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Part I

Leases: the general law

Chapter 1

Essential characteristics of a lease

1.1 An Estate in Land

Most people who see particulars in an estate agent's window offering for sale a desirable leasehold residence (often a flat) are aware that what is offered is something for a certain period, such as 'the remainder of a ninety-nine-year lease', and that this is less than a freehold, which connotes an unlimited and indefinite ownership. Few people would realise, however, that the basic distinction between the two derives from the historical development of land law.

Both leaseholds and freeholds are 'estates' in land. In the feudal society of medieval England, it was not possible to own land as all land belonged to the King. The King would graciously grant tenure of the land to his lords in return for certain services (often the provision of men and horses for battles, a form of tenure known as Knight Service), and the lords would in turn grant tenure of plots of land to the villeins in the manor in return for their services. Neither the lord nor his villeins owned the land itself, however. The extent of their interest in the land was therefore determined by the duration of the tenure granted to them, and this was known as their 'estate' in the land.

From early times, there was always a distinction between estates of an uncertain duration (such as life estates, or estates which were inheritable by certain heirs and so would continue until there were no such heirs capable of taking) known as *freehold* estates, and estates of a limited and definite duration which were estates of less than freehold, later known as 'term of years' or *leasehold* estates.

The 1925 property legislation radically changed English land law with the ultimate aim of simplifying the conveyancing process for a purchaser. Since 1 January 1926, when the legislation came into force, only two estates in land may subsist at law, those being (a) the fee simple absolute in possession (or what is now commonly known as freehold) and (b) the term of years absolute (leasehold). Because s.205 (xix) of the Law of Property Act 1925 (LPA 1925) defines 'possession' as including receipt of the rents and profits of the land, it is possible for a person who has a freehold estate, who creates a lease on which he receives rent, to still have a legal freehold estate. The lease which he creates may also be a legal estate, and the two legal estates may subsist in the land concurrently.

The definition of land in English land law is to be found in a Latin phrase '*cujus est solum, ejus est usque ad caelum et ad inferos*' adopted by English law, meaning that with ownership of land goes ownership of the subsoil and air space above and any premises and fixtures on the land. This maxim is subject to many restrictions nowadays, and must necessarily be revised. For example, British Coal may have mining rights under a person's land and civil aviation authorities a right to fly aeroplanes through air space over land, and clearly a block of flats creates horizontal rights of ownership and not vertical ones.

Notwithstanding that a lease creates an estate in land, it is also a contract between two parties – a landlord and a tenant. It will often contain a number of covenants by both of them, and there is an increasing tendency for the courts to recognise this contractual nature of a lease as well.¹

1.2 Fixed Duration

A lease, then, is an estate in land of a fixed and definite duration. Although the technical name for it is 'a term of years', it may in fact be for any term less than a year – a week, a month or even a day – as well as for any number of years. It must, however, be for a *definite* or *determinable* duration, and the grant of an interest in land which does not comply with this requirement will not create a lease. Thus in the case of *Lace v. Chantler* (1944) a lease 'for the duration of the war' was held to be void.²

A very usual provision included in a lease for a fixed term is a proviso for re-entry by the landlord and forfeiture of the term if the tenant does not pay the rent or is in breach of any of the covenants contained in the lease. It is specifically provided by s.205(1)(xxvii) LPA 1925 that such a clause for premature defeasance of the term on certain events will not invalidate a lease.

A periodic tenancy, running automatically from one period to another unless terminated by either party, also falls within the definition as it is regarded as being a tenancy for that period. Examples of periodic tenancies are weekly, monthly, quarterly or yearly tenancies. Leases for life or until marriage are clearly outside the scope of the definition, but special provision is made for such leases in s.149(6) LPA. The particular characteristics of these and periodic tenancies will be dealt with in Chapter 2.

1.3 Exclusive Possession of Land

Because a tenant is given an estate in the land, he is entitled to exclusive possession of it and may exclude from it the landlord or anyone else. For this reason, it is usually necessary for a landlord who requires entry onto premises during the term of the lease (e.g. to inspect the state of repair) to reserve a right of entry in the lease itself.

A grant of anything less than exclusive possession will not create a leasehold estate. Thus in *Clore v. Theatrical Properties Ltd.* (1936) a right to sell refreshments in a cinema which did not give the grantee exclusive possession was held not to be a lease but merely a licence.

The House of Lords in *Street v. Mountford* (1985) has reasserted this basic difference between a lease and a licence. A lease is a proprietary interest in land whereas a licence is merely permission for user of, or entry on to, the land. There are, however, some circumstances where an occupier may have only a licence notwithstanding that he has exclusive possession, and these circumstances will be examined in more detail at the end of this chapter.

1.4 Rent

Rent is the consideration for the possession of the land enjoyed by the tenant, and as such is usually one of the basic characteristics of a lease. This commercial nature of a lease often distinguishes it from interests which are gratuitous and which may then take effect under a trust. Nevertheless, it is possible to have a gratuitous lease. This is specifically envisaged by the definition of a term of years in s.205(1) (xxvii) LPA, which states 'whether or not at a rent', and it was recognised by the Court of Appeal in *Ashburn Anstalt v. W.J. Arnold & Co.* (1987) that rent-free occupation could nevertheless be a lease.

Rent is usually a money payment, of course, but it does not have to be. The most common alternative to a money payment is services, where the property is leased in return for the tenant's services.

Rent is an acknowledgement of the landlord's reversionary title, and failure to pay rent for twelve years may result in his reversionary title being extinguished under the Limitation Act 1980. Alternatively, lack of rent may be a factor which indicates that the agreement between the parties is not a lease at all, but is merely a licence, as in the case of *Heslop v. Burns* (1974).³

1.5 Reversion Expectant upon the Term

Because a lease is for a definite and limited duration, there must always be a reversionary interest expectant upon its determination. This will usually be a freehold estate, but need not necessarily be so. For example, a person who has himself a lease for ninety-nine years may grant out of it a lease for any lesser term, called a sublease or underlease.

If the sublease is for, say, fifty years, it is then possible to grant a further sublease for any term less than fifty years. The reversion on this last lease would be the sublease of fifty years, the reversion on the sublease of fifty years would be the lease of ninety-nine years, and the reversion on the ninety-nine-year lease would be the freehold.

The lease and the immediate reversion must be vested in different persons, however, and should they become vested in the same person, then the lease will cease to exist. This principle was illustrated by the House of Lords case of *Rye v. Rye* (1962), where it was held that co-owners could not grant a valid lease to a partnership of which they themselves were the partners, as a partnership (unlike a limited company) does not have any distinct identity separate from the partners in it.

1.6 Distinction between a Lease and a Licence

It was at one time believed that the essential difference between a lease and a licence was that a lease gave the tenant exclusive possession of the property, whereas a licence did not.

Under the Rent Acts, extensive protection was given to tenants both as regards security of tenure and rent control. In the majority of leases, when the contractual term of the lease expired, the tenant would have a statutory tenancy which the landlord would be able to terminate only on certain grounds, and which could pass on the tenant's death to certain members of his family living with him in the leased premises.

Not surprisingly, many landlords were anxious to avoid creating a lease which might not be terminable for many years to come, and attempted (with varying degrees of success) to avoid the effect of the Rent Acts by creating a licence instead. Moreover, there have been circumstances where, although the logical interpretation of an agreement would suggest that a lease has been created, the judges have concluded that it was merely a licence in order to avoid undue hardship to the landlord. The distinction between leases and licences is therefore blurred. It is certainly no longer defined by the simple criterion of exclusive possession, and it requires an examination of the principles applied by the courts to determine which side of a rather wavering line any particular agreement may fall.

First, it is clear that if there is no exclusive possession, then the occupier of premises cannot have a lease but only a licence. 'Exclusive possession' means the right to exclude everyone else, including the landlord, from the premises, and in *Luganda v. Service Hotels Ltd.* (1969) this was distinguished from 'exclusive occupation', which gave the occupier the right to exclude everyone except the landlord – a circumstance usually typical of a lodger's rights.⁴ In the decision of *Brooker Settled Estates Ltd. v. Ayers* (1987) the Court of Appeal ruled that whether exclusive possession exists or not is a matter of fact for the trial judge to determine in every case, and it is not a proper inference to draw that a person in possession of premises who is not a lodger necessarily has exclusive possession and is a tenant.

Secondly, it is abundantly clear from *Addiscombe Garden Estates Ltd. v.*

Crabbe and Others (1958),⁵ and from the House of Lords' decision in *Street v. Mountford* (1985), that what the parties call their 'agreement' is by no means conclusive and it is primarily the intention of the parties which the court will look at in deciding whether the agreement creates a lease or a licence. Moreover, this intention is to be deduced from the realities of the arrangement in practice, and not as may be expressed in the agreement.

Since the decision in *Street v. Mountford*, the presumption is in favour of a lease wherever exclusive possession of premises is granted for a term at a rent. However, the speech of Lord Templeman in *Street v. Mountford* clearly recognises that there will be some instances where this will still not apply. These are where the occupation of premises by someone is referable to legal relations other than a tenancy – e.g. a service occupancy, or occupation under a contract for the sale of property.

Alternatively, the arrangement between the parties may not have been intended to create legal relations at all. In the case of *Facchini v. Bryson* (1952) Denning L.J. referred to the possible existence of 'circumstances such as family arrangement, an act of friendship or generosity, or such like, to negative any intention to create a tenancy'. Lord Templeman cites these situations as ones which may not give rise to a tenancy, in spite of exclusive possession, as they may not create legal relations at all between the parties.

There have been cases of family arrangement (*Cobb v. Lane* (1952),⁶ friendship (*Heslop v. Burns*)³ and generosity (*Marcroft Wagons Ltd. v. Smith* (1951))⁷ where the courts have decided that a licence and not a lease had been created. In *Ward v. Warnke* (1990), however, it was said that a family relationship is not conclusive of a licence and there may still be a tenancy if the circumstances support this.⁸ Whilst the decision in *Street v. Mountford* clearly gives the courts the power to expose any 'sham' licences, which are in reality leases, certain well-established types of occupancy will still not be within the definition of leases as they are not agreements which were intended to create legal relations.

In *Bruton v. London & Quadrant Housing Trust* (1999), the House of Lords applied the principle of *Street v. Mountford* to a licence granted by a Housing Trust which was a charity. The Trust itself was a licensee of a block of flats from Lambeth LBC for the purpose of providing temporary accommodation for homeless persons. The House of Lords held that the licence granted to Mr. Bruton had all the hallmarks of a lease, giving him exclusive possession of premises for a period in return for a payment. It was irrelevant that the Housing Association itself only had a licence from the council, and they were estopped from denying the tenancy which they had created. This decision has recently been reviewed by Lord Scott in *Kay v. Lambeth LBC* (2006), where he said that the 'non-estate' Bruton tenancies

granted by the Trust, although binding on them, could not be binding on the Lambeth Borough Council.⁹

Another way in which landlords have sought to ensure that they grant an occupier of premises a licence rather than a lease is to grant rights of shared occupation only to two or more persons, reserving to the landlord the right to select another occupier if one should vacate the premises. It may then be argued that no one occupier has exclusive possession of the premises.

The decision of the House of Lords in *A.G. Securities v. Vaughan and Others* (1988) accepted that four occupiers, who each signed different licence agreements on different dates at varying rents, which expressly negated exclusive possession of any part of the premises, could not have a joint tenancy of a four-bedroom flat which gave them 'in toto' exclusive possession.

The essential ingredients of a joint tenancy – which would have to commence at the same time and give each of the joint tenants identical rights in the whole of the property – were missing. In *Mikeover v. Brady* (1989) two licensees paid identical monthly sums under two licence agreements. When one vacated the premises the landlord refused to accept any payment from the remaining licensee other than that under his agreement. It was held that as they were clearly liable individually for their own payments there was no unity of interest essential for a joint tenancy and they were necessarily licensees.

In the case of *Antoniades v. Villiers and Another*, however (1988, heard on appeal along with *Vaughan*) the House of Lords decided that occupation of a one-bedroom flat given to two people at the same time, where they both paid equal contributions to periodic payments of rent, was in fact a lease and not a licence as it described itself. The landlord's right of entry and occupation, expressly reserved for the purpose of avoiding exclusive occupation by the two occupiers, was unrealistic in a one-bedroom flat and amounted to a sham. The two occupiers together had exclusive possession for a term at a rent, and therefore had a tenancy.

Two further cases in which the landlord purported to reserve a right of entry which the court decided was not real are *Aslan v. Murphy* (1990)¹⁰ and *Family Housing Association v. Jones* (1990).¹¹ In each case the court found that a lease had been created, and in the latter case, the court was not prepared to find that the retention of a key by the landlord was in itself sufficient to indicate shared possession.

Although the virtual abolition of security of tenure now means that the creation of a lease will not have the same far-reaching effects for a landlord, and the deluge of litigation in this area has abated, the distinction is still important as a lease creates an estate in land, with all that this entails, whereas a licence is still only an agreement.

A lease will often give a tenant certain important statutory rights which may not attach to a licence. A licence is usually more easily revoked and will not give rise to the same rights which a tenant would have against a landlord. In *Monmouth Borough Council v. Marlog* (1994), the tenant of a three-bedroom house, under a written tenancy agreement, allowed a woman and her two children to share the house with him. He later left the house and the Council sought to recover possession of it. It was held that the woman was merely a licensee under an informal house-sharing arrangement, and not a subtenant, so that the Council could recover possession against her. Also, the rights of a tenant are much more likely to be binding on a third party than the rights of a licensee. In *Skipton Building Society v. Clayton* (1993), a 'Licence' whereby vendors of property occupied it for their lives was held to be a lease within S.149(6), LPA (see section 2.4) and so binding on the Building Society, to which the purchaser had mortgaged the property.¹²

The distinction between a lease and a licence may also be important in relation to business premises where a lease (even a periodic one) will be within the provisions of the Landlord & Tenant Act 1954, Part II, whereas a licence will not be. In *Esso Petroleum Co. Ltd. v. Fumegrange Ltd.* (1994), a filling station, shop and car wash was managed by the occupiers on behalf of Esso under three separate licence agreements. The occupiers tried to claim that they had exclusive possession and were lessees. Esso exercised considerable control over the management of the businesses, however, and issued a manual of operating standards. It was held that this degree of control negated any intention to create a lease, and although the licensees had exclusive occupation, they did not have exclusive possession as regards the landlord. A decision to the contrary, where a management agreement on restaurant premises gave the sole and exclusive right to operate the restaurant business to the restaurant proprietor, was held to create a lease and not merely a licence.¹³

In *Clear Channel Ltd. v. Manchester City Council* (2006), the Council entered into two agreements with the claimants for the erection and use of advertising hoardings on sites. The first agreement, which described itself as a licence and stated that no tenancy was to be conferred, concerned thirteen sites which were identified only by general addresses and not specifically described. The judge (whose decision was confirmed by the Court of Appeal) concluded that the agreements conferred merely a right to use the sites rather than any exclusive possession of them and that they were not sufficiently described to be an area of land contained in a lease. Jonathan Parker L.J. said that he would have had great difficulty in construing an agreement as a lease when the parties, who had received legal advice and were of equal bargaining power, had expressly stated in the

agreement that it was not. The 1954 Act did not therefore apply. The second agreement, contained in a letter, set out terms entirely consistent with a tenancy granting rights and obligations with regard to clearly identified land which could be the subject matter of a lease, and the user of the site for advertising was sufficient business user for the 1954 Act to apply.

In *Hunts Refuse Disposals Ltd. v. Norfolk-Environmental Waste Services Ltd.* (1997) the Court of Appeal accepted that while the principles of *Street v. Mountford* apply to both residential and business premises, their application in practice may be very different to business premises. In that case, it was held that the exclusive right to deposit waste on a thirty-one-acre site, for twenty-one years, part of which was used for quarrying, created a licence and not a lease. Similarly, the judgment of Jonathan Parker L.J. in *Clear Channel* above demonstrates the possibility that the courts may not apply the principles of *Street v. Mountford* so rigorously in commercial transactions.

Notes

► **1** Luxton, 'Termination of Leases: from Property to Contract?', in Birds, Bradgate and Villiers (eds.), *Termination of Contracts*, 1995, Wiley Chancery, Chapter 7.

► **2** Because a number of leases had been made in this form during the war, the Validation of War-time Leases Act 1944 was passed specifically to validate them.

► **3** *Heslop v. Burns* [1974] 3 All ER 406

An elderly man who had befriended a young couple allowed them to live in a property of his. No rent was paid and he paid the rates. After his death, his executors brought an action for possession of the property. They were successful as the court decided that the couple had only a licence and not any kind of tenancy.

► **4** *Luganda v. Service Hotels Ltd.* [1969] 2 Ch 209

Rooms were let to occupiers and the landlords provided some portage and room services. It was held that, although the occupant had exclusive occupation in

that he was able to exclude everyone but the landlord (and had limited protection under Part VI, Landlord & Tenant Act 1968), he did not have exclusive possession which enabled him to exclude the landlord and was not therefore a lessee.

► **5** *Addiscombe Garden Estates v. Crabbe & Others* [1958] 1 QB

A document, which described itself as a licence, gave the trustees of a tennis club the right to use tennis courts for a fee. There was a right of re-entry on non-payment of the fee and an agreement for quiet enjoyment, and the trustees were to repair and maintain the premises and to permit the grantors to enter and inspect. It was held that the terms were indicative of a lease rather than a licence.

► **6** *Cobb v. Lane* [1952] 1 All ER 1199

A sister allowed her brother to occupy a house belonging to her,

she paying the rates. It was held that this was a family arrangement, creating a licence rather than a tenancy.

► **7 *Marcroft Wagons Ltd. v. Smith* [1951] 2 All ER 271**

A landlord permitted the daughter of a protected tenant, who had lived in the cottage for many years, to remain there after her widowed mother's death. He refused to put her name in the rent book but accepted rent for six months. It was held nevertheless that she was not a tenant but only a licensee, as she had only permissive occupation.

► **8 *Ward v. Warnke* [1990] 22 HLR 496**

The plaintiff's daughter and her husband occupied a holiday cottage belonging to the plaintiff. They paid all outgoings and a small sum of £3 per week which later rose to £6 per week. The daughter left but her husband and child remained there. It was held that the husband was a tenant as the premises were let for a term at a rent and the family relationship did not prevent this.

► **9** In *Bruton*, the London Quadrant Housing Trust had surrendered its licence and been granted a tenancy by the Lambeth Borough Council in 1995, which the Council terminated after the decision in the Court of Appeal. Lord Scott said that the tenancies created by the Trust thereupon became 'estate' tenancies, but still fell when the lease to the Trust was terminated. In *Kay v. Lambeth LBC* (2006), the tenant also pleaded Article 8(2) of the Human Rights Act 1998 as a defence to his eviction, but the House of Lords applied their previous decision on this in *Harrow LBC v. Qazi*. For a discussion of this, see section 15.2.

► **10 *Asian v. Murphy (Nos. 1 & 2)* [1990] 1 WLR 766**

The licensee's agreement allowed him to occupy the premises from midnight until 10.30a.m. and from midday to midnight. It was held that the break of one and a half hours each day was a pretence and to be ignored, and he therefore had a lease.

► **11 *Family Housing Association v. Jones* [1990] 1 All ER 385**

The Housing Association, which had granted a licence of temporary accommodation to a homeless person, retained keys to the premises. The purpose of this was to discuss rehousing with the occupier and inspect the state of repair and not to introduce another occupier. The Court of Appeal held that retention of keys alone was not sufficient to indicate a licence where the purpose of retention did not relate to shared occupation.

► **12 *Skipton Building Society v. Clayton* (1993) 66 P&CR 223**

The vendor of a flat sold it to the purchasers at one-third of the market value in return for the purchasers granting a 'licence' to him and his wife to live there for the rest of their lives. The licence purported to give the purchasers' 'possession, management and control' of the property. They did not have any key to the property however and the judge found that this clause, along with the description of the agreement as a 'licence', was a sham. The reality was that the vendor and his wife had sole possession. It was held that the agreement created a lease and

not a licence, to which s.149(6) LPA applied as the sale at one-third of the market price amounted to a 'fine' within the section (see section 2.4). It therefore became a lease for ninety years and was binding on the Building Society to which

the purchasers mortgaged the property.

► 13 *Bon Appetito v. Michael Poon* (2005) Unreported Newcastle CC 18.1.05.

Summary

- A lease is a contract between a landlord and a tenant which creates an estate in land. It may be a legal estate (term of years absolute).
- A lease must be for a fixed and definite duration and must give the tenant exclusive possession of the property.
- Rent will usually be payable although it is not essential.
- The landlord (who owns the reversion) and the tenant (who owns the term) must be different persons.
- It is not always clear whether an agreement is a lease or a licence. After the case of *Street v. Mountford*, there is a presumption of a lease, but circumstances such as lack of legal relations or no exclusive possession, may mean that the agreement is merely a licence.
- The distinction is still important as regards certain statutory rights and as regards the enforceability of a lease against third parties.
- In commercial transactions, there may be reasons for not applying the principles of *Street v. Mountford* too rigidly.

Exercises

- 1.1 What is an estate in land?
- 1.2 What is the essential difference between a freehold and a leasehold estate?
- 1.3 Does a right of re-entry reserved to the landlord in certain circumstances make a lease invalid?
- 1.4 What are the essential requirements of a lease?
- 1.5 How would you define a licence?
- 1.6 What is rent? Does it have to be a money payment?

Exercises cont'd

- 1.7** Why have the courts been reluctant in some cases to find that an agreement creates a lease?
- 1.8** Give examples of circumstances where the courts have decided that a licence rather than a lease has been created.

Workshop

- 1** Lawrence allowed three students to occupy a three-bedroom flat of his. The students were each given a licence agreement to sign which stated that they did not have exclusive possession and must each contribute a one-third part of the fee for occupation. Recently, one of the students left and the other two advertised his room and have allowed someone else to occupy it.
Discuss whether the agreements between Lawrence and the students create a lease or a licence of the flat.
- 2** Five years ago, the Ambridge Borough Council entered into a written agreement with Teasmade Ltd. whereby Teasmade Ltd. were to have exclusive possession of a hut on a recreation ground to provide refreshments until such time as the Council demolished the hut in order to build a pavilion. The Council is now ready to proceed with the building and have asked Teasmade Ltd. to vacate the hut. Advise Teasmade Ltd.

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