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## Leases

### Lease or Licence? Exclusive Possession

[Fatac \(CA, 2002\)](#) > license or lease? Exclusive possession discussion.

#### **Facts:**

Puhinui owned land with quarry on it. P grants Atlas the right to operate the quarry for 12 years, renewable for a further 3 years.

P then entered into an agreement to sell the land to Mt Wellington, subject to what was described as A's 'license'.

Fatac needed to know if A's right as a license or a lease, for GST purposes.

HC finds the right is a license. Fatac appeals.

#### **Judgment**

CA said important part was distinction between lease and license.

Traditionalist approach was to ask whether the occupier has exclusive possession > points to a lease.

- Glenwood: Right to use an area for the cutting of timber found to be exclusive possession of area

- Waimiha: Different result, cutting timber and removing found to be license only because no exclusive possession.
- English courts departed for a while under Denning, looked just at parties intention. But then returned to EP test. NZ departed too and following Denning. Judge in this case says time to return to orthodoxy.

Parties' intention: Only matters to figure out whether they intend to confer a right of exclusive possession. Intention to legal classification is irrelevant – doesn't matter if they thought it was a lease or license.

#### Refinements to the exclusive possession test:

- Defined term: possession that is terminable at the will of the owner is not exclusive possession. Necessary incident of exclusive possession is therefore a defined term, whether fixed or periodic.
- Rent: Relevant to the intention to be legally bound. Indicates whether parties intend to create a lease arrangement and can be legally bound, but not decisive.
- Restrictions: Limitations/restrictions on the use of land by the occupier do not negate existence of a lease. Lessee has EP and enjoys rights of ownership temporarily: this does not mean the lessor cannot impose restrictions on use of land. EP is not the same as unqualified use and possession of the land.
- Cases with there is exclusive possession but no lease:
  - o No intention to be legally bound
  - o Occupier's right to possession may be terminated for reasons extraneous to the occupation of the land, e.g occupation pursuant to an employment relationship or holding of an office.
  - o Where you only have possession of a small section of a larger area, may not be exclusive possession
  - o Where occupier's use of the land is controlled by someone else
  - o Where landlord may come and go at their discretion
  - o Where your portion of land is not designated and moves around according to the landlord
  - o Where statute forbids tenancy/lease.

#### Words and terms of contract

- Doesn't matter that K referred to a 'license'. Terminology and intention only useful to extent that it speaks to intention regarding EP.
- If a term requires you to shift around the property according to directions of the owner, points away from EP.

#### Application of exclusive possession test > license not lease

- Atlas did not have exclusive possession because the landlord had a general right of entry to the land so long as they didn't interfere with A's work. Points away from EP.
- Mt Wellington had an agreement with Atlas. Said that MW had right to quarry materials as well as Atlas, to stockpile and remove materials, to set up a quarry area etc. Points away from EP.
- Duration of term and definition of area lacking.

## Discussion of a lease vs License

- Nature of rights is different. Lease > property rights. License's > personal right, mere permission.
- Leases involve giving up possession for a stated period. Tenants enjoy fundamental ownership rights for period. Licenses exist merely to extent that permission had been given.
- At CL, licenses can be revoked subject to damages. Modified now by PLA. No creation requirements for licenses. Failure to comply with formality requirements for lease can lead to creation of a license instead.

### Why does this distinction matter?

- Tenants/lessor's are protected from eviction. But PLA 2007 has extended protections to licensees also.
  - PLA s206 sets out a cancellation code for cancelling leases
- Proprietary interests against TP if you have a lease. Can sue trespass and nuisance.
- Right to assign or sublet leases > licensees cannot do this unless specifically permitted.
- Leases are registrable by licenses are not.

## Dual Character of Leases: Privity of Contract and Privity of Estate

### City of London v Fell (CA, 1993)

#### **Privity of Contract and Privity of Estate**

##### **Facts:**

Fell leases premises from City of London Corp for 10 years with rent review after 5 years. Lessee promised to pay rent.

Fell eventually moved elsewhere and assigned the lease to Grovebell. Rent was increased according to original K.

Lease expired but G continued in possession for a while. Then CLC regained possession after the holding over period. The holding over statutory provision says that the tenancy continues after expiration of the lease. But **G did not pay rent during this period**. CLC sued Fell for the rent.

**Issue:** Does F's obligation to pay the rent end at the expiration of the lease or does it extend into the holding over period?

##### **Judgment**

Argument by Fell: Lease involves a K between original landlord, tenant, and the grant of an estate. Once the tenancy is assigned, **liability to the landlord only lies under the K** and not under privity of estate.

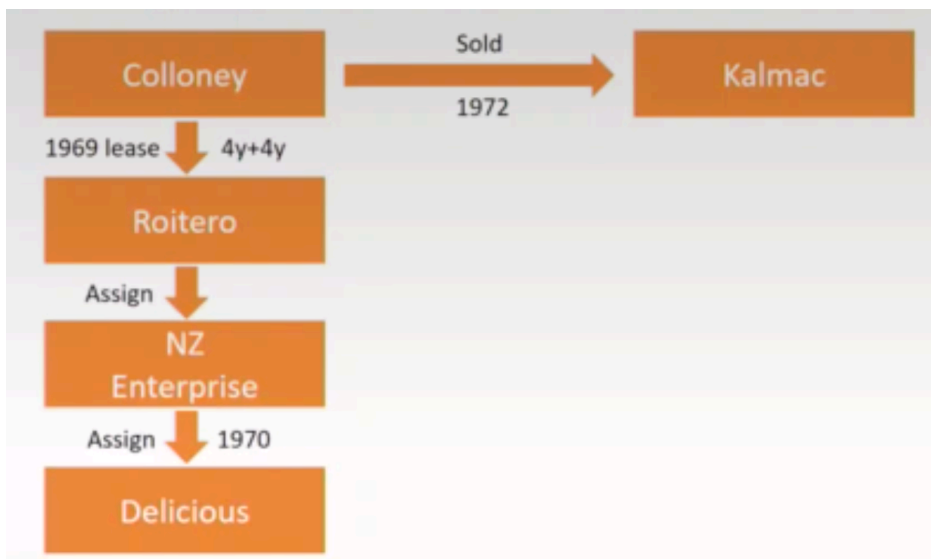
- Assignee's liability lies only in privity of estate (unless a new contract is entered into): so is only liable for the covenants in the lease contract that touches and concerns the land.
- Assignee not bound by all covenants in the original contract.
- So basically, privity of estate moves but liability remains with privity of contract which is between original parties still.

Court agreed with Fell's argument:

- Disagreed with Queens Bench approach that distinguished between term and tenancy. The “term” is an integral part of the tenancy: if one is continued, so is the other.
- Leases give rise to privity of contract and privity of estate. Obligations that touch and concern the land are imprinted on the term of reversion – they bind the current lessor and current lessee and successors in title.
- Original tenant is bound by the contract but not bound by the tenancy if it goes beyond the contract. The tenancy post 1986 exists because of Statute and not because of the K that they are bound by. Only covenanted to pay during the contractual term. Therefore, Fell not liable for rent post 1986 which is not provided for in any of terms of K.

## Rights and Obligations

### Kalmar



### Facts

### Nordern

### Tram Lease

### Mobil Oil NZ

## Mortgages

What obligations are secured by a mortgage?

### Westpac v Clark

### **Facts**

- W was induced by an imposter to loan money (mortgagee), with security over a property > all-obligations mortgage.

- Property owned by true owner/RP, whose identity the imposter had assumed (so basically, I have a house give me money, but not actually his house).
- Loan document was forced. C, the lawyer, forgot to register the mortgage.
- W sued C under negligence, arguing that had the mortgage been registered, W would have obtained indefeasible title as mortgagee.
  - Void forged mortgage would have been treated as valid under indefeasibility provisions of LTA if it had been registered without fraud on its part.

**Held: [48-50]:** No claim against Clark even if he had registered mortgage immediately, situation would not have changed.

No security to be secured. Personal obligations only applied to the fraudster. Because personal obligations are tied to security aspect under all-obligations mortgage (remember conflated), security could not be tied to the real proprietor of the land. (*Blanchard J*)

A forged mortgage would have been validated through registration (*Frazer v Walker*)

**BUT key question:** Hypothetical > *if* the mortgage had been registered, what would it have secured?

- Fixed sum mortgage: the debt owed is the debt secured, because the sum of money is specified in the mortgage instrument. There would be no issues.
  - Secures amount specified in mortgage instrument e.g instrument secures \$100,000 and then bank can sell to recover.
  - But innocent party cannot be sued for the shortfall on the covenants in the mortgage.
- All-obligations mortgage (as here)
  - Whoever signs the **loan agreement** (covenant), it is their loan/debt.
    - Was the imposter here = loan/debt is imposters.
    - Referred to 'you' as in imposter. Never signed by RP.
  - But the **mortgage instrument** refers only to the real proprietor/true owner of the property. The mortgage therefore secures only the real proprietors debt.
    - The real proprietor had no debt as it was the imposter who executed the loan agreement.
    - 'you' as in real proprietor
  - Therefore, the charge secures nothing.
- Alternatives:
  - Had the mortgage instrument referred to the imposter instead of the real proprietor, there would be no problems.
  - Possible that had loan agreement been incorporated by reference into the mortgage, may have been enforceable.

Important point touched upon is Indefeasibility of Title:

- Ruping will talk about this more in depth. Important to remember that Torrens System in NZ based on this belief, central register > whatever is written in there reflects legal reality.
- Who has the right to performance of what kind of promises?
  - Person named in register holds guaranteed title to in all but the most exceptional circumstances.

### Mortgagor's Equity Of Redemption

*Fairclough v Swan Brewery (HOL, 1912)*

Postponement on right to redeem

#### Facts:

- F leases brewery. F borrows money from SB and mortgages the lease.
- Under the terms of the mortgage F not allowed to repay debt early, can only sell SB's beer during the term of the mortgage
- At some point during mortgage, F starts selling other brand of beer
- SB sues, F counterclaims seeking redemption.

Held: Mortgage irredeemable and a clog on the equity of redemption.

- Mortgage cannot be made irredeemable. Court will not allow right o redemption to be hampered or crippled.
- In this case mortgage was in effect irredeemable. Due date/end of mortgage only one month before the lease ended. This means that by the time F could redeem the property, he only has one month of the lease left.

*Knightsbridge Estates Trust v Byrne (CA, 1989)*

Postponement on right to redeem

#### Facts:

- KET had a mortgage, but didn't like its terms and started looking for a better deal.
- In 1931 entered into mortgage with B. Loan to be repaid over 40 years.
- 6 years later KET wanted to pay of the full sum of the debt and redeem the property. Came to court claiming postponement of 40 years was a clog.

Held: While there is a long postponement, not a clog if parties are on equal standing and there is no oppressive or unconscionable conduct.

- Equity will grant relief against terms of a mortgage if they oppressive or unconscionable. But, equity does not interfere with contracts which are merely unreasonable > do not want to interrupt freedom of contract.

- Question therefore is whether right to redemption is real or illusory?
  - Mortgage between two competent parties acting under expert advice. Should not interfere with freedom of contract by altering terms
  - Business realities were that KET were trying to get out of previous mortgage. This was a commercial agreement and there was competition between lenders. The parties were at arm's length and on equal footing.
  - In such circumstances, even though the postponement is long, there is no reason why court should allow mortgagor to escape from the contract

*Jones v Morgan (CA, 2001)*

Facts:

- WM and JM are trustees of a farm and also own some shares in the farm. WM wanted to develop the farm as a nursing home.
- 1994: WM borrowed money from Jones, mortgaging the farm. Agreed to transfer 50% of some shares of the company (to be set up but never eventuated)
- 3 years later, plan has collapsed. WM entered into different agreement with Jones. Under this:
  - WM promised to sell part of the farm and use proceeds to repay most of the debt.
  - Also agreed to transfer half his share of the rest of the farm to Jones (as they would still have owed 50k to Jones, selling farm wasn't enough to cover the debt).
    - Totally new step from other loan agreement.
- Ambiguous whether WM was still obliged to repay the outstanding debt (or give half of the farm over). WM ended up repaying the outstanding debt anyway.
- Jones sued for half-share of the farm, the 50% of the property as it was written in that agreement.

Issue: Is William Morgan obliged to transfer the 50% share after paying off the debt?

Held: The agreement to transfer 50% share is a clog.

- When will a collateral advantage be unenforceable?
  - The half-share of farm is a collateral advantage
  - *Kreglinger*: collateral advantage will be fine unless it is:
    - Unfair or unconscionable
    - A clog on the equity of redemption
    - Inconsistent with or repugnant to the right to redeem.
- Unconscionability and duress
  - A bargain will only be unconscionable if one of the parties "has imposed the objectionable terms in a morally reprehensible way"

- There must be impropriety in the conduct of the party and in the terms of the contract
- Duress must amount to coercion so as to violate consent. Ordinary commercial pressure is not enough.
- WM had independent legal advice and the agreement was drafted by his lawyer = no duress.
- Clog on the equity of redemption
  - The agreement to transfer 50% of the farm to Jones = the right to acquire an interest in the mortgaged property.
  - *Kreglinger*: “a mortgagee cannot as a term of the mortgage enter into a contract to purchase, or stipulate for an option to purchase, any part or interest in the mortgaged premises.”
  - But, an agreement or option to purchase will be fine if it is contained in a separate agreement which is independent of the original mortgage agreement.
  - Question is not whether the two contracts were made at the same time or in the same instrument, but whether they are in substance a single and undivided contract or two distinct contracts.
  - Here, majority find agreement to transfer 50% of farm is part of original mortgage agreement = a clog.

### Reopening Oppressive Mortgages

*GE Custodians v Bartle (SC, 2011)*

#### Facts:

- B’s are superannuants with limited income. They decided to invest into the property market.
- B’s entered into a scheme with Blue Chip. Purchased property for \$500,000.
  - To do this they borrowed from a bank (GE) using a mortgage broker (TML).
  - The loan was secured against their family home and the new property.
- To repay the loan B’s had an arrangement with Blue Chip where Blue Chip would subsidize the repayments > very risky scheme.
  - (and I think Blue Chip would pay out loan for them)
- Property market fell, Blue Chip went bankrupt. B’s could not repay the loan on its own. New property sold as a mortgagee sale at a big undervalue, meaning that the family home was at risk.
- B’s applied to court to have their mortgage reopened under s120 of the CCCFA

Issue: Can the B’s mortgage (given to them by GE/Bank) be reopened under s120 of the CCCFA due to being ‘oppressive’?

#### Procedural History:



- HC: mortgage not oppressive
  - B had independent legal advice
  - GE had no reason to inquire into the BC scheme
  - BC scheme was risky independent of the loan, loan shouldn't be seen as oppressive just because of that riskiness.
  - B signed a declaration that they could repay the loan in full
  - TML's knowledge (if any) cannot be imputed to GE
- CA: Mortgage oppressive
  - BC scheme was defective and B had no ability to repay the loan.
  - TML (mortgage broker) had knowledge of this and that knowledge can be imputed to GE
  - GE therefore should have made further inquiry

SC Held: Mortgage not oppressive

- Meaning of 'oppressive':
  - Broader than unconscionable conduct, can be oppressive without UC being proven.
  - For purposes of CCFA: includes where a transaction or its terms are in breach of reasonable standards of commercial practice
  - Objective standard decided by the court. Can only find oppressive if lender has knowledge of the matter which gives rise to oppression or knew something which should have made them inquire further.
- Mortgage will not be oppressive if the lender complied with reasonable standards of commercial practice
- **Question is whether in light of what GE/TML knew, the mortgage was oppressive:**
  - TML had very little knowledge, GE knew about the same (therefore don't need to ask whether TML was GE's agent)
  - B purported that they were in a stable financial position, overall GE had no reason to think B couldn't repay the full loan.
  - Lender need not make inquiries if they knew the borrower has independent legal advice. Lender may assume advice is sound and competent.
- Policy grounds: lenders should not have to take responsibility for matters which they neither knew nor should have known. Otherwise they will have to make lots of inquiries, which are inefficient and a waste of time.
- Neither TML or GE knew anything which would indicate they were acting in breach of reasonable standards of commercial practice, nor did they have to make further inquiries based on what they *did* know.

Mortgagee's Power of Sale

[Apple Fields Ltd v Damesh Holdings Ltd \(CA, 2001\)](#)

Facts:

- AF had some land which was mortgaged to Damesh and ANZ.
- Mortgagee sale: ANZ pressuring AF to sell the land. AF agreed with D to conduct a mortgagee sale, selling the land to H.
- AF eventually sued D claiming it had breached its duty to take reasonable care to obtain the best price reasonably obtainable at the time of sale (s176 – power of sale requirements) AND its equitable duty to exercise its power of sale in good faith.
  - Argued the D didn't seek best price over period of time and that D had an interest in the company purchasing the land, H.

Issue: Did D breach its reasonable care requirements under s176 of the PLA when exercising their power of sale?

Held: No breach of reasonable care requirements.

- A mortgagee's duties:
- When does the duty arise?
- What is 'reasonable care'?
- What is the 'best price'?
- On the facts: