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# Landlord and Tenant Law

CPD Update

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# Preface

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This update has been prepared by ILEX Tutorial College (ITC) to assist Fellows and Members of the Institute of Legal Executives (ILEX) in meeting their continuing professional development (CPD) or lifelong learning requirements for 2008. Fellows are required to complete 16 hours CPD in 2008 and Members eight hours CPD. It has been written for Fellows and Members currently practising in this area and it is assumed, therefore, that those using it have a level of knowledge equivalent to an ILEX Level 6 Professional Higher Diploma in Law pass.

Each update contains information on developments in law and/or practice in 2007 and early 2008. Studying each update and completing the accompanying self-assessment test will account for four hours of CPD. Fellows and Members are entitled to two free updates a year.

Details of the completion of the self-assessment test should be recorded by Fellows in their CPD logbooks using the reference code printed inside the front cover of the update. It is **not** necessary to return the completed self-assessment test to ILEX. All completed self-assessment tests should be retained, however, as ILEX may request their return for monitoring purposes.

Any queries about completion of the self-assessment test and any other CPD issues should be made to the Membership Operations Division on 01234-845733.



# Introduction

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This update is not intended to be an academic study of the law. It is for those Fellows already practising in this field, and therefore assumes a level of knowledge in this subject equivalent to an ILEX Membership Examination Level 6 pass. It is advised that you do not attempt this update if you are not currently practising in this field of law.

This update is provided for educational updating and tuition purposes. Decisions on legal practice should not be taken on the basis of this update, which is intended to clarify certain areas of difficulty. For further information on any of the subjects, please refer to standard reference works and sources of law. Ensure that you use the latest material, and that you are aware that other legal subjects may impinge on this one.



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# Chapter 1: Leasehold Covenants – Case Law Update

## 1.1 Covenants to repair

### 1.1.1 Notice

The House of Lords established in *O'Brien v Robinson* [1973] 1 All ER 583 that a landlord is not liable under a covenant to repair – whether it be expressed or implied – unless he has notice of the disrepair.

It was held in *Princes House Ltd v Distinctive Clubs Ltd* [2007] EWCA Civ 374 that any express statement that the landlord's liability for repair is not triggered until it has notice of the disrepair will be displaced where knowledge of the dilapidations is manifest.

Here, the landlords' obligations to maintain and repair the roof of the premises were qualified by a clause which stated that the landlord would not be liable to the tenant for failing to carry out its maintenance duties until the tenant had notified the landlords of the failure to repair. The landlords had notified the tenant of their intention to replace the roof within the five-year period but they later informed the tenant that the work would not be finished until after the end of this period.

The Court of Appeal held that even though the tenant had served no notice notifying the landlords of the disrepair, the landlords were in breach of their covenant to use all reasonable endeavours to repair the roof within the five-year period. Because the landlords had already informed the tenant of their intention to replace the roof, it was evident that the landlords knew that the roof was in need of repair and had effectively indicated to the tenant that they did not intend to rely upon the need for notice under the lease before carrying out their obligations.

### 1.1.2 Remedies for tenant's failure to repair

By **s18(1) LTA 1927** damages shall not exceed the diminution (if any) in the value of the reversion attributable to the breach. The reasonable cost to the landlord of remedying the disrepair will often be regarded as a fair indication of the diminution in value.

In *Carmel Southend Ltd v Strachan and Henshaw* [2007] 35 EG 136 the High Court held that the landlord could not recover damages to reflect the cost of replacing a roof when piecemeal repair would have been sufficient. The tenant had taken a 15-year lease of industrial premises, covenanting to keep and to yield up the premises in good and substantial repair. The asbestos roof had caused continual problems with leakage and defective roof lights and seals and, when the lease expired, it was in a state of disrepair. The landlord and the outgoing tenant agreed that a patch repair would suffice but the incoming tenant insisted on a new roof overlaying the existing structure. The landlord claimed the costs of the new roof from the outgoing tenant as dilapidations. The court agreed with the outgoing tenant that he should not be responsible for more than the patch repairs. Patch repairs, which were very common in the industry, were the appropriate repair works, given the particular disrepair to the roof and the terms of the covenants. However, the second limb of **s18(1)** (which prevents damages from being recovered for disrepair if it is shown that the premises are to be demolished or the subject of such structural alterations

as would render the repairs of no use) did not apply and the landlord could therefore recover from the tenant cost of repairs to the roof lights even though the new overlaid roof rendered the original lights of no use.

Although, as indicated above, the diminution in value is usually taken to be the reasonable cost to the landlord of remedying the disrepair, in some circumstances a range of other factors dictate otherwise. One of those is the presence in the property at the lease end of a sub-tenant whose lease is binding on the landlord. Theoretically, all sub-leases will themselves have terminated by the time any headlease comes to an end but where the sublease enjoys statutory protection, the subtenant will become a direct tenant of the landlord. This means that any diminution in value of the landlord's reversion resulting from the tenant's breach of its repairing obligation will be critically affected by the subtenant's repairing obligations and the subtenant's ability to comply with those obligations.

In *Lyndendown Ltd v Vitamol* [2007] EWCA Civ 826, the landlord owned the freehold reversion of two industrial units. The tenant sublet both units with the landlord's consent. The subleases contained full repairing covenants. When the subtenant (which was entitled to renewal under the **Landlord and Tenant Act 1954**) remained in occupation after the expiry date, it did so as a direct tenant of the landlord. The landlord alleged that the tenant was in breach of its repairing covenants and that it had, as a result, suffered a diminution in value. The tenant argued that there had been no diminution in value because the subtenant – which had a full liability to repair – was still present in the premises at the determination of the headlease and would take a renewal lease on similar terms.

The Court of Appeal held that where the repairing obligations of a sub-tenant who remains in occupation after the expiry of the head-lease are the same as those of the tenant, there is no damage to the reversion and **s18 LTA 1927** prevents the landlord from recovering damages from the tenant.

## Chapter 2: Running of Leasehold Covenants – Case Law Update

**s17 Landlord and Tenant (Covenants) Act 1995** provides that a former tenant or guarantor is not liable to pay a “fixed charge” under a lease (i.e. rent, insurance, service charges, etc.) unless, within six months of the date when the charge “becomes due”, the landlord serves a notice on the former tenant or guarantor stating that he intends to recover the fixed charge from him. The landlord can also recover a greater amount which is subsequently determined, provided that this possibility is stated in the notice and a further notice under **s17(4)** is served on the tenant within three months of the actual amount due being determined. Difficulties may arise therefore where the rent is undergoing review or the final amount of service charge has yet to be determined.

In *Scottish & Newcastle plc v Raguz (No. 2)* [2007] EWCA Civ 150, Scottish & Newcastle plc (S&N) were the original tenants of a long lease (granted in 1982) which they assigned to R. On the assignment, R gave S&N an indemnity covenant for the performance of the tenant’s obligations in the lease. There were a number of further assignments until the current tenant defaulted in 1999. The exact amount of rent due was not certain because of an outstanding rent review (which was not finalised until 2005). The landlord served **s17** notices on S&N to recover the outstanding rent but the notices did not refer to any uplift in rent which might result from the determination of the rent review. S&N paid the outstanding rent and claimed under the indemnity for the sums it had paid out.

The Court of Appeal held that liability for the reviewed rent did not fall when the balancing payment was finally ascertained but instead accrued as each instalment of the passing rent fell due between the review date and the date the review was completed. Therefore, a **s17** notice should have been served within six months of each instalment of rent falling due even though the exact amount of the outstanding rent had yet to be determined. Each **s17** notice must explain that the landlord is protecting its right to claim the balance of reviewed rent once it has been ascertained. Once the new rent has been determined, a further **s17** notice must be served within three months of that date.



# Chapter 3: Residential Tenancies – Case Law Update

## 3.1 Assured shorthold tenancies

Any assured tenancy created on or after 28 February 1997 is automatically an assured shorthold tenancy unless one of the exclusions in **Sch 2A** to the **Housing Act 1988** (inserted by **Sch 7 Housing Act 1996**) applies. One such exclusion is where the landlord serves notice on the tenant before the assured tenancy is entered into, stating that the assured tenancy is not an assured shorthold: **para 1 Sch 2A**). Another is where, the landlord serves notice after the tenancy has been entered into, stating that the assured tenancy to which it relates is no longer an assured shorthold: **para 2 Sch 2A**).

In *Andrews v Cunningham [2007] EWCA Civ 762*, the Court of Appeal held that, because an assured shorthold is itself a type of an assured tenancy, the words “Assured Tenancy” on the cover of a rent book with which the landlord had provided the tenant were insufficient to amount to a notice under **para 1** or **para 2 Sch 2A**.

A further circumstance in which an assured tenancy is not a shorthold is where the assured tenancy...*contains a provision to the effect that the tenancy is not an assured shorthold tenancy*. Without coming to any definite conclusion on the issue, Lawrence Collins J thought that this must almost certainly require a written agreement because:

*“enabling a tenant to ... defend a claim for possession on the ground [of an oral agreement] that the tenancy was not an assured shorthold ... would be contrary to the whole regime of assured shorthold tenancies, and would result in unfounded claims that there was an oral agreement... having to go to trial.”*

## 3.2 Obtaining possession under the Housing Act 1988

The **Housing Act 1988 (HA 1988)** gives security of tenure to assured tenants by providing that the landlord cannot regain possession of the premises without a court order: **s5(1)**. The court can only make an order if the landlord satisfies one or more of the grounds set out in **Sch 2 HA 1988. Part (b) of ground 14** applies where *the tenant or a person residing in or visiting the dwelling-house ... has been convicted of*

- (i) *using the dwelling-house or allowing it to be used for immoral or illegal purposes; or*
- (ii) *an indictable offence committed in, or in the locality of, the dwelling-house.*

In *Raglan Housing Association v Fairclough [2007] EWCA Civ 1087*, an assured tenant had been sentenced to four years' imprisonment (including an extended licence period of three years) having pleaded guilty to several counts of making and possessing indecent photographs of children while living at an earlier, nearby address. On learning of the convictions, his landlord sought possession under **ground 14**. The judge held that the tenant had been convicted of indictable offences committed in or in the locality of the dwelling house and that it would be reasonable to make a possession order having regard to the nature and gravity of those offences.

The Court of Appeal dismissed the tenant's appeal, rejecting his argument that **ground 14(b)(ii)** did not apply if the offences were committed before the commencement of the tenancy of the dwelling of which possession was sought. It held that **ground 14(b)(ii)** also applied when the offences were committed before the tenancy commenced. In reaching its conclusion, it distinguished between the two limbs of **ground 14(b)**. Conviction for immoral or illegal purposes was directed to one particular type of behaviour likely to cause distress and annoyance to neighbours, namely the manner in which the premises themselves were used. It was not enough that the tenant has been convicted of a crime with which the premises had nothing to do beyond merely being the scene of its commission: *Schneiders & Sons v Abrahams [1925] 1 KB 301*. Given that **ground 14(b)(i)** required the premises themselves to be connected with the crime, it might well be limited to convictions arising out of the use of the premises during the tenancy agreement. **Ground 14(b)(ii)** was much broader, however, being directed to behaviour in the locality in general. The tenant could properly be held responsible for the way in which he had behaved in the locality both before he became a tenant and afterwards.

# Chapter 4: Long Residential Leases – Case Law Update

## 4.1 The Leasehold Reform Act 1967

In *Boss Holdings Ltd v Grosvenor West End Properties Ltd* [2008] UKHL 5 the question was whether, in the light of the abolition of the residence requirement for leasehold enfranchisement by the **Commonhold and Leasehold Reform Act 2002**, the term *building designed or adapted for living in* under the definition of house in **s2(1) Leasehold Reform Act 1967 (LRA 1967)** could be applied to a terraced house comprising six floors which was originally used as a single residence but later occupied for separate residential and commercial use. The property had become gravely dilapidated and was not physically fit for immediate residential occupation. The House of Lords held that the word *designed* was concerned with the past, and the phrase *designed or adapted for living in* required:

- a consideration of the property as it was initially built and the purpose for which it was originally designed; and
- whether work had subsequently been done to the property so that the original design had been changed.

In asking each question, the ultimate concern was to decide whether the purpose for which the property had been designed or adapted was *for living in*. There was no requirement that the property actually be in such a physical state that it could be lived in. The fact that the property in question had not been occupied for a number of years and had become internally dilapidated and incapable of beneficial occupation did not detract from the fact that it had been designed for living in when it was first built. Their Lordships then went even further and considered the possibility that premises, which had been designed for living in but subsequently adapted to another purpose, could still amount to a house for the purposes of **s2(1)**. It appears therefore that tenants with long leases of commercial premises originally designed as houses may now have the right to enfranchise under the **LRA 1967**.

## 4.2 Tenant's right to extend the lease of a flat or maisonette

The **Leasehold Reform, Housing and Urban Development Act 1993 (LRHUDA 1993)** gives most long leaseholders of flats the right to extend their leases for a term equal to the unexpired residue of the existing lease plus 90 years provided they have been qualifying tenants for the last two years before the exercise of the right. In *Howard de Walden Estates v Les Aggio* [2007] **3 All ER 910**, the question was whether the headlessee of two flats in a block was the qualifying tenant for the purposes of the **LRHUDA 1993**. The flats were not sublet on long leases and there was no other qualifying tenant.

The Court of Appeal agreed with the freeholders that if a head lessee of several flats in a block was allowed to exercise the right of lease extension in respect of individual flats, it would result in the separation of the existing headlease into several different parts and would require all parties to create a wholly new scheme of covenants for the areas used in common. The legislation did not cater for this. The court rejected the claim, stating that that the legislation was intended for the benefit of occupational long lessees and not for headlessees.

#### 4.2.1 Procedure

A tenant of a long lease has a right to acquire a new lease by virtue of the **Leasehold Reform, Housing and Urban Development Act 1993 (LRHUDA 1993)** but may not do so if the landlord intends to redevelop any premises in which the flat is contained: **s47**.

In *Majorstake Ltd v Curtis [2008] UKHL 10* the tenant gave notice to his landlord claiming to exercise his right to acquire a new lease. The landlord responded by serving a counter-notice, stating its intention to redevelop the tenant's seventh-floor flat by combining it with the one beneath it to form a single duplex apartment. The Court of Appeal held that the expression *any premises in which the [tenant's] flat is contained* refers to any unit of property provided that it includes the whole of the flat and also extends to other property. The Court acknowledged however that this construction would enable a landlord to deprive a tenant of his right under the **LRHUDA 1993** by establishing an intention to redevelop the tenant's flat plus, say, an adjoining box-room.

The House of Lords allowed the tenant's appeal. It pointed out that the **LRHUDA 1993** was designed to give long leaseholders of flats rights as close as possible to those of freeholders at a price approximating to the market price. The purpose would be frustrated if the landlord could defeat those rights by proposing to do comparatively minor works to the building. Nor could it have been Parliament's intention to allow the landlord to define the "premises" for itself. Therefore it seemed clear that the phrase *any premises in which the flat is contained* had to mean an objectively recognisable physical space, something which the landlord, the tenant, the visitor and the prospective purchaser would recognise as the *premises*. In this case the whole block of flats was the premises.

# Chapter 5: Business Tenancies – Case Law Update

## 5.1 Occupation by the tenant

Where premises are used for business purposes (even if only in part), then they will normally be subject to a business lease unless the business use is minimal and ancillary to residential use: *Cheryl Investments Ltd v Saldanha* [1978] 1 WLR 1329. The status of a single lease cannot be partially business and partially residential; it has to be one or the other. Where a significant section of the premises is not only set aside for exclusively business use and there is also an obligation to use them for business use, it is clear that a business tenancy is intended.

The premises in *Broadway Investments Hackney Ltd v Grant* [2007] HLR 23 comprised a basement and ground floor shop with a residential flat above. The tenant had initially taken a licence agreement of the premises when they were derelict and little more than a shell. He started work to make them habitable and by the date of the lease in 1995 they were in a state in which he could, and did, move in to live in the upper part. By January 2000 he had made the lower part fit for use and had been running a shop there ever since, selling fish and groceries. The lease described itself as a lease of shop premises and obliged the tenant to keep the premises open as a shop at certain times. The tenant fell into arrears of rent and the landlord claimed possession. The tenant argued that he should be entitled to the protection available to assured (residential) tenants and so have possession suspended on the basis of payments of arrears over a period. The landlord claimed this was a business tenancy and that residential tenancy rules were inapplicable. The tenant claimed that his main objective in taking the lease was to have somewhere to live. The Court of Appeal held that the lease was a business tenancy to which Part II LTA 1954 applied. The fact that the premises were occupied under s23 for the purposes of a business (as well as for other purposes) brought them squarely within the LTA 1954.

The LTA 1954 did not apply until the date on which the tenant started to trade from the shop because, until then, he did not occupy any part of the premises for the purposes of any business. Before then, he may well have had a residential tenancy. The situation changed, however, when he did start to trade at the shop, and from then on Part II LTA 1954 applied.

The tenant's subjective motive or intention at the time of taking the tenancy, to have somewhere to live, must not be allowed to obscure the reality of the case. Not only did the lease allow him to use the ground floor and basement for business purposes but, by virtue of the "keep open" clause, it positively required him to do so.

### 5.1.1 Other terms of the new tenancy: s35

Where the current tenancy includes rights enjoyed by the tenant in connection with the holding, those rights shall be included in the new tenancy unless the parties agree to the contrary: s32(3). If the parties cannot agree, the court will determine which rights should be included. If they cannot agree on other terms of the new tenancy, other than duration and rent, they may be determined by the court which must have regard to the terms of the current tenancy and to all relevant circumstances: s35(1). The new lease will usually be on the same terms as the old tenancy but the court may, occasionally, sanction a change. The burden of persuading the court to use its powers in s35 to impose a change

to the terms of the current tenancy rests on the party proposing the change. The court will only agree to such a request if it is fair and reasonable: ***O'May v City of London Real Property Co. Ltd [1983] 2 AC 726.***

In ***Picture Warehouse v Cornhill Investments Ltd [2008] EWHC 45***, a business tenancy was assigned to a new tenant and in subsequent negotiations for a new lease it was agreed that the tenant would move offices and vacate two of the three parking spaces which it occupied. The tenant would be provided instead with two designated places at the front of the premises, where visitors were allowed to park for up to 30 minutes. The rent was reduced in consequence. The new lease was entered into but did not refer to the provision of parking. Work to the area of land in front of the premises brought the landlord into dispute with the local authority and problems arose which restricted the tenant's access to the spaces. The tenant later requested a lease on the same terms as the original lease and the issue of which express new term related to parking should be included in the new lease was tried as a preliminary issue. The judge found that it would be a wrong exercise of his discretion to insert a right as the tenant wanted because the tenant had merely a bare licence which could be determined at any time due to the dispute with the local authority. The tenant relied on **ss32(3)** and **35(1)** in support of her submission that a term as to parking should be included in the new lease and submitted that **s32(3)** should be read broadly to include rights not included in the tenancy but which were enjoyed in connection with the tenancy.

It was held that the judge was right to call what was given a "licence" given that it was a permission for the tenant's visitors to park for up to 30 minutes with no guarantee that space would be available. Even though consideration was given in that the tenant received a reduction in the rent, it nonetheless remained a licence or permission and was not irrevocable. The problem under **s32(3)** was that the existing lease did not include any rights as to external parking. Whatever rights the tenant had were outside the lease and so were outside the section. Finally, the tenant had not established any case to have a term inserted in the new lease by virtue of **s35(1)** giving him an irrevocable right to have parking for two cars outside the building. It was plain that the tenant sought a right to have a parking space rather than permission which was shared with other tenants with no certainty of a space. It was plainly right to leave the tenant to rely on the terms of the licence.

## 5.1.2 Interim continuation

Before June 2004, the **LTA 1954** required the tenant to make an application to the court to protect its position. Usually negotiations followed and the court would order each party to pay its own costs. Now, as a result of the amendments made by the **Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 (RR(BT)(EW)O 2003)** the parties can agree to extend the time for making an application to the court to avoid unnecessary costs. Tenants are no longer required to serve a counter-notice within two months of a landlord's **s25** notice. If the tenant issues renewal proceedings under **Part II LTA 1954** but later decides that it no longer wants a new tenancy, it can file a notice of discontinuance under the **Civil Procedure Rules**. The tenant will have to pay the costs of the proceedings: ***Walker v Walker [2006] 1 WLR 2194***. Where the landlord has issued proceedings and the tenant files an acknowledgement of service confirming its intention to take a new tenancy but later decides that it no longer wishes to do so, it can inform the court under **s29(5)** that it does not want a new tenancy. The tenancy will continue for three months after discontinuance: **s64**. The amendments to **LTA 1954** made by **RR(BT)(EW)O 2003** failed to address the cost consequences from the tenant's

change of mind following issue of proceedings by the landlord but it was held in ***Lay v Drexler [2007] EWCA Civ 464*** that where the landlord issues proceedings and the tenant has confirmed in an acknowledgement of service that it wants a new tenancy, the tenant is in effect, commencing proceedings for the grant of a new lease. Accordingly when the tenant serves notice under **s29(5)** it will be equivalent to serving a notice of discontinuance.



# Chapter 6: Statute Update

## 6.1 Commercial rent arrears recovery (CRAR)

The remedy of distress is available to landlords who were seeking to recover arrears of rent. It is an ancient remedy of feudal origin which enabled landlords to take goods from the demised premises and either hold them until the arrears were paid or sell them and take what was owed from the sale proceeds.

Although the landlord requires prior leave of the court to levy distress on tenants subject to the **Rent Act 1977** and the **Housing Act 1988**, a court order is not required in relation to secure tenants subject to the **Housing Act 1985** (e.g. residential tenants with local authority landlords) or commercial tenancies. There have been a number of proposals (e.g. by the Law Commission and the Lord Chancellor's Department) for the reform or abolition of distress and in *Fuller v Happy Shopper Ltd [2001] 1 WLR 1681* it was suggested that levying distress might breach the **Human Rights Act 1998 (HRA 1998)**.

**Part 3 Tribunals, Courts and Enforcement Act 2007 (TCEA 2007)** abolishes the common law right to distrain for arrears of rent and introduces the CRAR scheme, a non-court based remedy which is available only in relation to commercial premises and which is intended to be compliant with **HRA 1998**. It allows landlords to recover rent arrears by using a new statutory procedure for taking control of the tenant's goods. **Part 3 TCEA 2007** has not yet come into force and no commencement date has been set. For the time being, therefore, landlords may continue to use the remedy of distress.

There are a number of requirements which must be satisfied before a landlord can use the CRAR procedure.

(1) There must be a lease, that is, *a tenancy in law or in equity, including a tenancy at will but not including a tenancy at sufferance (s74(1))* which must be evidenced in writing: **s74(2)**.

(2) The lease must be of commercial premises. A lease will not be of commercial premises if any part of them is either let or occupied as a dwelling: **s75(1)**. For example, a lease of property comprising a shop with a flat above will not be lease of commercial premises if the flat is used, or required by the lease to be used, as a dwelling. If, however, the lease does not impose any requirements as to the use of the flat and the tenant chooses to use it as an office or storeroom for the shop, then the lease will be regarded as of commercial premises. Premises occupied or sub-let as a dwelling in breach of the terms of the lease will not be regarded as a dwelling. A commercial tenant cannot therefore seek to prevent his landlord from using CRAR against him by allowing a third party to occupy part of the premises as a dwelling. In such circumstances, the landlord can still use the CRAR against his tenant even though residential occupiers are present.

(3) Rent is defined by **s76** as the amount payable under a lease (in advance or in arrear) for possession and use of the demised premises, together with:

- any interest payable on that amount under the lease, and
- any value added tax chargeable on that amount or interest.

This means that CRAR cannot be used for arrears of insurance and service charges, even where the lease deems such payments to be rent. (Currently, it is possible for landlords to levy distress for such sums.)

(4) By **s77**, the amount of arrears must be certain or capable of being calculated with certainty. The net unpaid rent must equal or exceed a set amount (to be prescribed by regulations). The net unpaid rent is the amount of unpaid rent less any interest or VAT and any permitted deductions such as damages for the landlord's breach of his obligation to repair (or the cost of repairs if carried out at the tenant's expense).

(5) An enforcement agent must not take control of the goods until the tenant has been given notice: **para 7 Sch 12**. The minimum period of notice, the form of the notice, what it must contain, how it must be given, and who must give it will be prescribed by regulations.

(6) An enforcement agent may only take control of goods which belong to the tenant: **para 10 Sch 12**. Once notice has been given the goods become bound. This means that any assignment of the goods will not affect the ability of the enforcement agent to take control of them although the title of a purchaser in good faith for valuable consideration without notice is not prejudiced.

(7) By **s78**, once the notice of enforcement has been served, the tenant may make an application to the court to intervene. If the court is satisfied that there are sufficient grounds for intervening (the prescribed grounds are to be specified by regulations), it may make an order setting aside the notice and/or stating that no further step may be taken in relation to the rent claimed without further order.

(8) An enforcement agent may enter the premises within the prescribed period. The right of an enforcement agent to enter without a warrant arises automatically if the agent is acting under the CRAR procedure. An enforcement agent may also apply to the court to issue a warrant authorising him to enter a specified premises to search and take control of goods. Before issuing the warrant the court must be satisfied that:

- (a) an enforcement power has become exercisable;
- (b) there is reason to believe that there are goods on the premises that the enforcement power can be used to take control of if the warrant is issued;
- (c) it is reasonable in all the circumstances to issue the warrant.

(9) Only enforcement agents acting on the written instructions of the landlord, are allowed to enter the premises to take legal control of the tenant's goods up to the value of the arrears and any costs. (Previously, the landlord or a certificated bailiff acting on his instruction were permitted to take legal control of goods.)

(10) If requested, the enforcement agent must provide evidence of his identity and his authority to enter the premises. The request may be made before the enforcement agent enters the premises or while he is there: **para 26 Sch 12**. After entering the premises the enforcement agent must provide a notice for the debtor giving information about what the enforcement agent is doing. If the debtor is on the premises when the enforcement agent is there, the enforcement agent must give him the notice then. If the debtor is not there, the enforcement agent must leave the notice in a conspicuous place on the premises: **para 28 Sch 12**.

(11) The enforcement agent may only take control of goods which are on the premises providing the value of the goods does not exceed the net unpaid rent. The enforcement agent may then either secure the goods on the premises,

remove and secure them elsewhere or enter into a controlled goods agreement. By **para 13(4) Sch 12** a controlled goods agreement is an agreement under which the debtor is:

- (a) permitted to retain custody of the goods;
- (b) acknowledges that the enforcement agent is taking control of them, and
- (c) agrees not to remove or dispose of them, nor to permit anyone else to do so, before the debt is paid.

(12) If an enforcement agent takes control of goods, he must provide the tenant with an inventory of them as soon as reasonably practicable: **para 34(1) Sch 12**. Before the end of a minimum period (to be specified by regulations), the enforcement agent must make or obtain a valuation of the goods and give the tenant an opportunity to obtain an independent valuation: **para 36 Sch 12**. After the expiry of the minimum period, the enforcement agent may sell the goods, having given the date, time and place of the sale to the tenant and any co-owner: **para 40 Sch 12**. An enforcement agent must sell or dispose of controlled goods for the best price that can reasonably be obtained: **para 37 Sch 12**. The sale will be by public auction unless the court orders otherwise: **para 41 Sch 12**.

(13) **para 58 Sch 12** provides that where the tenant pays the amount outstanding in full after the enforcement agent has taken control of goods and before they are sold or abandoned, the enforcement agent must as soon as reasonably practicable make available any goods he has removed for collection by the debtor. No further step may be taken under the enforcement power concerned. Controlled goods are abandoned if:

- (a) the enforcement agent does not give the debtor or any co-owner notice of sale under **para 40** within the permitted period; or
- (b) they are unsold after a sale of which such notice has been given.

(14) A landlord who is entitled to use CRAR against his immediate tenant may instead serve a notice on any sub-tenant to pay his rent directly to him, rather than paying it to his own landlord. The landlord must give the sub-tenant a **s81** notice which:

- sets out the amount of the arrears owed to the superior landlord by the immediate tenant;
- requires the sub-tenant to pay his rent directly to the superior landlord instead of paying it to his own landlord until the amount of the arrears specified in the notice have been paid off, or rent ceases to be payable by the sub-tenant, or the notice is withdrawn or replaced by the superior landlord.

(15) Generally, CRAR ceases to be exercisable after the lease ended. However, it continues to be exercisable in relation to:

- (a) goods taken control of under it before the lease ended; or
- (b) rent due and payable before the lease ended, provided that:
  - the lease did not end by forfeiture;
  - not more than six months has passed since the day when it ended;

- the rent was due from the person who was the tenant at the end of the lease;
- that person remains in possession of any part of the demised premises;
- any new lease under which that person remains in possession is a lease of commercial premises;
- the person who was the landlord at the end of the lease remains entitled to the immediate reversion.

# Landlord and Tenant Law

Self-assessment Test

Name: .....

Date: .....

Membership No: .....



# Self-assessment Test

For each of the questions select the correct answer. Unless otherwise stated, only one option is correct.

## Question 1

A landlord cannot levy distress in relation to:

- (a) any residential tenancy;
- (b) tenancies which are subject to the **Rent Act 1977** or the **Housing Act 1988**;
- (c) tenancies which are subject to **Part II Landlord and Tenant Act 1954**.

## Question 2

When it comes into force, **Part 3 Tribunals, Courts and Enforcement Act 2007** will:

- (a) abolish the law of distress in relation to commercial premises only;
- (b) introduce a scheme whereby the landlord may seize the tenant's goods but only with the permission of the court;
- (c) abolish the law of distress in relation to all types of tenanted property.

## Question 3

When **Part 3 Tribunals, Courts and Enforcement Act 2007** comes into force, it will provide that the commercial rent arrears recovery scheme (CRAR):

- (a) cannot be used for arrears of insurance and service charge even where the lease deems such payments to be rent;
- (b) can be used for arrears of insurance and service charges but only where the lease deems such payments to be rent;
- (c) can be used for arrears of insurance and service charges but only where the landlord serves notice on the tenant to such effect.

## Question 4

**Princes House Ltd v Distinctive Clubs Ltd [2007] EWCA Civ 374** indicates that:

- (a) the landlord is not liable under a covenant to repair unless the tenant has given him notice of the disrepair;
- (b) where the lease expressly requires the tenant to serve notice of disrepair, the landlord who has already undertaken to carry out repairs (but has delayed in doing so) will be liable even if no notice is given;
- (c) the tenant need never serve notice of disrepair to make the landlord liable under a covenant to repair.

## Question 5

Any assured tenancy created on or after 28 February 1997:

- (a) is automatically an assured shorthold tenancy;
- (b) will only be an assured shorthold tenancy if it falls within one of the exclusions in **Sch 2A Housing Act 1988**;
- (c) will only be an assured shorthold tenancy if notice to that effect is served prior to the grant.

### Question 6

Any tenancy created on or after 28 February 1997 which complies with the requirements of **s1 Housing Act 1988** will be an assured tenancy if:

- (a) the landlord and tenant orally agree that it is an assured tenancy;
- (b) the words “assured tenancy” appear on the cover of the rent book which the landlord gives to the tenant;
- (c) the landlord serves written notice on the tenant (before or after the tenancy is entered into) that it is an assured tenancy.

### Question 7

Andy, an assured tenant, has just been given a non-custodial sentence following a conviction for receiving stolen goods. The landlord may be able to succeed in recovering possession under **ground 14(b)(ii) Housing Act 1988** if, at the time when the offence was committed:

- (a) Andy was living in the next street;
- (b) Andy was living in the next town;
- (c) only if Andy was living in the property of which possession is sought.

### Question 8

The requirement in **s2(1) Leasehold Reform Act 1967** that a *house* includes any building designed or adapted for living in means that:

- (a) the tenant who seeks to enfranchise must have been resident in the property for a minimum period at the time when the tenant makes his or her claim;
- (b) the right to enfranchise cannot extend to premises which are of mixed residential and business use;
- (c) the premises may fall within the definition of a *house* even though they are so dilapidated that they cannot currently be occupied

### Question 9

Unless the landlord has expressly or impliedly agreed otherwise:

- (a) a property which was originally let for mixed residential and business use will be governed by **RA 1977** or **HA 1988** if the tenant ends the business use;

(b) a property which was originally let for mixed residential and business use will only be governed by **RA 1977** or **HA 1988** if the business user is merely incidental to the residential user;

(c) a property which was originally let for business use will be governed by **RA 1977** or **HA 1988** if the tenant changes the use to that of a residence.

### Question 10

Where a lease of a shop with a flat above obliges the tenant to keep the premises open as a shop at certain times but the tenant's main objective in taking the lease is to have somewhere to live, the tenancy will be subject to:

(a) **Part II Landlord and Tenant Act 1954;**

(b) one of the statutory codes which confers security of tenure upon residential tenants;

(c) both (a) and (b).

### Question 11

*Lyndendown Ltd v Vitamol [2007] EWCA Civ 826* establishes that:

(a) the diminution in value for the purposes of **s18 Landlord and Tenant Act 1927** is usually taken to be the reasonable cost to the landlord of remedying the disrepair;

(b) the tenant will not be in breach of its repairing covenant where its lawful subtenant (whose sublease contains an identical repairing covenant) remains in occupation after the expiry of the head-lease as a direct tenant of the landlord;

(c) the landlord cannot recover damages under **s18 Landlord and Tenant Act 1927** to reflect the cost of replacing a roof when piecemeal repair would have been sufficient.

### Question 12

*Scottish & Newcastle plc v Raguz (No. 2) [2007] EWCA Civ 150* establishes that where the rent is in arrears but a review of the rent is currently taking place:

(a) the landlord cannot serve a notice on the former tenant or guarantor under **s17 Landlord and Tenant (Covenants) Act 1995** stating that he intends to recover the rent from him until the review has been finalised and the total amount determined;

(b) the landlord should serve a **s17** notice on the former tenant or guarantor within six months of each instalment of rent falling due, even though the exact amount of the outstanding rent will not be known until the review has been finalised;

(c) the landlord cannot recover rent from a former tenant or guarantor.

### Question 13

*Picture Warehouse v Cornhill Investments Ltd [2008] EWHC 45* demonstrates that:

- (a) on renewal of business tenancy, **ss32(3)** and **35 Landlord and Tenant Act 1954** will automatically upgrade into a legal easement a contractual licence enjoyed in connection with the existing tenancy;
- (b) **s35 Landlord and Tenant Act 1954** will automatically allow for the inclusion in the new tenancy a licence enjoyed by the tenant in connection with the holding under the current tenancy;
- (c) **s32(3) Landlord and Tenant Act 1954** will not allow for the inclusion in the new tenancy of a licence enjoyed by the tenant in connection with the holding under the current tenancy.

#### Question 14

Where the tenant has served a **s26** request under **Part II LTA 1954** but later filed a notice of discontinuance:

- (a) the tenant will have to pay the costs of the proceedings;
- (b) the landlord will have to pay the costs of the proceedings;
- (c) the court will order each party to pay its own costs.

#### Question 15

Where the tenant is in breach of a repairing covenant, the landlord can recover damages under **s18 Landlord and Tenant Act 1927** for the diminution in the value of the reversion attributable to the breach:

- (a) where it is proved that the premises are to be demolished or the subject of such structural alterations;
- (b) unless it is proved that patch repairs are sufficient;
- (c) where a subtenant (which is entitled to renewal under the **Landlord and Tenant Act 1954**) remains in occupation after the expiry of the head-lease as a direct tenant of the landlord, and the sub-lease contains a full repairing covenant.

**The following are short-answer questions:**

#### Question 16

How can a landlord convert an existing assured shorthold tenancy into an assured tenancy?

#### Question 17

To what extent is it correct to say that, in order for the court to make an order for possession under **ground 14 Housing Act 1988**, the demised premises must themselves be connected with the anti-social behaviour which prompts the landlord's application?

#### Question 18

When **Part 3 Tribunals, Courts and Enforcement Act 2007** comes into force, will the landlord be able to use the commercial rent arrears recovery scheme in respect of a shop with a flat above where the lease of is silent as to the use of the flat and the tenant uses it for residential purposes?

**Question 19**

Tariq is a tenant of a unit on an industrial estate. He is three months in arrears with his rent and has not paid the service charge. The lease deems service charge to be rent. When **Part 3 Tribunals, Courts and Enforcement Act 2007** comes into force, will the landlord be able to use the commercial rent arrears recovery scheme to recover the outstanding payments?

**Question 20**

Lal is the landlord of a block of offices which is held under a five-year tenancy by Tiff. The tenancy is subject to the **Landlord and Tenant Act 1954**. Lal wishes to insert a term in the new tenancy extending Tiff's repairing obligations. Tiff is opposed to any changes and an application is due to be made to the court to determine the matter. Who will bear the burden of convincing the court that the new term should be included in the new tenancy?

**Question 21**

Which statute abolished the residence requirement for leasehold enfranchisement under the **Leasehold Reform Act 1967**?

**Question 22**

For the past 10 years, Acme Properties Ltd has been the long leaseholder of premises which were originally constructed as a house but are now used as office premises. Can Acme Properties enfranchise under the **Leasehold Reform Act 1967**?

**Question 23**

For the past 10 years, Acme Properties Ltd has been the long leaseholder of premises which were originally constructed as a house but are now in such a state of disrepair that they are unfit for human habitation. Can Acme Properties enfranchise under the **Leasehold Reform Act 1967**?

**Question 24**

For the past 10 years, Acme Properties Ltd has been the long leaseholder of two flats in a purpose-built block which it sub lets under assured shorthold tenancies. Would Acme Properties qualify as being entitled to extend the leases of the flats under the **Leasehold Reform, Housing and Urban Development Act 1993**?

**Question 25**

Tina is the long leaseholder of a flat in a block of six flats. The landlord intends to extend the flat by combining it with a large storage cupboard which currently opens up to the landing. Will the landlord be able successfully to challenge Tina's claim to acquire a new lease by virtue of the **Leasehold Reform, Housing and Urban Development Act 1993 (LRHUDA 1993)** on the ground that he intends to redevelop any premises in which the flat is contained: **s47**?

**Question 26**

Which case establishes that where the landlord is seeking possession under **ground 14(b)(i) Housing Act 1988**, that is, *the tenant or a person residing in or visiting the dwelling-house ... has been convicted of using the dwelling-house*

*or allowing it to be used for immoral or illegal purposes*, the court will not order possession unless it is satisfied that the premises themselves are connected with the crime?

**Question 27**

Is **ground 14(b)(i) Housing Act 1988** limited to convictions arising out of the use of the premises during the tenancy agreement?

**Question 28**

Is possession under ground **14(b)(ii) Housing Act 1988**, that is, *the tenant or a person residing in or visiting the dwelling-house ... has been convicted of ... an indictable offence committed in, or in the locality of, the dwelling-house*, limited to convictions arising out of the use of the premises during the tenancy agreement?

**Question 29**

In April 2007, Carol is granted a licence of dilapidated premises consisting of a ground floor shop with a residential flat above. She spends the next few months renovating the property and moves into the flat in November 2007. She is granted a tenancy of the property in February 2008. She opens the shop for business in May 2008. At what time does **Part II Landlord and Tenant Act 1954** start to apply?

**Question 30**

Where the landlord issues proceedings under **Part II Landlord and Tenant Act 1954** and the tenant has confirmed in an acknowledgement of service that it wants a new tenancy, but subsequently serves notice under **s29(5)** that no longer does so, when will the continuation tenancy come to an end?





# Feedback

## Question 1

(b) is the correct answer.

## Question 2

(c) is the correct answer.

## Question 3

(a) is the correct answer.

## Question 4

(b) is the correct answer.

## Question 5

(a) is the correct answer.

## Question 6

(c) is the correct answer.

The Court of Appeal held in ***Andrews v Cunningham [2007] EWCA Civ 762*** that, because an assured shorthold is itself a type of an assured tenancy, the words “Assured Tenancy” on the cover of a rent book which the landlord had given to the tenant were insufficient to amount to a notice under **para 1** or **para 2 Sch 2A** that the tenancy was not an assured shorthold. The court also felt that any provision contained in the assured tenancy *to the effect that the tenancy is not an assured shorthold* must almost certainly require a written agreement.

## Question 7

(a) is the correct answer: ***Raglan Housing Association v Fairclough [2007] EWCA Civ 1087***.

## Question 8

(c) is the correct answer: ***Boss Holdings Ltd v Grosvenor West End Properties Ltd (2008) UKHL 5***.

## Question 9

(b) is the correct answer: ***Cheryl Investments Ltd v Saldanha [1978] 1 WLR 1329***.

## Question 10

(a) is the correct answer: ***Broadway Investments Hackney Ltd v Grant [2007] HLR 23***.

The status of a single lease cannot be partially business and partially residential – it has to be one or the other.

## Question 11

(b) is the correct answer.

**Question 12**

(b) is the correct answer.

**Question 13**

(c) is the correct answer.

**Question 14**

(a) is the correct answer: ***Walker v Walker [2006] 1 WLR 2194.***

**Question 15**

(b) is the correct answer: ***Carmel Southend Ltd v Strachan and Henshaw [2007] 35 EG 136.***

**Question 16**

The landlord must serve notice stating that the assured tenancy to which it relates is no longer an assured shorthold: **para 2 Sch 2A Housing Act 1988.**

**Question 17**

It was held in ***Schneiders & Sons v Abrahams [1925] 1 KB 301*** that it was not enough that the tenant has been convicted of a crime with which the premises had nothing to do beyond merely being the scene of its commission.

**Question 18**

No – the lease must be of commercial premises. A lease will not be of commercial premises if any part of them is either let or occupied as a dwelling: **s75(1) Tribunals, Courts and Enforcement Act 2007.**

**Question 19**

No. Rent is defined by **s76 Tribunals, Courts and Enforcement Act 2007 (TCEA 2007)** as the amount payable under a lease (in advance or in arrears) for possession and use of the demised premises, together with:

- any interest payable on that amount under the lease; and
- any value added tax chargeable on that amount or interest.

This means that CRAR cannot be used for arrears of insurance and service charge, even where the lease deems such payments to be rent. (Currently, it is possible for landlords to levy distress for such sums.)

**Question 20**

The burden of persuading the court to use its powers in **s35 Landlord and Tenant Act 1954** to impose a change to the terms of the current tenancy rests on the party proposing the change. The court will only agree to such a request if it is fair and reasonable: ***O'May v City of London Real Property Co Ltd [1983] 2 AC 726.***

**Question 21**

The residence requirement was abolished by the **Commonhold and Leasehold Reform Act 2002.**

**Question 22**

Yes.

In ***Boss Holdings Ltd v Grosvenor West End Properties Ltd [2008] UKHL 5***, the House of Lords held that the term *building designed or adapted for living in* under the definition of house in **s2(1) Leasehold Reform Act 1967** could include premises, which had been designed for living in but subsequently adapted to another purpose.

The abolition of the residence requirement by the **Commonhold and Leasehold Reform Act 2002** means that the right to enfranchise may now be exercised by a non-resident (including a commercial) tenant.

**Question 23**

Yes.

In ***Boss Holdings Ltd v Grosvenor West End Properties Ltd [2008] UKHL 5***, the House of Lords held that the term *building designed or adapted for living in* under the definition of *house* in **s2(1) Leasehold Reform Act 1967** did not require the property to be in such a physical state that it could be lived in.

**Question 24**

No: ***Howard de Walden Estates v Les Aggio [2007] 3 All ER 910***.

**Question 25**

No. In ***Majorstake Ltd v Curtis [2008] UKHL 10***, the House of Lords held that that the phrase *any premises in which the flat is contained* had to mean an objectively recognisable physical space, that is, something which the landlord, the tenant, the visitor and the prospective purchaser would recognise as the premises. The whole block of flats is likely to be regarded as the premises.

**Question 26**

***Schneiders & Sons v Abrahams [1925] 1 KB 301***.

**Question 27**

Probably, given that in respect of **ground 14(b)(i)**, ***Schneiders & Sons v Abrahams [1925] 1 KB 301*** requires the premises themselves to be connected with the crime.

**Question 28**

No: ***Raglan Housing Association v Fairclough [2007] EWCA Civ 1087***.

**Question 29**

May 2008 – when Carol occupies the shop for the purposes of her business: **s23 Landlord and Tenant Act 1954**. See ***Broadway Investments Hackney Ltd v Grant [2007] HLR 23***.

**Question 30**

The tenancy will continue for three months after discontinuance: **s64 Landlord and Tenant Act 1954**.

