

Chapter 2: The Formal Requirements for the Creation of a Lease

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Aims of this Chapter

This chapter will enable you to achieve the following learning outcome from the ILEX syllabus:

- 2 Understanding the formal requirements for the creation of a lease

2.1 Introduction

Legal leases

Legal leases must, like any legal estate or interest, be granted by deed – **s52(1) LPA 1925**.

There is an important exception to this rule in **s54(2) LPA 1925** which states that a legal lease may be created in writing or even verbally provided that:

- it is for a term of not more than three years – this includes periodic tenancies; and
- it takes effect in possession;
- it is at the best rent reasonably obtainable;
- no fine (i.e. premium or lump sum) is payable by the tenant to the landlord for the grant.

Equitable leases

A lease for three or more years, which does not comply with the above requirement of a deed, may not be completely invalid. There may be both an implied legal periodic tenancy which is valid within **s54(2)** and (provided that there is a written contract which complies with **s2 Laws of Property (Miscellaneous Provisions) Act 1989 (LP(MP)A 1989)**) a lease recognised by equity. This is a very important point which requires a knowledge of the types of tenancy before it can be appreciated fully. It is to these various types of tenancy and an explanation of them that we now turn.

Contracts for a lease

It is usually the case that the parties enter directly into a formal lease on the completion of negotiations, though they may first enter into an agreement for a lease. This is a specifically enforceable contract in which one party agrees to give, and the other agrees to take, a lease. Prior to 27 September 1989, contracts for leases had to be evidenced either in writing or by acts of part performance, otherwise they were unenforceable in a court of law by virtue of **s40 LPA 1925**. This provision was repealed by **s2 LP(MP)A 1989**.

It provides that a contract for the sale or other disposition of an interest in land:

- must be in writing; and
- must incorporate all the terms which the parties have expressly agreed in one document (or in each document where contracts are exchanged);
- may incorporate terms by reference to some other document;
- must be signed by or on behalf of all parties (or, where contracts are exchanged, one of the documents incorporating the terms but not necessarily the same one). **NB** Where the terms of a supposedly agreed lease are set out in a letter from, for example, the landlord, the tenant (or his authorised representative) must also physically sign that letter: *Firstpost Homes v Johnson [1995]*.

In summary, contracts for land, including a contract for a lease, must be in writing and signed by or on behalf of the parties. If not, the whole contract is not merely unenforceable, but void.

Under **s2(5)** these provisions do not apply to:

- contracts for leases of three years or less falling within **s54(2) LPA 1925** (see above);
- contracts made in a public auction.

It should be stressed that the above applies only to a contract to create a lease in the future. It does not apply to an initial grant of a lease.

2.2 The types of tenancy

We will now look at various types of tenancy created by common law. There are other types of lease created by statute.

2.2.1 Fixed-term tenancy

One of the two most common forms of tenancy is a fixed-term tenancy.

A fixed-term tenancy can be of any duration and comes to an end automatically on the expiration of the term. No notice to quit is required to bring the tenancy to an end. The tenancy may be terminated early, for instance, by forfeiture or by operation of a break clause, inserted into the lease.

2.2.2 Periodic tenancy

This is the other common type of tenancy. The total duration of a periodic tenancy is not fixed from the outset. It continues automatically from period to period until it is terminated by notice at the end of one period. The period may be of any duration, for example, weekly, monthly, quarterly or yearly. Periodic tenancies are regarded as being of fixed maximum duration provided that either side knows what notice he needs to give to terminate: see *Prudential Assurance Co Ltd v London Residuary Body [1992]* at **1.3.2**. Periodic tenancies can arise either expressly or by implication.

(1) **Express periodic tenancies:** this is the most obvious method of creation of a periodic tenancy and may arise by the use of such words as “to X from year to year” or “to Y as a yearly tenant”.

(2) **Implied periodic tenancies:** a periodic tenancy may be implied on the basis of calculation of rent or on the basis of the intervals between payments of rent, for instance, “to X at £1,200 per year” or “to Y at £100 payable monthly”.

An express periodic tenancy, like any express term, overrides a periodic tenancy implied on the basis of calculation of rent. An implied tenancy based on calculation of rent overrides an implication based on the intervals between payments: for example, “A lease from month to month at £1,200 per annum” creates an express monthly tenancy, while “A lease at £1,200 per year payable monthly” creates an implied yearly periodic tenancy based on calculation of rent.

2.2.3 Tenancy at will

A tenancy at will arises when a tenant occupies land with the consent of the owner on the basis that either party can bring the tenancy to an end at any time. It can be created either expressly or by implication.

(1) Express tenancy at will

An illustration of an express tenancy at will is *Manfield v Botchin [1970]*, where the landlord created such a tenancy of business premises, so as to be sure of being able to regain possession immediately on being granted planning permission for redevelopment. Express creation, although rare, may thus be useful in order to avoid the creation of a periodic tenancy and the consequent need to give a long period of notice to terminate.

(2) Implied tenancy at will

An implied tenancy at will arises when a tenant holds over (remains in possession), with the **consent** of the landlord, after termination of the tenancy.

In *Wheeler v Mercer [1957]*, for instance, the landlord had given valid notice to quit the demised land. This notice had expired. The tenant nevertheless remained in possession whilst negotiations for a new lease were under way. These negotiations broke down. The House of Lords held that there was a tenancy at will, which could be terminated at any time by the landlord.

In fact, a tenancy at will is very rare in this circumstance (as some form of statutory tenancy usually comes into existence on the tenant holding over, for instance, under **RA 1977**).

This implication of a tenancy at will can be rebutted in certain circumstances. In *Javad v Aqil [1991]*, an express tenant at will paid rent monthly pending negotiations for the full grant of a lease. This was not enough, in the circumstances, to create a periodic tenancy.

Much more common and much more important is where a tenancy at will arises when a tenant enters into possession under an informal legal lease: for example, for lack of a deed (see **2.1** and **2.3**).

When an implied tenant at will pays, or agrees to pay, rent, a periodic tenancy will be implied as above, based on the method of calculation, or failing this, the intervals between payments of rent (see **2.2**)

In *Arben Katana (1) and Dan Abraham (2) v Catalyst Communities Housing Limited [2010]*, the Appeal Court affirmed the principle that the law presumes the creation of a tenancy at will following the expiry of a fixed-term tenancy and declined to displace this presumption on the evidence of an alternative arrangement between the parties.

The housing association had acquired an old garage, on which it intended to build social housing. However, it expected the process of getting planning permission to be arduous. It therefore let out the site to a third party, who in turn let it out to the two appellants on long leases. He subsequently vanished.

Four years later, during which time the tenants paid rent monthly, the housing association tried to get possession from the appellants. They resisted saying that they were periodic tenants and, as they carried out their businesses from the site, had the protection under the **Landlord and Tenant Act 1954**.

The housing association maintained, however, that they were merely tenants at will and pointed to a clause in the original agreement which said that the agreement was for a fixed term of three months and thereafter terminable on not less than a week's notice.

Despite the length of time the appellants had occupied the site – some four years, paying rent monthly – with the housing association's knowledge, the Court of Appeal said that a periodic tenancy did not exist. It was a tenancy at will. If this had been a residential tenancy, this result would have been very surprising; however, in commercial situations, the court is always slower to look behind the terms of the written agreement.

2.2.4 Tenancy at sufferance

A tenancy at sufferance arises where a tenant occupies land without his landlord's consent or objection by holding over after the expiration of a lease. It is essential that the initial entry was lawful and with consent; on expiration of this initial right to occupy, there can be no agreement as to the tenancy, as the essence of a tenancy at sufferance is that the landlord does not agree to its existence.

Where there is a tenancy at sufferance the landlord can recover possession and terminate the tenancy at any time. The tenant has rights in the land and can bring an action in trespass or ejectment against third parties. Subsequent events may result in the following occurring.

- (1) If the landlord requires the tenant to quit, the tenant becomes a trespasser (the tenant may, as with a tenancy at will, have a statutory right to remain in possession (see **7.1** and **9.4.1**)).
- (2) If the landlord signifies his consent, the tenant becomes a tenant at will and if the tenant then pays, or agrees to pay, rent an implied periodic tenancy is created based on calculation of rent or intervals of payment.
- (3) If a tenant at sufferance retains possession for the appropriate period without payment of rent, he may acquire title by adverse possession.

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