# THE HARROWING EFFECTS OF THE UNLIMITED CONTINUING LIABILITY OF ORIGINAL LESSEES AFTER EXHAUSTION OF FURTHER INTERESTS IN LEASEHOLD TRANSACTIONS*

**Abstract**
*This research aimed at identifying the significance of the principle of privity of contract as a tool for preserving covenants and/or obligations in real property transactions. It was established in the nineteenth century and makes the original parties to the agreement bound by any covenant made for the duration of the period of the contract. The object of this research challenged the continuing liability of the original lessee/tenant where he remains bound by any covenant made for the duration of the contract period. The methodology adopted is doctrinal with primary and secondary sources on law aided by international treaties, textbooks, journal articles, newspapers and online materials. The paper appraised the nature, scope and the application of the principle of privity of contract in a tenancy leasehold relationship and distinguished between the principle of privity of contract and the principle of privity of estate. It assessed the obligations of the original parties under the lease agreement after an assignment of the lease by the lessee or the assignment of the reversion by the lessor and goes further to examine the rationale/justification for the application of the principle. This work evaluated quite extensively the basis for enforcement of covenants in tenancy/leases, the effects of the principle, the remedies open to the parties and the limitations to its application. The discourse also considered ways by which the original lessee can limit, exclude or evade the liability and finally made recommendations, the need for reforms in Nigeria in the context of the modern concept of tenancy and in the light of recent developments in some common law jurisdictions.*

**Keywords:** Privity, Lease, Lessee, Lessor, Covenants, Leasehold, Assignment, Reversion.

## 1. Introduction

The principle of Privity of Contract is a common law principle that applies in many common law jurisdictions. It stipulates that a contract cannot confer rights or impose obligations upon any person who is not a party to the contract. The principle makes the original parties to the contract bound by any form of covenant thereunder for the duration of the term created by the lease in accordance with the law of contract. Privity of contract in relation to leases is that a lessor or lessee who covenants to be bound by obligations in a lease for the duration of the term created by the lease remains liable for breach of covenant which occurs after he has disposed of his interest in the leasehold property.[1] In modern leases, the relationship between the lessor and the lessee is one of contract which confers on the lessee an estate in land without losing its contractual characteristics. The lessee becomes an owner of the estate for the duration of the term and parties are thus, parties to a contract and parties to the grant of an estate.[2] Upon assignment of the interest or reversion, though there is no privity of contract between the original parties to the lease and an assignee either of the lease or of the reversion, the assignee can still enforce certain covenants touching and concerning the subject matter of the lease. The common law principle has been given statutory recognition in some states in Nigeria with very slim remedies open to the parties. The effect, especially on lessee's liabilities is drastic and far- reaching.[3]

## 2. Nature and Scope of the Principle of Privity of Contract

The privity of contract principle in relation to leases is that a lessor or lessee who covenants to be bound by obligations in a lease for the duration of the term created by the lease remains liable for breach of covenant which occurs after he has disposed of his interest in the leasehold property.[4] This anachronistic and unjust principle of the common law applies in all cases where there is an assignment of the lease by the lessee or the reversion by the landlord notwithstanding that in such cases, the assignor has transferred the totality of his interest to the assignee over whom he has neither control as regards observance of the covenants nor the opportunity of him rejecting the financially unsound. An assignment occurs where the lessee's interest under

***By Vivian Chinelo ARINZE, LL.M, B.L,** Lecturer, Department of Commercial and Property Law, Faculty of Law, Nnamdi Azikiwe University, Awka, Nigeria. Email: arinzevivian7@gmail.com, vc.arinze@unizik.edu.ng.; and
***Ezinne Olivia ONWUGBENU, LLM, BL**, Lecturer, Department of International Law and Jurisprudence, Faculty of Law, Nnamdi Azikiwe University, Awka, Nigeria. Email: oliviaonwugbenu@gmail.com, eo.onwugbenu@unizik.edu.ng

[1] Smith, Imran Oluwole, 'Landlord and Tenant Law in Nigeria' (Ecowatch Publications Limited, 2018) at page 186.
[2] *Nnodi v Thanks Investment Lt*d. (2005) 3 FWLR (Pt. 272) at 535-536.
[3] Rivers State Landlord and Tenant Edict No. 4, 1988, s.91(3) & 4; Kaduna State Landlord and Tenant Edict, s. 95(3) & (4).
[4] Rushdens Case (1533) 1 Dy, 4; 73 E.R. 10; Walker's Case (1587) 3 Co. Rep 22; 76 E.R. 67; and *Thursby v. Plant* (1668) I Wins. Sound 230; 85 E.R. 254. Cited in I.O. Smith, op cit.

the lease is transferred absolutely to another person known as the assignee. The lessee disposes of the residue of his term of years in favour of the assignee/purchaser. The effect of the assignment is that the assignee steps into the shoes of the assignor/the original lessee and becomes the new lessee under the lease, he is entitled to the estate in the subject matter of the lease, thus, privity of estate exists between the assignee and the lessor, however, he is not contractually liable. The assignor/original lessor remains contractually liable in respect of post assignment breaches of covenants by the assignee. It was *held* in *City & Metropolitan Properties Ltd v Greycroft Ltd,* that the original landlord remained liable to the original tenant based on his covenants in the lease despite an assignment of the leasehold interest.[5]

Although the principle is designed to operate between the two original parties to the lease (the lessor and lessee) it has served the interest of the landlord mainly; always working to the detriment of the tenant in cases where the assignee of the lease is either insolvent and unable to pay his rent or otherwise failed to perform some other obligations under the lease. In the words of Lord Nicholls in the English case of *Hind castle Ltd v Babara Attenborough Associates Ltd.*

> Sometimes, in post assignment cases, protection may be achieved at an unreasonable high price to others. The insolvency may occur many years after the lease was granted, long after the original tenant parted with his interest in the lease. He paid the rent until he left, and then took on the responsibility of other premises. A person of modest means is understandably shocked when out of the blues. He receives a rent demand from the landlord of the property he once leased. Unlike the landlord, he has no control over the identity of the assignees down the lines. He had no opportunity to reject them as financially unsound. He is even more horrified when he discovers that the rent demanded exceeds the current rental value of the property.[6]

The liability of the original tenant is not that of a guarantor arising after another unsuccessful pursuit of claim against the assignees; it is a primary liability directly falling on the tenant whenever the assignee defaults. The original lessee remains directly and primarily liable to the lessor for the whole of the term. He cannot demand that the lessor first exhaust his remedies against the defaulter, or complain that the lessor should have refused consent to the assignment to such a tenant.[7]

**Effect of Post-Assignment Variation**

Under the principle of privity of contract, liability of former lessee for future liabilities continues for the duration of the lease. For the purpose of this article, the original lessee will be termed 'T1', and subsequent assignees of the lease 'T2', 'T3' and so forth. The original lessor will be referred to as 'L1', and assignees of the reversion 'L2', 'L3' and such. For example, T1 has a ten-year lease in January 1, 2000, assigned the remainder of the term to T2 in 2005, T1 remains liable for any arrears of rent or breach of any other covenant in the headlease until and inclusive of December 31, 2010. This is so notwithstanding that the assignee i.e. T2 subsequently assigned to T3, T3 to T4 and so on. The liability may also arise in relation to any assignee in the chain and need not particularly be related to T2; the only assignee known to T1. Where the headlease conferred an option to enlarge the term on T1, and the latter never exercised the option before assigning to T2, T1 nonetheless liable for the enlarged term where T2 or any subsequent assignee exercised the option and against, it is immaterial that any such assignee is unknown to the former lessee.[8] This principle was given judicial imprimatur in *Bayton v. Morgan*,[9] where the court held that a bonafide post assignment variation leading to the alteration of the lease would bind the original lessee, notwithstanding that the variation resulted from the agreement between the lessor and the assignee of the lease. However, in the subsequent decision of the Court of Appeal in *Friends Provident Life Office v. British Railway Board,*[10] it questioned the correctness of *Controvincial Estate Plc v. Bulkstorage Ltd and Selous Street Properties Ltd v. Oronel Fabrics Ltd.* It emphasized on the vulnerability of the original tenant to an unanticipated expansion of the liability post assignment. In that case, T1 who had a 21-year term of lease assigned the lease to T2 after 6 years. The following year, T2 executed a deed of variation with L1 which substantially increased the

[5] (1987) 283 EG 199

[6] (1996) 2 WLR 262

[7] *The Cambridge Law Journal*/ Volume 55/ Issue 2/ July 1996, Published online by Cambridge University Press: 16 January 2009, pp 313-357. Accessed on the 1st day of September at 9am

[8] *Warmford Investments Ltd v. Duckworth (Supra); Baker v Merekel* (1960) 1 QBD 657

[9] See also *Controvincial Estate Plc v. Bulkstorage Ltd* (1983) 46 P & CR 393 Selous Street Properties Ltd v. Oronel Fabrics Ltd (1984) 270 EG. 643.

[10] (1996) 1 All ER 336 (CA)

rent and altered the covenants against alienation and user so as to facilitate the grant of sub tenancies and licenses by T2. There was a further assignment to T3, a company which subsequently went into liquidation. L1 and T1 under the privity of contract claiming rent which had accrued after the deed of variation. The Court of Appeal held that T1 was not liable for the higher rent. The reasoning of the court of Appeal was that: 'If …an assignee of the lease, by arrangement with the landlord agrees to undertake some obligation not contemplated by the contract contained in the original lease, the estate may be altered but the variation does not affect the obligations of the original tenant.'[11] The court gave the decision in *Baynton v Morgan* a restricted interpretation to the extent that while an assignment may empower an assignee to deal with the estate so as to increase his liability and that of his successor, it does not *ipso facto* amount to a variation of contract between the original lessee and the lessor as contained in the head-lease. The decision in Controvincial case was *held* justified on the peculiar facts of the case as TI in the case had bound himself to the terms as subsequently varied; he covenanted to pay not only the original but also the reviewed rent. The position at common law as regards post assignment variation is that it does not affect the obligations of the original lessee unless it is contemplated by the contract contained in the original lease. It is apposite to state that the variation must be made *bona fide* and not out of malicious motive or fraudulent intent through collusion with the assignee with no intention or means of meeting the said obligations.

**Privity of Contract Distinguished from Privity of Estate and the Nexus between both Principles**

The concept of privity of contract has been discussed above. Privity of contract differs from privity of estate in that privity of estate makes parties bound by covenants that 'touch and concern' the land mainly. A covenant is said to touch or concern land where it has direct reference to the land.[12] In cases of assignment of the term or the reversion, two basic questions need to be resolved in the affirmative for covenants to be enforceable against a third party. The questions are: whether there is privity of estate; and whether the covenant sought to be enforced touches the ground.

An assignment of the lease by the original lessee or an assignment of the reversion by the lessor does not rid the original party of his contractual liability to the other party. It however diverts him of the estate in the land out which the lease was created or in respect of which the reversion is held, creating, therefore, privity of estate between the assignee of the reversion and the lessee. It is trite that where the original lessee merely creates a sub-lease in favor of the sub lessee, there is no privity of contract. See *Nigeria Properties Co. Ltd. v. Doherty*[13] the Court of Appeal held that, there was neither privity of contract nor privity of estate between the lessor and the sub-lessee and consequently, no covenant is enforceable between them. The nature of privity of estate is such that leasehold covenants run with the land and the reversion as the case may be, and bind all assignees of the term or the reversion respectively, who are privy to the estate in the terms of years. The existence of privity of estate does not automatically make the contract enforceable by either party unless such covenant is one that touches and concerns the land so as to run with the land and reversion. A covenant touches and concerns the land if it has direct reference to the land[14]. The covenant must also be incidental to the relationship of the lessor and the lessee, examples of such covenants are: covenants to pay rent, covenant to repair, covenant to renew rent for a periodic lease etc. In *Horsey Estate Ltd v. Steiger & Petrite Co. Ltd,* it was stated *inter alia*, that the true principle is that no covenant which merely affects the person but does not affect the nature, quality or value of the subject matter demised or the mode of using same runs with the land[15]. There exists mutual enforceability of covenants as between the assignees of the term and the reversion where there is privity of estate and the covenants touches and concerns the land.

**The Justification/Rationale of the Application of Privity of Contract**

The application of the privity of contract principle to leases been known to have caused a lot of untold hardship for lessees over the years than the lessors and the reason for this is not questionable. Many covenants in leases create obligations for lessee especially in the areas of payment and review of rent as well as repairs or indemnity for repairs. On the other hand, in a large number of cases, the lessor's obligation is mainly restricted to protection of the lessee's tenure and assurance of peaceful enjoyment of the leasehold property by the lessee[16]. In practice, in almost all the cases on enforcement of covenant via the principle of privity of contract, it has been the lessee's covenants which were brought to be enforced and only in very

[11] Ibid. per Sir Christopher Slade
[12] *Hau Chiao Commercial Bank Ltd. v. ChiaphuaIndustrues* (1987) AC 99.
[13] (1958) WNLR 85
[14] Smith Imran Oluwole, *Landlord and Tenant Law in Nigeria* (Ecowatch Publications Limited, 2018) at page 114
[15] (1899) 2 QB 79 at 89
[16] I.O. Smith, *op cit* at p. 198

few cases has the tenant had a way out of the onerous and sometimes unanticipated liability. This brings to the fore the rationale behind the continued existence of this principle. One obvious rationale can be found in the sanctity of contract.

This doctrine of privity of contract is founded on the principle of freedom of contract which allows parties to enter into a contract, vary the contract and/or end the contract. The principle which was enunciated in the 19th century provides that only parties to a contract can sue and be sued on it. The creation of a third party right will impede on this freedom of contract except where the parties' contractual agreement provides for a third party's rights and obligations.[17] This position can be easily countered on the ground of unequal bargaining power between the lessor and the lessee. The practical situation in modern times is that equity of bargaining power largely assumed between lessor and lessee is an illusion especially with regards to individual lessee, this fact has since been recognized by statutes in many common law countries including Nigeria.[18] Also, in a country like Nigeria where there is a high level of illiteracy, low level of information and inadequate mass education on issues such as this, there is widespread ignorance amongst lessees as to the nature of the doctrine and its applicability to them.[19]

Another argument being put forward as the basis for making the original lessee liable under the privity of contract principle is that 'the assignee has been put into the shoes of the original lessee and can do all such acts as the original lessee could have done'[20] According to Prof. I.O. Smith, this argument is absurd to say the least,[21] if the assignee of the lease stepped into the shoes of the original lessee, it should follow that all contractual obligations hitherto borne by the lessor would be borne by the assignee who should be primarily liable to the lessor for any breach in contract. On the contrary, the effect of the operation of the privity of contract principle is that the lessee and not the assignee remains directly and primarily liable to the lessor for the whole of the term[22] and the latter cannot be compelled to exhaust his remedies against the defaulter assignee.

Furthermore, one of the reasons for the doctrine of privity of contract is that it is unjust to allow a person who is not a party to a contract to sue or derive benefit from the same contract which he the third party cannot be sued.[23] The court noted in *Tweedle v Atkinson*,[24] that circumstances where third party's benefit from a contract, allowing such parties enforce his or her benefit to the contract will also cause a clog or hamper the rights to vary the contract by the parties to the contract. In the development of contractual relations, a party who has not furnished consideration towards the formation of a contract cannot bring an action on it in modern times, the growing importance of institutional leases in the commercial property market appears to be a stronger rationale for the application of the principle. The domination of the commercial property market by institutional investors like the banks and insurance companies for whom property is an investment medium with the need for a secure income stream has made the principle more relevant than ever before in guaranteeing security of income and an assurance that real property maintains its competitive edge over gifts and equities.[25]

**Application of the Privity Principle in Nigeria, New Zealand, Canada and United Kingdom**

This legal principle commonly referred to as the doctrine of privity of contract is to the effect that only the parties to a contract and those who take under them by succession or assignment can have rights or obligations under that contract. It became an established part of the common law as a result of decisions in England, in the nineteenth century, and it survives in many common law jurisdictions like Australia, Canada and New Zealand. In Nigeria, the principle of privity of contract has been given judicial impetus in many cases. For example, in *Chubaikpeazu v African Continental Bank*,[26] the Appellant entered into an agreement with one Emodu who was a debtor with one of the Respondent banks under which the Appellant was to run Emodu's business with the intention that all proceeds should be paid into the bank until Emodu's debt was

[17] Olusegun Yerokun, *Modern Law of Contract* (Higher Ground Printers & Suppliers, Lagos), 1999, p,171

[18]The various rent control laws of various countries and various federating states within Nigeria are enacted to assuage the apparent inequality

[19] I.O. Smith, *op cit* at p. 198 - 199

[20] Per Harman J. In *Controvincial Estates Plc V. Bulk Storages (Supra)*

[21] I.O. Smith, *op cit* at p. 199

[22] *Baynton v. Morgan supra*

[23] *Tweedle v. Atkinson* (1861) 1 B&S 393, 121 ER 762

[24] *Supra*

[25] Martin Davey, 'Privity of Contract and Leases – Reform at last' (1996) 59 MLR

[26] (1965) NMLR 374

completely liquidated. The Appellant managed the business for some time and then transferred back the business under a new agreement without the knowledge of the bank. The bank sued the appellant as the guarantor of Emodu's debt. It was revealed that the terms of the contract of the document were between Emodu and the Appellant only, the bank was never a party. It was *held* that the bank, not being a party could not acquire rights under the deed. A contract cannot be enforced by a person who is not a party even if the contract is made for his benefit and purports to give him a right to sue upon it.[27]

The common law principle of privity of contract has equally received statutory recognition in relation to former tenant's liability for rent in Nigeria. In both Rivers and Kaduna States, for example, the Landlord and Tenants Edicts with similar provisions reaffirm the liability of the original tenant for rent after assignment of tenancy. In other states where no legislation like those in Kaduna and River State exist, the common law remains applicable and shall be applied by the courts. Future liability of former tenants is not restricted to arrears of rent owned by assignees of the lease but also includes breach of other covenants such as covenant to repair for which the lessor can claim damages from the former lessee or the operation of the rent review clause agreed between the lessor and assignees of the lease. The common law position applies in Nigeria in the absence of contrary provision of the statute.[28]

In New Zealand, due to the resultant hardship of the applicability of the principle on the original tenant, varying incursions have been made. The Residential Tenancies Act was promulgated in 1986 releasing residential tenants from liability on lawful assignment of his interest while the assigning tenants in commercial leases remain liable throughout the lease. In the Canadian province of Manitoba, the position in New Zealand has been followed with a further step taken by its Law Reform Commission in 1995 proposing that a tenant of a commercial lease should not be primarily liable subsequent to assignment, but as a guarantor.

In England, a major incursion into the application of the principle was made in 1995. The Landlord and Tenants (Covenants) Act 1995, which came into force on 1 January 1996, the Act ultimately, deny lessors the right to resort to the principle. It is astute without precedent in any of the jurisdictions where privity of contract has been invoked, and it will have an untold impact on the negotiation and enforcement of commercial leases in the country. The English Act also made some ground breaking innovations in the law with regard to the privity of contract and continuing liability of lessees.

**Limitations to the Principle of Privity of Contract**

The privity of contract is not open-ended; the basis for such liability is the contract. Since the liability of the original tenant arises from construction of the lease, it is perfectly possible for the lease to exclude or restrict liability subsequent to the assignment of the leasehold interest. The liability of the original tenant is also limited to the duration of the original lease, where there is surrender of the old lease and a re-grant of a new lease, the liability of the original lessee cease.

**3. Excluding/Avoiding the Continuing Liability**

***Surrender and Re-grant:*** It is obvious that if the landlord expressly grants a new lease of the property to the assignee, the contractual liability of original lease will cease. The lease under which they were liable no longer exists. Where there has been no express grant of a new lease, a former lease may nevertheless argue that a variation in the terms of the lease agreed by lessor and assignee has been so dramatic that the lease as varied is in law a new lease, with the same consequences for his contractual liability. A surrender of the old lease has been effected 'by operation of law', as explained by Russell L.J., giving the judgement of the Court of Appeal in *Jenkin R. Lewis Ltd. v. Kerman* stated thus:

> If a tenant holding land under a lease accepts a new lease of the same land from his landlord he is taken to have surrendered his original lease immediately before he accepts the new one. The landlord has no power to grant of a new lease except on the footing that the old lease is surrendered and the tenant accepting the new lease is estopped from denying the surrender of the old one. This 'surrender by operation of law' takes effect whether or not the parties to the new lease intend it to take effect. Moreover, even if there is no express grant of a new lease the old lease will be surrendered by operation of law if the agreement

[27] *Ibid.*
[28] *Supra*

> made between the landlord and the tenant is such as can only be carried out so as to achieve the result which they have in mind if a new tenancy is in fact created.[29]

There are many cases where the lessee has sought to argue surrender and re-grant, although not all concern attempts by the lessee to escape liability under the covenants. The lessee must show either that a new lease has been granted, which can only take effect by inferring surrender of the old lease, or that a new arrangement is in place, which is substantially different to the old that as a matter of law it can only take effect as a new lease. Although the doctrine does not depend upon the parties' intent to surrender, as it 'takes place independently, and even in spite of intentions,' the circumstances in which surrender and re-grant is inferred from a 'new arrangement' are very limited. An increase in rent will not do, even though accompanied by extensive variations to the user and alienation covenants neither will the surrender of part of the land demised, nor does not the addition of another lessee to the lease have this automatic effect.[30] It has recently been judicially suggested that there must be either an increase in the extent of the premises demised, or an increase in the length of the term for which they are to be held.

***Release****:* Release may be by deed or by 'accord and satisfaction'. The lessor and lessee may themselves come to terms whereby the lessee's liability is to be released, perhaps on assignment of the property demised, in which case there is little problem (save occasionally in establishing the vital factor of consideration where no deed of release is executed). But as, by application of the doctrine of 'accord and satisfaction', release may be implied from the lessor's conduct, the exercise of caution is necessary. In *Deanplan Ltd. v. Mahmoud,* a salutary tale, the landlord claimed rent arrears from the then tenant, who was the second assignee, T3, under the lease. By agreement, this tenant surrendered the lease, and the landlord accepted certain goods 'in full and final settlement of all claims and demands' against him. The landlord then proceeded against the defendant, the first assignee, T2, for the outstanding debt, on the basis of a direct covenant, made by him to the landlord at the time of the assignment. His action failed. It was held that the agreement with T3 had released T2 as well from liability, as a release of one joint or one joint and several contractor releases all others.[31]

## 4. Available Options for the Original Lessee

### *Indemnity and Reimbursement*

The former tenant may attempt to seek recompense from the assignee whose default has caused the landlord to pursue him. In doing so, he will have a close eye on the practicalities of the situation. He must, as the lessor has done, seek a solvent defendant. The parties to an assignment may draft their own indemnity covenants, but traditionally recourse has been had to the ones implied by statute. The operation of the statutory covenants is exemplified by the case of *Johnsey Estates Ltd. v. Lewis & Manley (Engineering) Ltd,*[32] the original tenant, T1, having covenanted to pay rent (and insurance premiums) during the term, assigned to the third party, T2, which then assigned in turn to a company, T3, which subsequently went into liquidation. The landlord sued T1 for the rent during the period when T3 was in possession as tenant. T1 argued that by reason of the covenant implied in the deed of assignment T2 was liable to indemnify him in respect of any rent unpaid or other breaches of covenant committed during the term, including the period following assignment to T3. The Court of Appeal accepted this argument, and rejected the contentions of T2 that the statutory covenant was not applicable as the assignment was not 'for valuable consideration'.

### *Conveyancing Devices*

Since the basis of liability of the original lessee lies in the existing contract between the latter and the lessor, the lease may exclude or restrict liability interest or contain a clause compelling the lessor to take a direct covenant from the assignee. In the alternative, the original tenant as the first assignor may take express indemnity from the assignees who upon further assignment would have taken an indemnity from his assignee with subsequent assignments taking the same pattern to form a chain enabling liability to the ultimately visited on the defaulting assignee. In the old Western and Mid-Western State of Nigeria, there is an implied indemnity covenant upon assignment of the lease. This statutory covenant is guaranteed under then Property and Conveyancing Law (PCL), as contained in the schedule to the law. It imposes obligation on the assignees or the person delivering title under them to pay rent and observe and perform all covenants contained in the

[29] (1971) Ch. 477.
[30] *59 Trustees of Francis Percival Saunders v. Ralph* (1993) 66 P. & C.R. 335.
[31] (1993) Ch. 151.
[32] (1987) 2 E.G.L.R. 69

lease and to indemnify the assignees and their estates and effects from and against all proceedings, costs, claims and expenses on account of any omission to pay rent or any breach of any of the covenants.
One significant feature of the different conveying safeguards is that they are premised upon the risk of assumption or wishful thinking and the weakness is exposed when the assumption fails or the thinking of the original tenant is proved wrong. The lessor's agreement to an excluding and limiting term in the lease or the extraction of direct covenant from the assignee is a mere possibility which runs shirt of reality. The protection afforded by the privity of contract principle will not easily be traded off without other equal means of protection. The difficulty in finding a solvent defendant in times of recession is too high a price to pay for the concession. In long term leases with assignments subject to consent which cannot be unreasonably withheld,[33] the lessor's solicitor is bound to take the practicality of the situation into consideration when drafting the lease. In leases of residential premises involving individual leases, there is usually unequal bargaining power and more often than not, the tenant takes what he gets.

The effectiveness of express indemnity extracted from an assignee hinges on two presumptions – first, the existence of an unbroken chain of indemnities and second, the solvency availability of the assignee. If it turned out that an indemnity was not taken at a stage, the original lessee is not covered by the earlier indemnity extracted from the first assignee and remains liable to the lessor. In the event of the assignee's insolvency, the original lessee is at best an ordinary creditor with a dull prospect of restitution. Where the trustee in bankruptcy disclaimed the lease, the assignee and his guarantor would be discharged from liability with no relief to the original tenant. In any case, where there is a chain of assignment and the original lessee's (A) immediate assignee (B) becomes bankrupt or disappears, the former cannot proceed against the next assignee (C) down the chain for a breach by the current tenant in possession unless (B) has assigned to him the benefits of C's covenant.[34]

***Restitution or Claim against Assignee in Quasi Contact***
The original lessee made to pay for the default of an assignee may sue the assignee in quasi contact to recover the sum paid. Cockburn C.J. enunciated this principle in *Moule v. Garrett* as a general proposition that 'where one person is compelled to pay damages by the legal default of another, he is entitled to recover from the person by whose default the damage was occasioned the sum so paid.' An original lessee, T1 was thereby enabled to sue an assignee, T3, with whom he was not in any contractual relationship, for reimbursement when he had to pay damages to the lessor for breaches of a repairing covenant committed during T3's possession. The case is illustrative of the obvious advantage of quasi-contract over an action on the covenants: no contractual nexus needed to be proved. On the other hand, the assignee will only be liable for those breaches which have been committed by his 'legal default', i.e. during his lease, whereas the assignee's statutory covenant of indemnity relates to breaches committed throughout the remainder of the term.[35]

Moreover, the right being one of the reimbursement rather than indemnity, it appears that the original tenant will not be able to recover the costs incurred in resisting the landlord's claim. However, there are limitations in relation to the original tenant reimbursement, for the assignee will only be liable for those breaches which have been committed during his tenancy as opposed to breaches committed throughout the remainder of the term. This limitation was the basis of the court's refusal to make an order of the reimbursement against an assignee in *RPH Ltd v. Mirror Group (holdings) Ltd.*[36] In that case, the landlord sued the original tenant for arrears of rent in respect of a lease granted in 1970 and assigned in 1972 to T2. In 1979, T2 further assigned the lease to T3 who subsequently assigned to T4 in 1987. At the time of the action, only T3 was solvent but the Court refused to make an order of reimbursement against it since the rent being claimed did not relate to their period of tenancy, The Court also held that T1 could not compel T2 to enforce the benefit of its covenant against T3.

Another limitation to the original tenant's claim in the quasi contract is that the assignee will only become liable to reimburse the original tenant where the breach is of a covenant which touches and concerns the land and not one which is merely personal or collateral. The basis for this is that the relationship between the

[33]*Theodorou v. Bloom* (1964) 1 WLR 1152
[34]*Selous Street Properties Limited v. Oronel Fabrics Lord (Supra).* But where an immediate assignee becomes bankrupt the original tenant can take over from the trustee in bankruptcy or liquidator an assignment of that assignee's right of indemnity against the next person in the chain and can seek recourse from the latter –*Becton Dickinson UK Ltd. v Zwebner* (1989) QB, 208. Cited in I.O. Smith, *op cit* 196.
[35] See *Johnsey Estates Ltd case (supra)*
[36] (1993) 65 P. & C.R. 252

original landlord and the assignee of the lease is that of privity of estate which makes the latter liable only for covenants having direct reference to the subject matter of the lease or affecting landlord qua landlord and tenant qua tenant. The effectiveness of a claim in quasi contract indemnity covenants depends solely on the solvency of the assignee of lease and whether the trustee in bankruptcy is disclaiming liability or not. It is common knowledge that as between parties to a lease agreement, the lessor is always at a vantage position. Not only does he dictate many of the terms in the agreement, he usually reserves for himself that effective weapon of forfeiture to which resource, may be had for breach of covenant. The lessor always has the opportunity not only of prescribing qualifications to assignment at the time of creating the lease which may include the type of assignee and the other subsequent assignees after assignment of the lease by the original lessee. However, in response to the various agitations for a legal review or reform of this area of legal regime, many countries within the commonwealth sphere have reacted positively albeit in a limited form without fundamentally destroying the form and or essence of the principle or concept by enacting statutes with the aim of limiting and or ameliorating the possible damaging and deplorable effect of the principle in its raw state under the common law.

## 5. Conclusion and Recommendations

The principle of privity of contract in leases in its traditional form has been more of a burden, especially to the tenants, than a necessary tool of preserving covenants and or obligations in real property transactions. The seemingly harsh and or harrowing effect of the unlimited continuity of liability of lessees even after divesting themselves of any further interest in the leasehold interest leaves a little to be desired of the principle or concept. The presumptive nature of the doctrine or principle has not been helpful. The fact that there are often no clear terms in the original lease agreement spelling out the implications of this principle has made it further difficult for tenants to comprehend. The following measures may be necessary. A lessee who assigns all the property let by a lease should cease to be liable to comply with the lease covenants and similarly should have the benefit of the lease. The assignee should become liable to perform the covenants and should have the benefit. A lessor consenting to an assignment should request that the assignee covenant directly with him to pay the rent and observe the other covenants for the duration of the term and as a result bring the liability within the scope of contractual liability. The only difference will be from the date of assignment of the lease. A lessor consenting to an assignment should be able to impose a condition that the original lessee guarantees the performance of the lease covenants by his successor, but only until the following assignment.