

# Leases- Topic 7

## What is a Lease?

- **Lease is a contract** to confer **exclusive possession** for a **definite term**
  - Not a license (no EP)
  - Not a freehold (no certain end, is a non-freehold estate)
  - Real property (land)
- **Source of Law:** *Residential Tenancies Acts 1997 (Vic)*
- A lease is an agreement between the landlord and tenant to confer EP, upon terms for a limited period of time. **Right in rem for duration of lease**.
- Lease used to be treated as purely contractual relationship, now is a real property interest with more extensive remedies and property rights.
  - E.g. right to damages, specific performance at equity or the doctrine of ejectment.

## Terminology

- **Leasehold Grantor** = landlord/lessor
- **Leasehold Grantee** = tenant/lessee
- **Agreement** = lease/ tenancy agreement /demise /tenancy
  - Tenant (T) gets the leasehold
  - Landlord (L) gets the leasehold reversion (after the end of the lease, fee simple revert back to the landlord)

## The Lease Contract

- **Parties can incorporate any terms** subject to some statutory exceptions
  - **Forfeiture clause:** L can determine the lease in the event of a breach by T
- **Covenant:** damages/ injunction
- **Condition:** rescission
- Typical covenants:
  - **Covenant** by the tenant to **pay rent**
  - **Covenant** by either tenant or landlord **to repair the premises**
  - Covenant by the tenant not to assign or sublet the premise without prior consent of the landlord

## Types of Leases

### 1. Fixed Term Lease

- A **lease** of a **fixed period**
  - Fixed term does not have to be one continuous period
    - E.g. lease for three successive public holidays is valid. (certain duration)
  - Automatically expires at end of fixed period, not need to give notice.
- Usually **created by deed** (if >3 years or more) *PLAs52(1)*
- **Duration must be certain**.

- Can be one day or 300 years (PLA s153)
- Any lease more than 300 years, tenant can turn into fee simple.
- Perpetual leases (only by statute); E.g. for state library.
- **RULE:** Can be of any length provided that at the time the agreement is entered into the exact date of termination is either known or ascertainable by the parties
  - *Bishop v Taylor (1968) 118 CLR 518*
  - Lease term for “duration of the war” (problem- don't know when war will end).
  - “Until Easter Sunday 2015” is ok because the date is ascertainable

### Roadmap: Lease?

1. **Issue** – is it a lease?
2. **Formalities?** (e.g. if more than 3 years) (PLA; e.g. paid rent)
3. **What is the objective intention of the contract?** – Is it to give EP for duration of terms?
4. **Is there EP** (private, uninterrupted occupation)? – facts surrounding circumstances & effect of the agreement
5. **If no formalities is it an equitable lease?** Is it capable of specific performance – time, parties, location, rent
  - a) Agreement to agree (*Walsh v Lonsdale*)
  - b) Tenancy by estoppel
  - c) Part performance

## 2. Periodic Tenancy

- Lease that lets land for week to week, month to month etc. It may arise where the tenant continues in possession after the expiration of a fixed term lease, still pays rent.
  - Does not terminate until appropriate notice is given, equivalent to rental period
    - Endures depending on rental paid
  - Usually lease term to say what kind of tenancy it becomes (CL: yearly tenancy)
  - If rent is paid monthly, assumption (implied) that monthly period.
- **No fixed duration**
  - At CL a succession of terms e.g. monthly periodic lease 10 years = 10 year term
    - At CL presumption that will be yearly period. *Moore v Diamond (1929)*
  - Does somewhat violate certainty requirement, can retrospectively be given a fixed duration.

### Types:

1. **Express via deed**
2. **Orally** (<3 years)
3. **Implied via occupancy**

## 3. Tenancy at Will (more like a type of license)

- **Tenant enters possession** with the **consent of the landlord** but **does not pay rent.**
  - E.g. Cousin in bungalow at your house, going to pay rent when he gets a job. Never gets a job though and thus never pays rent. Best thing to do is to withdraw your consent, otherwise they become an adverse possessor.

- If the landlord accepts rent it becomes a periodic tenancy.
  - E.g. Usually after the end of fixed term lease and then negotiate while tenant in possession but no longer paying rent
- Either party may terminate the agreement at any time
  - Express or implied
- No trespass until tenancy is revoked
- Usually do not satisfy formalities (thus quasi tenancy) but useful interim devices

#### AP of Tenancy at Will (When consent is withdrawn)

- After 1 year, LAA s13 holds that a tenancy at will is deemed to be determined (ended)
  - A right of action to recover land is deemed to accrue on that date.
- Thus AP time runs against the landlord at the end of one year after the creation of the tenancy at will. LAA Vic s13(1)

#### 4. Tenancy at Sufferance

- A mere fiction – it lacks the essential features of all tenancies; *Fry v Metzelaar*
- Arises after end of fixed term lease and tenant holds over with NO CONSENT, and NO RENT
  - If L later consents = tenancy at will
  - If T later pays rent = periodic tenancy
- Why not a trespasser? Consent; Otherwise AP starts to run.

### Formalities for Creating a Lease

1. The Compliance with relevant Statutory Formalities (E.g. consideration)
  2. Exclusive Possession
  3. Certainty of Duration: the lease must exist for a defined period of time which is certain in duration.
- **Rent:** not essential, can be in kind such as offer services or labour instead of rent.

#### 1. Statutory Formalities

- A legal lease must be created by a deed; (*PLA s52(1)*).
  - A deed is defined as an interest signed, sealed and delivered.
    - Describe the lease
    - Date lease entered into
    - Names of parties
    - Recitals (background)
- All assignments must be in writing via deed; *S126 Instruments Act*
  - **Exception:** Oral lease for no more than three years at the best rent available, and taken in possession, (*PLA s54(2)*).
  - A lease may also be created by the tenant going into possession and creating a tenancy at will or a periodic tenancy if the landlord accepts rent (*PLA s52*).

*Instruments Act S126:*

- An action **must not be brought** upon a contract for the sale or other disposition of an interest in land **unless** the agreement is **in writing signed by** the **person to be charged** or by a **person lawfully authorised** **in writing by that person to sign** such an agreement.

## 2. Exclusive Possession

- **RULE:** Grant of EP creates a lease and **no lease exists without EP**
  - If no EP, then either a bare or contractual license.
- **Exclusive Possession TEST: Right of a lessee to maintain ejection** (get rid of person on property) **and**, after his entry, trespass; *Radaich v Smith*
  - **Also:** **Landlord limited right of entry** (by contract or statute), e.g. to view or repair and not inconsistent with grant of exclusive possession
    - Exclusive possession not mean land is a bubble, just because land lord can come in and out in a limited way not effect possession.
  - **Question of fact dependent on each case;** *Radaich v Smith*
    - **No one factor determinative & naming something a lease** does **not mean** there is a **lease** and EP. E.g. language of contract or surrounding circumstances and nature of the premise.
- EP is private, uninterrupted and full occupation of the land for the lease duration.

### *Radaich v Smith* (1959) 101 CLR 209

- R entered into a deed with S for a term of 5 years for:
  - Sole & exclusive license and privilege to supply refreshments to the public and carry on the business.
- ISSUE: Was it a lease or license? Lease subject to fair rents board.

HELD:

- The **intention of the parties** could not **override the objective fact** of **EP existing thus a lease arising from the circumstances.**
- “Sole and exclusive licence” = a lease due to substantive rights conferred and intention
- **Mere fact** a **contract is called a license** is **not conclusive** that is actually a license.
- Interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes.
  - Grantee was given a legal right of exclusive possession of the land for a term or from year to year or for a life or lives, is a tenant
- **EP exists** where the terms of the lease **entitled the tenant to private, uninterrupted and full occupation of the land** for the entire duration of the term.
- **To determine whether EP?**
  1. What are the **terms of the agreement?**
    - References/language, e.g. “that part of the premises occupied by her”
  2. What are the **surrounding Circumstances?** (No one fact determinative)
    - Nature of the premises (could only operate shop if EP)

### *Wik v Queensland*

- **Pastoral Lease: not a lease if no exclusive possession.** Thus no extinguishment of NT.
- Need to look at substance of the grant (*Radaich*) **and not** **intention of the parties.**

### *Street v Mountford* [1985] AC 809, [CB 7.6]

- Rented furnished rooms, 37 pounds per week subject to 14 days' notice.
- "I understand and accept that a licence in the above form does not and is not intended to give me a tenancy protected under the Rent Acts." (Signed paper saying not a lease)
- ISSUE: Was this a tenancy or a licence?

HELD:

- M is a tenant, thus there is a valid lease with EP and a term of rent.
- The **existence of exclusive possession** is in **itself determinative** and **subjective intention of the landlord**, once granted, **cannot deny or alter exclusive possession**.
- **No tenancy unless** the **occupier enjoys exclusive possession** for a fixed term with rent.
  - **But occupier who enjoys EP is not necessarily a tenant**, may be owner in fee simple or a trespasser
- **The role of intention: Parties cannot turn tenancy into a licence merely by calling it one.**
  - Circumstances and conduct of the parties show that what was intended

### *Bruton v London Quadrant Housing Ltd* [2000] 1 AC 406 (Nemo Dat)

- L made agreement to 'license' house to charity. Charity let homeless people live there.
- Term saying no interest conferred and that temporary place for homeless people.
  - Mutual intention of all three parties was a licence, council did not give trust title.
- ISSUE: Did B have a lease subject to *Tenants Act* for covenant of repair (Nemo Dat)

HELD:

- L did not intend to grant a tenancy, but they entered into an agreement on terms which constituted a tenancy, thus B is a tenant.
- Where **accommodation granted** for **term** (certain duration) at a **rent** with **exclusive possession**, Landlord providing no attention nor services, the **grant is a tenancy = lease**
  - **Regardless of intention of the parties to be a mere license**
  - **Legal consequences of agreement is determinative not the parties label chosen.**
- Lease: relationship between tenant/ landlord, not if binding or proprietary interest.
- A **lease usually creates a proprietary interest** called a leasehold estate, **depends whether landlord had interest** in the **first place** to grant. (*Nemo Dat Quod Non Habet*)
  - What the proprietary interest is, depends on what the grantor is giving.
- Can have a very narrow lease out of agreement where no estate transferred or involved.
- The fact the parties use language more appropriate to a license is irrelevant, if upon the true construction of the agreement, it has the identifying characteristics of a lease.

### 3. Certainty of Duration

- **Duration must be certain** (at time the lease takes effect and executed)
- **Certain beginning and a certain end.** **Any ambiguity of term will invalidate the lease**
  - E.g. cannot be lease until the tenant wins Tatts lotto= no certain and invalid
  - E.g. lease until loan is required *Prudential Assurance v London*

## Equitable Leases

- **NOTE:** If stuff up formalities, but have a set duration can claim equitable lease.
  - A lease may not be enforceable under CL, but can be enforceable under equity.
- **Assumption** that equitable jurisdiction will uphold a tenancy where it would be unconscionable to deny it.

### Legal vs Equitable Leaser

- An **equitable lease differs from a legal lease** in that:
  - **Enforcement is discretionary** (if court does not like you, e.g. dodgy, no lease);
  - A **landlord cannot recover rent** unless court of equity order specific performance;
  - An equitable lease will lose in a priority contest with later legal interest acquired for value without notice of the equitable lease. (General law will overcome equity)

### 1. Walsh v Lonsdale Principle

- A **lease may be enforceable** where a **tenancy agreement** has **been made which is specifically enforceable.**
  - Will be enforced within equitable jurisdiction with same force as a legal lease.
- Lease is only enforceable between the landlord and the tenant.
  - **Not enforceable against third parties.** E.g. person who guaranteed to pay the rent.
    - *Chan v Cresdon (1989) 168 CLR 242*

#### Walsh v Lonsdale (1882) LR 21 Ch D 9 (CA)

- Agreement to grant 7 year lease (rent paid monthly). Formal lease never drafted.
  - Covenant: on any day, the Landlord could demand one year's rent in advance.
    - Request for rent one year in advance made.

HELD:

- Lease enforced at equity, even though no formal lease agreement.
  - As based around whether agreement is enforceable, is on the facts.
  - **Must constitute a contract under CL principles: rent, name, duration**
- If **tenant has a lease agreement**, has **same terms in equity as if granted**, and if both parties admit specific performance can be given as relief, then a lease.
- Landlord can only re-enter if breach of covenant and thus **tenant cannot claim distress when rent covenant called upon, just because not in writing.**

### 2. Tenancy by Estoppel

- Where **landlord has represented** will **grant EP** over land, **but in fact has not title.**
- **Concept:** **Each party is estopped** from **denying each other's title**
  - E.g. T discovers L has no title, T must still pay rent
    - E.g. if rent out house before your title has been confirmed in sale
  - E.g. T discovers L has no title, L cannot evict T on those grounds
    - *Bruton v London Quadrant Housing Trust*
- Arises sometimes in fee simple conveyance let prematurely
- **Estoppel** will bind landlord and tenant, but **not bind the true owner.**

### 3. Part Performance; PLA s55(d)

- Despite the absence of a written contract, **acts performed such as taking of possession and the payment of rent**, are **unequivocally referable** to the **alleged lease agreement**, the **lease** may be **enforced provided specific performance would be granted**.
  - *Lighting by Design (Australia) Pty Ltd v Cannington Nominees Pty Ltd*
- **Remedy: specific performance** (equity)
- **Part performance** is an exception to the *Statute of Frauds*, thus **writing** is not required where **sufficient acts of part performance** can be **proved**;

## Assignments and Subleasing

### Statement of Law-*Debonair Nominees Pty Ltd v J & K Berry Nominees Pty Ltd* [2000] SASC 244

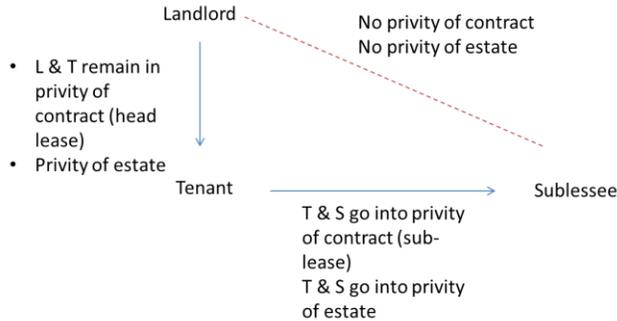
- **When valid lease**, **both privity of contract and privity of estate** between **lessor and lessee** (arises from tenure between the parties).
- **Upon an assignment of the lease**, that **tenure is broken** but the **privity of contract remains**.
- **After assignment**, whilst **privity of estate** between the lessor and the assignee of the lease, the **original lessee remains liable** upon the express covenants.
  - Liable for all breaches of covenants throughout the term of the lease, even after assignment because the privity of contract remains: *Re Teller Home Furnishers Pty Ltd (In Liquidation) Electronic Industries v Horsburgh* [1967] VR 313

## Concepts

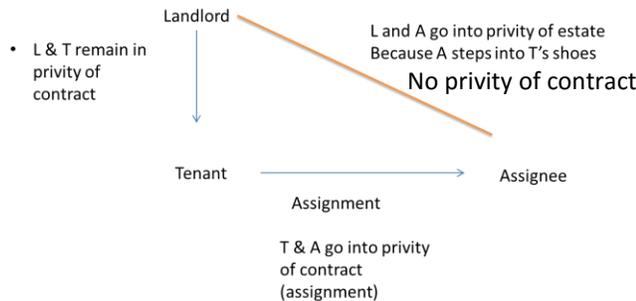
- **Privity of Contract**: an agreement between parties (**P of C**)
- **Privity of Estate**: Landlord tenant relationship exists between parties (**P of C & P of E**)
  - Never relationship between a Landlord and a subtenant
- **RULE: before one party can sue another**, they **must be** in either **privity of contract or privity of estate**. E.g. Sue for breach of:
  1. **P of C** – **ALL covenants enforceable** between the parties
  2. **P of E** – **Only enforce covenants** if they **“touch and concern the land”**
  3. **If no P of C or P of E**, **covenants not enforceable** (some exceptions)
- **ASSIGNMENT**: T **disposes WHOLE interest** to Assignee (A) (**no new lease**)
  - Transfers title of the lease to another person for the entire time
- **SUBLEASE**: T **disposes partial interest** Sublessee (S) (**new sub-lease**)
  - Transferring part of term over to a third party and retaining surplus.
  - E.g. want to move back after going overseas for 3 months, leasehold reversion.
- No limit to the number of assignments **and** subleases
- The **right to assign or sub-let is an inherent right** attaching to all leasehold interests apart from the tenancy at will and the tenancy in sufferance. *Allcock v Moorhouse*
  - Sublease or assign must be a deed if over 3 years or if under can be writing.
- The **right to assign or sub-let might be removed or modified**.

- **Lease covenants can expressly prohibit right to a tenant to sublet or assign.**
  - E.g. May requires consent of landlord, which cannot be unreasonably withheld (reasonable person TEST); *Re Gibbs and Houlder Brothers*

### Sublease:



### Assignment:



### Consent of the Landlord

- Landlord consent cannot be unreasonably withheld (*Nominees v Jenkins Development*)
- **TEST: Consent will not be unreasonably withheld if in the circumstances the same conclusion would have been made by a reasonable person (RP)**
  1. Will it affect L's ability to let the property in the future?
  2. Would a RP in the lessor's position see it as damaging his property interests?

## Covenants that 'Touch and Concern the Land'

### The Enforceability of Lease Covenants

- **A Covenant:** doing of an act set out in the lease. Express or implied (term in a contract)
  - Usual covenants (depends on type of lease)
    - T to pay rent, outgoings and permit landlord to enter if rent not paid.
- **P of C** – all covenants are enforceable (if concern land)
- **P of E** – covenant must Touch and Concern the Land

### *P & A Swift Investments v Combined English Stores Group (CESG) [1989] [CB 7.30]*

- Landlord liquidated, leasehold reversion transferred to P. But surety's covenant (paying rent) was not assigned expressly. X defaulted on rent. CESG refused to pay X's rent.
- Could P enforce 'surety' covenant to pay rent and does it touch and concern the land?

HELD:

- Where Privity of Estate the tenant's covenant to pay rent touches and concerns the land
  - The surety to pay rent was enforceable as a covenant by surety guaranteeing the tenants covenant rent must also touch and concern the land.
- Covenants relate not only to rent but also to repair, insurance and user of the premises.
  - All covenants by a tenant in favour of the landlord touch and concern the land:
    - I.e. reversion of the landlord. Prevent personal covenants affecting third parties. E.g. failing to pay rent.
- **TEST: Covenant must-**
  1. Benefit only the reversioner (LL) for time being, and if separated from the reversion ceases to be of benefit to the covenantee (tenant);
  2. Affect the nature, quality, mode of user or value of the land of the reversioner and be not from collateral circumstances;
  3. Not be expressed to be personal (not being given only to a specific reversioner or to the obligations of only a specific tenant);
  4. Paying a sum of money will not prevent it from touching & concerning the land
    - If conditions (1-3) ^ are satisfied and the covenant is connected with something to be done on, to or in relation to the land.

### Examples:

#### Touch and Concern the Land

- Covenant to pay rent
- Covenant to repair
- A covenant by a surety guaranteeing performance of a tenant's covenant that touches and concerns the land (*PA Swift*)
- Covenant against assigning or sublet without permission
- Covenant to insure against fire
- Covenant to use premises as a private dwelling
- Covenants by L not to build on certain parts of neighbouring property

#### Do Not Touch and Concern

- Covenant to purchase
- Covenant by L not to open another public house within half mile
- Covenant unrelated to the land
- Covenants restraining competition (*Specialist Diagnostic*)

## Rights and Duties of Landlords and Tenants

### Sources of Rights and Duties

- Express Covenants
- Implied Covenants (from statute and common law)
  - Lease contract usually sets out covenants of landlords/tenants, implied in wording.

### Implied Covenant at Common Law:

### (1) To provide Tenant with Quiet Enjoyment

- **Tenant's right of possession**, i.e. to **allow tenant to remain peacefully in possession** during term free from interruption
- **Must be substantial** and **physical interference** with quiet possession or the purposes for which the lease was granted; *Purple Tangerine Pty Ltd v Australian Financial Loan*
  - E.g. Removal of doors/windows of tenant's premises; disconnection of gas
- Damages available

### (2) Non-Derogation from Grant by Landlord

- **Obligation not to take away from the right granted** to the **tenant**
- *Aussie Traveller Pty Ltd v Marklea Pty Ltd [1998]*: A leased place for his business.
  - Sawdust from another tenant substantially interfered with P's business. **Landlord liable for derogating from lease granted to plaintiff.**

### (3) Duty of Reasonable Repair by Landlord

- **If unfurnished premises:** **No specific common law duty to repair,**
- **If premises are furnished:** **Landlord must repair:** *Cruse v Mount [1933] Ch 278*
  - Obligation to keep in state of repair: same as condition at the start of the lease
    - *Penn v Gatenex [1958]*
- **L obliged to keep furnishings in a state of reasonable repair** under contract
  - If breached may obtain damages for breach of contract.

### (4) Duty to Exercise Reasonable Care by Landlord

- **Landlord has duty to take reasonable care to avoid foreseeable risk or injury to tenant and occupants.**

#### *Jones v Bartlett (2000)*

- J son of tenant, was injured by acting carelessly in the house, put his knee through glass.

#### HELD:

- House was within statutory requirement when made and no obligation to have premises inspected by an expert.
- There is **no such thing as absolute safety.** **All residential premises contain hazards** to their occupants and to visitors.

#### Landlords Duty of Care Summary

- Premises must be reasonably fit for the purposes for which they are let.
- Avoid foreseeable risk of injury to tenant and tenant's family.
- Not to let premises suffer from an unsafe defect.
  - Limited to defects at time when tenant is let into possession.
  - Not responsible for defects couldn't have been discovered by reasonable care
- General duty of care –to occupiers who enter premises with consent.

### (5) Tenant to Use Premises in a Tenant-like Manner

- **Tenant must use the premises in a tenant-like manner** – reasonableness assessment: *Warren v Keen [1954] [CB 7.21]*

- **Tenant must take proper care** when there **and away**, to **clean when necessary as a reasonable tenant would**, ensure **house not damaged** willfully or negligently
- Tenant not liable for reasonable fair wear and tear
- Tenant must notify landlord of structural defects as soon as possible.

### **Other Examples of Tenant's Duties**

- **Not to commit waste** – not to damage premises or alter in ways that adversely affect the landlord's right to possession in the future. E.g. cannot dig up the tree out the front
- **To yield up possession at the end of the lease** – Must vacate premises at termination of lease and make sure landlord can retake possession easily
- **To allow landlord** (reserved right)- to inspect and repair

### **Covenants Implied by Statute:**

#### *Transfer of Land Act 1958 (Vic) s 67*

- To pay rent.
- Tenant to keep and yield up premises in good and tenantable repair, having regard to age, locality of premises.
  - Accidents/damage from storm/tempest and reasonable wear & tear excepted
- To allow landlord to inspect at reasonable times.
- Landlord's right of re-entry and to take possession of the leased property for breach of covenant TLA s67(1)(d). (Essentially a forfeiture clause)

#### *Residential Tenancies Act 1997 (Vic)*

- **Urgent Repairs:** s 72- Tenant may have repairs to premises done if landlord not doing it and has had 14 days' notice. Landlord must reimburse reasonable cost OR \$1000 (lesser).
- **Rent in Advance:** Landlord cannot ask for more than 1 month rent in advance: s 40
- **Excessive Rents:** may be investigated: s 45
- **Notice:** Tenant must give notice of damages: s 62
- **Landlord Notice** (to enter rented premises): 7 days with consent: s 85

### **Remedies for Breach**

1. Is there a lease? (Briefly mention)
2. Is there assignment or sublease? – If so issues of **PoC** and **PoE?** (Brief mention)
3. Which covenants are alleged to be breached? If **PoE** –covenant touch and concern the land?
  - Implied, express, statute
4. Breach – what remedy is sought e.g. forfeiture, repudiation?

### **Ending a Lease**

1. **Natural Expiration of Term** (Term agreed upon comes to an end)
2. **Notice to Quit** (Advise landlord of exit)

3. **Surrender** (Gives up lease to landlord- voluntary surrender)
4. **Merger** (When the tenant buys the property)
5. **Frustration** (Contract becomes incapable of performance, e.g. house burns down)
6. **Termination due to Breach** (T not pay rent and landlord re-entry of land)

## Terminating a Lease for Breach

### Remedy 1: Forfeiture (Property Remedy)

- **L has the right to terminate Lease** to T **due to breach**
  - L must make formal demands for rent, peaceful re-entry, or bring action for repossession
- **For covenants, no common law right of forfeiture** (damages, injunction)
  - BUT usually an express forfeiture clause “proviso for re-entry”, AND
  - Implied by statute TLA s67(1)(d) (breach allows L re-entry).
- **If breach, lease is “voidable”**, on foot until L exercises right of re-entry
- Damages for past breaches of covenant

### Relief against Forfeiture

- A **tenant may seek ‘relief against forfeiture’** (threat to ensure tenant pays rent)
  - E.g. tenant pays all arrears of rent and costs
- SCA s79/80: If tenant has paid arrears (past rents) of rent and costs prior to hearing, proceedings shall cease.

### Remedy 2: Repudiation of Contract (Contract Remedy)

- **Repudiation** – a **party manifests inability or unwillingness to perform**
  - Termination under forfeiture = surrender. Ends lease/ ends tenants obligation
- Ordinary contract law can apply to leases including **Repudiation Doctrine**
  - Progressive *Mailing House Pty Ltd v Tabali Pty Ltd (1985) 157 CLR 17*
    - Serious breach e.g. abandoning or consistently failing to pay rent.

## Repudiation of a Lease Term

1. **Covenants must be “essential terms” or “fundamental terms”** of the lease contract
  - (Can stipulate any clause to be essential) (*Shevill*)
2. **T refuses or is unable to perform essential terms**
  - E.g. T persistently failing to pay rent. But each case depends on own facts.
3. **If breach, L can recover damages for loss of future benefits** under the Lease (assessed at date of termination)
4. **L obligated to take reasonable steps to mitigate loss** e.g. find another tenant (*RTA*)

### *Progressive Mailing House v Tabali (1985)*

- P rented industrial premises. Damaged property, sub-let without consent, used premises unlawfully and failed to pay rent.
- Issue 1: Had P committed breach of contract or repudiated the lease?

- Issue 2: If LL accepts repudiation, can damages for loss of future benefit be obtained?

Held:

- Landlord entitled to end lease.
  - Successive serious breaches & failure to pay rent. Repudiation damages available. Claim for loss of bargain possible under contractual rationales.

**TEST: When Repudiation in a Lease Occurred-**

- Party evinces an intention no longer to be bound by the contract or that he intends to fulfil the contract only in a manner substantially inconsistent with his obligations and not in any other way"

*Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd (2008)*

- G granted lease to D for 15 years. D agreed to monthly rent in advance (essential term)
- D sublet to Woolworths and they didn't pay rent. D in breach of essential term.
- G sought arrears of rent as well as loss of bargain damages for rest of the 15 years.

HELD:

- Breach of an essential term, thus loss of bargain damages were available.
- The benefit of the covenant could be enforced by the assignee to the reversion, the covenant to pay rent clearly satisfied the touch and concern tests
- Possible by express provision in the contract to make a term a condition, even if it would not be so in the absence of such a provision
- Breach did not in itself constitute a basis for failing to give effect to the obligations to which the parties had bound themselves. Court gave effect to obligations
- Cases have shown where a lease is terminated pursuant to a specific contractual clause, a broader remedial scope may be available.