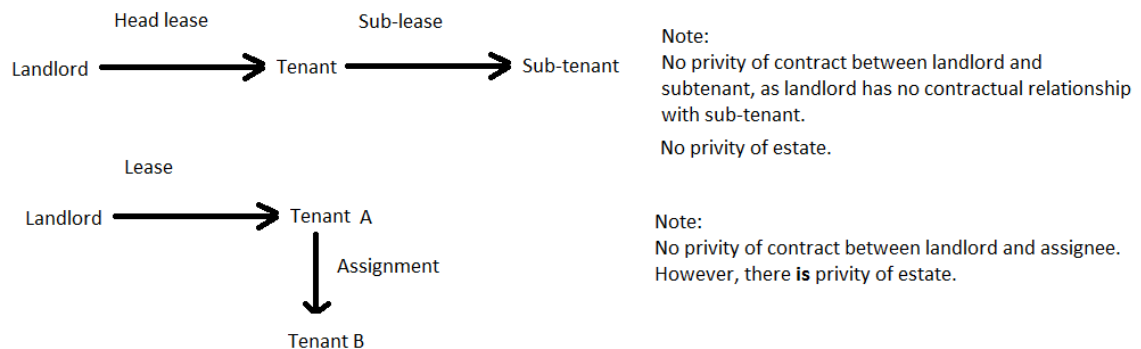


II CONTENTS

A *Assignment and sub-letting of leases* (reference guide)



1 Overview

- The tenant may dispose of their possessory interest to a third party prior to the expiration of a lease;
 - Regardless of whether assignment or sub-lease, there is no privity of contract;
- If the tenant disposes of the whole of the interest, they have **assigned** the interest;
 - **Legal effect – assignee substitutes for the tenant in relation to the enforceability of the parties' rights and duties;**
 - The assignment does **not** create a new lease;
 - The landlord and assignee will be in privity of **estate**;
- If a tenant does **not** dispose of their whole interest, creates a **sublease**;
 - The head tenant's rights and duties vis-à-vis the landlord are **unaffected**, and there is no **privity of estate** between the landlord and sub-tenant;
 - That is, the landlord cannot take action against the sub-tenant;
 - Landlord *can* take action against head tenant to enforce a covenant;

2 Enforceability of covenants by and against assignees or subtenants

- Assignment does not create a new lease;

- The assigner remains liable for breaches of covenants committed **while they were the tenant**;
- However, the landlord cannot 'double-dip', i.e. sue the assignor *and* assignee for arrears of rent;
- As there is no privity of contract *or* estate between the landlord and subtenant, no action can be taken for breach of a covenant;
 - Focus on enforcement against the head tenant;
- **To enforce a covenant against an assignee, on the basis of privity of estate, the landlord must show the covenant 'touches and concerns the land'**
 - Remember, no privity of contract, and so personal covenants are unenforceable (would be enforceable under normal principles of contract law);

3 Covenants must 'touch and concern the land'

- Covenants which relate to personal obligations are **not** enforceable – do not 'touch and concern the land';¹
- A guide for determining whether a covenant 'touches and concerns the land' is given in ***P & A Swift Investments***.²
 1. The covenant benefits only the landlord for the time being, and if separated from the land ceases to be of benefit to the tenant;
 2. The covenant affects the nature, quality, mode of use or value of the land;
 3. The covenant is not expressed as a personal requirement;
 4. The fact a covenant is to pay a sum of money will not prevent it from being deemed to 'touch and concern the land' so long as the previous three conditions are satisfied;
- Examples of covenants which have been held to touch and concern the land:
 - By the tenant:

¹ *Spencer's Case* (1583) 77 ER 72.

² *P & A Swift Investments v Combined English Stores Group Plc* [1989] AC 632.

- To repair the premises;
 - To pay rent;
 - Not to sublet or assign without the landlord's consent;
 - Not to sell fixtures;
- Examples of covenants held **not** to touch and concern the land:
 - By the tenant – to pay rent in respect of other property;
 - By the landlord – not to open another public house within half a mile of the property;

B *Fixtures, Chattels and Encroachments (structure guide)*

1 Fixtures and chattels

1. In determining whether an object is a fixture or chattel, the court will have regard to 'all the facts and circumstances of the case': **Blacker**
 - This includes both the *degree of annexation* and *purpose of annexation* tests;
 - The purpose test has assumed greater prominence in recent cases:
Palumberi
2. Application of *degree of annexation* test:
 - Is the chattel attached to land in a manner other than by its own weight?
 - i. Yes – prima facie a fixture *under this* test; **Metal Manufacturers**
 - ii. No – not a fixture *under this* test, even if embedded in the soil;
Monti v Barnes
3. Application of *purpose of annexation* (objective) test:
 - Was the object fixed to the land to benefit the whole of the land (fixture) or as a temporary means or merely to display object (chattel)?
 - Per **Metal Manufacturers**, considerations include:
 - i. Would removal of the object destroy the attached property?
 - ii. Would the cost of removal exceed the value of the attached property?

- iii. Would removal cause significant damage to the land or building?
- iv. Was attachment for the better enjoyment of the attached object or the land/building to which it was attached?
- v. What is the nature of the object itself?
- vi. What was the contemplated use of the object?
- vii. What period of time was the object affixed in that position?
- viii. What function was to be served by the annexation of the object?

2 Encroachments

- Two situations:
 - Where the *entirety of the building* is erected under mistake of title;
 - Where *part of the building* encroaches on another person's land;

(a) *Erection of building under mistake of title*

1. Prima facie, ownership of the building will vest in the owner of the land owing to the doctrine of fixtures.
2. The 'builder' may be able to claim ownership through either equitable estoppels or the equity of acquiescence (of the landowner);
3. Elements of acquiescence, per ***Russell v Watts*** – need all five to succeed:³
 - (a) Was the 'builder' mistaken as to their legal rights [to the land]?
 - (b) Did the 'builder' expend some money or do some act on the faith of that mistaken belief?
 - (c) Did the landowner know of the existence of their own right, inconsistent with that claimed by the 'builder'?
 - (d) Did the landowner know of the 'builder's' mistaken belief as to their legal rights?

³ See *Brand v Chris Building Co* on ~p. 60 of the reference guide for an illustration.

- (e) Did the landowner encourage the builder as to their expenditure of money/acts by either directly or by abstaining from exercising their legal rights?

4. Elements of equitable estoppels:

- (a) Has there been representation by the owner of the land?
- (b) Did that representation induce the 'builder' to build on their land?
- (c) Did that act cause detriment to the 'builder'?

(b) *Encroachment of buildings onto neighbouring land*

1. The encroaching or adjacent owner can apply to the court for relief in respect of the encroachment: ***Encroachment Act 1944 (SA) s 4***
 - A driveway and a fence have been held to constitute a 'building' and so fall under the definition of 'encroachment' in the Act: **s 2; *Clarke v Wilkie***
2. Court may make any orders it sees fit e.g. order compensation, taking into account all relevant factors, **but cannot order a transfer of land ownership: s 4(2)-(3)**

III FLOWCHART SAMPLE

