

G1B

OWNERSHIP: THE LEASE

1 THE CONTENT QUESTION

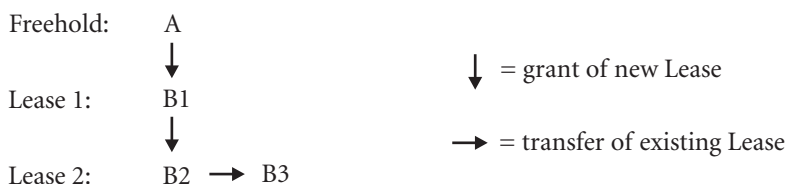
1.1 Definition

B has a Lease if he has:

- a right to exclusive control of land;
- for a limited period.

A Lease thus consists of Ownership of land *for a limited period*. In the terminology of the Law of Property Act 1925 (the LPA 1925) the Lease is one of only two ‘estates’ in land. The Freehold and the Lease are the *only* two rights that give B exclusive control of land.

So, if A has a Freehold and makes a binding promise to B1 to allow B1 exclusive control of the land for the next 21 years, B1 acquires a Lease. If B1 then makes a binding promise to B2 to allow B2 exclusive control of the land for the next five years, B2 also acquires a Lease. B2, if he wishes, can then transfer his five-year Lease to B3.¹



In such a case, A and B1 are in a *landlord–tenant* relationship: A is the landlord and B1 is the tenant. B1 and B2 were also in such a relationship: as the result of B2’s transfer of the Lease, B3 has now stepped into the shoes of B2. So, there is now a landlord–tenant relationship between: (i) A and B1; and (ii) B1 and B3.

1.2 The distinction between a Lease and a licence

EXAMPLE 1

A has a Freehold. A makes a contractual promise to allow B to occupy A’s land for six months. Three months later, A transfers his Freehold to C.

¹ B2’s transfer of the Lease to B3 may be a breach of a duty imposed on B2 by his agreement with B1. If so, B3 still acquires B2’s Lease (*Old Grovebury Manor Farm Ltd v W Seymour Plant Sales and Hire Ltd (No 2)* [1979] 1 WLR 1397); but B2’s breach may have serious consequences for B3: see 2.2.2(ii) below.

If the contractual agreement gives B a right to exclusive control of A's land for six months, B has a Lease. If it does not give B such a right, he has a contractual licence: B has a liberty to make use of A's land and A is under a contractual duty to B not to revoke that liberty (see **E6:1**).

The distinction between a Lease and a licence is fundamental. A licence, even a contractual licence, does *not* count as a property right or a persistent right (see **E6:3.4.2**). In **Example 1**, if B's agreement with A gives him a licence, B will thus have no pre-existing right that he can assert against C. However, if that agreement gives him a right to exclusive control of A's land, B will have a Lease: a pre-existing property right that imposes a prima facie duty on C. In fact, if B has a Lease, the rest of the world is under a prima facie duty not to interfere with B's use of the land. For example, if X runs a nearby pig farm that produces nauseating smells, X commits the wrong of nuisance against B (see **G1A:4.1.1**).²

Even if no third parties are involved, there are still advantages to B in having a Lease rather than a licence.

1. Particular statutes may give B certain rights against A if, but only if, B has a Lease.³
2. Judges have developed basic duties of A (and also of B) that are implied by law into all Leases, whether the parties expressly agreed to those duties or not.

The second point is of less importance than the first. English judges have been cautious in implying duties into Leases and so the implied duties of A and B are very limited.⁴ B has a duty not to alter permanently the physical character of the land;⁵ A has a duty not to interfere with B's expected use of the land and not to allow a substantial interference with B's physical control of the land.⁶ In fact, it may even be possible to argue that these duties are not dependent on B having a Lease: similar duties could be implied into a contractual licence allowing B to occupy land as a home.

The first point can be important in practice. For example, section 11 of the Landlord and Tenant Act 1985 applies where A grants B a Lease, for less than seven years, of a home.⁷ It imposes certain basic duties on A to keep the house in a reasonable condition: for example, where repairs to the structure and exterior of the house are necessary, A must pay for those repairs. A cannot avoid this duty by simply specifying in the agreement that he is not liable for repairs: the duty is mandatory and A has to get the permission of a court to contract out of it. In contrast, if A gives B a contractual licence of a house, no such duties are implied: A is free to stipulate that he has no duty to repair the house B occupies.

In the past, the first point was of even greater practical relevance. Under now-repealed

² In contrast, if B has *only* a licence (eg, as where B shares occupation of land with A), X is under no such duty to B and thus cannot commit the wrong of nuisance against B: see *Hunter v Canary Wharf* [1997] AC 655.

³ The exact nature of the right B needs to acquire statutory protection, as well as the term used to describe that right, varies from statute to statute. For example, s 11 of the Landlord and Tenant Act 1985 applies only to 'leases'; the Rent Act 1977 applies to 'tenancies' but that was taken to require that B has a Lease. As we will see below, the term 'lease', when used in the context of a statute, may have a different meaning to the usual meaning of 'Lease' as a property right.

⁴ Judges in other jurisdictions have displayed less reluctance: see eg *Javins v First National Realty* (1970) 428 F 2d 1071 (District of Columbia Court of Appeals). For a comparison between the English and US approaches see Bright, *Landlord and Tenant Law in Context* (2007) 30–5.

⁵ See eg *Marsden v Edward Heyes* [1927] 2 KB 1, applying *Horsefall v Mather* (1815) Holt NP 7.

⁶ See eg *Markham v Paget* [1908] 1 Ch 697.

⁷ The term used in the Act is a 'dwelling-house'.

legislation, such as the Rent Acts,⁸ a good deal of statutory protection was available to B if he had a Lease. For example, B had the right, subject to certain conditions, to remain in occupation of his home even *after* the end of the period agreed with A. This ‘security of tenure’ ensured that B’s right to exclusive control of the land endured even if A wished to use the land for a different purpose. B could also argue that the rent agreed with A was unfairly high and should be changed: these ‘rent control’ provisions also gave B valuable security.

The degree of statutory protection available to B varied with changes of government: on one view, securing B’s occupation is vital to protecting the vulnerable; on another view, statutory intervention is an unwarranted interference with A’s freedom to enter into private agreements relating to his own land. Current legislation generally reflects the view that if A gives B a Lease, the parties’ agreement will determine both: (i) the length of B’s occupation; and (ii) the rent payable by B. In general, then, B receives little statutory protection. For example, if A gives B a standard residential Lease, the default position is that B acquires an ‘assured shorthold tenancy’.⁹ When the initially agreed period ends, A can remove B from the land as long as: (i) A gives B at least 2 months’ notice; and (ii) at least 6 months have passed since the grant of the Lease.¹⁰ And A is free to set whatever rent he chooses.¹¹ However, in other cases, B can acquire some statutory protection:

1. Significant protection is still given to B where he has a Lease of a home and A is a *social landlord* such as, in particular, a local authority.¹² For example, A’s power to terminate the Lease, even at the end of the initially agreed period, is limited. In those cases, it seems, less value is attached to A’s freedom to use its land as it wishes.
2. If B has a Lease of a home and A, a private landlord, has *chosen* to give B an *assured tenancy*, B receives some important statutory protection. For example, A’s power to terminate the Lease, even at the end of the initially agreed period, is limited. However, B acquires such protection only if A decides to give B such an assured tenancy.¹³
3. If B has a Lease of *business premises*, statute may limit A’s ability to end the Lease. In particular, B may have a statutory right to continue using the land at the end of the

⁸ I.e., the Rent Act 1977 and its predecessors. Some Leases, entered into before 15 January 1989, are still governed by the Rent Acts. These are known as ‘regulated tenancies’ but now represent only a very small proportion of private rented accommodation: see Bright, *Landlord and Tenant Law in Context* (2007) 203.

⁹ Housing Act 1988, s 19A.

¹⁰ The Law Commission’s latest proposals on the protection of residential occupiers do not change that basic position. Those proposals include the sensible suggestion that the limited statutory protection available to B against A should be the same whether B has a Lease or a contractual licence: see Law Commission Report No 297 (2006) eg 1.5.

¹¹ The Unfair Terms in Consumer Contract Regulations 1999 can apply where B, a consumer, acquires a Lease from A. For detail of the impact of those terms on Leases see the Office of Fair Trading’s *Guidance on Unfair Terms in Tenancy Agreements* (OFT 356, 2005). However the Regulations do not apply to ‘core terms’ (such as rent) provided such terms are set out by A in plain and intelligible language.

¹² The protection available to B takes two forms, First, where A is a local authority (or one of the other bodies falling under s 80(1) of the Housing Act 1985), B may have a ‘secure tenancy’ under the Housing Act 1985. Second, where A is a registered housing association, A will be encouraged to give B an ‘assured tenancy’ under the Housing Act 1988: such a tenancy, in practice, gives B similar protection to that provided by a secure tenancy.

¹³ Prior to 1997, the default position was that B had an ‘assured tenancy’. So if A did not choose to give B an ‘assured shorthold tenancy’ B could acquire statutory protection: as claimed, eg, in *Gray v Taylor* [1998] 1 WLR 1093 (see **Example 9b** below).

agreed period.¹⁴ In those cases, it seems, more value is attached to B's need to continue using A's land.

4. If B has a *very long residential Lease*, he may have a statutory right to buy A's Freehold. In those cases, it seems that the long connection B may have with the land, and the improvements he may have made to it, justify B having the chance to make his right to exclusive control permanent (see **B:8.3.1**).¹⁵
5. If B has as an *agricultural business Lease*, he may have some statutory protection if: (i) he has made improvements to the land; provided that (ii) A give written consent to those improvements.¹⁶ This limited protection is justified by the need to give B an incentive to make improvements that may increase the productivity of the land.

1.3 Doctrine v practical convenience

In the past, the Rent Acts gave an occupier of a home a strong incentive to claim a Lease. Equally, they meant that A was often very keen to avoid granting B a Lease. This led to a sharp battle between the parties and to a dilemma for the courts. For example, if a court felt that: (i) B's rights did, strictly speaking, amount to a Lease; but (ii) on the facts, B did not deserve to have all the protection of the Rent Acts; then (iii) it would be tempting for the court to *restrict* the true definition of a Lease and find that B had only a licence.¹⁷ For example, from the 1950s to the 1980s, the Court of Appeal, led by Lord Denning, adopted a deliberately narrow definition of a Lease precisely because of this desire to limit the impact of the Rent Acts (see **E6:3.4.2(iii)**).¹⁸ The converse was also true: if B's case seemed deserving, a court might be tempted to *expand* the true definition of a Lease in order to protect B.¹⁹

There may thus be an important tension between: (i) the demands of *doctrine*; and (ii) the perceived needs of *practical convenience* (see **B:9**).²⁰ The doctrinal definition of a Lease provided by the land law system may clash with what a judge perceives as the practically convenient result. We need to be aware of this tension when looking at decisions about the content of a Lease. We must always be alert to the possibility that a judge's view as to whether B's rights amounted to a Lease may have been guided by the desirability or otherwise of allowing B to rely on a particular statute; and *not* by a desire to reach the doctrinally correct conclusion.

¹⁴ Landlord and Tenant Act 1954, Part II. See *per* Lord Nicholls in *Graysim Ltd v P & O Property Holdings Ltd* [1996] AC 329 at 334.

¹⁵ The exercise of such a right is known as 'enfranchisement': see eg Leasehold Reform Act 1967. In addition, if B has a Lease of any length from a local authority, he may have a 'right to buy' his landlord's Freehold under the Housing Act 1985.

¹⁶ B acquires this protection if he has a 'farm business tenancy' under the Agricultural Tenancies Act 1995. Agricultural Leases entered into before 1 September 1995 are regulated instead by the Agricultural Holdings Act 1986: if B has an 'agricultural holding' under that Act or its predecessors he has, in very general terms, a right to continue in occupation as long as he farms the land properly. Many of these agricultural holdings, which can pass to B's successor, remain in force today: see Bright, *Landlord and Tenant Law in Context* (2007) 264.

¹⁷ See eg *Marchant v Charters* [1977] 1 WLR 1181.

¹⁸ As explained by Lord Denning MR in *Cobb v Lane* [1952] 1 TLR 1037.

¹⁹ The decision of the House of Lords in *Bruton v London & Quadrant Housing Trust* [2000] 1 AC 406 provides a modern example (see **1.5.3** below).

²⁰ For a general theoretical discussion of the clash between doctrine and practical convenience in property law (from which the terms as used here are derived), see Harris in *Oxford Essays on Jurisprudence* (3rd series, 1987, eds, Eekelaar and Bell).

1.4 A right to exclusive control: general position

1.4.1 Doctrine

The doctrinal test for a Lease depends on whether B has a right to exclusive control of land for a limited period. The current test for a Lease is based on that doctrinal position. In a case such as **Example 1**, the courts test for a Lease by asking if B has a right to *exclusive possession* of the land. That term is synonymous with a *right to exclusive control*. As Lord Templeman put it in the leading case of *Street v Mountford*,²¹ if B has exclusive possession he has ‘the rights of an owner of land, which is in the real sense his land albeit temporarily and subject to certain restrictions.’²²

For example, if B’s agreement with A gives A the power to: (i) allow other people into occupation of the land; or (ii) move B into different accommodation,²³ B clearly does *not* have a Lease: he does not have a right to exclusive control. And if the agreement merely permits B to use the land for a specific, limited purpose, B clearly does *not* have a Lease: he does not have a right to exclusive control.²⁴

In theory, it should be relatively easy to see if the agreement gives B a right to exclusive control. As Lord Templeman suggested in *Street v Mountford*, we need to ask ‘who is the owner for the time being?’: during the period of the agreement, is Ownership vested in A or in B? Where A does grant B a Lease, A transfers his right to exclusive control to B for the period of the Lease. If A does not grant B a Lease, A retains his right to exclusive control and comes under a duty to allow B to make a limited use of land. At any given time, the right to exclusive control must be vested *either* in A or in B. So, if A has retained open-ended powers to use the land, such as a power to come onto the land at any time to provide B with services such as cooking or cleaning,²⁵ B *cannot* have a Lease: A, rather than B, has a right to exclusive control of the land.

	B’s Right	A’s Right
B has a Lease	Right to exclusive control	Right to make a limited use of the land
B has a Licence	Right to make a limited use of the land	Right to exclusive control

Of course, in practice, things may be more complicated. Certainly, B can have a Lease even if A imposes some restrictions on B’s use of the land: for example, a term that B may not keep pets on the land does not prevent B having a Lease. And if A gives B permission to use land for a particular purpose, but the nature of that land means it can only really be used for that purpose, B may still have a Lease.²⁶ In such a case, the limits on B’s use of the

²¹ [1985] AC 809.

²² *Ibid* at 816.

²³ See eg *Westminster CC v Clarke* [1992] AC 288.

²⁴ In *Hunts Refuse v Norfolk* [1997] 1 EGLR 16, A had a Freehold of a quarry and gave B an ‘exclusive licence and full liberty to use the Site for depositing waste without restriction as to amount for the period of 21 years’. A thus allowed B to use the land only for a specific purpose: the depositing of waste. As B could not claim to have a right to exclusive control of the land, the Court of Appeal decided that B had no Lease.

²⁵ See eg *Huwylar v Ruddy* (1995) 28 HLR 550.

²⁶ See eg *Addiscombe Estates v Crabbe* [1958] 1 QB 513: the land in question was to be used as a tennis club.

land come from the nature of the land rather than the nature of B's right.²⁷ However, in practice, it can be hard to distinguish between:

1. a case where A gives B a right to exclusive control for a limited period, whilst also reserving certain rights to use and control the land; *and*
2. a case where A retains his right to exclusive control, but gives B a number of contractual rights to use the land.

So, if the agreement between A and B gives *both* A and B a set of rights to use and control the land, it may be difficult to decide in practice whether: (i) the right to exclusive control is held by A (hence B has a licence); *or* (ii) that right has instead been transferred, for a limited period to B (hence B has a Lease). The crucial difference between the two cases is that in the latter, but not the former, B has a property right in the land: the rest of the world is thus under a *prima facie* duty not to interfere with B's use of the land.

1.4.2 Practical convenience

The basic test for a Lease, set out in *Street v Mountford*, is squarely consistent with doctrine. However, the perceived needs of practical convenience have had an important impact on the courts' *application* of that test. We can see this by considering five specific questions that may arise when applying the test.

1.5 A right to exclusive control: specific questions

1.5.1 What if A does not intend to give B a Lease?

(i) Doctrine

If the rights given by A to B entitle B to exclusive control of the land for a limited period, then, providing he satisfies the acquisition question, B will have a Lease. This is the case *even if A did not intend to give B a Lease*. A's intention is of course crucial when we ask the first question: what rights does the agreement give to B? However, A's intention is irrelevant when we ask the second question: do the rights given to B amount to a Lease? There are two points here. First, it is for the land law system, not A, to define a Lease. That point is not specific to property law. For example, let us say A makes an oral promise to give B £100 in two weeks' time. A and B both call the promise 'a contract' and intend it to be binding. However, it does *not* give B a contractual right against A: no consideration has been provided by B. As the law's test for a contract has not been satisfied, A and B's intention to have a contract is irrelevant.

The second point is that it is simply not possible for A *both* to: (i) give B a right to exclusive control of a thing; and (ii) to deny that B has a property right. This point is specific to property law. It shows that: (i) *if* A gives B a right to exclusive control of a thing; *then* (ii) A's intention to give B only a personal right is irrelevant.²⁸ Of course, this does not mean A is trapped into giving B a Lease. If A is keen to ensure that B does not acquire a

²⁷ See eg Morritt LJ's analysis of *Addiscombe Estates v Crabbe* in *Hunts Refuse v Norfolk* [1997] 1 EGLR 16.

²⁸ This point is specific to cases where A gives B a right to exclusive control. So, for example, A's intention to give B only a personal right *can* prevent B acquiring: (i) an Easement (see **G5:1.6**); or (ii) a Restrictive Covenant (see **G6:1.3**).

Lease, A simply needs to ensure that the rights he gives B under agreement do not amount to a right to exclusive control.

We can draw an analogy with cooking. A can choose his own ingredients when cooking; his intention is therefore crucial to what he produces. But if A chooses to: (i) mix together flour, eggs, sugar, butter and baking powder; and (ii) put the mixture in a tin and heat it in the oven; then (iii) whether he likes it or not, A makes a cake. It does not matter that A intended to make a casserole: he is judged by what he produces and he has produced a cake. If A wants to make a casserole, the solution is simple: he needs to choose the right ingredients.

EXAMPLE 2

The facts are as in **Example 1**. The written agreement between A and B makes clear that A does not intend to grant B a Lease: for example, B is referred to throughout as ‘the licensee’. The agreement does however give B a right to exclusive control of the land for a limited period.

In such a case, A’s intention does *not* prevent B’s right counting as a Lease. This was confirmed by the House of Lords, in *Street v Mountford*,²⁹ on which **Example 2** is based. This might seem to be an example of a court bending the rules to thwart A’s unscrupulous attempt to avoid giving B the statutory protection available under the Rent Acts. However, the decision is perfectly correct as a matter of doctrine: it is conceptually impossible for A to give B a right to exclusive control for a limited period and then to claim that B has only a licence.

(ii) Practical Convenience

Prior to the decision in *Street*, a number of Court of Appeal decisions had held that: (i) *if* A gave B a right to exclusive control for a limited period; but (ii) A did not intend to grant B a Lease; then (ii) B did *not* have a Lease.³⁰ That view seems to have been motivated by practical convenience: in some cases, judges may have felt that B did not deserve the statutory protection available to a party with a Lease.³¹

EXAMPLE 3

A has a Freehold of a cottage. A gives B1 a Lease of the cottage determinable on B1’s death. When B1 dies, A gives a similar Lease to B2 (B1’s wife). B2 occupies the land with B3 (her daughter). When B2 dies, A does not wish to grant B3 a Lease: A would prefer to make the cottage available to A2. However, out of kindness to B3, A allows B3 to remain in occupation, paying rent, for six months. A now wants to remove B3 and allow A2 to occupy the cottage.

In *Marcroft Wagons Ltd v Smith*,³² on which **Example 3** is based, B3 claimed that: (i) A’s acceptance of rent from B3 created a new Lease in favour of B3; and so (ii) B3 had a

²⁹ [1985] AC 809.

³⁰ See eg *Marcroft Wagons v Smith* [1951] 2 KB 496; *Marchant v Charters* [1977] 1 WLR 1181; *Somma v Hazelhurst* [1978] 1 WLR 1014.

³¹ As explicitly stated by Lord Denning MR in *Cobb v Lane* [1952] 1 TLR 1037 at 1041.

³² [1951] 2 KB 496. In that case, B2 had acquired a Lease because a statute (the Increase of Rent and Mortgage (Interest) Restrictions Act 1920) had given B2 a right to such a Lease. So, to that extent, A’s use of the land had already been curtailed by statute.

statutory right (under the now repealed Rent Restriction Acts) to remain in occupation of the land. B's claim, as a matter of doctrine, seems to be valid: A had given B a right to exclusive control of the land for a limited period (see 2.1.2(ii) below). However, the Court of Appeal clearly thought it would be unsatisfactory for A to be bound by the statutory protection that a Lease would give B3: as a result of his generosity in allowing B3 to remain temporarily, A might then be unable to use the cottage for any other purpose for a very long time. The Court of Appeal therefore made clear that the traditional, doctrinal test for a Lease should be varied.³³

In this way, a court could depart from doctrine to reach what it perceived to be a practically convenient result. However, in *Street v Mountford*,³⁴ the traditional,³⁵ doctrinal position was restored. Of course, that return to doctrine can in itself be seen to give effect to a different view of practical convenience: this time the emphasis is on protecting B, rather than protecting A. So, just as the statutes regulating Leases have changed with different governments, so can the definition of a Lease vary according to judges' differing views of the demands of practical convenience.

1.5.2 What if A does not intend to give B a right to exclusive control?

(i) Doctrine

There seems to be an obvious way for A to ensure that B does not acquire a Lease: A simply needs to ensure that the rights acquired by B under the agreement do *not* amount to a right to exclusive control.

EXAMPLE 4

The facts are as in **Example 1**. The signed, written agreement between A and B makes clear that A has the right to allow other parties onto the land to share occupation with B.

In such a case, that term clearly means that B does *not* have a right to exclusive control of the land. If B wants to claim a Lease, he will therefore need to show that this term is, for some reason, not binding.

The basic test is that B is bound if it is reasonable for A to believe that B has agreed to a particular term.³⁶ The test is thus an 'objective one': even if B may inwardly have had no intention to be bound by the term, his apparent willingness suffices. If B has signed a document, it is almost always reasonable for A to believe that B has agreed to be bound by the terms of that document.³⁷ However, if the term is, on the facts, wholly implausible, this may allow B to say that, despite his signature, it was *not* reasonable for A to believe that B was agreeing to the term. So, in **Example 4**, a term that A is free to insert other occupiers may be wholly implausible *if* the premises are too small to be reasonably occupied by another person alongside B. Similarly, if there were to be a term in an agreement denying B the right to occupy between 10.30 am and noon each day, that term may be so

³³ See esp *per* Denning LJ at 505–6.

³⁴ [1985] AC 809

³⁵ See eg *Lynes v Snaith* [1899] 1 QB 486; *Allan v Liverpool Overseers* (1874) LR 9 QB 180.

³⁶ See eg *Smith v Hughes* (1871) LR 6 QB 597 at 607.

³⁷ An exception occurs where A has misrepresented the meaning of the term to B: see eg *Curtis v Chemical Cleaning & Dyeing Co* [1951] 1 KB 805.

‘astonishingly extreme’ that, even if B signs the agreement, A cannot reasonably believe that B is agreeing to be bound by such a term.³⁸ As a result, a court *may* be doctrinally justified in ignoring that term when deciding if the agreement gives B a right to exclusive control of the land.

An apparent term will also fail to be contractually binding if it is a ‘sham’. The sham concept is, however, very limited. It is simply an application of the general rule that a term is only contractually binding if it is reasonable for A to believe that B has agreed to it.³⁹ For example, let us say A sells a right to B for £10,000; but, in the written contract of sale, the parties record the price as £15,000. They do so in an attempt to minimise B’s tax bill. It is not reasonable for A to believe that B has agreed to pay £15,000: the parties have agreed otherwise, and they intend to use the document simply to trick the tax authorities. The promise to pay £15,000 can thus be described as a ‘sham’—although it is debatable whether calling it a ‘sham’ adds anything to our analysis. The promise does not give A a right simply because of the *general rule* that A can only acquire a contractual right against B if it is reasonable for A to believe that B has agreed to be bound.

In theory then, there are two chief ways in which B could argue that the term allowing A to insert other occupiers is not contractually binding:

1. As it is factually very unlikely that anyone else could occupy along with B, it is wholly implausible for A to believe B is agreeing to such a term; *or*
2. A and B did not intend the term to be binding (i.e. it is a ‘sham’ inserted to trick third parties).

However, it is very hard to see how that second method could ever apply in a case such as **Example 4**. Certainly, A and B are not conspiring to hide their true intentions: A genuinely *does* intend the term to be binding.⁴⁰ After all, the whole point of the term is to prevent B gaining the right to exclusive control necessary for B to have a Lease.

Nonetheless, in *Antoniades v Villiers*,⁴¹ the House of Lords held that a term such as that used in **Example 4** could be ignored in deciding if B had a right to exclusive control. One doctrinal means of justifying that decision is to say that, on the facts of the case, the term was wholly implausible: as the premises were too small for another occupier to be inserted, it was unreasonable for A to believe that B was agreeing to be bound by the term.⁴² However, in an important speech, Lord Templeman adopted more expansive reasoning,

³⁸ See *per* Ralph Gibson LJ in *Crancour Ltd v da Silvaesa* (1986) 18 HLR 265 at 274–6; *per* Lord Donaldson MR in *Aslan v Murphy* [1990] 1 WLR 766 at 772.

³⁹ See McFarlane & Simpson, ch 8 in *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (ed Getzler, 2003). The ‘sham’ concept may have an independent role to play when deciding what *evidence* a court can take into account when determining the parties’ intentions: see Conaglen (2008) *CLJ* 176. For ‘sham’ Trusts see **F3:2.1.1**.

⁴⁰ See *eg* Bingham LJ in the Court of Appeal in *Antoniades v Villiers* [1988] 3 WLR 139 at 149: ‘If the written agreements are to be discarded as a sham, it must be shown not only that the occupants intended to enjoy a right to exclusive possession but also that the landlord shared that intention. In my view he plainly did not. He was determined that they should not enjoy that right. Doubtless his determination was conditioned by his desire that the relationship between himself and the occupants should not be governed by the Rent Acts, but that consideration must be understood as fortifying rather than undermining his intention that the occupants should have no right to exclusive possession.’

⁴¹ [1990] 1 AC 417.

⁴² This seems to be the view of the facts taken by Lord Oliver in *Antoniades v Villiers* [1990] 1 AC 417 at 469 and (perhaps) by Lord Jauncey at 477.

holding that the term could be rejected as a sham or a ‘pretence’. This suggests there is a third means by which B can show a term is not binding: by showing it is a ‘pretence’.

In his speech, Lord Templeman gave no clear definition of a ‘pretence’. His Lordship did however suggest that a term might be disregarded if:⁴³

1. the term was inserted by A *with the purpose* of giving B a licence rather than a Lease;⁴⁴
or
2. if A did not *in practice* attempt to rely on the term.⁴⁵

The first suggestion cannot be correct. If A chooses not to give B a right to exclusive control, he is free to do so: he is under no duty to give B a Lease. In the same way, if A puts money in a tax-exempt savings account, A acts with the *purpose* of avoiding tax: but that does not mean A’s action needs to be set aside and tax levied on that money.⁴⁶

The second suggestion means that if, in **Example 4**, A does not *in fact* try to insert another occupier, the term giving him a right to do so can be disregarded. Yet this is also very dubious: in determining whether B has a right to exclusive control, we need to look at the *rights* of the parties. And those rights are determined by the intention of the parties when making their agreement. The mere fact that A has not yet tried to insert another occupier does not, by itself, demonstrate that A and B did not *intend* A to have the right to do so.

The best attempt to reconcile the concept of a ‘pretence’ with the need to uphold doctrinal rules consists of saying that a term can be disregarded if A *never intended to enforce the term in practice*.⁴⁷ However, this is a very difficult test to apply: it all depends on what we mean by ‘enforcement’. For example, A may not plan to insert another occupier but if A intends to rely on the term to show that B does not have a right to exclusive control, then, in a sense, he does intend to enforce that term. More importantly, it seems to be inconsistent with the general doctrinal rules applying to contractual rights. Under those rules, the crucial question is not whether A intended to enforce a term; but simply whether the term was *intended to give A a right*.⁴⁸

(ii) Practical convenience

In dealing with cases where A does not intend to give B a right to exclusive control, the courts have thus gone beyond the limits of doctrine: they have sometimes disregarded terms that, according to the usual rules, ought to bind B. In particular, it seems that the courts’ willingness to disregard terms as ‘pretences’ cannot be doctrinally justified. Nonetheless, the

⁴³ Lord Templeman at 462 also suggested that a term can be disregarded if it would have the effect of depriving B of the statutory protection given by the Rent Act 1977. However, that cannot be right: the statutory protection applies only if B has a Lease; and B cannot have a Lease if he has no right to exclusive control.

⁴⁴ [1990] 1 AC 417 at 462.

⁴⁵ [1990] 1 AC 417 at 462. See too *Aslan v Murphy* [1990] 1 WLR 766.

⁴⁶ Tax cases make very clear that A’s action cannot be disregarded simply because A acted with the *purpose* of avoiding tax: see eg *IRC v Duke of Westminster* [1936] AC 1. See esp. *per* Lord Tomlin at 19–20: ‘Every man is entitled to arrange his own affairs so the tax attaching under the appropriate Acts is less than it otherwise would be.’

⁴⁷ This analysis is developed by Bright [2002] CLJ 146.

⁴⁸ See eg *Burdis v Livsey* [2003] QB 36 esp at [44]: ‘Commercial parties may, and often do, choose not to enforce their strict legal rights without intending to create or demonstrate some different state of affairs.’ This view is developed further by McFarlane and Simpson, ch 8, in *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (ed Getzler, 2003) 172–8.

line taken by the courts is readily understandable: as a matter of practical convenience it may seem harsh to deny B the statutory protection available to those with Leases *if*, in substance,⁴⁹ B is occupying land as his home. Indeed, it is interesting to note that the Law Commission's current plans for improving the relevant statutes include a proposal that they should apply *whenever* B is occupying a home and paying rent: not just when B has a Lease.⁵⁰ On this view, B could qualify for statutory protection even if he had no right to exclusive control. This proposal is based on the eminently sensible view that, as the statutory protection gives B particular rights *against* A, rather than against third parties, that protection should be available even if B does not have a property right.

It can therefore be argued that, in cases such as *Antoniades v Villiers*, the courts were, in effect, *anticipating* the Law Commission's proposal: they extended statutory protection to B although, strictly speaking, B did not have a Lease.⁵¹ As a matter of practical convenience this approach can be commended. Certainly, the protection formerly available to occupiers under the Rent Acts could easily have been undermined if A simply needed to make clear his intention not to give B a right to exclusive control. The problem, however, is that the courts' approach has had two effects: (i) it has allowed B to qualify for statutory protection against A; *and* (ii) it has allowed B to acquire a property right. This second consequence may have unwelcome consequences for third parties: they are then *prima facie* bound by B's right *even though*, strictly speaking, B has no right to exclusive control of the land.

A more transparent approach would have involved the courts admitting that the word 'Lease', when used to define the scope of statutory protection, has a *special, non-doctrinal* meaning and so covers cases in which B does not have a property right. So, it could be said that, in a case like *Antoniades v Villiers*, B did *not* have a true Lease: B had no right to exclusive control as A had a right to insert other occupiers. However, as A had not used this right, B, in substance, exclusively occupied the premises as his home. And such occupation may be enough to give B a 'Lease', in the *special, non-doctrinal sense intended by the Rent Act 1977*. If that approach were adopted, the courts could reconcile: (i) the need to give B statutory protection against A; with (ii) the need to protect third parties who may later deal with the land. This would seem to a better way to resolve the **basic tension** between B and C and, indeed, is reflected in the Law Commission's current proposals.

⁴⁹ This preference for 'substance over form' is reflected in an extra-judicial article by Lord Templeman in *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (ed Getzler, 2003) 130–34.

⁵⁰ See Law Commission Report No 297 (2006) eg at 1.5: '[W]e recommend a new 'consumer protection' approach which focuses on the contract between the landlord and the occupier . . . our recommended scheme does not depend on technical legal issues of whether or not there is a tenancy as opposed to a licence.'

⁵¹ This view is developed further by McFarlane and Simpson, ch 8, in *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (ed Getzler, 2003).

1.5.3 What if A is unable to give B a right to exclusive control?

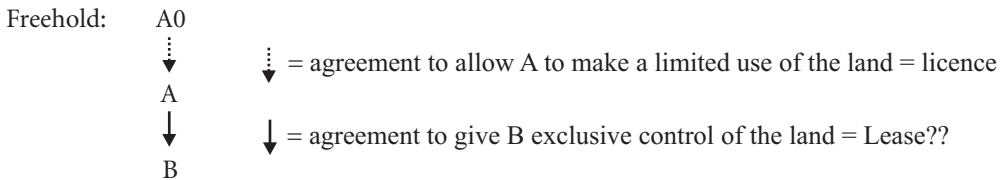
(i) Doctrine

EXAMPLE 5a

A0 has a Freehold. A0 makes a contractual agreement to allow A to make a limited use of the land. Under the terms of that agreement, A takes physical control of the land. A then enters into a contractual agreement with B under which B has a right to exclusive control of the land for six months.

EXAMPLE 5b

The facts are as in **Example 5a**: with the difference that, before entering into the contract with B, A does *not* take physical control of the land.



In such a case, can B have a Lease? This depends on the rights of A: A clearly cannot give B a right to exclusive control of the land if A has no such right. In **Example 5a**, A has *two* distinct rights. First, A has a personal right against A0—a contractual licence—arising as a result of his agreement with A0. Second, by taking physical control of the land, A independently acquires a Freehold of that land (see **G1A:2.1**). So, A *does* have a right to exclusive control of the land.⁵² This means that A *can* give B a right to exclusive control: B *can* thus acquire a Lease.

In contrast, in **Example 5b**, A has only *one* right: a personal right against A0 arising as a result of his contractual licence. A thus has *no* right to exclusive control of the land and so should *not* be able to give B a Lease. If B takes physical control of the land, B then independently acquires a Freehold; but B does not have a Lease and A and B are *not* in a landlord–tenant relationship.

When considering B's position against A0 or a party acquiring a right from A0, there is no real difference between **Example 5a** and **Example 5b**.⁵³ It is true that, in the first example, B does have a Lease. As a result, the rest of the world is under a prima facie duty to B. However, B's Lease does *not* impose a duty on A0, or anyone acquiring a right from A0: B has no defence to A0's pre-existing Freehold. So if, under the terms of A's licence, A0 can remove A from the land, A0 will also be able to remove B.⁵⁴ Similarly, if A0 transfers his

⁵² See eg *National Provincial Bank v Ainsworth* [1965] AC 1175 at 1232 *per* Lord Upjohn, discussing the position of Mrs Ainsworth (a licensee) after her husband left the home: 'in truth and in fact the wife [B] at all material times was and is in exclusive occupation of the home. Until her husband [A] returns she has the dominion over the house and she could clearly bring proceedings against trespassers.'

⁵³ There is, however, a difference if C acquires a right from A rather than from A0. In the first example, but not the second, B's pre-existing property right (acquired from A) will be prima facie binding on C.

⁵⁴ As confirmed by the House of Lords in *Kay v Lambeth LBC* [2006] 2 AC 465, esp *per* Lord Scott at [138]–[148].

Freehold to C, *neither* A nor B has a pre-existing right that can bind C. So, in **Example 5a**, B's Lease is rather weak: it depends on A's *independently acquired* Freehold, which is itself vulnerable to A0's pre-existing Freehold. Similarly, in **Example 5b**, the rest of the world is under a prima facie duty to B: B has a Freehold as a result of his physical control of the land. But, again, B has no defence to A0's pre-existing Freehold.

Nonetheless, the difference between **Example 5a** and **Example 5b** may be crucial when considering B's rights *against* A. For example, it may well be that the contract between A and B does not impose a duty on A to repair the premises. However, if B has a Lease, for seven years or less, of a home, section 11 of the Landlord and Tenant Act 1985 (the 1985 Act) imposes a statutory duty on A to carry out certain repairs. So, in **Example 5b**, but *not* in **Example 5a**, A may be under a statutory duty to B, arising under the 1985 Act, to carry out certain repairs.

	Does A have a right to exclusive control?	Does B have a Lease?	Can the 1985 Act impose a duty on A to B?	Does B have a right that binds A0?
Example 5a	Yes	Yes	Yes	No
Example 5b	No	No	No	No

The table above shows the *doctrinally* correct analysis of **Examples 5a** and **5b**. In *Bruton v London & Quadrant Housing Trust*,⁵⁵ the House of Lords considered facts essentially identical to **Example 5a**. It was held that: (i) B *did* acquire a Lease from A; and so (ii) the 1985 Act did apply to impose a duty on A. That *result* is consistent with the reasoning set out here. However, the *reasoning* of the House of Lords goes further. On that reasoning, A can grant B a Lease *even if* A has no right to exclusive control of the land: B can therefore acquire a Lease in *both* **Example 5a** and **Example 5b**.

EXAMPLE 6

A makes a contractual promise to B to give B exclusive control of Buckingham Palace for six months.

According to the House of Lords in *Bruton*, B *does* acquire a Lease. It does not matter that A has no right to exclusive control of the Palace; nor even that A has no liberty to make any use of it. The House of Lords took the view that B can have a Lease *whenever* A makes a contractual promise to give B exclusive control of some land. From a doctrinal point of view, that reasoning is impossible to defend.⁵⁶

(ii) Practical convenience

The *Bruton* decision, quite deliberately, allows B to have a 'Lease' *without* having a property right.⁵⁷ It extends the term 'Lease' to a particular type of contractual duty: a duty to allow B

⁵⁵ [2000] 1 AC 406.

⁵⁶ See eg Bright (2000) 116 LQR 7; Dixon (2000) 59 CLJ 25.

⁵⁷ The analysis of the House of Lords means there is no room for a so-called 'tenancy by estoppel': see *per* Lord Hoffmann at 416. A tenancy by estoppel used to arise if: (i) A is under a duty to give B exclusive control of land for a limited period; but (ii) A has no property right. The effect of a tenancy by estoppel is that the duties of A and B, against each other, are the same *as if* A and B were landlord and tenant. Such a tenancy is now unnecessary:

exclusive control of land for a limited period. So, in **Example 6**, the contractual agreement between A and B, although it only gives B a personal right against A, can count as a ‘Lease’.

Of course, in most cases where A makes a contractual promise to give B exclusive control of land, A *does* have a right to exclusive control of that land. In such cases, B will have a property right: a Lease. But, in the rarer case, such as **Example 6**, where A does *not* have such a right, A’s contractual promise, according to the House of Lords, can still give B a ‘Lease’. The view of the House of the Lords is thus that if B has a Lease, then he will *usually*, but *not always*, have a property right.⁵⁸ This view is inconsistent with the fundamental doctrinal principle that a Lease is a property right in land.

However, from the perspective of practical convenience, it may be possible to justify the reasoning of the House of Lords. It is very important to realise that *Bruton* itself did *not* involve any third parties. B claimed a Lease solely in order to show that A was under a statutory duty, under the 1985 Act, to make repairs. So, like *Antoniades v Villiers*,⁵⁹ *Bruton* was a dispute between A and B. Given this, A’s argument (that B cannot have a Lease as A does not have a right to exclusive control of the land) looks very unattractive. After all, it is not B’s fault that A is just a licensee. B can argue that if the agreement would otherwise suffice to give B a right to exclusive control, why should A wriggle out of the duty to repair simply because of the nature of A’s agreement with A0? Certainly, B could say that the purpose of section 11 of the 1985 Act is to ensure that B, a short-term occupier, is not saddled with the cost of repairs that will confer benefits lasting beyond the end of B’s occupation. That purpose is furthered by protecting *all* parties occupying a home for less than seven years, whether they have a property right or not.

It may therefore be possible to explain the reasoning in *Bruton* by adopting the same approach we applied to the ‘pretence’ cases, such as *Antoniades v Villiers*, in **1.5.2** above. The reasoning depends *not* on B having a Lease in the standard sense of a property right; but instead on B having a ‘Lease’ in the broader sense of that term intended by a particular statute.

1.5.4 What if B1 and B2 occupy land together?

EXAMPLE 7

A has a Freehold. A enters into two separate agreements with B1 and B2, giving each party the right, for a limited period, to occupy the land.

Clearly neither B1 nor B2 can *individually* claim to have a Lease: as each must share with the other, neither has a right to exclusive control. However, it is possible for two parties to combine to form a team, and for that team to hold a right *together* (see **F2:1.1**). So B1 and

according to the House of Lords, A’s lack of a property right does not prevent B acquiring a Lease: so A and B are *actually* landlord and tenant. For an argument that the tenancy by estoppel analysis *might* nonetheless have been applied to the facts of *Bruton* see Routley [2000] 63 *MLR* 424 and the dissenting judgment of Sir Brian Neill in the Court of Appeal: [1998] QB 834.

⁵⁸ See *per* Lord Hoffmann [2000] 1 AC 406 at 415. The analysis of the House of Lords in *Kay v Lambeth LBC* [2006] 2 AC 465 (see *per* Lord Scott at [138]–[148]) confirms that B does *not* have a Lease in the sense of a property right that derives from A0’s right to exclusive control of the land. Rather, as noted by Lord Scott at [144], B is in the same position as if he acquired a Lease from a squatter on A0’s land.

⁵⁹ [1990] 1 AC 417.

B2 can claim that they form a team that has a single right to exclusive control of the land. If that is the case, B1 and B2 will be *co-holders* of a Lease and, as a result, *co-owners* of the land. In **G2:1.2.5**, we will examine the special considerations that apply in a case such as **Example 7**.

1.5.5 Is a right to exclusive control for a limited period always a Lease?

It is often said that there are exceptions to the basic test: situations in which B has a right to exclusive control for a limited period *but* does not have a Lease. In *Street v Mountford*,⁶⁰ Lord Templeman suggests three basic exceptions:

- A and B have no intention to create legal relations;
- A has no power to give B a Lease;
- B's right arises from some other legal relationship: eg, B has a Freehold; B is a service occupier.

(i) Doctrine

As was pointed out by Millett LJ in the Court of Appeal in *Bruton v London & Quadrant Housing Trust*,⁶¹ the first two categories are *not* genuine exceptions. First, if the parties have no intention to create legal relations, it is impossible for B to say that he has acquired, through an agreement with A, any *right* to exclusive control. An intention to create legal relations must be present before an agreement can give rise to rights. However, as we will see below, practical convenience can play an important role when a court decides the factual question of whether, in a particular case, the parties did intend to create legal relations.

Second, if A simply has no power to give B a Lease, then A cannot give B a right to exclusive control. So, in a case such as **Example 6**, A's lack of a right to exclusive control means that A cannot give B a property right. A may be able to give B a 'Lease' in the wider sense intended by the Landlord and Tenant Act 1985 but, as the House of Lords made clear in *Bruton*, B cannot have a property right.

This leaves the final category. In *Street v Mountford*, Lord Templeman said that:

an occupier who enjoys exclusive possession is not necessarily a tenant. He may be owner in fee simple, a trespasser, a mortgagee in possession, an object of charity or a service occupier.⁶²

The first three examples are simply situations in which B does not have a right to exclusive control *for a limited period* and so are not true exceptions to the basic test. The latter two are more difficult. First, if B is an 'object of charity', this simply tells us about A's motives in giving B a right to exclusive control for a limited period. Those motives may tell us why A gave B a particular right, but should not change the **content** of that right. After all, if A is moved to give his Freehold away to B because B is homeless, A is free to do so: B still acquires the Freehold even though he is an 'object of charity'. There is no reason why it should be impossible for A to give an 'object of charity' a Lease: certainly, B can acquire a Lease even if he is under no duty to pay rent to A.⁶³

⁶⁰ [1985] AC 809 at 818.

⁶¹ [1998] QB 834 at 843, referring to his earlier comments in *Camden London Borough v Shortlife Community Housing* (1992) 25 HLR 330.

⁶² [1985] AC 809 at 826H–827B.

⁶³ See LPA 1925, s 205(1)(xxvii) and *Ashburn Anstalt v Arnold* [1989] Ch 1 at 9–10.

There may be a doctrinal explanation, albeit a rather unsatisfactory one, for the service occupier case. If B acquires physical control of a thing in the course of his duties as an employee of A, B, exceptionally, does *not* acquire a property right (see **D1:2.1**). Similarly, it could be argued that it is impossible for A to *transfer* a right to exclusive control of land to an employee: at least if A attempts to give B that right as part of the terms of B's employment, so as to enable B to better perform his duties as an employer... So if A, a local authority, makes a contractual promise to give B, a school caretaker, exclusive control for a limited period of a house on the school grounds, B cannot have a Lease. However, this argument depends on extending the proposition that an employee does not acquire a property right when taking physical control of a thing in the course of his appointment. And that proposition is already doctrinally dubious (see **D1:2.1**).

(ii) Practical convenience

(a) The 'tolerated trespasser'

EXAMPLE 9a

A, a local authority, has a Freehold. A grants B a Lease of land B is to use as his home. B runs up serious rent arrears. A obtains a court order allowing it to remove B from the land (a possession order). A then makes an agreement with B that B can stay on the land, provided B complies with certain conditions. B remains in occupation for a further two years, but then breaches one of those conditions. A, relying on its earlier possession order, seeks to remove B from the land.

B's initial Lease is a 'secure tenancy': B thus receives some statutory protection under Part IV of the Housing Act 1985 (see **1.2** above). In particular, A can only end the Lease by obtaining a court order: the statute specifies when a court may grant such an order.⁶⁴ To obtain its possession order, A convinced a court that it was permitted to end B's initial Lease. B's initial Lease then ended on the date set out in the order.⁶⁵ However, B can claim that A's agreement to allow B to remain in occupation then gave B a second, *new* Lease. If that is correct, B's new Lease will also be protected by statute: A can then only end that Lease by following the statutory procedure. B's argument is thus that A must start from scratch and cannot rely on the order it obtained to end B's initial Lease.

From a doctrinal perspective, B's argument seems convincing: as in **Example 3** above, the new agreement between A and B gives B a right to exclusive control for a limited period. However, in *Burrows v Brent LBC*,⁶⁶ on which **Example 9a** is based, the House of Lords rejected B's argument. It found that the new agreement between A and B did *not* give B a right to exclusive control of the land as A and B had *not* intended that agreement to create legal relations.⁶⁷ B therefore did not have a Lease and was described instead as a 'tolerated trespasser': someone who had no right to be on the land, but whom A, for a period of two years, had chosen not to remove.⁶⁸

⁶⁴ For further detail see Bright, *Landlord and Tenant Law in Context* (2007) 613–39.

⁶⁵ Housing Act 1985, s 82(2).

⁶⁶ [1996] 1 WLR 1448.

⁶⁷ See *per* Lord Browne-Wilkinson [1996] 1 WLR 1448 at 1454–5. See too the analysis of Arden LJ in *Lambeth London Borough Council v O'Kane* [2005] EWCA Civ 1010.

⁶⁸ The concept of a 'tolerated trespasser' is a difficult one: see Loveland (2007) 123 *LQR* 455; Bright (2003) 119 *LQR* 495.

This reasoning is very difficult to support.⁶⁹ It seems odd to say that A did not intend the new agreement with B to create legal rights; after all, that agreement contained carefully defined conditions on which B was allowed to occupy A's land.⁷⁰ The decision in *Burrows* is thus similar to *Marcroft Wagons v Smith* (see 1.5.1(ii) above).⁷¹ In that case, the Court of Appeal held that B had no Lease because A had not intended to grant B a Lease. Of course, following its decision in *Street v Mountford*,⁷² the House of Lords could not adopt that reasoning in *Burrows*: instead, it adopted the different tactic of finding, as a matter of fact, that A did not intend to give B any legal right.

As a matter of practical convenience, the decision in *Burrows* may be defensible. As a later court noted, there may be 'reasons of policy' for denying B a new Lease.⁷³ If B is recognised as having a new Lease in **Example 9a**, then B gains the statutory protection afforded by the Housing Act 1985. However, in practice, that protection will only be temporary: if, for example, B is again in arrears of rent, A will be able to use the statutory procedure to end the new Lease. Yet A will be put to the time and expense of having to apply for a possession order from scratch. So, in **Example 9a**, the only immediate effect of recognising that B has a Lease is to increase the time and expense incurred by A. Further, there might be a wider consequence of finding such a Lease. Let us say B2, occupying under a Lease from A (a local authority), is in arrears of rent. A obtains a possession order. B2 suggests a new arrangement under which he can continue in occupation. If A knows that such a new deal will give B2 a new Lease, and hence new statutory rights, A may well reject it and proceed to remove B2 from the land. This is of no benefit to B2 and also of little benefit to A: it is unlikely that, in practice, A will be able to recover the rent arrears, and A's statutory duty to deal with homelessness may even mean that, if A chooses to enforce the possession order by removing B2, A will have a duty to find some alternative accommodation for B2 and anyone who had been occupying the land with B2.⁷⁴

So it seems that, in a case such as **Example 9a**, each of A and B needs a way to reach a new agreement that does not have the effect of giving B a new Lease.⁷⁵ The tolerated trespasser concept, based on the fiction that the new arrangement between the parties is not

⁶⁹ An alternative explanation for the 'tolerated trespasser' is that no new Lease arises as B continues to occupy under the original Lease which is in 'limbo' as it may revive under s 85(2) of the Housing Act 1988. However, in *Leadenhall Residential 2 Ltd v Stirling* [2002] 1 WLR 499, the 1985 Act did not apply: A was a private landlord and B's original Lease was an assured tenancy protected under the Housing Act 1988. Nonetheless, the Court of Appeal held that, an agreement entered into by A and B after a possession order was granted did not (initially at least) lead to a new Lease as A and B (initially at least) had no intention to create legal relations. So, as the 'tolerated trespasser' concept can apply outside the Housing Act 1985, it cannot be based simply on that Act: see too *Knowsley Housing Trust v White* [2007] 1 WLR 2897 (although note that permission to appeal to the House of Lords has been granted in that case).

⁷⁰ See eg Bright (2003) 119 LQR 495.

⁷¹ [1951] 2 KB 496.

⁷² [1985] AC 809.

⁷³ Per Roch LJ in *Pemberton v Southwark LBC* [2000] 1 WLR 1672 at 1677: 'There are reasons of policy why a former secure tenant who has been allowed to remain in occupation of premises upon terms . . . does not [have] a new tenancy or a licence.' See too *Leadenhall Residential 2 Ltd v Stirling Ltd* [2002] 1 WLR 499.

⁷⁴ In some cases where B2 defaults on rent, it can be said that B2 is *intentionally* homeless, and so A's statutory duty to B2 is more limited (see Housing Act 1996, ss 190–91). However, it may not always be possible to say that B2's failure to keep up the rent was intentional; and it will certainly be very difficult to say that the homelessness of any members of B2's family, previously occupying the land leased to B2, is intentional.

⁷⁵ In *Knowsley Housing Trust v White* [2007] 1 WLR 2897 at [18], Buxton LJ described the 'tolerated trespasser' concept as 'humane . . . in avoiding immediate expulsions of socially deprived tenants from their accommodation.'

intended to create legal rights, serves that role. The fiction is emphasised by a later case that dealt with the question of whether B, a so-called tolerated trespasser, could bring a claim in nuisance against A.⁷⁶ It was held that, as B had a right against A to exclusive control of the land,⁷⁷ A was under a duty to B not to unreasonably interfere with B's enjoyment of the land.

So, if B is a tolerated trespasser: (i) he may have a Lease for one purpose: he is allowed to bring a claim in nuisance against A; *but* (ii) not for another purpose: he does not qualify for protection under the Housing Act 1985. In other words, B does have a Lease in the sense of a property right; but not in the sense in which that word is used in the Housing Act 1985. As a result, it seems that the decision in *Burrows v Brent LBC* achieves the exact opposite of *Antoniades v Villiers* and *Bruton v London & Quadrant Housing Trust*. In that pair of cases: (i) B does *not* have a Lease, in the sense of a property right; *but* (ii) B has a 'Lease' in the special, *wider* sense of that term used by a particular statute. In contrast, in *Burrows*: (i) B *does* have a Lease, in the sense of a property right; *but* (ii) B does *not* have a 'Lease' in the special, *narrower* sense of that term used by a particular statute.

Possible explanation of three House of Lords' decisions:

	Does B have a Lease (ie, a property right in land)?	Does B have a 'Lease' in the sense intended by a statute?
<i>Antoniades</i>	No ⁷⁸	Yes ⁷⁹
<i>Bruton</i>	No ⁸⁰	Yes ⁸¹
<i>Burrows</i>	Yes ⁸²	No ⁸³

Whilst it does fulfil its practical purpose of denying B, in a case such as **Example 9a**, a new Lease with statutory protection, the 'tolerated trespasser' concept also causes some practical problems.⁸⁴ As a result, the courts have tried to find different practical solutions in a case such as **Example 9a**. In particular, when A initially applies for physical control of the land, a

⁷⁶ *Pemberton v Southwark LBC* [2000] 1 WLR 1672. By having physical control of the land, B independently acquired a Freehold and so could bring a nuisance claim against X without needing to show his agreement with A gave him a Lease. However, to bring such a claim against A, B had to show that he had acquired a right to exclusive control *from A*.

⁷⁷ As Roch LJ put it at 1682 B had 'exclusive occupation and possession' of the land and hence had a 'sufficient interest' in the land to sue in nuisance. Sir Christopher Slade at 1685–6 also notes that B had 'the right to exclusive possession'.

⁷⁸ Under the approach to the 'pretence' question adopted by the House of Lords in *Antoniades*, B *does* have a right to exclusive control of the land for a limited period and so has a property right. However, on the view taken in this book, the 'pretence' doctrine does not justify ignoring a term that prevents B acquiring a right to exclusive control of the land and so, in such a case, B should *not* have a property right.

⁷⁹ The statute in question was the Rent Act 1977.

⁸⁰ As discussed in **1.5.3(i)** above, B *does* have a property right if A was in physical control of the land when entering the agreement with B. However, the reasoning of the House of Lords in *Bruton* does not depend on A having physical control of the land and so can apply when B has no property right: see eg *per* Lord Hoffmann [2000] 1 AC 406 at 415.

⁸¹ The statute in question was the Landlord and Tenant Act 1985.

⁸² As shown by the fact that a 'tolerated trespasser' can sue A in nuisance: *Pemberton v Southwark LBC* [2000] 1 WLR 1672.

⁸³ The statute in question was the Housing Act 1985.

⁸⁴ See *Bristol CC v Hassan* [2006] 1 WLR 2582 at [34] and [35]. As a result of those problems, the Department for Communities and Local Government are investigating what reforms might be made: see *Tolerated Trespassers: Consultation* (August 2007).

court will now give A a *postponed possession order*: that order will *not* set a specific date on which B must give up physical control of the land.⁸⁵ This means that B's initial Lease continues:⁸⁶ there is no need to use the 'tolerated trespasser' concept to prevent B acquiring a second, new Lease. The postponed possession order will stipulate that B must comply with particular conditions (eg, B makes up the rent arrears and continues to pay rent). If B fails to comply with any of the conditions, A can apply to court for an order fixing a specific date on which B must leave the land and therefore bringing B's Lease to an end.⁸⁷

(b) The 'object of charity'

EXAMPLE 9b

A1 and A2, trustees of a charity, have a Freehold. A1 and A2 have a duty to use that land only for the charitable purpose of providing accommodation to elderly people in need. B occupies one of the flats on that land. B's agreement with A1 and A2 gives B a right to exclusive control of the land in return for B paying a small monthly sum to pay for maintenance and some essential services.

In such a case, there are no doctrinal grounds for denying B a Lease: B has a right to exclusive control of the land for a limited period. However, in *Gray v Taylor*,⁸⁸ on which **Example 9b** is based, the Court of Appeal found that, as B was an 'object of charity', he did not have a Lease. No third party was involved: B claimed a Lease in order to qualify for statutory protection that would make it more difficult for A to remove B from the land.⁸⁹ The decision to deny B a Lease seems to have been based purely on the needs of practical convenience. First, there is a desire not to 'punish' A1 and A2 for their generosity.⁹⁰ Second, there is a desire to give A1 and A2 the flexibility to respond if B's position changes. For example, if B wins the lottery, the trustees may wish to remove B so that, in accordance with their charitable duty, they can make the accommodation available to a needier party. Yet if B has a Lease, the statutory rights he thereby acquires could make it difficult for the trustees to remove B.⁹¹

It thus seems that the 'object of charity' exception, like the 'tolerated trespasser' concept, has been used to *narrow* the scope of statutory protection by giving a special meaning to the term 'Lease' as used in a particular statute. However, this should not mean that B can never acquire a Lease, in the sense of a property right in land, if he is an 'object of charity'. B, like anyone else, should have such a property right if he has a right to exclusive control of land for a limited period.⁹²

⁸⁵ Such an order was advocated by the Court of Appeal in *Bristol CC v Hassan* [2006] 1 WLR 2582: see now s IV of the Practice Direction supplementing Part 55 of the Civil Procedure Rules.

⁸⁶ Similarly, under the Law Commission's proposals, B's initial Lease will continue (even after a possession order with a specific date is granted) until B actually gives up physical control of the land: Law Com No 297 (2006) at 4.54–4.56.

⁸⁷ This new form of possession order was advocated by the Court of Appeal only in May 2006 so there will still be parties falling into the 'tolerated trespasser' category. Further, the new form of order applied only to cases where B has a 'secure tenancy' from a local authority, whereas it seems the 'tolerated trespasser' category can also apply where B initially has an 'assured tenancy' from a private landlord: see *Knowsley Housing Trust v White* [2007] 1 WLR 2897 (although note that permission to appeal to the House of Lords has been granted).

⁸⁸ [1998] 1 WLR 1093.

⁸⁹ B would have been an 'assured tenant' under the Housing Act 1988.

⁹⁰ That desire is clear in *Marcroft Wagons v Smith* [1951] 2 KB 496 (see 1.5.1(ii) above).

⁹¹ See esp *per* Nourse LJ at 1099.

⁹² Barr, in *Modern Studies in Property Law* (ed Cooke, 2001) 247–9 points out that there is no reason why a charity cannot make a contractual agreement to give B a right to exclusive control of land.

As it is based on practical convenience rather than doctrine, the scope of the ‘object of charity’ exception is unclear. For example, in *Bruton v London & Quadrant Housing Trust*,⁹³ the essential facts were as in **Example 5a** above. A0, a local authority, had a Freehold. It planned to develop the land at some point but, until then, it decided to make the land available as short-term accommodation for those in need of housing. It therefore gave A, a housing association, a licence of the land. When B claimed he had a Lease, one of A’s arguments was that, as it was acting out of charitable motives, it should not be burdened by the statutory rights B would acquire as a result of having a Lease. However, this argument was firmly rejected by the House of Lords. Lord Hoffmann stated that the fact that A was a ‘responsible landlord performing socially valuable functions’ was irrelevant.⁹⁴ The **content** of B’s right cannot depend on the motives for which A gave B that right.

(c) The ‘service occupier’

Practical convenience has also influenced the courts in holding that a ‘service occupier’, even if he has a right to exclusive control of land for a limited period, does not have a Lease. The point seems to be that, if A gives B a right to exclusive control of land so as to enable B better to perform his duties as A’s employee, A needs to have the freedom to end B’s right when B’s employment ends. As a result, the statutory security of tenure potentially available to a party with a Lease is clearly inappropriate. Of course, Parliament could deal with this problem directly by giving A the right to remove B in such a situation. However, it may be that, given the traditional rule that a service occupier cannot have a Lease, Parliament did not feel the need to provide such an exception. As a result, even if that traditional rule were to change so that a service occupier can have a Lease, it may be correct to interpret the term ‘Lease’, when used in a particular statute conferring security of tenure, as *not* including the Lease held by a service occupier.

SUMMARY of G1B:1.5

The basic test for a Lease is clear: B has such a right if he has a right to exclusive control of land for a limited period. It seems that, *whenever* B claims he has a Lease in order to show that he has a property right in land (and therefore that the rest of the world is under a prima facie duty to B), the courts have applied this standard definition. However, in many cases, B claims he has a ‘Lease’ but is *not* interested in showing he has a property right. Instead, B simply wishes to rely on a particular *statute* that gives protection only to parties who have a ‘Lease’. For example, under the Rent Acts, a residential occupier could claim security of tenure and the right to a fair rent if he had a ‘Lease’: that is why B claimed a ‘Lease’ in *Marcroft Wagons v Smith*,⁹⁵ *Street v Mountford*⁹⁶ and *Antoniades v Villiers*.⁹⁷ Similarly, in *Gray v Taylor*,⁹⁸ B claimed a ‘Lease’ in order to qualify for the protection provided to an ‘assured tenant’ by the Housing Act 1988. The statutory protection available to residential occupiers is now very much reduced. However, if B has a ‘Lease’ of seven years or less of a

⁹³ [2000] 1 AC 406.

⁹⁴ [2000] 1 AC 406 at 414.

⁹⁵ [1951] 2 KB 496

⁹⁶ [1985] AC 809.

⁹⁷ [1990] 1 AC 417.

⁹⁸ [1998] 1 WLR 1093.

home, section 11 of the Landlord and Tenant Act 1985 imposes a duty to repair on A: that is why B claimed a ‘Lease’ in *Bruton v London & Quadrant Housing Trust*.⁹⁹ And if A is a local authority, B may claim a ‘Lease’ in order to acquire security of tenure under the Housing Act 1985: that was why B claimed a Lease in *Burrows v Brent LBC*.¹⁰⁰

In such cases, where B’s *only* reason in claiming a ‘Lease’ is to claim statutory protection, the determining factor may simply be whether a court believes that B *deserves* the statutory protection in question. Thus B may be given that protection even if he does not truly have a right to exclusive control of the land and so cannot have a Lease in the standard sense of a property right in land. The House of Lords expressly admitted this in *Bruton*; and may have impliedly acknowledged it in their decision in *Antoniades v Villiers*. Equally, B may be denied statutory protection even if he does in fact have a right to exclusive control of land for a limited period and thus has a Lease in the standard sense of a property right in land: this seems to be the effect of *Burrows v Brent LBC* and *Gray v Taylor*.

On this view, it is crucial to distinguish between: (i) the courts’ approach to defining what counts as a Lease in the standard sense of a property right in land; and (ii) the courts’ approach to defining what counts as a ‘Lease’ when applying a statute. In cases such as *Antoniades*, *Bruton* and *Burrows*, the House of Lords did *not* change the answer to the content question: it did not address the test for when B’s right counts as a property right. Instead, it interpreted particular statutes in such a way as to ensure that B acquired statutory protection if, and only if, it made practical sense for B to receive that protection.

On the view put forward here, the battle between doctrine and practical convenience has not compromised the content of a Lease, in the standard sense of a property right in land. Rather, that battle has influenced the *different* question of how courts interpret the term ‘Lease’ when it is used to set the scope of statutory protection available to an occupier of land. On one view, which seems to be adopted by the House of Lords in *Street v Mountford*,¹⁰¹ the term ‘Lease’, when used in a statute, should be given its standard, doctrinal meaning. On a different view, explicitly adopted by the House of Lords *Bruton* and implicit in *Antoniades* and *Burrows*, the term ‘Lease’ can, in a particular statutory context, be given a special, non-standard meaning. The clash between these two views has nothing to do with the question of whether B has a property right; it is rather a dispute about the proper role of judges when interpreting legislation. This is of course an interesting issue, but its resolution will not affect the basic point that B has a Lease (a property right in land) if, and only if, he has a right to exclusive control of land for a limited period.

1.6 An unconditional (but not necessarily immediate) right to exclusive control

Section 1 of the LPA 1925 defines a Freehold as a ‘fee simple absolute in possession’. This means that B’s right to exclusive control must be unconditional (see **G1A:1.3**) and immediate (see **G1A:1.4**). The same section defines a Lease as a ‘term of years absolute’. ‘Absolute’ again means B’s right to exclusive control must be unconditional. However, there is no requirement that a Lease must be ‘in possession’. This means that A can give B a Lease under which B’s right to exclusive control will take effect only in the *future*. For example, if,

⁹⁹ [2000] 1 AC 406.

¹⁰⁰ [1996] 1 WLR 1448.

¹⁰¹ [1985] AC 809.

in September 2008, A makes a contractual promise to give B exclusive control of land for five years from 1 January 2009, B *immediately* acquires a Lease. So, if A then transfers his Freehold to C in December 2008, C is *prima facie* bound by B's pre-existing property right.

There are some limits on such future (or 'reversionary') Leases. If, in September 2008, A makes a contractual promise to give B exclusive control of land for five years from 1 January 2030, B does *not* acquire a Lease: section 149(3) of the LPA 1925 states that such a future Lease has to take effect in possession within 21 years of its creation.¹⁰²

1.7 A right to exclusive control for a limited period

1.7.1 The basic rule

A Lease consists of a right to exclusive control of land for a limited period. So, if A gives B a right to exclusive control of land 'until England win the football World Cup' that right does not count as a Lease. The problem is *not* that the parties will be unable to tell if the specified event has happened:¹⁰³ if and when England win the football World Cup, they (and everyone else) will know about it. The problem is rather that it is impossible for A to know *if and when* he can regain his right to exclusive control of the land. And that uncertainty is simply incompatible with a Lease. A Lease arises where A retains his property right in the land and grants B a new property right. So, if A grants B a Lease, A does *not* lose his property right in the land. But if it were possible to have a Lease in which A does not know *if and when* he will again have a right to exclusive control of the land, A's property right will, in effect, be meaningless.¹⁰⁴

EXAMPLE 10a

A, a local authority, has a Freehold. A grants B a right to exclusive control of a strip of that land adjoining a road. B is to have that right 'until the strip of land is needed for road-widening'.

In such a case, A's agreement with B cannot give B a Lease: B's right to exclusive control for that uncertain period is inconsistent with A's Freehold. This result was confirmed by the House of Lords in *Prudential Assurance Ltd v London Residuary Board*,¹⁰⁵ the basic facts of which are identical to **Example 10a**. In that case, Lord Browne-Wilkinson expressed frustration that the rationale for the rule was unclear, stating that 'No one has produced any satisfactory for the genesis of the rule' that 'the maximum duration of a [Lease must be] ascertainable from the outset'.¹⁰⁶ However, the problem may lie with his Lordship's formulation of the rule. It is *not* the case that the maximum length of the Lease must be known at the outset:¹⁰⁷ the important point is that A must be able to tell if and when he will be able

¹⁰² Section 149(3) applies where A attempts to give B a right to exclusive control 'at a rent' or 'in consideration of a fine'.

¹⁰³ As was confirmed by the House of Lords in *Prudential Assurance v London Residuary Board* [1992] 2 AC 386, the analysis of the Court of Appeal on this point in *Ashburn Anstalt v Arnold* [1989] Ch 1 is thus incorrect.

¹⁰⁴ For alternative analyses of the possible purposes of the need for a limited period, see eg Bright (1993) 13 LS 38; Sparkes (1993) 109 LQR 93.

¹⁰⁵ [1992] 2 AC 386.

¹⁰⁶ *Ibid* at 396; his Lordship also described the rule as 'ancient and technical' and serving no useful purpose.

¹⁰⁷ The total duration of a periodic tenancy need not be known at the outset: see 1.7.2(i) below.

to assert his right to exclusive control of the land. The rule therefore has a valid doctrinal purpose. So, in **Example 10a**, as A does not know if and when the land may be needed for road-widening, A does not know if and when he will be able to exercise his right to exclusive control of the land: A's Freehold could thus become meaningless if B's right were allowed to count as a Lease.

1.7.2 The effect of the basic rule

In **Example 10a**, B does *not* have a property right entitling him to exclusive control of the land until it is needed for road-widening. So what right does B have?

(i) A periodic tenancy

EXAMPLE 10b

The facts are as in **Example 10a**. A and B agree that B is to pay A an annual rent of £500.

In such a case, B *does* acquire a Lease. Of course, that Lease cannot give him a right to exclusive control until the land is needed for road-widening. In fact, the Lease does *not* arise as a result of A and B's express agreement. Instead, it arises as a result of: (i) B's conduct in paying rent; *and* (ii) A's conduct in accepting that rent. As a result of that conduct, a court can infer that A has exercised his power to grant B a Lease. In such a case, B's right arises under an *implied periodic tenancy*. We will examine this means of acquiring a Lease in **2.2.1(ii)** below.

A periodic tenancy is formed by a succession of Leases for a period (eg, a week, a month or a year) that continue to arise from one period to the next *unless* either A or B gives notice to the other that he will not renew the Lease. For example, if A gives B a yearly periodic tenancy on 1 January 2008, B's right to exclusive control will automatically continue from one year to the next: each year, B will acquire a new yearly Lease. If either A or B decides not to renew the Lease, he needs to give the other party six months' notice.¹⁰⁸ So, if A decides in October 2008 that he wishes to end the Lease, B's right to exclusive control will end on 1 January 2010: (i) B's current yearly Lease runs until 31 December 2008; (ii) A is too late to give B six months' notice of his intention not to renew the Lease on 1 January 2009; (iii) so, on 1 January 2009, A has to renew the Lease for another year. Of course, if A had decided not to renew in *May* 2008, he would be bound only until 1 January 2009: by acting in May 2008, he can give B six months' notice of his intention not to renew the Lease on 1 January 2009.

A periodic tenancy is sometimes said to be an exception to the need for a limited period: at the start of the Lease, neither A nor B can be sure how long the Lease will last. However, even if A and B do continue to renew the Lease (as will occur in **Example 10b** as B continues to pay rent and A continues to accept that rent) they simply create a succession of one-year Leases, each of which has a limited period.¹⁰⁹ Second, and more importantly, the

¹⁰⁸ If B instead has a monthly periodic tenancy, either side can give one month's notice of a refusal to renew the Lease. And if B has a weekly periodic tenancy, the notice period is one week.

¹⁰⁹ The courts, however, treat a succession of periodic tenancies, for some purposes, as one single Lease: see eg *Legg v Strudwick* (1709) 2 Salk 414 and the discussion in *Bowen v Anderson* [1894] 1 QB 164. However, for most important purposes, that is not the case. So, even if a yearly periodic tenancy ends up lasting for 10 years, it is not caught by any of the formality rules applying to a 10-year Lease: see eg *re Knight, ex p Voisey* (1882) 21 Ch D 442: see too **5.3.4** below.

periodic tenancy is not inconsistent with the *rationale* of the limited period rule. For A, from the outset, has a definite right to regain exclusive control of the land: by giving B sufficient notice, he can simply refuse to renew B's periodic tenancy.¹¹⁰ So, in **Example 10b**, A can simply give B notice that he does not intend to renew B's implied periodic tenancy. If A does so within six months of the end of the current yearly tenancy, A will be bound to grant B a new yearly tenancy, and so will have to wait until the end of that year before regaining exclusive control of the land. However, it is *certain* that A can regain that control. The periodic tenancy is thus *not* an exception to the need for a limited period. Rather, it nicely demonstrates the rationale of that rule: to ensure that A has a guaranteed right to regain exclusive control of his land.

(ii) A tenancy at will

EXAMPLE 10c

The facts are as in **Example 10a**. A and B agreed that B would not have to pay A rent: instead, B paid a single up-front fee of £5000.

In such a case, B *cannot* acquire a Lease by means of an implied periodic tenancy. No rent has been paid by B and accepted by A. So, the conduct of the parties *cannot* lead a court to infer that A exercised his power to grant B a Lease. It seems that B has only a *tenancy at will*. This type of Lease arises where: (i) B has a right to exclusive control of A's land; and (ii) A can end that right *at any time, without giving notice*.¹¹¹ B is thus in a very weak position: there is no guaranteed minimum period for which B can use the land.¹¹² Nonetheless, a tenancy at will *does* count as Lease. The rationale of the limited period rule is met: as A can end B's Lease whenever he wishes, there is a definite future point at which A can regain exclusive control of the land.

As a tenancy at will counts as a Lease, B can qualify for some statutory protection against A.¹¹³ Moreover, as B has a right to exclusive control for a limited period, he has a property right. However, B's right cannot bind C if C acquires a right from A: A's decision to give C that right will be taken as a decision to terminate B's tenancy at will.¹¹⁴ Moreover, the death of either A or B will also end B's right to exclusive control: for that reason the tenancy at will is sometimes said to involve a purely 'personal relation' between A and B.¹¹⁵

¹¹⁰ This point is noted by Lord Templeman in *Prudential Assurance v London Residuary Body* [1992] 2 AC 386 at 394: 'A tenancy from year to year is saved from being uncertain because each party has power by notice to determine at the end of any year.'

¹¹¹ The standard position in a tenancy at will is that B also has the right to end the tenancy at any time. B may wish to use this right in a case where the tenancy at will includes a duty to pay rent.

¹¹² If A does end B's tenancy at will before the land is needed for road-widening, B can argue that A will be unjustly enriched if he is allowed to retain the benefit of the £5000 paid by B to A. B can argue that money was paid under a mistake of law: B wrongly believed he had a legal right to exclusive control of the land until the land was needed for road-widening. Compare eg *Nurdin & Peacock Plc v DB Ramsden & Co Ltd* [1999] 1 WLR 1249.

¹¹³ Eg, a tenant at will had statutory protection under the Rent Acts.

¹¹⁴ The same is true of the 'tenancy by sufferance'. This appears to be a form of tenancy by will, arising when B, after the expiry of a Lease, remains in physical control of the land without the consent of A. The tenancy at sufferance is basically a holding device that prevents any limitation period from running against A whilst he decides what to do about B. If A decides to object to B's possession, the tenancy by sufferance ends and B becomes a trespasser; if A decides to consent, the tenancy by sufferance ends and B becomes a tenant at will or, if he pays rent, a tenant with an implied periodic tenancy.

¹¹⁵ Per Viscount Simonds in *Wheeler v Mercer* [1957] AC 416 at 427

(iii) A contractual right?

In **Examples 10b** and **10c**, can B instead rely on a simple contractual right against A? After all, it seems that B has a contractual licence: (i) A has given B liberty to occupy the land; and (ii) A is under a contractual duty to B not to revoke that liberty until the land is needed for road-widening. So, if A were to seek to remove B before that point, B could ask a court to specifically protect his right (see **E6:3.2**); even if no such order is made, B could then claim money from A as a result of A's breach of contract.

The courts seem to have rejected this possibility.¹¹⁶ In *Prudential Assurance*, for example, Lord Browne-Wilkinson expressed some concern that, as a result of B having only a periodic tenancy, A was free to end B's right even if the land was not needed for road-widening. That was seen as the inevitable result of a finding that the planned Lease had not arisen; no consideration was given to the possibility that B might instead be able to assert a contractual licence against A. The assumption is that the parties' rights are governed *wholly* by the periodic tenancy or, in **Example 10c**, the tenancy at will.¹¹⁷ This has the paradoxical consequence that, in **Examples 10b** and **10c**, B is *worse* off (in relation to A at least) as a result of the fact that his agreement with A gives him a right to exclusive control. If it did not give B such a right, B would simply have a contractual licence: A would be under a contractual duty to allow B to use the land until it was needed for road-widening and so could simply enforce that right against B.

1.7.3 A Lease for life?

A may attempt to give B a right to exclusive control of land until B's death; or until the death of someone other than B. In such a case, B should acquire a Lease: it is clear that, at some point in the future, A will regain his right to exclusive control of the land. Under the LPA 1925, B *does* acquire a Lease: but, under section 149(6), the Lease is recharacterised as a Lease for 90 years determinable on the death of the relevant person.¹¹⁸ That provision puts a maximum duration on B's Lease: but it should not be thought that all Leases need to have such a limit. After all, in a periodic tenancy or tenancy at will it may not be clear, at the outset, how long B's right to exclusive control will last. But such Leases, like a Lease for life, are valid: it is certain that A will regain his right to exclusive control of the land.

SUMMARY of G1B:1.7

A Lease arises where A keeps his property right in land and gives B a right to exclusive control, for a limited period, of that land. A Lease for an unlimited period is a conceptual impossibility. Such a Lease would be inconsistent with A's property right: there must be a *guaranteed point at which A can again exercise his right to exclusive control of the land*. This requirement for a limited period is entirely consistent with the periodic tenancy and the tenancy at will. In each case, there is a definite point at which A can, if he wishes, regain exclusive control of the land.

¹¹⁶ It was explicitly rejected by Lord Greene MR in *Lace v Chantler* [1944] KB 368 at 372.

¹¹⁷ As noted by Bright, *Landlord and Tenant Law in Context* (2007) 75–6, there is no 'convincing reason' for this assumption.

¹¹⁸ After that death, A has to give one month's written notice to end the Lease: s 149(6).

1.8 Covenants in Leases

1.8.1 Introduction

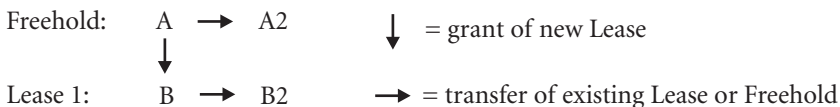
If A makes a contractual agreement giving B a right to exclusive control of land for a limited period, B has a Lease. In practice, the contract between them also imposes duties on B owed to A (eg, a duty to pay rent); and further duties on A owed to B (eg, to carry out major repairs). As a result, each of A and B will have rights against the other. Certain duties are implied *whenever* B has a Lease: B has a duty to A not to alter permanently the physical character of the land;¹¹⁹ A has a duty to B not to interfere with B's expected use of the land and not to allow a substantial interference with B's physical control of the land (see 1.2 above).¹²⁰ And statutes may also impose duties when B has a Lease: for example, section 11 of the Landlord and Tenant Act 1985 imposes a duty on A to carry out particular repairs whenever B has a Lease, for seven years or less, of a home (see 1.2 above).

Some of the express, implied or statutory rights that B acquires against A may bind not only A but also A2, a party to whom A transfers his property right. And some of the express, implied or statutory rights that A acquires against B may bind not only B but also B2, a party to whom B transfers his Lease. Rights with this effect can be known as 'leasehold covenants'. They form part of A and B's initial landlord–tenant relationship and regulate that relationship even if A2 and B2 have now stepped into the shoes of A and B.

1.8.2 The effect of leasehold covenants

EXAMPLE 11a

A Ltd has a Freehold of business premises. A Ltd makes a contractual agreement with B Co under which B Co has a right to exclusive control of the land for 21 years. B Co promises to pay a rent of £1000 a month; A Ltd promises to undertake major repairs that may be required. A Ltd is a paper manufacturing business and so makes B Co promise that: (i) it will not run a paper manufacturing business on the land; and (ii) for the duration of the Lease, it will buy paper from A Ltd. In return, A Ltd promises to provide any paper ordered by B Co for its own use at a 15 per cent discount. B Co is substantively registered as holding a 21-year Lease. Two years later, A Ltd transfers its Freehold to A2; a further year later, B Co transfers its Lease to B2.



Initially, a landlord–tenant relationship existed between A and B. Such a relationship now exists between A2 and B2.

1. A2 is under a duty to B2: (i) not to interfere with B2's right to exclusive control of the land; *and* (ii) to observe any landlord's 'leasehold covenants' contained in the

¹¹⁹ See eg *Marsden v Edward Heyes* [1927] 2 KB 1, applying *Horsefall v Mather* (1815) Holt NP 7.

¹²⁰ See eg *Markham v Paget* [1908] 1 Ch 697.

agreement between A and B (such as the duty to carry out any major repairs that may be required).

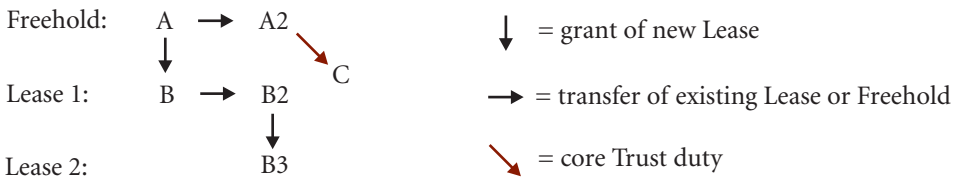
2. B2 is under a duty to A2 to observe any tenant’s ‘leasehold covenants’ (such as the duty to pay a rent of £1000 a month).

This enforcement of ‘leasehold covenants’ is often said to depend on ‘privity of estate’: it arises because A2 has acquired A Ltd’s estate (in this case, a Freehold)¹²¹ and B2 has acquired B Co’s estate (a Lease).

Whilst leasehold covenants can thus bind third parties, it would be a mistake to think of these covenants as independent property rights or persistent rights. They do *not* impose duties on the rest of the world; nor are they *prima facie* binding on any third party who acquires a right from A or B. Rather, they can only bind those third parties who step into the shoes of A or B by acquiring the *very property right* initially held by A (A’s Freehold) or by B (B’s Lease).

EXAMPLE 11b

The facts are as in **Example 11a**. B2 grants B3 a two-year Lease of the land. A2 then declares a Trust of its Freehold in favour of C.



In such a case, B3 is *not* bound by any leasehold covenants in A and B’s original Lease. Unlike B2, B3 has not stepped into the shoes of B: he has not acquired the very Lease B held. Instead, B2 has kept that property right and has given B3 a *new* property right. So, if B2 fails to perform his duty to pay £1000 a month rent to A2, A2 *cannot* sue B3 for that rent.

Similarly, C is *not* bound by any leasehold covenants in A and B’s original Lease. Unlike A2, C has not stepped into the shoes of A: he has not acquired the very Freehold A held. Instead, A has kept that property right and has given C a *new* persistent right. So, if A2 fails to perform his duty to carry out repairs, B2 *cannot* sue C.

Leasehold covenants therefore need to be carefully distinguished from the Restrictive Covenant (see **E2:1.3.2** and **G6**). In **Examples 11a** and **11b**, B Co’s promise not to run a paper manufacturing business on the land gives A Ltd a Restrictive Covenant. That right counts as a persistent right and so can bind not just B Co but also *anyone* who acquires a right that depends on B Co’s right. So, in **Example 11b**, A Ltd has a *prima facie* power to assert its Restrictive Covenant against B3 and thus to impose a duty on B3 not to run a paper manufacturing business on the land. Of course, there is an important difference in the content of a Restrictive Covenant and a leasehold covenant. To count as a Restrictive

¹²¹ The principle applies in the same way if the initial landlord–tenant relationship arises when A, a party with a Lease, grants B a sub-Lease.

Covenant (a persistent right) B Co's promise must be *negative*: it must be a promise *not* to make a particular use of the land.¹²² In contrast, a positive duty, such as duty to pay rent, *can* count as a leasehold covenant.

1.8.3 The content of leasehold covenants

Not all rights arising in a Lease agreement count as leasehold covenants. In **Examples 11a** and **11b**, B Co's duty to pay rent binds B2; and A Ltd's duty to undertake major repairs bind A2. In contrast, B Co's promise to buy paper exclusively from A Ltd does *not* count as a leasehold covenant: it will not bind B2. And A Ltd's promise to provide any paper ordered by B Co for its own use at a 15 per cent discount does *not* count as a leasehold covenant: it will not bind A2.

This result was formerly reached by applying the rule that a duty imposed in a Lease counts as a leasehold covenant only if the content of the duty 'touches and concerns the land'.¹²³ However, the Landlord and Tenant (Covenants) Act 1995 adopts a different test. Under the Act, *any* promise in the original Lease will bind A2 and B2 *unless* it is apparent that the promise is personal to one or both of A and B.¹²⁴ It is by applying this new test that: (i) B Co's duty to buy paper from A Ltd will be held not to bind B2; and (ii) A Ltd's duty to sell paper to B Co at a discount will be held not to bind A2.

1.8.4 The Landlord and Tenant (Covenants) Act 1995

The Act sets out a code that: (i) applies to any Lease created on or after 1 January 1996;¹²⁵ and (ii) regulates how and when rights arising in a Lease can be enforced by, or against, parties other than A and B. The Act cannot be discussed in detail here.¹²⁶ However, one reform is worth noting.

The Act ensures that if B makes a promise to A in a Lease, B's contractual duty to A ends when B transfers the Lease to B2. Before this reform, B could remain under a contractual duty to A even after transferring his Lease.¹²⁷ Under the Act, B can only be held liable for B2's breach of a promise made by B *if* A and B have entered into an 'authorised guarantee arrangement' (AGA). Under such an arrangement, B guarantees that B2 will perform the promise originally made by B. B will then be liable for a breach by B2; but not for a breach by any later holder of the Lease, such as B3 or B4. On the face of it, there is not much incentive for B to enter into an AGA: however, as we will see in **2.2.2** below, the original

¹²² See eg *Rhone v Stephens* [1994] 2 AC 310.

¹²³ Examples of promises not touching and concerning the land include a promise by B to repair tools (*Williams v Earle* (1868) LR 3 QB 739); and a promise by A to pay B money at the end of the Lease if the Lease is not renewed (*re Hunter's Lease* [1942] Ch 124).

¹²⁴ It is, in theory, possible to have a covenant that is personal to A but not to B (or vice versa). If a promise made by B is personal to B but not to A then: (i) it can be enforced by A2 against B; but (ii) it cannot be enforced by A or A2 against B2.

¹²⁵ The Act also affects the way in which, in a pre-1996 Lease, a landlord (eg, A, A2, A3, etc) can enforce B's duty to pay a fixed sum (eg, rent) after B has assigned his Lease to B2: see ss 17–19.

¹²⁶ For detailed discussion see eg Bright, *Landlord and Tenant Law in Context* (2007), ch 18.

¹²⁷ Similarly, B could assert his contractual right against A even after A transferred his Freehold to A2. Even after the Act, B can still bring a contractual claim in such a case. However, ss 6–8 allow A to avoid this liability if A gives notice of the transfer to B and B does not object; or if A gives notice to B and a court finds that it is reasonable for A to be released from his contractual duty to B.

Lease will often state that B must get A's consent to a transfer of the Lease. As a condition of giving such consent, A may require that B enter into an AGA.

2 THE ACQUISITION QUESTION

2.1 Independent acquisition?

It is impossible for B to acquire a Lease by means of an independent acquisition. If B takes physical control of land, he acquires a Freehold: there is no time limit to his right to exclusive control.

EXAMPLE 12

A has a Freehold owner. He gives B1 a 99-year Lease of his land. Whilst B1 is absent, B2 takes physical control of the land.

In such a case B2 independently acquires a Freehold: he does not acquire B1's Lease. This is confirmed by the decision of the Court of Appeal in *Tichborne v Weir*.¹²⁸ In that case, it was held that a leasehold covenant entered into by B1 did not bind B2. As we have seen, a leasehold covenant can bind B2 only if B2 steps into B1's shoes by acquiring B1's Lease (see 1.8.2 above). And, in **Example 12**, B2 does *not* acquire B1's Lease; instead he independently acquires a Freehold. If, as occurred in *Tichborne*, B2 remains in physical control of the land for a long period and a statutory limitation period extinguishes B1's Lease,¹²⁹ the position does not change. The limitation statute does *not* transfer B1's Lease to B2: it simply extinguishes B1's Lease.¹³⁰

It seems, however, that the Land Registration Act 2002 departs from this basic position. Let us say that, in **Example 12**, B2 retains physical control of the land for 10 years. Under Schedule 6 of the 2002 Act, B2 can then apply to be registered: not, it seems, as the holder of his own, independent Freehold; but rather as the new holder of B1's registered Lease.¹³¹ There is no principled justification for this approach. By taking physical control of the land, B2 acquires a Freehold rather than a Lease.¹³² And if B2 is registered as the new holder of B1's Lease, B2 then acquires a set of rights against, and duties to, A.¹³³ Yet there is no doctrinal reason why B2 should acquire the rights or duties arising under A and B1's initial Lease agreement.

There is simply no need for the approach adopted in the 2002 Act: the transfer of B1's

¹²⁸ See eg *Tichborne v Weir* (1892) 67 LT 735.

¹²⁹ See Limitation Act 1980, s 17 (see **G1A:3**).

¹³⁰ As Lord Esher MR noted in *Tichborne v Weir* (1892) 67 LT 73, the limitation statute does not effect a 'statutory conveyance' of B1's Lease to B2.

¹³¹ This is the assumption made by the Law Commission: see Law Com No 271 at eg 14.69. The odd wording of para 1 of Sch 6 of the 2002 Act states that B2 may apply to be registered as holding a 'registered estate in land if he has been in adverse possession of the *estate* [emphasis added] for the period of ten years ending on the date of the application'. Of course, it is the land itself, not B1's estate, that B2 adversely possesses.

¹³² This is acknowledged in Law Com No 271 at eg 14.68 and also by para 9(1) of Sch 6 of the LRA 2002: where B is registered following his adverse possession 'the title by virtue of adverse possession which he had at the time of the application is extinguished'. So, in **Example 12**, B2's Freehold thus disappears, to be replaced by the registered Lease. It is of course bizarre that the B2's registration should extinguish B2's *right* as well as B1's right.

¹³³ See the discussion of leasehold covenants in 1.8 above.

Lease to B2 is both unprincipled and unnecessary. The lapse of time should simply lead (as it does in unregistered land)¹³⁴ to the extinction of B1's pre-existing Lease.¹³⁵ A better solution, if B2 satisfies the criteria laid down by Schedule 6 of the 2002 Act, is to rectify the register so as to: (i) remove B1's Lease; and (ii) register B2 as holding a new Freehold. B2's Freehold would of course be qualified by the fact that it is subject to A's pre-existing registered Freehold. This would mean there would be *two* separate registered Freeholds: one held by A, the other by B. That prospect seems to have deterred the drafters of both the Land Registration Act 1925¹³⁶ and the 2002 Act. However, the simultaneous existence of two Freeholds is nothing to fear (see **G1A:2.1.3**): we have a clear rule that says that A's Freehold, as it arose first, can be asserted against B2.

2.2 Dependent acquisition

B can only acquire a Lease if A has validly exercised his power to give B a Lease. If A has a Freehold or Lease, A can grant B a new Lease. Alternatively, if A already has a Lease, he can transfer that pre-existing property right to B.

2.2.1 Creation of a New Lease

(i) Express grant

A's power to give B a Lease can be regulated by the formality rules imposed by section 52 of the LPA 1925 and section 27 of the LRA 2002 (see **E1:2.3**).

	Section 52 LPA: is a deed necessary?	Section 27 LRA: is substantive registration necessary?
Lease of three years or less	Yes <i>unless</i> section 54(2) LPA applies	No <i>unless</i> the Lease is 'exceptional'
Lease of more than three years but no more than seven years	Yes	No <i>unless</i> the Lease is 'exceptional'
Lease of more than seven years	Yes	Yes

It is clear from the table that we need to know: (i) the scope of section 54(2) of the LPA 1925; and (ii) the definition of an 'exceptional' Lease.

(a) Section 54(2) of the LPA 1925

The first exception, set out in section 54(2) of the LPA 1925, applies only if three conditions are met:

- A grants B a Lease of three years or less; *and*

¹³⁴ Limitation Act 1980, s 17.

¹³⁵ In fact, the Law Commission's original plan (Law Com No 254 at 10.70 to 10.76, 10.78) was to allow B to register as holding his own, independent Freehold. However, the Commission changed its mind following the decision in *Central London Commercial Estates Ltd v Kato Kagaku Ltd* [1998] 4 All ER 948. That decision was based on the odd provisions of s 75 of the 1925 Act: it is unfortunate that its effect lives on.

¹³⁶ Under s 75 of the LRA 1925, the very odd response was to impose a statutory Trust: in **Example 12**, the expiry of the limitation period would lead to B1 holding his registered Lease on Trust for B2.

- B has an immediate right to exclusive control of the land; *and*
- B is under a duty to pay the ‘best rent that is reasonably obtainable without taking a fine’.

If those conditions are met, B can acquire a Lease without the need for a deed and without there being *any writing at all*. Section 54(2) is thus an exception to section 52 as it allows short Leases to be created orally. However, it is important to note that *not all short Leases are covered by the exception*.

EXAMPLE 13a

A has a Freehold. On 1 March, A and B sign a document stating that B will have a right to exclusive control of the land for three years from 1 April. B is under a duty to pay £1000 a month as rent.

In such a case, B *cannot* rely on section 54(2). B’s claimed Lease does not ‘take effect in possession’ as there is a gap between A and B’s agreement and the start of B’s right to exclusive control.¹³⁷ As a result, the basic section 52 formality rule applies: as no deed has been used, A has not exercised his power to give B the intended three-year Lease.

EXAMPLE 13b

A has a Freehold. On 1 March, A and B sign a document stating that B has a three-year Lease. A reasonable market rent would be £1000 a month but, as A and B are friends, B is under a duty to pay only £500 a month. B moves into the premises immediately.

Again, B *cannot* rely on section 54(2). His claimed Lease is not ‘at the best rent which can be reasonably obtained without taking a fine’. So, as no deed has been used, A has not exercised his power to give B the intended three-year Lease.

There does seem to be logic to the requirements of section 54(2). Formality rules can have disadvantages (see **C3:4.2**). In particular, the time and possible expense involved in using a deed may be inappropriate where A plans to give B only a short Lease. Further, where the Lease is for three years or less, the advantages of a formality rule may be less important. For example, the need for *caution* and to *protect A from a fraudulent claim* is reduced: B’s right will be of relatively short effect and, in return for temporarily losing his right to exclusive control of the land, A will at least receive a reasonable rent from B.

If A can give a short Lease orally, the absence of a deed or writing can make B’s Lease difficult for C to discover.¹³⁸ The conditions of section 54(2) therefore give C some protection. First, the requirement for B’s right to exclusive control to arise immediately *reduces the risk* to C of being bound by a hidden Lease. If there were no such requirement then, in **Example 13a**, C could be bound by B’s oral Lease even if C acquired A’s Freehold on 15 March: at that point, it would be very difficult for C to discover B’s Lease. It should be noted, however, that the test is whether the agreement between A and B gives B an immediate *right* to exclusive control of the land, not whether B immediately exercises that right. So, if in **Example 13a**, B’s right to exclusive control began on 1 March, section 54(2)

¹³⁷ *Long v Tower Hamlets LBC* [1998] Ch 197: see Bright [1998] *Conv* 229.

¹³⁸ It is worth noting that C will not be able to rely on the lack of registration defence as a Lease counts as an overriding interest: see para 1 of Sch 3 of the LRA 2002, discussed in **E1:3.6**.

would apply even if, in fact, B did not move into until 1 April. Second, the ‘best rent’ requirement *softens the blow* to C of being bound by B’s Lease. Even if C is under a duty to allow B exclusive control of the land for the remainder of the Lease, C will at least receive the rent due from B.¹³⁹

(b) ‘Exceptional’ Leases under section 27 of the LRA 2002

The general rule imposed by section 27 of the LRA 2002 is that A cannot exercise his power to grant B a property right if B does not substantively register his right (see **E1:2.3.4**). However, in general, that registration requirement does *not* apply if A grants B a Lease of seven years or less. The registration requirement is likely to be extended to all Leases of more than 3 years when electronic registration is up and running (see **E5:4.4**):¹⁴⁰ it will then be easier both for B to register his right and for the Land Registry to deal with the additional information such registration will bring. However, even if that change is introduced, there will still be unregistered Leases that may bind C. The justification is that the disadvantages of a formality requirement (eg, increased time and expense) outweigh the advantages that go with registration (ie, the publicity that makes it easier for C to discover B’s right). In particular, even if B’s Lease is not registered, it may still be possible for C to discover that right: either by discovering the deed used to create B’s Lease (if it does not fall within section 54(2)); or by observing that B is in occupation of the land, or is taking rent from the occupier.

However, there are some exceptional Leases that are *particularly* hard for C to discover. These Leases,¹⁴¹ which must be registered even if they are granted for a period of seven years or less, are:

1. Leases where the gap between A and B’s agreement and the start of B’s right to exclusive control is more than three months (‘future Leases’);¹⁴²
2. Leases where, during the period of the Lease, B does not have a continuous right to exclusive control: eg, where B has a right to exclusive control only in July and August of each year (‘time-share Leases’).¹⁴³

In both cases, the publicity provided by registration is particularly important: C may acquire a right from A at a point when B has a Lease *but* does not have a right to exclusive control of the land. In case 1, as we noted above when examining **Example 13a**, C may acquire a right from A in the gap between A’s agreement with B and the start of B’s right to exclusive control. In case 2, C may acquire a right from A in the period of the year when B does not have his right to exclusive control.

¹³⁹ This element also helps to protect A: the cautionary function of the formality requirement is less important when, in returning for giving B a Lease, A acquires a reasonable rent.

¹⁴⁰ See Law Com No 271 at 3.17, 3.30, 4.20, 6.11.

¹⁴¹ Under s 27(2)(b)(iv) and (v) of the LRA 2002, two other forms of Lease also require substantive registration even if they are granted for seven years or less. These Leases arise under the Housing Act 1985: under that Act, one of the conditions applying to such Leases was that they had to be registered (see s 154 and Sch 9A para 2(1) of the Housing Act 1985). So the 2002 Act simply confirmed that position.

¹⁴² LRA 2002, s 27(2)(b)(ii).

¹⁴³ LRA 2002, s 27(2)(b)(iii).

(ii) Inferred grant: the implied periodic tenancy**(a) Definition**

If A has not expressly exercised his power to give B a Lease, it may still be possible for a court to *infer*, from the conduct of A and B, that A has exercised that power.

That inference arises only if: (i) B has offered payments of rent; and (ii) A has accepted those payments. In such a case, B's Lease is referred to as an *implied periodic tenancy*. So, when examining **Example 10b**, we saw that A's continued acceptance of rent can lead a court to infer that A has given B a succession of yearly Leases. As demonstrated by **Example 10b**, that inference can be made even where A tried and failed to give B a Lease of a different length. Similarly, in **Examples 13a and 13b**, A's acceptance of a monthly rent can lead a court to infer that A has given B a succession of monthly Leases.

It is often said that, for the inference to arise, B also needs to be in physical control of A's land.¹⁴⁴ That may, of course, be very helpful in making clear that a payment made to A by B was a rent payment and was not made for some other reason. Technically, however, it does not seem to be necessary for B to be in physical control of A's land.¹⁴⁵ An implied periodic tenancy can arise as long as a court is confident that B's money was offered and accepted as rent: as a payment in return for a right to exclusive control of A's land for a limited period.¹⁴⁶

Where B's Lease arises under an implied periodic tenancy, the period of the Lease will depend on the basis on which B's rent was calculated. If it was calculated on a weekly basis, B will have a succession of weekly Leases; if on a monthly basis, B will have a succession of monthly Leases; if on a yearly or part-yearly basis (eg, quarterly or six-monthly), B will have a succession of yearly Leases.

Of course, if rent is paid by B and accepted by A, there will usually be an express agreement between the parties. However, in such cases, there may be a reason why that express agreement does not give rise to a Lease.

1. A and B's express agreement may not amount to a valid exercise by A of his power to give B a Lease. As shown by **Example 10b**, that agreement may not give B a right to exclusive control *for a limited period*; and as shown by **Examples 13a and 13b**, A may not have complied with a *formality rule* regulating his power to give B a Lease.
2. A and B's express agreement may have expired: for example, as in **Examples 3 and 9a**, B may remain in physical control of the land and continue paying rent after the end of an expressly agreed Lease.
3. Where A and B are negotiating for, but have not yet reached, an express agreement, A may nonetheless allow B to take control of the land and begin paying rent.

In some ways, B's acquisition of a Lease by means of an implied periodic tenancy appears to

¹⁴⁴ See eg *per Kelly CB in Martin v Smith* (1874) LR 9 EX 50 at 52.

¹⁴⁵ See eg *Huffell v Armistead* (1865) 7 C&P 56. B did in fact take physical control of the land, but the implied periodic tenancy was found to arise *before* B did so.

¹⁴⁶ There may be cases in which B pays money in return for permission from A to occupy A's land and that payment does *not* count as rent. In *Leadenhall Residential 2 Ltd v Stirling* [2002] 1 WLR 499, A obtained a possession order but declined to enforce it as long as B paid A rent arrears due under a previous Lease and 'mesne profits', ie, a monthly sum payable by B as a result of his wrongful occupation of A's land. There was no implied periodic tenancy as the money paid by B was *not* rent under a new Lease. Instead, that money was the price paid by B in return for A not enforcing the possession order. Whilst that arrangement was in place B was thus, in effect, a 'tolerated trespasser' (see **1.5.5(ii)(a)** above): see eg *per Lloyd J* at [30].

be an example of independent acquisition. However, B does *not* gain his right simply as a result of his own conduct: rather B's right arises because the court infers that A exercised his power to give B a Lease. B's right comes from an inference made about the intentions of *both* A and B, derived from *both* parties' conduct. In particular, as we will see in (c) below, it is important to remember that payment and acceptance of money does not *guarantee* B a Lease. If A can show he nonetheless did *not* intend to give B a right to exclusive control of the land for a fixed term, but rather accepted B's money for some other reason, the court will not infer that A granted B a Lease.

(b) Formalities

An implied periodic tenancy is based on an assumption that A has exercised his power to give B a Lease. This raises the question of how formality rules apply to the acquisition of such a Lease. First, there can be no need for B substantively to register: the inferred Lease will have a term, at the longest, of a year. Second, in some cases, B can rely on section 54(2) to escape the need for a deed. However, section 54(2) only applies where B's Lease is 'at the best rent that is reasonably obtainable without taking a fine' and there is no guarantee that B's claimed periodic tenancy will satisfy this requirement: to acquire such a Lease, B must be paying *some* rent, but he need not be paying the *best* rent reasonably obtainable.

So, if section 54(2) does not apply, then A could argue that, as no deed has been used, B does not have a Lease. In practice, however, this argument will not succeed. As in **Examples 10b, 13a and 13b**, an implied periodic tenancy can arise even if no deed has been used. One technical reason is that an implied periodic tenancy is covered by section 52(2)(d) of the LPA 1925, which exempts 'leases or tenancies or other assurances not required by law to be made in writing'. Further, the facts giving rise to the implied periodic tenancy may: (i) provide the necessary *evidence* of A and B's intentions; *and* (ii) provide *publicity* by alerting C to the existence of B's Lease.

(c) Doctrine and practical convenience

If an implied periodic tenancy arises, B will have a Lease and thus may gain statutory protection. As a result, in deciding whether to infer that A has exercised his power to grant B a Lease, a court may be influenced by the desirability or otherwise of allowing B such protection. As we saw in **1.5** above, the perceived needs of practical convenience may affect a court's willingness to find that B has a Lease. The tension between doctrine and practical convenience is particularly acute in this context: if an implied periodic tenancy arises, A may be burdened by statutory duties to B even though A has not *expressly* given B any rights.

EXAMPLE 14

A has a Freehold of business premises. A and B begin negotiating about the possible grant by A of a 10-year Lease to B. B pays £2500 to A as 'rent for three months in advance' and takes physical control of the land. The negotiations then break down and A attempts to remove B from the land.

In such a case, B can argue that: (i) as a result of A's acceptance of rent, B has a Lease (arising under an implied periodic tenancy); *and* (ii) as B has a Lease of business premises, he has a statutory right (under Part II of the Landlord and Tenant Act 1954) to renew that Lease and hence to remain in occupation of the land. However, in *Javad v Mohammed*

Aqil,¹⁴⁷ on which the facts of **Example 14** are based, the Court of Appeal rejected B's argument. The court's approach was expressly influenced by the statutory background. Noting the 'extent to which statute has intervened in landlord-tenant relationships',¹⁴⁸ Nicholls LJ held that the courts should be cautious in inferring that A has exercised his power to give B a Lease.

The perceived needs of practical convenience can thus influence a court's willingness to find an implied periodic tenancy. In **Example 14**, it may seem undesirable for B to have any statutory protection. It is clear that A wanted to be free to remove B if the negotiations for an expressly agreed Lease failed. And if B does acquire statutory protection in such a case, the wider commercial effects could be harmful: in future cases, A would be reluctant to allow B into occupation of the premises during the parties' negotiations. A would thus lose the chance of receiving rent from B during that period; and B would lose the chance to get his business up and running as soon as possible.

Nonetheless, the approach taken in *Javad* can be easily reconciled with doctrine.¹⁴⁹ The statutory protection available to those with Leases makes A *less likely* to intend to give B a right to exclusive control for a limited period. As a matter of *fact*, the courts must then be more careful about inferring that A has exercised his power to give B a Lease. And in *Javad* itself, as A and B were involved in ongoing and uncertain negotiations, it was in any case very unlikely that A would wish to give B a right to exclusive control *for a set period* such as a week, a month or a year. After all, A wants to retain the right to remove B from the land if the negotiations come to nothing. So, in a case such as **Example 14**, the correct inference to draw, as in *Javad*, is that A intends to give B a right to exclusive control of the land that A can terminate *whenever A wishes*. As a result, B does not acquire a weekly, monthly or yearly Lease under an implied periodic tenancy: instead, B acquires a tenancy at will.¹⁵⁰ And, under Part II of the Landlord and Tenant Act 1954, a tenant at will of business premises does *not* have a right to renew his Lease. So, in a case such as **Example 14**, a court does not need to depart from doctrine in order to find that B has no statutory protection.¹⁵¹

(iii) What if B1 grants B2 a Lease in breach of the terms of B1's Lease?

EXAMPLE 15

A has a Freehold. A grants B1 a 21-year Lease. A's agreement with B1 contains a term preventing B1 from transferring the Lease or from granting a sub-Lease without A's consent. The agreement also states that, if B1 breaches that promise, A can terminate B1's Lease. One year later, B1 grants B2 a 10-year Lease without obtaining A's consent.

¹⁴⁷ [1999] 1 WLR 1007.

¹⁴⁸ *Ibid* at 1012.

¹⁴⁹ See too Bright, ch 2 in *Landlord and Tenant Law: Past, Present and Future* (ed Bright, 2006).

¹⁵⁰ See too *Cardiothoracic Institute v Shrewdcrest Ltd* [1986] 1 WLR 368: there B remained in occupation after the expiry of a Lease while A and B negotiated about the grant of a new Lease. Knox J found that there was no implied periodic tenancy and that B instead was a tenant at will.

¹⁵¹ Similarly, if A is a local authority, the security of tenure given by Part IV of the Housing Act 1985 does *not* apply if B has only a tenancy at will: *Banjo v Brent London Borough Council* [2005] 1 WLR 2520. A tenancy at will can, however, qualify for protection, where A is a private landlord, as an assured tenancy under the Housing Act 1988. In *Leadenhall Residential 2 Ltd v Stirling* [2002] 1 WLR 499, the Court of Appeal effectively allowed the 'tolerated trespasser' concept to be used to find that, even though A allowed B to retain physical control of land in return for payment, there was neither a tenancy at will nor an implied periodic tenancy and hence that B did not have statutory protection as an assured tenant. In such a case, the needs of practical convenience, discussed in **1.5.5(ii)(a)** above, seem to dictate the result.

In such a case, B2 *does* acquire a 10-year Lease.¹⁵² When B1 deals with B2, B1 has a right to exclusive control of the land for the next 20 years: B1 therefore has the power to give B2 such a right for the next 10 years. However, by granting B2 that Lease, B1 is in breach of his contractual duty to A and A has a power to *terminate* B1's Lease. If a court allows A to exercise that power and end B1's Lease,¹⁵³ B1's right to exclusive control will end. As a result, B2's Lease, derived from and dependent on B1's right to exclusive control, will also end. B1's breach can thus have an important effect on B2 (see further **2.2.2(ii)** below).

2.2.2 Transfer of a pre-existing Lease

If B2 claims that he has acquired a Lease as a result of B1's transfer to B2 of a pre-existing Lease, B2 needs to show that: (i) B1 had a Lease; and (ii) that B1 exercised his power to transfer that Lease to B2.

(i) Formality rules

Formality rules can regulate B1's power to transfer a Lease. For example, if B1's Lease is substantively registered, section 27 of the LRA 2002 applies: B1's Lease can only be transferred to B2 if B2 is substantively registered as the new holder of the Lease. If B1's Lease is not substantively registered, section 52 of the LPA 1925 applies: A's Lease can only be transferred to B by means of a deed.

EXAMPLE 16a

A has a Freehold. A orally gives B1 a right to exclusive control of the land for three years. B1's right to exclusive control arises immediately and is given in return for a market rent. B1 wishes to transfer that Lease to B2.

B1's Lease can arise even though no deed has been used: it meets the requirements of section 54(2) of the LPA 1925 (see **2.2.1(i)(a)** above). Nonetheless, B1 *cannot* orally transfer that Lease to B2. A deed must be used as the general section 52 formality rule applies. As confirmed by the Court of Appeal in *Crago v Julian*,¹⁵⁴ the section 54(2) exception applies only to the *creation* of Leases, not to their transfer.

(ii) What if B1's transfer to B2 is a breach of the terms of B1's Lease?

EXAMPLE 16b

The facts are as in **Example 15** above: with the difference that, one year after acquiring his Lease from A, B1 transfers that Lease to B2.

¹⁵² See *per* Lord Russell in *Old Grovebury Manor Farm Ltd v W Seymour Plant Sales and Hire Ltd (No 2)* [1979] 1 WLR 1397 at 1398 (that case involved a transfer of B1's Lease in breach of a duty to A, but the reasoning applies equally to the grant of a sub-Lease by B1).

¹⁵³ As we will see in **4.3** below, the courts have a discretion to prevent A exercising his power to terminate (or 'forfeit') B1's Lease.

¹⁵⁴ [1992] 1 WLR 372. If B1 attempts to transfer the Lease using writing that satisfies the Law of Property (Miscellaneous Provisions) Act 1989, s 2(1) (see **E2:2.2.3**) then, although B1 keeps his Lease, B2 may acquire an Equitable Lease (see *per* Lord Chelmsford LC in *Parker v Taswell* (1858) 2 De G & J 559 at 570–1 and **D2:2.1.2**).

In such a case, B2 *does* acquire B1's Lease.¹⁵⁵ It is simply not possible for A, in his agreement with B1, to deny B1 the power to transfer his Lease. The same rule applies where B1 has a Freehold: A cannot transfer a Freehold to B1 and deny B1 the power to transfer that Freehold to B2.¹⁵⁶ Across the property law system, there is a clear rule that if B1 has a right to exclusive control of a thing (eg, ownership of a thing other than land; a Freehold of land; or a Lease of land) then B1 *does* have the power to transfer that property right to B2. So, A cannot both: (i) transfer his right to exclusive control to B1 (even for a limited period); *and* (ii) prevent B1 from transferring that right to B2.¹⁵⁷

However, in **Example 16b**, B1 is clearly in breach of his contractual duty to A. This can have an effect on B2. If A is allowed to exercise his power to terminate B1's Lease, B2's right to exclusive control, derived from and dependent on B1's Lease, will also end. As a result, A will be able to remove B2 from the land. So, in **Example 16b**, A can serve a notice on B2¹⁵⁸ and apply for a court order for possession of the land.

Although the court always has the discretion not to permit the termination of B1's Lease,¹⁵⁹ it is clear that B2's position can be affected by B1's duty to A not to transfer the Lease.¹⁶⁰ In fact, such terms are quite common.¹⁶¹ For example, A may specify in his initial agreement with B1 that B1 can transfer the Lease to B2 only if B1 enters into an 'authorised guarantee arrangement' (AGA) (see **1.8.4** above).¹⁶² That agreement will allow A to pursue a claim against B1 if B2 fails to perform a guaranteed duty, such as the duty to pay rent.

The initial agreement between A and B1 may provide that a transfer is allowed *if* the current landlord consents. In those cases, when B1 asks for permission to transfer his Lease, the Landlord and Tenant Act 1987, section 19, and the Landlord and Tenant Act 1988 impose various statutory duties on A (or any party, such as A2, who has since acquired A's initial Freehold or Lease). In particular: (i) A must respond to the request within a reasonable time; (ii) A must give consent, unless A can show that it is reasonable not to do so; (iii) A cannot impose conditions on that consent, unless A can show such conditions are

¹⁵⁵ *Old Grovebury Manor Farm Ltd v W Seymour Plant Sales and Hire Ltd (No 2)* [1979] 1 WLR 1397.

¹⁵⁶ See eg *Attwater v Attwater* (1853) 18 Beav 330; *re Elliot* [1896] 2 353, esp *per* Chitty J at 356: 'the owner of property has as an incident of his ownership the right to sell and to receive the whole of the proceeds for his own benefit.' *In re Macleay* (1875) LR 20 Eq 186 suggests a restriction on sales 'outside the family' can limit B's power to transfer a Freehold; however that decision has been questioned (see eg *re Rosher* (1884) 26 Ch D 801) and was not followed in *re Brown* [1954] 1 Ch 39.

¹⁵⁷ It may, however, be possible to impose such conditions where he gives B a right under a Trust: in such a case, B acquires only a persistent right.

¹⁵⁸ As B1's breach does not relate to non-payment of rent, s 146 of the LPA 1925 provides that A must serve a notice. In a case such as **Example 15**, the notice must be served on B2, not B1: see *Old Grovebury Manor Farm Ltd v W Seymour Plant Sales and Hire Ltd (No 2)* [1979] 1 WLR 1397.

¹⁵⁹ See s 146(2) of the LPA 1925 and eg *Hyman v Rose* [1912] AC 623.

¹⁶⁰ Under the Law Commission's proposed scheme for dealing with tenant defaults, a breach by B1 of a duty not to transfer the Lease is to be treated as a breach by B2: see Law Com No 303 (2006) at 3.60. This allows the scheme to apply where, in a case such as **Example 15**, A seeks to terminate B2's Lease.

¹⁶¹ For further detail on such clauses and their interpretation see Bright, *Landlord and Tenant Law in Context* (2007) 530–34.

¹⁶² Similarly, A could stipulate that B1 can grant a sub-Lease to B2 only if B2 makes a particular contractual promise to A. By that means, A can have greater control over B2's use of the land than would otherwise be possible. If he acquires a sub-Lease, B2 is not in a landlord–tenant relationship with A and so is not bound by leasehold covenants: see **1.8.2** above.

reasonable; and (iv) A must give B1 written notice of his decision, specifying any reasons for which A has denied the request.¹⁶³

A's failure to comply with these statutory duties can count as a wrong against B1: in such a case, A will be under a duty to pay B1 money representing the value of B1's right and compensating B1 for any relevant loss suffered by B1.¹⁶⁴ Indeed, it may even be possible for punitive damages to be awarded if A's conduct is particularly outrageous.¹⁶⁵ As a result, if A enters a Lease with B1 and wants to have control over any transfer of the Lease, the safest option for A is simply to impose an absolute duty on B1 not to transfer the Lease. After all, if B1 then suggests a transfer that A is happy with, A can waive B1's duty. However, the problem for A may be that a Lease with such a prohibition on transfer may be a less attractive product: for example, B1 may expect to pay a lower rent in return for accepting such a prohibition.

In addition to any prohibitions that A may impose in his agreement with B1, statute can also impose duties on B1 in relation to the transfer of a Lease. For example,¹⁶⁶ the general rule is that, if B1 is a secure tenant under Part IV of the Housing Act 1985, he *cannot* assign that tenancy.¹⁶⁷ After all, if a local authority, in discharge of its statutory duties to provide housing, has chosen to give accommodation to B1, B1 cannot undermine that decision by transferring his Lease to B2.

SUMMARY of G1B:2

B can only acquire a Lease if A has validly exercised his power to give B a Lease. Where A attempts expressly to give B a new Lease, B will have to show: (i) that A intended to give him a right to exclusive control of the land for a limited period; and (ii) that any relevant formality rules have been complied with. If B is unable to do this, he may argue that, due to A's acceptance of rent paid by B, a court can *infer* that A exercised his power to grant B a Lease. If such an inference is made, B's Lease arises under an implied periodic tenancy. In such a case, the length of B's Lease will *not* be set by A and B's express agreement. Instead, it will depend on the period in relation to which B paid rent.

Where B1 has a Lease, he may transfer that Lease to B2. B2 will need to show: (i) that B1 intended to transfer his pre-existing Lease to B2; and (ii) that any relevant formality rules have been complied with. Even if B1's Lease arose orally under section 54(2) of the LPA 1925, B1's power to transfer that Lease to B2 *must* be exercised in a deed.

¹⁶³ See Landlord and Tenant Act 1988, ss 1 and 5(3). A cannot later rely on a particular reason for refusing consent if he does not notify B of that reason in writing within a reasonable time of B's request: see eg *Go West Ltd v Spigarolo* [2003] QB 1140 at [22]. For discussion of how these 'reasonableness' tests are applied see Bright, *Landlord and Tenant Law in Context* (2007) 524–30.

¹⁶⁴ See eg *Blockbuster Entertainment Ltd v Barnsdale Properties Ltd* [2003] EWHC 2912.

¹⁶⁵ See *Design Progression Ltd v Thurloe Properties Ltd* [2004] EWHC 324.

¹⁶⁶ For consideration of other statutory rules applying to residential Leases and the reforms proposed by the Law Commission in Report No 297 (2006) see Bright, *Landlord and Tenant Law in Context* (2007) at pp.534–542.

¹⁶⁷ Housing Act 1985, s 91(1): see eg *City of London Corp v Brown* (1989) 22 HLR 32. For discussion of the general rule and its exceptions see Bright, *Landlord and Tenant Law in Context* (2007) 535–7.

If B1 has a Lease, B1's conduct in transferring his Lease to B2, or giving B2 a new sub-Lease, may be a breach of the terms of B1's Lease with A. In such a case, B1's breach can cause problems for B2. It may be that B1's breach gives A a power to terminate B1's right to exclusive control. If A has that right, and is able to exercise it by terminating B1's Lease, B2's Lease will also end.

3 THE DEFENCES QUESTION

If B has a Lease, he has a property right in land. As a result, the rest of the world is under a prima facie duty to B, for the period of the Lease, not to interfere with B's right to exclusive control of that land. It is very difficult for C to have a defence to a pre-existing property right in land (see **E1:3**).¹⁶⁸

In particular, if B has a Lease, it will be *impossible* for C to use the lack of registration defence against B's Lease. First, in order for B to acquire a Lease of more than seven years,¹⁶⁹ B will need to substantively register that Lease. In such a case, C will obviously be unable to rely on the lack of registration defence. Second, if B has managed to acquire a Lease without substantive registration, his Lease counts as an overriding interest: as a result, it is immune from the lack of registration defence.¹⁷⁰

4 THE REMEDIES QUESTION

4.1 B's right to exclusive control

The core of a Lease is B's right to exclusive control of land for a limited period. The rest of the world is therefore under a prima facie duty to B, during the period of the Lease, not to interfere with B's exclusive control of the land. If a third party does not have a defence to B's Lease, and breaches that duty, that third party commits a wrong against B (see **E1:4.1.1**). B can then bring a claim against that third party based on the wrongs of trespass, nuisance or negligence: those wrongs apply in the way set out in **G1A:4.1.1**. A court will almost always grant a remedy that specifically protects B's right to exclusive control of the land.¹⁷¹ In fact, if a third party is in physical control of the land, B will be able to use the speedy possession procedure made available by Part 55 of the Civil Procedure Rules.

¹⁶⁸ **E1:3.7.1** examines when the lapse of time, in combination with other factors, may prevent B from resisting an application by C to have the register rectified and B's registered Lease removed.

¹⁶⁹ Or one of the exceptional Leases of seven years or less set out in s 27(2)(b)(ii)–(v) of the LRA 2002.

¹⁷⁰ LRA 2002, Sch 3 para 1.

¹⁷¹ When Leases were first recognised as property rights, the rule was not a Lease (unlike a Freehold) would *not* be specifically protected. However, by the end of the 15th century at the latest, B's Lease was specifically protected (in the action of ejectment) and this distinction with the Freehold disappeared. See eg Simpson, *A History of the Land Law* (2nd edn, 1986) 144. Nonetheless, Leases were for long afterwards still seen 'personal property': see eg *Belaney v Belaney* (1866) LR 2 Eq 210 (if B1 has a Lease and, in his will, leaves his personal property and personal estate to B2, then B2 acquires the Lease).

4.2 B's rights under leasehold covenants

As well as his core right to exclusive control, B is likely to have other rights as a result of his agreement with A: for example, A may have a duty to carry out particular repairs. If those rights count as 'leasehold covenants', they will bind not only A but also any third party, such as A2, who steps into A's shoes and thus enters into the landlord–tenant relationship with B (see 1.8.2 above). The general position is that such rights, like other rights relating to land, are specifically protected. So if A breaches his duty to repair, B can: (i) claim money as compensation for any relevant loss that failure has caused him;¹⁷² and (ii) get an order forcing A to ensure that the repairs are carried out.¹⁷³ An additional remedy is also available to B: it may be appropriate if, for example, A cannot be traced or A is refusing to comply with his duty to repair. That remedy is for the court to appoint a *receiver* or *manager*: a party who can take on some of the functions of a landlord and who can thus receive B's rent on A's behalf and use that money to fulfil A's duty to repair.¹⁷⁴

If A or A2 commits a particularly serious breach of a leasehold covenant, B may try to use that as a reason to terminate his Lease. It is rare for his agreement with A to give B that power to terminate the Lease. However, there is a general contractual doctrine that allows one party to terminate a contract if the other party commits a fundamental breach of his contractual duties.¹⁷⁵ If A's breach deprives B of 'substantially the whole benefit'¹⁷⁶ B is due to receive under the contract, B can terminate that contract.

EXAMPLE 17

A has a Freehold of a house. A grants B a five-year Lease with a £300 monthly rent. A fails to carry out any repairs even though the ceiling of one bedroom has collapsed; water pipes have burst; part of the roof is leaking; and there is damp in the hall. B wants to terminate the Lease so that he is free to move out and no longer has to pay rent.

In such a case, even if A has not made a contractual promise to undertake repairs, section 11 of the Landlord and Tenant Act 1985 imposes such a duty on A. As A is in serious breach of that duty, B is entitled to terminate the Lease. By doing so, B releases himself from his duty to pay rent for the remainder of the five-year term. This analysis was adopted by Stephen Sedley QC, sitting in the County Court, when deciding *Hussein v Mehlman*,¹⁷⁷ on which **Example 17** is based. At the time, his decision was a novel one;¹⁷⁸ but the general principle it applies is surely correct and has since been confirmed by the Court of Appeal.¹⁷⁹

¹⁷² See eg *Wallace v Manchester CC* [1998] 3 EGLR 38.

¹⁷³ See eg *Jeune v Queen's Cross Ltd* [1974] Ch 97. See too Landlord and Tenant Act 1985, s 17. The surprising traditional rule, examined and disapproved of by Lawrence Collins QC in *Rainbow Estates Ltd v Tokenhold Ltd* [1999] Ch 64 was that any leasehold covenant imposing a duty to repair could not be specifically enforced.

¹⁷⁴ Supreme Court Act 1981, s 37(1). See eg *Hart v Emelkirk Ltd* [1983] 1 WLR 1289; *Caws and Fort Management Co Ltd v Stafford* [2007] EWCA Civ 1187.

¹⁷⁵ See eg Peel, *Treitel's Law of Contract* (12th ed, 2007), ch 18.

¹⁷⁶ *Per Lord Diplock in Afovos Shipping Co SA v R Pagnan ('The Afovos')* [1983] 1 WLR 195 at 202.

¹⁷⁷ [1992] 2 EGLR 87.

¹⁷⁸ See eg Bright [1993] Conv 71; Harpum (1993) 52 CLJ 212.

¹⁷⁹ See eg *Chartered Trust plc v Davies* (1998) 76 P & CR 396. That case did not concern a breach of a duty to repair, but the principle must apply whenever A's breach of duty deprives B of substantially the whole benefit he is due to receive under the agreement.

4.3 A's right to regain exclusive control

In a Lease, A, as well as B, has a property right in the land. The requirement that a Lease must be for a limited period ensures that, at some definite point in the future A can, if he wishes, regain exclusive control of the land (see **1.7.1** above). When the agreed period of B's Lease ends, then, if B has no statutory right to: (i) remain in occupation;¹⁸⁰ or (ii) to renew the Lease;¹⁸¹ or (iii) to extend the Lease;¹⁸² or (iv) to buy A's property right,¹⁸³ A's right to regain exclusive control will be specifically protected.¹⁸⁴

If A wishes to terminate the Lease *before* the end of the agreed period, things are more difficult. A may well insert an express term in his agreement with B giving him the power to end the Lease early in certain circumstances: eg, if B fails to perform a leasehold covenant such as the duty to pay rent; or if, as in **Examples 15 and 16b**, B grants a sub-Lease or transfers his Lease to B2 without A's consent. Such a clause is said to give A the power to 'forfeit' B's Lease. However, A is not permitted to immediately remove B from the land by relying on such a clause. Instead, courts of Equity developed means of protecting B from the penal effects of such a clause; and legislation now provides B with further protection. Of course, there is a need to balance protection for B with A's legitimate interest in regaining control of the land. As a result, the law relating to the forfeiture of Leases is notoriously complex; simplifying reforms have been proposed in the Law Commission's 2006 Report.¹⁸⁵

The Law Commission's proposals are based around: (i) one sensible idea that is *not* part of the present law; and (ii) two sensible ideas that form the basis of the present law. The first general principle is that A cannot bring an early end to B's Lease without a court order. Under the current law, B's Lease technically ends *before* a court order (even though A usually needs such an order to remove B): the court order is a response to the forfeiture that occurs when A exercises his power to terminate the Lease following B's breach.¹⁸⁶ This creates problems: it means B's occupation of the land in the period *after* a claim is brought is not fully regulated by the Lease agreement. For example, in that period, B is no longer under the contractual duty to pay rent to A.¹⁸⁷

The second general principle behind the Law Commission's proposals is that, if B objects to being removed from the land, A must get a court order if A wants to obtain possession.¹⁸⁸ That principle is present in the current law; even though B's Lease ends before that

¹⁸⁰ As may be the case under Part IV of the Housing Act 1985 if A is a local authority.

¹⁸¹ As may be the case under Part II of the Landlord and Tenant Act 1954 if B has a business Lease.

¹⁸² As may be the case under the Leasehold Reform, Housing and Urban Development Act 1993 if B has a long lease (ie, a Lease granted for a term over 21 years) of a flat.

¹⁸³ As may be the case under, eg, the Leasehold Reform Act 1967 if B has a long Lease (ie, a Lease granted for a term over 21 years).

¹⁸⁴ Of course, in regaining exclusive control, A must be careful not to breach the Protection from Eviction Act 1977 (see **E6:3.4.2(vi)**). So if B refuses to leave, A should apply to court for a possession order.

¹⁸⁵ Law Com No 303 (2006).

¹⁸⁶ Under the current law, forfeiture can also occur by 'peaceable re-entry': by A entering the land. That method of forfeiture is 'dubious and dangerous' (*per* Lord Templeman in *Billson v Residential Apartments Ltd* [1992] 1 AC 494 at 536) and tends to be used only where B has abandoned business premises.

¹⁸⁷ See eg *Moore v Assignment Courier Ltd* [1977] 1 WLR 638. B instead has to pay 'mesne rent': a reasonable rent that can be seen based on the need either: (i) to prevent B being unjustly enriched at A's expense by occupying for free; or (ii) to compensate A for B's wrongful occupation of the land: see the discussion in *Ministry of Defence v Ashman* (1993) 66 P & CR 195 and **E1:4.3**.

¹⁸⁸ The proposals allow a 'summary termination' procedure: termination can then occur without a court order, but only if B fails, within one month, to object to a summary termination notice served by A.

point, A almost always needs to obtain a court order to remove B.¹⁸⁹ The third general principle is that the courts can give B protection in a case where, even though a forfeiture clause applies, B can remedy his breach. For example, courts of Equity were careful to protect B from a clause allowing forfeiture for non-payment of rent. Such a clause was seen, essentially, as a means for A to have *security* for B's duty to pay rent. Where one party *transfers* a right to another as security for a debt, the courts developed the notion of an 'Equitable right to redeem': even if the debtor did not pay the debt exactly as agreed, he could still regain the right transferred to the creditor if he made up the arrears (see **F4:1.3**). The same principle was applied to forfeiture cases: even if B breaches his duty to pay rent, a court has the discretion *not* to grant a possession order to A *if* B makes up the arrears.¹⁹⁰ That principle will also apply under the Law Commission's proposals.¹⁹¹

5 THE NATURE OF A LEASE: CONTRACT OR PROPERTY?

5.1 A false opposition

It is often said that there is a tension between two different views of the Lease. On the first view, the Lease is seen as primarily a *property right*; on the second, it is seen as chiefly a *contractual right*. The characterisation of the Lease as either primarily proprietary or chiefly contractual is said to have a practical effect in the contexts discussed in **5.3** below.

However, this tension is an illusion. There is *no* conflict between property rights on the one hand and contractual rights on the other. The classification of a right as a property right depends on the **content question**: does B's right impose a prima facie duty on the rest of the world not to interfere with B's use of a thing? The classification of a right as a contractual right depends on the **acquisition question**: does B's right arise as a result of a promise which, because it was made in an agreement for which consideration was provided, binds A? It is therefore perfectly possible for B to have a right that is *both*: (i) a property right; *and* (ii) a contractual right. An example occurs where A, by means of a sale, transfers his ownership of a bike to B. B acquires a property right; and that right arises as a result of the contractual bargain between A and B (see **D1:2.2.4(iii)**).

Indeed, in almost all cases where he has a Lease, B's right to exclusive control of land for a fixed period is *both*: (i) a property right; *and* (ii) a contractual right. It is a property right because it is a right, relating to a thing, that imposes a prima facie duty on the rest of the world (see **D1:1.1**). It is a contractual right as B acquires that right as a result of a promise made to B in return for which B provided consideration. In fact, B usually acquires a number of different contractual rights: (i) a right to exclusive control of the land for a limited period; (ii) the benefit of contractually agreed leasehold covenants (rights that can

¹⁸⁹ A may be able to bypass the need for a court order by exercising his right to peaceable re-entry, but that route is rarely available, see n 186 above.

¹⁹⁰ See eg *Howard v Fanshawe* [1895] 2 Ch 581. The analogy with security means that Equity's protection is limited to cases where B's breach consists of a failure to pay a sum of money due to A. A wider principle is enforced by statute: see eg LPA 1925, s 146.

¹⁹¹ See eg cl 9(3)(c) of the Law Commission's draft Landlord and Tenant (Termination of Tenancies) Bill. A court can also make a 'remedial order' (see cl 13) denying A exclusive control of the land but specifying how B is to remedy his breach.

be enforced against parties later acquiring A's estate); and (iii) personal rights against A.¹⁹² All those rights are **acquired** in the same way; but their **content** differs.

This analysis does not mean that a Lease *must* arise as a result of a contract. It is possible for a Lease to arise purely by consent: A can exercise his power to grant B a Lease *without* coming under any contractual duties to B.¹⁹³ However, it does mean that it is misleading to say that there is a tension between the proprietary view of the Lease and the contractual view of the Lease. A Lease is simply a property right that can, and almost always does, arise through a contract. Indeed, when analysing the practical problems that are often said to depend on a choice between the 'proprietary' and 'contractual' views, that false opposition only obscures the solution to the problems.

5.2 Leases as property rights

EXAMPLE 18

A has a Freehold. A makes an oral agreement to give B an immediate right to exclusive control of the land for three years, at a market rent. Before B takes physical control of the land, X moves in.

In such a case, X commits a wrong against B. Even though B has not taken physical control of the land, his agreement with A gives him a property right. The rest of the world is under a *prima facie* duty to B not to interfere with B's right, for the next three years, to exclusive control of the land. It is thus clear that B's right to exclusive control of the land is not *only* a contractual right: it is also a property right.

EXAMPLE 19

A makes a contractual promise to pay B1 £100. In his agreement with B1, A stipulates that B1 cannot transfer his contractual right against A. B1 then attempts to transfer his right to B2.

In such a case, B2 does *not* acquire B1's personal right against A. A has stipulated, in effect, that A's duty to pay £100 will end if B1 attempts to transfer his right against A. As B1's attempted transfer thus releases A from his duty to B1, B2 has no right he can assert against A.¹⁹⁴

In contrast, we saw when examining **Examples 15 and 16b** above that if B1 transfers a Lease to B2 (or grants B2 a new Lease) in breach of his agreement with A, B2 *does* acquire a Lease. The problem for B2 is that A may be able to terminate that Lease but, nonetheless, B2 does acquire a property right. A Lease is thus treated in the same way as other Ownership rights (see **2.2.2(ii)** above): the usual rule applying to contractual rights, such as that in **Example 19**, does not apply. Again, it is clear that B's right to exclusive control of the land is

¹⁹² So, in **Example 11a**, B Co's contractual rights include: (i) a right to exclusive control of the land for a limited period; (ii) a right that A Ltd and later owners of A's Ltd Freehold carry out major repairs; and (iii) a personal right against A Ltd that A Ltd must sell paper to B Co at a discount.

¹⁹³ See *per* Millett LJ (dissenting) in *Ingram v IRC* [1997] 4 All ER 395 at 421–2: 'There is no doubt that a lease is property. It is a legal estate in land. It may be created by grant or attornment as well as by contract and need not contain any covenants at all.' There was a successful appeal against the decision of the majority of the Court of Appeal ([2000] 1 AC 293) and Lord Hutton at 310 expressly agreed with Millett LJ's analysis of the nature of a Lease.

¹⁹⁴ See *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85.

not *only* a contractual right: it is also a property right giving B Ownership of land (for a limited period).

5.3 Leases as contractual rights

5.3.1 *Bruton v London & Quadrant Housing Trust*

We considered the House of Lords decision in *Bruton* in 1.5.3 above. We saw that its effect is to allow B to have a ‘Lease’, at least in the sense in which that term is used in the Landlord and Tenant Act 1985, even if B’s agreement with A does not in fact give B a property right. According to the House of Lords, B can also have a ‘Lease’ if A is under a contractual duty to give B a right to exclusive control of land for a limited period. The decision can be analysed as favouring a ‘contractual’ rather than a ‘proprietary’ view of the Lease. However, such an analysis must be treated with a great deal of caution.

First, the *decision* in *Bruton* can be easily explained. As A had taken physical control of the land, A had its own independently acquired Freehold and was thus in a position to give B a Lease, in the standard sense of a property right in land (see **Example 5a** above). So, in *Bruton*, as in many other cases, B’s Lease is *both* a property right and a contractual right. Second, the *reasoning* in *Bruton* can also be explained. The term ‘Lease’, at least when used in the Landlord and Tenant Act 1985, may be given an extending meaning including: (i) cases where B has a property right; and (ii) cases B has a personal right against A to exclusive control of land for a limited period. The point is simply that B’s right can count as a ‘Lease’ (for the purposes of a particular statute) even if it gives B only a personal right against A. The *Bruton* reasoning thus has no effect at all on the vast majority of cases, in which B’s Lease is *both* a property right and a contractual right.

5.3.2 The doctrine of termination for breach

If A commits a particularly serious breach of a leasehold covenant, it may be possible for B, under general contractual principles, to terminate his Lease agreement with A (see 4.2 above). This is an application of a doctrine that allows one party to terminate a contract if the other party commits a fundamental breach of his contractual duties. The application of that doctrine to the Lease can be analysed as favouring a ‘contractual’ rather than a ‘proprietary’ view of the Lease. However, that analysis, again, must be treated with caution.

First, the application of a contractual doctrine to Leases is no surprise: as we have seen, if B has a Lease, he almost always has *both* a property right *and* a contractual right. The possibility of termination for breach thus proves only that a Lease may depend on a contract; it does *not* show that a Lease is not a property right.

The real issue in a case such as **Example 17**, where B attempts to terminate a Lease as a result of A’s breach, is the *characterisation of the parties’ bargain*. B acquires a power to terminate a contract if A’s breach deprives B of ‘substantially the whole benefit’¹⁹⁵ of his bargain with A. If, in **Example 17**, we say that B has essentially bargained for *only* a right to exclusive control of land for five years, A’s failure to carry out repairs cannot give B a power to terminate: it does not affect B’s right to exclusive control. If, instead, we say that B has

¹⁹⁵ Per Lord Diplock in *Afivos Shipping Co SA v R Pagnan* (*‘The Afivos’*) [1983] 1 WLR 195 at 202. See further Peel, *Treitel’s Law of Contract* (12th ed, 2007) ch 18.

essentially bargained for accommodation of a certain minimum standard for five years, A's failure to carry out repairs *can* give B a power to terminate: it may affect the quality of B's accommodation. The real question, unrelated to the supposed 'property' v 'contract' debate, is therefore *how we view B's bargain*.¹⁹⁶ In decisions such as *Hussein v Mehlman*¹⁹⁷ the courts have moved to the eminently sensible view that, in a residential Lease, B *can* lose substantially the whole benefit of his bargain even if he still has the right to exclusive control of land. As a result, the doctrine of termination for breach gains a new prominence. However, this does not mean that the Lease is now seen as more 'contractual' as opposed to 'proprietary'. Instead, it simply means that the essence of A and B's bargain is now characterised in a different, more realistic way: it is not enough for A to give B a property right in land; B is interested in having somewhere habitable to live.

Second, it is vital to note that the doctrine of termination for breach forms part of a wider principle that can operate *even in the absence of a contract*.¹⁹⁸ For example, let us say B is keen to purchase A's house. A and B make a preliminary, non-binding agreement and B pays A £1000 'subject to contract' to demonstrate his keenness. If B later decides not to proceed with the purchase, then there will be no contract between the parties. Nonetheless, B has (at least) a personal right against A.¹⁹⁹ A is under a duty to pay B £1000. B's right arises because the reason for which B paid A (the contemplated purchase) no longer exists. As a result, A would be unjustly enriched at B's expense if A were not under a duty to pay B £1000.²⁰⁰

The same principle underlies cases of termination for breach of contract. B is allowed to end the contract because he is no longer receiving substantially the whole benefit of his bargain: the basis on which he entered the contract has failed. The contractual doctrine is thus an example of a *wider* principle that, as shown by the example of the £1000 payment, is *not* limited to contracts. The wider principle can apply whenever one party *chooses* to give another a right.²⁰¹ Its application to Leases, therefore, does not prove that Leases are chiefly contractual. Instead, it reflects the obvious point that a Lease arises as a result of the consent of A and B.

5.3.3 The doctrine of frustration

EXAMPLE 20

A has a Freehold of business premises. A grants B Ltd, a logistics company, a 21-year Lease at a rent of £10,000 per month. A knows that B Ltd intends to use the premises as a distribution warehouse. A year later, to both parties' surprise, the road leading to the premises is permanently shut, making it impossible for B Ltd to make his intended use of A's land.

¹⁹⁶ See Bright, *Landlord and Tenant Law in Context* (2007) 30–33.

¹⁹⁷ [1992] 2 EGLR 87.

¹⁹⁸ See eg Birks, *An Introduction to the Law of Restitution* (1985) 223–6.

¹⁹⁹ B should also have a power to acquire a persistent right against A's right to the £1000 (see **D4:4.2**).

²⁰⁰ *Chillingworth v Esche* [1924] 1 Ch 97. The payment there was made as a 'deposit and in part payment of the purchase price'. It was found that the payment was not made as a guarantee by B that he would complete the purchase (see eg *per* Pollock MR at 107): hence A was under a duty to return the deposit to B. Note that even if the payment had been made as such a guarantee, the court now has a discretion to order its return: LPA 1925, s 49(2).

²⁰¹ See McFarlane and Stevens (2002) 118 *LQR* 569, and the works cited therein, for a fuller discussion of 'failure of basis' and the different senses in which the phrase has been used.

In such a case, is B Ltd still under a duty to pay A £10,000 a month rent for the next 20 years? B will argue that the dramatic change of circumstances means that his agreement with A has been *frustrated* and that the contractual duties of A and B are thus at an end.

Prior to 1981, it seems that the courts would not accept B Ltd's argument. It was assumed that a Lease could never be frustrated as, no matter how circumstances might change, B Ltd would still have the right to exclusive control of the land for a limited period. As long as B's acquisition of that right is seen as the defining feature of his agreement with A, that agreement can never be frustrated. However, in *National Carriers Ltd v Panalpina (Northern) Ltd*,²⁰² the House of Lords adopted a different approach, holding that it is possible, in extreme circumstances, for an agreement giving B a Lease to be frustrated. The application of the doctrine of frustration to the Lease can be analysed as supporting a 'contractual' rather than a 'proprietary' view of the Lease. However, that analysis, again, must be treated with caution. In fact, we can make exactly the same points as are made in 5.3.2 above.

First, the application of a contractual doctrine to Leases is no surprise: as we have seen, if B has a Lease, his property right is almost always a contractual right. The possibility of a Lease being frustrated thus proves only that a Lease may depend on a contract; it does *not* show that a Lease is not a property right.

The novelty of the House of Lords' reasoning in *Panalpina* does not consist in seeing the Lease as based on a contract. Again, it depends on the *characterisation of the parties' bargain*. The basic test for frustration is whether the new circumstances deprive one or both of the parties of 'substantially the whole benefit'²⁰³ of their bargain. The test is thus very similar to that applying to B's power to terminate for breach. So, in **Example 20**, if we say that, in essence, B Ltd has bargained *only* for a right to exclusive control of land for 21 years, the closure of the road cannot frustrate the Lease, as it does not affect B's right to exclusive control. If, instead, we say that, in essence, B has bargained for control of a distribution warehouse for 21 years, the closure of the road *can* frustrate the contract. The real question, unrelated to the supposed 'property' v 'contract' debate, is therefore how we view B's bargain. In the *Panalpina* decision, the House of Lords took the eminently sensible view that, in a commercial Lease, B *can* lose substantially the whole benefit of his bargain even if he still has the right to exclusive control of land.²⁰⁴ As a result, the doctrine of frustration gains a new prominence. However, this does not mean the Lease is now seen as more 'contractual' as opposed to 'proprietary': it simply means that the essence of A and B's bargain is now characterised in a different, more realistic way.

Second, the doctrine of frustration is, in any case, not a purely contractual principle. Like the doctrine of termination for breach, examined in 5.3.2 above, it rests on the wider 'failure of basis' principle. The possibility of a Lease being frustrated thus proves only that a Lease arises as a result of the consent of A and B.

²⁰² [1981] AC 675.

²⁰³ See eg *Davis Contractors Ltd v Fareham Urban DC* [1956] AC 696. See further Peel, *Treitel's Law of Contract* (12th ed, 2007) ch 19.

²⁰⁴ In *Panalpina* itself, the court declined to find frustration on the facts because B was only deprived of use of the land for 20 months of his 10-year Lease. As a result, the change of circumstance did not deprive B of substantially the whole benefit of his bargain with A. However, in **Example 20**, there is a stronger case for finding frustration.

5.3.4 The renewal of a co-held periodic tenancy

EXAMPLE 21a

A has a Freehold. In January 2000, A grants a yearly periodic tenancy to B1 and B2. All of the parties are happy for the arrangement to continue, and so B1 and B2 gain a succession of one-year Leases. In May 2007, B1 gives notice to A that he does not intend to renew the Lease in January 2008. B2, however, wishes to remain in occupation.

In January 2008, does the Lease of B1 and B2 end, allowing A to remove B2 and to regain exclusive control of the land? The House of Lords considered that question in *Hammersmith & Fulham LBC v Monk*,²⁰⁵ on which **Example 21a** is based. According to Lord Browne-Wilkinson, the question could be seen to depend on differing views of the nature of a Lease. B2 could emphasise the ‘proprietary’ nature of the Lease by arguing that B1’s unilateral decision not to renew should not be able to deprive B2 of his property right.²⁰⁶ A instead could focus on the ‘contractual’ nature of the Lease.²⁰⁷ A’s argument is that: (i) B2’s right to be on the land depends on an agreement between A, B1 and B2; and (ii) the consent of *all* the parties is necessary for that agreement to continue. In *Monk*, the House of Lords found in favour of A.²⁰⁸ That conclusion can be analysed as supporting a ‘contractual’ rather than a ‘proprietary’ view of the Lease.²⁰⁹ However, that analysis, again, must be treated with caution.

EXAMPLE 21b

A has a Freehold. A gives B1 and B2 a 10-year Lease. At the end of that 10-year period, A asks B1 and B2 if they wish to enter another 10-year Lease. B1 does not want to; but B2 is keen to renew the Lease.

During the initial 10-year period, it is impossible for B1 unilaterally to terminate the Lease. During that time, B1 and B2, acting together, have a property right. Like all co-holders of a right, their dealings with that right have to be governed by their mutual consent or, where they disagree, by a court order. However, once the 10 years are up, things are different. B1 is free to choose what agreements, if any, he wishes to enter. B1 can then unilaterally refuse to renew the Lease. B2 can take a new Lease on by himself (if A consents) but B2 clearly cannot force B1 to enter a new Lease against B1’s wishes.

Example 21b shows that the real question in *Monk* relates to the nature of a periodic tenancy. On one view, a periodic tenancy, no matter how long it lasts, can be seen as just one, continuous Lease. On that view, in **Example 21a**, B1 should *not* be able to unilaterally end the periodic tenancy: after all, in **Example 21b**, B1 cannot unilaterally end the Lease during its 10-year term. It is true that a periodic tenancy is seen, for some purposes, as one,

²⁰⁵ [1992] 1 AC 478.

²⁰⁶ See *eg per* Lord Browne-Wilkinson at 492 noting a case in which ‘[t]he contractual, as opposed to the property, approach was adopted’.

²⁰⁷ See *eg per* Lord Bridge at 483: ‘As a matter of principle I see no reason why this question should receive any different answer in the context of the contractual relationship of landlord and tenant than that which it would receive in any other contractual context.’

²⁰⁸ For an unsuccessful attempt to argue that B2’s loss of his Lease is a breach of B2’s human right under Art 8 of the ECHR, see *Harrow LBC v Qazi* [2004] 1 AC 983 (see **B:Example 15**).

²⁰⁹ *Hussein v Mehlman* [1992] EGLR 87.

continuous Lease. However, a periodic tenancy in fact consists of a number of individual Leases (see 1.7.2(i) above). So in **Example 21a**, B1 and B2 have a succession of yearly Leases. A periodic tenancy will be renewed automatically if not ended by the parties; but that cannot hide the fact that, like any Lease, a periodic tenancy must be renewed if it is to continue from one term to the next. So, in **Example 21a**, B1 should have the freedom unilaterally to refuse to renew the periodic tenancy: after all, in **Example 21b**, B1 can refuse to renew the Lease once the 10-year period is up.

So, it is no surprise that, in *Monk*, the House of Lords found in A's favour: B1 *was* able to unilaterally refuse to renew the periodic tenancy. However, there is no need to see the decision as preferring a 'contractual' view of the Lease; instead, it depends on the *characterisation of a periodic tenancy*. In *Monk*, such a tenancy is correctly seen to consist of a series of individual Leases; each of which needs to be renewed, with the parties' consent, at the end of its term.

SUMMARY of G1B:5

A Lease, in the standard sense, is always a property right: that property right almost always arises under a contract between A and B. In such cases, there is no conflict between 'contract' (the means by which B **acquires** his right); and 'property' (the **content** of B's right: the fact that B has a right in relation to a thing that imposes a prima facie duty on the rest of the world). It seems from the House of Lords' decision in *Bruton* that it is possible for B to have a 'Lease', in the particular sense in which a statute may use that word, even if B does not have a property right. However, this purely personal 'Lease' does not affect our definition of a Lease: in its standard sense it is always a property right.

Where B has a standard Lease, it may be possible for that Lease to be terminated as a result of a breach of contract; or for it to be frustrated as result of a dramatic change in circumstances. The courts' recognition of these possibilities is *not* based on a 'contractualisation' of the Lease. Instead, it is based on a characterisation of the bargain entered into by A and B. It is not based on seeing a Lease as 'contract' rather than 'property'. Indeed, the doctrines of termination for breach and frustration are based on a wider principle that applies not only to contracts but *whenever* rights arise as a result of the consent of A and B. Similarly, the fact that a standard Lease is a property right is not altered by one co-holder's ability to refuse to renew a periodic tenancy. The courts' recognition of that ability is *not* based on a 'contractualisation' of the Lease. Instead, it is based on the characterisation of a periodic tenancy: to continue from one limited period to the next, a periodic tenancy must be renewed; and it can only be renewed with the consent of all the parties.

6 THE EQUITABLE LEASE

If B has an Equitable Lease he does not have a property right in land. Instead he has a persistent right: a right against A's Freehold or Lease. Nonetheless, it is worth briefly considering the Equitable Lease here, in order to compare it with the Lease.

6.1 The content question

B has an Equitable Lease if: (i) A has a Freehold or a Lease; and (ii) A is under a duty to give B a right to exclusive control of that land for a limited period. The content of an Equitable Lease is thus governed by the content of the Lease, discussed in **section 1** above. So, if A makes a contractual promise to give B exclusive control of land until England win the football World Cup, B does *not* acquire an Equitable Lease: A is not under a duty to give B a right to exclusive control of land *for a limited period*. If B has a Lease, in the sense in which a particular statute uses that word, B may acquire important statutory rights. In general, the term 'Lease', when used in such statutes, *is* taken to include an Equitable Lease.²¹⁰

Where A grants B a Lease, it will almost always be the case that A and B acquire additional rights against each other, some of which may count as leasehold covenants and hence be binding on A2 and B2 (see **1.8.2** above). Similarly, where A is under a duty to grant B a Lease, it will almost always be the case that each of A and B has additional rights against the other.

EXAMPLE 22a

A has a Freehold. A and B enter negotiations for the grant by A of Lease to B. A and B make a written agreement, signed by each party and recording all the expressly agreed terms of the deal, that: (i) B will have a right to exclusive control of the land for five years; and (ii) that each of A and B will be under various duties (eg, B will be under a duty to A to pay an annual rent of £10,000; A will be under a duty to B to carry out any major repairs). One term of the agreement is that A may ask B for a year's rent in advance.

In such a case, B does *not* acquire a property right from A:²¹¹ as no deed has been used, the formality rule set out by section 52 of the LPA 1925 has not been satisfied. However, the formality rule set out by section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 has been satisfied and so A has exercised his power to make a contractual promise to give B a Lease (see **E2:2.3.3**). As a result, A is under a duty to grant B a Lease: B thus has an Equitable Lease. Equally, B is under a duty to A to pay A, on request, a year's rent in advance.²¹²

Equitable Leases are also covered by the Landlord and Tenant (Covenant) Act 1995 (see **1.8.4** above).²¹³ So if, in **Example 22a**: (i) A were to transfer his Freehold to A2; and (ii) B

²¹⁰ This is made clear in some statutes (eg s 28(1) of the Landlord and Tenant (Covenants) Act 1995) and is assumed to be the position in relation to others.

²¹¹ B will *independently* acquire a Freehold if he takes physical control of the land.

²¹² See *Walsh v Lonsdale* (1882) 21 Ch D 9.

²¹³ For Equitable Leases acquired *before* 1996, to which the Act does not apply, the position is different. The original rule was that the burden of promises contained in an Equitable Lease would *not* pass on a transfer of the Equitable Lease; however, the Court of Appeal in *Boyer v Warbey* [1953] 1 QB 234 advocated an approach closer to that applying to promises in Leases. As a result, the rules relating to such Equitable Leases are quite complicated: for more, see R Smith [1978] *CLJ* 98.

were to transfer his Equitable Lease to B2; then (iii) A2 could ask B2 for a year's rent in advance.

6.2 The acquisition question

6.2.1 General position

We examined the acquisition of persistent rights relating to land in **E2:2**. B can acquire an Equitable Lease without needing to substantively register that Lease; and without the use of a deed. If B claims that A is under a *contractual* duty to grant B a Lease, then, as in **Example 22a**, B needs to show that the formality rule set out by section 2 of the 1989 Act has been satisfied. If B claims instead that A is under a *non-contractual* duty to grant B a Lease, *no* formality rule applies. For example, in **E4:Example 11**, we saw that B will acquire an Equitable Lease if the doctrine of proprietary estoppel imposes a duty on A to grant B a Lease.²¹⁴

6.2.2 The relevance of specific performance?

In **D2:2.1.2(ii)**, we examined, and rejected, the conventional view that B can only acquire an 'Equitable property right' if A's contractual promise to give B a property right is specifically enforceable. That view has been expressed in a number of cases involving Equitable Leases.²¹⁵ It is therefore worth repeating that authority²¹⁶ and principle both dictate that B acquires a persistent right *whenever* A is under a *duty* to give B a property right; it does not matter what remedy a court might give to enforce that duty. In fact, Gardner's thorough analysis of the authorities relating to Equitable Leases makes clear that there is no sound foundation for the supposed requirement of specific performance.²¹⁷

6.2.3 An overlap with the implied periodic tenancy?

EXAMPLE 22b

The facts are as in **Example 22a**. After reaching his agreement with A, B takes physical control of A's land and pays a quarterly rent to A. One year later, B moves out of the land; but B continues paying rent to A. A sells his Freehold to C, who is registered as the new holder of A's Freehold.

In such a case, C will be able to use the lack of registration defence against B's pre-existing Equitable Lease. As B was not in actual occupation of the land when C committed to acquiring his right, B's right cannot count as an overriding interest.²¹⁸ However, B may

²¹⁴ See eg *JT Developments v Quinn* (1991) 62 P & CR 33; *Lloyd v Dugdale* [2002] 2 P & CR 13.

²¹⁵ See eg *Coatsworth v Johnson* (1886) 55 LJQB 220 (the decision can perhaps be explained on the basis that, due to B's breach of his agreement with A, A had a power to terminate the contract and hence end his duty to grant B a Lease); *Warmington v Miller* [1973] QB 877 (the decision can perhaps be explained on the basis that, as A's agreement was in breach of a term of a Lease held by A from A0, A0 could terminate A's Lease, thus meaning that A had no right against which B could have a persistent right).

²¹⁶ See esp *Holroyd v Marshall* (1862) 10 HLC 191; *Tailby v Official Receiver* (1888) 13 App Cas 523.

²¹⁷ (1987) 7 OJLS 60.

²¹⁸ That is the case even if B gave a sub-Lease to B2 who occupied the land and paid rent to B. The receipt of such rent from an occupier of land *did* give B an overriding interest under LRA 1925, s 70(1)(g); but that rule no longer applies under the LRA 2002.

argue that, in addition to his Equitable Lease, he also acquired a Lease by means of an *implied periodic tenancy* as A accepted rent from B (see 1.7.2(i) above). Crucially, a Lease arising under an implied periodic tenancy is immune from the lack of registration defence (see section 3 above) and so can bind C. So, in **Example 22b**, does B have *both*: (i) an Equitable Lease (as A is under a duty to grant B a Lease); *and* (ii) a Lease, arising under an implied periodic tenancy (as A has accepted rent from B)?

In *Walsh v Lonsdale*,²¹⁹ the facts considered by the Court of Appeal were essentially identical to those in **Example 22a**. In that case, A attempted to rely on the term in the planned Lease giving A the right to request a year's rent in advance. B instead wished to rely on the implied periodic tenancy, which contained no such term. A was successful, and some of the comments of the judges suggest that the Equitable Lease is to be preferred to the implied periodic tenancy; or even, more generally, that 'Equity prevails over the Common Law'.²²⁰ On this view, B has *only* an Equitable Lease and so does not have a Lease arising under an implied periodic tenancy. However, the *result* in *Walsh* can be explained without using such reasoning. That case did not involve any third party: and, whether or not an implied periodic tenancy arose, B was clearly under a contractual duty to A to pay a year's rent in advance if requested.

The decision in *Walsh* thus does *not* rule out B's argument in **Example 22b**. Nonetheless, we *can* support the proposition that, if B has an Equitable Lease, it is impossible for an implied periodic tenancy to arise. This does not depend on an assertion that 'Equity prevails over the Common Law.' Rather, it depends on the fact that, where he acquires a Lease under an implied periodic tenancy, B's Lease arises as result of an inference about A and B's intentions. And the inference that A intended to give B a yearly periodic tenancy seems inappropriate if we know that A is in fact under a duty to give B a different form of Lease. The Equitable Lease should be preferred to the implied periodic tenancy *not* because 'Equity prevails over Common Law' but rather because it better reflects the intentions of the parties.

6.3 The defences question

Under the LRA 2002, B can defensively register an Equitable Lease by entering a notice on the register.²²¹ Such a notice will prevent C, if he later acquires a right in the land, from relying on the lack of registration defence. If B does not defensively register, his Equitable Lease is vulnerable to the lack of registration defence (see **E2:3.6**). It does not qualify as an overriding interest in its own right: paragraph 1 of Schedule 3 applies only to Leases.²²² So, if C has acquired for value and substantively registered a property right in the land, he will have a defence to B's unregistered Equitable Lease *unless* B was in actual occupation of the land when C committed to acquiring his right.

²¹⁹ (1882) 21 Ch D 9.

²²⁰ See eg *per* Jessel MR at 14.

²²¹ LRA 2002, s 32.

²²² It refers to 'a leasehold estate in land granted for a term not exceeding seven years': granted refers only to the creation of a property right (ie, a 'legal lease' or, in the terminology of this book, a Lease): see *City Permanent Building Society v Miller* [1952] Ch 840.

6.4 The remedies question

The discussion in **section 4** above also applies where B has an Equitable Lease. One point to bear in mind is that if B has an Equitable Lease and has not taken physical control of the land, B has no right that he can assert against X, a stranger who does not acquire a right from A but who comes onto or otherwise interferes with the land. In such a case, B will have to rely on the terms of any agreement he has with A in order to persuade or force A to take action against X.

SUMMARY of G1B:6

As it is a persistent right rather than a property right, an Equitable Lease clearly differs from a Lease. However, in practice, an Equitable Lease may be just as useful to B as a Lease. For example, if B is in actual occupation of A's land *or* has defensively registered his Equitable Lease by entering a notice on the register, B will not be vulnerable to the lack of registration defence. B will also have the benefit of any rights (and the burden of any duties) agreed in the planned Lease. Such rights, are also capable of counting as leasehold covenants and thus binding and benefiting parties later acquiring A's estate or B's Equitable Lease. Finally, B will not miss out any statutory protection by virtue of having an Equitable Lease rather than a Lease.²²³

²²³ One disadvantage for B arises if B wishes to claim that he has an implied Easement over A's land. If A does give B a Lease it is possible for the grant of an Easement to be implied into that Lease by operation of s 62 of the LPA 1925 (see **G5:2.5.4**). However, s 62 does *not* apply if B simply has an Equitable Lease; although there are other means by which B can acquire an implied Equitable Easement (see **G5:6.2.1**).