probabilities.

Section D

Synopsis: Introduction to Tenant's Remedies; Damages; Deduction from Rent; Specific Performance.

7.16. Introduction to Tenant's Remedies

1. A tenant has three possible remedies against the landlord where he defaults on his express or implied repairing covenant:

   (a) Damages

   (b) Deduction from rent

   (c) Specific Performance

7.17. Damages

1. The usual procedure is to commence an action for damages in the County Court. The basic rules for the assessment of damages apply and there are no predetermined ceilings. In *Calabar Properties v Stitcher (1983)* the tenant was able to claim the cost of alternative accommodation as part of the damages. Unless an award of damages for repair is obviously wrong the Court of Appeal will not interfere; *Taylor v Knowsley BC (1985).*

   In *Wallace v Manchester City Council (1999)* the Court of Appeal laid down the following principles for the award of damages against a landlord.

   (a) The basis of the award of damages for disrepair involves a comparison of the property as it was for the period when the landlord was in breach of his obligation with what it would have been if the obligation had been performed.

   (b) Where a tenant remained in occupation (not withstanding the landlords breach) the loss requiring compensation was for the comfort and inconvenience which results when the premises was not in the state of repair required by the obligation. Such sum could be a global figure for discomfort and inconvenience or a notional reduction of rent, or a mixture, but the courts were not bound to make separate assessments under each head. Where a global sum for discomfort and inconvenience was proposed a judge could cross-check the proposed award by reference to the rent payable during the relevant period.

   (c) Where the landlords breach of covenant caused the tenant to sell or sublet the tenant could recover damages for the diminution of the price or recoverable rent.

   (d) In the circumstances, the tenant was entitled to damages for distress and inconvenience but not for diminution in value.

7.18. Deduction from Rent

1. Where the property is in a state of disrepair as a result of the landlord's breach of covenant and the landlord refuses to. comply with his obligations the tenant may undertake the repairs and deduct the cost of the repairs from the rent due: *Lee-Parker v lzett (1971)* and *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd (1979).* This procedure is not without risk and should only be used with caution.

7.19. Specific Performance

1. Specific performance may be available where the property is in a state of disrepair as a result of the landlord's failure to carry out his repairing obligations.

(a) (where the repairs relate to premises retained in the landlord's possession and damages are an inadequate remedy: *Jeune v Queen 's Cross PropertIes (1973)*;

(b) (under s17 of the *Landlord and Tenant Act 1985*. This applies to dwellings and empowers the County Court to order specific performance of a repairing covenant, but only at the discretion of the court.

2. Specific performance is not available to force the tenant to comply with his repairing obligations: *Hill vBarclay (1810)*.

However, in *Rainbow Estates Ltd v Tokenhold Ltd (1998)* the court held that specific performance of the tenant's repairing obligations would be ordered.

3. If the landlord fails to comply with his repairing obligations the court may order the appointment of a receiver so as to enable the tenant to have a surveyor or other suitably qualified person appointed to manage the property and to have the premises suitably repaired: *Hart v Elmkirk Ltd (1982)*.

7.20. Self-Examination Questions

1. Explain the meaning of 'repair' in landlord and tenant law.
2. What are the distinguishing features of repair; improvement and renewal?
3. Is: the standard of repair the same throughout the currency of a lease?
4. What do you understand by the exemption for fair wear and tear?
5. What are the effects of the *Landlord and Tenant Act 1985* apply?
6. In what circumstances do sections 11–16 of the *Landlord and Tenant Act 1985* apply?
7. Explain the covenant of 'tenant-like user'.
8. What are the landlord's main remedies for a tenant's default in his repairing obligations?
9. What is the effect of the application of the *Leasehold Property (Repairs) Act 1938* on the landlord's remedies for disrepair?
10. Outline the tenant's remedies for a landlord's failure to comply with his repairing obligations.
11. What is the significance of *Calabar Properties v Stitcher (1983)*?

8. LANDLORD'S LIABILITY AT TIME OF LETTiNG

Section A

Synopsis.- Fitness for Purpose; Defective Premises Act 1972

8.1. Fitness for Purpose

1. The general rule is that there is no implied term that the premises let will be suitable for any purpose. It is no tort to let tumbledown premises: *Robbins v Jones (1863)* but statute has amended some of the law by imposing the implied obligation in tenancies which are the subject of the *Landlord and Tenant Act 1985 s8*, which applies to lettings at low rents. Where this section applies the house is the subject of an implied undertaking that it is fit for human habitation at the commencement of the term.

2. Letting a furnished house or flat has always been an exception to the rule that the landlord has no liability at the time of the letting, for the common law implied a warranty that the premises were fit for human habitation at the commencement of the term. In *Smith v Marrable (1843)* Parke J, said that if the premises were so encumbered with a nuisance of so serious a nature that no person could reasonably be expected to live in them the tenant was at liberty to reject them. If he does so he is not liable for rent or for the use and occupation of the premises: *Wilson v Finch Hatton (1877)*.

3. In *Collins v Hopkins (1923)* the tenant was held entitled to recover his deposit on discovery that the room had recently been occupied by a TB patient. The obligation is strictly on at the time of the letting and does not continue for the length of the term: *Sarson vRoberts (1877)*.

8.2. Defective Premises Act 1972

1. Some of the common law has been over-ridden by the *Defective Premises Act s3* which has increased the landlord's liability by providing that if the tenant suffers damage as a result of any work performed by the landlord prior to the letting the fact of such letting no longer excludes any duty which would otherwise have arisen in negligence. This provision is of no assistance to the tenant where either the agreement of the tenancy was made before 1 January 1974, or where the landlord knew of the defect but did not create it himself.

   Of greater significance in this context are the provisions of s4 (1) which stipulate that:

   > "where premises are let under a tenancy which puts on the landlord an obligation to the tenant for the maintenance or repair of the premises, the landlord owes to all persons who might reasonably be expected to be affected by defects in the state of the premises a duty to take such care as is reasonable in all the circumstances to see that they are reasonably safe from personal injury or from damage to their property caused by a relevant defect."

   The section goes on to provide that a relevant defect is one which exists or continues to exist due to an act or omission by the landlord which constitutes a failure by him to discharge his maintenance and repairing obligations to the tenant. Further, a landlord who

has an express or implied power to enter and repair but the duty of care imposed by s4 only applies if the landlord knew or ought to have known of the defect.

8.3. Self-examination Questions

1. Is there any liability for the state of the premises at the time of letting?
2. What are the exceptions to the general rule?
3. How has the Defective Premises Act 1972 affected these rules?

9. ALTERING , IMPROVING, USING AND INSURING THE PREMISES

Section A

Synopsis: Alterations. Improvements; Improvements and Rent Review; Compensation for Improvements; Issues with Dilapidations.

9.1. Alterations

1. Leases frequently contain a tenant's covenant against altering or improving the premises. Unless so restrained a tenant is free to alter the premises, but he must comply with legislation such as the Town and Country Planning legislation.
2. An alteration is a change in the form or construction of a building and can include partial demolition and reconstruction. It refers to a physical alteration and not to a change in the use of a building.
3. A covenant against alterations is commonly qualified by a requirement that no alteration may be made "without the previous consent in writing of the landlord." Such a condition is subject to a statutory proviso that consent to the making of improvements is not to be unreasonably withheld: *Landlord and TenantAct 1927 s19(2)*. It should be noted that this subsection does not apply to absolute covenants prohibiting the making of alterations. See also *Woolworth v Lambert (1938)*.

9.2. Improvements

1. 'Improvements' is a narrower term than alterations. Whether or not the proposed works constitute an improvement of the premises for the purposes of the covenant must be considered from the tenants point of view: *Woolworth v Lambert (1938)*.
2. An improvement does not have to increase the value of the premises and can be constituted by the demolition and reconstruction of all the buildings on site: *Price v Esso Petroleum (1980)*. It should be noted that a tenant of business premises who claims compensation at the termination of his tenancy for the improvements he has undertaken to the premises must show that the improvement in question is "of such a nature as to be calculated to add to the letting value of the holding at the termination of the tenancy": *Landlord and Tenant Act 1927s3(1)(a)*.

9.3. Improvements and Rent Review

1. The market rent will normally be increased by improvements to the property. If they were made by the tenant or his predecessor in title at his own expense it would seem reasonable that on a rent review the new rent should be fixed disregarding their effect but in the absence of express provision the rent is assessed on the property as it stands including the improvements: *Ponsford v HMS Aerosols Ltd (1978)*. This will be so in the absence of an 'improvements to be disregarded' clause: *GREA Real Property Improvements v Williams (1979)*. If the lease is silent of the matter it is a question of construction whether or not improvements are to be taken into account: *Lear v Blizzard(1984)*.

2. Regard should be had to the inter-relationship between the provisions of the actual lease and the terms of the hypothetical lease at review.

9.4. Compensation for Improvements under the Landlord and Tenant Act 1927

1. The *Landlord and Tenant Act 1927* as amended by the *Landlord and Tenant Act 1954 Part II* provides that on quitting a holding at the termination of a lease, a business tenant (s17 of the *1927 Act*) may, in certain cases, claim compensation from the landlord for permitted improvements carried out by the tenant or his predecessor in title: si of the *1927 Act*. Compensation is not payable where the improvement is carried out
(i) pursuant to any contractual obligation, or
(ii) less than three years before the termination of the tease, or
(iii) if the landlord served notice that he is willing to grant a new lease: s2.

2. In order to qualify for compensation, the tenant must follow the statutory procedure strictly. Prior notice of the proposed work must be served on the landlord giving an opportunity for him to object, or to elect to undertake the work in consideration of a reasonable increase of rent, or such as the court determines: s3(1). If the landlord objects, and no agreement is reached, the tenant may apply to the court for a certificate that the work is a proper improvement. This will be granted if the work adds to the letting value of the holding, is reasonable to its character, and does not reduce the value of any other nearby property belonging to the landlord.

3. Where no objection is served, or a court certificate is obtained, the tenant may proceed with the work. A further certificate of completion must be obtained from the landlord or the court: s3(6). Any increased rent under a new lease or rent review should not include the value of permitted improvements carried out by the tenant or his predecessors in the business within the previous twenty-one years (s34 *Landlord and Tenant Act 1954* as amended).

4. The tenant's claim for compensation must be made within the appropriate time limits: s47 of the 1954 Act. The amount is the lesser of the net addition to the value of the holding resulting directly from the work or the reasonable cost of carrying out the work at the termination date less an allowance for obsolescence: sl(1) of the 1927 Act.

   As the basis of the compensation is the value of the improvements to the landlord, the amount may be reduced if the landlord intends to. alter or change the use of the premises, and no compensation is payable if the premises are to be demolished: sl(2). If disputed, the amount may be determined by the court; sl(3).

9.5. Issues with Dilapidations

1. Leases may contain a provision whereby a tenant who has undertaken alterations to the demised premises may have to re-instate the same at the end of the lease. This is separate from the normal dilapidations claim and settlement.

Section B

Synopsis: User Covenants

9.6. User Covenants

1. A covenant in a lease may stipulate the precise use to which the premises can be used (e.g. "use as a structural engineer's office") or it may stipulate the use in-a broader sense (e.g. "for the use otherwise than as a dwellinghouse"). Another possibility is that the use is specified by reference to one of the classes in the *Town and Country Planning (Use Classes) Order* which stipulates various types of classes of use for the purpose of the town and country planning legislation.
2. If the tenant wishes to change the use of the premises planning permission may be required though this is sometimes obviated by the application of the *Use Classes Order*. In any event there may be a proviso in the user covenant in the lease which is either absolute or qualified.
3. If the prohibition on changing the use of the premises is absolute there is no action which the tenant can take: *Comber v Fleet Electrics Ltd (1955)*. but a qualified covenant, i.e. one whereby the landlord's consent is required is subject to proviso that no fine, or sum of money in the nature of a fine, is to be payable where the alteration does not involve any structural alteration of the premises: *Landlord and Tenant Act (1927) s19(3)*. There is no statutory proviso that consent is not to be reasonably withheld so it is therefore desirable for the tenant to negotiate an express provision to this effect.
4. On a renewal under 1954 Act the court can have regard to any lawful use to which the premises can be put even though it is not the current use: *Aldwych Club v Copthall Property Co (1962*).

Section C

Synopsis: Insurance Covenants

9.7. Insurance Covenants

1. Tenants often enter into 'full repairing and insuring' (known as 'FR&I') leases with the result that they must not only keep the premises in full repair but also keep them fully insured. The tenant is in breach of the covenant to insure if the premises are uninsured at any time and it is irrelevant whether or not damage occurs: *Pitt v Shewin (1811)*.
2. Where the covenant is to insure with an insurance company approved by the landlord the landlord can refuse to approve the company on any ground he wishes: *Tredegar v Harwood (1929)*.
3. If the tenant obtains the advice of an insurance company concerning the level of insurance cover to fulfill his obligations under the covenant but that level is subsequently discovered to be inadequate, the tenant is not liable for breach of covenant: *Mumford Hotels Ltd v Wheeler (1964)*.
4. Where the landlord undertakes to arrange the insurance for the tenant, the landlord is under no duty to accept the lowest quotation: *Bandar Property Holdings v Darwen (1968)*.

5. For further detail on the use of the insurance monies for reinstatement of the premises after, e.g. a fire, see *Mumford Hotels v Wheeler (1964)*; *Re King (1963)*. In *Beacon Carpets v Kirby (1984)* there was a tacit acceptance by both parties that the insurance monies would not be used for rebuilding.
6. The Key Questions to pose are:
   (a) Who is to insure?
   (b) For what amount?
   (c) With which offer?
   (d) Reinstatement monies?

9.8. Self-examination Questions

1. What is an 'alteration' of premises?
2. Can a landlord withhold consent to a proposed alteration of the premises by a tenant?
3. What is the difference between an 'improvement' and an 'alteration'?
4. What are the common forms of user covenants?
5. What is the effect of the *Landlord and Tenant Act 1927* on a user covenant?
6. Which party is bound to insure the demised premises?
7. What is the effect of the decision in *Tredegar v Harwood*?

10. ASSIGNING, SUB-LETTING OR PARTING WITH POSSESSION OF THE PREMISES; ENFORCEMENT OF COVENANTS AFTER ASSIGNMENT OR SUB-LETTING

Section A

Synopsis: Assignment; Consent to Assignment

10.1. Assignment

1. A lessee has a common law right to assign his term but a covenant inserted in the lease may prohibit the tenant from assigning, i.e. parting with the whole of his term of years. Such a covenant is not broken by a sub-letting of all or part of the property: *Church v Brown (1808)* but is contravened by a sub-letting the whole of the property for all his term of years: *Langford v Selmes (1857)*. It should be noted that the covenant is not breached by a compulsory assignment of the term, e.g. to the personal representatives on the death of the tenant: *Crusoe v Rugby (1771)*.

10.2. Consent to Assignment

1. The various forms of covenant dealing with assignment can be analysed in the following way:

   (a) the lease contains no restriction against assignment;

   (b) the lease contains an absolute covenant against assignment;

   (c) the lease contains a qualified covenant against assignment;

   (d) the lease contains an express proviso that consent shall not be unreasonably withheld;

   (e) the lease contains a covenant by the tenant to offer a surrender to the landlord before assigning.

2. Where there is no restriction the tenant may assign his interest without obtaining the consent or licence of the landlord. If the property comprises a statutory tenancy under s2 of the *Rent Act 1977* it cannot be assigned as such but the tenant may be changed by agreement in writing.

3. A covenant which provides an absolute bar on assignment means that the landlord can withhold his consent in all circumstances and may impose what conditions he likes on the proposed assignment. Making the grant of a lease personal to the tenant is often a method of producing an absolute bar against assignment.

4. Section 79(1) of the *Landlord and Tenant Act 1927* applies to a covenant not to assign without obtaining the consent or licence of the landlord. Where the section applies the covenant is deemed to be subject to a proviso that such licence or consent shall not be unreasonably withheld.

In *Re Gibbs and Houlder Bros & Co Ltd's Lease (1925)* the question was whether it was reasonable to withhold consent because the proposed assignee would leave the adjoining premises in circumstances in which the landlord would have difficulty in letting the premises left. Held - it would be unreasonable to refuse consent on grounds which did not have some reference either to the personality of the tenant or his proposed user of the premises. See also *Tredegar v Harwood (1929)*.

5. In *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd (1985)* the Court of Appeal held that it would be unreasonable for a landlord not to consider the detriment to a tenant of a refusal to consent to an assignment where the detriment to the tenant was extreme and disproportionate to the benefit of the landlord. In this case the following principles were enunciated:

   (a) The purpose of a covenant against assignment without the consent of the landlord, such consent not to be unreasonably withheld, is to protect the lessor from having his premises used or occupied in an undesirable way, or by an undesirable tenant or assignee.

   (b) As a corollary to the first proposition, a landlord is not entitled to refuse his consent to an assignment on grounds which have nothing whatever to do with the relationship of landlord and tenant in regard to the subject-matter of the lease. A recent example of a case where the landlord's consent was unreasonably withheld because the refusal was designed to achieve a collateral purpose unconnected with the terms of the lease is *Bromley Park Garden Estates Ltd Moss (1982) 1 WLR 1019*.

   (c) The onus of proving that consent has been unreasonably withheld is on the tenant.

   (d) It is not necessary for the landlord to prove that the conclusions which led him to consent were justified, if they were conclusions which might be reached by a reasonable man in the circumstances.

   (e) It may be reasonable for the landlord to refuse his consent to an assignment on the ground of the purpose for which the proposed assignee intends to use the premises, even though that purpose is not forbidden by the lease.

   (f) While a landlord need usually consider only his own relevant interests there may be cases where there is such disproportion between the benefit to the landlord and the detriment to the tenant if the landlord withholds his consent to an assignment, that it is unreasonable for the landlord to refuse consent.

   (g) It is, in each case, a question of fact whether the landlord's consent to an assignment is being unreasonably withheld.

6. The problem of the effect of statutory protection for assignees has arisen on several occasions. Is it reasonable for the landlord to withhold consent on this ground? Where the assignment of the last seven and a half months of a five year term would have created a new Rent Act protected tenancy consent was unreasonably withheld:

   Thomas Bookham v Nathan (1955) but not when the assignment from a company tenant to an individual director would have created Rent Act protection: *Lee v K Carter (1949)*.

((See also *West Layton v Ford(1979*), *Bickel v Duke of Westminster (1977)*). Where the purpose of the refusal was to achieve a collateral advantage which was outside the terms of the lease the refusal was unreasonable. It is for the tenant to show that the refusal of consent is unreasonable: *Pimms Ltd v Tallow Chandlers (1964)*. Note the provisions of the *Race Relations Act 1976 (s24)* and the *Sex Discrimination Act 1975 (s31)*. It is not necessary for the landlord to show that his reasons for refusing consent were justified so long as they could have been given by a reasonable landlord: *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd (1985)*.

7. If the covenant expressly provides that consent is not to be unreasonably withheld the same rules apply as where the covenant against assignment is qualified.

8. A clause which requires the tenant to offer a surrender to the landlord before assigning is valid with respect to unprotected residential tenancies: *Bocardo SA v S&M Hotels (1979)*. Megarry J (as he then was) said (at first instance) that such a clause infringes against the purposes of the *Landlord and Tenant Act 1954 Part II* and is not valid in a tenancy of business premises: *Allnatt London Properties v Newton (1982)*. The position with tenancies protected by the *Rent Act 1977* is unclear, but in principle it would appear that the clause would be similarly ineffective.

10.3. Consent to assign, sublet etc and the Landlord and Tenant Act 1988

A landlord has only a reasonable time to answer a tenant's request to assign or underlet. The following cases illustrate the recent developments in the law:

1. *Go West v Spigarolo (2003)* — the landlords duty under the 1988 Act to respond to a request for consent to assign or underlet can require it to communicate its decision within weeks rather than months.

2. *Mount Eden Land Ltd v Folia (2003)* — a period of 24 days between the request and the decision was too long.

3. *Blockbuster Entertainments Ltd v Barnsdale Properties Ltd (2003)* — the court held that the landlord should have given consent within a week. The sub-tenant withdrew because of unreasonable delay by the landlord and the tenant was awarded damages of more than £70,000.

4. *Design Progression Ltd v Thurloe Properties Ltd (2004)* — the application was on 21 January 2002 and the court said that the landlord's response should have been given by 21 March 200The court awarded damages of £160,000 for unreasonable delay by the landlord in dealing with an application for consent to assignment.

5. *Norwich Union Linked Life Assurance Ltd v Mercantile Credit Co Ltd (2003)* — lease entitled the landlord to refuse consent if he was not satisfied that the sublease rent was full rack rent or if the full rack rent was less than the passing rent. Landlord claimed that the tenant's failure to supply details of the sub-lease rent with its application for consent meant that the application was not valid. Court held that it was up to the landlord to request the sub-lease rent if he wanted it.

10.4. Changes made by Landlord and Tenant (Covenants) Act 1995

1. The *Landlord and Tenant (Covenants) Act 1995* has amended the 'old' rules on assignment as follows:

   (a) In the case of a qualified covenant, namely one where the tenant requires the landlords consent to an assignment, section 1 9(1) of the *Landlord and Tenant Act 1988* states that a landlord cannot unreasonably delay such consent.

   (b) *Section 22 of the 1995 Act* modifies section 19 of the *1927Act* for new tenancies so as to allow the landlord and tenant to enter into an agreement (whether contained in the lease or not) specifying for the purposes of the lease any circumstances in which the landlord may withhold his licence or consent to an assignment or any conditions subject to which the licence or consent is granted.

   (c) In such a case the landlord is not to be regarded as unreasonably withholding his licence or consent to any such assignment if he withholds it on the ground (and it is the case that any such circumstances exist and, if he gives any such licence or consent subject to any such conditions, he shall not be regarded as giving it subject to unreasonable conditions.

   (d) The circumstances or conditions must either be (i) specific or (ii) where it is framed by reference to any matter falling to be determined by the landlord (or any other person for the purposes of the agreement), the persons power to determine that matter must be exercised reasonably or the tenant must have an unrestricted right to have the matter determined by an independent third party which is to be conclusive.

Section B

Synopsis: Sub-Letting,. Parting with Possession

10.5. Sub-Letting

1. A covenant not to assign will normally also seek to prevent sub-letting and parting with possession. Sub-letting consists of the creation of another tenancy out of the tenant's interest in the form of an underlease. Whether it-is a subletting of the whole or part of the premises the tenant must retain some reversion in the premises. Where the tenant sublets the property for the whole of his term that amounts to an assignment.
2. As a mortgage of a leasehold made after 1925 is achieved by making a sub-demise, it will therefore follow that a mortgage will be in breach of the covenant. If the lease provides the landlord's consent to be obtained then s86 of the *Law of Property Act 1925* requires that such consent is not to be unreasonably refused.
3. Close attention should be paid to detail as a covenant against underletting may not be broken by underletting part only of the premises: *Esdaile v Lewis (1956)*. In *Field v Barkworth (1985)* a covenant in a lease prohibiting the assignment or underletting of any part of the premises was held to prohibit the assignment of the whole or any part of the premise.

10.6. Parting with Possession

1. The question of whether a covenant against parting with possession has been broken is one of fact: *Stening v Abrahams (1931)*. If the tenant grants a right of concurrent user to another party that is not parting with possession: per *Farwell J in Abrahams v MacFisheries Ltd (1925)*.

Section C

Synopsis.- Enforcement of covenants after assigning or sub-letting - Introductory,. Original Parties; Assignees; Particular Situations; Tenant and Assignees; Sub- tenants; Guarantors

10.7. Introductory

1. The enforceability of a covenant contained in a lease depends initially on the doctrine of privity-of contract between the original landlord and the original tenant.
2. If either or both of the original parties assign their respective interests the further question arises of how far the covenant runs with the land or the reversion.
3. A covenant is said to run with the land when it is enforceable by or against the person for the time being in possession of the land by virtue of his possession.
4. The liability of a successor in title to one of the original parties may be based on the doctrine of privity of estate or, if no such privity exists, on the rule relating to the enforceability of restrictive covenants.

10.8. Original Parties

1. If a lease is granted by L to T, there is privity of contract between them. The effect of this is not only that L may enforce all the covenants in the lease against T which he retains the lease, but also that T remains liable on the covenant for the whole term, notwithstanding any assignment of the lease.
2. Thus, if T assigns his lease to A, L may sue T for unpaid rent or damages if the covenants are not observed by his assignee.
3. Similarly, L remains liable on his covenants for the whole term notwithstanding any assignment of the reversion by him.
4. It is, of course, open to the original parties to restrict their contractual obligations for the periods when they respectively retain the lease and the reversion.

10.9. Assignees

1. The rights and liabilities of assignees of the lease depend on whether the covenant in question “touches and concerns the land” and whether there is privity of estate between the parties. But these requirements must be satisfied:

   (a) Covenants touching and concerning land.
   This expression is synonymous with the more recent expression “covenants having reference to the subject-matter of the lease”. Any covenant which affects the landlord

qua landlord or the tenant qua tenant may be said to touch and concern the land. If the covenant of its very nature and not merely through extraneous circumstances affects the nature, quality or value of the land demised, or the mode of enjoying it, it falls within the definition.

Covenants by a lessee to pay rent, keep in repair, to use as a private dwelling house only, and not to assign the lease without the landlord's consent, all satisfy the definition. In contrast, covenants by a lessee to pay an annual sum to a third party or not to employ persons living in other parishes to work in the demised mill, do not. Covenants by a lessor for quiet enjoyment, to repair, to renew the lease satisfy the definition, whereas covenant which are purely personal or which are collateral to the land demised, such as a covenant giving the tenant a right to pre-emption over adjoining land, do not.

(b) Privity of Estate.
This describes the relationship between two parties who respectively hold the same estates as those created by the lease. This is the position where one holds the original reversion and the other the original term, or rather, the whole of what is now left of the original term. Thus there is privity of estate between the lessor and an assignee from the lessee of the residue of the term; also between the lessee and an assignee of the reversion; also between an assignee of the reversion and an assignee of the residue of the tenant. However, as between a landlord or his assignee and a sub-tenant or a squatter there is no privity of estate.

10.10.Particular Situations

1. There are four situations to consider:

(a) Benefit of covenant runs with land.

T assigns his interest to A. Can A enforce the covenants which were inserted in the lease in favour of T. According to *Spencers Case (1583)*. A can sue L on any of the case of covenants which touch and concern the land demised.

(b) Burden of covenant runs with land.

T assigns his interest to A. Can A be sued upon the covenants which were inserted in the lease in favour of L? In the case of covenants made after 1925 an assignee will be bound by them even though he is not mentioned in the lease since, by s79 of the *LPA 1925*, a covenant relating to the land of the covenantor is deemed to be made on behalf of himself and his successors in title, unless a contrary intention is expressed.

(c) Benefit of covenant runs with reversion.
L assigns his reversion to Z. Can Z enforce the covenants which were inserted in the lease in favour of L? In the case of covenants made after 1925, the rent reserved by a lease and the benefit of every covenant and provision therein having reference to the subject- matter of the lease and to be observed and performed by the tenant, are to be annexed to the reversionary estate expectant on the term granted by the lease, notwithstanding severance of that reversionary estate.

The effect of this section is that an assignee of the reversion, and not the assignor, is entitled to sue the tenant or exercise a right of reentry for a breach of the tenants covenants even if the breach was committed before the assignment. This applies where the breach is one causing damage which continues to depreciate the property after the assignment, such as a covenant to repair, and also to rent which became due before the assignment.

(d) Burden of covenant runs with reversion.
L assigns his reversion to Z. Can Z be sued upon the covenants which were inserted in the lease in favour of the lessee? By 142 of the *LPA 1925* the obligation of a covenant entered into by a landlord and having reference to the subject-matter of the lease is, as far as he has the power to bind the reversionary estate immediately expectant on the term, annexed to that reversionary estate.

10.11.Liability as Between Tenants and Assignees

1. Where the original tenant is sued by the landlord for a breach of covenant committed after the tenant had assigned the lease, he may be able to recover any damages payable from the assignee.
2. Section 77 of the *LPA 1925* provides that on the assignment for valuable consideration of the whole of the land comprised in a lease, the assignee impliedly covenants that he will pay all rent becoming due under the lease, observe and perform all the covenants therein contained and indemnify the assignor against any breach of their obligations.
3. Liability under the section is continuing, so that on a further assignment of the lease for value the same covenants will be implied on the part of the new assignee.
4. If the assignment is gratuitous, an express indemnity will be required for the assignor's protection.

10.12.Sub-Tenants

1. In the case of a sub-tenancy, there is usually neither privity of contract nor estate between the head landlord and the sub-tenant.
2. If, however, the lease requires that, on the grant of a sub-tenancy, the sub-tenant shall-enter into direct covenants with the head landlord, privity of contract will arise.
3. Apart from such a case, the head landlord cannot enforce the covenants in the head lease directly against the sub-tenant subject to two exceptions:
   (a) A restrictive covenant in the head lease will bind the subtenant as he has constructive notice of the contents of the head lease.
   (b) If the head lease contains a right of re-entry on breach of covenant forfeiture of the head lease will also determine the sub-tenancy unless the sub-tenant obtains relief.

10.13.Guarantors and Sureties

1. A landlord may require, either in the original lease or an assignment, a guarantor to guarantee the tenant's obligations.

2. The guarantor's contact is one of guarantee and not indemnity and thus the guarantor's liability is coextensive with that of the principal debtor to the extent of the guarantee; *Associated Diaries Ltd v Pierce (1983)*.

3. A surety or guarantor can be released by the following:

   (a) Expiry of lease.

   (b) By a change in the nature of the obligation.

   (c) By express release.

10.14.Landlord and Tenant (Covenants) Act 1995

1. The *1995 Act* came into force on 1 January 1996.

2. A tenancy will be a 'new tenancy' if it is granted on or after the date except in pursuance of an agreement entered into, or a court order made, before that date. An existing tenancy is a tenancy granted on or before 31 December 1995.

3. Where the tenant assigns the whole of the premises demised to him under a new tenancy he is released from the tenant covenants of the tenancy and ceases to be entitled to the benefit of the landlord covenants of the tenancy as from the assignment.

   There are two exceptions to this automatic rule:

   (a) the assignment is an excluded assignment as being either an assignment in breach of covenant or an assignment by operation of law: section 11;

   (b) the tenant may be required to enter into an authorised guarantee agreement: section 16.

4. A landlord may be released from his covenants when he assigns the reversion upon application. A landlord wishing to be released must notify the tenant that he wishes to be released within four weeks of the transfer. If the tenant objects the landlord is not released and must make application to the county court: sections 6 and A former tenant who did not obtain a release when he assigned his reversion may apply for release upon a future assignment. There are no provisions for notifying predecessor landlords so that a contractual obligation may be required. It may not be possible for a tenant to agree to release his landlord at some future date.

5. Upon assignment of a new tenancy the landlord can require that the assignor enters into an authorised guarantee agreement but only where the tenant is on an assignment released from a tenant covenant by virtue of the 1995 Act. It is an authorised agreement if.

   (a) under it the tenant guarantees the performance of the relevant covenant to any extent by the assignee and

   (b) it is entered into in the following circumstances:.

      i) consent of the landlord or someone else was required for the assignment;

      ii) consent was given subject to a lawfully imposed condition that the tenant would enter into a guarantee agreement;

iii) the agreement was entered into by the tenant pursuant to that condition, and;

iv) it does not impose on the tenant any requirement to guarantee in any way the performance of the relevant covenant by any person other than the assignee donor imposes on the tenant any liability, restriction or other requirement (of whatever nature) in relation to any time after the assignee is released from that covenant by virtue of the 1995 Act.

6. An authorised guarantee agreement may:

   (a) impose on the tenant liability as sole or principal debtor in respect of the assignee's obligations;

   (b) impose on the tenant liability as guarantor in respect of the assignee's performance of that covenant which are no more onerous than liability as sole or principal debtor;

   (c) require the tenant to take a new tenancy in the event of the tenancy being disclaimed;

   (d) makes incidental or supplementary provisions.

10.15.Self-examination Questions

1. What do you understand by assignment of the tenancy?
2. In what circumstances may a landlord withhold his consent to an assignment?
3. Are "offer to surrender back" clauses good in law?
4. What is meant by "sub-letting", the premises?
5. What is caught by a covenant prohibiting "parting with possession?"
6. What are the essential elements governing the enforceability of covenants in a lease before assignments?
7. What are the essential elements governing the enforceability of covenants in a lease after assignments
8. Examine the liability after assignment of tenants and assignees.
9. Consider the liability after assignment of sub-tenant.
10. How can a landlord further protect his interests on assignment?
11. How can a surety be released?
12. How has the 1995 Act affected the position?
13. What is an AGA?

11. TERMINATION OF THE TENANCY

Section A

Synopsis: Expiry of Term; Notice to Quit; Surrender; Merger; Disclaimer; Frustration; Forfeiture

11.1. Expiry of Fixed Term

1. A lease for a fixed period determines automatically when the fixed period expires. In such circumstances there is no need for the landlord to serve a notice to quit.

2. The tenant may have an option to renew the lease provided he complies with the terms of the option, e.g. to observe and fulfill the covenants in the lease. The tenant may also lawfully remain in possession where he is:

   (a) a tenant of business protected by the *Landlord and TenantAct 1954 Part II*, or

   (b) a tenant of a dwelling house protected by the *Rent Act 1977* or the *Housing Act 1988*, or

   (c) a tenant of agricultural land protected by the Agricultural Holdings Act 1986.

11.2. Notice to Quit

1. A lease for a fixed period need not be determined by a notice to quit unless the lease expressly so provides. In all cases a notice to quit is required for the determination of periodic tenancies, e.g. yearly, monthly or weekly tenancies. At common law the notice to quit need not be in writing: *Timmins v Rowlinson (1965)*, though this rule is subject to statutory qualifications.

2. The length of the notice required is dependent upon the express terms of the periodic tenancy or those implied by the general law in the absence of express terms. The following length of notice is appropriate in these particular periodic tenancies.

   (a) six months' notice must be given to terminate a yearly tenancy;

   (b) one quarter's notice must be given to terminate a quarterly tenancy;

   (c) one month's notice must be given to terminate a monthly tenancy;

   (d) one week's notice must be given to terminate weekly tenancy.

   Statutory provisions must be taken into account in determining the notice to be given. As will be seen below this depends on the purpose of the tenancy.

3. The appropriate notice must be expressed to expire at the end of the period or on the anniversary date: *Sidebotham v Holland (1895)*, subject to the agreement of the parties to the contrary; *re Threlfall (1880)*. See also *Winchester Court Ltd v Holmes (1941)*. The notice must also be clear and unambiguous: *Garner v Ingram (1889)*.

4. Where the periodic tenancy is yearly it may be specified that it is to be determined on one of the quarter days, i.e. Lady Day (March 25), Midsummer (June 24), Michaelmas

(September 29) and Christmas Day (December 25). These are important as the lease may stipulate they are the dates for the payment of rent etc.

5. The general law rules have been amended greatly by statute, the main amendments being:

   (a) Business Tenancies.

   The *Landlord and Tenant Act 1954 Part II* does not allow leases of business premises to be determined by a notice to quit. A tenancy of business premises can only be brought to an end by the procedure in the *1954 Act*, and the tenant is entitled to not less than six but not more than twelve months T notice.

   (b) Residential Tenancies.

   The *Rent Act 1977* provides for a continuation of a tenancy after its fixed period by a statutory tenancy. In addition, the *Protection from Eviction Act 1977* has amended the general law in several ways, in particular:

   (i) by providing for a minimum four week Ts notice to quit: s5(i);

   (ii) by stipulating that the notice to quit a dwelling house must be in writing: s5(i).

   (c) Agricultural Tenancies.

   Agricultural Holdings Act 1986 provides that a lease for two years or more does not automatically expire at the end of the term but continues as a tenancy from year to year. To terminate the tenancy requires a notice to quit given at least a year before the end of the period of the lease. The *Agricultural Holdings (Notice to Quit) Act)1977* provides that a yearly tenancy under the *1986 Act* continues until terminated by twelve months notice to quit.

   (d) Farm Business Tenancies.

   The *Agricultural Tenancies Act 1995* provides for limited security of tenure for a farm business tenancy.

11.3. Surrender

1. If T surrenders his lease to his immediate landlord and L accepts, T's lease merges with Ls reversion and comes to an end.

2. An express surrender should be by deed but a surrender for value which is evidenced in writing or supported by an act of part performance would be effective in equity by analogy with the doctrine in Walsh v Lonsdale.

3. Surrender by estoppel may arise where T or L or both do an act which shows an intent to end the lease and it would be inequitable for them to rely on the fact that no express surrender deed had been accepted by the landlord.

11.4. Merger

1. Merger would occur in the following circumstances:

(a) L leases land to T and then L's reversion and T's lease later pass into the hands of X;

(b) L leases land to T and then T later acquires L's reversion.

11.5. Disclaimer

1. The major example of disclaimer arises under the Insolvency Act 1985 which proves that a tenant's trustee in bankruptcy in whom an onerous lease has become vested can disclaim the lease.
2. The effect of disclaimer in such a case as between landlord and tenant is that the lease is at and end but this does not affect the rights of third parties. Thus, if T had mortgaged his lease to E, the court may make an order vesting the lease in E.

11.6. Frustration

1. The House of Lords in *National Carriers Ltd v Panalpina Northern, Ltd (1981)* held that the doctrine of frustration can apply in rare cases to a lease of land. The event would have to be such that no substantial use, permitted by the lease and in the contemplation of the parties, remained available to the tenant.

11.7. Forfeiture

1. A landlord has no right to forfeit a lease unless either:

   (a) the lease expressly so provides, or

   (b) the lease was granted expressly on condition that' or "provided that" the tenant fulfills specified undertakings.

2. A landlord exercises his power of forfeiture by re-entering the land. The right to forfeit a lease is sometimes referred to as a "right to re-enter". The:test for whether a clause is a forfeiture clause is that, it must, if exercised, bring the lease to an end earlier that the actual termination date; *Clays Lane HousIng Association Co-operation v Patrick (1985).*
3. The normal method of enforcing a forfeiture is by issuing and serving a writ for possession. If the court makes an order for possession the lease is determined and the tenant, unless he vacates willingly, can be evicted by a bailiff of the court.
4. It is inadvisable for a landlord to re-enter without recourse to the court as this could give rise to criminal liability.
5. The conditions under which a right of forfeiture can be enforced vary according to whether there has been a breach of covenant to pay rent or a breach of other covenants. Equity and statute have intervened to allow tenants relief in certain circumstances:

   (a) Non-Payment of Rent

   The landlord must make a formal demand for the rent due between sunrise and sunset on the day the rent is due unless he is exempted by the provisions of the *Common Law Procedure Act 1852* which states that no formal demand is required in the following circumstances:

(i) the rent is at least half a year in arrears and there are not sufficient chattels in the premises to cover the arrears by way of distress, or

(ii) the lease specifically states that no formal demand is necessary.

Either before trial, or within six months of a judgement granting a landlord possession, the tenant can obtain relief against the forfeiture if he pays the rent due together with expenses incurred by the landlord if it appears just and equitable to grant relief. If relief is granted, the tenant holds under the old lease and no new document is required.

(b) Breach of Other Covenants.

Section 146 of the LPA 1925 provides that a forfeiture is not enforceable unless the lessor serves a notice on the tenant which:

(i) specifies the breach, and

(ii) requires the breach to be remedied if this is possible, and

(iii) requires the tenant to pay compensation.

The tenant must then be given a reasonable time to comply with the requirements - three months in normal circumstances. In some circumstances the breach is regarded as being incapable of remedy, e.g. breach of a covenant not to permit the use of the premises for an illegal or immoral purpose - as in *Governors Rugby School v Tannahfi (1935)*; and breach of a covenant not to sub-let, as in *Scala House v Forbes (1974)*. If in the former case the illegal or immoral user is made by a sub-tenant, the tenant can remedy the breach by enforcing a forfeiture against the sub-tenant. (See also *Dunraven Securities v Holloway (1982)*). In the latter case it would seem that even the obtaining of a surrender of the sub-tenant's lease will not remedy the tenant's breach. The *Leasehold Property (Repairs) Act 1938* gives added protection to a tenant of premises other than an agricultural holding in respect of repairing covenants where the original term was for seven or more years and three or more years of the term remained un-expired.

6. If a tenant grants a sub-lease and subsequently his own lease is forfeited, the sublease automatically comes to an end. The *LPA 1925 s146* provides that the sub tenant may apply for relief against forfeiture on the tenant's lease irrespective of the ground which it was forfeited. Thus, a sub-tenant may obtain relief in circumstances where the tenant cannot. The Court can order the landlord to grant a lease to the sub-tenant for a period not exceeding the un-expired period of the sub-lease and may impose conditions requiring payment of a higher rent or performance of covenants previously entered into by the tenant.

11.8. Waiver of Forfeiture

1. If a landlord expressly or impliedly waives his right to forfeit the lease, he loses his right to re-tender in respect of the breach concerned, though not as regards subsequent breaches. The two essentials of waiver are that:

(a) the landlord is aware of the commission of an act of forfeiture by the tenant, and

(b) the landlord does some positive act which is a recognition of the continuance of the tenancy.

Thus if the landlord:

(i) accepts or sues for rent falling due after right to forfeiture arises, or

(ii) distrains for rent whether due before or after the breach, or

(iii) grants a new lease to a defaulting tenant.

Each of these acts is strong evidence that he has elected not to forfeit the lease. It is important to distinguish between continuing and non-continuing breaches of covenant as the waiver applies only to the particular breach in question. Once the landlord has unequivocally and finally elected to treat the lease as void, or by serving a writ for recovery of the land, no subsequent receipt of rent or other act will constitute waiver.

11.9. Self-examination Questions:

1. Under what circumstances may a tenant of fixed term tenancy lawfully remain in possession after the expiry of the term?
2. What are the respective lengths of a notice to quit for yearly, monthly or weekly tenancy?
3. How far have the general law rules on notices to quit been amended by statute?
4. What is meant by surrender and merger of the tenancy?
5. How is a surrender affected?
6. Does the law of frustration apply to lease?
7. How do the rules for forfeiture for non-payment of rent differ from the rules for forfeiture for breaches of other covenants?
8. How can a breach of covenant be waived?
9. When is a breach of covenant capable of remedy?

12. OTHER RIGHTS AND OBLIGATIONS

Section A

Synopsis: Option to Review; Option to Break; Option to Purchase the Freehold

12.1. Option to Renew

1. The lease may contain a covenant which provides the tenant with an option to renew the lease subject to the proviso that he has performed his covenants. When exercised the tenant becomes entitled to a further term of the premises for a period specified in the initial lease. The rent may be the same as the original term but is more likely to be revised by machinery similar to that used on a normal rent review.

2. Where the exercise of the option is subject to the question of whether the tenant has performed his covenants there is some uncertainty regarding the effect in law of a breach of the obligations. In *West Country Cleaners (Falmouth) Ltd v Saly (1966)* the tenant had observed his repairing obligations except for a failure to paint the premises in the final year of the term. The Court of Appeal held that the fact that the breach of covenant was trivial nevertheless rendered the option unenforceable. This should be compared with the decision in *Bassett v Whitley (1982)*. The rent for the period was withheld in an attempt to persuade the landlord to repair a leaking roof. The landlord contended that this negated the option, to renew. The Court of Appeal took a flexible approach and held that the option could still be exercised. The key question in whether "strict" or reasonable" compliance is required by the covenant.

3. Attention has to be paid to the terms of the renewed lease, in particular the rent. The clause will usually provide for the same terms to apply but where it does not the main problems usually arise over the rent to be paid. Thus, if the parties do not specify the machinery for determining the rent, leaving it 'to be agreed' it may be held void for uncertainty. See also *King's Motors (Oxford) Ltd v Lax (1970)* and *Thomas Bates and Son v Wyndham's (Lingerie) (1979*). A more liberal view was taken in *Sudbrook Trading Estate Ltd v Eggleton (1982)* where the court implied a term into an option to purchase the freehold that the price to be fixed was to be fair and reasonable. In *TNDFS v Beatties of London Ltd (1985)* the court held that a more liberal approach was justified where there had been a performance of the agreement on the tenant's side.

4. The main drafting concern is to avoid the creation of a perpetually renewable lease. Thus if the new lease is to contain the terms of the initial lease, including the option to renew, the tenant will receive a lease for 2,000 years; *Law of Property Act 1922 s 14*. Judicial construction of the lease may prevent this; *Plumrose v Real and Leasehold Estates Investment Society (1970)*.

12.2. Option to Break

1. An option which allows either the landlord or the tenant, or both, to determine the lease on a specified date before the end of the term is known as a break clause. Such a clause allows the parties to determine the lease on following the procedure prescribed in the

lease. A common example is a 21-year lease having an option to 'break' at the end of the seventh and fourteenth years.

2. The clause will usually provide for a notice 'triggering' the process of determination to be served by the party exercising the rights. If the clause does not stipulate who can exercise the right the construction most favourable to the tenant is adopted; *Humphrey v Stenbury (1909)*.
3. If the clause provides that it is only exercisable by the tenant if he has performed all his obligations under the lease it is a condition precedent to its successful exercise; *Simons v Associated Furnishers Ltd (1931)*. It would appear that the question of due performance of the obligations is relevant in this context in the same way as it is when considering an option to renew.

12.3. Options to Purchase the Freehold

1. In some leases the tenant is given an option to purchase the freehold from the landlord. They are usually not dependent upon the tenant complying with his rights and obligations under the lease but may be so.
2. The option may be specified to be of a certain duration, in which case it will lapse after that point. Alternatively, it may be expressed to exist for the duration of the lease. If it is not expressed to be for the benefit of a particular tenant it will pass on the assignment of the lease. *Griffith v Pelton (1958)*. It should be noted that it can also be assigned separately; *Re Button's Lease (1964)*.
3. An option does not normally last longer than the original duration of the lease and may not cover any period of 'holding over'; *Rider v Ford (1923)*.
4. The main problem in recent litigation has been as to the ascertainment of the purchase price when an option to purchase is exercised. The same criteria are applicable here as are appropriate where a rent review clause might be void for uncertainty but the courts appear to apply a more stringent construction; *Smith v Morgan (1971)*.
5. In *Sudbrook Trading Estate Ltd v Eggleton (1982)* the House of Lords implied a term in an option to purchase that the contract price to be fixed as to be a fair and reasonable price between the parties and that on a true construction of the clause the absence of the machinery for ascertaining the price was not fatal. The House of Lords thus overruled several authorities in which the Court of Appeal had held that such terms were essential to the validity of the option.

Section B

Synopsis: Landlord's Rights on Termination; Fixtures and Fittings

12.4. Landlord's Right on Termination

1. On the termination of the lease the landlord has the common law right of regaining possession of the premises. This has been affected by the statutory restrictions on obtaining possession.

2. If the premises concerned are protected by the Rent Act 1977 (as amended) the landlord will not be able to obtain possession against the statutory tenant without proving one of the grounds of possession and obtaining a court order.
3. Where the *Landlord and TenantAct 1954 Part II* applies the landlord can only gain possession by complying with the procedure of the 1954 Act and proving one of the grounds of opposition to a new tenancy.
4. If the tenant has sub-let the premises it is his duty to ensure that the sub-tenancy ends before the end of his tenancy.
5. The landlord may well have other rights against the tenant, e.g. the right to sue for arrears of rent or a claim in the tort of negligence for damage to the property.

12.5. Fixtures and Fittings

1. At the termination of the tenancy any article which has been affixed to the freehold becomes part of it under the maxim *quid quid planatur solo solo credit* (what is attached to the land as part of the land).
2. The question 'When does an article become affixed to the freehold?" was answered by Scannan, L.J. (as he then was) in *Berkley v Poulett (1977)*. "This depends upon the application to two tests: (1) the method and degree of annexation; (2) the object and purpose of the annexationsT. In this case the court held that six pictures firmly fixed into recesses in a room, a white marble statue of a Greek athlete weighing approximately one ton and sundial were fixtures. If anything is attached for its better enjoyment for easy use it is not a fixture; see *Elliott v Bishop (1854)*.
3. The decision of the court is usually finely balanced. In *Re De Falbe Ward v Taylor (1901)* tapestries said to be of a large value had been affixed to the walls of a house but the court held that tapestries had been attached for the purpose of ornamentation and were not fixtures. The importance of the purpose of the annexation was stressed in *Hamp v Bygrave (1983)*.
4. Those chattels which have been annexed to the freehold and were intended to be fixtures become, prima facie, the landlord's property at the end of the tenancy- unless they were intended to be, and are 'tenants fixtures'. Such exceptional items consist of:
   (a) domestic and ornamental fixtures
   (b) trade fixtures
   (c) agricultural fixtures
5. The general rule is that the tenant must remove his fixtures before the end of the term; *Barif v Probyn (1895)*. In *New Zealand Government Property Corporation v HM & S Ltd (1982)* the Court of Appeal held that when an existing lease expires or is surrendered and is followed immediately by another grant to the same tenant remaining in possession, the tenant doe not lose his right to remove tenant's fixtures and is entitled to remove them at the end of his new tenancy.

12.6. Self-examination questions

1. What is an option to renew?
2. What is a conditional option to renew?
3. How is a break clause exercised?
4. What is an option to purchase the freehold?
5. What are the landlord's rights on termination of the tenancy?
6. Explain the differences between a fixture and a fitting.
7. What are the texts for determining what is a fixture?
8. When can a tenant remove his fixtures?
9. What is the difference between a "strict" and "reasonable" interpretation of an option to renew or break.