

ENFORCEABILITY OF LANDLORD AND TENANT COVENANTS

3rd Edition

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Third Edition

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Enforceability of Landlord and Tenant Covenants

Third Edition

To Emily and Agatha

Foreword to the First Edition

A book on enforceability of leasehold covenants is very welcome for a number of reasons. First, it is a topic which merits a book in its own right, and, until the publication of this volume, no such book existed. Secondly, there have been a number of recent and important cases where the courts have had to consider the fundamental nature of leasehold covenants. Thirdly, some fundamental changes to the previously existing law have been effected by Parliament when it enacted the Landlord and Tenant (Covenants) Act 1995. Fourthly, as any reader of law reports, and particularly the specialist law reports, will know, leasehold covenants have provided a fertile source of litigation over the past twenty years: any doubts on that score will be put to rest by a quick perusal of the list of cases in this book.

I am therefore confident that any book on the subject should be welcome to barristers, solicitors, surveyors, and indeed many others in the English property world, as well as to academic lawyers.

Having read the final draft of this book, I believe that Timothy Fancourt has done much more than filling a hole in the market. His book satisfies what I believe to be the three main requirements of any first-class legal textbook: in terms of contents, structure and style, it is readable and it is also easy to use so far as the practitioner is concerned; in terms of contents, it deals with the subject fully and intelligently; the author expresses his own views on significant points on which there is no, conflicting, or unsatisfactory authority or on which there is poorly drafted legislation.

Accordingly, I have no hesitation in recommending this book both to practitioners and to academics.

David Neuberger
Royal Courts of Justice
December, 1996

Preface to First Edition

This book was written because the Landlord and Tenant (Covenants) Act came into force on January 1, 1996. Until that time, the law governing the enforceability of leasehold covenants as between lessors and their assigns and lessees and their assigns and any third parties was governed principally by the common law doctrines of privity of contract and privity of estate, with a statutory overlay of a few sections from the 1925 property legislation. That legislation added something of a polished finish to the law established by the old privities; and since 1925, the principles of law governing enforceability of leasehold covenants has become tolerably well defined, if not always simple to apply. It might be thought, therefore, that Parliament was bold indeed to attempt to replace this body of established law with a new code, comprised almost entirely in thirty-odd sections of a new statute. But the political imperative was present, and the Parliamentary draftsman ever willing, and so, on January 1, 1996, with something of a flourish if not a rush, the Landlord and Tenant (Covenants) Act 1995 was with us.

As Chapter 2 of the Text describes, the “old” law continues to apply to all tenancies granted in and before 1995, and also, in exceptional cases, to some tenancies granted on or after January 1, 1996. The existing principles of privity of contract, privity of estate and the relevant sections of the 1925 legislation will, therefore, continue to apply to many tenancies for many years to come. Part II of the Text attempts to summarise the law applying to such tenancies, both in order to provide a concise but connected treatment of that law, and also for the purpose of convenient comparison and contrast with the “new” code. Apart from the exceptional cases just mentioned, all tenancies granted on or after January 1, 1996 will be “new tenancies” within the meaning of section 1 of the Landlord and Tenant (Covenants) Act 1995, and to them the new statutory code will apply. Its provisions are considered in detail in Part III of the Text. A number of the provisions of the Act of 1995 apply both to “old” tenancies and to “new” tenancies. These introduce reforms in the law governing the liability of former tenants and guarantors of former tenants, and they are considered in Part IV. The remaining Parts of the Text deal with the anti-avoidance provisions of the Act, with the important amendment to s.19 of the Landlord and Tenant Act 1927 (Provisions as to covenants not to assign, etc. without licence or consent) which is intended to complement the provisions of the Act of 1995 relating to release of tenants’ contractual liabilities and to authorised guarantee agreements, and with other amendments and repeals.

In writing this book, I have been greatly assisted by my colleagues in Falcon Chambers who have been involved, as I have, during the past year in advising on

PREFACE TO FIRST EDITION

various aspects of the Act of 1995, and who have raised with me a number of interesting points on the true construction and effect of the Act. In particular, I am very grateful to Kim Lewison, Q.C. who, with typical assiduity and mastery of the subject, read the manuscript in a matter of days, and made a considerable number of helpful suggestions from which I have profited in finalising the Text. I should also record here debts which, though less directly reflected in the Text, are no less valuable: Mr Michael Prichard, formerly Senior Tutor and Director of Studies in Law at Gonville and Caius College, who first stimulated an interest in and demanded a rigorous approach to the analysis of the workings of property law; and Sir Robert Megarry, who needs no introduction, but who, over several years of working together on *The Rent Acts*, helped me to grapple with the difficulties of writing a coherent and accurate text about a (in that case) frighteningly complicated subject, and whose own books are, of course, a paragon to which all legal authors aspire. Any failings and infelicities of this book reflect entirely the poorness of the pupil, and not the excellence of the tuition. Finally, I am grateful to Sir David Neuberger, himself a foremost ex-practitioner in the field of landlord and tenant law, for taking time from his new career on the Bench to write the Foreword.

Although this book is a little late for the first anniversary of the Landlord and Tenant (Covenants) Act 1995, to say nothing of its coming into force, I am cheered by the fact that, to date, no case turning on or involving the Act has been reported. I hope that the book may prove of some assistance in the years to come, during which the operation of the Act can be expected to be subjected to close judicial scrutiny.

The Text states the law as at December 1, 1996.

T.M.F.

Falcon Chambers
December 1, 1996

Preface to Third Edition

In the preface to the second edition of this text, I observed that a number of fundamental issues about how the Landlord and Tenant (Covenants) Act 1995 works had yet to be considered by the courts. Since that edition, a number of those important questions have been considered, in particular what is and what is not an equitable assignment; what kinds of guarantee agreement are struck down by the anti-avoidance provisions of the Act and to what extent the anti-avoidance provisions have effect in avoiding agreements relating to new tenancies. In addition, there have been two appeals heard by the House of Lords: on the interaction of the landlord release and anti-avoidance provisions and on the operation of the fixed charge notice provisions, as well as a seminal decision of the Court of Appeal on authorised guarantee agreements. These and a number of other decisions on the Act have required re-writing of a number of chapters of the text. In addition, the abolition of the law of distress on April 6, 2014 and its replacement by the commercial rent arrears recovery scheme and the replacement of the Companies Acts 1985 and 1989 by the Companies Act 2006 have required other changes to be made.

The most contentious area of the operation of the Act remains the way in which the anti-avoidance provisions interact with the amendments to section 19 of the Landlord and Tenant Act 1927 that allow lessor and lessee to agree in advance when consent to assignment of the lease may be refused and subject to what conditions it may be granted. It is commonplace for alienation covenants in leases drafted after the Act was passed to state that the landlord may require an authorised guarantee agreement to be made by the lessee upon any assignment. In addition, most leases to corporate entities that depend on the existence of a parent company guarantee contain provisions that require a suitable replacement guarantee to be provided on any assignment. It is now clear that the guarantee of the original guarantor cannot be repeated, but conditions intended to provide a substitute guarantee tread a narrow line between validity and infringement of the anti-avoidance provisions. One such case was heard by the High Court and by the Court of Appeal shortly before publication; many more can be expected to follow as the draftsmen of most leases granted before 2011 were not aware of the way that the courts would interpret the anti-avoidance provisions. The importance of these issues in modern practice has led to a more detailed treatment of these aspects of the law in this edition. Otherwise, the structure of the text is unchanged from the second edition.

PREFACE TO THIRD EDITION

The law is stated as at October 1, 2014.

T.M.F.
Falcon Chambers
October 1, 2014

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