Client's objectives

The matter involving our client, Jack Finehurst, concerns the nature of the occupancy agreement, issued to Pets Bedding Ltd (PBL), and whether it constitutes a lease or a licence. Additionally, the pressing question is whether Jack can legally remove PBL from the Warehouse on the basis of non-payment of the licence fee. This question becomes significantly important for Jack as it affects his plans to find a new tenant but also because it helps for clarifying the rights and obligations of both parties involved in such commercial arrangements.

Licence or lease?

PBL seem to argue that the licence granted was in fact a lease. Such an issue is important to determine as a licence and a lease hold different rights. A lease gives one proprietary rights in land capable of being binding on third parties. Additionally, leases have varying degrees of 'security of tenure' applicable in both residential and commercial context. Finally, a lease cannot be terminated without due process. On the other hand, a licence does not generally have the above features as it is not a proprietary but a pure personal interest into land.

A lease is defined in **s.205(1)(xxvii) LPA 1925** as 'a term of years absolute', or in other words, a term of years taking effect either in posession or in reversion whether or not at a rent.

On the face of it, 'licence to occupy' suggests that a licence was granted. However ***Street v Mountford*** established that merely labeling an agreement as a licence does not determine its legal nature; rather, it is essential to assess the agreement against the applicable legal test set out in the case. The test set out in Street v Mountford requires three elements to be complied with: an exclusive possession, certainty of term and rent although rent was later confirmed both in case law (***Ashburn Anstalt v Arnold***) and statute (**s.205(1)(27) LPA 1925**) as not essential and necessary for a lease to be valid.

One of the elements that could negate exclusive possession is an unrestricted access from the landlord. Therefore, if the landlord may be able to enter the premises at anytime, except where he retains the key for emergency, exclusive possession is most likely not be satisfied. In the agreement, no designated hours are found and under Clause 3.2 the 'licensee is is granted all rights of access over the service yards serving or forming part of the Estate'. However, these rights are to be shared with anyone else who is entitled to similar rights (**3.2.1**). Given the facts, no one else is on the premises but Pets Beddings Ltd. Therefore, it could be argued that this clause looks like a 'sham clause', also known as a clause put in to make it look like the agreement is a licence but in reality is not as there is no intention to comply with it (***Antoniades v Villiers***). Further, **Clause 3.3**, the 'licensor has access to Licence Area at all times to provide security services to the Licence Area and/or the Estate' suggests restricted access from the landlord except in need of 'security services' which could be seen as services required for an emergency. Therefore, on these findings, PBL would have a great chance of being able to argue exclusive possession.

Certainty of terms also needs to be found in order for a lease to be existing. Under the agreement, the licence period indicates the 'licence' to be starting on 4th April 2022 and ending on the third anniversary hereof therefore 3 years from 4th April 2022. Thus, certainty of term is satisfied here.

There is also the mention of a monthly rent but as stated before this is not essential anymore.

All elements seem to be present or at least would have a great chance of being able of being argued therefore PLB would most likely be right in arguing that they have a lease rather than a licence.

In some cases however, where a lease was argued, there has been a few exception where licences had proprietary rights or where non-proprietary arrangements were found. In these cases, the agreement would look like a lease but would actually be a licence. The only exception that could arise here would possibly be a non-proprietary arrangement as PBL's owner and manager is Jack's cousin, Greta. As set out in ***Fachini v Bryson***, leasehold type arrangement can be denied and held to be licence when not intended to be a lease because of a lack of intention to create legal relations. However, it was made clear that this case won't always work for family relationships and that it is not an automatic assumption. Additionally, it seems clear here that there was such an understanding of a commercial agreement therefore this is most likely to be disregarded as there is clear intention to create legal relations.

Now that we have confirmed that no exceptions would work and that it is most likely that a lease will be found, formalities need to be considered. Indeed, lease formalities require a deed (**s.52 LPA 1925**) and susbstantive registration under **s.27 LRA 2002**. The deed itself needs to comply with **S.1 Law of Property (Miscellaneous Provisions) Act 1989** requiring the deed to be signed by the grantor, to be clear on its face that it is a deed, signed by both parties and delivered (dated). Here, there is no deed as there is no document clear on its face of such therefore the formalities are failed for a legal lease. Nevertheless, if a lease can not be legal, it can be found to be equitable as long as it complies with **s.2 LP(MP)A 1989.** Under the section, it will be valid if it is: in writing, containing express terms and signed by all parties. In this situation, the agreement are all satisfied therefore it is most likely that PLB has an equitable lease.

Removing Pets Bedding Ltd from the Warehouse

As stated before, a lease cannot be terminated without due process and there are limited circumstances in which a landlord can issue such notice due to statutory restrictions.

The best prospect in this case would to be to make use of Jack's lease forfeiture, which is a legal right in land which the landlord will have if there is express provision for it in the legal lease (**s1(2)(e) LPA 1925**). For equitable leases, which is the nature of the occupancy here, forfeiture is automatically implied and recognised in equity (***Shiloh Spinners v Harding***). Such a right is satisfied under three conditions: if there is a forfeiture clause, if the breach is capable of triggering the forfeiture clause and if the right to forfeit has not been waived.

An express provision for breach of any of the tenants' covenants needs to be present in the agreement to act as a forfeiture clause. **Clause 11.2.2** provides the right to landlord to terminate for breach of Licensee covenant therefore the first condition is satisfied.

Further, we need to determine whether the breach is capable of triggering the forfeiture clause. PBL have failed to pay their licence fee for serveral months amounting to a failure to pay the licence fee as required under **Clause 4.1**. As this is part of tenants' covenants, the breach is capable of triggering the clause.

The third condition needs us to examine whether the right to forfeit has been waived or not. Two elements constitute a waiver: the landlord's awareness of the breach and the landlord recognising the continued existence of the lease. As Jack is asking for advice, we know that he is aware of the breach. The second element often involves demanding or accepting the rent and is interpreted therefore as a recognition of the tenant's continuing status (***Central Estates (Belgravia) v Woolgar*** **[1972]**). Given the facts, it is not clear how long it has been since Greta has stopped paying rent but this informs us that the breach is a continuing breach. For rent, waiver takes place where a landlord demands or accepts rent which accrued due after the date of a breach of covenant known to the landlord (***Faiz and others v Burnley Borough Council***). Applying this principle, Jack's right to forfeit would only be waived only if he accepts rents from PBL without taking action to evict them after learning about the breach for several months. Thus, it is crucial that Jack does not accept or demand any rent to not constitute a waiver.

The agreement outlines the landlord's right to terminate the license and re-enter the premises if the licensee fails to pay the license fee within 21 days of becoming payable (whether formally demanded or not)(**Clause 11.2.1**). Therefore, if PBL, fails to pay the license fee within 21 days of becoming due, regardless of whether a formal demand is made, Jack, as the licensor, would have the right to terminate the license and re-enter the premises and would allow him to take action without the necessity of a formal demand for rent breaches specifically.

Nevertheless, it is important that Jack consider the best method here to remove PBL from the premises. A landlord cannot peaceably re-enter a premise which is physically occupied and would need to do so when nobody is present. Additionally, peaceable re-entry may be considered an offence under **s.6 Criminal Law Act 1977**. Therefore, the best prospect for Jack would be to get a court order to remove PBL from the premises. Although, a court order requires more time and money, it is the best option as it is one that cannot be challenged once granted.

It is important to note that for rent breaches, the law allows the tenant to have 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 (**s.138/139 County Courts Act 1984**). However, relief will only be granted where it is clear that the tenant can pay.

Conclusion

Indeed, it has been established that the arrangement between Jack and PBL constituted an equitable lease rather than a simple license agreement. Nevertheless, this does not stop Jack from removing PBL from the warehouse on the basis of non-payment of the licence fee using his forfeiture right which would be the best prospect. Should all else fail, there remains the possibility of offering to pay PBL for surrendering the lease, although it is worth noting that this is not the optimal solution.