Leases Versus Licences

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In Street v Mountford [1985] A.C. 809; [1985] 2 W.L.R. 877 HL at 819, Lord Templeman stated:

> *"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."*

That case established the three essential elements of a lease: (1) the right to exclusive possession of the property; (2) for a fixed term; and (3) at a rent. The most litigated of these three requirements is the first, to which a section of this article has been dedicated. However, there are other considerations which have been found to be (or not to be) determinative of the issue as to whether a residential property is occupied under a lease or a licence. The above passage, and the case law, make clear that it is the nature of the occupation, not the title nor even the contents of the agreement, upon which the court should focus.

When and why does it matter?

If the issue of lease vs licence has reached the courtroom, it is, of course because the answer must have a bearing on a particular litigious issue between the parties.

In disrepair claims, the lease vs licence debate has significant consequences. Most of the causes of action on which a disrepair claim is founded are reliant on the premises having been occupied under a lease. Section 9A of the Landlord and Tenant Act 1985 (the 1985 Act) applies to "a lease under which a dwelling is let" (s.9B). Section 11 of the 1985 Act applies only to leases, as is evidenced from the title of s.13: "leases to which s.11 applies". The duty of care under the Defective Premises Act 1972 (the 1972 Act) to take reasonable care to ensure that persons are safe from personal injury caused by any defect in the property, applies only in circumstances "where premises are let under a tenancy": s.4(1) of the 1972 Act.

In the context of possession proceedings, the impact is more limited. Under s.3(2B) of the Protection from Eviction Act 1977 (the 1977 Act), the requirement to obtain a court order to recover possession of residential premises applies in relation to premises let under a licence as well as a tenancy. It is only in circumstances where a lease or licence is excluded, within the meaning of s.3A of the 1977 Act, that a court order is not required. There is, of course, an impact on the relevant notice which will need to be served on the occupier: in the vast majority of cases, a lessee will be served with a notice seeking possession pursuant to either ss.8 or 21 of the

Housing Act 1988 (the 1988 Act) or s.83 of the Housing Act 1985 (the 1985 Act) if the tenancy is a secure tenancy; whereas a licensee will be served with a notice to quit in accordance with s.5 of the 1977 Act.

But what constitutes an unlawful eviction under a lease vs a licence? There are important distinctions to be made in this respect. An unlawful eviction is not a cause of action in itself; it is an event which gives rise to various potential causes of action some of which are not generally available to licensees. In *Love v Herrity* [1991] 2 E.G.L.R. 44; (1991) 23 H.L.R. 217 CA (Civ Div) at 46, the court made clear that, under an assured shorthold tenancy, a landlord may only obtain possession if the tenant unequivocally surrenders the tenancy or the landlord obtains a possession order by following the process set out in the 1988 Act. Otherwise, the eviction is unlawful. The position is similar for all tenants—assured, assured shorthold, or secure. There are prescribed grounds in the 1985 and 1988 Acts, and it is only on those grounds that possession can be sought. There is, of course, the s.21 process, but (1) that is still, in effect, a "ground of possession" which requires strict compliance with certain requirements in order to be relied upon; and (2) it is being abolished in the near future.

As mentioned earlier, in respect of a licence, the licensor needs to comply with the requirements of ss.3 and 5 of the 1977 Act. Anything less will amount to an unlawful eviction. This is the position in terms of removing a person from the property. However, the position is different in respect of trespass to land (i.e., entering the property whilst it is occupied under a lease or licence). This is a common cause of action in claims of unlawful eviction.

A licence does not confer a proprietary interest in land, so the tort of trespass to land cannot be committed against a licensee. As such, a licensor can enter into a licensee's property without committing the tort of trespass. This may still give rise to an action in trespass to goods, harassment or breach of contract, depending on the circumstances of the particular case. On a similar note, the covenant of the right to quiet enjoyment is only implied into tenancy agreements. Licensees do not have the benefit of this covenant.

Finally, there is an interesting distinction in terms of the recovery of unpaid "rent" for leases and licences, respectively. A lease requires payment of rent; however, sums paid under a licence are not strictly "rent", even if the licence agreement refers to the payment of rent. A licence confers an obligation to pay sums due under a contract. In certain circumstances, this can affect the cause of action under which unpaid money is recovered.

Under a lease, the landlord is always suing for a debt. Under a licence, this is not always so. Rent is a liquidated debt recoverable without proof of loss or mitigation. Under a licence, a licensor can only sue for unpaid sums as a debt if the contract imposes an unconditional obligation to pay, or if any conditions precedent to payment have been fulfilled *and* the amount payable is fixed and certain such that no further assessment or calculation would be required in order to figure out what is owed.

So, for example, if a licence is drafted in such a way that payment of money is given in exchange for the occupation of the property, and the licensee has left the property and no longer occupies it, the licensor may not be able to sue for those unpaid sums as a debt. Instead, the licensor would sue for damages, and would have to battle with the usual requirements of a damages claim: in particular, proof of loss and the duty to mitigate. If, for example, a licensor did not immediately fill the vacancy in order to mitigate his loss of payments, it may be difficult for him to establish that the full amount of unpaid money is payable by the licensee.

Legal principles and approach

Intention is key

The intention of the parties is central to a lease vs licence debate. Generally, the court will look at the intention of the parties and what the agreement says before interfering. If the intention is clear, the court will not interfere.

In *Bruton v London & Quadrant Housing Trust* [2000] 1 A.C. 406; [1999] 3 W.L.R. 150 HL at 413, Lord Hoffmann stated: "the meaning of the agreement, for example, as to the extent of the possession which it grants, depends upon the intention of the parties, objectively ascertained by reference to the language and relevant background". More recently, in *Stewart v Watts* [2016] EWCA Civ 1247; [2017] 2 W.L.R. 1107 at [38], Sir Terence Etherton MR held that the lease vs licence issue was "not necessarily determined by the labels or language used by the parties. It turns on the intention of the parties having regard to all the admissible evidence."

Also, in *AG Securities v Vaughan* [1990] 1 A.C. 417; [1988] 3 W.L.R. 1205 HL at 458, Lord Templeman stated: "the court must consider the surrounding circumstances, including any relationship between the prospective occupiers, the course of negotiations and the nature and extent of the accommodation and the intended and actual mode of occupation of the accommodation". It is of particular note that the mode of occupation is relevant, and for an example of a case in which this had a surprising but determinative effect, see *Antoniades v Villiers* [1988] 3 W.L.R. 139; (1988) 20 H.L.R. 439 CA (Civ Div), discussed further below.

Changing the Street v Mountford requirements

The *Street v Mountford* requirements are often considered the ultimate hallmarks of a tenancy; however, this has been altered over the years to a certain extent by case law. In *Mexfield Housing v Berrisford* [2011] UKSC 52; [2012] 1 A.C. 955, it was (crucially) confirmed that periodic tenancies are still "for a fixed term" in the context of the lease vs licence debate, so the requirement of a "fixed term" is not quite as strict as it might seem.

The case of *Ashburn Anstalt v WJ Arnold & Co* [1989] Ch. 1; [1988] 2 W.L.R. 706 CA (Civ Div) is often cited as a case which changed the effect of *Street v Mountford* somewhat, in that it held that the payment of rent is not a requirement of a tenancy. However, it is important to note that, in cases where a tenancy is found to have existed despite the fact that there is no payment of rent, there is generally some other consideration which "replaces" the rent requirement in a meaningful way. So, in *Ashburn Anstalt*, instead of the payment of rent, there was a scheme whereby the second defendant (who was found to have a tenancy) sold its leasehold interest to the claimant, then went into occupation pending the claimant's redeveloping the premises and granting the leaseback of a shop to the second defendant.

Homelessness accommodation and intention

As mentioned above, the intention of the parties is key in determining whether an occupation agreement is a lease or a licence. However, in certain contexts, the court takes a more nuanced approach when ascertaining intention. One such context is the provision of accommodation to homeless persons under the Housing Act 1996 (the 1996 Act). In this context, the approach of the courts to "intention" seems to be with respect to each of the individual requirements of a lease (most commonly, exclusive possession), as opposed to a consideration of the broader intention of the parties. So, in *Eastleigh BC v Walsh* [1985] 1 W.L.R. 525; (1985) 17 H.L.R. 392

HL, an agreement for temporary accommodation under homelessness legislation was found to have amounted to a grant of a tenancy to the occupier, despite the fact that, broadly, a local authority is very unlikely to have intended to grant such an interest in the provision of temporary homelessness accommodation. The arrangement under which a person is granted exclusive possession of the premises (and the other *Street v Mountford* features of a tenancy) does not escape being a tenancy merely because the arrangement is intended to provide temporary accommodation to a homeless person.

This is well-illustrated in the case of *Family Housing Association v Jones* [1990] 1 W.L.R. 779; (1990) 22 H.L.R. 45 CA (Civ Div), in which a housing association was providing homelessness accommodation under an agreement with a local authority. The association had retained a key to the premises, and it was explained that this was for the purpose of being able to offer support to the occupier, to discuss housing options, and to inspect the flat. It was not, as the judgment observed, so that the association could impose other co-occupants. There was a clause in the agreement which specifically stated that exclusive possession was *not* conferred on the occupier. However, the court found that, in light of all the circumstances and due to the intention of the parties specifically in relation to exclusive possession, that clause did not reflect the true meaning of the agreement and all the requirements of a tenancy were fulfilled. It was a lease.

Another case, in which the court "went the other way", finding that the occupancy agreement of a homeless person was a licence, is *Westminster City Council v Clarke* [1992] 2 A.C. 288; [1992] 2 W.L.R. 229 HL. Here, the court observed, at pp.300–301, that: "from the point of view of the council the grant of exclusive possession would be inconsistent with the purpose for which the council provided the accommodation". But again, it is the intention in relation to the specific requirement of exclusive possession which is scrutinised by the court, not the general intention of the parties in relation to the provision of such accommodation.

This approach, of ascertaining intention in relation to the specific requirements of an agreement, is particularly important in homelessness cases. It is arguable that a local authority will never (usually) intend to grant a tenancy to a homeless person in its provision of temporary accommodation under the 1996 Act. However, this should not mean that a local authority can never be found to have inadvertently granted a tenancy if all the requirements of a tenancy are met, and if it is clear from the evidence that the parties intended for them, as individual requirements, to be met. In *Jones* above, the fact that the key was retained for specified purposes, none of which encroached on the occupier's right to exclusive possession, was determinative of the issue, not the clause which claimed that no exclusive possession was conferred.

Exclusive possession

This is the element of leases vs licences which has attracted the most attention from the courts. *Woodfall* at 1.023, defines exclusive possession as "the ability on the part of a tenant to exclude all persons, including the landlord, from possession". It goes hand-in-hand with the primary legal distinction between a lease and a licence, which is that a lease confers a proprietary interest in land but a licence simply gives a person the right to occupy premises when it would otherwise be unlawful for them to do so.

Exclusive occupation, or "sole use", is not the same as exclusive possession, as was made clear in *Allan v Liverpool Overseers* (1873–74) L.R. 9 Q.B. 180 at 191–192. This was approved in *Street v Mountford* and again in the more recent case of *Global 100 Ltd v Laleva* [2021] EWCA Civ 1835; [2022] 1 W.L.R. 1046 at [39].

Furthermore, just because an agreement specifies that exclusive possession is not conferred on the occupier, this is not conclusive of the matter. We have already looked at *Jones*, but another interesting case (heard alongside *AG Securities*) is *Antoniades v Villiers* [1988] 3 W.L.R. 139. In this case, the mode of occupation of the property was a critical factor in determining whether the agreement was a lease or a licence. A couple were living together in a one-bedroom flat, having each signed a separate licence agreement. In both agreements, the landlord claimed to have the right to permit other people to use the flat and he reserved the right to move in with the occupiers. The court held that it was clear from his failure to exercise his right to move in, and from the fact that the accommodation was clearly too small to accommodate anyone else besides the occupiers, that there was no genuine need for this clause. As such, the couple did, in fact, have exclusive possession of the property and were occupying it under a joint tenancy.

It was recognised in *Street v Mountford* that there are circumstances in which an occupier enjoys exclusive possession but is not a tenant:

(1) Trespassers;
(2) Occupiers whose exclusive possession is referable to a legal relationship other than a tenancy, for example, a beneficiary under a charitable trust: see, *Gray v Taylor* [1998] 1 W.L.R. 1093; (1999) 31 H.L.R. 262 in which an occupier of a flat in an almshouse administered by trustees of a charity was found not to have a tenancy;
(3) Where parties do not intend to create legal relationships (e.g., if exclusive possession is conferred during "subject to contract" negotiations, as was the case in *Isaac v Hotel de Paris Ltd* [1960] 1 W.L.R. 239, although this was not in the context of residential premises), or where exclusive possession has been conferred as an act of friendship or generosity, though such cases will often turn on their own specific facts as to whether there was such an intention;
(4) Service occupiers.

Of course, this list is not exhaustive, and there are other situations in which a person can enjoy exclusive possession without being a tenant. As Lord Templeman put it in *Street v Mountford* at 818: "there can be no tenancy unless the occupier enjoys exclusive possession; but an occupier who enjoys exclusive possession is not necessarily a tenant."

Contractual terms to consider

The following specific clauses of a tenancy agreement should be noted as possible indicators that exclusive possession has *not* been conferred:

- A clause which states that an occupier may be required to share the accommodation;
- A clause which controls who can live in the property and who can stay overnight with occupiers;
- A clause conferring access rights on the landlord which go beyond the usual repairing and emergency access clauses;
- A clause stating that the occupier may be required to move to alternative interim/temporary accommodation at any time for any reason.

The latter is often found in agreements for homelessness accommodation.

As the above cases illustrate, however, it is crucial to consider not just the presence of these clauses in an agreement, but how, or even whether, they operate practically in all the circumstances. If, based on the way in which the occupiers are actually occupying the premises, and/or the way in which it was intended that they would do so, there is no need for the clause to be there because it either cannot have the desired effect or it is contrary to the parties' intentions, it is unlikely that the court will rely on it as a marker of the nature of the agreement.

Conclusion

From the vast body of case law in this area, one key principle can be extracted: the lease vs licence distinction operates on a case-by-case basis, guided by a multitude of potential factors. It is imperative that landlords and licensors ensure that their agreements are drafted in a way which not only makes clear their intentions, but which is consistent with the practical operation of the contract. Merely stating that exclusive possession is not granted will not suffice if, in reality, the terms of the agreement or the nature of the parties' relationship effectively confers it. On the other hand, tenants should remain vigilant about how their occupancy agreement operates, paying close attention to the rights they enjoy, not just on paper but in practice and through the conduct of their landlord.

The law is stated as at 15 August 2025.