

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
IN THE COURT OF APPEAL
CIVIL DIVISION

No. 3 of 2022

BETWEEN

Katherine Thatcher

Appellant

and

Phoebe Kusher

Respondent

RESPONDENT'S WRITTEN SUBMISSIONS

Date of document: 4 May 2022
Filed on behalf of: The Respondent
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1. The two issues raised by this appeal are:
 - 1.1. Whether the Respondent as a volunteer has an indefeasible title; and
 - 1.2. Whether the Respondent's title is subject to the Appellant's interest as a tenant in possession under s 42(2)(e) of the *Transfer of Land Act 1958* (Vic) ('TLA').

A. Ground 1 — the Respondent has an indefeasible title as a volunteer

2. The Respondent’s status as a volunteer is irrelevant for the disposition of this appeal. Even if the volunteers’ exception is not recognised, the Respondent’s title would still be subject to a leasehold interest — if existing — whereas, if it were a license, it would not.¹ There is nothing to suggest that the lease here is equitable in nature as there are no relevant formalities it fails to comply with.² There was also no relevant postponing conduct.³

A.1. The status of the volunteer’s exception

3. A volunteer is a person who has acquired a property right without paying valuable consideration.⁴ The ‘exception’ means that volunteers are subject to all pre-existing property rights, irrespective of notice.⁵ This doctrine has been recognised in trial judgements,⁶ however, recent obiter in *Zekry v Zekry* (‘*Zekry*’) has denied its existence.⁷

A.2. The volunteer’s exception should be rejected

4. The Court should follow the dicta in *Zekry*,⁸ and reject the volunteers’ exception:
 - 4.1. The purpose of the Torrens System is to provide certainty to acquirers of land. The volunteers’ exception exposes volunteers to uncertainty.
 - 4.2. The law demands coherence. Other Australian states including New South Wales and Western Australia do not recognise the volunteers’ exception.⁹ Further, the Court in *Zekry* referred to *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*, where the High Court supported abolishing the doctrine.¹⁰ Abolition is thus desirable as it would bring Victoria into conformity with other states.
 - 4.3. Prior equitable interest holders enjoy protections through the statutory provisions prohibiting fraud.¹¹ There is thus no justification to grant them increased rights of

¹ *King v David Allen & Sons, Billposting Ltd* [1916] 2 AC 54, 59–61 (Lord Buckmaster LC).

² *Eg Transfer of Land Act 1958* (Vic) s 66 (‘TLA’); *Property Law Act 1958* (Vic) s 54(2).

³ See especially *Latec Investments Ltd v Hotel Terrigal* (1965) 113 CLR 265 on postponing conduct.

⁴ Robert Chambers, *An Introduction to Property Law in Australia* (4th ed) (Lawbook Company, 2018) 512 [27.220].

⁵ *Ibid.*

⁶ See, eg, *King v Smail* [1958] VR 273 (‘*King*’); *Rasmussen v Rasmussen* [1995] 1 VR 613 (‘*Rasmussen*’).

⁷ *Zekry v Zekry* [2020] VSCA 336, [24], [74], [143] (Tate, Kyrou and Niall JJA) (‘*Zekry*’).

⁸ *Ibid* [74].

⁹ *Bogdanovic v Koteff* (1988) 12 NSWLR 472; *Conlan v Registrar of Titles* (2001) 24 WAR 299; *Gadsdon v Gadsdon* [2003] WASC 48.

¹⁰ *Zekry* (n 7) [74], citing *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 172 [198] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

¹¹ *TLA* (n 2) ss 42(1), 44(1).

protection when the property which they have been promised an interest in is transferred to a donee. In *King v Smail*, for instance, a fair result could have been achieved without recourse to the volunteers' exception.

- 4.4. The primary provision regarding indefeasibility makes no differentiation between purchasers for value and volunteers, suggesting that the statute generally intends for them to be treated alike.¹²

B. Ground 2 — the Appellant did not have a leasehold interest in the Lighthouse

5. *First*, a tenant in possession is a person in actual occupation of land, provided it is referable to a tenancy of sort.¹³ Being a tenant in possession will give the Appellant's interest priority over the Respondent's—as it was prior in time—thus binding them.¹⁴
6. *Second*, a key distinction between a lease and a license is that a lease requires exclusive possession over a property.¹⁵ This is a right to exclude others from entering the land.¹⁶ In contexts where there is a written agreement, the question is whether the agreement, on its proper construction, confers this right. Ordinary rules of contractual interpretation apply, requiring the reading of the whole agreement, its context, and surrounding circumstances (if admissible).¹⁷ Substance is placed over form.¹⁸
7. *Third*, the licensing agreement, on its proper construction, establishes a license to use Level 1 of the Lighthouse, rather than a lease.
 - 7.1. The agreement's purpose is to provide the Appellant a space to carry out her business; namely, clients taking photos on the viewing deck against the skyline.
 - 7.2. In light of purpose, that Walt cannot 'walk through' Level 1 during 10am–7pm is a contractual means of preventing interference with business activities. Further, the 'keys usage' term must be construed within this context, since it succeeds, and qualifies, the time term with 'but'. This context shows it does not impose restrictions or curtail Walt's rights *outside* those times—whether key usage or otherwise.

¹² *Ibid* s 40(1).

¹³ *Downie v Lockwood* [1965] VR 257, 259 (Smith J).

¹⁴ *Perpetual Trustees Company Ltd v Smith* (2010) 186 FCR 566, 583 [57] (Moore and Stone JJ).

¹⁵ *Radaich v Smith* (1959) 101 CLR 209, 214 (McTiernan J), 217–8 (Taylor J), 223 (Windeyer J) ('*Radaich*').

¹⁶ *Radaich* (n 15) 221–2 (Windeyer J).

¹⁷ *Lewis v Bell* (1985) 1 NSWLR 731, 734–5 (Mahoney JA, Kirby P agreeing at 732, Samuels JA agreeing at 732) ('*Lewis*'); *Swan v Uecker* (2016) 50 VR 74, 86 [31] ('*Swan*').

¹⁸ *Swan* (n 17) 91 [40], following *Radaich* (n 15).

- 7.3. Exclusive possession is not necessary or convenient to give effect to the agreement, this distinguishes the present case from *Radaich v Smith* and *Swan v Uecker*.¹⁹
- 7.4. That the parties labelled their agreement as a ‘LICENSING AGREEMENT’ can be considered in discerning intention, as there is no express grant of exclusive possession in the agreement.²⁰ It provides contractual context indicating an intention for the agreement to confer a *license*.
- 7.5. That the deposit was only in respect of Walt’s furniture, not the premises itself, indicates the right that was to be granted was not to be *in rem*.
8. The agreement can be constructed on its own, prior statements are inadmissible.²¹

¹⁹ Cf *Radaich* (n **Error! Bookmark not defined.**15) 215 (McTiernan J); *Swan* (n 17) 93 [46]; *Street v Mountford* [1985] 1 AC 809, 817–8 (Lord Templeman).

²⁰ *Lewis* (n 17) 737 (Mahoney JA, Kirby P agreeing at 732, Samuels JA agreeing at 732).

²¹ *Swan* (n 17) 88 [34], quoting *National Outdoor Advertising Pty Ltd v Wavon Pty Ltd* (1988) 4 BPR 97,322, 97,333–4 (Young J); *Codelfa Constructions Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337, 347 (Mason J).

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2 England

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Street v Mountford [1985] 1 AC 809

B Legislation

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