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Substantive Characteristics of Leases [Lease vs License]

INTRO: The issue for determination is whether [licensee/lessee] has been granted a lease or a mere license. If a leasehold interest has been granted, since it is a proprietary interest, it is enforceable *in rem* (against the world). On the other hand, if [X] has merely been granted a license, this is a contractual right that is only enforceable *in personam* [against the other party to the contract] namely, [X].

There are two substantive characteristics which must be satisfied in order for a lease to exist. First, the lessee must have a right to exclusive possession of the property. Second, the lease has to be of a certain duration.

1. Exclusive Possession

- ii. Exclusive possession is a legal right that entitles the holder to exclude all other persons including the landlord from the property (*Raiaich v Smith*)
- iii. Exclusive possession is the distinguishing feature between a lease and a license (*Raiaich*; *Street v Mountford*; *Swan v Uecker*)
- iv. For a person to have been granted exclusion possession, it must have been the intention of the parties to do so at the time of the grant (per Windeyer J in *Raiaich v Smith*; *Street v Mountford*)
- v. The parties' intention is determined objectively by having regard to the written agreement and the unique facts and circumstances of the case (*Swan v Uecker*)
- vi. Potential arguments:
 - ▶ **[X] would argue that since the agreement is called ["Y"] and [X] and [Y] are referred to as [licensor/lessor] and [licensee/lessee] respectively, this is conclusive of the fact that [Y] has been granted a [leasehold interest/mere license]**
 - However, as the High Court unanimously held in *Raiaich v Smith*, whether a lease or license has been granted is a matter of substance rather than form
 - In *Raiaich v Smith*, the agreement was referred to as a **"license"** and Mr and Mrs Smith was referred to as the **"licensors"** and Radaich the **"licensee"**

[terms used for avoidance purposes - did not want arrangement to be subject to review by the Fair Rents Board]

- **"parties cannot turn a tenancy into a license merely by calling it one"** (*Street v Mountford*)
 - In *Street v Mountford*, the **"license agreement"** stated that the **license did not create an estate in the land**
- Thus, what the agreement is called and how the parties are referred to is relevant however is not determinative of whether a lease or license has been granted
- ▶ If putative lessee has **control over the premises** in terms of who can enter, this strongly weighs towards exclusive possession (*Raidaich v Smith*)
- Consider if the **lessor has a free right to enter the property** [weighs against exclusive possession]
 - In *Swan v Uecker*, the court held that there was no evidence that the tenants could access the rented premises during the Airbnb stays
- However, if the **agreement provides the circumstances in which the landlord/licensor can enter the land**, this suggests exclusive possession [e.g: landlord only being allowed to enter the land once per year]
 - "any express reservation to the landlord of limited rights to enter and view the state of the premises and to repair and maintain the premises only serves to emphasise the fact that the grantee is entitled to exclusive possession and is a tenant" (*Street v Mountford*)
 - In *Street v Mountford*, a clause in the agreement granted Street [landlord] a limited rights of inspection and maintenance
- ▶ **Retention of keys** by the licensor/lessor is **not decisive** in determining whether exclusive possession has been granted [typical for landlords to retain keys to their properties] (*Swan v Uecker*)
- ▶ The premises being the **lessor/licensor's principal place of residence** is **not relevant** to whether exclusive possession has been granted

- ▶ If the agreement requires upon **expiration or determination of the arrangement** for the **person in possession to give up possession**, this suggests that exclusive possession has been granted (*Menzies J in Raidaich v Smith*)
 - However, the court held in *Swan v Uecker*, the ability of the licensor/lessor to require guests to depart after the agreed period of occupation is not relevant to characterising the right of the guest as proprietary [lease] or merely contractual [license] since they would have such an ability whether the agreement was a lease or license
- ▶ If the agreement is **commercial** rather than created in a social/domestic context, this would suggest exclusive possession has been granted (*Raidaich*)
- ▶ If the **nature of the business** contemplated to be carried out on the premises could not function effectively unless the putative lessee had the ability to control who can enter the property, this weighs towards the parties intending to grant exclusive possession (per Taylor J in *Raidaich v Smith*)
 - In *Raidaich v Smith*, Raidaich ran a milk bar and cafe [lock up shop]
- ▶ "All windows, door keys, locks, etc, lost or broken shall be paid for by the tenant" (*Raidaich*)
- ▶ If there is a covenant granting **quiet enjoyment** to the putative tenant, this is suggestive of exclusive possession
- ▶ If a person has **no need to bring an action in trespass**, this does not mean they have not been granted exclusive possession (*Swan v Uecker*)
 - The fact that a person might not exercise their right to sue in trespass does **not** mean they do not have such a right (*Swan v Uecker*)
- ▶ The fact that the **length of stay is short** is **not relevant** to working out whether exclusive possession has been granted (*Swan v Uecker*)
- ▶ An occupier of residential accommodation at a rent for a term is either a **lodger or a tenant** (*Street v Mountford*)
 - The occupier is a **lodger** if the landlord **provides attendance or services** which require the landlord or his servants to exercise **unrestricted access** to and use of the premises [does not grant exclusive possession]

- If on the other hand, residential accommodation is granted for a term at a rent with exclusive possession, the landlord providing neither attendance nor services, the grant is a tenancy
 - In *Street v Mountford*, Street did not provide attendance nor services to Mountford thus the court held she was not a lodger
 - [Taylor J in *Raidaich* noted that in exceptional cases, it may arise that a right to exclusive occupation or possession has been given without the grant of a leasehold interest]
- vii. The court would likely conclude given [X] that [Y] [does not have] has exclusive possession of the property hence suggesting that [Y] has a contractual license/ leasehold interest [with respect to/in the land]

Enforceability of Lease Covenants after Assignment

INTRO: Since [landlord/tenant] has assigned the [lease/reversion], the court will have to establish whether the covenant in the lease between the original landlord (X) and tenant (Y) that [articulate covenant] is binding on the [new landlord/tenant] namely, [X]

	Benefit	Burden
Assignee	<ul style="list-style-type: none"> - Assignee seeking to enforce against landlord - Apply touch and concern test 	<ul style="list-style-type: none"> - Landlord seeking to enforce against assignee - Apply touch and concern test
Reversioner	<ul style="list-style-type: none"> - Reversioner seeking to enforce against tenant - s 141 PLA & touch and concern test 	<ul style="list-style-type: none"> - Tenant seeking to enforce against reversioner - s 142 PLA & touch and concern test

- **Covenants will not be enforceable against an assignee/reversioner if the lease is equitable rather than legal since privity of estate only applies for legal leases**
 - **Determine if lease is legal or equitable!!**

1. Assignment by tenant

ii. Relationships between the parties

- ▶ [Before the assignment by [tenant], [landlord] and [tenant] would have had privity of contract since they were both signatories to the lease agreement as well as privity of estate due to them being in a landlord-tenant relationship]
- ▶ [After the assignment, since the [landlord] and [original tenant] are no longer in a landlord tenant relationship, there is no privity of estate meaning the original tenant does not retain any proprietary interest in the property. However, parties continue to be bound by the contract thus there is privity of contract]
- ▶ **With regard to the new tenant, there is no privity of contract with the landlord since they were not a signatory to the contract. However, given there is now a landlord tenant relationship between [X] and [Y], there is privity of estate**
 - The consequence of the **[original tenant] retaining privity of contract with the landlord** is that liability arising out of the contractual relationship may remain
 - This means that the original tenant will remain liable for any breaches committed during the period that [s/he] was a tenant
 - Even after the assignment, the landlord can sue the tenant for any breaches that occurred prior to the assignment