

# MSc Law and Professional Practice

## Professional Law Institute



### Land Law

#### Formative Marking Guidance

This question is a combination of a Lease/Licence question, together with advice on forfeiture. 50 marks are awarded for the entire question, and this is allocated further below.

Students are expected to have identified the following points, ideally in the order given below which was the structure suggested for the two topics.

#### Is this a Lease or a Licence? (40 marks)

##### Explain to the client why this is an issue

Leases are proprietary rights that are capable of binding third party purchasers of land and have to be terminated with due process. Licences are not proprietary rights and so cannot bind third party purchasers and can be terminated much more easily. Of particular concern to our client is the fact that commercial leases will potentially have security of tenure under the **LTA 1954**, which licences won't, so if this is a lease then the occupier may in fact have a right to stay on and request a new lease (subject to the advice given later on forfeiture). This would prohibit our client from granting a new lease to a new tenant as desired.

##### Explain the test for a lease and apply that to the facts of the question

The test for a lease is from ***Street v Mountford***, which stated that there must be exclusive possession, for a certain term at a rent. Rent is not actually required (see **s205(1)(xxvii) LPA 1925** as confirmed in ***Ashburn Anstalt v Arnold***).

Is there a certain term? This can be either a fixed term or a periodic term. Here we have a fixed term of 3 years so this is satisfied (see the definition of 'Licence Period').

Is there exclusive possession? This is the right for the occupier to exclude everyone else from the premises, including the landlord. Are there any clauses in the document that may affect this?

Clause 15 makes it clear that this is not a lease, and the labelling throughout refers to 'Licensor', 'Licensee' and 'Licence Fee' rather than 'Landlord', 'Tenant' and 'Rent'. Clause 3.1 also makes it clear that this is a non-exclusive licence. However, ***Street v Mountford*** states that you look at substance and not form, and so labelling is irrelevant. However, as this is a commercial dealing, the courts may be more likely to give credence to this labelling.

In the commercial context, the courts will look at the level of control the 'licensor' has over the property (***Esso Petroleum v Fumegrange***, where the court found a licence as the licensor could control the layout of the property, inspect the accounts etc). Here the licensor will only allow soft furnishings to be stored at the property (see clause 3.1 and the definition of 'Permitted Items'). Whilst it is not uncommon to specify a permitted use in a licence, this is much more restrictive than that by specifying a very limited use. This may therefore suggest this is a licence. Are they actually enforcing this clause though? If not, the courts may ignore it as in ***Aslan v Murphy*** where the court ignored a sham clause that required the tenant to vacate the property between certain hours.

Clause 3.3 of the Licence gives the licensor access at all times to provide security. If a licensor has unrestricted access, to provide services for example, then this is normally indicative of a licence (***Aslan v Murphy***). However, again might this be a sham clause? Are the security services actually being provided? The information from the supervisor suggests not as we are told that Pets Bedding Ltd have recently employed a security guard following a number of break-ins so is this indicative of security not being provided by the licensor?

Clause 6.3 of the Licence permits the licensor to introduce another tenant to share the property. In the residential context, cases like ***Antoniades v Villiers*** have looked at whether a sharing clause is realistic, based on things like the size of the property and the relationship between the parties. If this were a genuine clause, then this would probably negate exclusive possession, however it does not seem like this has ever been exercised as the information from the supervisor shows that the entirety of the warehouse is taken up with Pets Bedding stock and so there is certainly no sharing at present.

Whilst the above are the key issues that the students should have identified, there are also other provisions in the Licence that they may draw on to suggest

that the licensor has control over the property, such as clause 6.1 that looks more like a licence than a lease as it is non-assignable. Equally, there are clauses the other way, for example the forfeiture clause at 11.2 looks more like a lease than a licence.

Overall, there is enough uncertainty on these facts that it would be advisable to warn the client that there is a reasonable chance that this could be considered to be a lease.

[Note that the occupier is a single occupier and therefore the 4 unities are not required for this question.]

Are there any exceptions that may prohibit this from being a lease?

Although the Licence is granted to a company, the supervisor states that the company is owned and controlled by our client's cousin. Does this indicate there is a family arrangement and/or act of generosity (*Facchini v Bryson*)? Although they are cousins, the Licence Fee is quite significant and there is a level of formality in the document that has put in place, so it is unlikely that this would negate this from being a lease.

Formalities for creation

There still can't be a lease if the correct formalities have not been used. This is a 3-year arrangement. Leases of 3 years or less do not need to be created by deed to be legal (**s54(2) LPA 1925**) as long as they are in possession (the tenant has a right to the lease now, rather than in the future, which is satisfied), without fine or premium (nothing to suggest a premium was taken on the grant of the licence) and at the best rent (market rent – the Licence Fee is not something like £1 so we can assume this is satisfied). As such, no writing at all is required to create a legal 3-year lease so it does not matter that the Licence does not comply with the deed requirements from **s1 LP(MP)A 1989**.

Conclusion

There is a real risk that this would be held to be a lease, and, as it has not been contracted out of the **LTA 1954**, our client may not be able to remove the occupier to grant a new lease, unless they can forfeit the lease.

**Forfeiture (10 marks)**

We are told that Pets Bedding Ltd has not paid the Licence Fee for several months. Can the lease be forfeited?

1. Is there a forfeiture clause in the lease? Yes, see clause 11.2.
2. Has there been a breach by the tenant? The supervisor has confirmed that the Licence Fee has not been paid for several months, and it should be paid monthly in accordance with clause 4.1, so this is satisfied.
3. Has the client waived the right to forfeit? Waiver will happen if the client landlord is aware of the breach (which our client clearly is) and they then do something which recognises the continuing existence of the lease. The most common way to do this is by demanding or accepting the next rent payment (see for eg ***Central Estates (Belgravia) v Woolgar***) so the client must be advised not to do this (and to warn their managing agent not to do this). There is nothing on the facts to suggest this has happened.
4. The correct procedure must be followed to forfeit. This is a breach of a rent covenant. The only process required here is to serve a formal demand for the rent, unless the lease excludes this. Clause 11.2 of the lease does exclude this requirement ('whether it has been formally demanded or not') so our client can proceed to forfeit immediately.
5. Forfeiture can be carried out by either peaceable re-entry or court order as this is a commercial premises. As this premises is occupied, and therefore there would be a risk of criminal liability for force or violence under **s6 Criminal Law Act 1977**, it is advisable that our client obtains a court order. Also, the courts do not approve of peaceable re-entry (see ***Billson v Residential Apartments***).
6. Our client should be advised that the tenant is likely to apply for relief. 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 (**ss138/139 County Courts Act 1984**). So if Pets Bedding Ltd pay off the arrears of the Licence Fee, then they are likely to be awarded relief.