

Determination and review of rent in retail leases

- **Retail Leases Act 2003** (Vic) ss 33-38:
 - 33: rent based on turnover (determination of rent)
 - 34: agreement about rent based on turnover (determination)
 - 35: rent reviews generally
 - 36: extended application of section 35
 - 37: rent reviews based on current market rent
 - 38: confidentiality of information supplied to valuer

Step 8:

Conclusion

- In conclusion, my advice to X would be...
- **NB:** breaches of covenants are breaches of contract: If one or both parties breach a K you can sue for damages, injunctions, termination or repudiation.
 - Damages: most common, to compensate your loss (if not adequate, injunctions)
 - Injunctions: specific relief (to stop) or specific performance (you must do)
 - Termination: must be a substantial breach of intermediate term or warranty
 - Repudiation: party makes it clear they're not performing contractual responsibilities

Contractual Licenses

Step 1:

Write: Given [X] does not have a lease it is possible he/she has a contractual license. A license arises when permission is given by one person to another to do an act on the licensor's land, which would otherwise constitute trespass.

- A license is only enforceable against the parties to the K, distinct from property rights which are enforceable against the world (*David Allen*)

Step 2:

Types of Licenses

- **Gratuitous licence:** license Coupled with a Grant – strongest form as it is a license to enter land to exercise a property right over the land/chattels on the land (e.g. easement OR right to come onto land to take something natural from the land, for example, to fish on a property, or take trees, or shoot animals and take it away, or mine and take minerals away).
The license is attached to the proprietary interest. This license is irrevocable, if a person refused committing a conversion at detinue, and can be enforced against 3rd parties. License may be assigned to another along with the property right to which it is incidental.
- **Contractual License:** contractual right to enter onto land, giving consideration to use or occupy it for a particular purpose. Licensee has no exclusive possession. The license does not have to be have a certain duration. (easement could be an example of this)
- **Implied licence:** informal license. It does not grant any proprietary interest (e.g. you grant people a bare license to enter your house when you invite them over for dinner. If the guest misbehaves you have the ability to revoke their license). These can be revoked at the will of the licensor and for any reason whatsoever.

Step 3:

Revocation of Contractual Licenses

Is there an express or implied agreement not to wrongfully revoke the license?

- At CL a contractual license can be effectively revoked even if the revocation is a breach of contract (*Cowell* – racecourse ejection, sued for assault). If effectively revoked, licensee becomes a trespasser. Only thing they can sue for is breach of K.
 - Latham CJ in HC held in *Cowell* that K license to provide entertainment is inherently revocable in equity (equity will not step in).
- In some other cases (not entertainment), however equity may grant an injunction to restrain wrongful revocation of a license where there is an express or implied promise not to revoke and specific performance is available (*Heidke*)

Is equitable relief (an injunction) available to prevent revocation?

- Equitable remedies aren't unavailable as a matter of principle; problem is that often because K licenses involve a substantial element of personal service, and courts are reluctant to grant equitable relief for personal service contracts (*Heidke* per Hardy J).
- Factors to consider in deciding whether to grant an injunction:
 - Damages are not an adequate remedy for the licensee? (*Heidke* – *would have been substantial damage in which monetary compensation would be inadequate*)
 - Would an injunction be tantamount to ordering specific performance where a court would not otherwise do so? Would specific performance be available?
 - Would grant of injunction cause undue hardship on the licensor?
 - Would grant of injunction force parties into a continuing relationship requiring ongoing supervision?
 - Did party seeking injunction come with clean hands?
 - Was there an express or implied term that the licensor would not revoke, or revoke only for specified causes? If yes, court is more likely to award an injunction (*Heidke*)
- Even if it's too late for an injunction, remedies in tort may turn on whether equity would have granted an injunction (*Sigma*)
 - *Cowell* → P could not sue for assault as once the license was revoked security were entitled to use reasonable force to remove a trespassor
 - *Heidke* → An injunction was granted to prevent wrongful revocation from the contract to hire sporting ovals
 - *Sigma* → Revocation of license to be on land to construct a hotel on adjacent land. The court was required to consider whether revocation was wrongful and the position in equity

Step 4:

Enforceability Against Third Parties

- Generally, contractual licenses are NOT enforceable against third parties (*King v David Allen*), however there are some exceptions.
- Unless you bring yourself within some sort of ownership, easement, profit or security right, you cannot have a right in property (*Hill v Tupper*)
 - To admit the right would lead to the creation of an infinite variety of interests in land, and an indefinite increase of possible estates
- Exception 1: If a 3rd party has so conducted himself so to make it inequitable for him to deny the rights of the licensee, then equity may impose a constructive trust, which will give effect to the licensee's rights (*Ashburn Anstalt*)

- Notice of the rights is not enough. The person must've done something more, so as to make him/her conscience bound to respect it (*Ashburn Anstalt*)
 - For example, paying a lesser price for the land; providing additional oral undertaking.
- Exception 2: 'A licensee not in occupation may claim possession against a trespasser if that is a necessary remedy to vindicate and give effect to such rights of occupation' (Laws J in *Manchester Airport – but Georgeski reject this approach*)
- Liberal approach: *Manchester Airport v Dutton* (UK)
- A licensee not in occupation may claim possession against a trespasser if that is a necessary remedy to vindicate and give effect to such rights of occupation
 - Airport granted an order for possession against protestors who illegally occupied the woodland to prevent them lopping
- Traditional approach Barrett J, *Georgeski v Owners Corp SP* (NSW rejected UK approach)
- Licensee does not have possession (at most only occupation) so cannot sue for trespass (only the landowner has the right to restrain other's entry)
 - G could not stop neighbouring landowners entering the jetty and slipway as no possessory interest in the land (toes the orthodox line – cannot sue 3rd parties).
- *David Allen* → The contractual right to put posters on the wall could not be enforced against a third party
- *Ashburn* → While Ashburn knew of the agreement between Arnold and the original LL the court was not satisfied that the parties intended to impose an obligation on Ashburn to give effect to the license. Ashburn did not pay a lower price for the property as a result of it
- *Manchester airport* → Held that where a contractual licensee is granted a right to occupy land, that right is sufficient to support an action in trespass. This was overruled by *Georgeski*
- *Georgeski* → A license to build a jetty did not give P the right to injunct people from trespassing on it

METHOD:

- Lease or license?
- If license, is it a license coupled with a grant?
- If license, is an injunction available to restrain revocation?
 - Is there an express or implied term not to wrongfully revoke?
 - Is revocation in breach of a contract? (common law damages available for breach of contract)
 - Is equitable relief (specific performance and therefore an injunction) available to prevent revocation? Damages adequate? Suitability? Clean hands?

Step 7: In conclusion, my advice to X would be...

Easements

Step 1:

Write: An easement is a right enjoyed by the owner of one piece of land (the DT) to use or carry out some activity *short of taking possession* on another person's land (the ST).

- Once there is an on-sale to a third party, have to show that a property right has been created, as only property rights run with the land and will be enforceable (**s42(2)(d)**).
- If it's registered it's legal; if it's not, it is equitable (if comply with **s126**) (SAY THIS)