

**JANET BIGNELL**  
**FALCON CHAMBERS**

CASE STUDY

*A landlord, A Plc, is approached by a tenant, B Co, wishing to assign its lease of commercial premises. The lease contains the usual proviso that the landlord's consent is required. A Plc requires a licence to assign to be entered into, but whilst negotiations in relation to this take place the proposed assignee, C Ltd, goes into occupation and tenders rent.*

*A Plc accepts payment of rent on the basis that C Ltd is acting as B Co's agent. Thereafter rent is paid sporadically, sometimes by B Co, and sometimes by C Ltd. At a later date there is default in payment of rent and A Plc. peaceably re-enters. C Ltd offers to pay all arrears and costs in order 'to obtain relief from forfeiture on the usual terms'.*

*What should A Plc do?*

DISCUSSION

A Plc should reject C Ltd's offer and should take a firm legal line in order to protect its own position. A Plc has the advantage of having obtained physical possession of the premises and is, therefore, well placed to dictate its terms to both B Co and/or C Ltd and to explore the possibility of letting the premises to a new third party tenant.

Prior to the forfeiture, A Plc had created a potentially problematic situation for itself by either agreeing that C Ltd could enter occupation of the premises pending agreement of the terms upon which the proposed assignment was to take place, or failing to take any action to require that C Ltd vacated the premises once it discovered that C Ltd was in occupation. In circumstances where the terms upon which an occupier has entered occupation are not recorded in writing and that occupation continues for any length of time, there is a very real risk that the occupier will seek to argue that it has acquired rights to remain when required to vacate.

Fortunately, A Plc had accepted C Ltd's payments of rent on the basis that C Ltd tendered the payments as B Co's agent. A Plc had therefore avoided any real scope for argument by B Co and/or C Ltd that A Plc had permitted the assignment to C Ltd without the need for a formal licence, alternatively that there had been an implied surrender of B Co's tenancy by operation of law by virtue of the grant of an implied periodic tenancy to C Ltd. Nevertheless, A Plc should regard the fact that it has obtained possession and has received an approach from C Ltd as an opportunity to regularise the position such that there is no room for any doubt as to the future status and rights of any of the parties involved.

As tenant under the lease it is B Co that has the right to apply for relief from forfeiture. In the High Court, the old equitable jurisdiction to relieve against forfeiture for non payment of rent continues to apply where there has been a forfeiture by peaceable re-entry: Billson v Residential Apartments [1992] 3 WLR 264, CA. The 6 months' limitation period under the Common Law Procedure Act 1852 does not apply, but is likely to be taken as a guide to the appropriate timescale available for the making of an

application for relief: see the discussion in *Woodfall on Landlord and Tenant*, para. 17.188.

The usual conditions of relief are that the arrears should be paid within a time specified by the court, together with costs. The landlord is not bound to accept tender of the arrears from a third party on the tenant's behalf: *Richards v De Freitas* (1974) 29 P&CR 1, *Matthews v Dobbins* [1963] 1 WLR 227.

Against this background, I would suggest that A Plc should proceed as follows.

The first step is for A Plc to attempt to obtain certainty as to B Co's stance following the re-entry so that it knows whether it can safely grant a new lease or not. Because B Co was not in occupation of the premises as at the date of the re-entry, B Co may not know that the premises have been repossessed.

A Plc's solicitors should therefore write to B Co to inform it that the lease has been forfeited by peaceable re-entry as a consequence of its breach of the covenant to pay rent. The letter should invite B Co to notify A Plc whether or not it intends to apply for relief for forfeiture. A Plc could also offer to grant B Co relief if B Co pays the rent arrears, interest and A Plc's costs within a stated time period. A Plc's solicitors might also explain that A Plc intends to market the premises and that it intends to commence proceedings in debt against B Co in any event if the unpaid rent and any interest are not paid within a stated short timescale.

I suggest that A Plc's solicitors might also wish to send a "without prejudice" letter to B Co informing it that C Ltd has offered to pay the arrears and costs in order for the lease to be reinstated. The letter should explain that any application for relief may only be made by B Co as tenant and that A Plc will only agree to grant relief to B Co if the arrears are paid (a) by B Co itself, or (b) if B Co expressly authorises C Ltd to make the payment on its behalf as its agent and C Ltd acknowledges any payment to be made upon that basis.

The first option is much the best in my view. It is then a matter for B Co and C Ltd alone as to whether the money that B Co may pay to A Plc does or does not derive from C Ltd. If the second option is offered, or the arrears are re-tendered by C Ltd as agent for B Co, A Plc should make plain to both B Co and C Ltd that the grant of relief to B Co does not entitle B Co to allow C Ltd into occupation of the premises. B Co must apply for A Plc's consent to any proposed assignment, and any such consent will only be given by way of formal licence to assign in the event that an agreement is reached.

In writing to C Ltd and rejecting its offer, A Plc's solicitors' letter should explain that it is a matter for the former tenant, B Co, as to whether B Co intends to apply for relief. C Ltd has no status that entitles it to make an application for relief on its own behalf. Such an approach has the additional benefit that A Plc can assess the strength of any argument that C Ltd may seek to run to the contrary.

As a practical matter, if A Plc did not write in these terms and simply proceeded to deal with C Ltd on the basis suggested, A Plc would implicitly

be authorising C Ltd to re-enter occupation of the premises on indeterminate terms. This would be an invitation to future litigation, particularly if A Plc subsequently wished to require C Ltd to vacate.

A Plc would also have forgone the opportunity to continue to negotiate the terms of the proposed assignment to C Ltd with B Co, so retaining B Co's covenant, or to negotiate the terms of a new lease to be granted to C Ltd. In either event, those terms might have included the provision of an AGA or a rent deposit or a guarantor. These measures might be particularly important if there was now reason to question C Ltd's own financial strength.

Most importantly in legal terms, whatever the contemporaneous intentions of A Plc and/or C Ltd regarding "relief", if payment was accepted on the terms offered, any grant of relief direct to C Ltd would probably take effect as the grant of a new lease to C Ltd. B Co's lease was determined by the peaceable re-entry and A Plc does not possess any written comfort from B Co that C Ltd is tendering payment with B Co's authority as B Co's agent.

Following the termination of the lease, A Plc and C Ltd cannot agree that C Ltd may make payment as B Co's agent. C Ltd may only act as B Co's agent if it has B Co's authority to do so, or if B Co is subsequently prepared to ratify its actions. As such, in the absence of clarification and authorisation, A Plc may well later find that B Co was delighted that the lease had been terminated and that A Plc had inadvertently accepted C Ltd as a new periodic tenant when it need not have done so.

In the event that B Co does not intend to apply for relief, A Plc should have the freedom either to let the premises in the open market and to pursue B

Co for the arrears in debt, or to grant a new lease direct to C Ltd on such terms as it might choose.

In conclusion, if A Plc was to accept C Ltd's offer without more, A Plc would do so to the prejudice of:

- (a) its own immediate position as freehold owner of the property,
- (b) its position as landlord once C Ltd entered occupation of the premises; and
- (c) its own long term ability to sell its freehold interest with a clean title.

JANET BIGNELL

FALCON CHAMBERS  
LONDON EC4Y 1AA

29 May 2009