Denial of landlord's title: an outdated relic?

Mark Pawlowski asks whether the time has come to abandon the law on denial of landlord's title as an outmoded relic of the past.

A landlord is entitled to forfeit a lease (without recourse to a proviso for re-entry) upon breach by the tenant of an implied condition of the lease in circumstances where he denies his landlord's title to the demised property. The denial may take two distinct forms (1) a denial by matter of record or (2) a denial by act in pais.

EARLY HISTORY

A denial by matter of record can be traced back to the reign of Henry II and is founded on the oath of fealty given by a tenant of real property to his lord under the medieval system of tenure. If the tenant broke this oath, the land reverted to the lord who granted it. In particular, if the tenant did anything which impaired his lord's title to the land, this constituted a breach of his oath and gave rise to a forfeiture. A denial by the tenant in a court of record of his landlord's title occurred, most commonly, if the tenant failed to perform services due to his lord. This would prompt the lord to take action, for example, by taking the tenant's cattle by way of distress so as to compel the tenant to perform his services. In order to recover his cattle, the tenant would bring replevin in the Court of Common Pleas (a court of record) and, when the lord claimed for services in arrear, the tenant would enter a formal disclaimer (disavowing his lord's title) which barred the lord of all possessory remedies for the services. The result was that the tenant would regain his cattle and recover damages from his lord. The lord, however, could still bring a "writ of right for disclaimer" proving his title and recovering the tenant's interest in the land altogether by way of a forfeiture. A denial by act in pais, on the other hand, has a somewhat wider meaning in so far as the phrase means "act in the country". In other words, this refers to an act or transaction done or made by the tenant in denial of his landlord's title otherwise than in the course of legal proceedings.

THE CURRENT LAW

(a) denial by matter of record

In modern law, a denial by matter of record arises when the tenant, in the course of his pleadings, expressly renounces the landlord's title and is thereby estopped by the record from reasserting his lease or tenancy. This form of denial was discussed in *Warner v Sampson* [1959] 1 QB 297, where the Court of Appeal held that a general traverse in the tenant's pleadings did not involve the affirmative setting up by the tenant of a title adverse to that of the landlord as it merely put the landlord to proof of the allegations traversed. This was the view of the majority.

Lord Denning went further suggesting that the landlord's right to claim a forfeiture upon a tenant's denial by matter of record had become entirely obsolete with the wholesale abolition of the feudal system of tenure. In his view, the doctrine was no longer appropriate in the present day and that, if it still survived, it merely put the landlord to proof of his title without giving rise to a forfeiture of the lease. The plea for abolition, however, did not find favour with the majority (Hodson and Ormerod LJJ) who, on the assumption that the denial in the tenant's defence had created a forfeiture, held (in the alternative) that the landlord had not effectively elected to claim it either by peaceable re-entry or by proceedings for possession.

It is essential, therefore, for the landlord to exercise his right of forfeiture in the appropriate way if he is to rely on the tenant's denial. The tenant may, however, avoid a forfeiture by retracting his denial *before* the landlord re-enters or takes effective proceedings for re-entry in reliance on the denial: *Warner*, at 322. Conversely, a denial may be waived by the landlord by any act (for example, by a distress for subsequent rent) acknowledging the tenant as such: *Doe d. David v Williams* (1835) 7 C & P 322.

Once, however, the landlord has commenced proceedings for possession based on denial of his title in the tenant's pleading, the tenant cannot improve his position by amending his pleading to remove the denial notwithstanding that the amendment of a pleading relates back to the date of the original pleading. This is because the landlord's service of proceedings for possession is the equivalent to actual re-entry onto the demised property which brings the landlord and tenant relationship to an end.

It seems that a *partial* disclaimer of the landlord's title (i.e., in relation to only part of the demised property) is not sufficient to constitute a disclaimer of the whole title since it does not show that the tenant has evinced the necessary intention no longer to be bound by his relationship with the landlord*: WG Clark (Properties) Ltd v Dupre Properties Ltd* [1991] 3 WLR 579. This, however, would not rule out the possibility of a partial disclaimer leading to a forfeiture of *part* of the demised premises: *ibid*, at 706, referring to *GMS Syndicate Ltd v Gary Elliott Ltd* [1982] Ch. 1.

(b) denial by act in pais

A denial by act in pais arises when the tenant deliberately attempts to set up an adverse (or hostile) title either in himself or in a stranger in the face of the landlord's title. A very early case, dating back to 1594, is *Read and Morpeth v Errington* (1594) Cro Eliz 32, where a tenant's alienation of his landlord's estate was held to constitute a disclaimer giving the landlord a right to forfeit the lease. In the leading case of *Doe d. Ellenbrock v Flynn* (1834) 1 CM & R 137, the tenant delivered up possession and surrendered the lease to a person who claimed a hostile title with the intention of enabling that person to set up a claim adverse to the landlord's title. The Court of Exchequer held that the tenant's act constituted a denial entitling the landlord to re-enter. Lord Lyndhurst CB said, at 141:

> "If the tenant sets up a title hostile to that of his landlord, it is a forfeiture of his term, and it is the same if he assists another person to set up such a claim.

> Whether he does the act himself, on only colludes with another to do it, it is equally a forfeiture."

The rule in *Ellenbrock* has, however, been applied cautiously, as illustrated by the case of *Doe d. Graves, Downe v Wells* (1889) 10 Ad & E 426, where it was held that a tenant had not forfeited his term by orally refusing to pay his rent and claiming the landlord's estate as his own. According to the Court of King's Bench, mere words (as opposed to acts) were not capable of giving rise to a forfeiture of a lease for a definite term. The principle that it is dangerous to allow an interest in law to be forfeited by mere words was reiterated in *Wisbech St Mary Parish Council v Lilley* [1956] 1 WLR 121, where the Court of Appeal concluded that a tenant's denial by mere words will only give rise to a forfeiture if, on the facts, it is clearly proved. The requisite criterion in all cases is whether an intended and deliberate assertion of an adverse title can be shown on the part of the tenant. Where, therefore, the acts of the tenant are equivocal, they will not amount to an act of forfeiture.

THE LAW COMMISSION

It must be questioned whether the doctrine of denial of title continues to have any useful role to play in modern leasehold law. Its underlying rationale has clearly disappeared in so far as the rights and duties of a tenant are now defined almost entirely by the terms of the lease and not by reference to any feudal law of fealty. There is also much to be said for the view that the landlord is already adequately protected by the rule that a tenant is estopped from denying his landlord's title. The estoppel operates so as to bind both landlord and tenant (and their successors in title) with the consequence that the tenant cannot set up his landlord's lack of title to justify a breach of covenant or failure to pay rent and the landlord, in turn, cannot set up his want of title as a ground for repudiating the lease. Moreover, within the estoppel doctrine, there are established limitations which allow the tenant to question his landlord's title in appropriate circumstances.

Interestingly, the Law Commission, in its 1985 Report, *Forfeiture of Tenancies*, (1985), Law Com. No. 142, recommended the abolition of the doctrine of denial of the landlord's title. The original proposal was that, in relation to tenancies granted after the commencement date of the new statutory scheme for termination of tenancies, there would no longer be an implied term of denial of landlord's title and that any such term implied in a tenancy granted before that date should cease to have effect. This would not, however, have prevented the inclusion of, or render ineffective, any *express* term to similar effect. The upshot of the original scheme, therefore, was that the denial of the landlord's title would not be an event for which a tenancy could be terminated unless it was expressly prohibited by an express term: see, paras. 5.32-5.35.

In its 2006 Report, however, the Commission identified potential "far-reaching" consequences (beyond the remit of its new statutory scheme for termination of tenancies) if the doctrine were completely abolished. Instead, therefore, it recommended that the implied condition should remain intact but that breach of the implied condition should not constitute tenant default under the new scheme. It also recommended, in line with its earlier 1985 Report, that the scheme should not prevent

the parties from including an express term to the same or similar effect as the implied condition, breach of which would constitute a tenant default: see, *Termination of Tenancies for Tenant Default*, (Law Com. No. 303, 31 October 2006), at paras. 3.39-3.45 and Schedule 2, para. 7, to the *Landlord and Tenant (Termination of Tenancies) Bill*, attached to the Report. The Commission has since been asked to review its 2006 Report (and the draft bill) in view of developments since 2006 in relation, in particular, to other leasehold reform work in the residential sector. That review is currently underway. As things stand at the moment, therefore, there is no sign that draft Bill will become law in the foreseeable future.

Mark Pawlowski is a barrister and professor emeritus of property law, School of Law, University of Greenwich.