TOPIC 8: LASEHOLD ESTATES

Historical Background to the Development of Leases

- Leases are estates in land which confers on tenants' greater rights than those inherent in lesser interests such as easement or covenants.
    - Lease = the grant of possession by the owner to another in consideration for a payment known as rent. The right to possess land either in the present/future
- The lessee's right comprises an estate carved out of a larger estate of the freeholder, but limited in time, giving exclusive possession of the land for a maximum fixed duration.
    - Before 15th century = contractual rights, after 15century proprietary interest
- In AUS the majority of HC in *Wik Peoples v Queensland* emphasises that the common law lease was particularly unsuited to regulate the use and development of large areas of pastoral land beyond the reaches of the town and cities. Therefore, legislation has been introduced (statutory crown lease)
    - Leases are created by a contractual agreement between the parties, hence in the absence of a specific legislation the rights and duties of the of the LL/T are governed by the express provisions of the lease.
    - Common law principles assume equal bargaining power between the parties, which is incorrect = resulting in the statutory regimes which protect to various classes of vulnerable tenants.

Terminology

- Lessor/LL = The person granting the lease, the registered proprietor of the freehold property.
    - Lessor 'leases' or 'let' the premises, older term 'demise' can also be used
    - The lessors interest in land during currency of the lease is known as 'reversion' (fee simple estate subject to the leasehold interest of the lessee)
    - Lessor disposes of his right to another (purchaser) = assign the reversion
- The person taking the lease = lessee/tenant
    - Tenancy = right of occupation (duration short), lease is long-term agreements
    - Covenants = rights and duties of the parties to the lease
    - Can dispose of his interest = 'assigning the lease'. The assignee steps in the new tenant/lessee
    - Can also sublet the premises for a duration less than the lease, (lessee pays the LL, but the lessee can also take rent from the sublessee)
    - Sublease equal to the lease or greater it is assignment. Conversely if assignment is for less than the leased time = its sublease.
- A lease for a specified period is known as a 'term of years', it will continue unless determined earlier.
- Periodic tenancy lasts for a designated period and continues thereafter for a further period unless the appropriate notice is given by either party
    - In the absence of express agreement to the contrary, the LL cannot unilaterally vary the rent during a periodic tenancy.

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Common leasing documents

- Agreement for lease = a contract for a lease of property in the future
- Lease = a deed containing the covenant for each party, in relation to occupation of the property by the lessee
- Sub-lease = a new lease between the lessee as sub-landlord and sub-lessee
- Deed of assignment of lease = a deed that transfer the right of a lessee to another
- Deed of renewal of lease = a deed that extends the lease term, creates a new lease.
- Deed of novation of lease = a deed that substitutes the lessee for another: transfers the rights and obligations of the lessee to another (leasing cars in regards to employment)
- Deed of variation = a deed that varies the terms of the lease

I. CLASSIFICATION OF LEASE

Fixed-term tenancy

- Common law rule that a valid lease must be of duration that is certain or at least be capable of being rendered certain (in reference to something, Easter holiday)

  " Every contract sufficient to make a lease for years ought to have certainty in three limitations, viz in the commencement of, in the continuance of it and in the end of it" *Lace v Chantler*
- It can only be created expressly (oral or written), where the maximum period of duration is certain (known or ascertainable when the lease commences).
- While both parties can terminate the lease before the expiry date it does not prevent the lease from being invalid.

Periodic tenancy

- Renews indefinitely from one fixed period to another, at the commencement the duration is not certain, and is determined by proper notice.
- They are treated as a succession of term, which in retrospect is deemed to have been part of the original term. Certainty of duration: fictional agreement begins after each period which allows for certain duration as if new lease.
  - Eg. a monthly periodic agreement which has been continued in effect for 10 years will be treated in retrospect as a 10-year term.
- Type of periodic lease inferred from when rent is payed, monthly/weekly.
- How to create a periodic tenancy
  - Can be expressly created, in the form of a deed.
  - Can be created orally at the commencement of the agreement (oral agreement that T can enter into possession upon agreeing to pay rent)
  - Where T enters into possession and pays rent, however the fixed-term lease is invalid at common law or for another reason.
    - May hold a fixed term agreement at equity (*Walsh v Lonsdale)* or in in law, where the rules or equity prevails.
  - T goes into possession before signing the lease.
  - Fixed-term lease expires and T remains in possession of the premises with the consent of the LL = Over-holding

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Tenancy at will

- May arise by express agreement but most commonly it has been implied
- When T enters or remains in possession of property with the consent of the LL without paying rent, subject to the understanding that either party may determine the lease at any time.
    - No formal notice to quit is required, it can be on demand without notice
    - LL must give reasonable time.
    - Terminates if either party dies or does an act incompatible with the nature of the tenancy.
    - "deemed" to be determined after 1 year and needs further consent
- Could arise if T goes into possession while still negotiating the lease. OR it could arise if the fixed-term lease expires or if they enter under a formally invalid lease.
- The T cannot be used for trespass until the tenancy is revoked.

Tenancy at will

- tenant is an unlawful occupant: wrongfully occupies premises with no rent and without consent from the landlord
    - NOTE: because the landlord has not provided consent, a tenant at sufferance will also be in adverse possession.
- determined at any time without notice
- created only by implication

Tenancy for life

- *Berrisford v Maxfield:* recognised tenancies for life, which entails a continuing LL/T relationship by relevant grant.
- These leases are an exception to the requirement of certainty as life is fixed.
- tenant is an unlawful occupant: wrongfully occupies premises with no rent and without consent from the landlord

II. CHARASTERISTIC OF LEASE

D. EXCLUSIVE POSSESION

- Valid lease needs = exclusive possession
- Without exclusive possession it is a license and is not enforceable against third parties and will not have a property right.
- At common law: the grant of right of exclusive possession automatically creates a lease and no lease can exist unless the tenant is granted the right of exclusive possession or else it a contractual license.
- Subjective intention of the parties are subsidiary. Meaning it is only important if expressly written but the minute the nature of the right is seen to be exclusive, expression of intention is seen to be meaningless and irrelevant - *Street v Mountford*
- Subjective intention not completely irrelevant, it just cannot completely prevail if what they have establishes exclusive possession – *Radaich v Smith*

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Radaich v Smith (1959) 101 CLR 209

Facts

- S grant R right to run business for 5 years for 'sole and exclusive license', using words '"licensor" and "licensee". The grant was revocable and allowed R to renew license.
- R claimed the amount of rent charged was unfair and sought a determination from the Fair Rents Board of NSW. The Board could only hear R's claim if the agreement between S and R was a lease

Held

- Agreement between R and S was a lease.
- Examine the substance of the document rather than the form. Finding intention objectively by looking at what the parties intended by becoming in possession.

> Windeyer J " Depends upon the nature of rights which the parties intend the person entering upon the land shall have in relation to the land… a legal right of exclusive possession is a tenancy and the creation of such a right is a demise"

- Exclusive possession is 'control of those premises to the exclusion of all others. It is determined as a question of **fact**, and indicators include:
  - Physical control of entry (locks, keys)
  - Right to quiet enjoyment
  - Obligation to yield up at the end of grant (keys or else in possession)
  - Whether business could function without exclusive control
  - It is the ability to eject someone from the land
  - Unlike AP do not have to exclude the landlord, it is about excluding others
  - Commercial nature of the relationship, at an arm length. Not gratuitous promise.
  - Express covenants - Terms similar to that of a lease (Menzies & McTiernan JJ *Radaich*)
- Intention is important if it is not commercial in nature = presumption that there will be no intention to create a legally binding contract.

Street v Mountford [1985] 1 AC 809

Facts

- S granted M the right to occupy 2 furnished rooms at a weekly rent, subject to termination on 14 days' notice. Intended to create license & believed he had.
- Agreement included an acknowledgement from M that the she was not protected by the Rents Act.

Held

- A lease exists whenever there is grant of exclusive possession for a fixed or periodic term at an agreed rent, approving Windeyer's judgement.
- Focus is on substance, where the language is not important (eg declaring that it's a license), it is merely subsidiary.
- Residential premises are only used to reside and exclude others.
- A lodger who not have exclusive possession, where services are provided (hotel – constant access to the room to clean).
  - Exclusive possession not decisive of a lease eg, if hotel manager goes on a strike for 2 days, resulting in X having exclusive possession, not a lease.

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Swan v Uecker [2016] VSC 313

Facts

- S leased property to U with the term that occupied meant permanently residing. After commencement of lease U advertised on AirBnB for use as (1) room only for $100 per night, and (2) whole apartment for $200 per night, having access to the whole apartment.
- S served a notice to vacate to U, claiming breach of term of lease which prohibited subletting of property without prior consent.

ISSUE: Was AirBnB granting a license or a lease (sublease) ?

Held

- Despite calling it a license if the rights granted include exclusive possession , to can considered a lease.
- VCAT: The conduct of the parties was relevant, each AirBnB case support that it is a license, as the tenant did not give up his right and the guest did not consider the place as theirs = no exclusive possession
- SUPREME COURT OF APPEAL: considered whether AirBnb guest could be made to leave and whether the property is a guest's place of residence.
    - The court was looking for exclusive possession to fit into reality, not just the form (words used to describe the contract).
    - Retention of key by U was not decisive and could make the guest leave, as the LL has the same power.
    - AriBnB agreement could be considered a lease and breach of the lease between LL and U, as there was no consent.

E. CERTAINTY OF DURATION

- The duration of a lease must be certain or fixed in calendar, the date of termination is either known or ascertainable by the parties before the lease commences.
- A lease may be expressed to commence from a past date, although it will take effect from present or future date.
- Where the lease does not specify a commencement date, in the absence of evidence to the contrary it will be presumed to commence on the date the lease is executed or the oral lease is agreed to.
    - Reversionary lease a lease takes effect in the future. In Vic making a lease take effect 21 years from when the lease is made is void.

Lace v Chantler

- L was granted lease for 'duration of war' paying weekly rent.
- Lease for the "duration of the war" is invalid as it is impossible to ascertain when the lease would end. Duration could be certain or by reference to something which can be determined at the onset of the lease.

"duration as well as the commencement of the term must be stated. The certainty of a lease as to its continuance must be ascertainable either by the express limitation of the parties at the time the lease is made, or by reference to some collateral act which may, with equal certainty, measure the continuance of it, otherwise it is void"

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How is the rule relating to certainty of duration applicable to periodic tenancies

Prudential Assurance Co Ltd v London Residuary Body [1992] 2 AC 386
Facts

- LLC 'let' a strip of land to N, until land was required by Council for road widening purposes then LLC could end the 'tenancy' with 2 months' notice.
- N could erect temporary one storey building, however the road widening scheme never materialised & occupancy occurred for over 60 years. N transferred his right to P.
- LRB successor of LCC agreed to sell land to other defendants and served 6 months notice to P, LCC's freehold title vested in those D's, whom had no highway authority with road widening powers.

ISSUE: Was the notice effective as LRB had no highway authority therefore P could occupy the land for ever.

Held

- A grant for an uncertain term or duration did not create a lease (not fixed term lease), the 1930 agreement did not create an estate in the land because it purported to grant a term of uncertain duration.
- However, because the tenant had entered pursuant to the agreement and paid the yearly rent, he had become a tenant from year to year and that tenancy was then for a term certain because each party had the power to determine by six months' notice – implied periodic tenancy.
- NOTE: An example of how the court will make agreements certain.

Berrisford v Mexfield Housing Co-operative Ltd [2012] All ER 1393
Facts

- B leased to M (weekly rent) with terms that agreement could be terminate by B on 1 months notice (Cl. 5)or by M in certain circumstances Cl.6 (rent in arrears for 21 days, B in breach of contract, B ceases to B cease to be a member of the association (Maxfield or if Maxfield is dissolved).
- B fell behind in rent, but paid it back shortly after. M served B with a notice to quit, which did not rely on Cl. 6.
- In terms of being a lease it was uncertain about duration, however it was clear how the LL and the tenant wanted to terminate the contract
- M argued B had become a periodic (weekly or monthly) tenant, by paying rent and by the parties intention. Therefore, M was entitled to determine such tenancy with a week/months notice in common law.

ISSUE: Could the lease be determined without relying on Cl.5 or Cl.6.

Held

> "Every contract sufficient to make a lease for years ought to have certainty in three limitations, viz in the commencement of the term, in the continuance of it, and in the end of it . . . and words in a lease, which don't make this appear, are but babble" – *Say v Smith*

- Lease was not for a fixed term, was interpreted as a licence for all of B's life. The terms of the licence clearly restricted how it could be terminated. There is no reason not to give effect to the terms of the agreement.

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