Exclusively Yours—A Look Back at *Street v Mountford*

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Exclusive possession; Licences; Proprietary interests; Residential tenancies

In the first of a series of articles on seminal House of Lords' cases, the author looks back at the cases of Street v Mountford *and* Bruton v London and Quadrant Housing Trust*.*

Exclusive possession

Looking back at the dispute in *Street v Mountford* [1985] A.C. 809 with 29 years of hindsight, two thoughts come to mind. First, was it really necessary for a case as simple as "what is the difference between a licence and a tenancy?" to be decided by the House of Lords? And secondly, was it really decided as recently as 1985? Why was not such a basic issue settled sometime back in the 17th century?

The facts in *Street* were about as straightforward as any facts can be. By an agreement, dated March 7, 1983, Roger Street granted Wendy Mountford the right to occupy furnished rooms, Nos 5 and 6 at 5 St. Clements Gardens, Boscombe, from March 7, 1983 for £37.00 per week, subject to termination by 14 days' written notice and subject to the conditions set out in the agreement. The simple issue that the House of Lords had to decide was whether the agreement created a tenancy or a licence.

Two consequences would flow from the distinction. First, if the agreement were a tenancy, it would (subject to what is said in the second part of this article) create an interest in land that would be binding on third parties. Secondly, a tenancy would confer on the occupier some form of security of tenure—the Rent Act 1977 in this case.

The House of Lords unanimously declared the agreement to be a tenancy. Lord Templeman (who gave the only opinion) declared "the court must decide whether upon its true construction the agreement confers on the occupier exclusive possession." He then went on to utter one of the most quoted dicta in landlord and tenant circles:

> "If exclusive possession at a rent for a term does not constitute a tenancy then the distinction between a contractual tenancy and a contractual licence of land becomes wholly unidentifiable."

So the key is exclusive possession. An occupier with exclusive possession will normally have a tenancy. An occupier without exclusive possession is almost certainly a licensee.

We are all so familiar with that concept that it seems astounding that it needed Lord Templeman to make it clear beyond any doubt. The history of *Street* is surprising. At first instance, in the county court, the Recorder held that the agreement was a tenancy. However, this was reversed by the Court of Appeal who held that it was merely a licence. The Court was persuaded by some of the specific phrases contained in the agreement that Mrs Mountford had signed, which included

"the right to occupy the room", "a licence fee of £37 per week" and "all rooms must be kept in a clean and tidy condition". Furthermore, at the foot of the agreement, this statement appeared:

> "I understand and accept that a licence in the above form does not and is not intended to give me a tenancy protected under the Rent Acts."

Lord Templeman was surprisingly restrained in his criticism of the Court of Appeal and, in particular, of Slade L.J.. His most critical statement was the mild: "if the Lord Justice was right about this and other provisions, there is still no logical method of evaluating the results of his survey." Yet he made it clear that the Court of Appeal had gone about its decision-making in entirely the wrong way. Once it had concluded that exclusive possession had been given, then (in the absence of a limited number of exceptions, which were not relevant in this instance) there could be only one decision—and it was not the one that the Court of Appeal had reached.

Labels and shams

One point that Lord Templeman emphasised several times was that the label given to the arrangement by the parties was unimportant. Again, this is something that is now second nature to us, but perhaps it was more ground-breaking back in 1985. This case is responsible for one of the most memorable dicta that the writer is aware of:

> "If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence. The manufacture of a five pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade."

This point is well illustrated by the extraordinary case of *Somma v Hazlehurst* [1978] 1 W.L.R. 1014, a Court of Appeal decision seven years earlier than *Street*. A landlord let a double bed-sitting room to an unmarried couple, but did so by way of two separate agreements, one for each of them. In this way he attempted to prevent exclusive possession and so the application of the Rent Acts. Each agreement purported to permit the landlord to place a third party in the premises, to share with the remaining one should one leave. The Court of Appeal had held this arrangement to be a licence, and the case had not been taken to the House of Lords. In very Denning-esque language, Lord Templeman described the arrangement in *Somma* as a sham, explaining: "the room was let and taken as residential accommodation with exclusive possession in order that [the two people] might live together in undisturbed quasi-connubial bliss making weekly payments." In *Street*, Lord Templeman said that he would "disapprove" of the Court of Appeal decision in *Somma*, which presumably means that it no longer represents the law.

Exceptions

So, while it is true that there can be no tenancy without exclusive possession, is it right that where there is exclusive possession there has to be a tenancy? Not necessarily, it seems. There are exceptions where exclusive possession does not necessarily indicate a tenancy. In this context, Lord Templeman referred specifically to "occupancy under a contract for the sale of the land, occupancy pursuant to a contract of employment or occupancy referable to the holding of an office", but this was not intended to be an exhaustive list. Others might be where there is no intention to create a legal relationship at all (an occupier allowed to live in premises rent free,

for example, as an act of generosity or between family members) and (it is submitted) where there is occupation between exchange of an agreement for lease and the grant of a lease itself.

The importance of "rent" and "term"

Lord Templeman referred to "exclusive possession at a rent for a term" and it is often believed that all these three factors need to be present for a tenancy to exist. But it is clear from the dictum set out above that this is to take it out of context. Lord Templeman said that if an arrangement with these three factors did not create a tenancy, then there was no distinction between a tenancy and a licence. However, we do know that it is not necessary for any rent to pass in order for a tenancy to be created—*Ashburn Anstalt v WJ Arnold & Co (No 2)* [1989] Ch. 1; (1988) 55 P. & C.R. 137 is the authority for this.

On the other hand, a term is essential. We know from the case of *Prudential Assurance Co Ltd v London Residuary Body* [1992] A.C. 386 that an arrangement without an end date cannot be a tenancy. In that case, the agreement was for a "tenancy" until the premises were needed for road-widening. This was an uncertain period and, accordingly, no tenancy was created. The case was reviewed recently by the Supreme Court in *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52; [2012] 1 A.C. 955. It was accepted that there is no logical reason why a lease requires a term, but that it was not open to the Supreme Court to change the law in such a major fashion. This was an issue that had to be addressed by Parliament.

An interest in property?

Throughout Lord Templeman's opinion in *Street*, it is taken for granted that one of the consequences of a tenancy is that it creates an interest in property:

> "The tenant possessing exclusive possession is able to exercise the rights of an owner of land, which is in the real sense his land albeit temporarily and subject to certain restrictions … A licensee lacking exclusive possession can in no sense call the land his own and cannot be said to own any estate in the land. The licence does not create an estate in the land to which it relates but only makes an act lawful which would otherwise be unlawful."

However, this generally held assumption was shattered in a later House of Lords case, *Bruton v London and Quadrant Housing Trust* [1999] UKHL 26; [2000] 1 A.C. 406. The main speech was given by Lord Hoffmann, with whom the four other Law Lords agreed. Once again, the House of Lords was being asked to overturn the decision of the Court of Appeal.

The facts in *Bruton* were as simple as those in *Street*. Lambeth Borough Council had granted a licence to London and Quadrant of a block of flats to be used for short-term accommodation for homeless people. The parties agreed that the Council had no power to grant a lease of the property, in the particular circumstances. London and Quadrant had entered into an agreement with Mr Bruton, termed a weekly licence, to provide him with accommodation. Mr Bruton was now claiming that the agreement constituted a tenancy in order to bring into play the implied repairing covenants on the part of a landlord contained in s.11 of the Landlord and Tenant Act 1985.

So the question was a simple one: could a person without a proprietary interest in a property grant a tenancy of it? Or did the fact that he had no proprietary interest mean that whatever agreement was entered into necessarily had to be a licence? Prior to this decision, it was universally believed that it was necessary to have an interest in the property in order to be able to grant a lease. However, the House of Lords in *Bruton* ruled unanimously that this was incorrect.

Subject to the exceptions outlined in *Street*, any arrangement between an owner and an occupier that confers exclusive occupation creates a tenancy and, if the owner happens to have an interest in the property, the tenant too will acquire an interest. But it is the tenancy that creates the interest, and not the other way around.

> "A lease may, and usually does, create a proprietary interest called a leasehold estate or, technically, a 'term of years absolute.' This will depend upon whether the landlord had an interest out of which he could grant it. *Nemo dat quod non habet*. But it is the fact that the agreement is a lease which creates the proprietary interest. It is putting the cart before the horse to say that whether the agreement is a lease depends upon whether it creates a proprietary interest."(Lord Hoffmann)

As a result, the House of Lords held—to everyone's surprise—that Mr Bruton had a tenancy and, therefore, London and Quadrant was required to keep the relevant parts of the property, including the heating system, in repair in accordance with s.11 Landlord and Tenant Act 1985. Lord Hoffmann was careful to say at the end of his opinion that he expressed "no view on whether he [Mr Bruton] was a secure tenant or on the rights of the council to recover possession of the flat." Indeed, in *Kay v Lambeth BC* [2006] UKHL 10; [2006] 2 A.C. 465, the House of Lords held that Lambeth was entitled to possession as against London and Quadrant's tenants. Mr Bruton's tenancy was, therefore, only good as against London and Quadrant, and not against the whole world.

Conclusion

The concept of what have become known as "non-proprietary leases" has deeply troubled many commentators. Mark Pawlowski (then and now the general editor of *L & T Review*) wrote an article (with James Brown) in this publication at the time entitled "Bruton: A New Species of Tenancy?" ((2000) 4 L. & T. Rev. 119) stating that "the notion that a tenancy creates purely personal rights between the contracting parties and does not confer exclusive possession against the rest of the world is, to say the least, novel." In a later commentary, Pawlowski wrote: "if exclusive possession is limited as against the grantor only, is this not simply the conferment of exclusive *occupation* by another name?": see, [2005] 69 Conv. 262, 269. Similarly, a longer article by Michael Lower, entitled "The Bruton Tenancy", pointed out that "the advent of the non-proprietary lease might well give rise to some difficult issues in the future. Some aspects of the law of landlord and tenant rest on the concept that the lease is an interest in land": see, [2010] 74 Conv. 38, 45.

So there is widespread concern among academics as to the correctness of the decision (it does not trouble practitioners much, as few practitioners are aware of it, in the writer's experience). It would require legislation or a decision of the Supreme Court to change this surprising area of law—neither of which looks remotely likely.

The law is stated as at April 24, 2014.