

To sign is not to assign

Nikolas Ireland considers the importance of execution formalities on assignment in the context of a recent case



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If there is one resounding lesson to be learnt from the recent Court of Appeal decision in *Lankester & Son Ltd v Rennie* [2014], it is the importance of complying with the proper formalities when assigning a lease. Even where a landlord, tenant and assignee appear to be proceeding on the basis that an assignment has been effected, it is vital to formalise this position through proper completion of the legal documentation.

While it is, of course, possible to assign a lease by implication or in equity, this is very exceptional and legal practitioners and their clients do need to ensure that all of the assignment formalities have been met. As can be seen from the *Lankester* case, a failure to do so can result in a tenant remaining liable under a lease despite a third party having gone into occupation and being treated by a landlord as if it were a tenant.

The Court of Appeal upheld the decision at first instance that there had been no assignment in this case and the original tenants remained liable.

The facts

The defendants, Mr and Mrs Rennie, took a lease of a car showroom and associated facilities in Janson Road, Southampton from the claimant, Lankester & Son Ltd, for a term beginning on 1 May 2007 and expiring on 28 August 2017. The lease granted the defendants a personal break option to terminate the lease before 1 May 2012 on the giving of six months' notice and on the condition that they had paid the rent and other sums due under the lease.

Shortly after the lease began, the defendants approached the claimant with a view to surrendering the lease.

The defendants introduced to the claimant The Car Agency Ltd (TCA), as they had expressed an interest in taking a new lease of the premises following the proposed surrender. This deal did not proceed and instead there were discussions to assign the lease to TCA. The claimant indicated that they would consent to this assignment on the condition that two of the directors of TCA gave personal guarantees of the covenants contained in the lease.

The proposed assignment was delayed due to some issues TCA raised with the proposal. TCA were keen to retain the break right, which would be lost on assignment given its personal nature and, also, the directors of TCA did not want to enter into personal guarantees of TCA's liabilities under the lease. Added to this, any formal assignment could not proceed until the title to the property had been rectified so that the defendants were properly registered as owners of the lease. The title was not rectified until 8 December 2009.

The claimant knew the defendants were keen to vacate but warned them that, in the absence of a formal assignment, they, the defendants, would retain liability under the lease. Despite no assignment being possible at that time, the defendants vacated the premises in November 2008 and allowed TCA to occupy. TCA began to pay quarterly rent to the claimant thereafter and the claimant accepted these sums.

Throughout this period the defendants had been proceeding with their preparations to effect a formal assignment of the lease to TCA once their title to do so was established. By January 2009, the defendants had signed the deed of transfer which was then held by the solicitors acting jointly

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for both the defendants and TCA. TCA continued to occupy the premises and the claimant dealt with TCA as they would a tenant throughout 2009, granting them permission to make improvements to the premises and allowing them to pay the rent monthly as opposed to quarterly.

Things continued along these lines until TCA wrote to the claimant on 24 February 2010 stating their intention

remaining arrears from the defendants, as well as notifying them that the next quarterly rent payment would fall due on 29 September 2010.

The claimant's case against the defendants was that the defendants were liable under the covenants of the lease because no licence to assign had ever been granted, no formal assignment to TCA had ever taken place, and the defendants had allowed

that they could rely on the dealings between the claimant and TCA to show an estoppel.

Delivery

It is well established that, in order for a deed to be effective, it must fulfil four key requirements: that it is in writing, clearly intended to take effect as a deed, validly executed and delivered. Without satisfaction of these formalities, the deed will not be effective. For the purposes of the current case, it is important to understand exactly when a deed will be said to be delivered, as it will not necessarily be upon execution as per a simple contract.

Delivery of a deed will only take place where there is a clear indication of an intention to be bound. This must be shown by some act or words, and if there are continuing negotiations then these will provide strong evidence that the intention to be bound does not yet exist. In cases such as this, it will be very difficult to demonstrate that delivery has taken place, and therefore the deed will not be effective.

Where solicitors are holding executed deeds while negotiations are being finalised, it should not be assumed that the execution in itself will be sufficient to demonstrate delivery. Legal practitioners must ensure that advice is given to clients in relation to execution formalities where there is any possibility that the delivery of the deed may be called into question due to ongoing negotiations or issues.

Estoppel

An estoppel by representation will arise where party A represents a set of facts to party B which would have the effect of giving up any legal rights

Simply put, the deal was incomplete and, as such, it could not be shown that the deed had been delivered.

to vacate the premises on the basis that they were unable to accept the terms of the lease, notably in relation to the personal break right, which would be lost on assignment.

The claimant asserted that TCA remained liable under the lease; they were estopped from denying that the assignment had taken place as they had occupied the premises and paid the rent under the lease. In contradiction to this stance, the claimant also wrote to the defendants claiming that the assignment had not taken place, as the execution formalities had not been met and no consent had been granted. The claimant confirmed that they reserved their right to claim against the defendants for any shortfall which was not recovered from TCA.

Around July 2010, TCA agreed to pay the claimant £15,000 in settlement of the claim against it, and on 28 September 2010 the claimant sought to recover the

TCA into occupation of the premises at their own risk and on the basis they would retain liability under the lease. By the time the case reached trial on 31 January 2013, the claimant also claimed that the defendants had in addition lost the opportunity to exercise the break right, and they were therefore on the hook until the end of the term.

The defendants' case was that there had been an effective equitable assignment of the lease to TCA, as the defendants had executed and delivered the deed and all that was awaited was rectification of their title so the assignment could be completed. They argued that, in any event, the claimant was estopped from saying TCA was not their tenant after December 2008 when TCA started paying the claimant rent. They claimed that the claimant, the defendants and TCA all acted on the common assumption that TCA was the tenant of the premises and

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party A had against party B and party B then changes its position on reliance of the representation to its detriment.

In the present case, it was made clear by the Court of Appeal that an estoppel by representation is personal to the parties and so the relationship to consider was not that of the claimant and TCA but of the claimant and the defendants. The fact that the claimant had dealt directly with TCA as they might a tenant is not something on which the defendants can rely to support their defence that a representation was made to them.

Accordingly, the important facts for the purpose of any estoppel defence were that the claimant had told the defendants they would retain liability if they allowed TCA to occupy, that personal guarantees for TCA were required before consent to an assignment would be given, and that the claimant did not give permission, or have any knowledge that TCA were going to occupy, when TCA initially went into occupation. It could not, therefore, be shown that the claimant made any representation to the defendants that they had accepted TCA as the assignee of the lease.

Estoppel by convention operates in a similar way although bases the estoppel upon a shared understanding of the position which all parties proceeded upon.

For the estoppel defence to succeed, it would need to be shown that not only was the representation made directly to the person claiming it, but also that they subsequently acted to their detriment in reliance on that representation.

The decision

The Court of Appeal held that the judge in the County Court had made key factual findings, which sounded the death knell to the defendants' case. In summary, the most important of these were that:

- the claimant continued to insist on personal guarantees from TCA as a condition of any consent to assignment;
- the defendants knew that if they allowed TCA into occupation prior to the completion of the necessary formalities they would remain liable under the lease;

Practice points

- When acting for tenants who are seeking to assign their interest under a lease, it is vital to ensure that they appreciate the importance of complying with the formalities of the transaction. A failure to do so will probably have the undesired result that their interest has not been assigned, with the effect that they remain on the hook for the duration of the lease. Tenants should be advised against allowing a proposed assignee to enter occupation pending completion of the formal documentation. If this is to happen, there should be an agreement with the assignee whereby it can be required to complete the assignment once certain conditions are met.
- While the claimant landlord was successful in the *Lankester* case, the way in which they dealt with the proposed assignee is not to be recommended as it allowed the defendants to seek to dispute liability. Landlords should be very careful to clarify the basis upon which they are accepting rent from parties who have no legal interest, and ensure that no representations are made to either the tenant or the proposed assignee that the assignment is effective in the absence of formal documentation.
- This case also provides a reminder that where a party is presenting contradictory positions to different parties, this should not be done in open correspondence. The landlord's solicitors in the *Lankester* case failed to outline these differing contentions to the defendants' and TCA's positions on a without prejudice basis, thereby giving the defendants a glimmer of hope that they had an estoppel defence.

- TCA entered into occupation without the claimant's consent or knowledge;
- the formalities of the deed of assignment had not been completed;
- TCA vacated the premises as no agreement had been reached in allowing them a break clause;
- the letters sent by the claimant's solicitor in 2010 did not amount to an acknowledgment that TCA had become the tenant; and
- there was no evidence that the defendants had acted to their detriment in reliance on anything said or done by the claimant in their dealings with TCA.

The County Court decision was confirmed by the Court of Appeal, who agreed that the deed was not an effective assignment of the lease to TCA, as the formality of 'delivery' had not been met. The solicitors acting for TCA and the defendants had merely held the deed pending final instructions for its delivery following registration of the defendants' leasehold title. In addition, other matters also had to be resolved, such as the claimant's insistence of personal guarantees from TCA and TCA's requirement of a right to break. Simply put, the

deal was incomplete and, as such, it could not be shown that the deed had been delivered.

The Court of Appeal also agreed with the County Court that there was no estoppel by representation or estoppel by convention, which prevented the claimant from saying that TCA was not the tenant or that the defendants remained liable under the terms of the lease.

It should be noted that the court attributed a great deal of importance to the continuing requirement of the claimant that TCA gave personal guarantees as a condition of any consent being given, and, in addition, to the claimant having made clear that, if the defendants allowed TCA to occupy before the assignment had taken place, then they would remain liable under the lease.

The court considered that, when the defendants allowed TCA to occupy without the claimant's knowledge or permission, they effectively presented the claimant with a *fait accompli*. In these circumstances, the court had great difficulty in accepting that this gave rise to a representation by the claimant to the defendants that they had accepted TCA as an assignee. ■

Lankester & Son Ltd v Rennie
[2014] EWCA Civ 1515