

## Leases

### In exam,

1. Define a lease.
2. Is there a lease or a license?  
Prove elements of lease.
  - State element 1/2/3/4/5 (I)
  - State the law (R)
  - Apply to the facts of the case (A)
  - Conclude. (C)
3. Does a legal lease exist under the TLA?
4. Is there an equitable lease?
5. What kind of lease exists?
6. What were the express/implied covenants the EE/OR allegedly breached?
  - Was there an assignment or sublease?
7. Is EE/OR entitled to forfeit?
8. Remedies.

LESSOR = LANDLORD ('OR')

LESSEE= TENANT ('EE')

### Definition

(R): A lease is a right to exclusive possession of land given by one person (the lessor/landlord) to another person (the lessee/tenant), for a fixed/determinable term less than that which the grantor has in the land, usually in return for rent (*Radaich v Smith*) (*Progressive Mailing House Pty Ltd*). Leases are proprietary interest in the land, allowing for right in rem to be granted, and they are also a contract, allowing for contractual remedies to be granted (*Walker v Harris*). In contrast, a license is an *in persona right* borne out of commission that makes unlawful conduct lawful (*Thomas*). Thus, leases are not the same as licence as it lacks the right to exclusive possession.

Certain essential requirements must exist before a landlord-tenant relationship will arise. It is essential that a lease: adequately disclose the commencement and duration of the lease, adequately identifies the land and provide for a right of exclusive possession of the leasehold. (*Progressive Mailing House Pty Ltd*)

## STEP 1: Is there a lease or a license?

### License checklist

(*Picton-Warlow v Allendale Holding*)

- No Exclusive possession
- A personal contractual right
- No proprietary interest
- Owner has right to sue in trespass
- Death terminates a license – purely contractual
- Generally, a license is not transferable at will

## ELEMENTS OF A LEASE

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### ELEMENT 1: Is the land leased identifiable and ascertainable?

(R): The lease land has to be sufficiently defined and ascertainable (i.e. the boundaries). That is, the names of the LLD and tenant and the land leased must be clearly described. The description of the land does not have to be exact, as we are making a reference to the surface as it exists from time to time, so long it is capable ascertainment (*Goldsworthy Mining Ltd*).

Conclusion: The leased land is/is not identifiable.

**INDICATORS of a license or lease: Write Only if written agreement. \***

= intention as to what rights, in substance, were conferred.

✓ Express language of the grant

*Lewis* asserts that the court's purpose is to determine from the words used in context, what was the intention of the parties as to what rights should be granted. That intention should be derived from the words used.

e.g : Used the term 'lease', 'terms', 'terminate the lease', 'rent'

✓ Looking at the transaction as whole

When it is not clear from the terms of the grant, you have to look at other aspects of transactions. Thus, a grant may not be in terms of possession but of something else. It may be a grant occupy premises or the right to use the premises either generally or in a particular way. In such cases courts must by the process of construction, determine whether what is granted is a mere occupation or just a possession the relevant sense (*Lewis*).

e.g: is there a strong suggestion that it was an event or business?

✓ Looking at the surrounding context

The question is whether the implication is necessary to give business efficacy to the right that otherwise have been grantees (*Lewis v bell*).

Even if the agreement describes itself as a license, the courts can define it as a lease based on looking at the surrounding context. In *KJRR Pty Ltd*, the nature of the premises and the purpose for which the grant was given and taken was considered. It was held, using common sense, the grantee could make use of the premise only if she had the exclusive right to them as a shop. Similar to *City of Rockingham*, where the character of the business was such that it could be carried on effectively if the appellant had exclusive occupation.

e.g : business efficacy

✓ Intention as to what rights were reserved

Right reserved by tenant must be lesser than the rights conferred by landlord for it to be EP.

the classification of the transaction, as lease or licence, will depend upon whether the rights are or are not those of exclusive possession. It is in this sense that, as it has been said, expressions of intention are irrelevant: the parties cannot 'escape the legal consequences of one relationship by professing that it is another' (*Radaich v Smith*; *Lewis v Bell*)

**ELEMENT 2: Does the lessee have the right to exclusive possession of the premises?**

(R): Exclusive possession is the general right to exclude all others, including the landlord from the land/premises, (*The WA Club Inc*) subject at least to such specific provisions of entry (*Lewis v Bell*). Court held that EP is the determining test for a lease (*Radaich v Smith*) (*Street v Mountford*). If someone has EP, it is a lease, and it does not matter what is called (licence or lease). Hence, substance over form. (*Radich*). If the language of the document, grant or express terms (in its whole totality) shows an intention of the parties to lease, prima facie it is a lease. (*Lewis v Bell*)

(R): TEST - The objective test is ultimately whether 'the parties' conduct, viewed objectively, reveals a tacit understanding or agreement, or a manifestation of mutual assent, which evinces an intention to create legal relations'. (*Alonso v SRS Investments (WA)*)

Overall control is determinant – how much control did owner of land retain? The more control retained, the less likely occupier has EP. (*Appah*)