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MAGCO LEGAL LESSONS NO. 31

LEGAL TOPIC: LEASES – ELEMENTS, FORMALITIES, & ESSENTIAL COVENANTS

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INTRODUCTION

It is certainly common for property owners to utilise their properties to generate income. A popular instrument by which property owners achieve this goal is undoubtedly the lease. This instrument enables property owners to generate this income by allowing other persons or entities to occupy their properties for a period in return for money, without parting with their ownership or title in the same.

Leases, and the relationships which they form, which are that of landlords and tenants, have been the subject of legislative and judicial scrutiny for centuries. This article will examine some of the wealth of learning and practice which has developed in respect of leases, and landlord and tenant relationships. In particular, the elements of a lease, the formalities that must be satisfied for the creation thereof, and certain covenants that ought to be included therein will be explored.

THE ELEMENTS OF A LEASE

A lease or tenancy, by definition, is a contractually binding agreement not referable to any other relationship between the parties thereof and is created if certain requirements are met (**London Borough of Islington v. Green and Anor.** [2005] EWCA Civ 56). The said requirements were set out in the case of **Street v. Mountford** [1985] A.C. 809 as follows:

> "To constitute a tenancy the occupier must be granted exclusive possession for a fixed or periodic term certain in consideration of a premium or periodical payments."

Therefore, a lease would be created if three conditions are met: (1) there is a grant of exclusive possession of the demised premises (2) for a fixed or periodic term (3) in return for a premium or periodical payments. Further, according to **Street v. Mountford**, **supra**, and **Isaac v. Hotel De Paris Limited** [1960] 1 All Er 348, a lease would not be created in the following circumstances:

1. Where the parties had no intentions to create legal relations;
2. Where the relationship between the parties was that of vendor and purchaser;
3. Where the occupancy is pursuant to a contract of employment or a family arrangement;
4. Where a grant is made as an act of friendship, generosity, or charity; and
5. Where the owner had no power to grant a tenancy.

There have been instances where these circumstances negatived the creation of a lease. For example, in **Dobson v. Jones** 30 Digest (Repl.) 548, 1821, it was determined that a surgeon, who occupied a house to perform his duties, was not a tenant as his occupation thereat was for the purpose of and was an integral part of his employment: his occupation at the said house enabled him to readily perform the services required by him. This case demonstrates the principle that where one's occupation is necessary for the performance of their services and they are required to reside at the premises to perform those services, the occupation thereof being strictly ancillary to the performance of their duties, the occupation is that of a servant and not a tenant (**Smith v. Seghill Overseers** (1875) LRQB 422). A practical example would be a live-in maid who occupies quarters at your home. That live-in maid could never be considered a Tenant.

Further, in respect of family arrangements, the Caribbean Court of Justice in **Lackram Bisnauth v. Ramanand Shewprashad & Anor.** CCJ Appeal No. CV 12 of 2007 stated as follows:

> "In **Romany v. Romany** [1972] WIR 491 in the Court of Appeal of Trinidad and Tobago, had this to say:
>
> > 'Recent authority makes it clear that in family situations, where one member helps another in a period of difficulty over accommodation, there is usually no intention to create legal relationships, so that there can be no tenancy at will but merely a licence.'"

The application of this was seen in **Edwards v. Braithwaite** 32 WIR 85 wherein a tenancy was not created between a mother and son when the former invited the latter to reside at a chattel house. The Court found that the parties did not possess any intention to create a legal relationship and the son was merely granted a personal privilege with no interest in land. Therefore, should a person occupy property pursuant to a family arrangement, that person may not be considered to be a tenant. A practical example of this is where the parents of a child offer accommodation to the said child in a time of need, that child may not be considered a tenant.

FORMALITIES

As discussed hereinabove, a lease must contain three elements to be valid. However, the document which creates the said relationship must satisfy certain requirements in order to be considered to be a valid and enforceable lease. Of these requirements are statutory formalities which are found in **s.3 Landlord and Tenant Ordinance, 1940** Chap. 27 of No. 16-1940 (hereinafter referred to as "the LTO"), which states as follows:

> "No lease for a term exceeding three years or surrender of any land shall be valid as a lease or surrender, unless the same shall be made by deed duly registered; but any agreement in writing to let or surrender any land shall be valid and take effect as an

> agreement to execute a lease or surrender, and the person who shall be in the possession of the land in pursuance of any agreement to let may, from payment of rent or other circumstances, be construed to be a tenant from year to year."

Accordingly, the following principles emanate from the above section in respect of the requirements for a valid lease:

1. Leases for more than three years must be made by Deed and duly registered;
2. Leases for three years or less may be made by Deed or in writing (**G. Kodilinye, Commonwealth Caribbean Property Law, 3rd edn., page 14**); and
3. An agreement to let any land shall take effect as an agreement to execute a lease and may be enforced in a court of equity.

The section was analysed by Wooding C.J. in the local case of **Metcalfe and Eddy Limited v. Edghill** (1963) 5 WIR 417 wherein it was stated as follows:

> "I interpret these provisions to mean that (a) there can be no carving out of a legal estate for a term exceeding three years unless it is effected by a deed of lease duly registered; (b) an agreement in writing to let any land shall nevertheless take effect as an agreement to execute a lease and, accordingly, may be enforced as such in a court of equity; and (c) a person in possession of land in pursuance of an agreement to let, not must, but may, in appropriate circumstances be construed to be a tenant from year to year.'"

In respect of the rule that an agreement for a lease may be enforced by a court of equity, this was derived from the case of **Walsh v. Lonsdale** (1882) 21 Ch.D. 9, wherein it was stated as follows:

> "The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance. That being so, he

> cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted."

This rule permits documents that contain the basic elements of a lease to be enforceable even though they do not strictly comply with the above statutory formalities. These said basic elements are as follows:

1. A description of the parties (**Potter v. Duffield** (1874) LR 18 Eq. 1);
2. A full and accurate description of the property (**Harewood v. Retese** (1990) 1 WLR 333);
3. The terms of the agreement and the commencement thereof (**Harvey v. Pratt** (1965) 1 WLR 1025); and
4. The rent (**Chew v. Richmond** (1962) LRBG 31).

Therefore, it is suggested that landlords and tenants ensure that the documents which purport to establish their relationships comply with the above formalities in order to ensure that the said documents are valid and enforceable leases.

ESSENTIAL COVENANTS

A well-drafted lease must not only accurately reflect the desires of the parties, but it must also contain their rights and obligations. The clauses of a lease must therefore set out the covenants or obligations which the parties are bound to adhere to. The following is a list of covenants that landlords and tenants are encouraged to have reflected in their leases:

1. Quiet Enjoyment

The covenant of quiet enjoyment is an implied term whereby a landlord must not interfere with the tenant's lawful possession of the property. This covenant was explained by the Court in **Kenny v. Preen** [1963] 1 Q.B. 499, wherein it was stated as follows:

> "The basis of it is that the landlord, by letting the premises, confers on the tenant the right of possession during the term and impliedly promises not to interfere with the tenant's exercise and use of the right of possession during the term."

A breach of this covenant was found to have occurred in the local case of **Ram v. Ramkissoon** (1968) 13 WIR 332. In this case, the Tenant was operating a jewellery store on the premises, but the Landlord removed a piece of galvanize from the roof which caused rainwater to seep into it. Consequently, the Tenant's business activities were affected by rainwater and he was not able to operate effectively. The Court found that the Landlord breached the covenant of quiet enjoyment as the seepage of rainwater was not minimal and was a direct result of the Landlord's actions. Therefore, to avoid situations where the activities of a landlord may interfere with a tenant's lawful occupation of a demised property, it should be clearly stipulated in their lease that the landlord is not to interfere with the tenant's quiet enjoyment of that property. However even if it is not stated, it is a condition which is always implied in Law.

2. Non-Derogation from Grant

Where a lease is made for a particular purpose, the landlord cannot use any adjoining property retained by them in such a way that it would render the demised premises unfit for its purpose. This was outlined by the Court in **Aldin v. Clark** [1894] 2 Ch. 437 as follows:

> "The result of these judgments appears to me to be that where a landlord demises part of his property for carrying on a particular business, he is bound to abstain from doing anything on the remaining portion which would render the demised premises unfit for carrying on such business in the way in which it is ordinarily carried on, but that this obligation does not extend to special branches of the business which call for extraordinary protection."

As such, in an instance where a landlord retains property that adjoins the demised premises, it is essential that the lease must provide that the landlord's activities on the said retained property do not interfere with the tenant's usage of the demised premises.

3. Fitness for Human Habitation

Where a tenant intends to utilise the demised premises for residential purposes, the lease ought to expressly provide for the requirement of the same to be fit for human habitation.

The local Court of Appeal in **Hamblin v Samuel & Browne** (1966) 11 WIR 48 stated that in accordance with this covenant, demised premises must be "fit for humans to live in" and that the following factors should be taken into account to determine such fitness: repair, stability, freedom from damp, natural lighting, ventilation, water supply, drainage and sanitary conveniences, and the availability of facilities for the storage, preparation, and cooking of food, and for the disposal of water.

Premises would be deemed to be unfit for human habitation if defective in one or more of the above-stated factors. Therefore, any tenant should ensure that their lease contains such a provision and also physically inspect same to ensure that the demised premises are sufficiently habitable and do indeed meet the Legal requirement of being "fit for Human Habitation".

4. Tenantable Repair

It would be prudent for a lease to contain a clause in respect of the tenant's obligation to keep the demised premises in tenantable repair. This would require the tenant to keep the demised premises in a reasonable state of repair and not make any alterations to the same that would change its character, unless the Landlord's permission in writing has been specifically obtained for such. This obligation was accurately described in the case of **Brew Bros. Limited v. Snax (Ross) Limited** [1970] 1 All Er 587 as follows:

> "A tenant who enters into a covenant to put a building in repair is under a duty to do all such repairs except those which will change the character of the building. Whether or not the work required comes within the covenant is a question of degree. The cases show that where the tenant is not liable under a repairing covenant to eradicate a defect, he will not be liable for disrepair caused by that defect. A covenant to put and keep in repair does not affect the essential principle that a tenant is not obliged to do work to the premises which will make them different in character from those demised. The character of premises can be altered by altering a part of them or by doing substantial work of rebuilding in a case where they are so out of repair at the date of demise that such work is needed. In the latter case whether or not the resulting building is different in character from that demised is a pure question of degree."

Further, based on the above, as a tenant is not generally permitted to change the character of premises, it is advisable that a lease should contain a provision that requires the tenant to obtain the written consent of a landlord in respect of any alterations they may want to effect on the premises. This would also assist in ensuring the effective communication between the parties.

5. Option to Renew

A tenant may be desirous of renewing the lease upon the expiration of the same. As such, it is advisable that the lease must contain a provision that allows the tenant to notify the landlord of his intention to renew his tenancy and which binds the landlord to adhere to such notice. This of course should be subject to the tenant's observance of and compliance with the covenants of the lease and it may be subject to a rental increase for the new Term.

6. Option to Purchase

There may be an instance where a tenant is desirous of purchasing the demised premises, and this may be provided for in the lease by a clause concerning an option to purchase. This option was set out by the Supreme Court of Jamaica in **Broadway Import & Export Limited v. Michael Lev & Anor.** (1996) 33 JLR 26 as follows:

> "An option to purchase is the right to purchase a particular estate in land for a particular sum within a particular period. The holder of the option can call for the sale of the land to him for the agreed price at any time within the agreed period. Thus, with an option to purchase, the option holder is the prime mover. The option agreement constitutes an irrevocable offer to sell and once the plaintiff had accepted that offer by exercising the option, a contract had come into being."

7. Assignment and Subletting

Generally, a tenant is free to assign, sublet, or part with the possession of the demised premises to a third party (**Kodilinye, supra, page 31**). However, should a landlord desire

to prevent either of these from occurring, a lease may contain a provision that prevents the tenant from doing such (**Kodilinye, ibid, page 31**) and once this is specifically provided, the tenant may not lawfully do same without the express written waiver and/or permission from the Landlord.

8. Payment of Rates and Taxes

A lease ought to stipulate the party that is responsible for the payment of Rates and Taxes, which is customarily the landlord.

9. Payment of Bills

There may be numerous costs associated with a property, such as bills for electricity, water, telephone, internet, and cable. A lease should therefore stipulate the party that is responsible for the payment of bills, which is usually the tenant.

10. Entry

The entry of a landlord, its servants and/or agents onto demised premises is usually a contentious issue between a landlord and tenant as unexpected entry thereto is generally unwelcomed by the tenant. As such, it is prudent for a lease to provide that the landlord must give to the tenant reasonable notice of their intention to enter the demised premises and such entry must be justifiable for some very valid reason, such as to effect some urgent or emergency repair. The giving of such notice ought to make it easier for a tenant to prepare for the Landlord's entry onto demised premises.

CONCLUSION

The relationship between a Landlord and a Tenant is a unique one with certain requirements for the establishment of the same and many rights and obligations emanating therefrom. The precursor for the establishment of fruitful landlord and tenant relationships is indeed the preparation of well-drafted leases that accurately reflect the desires, expectations, obligations and responsibilities of the parties.