

Self-test questions

1. How is a valid legal lease created? What happens if the formality requirements are not carried out?

Answer: Generally, legal leases must be created by deed (s.52(1) LPA 1925). A deed is a formal, witnessed document. In addition, in common with other interests in land, the lease must usually be registered, in order to make the lease legal (LRA 2002, ss. 4(1) and 27(1)). If these two steps are not complied with, the lease will take effect in equity: it will be an equitable lease.

There are, however, some important exceptions to these rules. If the lease is for three years or less, taking effect in possession, at market value and not at a fine (premium), then it can still be a legal lease without a deed – indeed, it can be a legal lease even if the contract was made orally between the parties. Leases for three years or less do not need to be registered.

In fact, LRA 2002, ss. 4(2)(b) and 27(2)(b) state that only leases of over seven years in duration must be registered. Leases for over three years and less than seven years therefore do not need to be registered, although they must still be completed by deed in order to be legal.

See table 5.1 at 5.4.1.3 for a useful summary of these requirements.

2. Sasha and Michael move into a one-bedroom flat together. They are a little concerned about two clauses in their 'licence agreement': that the owner of the property reserves the right to move in with them at any time and that they must vacate their premises between 10.30 am and noon each day. Advise Sasha and Michael.

Answer: In order to determine whether somebody has a lease or a licence, the court must look at the "factual matrix" of the situation (*Street v Mountford*). Some years ago, landlords tried to dress up leases to look like licenses to avoid conferring on tenants the statutory protection that was attached to leases. In addition, leases confer a proprietary interest in the land, whereas licences do not.

It would appear that Sasha and Michael's landlord has tried to present their agreement as a licence (it is headed "licence agreement"). The court will not attach too much importance to the heading of the agreement, but will look to see if the agreement actually confers exclusive possession on Sasha and Michael. The two rather odd clauses in their agreement look as though they were designed to avoid the appearance of exclusive possession. They appear to be "sham" clauses, without any real meaning (see *Aslan v Murphy* [1990] 1 WLR 767 and *Crancour Ltd v Da Silvesa* [1986] 1 EGLR 80, particularly given that the flat has only one bedroom).

If the court, by looking at the reality of the situation, decides that the clauses are indeed sham, it will hold that Sasha and Michael do indeed have a tenancy (lease) of their flat.

See s.5.5.3 for more on exclusive possession, and the lease/licence distinction.

3. Halle has just moved into a new rented flat. She is a little confused about some of the clauses in the lease. Explain to Halle the meaning of the terms 'quiet enjoyment' and 'waste'. If she assigns her interest to Brendan, will he also be bound by the covenants?

Answer: Halle should be aware that the lease agreement is binding on both herself and the landlord. The first covenant that she refers to (“quiet enjoyment”) is a covenant made by the landlord to Halle. It means that the landlord must allow her to enjoy her occupation of the premises without disturbance from the landlord, or his or her agent, or anyone else claiming title from the landlord (for example, another of his or her tenants)—*Sanderson v. Berwick-upon-Tweed Corporation* (1884) 13 QBD 547. This prevents the landlord from direct physical interference of Halle’s enjoyment, and from more subtle disturbances – for example, noise. See 5.6.1.1 for more detail.

Lease agreements often contain a clause prohibiting the tenant (in this case, Halle) from committing “waste”. This has nothing to do with rubbish collection! It simply means that Halle must not do, or fail to do, anything that would result in the premises being permanently changed in any way. See 5.6.2.3 for more detail.

If Halle assigns her interest to Brendan, there will be no privity of contract between Halle’s landlord and Brendan, as Brendan was not a party to the original contract. Privity of contract will continue to exist between Halle and the landlord, which might cause Halle problems if Brendan breaches his covenants. There will, however, be privity of estate between Brendan and the landlord.

As Halle’s lease was granted after 1995, it is governed by the Landlord and Tenant (Covenants) Act 1995 (LTCA 1995). This means that when Halle assigns the lease to Brendan, LTCA 1995, s. 5, automatically releases Halle from the covenants of the lease. This means that, on assignment, Halle can walk away from the property with no fear of liability for Brendan’s breaches and no right to sue the landlord for any of his or her future breaches under the lease.

See 5.7.5.1 for more detail.

Examination question

1. What are the essential characteristics of a lease? If all of these are present, will a lease always be created?

Answer: There are two sources to help us identify the essential elements of a lease. These are s.205(xxvii) LPA 1925 and the leading case in this area of law, *Street v Mountford* [1985] AC 809. Essentially, in order for there to be a lease, the grantee must be granted exclusive possession for a certain term. Exclusive possession means the right to exclude everyone else from the property, including the landlord (although the landlord may keep a key and come and inspect the property from time to time).

The term of the lease must be known at the outset. It must have a certain start date, either immediately, or in the future (although not more than 21 years in the future (s.149(3) LPA 1925). It must also have a certain end. The term can be fixed or periodic (see 5.5.1).

Surprisingly, perhaps, the payment of rent is not an essential characteristic of a lease, although it will be indicative of a lease (see *Ashburn Anstalt v Arnold* and 5.5.2)

Even if the essential elements are present, a lease will not always be created. In *Street v Mountford*, Lord Templeman recognised that, in some circumstances, a lease would not be created. These were:

- (i) service occupancy – where someone was living in the property in order to better carry out their duties as an employee;

- (ii) no intention to create a legal relationship – where the parties did not intend to be legally bound (for example, acts of generosity or friendship and;
- (iii) where the grantor had no power to grant a lease.

This last exception must now be read in the light of *Bruton v London & Quadrant Housing Trust* [2000] 1 AC 406.

See the case close up of this case at 5.5.7.3.