

Chapter 16: Assessment question

In 1997 Letitia leased (by deed) a shop to Tajinder for 40 years. The lease includes a covenant under which the tenant undertakes to ensure that the shop is not used for illegal purposes. Rent is payable quarterly and in advance to Letitia's agent Rocky. The lease also includes a forfeiture clause which can be invoked if the tenant breaks any of the covenants.

In 2008 Tajinder lawfully assigned the lease to Androniki. In early 2009 Dandy, one of Androniki's shop assistants, took advantage of the fact that Androniki did not normally arrive at the shop until 9.30 a.m. He started an early morning 'side-line' selling cocaine. After only a month Androniki found out about the illegal trade. She immediately dismissed Dandy and reported his activities to the police. Last week Dandy was convicted of drug-trafficking.

Letitia has just read of Dandy's conviction in the local newspaper. She has decided to endeavour to forfeit the lease. She tells you, 'The rent under the existing lease is ridiculously low; if I can get Androniki out a new tenant would be willing to pay three times as much.'

Advise Letitia.

Specimen answer

There is one point of which Letitia should be warned almost the moment she has sat down in the office. As she wishes to forfeit the lease she should be careful not to do anything which might be construed by a court as 'waiver'. In particular she should inform Rocky that he should neither demand nor accept any further instalments of rent. Demanding/accepting rent is always a waiver of forfeiture even if done by an agent of the landlord who is ignorant of the landlord's intent to forfeit (see *Belgravia v Woolgar*.) Letitia should immediately insist that Rocky marks his file relating to the shop 'No rent to be collected'. If Rocky uses a computer system to send out rent demands/reminders, the computer must be reprogrammed immediately.

The forfeiture process instituted by Letitia should proceed in two stages:

- (1) Serve a notice under section 146 of the LPA and then (after waiting a reasonable time).
- (2) Issue a writ claiming forfeiture of the lease and possession of the property.

(It is still theoretically possible to forfeit a lease without court proceedings, using 'peaceable re-entry').

Letitia might be tempted to do what the landlords did in *Billson v Residential Apartments*; sneak in very early one morning when no-one is at the shop. However the House of Lords decision in *Billson* makes peaceable re-entry an undesirable course. Under the Lords' decision a tenant can claim relief from forfeiture after the landlord has peaceably re-entered, perhaps quite a long time after. Thus after the peaceable re-entry no new tenant

would be keen to take a lease of the property for fear that Androniki would reappear claiming relief.)

The section 146 notice should be served on Androniki (the current tenant, see *Old Grovebury*). Extreme care should be taken in drafting the notice. If the notice is not correctly drafted, any court proceedings for forfeiture commenced after the notice will be abortive, and Letitia will have to start all over again. The notice should give full details of the breach of covenant, and if Letitia wants monetary compensation the notice should contain a demand for such compensation.

If Androniki's breach is 'capable of remedy' the notice should include a demand that the breach be remedied. This 'capable of remedy' point is notoriously difficult. Normally a breach by a tenant of a covenant against illegal user is irremediable. The damage has been done; the property has been besmirched; everyone knows that the house is a brothel or the shop a drug den...However Letitia's case looks slightly like the problematic case of *Glass v Kencakes* where Paull J held that illegal user by a sub-tenant in breach of the head lease had been remedied by evicting the sub-tenant before the property became tainted (see also the recent Court of Appeal case of *Akici v L R Butlin* [2006]).

Letitia is therefore advised to play safe. She should include in the section 146 notice a clause, 'Remedy this breach if capable of remedy'. Moreover she should wait at least three months between serving the notice and issuing her writ. (A fortnight wait would be sufficient if the breach were irremediable.)

Having got to court (and getting there is clearly going to take at minimum a few months) Letitia should be warned that Androniki will probably apply (by way of counterclaim) for relief from forfeiture. Although relief from forfeiture is in the discretion of the court, Androniki's case for relief is strong. (The breach may be technically incapable of remedy, but the Court of Appeal in *Woolgar* and the Lords in *Billson* have made it clear that relief can be granted with respect to an irremediable breach.) Androniki has a strong case for relief as the breach was not committed by her personally but by her employee. She sacked Dandy the moment she found out. To grant forfeiture would be to deprive Androniki of a very valuable asset—a lease with 28 years to run at (seemingly) a cheap rent. When Androniki acquired the lease in 2006 she presumably had to pay quite a substantial price to Tajinder.

Probably Letitia's only hope is to come to court in a state of righteous indignation, fuming, 'I will not have my shop used as an emporium for HARD drugs such as Cocaine. Androniki should have been careful whom she employed, and should have been at the shop every day when it opened.' It would be fatal to her chances of forfeiture for Letitia to let on that she only wanted Androniki out in order to get in a tenant who was willing to pay a much higher rent (*cf. Woolgar*). Moreover, if Androniki proves that Letitia already has a new tenant lined up, that would destroy any claim that the property had been tainted.

It would thus appear that Letitia is likely to spend a lot of money, time and energy pursuing forfeiture proceedings which will probably end with relief from forfeiture being granted. It is probably not worth all the effort, particularly when it is remembered that Letitia will not be able to collect any rent while the forfeiture proceedings are pending.

Letitia may feel confident that she can re-let the property at a much higher rent. In the current economic climate her confidence may be misplaced. If the shop was left unlet for any length of time Letitia might even have a problem with 'shop squatters'.

Letitia might, as an alternative to forfeiture, consider suing for damages. She has the choice of suing Tajinder (privity of contract) or Androniki (privity of estate). However, as Letitia's reversion is not due to come into possession until 2035, it is difficult to see her recovering anything more than nominal damages.