

# LEASES

"A tenancy is a contractually binding arrangement, not referable to any other relationship between the parties, by which one person gives another the right to exclusive occupation of land for a fixed or renewable period or periods of time, usually in return for a periodic payment of money." *Bruton v Lodon & Quadrant Housing Trust* [2000]

"Put simply, a lease is created when a grantor transfers to another a portion of their estate in land for a term of years or a life or lives" *Radaich v Smith* (1959); *WA v Ward* (2002)

## 1. IS THERE A LEASE?

### A. COMMON LAW LEASES

#### Exclusive Possession

The contract creating a lease must allow the lessee to **exclude** others from the property *WA v Ward* (2002)

**Exclusive possession=** "The tenant with exclusive possession is able to exercise the rights of an owner of land, which is in the real sense his...land albeit temporarily and subject to certain restrictions. A tenant armed with exclusive possession can keep out strangers and keep out the landlord unless the landlord is exercising limited rights reserved to him by the tenancy agreement to enter and view and repair" *Street v Mountford* [1985]

#### **Indicia of Exclusive Possession** *WA v Ward* (2002)

- a clause in the agreement that demises land or a tenement to the grantee is 'an irrefutable indication that the grantee has the right of legal possession to the land or tenement the subject of the demise
- a provision defining the circumstances where the grantor can enter the land or premises
- a power conferred on the grantor to re-enter and determine the letting for the failure to pay rent
- an express covenant for quiet enjoyment

- "If exclusive possession at a rent for a term does not constitute tenancy then the distinction between a contractual licence of land becomes wholly unidentifiable" *Street v Mountford* [1985]

- *Radaich v Smith* (1959) Australian case adopted principle that an agreement giving exclusive possession is a lease even if the term used says 'licence'.

- The only intension which is relevant is the intension to create exclusive possession *Bruton v London & Quadrant Housing Trust* (1999)

#### Certain Commencement Date

A lease without an ascertainable date or duration is void for uncertainty- when the lease takes effect, must have a certain commencement date and be for a defined period, however short *Lace v Chantler* [1944]

#### **Ascertainable Commencement Dates**

- Tomorrow
- 'After the gas is connected'
- From the completion of the building
- When the existing tenant vacates the premise

#### **Uncertain Duration- Lease Invalid**

- Lease for a duration of war *Lace v Chantler* [1944]
- Lease until the land is required by the council for road widening *Prudential Assurance*
- 'Within a reasonable time' *Harvey v Pratt* [1965]

#### **Exceptions**

- Leases for life
- Tenancies at will
- Periodic tenancies
- \* Lease must also specify the names of the contracting parties

### B. LEGAL LEASES (TORRENS SYSTEM)

#### Requirements of Writing

- Leases of **more than 3 years** require a deed to convey a legal estate *S28(1) Law of Property Act 1936*
- Also, no interest in land can be created or disposed of except in writing *S29 Law of Property Act 1936*

### Requirements of Registration

- Lease of **more than one year must be registered** to convey a legal estate *SS67, 118, 119 Real Property Act*
- Unregistered leases for more than one year are equitable only**
- Unregistered leases are enforceable between contracting parties *Walsh v Lonsdale (1882)* but are *NOT* enforceable against a subsequent registered proprietor (legal interest) unless an *in personam* exception can be made out by the equitable lessee *R M Hosking Properties Pty Ltd v Barnes [1971]*
- Leases for **less than one year** will prevail (exception to indefeasibility) *S69(h) Real Property Act* but tenant must be in **possession** of property at time of transfer to new owner.

## 2. WHAT TYPE OF LEASE?

### A. FIXED TERM LEASE

Known as 'tenancy for years' or 'tenancy for a term' or a 'term of years', may be for any period or periods, regardless of whether those periods are continuous or discontinuous *Cth Life (Amalgamated) Assurance Ltd v Anderson (1945)*

- Can only be created expressly- a contract between two parties

At the time of agreement, the **exact time of termination** must be either known or ascertainable by parties *Lace v Chantler*

- cannot be contingent upon the occurrence of events at unknown dates
- however, can be determinable upon occurrence of an event, the date of which is unknown e.g. lease for 5 years but determinable upon completion of construction of another building

### B. PERIODIC LEASE

A periodic tenancy, whether it be yearly, quarterly, monthly or weekly is not a series of separate tenancies but is a single tenancy which continues until it is duly determined *Amad v Grant (1947)*

May replace an invalid fixed term lease

Can be created by an express agreement, or may arise through circumstances e.g.

- when tenant enters into possession of the premise and pays rent before signing the agreement
- when the fixed term expires and the tenant holds over- usually becomes monthly tenant under lease or yearly tenant at common law

In the case of **holding over**, a yearly periodic lease will be resumed at common law, where original fixed-term lease was for one year or longer *Moore v Dimond (1929)*

### C. TENANCY AT WILL

Exists whenever, by an express or implied agreement, the tenant is in exclusive possession of the land, otherwise than as servant or agent of the owner, for an estate which is not of freehold or for a term

-e.g. a tenancy at will exists where an 'intending lessor lets the intending lessee into occupation of the premises in anticipation of an agreement for a lease *Turner v York Motors Pty Ltd (1951)*

It is an **unassignable right** of temporary occupation (like a licence)