

# PROPERTY LAW GUIDEBOOK

## SECOND EDITION

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### CHAPTER 10

#### PROBLEM QUESTION 5

Jill and Mary are sisters who want to open up their own floral business. In the local paper they see an advertisement for a shop that sounds suitable for them and they arrange a meeting with the owner, Bob, who also owns the adjacent shop, where he runs a newsagent. Both Jill and Mary are very happy with the premises and make an oral agreement to lease the premises for two years at a monthly rent of \$3600. Bob then has a written agreement drawn up, which includes clauses containing the agreed duration and rent. The lease agreement also states that Jill and Mary are only licensees, although it also gives a written assurance that Bob will not enter the premises without Jill or Mary's permission. It also contains a clause that the lease can be subleased or assigned, although Bob's permission is required. The lease is signed by all of them, although it is never registered.

Twelve months later, Jill and Mary receive news that their father is seriously ill. Because they are the only living members of his family they decide they will look after him at home, rather than moving him into a nursing home. They therefore ask a friend, Georgina, to look after the business for them while they are caring for their father. No written agreement is made with Georgina because Jill and Mary know her well and fully trust her. It is orally agreed that Georgina will take over the total running of the business, be responsible for all the costs, including the rent, and also keep all the profits. It is also agreed that the arrangement will last for as long as Jill and Mary are required to look after their father. Bob is informed of this and verbally agrees to the arrangement. Soon after Jill and Mary leave the business to Georgina she finds that Bob is continually entering the premises without any reason or permission, and just seems to be always checking up on her. She informs Jill and Mary, who now want to stop Bob from entering their premises.

Discuss.

## SUGGESTED ANSWER

The issues in this problem are:

- 1 Is there a lease between Jill/Mary and Bob?
- 2 Has there been an assignment of the lease to Georgina?
- 3 Can Bob be prevented from coming onto the premises?

A lease involves a grant of the right of exclusive possession for a fixed period of time. In *Radiach v Smith* it was held that whether the transaction creates a lease or licence depends on the intention of the parties regarding what relationship the lessee shall have to the land. If there is a written document, the intention must be ascertained by examining the terms in the document. It does not matter whether the terms 'licensee' or 'tenant' are used, as it is a matter of substance rather than form. In the present case, there is a written document that gives the duration of the tenancy as two years and the rent as \$1600 a month. Thus, two requirements of a lease—certainty of duration and rent—are clearly outlined in the document. It is therefore a matter of whether the right of exclusive possession has been granted. Jill and Mary are described in the document as being licensees. However, it also contains a clause stating that Bob is not allowed onto the premises without Jill and Mary's permission. This would indicate that exclusive possession has been granted, which is the most important characteristic of a lease. The conclusion is that Jill and Mary are lessees, not licensees. The lease is not registered and while not relevant to the question at hand it should be noted that, being a two-year lease, it would be protected as an exception to the indefeasibility principle as a short-term lease under the relevant statutes except the *Law of Property Act 1936* (SA).

As lessees, Jill and Mary can sublet or assign the lease. An assignment involves the original lessee getting out of the lease and someone else taking over what remains of it, while a sublease is a transfer of less than the whole of the tenant's interest in the property (*Milmo v Carreras*). There is also the possibility that Georgina is just managing the place and is therefore just a licensee. The facts indicate that the agreement was for Georgina to take over the running of the business, including paying the rent and keeping all the profits. It is not in writing but as it is a short-term lease, it is still a legal interest, except under the *Law of Property Act 1936* (SA). Permission was required from Bob but this was requested and granted. It also appears that Jill and Mary are not going to be on the premises, which suggests that Georgina may have exclusive possession of the property. In that case she may be considered to be the lessee. However, the agreement was for Georgina to take over the business for as long as Jill and Mary needed to look after their father. It should be noted that in *Lace v Chantler*, 'the duration of the war' was held to be an uncertain duration and therefore did not create a leasehold interest. Thus, the term of the arrangement in the present case would also appear to be too uncertain to create a leasehold interest. It would appear therefore that Georgina is only there as a manager on a license, as was the case in *Issaac v Hotel de Paris*. This is also supported by the fact that there does not appear to be an intention to transfer the lease over to Georgina.

The significance of Georgina being a licensee is that she does not have the right under either the privity of contract or the privity of estate to take action against Bob. This is because, respectively, she was not a party to the original contract, and as a licensee she has no interest in the land and therefore cannot claim privity of estate with Bob. Bob had agreed not to enter the premises without permission, which means that he covenanted for quiet enjoyment. It should also be noted that if this was not a term of the contract then it would be implied under common law (*Lavender v Betts*). Thus Bob is in breach of the lease agreement since a lease grants exclusive possession to the lessee. Jill and Mary, both as the original parties to the agreement and also as parties with an interest in the land, can therefore take legal action to prevent him from coming onto the premises. The only way that Bob would have been lawfully able to come onto the premises would have been if there was no lease, but just a licence for them to be on the premises, which does not appear to be the case. If there had been breaches of the lease agreement then he could also have entered the property but that does not appear to be the case here.

In conclusion, Jill and Mary had a valid lease with Bob and appointed Georgina as a manager on license to run the business in their absence. Since Bob is in breach of a covenant of the lease, Jill and Mary can prevent him from entering the premises without permission.

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#### COMMENTS ON THE ANSWER

At the end of the second paragraph it was stated that the agreement was a short-term lease, except in South Australia, which means that it did not need to be registered to be an exception to the indefeasibility principle. As was noted, this was not actually relevant to the question, but it is an example of what can be briefly mentioned to provide a complete and comprehensive answer. However, the emphasis needs to be on the word 'brief', as you should not then be writing a longish paragraph on material that is not directly relevant to the question.