

PROPERTY LAW A

SEMESTER 2

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PRELIMINARY DEFINITIONS

GENERAL LAW = DEED SYSTEM LAND, PURCHASER NEEDS CHAIN OF TITLE, GOVERNED BY PLA

TORRENS SYSTEM = TITLE CONFERRED BY REGISTRATION, REGISTERED UNDER TLA

LESSOR = LANDLORD

LESSEE = TENANT

COVENANTOR = PERSON MAKING / BOUND BY PROMISE

COVENEANTEE = PERSON BENEFITTING FROM PROMISE

EXAM SCRIPT START

For the purposes of this exam, the following abbreviations will be used:

- Property Law Act 1958 ('PLA'),
- Limitation of Actions Act 1958 ('LAA'),
- Retail Leases Act 1958 ('RLA'); and
- Transfer of Land Act 1958 ('TLA').
- Adverse Possession (AP)

Adverse Possession

Limitation Periods – *Limitation of Actions Act 1958 (Vic)*

Subject	Relevant Section	Time Limitation
Chattels	Section 5	6 years
Land	Section 8	15 years
Crown Land	Section 7	N/A - cannot
Victorian Rail Track	Section 7A	N/A – cannot be AP
Water Authorities	Section 7AB	N/A – cannot be AP
Council Land	Section 7B	N/A - cannot be AP
Common Property	Section 7C	N/A – cannot be AP

- IF OBVIOUSLY PART PARCEL (NOT WHOLE PROPERTY): start with PP
- IF COULD BE FULL PROPEERTY: start with entire parcel, then move on to PP

Step 1: Introduction

Despite [Owner's] documentary title over [the land], [Possessor] may have a claim in AP (**TLA s42(2)(b)**). [Owner] has to show they have a better right than [possessor], as under the CL, possession gives rise to a presumption of ownership which may entitle the possessor to rights in rem against the whole world except those with superior interests (**Perry; Toohey J in Mabo**).

[Possessor] will argue they have been in continuous AP of [land] for [15+ years], meaning [Owner's] claim to the land is extinguished under **ss 8 and 18 LAA**. *chattels = 6 years (s 5 LAA)

Step 2: When does time start running?

As per **LAA s9(1)**, time begins to run when the owner of the land discontinues possession/has been dispossessed, and it has been adversely possessed by another (**s14(1)**).

- Fixed term lease: As per **s10(1) LAA**, one year from specified end date
- Periodic tenancy: As per **s13(2) LAA**, for periodic tenancies without a written lease, time will begin to run at the expiration of the relevant period
- Tenancy at will: As per **s13(1) LAA**, time will begin to run in relation to a tenancy at will after one year
- Rent: Where rent is subsequently received, time will restart (**s 13(2) LAA**)

practical effect is that landlord has 16 years (rather than 15) to claim against adverse possessor

- Where person has died: As per **s9(2) LAA**, provided the owner was in possession of the land at the time of death, time will begin to run upon death.

Here, [owner] (discontinued possession / was dispossessed) when they [apply to facts].

- Discontinued: DTH abandoned property of their own accord - e.g. moved away.
- Dispossessed: DTH was forced out (not necessarily by possessor).

To prove the land was adversely possessed, [Possessor] will need to establish animus possidendi and factual possession (**Buckinghamshire**).

Characterisation of Leases

<p>Lease: an estate in land giving lessee a right to EP for a certain duration</p> <ul style="list-style-type: none"> • A lease is a contract and a property interest • The lease is personal property – chattels real (for historical reasons) • The person granting the lease = lessor (landlord). • The person granted the lease = the lessee (tenant). • Out of my freehold estate I have created a leasehold estate. My freehold estate still exists but it is subject to the leasehold estate. I have a reversionary interest. When the lease has run its course, my interests in the land will fully revive. 	
Fixed term lease/tenancy	<ul style="list-style-type: none"> • Fixed period of time • Expires automatically at end of a period • Maximum duration is certain, but may still allow for early termination • Requires an express oral/written agreement, cannot arise by implication of law in absence of agreement
Period lease/tenancy	<ul style="list-style-type: none"> • Continues/renews automatically from period to period until determined by proper notice (ordinarily renews with each payment of rent) • Notice of termination usually equal to length of period, however yearly tenancy gives notice of 6mth • Uncertain maximum duration • While may arise from agreement, not exclusively dependent as to the mere payment of rent + EP → may arise after expiry of a fixed term lease (holding over through payment of rent and retention of EP) • May arise where there is an invalid fixed term lease
Tenancy at will	<ul style="list-style-type: none"> • Created when tenant occupies the land as a tenant on the basis that either party may terminate the tenancy at any time • AKA EP but no agreement as to duration or payment of rent • At will = determinable on giving reasonable notice • Arises out of agreement through holding over without payment of rent • If they pay rent periodically and landlord accepts, reverts to periodic tenancy
Tenancy at sufferance (“holding over”)	<ul style="list-style-type: none"> • Tenant holds over at expiration of a lease w/o consent of landlord • No rent • Landlord can bring action for recovery of possession, but cannot sue for damages in TP as original entry was lawful

Step 1: Introduction

A lease is an estate in land giving a right to exclusive possession (EP) for a certain duration. [Person occupying the property] will argue that they have a lease as it confers proprietary rights. [Other party / anyone trying to remove a person from their property] will argue that there is only a contractual licence (**MOVE ON TO LICENSE NEXT**).

Step 2: Exclusive Possession

EP requires control over premises to the exclusion of all others, and is touchstone in distinguishing a lease from a license. Whether an agreement entails EP is a question of fact to be decided by reference to the circumstances and nature of the agreement, including the objective intention of the parties (**Radiach**).

Leasehold Covenants: AKA rights & obligations

Step 1: introduction
Step 2: Has a covenant been breached
2.1 Express Covenants: included in written deed of a lease by agreement e.g. <ul style="list-style-type: none">• Landlord: structural repairs + maintenance• Tenant: pay rent, agree to rent review, non-structural repairs, use the premises only for specified purposes, not assign or sublet without L's permission
2.2 Implied by CL: do not apply if inconsistent with an express covenant or a covenant implied by statute <ul style="list-style-type: none">• Landlord:<ul style="list-style-type: none">○ Fitness for human habitation at beginning of lease○ Quiet enjoyment○ Non-derogation from Grant• Tenant:<ul style="list-style-type: none">○ To use the premises in a tenant-like manner○ To yield up possession on determination of lease○ Implied duty not to commit waste
2.3 Implied by Statute: applies to leases for more than 3 years
Step 3: Is there privity of contract between parties?
Step 4: if not, can we rely on privity of estate?
Step 5: conclusion

Step 1: Introduction

Leasehold covenants set out the rights and obligations of LLs and Ts. If either or both parties fail to observe an express or implied covenant, they may be sued for breach of leasehold covenant.

- Unless specified by agreement or statute, covenants operate independently (e.g. LL cannot refuse to repair as tenant failed to pay rent – only has right to damages) (*Hawkesbury*)

Step 2: Has a covenant been breached?

2.1 Fit for Habitation

If the premises are unfit for human habitation (pest infestation, structural issues, drainage/sewerage issues), T may terminate the lease.

- Only applies to residential tenancies and to the premises at the commencement of the tenancy.
- Might include: structural problems with a building; faulty drainage or sewerage systems; insect infestations etc.

2.2 Quiet Enjoyment AKA breaches on premises

Covenant of quiet enjoyment requires the tenant be allowed to peaceably hold and enjoy the premises without lawful interruption by LL (*Hawkesbury*).

e.g. removal of windows and doors; repeated threats to remove the tenant + hosing asbestos infected material off a roof going into the premises have all been held to be in breach of quiet enjoyment.

Easements

STAGE 1: introduction
STAGE 2: Essential Characteristics/Requirements -- <ul style="list-style-type: none">• DT + ST• For benefit of DT• DT + ST not owned and occupied by same person• Must be capable of forming the subject matter of a grant
STAGE 3: Valid Creation (see step 6)
STAGE 4: Scope (see step 8)

Step 1: Introduction

[Owner of benefited land/DT] may seek to prove that they have an easement over [owner of burdened land]'s property, granting them a proprietary right to use and interfere with [ST land].

- Under the Torrens System, easements "howsoever acquired" are exceptions to indefeasibility in Victoria. They are a paramount interest which runs with the burdened land, and are enforceable against D whether registered or not (s 42(2)(d) TLA).

As per *Re Ellenborough Park*, there are 4 requirements that must be met for an easement to be found. There must be a dominant and servient tenement (DT and ST) not owned and occupied by the same person, the easement must accommodate the DT, and it must be capable of forming the subject matter of a grant.

Step 2: There must be a Dominant and Servient Tenement

On the facts there seems to be a **DT** which is [apply to facts]. This is because it is the parcel of land that enjoys the benefit of an easement.

On the facts there seems to be a **ST** which is [apply to facts]. This is because the ST who is [name] can be defined as the land which is subject to the burden of the easement.

- (Where the easement is not created by prescription) The instrument creating the easement need not expressly identify the DT although it must be capable of being identified by the surrounding.

Step 3: Easement must Benefit DT

The easement must benefit and accommodate the DT 'in a real and intelligible sense' (*Ellenborough*), not just the individual who owns DT personally. This is a question of fact to be determined by the 'natural connection' between DT and ST – (AKA is it linked to the normal use of the DT land?)

- Must be a level of proximity/connection between DT and ST (**Clos**)
 - Consider location: physically close if not adjacent parcels of land?
- Business/personal benefit: Easement may benefit business conducted on DT (**Copeland**), but not business alone (**Clos**).
 - If easement is for commercial necessity, consider whether business is necessary for ordinary use of the DT land
- Easement should be 'clearly beneficial to the premises to which it is attached' (*Ellenborough*)
 - e.g. a garden 'undoubtedly enhanced and was connected to the normal enjoyment of the house to which it belongs' (*Ellenborough*)
- Benefit to others: others may benefit from the easement, need not be limited to DT

PROPERTY A CASES

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CASE	FACTS	ISSUES	DECISION
ANZ Banking Group v Widin (1990) 102 ALR 289	Oral agreement + part performance was argued as an alternative. ANZ had partly performed the agreement by endorsing and accepting bills and having W sign various loan documents. <ul style="list-style-type: none"> • Mortgage form signed by W → did not include information about particulars of title. • Diary note of bank → identified the property but made no reference to signed mortgage 	PART PERFORMANCE	The court applied the “strict test”, holding that the ANZ’s acts were unequivocally referable to a contract of the general nature of that alleged by the bank (a mortgage).
	Mortgage form signed by W → did not include information about particulars of title. Diary note of bank → identified the property but made no reference to signed mortgage	EVIDENCE OF CONTRACT (MULTIPLE DOCUMENTS + INSTRUMENTS ACT)	Details of the land had to be included in whatever was signed by W → did not occur here. Although incorporation by reference to another document was permissible, the diary note could only be related to the mortgage by oral evidence, so it was inadmissible.
Armory v Delamirie (1722) 1 Strange 506; 93 ER 664	Chimney sweeper found a ring & took it to a goldsmith to enquire its worth/value. The apprentice took the ring and weighed it and then removed its jewels. Chimney sweep asked for the ring to be returned. The apprentice refused.	ADVERSE POSSESSION: RIGHTS OF FINDERS	Armory’s prior right of possession was better than Delamirie’s. While finder of a jewel does not acquire absolute property or ownership, he will have rights against all except the rightful owner.
Ashburn Anstalt v Arnold [1989]	Agreement Arnold could remain in possession of premises as licensee rent-free until served 3 months notice by owner. Ashburn purchased fee-simple ‘subject to agreement’, including clauses containing above terms. Ashburn sought possession without notice.	REVOCATION/ ENFORCEABILITY BY 3RD PARTY If it was a lease, Arnold could enforce its rights against new owner of fee simple. However, if license, could Arnold enforce its contractual rights against Ashburn?	Court said if a lease had not existed... the license would not have bound the defendant, as licenses do not bind third parties. Where the purchaser undertakes an independent obligation to honour/ respect the rights of existing licensees, unless the words are intended to impose an obligation on the purchaser, he or she is not bound by the license. Buying a property ‘subject to’ a license is not in itself a sufficient indicator of an intention to respect licensee’s rights. Here, held it was a lease which bound landlord.