



Enforcing Covenants in leases (the *old* law)

Background

The law of Landlord and tenant forms part of what we call Land law. The other parts are Real Property law and Conveyancing.

What we must remember is that historically covenants developed in contract law before it found its way into land law. And leases before 1925 were personal property (chattels real).

A further point to remember is that there is a major difference between contract law and land law.

Illustration

In the law of contract there is a general rule. Anyone who is not party to the contract cannot sue for breach of that contract - see the case of *Tweddle v. Atkinson* (1861).

The situation in land law is different. Say A agrees to mow the lawn for his neighbour B every week during the summer for £10 a week. This is a contract enforceable only between A and B.

If however, B grants A, a legal right to drive his car across B's driveway, so that he can take a short cut to the main road, the position is different. This legal right of way is enforceable by any subsequent owner of A's land against any subsequent owner of B's land.

Cutting the lawn is a personal covenant. A right of way is a legal right that touches and concerns the land. See *Caerns motor Services v Texaco* (1994) 1 WLR 1249. A *solus* agreement was held to pass with the reversion, as it was a covenant that touches and concerns the land.

Privity of contract and privity of estate

- **Privity of contract** is the relationship which exists between parties to a contract.
- **Privity of estate** is the relationship that exist between landlord and tenant.

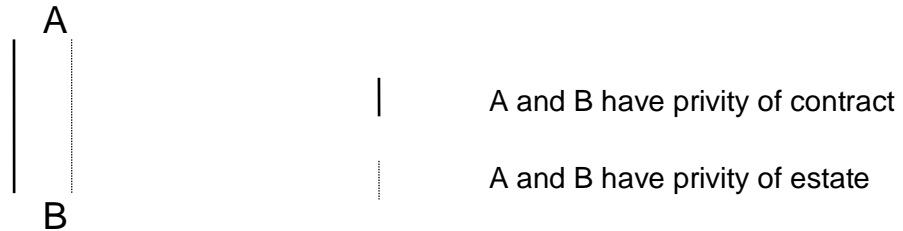
The following rules should be learnt:

- I. If there is **privity of contract** between the person subject to the covenant and the person wishing to enforce it, the covenant can be enforced. This is **Contract Law**.
- II. If there is no privity of estate, but there is **privity of estate** between the parties, the **covenant** can be enforced if it **touches and concerns** the land. This is an extension of contract law. Remember leaseholds are based on contract.

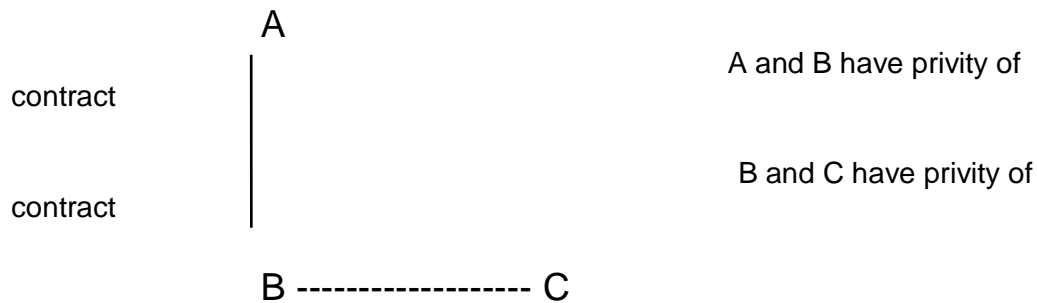
III. If there is **neither** privity of contract nor privity of estate between the parties, the covenant cannot be directly enforced at Common law. It can sometimes be enforced in Equity. If it can, this **land law** (see later).

Illustration

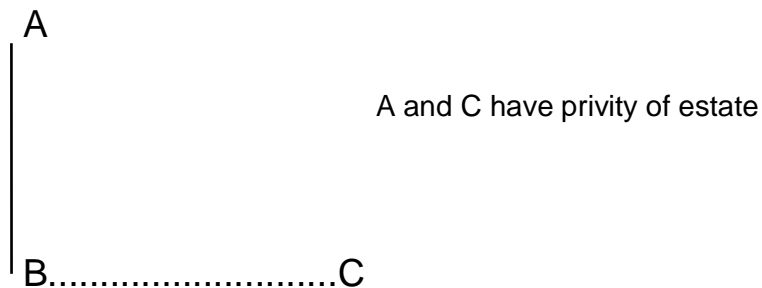
(i) A leases property to B for 20 years. **A** is the landlord and **B** the tenant.



(ii) Five years later B assigns the remaining 15 years of the term to C.



(iii) **BUT** a landlord and tenant relationship now exists between A and C.



A can enforce any covenants that touch and concern the land ie any covenant that affects the **nature, quality or value** of the land demised, touches and concerns the land.

Examples of covenants made by the tenant

The left hand ones touches and concerns the land, the right hand ones do not.

- | | |
|------------------------------|--|
| To pay rent | To pay an annual sum to a third party |
| To repair | To repair and renew the tools of a smithy standing on the land |
| To use as a private dwelling | Not to employ persons living in other |

house only

parishes in the demised mill

Covenants made by the landlord

To supply the demised premises with water

To sell the reversion at a stated price

Not to build on a certain part of the adjoining land

To pay at the end of the lease for chattels not amounting to fixtures

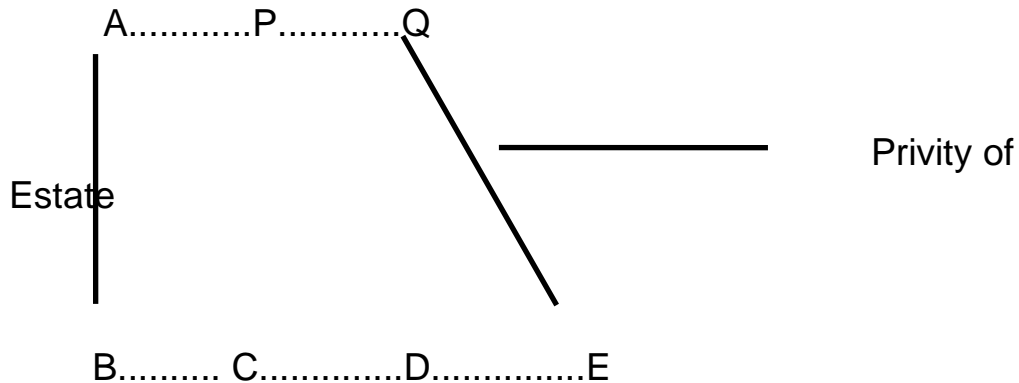
No matter how many changes of tenant take place, the landlord can always sue the present tenant for breaches of covenant which touch and concern the land.

If C sells to d and D to E and E becomes bankrupt or simply disappears, A can always sue the **original tenant B** on the basis of privity of contract.

B can then sue C on their contract, C sues D and D sues the bankrupt or vanished E. D who assigned to the hapless E will be held responsible.

If however B cannot trace C and E is worthless, B could end up paying for the wrongs of E. B can protect himself by an express indemnity which he obtains from C on assignment. This is a promise to repay B any damages he may have to pay to A should C be in breach of covenant.

Even if there are changes of Landlord i.e. A sells to P who sells to Q, there is still estate of contract between the present landlord and the present tenant.



What if E instead of assigning **sublets** to X? On sub-letting there is neither privity of contract nor privity of estate X and Q in our example.

The only situation in which Q could sue X direct is if there is a **Restrictive Covenant**. A Restrictive Covenant is a term inserted in a contract for the sale of property or a lease which restricts the use the new owner can make of the land.

Examples

- not to build
- not to carry on any trade or business
- to keep the garden free from sheds, huts, building material, scrap metal and caravans.

These covenants are negative ones. **Negative** in the sense that the tenant has to make no effort to keep the covenant. In other words if the tenant lies on the sofa watching television, the covenants will never be broken.

Negative covenants can be enforced under the rule in *Tulk v Moxhay*. The tenant must know about the covenants. An example is *Mander v Falcke* (1891). An action was brought against a sub-tenant farmer who was running a brothel on the premises. The action was for breach of a covenant not to cause annoyance or inconvenience to the landlord's adjoining property.

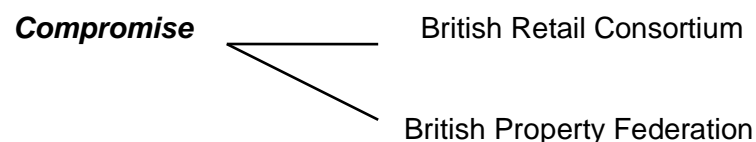
A could also have put a **forfeiture clause** in the original lease with B. That if the covenant is broken (whether by B, any assignee, subtenant or anyone else), A could take the property back. This would be so even if X was did not know that what he was doing was in breach of covenant.

Enforcing Covenants in leases [the new law]

Landlord and Tenant (Covenants) Act 1995

Basic intention

- (a) End the '**perceived inequities**' of the privity of contract rule. Original tenant bound to obligations for the *length of term* – irrespective of whether tenant remained in possession.
- (b) **Last recession** - Landlords faced by bankrupt tenants looked for someone else (the original tenant)



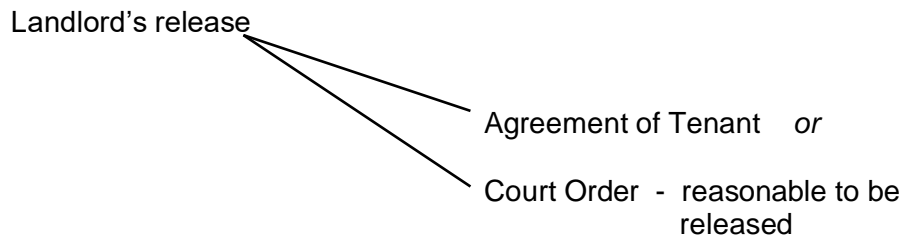
Start date : 1/1/96

Privity of Contract rule **abolished** – but not retrospectively. Old law applies to old leases. Act applies to residential, agricultural and business tenancies.

New tenancies - privity of contract rule abolished.

- (a) Authorised guarantee agreement. **AGA**.
- (b) Landlord can be asked to be **released** from its obligations e.g. repairs and services once it has assigned the reversion.
- (c) **S. 19(1) L&T ACT 1927** amended. Parties can agree in **advance** the **basis** on which Tenant can assign lease.
- (d) The end of privity. Tenant assigns. Automatic release from covenants from the date of assignment.

AGA. Current T guarantees assignees obligations.



A note on the assignment of the landlord's interest - the *reversion*

Four questions need to be answered on the assignment of the reversion.:

- (i) Will the tenancy bind the Landlord?
- (ii) What are the rights and liabilities of them new landlord?
- (iii) Can the landlord sue previous assignees of the lease?

Tenancies entered into before 1/1/96 - the old rules apply

Tenancies entered into after that date - the new rules apply

Binding nature of tenancy

Lease for less than 21 years is an overriding interest under section 70(1) k of the Land Registration Act 1925 (as amended) and where the tenant is in occupation it is protected additionally by 70(1)g. In unregistered land the purchaser takes subject to a tenant with a legal estate.

Rights of new landlord

Old tenancies - section 141 of the law of Property Act passes benefit of any covenant. on assignment the landlord can sue the tenant for past or future breaches. The new landlord (and only the new landlord) can sue for arrears of rent before assignment from the tenant or the original tenant before assignment.

New - if the original landlord has assigned the reversion the original tenant is liable to the current landlord because the benefit of the covenant goes with the reversionary estate (s 3(1) of the 1995 Act).

Landlord's covenants

Old - s 142 of Law of Property Act 1925. The new landlord liable to comply with obligations but not liable for breaches that occurred before the date of assignment.

New The landlord is liable on covenants in the lease whether or not they touch and concern the land. The old landlord is not automatically released from his covenants when he assigns the reversion. The appropriate notice needs to be served on the tenant. If the tenant objects application can be made to the court for the landlord to be released from covenants to which he is bound on a subsequent assignment of the reversion.

Subletting

Boxer M., Landlord and tenant: the new regime. Cavendish 1996 ISBN 1 85941 283 1

'Rule 44 :(p 67) If the Landlord has been unable to prevent in suitable terms the tenant granting sub-leases,....any assignment by the subtenant, including the original, should be subject to an AGA being given or, even better, should only be allowed if the assignee as a business tenant agrees to exclude his security of tenure rights'

See also **The landlord and Tenant (Covenants) Act 1995: A Legislative Folly** [1996] 60 Conv., Nov/Dec. by Philip Walter.

Landlords can insist on such onerous clauses that it becomes impossible for the tenant to assign during the term. 'A total prohibition on assignment and sub-letting is so uncongenial to a typical prospective tenant that it likely to cause a significant reduction in the rent that can be obtained...'

The obvious solution for landlords is to ban assignment but permit sub-letting on suitably drafted restrictive conditions. One could require the sub-tenant to enter into a direct covenant with the landlord to pay the rent and to observe all other tenant's covenants'.

In Jamaica, the principles of enforcing covenants in leases closely align with the fundamental concepts of land law, albeit within the framework of Jamaican legislation and legal precedent. Much like in other jurisdictions, the evolution of covenants from contract law to land law underscores the historical development of property rights.

Historical Context: Similar to other common law systems, Jamaica's legal landscape recognizes the historical development of covenants originating in contract law before their integration into land law. Pre-1925 leases were also considered personal property, reflecting a similar legal trajectory.

Distinguishing Factors: Jamaican law, like that of other jurisdictions, distinguishes between contract law and land law. While contract law operates on the principle of privity, where only parties to a contract can sue for breach, land law allows for the enforcement of rights that pertain to land, even by subsequent landowners. This distinction underpins the concepts of privity of contract and privity of estate in Jamaican land law.

Application of Principles: The enforcement of covenants in Jamaican leases relies on the existence of privity of contract and privity of estate. If there is privity of contract between the parties involved, the covenant can typically be enforced, akin to contract law principles. However, if there is no privity of contract but privity of estate exists, the covenant may still be enforceable if it touches and concerns the land. This extension of contract law into land matters is crucial in Jamaican leaseholds.

Illustrative Examples: Illustrative scenarios elucidate the application of these principles in Jamaican landlord-tenant relationships. Whether it's the landlord's obligation to provide services or the tenant's responsibility to maintain the premises, these examples demonstrate the legal nuances involved in enforcing covenants that affect the nature, quality, or value of the land.

Transition to New Laws: While specific legislation may differ in Jamaica, the evolution of laws governing landlord-tenant relationships mirrors global trends. For instance, the enactment of the Landlord and Tenant (Covenants) Act 1995 in other jurisdictions

echoes the effort to address perceived inequities and modernize legal frameworks to adapt to changing societal needs.

Impact on Subletting: In the Jamaican context, regulations governing subletting undergo scrutiny under evolving legal frameworks. Landlords' ability to dictate terms, such as through authorised guarantee agreements (AGAs), reflects efforts to balance the interests of landlords and tenants within the Jamaican property market.

Conclusion: Enforcing covenants in Jamaican leases entails navigating a complex interplay of legal principles, legislative frameworks, and judicial precedents. From historical precedents to contemporary statutes, the enforcement of covenants in Jamaican leases reflects the dynamic nature of property rights and the evolving legal landscape.

Note: Specific references to Jamaican laws, cases, and legal doctrines would further enhance the analysis of enforcing covenants in Jamaican leases.

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