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Lee

Drafting

NEGOTIATING, DRAFTING AND AMENDING COMMERCIAL LEASES

A. GENERAL

(a) Introduction

1. In the ideal situation the client (prospective landlord) would arrive in the Attorney's office with clear instructions on the full agreement reached between the parties regarding the letting of the commercial premises and request the Attorney to prepare a formal document embodying such agreement. However, more often than not, the Attorney receives incomplete instructions or is informed by his client that important matters pertaining to the letting were not discussed between the parties, much less agreed.

(b) Drafting

(i) The role of the Attorney

2. The Attorney therefore has the duty to ensure that the client has considered all the important issues, understands the consequences of the various options and to receive precise instructions from the client. Questions would cover, for example, the title to the premises, the area to be let, the landlord's fixtures, the shared facilities (if any), rights of access and plans for future development of the remainder of the land. The Attorney's role in the process of negotiating, drafting and amending the lease is a large one and if properly played can go a far way in speeding the completion of the lease.

(ii) Controlled Premises

3. An inquiry should also be made of the prospective landlord so as to ascertain whether the premises proposed to be leased are controlled premises or not (see Section 3(1)(e)(i) of the Rent Restriction Act) and fall within the ambit of that Act. This will affect especially the rent chargeable and the increase in rent (if any) from time to time.

(iii) The Initial Draft

4. The initial draft lease is usually prepared by the landlord's Attorney. It behoves the Attorney within the bounds of the landlord's instructions, to produce a detailed document that can be considered fair and reasonable to both parties. The landlord's Attorney may well be doing his client a disfavour by preparing a draft so heavily weighted in favour of the landlord that the prospective tenant walks away from the negotiations or, if not, the negotiations are affected by it and become "contentious" and more protracted than they should have been. It is advisable that the draft should be studied by the prospective landlord and fully discussed with the Attorney and if necessary, amended before dispatch to the tenant's Attorney.

5. Commercial activity by definition is active and dynamic. Businesses even when they are failing give rise to myriad issues. A lease of commercial premises even after completion will therefore be subject to constant and close scrutiny. One or both parties to commercial leases will more than likely be corporate entities rather than private individuals. The lease will be read and re-read during the term by the various officers of the company, the accountants, the property manager, the insurance brokers, attorneys and other advisers. The larger the development complex and the longer the term of the lease the more frequent will be the reference to the lease. In so far as is possible, the lease should be a comprehensive agreement which settles everything necessary between the parties and leaves nothing undecided or to be agreed.

6. The skill of the draftsman will be required to produce a document that is both "understood by its audience or readership"[1] and which sets out "clearly, unambiguously and as simply as possible the terms of the bargain struck between the parties".[2]

(iv) Some general guidelines

7. Murray J. Ross has catalogued a series of general guidelines that I can do no better than repeating here.

> "Drafting: what to do. It is suggested that leases can and should be drafted in normal English, rather than in the pompous, wordy, artificial style that conveyancers have often used. The modern draftsman should depart

from normal English only where there is a good reason, and should be aware that the reasons put forward (for example, the need to be unambiguous and comprehensive) will frequently be suspect. Although it may take some effort, the draftsman ought in most instances to be able to produce a clause in normal English that will be every bit as certain and comprehensive as its 'legal English' predecessor. Our landlord-clients, their tenants and both parties' successors will have cause to thank us for that effort, because it will produce leases that they will be able to read more quickly and understand more easily. Good drafting involves two sets of guidelines - those to be followed and those to be avoided. The good draftsman will decide what he is going to say before he begins drafting. He will use plain modern words in short, simply constructed sentences. He will state who does what, and will adopt the active rather than the passive voice, and whenever possible, the affirmative rather than the negative. He will gather sentences into clauses of manageable length and avoid long clauses by dividing them into several sub-clauses, or by introducing paragraphing. To avoid repetition and to create certainty he will use defined terms, and put into schedules material that otherwise would 'clutter' the document. He will present the document in a 'user friendly' way - for example, the provisions that deal with a particular topic will appear together, and the various topics will be set out in a logical order. The document will be complete. The clauses and sub-clauses will be well spaced, there will be a margin on all four sides of the page and each line will be of a sensible length. Every clause will have a heading and all but the simplest documents will have a list of contents. The number of each clause will appear in full and the numbering system will facilitate paragraphing. Punctuation will be used as an aid to reading but not as an aid to construction. Any cross-referencing will be correct, and there will be no pages or plans missing and no plans uncoloured."[3]

and

"Drafting: what not to do. The good draftsman will avoid all aspects of legalese - for example 'hereby' and 'thereby'; 'hereof' and 'hereto'; 'such' and 'the same'; 'said' and 'aforesaid'; the exaggerated use of 'any', 'each', 'every', and 'all'; unnecessary expressions (e.g. 'In consideration of...' or 'Subject to the terms of this Agreement...'); superfluous pairs (e.g. 'agreed and declared', 'execute and perform' and 'well and sufficiently'); circumlocations (e.g. 'in the event that' replaced by 'if' or 'shall be at liberty to', 'shall be entitled to' replaced by 'may'); Latin terms; and unnatural uses of the future tense. He will avoid technical language, 'buzz words' or jargon relating to the subject matter of the document. He will never change his language unless he wishes to change his meaning but will always change his language when he does wish to change his meaning."[4]

I wonder aloud how many practitioners have been following these guidelines.

(v) When does the term start?

It is of critical importance to know the exact date when the term begins as this will indicate when the term will end. Also various time provisions may hinge on the commencement date of the lease. The inquiry is often made whether the date expressed in the lease is included in the term. The general rule is that a term expressed to commence from a certain date commences from the first moment of the next day unless the contrary intention clearly appears from the document - Ladyman v Wirral Estate Ltd. [1968] 2 All ER 197.

(c) Amending

(i) Review by the tenant's Attorney

8. Once the tenant's Attorney receives the draft he should undertake a careful study of the document clause by clause noting as he goes along any matter he wishes clarified, amended, deleted or included. The tenant's Attorney should resist the temptation to amend for the sake of amendment or seek to redraft the document in his own style. It has been said[5] that there are only four good reasons for amending a draft document, viz,

(i) accuracy (to more accurately reflect the interest of the parties);

(ii) omission (to deal with a point omitted totally from the draft);

(iii) ambiguity (to remove a possible ambiguity); and

(iv) to make the document more favourable to the tenant (in a matter of detail not previously "agreed" between the parties).

9. The tenant's Attorney should try to avoid absolute covenants and to qualify them, where possible, by the use of such terms as "reasonable" or "use best endeavour". The effect of these amendments (where accepted) will generally mean that the tenant will not be in breach of his obligations in circumstances beyond his control. If possible, the landlord's right of access should be appropriately restricted. Also, where the landlord's permission is required then the qualification that it should not be unreasonably withheld or delayed is suggested. And

where the tenant has to comply with the terms of any document (for example, rules of the complex or an insurance policy) then provision must be made for same to be given to him by the landlord.

10. Once this review is complete the tenant's Attorney should discuss the lease with the tenant. However, depending on the results of the review and his relationship with the client the tenant's Attorney can choose to discuss the changes directly with the landlord's Attorney if the matters concern merely "legal" ones in order to save time and to speak to the client only if there are fundamental departures from his instructions as reflected in the document. In many instances and perhaps all too often tenants prefer to leave the finalisation of the lease to the Attorney.

(ii) The duty to the tenant

11. Despite this perception the tenant's Attorney should at some stage fully explain the provisions of the lease to his client and in particular any 'unusual or onerous' terms. After all it is the tenant who will have to fulfil the obligations and enjoy the benefit under the lease.

12. In Sykes v Midland Bank Executors [1970] 2 All ER 473, the sub-lease prevented the sub-tenants from changing the user of the leased premises without the permission of the superior lessors and such permission could be arbitrarily withheld. It was held that the sub-tenant's solicitors were negligent in not bringing this to the attention of the sub-tenant. Salmon L.J. said at page 477:

> "In my view, it is quite impossible to lay down any code setting out the duties of a solicitor when advising a client about a lease. A great deal depends on the facts of each particular case. A solicitor's duty is to use reasonable care and skill in giving such advice as the facts of the facts of the particular case demand."

Harman L.J. said at page 475:

> "When a solicitor is asked to advise on a leasehold title it is, in my judgment, his duty to call his client's attention to clauses in an unusual form which may, affect the interests of his client as he knows them."

Karminski L.J. was more expansive at page 481:

> "[the solicitor] should have expressly drawn to the Plaintiff's attention that the freeholder had an absolute right to refuse consent to a change of user. Clients rely on their solicitors to draw their attention to unusual clauses or dangers in conveyancing matters. This is so even if the clients concerned are experienced professional men, including architects and surveyors. The solicitor is consulted as an expert in conveyancing matters. Those in other professions have usually no knowledge or experience in this field; that is why they consult solicitors."

13. The additional advantage of fully explaining and involving the client in the negotiations is that oftentimes when issues between the respective attorneys become bogged down or positions appear to harden, the well-informed parties can discuss the matters between themselves and may resolve any differences more quickly.

14. It is advisable that the reasons for any suggested changes to the lease be indicated by the tenant's Attorney as this may also assist the parties in reaching a speedier compromise once the landlord's Attorney knows the reasons for the proposed amendments.

(d) Subsequent negotiations

15. After the proposed changes by the tenant are known, whether by return of the draft lease amended or by letter suggesting the changes, the landlord's Attorney will be able to assess how far apart the parties are and, whether in those rare cases, it makes sense to go on with the negotiations. Usually however the landlord's Attorney will be able to amend the lease and return it to the tenant's Attorney or to respond to the tenant Attorney's letter. At this juncture or even on receipt of the tenant's amendments a meeting of all the parties might prove useful. If the client is a corporate one, it is suggested that a senior officer or officers attend. Binding decisions can be taken immediately and time saved in not having to seek authorizations for decisions. Also, the face to face interaction between the parties with the opportunity to explain more fully may speed finalisation of an agreement.

16. Hopefully the negotiation drafting and amending process will proceed with expedition to a satisfactory conclusion. Much will depend on the reasonableness of the

parties and their willingness to compromise. In the end an important factor will be the relative strength of the parties as rarely will the parties be evenly balanced. If there is great demand for the premises to be leased, the landlord may be able to take a more inflexible position while if the premises have been empty for a while, the landlord may be willing to be more amenable to the tenant's proposals.

B. SOME SPECIFIC PROVISIONS

(a) Description of the leased premises

17. It goes without saying that great care should be taken to ensure that the premises to be leased should be described with absolute certainty and accuracy. This usually presents no problem in a stand alone building with its own certificate of title. In multi user premises (shopping plazas, office complexes and industrial estates) the problems can arise and where part of a floor or building is being leased, the task can become very complicated.

18. The ready solution is to have a proper and detailed plan prepared of the leased premises by a surveyor which is attached to the lease and initialled by the parties for identification. In this way there can be little dispute as to the exact dimensions and area of the leased premises.

19. The Attorney should also examine the relevant duplicate Certificate of Title or a copy thereof to confirm that the title description and volume and folio numbers are correct, the parties are the correct ones and properly described, the endorsed restrictive covenants do not prevent the user of the premises for the purpose intended and whether any consents to lease are required to be obtained from mortgagees.

20. It should be noted that in the absence of a provision to the contrary the lease of a part of a building described horizontally or vertically includes the external walls of the part so demised - Hope Bros. Ltd. v Cowan [1913] 2 Ch 312 and Goldfoot v Welsh [1914] 1 Ch 213.

21. This position would be different from the lease of a strata lot where the boundaries are the centre of the floor, walls or ceiling between the strata lots or between a

strata lot and common property. Section 7(3) of the Registration (Strata Titles) Act.

22. The Attorney should be especially put on notice when a part only of a building is being leased that there may be the need to make the necessary exceptions and reservations and include the necessary regrants in the lease. Such rights should be expressly set out in the lease so that there can be no doubt regarding their existence. These would include rights of way, right to park, right through conducting media (water, electricity, sewage and telephone and television service), right of light and air, right to develop adjoining land and right to use common toilets.

23. The tenant's Attorney will usually try to restrict the rights of access by the landlord to reasonable hours of the day and after reasonable notice to the tenant.

(b) Interest on the late payment of rent

24. Care should be taken in fixing the rate of interest so as not to impose on the tenant a penalty instead of just liquidated damages for his breach of the covenant to pay rent. Dunlop Pneumatic Tyre Company Ltd. v New Garage and Motor Co. Ltd. [1915] AC 79.

(c) Service charge

25. The payment of a service or maintenance charge by the tenants is one of the ways in which the landlord ensures that no part of the rent is used in the upkeep of the leased premises as the tenants bear the responsibility to reimburse the landlord for such expenditure. These "clear leases" were described by Lord Wilberforce as -

> "leases in which the tenants bear all the costs and risk of repairing, maintaining and running the building of which their demised premises form a part so that the rent payable reaches the landlord clear of all expenses and overheads". O'May v City of London Rent Property Co. Ltd. [1982] 1 All ER 660, 671.

25. Clear leases have become the norm in modern commercial lettings. The draftsman needs to consider the list of services and charges to be covered by the service

charge, how often it is to be paid and how it is to be divided among the various tenants.

27. As regards the latter it is usual to apportion the service charge on a fixed percentage basis rather than leaving it to the landlord or his expert to exercise discretion in dividing same on "a fair proportion basis". While this method ("a fair proportion basis") has flexibility in that it allows for the tenant who uses a particular service more to bear a greater proportion of the expenditure connected with it, tenants tend to be quite suspicious of leaving the apportionment to the landlord's expert. The fixed percentage is usually based on the floor area, that is, the proportion which the floor area of the leased premises bears to the entire lettable area in the building.

28. The practice is for the landlord to adjust and reconcile annually the regular service charge payments with the actual expenditure incurred by him with respect to the building or complex on the production of the audited accounts.

(d) Guarantors

29. Where the landlord is unsure about the financial position of the tenant or where the tenant is a corporate entity (especially with a nominal share capital) consideration should be given to having third parties guarantee the tenant's obligation under the lease. This gives the landlord additional safeguard should the tenant experience financial difficulties or go into liquidation/ bankruptcy.

30. It should be borne in mind however that the landlord owes a duty of care to the guarantor to take reasonable steps against the tenant if he breaches any terms of the lease and not to act in a haphazard or inconclusive way towards the tenant as this may endanger the landlord's rights against the guarantor.

31. In Standard Chartered Bank Ltd. v Walker and another [1982] 3 All ER 938 A bank made a loan to a company secured by a debenture and guaranteed by two of the company's directors. The bank later appointed a receiver for the Company under the debenture. The receiver disposed

of the assets of the Company at considerably less than its real value and the sum realised was barely sufficient to cover the costs of realisation. The bank sued the guarantors on their guarantee. It was held that the duty of care owed by a receiver of a company under a debenture in disposing of a company's assets was owed not only to the company but also to the guarantor of the company's liability under the debenture.

> "Clearly the guarantor's liability is dependent on the company's. He is in a special position. The amount of his liability depends entirely on the amount that the stock realises when sold with proper care. To my mind he is well within the test of 'proximity'. The receiver owes a duty not only to the company, but to the guarantor to exercise reasonable care in the disposal of the assets" per Lord Denning M.R.[10]

(c) Insurance

32. The usual practice is for the landlord to assume the obligation to insure. In this way the landlord ensures the protection of his capital investment and fulfils the obligation to his mortgagee. Notwithstanding this obligation by the landlord, it is the tenant who usually pays the premium under today's "clear or net leases". Areas to be considered for inclusion in the insurance clauses include -

(a) the sum insured;

(b) the risks to be covered;

(c) what happens on the damage or destruction of the leased premises by an insured risk.

33. The tenant's Attorney should then review the risks against which the landlord has covenanted to insure together with the repairing covenant and proviso for suspension of rent if the leased premises become unfit for use. The tenant's Attorney should note that the tenant's obligation to repair should exclude liability to repair damage caused by an insured risk. Also where the landlord does not covenant to insure against all reasonable foreseeable risks but only say "fire and such other risks as the landlord may deem fit" then the tenant will be liable under the repairing covenant for damage caused by other perils as hurricane, flood, storm etc.

34. Where the proviso for cesser of rent operates only when damage is caused by an insured risk, the tenant will be liable to pay rent if the premises are rendered unfit for use by a risk which the landlord has not insured. The tenant's Attorney should either seek an amendment to widen the risks to be covered (and obtaining protection under the repairing covenant and the cesser of rent proviso) or the tenant takes out insurance in respect of any liability to repair damage arising from any risk left uninsured by the landlord and any liability to pay rent during the time he is unable to occupy the leased premises.

(f) Rent Review

35. "A rent review clause is designed to deal with a particular commercial problem, namely, that of a tenant who wants security of tenure for a lengthy term and the landlord who in times of inflation or a rapidly changing property market does not want to commit himself to a fixed rent for the whole of that term" MFI Properties Limited v BICC Group Pension Trust Ltd. 1986 1 All ER 974 per Hoffman J at 975.

36. Complex forms of rent review are found in long leases of twenty five years and up-wards involving various "assumptions", "disregards", "valuation method", the third party (arbitrator or expert) and the review procedure itself. This is usually a time consuming process and tends to be costly.

37. Other approaches to rent review include -

(a) Shorter term leases of say 3-5 years with fixed percentage increases at the commencement of each year;

(b) Premium Rents where the parties agree to a fixed rent for the entire term which will result in the tenant paying an initially higher rent in the early years of the lease to compensate the landlord for his "loss" in the later years. The following example demonstrates -

	Annual Rent	Premium Rent
Year 1	$1,000	$1,200
Year II	$1,100	$1,200
Year III	$1,200	$1,200
Year IV	$1,300	$1,200
Year V	$1,400	$1,200
	$6,000	$6,000

(c) Index-linked rents which ties the increases in rent to, say, the movements in the cost of living index. This will not necessarily reflect the market rent for the premises but it will ensure that rent increases are kept in line with general inflation.

38. In any event the landlord's Attorney usually ensures that on any rent review, the new rent does not fall below the existing rent, that is, the rent can only be reviewed upwards.

(g) Proviso for Re-entry

39. It is usual to insert in leases an express proviso for re-entry by the landlord and forfeiture in the event of a breach of the covenant to pay rent (whether formally demanded or not) or a failure by the tenant observe the other covenants. Indeed under Section 96(b) of the Registration of Titles Act this right of re-entry is one of the implied powers of the landlord. These provisions give the landlord the right to make an actual entry to work the forfeiture or to sue for recovery of possession instead of making a re-entry. It is the service and not the issue of the writ which is equivalent to re-entry and effects a forfeiture and the lease is determined from the date of service. Canas Property Co. Ltd. v. K L Television Services Ltd. [1970] 2 All ER 795.

40. Historically the tenant was entitled to petition the old Court of Chancery for relief from forfeiture for non payment of rent. In England the position has been codified and extended by statute. It is submitted that the "pre statutory" position still is in effect in Jamaica so that equity will relieve a tenant against forfeiture for non payment of rent but as a general rule not in other cases, Barrow v Isaacs & Son [1891] 1 Q.B. 417.

41. Accordingly, the proviso for re-entry and forfeiture in a lease provides another remedy in the landlord's arsenal. This is of course subject to the leased premises not being controlled premises under the Rent Restriction Act and therefore subject to Section 27 which

prohibits the eviction of a tenant without an order or judgment of a competent Court.

(h) Security Deposit

42. Another device used by landlord to minimise the consequences of a breach of the covenants by tenant is the taking of a sum of money (usually equivalent to one, two or three months' rent) as a security deposit. This sum is held by the landlord in escrow to remedy or assist in remedying the non performance by the tenant of any provisions of the lease and is refundable, to the extent unused, at the termination of the tenancy.

43. Under section 24(1) of the Rent Restriction Act "no person shall as a condition of the grant renewal or continuance of a tenancy of any controlled premises ... require the payment of any fine, premium or other like sum, or the giving of any consideration in addition to rent... ".

44. The words "fine" and "premium" are not defined in the Act. The Dictionary of English Law has this to say with respect to the definition of "premium":

> "In granting a lease, part of the rent is sometimes capitalised and paid in a lump sum at the time the lease is granted. This called a fine or premium."

45. In R v. Ewing (1977) 65 Cr. App. R 4 the English Court of Appeal had to consider the meaning of Sections 85(1) and 92(1) of the English Rent Act. Section 85(1) reads as follows:

> "Any person who, as a condition of the grant renewal or continuance of a protected tenancy, requires, in addition to rent, the payment of any premium or the making of any loan (whether secured or unsecured) shall be guilty of an offence under this section..."

and Section 92(1) of the same Act reads:

> "In this part of the Act unless the context otherwise requires ... 'premium' includes any fine or other like sum or any other pecuniary consideration in addition to rent ...."

46. The appellant had been convicted of obtaining a pecuniary advantage (i.e. the evasion of a debt) by deception contrary to Section 16(2) of the Theft Act in that he had paid the rent and security deposit to the landlord by cheque in a false name which he later stopped there being no money in the account on which the cheque was drawn. It was

argued on his behalf that the returnable deposit was an unlawful premium under Sections 85 and 92(1) of the Rent Act and was therefore an unlawful payment and could not constitute a debt or charge within Section 16(2) of the Theft Act.

Lawson J said:

> "In our judgment the payment of the returnable deposit, as it is described in the agreement, was not a premium. It was not either a fine or other like sum and it was not 'any other pecuniary consideration in addition to rent'. It was what it was specified to be, that is to say, a deposit as against the tenant's obligation to pay various accounts such as electricity, telephone and service accounts and other matters in respect of any dilapidations, bearing mind that this was a furnished tenancy."

Accordingly the appeal was dismissed.

47. This case is authority for saying that the demand of a refundable security deposit need not be contrary to Section 24(1) of the Rent Restriction Act. However, it does not say that a deposit can never be a fine, premium, etc.

48. It is submitted that if the amount demanded of the tenant was so excessive in relation to the matters it sought to secure as to be unreasonable, then it may well fall for consideration as to whether such a penal sum is not caught by Section 24(1) of the Act. Indeed, the Court of appeal itself in Ewing referred to this. The weekly rental demanded of Ewing was £12.00 per week (or £48.00 per month) and the deposit was £48.00.

(i) To comply with statute

49. Many leases contain a provision whereby the tenant is obliged to observe and comply with the requirements of any statutory enactment, order, regulation and bye law under or pursuant to the Town and Country Planning Act, Local Improvements Act and any similar or related legislation. The tenant should be made aware of the full effect of such a provision. In these times of disaster preparedness and environmental concern the tenant could well find installation of required equipment and/or modification of existing works a costly exercise. The tenant's Attorney should ensure that any such obligations to be assumed by the

tenant are reasonable and relate to the tenant's user of the premises.

(j) Break clause

50. A "break clause" in the lease gives an option either to the landlord or the tenant or both to determine the lease usually after giving a period of notice which may or may not be conditional on the happening of some event. Where the leased premises are controlled premises under the Rent Restriction Act it would appear that Section 27 would apply with the consequences discussed at paragraphs 60 to 67.

C. SOME STATUTORY CONSIDERATIONS

(a) The Registration of Titles Act

(i) Effect of registration

51. For land under the Registration of Titles Act, the effect of registration of the lease is to afford the lease the protection and benefit of that statute and to create a legal interest in land. Under Section 94 of the Registration of Titles Act -

> "Any freehold land under the operation of this Act may be leased for any term not being less than one year by the execution of a lease thereof in the form in the Sixth Schedule, and the registration of such lease under this Act ..."

52. It has long been decided Crowley v Templeton (1914) 17 C.L.R. 457, a case in the High Court of Australia on appeal from the Supreme Court of Victoria, that although the words "may be" are permissive or facultative in form they are, in fact, peremptory and exclusive in effect.

53. Accordingly, any lease for a period of 1 year or more which is not registered does not create a legal estate in favour of the tenant. The tenant would not enjoy the protection of the Act. This is clearly seen from Section 63 of the Registration of Titles Act which runs as follows:

> "When land has been brought under the operation of this Act, no instrument until registered in manner herein provided shall be effectual to pass any estate or interest in such land, or to render such land liable to any mortgage or charge, but upon such registration the estate or interest comprised in the instrument shall pass or, as the case may be, the land shall become liable in manner and subject to the covenants and

> conditions set forth and specified in the instrument or by this Act declared to be implied in instruments of like nature..."

54. It appears therefore that such an unregistered lease would create only an equitable interest in the land and not be binding on the registered proprietor for the time being except his own landlord.[6] Of course, as the general law of leases, not being inconsistent with the Torrens enactments, will be applicable to leases of land under the Torrens system.[7]

55. The tenant may lodge a caveat against his landlord's title to protect his equitable leasehold interest.

(ii) Short-term leases

56. There is a special problem with leases for a term not exceeding 1 year (short term leases). The Registration of Titles Act makes no mention as to their validity and/or registrability. Three positions have been identified. Firstly, such leases may be absolutely void conferring no interests or rights at all; or secondly they may be valid as between the parties and as against other persons taking the land with notice but liable to be defeated by a bona fide purchaser without notice; or thirdly they may be valid as registered estate binding on all successive owners of the land.[8]

57. While in all the Australian States and New Zealand statutory amendments have been made to correct this situation, the position has not been statutorily addressed in Jamaica.

(iii) Inconsistency in Provisions

The situation is compounded in our jurisdiction by the paramountcy provision (Section 70) of the Registration of Titles Act, the proviso (which limits the indefeasibility principle) to which reads -

> "Provided always that the land which shall be included in any certificate of title or registered instrument shall be deemed to be subject to ... the interests of any tenant of the land for a term not exceeding three years notwithstanding the same

> may not be specifically notified as encumbrances in such certificate or instrument."

58. This anomaly in the number of years in Sections 94 and 70 and the problems mentioned in paragraph 56 above will have to be resolved by the legislature.

(b) The Rent Restriction Act

(i) Termination of a lease

59. A lease for a fixed term of years (as most commercial leases are) is terminated by effluxion of time. At common law the tenancy is automatically terminated at the end of the agreed term without the necessity for a notice to quit. This position has been so modified in recent times that one writer has commented that "there are comparatively few cases in which effluxion of time has its normal effect."[9]

(ii) Statutory tenancy

60. Section 27 of the Rent Restriction Act provides for the protection of the tenant of controlled premises by requiring an order or judgment of a Court as a prerequisite for the recovery of possession of the leased premises as follows:

> "Except under an order or judgment of a competent court for the recovery of possession of any controlled premises, no person shall forcibly remove the tenant from these premises or do any act, whether in relation to the premises or otherwise, calculated to interfere with the quiet enjoyment of the premises by the tenant or to compel him to deliver up possession of the premises."

61. The tenant who holds over after the expiry of the fixed term becomes a "statutory" tenant and pursuant to Section 28(1) of the Rent Restriction Act "so long as he retains possession shall observe and be entitled whether as against the landlord or otherwise to the benefit of all the terms and conditions of the original contract of tenancy, so far as the same are consistent with the provisions of the Act."

62. The Privy Council confirmed this in Crampad International Marketing Company Limited and Clover Brown v. Val Benjamin Thomas on appeal from Jamaica as follows:

> "At the date of hearing before the judge the contractual term had expired and the question then arises what was the status of the appellants at that date? The judge held that they were entitled to remain as statutory tenants and that was also the view expressed by Carberry J.A. in his dissenting judgment. In their Lordships' opinion, this was correct. As already mentioned, the Jamaican Act is so different in its scope from the United Kingdom statute that there is no compulsive reason for restricting the statutory protection against eviction within the limits which have been applied by the English Court of Appeal in Skinner v. Geany [1933] 2 K.B. 266. The term "statutory tenancy" is merely a convenient label for describing the status of the tenant whose contractual right to remain has determined but who remains in possession on reliance upon the restrictions contained in the Act upon the landlord's ability to resume possession. The framework of the Jamaican legislation precludes the argument that the corporate or other non-resident tenant cannot be a statutory tenant."

(iii) Procedure for Recovery

63. The landlord can then decide whether to proceed to recover the premises under Section 25 (by serving a one month notice) or under Section 26 (by serving a 12 month notice in respect of commercial premises) as the Court of Appeal decided in Marcus Dabdoub t/a Marc's v Eli Saba and Carole Saba R.M.C.A. No. 13/89 that both these sections of the Act are independent of each other.

64. Even if it could be argued that there is no requirement for service of a notice to quit on the tenant on the expiry of a fixed term, but rather court proceedings could be immediately commenced the landlord would still have the task of satisfying the Court in respect of one of the grounds or reasons set out in Section 25(1) of the Act.

65. The better view (although it is disadvantageous to the landlord but not the business tenant) is that a notice to quit is required in all commercial leases and depending on whether the landlord has a valid Section 25 reason the tenant could end up with an additional year (or more if he serves a counter notice) to his fixed term.

66. In event this is an incorrect view, and no notice to quit is initially required, the prudent draftsman would omit from the lease any provision which created a monthly

tenancy in favour of the tenant who holds over after the expiry of the fixed term lest its presence prejudice the landlord.

67. It is not legally possible to include a Section 26 notice to quit in the lease as the Act requires the notice to be given "in the case of premises leased to the tenant for a fixed term of years not more than twelve months before the date of expiration of the lease". Section 26(2)(b).

JEROME LEE
30TH NOVEMBER, 1990

NOTES

1. Murray J. Ross - Drafting and Negotiating Commercial Leases (3rd Ed.), page 1.

2. Ibid page 1.

3. Ibid, page 2.

4. Ibid, page 4.

5. Ibid page 13.

6. James Edward Hogg - Registration of Title to Land throughout the British Empire.

7. E. A. Francis, The Law and Practice relating to Torrens Title in Australasia (volume 1) page 274 and Section 2 of the Registration of Titles Act.

8. Ibid.

9. E. H. Burn-Cheshire's Modern Law of Real Property (11th Ed.) page 451.