

70317: REAL PROPERTY

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LEASES

REAL PROPERTY

A. TERMS

- Lessor - Person who grants the lease i.e. landlord
- Lessee - Person who takes interest i.e. tenant
- Lease - Proprietary interest in land (demise)
- Assignment - Transferring your interest to a third party

B. CHARACTERISTICS OF A LEASE

FOUR CERTAINTIES OF A PERIODIC LEASE

- Most leases are periodic in nature; such lease must have certainty to:
 - a) Parties to lease;
 - b) Property being leased;
 - c) Period of the lease; and
 - d) Price to be paid for the lease (i.e. rental).
- Where the date of commencement cannot be ascertained from the provisions of the lease, it is void: *Cabooture Park Shopping Centre (1987)*.
- Commencement date may be implied: *Jopling (1909)* i.e. lessee enters into possession and begins paying rent from a certain date.
- A firm date, or at least precise method by which the term can be ascertained at the time of entering lease, is required: *Prudential Assurance Co ltd (1992)*.
- Regard may be given to collateral matters from which a period can be calculated: *Lace v Chantler (1944)*.

TENANCIES AT WILL OR AT SUFFERANCE

1. TENANCY AT WILL

- Tenancy at will is when lessee occupies land as a tenant with the lessor's consent, on the basis that either party may terminate the tenancy at any time, without prior notice.
- Can be created by express agreement or implication.
- Tenancy at will is implicated where the lessor continues to occupy land under an expired lease without paying further rent on a periodic basis, **with the lessor's consent**; or
- Where prospective lessee is let into possession pending a concluded agreement for the grant of a lease, without yet having paid rent on a periodic basis with the lessor's consent.

2. TENANCY AT SUFFERANCE

- Tenancy at sufferance is where lessee who initially occupied property under valid lease remains in possession after lease has expired, **without lessor's consent**.
- Arises by operation of law.
- A tenant at sufferance is liable to pay 'use and occupation' fees distinct from rent.
- A lessor may eject a tenant at sufferance at any time, without notice.
- No tenancy at sufferance can arise where occupant is in possession despite the lessor's objecting – such occupant is a trespasser.

THE REQUIREMENT OF EXCLUSIVE POSSESSION

- To be a lease, occupant must be granted exclusive possession.
- A lease confers on the lessee a right to exclusive possession of the land: *Radaich (1959)*.

1. RADAICH V SMITH TEST

- TEST: whether lease has been created – whether or not right of exclusive possession has been granted.
- The test is to be applied to the **substance** rather than form of the relationship.
- The lessee has a right to exclude all others from the land, including lessor.
- In *Radaich*, the relationship between the owner and occupant was described as a 'license' but the relationship included a five-year term, sole and exclusive right to provide refreshments and provisions that at the end of the term the occupant would 'give up possession'.
- Despite the classification given to the relationship by parties, the substance and effect of such instrument created a leasehold interest and the relationship of lessor and lessee.

EQUITABLE LEASE

- Lease not created by deed and not oral leases of *s23D CA* is **not enforceable by law**.
- They may be enforceable by equity provided there is **sufficient writing**.
- Under Section 53 RPA a lease over TT land which is greater than 3 years must be registered or it will be regarded as an equitable lease: *Leitz (1977)*.

WALSH V LONSDALE (1882)

- o Parties entered an agreement to grant a lease for 7-years.
- o Agreement stated intention to enter formal lease, which would contain a provision that the landlord could demand a year's rent in advance – this did not eventuate.
- o The lessee entered possession and started paying rent quarterly in arrears.
- o The lessor sought a year's rent in advance and the lessee argued that since there was no formal lease the agreement for lease was unenforceable at law.
- o Where the lease is unenforceable at law, the lessee is regarded as a yearly tenant.
- o Held parties had entered a binding contract to enter lease and equity enforced this agreement.

LEITZ LEEHOLME STUD PTY LTD V ROBINSON (1977)

- o Lessee entered into possession and paid rent under lease of 6-year term. Lease was not registered.
- o After 3 years, lessee vacated the premises and lessor sued lessee for breach of contract.
- o Lessee argued that a tenancy at will had arisen.
- o The lease had therefore been terminated by giving one month's notice, thus terminating the whole legal relationship between the parties including any contract for the lease.
- o NSW Court of Appeal held agreement gave rise to equitable lease.

PRIVITY OF ESTATE AND PRIVITY OF CONTRACT

1. PRIVITY OF CONTRACT

- o Privity of contract exists between original lessor and lessee.
- o Covenants in lease are enforceable between them as a matter of contract law, and the covenants remain enforceable between parties even after they have disposed of their respective interests by 'assignment': *Ahern v LA Wilkinson (1929)*.

1.1. PROPERTIES

- If a lessee assigns the lease and assignee breaches the covenant to pay rent, the lessor can sue the original lessee for the arrears: *195 Crown Street Pty Ltd (1969)*.
- If rather than assigning the lease, the lessee surrenders lease and new lease is granted to new lessee they would not be liable: *195 Crown (1969)*.

- If lessor assigns the reversion and the assignee of reversion breaches lessor's covenant, the lessee can sue the original lessor for breach by reason of contractual relationship.

2. PRIVITY OF ESTATE

- Exists between lessor and lessee.
- Privity of estate survives disposal by assignment.
- Assignment of lease should be contrasted with sublease – latter is transfer of something less than whole interest in the lease.

2.1. PROPERTIES

- Lessor assigns the reversion (to A for life, reversion to grantor); privity of estate exists between the assignee and lessee.
- Lessee assigns the lease; privity of estate exists between the lessor and lessee's assignee.
- Both original lessor and lessee assign their interest; privity of estate exists between respective assignees.
- Assignment is a transfer of whole of lessee's interest in the lease – assignee takes the place of the lessee and becomes the lessee to the lessor. Thus, privity of estate exists between lessor and assignee.

C. COVENANTS IN LEASES

- Parties to a lease are subject to provisions of the lease.

SPECIFIC LEGISLATION REGULATING LEASES

Certain lease relationships are heavily regulated by statute:

- Retail shopping center leases: Retail Leases Act 1994 (NSW)
- Residential leases: Residential Tenancies Act 1987 (NSW)
- Retirement village leases: Retirement Villages Act 1999 (NSW).

COVENANTS BY IMPLICATION

Covenants may be implied by common law principles, statutes and general contractual principles.

Two covenants, implied by **common law** are:

- Covenant for quiet enjoyment; and
- Covenant not to derogate from the grant.

Where the lease does not expressly contain these covenants, they will be **implied into the lease**: *Budd Scott v Daniel (1902)*.

1. COVENANT FOR QUIET ENJOYMENT

- A lessee has a right to enjoy the leased premises without interruption from lessor.
- It is question of fact whether or not there has been denial of ‘quiet enjoyment’: *Todburn Pty Ltd (1990)*.
- Regular excessive noise amounts to substantial interference with enjoyment.
- However, interference arising from factors related to the condition of property before the grant of lease is not a breach: *Southwark London Borough Council (1999)*.

1.1. EXAMPLES

- Damage caused to goods situation in lessee’s premise by water overflowed from lessor’s blocked down pipes as a result of poor maintenance: *Martins Camera Corner PO Ltd (1976)*.
- Removal of doors and windows: *Lavender v Betts (1942)*.
- Obstruction and repeated knocking and shouting: *Kenny v Preen (1963)*.
- Carrying out of structural repairs: *Dowse (1962)*.
- Disconnection of electricity supplies: *Perera v Vaniyar (1953)*.
- Disturbance as a result of inherent structural defects of premises which existed before the creation of lease, and such disturbances were within contemplation of parties there is no breach of covenant.

2. COVENANT NOT TO DEROGATE FROM THE GRANT

- Lessor must not do anything inconsistent with purposes for which the property was leased, unless parties agreed otherwise

2.1. TEST

- Whether premises have been rendered unfit or materially unfit for purpose for which they were granted: *Gordon v Lidcome Developments Pty Ltd (1966)*.

2.2. EXAMPLES

- Lessor interferes with access to restaurant business on sixth floor by allowing lift to restaurant to remain out of operation for months is a breach: *Karaggianis (1979)*.
- P’s business was adversely affected by sawdust and industrial noise from neighboring premises leased from same lessor – undertaking not to cause nuisance: *Aussie Traveler Pty Ltd (1998)*.

- Demolition works close to leased property, thieves were able to enter leased property and steal large amount of stock: *Lend Lease Development Pty Ltd (1985)*.

3. IMPLIED DUTY OF GOOD FAITH

- Duty to act in good faith is implied into all contracts, including leases: *Renard Constructions Pty Ltd (1992)*.
- A lessee asserted that lessor was under duty to good faith in respect of performance of obligations under lease – claimed lessor had contravened duty by pressuring local council to issue orders in relation to property which were unreasonable: *Alcatel Australia Pty Ltd v Scarcella (1998)*.
- However, NSW Court of Appeal held implied duty of good faith had not been breached in this case.

4. IMPLIED BY STATUTE

- Section 84 and 85 CA 1919 (NSW).

4.1. SECTION 84

- Keep premises in good and tenantable repair such to make them reasonably fit for occupation of reasonably minded tenant of class who would likely take them, with regards to ‘age, character and locality of the house’: *Proudfoot v Hart (1890)*.
- Pay the rent reserved by lease at time specified.
- Alters position under common law where destruction of premises did not release lessee from contractual obligation to pay rent: *Paradine v Jane (1647)*.
- Section 84 permits abatement of rent where fire, flood, lightning and other events which render demised premises unfit for occupation - extent of abatement proportionate to extent of damage.
- Lessor’s right to recover rent are suspended until premises is made fit for occupation and use of lessee.
- Lessee is not obliged to repair damage from fire, flood, lightning, storm, tempest and reasonable wear and tear.
- For other damages, lessor may commence proceedings where lessee fails to repair: s133A (1) CA.

5. IMPLIED BY GENERAL LAW

- A term will be implied into contract where such term is required to give business efficacy to lease: *Liverpool City Council v Irwin (1977)*.