Practitioner Page

Split Leases and Reversions

Mark Pawlowski
General Editor

This Practitioner Page discusses the legal position regarding part-assignment of leases and reversions in the context of the statutory rights of residential and commercial tenants.

It is not often that a property lawyer will encounter a lease or reversion which has been "split" or severed in the sense that the leasehold or freehold estate has been formally partitioned between two or more third parties. Such a partition will usually occur were only part of the demised property (or reversionary interest) is assigned to a third party, leaving the retained part still in the ownership of the original tenant or reversioner. The result is, in many respects, a legal oddity meriting special attention.

Split reversion

In *Jelley v Buchman* [1974] QB 488 the question was whether the severance of the reversion had created two tenancies. The landlord had granted a weekly tenancy of a dwelling-house and adjoining land. A successor in title of the landlord sold the reversion on the land to a third party, but not the reversion on the dwelling-house. The reversioner on the land claimed that the original tenancy had thereby been divided into two separate tenancies and that, consequently, the tenant no longer enjoyed statutory protection under the Rent Act 1977 in respect of the land. This argument was rejected by the Court of Appeal, who held that s.140 of the Law of Property Act 1925 Act merely gave each reversioner rights and remedies similar to those which it would have had *if it had been granted* a separate tenancy of the premises in respect of which it was the owner (i.e., there was still only *one* tenancy but now with two reversioners). In other words, only the reversion was divided and the incidents attaching to it (for example, the right of the landlords to receive rent), but otherwise the tenancy remained intact as one single tenancy albeit now with two landlords. The rationale of the decision is that it would be wrong to impose on the tenant two tenancies following a severance of the reversion to which it was not a party. In the words of Stamp L.J., at 498:

> "We can find nothing in [s.140] to suggest for a moment that the legislature intended that following a severance to which the lessee was not a party, he should find himself holding part of his land under one tenancy and part under another."

Contracts of tenancy

In *Lester v Ridd* [1990] 2 Q.B. 430, the question was whether the assignee of part of the leased property (which consisted of a house) was entitled to acquire the freehold under the Leasehold Reform Act 1967. The freeholder argued that he could not because the house was "comprised in an agricultural holding" and, therefore, excluded by s.1(3)(b) of the 1967 Act. Significantly, s.1(1) of the Agricultural Holdings Act 1986 defined an agricultural holding as "the aggregate of the land . . . comprised in a contract of tenancy which is a contract for an agricultural tenancy . . ." The question, therefore, whether two *tenancies* had been created was not strictly the statutory question - rather, the question was whether two *contracts* of tenancy had been created. That being the question, it was apparent that no such contract could have been created unless the landlord was a party to the contract.

In the absence of the landlord's participation, the Court of Appeal held that the partition of the leasehold property between several assignees did not create separate contracts of tenancy with separate tenants for each part. The practical outcome, therefore, was that the subject property was still comprised in an agricultural holding (comprising the whole of the premises demised by the original lease) thereby depriving the tenants of any right of leasehold enfranchisement by virtue of s.1(3)(b) of the 1967 Act.

The decision in *Lester* establishes that the concurrence of the landlord to any severance of the leasehold property is essential for the creation of two (or more) separate *contracts* of tenancy in the land. This stems from the basic notion of contract law that a contractual agreement must be freely entered into with the independent and genuine knowledge and consent of all parties to the transaction. Contractual relations are based on an exercise of independent choice and it would, clearly, be inappropriate to impose upon a non-consenting landlord not only a new contract of tenancy, but one which (potentially) could attract statutory rights of security, compensation, etc.

Split tenancies

In principle, there is no reason why a tenant cannot partition his leasehold estate so as to create two separate *tenancies* (with separate and distinct tenants for each part of the premises). The point arose in *Smith v Jafton Properties* [2012] Ch 519, where the lessee of the property had refurbished it into four flats and executed three transfers purporting to assign its lease in three parts: a transfer of flats one and two to T1, a transfer of flats three and four to T2, and a transfer of the common parts of the property to T1 and T2 jointly. The landlord had not been consulted about the assignments and did not consent to them or to the apportionment of the rent. T1 and T2 subsequently served a notice on the landlord under s.13 of the Leasehold Reform, Housing and Urban Development Act 1993 claiming a right of collective enfranchisement of the whole of the property.

The Court of Appeal concluded that, at common law, an assignment of part of the leased property by which it is physically severed has the effect that the holder of each part has privity of estate with the landlord only as respects that severed part. In other words, he is the tenant of that severed part only. The upshot was that T1 and T2, who

had been assigned a part each, were both qualifying tenants for the purpose of collective enfranchisement under the 1993 Act. Significantly, unlike in *Lester*, the 1993 Act used the words "lease" and "tenancy" interchangeably. It was not, therefore, focusing on the contract by which the estate in land was created, but was concerned with the tenure, or status, of the holder of the leasehold estate. That had to mean the tenant in question who held an estate in land consisting of or including his flat.

Apportionment of liability

In the case of a severance of the leasehold estate between several assignees, there is no relevant statutory provision comparable to s.140 of the Law of Property Act 1925 (which permits apportionment of conditions upon severance of the *reversionary* estate in land comprised in a lease). The position is, therefore, governed by the common law, at least in respect of tenancies created before 1 January 1996. For tenancies created on or after this date, the provisions of the Landlord and Tenant (Covenants) Act 1995 have modified the common law position. In *Smith*, Lewison L.J. set out the relevant principles at common law as follows, at [29]:

> "(i) The assignee's liability to pay the rent and perform the obligations of the lessee depend on privity of estate alone. (ii) If the assignee is the assignee of part only of the leased property then the rent and other obligations for which he is liable are those referable to the part of the leased property assigned to him. (iii) He is not liable for the rent or other obligations referable to the part of the leased property that has not been assigned to him. (iv) The rationale for these propositions is that the assignee only has privity of estate as regards the part of the leased property of which he is the assignee. He has no privity of estate as regards that part of the leased property that has not been assigned to him."

The effect, at common law, therefore, of a partition of the demised property so as to create separate tenancies (with or without the landlord's concurrence) is to sever the covenants of the lease so as to follow the land. Thus, an action on the tenant's covenant will lie against each assignee of part for say, not repairing his part: *Stevenson v Lambard* (1802) 2 East 575, at 580. Similarly, under the covenant to pay rent, the landlord can only sue an assignee of part only of the premises for an apportioned part of the rent: *Hare v Cantor* (1778) 2 Cowp. 766. In the *Lester* case, Dillon L.J. reaffirmed this principle stating, at 1116:

> " . . . the proportionate part which the landlord could recover from an assignee of part only of the land would be the part of the whole rent which the court thought fairly attributable to the part of the land in question, and not necessarily the part of the rent which the several assignees had agreed among themselves, without the concurrence of the landlord, to be attributable to that part of the land."

It is also implicitly recognised in s.190(3) of the Law of Property Act 1925 that an apportionment of rent effected without the landlord's consent on an assignment of part of the demised premises is not binding on the landlord: see, the words "without prejudice to the rights of the lessor" in s.190(3) and also, s.190(6) and (7). It is evident,

therefore, that an apportionment may be made by agreement of the parties, although the landlord not a party to the agreement will not be bound by it unless the parties to the agreement apply for the apportionment to become binding on the landlord as an "appropriate person" under s.9(4) and (5) and s.10 of the Landlord and Tenant (Covenants) Act 1995 in respect of new tenancies covered by the Act. (Interestingly, an order for apportionment may also be made by the Secretary of State on an application under s.20(1) of the Landlord and Tenant Act 1927 in certain defined circumstances).

It seems that, under the common law, the only person whom the landlord can sue for the *whole* rent (following an assignment of part of the premises) is the original tenant. However, in the case of new tenancies (created on or after 1 January 1996), the provisions of the 1995 Act will apply. Under the Act, once there has been an assignment (albeit of only part) of the demised property, the original tenant's liability under the covenants in the lease is released (except in the case where the original tenant has entered into an authorised guarantee agreement under the Act). But the tenant is released only to the extent that the covenants apply to the part disposed of: s.5(3). The covenant to pay rent, for example, cannot be attributed exclusively to any particular part of the land comprised in the tenancy and so the Act, in effect, preserves the common law position so that both the original tenant and assignee will continue to remain liable to the landlord, notwithstanding any apportionment of rent which they may have agreed between themselves. However, as mentioned earlier, the Act does provide a mechanism by which agreed apportionments can be made to bind the landlord: s.9(4) and s.10.

Statutory protection under Part II

It appears from the forgoing analysis that, regardless whether the landlord has concurred in the severance of the leasehold estate, the original tenancy will be effectively divided into separate tenancies all of which will be protected under Part II of the Landlord and Tenant Act 1954, provided, of course, each tenant can satisfy the necessary requirement of business occupation in respect of its separate part. Thus, each tenant will be entitled to serve a s.26 request on the landlord within the prescribed time-limits seeking a new tenancy of the part occupied by him at the relevant time. The tenant would only be entitled to a new tenancy of that part because, unless the landlord agrees otherwise, the court can only grant a new tenancy of the "holding" (see, s.32(1)) and the holding is defined in s.23(3) as excluding any property not occupied by the tenant. Conversely, if the landlord is successful in opposing the tenant's application for the grant of a new tenancy, it will be entitled to possession of that part occupied by the tenant under his tenancy only.

The position may be contrasted with the facts in *Lester*, above, where the tenants were unable to invoke any rights of leasehold enfranchisement under the 1967 Act because the subject property was still comprised in an agricultural holding forming the *whole* of the premises demised by the original lease.

The law is stated as at 7 December 2023.