Legal and Equitable Leases: What is the Difference and does it Matter?

While lawyers are familiar with the distinction that exists between legal and equitable leases – and why the distinction is important – others may find the subject to be somewhat elusive. This Article helps to explain some of the differences.

If a lease has been registered under the *Transfer of Land Act 1893* (WA) (TLA) it will be a *legal* lease; the common law recognises it as such because the TLA gives statutory recognition to the lease.

However, not all leases are registrable. In particular, a lease for a term of 3 years or less cannot be registered under the TLA. Nonetheless, if such a lease complies with certain requirements that are specified in the *Property Law Act 1969* (WA), then it will operate as a legal lease that is recognised by the common law.

So you can have a legal lease that acquires that status via registration under the TLA and you can also have a legal lease for a term of 3 years or less if certain requirements are met under the *Property Law Act 1969* (WA). However, sometimes a lease will exist which is not recognised by the common law but which is still recognised by the Courts – such leases are called *equitable* leases.

The difference is largely the product of the historical development of the law in England. Dating from medieval times, the Courts of common law in England were very rigid. If your claim did not match the existing forms of action you had no remedy; and even if you did have a claim that matched a required form of action, often the common law could not accommodate the particular facts and circumstances of your case. Consequently, the mechanical application of the law often caused serious injustice. In light of this, over some several hundreds of years, a practice developed (that was eventually enshrined in legislation) that would allow Courts to grant relief when it was against good conscience for a party to exercise its strict rights at common law. Thus a Court could apply equitable principles – or the ‘law of equity’. If the common law and equity conflicted, then, by force of legislation, the law of equity prevailed.

There are particular formalities that are required to create a lease before the common law will recognise one. For example, certain contracts, including leases, have to be recorded in writing to help to prevent fraud: *Statute of Frauds 1677* (Imp), s.4. More particularly, in the case of conveyances of land (which includes leases), any conveyance for the purpose of creating a *legal estate* is void unless it is created by deed: *Property Law Act 1969* (WA), s.33(1). Note that the prescribed Landgate forms, when completed and signed, are deemed to be deeds: TLA, s.85.

Even so, in certain cases, the Courts in their equitable jurisdiction will recognise leases that do not comply with these legal requirements. In particular, if parties have signed a lease but the lease is not in the form of a deed, then a Court of equity may nonetheless decide that the lease should be enforced if to do otherwise would offend good conscience. Lawyers know this as the principle in *Walsh v. Lonsdale*, being a case that was decided in England in 1882.

Equity may even intervene if the parties have not recorded their agreement in writing. Take for example the situation where a person alleges that an oral lease for a term of 7 years exists, and that person can point to the fact that he or she has entered into possession of premises, has been given keys to the premises, and has started to pay rent under the alleged lease. In such a case, depending upon the Court’s view of the supporting evidence, a lease for such a term can come into existence in the eyes of equity, even though the lease has not been recorded in writing.

Indeed, the law of equity has now advanced to the point where such acts of part performance (as they are called) need not be shown in order for an unwritten lease to be enforceable in certain cases. That is because, since 1988, Australian law has recognised that a party can be stopped from denying that a contract exists if
certain features are present in a case, the key one being that such a denial would be against good conscience (or ‘unconscionable’) when all of the facts are taken into account.\(^1\)

With the advent of the TLA in 1893, registrable leases (i.e. leases for a term in excess of 3 years) had to be registered if a tenant wished to acquire a legal lease. That is because under the Torrens System, which is implemented by the TLA, one acquires legal title by registration – it is a system of title by registration and not registration of title.

Consequently, if parties sign a written lease for a term in excess of 3 years, but they do not register it, then the lease can only ever be recognised by the Courts as being an equitable lease.

As the Courts are prepared to enforce an equitable lease, you might well ask why one should bother to register it. The answer is that equitable leases have their vulnerabilities. These include:

1. If you do not register the lease (or protect it with a caveat) and the landlord sells the land, then the lease will be destroyed when the buyer’s Transfer is registered. That is because under the Torrens System, by and large (but with some important exceptions), a transferee takes free of unregistered interests.

   Even though the leasehold estate is destroyed in such a case, the better view is that the tenant will still enjoy the right to sue the landlord for damages for having breached its contract to give the tenant its lease for the full term.

2. An equitable lease can only be enforced by a Court in its equitable jurisdiction. Importantly, unlike the case with common law remedies, equitable remedies are discretionary. If a Court thinks that a tenant has shown poor form – for example, if a tenant is required under its lease to keep leased premises in repair but it has not done so – then the Court might conclude that the tenant does not have ‘clean hands’. In that case, the Court might refuse to assist the tenant because it would be against good conscience for it to do so.

The question whether a registrable lease should be registered or whether a landlord can ignore the issue and leave it to its tenant to protect the lease with a caveat is a nice one which Lawyers have occasion to consider from time to time.

Borrello Legal can help you with these, and your other leasing and property questions. If you need help, please contact our Leasing Team on +618 9404 9100.

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\(^1\) However here there is an exception. Under the Property Law Act, if parties agree to an oral lease for a term of less than three years and the tenant takes possession on the date of that oral agreement, then the lease will be recognised at common law and will therefore be a legal lease.