COMMENT

Landlords' Legal Limits on Eviction

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It has often been said that the law of landlord and tenant in Western Australia is obscure. One reason may be that there is no comprehensive enactment on the subject; and as other jurisdictions amend their law, cases from those jurisdictions become of doubtful relevance in this State. An effect is that on some specific points, varying advice has been offered.

The comment which follows is taken from work in progress on landlord and tenant law in Western Australia and relates to one point on which there seems to be some confusion.

The basic common law rule relating to the eviction of tenants can be baldly stated: Once the term of a lease is ended, the land is no longer subject to the lease; the tenant becomes a trespasser; and the landlord may use reasonable force to remove tenant and belongings.[1] There are qualifications to that rule but nothing which completely abrogates it. The more important of these are as follows:

(1) The requirement that the lease be ended — that termination has been effected — sets significant practical limitations on the landlord's power to evict. It is not intended here to treat this extensively, but some requirements related to termination are: formalities required on terminating a periodic tenancy such as the period of notice which must be given;[2] by notice provisions of section 81 of the *Property Law Act 1969* (W.A.) which make the service of a notice (giving the tenant the opportunity to remedy or compensate the landlord for a breach of covenant other than the covenant to pay rent) a precondition for the enforcement of a right of re-entry or forfeiture; and, where termination is effected by re-entry,

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1 See Hemmings v. Stoke Poges Golf Club [1920] 1 KB 720; Housing Commission of N.S.W. v Allen (1967) 86 W.N. (N.S.W.) (Pt 2) 204; Cavendish Investments v. Steel unreported decision Supreme Court of W.A. 8/11/79. 10404/79 Unless otherwise indicated the following discussion focuses upon the position under Western Australian law.

2. See Woodfall *Landlord & Tenant* 1-1971 et seq.

the possibility that an act relied on by the landlord as re-entry may not, in law, effect a re-entry.[3]

(2) The right of a tenant to relief against forfeiture may, in appropriate circumstances, effectively restrict a landlord's power to recover possession. In the case of forfeiture for non-payment of rent, these rights are based on principles developed by Equity, which, in regarding the right of re-entry as security for the payment of rent, will grant relief against the exercise of that right where the tenant pays all arrears of rent and landlord's costs. The procedure is still governed by the *Common Law Procedure Act 1852* (U.K.) although in the case of forfeiture for breach of other covenants, the right to relief is based on section 81 of the *Property Law Act 1969* (W.A.).

(3) Criminal sanctions imposed in relation to the use of force to recover possession of land are of little real effect in restricting the landlord's right to evict tenants.[4] The governing provision is section 69 of the *Criminal Code 1913* (W.A.) which reads:

> 69. Any person who, in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, enters on land which is in the actual and peaceable possession of another is guilty of a misdemeanour, and is liable to imprisonment for one year.
>
> It is immaterial whether he is entitled to enter on the land or not.

A companion section, section 70 of the *Code* makes it a misdemeanour forcibly to keep possession of land:

> 70. Any person who, being in actual possession of land without colour of right holds possession of it in a manner likely to cause a breach of the peace or reasonable apprehension of a breach of the peace, against a person entitled by law to the possession of the land, is guilty of a misdemeanour, and is liable to imprisonment for one year.

It has not been possible to discover if any prosecutions have been brought against landlords or tenants under these sections, but it would

3 See Woodfall, supra n.2 at 1-1857, citing as authority Relvok Properties v. Dixon (1973) 25 P. & C.R. 1. Landlord who entered merely to secure the premises after a tenant had defaulted in paying rent and had absconded, had not effected a re-entry. Actual physical (or 'peaceable') re-entry is not the only means of re-entry. Others include the issue and service of proceedings for the recovery of possession, or the re-letting of the premises to a subtenant of the present tenant.

4. Compare Butt et al. *Cases and Materials on Real Property* (1980) at 627: "If the lessor chooses to physically re-enter, he should take care not to breach the modern equivalents of the Forcible Entry Acts of 1381, 1391 and 1429" There is no suggestion that there is great risk of a landlord's being prosecuted.

be surprising if there had been many. In England, it has been with squatters that recent reported cases on the Statutes of Forcible Entry (the predecessors of these sections) have been concerned.[5]

Section 69 applies only where there is a person in "actual and peaceable possession" which, even allowing for the chameleon-like nature of the concept of 'possession', seems to allow a landlord to enter a house which is (even if only temporarily) vacant. This is more restricted in scope than the Statutes of Forcible Entry, which, it seems, make it an offence forcibly to enter unoccupied premises. However, the vast majority of reported cases concern occupied premises.[6]

Breach of this provision by a landlord does not thereby affect his civil liability. This needs some qualification. Should a landlord use 'reasonable' force to remove a tenant then, even if the landlord is thereby guilty of forcible entry, the tenant has no civil remedy.[7] However the use of 'excessive' force cannot be justified by the trespass of the tenant, and a civil remedy would then be available. It seems that the remedy would be an action in assault or, in relation to excessive force in removing goods, conversion. It is possible that the tenant may also have an action against the landlord in trespass, on the basis that the use of excessive force makes the entry unlawful and so not able to be relied on as re-entry terminating the lease. This argument could only be offered where termination was to be effected by physical re-entry and not where the term had already ended by notice, or expiry of fixed term lease, or re-entry by issue and service of a writ of possession.

(4) In Western Australia, as in some other states, the remedy of distress for rent has been abolished.[8] This common law remedy entitled the landlord to enter the premises and impound as much of the tenant's chattels as was reasonably necessary to cover arrears of rent and expenses. The exercise of this remedy was highly contentious.[9] The battle has moved to the main substitute for distress, the tenancy bond.

(5) Where the landlord re-enters and terminates the tenancy, the question may arise as to rights in relation to the tenant's goods on the premises. A clear answer cannot be given. Should the landlord be classed as a gratuitous bailee, then the he will be liable for loss or damage caused by gross neglect and will be liable in conversion for disposing of the goods unless the circumstances raise the defence of necessity (such as where the

5. See, e.g., R. v. Robinson [1970] 3 All E.R. 369.
6 See Scott, "Forcible Entry and Detainer" in (1971) 35 Conv. 243.
7. Supra n. 2.
8. Distress for Rent Abolition Act 1936 (W.A.) s.2.
9. See D. Englander, *Landlord and Tenant in Urban Britain 1838-1918* (1983).

goods are deteriorating, but not merely because they are an inconvenience).

If, however, the landlord is classed as an involuntary bailee then there is no liability for damage caused by negligence, (as distinct from wilful damage). In this case — but not in the case of gratuitous bailment — it seems that the removal of the tenant's goods, and the leaving of them outside would not render the landlord liable to compensate the tenant for damage to the goods.

It seems that in Western Australia advice most commonly given in this situation is based on the view that the landlord is an involuntary bailee. However, it is arguable that the relationship of landlord and tenant has implicit in it the necessary consent to the bailment, making the landlord a gratuitous bailee, and so subject to the higher standard of duty.

There are no other substantial legal restrictions on the landlord's right to evict a tenant. Once the lease has been terminated the landlord can exercise rights as owner without further formality: he may change the locks, turn off gas and electricity, remove the tenant's goods, and remove the tenant by reasonable force if necessary.

There is no statutory prohibition on the use of self help by a landlord in evicting a tenant. Thus the landlord is not obliged to get the order of a court for possession, although if the landlord elects to take curial proceedings to obtain possession the right to re-enter peaceably may be lost.[10]

Why these 'rules' of property law are as they are is a more general question requiring a consideration of quite different issues.[11]

10. Argyle Art Centre Pty Ltd v. Argyle Bond & Free Stores Co. Pty. Ltd [1976] 1 N.S.W.L.R. 377.
11. See, e.g., Tapper, 'Landlords "Making Entry With Strong Hand": Legal Limits on Eviction' (unpublished paper delivered to Law and Society Conference, August 1983). I hope further to pursue these issues at a later date.