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Caveat sublessee

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Conveyancers will be familiar with assurances in which the grantor is expressed to convey "as beneficial owner" or "as trustee" or in some other capacity. The purpose is to import into the assurance the covenants for title set out in s. 7 of the Conveyancing and Law of Property Act 1881, thereby avoiding the necessity of setting out such covenants in full in the deed itself. The provisions of s. 7 do not apply, however, to the grant of a lease,[1] though such an instrument is commonplace, and the need for the lessee to be protected is no less than that of grantees in assurances to which s. 7 does apply. The purpose of this note is to examine the protection afforded to a sublessee by covenants for title on the part of the sublessor, though much of what is said will be equally applicable in the case of the grant of a lease. The consideration which makes the position of a sublessee of interest is that his enjoyment of his land under the sublease depends upon the continued existence of the headlease. While a lessee from a lessor in fee simple is likewise at risk that his enjoyment of the land will come to an end as a result of a claim by someone with title paramount,[2] the risk for a sublessee is greater, not only because the sublessor's estate *must* terminate (by effluxion of time), but also because of the danger that it may end earlier than anticipated by forfeiture, if the rent reserved by the headlease is not paid or the covenants in it are not observed by the sublessor. It is the fact that the sublessee depends for his enjoyment of the land demised to him on someone else carrying out her obligations to a third party that makes the position of the sublessee different from that of an assignee of a lease or a purchaser in fee simple. While the assignee or purchaser may be at risk if she does not observe the terms of any covenants affecting the land she has acquired, her fate lies in her own hands, and the former owners of the land effectively step out of the picture once the transaction takes place. The sublessee is in a different position: he may well comply with all the obligations contained in the sublease; it may be also that he does nothing to contravene anything in the headlease; yet if the sublessor fails to perform her obligations in the headlease, the sublessee may suffer the consequences. The question is whether he has a remedy against the sublessor if that turns out to be the case.

1 S. 7(5).

2 "[E]viction by title paramount means eviction by a title superior to the titles both of lessor and lessee; against which neither is enabled to make a defence": *Neale* v *Mackenzie* (1836) 1 M & W 747, at 759 per Lord Denman CJ. Cp. *Matthey* v *Curling* [1922] AC 180, at 227 per Lord Buckmaster : "Eviction by title paramount means an eviction due to the fact that the lessor had no title to grant the term, and the paramount title is the title paramount to the lessor".

The picture which emerges is unusual in some respects. First, in contrast to assurances to which s. 7 of the Conveyancing Act applies, sublessees may well feel confident from being able to point to covenants on the part of the sublessor expressly set out in the assurance to them. Such confidence may be misplaced, however, since the very fact that the sublessor's covenants are expressed in the instrument on which the sublessee relies is likely to limit the liability of the sublessor rather than secure the protection of the sublessee,[3] and, more importantly, displaces the covenants which would be implied at common law. While this might suggest that a sublessee would be in a better position were he to rely simply on the covenants which would be implied at common law in the absence of any provision in the sublease, this would be inaccurate. While at common law an action of covenant would lie in favour of a sublessee against the sublessor if the former was disturbed in his enjoyment of the land by the latter notwithstanding the absence of any express covenant in the sublease, the sublessor was under no liability where the sublessee was dispossessed at the behest of a superior lessor.

A second feature which makes the picture unusual relates to the position in Ireland. The position of lessees and sublessees in Ireland significantly improved with the enactment of the provisions contained in s. 41 of Deasy's Act. What is notable about the section, however, is not its applicability, but the fact that it will be *in*applicable in most cases. The invariable practice of including express covenants for quiet enjoyment in leases and subleases in Ireland has the effect of excluding the operation of the section and results in the protection afforded to sublessees being limited to what the sublease provides. What may be more notable, however, is that it may be the case that lessees and sublessees may be entitled to the wider protection that the section provides, yet settle for less. If the sublease has come about as the result of a contract made by the parties beforehand, the sublessee's entitlement under that contract may be to a covenant from the sublessor more extensive than the one usually found in leases and subleases. A consideration of the position independently of s. 41, and under its provisions, may serve to prompt conveyancers to reconsider whether they should be content to accept the usual form of covenants on the part of lessors when approving a lease or a sublease, or should try to negotiate better protection for their clients, or (strange though it sounds) should insist that *no* covenant appear in the lease or sublease to their client.[4]

Basic principles

It is not difficult to appreciate that, in the absence of statutory provisions to provide otherwise, a lessee's right to enjoy the land demised to him is dependent on the title of the person who made the lease. So, for example, in the case of a lease made by a tenant for life, on the death of the lessor the lease will not be binding on the remainderman, who accordingly will have a better right to possession than the lessee. So, too, in the case of a lease (the headlease) and sublease, the starting point in analysing the situation is that termination of the headlease will give the person who made it (the superior lessor) a right to possession which will take priority over that of the sublessee. Whatever may be the position as between sublessor and sublessee, as between the superior lessor and the sublessee, the latter will have no defence to a claim to possession of the land by the former. Thus, where the headlease comes to an end by effluxion of time,[5] by service of a notice to

3 Anon, "Landlords' Covenants" (1937) 2 *Conv* (NS) 11, at 12.

4 See *Colhoun* v *Trustees of Foyle College* [1898] 1 IR 233, at 234 and 237; below, p. 215.

5 *Thai Holdings Ltd* v *The Mountaineer Ltd* [2006] 1 NZLR 772.

quit,[6] by exercise of a break clause,[7] or by forfeiture,[8] the sublessee will have to go, as the superior lessor has a better right to possession than the sublessee. It is otherwise if the headlease comes to an end by surrender[9] or merger,[10] the explanation being that in such cases the consensual act on which the headlease ends cannot prejudice the interest of a third party, the sublessee.[11] Likewise, the sublessee's rights remain good as against the superior lessor where the headlease is disclaimed on the sublessor's insolvency.[12] The lessee under a lease created by a tenant for life, and the sublessee whose enjoyment depends on the continued existence of a headlease, may be aggrieved that they can no longer enjoy the land demised to them, but it is not hard to see why. What may surprise them is to learn that they may have no remedy against their respective lessors.

Of the two cases mentioned, the dangers for someone wanting to take a lease from a tenant for life are surmountable because of the Settled Land Acts. A tenant for life observing the provisions of the Acts is able to make a lease which will be binding on the remainderman after the death of the tenant for life. The lessee who takes a lease from a tenant for life needs only to be sure that the lease is made in accordance with the provisions of the legislation. The more common case where the same danger arises is that of someone taking a lease from a lessee. The sublessee's enjoyment of his land is dependent not only on performance of his own obligations under the sublease, but also on the continued existence of the headlease. If the term of the headlease runs out naturally before the term created by the sublease is due to end, then while the sublessee can complain that he has not had the benefit of what the sublessor contracted to give him, it is arguable that the sublessee has only himself to blame in not ascertaining what the sublessor's title was.[13] Given, however, the statutory restrictions on the ability of lessees and sublessees to investigate the title of the person making the lease or sublease,[14] culpability might appear harsh. Nonetheless, it is well established.[15] Aside from that, sympathy for the sublessee must surely exist if the headlease comes to an end otherwise than by running its full term. The continued existence of the headlease may well depend on the performance and observance of covenants in it on the part of the sublessor in her capacity as lessee under the headlease. Failure by the sublessor to perform and observe such covenants will expose the headlease to forfeiture, and forfeiture will bring down the sublease as well. True, the sublessee has a measure of

6 *Sherwood* v *Moody* [1952] 1 All ER 389; *Pennell* v *Payne* [1995] QB 192; *Barrett* v *Morgan* [2000] 2 AC 264; *McBirney & Co. Ltd* v *Morris* [1942] IR 364.

7 *PW & Co.* v *Milton Gate Investments Ltd* [2004] Ch 142; *Kay* v *London Borough of Lambeth* [2006] UKHL 10.

8 *Great Western Railway Co.* v *Smith* (1876) 2 Ch D 235; *Viscount Chelsea* v *Hutchinson* [1994] 2 EGLR 61; *Hammersmith & Fulham London Borough Council* v *Top Shop Centres Ltd* [1989] 2 All ER 655, at 669 per Walton J: "once the headlease has been forfeited, the underlessees are, vis-à-vis the freeholder, trespassers".

9 *Doe d Breadon v Pyke* (1816) 5 M & S 146; *Mellor* v *Watkins* (1874) 9 QB 400; *Pleasant* v *Benson* (1811) 14 East 234; *Fleeton* v *Fitzgerald* [1998] NSWSC 696; *Crosswell* v *Meriton Pty Ltd* [1993] ASSC 114. See, however, also discussion in *Kay* v *London Borough of Lambeth* [2006] UKHL 10, at [143].

10 *Robert Bryce & Co. Ltd* v *Stowehill Investments Ltd* [2000] 3 NZLR 535; *Canada Safeway Ltd* v *Surrey (City)* (2004) 35 BCLR (4th) 73.

11 For statements of the relevant principles, see *Pennell* v *Payne* [1995] QB 192; *Barrett* v *Morgan* [2000] 2 AC 204; *PW & Co.* v *Milton Gate Investments Ltd* [2004] Ch 142; *London Borough of Islington* v *Green* [2005] EWCA Civ 56; *Kay* v *London Borough of Lambeth* [2006] UKHL 10; *Thai Holdings Ltd* v *The Mountaineer Ltd* [2006] 1 NZLR 772.

12 *Hindcastle Ltd* v *Barbara Attenborough Associates Ltd* [1997] AC 70.

13 See *Adams* v *Gibney* (1830) 6 Bing 656; *Besley* v *Besley* (1878) 9 Ch D 103; *Clayton* v *Leech* (1889) 41 Ch D 103; *Keech* v *Hall* (1778) 1 Doug 21.

14 Vendor and Purchaser Act 1874, s. 2; Conveyancing and Law of Property Act 1881, ss. 3 and 13.

15 See *Imray* v *Oakshette* [1897] 2 QB 218 where a sublessee was refused relief against forfeiture of the headlease on the basis that he had been negligent in not discovering the terms of the headlease, notwithstanding that he was precluded from calling for the headlease by the statutory provisions.

protection, in that if he is aware that the sublessor has not paid the rent due under the headlease to the superior lessor, the sublessee may be able to fend off forfeiture proceedings by the latter by paying the superior lessor what he is owed, in order to protect the sublessee from eviction. If he does so, the sublessee will be able to set up such payment in defence of any later action by the sublessor for rent due to her from the sublessee.[16] If the sublessor has received the rent she is owed by the sublessee, the payment made by the sublessee to the superior lessor is recoverable from the sublessor in an action for money had and received,[17] or by sale of the sublessor's interest, the sublessee being a secured creditor for the amount he has paid.[18] Even if the superior lessor has not threatened eviction, the sublessee may voluntarily make payment to the superior lessor of so much of the rent payable under the sublease as is needed to discharge the rent due under the headlease, by virtue of s. 21 of Deasy's Act.[19] Apart from such salvage provisions, if forfeiture of the headlease does take place, for non-payment of rent or for breach of any other term of the headlease, the sublessee is able to apply for relief against forfeiture.[20] Relief is not, however, assured, and even if obtained, will put the sublessee to inconvenience and expense. If the forfeiture has been occasioned by fault on the part of the sublessor, it might be expected that the sublessee should have an action against the sublessor.

Eviction by title paramount

The dispossession of a sublessee as a result of a claim by someone with a title paramount to that of the sublessor, such as a superior lessor, will suspend the sublessee's obligation to pay the rent reserved by the sublease for as long as the dispossession subsists.[21] In such circumstances, the sublessee is not precluded from defending any claim the sublessor may bring for the rent by the rule that a lessee may not impugn the title of his lessor.[22] So far as the sublessee's liability under covenants in the sublease is concerned, if the rent is suspended, no action will lie on any covenant by the sublessee to pay it.[23] Nor, on the basis of *Andrews* v *Needham*,[24] will an action lie for breach of a covenant by the sublessee

16 *Sapsford* v *Fletcher* (1792) 4 TR 511; *Taylor* v *Zamira* (1816) 6 Taunt 524; *Carter* v *Carter* (1829) 5 Bing 406. The basis on which the cases rest was explained by Rolfe B in *Graham* v *Allsopp* (1848) 3 Ex 186, at 198, as being that the sublessor "is bound to protect his tenant from all paramount claims, and when, therefore, the tenant is compelled, in order to protect himself in the enjoyment of the land in respect of which his rent is payable, to make payments which ought, as between himself and his landlord, to have been made by the latter, he is considered as having been authorised by the landlord so to apply his rent due or accruing due". See also *Jones* v *Morris* (1849) 3 Ex 742.

17 *Graham* v *Allsopp* (1848) 3 Ex 186; *Ryan* v *Byrne* (1883) 17 ILTR 102; *Murphy* v *Davey* (1884) 14 LR Ir 28.

18 *Locke* v *Evans* (1823) 11 Ir Eq Rep 52; *O'Geran* v *McSwiney* (1874) IR 8 Eq 500 & 624.

19 See *Ahearne* v *McSwiney* (1874) IR 8 CL 568; *Grogan* v *Regan* [1902] 2 IR 196.

20 Conveyancing and Law of Property Act 1892, s. 4; S Tromans, "Forfeiture of leases: relief for underlessees and holders of other derivative interests" [1986] *Conv* 187; *Hammersmith & Fulham London Borough Councils* v *Top Shop Centres Ltd* [1989] 2 All ER 655; *O'Connor* v *Mooney & Co.* [1982] ILRM 373; *Enock* v *Lambert Jones Estates Ltd* [1983] ILRM 532.

21 See *Matthey* v *Curling* [1922] AC 180, at 227, Lord Buckmaster referring to "the title paramount to the lessor which destroys the effect of the grant, and with it the corresponding liability for payment of rent". Atkin LJ (dissenting) had explained the principle in the same case in the Court of Appeal (ibid. 200): "If a third party enters and evicts the lessee claiming by a lawful title superior to that of the lessor or lessee, then the obligation to pay rent is suspended entirely during the eviction if the eviction is from the whole of the demised premises, and is apportioned if it is from part."

22 *Hopcraft* v *Keys* (1833) 9 Bing 613; *Parker* v *Manning* (1798) 7 TR 537; *Levingston* v *Somers* [1941] IR 183; *Industrial Properties (Barton Hill) Ltd* v *Associated Electrical Industries Ltd* [1977] QB 580; *Yeung Lam Wilson* v *Lam Po Chong Priscilla* [2000] HKCA 398.

23 *Morrison* v *Chadwick* (1849) 7 CB (NS) 266; *Matthey* v *Curling* [1922] AC 180, at 227 per Lord Buckmaster.

24 (1597) Noy 75; Cro Eliz 656.

to yield up the premises at the end of the term created by the sublease, if the sublessee is evicted by someone with title paramount. Noy's report of the case records the ratio as being that "if the land be gone, the obligation is discharged". All that this means, however, is that the sublessee may be excused from performing his obligations in the sublease if he loses possession to someone claiming by title paramount: it does not mean that he will be compensated for that loss. To succeed in that, he must rely on one of the possibilities next considered.

Claims against the sublessor

Breach of covenant

One possible ground for an action by the sublessee against the sublessor is that the eviction of the sublessee by someone claiming by title paramount amounts to a breach of covenant by the sublessor. The covenant in question may be one which is expressly set out in the sublease. Even, however, if it is not, it is possible that an action will lie on the basis that a covenant on the part of the sublessor is implied.

Covenant(s) implied at common law

It is convenient to begin with considering the position if there is no covenant set out in the sublease on which the sublessee may base his action. The position in Ireland with regard to implied obligations is different from that which existed at common law.[25] It is necessary to examine briefly the latter first, in order to understand the improvements which legislation in Ireland brought about in the context with which we are concerned.

Covenant for quiet enjoyment

Where the sublessee's enjoyment of the property held by him is interrupted during the term created by the sublease, redress against the sublessor may be possible if there exists on the part of the sublessor a covenant by the sublessor for quiet enjoyment. In *Southwark London Borough Council* v *Tanner*,[26] Lord Millett explained that a such a covenant was originally regarded as one to secure title or possession, but its scope had been extended to cover any substantial interference with the ordinary enjoyment of the land, though neither title nor possession were affected. The recovery of possession by a third party such as a superior lessor will clearly come within the scope of a covenant for quiet enjoyment by the sublessor, but the question is whether recovery by such a third party is a breach for which the sublessor is liable under her covenant.

From the time of Coke it has been clear that an action would lie for a lessee against his lessor if the former was disturbed in his enjoyment of the land, notwithstanding the absence of an express covenant in the lease, on the ground that a covenant for quiet enjoyment might be implied from the use of the word "demise".[27] Use of the word imported what is variously described as a *covenant in law* or an *implied covenant*,[28] on the

25 For the position at common law, see further Russell, "Leasehold covenants for title" (1978) 47 *Conv* (NS) 418.

26 [2000] 1 AC 1, at 22.

27 For early authorities, see *Styles* v *Hearing* (1605) Cro Jac 73; *Holder* v *Taylor* (1614) Hob 12; *Coleman* v *Sherwyn* (1689) 1 Show KB 79.

28 "A covenant in law, properly speaking, is an agreement which the law infers or implies from the use of certain words having a known legal operation in the creation of an estate: so that after they have had their primary operation in creating that estate, the law gives them a secondary force, by implying an agreement on the part of the grantor to protect and preserve the estate so by those words already created.": *Williams* v *Burrell* (1845) 1 CB 402, at 429 per Tindal CJ. The term "covenant in law" was considered more correct than "implied covenant" by Lord Russell CJ in *Baynes & Co.* v *Lloyd & Sons* [1895] 1 QB 820, at 822.

ground that a demise was held to carry with it an agreement for enjoyment of the thing granted.[29] Whether any other word would suffice to import this covenant remained, somewhat surprisingly, unsettled until comparatively recent times. Despite clearly expressed views that any expression equivalent to "demise" would suffice to import a promise for quiet enjoyment, and that this would be so whether the tenancy was created by deed, by instrument in writing or indeed by parol,[30] in 1895 Kay LJ thought that the weight of authority was in favour of the view that a covenant was not implied from the mere relation of landlord and tenant, but only from certain words used in creating the lease.[31] Shortly thereafter, however, a further review of the authorities led the Divisional Court (Lord Alverstone CJ, Darling and Channell JJ) to the opposite conclusion.[32] A few years later, Swinfen Eady J seems eventually to have settled the question, holding that a covenant for quiet enjoyment was implied in an agreement in which the words used were "agrees to let", saying that he was "bound to follow what the current of authority for more than the last sixty years had determined to be the law, and what three Chief Justices of England have successively held to be the common law, both upon principle and authority, and to be the only view consistent with common sense."[33]

Covenant for good title

An alternative basis upon which a claim may be possible against the sublessor, again resting on a covenant by the sublessor, is that the dispossession of the sublessee as a result of the termination of the headlease gives rise to breach of a covenant by the sublessor that she had good title to make the sublease. If such a covenant was entered into by the sublessor, then the destruction of the sublessor's title should allow a claim by the sublessee under the covenant. Whether the obligations implied on the part of a lessor at common law included a covenant for good title is, however, a matter of some difficulty. There are certainly statements that such a covenant would be implied, at least if the tenancy were created in writing.[34] Thus, in *Holder* v *Taylor*,[35] the court held that an action of covenant would lie where the lessor was not seised of the land he had purported to demise, on the basis that "the breach of covenant was, in that the lessor had taken upon him to demise that, which he could not; for the word [demisi] imports a power of letting, as [dedi] a power of giving". In *Line* v *Stephenson*,[36] Lord Denman CJ speaks of a covenant for title being implied from "demise", and Alderson B says that the term "raises a covenant, of which either want of title, or eviction would be a breach". The explanation of Parke B in *Sutton* v *Temple*[37] was

29 *Kean* v *Strong* (1845) 9 Ir LR 74, at 81 per Crampton J.

30 See *Hart* v *Windsor* (1843) 12 M & W 68, at 85 per Parke B: "it is clear that from the word 'demise,' in a lease under seal, the law implies a covenant, in a lease not under seal, a contract, for title to the estate merely, that is, for quiet enjoyment against the lessor and all that come in under him by title, and against others claiming by title paramount during the term; and the word 'let,' or any equivalent words, (Shepp. Touch, 272), which constitute a lease, have, no doubt, the same effect, but not more". See also *Bandy* v *Cartwright* (1853) 8 Ex 913; *Hall* v *City of London Brewery Co. Ltd* (1862) 2 B & S 737; *Penfold* v *Abbott* (1862) 32 LT NS 67; *Mostyn* v *West Mostyn Coal and Iron Co. Ltd* (1876) 1 CPD 145; *Robinson* v *Kilvert* (1889) 41 Ch D 88.

31 *Baynes & Co.* v *Lloyd & Sons* [1895] 2 QB 610, at 615. For earlier doubt whether alternative expressions to "demise" would suffice to import a covenant for quiet enjoyment, see *Messent* v *Reynolds* (1846) 3 CB 194.

32 *Budd-Scott* v *Daniell* [1902] 2 KB 351.

33 *Markham* v *Paget* [1908] 1 Ch 697, at 716.

34 According to *Bandy* v *Cartwright* (1853) 8 Ex 913, no covenant for good title would be implied if the tenancy had been created orally.

35 (1614) Hob 12.

36 (1838) 5 Bing 183, at 186 and 185 respectively. See also *Mostyn* v *West Mostyn Coal and Iron Co. Ltd* (1876) 1 CPD 145.

37 (1843) 12 M & W 52, at 64.

that the law annexes to the word "demise" "a condition that the party demising has a good title to the premises, and that the lessee shall not be evicted during the term". In *Fraser* v *Skey*,[38] after stating that the plaintiff's declaration was bad, the report proceeds to say "or else it should have alleged a breach, that the lessor had no title to demise for so long a term". The clearest statements, however, that such a covenant is implied from use of the word "demise" are to be found in *Burnett* v *Lynch*[39] and *Baynes & Co.* v *Lloyd & Sons*.[40] In the former, Littledale J explained that "[a]n action of covenant will lie by the lessee against the lessor upon the word 'demise' in the lease; . . . that word imports a covenant in law on the part of the lessor that he has good title, and that the lessee shall quietly enjoy during the term"; in the latter Lord Russell CJ said that "the word 'demise' . . . imports a covenant for title and a covenant for quiet enjoyment".

Notwithstanding such statements, doubts about what covenant is implied at common law from use of the term "demise" remain. Kay LJ in *Baynes & Co. v Lloyd & Sons*[41] commented that that no authorities had been cited by Littledale J for the proposition advanced in *Burnett* v *Lynch*, and described Lord Denman's statement as an admission made somewhat doubtfully. In *Leonard* v *Taylor*,[42] Fitzgerald and Barry JJ appear to consider the covenant implied from use of the term "demise" to be one for quiet enjoyment. Doubt exists also as to whether the covenant implied for good title is a separate covenant or part of the covenant for quiet enjoyment which undoubtedly is implied. While there is a clear dictum in *Norman* v *Foster*[43] that the covenant for good title and that for quiet enjoyment are separate, this was explained in the Common Pleas in *Line* v *Stephenson*[44] as referring to a lease in which there were express covenants. Lord Russell's view, quoted above, suggests, however, that no such distinction is needed. Most recently, the position has been said to be that the promises implied from "demise" are that the lessor is entitled to grant some term in the demised premises, and that the lessee will have quiet enjoyment; and that such promises are more properly to be regarded as embodied in one single covenant, and that this covenant may be broken either by want of title or by eviction of the tenant.[45]

Eviction by title paramount

Although a covenant on the part of a lessor was implied by "demise" or an equivalent expression, it eventually became established that the covenant so implied would not render a sublessor liable to her sublessee where the latter was dispossessed as a result of a claim by title paramount. An early authority is *Andrews' Case*,[46] the short report of which records Gawdy and Fenner JJ as holding that the covenant implied from "demise" would protect the lessee against entry by the lessor but not against entry by a stranger.[47] A line of

38 (1773) 2 Chitty's Reports 646.

39 (1826) 5 B & C 589, at 609.

40 [1895] 1 QB 820, at 825.

41 [1895] 2 QB 610, at 616.

42 (1873) 7 LR Ir 207, at 216 and 217 respectively.

43 (1673) 1 Mod 101.

44 (1838) 4 Bing (NC) 678, at 683; 1 Arn 294, at 298.

45 *Miller* v *Emcer Products Ltd* [1956] Ch 304, at 319 per Romer LJ.

46 (1589) 2 Leon 104.

47 Note, however, the explanation of *Andrews' Case* given by in *Markham* v *Paget* [1908] 1 Ch 697, at 717–18, in which Swinfen Eady J considered that the authority establishing the rule that the covenant for quiet enjoyment implied from "demise" does not render the lessor liable for claims by title paramount is the much later decision in *Jones* v *Lavington* [1903] 1 KB 253, and that until *Baynes & Co.* v *Lloyd & Sons* [1895] 2 QB 610 the received view was that lessors *would* be liable as a result of such claims. For the view that the covenant would render the covenantor liable if the covenantee were dispossessed by someone claiming by title paramount, see

authorities relevant to the question exists involving leases made by a tenant for life, where the lessee had been dispossessed during the term created by the lease by a remainderman who had become entitled to possession following the death of the tenant for life/lessor. In these cases, the courts took the view that the lessor's executors would not be liable in an action on the covenant for quiet enjoyment implied on the part of the lessor.[48] The explanation was that such covenant would not bind the lessor to do more than was in his power.[49] In *Penfold* v *Abbott*,[50] a yearly tenant failed in an action against his landlord following a claim brought by someone with a title paramount, Wightman J saying that "the agreement on the part of the lessor implies no more than that the lessee shall have quiet enjoyment so long as his, the lessor's, interest in the premises lasts".[51]

The result reached in the cases involving leases by tenants for life was reached also in cases involving leases and subleases. *Penfold* v *Abbott*, mentioned already, is one. In *Granger* v *Collins*,[52] an action of assumpsit by a sublessee evicted by a superior lessor failed on the basis that no promise by the sublessor against eviction by the superior lessor was implied from the relation of landlord and tenant between the defendant and the plaintiff. In *Schwartz* v *Locket*,[53] an action by a yearly tenant against his landlord, a lessee, for breach of an implied covenant for quiet enjoyment failed where the tenant had been dispossessed before the end of the current year of the tenancy as a result of proceedings by the superior lessor after expiry of the lease. *Baynes & Co.* v *Lloyd & Sons*[54] involved a subletting where the term of the sublease exceeded the remainder of the term of the lease under which the sublessor held the premises. On expiry of the lease, possession was recovered by the superior lessor, and the sublessee brought an action against the sublessor for damages, alleging breach of an implied covenant for title or alternatively for quiet enjoyment. Again, the action failed. Finally, in *Jones* v *Lavington*,[55] a sublessee who acted in contravention of a restrictive covenant contained in the headlease (of which covenant he was unaware) was unable to recover against the sublessor on the implied covenant for quiet enjoyment after the superior lessor had obtained an injunction restraining the sublessee's activity. The position was eventually summarised by Pearson J in *Kenny* v *Preen*[56] as being that "[t]he implied covenant for quiet enjoyment is not an absolute covenant protecting a tenant against eviction or interference by anybody, but is a qualified covenant protecting the tenant against

[n. 47 cont.] *Hayes* v *Bickerstaff* (1669) Vaughan 118, at 119; *Hart* v *Windsor* (1843) 12 M & W 68, at 85; and the doubt expressed by Charles J in *Hoare* v *Chambers* (1895) 11 TLR 185, at 186. Holdsworth mentions a number of decisions in the Year Books in which the view had been that the covenantor would be liable in such circumstances: see Holdsworth, *History of English Law* (1925) vii, pp. 251–2.

48 *Swan* v *Stransham* (1566) 3 Dyer 257a; *Cheiny and Langley's Case* (1588) 1 Leon 179, sub nom. *Landydale* v *Cheyney* Cro Eliz 157; *Bragg* v *Wiseman* (1614) 1 Brownl 22; *Adams* v *Gibney* (1830) 6 Bing 656.

49 *Monypenny* v *Monypenny* (1861) 9 HLC 114, at 139 per Lord St Leonards: "*Adams* v *Gibney* . . . shows that, in a case like this, where the estate of the lessor ceased with his life, the executors shall not be charged with the implied covenant, because the covenant in law ends and determines with the estate and interest of the lessor. That is a rule of law; it does not depend upon particular circumstances. It is an abstract rule of law, that if there is a demise, upon which demise at common law there is an implied covenant, that implied covenant is restrained and restricted in the way I have stated. The covenant does not bind them to do more than he himself can do."

50 (1862) 32 LT NS 67.

51 Ibid, 68.

52 (1840) 6 M & W 458.

53 (1889) 61 LT NS 719.

54 [1895] 2 QB 610.

55 [1903] 1 KB 253.

56 [1963] 1 QB 499, at 511.

interference with the tenant's quiet and peaceful possession and enjoyment of the premises by the landlord or persons claiming through or under the landlord".

Ireland: s. 41 of Deasy's Act

The provisions of s. 41 of Deasy's Act mean that in Ireland some of the questions as to the obligations of a sublessor at common law can be left aside. Where s. 41 applies, a sublessee can rely on the agreement on the part of the sublessor implied by the section. The security the section provides will, however, not be available in all cases. Some of the cases in which the section will not apply are apparent from its terms: others are less obvious.

The section provides as follows:

> Every lease of lands or tenements made after the commencement of this Act shall (unless otherwise expressly provided by such lease) imply an agreement on the part of the landlord making such lease, his heirs, executors, administrators, and assigns, with the tenant thereof for the time being, that the said landlord has good title to make such lease, and that the tenant shall have the quiet and peaceable enjoyment of the said lands or tenements without the interruption of the landlord or any person whomsoever during the term contracted for, so long as the tenant shall pay the rent and perform the agreements contained in the lease to be observed on the part of the tenant.

In cases where the section applies, the agreement implied on the part of a sublessor will be more beneficial to the sublessee than the obligations which would be implied at common law. Not only is it clear that an agreement is implied that the sublessor has good title; the agreement is that she has good title to make "such lease", i.e. the sublease in question, not just *some* lease. It is, however, in the agreement implied as to quiet enjoyment that the improvement in the position of the sublessee effected by the section can be seen. The agreement implied under the section is that the sublessee will have quiet enjoyment *during the term contracted for* and without interruption of the sublessor *or any person whomsoever*. The former expression extends the liability of the sublessor beyond that under the covenant implied at common law, which was limited to the continuance of the sublessor's estate.[57] The latter expression is clearly capable of extending to interruption by a superior lessor.[58] If it does, then the existence of the agreement provided by s. 41 should provide the sublessee with a remedy against the sublessor in the circumstances. Despite this, in some cases sublessees may not be in as strong a position by reason of the section as they might suppose. First, the section will not apply unless there is a lease, defined in s. 1 of the Act as meaning an instrument in writing. A sublessee whose tenancy has been created orally will not therefore be able to rely on the agreement as to title and quiet enjoyment which the section specifies.[59] Secondly, the section will not apply if the tenancy of the sublessee is rendered void by s. 18 of the Act.[60] The reasoning is that the agreement mentioned in s. 41 is implied where there is "a lease, a landlord and a tenant", all of which are absent if the

57 Above, p. 208. Cp. the position under express covenants in which similar words to those in s. 41 have appeared: *Evans* v *Vaughan* (1825) 4 B & C 261; *Williams* v *Burrell* (1845) 1 CB 401; below, p. 211.

58 Cp. *Foster* v *Pierson* (1792) 4 TR 617 where similar words appeared in an express covenant; below, p. 212.

59 Whether a sublessee whose tenancy has been created orally can assert instead that there exists on the part of the sublessor the covenant implied at common law for quiet enjoyment (none for title being implied in an oral tenancy) is not clear. The competing arguments are that in stating that obligations are implied in leases, none are implied otherwise; or alternatively, that the section defines the terms of the obligations implied in a lease, and in failing to deal with oral tenancies leaves the position at common law untouched. The latter appears to have been the view of Gibson J in *Canavan* v *Burton* [1900] 2 IR 359, at 364.

60 *Canavan* v *Burton* [1900] 2 IR 359 at 370; *Knight* v *Smith* [1947] Ir Jur Rep 17; *Carew* v *Jackson* [1966] IR 177.

tenancy is void by reason of s. 18.[61] In contrast, if the position is merely that the sublessor has no title to grant the tenancy, the sublessee will be able to sue on the implied agreement as the sublessor will be estopped from denying the tenancy exists.[62] Thirdly, even if the section does apply, and there is implied on the part of the sublessor the agreement mentioned in the section, *Whelan* v *Madigan*[63] and *Riordan and Mulligan* v *Carroll*[64] show that the sublessor's obligation under the agreement is dependent upon the sublessee's performance of his own obligations.[65]

The final caveat to note regarding the applicability of s. 41 is potentially the most significant for present purposes. The terms of the section are that an agreement will be implied on the part of the sublessor "unless otherwise expressly provided by such lease" (i.e. by the sublease). No agreement will be implied under the section if the sublease contains terms bringing the case within this proviso. In this regard, the section mirrors the position at common law. A series of decisions beginning with *Nokes' Case*[66] had established that the presence of an express covenant in a lease would exclude implication of a covenant which would otherwise be implied from the grant made. It was clear too that this was the case also if the express covenant was not as extensive as the covenant which would otherwise be implied. In *Merrill* v *Frame*,[67] a lessee sought to rely on the implied covenant for good title to recover against the lessor where the lessee had been evicted as a result of a claim by title paramount. The court held that the existence of an express covenant for quiet enjoyment prevented the lessee from doing so. *Line* v *Stephenson*[68] illustrates the extent of the principle, the court rejecting the lessee's argument that two covenants were implied from "demise", namely a covenant for good title and a covenant for quiet enjoyment, and that the latter only was excluded by an express covenant in the lease for quiet enjoyment.[69]

61 *Canavan* v *Burton* [1900] 2 IR 359, at 366 per Gibson J. In the words of Palles CB (at 361) "it is not sufficient that the instrument should *purport* to create the relation of landlord and tenant, if in fact it is inoperative to do so". Whether the sublessee can rely on express covenants in a void sublease is a matter which the authorities leave open.

62 *Downes* v *Hamilton* (1949) 83 ILTR 78.

63 [1978] ILRM 136.

64 Unreported, 28 July 1995, High Court, Ireland.

65 In this regard the position under the section is different from that in cases in which lessors have been held liable under express covenants for quiet enjoyment to lessees who were in breach of their obligations even where the covenant appears premised on the lessee paying the rent and performing his obligations: see *Dawson* v *Dyer* (1833) 5 B & Ad 584; *Edge* v *Boileau* (1885) 16 QBD 117; *Slater* v *Hawkins* [1982] 2 NZLR 541. For the contrary view, see *Anon* (1589) 4 Leon 50; *Crofter Properties Ltd* v *Genport Ltd* unreported, 15 March 1996, High Court, Ireland.

66 (1599) 4 Co Rep 80b, also reported sub nom. *Nokes* v *James* Cro Eliz 674, but note the preference in *Line* v *Stephenson* (1838) 7 LJCP 263 for the former report. For later cases applying the principle, see *Proctor* v *Johnson* (1609) 2 Brownl 212; *Brown* v *Brown* (1638) 1 Lev 57; *Deering* v *Farrington* (1674) 1 Mod 113; *Clarke* v *Samson* (1748) 1 Ves 100; *Dennett* v *Atherton* (1872) 7 QB 316; *Clayton* v *Leech* (1889) 41 Ch D 103; *Grosvenor Hotel Co.* v *Hamilton* [1894] 2 QB 836; *Miller* v *Emcer Products Ltd* [1956] Ch 304; *Cowan* v *Factor* [1948] IR 128; *Murphy* v *Bandon Co-operative Agricultural and Dairy Society Ltd* [1909] 2 IR 510.

67 (1812) 4 Taunt 329.

68 (1838) 4 Bing NC 678; 1 Arn 294; 7 LJCP 263 (Common Pleas); (1838) 5 Bing NC 184; 7 Scott 69 (Exchequer Chamber).

69 The position was explained by Lord Cozens-Hardy MR in *Malzy* v *Eichholz* [1916] 2 KB 312, at 313: "when in a deed you find an express covenant dealing with a particular matter as to the demised premises there is no room for an implied covenant covering the same ground or any part of it. That is very old law . . . The very object of inserting a covenant for quiet enjoyment in a conveyance of freehold or leasehold property is to get rid of the implied covenant which is found in the word 'grant' or 'demise', whichever it may be. Then it is said that if the express covenant does not go far enough you can fall back upon the implied covenant from the word 'grant' or the word 'demise'. That proposition would be absolutely contrary to the uniform practice of all owners who deal with real property, and would moreover, be contrary to the law which has been perfectly established for more than half a century."

Whether the position was the same under s. 41 as that at common law just described was the issue in *Leonard* v *Taylor*.[70] Here a lease contained a covenant by the lessor for quiet enjoyment without interruption by the lessor or persons claiming under him. The lessee brought an action for breach of the agreement as to good title implied by s. 41. Though all three members of the Queen's Bench agreed that the action failed, different views of the effect of the legislation, and whether the position in Ireland was the same as that at common law, were expressed. For Whiteside CJ, it was to be assumed that Parliament was aware of the existing law, so that the same meaning should be attributed to the language of the agreement in s. 41 as had been given to covenants in similar language hitherto.[71] Fitzgerald and Barry JJ expressed doubts, however, on the decision reached, the former disagreeing with the view that the section merely declared the existing law[72] and doubting the application of the maxim upon which the decisions from *Nokes' Case* to *Line* v *Stephenson* had been decided,[73] the latter construing the expression "unless expressly provided by such lease" as meaning "unless there be a different express provision as to good title or quiet enjoyment contained in the lease".[74] On a writ of error to the Exchequer Chamber, the decision was affirmed, Palles CB saying that it was impossible to conclude that the agreement implied under s. 41 was identical to that at common law implied from "demise", and that little assistance to the meaning of the section could be gathered from considering the law before the section. He went on, however, to explain that the terms of the covenant in the lease were a provision contrary to what he described as both branches of the statutory agreement.[75]

Eviction by title paramount

One case is reported in which a claim under the agreement for quiet enjoyment implied under s. 41 has arisen in the context of a sublease, where the sublessor has been in breach of obligations owed by her to the superior lessor under a headlease, resulting in eviction by the superior lessor. In *Kearns* v *Oliver*,[76] the sublessee's claim was brought after he had been evicted by the superior lessor following non-payment of the rent due from the sublessor under the headlease. The sublessee argued that the sublessor would be liable under the implied agreement for quiet enjoyment "if (by himself suffering ejectment for non-payment of rent) he permitted his tenant to be evicted".[77] Unfortunately, for present purposes, Morris CJ was able to dismiss the sublessee's claim on other grounds, leaving unanswered the question whether the sublessee's argument was right.

Express covenant(s) by the sublessor

A sublessee wishing to recover against a sublessor following dispossession as a result of a claim by someone with title paramount may not have to worry about the niceties of the common law, or to rely on s. 41, if instead he can point to an express covenant in the sublease which deals with the issue. The sublessee may reasonably expect that a covenant for quiet enjoyment will be found in the sublease. The question is whether that is enough.

70 (1872) IR 7 CL 207 (Queen's Bench); (1874) IR 8 CL 301 (Exchequer Chamber).
71 (1872) IR 7 CL 207, at 213.
72 Ibid. 216.
73 Ibid. 217.
74 Ibid. 218.
75 (1874) IR 8 CL 310, at 305.
76 (1889) 24 LR Ir 473.
77 Ibid. 477.

Covenant for quiet enjoyment

Where the sublease has been professionally prepared, it will commonly be the case that a covenant for quiet enjoyment appears in the sublease. The precise terms of the covenant will of course determine the circumstances in which the lessor is to be liable. It is possible for the covenant so to be drafted that the sublessor will be liable for interruptions by someone claiming by title paramount,[78] but commonly the covenant found is one limiting the liability of the sublessor to her own acts and those of persons claiming under her. If such is the case, the prospect of a successful claim against the sublessor by a sublessee dispossessed during the term of the sublease in consequence of a claim by a superior lessor following termination of the headlease is slight, if it exists at all, as the act of the superior lessor in recovering possession is unlikely to be seen as the act of the sublessor or someone claiming under the sublessor. In *Spencer* v *Marriott*,[79] a sublessee was dispossessed following forfeiture of the headlease by the superior lessor in consequence of the use to which the premises were put by the sublessee, this contravening a covenant in the headlease. The sublessee's action against the sublessor on a covenant in the sublease for quiet enjoyment failed, the court holding that "the eviction was not produced by any thing proceeding from the covenantor, but from the person in possession of the premises". Likewise, in *Besley* v *Besley*,[80] a sublessee failed in an attempt to recover compensation from the sublessor where a superior lessor entered on expiry of the headlease, and in *581834 Alberta Ltd* v *Alberta (Gaming and Liquor Commission)*[81] a sublessee failed in an action against his lessor on foot of a covenant for quiet enjoyment in the usual form where possession had been obtained by a mortgagee after default under a mortgage by a superior lessor.[82] In *Doyle* v *Hort*,[83] Palles CB said of a covenant limited to acts of the lessor and those claiming under him that the covenant "would not, of course, extend to acts of [a superior lessor], or of the owner of the fee". On appeal, Ball C was of the same view, saying that if the fee simple owner, in consequence of a breach of the provisions of the headlease, had elected to treat it as void, no remedy on the covenant for quiet enjoyment could have been had by the sublessee against the sublessor, for the disturbance would not have been by the sublessor or anyone claiming under him.[84] The decisions are in line with cases involving leases by tenants for life and entry by remaindermen, which proceed on the basis that such entry was not by someone claiming under the tenant for life.[85] While decisions do exist in which executors of tenants for life have been held liable where the lessee has been dispossessed as a result

78 *Brennan* v *Kettel* [2003] EWCA Civ 1186 (covenant against interruption by lessor or anyone claiming under or in trust for lessor or by title paramount); *Queensway Marketing Ltd* v *Associated Restaurants Ltd* [1988] 2 EGLR 49 ("lessor" defined as including superior lessor); *Foster* v *Pierson* (1792) 4 TR 617 (covenant covering acts of any person whomsoever). Covenants expressly rendering the lessor liable for the acts of someone with title paramount can be found also in *B & Q plc* v *Liverpool and Lancashire Properties Ltd* (2001) 81 P & CR 20 and *Matalan Discount Club (Cash & Carry) Ltd* v *Tokenspire Properties (North Western) Ltd* (unreported, 18 May 2001, Technology and Construction Court) though both cases proceed on other grounds. The decision in *Andrew* v *Pearce* (1803) 1 Bos & Pull 158 (covenant against interruption by any person whomsoever) in favour of the covenantor's executor likewise proceeds on a different ground.

79 (1823) 1 B & C 457.

80 (1878) 9 Ch D 103.

81 [2007] AJ No 1184 (Alberta CA).

82 Contrast the position where the mortgage is by the sublessor himself: *Sutherland* v *Wall* [1994] CLY 1448; *Yeung Lam Wilson* v *Law Po Chong Priscilla* [2000] HKCA 398; *Multi-Progress Ltd* v *Olympus Hong Kong and China Ltd* [2001] HKDC 150; cp. *Carpenter* v *Parker* (1857) 3 CB (NS) 206.

83 (1878) 4 LR Ir 455, at 467.

84 (1879) 4 LR Ir 455, at 477.

85 *Woodhouse* v *Jenkins* (1832) 9 Bing 431.

of a claim by a remainderman, the basis on which these proceed is that the covenantor had been party to a disposition from which the claimant's title was derived.[86]

The same result, viz. that a sublessor would not be liable on a covenant for quiet enjoyment where the dispossession of the sublessee was by reason of a claim by the superior lessor, was reached where the reason the headlease ended was fault on the part of the sublessor. In *Kelly* v *Rogers*,[87] the superior lessor recovered possession after forfeiting the headlease for non-payment of the rent by the sublessor. The dispossessed sublessee brought an action against the sublessor on the basis that the interruption of the sublessee's enjoyment was caused by the sublessor's failure to pay the rent, and that accordingly this was an act of the sublessor for which he was responsible under the covenant. The Court of Appeal disagreed, distinguishing the act of the sublessor which allowed the lease to be forfeited from the forfeiture itself, which was the act of the superior lessor. The interruption was accordingly not an act of the sublessor or someone claiming under him within the terms of the covenant.[88]

One or two authorities can be found taking the view that a covenantor would be liable in such circumstances. A different result from that in *Kelly* v *Rogers* had been reached on similar facts in the earlier case of *Stevenson* v *Powell*.[89] Though the case was cited to the court in *Kelly* v *Rogers*, it is not mentioned in any of the judgments in that case. In *Lady Cavan* v *Pulteney*,[90] Lord Loughborough LC considered *obiter* that if lessees of a tenant in tail were evicted by any person claiming paramount to the lessor "they must upon that eviction have under the covenant in the leases satisfaction from his assets".[91] A similar situation, involving a lease by a tenant for life, arose in *Williams* v *Burrell*.[92] An action by the lessee against the lessor succeeded, the court basing its decision on the ground that the lessor had promised for quiet enjoyment *during the term created* by the sublease.[93] Notwithstanding such decisions, it appears that a sublessee seeking to recover from the sublessor under a covenant in the sublease for quiet enjoyment, where the complaint arises from dispossession of the sublessee by a superior lessor, is going to be on an uphill struggle. Two cases illustrate the point. The first is *Cohen* v *Tannar*,[94] which at first sight appears favourable to a sublessee, but on further examination gives less comfort than might initially be supposed. In it, forfeiture proceedings were brought by a superior lessor for breach of covenant. The sublessor notified the sublessee, but did not defend the action, and later consented to judgment. An action against the sublessor by the sublessee for breach of a covenant for quiet enjoyment was successful. Vaughan Williams LJ made it clear, however, that there was no obligation on the sublessor to defend the action by the superior lessor, and that it was the sublessor's consenting to judgment which rendered him liable, saying that:

86 See *Evans* v *Vaughan* (1825) 4 B & C 261; *Calvert* v *Seabright* (1852) 15 Beav 156; *Lock* v *Furze* (1866) 1 CP 441. See also *Hurd* v *Fletcher* (1778) 1 Doug 43.

87 [1892] 1 QB 910. Pawlowski, "Forfeiture; quiet enjoyment; underleases" [1999] *Landlord and Tenant Review* 76.

88 Cp. *Stanley* v *Hayes* (1842) 3 QB 105 (lessee unsuccessful in an action on a covenant for quiet enjoyment following distraint as a result of non-payment of land tax by the lessor, on the ground that the distraint was not by someone claiming under the lessor); *Advance Fitness Corporation Pty Ltd* v *Bondi Diggers Memorial & Sporting Club Ltd* [1999] NSWSC 264 (sublessor not liable on covenant for quiet enjoyment where notice requiring work to demised premises issued by local authority, notwithstanding want of repair by sublessor at outset of sublease may have led to notice).

89 (1612) 1 Bulst 182.

90 (1795) 2 Ves Jr 544.

91 Ibid. 561.

92 (1845) 1 CB 402.

93 Cp. *Evans* v *Vaughan* (1825) 4 B & C 261.

94 [1900] 2 QB 609.

> if all the defendant had done had been to omit to defend the action, there would have been no breach of the covenant for quiet enjoyment. The reason I say so is this: there may, no doubt, be a breach of the covenant by an act of omission, but it must be the omission of some duty, and there was no duty cast upon the defendant of defending this action after he had given notice to the plaintiff of the pendency of the action, when the plaintiff might perhaps, if he had so chosen, have applied for an order under s. 4 of the Conveyancing Act, 1892.[95]

The other decision is *Thai Holdings Ltd* v *The Mountaineer Ltd*.[96] In it, the sublessor held under a headlease for a term to expire in 2004, but had an option to renew the headlease for a further term of eight years. The term created by the sublease was for a period ending in 2000, but the sublessee had options to renew the sublease for successive periods of two years each, up to 2010. The sublessee renewed the sublease up to 2004. It was then told that the headlease had expired. In proceedings by the sublessee for an order that the sublease be renewed further, the question arose whether the sublessor was in breach of its covenant in the sublease for quiet enjoyment, by failing to exercise its right to renew the headlease and thereby preventing the sublessee being able to renew the sublease after 2004. The court held, contrary to a suggestion in *Neva Holdings Ltd* v *Wilson*,[97] that no breach occurred.

Covenant for good title

In contrast to a covenant for quiet enjoyment, an express covenant by the sublessor that she has title to make the sublease is unlikely to appear in the sublease. One writer mentions two authorities[98] in which covenants for title can be found in leases, but makes the point that in modern times it is not the practice for leases to contain such provisions.[99] Nor is the situation any different in Ireland, despite the provisions of s. 41 of Deasy's Act which imply an agreement that the lessor has good title to make the lease if the lease is silent on the point.[100]

Covenant to observe terms of headlease

The sublessee may not need to concern himself about the absence of a covenant for good title, or with the question whether any covenant for quiet enjoyment given by the sublessor renders the sublessor liable in circumstances where the headlease is terminated following default by the sublessor, if he can instead rely on a covenant by the sublessor in the sublease that she will perform her obligations in the headlease. In such cases, the sublessee's entitlement to recover against the sublessor in the event of forfeiture of the headlease seems clear.[101]

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95 [1900] 2 QB 609, at 614.

96 [2006] 1 NZLR 772.

97 [1991] 3 NZLR 422, at 428 per Bisson J: "One must assume the sublessor will keep the head lease alive. Indeed, he is contractually bound to do so to assure the sublessee quiet enjoyment and avoid any re-entry by the head lessor."

98 *Robert Bradshaw's Case* (1612) 9 Co Rep 60b; sub nom. *Salman* v *Bradshaw* Cro Jac 304 (covenant by lessor that he had full power and lawful authority to make the demise); *Muscot* v *Ballet* (1615) Cro Jac 369 (covenant that lessor seised in fee of the land demised). See also, however, *Andrews* v *Pearce* (1805) 1 Bos & Pull 158 (covenant that lessor had good right to grant and demise, as well as covenant for quiet enjoyment).

99 Russell, "Leasehold covenants for title" [1978] *Conv* 417, at 423.

100 The precedents in Edge, *Forms of Leases and Other Forms Relating to Land in Ireland* (1884) and Stubbs and Baxter, *Irish Forms and Precedents* (1910) do not contain any express covenant that the lessor has title to make the lease.

101 For the sublessor's liability under the covenant where no action is taken by the superior lessor, see *Matania* v *National Provincial Bank Ltd* [1936] 2 All ER 633 and *Ayling* v *Wade* [1961] 2 QB 228. See also *Advance Fitness Corporation Pty Ltd* v *Bondi Diggers Memorial & Sporting Club Ltd* [1999] NSWSC 264 for a claim by a sublessee based alternatively on a covenant by the sublessor for quiet enjoyment, a covenant to observe the terms of the headlease, and derogation by the sublessor from its grant.

Sublessee's entitlement to covenant(s)

The grant of a sublease will in some instances have come about as a result of a preceding contract between the parties. The terms of that contract ought to be carried into effect in the sublease.[102] It remains to be considered whether, under the terms of the contract, the sublessee is entitled to a covenant or covenants by the sublessor in the sublease, and if so, what the terms of such covenant(s) should be.

The parties may well specify in their contract what covenants are to be contained in the lease. If, however, they do not, the position at common law was that the parties would be entitled to have covenants included in the lease, and those covenants would be what were considered "usual".[103] The same was true in the case of an open contract for a sublease, so that the sublessor could not insist on the sublessee entering into covenants mirroring restrictions in the headlease where the restrictions were unusual, and where the sublessee was not aware of them.[104] The question for present purposes is what covenants the sublessee is entitled to from the sublessor. The answer provided in *Colhoun* v *Trustees of Foyle College*[105] is that the sublessee will be entitled to covenants corresponding to the provisions of s. 41 of Deasy's Act. In *Colhoun*, a contract for a fee farm grant of building land was entered into, such grant to contain "all covenants usual and proper in building leases". The question was whether the grantors were entitled to limit their liability under the covenant to be contained in the grant to liability for their own acts and acts of those claiming under them. The court considered that in the absence of agreement otherwise, the parties to a lease would be entitled to covenants corresponding to the provisions of ss. 41 and 42 of Deasy's Act, so that the grantee was entitled to a covenant for title by the grantors in the form provided in s. 41. Fitzgibbon LJ made it clear that if a lessor wants to cut down the statutory obligations, he must stipulate expressly to that effect.[106] Walker LJ thought it not unreasonable to hold that the parties should be taken as having contracted with reference to the law which bound the grantors "in the absence of an express statement to the contrary, by the implication of an absolute covenant".[107]

Once the sublease takes effect, the rights of the parties will be regulated by it and not by the contract.[108] If the sublease contains provisions which do not correspond to the terms of the preceding contract made by the parties, proceedings for rectification of the sublease may be possible. If the sublease contains a covenant by the sublessor for quiet enjoyment, qualified in the usual way to acts of the sublessor and those claiming under the sublessor, but the contract entitles the sublessee to an unqualified covenant, it would appear open to the sublessee to seek rectification on this ground. In such circumstances, rectification would extend the liability of the sublessor under the covenant. The converse situation, where rectification in order to make the covenantor's liability correspond with the terms of the parties' agreement would *limit* the liability of the covenantor under a covenant

102 An extreme example is *Onions* v *Cohen* (1865) 2 H & M 354 in which the plaintiff was entitled to have a lease from the defendant contain an unqualified covenant for quiet enjoyment, this being the term of the agreement between the parties, notwithstanding that it was discovered that the defendant did not have title to part of the property to be demised.

103 *Church* v *Brown* (1808) 15 Ves Jr 258; *Propert* v *Parker* (1832) 3 My & K 280; *Chester* v *Buckingham Travel Ltd* [1981] 1 All ER 386.

104 *Melzak* v *Lilienfeld* [1926] Ch 480. Contrast the position where the agreement is that the sublessee is to be subject to the same restrictions as are contained in the headlease: *Hoare* v *Chambers* (1895) 11 TLR 185.

105 [1898] 1 IR 233.

106 Ibid. 236.

107 Ibid. 237.

108 *Baynes & Co.* v *Lloyd & Sons* [1895] 1 QB 820, at 823; *Knight Sugar Co. Ltd* v *Alberta Railway & Irrigation Co.* [1938] 1 All ER 266.

for title, arose in *Butler* v *Mountview Estates Ltd.*[109] Though the case concerns an assignment of an existing lease rather than the grant of a sublease, the relevant principles are equally applicable in either case. Rectification of the assignment was ordered in order that the assignor's liability under the covenants for title implied under the Law of Property Act[110] should correspond to what the parties had agreed in their preceding contract.

Derogation from grant

An alternative possibility for a sublessee wanting to recover from the sublessor following eviction by a superior lessor may be a claim based on derogation from grant.[111] The principle was explained by Blanchard J in *Tram Lease Ltd* v *Croad*[112] in the following terms:

> The principle of law called "non-derogation from the grant" consists in this: that no one who has granted a right of property, whether by sale, lease or otherwise, may thereafter do or permit something which is inconsistent with the grant and substantially interferes with the right of property which has been granted.

The principle can be seen in operation in the law of easements, where it may operate to confer easements on a grantee of land where none are expressed in the grant, and in the law of landlord and tenant, where it has been applied to prevent lessors carrying on activity on land adjacent to the land they have demised, where that activity is such as to frustrate the purpose of the lease under which the lessee holds.[113]

The principle that a grantor may not derogate from her grant has been formulated in different ways in the authorities. In *Specialist Diagnostic Services Pty Ltd* v *Healthscope Ltd*,[114] Croft J identified four different ways in which the principle had been put, namely a presumption of law, an implied obligation, an implied contract, or an implied covenant. The last appears to be the most common formulation in recent Australian decisions.[115] In *Healthscope*, Croft J went on to say that the obligation arises from the implication of terms in order to give effect to the contract.[116] The view differs from that in *Molton Builders Ltd* v

109 [1951] 1 All ER 693.

110 Law of Property Act 1925, s. 76, corresponding to Conveyancing and Law of Property Act 1881, s. 7.

111 Elliott, "Non-derogation from grant" (1964) 80 *LQR* 244; Peel, "The nature of rights arising under the doctrine of non-derogation from grant" (1965) 81 *LQR* 28; Hopper, "Landlord's implied covenant not to derogate from the grant" (2008) 16 *APLJ* 157.

112 [2003] 2 NZLR 461, at 469.

113 *Lyttelton Times Co. Ltd* v *Warders Ltd* [1907] AC 476; *Mount Cook National Park Board* v *Mount Cook Motels Ltd* [1972] NZLR 481. For discussion whether the appropriate test for application of the principle is frustration of the purpose of the lease or something less, see *Nordern* v *Blueport Enterprises Ltd* [1996] 3 NZLR 450; *Specialist Diagnostic Services Pty Ltd* v *Healthscope Ltd* [2010] VSC 443. For recent applications of the principle, see *Oceanic Village Ltd* v *Shirayama Shokusan Co. Ltd* [2001] All ER (D) 62 (Feb); *Platt* v *London Underground Ltd* [2001] 2 EGLR 121; *Dorrington Belgravia Ltd* v *McGlashan* [2009] 1 EGLR 27; *Carter* v *Cole* [2009] EWCA Civ 410.

114 [2010] VSC 443, at para. 151 of judgment. See also *Shilkin* v *Taylor* [2011] WASCA 255, at para. 51 of judgment.

115 See *Karaggianis* v *Malltown Pty Ltd* (1979) 21 SASR 381; *Lend Lease Development Pty Ltd* v *Zemlicka* (1985) 3 NSWLR 207; *Aussie Traveller Pty Ltd* v *Marklea Pty Ltd* [1997] QCA 2; *Advance Fitness Corporation Pty Ltd* v *Bondi Diggers Memorial & Sporting Club Ltd* [1999] NSWSC 264; *Glasshouse Investments Pty Ltd* v *MPJ Holdings Pty Ltd* [2005] NSWSC 456. The formulation appears also in English authorities: see *Duke of Westminster* v *Guild* [1984] 3 All ER 144; *Nynehead Developments Ltd* v *RH Fibreboard Containers Ltd* [1999] 1 EGLR 7.

116 [2010] VSC 443, at para. 151 of judgment.

City of Westminster London Borough Council,[117] in which Lord Denning said the principle was not based on an implied term, but was "a principle evolved by the law itself".[118]

The significance of the difference between the various formulations of the principle has not been fully worked out in the authorities. One question which arises is how successors in title to the original parties to a lease are affected.[119] A second question is whether the obligations are personal or necessarily linked with adjoining land retained by the lessor.[120] A third is whether there is any difference between the liability arising under the principle and that arising under a covenant for quiet enjoyment. Apropos the last of these questions, the weight of authority appears to favour the view that there is "little, if any, difference between the scope of the covenant and that of the obligation which lies upon any grantor not to derogate from his grant",[121] though, in some instances, cases have proceeded on the basis that the defendant will be liable (if at all) on the basis that what he has done is a derogation from his grant, but not on the basis of breach of his covenant for quiet enjoyment.[122] A final question, also concerning the relationship of the principle to a covenant for quiet enjoyment, is whether a claim based on derogation from grant is excluded by the presence of a covenant in the sublease for quiet enjoyment. It has been seen

117 (1975) 30 P & CR 182.

118 In *Glasshouse Investments Pty Ltd* v *MPJ Holdings Pty Ltd* [2005] NSWSC 456, Young CJ in Eq. explained the difference between a covenant for quiet enjoyment and the principle that a grantor may not derogate from his grant as being that "the former springs from the relevant instrument, but the latter from "the duty imposed on the grantor in consequence of the relation which he has taken upon himself towards the grantee".

119 In *Molton Builders Ltd* v *City of Westminster London Borough Council* (1975) 30 P & CR 182, the plaintiff, a sublessee, brought an action against a superior lessor. No action on the defendant's covenant for quiet enjoyment was possible, as the plaintiff had neither privity of contract nor privity of estate with the defendant entitling it to sue on the covenant. An action based on the defendant having derogated from its grant was possible, however, though in the end unsuccessful. In *Harmer* v *Jumbil (Nigeria) Tin Areas Ltd* [1921] 1 Ch 200, an action based on derogation from grant was successful against a licensee of the owner of land, whose predecessor in title had made a lease to the plaintiff. It was accepted that the defendant could be in no better position than the lessor so far as liability for derogation was concerned. It was argued, however, that no liability under a covenant for quiet enjoyment by the lessor could arise as the defendant was not owner of the reversion on the lease. For discussion of the principle with regard to successors in title to the grantor, see also *Cable* v *Bryant* [1908] 1 Ch 259 and *Johnston & Sons Ltd* v *Holland* [1988] 1 EGLR 264.

120 See *Gordon* v *Lidcombe Developments Pty Ltd* [1966] 2 NSWR 9.

121 *Southwark London Borough Council* v *Tanner* [2001] 1 AC 1, at 23, per Lord Millett. Contrast the view of Higgins J (dissenting) in *O'Keefe* v *Williams* (1910) 11 CLR 171, at 217: "To my mind, it is a grave error to treat the obligation not to derogate from one's grant as if it were a mere replica of the obligation under a covenant for quiet enjoyment. There would be no need to express such a covenant, there would be no need to imply such a covenant, if the grantor were already under the same obligation from the very nature of his grant. The two kinds of obligation may cover, indeed, much of the same ground; but they do not coincide." For support for Lord Millet's view, see *Robinson* v *Kilvert* (1889) 41 Ch D 88, at 95; *Tebb* v *Cave* [1900] 1 Ch 642, at 646; *Booth* v *Thomas* [1926] Ch 109, at 114; *Penn* v *Gatenex Co. Ltd* [1958] 2 QB 201, at 226; *Malzy* v *Eichholz* [1916] 2 KB 308, at 314 and 323; *Platt* v *London Underground Ltd* [2001] 2 EGLR 121, at 122; *Glasshouse Investments Pty Ltd* v *MPJ Holdings Pty Ltd* [2005] NSWSC 456, at para. 28; *Rank Profit Industries Ltd* v *Secretary for Justice* [2008] HKCA 152. In *Kennedy* v *Elkinson* (1937) 71 ILTR 153, the lessee relied on both derogation from grant and the agreement implied under s. 41 of Deasy's Act. His action was successful, though it is not clear on which of the grounds relied on the decision is based.

122 See *Harmer* v *Jumbil (Nigeria) Tin Areas Ltd* [1921] 1 Ch 200 (Eve J at first instance finding no breach of covenant; appeal proceeds on question whether derogation from grant established); *Kelly* v *Battershell* [1949] 2 All ER 830 (plaintiff not relying on covenant, but proceeding on question whether derogation from grant); *Molton Builders Ltd* v *City of Westminster London Borough Council* (1975) 30 P & CR 182 (no action possible on covenant for want of privity); *Grosvenor Hotel Co.* v *Hamilton* [1894] 2 QB 836 (express covenant not sufficiently wide to cover act complained of); *Lend Lease Development Pty Ltd* v *Zemlicka* (1985) 3 NSWLR 207 (no breach of implied covenant but plaintiff succeeds on derogation from grant). In *Nordern* v *Blueport Enterprises Ltd* [1996] 3 NZLR 450, Elias J explained that derogation by a landlord from his grant will "often but not inevitably" entail breach of the covenant for quiet enjoyment.

already that the presence of a covenant for quiet enjoyment in the sublease will exclude the implication of the covenant that would have been implied at common law, or under s. 41 of Deasy's Act. It seems, however, that the presence of an express covenant for quiet enjoyment does not have the same effect on the principle of non-derogation from grant. In *Multi-Progress Ltd* v *Olympus Hong Kong and China Ltd*,[123] an agreement for lease contained a term on the part of the landlord in the usual form of a covenant for quiet enjoyment, and while it was accepted that such would exclude the covenant which would be implied at common law, the court held that it would "not exclude the operation of the implied covenant on the part of the [landlord] not to derogate from its grant". Similarly, in *Nordern* v *Blueport Enterprises Ltd*,[124] Elias J considered that the principle was not excluded by the inclusion in a lease of a covenant for quiet enjoyment.

There seems to be no difficulty in applying the principle that a grantor may not derogate from her grant where a sublessee is dispossessed during the term of the sublease by action on the part of the sublessor. The basis of the principle is that the grantor may not give with one hand and take away with the other,[125] so that a sublessor who terminates a sublease early should be liable under the principle if the termination is not justified, e.g. by fault on the part of the sublessee entitling the sublessor to forfeit the sublease. In both *Pennell* v *Payne*[126] and *Barrett* v *Morgan*,[127] it appears to be the view that that the act of a sublessor in serving a notice to quit to determine a headlease, thus entitling the superior lessor to possession, would expose the sublessor to an action for damages by the sublessee on the ground that the sublessor had derogated from her grant.[128] The difficulty for a sublessee wishing to rely on the principle will be to establish that there has been a derogation if there is no such positive step on the part of the sublessor. The basis of the sublessee's complaint is likely in many instances to be *inaction* on the part of the sublessor, such as failure to pay the rent reserved by the headlease or to perform the lessee's covenants in it, rather than some positive step taken by the sublessor. Claims that inaction on the part of a grantor has amounted to a derogation from grant have been brought, but have failed in a number of cases.[129] In one of these, reference is made to "the essentially negative effect of the

123 [2001] HKDC 150.

124 [1996] 3 NZLR 450, at 455.

125 *Southwark London Borough Council* v *Tanner* [2001] 1 AC 1, at 23 per Lord Millett. Cp. *Northern Ireland Housing Executive* v *Sloan* [1984] NI 29, where the court considered that were the landlord of premises demised for use as a supermarket so to restrict (under a power in the lease) the goods the tenant could sell that the tenant's business was effectively destroyed, this would amount to "a repudiation of the grant and a denial of the right contractually conferred".

126 [1995] QB 192, at 202.

127 [2000] 2 AC 264, at 274.

128 See also *Conoid Pty Ltd* v *International Theme Park Pty Ltd* [2000] NSWCA 189. Though the case proceeds only on the question whether the sublessor was in breach of his covenant for quiet enjoyment, it would seem that *Cohen* v *Tannar* [1900] 2 QB 609 could have been determined on the basis that the act of the sublessor in consenting to judgment in the action for possession brought by the superior lessor amounted to a derogation from grant.

129 See *Penn* v *Gatenex Co Ltd* [1958] 2 QB 210 (alleged duty of lessor to supply power to serve refrigerator in demised premises); *Advance Fitness Corporation Pty Ltd* v *Bondi Diggers Memorial & Sporting Club Ltd* [1999] NSWSC 264 (alleged duty of lessor to consent to work on demised premises required by local authority); *Gold Shine Investment Ltd* v *Secretary for Justice* [2010] 1 HKC 212 (alleged duty of lessor to consent to development); *William Old International Ltd* v *Arya* [2009] EWHC 599 (Ch) (alleged duty to enter into grant of easement to electricity supplier); also *Secure Parking (WA) Pty Ltd* v *Wilson* [2008] WASCA 268 (alleged duty to renew lease for benefit of purchaser from lessee: Murray AJA (dissenting) holding that derogation not established, the other members of the court not deciding the point. Cp. *Mount Cook National Park Board* v *Mount Cook Motels Ltd* [1972] NZLR 481, Woodhouse J considering (at 496) that a lessor, which was also a licensing authority, would be acting in derogation of its grant were it arbitrarily to refuse to grant a licence needed by the lessee, or to impose conditions willing licensees would not accept.

derogation doctrine".[130] There are, however, authorities suggesting otherwise. In *Chartered Trust plc* v *Davies*,[131] Henry LJ thought that there must come a point where a landlord becomes legally obliged to take action to protect that which he has granted to his tenant.[132] In *Booth* v *Thomas*,[133] a lessor was held liable on his covenant for quiet enjoyment where damage was caused to the lessee as a result of failure of a culvert on the lessor's adjacent land. Russell J at first instance[134] had held that the lessor was liable also on the basis that he had derogated from his grant by omitting to keep the culvert in repair. Closer, however, to the situation under discussion is *Multi-Progress Ltd* v *Olympus Hong Kong and China Ltd*[135] in which the court held that a landlord who had defaulted on its mortgage repayments, resulting in an order for possession being made in favour of the mortgagee, was under a duty to the tenant to make repayments under the mortgage, and in breach of what was described as an implied covenant not to derogate from its grant.

Multi-Progress illustrates the essential point neatly: if a sublessee is to succeed on the basis of the principle in an action against the sublessor, where what is relied on is failure by the sublessor to perform his obligations in the headlease, it must be shown that the sublessor undertook an obligation to the sublessee to perform those obligations. As Ribeiro PJ explained in *Rank Profit Industries Ltd* v *Secretary for Justice*:[136]

> The application of that general principle to particular facts . . . requires identifying in the first place what obligations, if any, on the part of the grantor can fairly be regarded as necessarily implicit in the grant, taking into account the particular purpose of the transaction when considered in the light of the circumstances subsisting at the time it was entered into. Only then can one determine whether the grantor's conduct constitutes a derogation from grant in violation of the implicit obligation identified.

Breach of a duty in tort

A third possible basis for an action by a sublessee against a sublessor following dispossession as the result of a claim by a superior lessor is that the sublessor is under a duty in tort to the sublessee, breach of which, if it leads to loss by the sublessee, will render the sublessor liable. The possibility of a claim on this basis arises from *Hancock* v *Caffyn*.[137] To understand the decision, however, it is necessary briefly to refer to an earlier case, *Burnett* v *Lynch*.[138] In it, a lessee was successful in an action against an assignee to recover money the lessee had had to pay to the lessor in a claim by the latter for breach by the assignee of a covenant in the lease after the assignment had taken place. The difficulty for the lessee was that the assignee had not entered into a covenant in the assignment to perform the lessee's covenants and to indemnify the lessee against claims by the lessor for breach of them. That was enough to preclude the lessee bringing an action of covenant, but the lessee succeeded in an action on the case, on the basis of a duty owed by the assignee to the lessee arising

130 *William Old International Ltd* v *Arya* [2009] EWHC 599 (Ch), at para. 42 per Judge Pelling.

131 (1998) 76 P & CR 396, at 408.

132 See also *Yankwood Ltd* v *Havering London Borough Council* [1998] EGCS 75 (suggestion that lessor might be in breach of his obligation by failure to control trespassers on lessor's adjoining land).

133 [1926] Ch 397. See also *Bowes* v *Lord Mayor etc. of Dublin* [1965] 1 IR 476.

134 [1926] Ch 109.

135 [2001] HKDC 150.

136 [2009] HKCFA 63, at para. 12 of judgment.

137 (1832) 8 Bing 358.

138 (1826) 5 B & C 589.

independently of covenant, breach of which had led to loss by the lessee. Littledale J explained the position thus:[139]

> where from a given state of facts the law raises a legal obligation to do a particular act, and there is a breach of that obligation, and a consequential damage, there, although assumpsit may be maintainable upon a promise implied by law to do the act, still an action on the case founded in tort is the more proper form of action, in which the plaintiff in his declaration states the facts out of which the legal obligation arises, the obligation itself, the breach of it, and the damage resulting from that breach . . . Here there having been neither an express contract to indemnify, nor any express promise to perform the covenants, I think an action on the case, founded upon a breach of duty, is more proper than an action of assumpsit founded on the breach of a supposed promise. The ground of the present action is the damage to the plaintiffs resulting from a default of duty by the defendant.

Not long after *Burnett* v *Lynch*, the possibility of the principle being applied in a case involving a lease and sublease arose in *Hancock* v *Caffyn*. Here a sublessor failed to pay the rent reserved by the headlease, resulting in the superior lessor levying distress on goods of the sublessee. Assignees in bankruptcy of the sublessee brought an action against the sublessor based on the loss sustained by the sublessee. The duty alleged to have been breached was to pay the rent reserved by the headlease, and to indemnify the sublessee. In giving judgment for damages in favour of the sublessee, Tindal CJ considered the sublessor to be under the same obligation to pay rent to the superior lessor as the assignee in *Burnett* v *Lynch* had been to pay rent to the lessor:[140]

> The duty alleged is, that [the sublessor], by paying over to the superior landlord the rent received from the under-tenant, should protect the under-tenant from the superior landlord's distress. And that is no more than one of the necessary consequences of the implied agreement on the part of every landlord for his tenant's quiet enjoyment. Even if there be no actual agreement by the mesne landlord to pay to the superior landlord the rent received from the under-tenant in order to secure his quiet enjoyment, still, in the case of *Burnet* v. *Lynch*, it was held to be an implied duty on the part of the assignee of a lease to perform the covenants contained in it, in order to keep the assignor harmless . . . And *Burnet* v. *Lynch* is also an authority that case is the more proper form of action, although assumpsit may also lie.

The view expressed in *Hancock* v *Caffyn* must, however, be considered in light of two Irish decisions given shortly earlier. In *Joyce* v *Steele*,[141] a sublessee's action on the case against a sublessor failed on the basis that the sublease contained a qualified covenant by the sublessor for quiet enjoyment, the presence of which was considered by the court to define the sublessor's liability and exclude any other liability.[142] *Joyce* v *Steele* was considered to settle the issue before the court in *Geraghty* v *Darcy*,[143] where a sublessee brought assumpsit against a sublessor after distress had been levied by a superior lessor. The report does not indicate whether a covenant for quiet enjoyment existed, merely that the jury found in favour of the sublessor.

139 (1826) 5 B & C 589, at 609.

140 (1832) 8 Bing 358, at 366.

141 (1827) 1 Ir Law Rec 56.

142 See also *Schlencker* v *Moxsy* (1825) 3 B & C 789.

143 (1829) 2 Ir Law Rec 499.

Breach of a fiduciary duty

It may be possible in some cases for a sublessee who has been dispossessed as the result of forfeiture of the headlease to base a claim against the sublessor on breach of a fiduciary obligation owed by the sublessor to the sublessee. A trustee is under a duty to preserve the trust estate, and if the same principle is applicable to the case of sublessor and sublessee, forfeiture of the headlease as a result of failure by the sublessor to perform her obligations under it to the superior lessor should be actionable as a breach of that duty. Such a principle was the basis of Nourse LJ's decision in *Bland* v *Ingram's Estates Ltd*,[144] in which an application for relief against forfeiture of a lease on the ground of non-payment of rent was made by someone who had obtained a charging order against the lessee. Nourse LJ held that relief could be granted as the lessee was under an obligation to the applicant to take reasonable steps to preserve the applicant's security, and that, in a case where the lease had been forfeited for non-payment of rent, such steps would include initiating and pursuing an application for relief against the forfeiture. If the obligation requires a lessee to pursue an application to reinstate the lease, it would seem to follow that it should require him so to act as to avoid the lease being forfeited in the first place, and that his failure to perform his obligations under the lease, resulting in forfeiture, should be actionable by the person to whom he owes the obligation referred to by Nourse LJ.

The difficulty for a sublessee seeking to rely on breach of a fiduciary obligation owed to him by the sublessor will be in establishing that a fiduciary relationship exists between the parties. The relationship of landlord and tenant between the parties will itself not be enough to give rise to fiduciary obligations on the part of the sublessor.[145] One instance where a sublessee should, however, succeed is where leasehold property has been mortgaged by way of subdemise, so that the sublessor and sublessee are also mortgagor and mortgagee. Though concerned with a charging order rather than a mortgage, Nourse LJ's view in *Bland* v *Ingram's Estates Ltd* that the lessee was under an obligation to the chargee to preserve the chargee's security appears applicable to the latter case.

Breach of an implied contractual term

Modern cases have emphasised that a lease not only involves the creation of an estate in the lessee, but is also a contractual relationship between the parties to it. The extent to which principles in the law of contract can be used to resolve disputes between the parties to a lease is an issue which courts are now having to determine. One aspect of the issue relevant for present purposes is whether obligations on the part of one or other of the parties to a lease can be implied on the basis of principles in the law of contract, or whether the only obligations implied in the case of a lease are those hitherto considered, arising either at common law or under statutory provisions. If, for example, it is possible to imply an obligation on the part of a lessor to repair part of the demised premises, on the basis that the obligation is needed to give business efficacy to the contract the parties have made,[146]

144 [2001] Ch 767.

145 See *Lytle* v *Fox* [1898] 1 IR 340, at 352 per Chatterton VC: "the parties were only in the relation of landlord and tenant, which does not ordinarily import anything in the nature of a trust or fiduciary relation". Also *McSweeney* v *Drapes* [1905] 1 IR 186, at 193, Barton J saying that the defendants (successors in title to a sublessor) "did not stand in any fiduciary or quasi-fiduciary relation towards the plaintiff, and did not owe the plaintiff any duty outside of the obligation defined by the covenant in the sublease". More recently, see *Scrapbook Alley Ltd* v *Chow* CIV-2011-454-141 (New Zealand High Court, Palmerston North Registry, 5 September 2011); *Fotherby* v *Cowan* [2012] NSSC 182 (Nova Scotia).

146 *Barrett* v *Lounova* (1982) Ltd [1981] 1 All ER 351. The decision has met with criticism: see *Carbure Pty Ltd* v *Brile Pty Ltd* [2002] VSC 272; *Carrathool Hotel Pty Ltd* v *Scutti* [2005] NSWSC 401.

is it so very different to say that a sublessor should be under an obligation to the sublessee to perform the sublessor's obligations as lessee under the headlease, since otherwise the sublessee will (if the superior lessor elects to forfeit the headlease) not be able to enjoy the benefit of the contract the parties have made?[147] The implication of such a term appears to fall within the principle stated by Cockburn CJ in *Stirling* v *Maitland*,[148] that:

> if a party enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative.

In Australia it is clear that obligations on one or other of the parties to a lease can arise through application of principles derived from the law of contract.[149] In *Aussie Traveller Pty Ltd* v *Marklea Pty Ltd*,[150] McPherson JA explained that, while in some of the older authorities the liability of a lessor had been treated as depending on the presence of words such as "demise", in Australia it had been settled by *O'Keefe* v *Williams*[151] that the matter "is properly one of implication of terms in order to give business efficacy to the contract". Likewise, in *Advance Fitness Corporation Pty Ltd* v *Bondi Diggers Memorial & Sporting Club Ltd*,[152] Austin J said that it was:

> permissible and necessary for the Court, where the parties to a lease are in a commercial contractual relationship . . . to consider whether any implied term arises under the principles applicable to commercial contracts, rather than limiting its attention to the implied covenants recognized by the law of landlord and tenant.

Accordingly, the court considered that the plaintiff in *Advance Fitness* was right in submitting that the court should have regard not only to the principle that the lessor would not derogate from its grant, but also to implied contractual terms such as that in *Mackay* v *Dick*.[153]

In cases where the relationship between the parties cannot be characterised as commercial in the way described by Austin J, the position may be different. In *Carbure Pty Ltd* v *Brile Pty Ltd*,[154] Balmford J was doubtful whether it was possible "to imply into a

147 In considering what answer should be given to the question, regard should be had to comments made by Lord Russell CJ in *Baynes* & *Co. v Lloyd & Sons* [1895] 1 QB 820, at 826: "The Courts, in my humble opinion, have too often sought in order to avoid hardship, to import by implication protective provisions not to be found expressed in written contracts. It is not desirable to make further effort in this direction. I think it much better that contracting parties should be made clearly to understand that their duty is to put into the contracts into which they enter such express provisions as may be needed for their protection."

148 (1864) 5 B & S 840, at 852.

149 The possibility that an implied obligation on the part of a lessor arising from application of the law of contract could improve the position of the lessee was recognised in *Softplay Pty Ltd* v *Perpetual Trustee WA Pty Ltd* [2002] NSWSC 1059, Barrett J saying (at para. 9 of judgment) that the implied term contended for by the lessee (an obligation of the lessor to act in good faith) "would have the capacity to bolster significantly the arguments based on the covenant for quiet enjoyment and derogation from grant".

150 [1997] QCA 2.

151 (1910) 11 CLR 171.

152 [1999] NSWSC 264, at para. 94 of judgment.

153 (1881) 6 App Cas 251. For the principles upon which terms may be implied into contracts, see now *BP Refinery (Westernport) Pty Ltd* v *Shire of Hastings* (1977) 180 CLR 266; *A-G of Belize* v *Belize Telecom Ltd* [2009] 1 WLR 1988. In the context of a lease, the test, according to Palmer J in *Edward Kazas & Associates Pty Ltd* v *Multiplex (Mountain Street) Pty Ltd* [2002] NSWSC 840, at para. 59 of judgment is: "in the light is the factual circumstances at the time the lease is granted, is the alleged term reasonable and equitable; is it necessary to give business efficacy to the lease, 'business efficacy' meaning implementation in a practical and businesslike way of the intended use of the demised premises by the lessee consistently with the reasonable use of the whole property by the lessor and any other occupiers; is the term so obvious that it goes without saying; is it capable of clear expression; does it contradict any express terms of the lease?"

154 [2002] VSC 272, at para. 29 of judgment.

simple lease, where there is no relationship between the parties other than that of landlord and tenant" the obligation contended for (an obligation on the part of the landlord to repair the property demised).

Summary

The position would therefore appear to be that in the common case, where there is a covenant by the sublessor in the sublease for quiet enjoyment, and such covenant is in the usual form, the sublessor will not be liable to the sublessee under the covenant where the sublessee is dispossessed as a result of action taken by a superior lessor, notwithstanding that such action is based on failure by the sublessor to perform her obligations to the superior lessor, resulting in forfeiture of the headlease. In contrast, if there is no such covenant in the sublease, the sublessee stands a better chance of success, as the agreement which will be implied on the part of the sublessor under s. 41 of Deasy's Act is wide enough to render the sublessor liable for the action of the superior lessor. Independently of any express or implied covenant for quiet enjoyment, the principle that a grantor may not derogate from her grant may afford a remedy for the sublessee. If the sublease is a commercial arrangement, it may be possible to argue that an obligation is to be implied that the sublessor will perform her obligations to the superior lessor, on the basis that such term is needed in order to give business efficacy to the sublease. If there is a fiduciary relationship between the parties, the sublessee may be able to base a claim on an obligation arising from that relationship. The easiest means, however, for the sublessee will be a covenant in the sublease by the sublessor to perform and observe her obligations under the headlease, and to indemnify the sublessee against loss arising from the sublessor's failure to do so. Finally, the sublessee may have an action in tort, based on a duty of the sublessor to perform her obligations to the superior lessor, breach of which will give rise to a claim by the sublessee for his loss.

The existence of several different possible bases for a claim against the sublessor has been the subject of comment in a number of the authorities. Ormrod LJ did not attach much weight to what he described as the label of the cause of action in *Hilton* v *James Smith & Sons (Norwood) Ltd.*[155] In *Edward Kazas & Associates Pty Ltd* v *Multiplex (Mountain Street) Pty Ltd*,[156] Palmer J, speaking of the process of implying obligations to resolve disputes between the parties to a lease, said memorably that "[t]he routes by which one reaches that implication have different street names . . . but in truth, these names simply mark adjacent lanes on the same highway, not different roads leading in different directions".[157] He went on:

> In the context of contracts for the creation of interests in land, whether limited or unlimited, it may be time to regard the tags "necessarily implied term", "implied grant" and "non-derogation from the grant" as denoting distinctions without differences, leading more to confusion than to consistent application of an over-arching principle.[158]

That result may well be desirable, but the authorities have yet to go so far. The cases appear reconcilable only on the basis that different forms of action or different principles of law have been the basis on which they have proceeded. The view in *Kelly* v *Rogers* that a sublessor is not liable on an express covenant for quiet enjoyment in the usual form is based on construction of the terms of the covenant. The cases deciding he is not liable on the covenant for quiet enjoyment implied at common law are based on the view that that

155 [1979] 2 EGLR 44.

156 [2002] NSWSC 840.

157 Ibid. para. 56 of judgment.

158 Ibid. para. 58.

covenant lasts only as long as the covenantor's estate lasts. If the sublessor is not liable under the principle that a grantor may not derogate from her grant, it may be because that doctrine operates negatively and not positively. If the sublessor is liable on the basis of *Hancock* v *Caffyn*, this can be reconciled with the cases on implied covenants on the basis that the duty breached is one arising in tort. Standing back from the details, however, there is a difference of view on the question whether the sublessor is under a duty to the sublessee to perform her obligations to another party, in order to protect the sublessee. Rolfe B had said in *Graham* v *Allsopp*[159] that the sublessor was bound to protect his tenant from paramount claims. Likewise, in *Jones* v *Morris*,[160] Pollock CB spoke of a landlord being bound to protect the party holding under him from claims by someone with title paramount. Tindal CJ thought a duty existed in *Hancock* v *Caffyn*.[161] Judge Lok in *Multi-Progress Ltd* v *Olympus Hong Kong and China Ltd*[162] said that the landlord "certainly owed a duty" to the tenant to make mortgage repayments. Such views cannot easily be reconciled with that of Vaughan Williams LJ in *Cohen* v *Tannar*[163] that the sublessor was under no duty to defend forfeiture proceedings brought by the superior lessor. The question is a simple one: ought the sublessor to be liable to the sublessee if the sublessor does not fulfil her obligations under the headlease, where this is the root cause of the sublessee being dispossessed, and has the effect of rendering worthless the grant the sublessor made? The question is essentially the same where the context is a lease made by a mortgagor. In that context, payment of what was due to the mortgagee was described by the court in *Multi-Progress Ltd* v *Olympus Hong Kong and China Ltd* as a fundamental obligation on the part of the lessor.[164]

Conclusion

Although the practice of creating leases on the sale of property has been curtailed by Article 30 of the Property (NI) Order 1997, the existing pyramid of titles made up of fee farm grants, leases and subleases will exist until such time as redemption of superior interests takes place. So long as the pyramid continues to exist, the risk exists for anyone in the pyramid holding under a sublease that a claim may be made by someone claiming a title paramount to that of the person who created the sublease. The same risk exists in cases where new subleases are made. Such a claim may be based simply on the ground that the term created by the headlease has come to an end by effluxion of time, or because the superior lessor has forfeited the headlease for non-payment of rent by the sublessor or breach by her of some other term of the headlease. The chances of a sublessee recovering against his lessor where the sublessee is evicted as a result of a claim by title paramount are slight. The weakness of the position of a sublessee at common law was noted by the Jenkins Committee in 1950[165] and again by the Law Commission in 1975,[166] with the fact that a claim by title paramount would not be a breach of the covenant for quiet enjoyment being seen by the Law Commission as giving rise to the worst defects in the existing law.[167] Eventually, the law in England was changed on the basis of the Law Commission's view

159 Above, p. 204.

160 (1849) 3 Ex 742, at 747.

161 Above, p. 220.

162 [2001] HKDC 150, at para. 13 of judgment.

163 Above, p. 213.

164 [2001] HKDC 150, at para. 13 of judgment.

165 Lord Jenkins, *Report of the Leasehold Committee* Cmd 7982 (London: HMSO 1950), para. 318.

166 Law Commission, *Report on Obligations of Landlords and Tenants* No 67 (1975).

167 Ibid, para. 46.

that lessees should enjoy the same protection in the form of implied covenants for title as grantees under other forms of assurance.[168] In Northern Ireland too, successive reviews have pointed out the problems.[169] For existing sublessees, success will depend, in the absence of a covenant that the sublessor will perform and observe the covenants in the headlease, on there being an unqualified covenant in the sublease for quiet enjoyment, but such is seldom likely to be the case, the usual covenant being one limiting the sublessor's liability to interruptions by the sublessor and persons claiming under or in trust for her. For those proposing to take a sublease, the die has not yet been cast. The desired result will be to obtain from the sublessor a covenant unqualified as to the persons for whom she will be liable, and (on a "belt and braces" approach) a covenant by the sublessor to perform and observe her covenants in the headlease. The means by which to achieve that result may, however, require some consideration. If the sublessor will agree to the sublease containing a covenant by her sufficient to render her liable if a superior lessor forfeits the headlease, well and good. The danger of course is that the sublessor's bargaining power is greater than that of the sublessee. An alternative tactic may be to say nothing: if the contract the parties enter into does not specify that the covenant for quiet enjoyment the sublease will contain will be a limited one, then the sublessee will be entitled to a covenant in accordance with s. 41 of Deasy's Act, which should render the sublessor liable if there is a claim by title paramount. What the sublessee must not do is to give up the protection an open contract will afford him by then accepting a sublease with a qualified covenant in place. For those intending to grant a sublease, the moral is equally clear: if what is intended is that liability will be restricted and the usual qualified covenant only entered into, this needs to be made clear in the contract, by annexing to the contract a draft of the sublease to be granted on completion.

168 Law Commission, *Transfer of Land: Implied covenants for title* No 199 (1991), para. 4.5; Law of Property (Miscellaneous Provisions) Act 1994.

169 See Queen's University Belfast Working Party, *Survey of the Land Law of Northern Ireland* (Belfast: QUB 1971), para. 302 ff; Land Law Working Group, Discussion Document No 3, *Landlord and Tenant* (1982), para. 3.4ff; Land Law Working Group, Final Report, *The Law of Property* (1990), para. 4.3.5.