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Abbreviations:

CA = counter-argue
CL = common law
CT = Certificate of title
NT = native title
RP = registered proprietor
POC = privity of contract
POE = privity of estate

CA = Conveyancing Act
RPA = Real Property Act

Lease Fundamentals

Introduction

- Difference between a sublease and an assignment of lease: whether the period granted by tenant to another is shorter than his own lease? Yes: sub-lease.
- While the lease is running, landlord still has the fee simple interest in land (ie reversion¹⁸) while he gives possession to the lessee.

Formal requirements to create lease

1. Contract: s 54A in writing – create a *legally binding contract*/an *equitable lease*
 - 1) For commercial lease – usu start by negotiating the terms; must agree who will be responsible for what
 - 2) For residential lease – not much negotiation over the terms of lease, heavily regulated by the Residential Tenancies Act 2010 (NSW). Landlord **cannot** create leases that are inconsistent with the Act.
 - 3) For retail lease - regulated by *Retail Leases Act 1994*. Any provision in the lease that is inconsistent with the Act is void: s 7.
2. Registration (s 53(1), exception – less than 3 yrs): must fill in the Torrens lease form + lease agreement + CT/CoRD holder consent in case of mortgage

Implied lease at common law

Common law implies a lease if a tenant is: (1) in possession of premises **and** (2) paying rent on a regular basis, eg weekly, monthly.

- Effect: legal lease.
- Circs: still negotiating but tenant is keen to move in; registered lease expired but stayed on; written lease but not register, etc.
- s 127 CA: all common law implied tenancies from year to year are converted to tenancies from month to month, terminable by either party with one month's notice. “*tenancy at will*”
- If the landlord sells the reversion, implied tenancies at common law bind the new registered proprietor. Because it's implied tenancy from month-to-month – lease for less than 3 years: s 42(1)(d). NOT because it's legal lease.

Conclusion: implied tenancy from week to week/month to month; implied tenancy from year to year → converted to s 127 tenancy (from month to month).

Substantive requirements (⇔ licence)

Requirement 1: certainty of duration

1. **Rule:** leases must be of a duration that is certain or capable of being rendered certain. – look at terms of lease
 - Lease for the duration of the war is uncertain: *Lace v Chantler*.
 - “The right to occupy would last as long as a person owned a parcel of shares” is a licence since no one knows when someone might decide to sell: *Wilson v Meudon*.¹⁹
 - **Periodic tenancy**²⁰ is certain b/c it is treated as fixed terms for one week, one month etc.

Requirement 2: exclusive possession

1. **Rule:** the tenant must have a right to exclude everyone else from the premises, including the landlord.
 - Determined by the terms of the lease; title of the agreement is irrelevant: *Radaich v Smith*.
 - Licence is a personal permission to enter the land and use it for some stipulated purpose: *Radaich v Smith*.
 - A reservation to landlord of a limited right of entry (eg as to view or repair) is not inconsistent with a grant of exclusive possession.

Typical covenants in leases

¹⁸ Possession will eventually revert back to landlord when the lease comes to an end.

¹⁹ Company title predates strata title. Company owns the apartment, and when people buys the apt they buy a portion of shares in the company.

²⁰ Periodic tenancies are leases that continue for specific periods until terminated by a period of notice, eg implied tenancy at common law or under s 127.

Exam Mind map

Indefeasibility of title

Step 1: who is registered? – legal owner of that interest – once registered, the registered interest is immune from adverse claims; “indefeasible” (*Frazer v Walker*) – bound by interests already on the register (notice irrelevant); not bound by unregistered interests: s 42. (notice of unregistered interest is irrelevant: s 43)

(note: *Frazer* – register despite forged mortgage instrument)

Step 2: exceptions to indefeasibility? (fraud/ volunteer/ short-term tenancy/ rights in personam/ overriding statutes)

Step 3: if indefeasible – to what extent?

Test: terms are indefeasible if they are integral to the estate or interest vested in the lessee/mortgagee and they touch and concern the land. (*Mercantile Credit*)

- Option to renew: (though contractual in nature) affect the term of lease, indefeasible – the option lease when brought into existence by exercise of option also attracts indefeasibility. (*Mercantile Credit*)
- Option to purchase: s 53(3) RPA, indefeasible.
- Personal covenants (eg covenant to repay the loan in a mortgage): defeasible.

!! NOTE: in exam, in terms of option to purchase, just use s 53(3) RPA; do not cite the *Mercantile Credit* case
