

### Mortgages: Introduction

**Mortgagee:** The **lender** who loans money to fund the property purchase.

**Mortgagor:** The **borrower** who grants rights over the property as a security for the loan.

**Mortgage:** A proprietary right.

Must be created by **\*\*deed**.

The **deed** must be **registered at the Land Registry**.

**Equity of redemption:** The **collective rights** of the borrower and their ability to which it may **challenge mortgage terms**.

A borrower has an **equitable right** to redeem the mortgage (i.e. pay it back).

Equity will be prepared to declare **void** any term which tries to **postpone/prevent** redemption of the loan.

A lender may not use its position to impose terms that would be considered **morally reprehensible** or **unconscionable**.

**Undue influence:** A borrower has a right to be **protected from undue influence**.

A mortgage loan can be **set aside** for undue influence.

**Priority:** A landowner may **grant more than one mortgage** over their land.

**Issues of priority** arise where the loan is in **default** and there is **not enough money** to pay back all the lenders.

**Rights of lender in a default:** 1. Right to **possess** the property; and

2. Power to then **sell** it.

A **court order** should be recommended to a lender unless the mortgaged premises are vacant for right (1).

If the mortgaged property is **wholly/partly used as a dwelling** and the borrower can show they are able to **repay** the arrears and continuing payments due, the court is likely to **postpone the order for possession**.

**Lender's duties:** The lender is under duties when exercising its power of sale.

E.g. they must sell the property at **market value** and seek **expert advice** as to the manner of sale.



### Anatomy of a Lease

<b>Parties, date, definitions, interpretation provisions:</b>	<p><b>Date</b> of the lease.</p> <p><b>Names and addresses</b> of landlord and tenant.</p> <p>A section giving <b>guidelines on interpretation</b> and <b>definitions</b>.</p>
<b>Demise and rents:</b>	The landlord <b>transfers or grants</b> the lease of the premises to the tenant for a <b>specified term</b> in consideration of the rent paid and the covenants entered into.
<b>Tenant covenants:</b>	<p>A <b>tenant may do all things</b> that an owner of an estate can do <b>unless the lease prohibits</b> such actions.</p> <p>The lease sets out what the <b>tenant cannot do</b> by way of a number of tenant covenants.</p> <p>e.g. obligation to pay rent, whether the tenant can make alterations; whether tenant can assign/underlet the premises.</p> <p>If there is <b>no mention</b> of an action in a lease, the <b>tenant is free to do it</b>.</p>
<b>Landlord covenants:</b>	<p>If the lease is a lease of part of a building, the landlord may <b>covenant to provide services</b>, maintain common areas and to insure the building.</p> <p>The most common is the <b>covenant for quiet enjoyment</b> (covenant not to interfere with tenant's possession/enjoyment of property during lease term).</p>
<b>Guarantor's covenants:</b>	<p>An individual/company guarantor may also be a party to the lease.</p> <p>Covenant to <b>guarantee payments</b> that must be made under the lease and the performance of any other obligations so that if the tenant defaults in payment, the landlord is able to call upon the guarantor.</p>
<b>Provisos, agreements and declarations:</b>	<p><b>Miscellaneous section</b> dealing with a number of matters.</p> <p>e.g. forfeiture clauses, exclusion of security of tenure.</p>
<b>Rights granted:</b>	Any <b>easements</b> over the property or parts of the building.



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Not published yet.  
Last updated 7th January, 2024.  
Page 2 of 30.

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### Anatomy of a Lease (cont)

**Rights excepted and reserved:** The **landlord's reserved rights** to access the premises, or run cables through it or carry out repairs, for example.

**Rent review provisions** to review rent at regular intervals.

**Service charge** provisions to cover costs for maintenance and repairs where the property is one part of a whole.

**Prescribed lease clauses:** Where you are granting a **registrable lease**, your lease must include a list of Prescribed Lease Clauses at the front.

Main areas of focus = **date** of lease; landlord's **title number**; **parties**; **term**; **easements** granted & reserved.

### Business Leases: Security of Tenure

**Security of tenure:** A business may **request a new tenancy** at the end of their lease.

The **landlord's ability to recover** the premises from the tenant is limited.

#### .....Advantages.....

For the **tenant:** Can treat the premises as a **long-term** prospect.

Can invest in **fitting out the premises** and making them **suitable** for their purposes.

Retail/restaurant business can **reap the benefits of goodwill** from their location, i.e. repeat customers.

Do **not** have to worry about **considerable upheaval** caused by having to move at the end of contractual term.

For the **landlord:** Premises is **more appealing** to prospective tenants.

Tenant is encouraged to **look after the premises**.

Market **rent may be higher** for a lease enjoying security of tenure.

#### .....Disadvantages.....

For the **landlord:** Limits to the landlord's freedom.

**Complying with requirements** can be quite complicated.

#### .....Application of Security of Tenure.....



### Business Leases: Security of Tenure (cont)

<b>Any tenancy:</b>	<b>Fixed term or periodic tenancies</b> can benefit from security of tenure. Licences or tenancies at will cannot benefit from security of tenure.
<b>Occupied by the tenant:</b>	If a tenant leaves the premises <b>vacant</b> , they do <b>not</b> have security of tenure. If the tenant <b>underlets</b> the whole/part of the premises, they <b>cannot</b> be in occupation and will <b>lose security of tenure</b> over the whole/part of the premises accordingly.
<b>For the purposes of a business:</b>	For any <b>trade, profession or employment</b> E.g. charity shop, members-only tennis club, residential use that furthers the tenant's business A tenant taking a small amount of lodgers without profit is <b>not</b> for business purposes, nor is a premises offering <b>free</b> Sunday school sessions.

#### .....Excluded Tenancies.....

<b>S 43 Landlord and Tenant Act 1954</b> specifically excludes some types of tenancies from security of tenure:	<b>Agricultural tenancies</b>  <b>Mining leases</b>  <b>Service tenancies</b> (lease granted as part of a tenant's employment)  <b>Fixed term tenancies of 6 months or less</b> (which can become protected if tenant has been in occupation for 1 year or more whether through successive tenancies or if tenancy is renewable beyond 6 months).
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#### .....Contracted Out Tenancies.....

<b>S 38A Landlord and Tenant Act 1954:</b>	Parties can agree to <b>exclude a fixed term lease</b> from security of tenure provisions. A <b>periodic tenancy</b> that qualifies for security of tenure <b>cannot</b> be contracted out. <b>Short term leases</b> (5 years or less) and <b>underleases</b> are commonly contracted out.
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#### .....Procedure for Contracting Out.....

The **two-stage procedure** must be **strictly observed**.

<b>Stage 1:</b>	The landlord must <b>serve a warning notice</b> on the tenant in a prescribed form.
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### Business Leases: Security of Tenure (cont)

This should detail the **consequences** of contracting out.

It must be served **before** the parties **complete the lease**.

**Stage 2:** The tenant must **provide a declaration** in prescribed form to the landlord.

It must be provided **before** the parties **complete the lease**.

If **lease completion** is **14+ days** from the **date of warning notice**, this can be a **simple signed declaration**.

If lease completion is **>14 days**, the tenant must provide a **statutory declaration** (declared before an independent solicitor).

The resulting lease **must** contain reference to both the notice and declaration of contracting out.

### Leases: Types of Covenant

**Absolute:** *'The Tenant shall not do [ ]'*

The tenant is **completely prohibited** from doing something.

**Qualified:** *'The Tenant shall not do [ ] without the Landlord's consent'*

The tenant can go and **ask the landlord for its consent** although the **landlord does not have to give it**

**Fully qualified:** *'The Tenant shall not do [ ] without the Landlord's consent such consent not to be unreasonably withheld or delayed'*

The landlord has to be **reasonable** if it is going to **withhold its consent**.

Landlord is **not** entitled to **refuse its consent** on grounds which have **nothing to do with the landlord and tenant relationship**.

Must be something to do with, for example, the proposed assignee's **ability to pay the rent** or **bad references**.

**Note:** Statutes relating to **user, alterations and alienation** covenants intervene with regards to qualified covenants.

### Leases: Repair Covenants

The tenant must keep the premises in the condition in which they would be kept by a **reasonably minded owner**, having regard to:

- the **character & type** of premises at the beginning of the lease.

- the **age** of the premises.

- the **express words** of the covenant.

.....  
The tenant **must put the premises in repair first**, if at the time of the letting they were out of repair.

- this can be very **onerous**.



### Leases: Repair Covenants (cont)

A repair obligation can be **limited by a schedule of condition**

.....  
 if the works constitute **'renewal' rather than 'repair'**, they will **not** fall within the tenant's repair obligation.

**Repair = restoration** by renewal or replacement of **subsidiary parts**.

**Renewal = reconstruction** of the **entirety** of the premises.

If the **cost** of undertaking works is only **slightly less** than the **value of the premises**, it will **not** fall within a repair covenant.

### Leases: Alteration Covenants

The tenant is **free to carry out any alterations** to the premises unless the lease stipulates otherwise.

This is subject to the **legal doctrine of waste** which prevents alterations which would **devalue** the premises.

.....  
 If there is a **qualified covenant** against alteration that **improve** the premises, S 19(2) LTA implies a proviso that the **landlord's consent is not to be unreasonably withheld**.

S 19(2) converts a **qualified covenant** against **improvement** alterations into a **fully qualified one**.

**Improvements** = works that **improve the premises** from the **tenant's perspective**.

.....  
 As a condition for giving consent, the landlord can ask for:

- **payment of compensation** for loss in value caused by the alterations;
- **reinstatement** of the premises at the end of the lease if reasonable;
- **payment of the landlord's expenses** in giving consent.

### Leases: User Covenants

A landlord will want **control over the tenant's use** of the premises.

A tenant may be able to **change the use** of the premises depending upon the type of covenant.

.....  
 S 19(3) LTA prevents a landlord **demanding payment** for granting its consent to **qualified user covenants**.

The landlord **can** demand payment if the **change of use** involves a **change to the structure**.

If the change involves **structure**, the landlord can **increase the rent** or **charge the tenant a lump sum** in return for consent.

The landlord's consent for **qualified user covenants** need **not** be reasonable.

The landlord **can** recover its **costs and expenses** in the application for consent.

### Leases: Alienation Covenants

#### .....Assigning a Lease.....

If the lease is **silent** as to assignment, then the benefit of a lease is **freely assignable**.

Most leases contain **restrictions on assignment** so that the **landlord has to consent** and has **control** over who ends up being the tenant.

A **covenant against assignment** does **not** prohibit **subletting of the whole or part**.

A **covenant against sub-letting the whole** does **not** prohibit a **subletting of part**.

#### Formalities to Transfer the Lease:

**Deed:** S 52 LPA 1925 requires a deed.



### Leases: Alienation Covenants (cont)

Applies even if the lease has been created **with no formalities**.

**No short lease exception:** the assignment still **must** be by deed.

Land Registry form **TR1/TR01** is often used.

**Registration:** If the **lease is registered** at the Land Registry, the **deed of assignment must also be registered** to update the registered proprietor of the lease as the assignee.

**Licence to Assign:** A **deed** which **formally records** the landlord's consent.

The landlord, tenant & assignee are all party to it.

#### .....Subletting a Lease.....

Subletting/subleasing/underletting involves a tenant **granting a lease out of its own lease**.

The **tenant would always be responsible** for performing the covenants in the lease and still be in the picture until the end of the lease term.

#### Formalities to Underlet the Lease:

**Deed:** The general rule is that the lease must be granted by deed.

**Registration.** The deed must be registered if the **term is for over 7 years**.

**Licence to Underlet:** A **deed** which **formally records** the landlord's consent to the underletting.

The landlord, tenant & undertenant are all party to it.

#### .....Statutory Interventions.....

**Absolute covenants:** Where a property is **not capable of being sub-divided**, leases will contain an **absolute prohibition of underletting** of part of the property.

The landlord may as a 'one-off' **waive the prohibition against alienation**, but it is under no obligation to do so.

**Qualified covenants:** S 19(1)(a) converts a **qualified covenant into a fully qualified covenant**.

**Fully qualified covenants:** Consent shall not be **unreasonably held**.

**Not necessary for the landlord to justify conclusions** for refusing consent, if those conclusions might have been reached by a **reasonable person in the circumstances**.

May be **reasonable** for the landlord to refuse its consent to an assignment due to the **purpose** for which the proposed assignee intends to use the premises - even if that purpose is **not forbidden by the lease**.



### Leases: Alienation Covenants (cont)

Where a tenant applies to the landlord **in writing** for consent (s 1 LTA):

- the landlord must give **written consent** within a **reasonable time** (~28 days from receipt);
- the **burden** is on the **landlord** to provide reasonable refusal; and
- **written reasons** must be provided.

The landlord is entitled to be given **sufficient information** to enable it to make a decision (a reasonable time will **not expire** before L has this but L must ask for it).

If the **landlord** does not comply with requirements, it may be liable for **tortious damages** for **breach of statutory duty**.

.....Refusal of consent.....

**Reasonable:** Unsatisfactory **tenant's reference**.

Proposed assignee's use of the property would **damage the landlord's own commercial interests** (if they run a rival business).

The **existing tenant** is already in **breach of covenant**.

**Unreasonable:** The landlord's intention was to bring the tenancy to an end so would **not consent to any assignee**.

Proposed assignee was **already a tenant of the landlord** in another property which is difficult to re-let.

.....Pre-Conditions for Alienation.....

**S 19(1) LTA 1927:** Applies to any lease granted **on/after 1 Jan 1996 - new leases**.

**New leases:** L & T can **agree circumstances** in which L may withhold consent to an **assignment**.

L & T can *agree conditions\** subject to which consent may be granted.

These **circumstances/conditions** will be **automatically reasonable** if imposed by L when giving **consent to assign**.

**AGA:** Authorised Guarantee Agreement

A **common condition** attached to L's consent.

**Outgoing T promises to perform** *incoming assignee's obligations under lease if it defaults\**.

Any future **assignment by the assignee** requires a **further AGA**.

L will only ever have the **current T** and **T immediately prior** to current T on the hook.





### Leases: Covenant Enforceability

#### .....Original Parties.....

**Privity of contract:** All terms of a lease can be enforced by the **original L** against the **original T** and vice versa.

**Privity of estate:** Exists between any **current L** and **current T** of the property.

It lasts **only for a period** while the lease is **vested in T**.

Upon **assignment** of the lease of reversionary interest:

- **Privity of contract** remains between **original L** and **original T**.

- There will be **no privity of estate** between **original L & original T**.

- **Privity of estate** exists between the **current L** and **current T**.

**T assigns its interest** to a successor in title:

- **No contractual relationship** between L and **new T** (assignee): privity of estate but no privity of contract.

**L sells its reversionary interest:**

- **No contractual relationship** between the **buyer** and **current T**: privity of estate but no privity of contract.

#### .....Rules for Leasehold Covenant Enforceability.....

##### Old leases:

Created **before 1 Jan 1996**.

Liability of **original L & T** continues for **full duration** of the lease term, regardless of assignment/reversion.

Privity of contract means **original L & T** remain liable for **breaches of covenants** by their **successors** for entire lease duration.

Privity of estate allows **T's covenants** that **touch & concern** the land to be **enforceable by/against successor L's & T's**.

##### New leases:

Created **on/after 1 Jan 1996**.

**Abolishes privity of contract.**

**Original L & T** are **no longer liable for covenants** for full duration of the lease term.

**Tenants:** A **T with a new lease** will obtain an **automatic release** from the **T's covenants** upon **assignment** (s 5 LCTA).

There is **no automatic relief** if the assignment is in **breach of the alienation covenant**.

T remains liable for breaches of covenant occurring **during their period of occupation**.

When **T assigns a lease**, the **assignee** acquires the **benefit and burden** of **all covenants** in the lease.

**Landlords:** There is **no automatic release** of the L upon assignment of the reversion of a new lease.

L must **apply for such a release** from T.

If **T refuses** to release the outgoing L, L can **apply to the court**.

L remains liable for breaches of covenant occurring **during their period of occupation**.



### Leases: Covenant Enforceability (cont)

When **L assigns the reversionary interest**, the **incoming L** acquires the **benefit and burden** of the covenants.

The benefit and burden of covenants which are **personal** (i.e. express between 2 named parties in the lease) will **not** pass to a third party.

.....**Suing a Former Tenant**.....

An **assignee** of the lease becomes **liable for all covenants** in the lease from the **date of assignment**.

Should the **assignee be unwilling/unable to comply**, **L may look to other parties for compensation for breaches of covenant committed by a subsequent assignee\***.

If the **outgoing T** has been **automatically released** under the lease on assignment (s 5), T will **not** be liable.

If the **outgoing T** has provided an **AGA** on assignment, L could sue the **former T** who is guaranteeing obligations of their **immediate successor**.

.....**Presence of an AGA**.....

The presence of an AGA provides L with a choice:

- L could sue the **current T** and may be able to obtain an **equitable remedy**.

- If **current T is not worth suing**, L can sue the **outgoing T** acting as a guarantor for **current T** through AGA. The potential **remedy** is limited to **damages**.

- The **former T** may **recoup damages** paid on behalf of **current defaulting T** using an **indemnity**.

.....**Indemnities for Assignments**.....

An **outgoing T** should ensure their **assignee** enters into an **express indemnity covenant** on assignment.

The **assignee** agrees with the **outgoing T** to pay the rent & perform all covenants for the remainder of the lease.

The **former T** may then sue the **assignee** for **breach of indemnity covenant** and recoup damages paid to L.

Where there is **no express indemnity covenant**, the **former T** could claim **indemnity at common law** under *Moule v Garrett*.

*Moule v Garrett* can only be used for actions against **assignees** and **not** sub-tenants.

Indemnity is of **little value** - if the **assignee** was worth suing, L would have done so initially.

.....**Subleases**.....

S 3(5) LTCA allows **restrictive covenants** in new leases to be enforced against any **owner/occupier** of the premises.

L's will **not** be able to directly enforce any **positive covenants** against a **subtenant**.

### LTCA 1995

Some sections of LTCA apply to **old & new leases**.

**S 17 - Tenant default notice:** Where L wishes to pursue a **former T** who remains liable for a **fixed charge**, L must **serve notice** of the claim on T within **6 months** of the charge becoming due.

Fixed charge = **arrears of rent, service charge or insurance premiums**.

If L does **not** notify the **former T** of the claim **and** amount due, L **cannot** make a claim.

**S 18 - Liability for variations:** **Former tenants and guarantors** are **not** liable to pay any **additional amounts** owing in respect of **unanticipated variations** made to the lease **after the assignment**.



### LTCA 1995 (cont)

**S 18 - Overriding leases:** If a **former T** is called upon by **L** to pay **fixed charges** due from an **assignee**, the **former T** is entitled to request an **overriding lease** from **L**.

The **former T** would then become the **immediate L** of the defaulting party.

The overriding lease is granted for a **term equal to the remaining term of the lease + 3 days**

The lease contains the **same covenants** (except for personal ones).

If the **former T** requests an overriding lease, **L** is **obliged to grant it** within a **reasonable time**.

### Factors that Defeat a Lease

For a lease to exist, rather than a licence, there needs to be: **certain term, exclusive possession, correct formalities**.

Even where these requirements *are* present, the agreement may still **not** be a lease.

.....

The main situations where something which would otherwise be a lease is merely a licence are where there is:

**1. No intention to create legal relations:** Where there is a **family arrangement**, an **act of friendship** or **generosity**, it can be presumed that there is a **lack of such intention**, though this does **not** automatically follow.

If there is a **degree of formality** to the agreement and/or a **rent is paid** then this would evidence an **intention to create legal relations**.

**2. A service occupancy:** This arises where there is an **employer/employee relationship** between the landowner and the occupier

Where the occupier is **required to live in the premises** for the **better performance** of his duties as an employee, there is **no tenancy**, even though a rent may be paid.

A **perk** of the job does **not** enable a better performance of duties.

E.g. **caretaker's flat, gamekeeper's cottage, domestic staff accommodation**.

### Legal Mortgages

A mortgage is capable of being a **legal interest in land**.

To be **recognised as a legal interest**, the mortgage must be created in compliance with the **formalities** for a legal interest over **registered land**.



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Not published yet.  
Last updated 7th January, 2024.  
Page 11 of 30.

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### Legal Mortgages (cont)

If the mortgage is being granted over a **legal estate** by the **legal owner**, the mortgage is capable of being a **legal interest**.

If the mortgage is granted by **deed** and is properly **registered**, it is a valid legal mortgage.

#### .....Formalities.....

Deed + Registration

#### Deed:

- Must be clear on the face of the document that it is **intended to be a deed**.
- Must be **validly executed**.
- Must be **delivered**.

#### Registration:

- Must be registered at the **Land Registry**.
- If **not registered**, the mortgage will **not** take effect as a legal mortgage but could still be an **equitable interest**.
- The **grant of a legal charge** is required to be completed by **registration**.

### Equitable Mortgages

**Mortgages of equitable interests:** Where the borrower holds an **equitable interest** in the land (e.g. beneficiary), any mortgage of that interest will be equitable in nature.

Such a mortgage can be created very **informally**.

It need only be **in writing** and **signed by the grantor** in order to be validly created.

**Defective legal mortgages:** A mortgage over **registered land** which is **not** granted by a **valid deed** or that is **not** completed by **registration** will **not** take effect as a legal mortgage.

It may be regarded as an equitable mortgage - a **contract to grant a legal mortgage** - if it is **in writing**, contains **all agreed terms** and is **signed by mortgagor & mortgagee**.

### Discharge of Mortgages

Once a mortgage has been **repaid in full**, the **mortgage entries** at the Land Registry must be **cancelled**.

A mortgage is only **fully discharged** when all reference to it has been **removed from the Charges Register** at the Land Registry.

A **DS1 form** is used to **discharge a mortgage** over the **whole** of the land in a title.

A **DS3 form** is used to **discharge a mortgage** over **part** of the land in title (e.g. if only part of the land is being sold).



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Not published yet.  
Last updated 7th January, 2024.  
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### Mortgages: Equity of Redemption

Equitable of redemption rules =

#### 1. The equitable right to redeem supplements the legal right to redeem.

- A mortgage may include an **option for the lender to purchase** the mortgaged property.
- Such terms **may be declared void** as preventing the exercise of the equitable right to redeem.
- If the **lender has the opportunity to buy** the property, the **borrower inevitably loses the right** to take the property back free of the loan, which is fundamental to the nature of a mortgage as security.
- Whether the right to redeem is rendered **valueless** is a question of **fact and degree**.
- If an option is independent of the mortgage, it may be upheld.

#### 2. No postponement/prevention of redemption.

- Courts look at clauses which postpone the legal date for redemption very closely and will **not allow a clause which prevents redemption** altogether.
- Courts **may allow a lender to postpone** the date, but will consider the equitable rule that there must be **no clog or fetter** on the equity of redemption.
- This is a **clog on the equity of redemption**.

#### 3. No collateral advantages

- Lenders are entitled only to the repayment of **capital advanced plus interest**.
- If a lender **tries to extract additional value** from the borrower, the offending term in the mortgage deed **may be struck out** as being contrary to the equity of redemption.

#### 4. No unconscionable terms

- Courts have a well-established inherent equitable jurisdiction to **strike out oppressive and unconscionable** terms.
- The term must be **more than simply 'unfair' or 'unreasonable'**.
- **High-interest rates** attract the most attention.
- The imposition of a **premium** is **unconscionable** if it **wipes out any chance of surplus sale proceeds** for the borrower.
- The lender may be **justified in charging a higher rate** if the borrowers have a **poor credit history** and are a **credit risk**.
- Has the term been imposed in a **morally reprehensible** manner?

### Mortgages: Undue Influence

....How does the **bank** ensure there is **no undue influence** when granting a mortgage?....

- Lender must **write** to the party who is granting the mortgage **not for their benefit** (Party B).
- Lender must **explain** to Party B that the Bank needs **confirmation from an independent solicitor** that that solicitor has explained the transaction to them.
- Bank will ask Party B to **nominate an independent solicitor** and provide **all information** to that solicitor .
- Bank must **not** proceed to lend until **confirmation is received** from the solicitor that the transaction has been fully explained to Party B.

....What role does the **independent solicitor** play?....

- Must **meet the party** who is entering into the mortgage not for their own benefit (Party B) **face to face** and **on their own**.
- Must **explain why** they are meeting.
- Must **explain documents and transaction** in a **meaningful** way using **non-technical language**.



### Mortgages: Undue Influence (cont)

- Must **point out the risks**, emphasise that Party B has a **choice**, keep a **detailed attendance note** and confirm everything in **writing**.
- The solicitor will then **send a certificate to the Bank**.

.....

If this is done, the **Bank's interest in the land under the mortgage**, including the right to possess and sell, has **priority** over the private individuals' freehold interests.

These steps should be taken in **every non-commercial case** where a **private individual** offers **their property as security for another person's debts**.

E.g. parent/child; brother/sister; employer/employee; friends.

### Mortgages: Priority over Registered Land

#### .....Legal Mortgages.....

- Priority between **registered charges** depends on the **order they are entered on the register** - S 48 LRA 2002.
- Mortgages over registered land which are **not** completed by **substantive register** will **not** take effect as a legal mortgage - S 27(1) LRA.

#### .....Equitable Mortgages.....

- Priority between **equitable mortgages** depends on the **order of creation** - S 28 LRA 2002.
- If the equitable mortgage is **protected by entry of a notice**, it will take **priority over later legal mortgages** - protection will **NOT** affect priority over **equitable mortgages** which is always by **creation date**.
- An equitable mortgage **not protected** by notice does **not** take priority over a later **registered estate** (transfer of legal estate for value) or **registered charge** (grant of legal mortgage).

### Mortgages: Lender's Rights / Remedies

#### Debt action:

- This is used **in addition to** one of the other remedies.
- A **personal action** against the borrower.
- **Negative equity** = when the **value** of the mortgaged property is **less** than the **outstanding mortgage debt**.
- If the lender **sells** in **negative equity**, they will wish to pursue a **debt action** against the borrower for the **shortfall**.
- Under a mortgage created by **deed**, **the period for recovery of the debt stated in the deed (the capital) is 12 years\***.
- The **limitation period** for recovery of interest is **6 years**.

#### Possession:

- This is a **last resort**.
- A prudent lender will **make an application to the court** for an order for possession, even though this may not be strictly necessary.
- Lenders should try to **discuss the debt** with the borrower and **accept reasonable requests** for a new payment plan.
- Where the property is **wholly/partly residential** S 36 AJA 1970 applies: **power to postpone** the date for delivery of possession as the court thinks **reasonable**.

#### Sale:

- Most mortgage docs contain an **express power of sale** setting out how/when the power will be exercised.
- Right to sell can be **implied under s 101(1)(i) LPA** and arises **when the mortgage money has become due**.
- S 101(1)(i) can be exercised where at least 1 of the below apply:



### Mortgages: Lender's Rights / Remedies (cont)

1. **Notice** requiring payment of the whole loan **served by lender & borrower defaulted**.
2. **Interest is unpaid with 2 months' arrears of that interest**.
3. Borrower has **breached another mortgage provision** which could affect value of security (i.e. the property).
  - Lenders are under a duty to take **expert advice** as to the method of sale, marketing strategy & reserve price.
  - Lender must take **reasonable care** to obtain **true market value** for property but is **not expected** to delay to improve property or wait for upturn in market.

#### Receiver:

- A receiver acts as a **manager of the mortgaged property** if the lender does not repossess/sell.
- Power arises under s 101(1)(iii) LPA 1925.
- The receiver's function is to **get income** from the land.
- The receiver is the **borrower's agent** so a **safer option for the lender**.

#### Foreclosure:

- Rarely used nowadays - **draconian remedy**.
- Lender takes **freehold** of the property.
- This is a **lengthy and complex** procedure for the lender.
- The court may order a **sale in lieu of foreclosure**, especially if the property is worth **more** than the debt.
- Even after declaring foreclosure, the borrower can **re-open the case** if they can show they have the **means to pay**.

### Is a Right an Easement?

#### 4 requirements to be an easement:

1. To be a legal easement, the right must fall within definition in s 1(2)(a) LPA 1925: **granted/reserved for equivalent of freehold/leasehold estate**.
2. Right must be **capable** of being an easement - *re Ellenborough Park*.
3. Right must **not** be prevented from being an easement by a **disqualifying factor**.
4. Right must have been **acquired as an easement**: expressly, impliedly or prescription.

### Easements: Requirements 1 & 4.

#### .....Legal Easements.....

- An easement granted/reserved for the equivalent of a term of years absolute is capable of being a legal interest in the land.
- e.g. a right of way granted when part of freehold land is sold will be granted forever.
- e.g. a right of drainage granted in a 5-year lease will be granted for the term of that lease.

#### .....Equitable Easements.....

- An easement not granted/reserved for the equivalent of a freehold/leasehold.
- e.g. a right to park granted until 'the alternative parking facility is complete'.

#### .....Positive Easements.....

- Allow the holder to use the servient land of another in a particular way.
- e.g. a right of drainage allows the holder to use pipes under that land.

#### .....Negative Easements.....

- Prevent the servient land owner from doing something on their land by giving the dominant owner the right to receive something.



### Easements: Requirements 1 & 4. (cont)

- Enjoyed from the dominant owner's land and does not involve entering/using the servient land at all.

- e.g. a right to air; a right to light (only in relation to a defined aperture); a right to support.

#### .....Grants.....

- A type of easement.

- A landowner sells/leases part of their land to another and gives them an easement over the land which they have retained.

#### .....Reservations.....

- A type of easement.

- A landowner sells/leases part of their land to another and retains a right over the land they have sold/leased.

#### .....Express creation.....

- Most easements commonly arise when land is sold/leased.

- Set out in writing in the **transfer deed or lease**.

#### .....Implied creation.....

- Easement may be deemed to have been created impliedly so it is *effectively* "written" into the document from which it was omitted.

#### .....Implied creation.....

- Easements may arise by long use.

- Legal easements created out of easements exercised over land for **at least 20 years** with no express grant/reservation.

- Easement should have been exercised over this time **without force, secrecy or express permission**.

- Generally can only be claimed by a **freeholder**. Tenant can only claim if it is **right of light**.

- No use for **1 year or more** = **interruption** to the 20 years.

### Easements: Requirement 2

#### Factors which disqualify an easement

**1. Exercise of the right must not amount to exclusive possession of the servient tenement:**

If an easement causes the servient owner to **not be able to use the servient land** at all it is clear that there is exclusive possession by the dominant owner.

The easement must not leave the servient owner with **no reasonable use** of the servient tenement - ouster principle.

Sole use for a **limited purpose** retains the servient owner's **possession and control**, so can still be an easement.

**2. Exercise of the right by the dominant owner must not involve additional/unavoidable expenditure by the servient owner:**

If there is a **positive obligation** on the servient tenement to spend extra money to redeem the right, it is **not** an easement.

**3. Exercise of the right must not depend on permission being given by the servient owner:**

After the initial grant, **express permission** should not be required.





### Easements: Requirement 2 (cont)

If the servient owner only exercises their right in so far as they are **permitted by the dominant tenement**, there is no easement.

### Easements: Requirement 3

#### 4 essential characteristics of an easement - *Re Ellenborough Park*

- |   |   |
|---|---|
| <b>1. There must be a dominant &amp; servient tenement:</b> | 2 identifiable pieces of land: <ul style="list-style-type: none"><li>- 1 which <b>benefits</b> from the exercise of the right (dominant);</li><li>- 1 which is burdened by its exercise (servient).</li></ul>   |
| <b>2. The right must accommodate the dominant tenement:</b> | The right must <b>benefit the dominant land</b> , not a person/business on the land.<br><br>The right should affect <b>nature, quality, use or value</b> of dominant land and not be expressly personal.<br><br>The dominant and servient land must be <b>sufficiently proximate</b> to each other.                   |
| <b>3. There must be diversity of ownership:</b>             | The dominant and servient land must be owned by <b>different people</b> .<br><br>If the dominant and servient land ever came back into common ownership, any easements enjoyed by the would be extinguished.  |
| <b>4. The right must lie in grant:</b>                      | The right must be: <ul style="list-style-type: none"><li>- granted by a <b>capable grantor</b> to a <b>capable grantee</b> (over 18 etc.);</li><li>- capable of reasonably exact description</li><li>- judicially recognised (within the traditional list or maybe a <b>new positive</b> type of easement).</li></ul> |

### What is Land?

Land includes the surface, buildings or parts of buildings on the land, other corporeal hereditaments and other incorporeal hereditaments.

**Corporeal hereditaments:** Physical things attached to the land - **fixtures**.

**Incorporeal hereditaments:** The **benefit of any proprietary rights the land has** but which have no physical substance.

#### .....Airspace and the Ground Below.....

**Airspace:** An owner's rights in the airspace above his land are **restricted** to such height as is **necessary** for the **ordinary use and enjoyment of the land and the structures** upon it.



### What is Land? (cont)

Above that height, the owner has **no greater rights** than any other member of the public.

**Lower airspace:** To such height as is **necessary for the reasonable enjoyment** of the particular piece of land.

If a structure **overhangs the lower airspace of your property**, that is a **trespass** irrespective of whether damage is caused to your property.

**Cranes** are deemed to be within lower airspace.

**Upper airspace:** Hundreds of feet above the land and not interfering with any use of that land would **not** be trespass.

S 76(1) Civil Aviation Act 1982 **grants immunity** from trespass or nuisance for any **innocent flight of aircraft**.

**Ground below:** Land ordinarily carries with it **all that is beneath the surface**.

A landowner is **not entitled to all minerals** under his land. All mines of gold and silver belong to the Crown.

If a landowner finds **"treasure"** then that also **belongs to the Crown**.

Any **coal under land belongs to the Coal Authority** by virtue of the Coal Act 1938.

S 43 Infrastructure Act 2015 effectively states there is **no trespass at depths below 300 metres** and therefore there is **no need for the consent of the freehold owner to deep-level drilling**.

### Land Ownership

All physical land is owned by the Crown.

A **proprietary right of possession** is called an **estate in land**.

**Freehold estate:** Also known as the **fee simple absolute in possession**.

A right of possession which **lasts until the current owner dies without heirs**.

If the current owner dies without next of kin and without a will, the land is regarded as **bona vacantia** and the estate **reverts to the Crown**.

**Commonhold:** A type of freehold estate.

Designed to meet needs of owners of properties where owners are **interdependent** on each other.

**No overall landlord.**

There is a **freehold owner** and a **commonhold association** company.

The owner of each flat is a **member of the association**.



### Land Ownership (cont)

Association is responsible for maintaining the communal areas of the building.

**Leasehold estate:** Also known as a **term of years absolute**.

A leaseholder (tenant) may grant a **lease of lesser duration** out of their own leasehold, while still retaining the original lease.

- a sub-lease.

When a lease ends the **right to physical possession** of the land **automatically reverts to the landlord**.

**Freehold reversion:** The **residue of the estate** after granting a lease.

**Leasehold reversion:** The **residue** where the **granter of the lease** holds a **leasehold estate**.

The same piece of land may **simultaneously** be subject to a **freehold, lease, sub-lease** etc.

Each estate holder could be described as the **owner** for the right to possession for their **"slice of time"**.

### Sale of a Freehold Estate

**Pre-exchange:** After an offer is **accepted**, the **buyer** will make **various enquiries** before committing to a purchase by the formal exchange of contracts.

E.g. carrying out searches of the public registers and confirming that the seller actually owns the land.

The buyer will also want to find out about any **proprietary rights** which benefit or burden the land.

#### .....Three-Stage Process.....

**1. Exchange of Contracts:** **Voluntary** and not legally necessary to transfer the estate, but **common in practice**.

Seller and buyer **enter into a binding contract** in which they agree the price and other terms.

The parties become **legally committed** to buy/sell the land.

Parties can **pull out** of the deal without legal liability until contract is entered into.

Buyer usually pays a **deposit** to the seller.

**1a. Formalities:** **S 2 LP(MP)A 1989**

The contract must be **in writing**.

It must contain all **expressly agreed terms**.

It must be **signed by both parties**.

(Remember: a contract is **not** required to legally transfer the land).

**2. Completion:** This occurs by way of a **deed** - S 52(1) LPA 1925.



### Sale of a Freehold Estate (cont)

The buyer **pays the balance of the purchase money** to the seller and the seller moves out of the property and hands the keys to the buyer.

The sale triggers a **legal requirement to register** the land.

#### 2a. Requirements:

**S 1 LP(MP)A 1989**

The document must be **labelled as a deed**.

The deed must be **validly executed** (the seller must **sign in the presence of a witness**).

The **buyer does not** legally have to sign the deed but in practice **both parties execute**.

The deed must be **delivered** by **dating the document**.

#### 3. Registration: The buyer sends the **completed deed** to the **Land Registry**.

For **registered** land -

Legal title transfers at the point at which the **buyer is registered** at the Land Registry.

For **unregistered** land -

Legal title transfers at the **point of completion**. First registration of land must be registered within **2 months of completion** or title **reverts back to seller**.

### Land Registration

#### .....Unregistered Land.....

The **title information** is contained in various **old paper title deeds**.

These are difficult to search through to:

- discover **third party interests**
- **examine title deeds**
- guarantee **accuracy** or **compensation for error**
- quickly and inexpensively.

#### .....Registered Land.....

Land has been **registered at the Land Registry**.

The register is a **complete record** of all matters relating to a piece of land.

Once registered, a person's **ownership is guaranteed by the State**.

All information is held **centrally** and can be viewed **online**.

#### .....Registering Unregistered Land.....

There is **no obligation** to register an unregistered title.

But, unregistered land **must be registered** if there is a transaction/event which **triggers** compulsory registration.

Each time that land is **sold** for the first time **since 1 December 1990** it must be registered - **first registration**.

#### .....Triggering Events.....

Apply to **both** unregistered and registered land.

If **unregistered**, the land must be **registered for the first time**.

If **registered**, the register must be **updated**.

The events:

- Transfer of freehold estate by **sale, gift or court order**.



### Land Registration (cont)

- Grant of a **lease** for a term of **more than 7 years**.
- A **first legal mortgage** of the freehold or of a leasehold with **more than 7 years** to run.
- **Assignment (transfer) of a lease** of **unregistered** land with **more than 7 years** to run.
- An **assent, vesting assent or vesting deed** which is a disposition of the freehold or a leasehold with **more than 7 years** to run (refers mainly to **transfers on death**).
- The grant of a **lease** to take effect in possession **more than 3 months after the date of the grant** (i.e. future leases).

### The Purpose of Land Registration

#### .....Mirror Principle.....

The register should reflect **all matters** that the property has the **benefit and burden** of.

Should be a **clear and comprehensive account of the ownership and rights** of a piece of land.

A purchaser should only need to look at the register to understand who **owns a property** and what **third party rights will bind the property**.

However, an overriding interest is an interest that **does not appear on the register** but will still be binding on the owner of the legal estate and any buyer of it.

#### .....Curtain Principle.....

The register records the **legal title**.

The **beneficial or equitable ownership** of the land is **kept off** the title.

The purchasers **need not be concerned** with beneficial/equitable ownership of the land.

#### .....Insurance Principle.....

The **accuracy** of the register is **guaranteed** by the state.

If there is an **error with the register**, it will be **corrected** and anyone who has suffered any loss will be **compensated** (S 23 LRA 2002) - 'state indemnity'.

### Registered Title to Land

When a piece of land is registered for the first time, it is given a **unique title number** and the details of the land owner and rights that **benefit/burden a piece of land are recorded**.

The **Land Registry registered title documents** are known as the **Official Copy**.

The **Official Copy** for each piece of land contains:

- |                                    |  |
|------------------------------------|--|
| <b>1. Property register:</b>       | <b>A description</b> of the property by reference to a filed plan.     |
|                                    | The <b>nature</b> of the estate (freehold/leasehold).                  |
|                                    | The details of any <b>proprietary rights that benefit</b> the land.    |
| <b>2. Proprietorship register:</b> | <b>Details of the owner</b> of the legal estate.                       |
|                                    | The <b>class of title</b> .  |
|                                    | Any <b>restrictions</b> on the owner(s) ability to deal with the land. |
| <b>3. Charges register:</b>        | <b>Details of any burdens</b> on the land.                             |
|                                    | <b>Details of any leases</b> granted out of the title.                 |

.....



### Registered Title to Land (cont)

With the exception of those deemed by the LRA 2002 to be 'overriding', only interests that have been correctly entered on the register will be enforceable against a purchaser.

### Classes of Title

**Absolute Title** The **best form of ownership**.

**Most properties** are registered with this class of title.

The land is **only bound** by interests that are **registered** on the title or **overriding** interests.

**Qualified Title** An owner may be registered with qualified title if the Land Registry is of the opinion that the **title has some defect** which it will then specify on the register.

**Very rare** to see someone registered with qualified title in practice.

**Good Leasehold Title** Granted where the Land Registry is satisfied as to the title of the **leaseholder only** and not the freeholder.

Could be the case where the **freehold title is unregistered** and where the applicant **fails to submit evidence of the freehold title** when applying to register his leasehold title.

**Possessory Title** May be given by the Land Registry where the applicant is in **possession of the property** or is in **receipt of rents and profits** and there is no other class of title that can be given.

Where there are **no title deeds** to prove ownership or the deeds have been destroyed, Possessory Title would be given.

Usually given to those with a claim under '**Adverse Possession**' or '**Squatters Rights**'.

May mean that third party interests created before the date of first registration will bind the property even though these are not noted on the title.

### Legal Interests in Land

**Mortgage:** Can be defined as a **loan of cash**, which is secured by rights granted over property.

Rights include the **right to possess and sell** the land in the event of default in the mortgage repayments.

The **borrower** grants the mortgage, **not** the lender.

**Easement:** A proprietary right to **use land which belongs to another**.

Use is **more limited** than an exclusive right to occupy or use.

Must be granted for a **term equivalent to a freehold/leasehold estate** - i.e. forever or for a certain period - to be a legal easement.

Examples: **rights of way, drainage, storage** and **parking** on neighbouring land.



### Legal Interests in Land (cont)

**Rights of entry:** A right for a **landlord to re-enter leased premises** and end the leasehold estate in the event of tenant default or some other specified event; **OR**

A **rentcharge owner's right to hold the land** if money owed is not paid.

Rentcharge = a legal right to **receive a periodic sum** paid by the owner of the land (very rare).

A **right of entry in a lease = a forfeiture clause\***.

### Equitable Interests in Land

**Restrictive covenants:** A covenant is a **promise**.

Restrictive covenants **prevent** a land owner from doing something on their land.

**Estate contracts:** A **contractual right** to a legal estate, whether freehold or leasehold.

Equity will order **specific performance of a contract to create or transfer** a legal estate, because each piece of land is regarded as unique.

This, together with the maxim that **'equity sees that as done what ought to be done\***, results in an equitable interest arising from the contract.

**Interests in a trust of land:** A piece of land may be **placed in trust**.

The **beneficiary(s) has an equitable interest** in the land.

### Legal vs. Equitable Interests

#### .....Remedies.....

#### Legal Interest

- **wide range** of remedies available
- **entitled to damages** as of right
- no discretion as to the merits of the case
- **equitable remedies** may be available

#### Equitable Interest

- remedies entirely at discretion of court
- **not entitled** to damages as of right
- 
- 

#### .....Enforcement.....

Enforcement of the interest against third parties differs in both cases.

### Proprietary Rights in Land

**Proprietary rights:** Can be enforced by an **action in rem** (use or possession of the land can be **recovered**).

The right holder will have a **right to occupy/use/restrict** what can be done on the land in some way.

They do **not** have to settle for damages if they are deprived of their right.



### Proprietary Rights in Land (cont)

Can be **enforced against a third party**.

Fixed list of proprietary rights:

- **freehold** estate
- **leasehold** estate
- **easement**
- **mortgage**
- **restrictive covenant**
- estate **contract**
- **beneficial interest** in a trust of land

**Personal rights:** Use/occupation of the right **cannot** be recovered.

Can only be enforced by a personal action for **damages** if the right is breached.

**Only bind the parties to that right.**

**Cannot** be enforced against **third parties**.

**Just because a particular use of land is recognised on the list of proprietary rights, this does not mean the right is definitely proprietary.**

The **nature, creation and protection** of rights in land need to be considered:

**Nature of a right:** To have proprietary status, a right must satisfy certain characteristics of that right.

E.g. If a right to park is an easement but the car is locked out of the garage so unable to use it, this **does not fit with the definition of an easement**.

**Creation of a right:** Most proprietary rights are subject to **strict formality requirements**.

Compliance with such formalities may ultimately determine whether the right is proprietary or not.

**Protection of a right:** If a right is proprietary, is it enforceable against a third party?

To be **enforceable** against subsequent owners, the right **must be registered at the Land Registry**.

### Fixtures

..... **The Legal Test** .....

The **degree** of annexation test raises a **presumption**, that the thing in question is or is not a fixture which can then be **rebutted** by objectively looking at the **purpose**.

**1. Degree of annexation test:** The **more firmly the object is fixed** to the land or building, the **more likely** it is to be classified as a fixture. Even if it is **fairly easy to remove**, its **character** is still prima facie that of a fixture.





### Fixtures (cont)

If the object **rests on the land by its own weight**, it is generally considered to be a chattel.

#### 2. Purpose of annexation test:

This test takes **priority over the degree test**

Considers **why** the object is attached to the land/building.

Was the object for the **more convenient use or enjoyment** as a **chattel**, or to **enhance** the land or building in some way as a **fixture**?

#### .....Fixture vs Chattel.....

Fixture	Chattel
- intended to be <b>permanent</b>	- <b>temporary</b>
- a <b>lasting improvement</b> to the building	- no more than is necessary for the object to be <b>used and enjoyed</b>
- <b>kitchen units</b>	- ornamental items, e.g. pictures
- items <b>installed by a builder</b> are more likely fixtures	- easy to remove <b>carpets</b> and <b>curtains</b>
- <b>bathroom fittings</b>	- <b>light fittings</b> attached with screws
- <b>chattels</b> which form part of the <b>architectural design</b> of a building	- <b>kitchen appliances</b> which are not integrated and can be removed without damage
- objects which cannot be removed <b>without destruction/damage</b>	- <b>securely affixed</b> items which are affixed as such purely for <b>better enjoyment</b> of that item

### Land Contracts

A contract to buy/sell is **not** the only type of land contract, but they all follow the **three-stage process**.

#### .....Formalities.....

#### 1. The contract must be in writing

There is **no scope** for an oral land contract.

#### 2. It must contain all expressly agreed terms

Terms must be incorporated by being **set out in the document** or by **reference** to some other document.

#### 3. It must be signed by both parties

Terms may be contained in **one document** signed by **both parties**.

If the contract is to be **exchanged**, terms should be contained in **2 identical** documents.

#### .....Variations.....

Whenever a **material** term in a land contract is varied, that **variation must also comply** with the above formalities.

A **material term** is one which is **essential to the nature of the contract**

#### .....Application.....

Land contracts most often create a **contractual right to a legal estate**

E.g. sale contracts, contract for lease, option agreement, right of pre-emption.

#### .....Effect.....

A land contract may be created **deliberately**.



### Land Contracts (cont)

A land contract may be created through parties **trying to create a valid deed but failing**.

The courts will recognise an **equitable interest** in the land where a binding land contract exists.

Binding contracts **pass an equitable interest** in the land to the buyer - an **estate contract**.

An estate contract can only exist if the remedy of **specific performance** is available (i.e. C has clean hands).

An estate contract is a **proprietary right in land** so it is capable of **binding and being specifically enforceable against third parties**.

To be **binding on third party** purchasers, an estate contract **must be protected** against third parties.

If the estate contract is **not protected** but the **third party is a donee** (gifted/inherited land), the **donee will be bound** by a properly created estate contract.

### Breach of Land Contract

**Damages:** Common law remedy.

Available **as of right**.

Measured by the **loss which C has suffered** as a result of the breach.

**Specific performance:** Equitable remedy.

A **court order** compelling the defaulting party to **carry out positive contractual obligations**.

**Not** available as of right; at the **discretion** of the court.

Regard will be had to the **behaviour of both parties**.

Must come with **clean hands**

**Injunction:** Equitable remedy.

A **court order restraining somebody from doing something**, including breaching a contract by selling the land to someone else.

**Not** available as of right; at the **discretion** of the court.

Regard will be had to the **behaviour of both parties**.

Must come with **clean hands**

### Lease vs. Licence

#### Lease

- **Proprietary right** in the Land
- Capable of being **enforced against third parties**
- A tenant can **sue a third party for nuisance or trespass**
- Can confer the **right of security of tenure**
- Enforceable *in rem*
- Tenants under leases receive **various statutory protection**

#### Licence

- **Personal permission** to be on someone's land
- Can only be **enforced against the grantor**
- A licensee is **not entitled to sue a third party for nuisance or trespass**
- **No security of tenure**
- Enforceable *in personam*
- **No statutory protection** for licensees



### Lease Requirements: Certainty of Term

Certainty of term can be shown by a **fixed term** or a **periodic term**.

#### Fixed term

- exists where the **maximum duration** of the arrangement is **known from the outset**.
- Once created, **neither party can unilaterally end the lease earlier** unless there is a break clause present in the lease enabling them to do so.

#### Periodic term

- Technically a **lease for one period**.
- Generally, **weekly, monthly, quarterly, yearly**.
- The period goes on extending itself automatically until either landlord or tenant give notice to terminate the tenancy - **notice to quit**.
- Can be created **expressly** (via written agreement) or **impliedly** (by looking objectively at all relevant circumstances)
- The 'term' of the periodic tenancy depends upon the period by reference to which the rent is calculated, rather than the intervals at which it is payable.

### Lease Requirements: Exclusive Possession

*Street v Mountford*

Exclusive possession means the **right to exclude** all others from the property, including the landlord.

If a **clause appears to defeat exclusion possession** but has been inserted into a lease only to make what would otherwise be a lease, appear like a licence, it will be thrown out as a **sham**.

Certain scenarios may indicate that an occupier does **not** have exclusive possession:

**1. Retention of a key:** A landlord retaining a key to the premises may make it appear as if the occupant does not have exclusive possession.

However, if the key is only retained for **emergencies**, exclusive possession may still exist.

Is the right of access the landlord has **restricted or unrestricted?**

**Restricted = likely exclusive possession**

Retention of a key will **not** determine the nature of arrangement either way.

**2. Landlord provides services:** If a landlord provides **attendance or services** there is a **licence**.

Services include **cleaning, changing linen** etc.

This holds on the assumption that the **services are actually carried out**.



### Lease Requirements: Exclusive Possession (cont)

**3. Sharing clauses:** If the landlord reserves the right to **share the property** with the occupiers or reserves the right to **introduce others to share**, this may mean there is **no** exclusive possession.

The occupier **cannot** exclude whoever the landlord is able to introduce.

The sharing clause may be a **sham**.

In considering whether the clause is a sham, the **size and nature** of the accommodation, the **relationship** between the occupiers, the **wording** of the clause and whether the clause has been **exercised** should be considered.

### .....Business Tenancies.....

The courts are **more prepared to accept the reality of the label** 'licence' than they are in the residential context as there tends to be more **equality in bargaining power**, with commercial leases often negotiated and parties legally represented.

A **high degree of physical control** over the premises and conduct of a business on a land is likely to be indicative of **alicense**.

If the occupation agreement contains a **right for the landlord to relocate and move the tenant** to alternative premises, it will **not** be a lease.

### Leases: Formalities

**The general rule:**

DEED

To create a legal lease, a **deed** must be used.

The requirements of a valid deed are in s 1 LP(MP)A 1989.

**Leases over 7 years:**

DEED + REGISTRATION

A **deed** must be used.

The lease must also be **registered** - this is **compulsory**.

If not registered, the legal leasehold estate will **not have been created**.

**Leases of 7 years or less:**

DEED (binding as an overriding interest)

A **deed** must be used.

The lease **need not** be registered.

Lease will still take effect as a legal lease.

Lease will be **binding on a new freehold estate owner** as an **overriding interest**.

**Leases of 3 years or less:**

NO FORMALITIES (so long as requirements fulfilled)

No deed needed so long as:

1. The lease takes effect **in possession**
2. It is granted at **best/market rent**; and
3. **no premium/fine** is payable



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Not published yet.

Last updated 7th January, 2024.

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### Leases: Formalities (cont)

The lease **need not** be registered.

Lease will be **binding on a new freehold estate owner** as an **overriding interest**.

Examples:

- Short fixed term leases (max. term of 3 years or less)
- Express periodic tenancies (w/ tenancy agreement)
- Implied periodic tenancies (occupier is in possession and paying rent at regular intervals).
  
- Periodic tenancies are only short term when each individual period of tenancy is 3 years or less.

**Equitable leases:** WRITING + TERMS + SIGNED BY BOTH

Parties enter into a **contract for lease** or try to grant a legal lease which **fails to comply** with the formality requirements.

The tenant will have an equitable lease (estate contract) if the agreement:

- is in **writing**
- contains **all the terms**
- is **signed by both parties**

### Leases: Multiple Occupancy

If the occupiers together have the **right to exclude all others**, including the landowner, then there is likely a lease arrangement.

There could be **one single lease** (a joint tenancy) or **several individual leases**.

**Joint tenancy:** All co-owners/tenants constitute **one single entity**.

They own/lease the **whole property** as **one collective entity**.

They are **jointly and severally liable** for the terms of the agreement.

**Joint liability:** If **one occupier left**, the **remaining occupiers** would be liable for the **whole rent payment**, not an individual share of it.

### Joint Tenancy: Requirements

**1. Unity of Possession:** All must be entitled to occupy the **whole of the premises**.

No-one has exclusive use of any part

If the occupiers can show that they each have **exclusive possession** of a part of the property then it is possible for them to have **individual leases** of their own part.

**2. Unity of Interest:** All must hold the **same lease term and restrictions**.

All must be **jointly liable for the rent**.

**3. Unity of Time:** All of the occupiers' **interests must start at the same time**.



### Joint Tenancy: Requirements (cont)

**4. Unity of Title:** All of the occupiers' interests must derive from the **same document** or from **separate but identical documents** which are interdependent (i.e. both would have been signed, or neither).

Where occupants do **not** have **all 4 unities**, they do **not** have a joint tenancy.

### Easements: Formalities

**Express legal easements:** Must be created by **deed** - s 52 LPA 1925.

Must be intended to be a deed; signed by grantor & witness; delivered/dated.

Easement must be **substantively registered** at the Land Registry to be legal - s 27(2)(d) LRA 2002.

**Benefit** of the easement noted on the **Proprietary Register** of dominant land's title.

**Burden** of the easement is noted in the **Charges register** of the servient land's title.

**Express equitable easements:** Not been created properly?

Failed contract must be:

- in writing
- contain all terms
- signed by both parties.

Not granted/reserved for suitable duration term?

Must be:

- in writing
- signed by grantor.

**No substantive registration** needed for equitable easement to exist.



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