

From: Trainee

To: Chloe Sheppick

Subject: Warehouse 14, Mallory Industrial Estate, Bournemouth, BH1 1AA (the 'Warehouse')

Dear Chloe, thank you for your email, I hope you are doing well. I have analyzed the contract you sent me and I have prepared you a legal advice which you can look at and eventually forward to Jack.

The advice is divided in two sections:

1. Whether the contract Jack has with Pets Bedding is a licence or a lease;
2. What are the consequences (termination).

Legal advice to Jack concerning the contract he has made with Pets Bedding Ltd:

Dear Jack,

- Concerning your situation, it is crucial to understand whether the contract you have with Pets Bedding Ltd is a licence or a lease. The reason why this distinction is so relevant is that they can give you very different consequences or effects. Now, the most important difference between a lease and a license is that a lease is a proprietary right, and it can potentially bind a third-party purchaser of the land. Moreover, leases do have the ability to bind a new owner. To be clear, the key distinction between proprietary and personal rights is that proprietary rights can buy new owners their rights in land, so they are rights in the land itself, as opposed to the personal rights, which are only rights in persona. Licenses, by comparison, are not binding; they are an example of a right in persona. Leases also have the ability to benefit from security of tenure, whereas licenses can't. Finally, leases can't be ended without due process. In general, it is possible to say that leases are much less precarious than licenses. So that is why it is relevant to assess whether something is a lease or a license.
- 1. To assess whether the contract you have is a lease or a license, we should proceed by applying the test for a lease, which requires two elements: exclusive possession and certainty of terms (*Street v Mountford*¹). If one of these requirements will be satisfied, then the contract you have will not be a lease.

¹ [1985] AC 809

- Exclusive possession: the first condition implies that the tenant (in this case Pets Bedding Ltd) has the right to exclude anybody else from entering the property. However, there are various degrees to which this condition is applied. Among them, the tenant still has exclusive possession of the property even if the landlord has a restricted access. This means that the contract states that the landlord can enter the building for specific and reasonable purposes, such as for emergency repairs (**Aslan v Murphy**²). It must be clear that the landlord's access to the building should be restricted and not extended, meaning that the landlord cannot have the right to regularly enter the property, otherwise it will not be a lease.

By looking at the contract you have done with Pets Bedding Ltd, we should focus on clause 3.3 which states that "The Licensee acknowledges that the Licensor will have access to the Licence Area at all times to provide security services to the Licence Area and/or the Estate". Even if the meaning of this clause is not properly clear, and it leaves doubts on whether you have restricted or extended access to the building, I believe it is possible to interpret this clause as a "sham clause" (**Antoniades v Villiers** ³). In fact, Pets Bedding Ltd had employed a security guard to secure the stock they have within the Warehouse. This means that, based on the facts, you haven't entered the property repeatedly for security reasons. In other words, we should look at the substance of the contract and not the form of the arrangement. For this reason, I believe that Pets Bedding Ltd had exclusive possession of the property and that you had a restricted access.

Related to the issue of exclusive possession is the issue of joint tenancies. Indeed, if you have more than one person occupying a property, there's a kind of basic concern that both of those people cannot claim exclusive possession because the other person also has a right to be there as well. However, it doesn't look like there is a joint tenancy here, as the only tenant appears to be Pets Bedding Ltd. Therefore, this does not constitute an issue for us.

- Certainty of terms: this second condition requires that the contract specifies the duration of the lease. Leasehold term can be any length of time but must be a period which can be determined from the outset (**Lace v Chantler [1944]**⁴). Clause 1 of the contract with Pets Bedding Ltd defines that the term goes from the period "starting today and ending on the third anniversary hereof". This means that the term goes from the 4th of April 2022 to the 4th of April 2025. Therefore, the requirement of certainty of term is satisfied.

As stated above, this is not the case of a joint tenancy. This is relevant as it means that we do not have to demonstrate the existence of the four units that have been introduced by (**AG Securities v Vaughan** ⁵).

² (No 1) [1989] EWCA Civ 2

³ [1990] 1 AC 417

⁴ [1944] KB 368

⁵ [1990] 1 A.C. 417

At this point, we should consider whether any exception may be applied. This means whether your situation is a “non-proprietary arrangement” that looks like a lease, but in fact it ends up being a licence. One of the areas where an exception may be applied is in family relationships. In **Fachinni v Bryson**⁶ the Court confirmed that leasehold type arrangements can be denied and held to be licenses instead, where it's clearly not intended to be a lease because there is a lack of intention to create legal relations between family members. Concerning your situation, it looks like you had an intention to create a legal relation with your cousin. This emerges both from the fact that the contract was made with your cousin's company and not with Greta herself; plus, from the fact that you created a written contract instead of just defining the terms orally between the two of you. Therefore, I believe this exception does not apply into your situation.

The last issue to be considered are formalities for the creation of a lease; if they are not met, then the lease may be equitable. Formalities depend on the length of the lease. Section 52(2) of the LPA 1925 requires that for contracts of length of 3 years or less there is no written requirement, provided that there is immediate possession, at best rent and no premium. Therefore, formalities can be considered as being satisfied.

To conclude, it looks like the contract you have with Pets Bedding Ltd is a lease.

2. At this point, we should consider how you can terminate the lease and if you can remove Pets Bedding Ltd from the Warehouse due to the non-payment of the fee. In your case, their failing to pay the licence fee is a breach of the contract. There are different ways in which a lease can be terminated; among them, the one that suits better your situation is forfeiture. I will now explain to you the reason why. Forfeiture is a legal right in land which the landlord will have if there is express provision for it in the legal lease (section (1)(2)(e) LPA 1925). The process for forfeiture requires the following elements to be verified:
 1. Check for existence of forfeiture clause → clauses 11.2 and 11.2.1 appear to be forfeiture clauses, therefore this requirement is satisfied.
 2. Check that a breach has taken place → requirement satisfied, as the breach is the non-payment of the licence fee.
 3. Ensure right to forfeit has not been waived (which means that you were aware of the breach or that you performed some unequivocal act recognizing continued existence of the lease) → verified
 4. Follow any formal requirements → verified
 5. Forfeit using appropriate method → There are two ways in which you can proceed to actually forfeit the lease: by court order or by peaceable re-entry self-help (**Billson v**

⁶ [1952] 1 TLR 1386

Residential Apartments⁷). I suggest you proceed with the first option due to the fact that self-re-entry may lead to the risk of criminal sanction if in breach of **s6 Criminal Law Act 1977**

6. Consider position re relief → For rent breaches, there is an automatic right to relief up until the date of a court order and a discretionary right to relief up to 6 months after a court order or peaceable re-entry (**s138/139 County Courts Act 1984**).

To conclude, I advice that you have the right to terminate the lease you have with Pets Bedding Ltd, in order to do so by forfeiture, a court action is required.

I hope everything is clear, do not hesitate to contact me for any further detail or clarification.

Sincerely,

Trainee

Words count: 1497 **[1992] 1 A.C. 494**

⁷ [1992] 1 A.C. 494