

FORMATIVE REVISED AFTER FEEDBACK

From: Trainee

Sent: 24/02/2024

To: Jack Finehurst

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

Dear Jack,

Chloe informed me about your current issue regarding the Warehouse. Please find here the Letter of Advice which includes:

- i) Assessment of whether the contract you signed with Pets Bedding is a licence or a lease; and, consequently,
- ii) How you can bring the contract to an end.

i) Licence or Lease

As you probably inferred from Pets Bedding Ltd's argument, lease and licence give rise to different consequences and effects. It is thus important to identify the main differences. Although they both give a right to occupancy and possession of land, a lease is a proprietary right, and it can potentially bind a third-party purchaser of the land. Licences are, instead, right in persona: only the person you granted a licence can benefit from it. Commercial leases also have security of tenure (right to continue to occupy the property after the end of the lease term). In addition to that, and of more importance for the case you are involved in, leases cannot be ended without due process. From this follows that a licence will be easier to bring to an end compared to a lease. This is the rationale behind Pet Bedding's argument. However, before dealing with your right to terminate the contract, let us first understand which type of agreement you created with the company.

Street v Mountford test for leases requires exclusive possession and certainty of term. Both requirements need to be satisfied in order to have a lease. Rent is another requirement for a lease. However, it is not necessary according to Ashburn Anstalt v Arnold. Anyway on the agreement rent equals to the monthly licence fee of £15,999 plus VAT per month.

Based on the contract you forwarded us:

- Exclusive Possession:

Exclusive possession is the right of a tenant to exclude anybody else from entering the property. In order to understand whether the agreement grants exclusive possession or not few clauses should be considered:

- a. Clause 3.3 refers to an "non-exclusive licence", and clause 15 repeats the concept and adds that "Nothing in this Licence is intended to create a tenancy". However, as suggested by Esso Petroleum v Fumegrange it is the substance that matters and not the use of words like licence and exclusive possession. In commercial situations, like this one, it is also thus important to look at the level of control from the landlord, which appears not to be present on the facts.
- b. Clause 3.3 give access to the landlord at any time for emergency purposes. The case of reference is Aslan v Murphy. In fact, this clause is a sham clause, an extreme term the landlord includes the exclude the possibility of a lease. This is an extreme clause because we know that Pets Bedding Ltd have recently employed their own security guard due to

Commented [LS1]: Try to be very concise - binding third parties is not relevant on our facts. Cut straight to the key points. Commercial leases may have security of tenure so, if PB have a lease, Jack may not be able to remove them (easily).

Commented [LS2]: Definition - good.

Commented [LS3]: This would be confusing to the client. Rent is not required so you can omit this or clarify that rent is usually payable but not required as per AAva.

Commented [LS4]: Yes, true. But now use our facts. Which terms of the agreement show Jack has control over the warehouse? We do have some info here so use it.

Commented [LS5]: This is not correct as stated. Cl 3.3 is not about emergency access (which is a common term). Please summarise the clause before discussing 'sham clauses'. Also the term is not 'extreme' - it is possible security services could have been provided they just were not on our facts. Please define 'sham or pretence clause' before using the facts to show this clause is likely a pretence. The textbook or Street v Mountford can help with the definition of 'sham clause'.

break-ins. This suggests that Jack is not providing security. On the facts, landlord access to the property is not present.

- c. Clause 6.3 gives the possibility to share the space with another occupier. This is another clause which triggers the exclusivity of possession. However, as in *Antoniades v Villiers* this clause is unrealistic because the warehouse is already full, so no space is left for another occupier.

Commented [LS6]: As with the discussion of 3.3 above, please explain why these clauses would defeat exclusive possession. Because there was no explanation of 'sham clause' this discussion is not as strong as it could be.

All these factors together help to conclude that on the substance exclusive possession is granted and therefore this agreement is a Lease.

Certainty of Term Certainty of term requirement is satisfied when the commencement and end date of the lease are certain (*Lace v Chantler*). In the agreement, clause 1. Definitions – Licence Period states as follows “the period starting on 4 April 2022 (date of the agreement) and “(unless terminated under clause 11.2) ending on the third anniversary hereof”. Since the maximum duration of the lease is 3 years, there is certainty of term. We are therefore dealing with a 3 year fixed term lease.

Commented [LS7]: Good. You explained/defined certain term and then used the facts to show we have a certain term here.

The following step to understand whether the arrangement you have with Pets Bedding Ltd is a lease or a licence is to identify whether there is any exception to be considered. You and Greta are cousins. In the situation of family relationships, following *Fachinni v Bryson* [1952], it should be considered whether there was a clear intention to create legal relations between you and Greta. The intention to create legal relations is essential to create a lease. But, on the facts, this exception does not hold as per the formality of the document, the agreed (high) monthly fee, as well as the business purpose (stock storage) of the contract. This evidence confirms the intention to create legal relations between the parties.

Formalities for the creation of a lease depend on the length of the lease. In this case, following the certainty of terms expressed in the agreement, we know that the arrangement is of exactly 3 years. s54(2)LPA 1925 rules that leases of 3 years or less require no written requirement provided immediate possession, at best rent, and no premium. The facts meet the short lease requirement: agreement appears to be for market rent (£15,999/month + VAT); there is no indication of a fine or premium and the tenant is entitled to immediate possession as per the agreement. Therefore, in this case, formalities are satisfied. PB have a legal three-year lease.

Commented [LS8]: A legal lease

From the above analysis follows that you and Pets Bedding Ltd are involved in a lease, and not a licence.

Commented [LS9]: Generally this is good. If you can cite the clause that shows immediate possession or refer to the relevant term from your certainty of term discussion that would be helpful.

II) Termination of the Lease

Having assessed that the agreement is a lease, let us now move on to how this lease can be terminated. In particular, you would like to know whether he can remove them from the Warehouse based on non-payment of the fee.

Commented [LS10]: Whether you can remove them. Please link this to security of tenure. As PB have a lease they may have security of tenure under LTA 1954 which means . . .

Looking at the contract, clauses 11.2 and 11.2.1 state:

11.2 The Landlord may terminate this Licence and re-enter the Licence Area (or any part of the Licence Area in the name of the whole) at any time after any of the following occurs:

11.2.1 the whole or any part of the Licence Fee is unpaid 21 days after becoming payable (whether it has been formally demanded or not)

This wording is to be intended as a forfeiture clause which a legal right in land which the landlord will have if there is express provision for it in the legal lease, as regulated by (s1(2)(e) LPA 1925).

On the facts, we know that Pets Bedding Ltd have failed to pay their licence fee for several months. This amounts to a breach of contract, and in particular of clause 4.1 of the agreement.

Forfeiture can be used as a process to terminate a lease unless the right to forfeit has been waived. This occurs when the Landlord is aware of the breach and the Landlord (or agent) performs some unequivocal act recognising the continued existence of the lease (Central Estates v Woolgar, 1972).

In this case, the fact that several months had passed before you came to seek legal advice can amount to his acceptance of not receiving the rent. However, from the facts, we have no evidence of you requesting the rent payment. And according to London & County v Wilfred Sportsman [1971] and as in this case, for a 'continuing breach' the waiver only applies until the next rental payment is due. In addition, in case of breaches, there is a formal requirement of issuing a s146 LPA 1925 notice in which the breach is specified, a reasonable time is given to the tenant to remedy the breach and a compensation request is included, if relevant. However, in the case of a rent breach like this one, there are commonly no formal requirements. Therefore, no waiver prevents the use of the forfeiture clause here.

In terms of how the landlord Jack can put into practice the forfeiture, there are two different methods: a court action to obtain possession and a peaceable re-entry (i.e. self-help). I strongly advise Jack to proceed with the first option for the following reasons:

- self-help is discouraged by the court (Billson v Residential Apartments, 1992);
- it carries risks of criminal sanctions if in breach of s6 Criminal Law Act 1977;
- this risk is increased by the fact that Pets Bedding Ltd has recently employed a security guard.

In addition to removing the company from the Warehouse, the right to forfeiture entitles the tenant to apply for relief. This is governed by statutory principles. s138/139 County Courts Act 1984 rules that in case of failure to pay rent, there is an automatic right to relief up until the date of a court order and discretionary up to 6 months after. Understandably, relief will only be granted when it is ascertained that the tenant can pay.

To summarise, although Pets Bedding Ltd's argument of having contracted with Jack for a lease is correct, Jack has still the right to terminate their arrangement. This is because leases can be brought to an end if the contract includes a forfeiture clause and no waiver has been put in place. Nevertheless, it is important to acknowledge that the termination of their lease will be obtained by a court action and relief may be granted.

Should you require further information regarding the court proceeding, do not hesitate to contact us.

Sincerely,

Trainee

Commented [LS11]: First part of the forfeiture checklist = good.

Commented [LS12]: It would be helpful to first explain that demanding or accepting rent after you know of the breach would waive the breach. Then advise the client not to accept or demand rent/the licence fee. Then advise on what to do if the client or his agent has accepted or demanded rent.

Commented [LS13]: No - this is not required for a rent breach. Review the process for rent versus non-rent breaches.

Commented [LS14]: Forfeiture discussion was generally good. A few marks lost for small points as noted above and please revise the procedure for rent v non-rent breaches.