

LANDLORD & TENANT

100 INTRODUCTION

The relationship of LAND ORD & TENANT is created if the owner of land gives possession of the land for a DEFINITE period & charges RENT for this right. Unless either party can show that the intention was to create a LICENCE. It should be thought of as a BUSINESS TRANSACTION. The relationship ranges from short term licences to leases in PERPETUITY. Range of 1 week to 999 years.

Combines the features of a CONTRACT & a PROPRIETARY interest in the land.

The landlord & the tenant each have separate obligations at law.

There are 4 kinds of leases;

- *LEASE FOR YEARS
- *PERIODIC LEASE
- *TENANCY AT WILL
- *TENANCY AT SUFFERANCE

COVENANTS: are CLAUSES in the LEASE DOCUMENT. if the lease is under SEAL. e.g. repairs to the building.

*101 LEASE FOR YEARS (OR TERMS OF YEARS)

These are leases from the landlord to the tenant for a DEFINITE number of years. A lease for a TERM.

There is a DEFINITE BEGINNING & A DEFINITE ENDING to the lease agreement.

E.G. If A agrees to lease his land to B for 5 years at an annual rental of \$100 then this is a LEASE FOR YEARS.

& Such leases expire without notice & are generally created by a formal document.

Typical purposes ;

- *Residential leases
- *Business premises
- *Grazing & agricultural land
- *Mining leases. Often 5 to 20 years. There is usually reserved a "DEAD RENT" + ROYALTIES in addition while the mine is being worked.
- *Building Leases; Can enable the builder to profit without immediate capital outlay on the development. Gives greater control over the development by the owner.

The rent reserved is called a GROUND RENT.

*102 PERIODIC LEASE (LEASE FROM YEAR TO YEAR)

This type of tenancy will continue indefinitely until determined by NOTICE served by either the landlord or the tenant upon the other. It can only be determined at the end of any year unless there is an stipulation for DETERMINATION WITHOUT NOTICE.

This kind of tenancy is rarely created. A tenancy from YEAR TO YEAR can arise by PRESUMPTION of law when a person when a TENANT AT WILL or ENTERED UPON PREMISES has remained IN POSSESSION. Such a presumption cannot arise in N.S.W. as S.127 of the CONVEYANCING ACT 1919 says that no tenancy from year to year shall be implied by payment of rent. If there is a tenancy & no agreement as to its duration.

TENANCIES FROM YEAR TO YEAR are determined at COMMON LAW by a $\frac{1}{2}$ years NOTICE. The notice expires on the ANNIVERSARY OF THE DAY OF THEIR COMMENCEMENT.

PERIODIC LEASES include QUARTERLY, HALF-YEARLY & MOST commonly; WEEKLY TENANCIES. I.E. THEY CONTINUE FROM PERIOD TO PERIOD E.G. WEEK TO WEEK or MONTH TO MONTH. Can be terminated by a proper NOTICE TO QUIT expiring on the last moment of the WEEKLY TERM.

*103 TENANCY AT WILL

This is a tenancy where the tenant is IN POSSESSION BUT occupancy is DETERMINABLE at wither the will of the LANDLORD or TENANT.

Thus the tenancy is usually at the will of the LESSOR. E.G. ~~xxxxxxxxxxx~~ Permission to live in a house "rent free".

It is thus an informal arrangement. Where rent is paid then a more stable arrangement such as a PERIODIC TENANCY. E.G. WEEKLY TENANCY

S.127 of the CONVEYANCING ACT states that no year to year tenancy can be implied merely by the mode of rent payment. If there is a tenancy, no agreement as to its duration then it is deemed to be a TENANCY AT WILL determinable by 1 months notice in writing.

"GIVE & TAKE FENCE"

A common arrangement on water boundaries on rural properties. This is a tenancy at will but there may be an EXPRESS TERM of the tenancy that the tenancy cannot be TERMINATED without REASONABLE NOTICE given by one party to the other. (LANDALE V. MENZIES 9CLR 89)

*104 TENANCY AT SUFFERANCE

This is where the lawfully occupied tenant "holds over" on the termination of his lease. He continues in possession without the consent of the landlord or owner.

E.G. A tenant has leased a property under a 3 year lease agreement. At the expiration of 3 years he "holds over". He then becomes a TENANT AT SUFFERANCE.

No notice is needed to determine the tenancy. The landlord may enter at any teime & the tenant may leave at any time.

The ~~in~~ landlord is not liable for rent as such but rather compensation for the occupation & use of his land without his permission & therefore can in certain circumstances claim an additional amount as compensation.

If the TENANT AT SUFFERANCE PAYS RENT then under S.127 of THE CONVEYANCING ACT the tenancy can be determined at any time by 1 MONTHS NOTICE IN WRITING.

If the premises is subject to the controlling provisions of the LANDLORD & TENANT ACT a TENANCY IN SUFFERANCE Cannot arise. This act allows the tenant to continue in possession after the expiaration of the lease by effluxion of time.

*105 DEED

Does not apply to TENANCIES AT WILL OR AT SUFFERANCE.

If the subject premises come under the provisions of the REAL PROPERTY ACT & the term of the lease EXCEEDS 3 years then the lease must be registered with the REGISTRAR GENERAL BY way of a MEMORANDUM OF LEASE.

Periodic leases & TERMS OF YEARS for 3 years or less (irrespective of whether or not the rent is a market rent) can be created in writing or by word of mouth.

OLD SYSTEM

A lease is not valid at law unless effected by DEED, UNLESS at market rent for a term of not more than 3 years. (CONVEYANCING ACT S.23B) including any right of extension (S.23D) (Lease in this case does not have to be in writing)

EQUITABLE LEASE

Writing alone without a DEED or MEMORANDUM is sufficient even where the term exceeds 3 years as long as it is a VALID & ENFORCEABLE CONTRACT.

FORM OF LEASE BY DEED:

"THIS DEED made the ... day of in pursuance of the Conveyancing Act, 1919 between.....of...hereinafter called the lessor of the one part &of..... hereinafter called the lessee of the other part WITNESSETH that the lessor doth demise unto the lessee his executors administrators & assigns ALL that piece of landfrom theday of....FOR THE TERM of....years thence ensuing YIELDING & PAYING therefor during the said term the yearly rent of \$.....be equal monthly payments on the first day of each month & the lessee covenants with the lessor

- (1) To pay rent
- (2) To pay taxes except for local improvements, also rent of water meter
- (3) To repair, reasonable wear & tear & damage by fire, lightning, flood & tempest only excepted.
- (4) To leave the premises in good repair
- (5) That the lessor may enter & view the state of repair & that the lessee will repair according to notice in writing, & that in default the lessor may repair.

AND the lessor covenants with the lessee for quiet enjoyment.
IN WITNESS whereof the parties have hereunto set their hands & seals".

OLD SYSTEM: A PAROLE LEASE at the MARKET RENT FOR a term not exceeding 3 years is VALID(S.23D C.A.)
OTHERWISE to pass an interest at law the lease must be by DEED (S.23B)

*106 COVENANTS

The basic COVENANTS are those (1) to (5) above expressed in the DEED. The COVENANT is between the LANDLORD & the TENANT & it can be seen that both benefit & are burdened by the COVENANTS.

They may run with the land at law.

There are 4 rules to covenants as in SS.117/8 of the CONVEYANCING ACT:

- (1) An assignee of the lease is bound by the LESSEE'S COVENANTS
- (2) An assignee may enforce the LESSOR'S COVENANTS
- (3) An assignee of the LESSOR'S REVERSION is bound by the LESSOR'S COVENANTS
- (4) This assignee may enforce the LESSEE'S COVENANTS

RESTRICTIVE COVENANTS:

There are often R.C. which restrict the lessor's use of the land. E.G. the lessee will ONLY carry out one ARTICULAR TRADE in the premises leased.

This is common in shopping centres where the owner is trying to "spread" the types of trades to increase profitability by reducing competition. However such restrictions are under a cloud as being contrary to the TRADE PRACTICES ACT.

*107 FORFEITURE

A breach of any COVENANT or CONDITION in a lease entitles the LESSOR to forfeit the lease. However this general rule is subject to the COURT giving relief in CERTAIN CIRCUMSTANCES

It is known as the "FORFEITURE CLAUSE". The common form relates not only to the default in payment of rent for a specified short period but also to default in observing & performing covenants contained in the lease & frequently to the bankruptcy of the tenant.

A common form;

"Provided that if the rent hereby reserved or any part thereof is in arrear for fourteen days (whether lawfully demanded or not) or in case default is made in the observance or fulfilment of any covenant or condition herein contained & such default is continued for the space of 1 month, or if the lessee or any assign of the lessee shall become bankrupt, the lessor may re-enter upon the demised premises or any part thereof in the name of the whole & enjoy the same as of his former estate & thereupon the estate & interest of the lessee his executors administrators & assigns shall absolutely cease & determine."

*RE-ENTRY

S.85(1)(d) CONVEYANCING ACT:

This section implies in every lease a proviso for re-entry on default in payment of rent for 1 month & default in the observance of any covenant which is continued for 2 MONTHS or if repairs which the lessee requires by notice are not completed within the time specified in the notice.

This section does not refer to bankruptcy. It also would probably apply only to leases by DEED or by MEMORANDUM under the R.P.A.
(SEE WATTS 10 ALJ 357)

"Whether lawfully demanded or not" in the statutory

"although no formal demand thereafter has been made" is to avoid a common law rule which requires certain formalities to be observed such as demanding the rent before the proviso can be enforced. The contractual relationship between the lessee & lessor enables them to create their own law by agreement.

*0109 ASSIGNMENT

The lessee has an INTEREST in the land. Therefore he has property & generally he is entitled to dispose of the property.

The LESSEE remains liable on all covenants in the lease.

PRIVITY OF ESTATE: the ASSIGNEE also becomes liable to the LESSOR on all such COVENANTS.

I.E. The lessor may after assignment sue either the original lessee or the ASSIGNEE for unpaid rent.

CONSENT REQUIRED: Leases usually contain a covenant which requires the consent of the lessor before the lessee can ASSIGN or SUBLET his interest. ~~Generally~~ The lessor will not withhold consent if the ASSIGNEE or SUBLESSEE is respectable & responsible.

The lessee must ask for consent otherwise he affords grounds for forfeiture.

RESTRICTIONS ON ASSIGNEES: Under the CONVEYANCING ACT ASSIGNEES are restricted by lessees' covenants which HAVE REFERENCE TO THE SUBJECT-MATTER OF THE LEASE.

(1) AFFECTS THE LAND. G.

- * Covenant by LESSEE to LESSOR to repair or to build
- * Not to open a public-house on the demised land
- * Not to erect a public-house on adjoining land

(2) AFFECTS THE LESSEE/LESSOR RELATIONSHIP

OR

- * A covenant to sell the LESSOR'S beer only (for that is part of the rent)
- * A covenant by the LESSOR to renew the lease (affects the relationship of landlord & tenant)

~~OR~~ BUT

* An option to purchase the freehold is not a covenant on the land or a LESSEE/LESSOR RELATIONSHIP, therefore cannot be exercised by an ASSIGNEE unless "ASSIGNS" are specially mentioned.

*110 SUBLEASE (UNDERLEASE)

The ~~LESSEE~~ LESSEE can subLEASE but must be for the balance of the lease less a few days otherwise it is an ASSIGNMENT.

This is called an UNDERLEASE.

The SUBLESSEE stands in no relationship to the HEAD LESSOR. The SUBLESSEE is only liable to the LESSEE. Of course the LESSEE still remains liable to the LESSOR.

*111 DOCTRINE OF WASTE

Any act or omission which changes or diminishes the value of the inheritance.

This applies where there are no covenants.

E.G. for a LIFE TENANCY

To remove a fixture by the lessee is contrary to the DOCTRINE OF WASTE. However common law permits the LESSEE to remove TRADE, DOMESTIC OR ORNAMENTAL FIXTURES during the lease term IF THEIR REMOVAL WOULD NOT CAUSE IRREPAIRABLE DAMAGE. (AGRICULTURAL FIXTURES ARE NOT TRADE FIXTURES) (ELWES V. MAWE 1802 3EAST28)

includes AMELIORATING WASTE - i.e. an alteration in the or buildings or the use to which they are put which would generally be regarded as an IMPROVEMENT. VOLUNTARY WASTE: Deliberate & active change

The right of removal is an exception to the LAW OF WASTE But not to the LAW OF FIXTURES. It only arises when the article becomes REALTY.

*112 RESTRICTIVE COVENANTS

The Crown can impose restrictions on the use to which the property can be put. E.G. LEASE OF CROWN LAND FOR A RACECOURSE OR A SCHOOL OF ARTS.
SUCH GENERAL RESTRICTIONS ARE TAKEN INTO ACCOUNT WHEN ASSESSING THE U.V. COVENANTS ARE IGNORED.

A SUB-TENANT will be bound in EQUITY in accordance with the DOCTRINE OF RESTRICTIVE COVENANTS BUT only if advised of such restrictions on taking up the SUB-LEASE.

AN ASSIGNEE is liable only for those breaches which occur during his tenancy. The ORIGINAL COVENANTOR remains personally responsible because of the original contract. (E.G. PRIVITY OF CONTRACT through PRIVITY OF ESTATE)

TORRENS TITLE: The benefit of the covenant runs with the land. (S. 53 R.P.A.) E.G. A covenant by the lessor not to open a public house within $\frac{1}{2}$ mile of the demised public-house DOES NOT RUN WITH THE LAND for that AFFECTS THE TENANTS BUSINESS & NOT THE LAND AS SUCH.

All the usual CONTRACTUAL REMEDIES are available for BREACH OF COVENANT including not only an ACTION FOR DAMAGES but also the EQUITABLE REMEDIES OF INJUNCTION & SOMETIMES SPECIFIC PERFORMANCE.

HOWEVER the landlord usually protects himself by a PROVISIO FOR RE-ENTRY ON BREACH OF THE TENANT'S COVENANTS AS WELL AS NON-PAYMENT OF RENT. The covenants implied by the CONVEYANCING ACT EXTENDS TO BOTH TYPES OF DERALTY.

*113 RE-ENTRY S.129 CONVEYANCING ACT

This imposes certain formalities on the exercise of the right of RE-ENTRY FOR BREACH OF COVENANT & PROVIDES FOR RELIEF AGAINST FORFEITURE:

(1) The proviso cannot be enforced until a WRITTEN NOTICE has been served on the TENANT specifying the breach complained of. If the breach is capable of remedy then the lessee is to remedy it & the lessor can claim compensation for the breach. The lessee must be given reasonable time to comply with the notice & ONLY ON NON-COMPLIANCE CAN THE LANDLORD RE-ENTER.

(2) EVEN AFTER NON-COMPLIANCE the tenant may apply for relief in EQUITY. The court may grant or refuse relief or if it grants it may be on terms of payment of costs, compensation etc.

*114 TENANT'S ENJOYMENT OF THE LAND

This is necessarily limited to the enjoyment of its fruits I.R. INCOME BUT NOT CAPITAL.
This is governed by the EXPRESSED COVENANTS in the lease itself E.G. REPAIR COVENANTS

666666 RENT

Rent is the basic payment for commercial leases. Often there is a lump sum payment as well such as a PREMIUM OR A FINE. These are treated as payments in lieu of rent i.e., part of the lease agreement.

RENT CONTROLLED BY STATUTE: There is market rent & rent controlled by STATUTE. The major controlling legislation in N.S.W. is the LANDLORD & TENANT (AMENDMENT) ACT 1948. We will consider this act in greater detail in a later part.

The lease as we have stated is a CONTRACTUAL AGREEMENT. Thus payment of rent can be enforced termination of the lease & recovery of the land itself under the "RE-ENTRY" PROVISION.

RECOVERY: Can be an ordinary action for debt or an action on COVENANT to pay the rent. It does not differ from similar actions for debt unconnected with ~~property~~ leases.