

PROPERTY NUTS & BOLTS: Tenant or licensee?

Richard Clarke
Landmark Chambers
5 June 2018

Tenant, licensee or trespasser



- Critical to be clear as to the legal basis of occupation to ensure that the correct means of terminating that occupation is used;
- Not simply a matter of checking the terminology used by the parties – ascertaining the basis of occupation is “not... a question of words but of substance” – see *Glenwood Lumber Co. Ltd. v. Phillips* [1904] A.C. 405 at 408-409;
- Whether an agreement is a tenancy or licence is a question of law, not of the parties’ subjective intentions: *Mexeld Housing Co-operative Ltd v Berrisford* [2012] 1 AC 955 at [17].



Street v Mountford [1985] 1 AC 809

- The House of Lords considered the nature of a tenancy in *Street v Mountford*;
- The essential characteristics of the tenancy are:
 - the grant of exclusive possession;
 - for a fixed or periodic term certain;
 - in consideration of a premium or periodical payments;
- These are (usually) cumulative requirements;
- Grant may be express or inferred, written or oral;
- Exceptional cases where an agreement, despite satisfying these criteria, does not amount to a tenancy.



Grant of exclusive possession

- Exclusive possession is distinct from a right personally to occupy;
- E.g. Hotel/lodger – provider cleans room, changes bedding etc. at short notice – no exclusive possession.
- Exclusive possession is secured by the right of the lessee to maintain ejection and, after their entry, trespass, and the lessee is able to exclude his landlord as well as strangers from the demised premises;
- Exclusive possession not inconsistent with the landlord reserving a limited right of entry, as for example to view or repair.



For a fixed or periodic term certain

- To be a tenancy, there must be certainty of term;
- For example:
 - in *Lace v Chantler* [1944] KB 368 the Court of Appeal held that a purported letting for the “duration of the [Second World] War” could not take effect as a good tenancy for the duration of the war as it was for an uncertain term;
 - In the *Prudential* case [1992] 2 AC 386, the House of Lords held that a purported lease of land, at a weekly rent, “until the land is required by the council for the purposes of the widening of the road” was incapable of creating a tenancy due to the uncertain (and potentially perpetual) term.



Term certain cont.

- Requirement was established prior to the invention of periodic tenancies;
- However, periodic tenancies are for a term certain (see Lord Templeman in *Prudential*)
 - Term comes to an end when the week/month/quarter or the year for which it has been granted comes to an end ;
 - Upon the expiry, the law assumes a re-letting (or the extension of the term) at the end of each period, unless one or other of the parties gives notice to quit.
- Note: certainty of rental period is not the same as certainty of term;
- Problem arises if either party is forbidden to give that notice except in circumstances which may never arise.



Term certain cont.

- Problem dealt with in *Prudential*:

“A power for nobody to determine or for one party only to be able to determine is inconsistent with the concept of a term from year to year... A lease can be made for five years subject to the tenant's right to determine if the war ends before the expiry of five years. A lease can be made from year to year subject to a fetter on the right of the landlord to determine the lease before the expiry of five years unless the war ends. Both leases are valid because they create a determinable certain term of five years. A lease might purport to be made for the duration of the war subject to the tenant's right to determine before the end of the war. A lease might be made from year to year subject to a fetter on the right of the landlord to determine the lease before the war ends. Both leases would be invalid because each purported to create an uncertain term. A term must either be certain or uncertain. It cannot be partly certain because the tenant can determine it at any time and partly uncertain because the landlord cannot determine it for an uncertain period. If the landlord does not grant and the tenant does not take a certain term the grant does not create a lease.” (394F-395C)



Term certain cont.

- Lord Neuberger in *Mexeld Housing Co-operative Ltd v Berrisford* [2012] 1 AC 955 summarised the legal principles confirmed in *Prudential* to be as follows:
 - an agreement for a term, whose maximum duration can be identified from the inception can give rise to a valid tenancy;
 - an agreement which gives rise to a periodic arrangement determinable by either party can also give rise to a valid tenancy;
 - an agreement could not give rise to a tenancy as a matter of law if it was for a term whose maximum duration was uncertain at the inception;
 - (a) a fetter on a right to serve notice to determine a periodic tenancy was ineffective if the fetter is to endure for an uncertain period, but (b) a fetter for a specified period could be valid.



Term certain cont.

- Court criticised the current state of the law in both *Prudential* and *Mexfield*;
- Lady Hale considered [88] the rules to have an “*Alice in Wonderland quality*”;
- However, requirement left unchanged in *Prudential* on the basis of “*500 years of judicial acceptance*”;
- Requirement left unchanged in *Mexfield* because, despite there being “*much to be said for changing the law*” because of :
 - Age and strength of authority confirming the requirement;
 - Drafting of Law of Property Act 1925 supports the requirement;
 - The recent affirmation of the requirement in *Prudential*;
 - Potential for change in the law to upset long established titles;
 - A valid tenancy not argued by the parties on the facts.



Mexfield

- But, Court circumvented the rule in *Mexfield*;
- Short tenancy granted by mutual housing association, without statutory security of tenure;
- *Mexfield*’s standard form occupancy agreement purported to grant a tenancy from month to month which was terminable by Ms Berrisford giving one month’s notice to quit (clause 5), and was terminable by *Mexfield* only in the following circumstances (clause 6):

“a) If the rent reserved . . . shall at any time be in arrear and unpaid for 21 days after the same shall have become due . . .

b) If the member shall at any time fail or neglect to perform or observe any of the stipulations conditions or provisions contained in this Agreement which are to be performed and observed by the Member

c) If the Member shall cease to be a member of the Association

d) If a resolution is passed under . . . the Association’s Rules regarding a proposal to dissolve the Association.”
- Court decided, on a true construction of the agreement, it was intended that Ms Berrisford enjoy the premises for life subject to determination in accordance with clauses 5 and 6. Consequently, the agreement would have been a tenancy for life prior to 1926.
- Under s149(6) of the LPA 1925, tenancies for life are takes effect as a 90 year term determinable on the death of the lessee, or (here) earlier in accordance with clauses 5 and 6.



Consideration of a premium or periodical payments

- Payment of rent a hallmark of a tenancy but not an essential requirement – see Court of Appeal in *Ashburn Anstalt v Arnold* [1989] Ch 1;
- Unwilling to read *Street v Mountford* as establishing a rule that ‘no rent, no lease’;
- But note – a tenancy at no rent cannot be an assured tenancy: Housing Act 1988 Sch 1 paragraph 3.



Exceptional cases

- See *Street v Mountford* at 823-4
- Sometimes it may appear from the surrounding circumstances that the right to exclusive possession is “referable to a legal relationship other than a tenancy”;
- For example, service occupiers. Employee with exclusive possession will be service occupier where:
 - Express term of employment contract they occupy the premises for the better performance of their duties; or
 - Essential for the performance of the duties of the occupying employee that they occupy the premises (e.g. caretaker);
- HA 1988 Schedule 2 ground 16 for possession (discretionary) “The dwelling-house was let to the tenant in consequence of his employment by the landlord seeking possession or a previous landlord under the tenancy and the tenant has ceased to be in that employment...”



Tenancies created by an agent

- An agent, as between himself and a third party, has such authority as is actually conferred on him by his principal ('actual authority'), or such authority as has ostensibly been conferred on him because of the manner or circumstances in which he has been held out as an agent ('ostensible authority').
- An agent has actual authority where the acts done by him fall within the scope of the authority granted by the principal. An act done without actual authority can also be saved by the principal later ratifying the act.
- As for ostensible authority, as Mr Justice Toulson explained in Ing Re (UK) Ltd v R&V Versicherung Ag [2006] EWHC 1544 (Comm) at paragraph 99:

"The doctrine of apparent or ostensible authority is based on estoppel by representation. Where a principal (P) represents or causes it to be represented to a third party (T) that an agent (A) has authority to act on P's behalf, and T deals with A as P's agent on the faith of that representation, P is bound by A's acts to the same extent as if A had the authority which he was represented as having. The general principle is too well established to need citation of authority."

- Two requirements for ostensible authority to arise:
 - The principal represents to a third party that the person has authority to act as their agent in a certain respect (which can be implied from the circumstances); and
 - The third party relies on that representation to their detriment in their dealings with the agent.
- See Overbrooke Estates Ltd. v. Glencombe G Properties Ltd [1974] 1 WLR 1335 at 1339H-1340A.



Bruton tenancies

- *Bruton v London and Quadrant Housing Trust* [2000] 1 AC 406:
- Confirmed that a person can grant a tenancy, effective between themselves and the tenant, without having an estate in land;
- Landlord is estopped from denying that he has title to grant the tenancy;
- Tenancy would not bind the person with an immediate right to possession against the landlord.

Terminating licences

- Must be terminated in accordance with its terms;
- Common law requirement for reasonable notice;
- Protection from Eviction Act 1977 requirements;
 - S5 requirements - notice to quit, to be valid, must be in writing, include prescribed information and give 4 weeks notice;
 - See s3A exclusions (lodgers, trespassers given licence as temporary expedient)