

# Chapter 15

## Leases

<http://www.palgrave.com/law/Stroud3e/>

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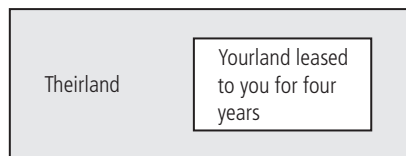
### Introduction

Essentially, a lease is a right made in a contract to occupy someone else's land for a set period of time.

For example, Mr Theirland owns Theirland in its entirety.



Mr Theirland wants to make some money. He makes an agreement with you, a contract, which allows you to occupy that part of Theirland called Yourland for a set period of time, four years for example, in return for monetary payment. This is commonly known as renting Yourland or leasing Yourland.



You have the right to use Yourland for four years, after which Yourland will return to form part of Theirland again.

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There are three main areas to look at in leases.

First, what is a lease? What constitutes a lease? What do you have to show in order to be able to say that you have something that is capable of being a lease?

Secondly, has the lease been created in a recognised way? As elsewhere in Land Law, you need a certain degree of formality before you can create a valid lease.

Lastly, if the leased land is sold, is the lease binding on the new owner? In the example below, if Theirland, subject to the lease of Yourland, is sold to Peter, is the lease of Yourland binding on Peter? Peter will want to know whether he has to let you occupy Yourland for the full four years of the lease. You will also want to know whether you have the right to stay there for the full four years, even though Peter has purchased Theirland.



The chart on page 363 shows the three areas that will be looked at in this chapter. Box A looks at the essence of a lease. Box B looks at how a lease is created and Box C looks at how leases are protected when land is sold. You must meet the requirements in both Boxes A and B in order to have a valid lease. Box C is relevant if there is a purchaser who buys land subject to a lease.

<b>LEASES</b>		
<p><b>Box A</b></p> <p><b>THE ESSENCE OF A LEASE</b></p> <p>You must tick boxes 1, 2 and 3</p> <p>A LEASE CAN EXIST IF THERE IS:</p> <p><input type="checkbox"/> <b>1.</b> Exclusive possession</p> <p>and</p> <p><input type="checkbox"/> <b>2.</b> A certain term</p> <p>and</p> <p><input type="checkbox"/> <b>3.</b> Rent or consideration</p> <p><b>BUT A LEASE WILL NOT EXIST IF</b></p> <p><b>4.</b> There is no intention to create a legal relationship</p> <p>or</p> <p><b>5.</b> There is an act of friendship or generosity</p> <p>or</p> <p><b>6.</b> There is a service occupancy</p> <p>or</p> <p><b>7.</b> There is a lodger</p>	<p><b>Box B</b></p> <p><b>THE CREATION OF A LEASE</b></p> <p>Tick as many boxes as possible but at least one:</p> <p>A lease can be created by the following means. The type of lease that results is in brackets</p> <p><input type="checkbox"/> <b>1.</b> By deed (legal lease)</p> <p><input type="checkbox"/> <b>2.</b> Under section 54(2) of the Law of Property Act 1925 (legal lease)</p> <p>(i) A fixed term lease or</p> <p>(ii) An express periodic tenancy or</p> <p>(iii) An implied periodic tenancy</p> <p><input type="checkbox"/> <b>3.</b> Under section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (equitable lease)</p> <p><input type="checkbox"/> <b>4.</b> By proprietary estoppel</p>	<p><b>Box C</b></p> <p><b>THE PROTECTION OF A LEASE</b></p> <p>Look at either</p> <p><b>UNREGISTERED LAND</b></p> <p><b>1.</b> Legal lease</p> <p><b>2.</b> Equitable lease</p> <p>OR look at</p> <p><b>REGISTERED LAND</b></p> <p><b>3.</b> Dealings which must be completed by registration</p> <p><b>4.</b> Interests which override a registered disposition</p> <p><b>5.</b> Interests entered as a notice or protected by a restriction</p>

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## The essence of a lease

**Box A**

## THE ESSENCE OF A LEASE

You must tick boxes 1, 2 and 3

A LEASE CAN EXIST IF THERE IS:

1. Exclusive possession

and

2. A certain term

and

3. Rent or consideration

BUT A LEASE WILL NOT EXIST IF

4. There is no intention to create a legal relationship

or

5. There is an act of friendship or generosity

or

6. There is a service occupancy

or

7. There is a lodger

Box A gives the conditions you need to satisfy in order to claim a right that can be called a lease. We'll use the example of Theirland and Yourland as shown in the introduction when talking about Box A.

**Q:** *Is there a difference between a lease and a tenancy?*

**A:** Essentially, a lease and a tenancy are the same, and mean the occupation of someone else's land for a set period of time. The word 'lease' is usually used when the set period runs for a fixed term of over one year, for example three years or 99 years. A tenancy usually relates to a period of a year or less, for example, a year, a week or a month. In a lease, the term lessor is given to the person who grants the lease and the term lessee is the word given to the person who takes the lease and occupies the land. In a tenancy, the word landlord is used for the person who grants the tenancy and the word tenant for the person who takes the tenancy and occupies the land. Although this is a guide, the terms are used interchangeably.

**Q:** *Does this chapter apply as much to residential leases, as in the lease of a flat, as to leases of industrial or commercial property?*

**A:** Yes. Although you'll find that some of the cases discussed in this chapter relate to residential accommodation, while others relate to commercial property, the principles are the same. The main differences between a residential and a commercial lease are the terms agreed in the lease. Whereas a promise to pay rent is likely to be common to both, a promise to paint the outside of a house every year will not be relevant to a commercial property. Residential and commercial leases are also governed by different statutes.

**Q: What is meant by the term 'freehold reversion?'**

**A:** In the example at the beginning of the chapter, Theirland was owned by Mr Theirland. He owned the freehold estate of Theirland. When he granted you a lease, he carved a leasehold estate out of Theirland for four years. At the end of the four years, this leasehold estate ends. Yourland becomes part of Theirland again. Throughout the duration of the lease Mr Theirland owns what is called the *freehold reversion* of Yourland. He owns the right to Yourland when it reverts to being part of Theirland.

**Box A1** Exclusive possession

**Q: What's exclusive possession?**

**A:** It's the hallmark of a lease. It means that you have the right to exclude or resist everyone coming onto Yourland during the period of your lease, including the landlord, Mr Theirland.

**Q: Including the landlord?**

**A:** Especially the landlord. If you have exclusive possession it means you can exclude everyone, and that means you must be able to exclude the landlord as well. If the landlord wishes to come and inspect the premises to make sure that you're keeping them in a presentable state, he should make an appointment to come and visit you. If he is able to enter at will, and come and go as he pleases, you do not have exclusive possession. Exclusive possession is a key element of a lease, and it means the right to resist anyone coming onto the land, including the landlord.

*Shell-Mex and BP Ltd v Manchester Garages Ltd* (1971) is an example of a situation in which there was no exclusive possession. An agreement allowed Manchester Garages to use Shell's garage for selling petrol. Manchester Garages had not been granted exclusive possession because Shell still had rights of possession and control. Shell could decide on the layout of the garage and could move the pumps and storage tanks.

**Q: What happens if the landlord has said in the lease agreement that he will come in and inspect the premises on the last Friday of every month?**

**A:** That doesn't mean you don't have exclusive possession. In fact, an agreement like this actually confirms that you *do* have exclusive possession because the landlord can't just wander in at will. He has had to make an appointment to enter the premises, thereby confirming your exclusive possession.

**Q: What happens if the landlord has kept a key to Yourland in case there is an emergency, for example, the taps freezing?**

**A:** Again, this will not deny you exclusive possession: see *Family Housing Association v Jones* (1990). Because the landlord has reserved the right to enter in an emergency, it

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confirms that he cannot just enter at will, emergency or no emergency, and so you have exclusive possession. In *Aslan v Murphy* (1990) Lord Donaldson MR stated that it didn't matter that the landlord kept a key. What really mattered was why he wanted to keep a key and what he used it for.

Note the difference between exclusive occupation, where you are the only one living there, and exclusive possession, which is the right to resist the entry of everyone including the landlord. You can have exclusive occupation of premises, but this may not also amount to exclusive possession.

**Q:** *What happens if you have your own room but share a bathroom or kitchen?*

**A:** You will have exclusive possession of your own room and a licence to use the bathroom or kitchen. It is possible to claim statutory security of tenure for the entirety. The land that you are claiming exclusive possession of must be clearly identified. In *Clear Channel UK Ltd v Manchester City Council* (2005), as the land over which Clear Channel claimed exclusive possession had not been identified precisely there was no intention to grant exclusive possession.

### Box A2 A certain term

**Q:** *What's a certain term?*

**A:** A certain term is one where the duration of the lease is known to both parties when the lease is created. If you are given a lease of Yourland for four years, both you and the landlord, Mr Theirland, know at the beginning of the lease that you have the right to occupy Yourland for four years.

**Q:** *Why is it important to know how long a lease is going to last?*

**A:** So that both you and your landlord, Mr Theirland, know where you are. Life in rented property would be very uncertain if you couldn't ever be sure how long you were going to be there for. The landlord could give you notice to leave at any time, and vice versa. Remember that it wasn't so long ago that most people spent their entire lives in rented accommodation, and many still do. A large number of shops and business premises are leased and will also require certainty of term. Furthermore, if you don't put a time limit on a lease, it becomes difficult to distinguish between a freehold estate, ownership as we know it which goes on forever, and a leasehold estate, which is for only a set period.

**Q:** *What is an uncertain term?*

**A:** An uncertain term is one where you don't know how long the lease is going to last. In *Lace v Chantler* (1944) a lease was granted for the duration of the war. As nobody knew how long the war was going to last, the lease was not of a certain term and was therefore invalid.

**Q:** *Isn't having to decide a certain term inconvenient if the landlord doesn't know how long he wants to tie his land up for? What happens if he wants to develop his land sometime in the future, but isn't sure when?*

**A:** There were several attempts to get round the requirement of a certain term for this exact reason. In *Ashburn Anstalt v Arnold & Co* (1989) it was held that as long as both parties knew of the event which would bring the lease to an end, even if they didn't know

when that event would be, then you could say that it was a certain term. A certain term for the parties at any rate. Imagine you knew Yourland was going to be developed sometime in the future and you agreed with Mr Theirland that the lease would come to an end when he showed you a letter giving him planning permission for the development of Yourland. You also agreed with him that you could leave at any time. Both you and he would know the events that would bring the lease to an end. It's arguable that there is a certain term because you both know this, although you don't actually know when either of those events will occur. This example is similar to the facts in *Ashburn Anstalt v Arnold & Co* (1989), where the court decided that a term defined in this way was certain. However, this lateral thinking was overruled in *Prudential Assurance Co. Ltd v London Residuary Body* (1992), which confirmed that *Lace v Chantler* (1944) remained good law. You had to know at the beginning of the lease how long it would go on for, and that was final.

**Q:** *Does the lease have to start at the time when it's created, or can it be created to start at some time in the future?*

**A:** Either. If it starts in the future it can't start more than 21 years after the date of the grant of the lease. If it starts later than that, it will be void under section 149(3) of the Law of Property Act 1925.

**Q:** *Can you have a certain term for less than one full year?*

**A:** Yes. Section 205(1)(xxvii) of the Law of Property Act 1925 states that a term of years includes a term for a year or years, a term for less than a year, a term for a fraction of a year and a term from year to year. Short periods of time are still certain periods, or certain terms, because one week is a certain period of time, as is one month and so on.

**Box A3** Rent or consideration

In the important case of *Street v Mountford* (1985) Lord Templeman held that 'the only intention which is relevant (to the creation of a lease) is the intention demonstrated by the agreement to grant exclusive possession for a term at a rent'. Although he appears to say that rent is necessary, this is not true. Section 205(1)(xxvii) of the Law of Property Act 1925 talks about a term of years whether or not at a rent. *Ashburn Anstalt v Arnold* (1989) confirmed that rent was not an essential requirement of a lease, as did *Skipton Building Society v Clayton* (1993).

**Q:** *Why did Lord Templeman appear to make rent one of the requirements of a lease?*

**A:** Possibly because the case was to do with eligibility under the Rent Acts. For a tenant to be eligible for protection under the Rent Acts, rent has to be paid.

The other side of the argument is that if a lease is created in a written agreement, the agreement will not be enforceable unless there is some form of consideration. The rent is consideration for that agreement. Furthermore, you can create a short legal lease under section 54(2) of the Law of Property Act 1925 but the lease has to be at the market rent, and, again, you need rent here. If a lease is created in a deed, you do not require consideration because the deed itself makes the contract enforceable.

So a discussion of rent or consideration is included here because, for some types of leases, a lease cannot be created without it. On a more practical note, it's highly unlikely that anyone is going to let you occupy their property unless you pay them. In most leases

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or tenancies the lessee or the tenant pays rent money to the landlord. Payment does not necessarily have to take the form of money.

Boxes A4, A5 and A6 show a set of circumstances that were noted in *Facchini v Bryson* (1952) that exclude the finding of a lease if they occur. The circumstance in Box A7 was defined in *Street v Mountford* (1985), and again excludes the finding of a lease. Although you may be able to tick the boxes for exclusive possession, A1, a certain term, A2, and rent, A3, there are some circumstances in which, even though you've ticked these boxes, you will still not have a lease.

**Box A4** There is no intention to create a legal relationship

A lease is a contract, a legally binding relationship. A lease-type relationship could arise in a family situation. Take an example where Fred allows Auntie Dora to occupy his spare room for six months while her house is being redecorated. Auntie Dora may consider that she has exclusive possession of her room. It is presumed that Fred had no intention of entering into a legally binding contract to give Auntie Dora a lease, even if she did have exclusive possession of the spare room, and even if she paid Fred for the use of the room. This is common sense really. You don't want everyone who stays with you in this kind of situation to start claiming a lease and all associated rights. So the fact that there is no intention to create a legal relationship will exclude the finding of a lease.

In *Cobb v Lane* (1952) the owner allowed her brother to occupy a house rent-free. There was no intention to create a legal relationship, and accordingly the brother did not have a lease.

In *Heslop v Burns* (1974) Mr and Mrs Burns occupied rent-free accommodation in a house owned by a benefactor who had taken pity on their impoverished circumstances. It was held that there was no intention to create a legal relationship and therefore the couple did not have a lease.

**Box A5** There is an act of friendship or generosity

This is similar to Box A4 where a person is allowed to occupy someone else's premises as a friend. For example, Jane allows her student friend, Janine, to stay in her spare room when Janine can't find a room of her own. Acts of friendship or generosity will exclude the finding of a lease because, again, there is no intention to create a legal relationship.

In *Marcroft Wagons Ltd v Smith* (1951) the tenant died and her daughter was allowed to remain in the house through the generosity of the landlord. Despite the fact that the landlord accepted rent from the daughter while he was considering the situation, the court decided that a lease did not exist because his conduct showed an act of kindness, not an intention to form a legally binding contract.

**Box A6** There is a service occupancy

This is where someone occupies premises for the purpose of being better able to carry out his or her employment. Take an example where Fred is appointed as caretaker of a boarding school. He is given the use of a cottage in the school grounds for himself and his wife so that he is on the premises if anything goes wrong or needs repairing in an emergency. The reason he will not be seen to have a lease, despite the fact that he is likely

to have exclusive possession, is that he is occupying the cottage as part of his employment. The relationship is one of employer and employee, not landlord and tenant.

**Q:** *Does the accommodation have to be absolutely necessary in order for a person to be able to carry out the job that goes with it?*

**A:** No. It's enough that the accommodation enables better performance of duties. However, the accommodation must not be just a perk or a fringe benefit. In *Norris v Checksfield* (1991) Lord Guest stated:

The residence must be ancillary to the duties which the servant has to perform, or, put in another way, the requirements must be with a view to the more efficient performance of the servant's duties.

In *Norris v Checksfield* (1991) a coach mechanic had permission to use a bungalow which was close to where he worked. In return for the use of the bungalow, the mechanic had agreed to apply for a passenger service vehicle licence and to drive coaches for his employer. In fact he had been disqualified from driving! Not surprisingly, his employer brought an action for possession of the bungalow. It was held that the mechanic was occupying the bungalow for the better performance of his duties as a coach driver. As this was a service occupancy, he did not have a lease and his use of the bungalow came to an end when his employment ended. The relationship was one of employer and employee, not landlord and tenant.

**Box A7** There is a lodger

This last category was defined in *Street v Mountford* (1985). A lodger is defined as an occupier who receives services or attendance from the owner that are personal to the occupier. Services can include the provision of meals, laundry, internal window cleaning or the collection of rubbish from within the accommodation, for example. As the owner is able to enter when he wishes in order to carry out these services, the lodger can never claim exclusive possession and can therefore never claim a lease. People occupying bedsits where personal services are provided, guests staying in hotel rooms and people living in residential homes are all classified as lodgers. They may well have exclusive occupation, but they do not have exclusive possession, and so they do not have a lease.

In *Abbeyfield (Harpenden) Society Ltd v Woods* (1968) the occupier of a room in an old people's home did not have a lease because meals were provided and there was a resident housekeeper.

In *Street v Mountford* (1985) Lord Templeman stated:

An occupier of residential accommodation at a rent for a term is either a lodger or a tenant. The occupier is a lodger if the landlord provides attendance or services which require the landlord or his servants to exercise unrestricted access to and use of the premises. A lodger is entitled to live in the premises but cannot call the place his own.

Summary of the essence of a lease

The formula for a lease is exclusive possession plus a certain term plus rent. Although rent is not essential, it does support a contractual arrangement. Even if there is exclusive possession for a certain term at a rent, if the claimant falls into one of the exclusion categories, he will not have a lease.

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The effect of not meeting the requirements for a lease

**Q: What do you have if you don't have a lease?**

**A:** You have a licence to occupy the land, which is permission to be on the land. The person who grants the licence for the other party to occupy the land is called the licensor, and the person who takes the licence and occupies the land is called the licensee.

The licence is called a bare licence where no consideration is given for the permission to be on the land. The postman has a bare licence to walk up the drive to your door as he doesn't pay you for the privilege of doing so. A licence granted for consideration is called a contractual licence. When you go to the cinema, you pay for the privilege of being on the premises. You have a licence or permission to be there, and, as you have given consideration in the form of buying a ticket, you have a contractual licence. If you have permission to occupy another's land and you do not meet the requirements of a lease, you have a licence. Any money paid in return for permission to occupy the land will be called consideration for the licence, not rent, because you do not have a lease.

The distinction between a lease and a licence

**Q: Is it important to distinguish between a lease and a licence?**

**A:** Yes. There are some very important differences between the two.

First, a lease is a proprietary right in the land and is capable of binding a person who buys the land that is subject to the lease. A contractual licence is not a right in the land. It is a personal claim binding only on the parties who made the original agreement.

This said, you need to be aware of the heavily criticised case of *Bruton v London & Quadrant Housing Trust* (2000). A leasehold estate is a proprietary right in the land. The *Bruton* case allowed a landlord and tenant relationship to arise even though the landlord did not own the freehold estate from which to carve out a leasehold estate. This means that you can have a landlord and tenant relationship which is purely personal between the parties and has no estate of land attached to it. Such a decision is contrary to all known theory and has provided hours of entertainment for the academic world. There is more discussion on the matter of non-proprietary leases at the end of this chapter.

Secondly, a lease cannot be revoked (withdrawn) in breach of contract by the landlord because it is a contract capable of specific performance. Land is unique, and if the landlord failed to honour the lease, you would never be able to obtain an identical lease. The courts can therefore insist that the landlord lets you stay there for the agreed term. However, both a bare and a contractual licence can be revoked (withdrawn) at any time by the licensor, as long as reasonable notice to leave is given. Although the occupier can claim damages for breach of contract or, in some cases, obtain an injunction to stop the contract being revoked, this is clearly a precarious position to be in. If you occupy residential premises under a licence and the licence is revoked (withdrawn), you are going to have to find somewhere else to live whatever damages are awarded. Licences are discussed in detail in Chapter 13.

Thirdly, and most importantly, if you have a lease you may be able to claim statutory protection from the demands of a landlord. You may well have heard of the Rent Acts or the Landlord and Tenant Acts. Statute can afford a tenant protection against an unreasonable rent increase or protection from eviction before the lease has come to its end,

for example. Neither a bare licence nor a contractual licence comes under any form of statutory protection. They are simply permissions to occupy land.

**Q:** *So if you occupy land, you clearly need to make sure you have been granted a lease?*

**A:** Yes. Very definitely. If you are occupying land, the importance of being able to obtain the statutory protection available to a tenant is paramount. This means that you need to ensure you have a lease. Conversely, the owner of the land will try and ensure that you have only been granted a licence as it is not in his interests for you to have this statutory protection. As exclusive possession is the hallmark of a lease, whether you have a lease or a licence is mainly determined therefore by whether or not you have exclusive possession.

**Q:** *Presumably, landlords will try and avoid granting exclusive possession because, if there is no exclusive possession, there cannot be a lease or a tenancy?*

**A:** Yes. This is where conflict between the owner of the land and the occupier can arise. The owner would claim that he had not granted exclusive possession and the occupier would claim that he had. This conflict culminated in the important case of *Street v Mountford* (1985) but, before we look at this case, we need to backtrack to a case called *Somma v Hazelhurst* (1978). In this case the owner, Miss Somma, had given Mr Hazelhurst and his partner, Miss Savelli, the use of an upstairs room. The agreements that each party signed were called licences. In these licence agreements it was stated that Mr Hazelhurst could share the room with Miss Savelli and vice versa. Miss Somma also reserved the right to share the accommodation with Mr Hazelhurst and Miss Savelli herself, or to move total strangers in with them.

**Q:** *Was this specifically with the aim of ensuring that Mr Hazelhurst and Miss Savelli could not claim exclusive possession, and therefore statutory protection, because other people were entitled to share the room with them?*

**A:** Almost certainly, even though Miss Somma had probably no intention of sending anyone else to live with them, let alone moving in herself.

**Q:** *So the court just looked at what was stated in the agreement and, because it was called a licence, it was held actually to be a licence?*

**A:** Yes. The court looked at the parties' expressed intentions. The agreements stated that Mr Hazelhurst and Miss Savelli had been given licences, and the terms of the agreement also indicated that licences had been granted. While the court may have disapproved of the nature of the arrangement, disapproval was insufficient to classify the agreement as unreal or bogus.

**Q:** *Were landlords in a very powerful position here because they could ensure that they created a licence simply by putting in a clause similar to the one included by Miss Somma and calling the arrangement a licence?*

**A:** Yes, because the court looked at the parties' expressed intentions, not what was happening in reality. They were only in a powerful position though until *Street v Mountford* (1985). In this case Mrs Mountford had been given the use of rooms belonging to Mr Street. The agreement they had signed was again called a licence. Mr Street was

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referred to in the agreement as the 'licensor' and Mrs Mountford as the 'licensee'. However, the House of Lords held that it didn't matter whether the parties had called the agreement a lease or a licence. What really mattered was what Mrs Mountford had been given as a matter of law. Looking at the objective reality of the situation, she had actually been given exclusive possession of the premises for a certain term at a rent. She had therefore been granted a lease, regardless of the label the parties had attached to the agreement. As Lord Templeman said:

My Lords, the only intention which is relevant is the intention demonstrated by the agreement to grant exclusive possession for a term at a rent.

An often-quoted statement that highlights the fact that the agreement must be looked at objectively to decide whether a lease or a licence has been created again comes from Lord Templeman in this case:

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.

Lord Templeman was saying that if, by looking at the situation objectively, you could determine that exclusive possession had been granted and the other requirements for a lease were met, there would be a lease even if the parties themselves had called the agreement a licence. In *Street v Mountford* (1985) the court found that Mrs Mountford had a lease, despite the fact that the word 'licence' was used throughout the agreement. In objective reality she had exclusive possession for a certain term at a rent. The case also overruled *Somma v Hazelhurst* (1978).

### **Q:** *What was the effect of Street v Mountford (1985)?*

**A:** Cases that followed were decided on the objective reality of the situation, not on what the parties thought or said or wrote. This inevitably led to some creative thinking by owners of land as to how they could avoid granting exclusive possession, and thereby avoid granting a lease. Unfortunately they came up with some very disingenuous ways to achieve this. The first way was to put into the occupancy agreement a wide range of services, such as cleaning or the provision of meals. The occupier would be seen as a licensee because he couldn't resist the owner's unrestricted access in order to supply those services (Box A7) and so couldn't claim exclusive possession. Owners also tried to insert clauses into the occupancy agreement which stated that the occupier had to move out of the premises for a certain time each day, thereby excluding exclusive possession because the landlord could use the property in that time. The courts became wise to these pretence clauses as they were called, and awarded a lease where there was clearly exclusive possession for a certain term at a rent.

A classic example of a pretence clause occurred in *Aslan v Murphy* (1990). The owner of the basement property, Aslan, granted a licence to the occupier, Murphy. Aslan retained a set of keys and stated that he could enter the property at any time. Although the basement measured only 4'3" by 12'6", Murphy was required to share the accommodation with another party and also to be out of the accommodation for an hour and a half each day. These clauses were held to be wholly unrealistic and clearly pretences. The agreement did not represent the actual situation, and the court found a lease, not a licence. Similarly,

in *Crancour Ltd v Da Silvaesa* (1986) the occupiers could occupy the rooms in a house for 26 weeks but not between 10.30 am and midday on any day. The owner also retained an absolute right of entry for carrying out management and cleaning and providing attendance. The clauses were held to be pretences and the court again found a lease, not a licence. In both cases the objective reality was exclusive possession for a term at a rent

**Q:** *What happens if these clauses for services and cleaning are in the occupancy agreement, but the services are never carried out?*

**A:** The obvious implication is that they are pretence clauses put in to try and deny exclusive possession. If the services start but subsequently stop, you can argue that they are genuine. The occupier can always insist that they are resumed, otherwise it is a breach of the occupancy agreement. Even if the occupier chooses not to insist on their resumption, there will still be a licence because the owner continues to have unrestricted access. The occupier is simply not insisting that the services are resumed. Be careful though. Not all clauses put in occupancy agreements are pretences. *Westminster City Council v Clarke* (1992) concerned a hostel for homeless men. The licence agreement stated that the occupier could be asked to change rooms or share rooms with another occupier. These clauses were held to be genuinely required for the management of the hostel. They were not designed to avoid exclusive possession and statutory protection, and so a licence was created.

**Q:** *What happens if two or more people share a flat? Can they still have a lease even though they're sharing?*

**A:** The answer to this concerns the requirements for a joint tenancy which were discussed in Chapter 8. If two or more people take a legal lease and satisfy the four unities of possession, interest, time and title, they will hold the legal lease as joint tenants. As such, they 'own the whole' and can exclude anyone not in the joint tenancy. As they can exclude anyone else, they have exclusive possession and can therefore claim a lease. Again, it doesn't matter whether the agreement is called a licence or a lease, as the same approach is adopted here as in *Street v Mountford* (1985). If the reality of the situation satisfies the four unities, which then gives exclusive possession, there will be a lease. Two cases illustrate these points. The first is *Antoniades v Villiers* (1990), where a couple entered into separate agreements called licences for a small one-bedroom flat. In these licence agreements the landlord had reserved to himself the right to introduce other parties, including himself, into the double bed with the couple! Not surprisingly this was considered to be a pretence clause which was ignored. In reality the couple actually had a joint tenancy with the right to be able to exclude anyone not in the joint tenancy. This gave them the exclusive possession necessary for a lease.

However, in *AG Securities v Vaughan* (1990) four different parties signed different licence agreements on different days. There was no joint tenancy because the agreements had been signed on different days, so the unities of time and title, which are both required for a joint tenancy to exist, were missing. As there was no joint tenancy, they could not collectively exclude anyone else and so did not have exclusive possession of the flat. Furthermore, although the parties had exclusive occupation of the property, the landlord could introduce new occupiers of his choice if any occupant left, which again meant that they did not have exclusive possession. Each party therefore had a licence. A similar result

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occurred in *Stribling v Wickham* (1989) where it was held that 'The three licences were in substance and reality just what they purported to be' and there were no pretence clauses. In *Mikeover Ltd v Brady* (1989) there was no unity of interest because each party was responsible for his agreed share of the money payable only and not for that of the other party and a licence was found.

The objective reality test came up recently in the context of a claim for a commercial lease in *Clear Channel UK Ltd v Manchester City Council* (2005). Clear Channel put up advertising displays on sites owned by Manchester City Council and tried to argue that the agreement between them was a tenancy and not a licence. This was clause 14.1 of that agreement:

This Agreement shall constitute a licence in respect of each Site and confers no tenancy on [Clear Channel] and possession of each Site is retained by [the Council] subject however to the rights and obligations created by this Agreement.

Again, the answer went back to the substantive nature of the agreement, whether there was exclusive possession for a certain term at a rent. Clear Channel never had exclusive possession of the sites and had also agreed to allow the Council access. It therefore had licence agreements. The case is important because Lord Justice Jonathan Parker said that although he didn't want to cast doubt on *Street v Mountford* (1985), in a situation like this where both parties had equal bargaining power, both had full legal advice and the legal consequences of the agreement were spelt out – a licence and not a tenancy – he would take some persuading that what was said in the agreement was different from what they intended.

**Q:** *Does that mean that what parties put in a document starts to become more conclusive?*

**A:** His words were obiter but cases where both parties have equal bargaining power, full legal advice and the effect of the agreement clearly spelt out are likely to be uncommon. Lord Justice Jonathan Parker also said he was surprised and unedified that a substantial organisation like Clear Channel, with the benefit of full legal advice, should enter into an agreement where the expressed intention in that agreement was not to create a tenancy, and then invite the court to say that it did.

In *Scottish Widows plc v Stewart* (2006) it was confirmed that the test for a lease was whether the agreement gave exclusive possession. Occupation was not the same as possession. In the case there was nothing in the agreement which entitled the occupier to exclude the owner, and so there was a licence. The court also said that whereas residential leases required different considerations, it agreed with the views of Lord Justice Jonathan Parker in Clear Channel in holding that where commercial undertakings had clearly spelt out what they intended, it would be hard for either party to argue otherwise.

**Q:** *Why do residential leases require different considerations?*

**A:** Because the parties don't necessarily obtain legal advice and the parties in a residential lease are unlikely to have equal bargaining power. So it looks as though, if parties to a commercial lease spell out what they intend in the agreement with full legal advice and equal bargaining power, they are unlikely to be able to wriggle out of what they call their agreement. In other cases and in residential leases, the objective reality test will continue to govern the situation.

Summary of the distinction between a lease and a licence

There are significant differences between a lease and a licence. As a lease may attract statutory protection for the tenant, owners of land have tried to avoid granting exclusive possession, and therefore a lease, by inserting pretence clauses into occupancy agreements. The courts will look beyond these pretence clauses at the objective reality of the situation in determining whether there is a lease or a licence.

### The creation of a lease

#### Box B

##### THE CREATION OF A LEASE

Tick as many boxes as possible but at least one:

A lease can be created by the following means. The type of lease that results is in brackets

- 1. By deed (legal lease)
- 2. Under section 54(2) of the Law of Property Act 1925 (legal lease)
  - (i) A fixed term lease or
  - (ii) An express periodic tenancy or
  - (iii) An implied periodic tenancy
- 3. Under section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (equitable lease)
- 4. By proprietary estoppel

Assuming you have been able to tick all the boxes in Box A, you have something that is capable of being a lease. You haven't actually got a lease at this stage because you still have to prove that it has been created in a way that is recognised by the courts or by statute. If you can't prove that it's been created in a recognised way, you do not have a valid lease. You must tick as many boxes as possible in Box B, but at least one. We'll use an example where you have taken a lease of Yourland from Mr Theirland. When creating a lease, you must look at both the degree of formality required and also the length of the lease.

#### Box B1 By deed (legal lease)

A legal lease can be created by deed. The requirements of a deed are found in section 1 of the Law of Property (Miscellaneous Provisions) Act 1989.

In essence the deed must be:

- ▶ in writing
- and*
- ▶ clear on the face of it that it is intended to be a deed

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*and*

- ▶ signed by the person making the deed in the presence of a witness who attests his signature

*and*

- ▶ delivered as a deed.

The process of witnessing a deed is called attestation and the witness has to sign and date the deed. A deed does not have to be delivered physically. It's sufficient that the person granting the interest in the deed makes it clear that he intends to be bound by it. This is usually inferred from the fact that he signs it.

Creating a lease by this method results in a legal lease for the following reason. First, section 1 of the Law of Property Act 1925 states that there are only two estates in land capable of subsisting or being created at law, i.e. of being legal. They are:

- ▶ the estate in fee simple absolute in possession, generally known as freehold ownership, and
- ▶ the term of years absolute, the lease.

Secondly, section 52(1) of the Law of Property Act 1925 states that no legal estate or interest will be created in land unless a deed is used. Therefore, in order for a lease to be legal, it must be created by deed. Overall, then, these sections mean that a lease is capable of being legal under section 1 of the Law of Property Act 1925, but must be made by deed under section 52(1) of the same Act in order to be legal.

**Q:** *How long does a legal lease by deed go on for?*

**A:** A fixed term lease will go on for the term stated in the deed. So a legal lease for 50 years of Yourland created by deed will go on for 50 years. At the end of 50 years the lease comes to an end and you must leave. It is possible for a lease to contain terms that enable it to be brought to an end prematurely.

**Box B2** Under section 54(2) of the Law of Property Act 1925 (legal lease)

**Q:** *Do you always have to have a deed to create a legal lease?*

**A:** No. Section 54(2) of the Law of Property Act 1925 creates an exception to section 52(1) which requires a deed to create a legal interest. Section 54(2) is a quick and easy way to create a legal lease. There are four conditions which must all be met:

- ▶ The agreement can be oral (spoken) or in writing.

*and*

- ▶ The lease must be for a period of three years or less.

*and*

- ▶ The lease must take effect in possession: see *Long v Tower Hamlets London Borough Council* (1998). This means the tenant must have the right to go into the property immediately.

and

- ▶ The lease must be at the best rent which can reasonably be obtained without taking a fine. The best rent is usually the market rent. In *Fitzkriston LLP v Panayi* (2008) £4,000 was not the best rent for the property because the best rent would have been somewhere between £12,000 and £20,000 and so no lease was created under section 54(2). A fine is a lump sum payable at the start of a lease in consideration of a reduction in rent.

**Q: Why are you allowed to create a legal lease without a deed?**

**A:** Practicality. Think of the number of short-term leases created in this country. It runs into millions. You wouldn't want this number of people queuing outside solicitors' offices trying to create all these short leases by deed, even if they knew they had to have a deed in the first place. Unless of course you were a solicitor.

There are three ways of using section 54(2) of the Law of Property Act 1925 to create a legal lease.

**Box B2i** A fixed term lease

If you have a fixed term lease, the lease will finish at the end of the given term. A fixed term lease for three years or less can be created under section 54(2).

**Q: So Mr Theirland could grant me a legal lease simply by agreeing orally that I can occupy Yourland for two years, for example?**

**A:** Yes, providing of course you also met the other conditions under section 54(2) of paying the market rent and you have the right to go into the property immediately. He could also grant a two-year lease to you in writing. The writing does not have to meet any statutory conditions or other formality, and this would again create a legal lease for two years.

**Box B2ii** An express periodic tenancy

When tenancies for one year or a part of a year are expressly granted for a period of time which is stated to recur, for example from week to week, they are express periodic tenancies. They are granted *expressly*, they are *tenancies* because there is a relationship of landlord and tenant, and they are for *periods of time*, whether for a week, a month, three months, six months, a year or any other part of a year. The main feature of these periodic tenancies is that, at the end of the period, the week, month, three months, six months or year, they can renew themselves automatically until either the landlord or the tenant gives notice that they want the tenancy to end.

**Q: When would they renew themselves automatically?**

**A:** They would renew themselves if the words used in the grant indicated that the parties saw the tenancy as continuing automatically. If you are granted a tenancy of Yourland 'from week to week' for example, the tenancy will continue 'from week to week' until either you or the landlord, Mr Theirland, gives notice. This saves you having to find Mr Theirland at the end of every week to renew your tenancy agreement. This automatic renewal applies only to periodic tenancies for a year or less, and it applies only if the wording indicates that the term is to be continuous. The words 'from week to week' indicate that the periodic tenancy will continue to run until brought to an end. However,

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if you are granted a tenancy for 'one week', this will be a fixed term of a week. It will not be renewed automatically and must be specifically granted again if this is what you and the landlord, Mr Theirland, want.

**Q:** *Are these periodic tenancies created under section 54(2)?*

**A:** Yes, providing of course you meet the conditions in section 54(2). Periodic tenancies come under this section because a year or less is a period of less than the three-year limit given under section 54(2). As section 54(2) gives you a *legal* lease, these express periodic tenancies are known as *legal* periodic tenancies. An express legal periodic tenancy granted from week to week will give you an express legal *weekly* periodic tenancy, one granted from month to month will give you an express legal *monthly* periodic tenancy.

**Q:** *If an express legal weekly periodic tenancy carries on for over 156 weeks (52 weeks three years) because neither the landlord nor the tenant gives notice, then the period of time will be over the three years allowed in section 54(2). Does that matter?*

**A:** No. Each period of time in a periodic tenancy is seen as a separate period of time. Only a weekly periodic tenancy is being created each time, even though you may do this for as long as you like.

### Box B2iii An implied periodic tenancy

A periodic tenancy can be created expressly between the parties, as in the parties talking expressly to one another about the terms and conditions. A periodic tenancy can also be implied by operation of law: see *Martin v Smith* (1874). Implied legal periodic tenancies are implied from the circumstances where a person is in occupation of land with the owner's permission, paying rent on a periodic basis with the intention to create a landlord and tenant relationship. In this case, a legal periodic tenancy will be implied. Again, if the circumstances indicate the continuation of an implied legal periodic tenancy, it will renew itself automatically.

**Q:** *If the tenancy is only implied between the parties, how do you know whether it's a weekly, monthly or yearly periodic tenancy?*

**A:** The tenancy is defined by reference to how frequently the rent is said to be paid. If rent is paid every week, this will create an implied legal weekly periodic tenancy, if monthly, then an implied legal monthly periodic tenancy, and, if yearly, an implied legal yearly periodic tenancy. If rent is said to be paid at £12,000 *per annum* with £1,000 paid every month, this will still give an implied legal yearly periodic tenancy because you determine the time by reference to the overall period of time.

**Q:** *How are these implied legal periodic tenancies created?*

**A:** They are created under section 54(2) again, and so must meet the conditions stipulated in that section.

Look at an example where an implied legal periodic tenancy can arise. Imagine you have a fixed term legal lease of Yourland for 10 years which has been created by deed. You pay rent every month. If, at the end of your 10-year lease you pay a further month's rent, which is accepted by the landlord without any further express agreement, an implied legal monthly periodic tenancy will arise. It will be implied from the fact that you are occupying the land and paying rent. The one factor which might exclude an implied legal periodic

tenancy arising is any lack of intention to create the legal relationship of a tenancy: see *Javad v Aqil* (1991).

**Q: How does a legal periodic tenancy end?**

**A:** If either the landlord or the tenant wants to bring an express or an implied legal periodic tenancy to an end, notice must be given. The notice period is usually that of a full period, and this is the same for both express and implied periodic tenancies.

A weekly periodic tenancy requires notice of one week expiring at the end of one of the weekly periods.

A monthly periodic tenancy requires notice of one month expiring at the end of one of the monthly periods.

A yearly periodic tenancy requires notice of half a year expiring at the end of a year of the tenancy.

These common law rules can be altered by statutory exceptions which prescribe different notice periods. You also need to be aware of the Protection from Eviction Act 1977 which creates some exceptions in favour of the tenant if the leased property is a dwelling house.

**Q: How do leases other than periodic tenancies end?**

**A:** They end when the term comes to an end. If you have a lease of Yourland for five years or 999 years, you will have the right to occupy Yourland for five years or 999 years. At the end of the period, the lease comes to an end.

**Q: So it's only periodic tenancies that carry on automatically until either the landlord or the tenant actually brings them to an end by notice?**

**A:** Yes, but only if this continuation is indicated by the wording in any express agreement, or from the circumstances in an implied agreement.

**Q: Can I end a five-year or 999-year lease early?**

**A:** This will depend on the terms specified in the lease.

**Q: If two people, A and B, rent a flat together, what happens if they have an argument and A gives notice to end the tenancy to the landlord?**

**A:** In *Hammersmith and Fulham LBC v Monk* (1992) it was held that this will bring the tenancy to an end.

**Q: So B's interest will come to an end even though he didn't actually give notice. Don't joint tenants have to act together on the legal title to bring the lease to an end?**

**A:** No. The reasoning behind this is that a joint tenancy of a periodic tenancy, let's say a weekly periodic tenancy, will carry on until either the landlord or the tenant brings it to an end by giving a week's notice. However, the 'tenancy will carry on' part of the sentence relies on the fact that both A and B agree to this, even if it's a tacit agreement that's not actually put into words. If one of them doesn't agree by giving notice, A here, the tenancy will come to an end.

**Q: Isn't this rather hard on the party left behind?**

**A:** Yes, and this happened in *Harrow London Borough Council v Qazi* (2003). And, just to make matters worse, if one party stops paying the rent, you and anyone else in the

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tenancy with you is jointly and severally liable for paying it, which means the landlord can come after any or all of you in the joint tenancy to pay the absentee's share. Even if you find someone to take the absentee's place, that is called subletting and there is a fairly good chance that the agreement you have made with the landlord will not allow subletting so you risk losing the property. Under Law Commission proposals, only the party who gave notice would be able to bring his/her interest to an end: see *Renting Homes: The Final Report* (Law Com No 297).

**Box B3** Under section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (equitable lease)

Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 governs contracts for the creation, sale or disposition of an interest in land. The contract must be

- ▶ in writing
- and*
- ▶ signed by or on behalf of both the parties to the contract
- and*
- ▶ it must contain all the express terms of the agreement.

A written agreement to create a lease satisfying section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 will create an equitable lease.

This agreement can arise in one of two ways. The first is when you and Mr Theirland have some chats about the possibility of a lease of Yourland. He then agrees to grant you a lease by deed of Yourland in two weeks' time. This would give both you and Mr Theirland time to go and consult a solicitor. This is an agreement, or a contract, to grant you a lease in two weeks' time. It must therefore meet section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. Provided this contract is in writing, contains all the expressly agreed terms and is signed by or on behalf of both you and Mr Theirland, you will have an equitable lease.

**Q:** *Why do I have an equitable lease?*

**A:** A contract for the creation of an interest in land is capable of specific performance because land is unique. A lease is an interest in land. If land is unique, a lease of land is also unique. If Mr Theirland refuses to grant you a lease by deed in two weeks' time, you will never be able to find another lease quite like the one you've lost because no two pieces of land are the same. Even granting you damages for breach of contract would not enable you to find an identical lease. A contract in which Mr Theirland agrees to grant you a legal lease of Greenacres in two weeks' time is therefore capable of specific performance. The court will specifically order Mr Theirland to grant you your legal lease: see *R v Tower Hamlets London Borough Council, ex parte Von Goetz* (1999). If he fails to do this, it is contempt of court. As this contract is capable of specific performance and equity views that as done which ought to be done, you will immediately have an equitable lease, a lease recognised in equity, when the contract is made.

The second way of creating a lease in a written agreement is when you and Mr Theirland simply create a lease in writing which starts at that time. The agreement does not have to amount to a deed under section 1 of the Law of Property (Miscellaneous

Provisions) Act 1989, but it must satisfy the requirements of section 2. As this, too, is a contract capable of specific performance and equity views that as done which ought to be done, you will again have an equitable lease.

**Q:** *What happens if I don't meet all the requirements of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989?*

**A:** A contract that does not meet these requirements is void, which means it is as though it never existed.

**Q:** *What rights do you have if you occupy property under an equitable lease?*

**A:** You have the right to occupy on the same terms as if the agreement had been formalised by deed. There are several disadvantages to having an equitable lease. The main disadvantage is that an equitable lease will not automatically bind a purchaser without some form of protection. If Mr Theirland sells Theirland to Peter while you are in occupation of Yourland under a four-year equitable lease, for example, you will want to know whether Peter is bound by your lease. Peter of course will want to know whether he has to let you stay for the full four-year term. The answer to this depends on whether your lease needs any protection on a register. This is explained further when we look at Box C. The danger here is that most people wouldn't begin to know whether they should protect their equitable lease on a register. The other danger is that they haven't consulted a solicitor who could give them this information because it's only a written agreement.

A further disadvantage is that the remedy of specific performance depends on the behaviour of the party claiming the remedy. Equity is based on fairness and justice, so if you want to claim specific performance of a contract, you must have behaved equitably yourself. In *Coatsworth v Johnson* (1886) Coatsworth had an equitable lease of a farm. One of the conditions in the lease was that Coatsworth should farm the land in a good manner. He didn't do so and was evicted. His claim for specific performance of the equitable lease, which would have entitled him to remain on the land, was rejected on the basis that he himself had not behaved well by mismanaging the land, and so he could not come to court and ask for a remedy based on fairness and justice.

**Box B4** By proprietary estoppel

Proprietary estoppel is an informal way in which a lease can be created. It is covered in Chapter 12.

The effect of ticking more than one box in Box B

**Q:** *What happens if you can tick more than one box in Box B?*

**A:** An example is as follows.

You are occupying Yourland under a four-year lease which has been created in a written agreement satisfying section 2 of the Law of Property (Miscellaneous Provisions) Act 1989. You pay the market rent of £500 per month as agreed in the contract. This is a four-year equitable lease in Box B3.

However, as you are in possession of Yourland and paying rent monthly, this will also create an implied legal monthly periodic tenancy. It is implied from the circumstances that you are occupying land and paying rent with the intent to create a landlord and tenant relationship. You satisfy section 54(2) of the Law of Property Act 1925 as you are paying

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the market rent, there is no indication of a fine, and a month is a period of three years or less.

You therefore have both an equitable lease of Yourland and an implied legal monthly periodic tenancy.

**Q:** *Which one takes precedence?*

**A:** If there is any conflict between law and equity, equity will prevail. Your four-year equitable lease and all the terms in that agreement will take precedence. *Walsh v Lonsdale* (1882) is the authority here and shows this happening in practice. In our example, the terms of your equitable lease allow you to occupy Yourland for four years. This four-year term takes precedence over the implied legal monthly periodic tenancy.

**Q:** *Are there any circumstances in which I would need to rely on the implied legal monthly periodic tenancy, rather than on the equitable lease?*

**A:** Yes. If your written agreement turned out to be defective because it didn't satisfy section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, it would be void. You would then have to rely on the implied legal monthly periodic tenancy.

**Q:** *And could I continue to occupy Yourland under the implied legal monthly periodic tenancy?*

**A:** Yes. However, an implied legal periodic tenancy carries on until one party wants to bring it to an end, and gives notice. As the notice period for a monthly periodic tenancy is one month, Mr Theirland will have to give you only one month's notice expiring at the end of one of the monthly periods, after which time you must go. Your implied legal monthly periodic tenancy gives you some stay of execution, but only for the length of the notice period.

Another example when you may need to rely on the implied legal monthly periodic tenancy is in the following situation. Let's say that when you occupied Yourland under the equitable lease, you created so much trouble that Mr Theirland evicted you. You asked the court to insist that Mr Theirland allow you to remain in Yourland for the full four years granted to you. After all, you did have a written agreement, a contract that you could occupy Yourland for four years. A contract for the creation of an interest in land is a contract that is capable of specific performance because you would never be able to find an identical lease elsewhere, and so specific performance should be awarded. Specific performance is an equitable remedy and will be awarded only if you have behaved equitably yourself. You clearly haven't if you have caused trouble, and the courts have the discretion to refuse the remedy. In this case you will have to fall back on your implied legal monthly periodic tenancy.

**Q:** *And could I continue to occupy Yourland under the implied legal monthly periodic tenancy again?*

**A:** Yes. Again though, as the notice period for a monthly periodic tenancy is one month, Mr Theirland will have to give you only one month's notice expiring at the end of one of the monthly periods, after which time you must go. Again, your implied legal monthly periodic tenancy gives you some stay of execution, but only for the length of the notice period.

**Q:** *If I hadn't caused trouble, how long could I have stayed under the equitable lease?*

**A:** The full four years. You are much better off with your equitable lease because the landlord can always give notice in a periodic tenancy.

The effect of not creating a lease in a recognised way

If a lease has not been created in a recognised way, the occupier will have only a bare or a contractual licence. The distinction between a lease and a licence was discussed on page 370.

Summary of the creation of a lease

A deed must be used to create a legal lease. An exception to this requirement is found in section 54(2) of the Law of Property Act 1925, which allows for the creation of a legal lease for three years or less. An equitable lease will be created if the requirements of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 are met. A lease can also be created by estoppel. If a lease has not been created in a recognised way, the occupier will have only a bare or a contractual licence.

The protection of a lease

#### Box C

##### THE PROTECTION OF A LEASE

Look at either

##### UNREGISTERED LAND

1. Legal lease
2. Equitable lease

OR look at

##### REGISTERED LAND

3. Dealings which must be completed by registration
4. Interests which override a registered disposition
5. Interests entered as a notice or protected by a restriction

In the example that follows, Mr Theirland, the owner of Theirland, granted you a lease of Yourland. Mr Theirland has now decided to sell Theirland to Peter. The question is whether your lease of Yourland is binding on Peter as Yourland forms part of Theirland, even though it is leased to you. There is no period of time given in this example, as the protection of a lease depends not only on how it was created, but also for how long it was granted.

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### Unregistered land

Use the procedure given in Chapter 3 on page 43 to determine how interests are protected in unregistered land. This procedure is repeated below for your convenience.

*Step 1.* Establish whether it is a legal or equitable interest that is being claimed. If it is a legal interest, legal rights bind the world both before 1926, and, excluding a puisne mortgage, after then as well. If it is an equitable interest you must see whether the equitable interest is capable of entry as a land charge under the Land Charges Act 1972.

*Step 2.* If the equitable interest is not capable of entry as a land charge, use the rule that governed equitable interests before 1926, known as the doctrine of notice. If the equitable interest is capable of entry as a land charge, work out in whose interest it is to enter it as a land charge. This will be the person who benefits from the equitable interest.

*Step 3.* Check to see whether that person has entered his equitable interest as a land charge in the correct class on the Land Charges Register against the name of the owner of the land that the right is over.

- ▶ An equitable interest that has been entered as a land charge binds everyone who takes the land under section 198 of the Law of Property Act 1925.
- ▶ If the equitable interest has not been entered as a land charge, it will not be binding on some classes of purchaser.

Now apply the procedure.

#### **Box C1** Unregistered land – legal lease

*Step 1.* A legal lease is a legal interest. Legal rights bind the world.

This means that if you have a legal lease, it will be binding on Peter.

**Q:** *So Peter must let me continue to stay in Theirland if I have a legal lease?*

**A:** Correct. That means that leases created in the following ways will be binding on Peter:

- ▶ a lease created by deed (Box B1); or
- ▶ a fixed term lease created under section 54(2) of the Law of Property Act 1925 (Box B2i); or
- ▶ an express periodic tenancy created under section 54(2) of the Law of Property Act 1925 (Box B2ii); or
- ▶ an implied periodic tenancy created under section 54(2) of the Law of Property Act 1925 (Box B2iii).

**Q: How does Peter find out about the legal lease?**

**A:** When unregistered land is sold, a purchaser must look back through the title deeds of that land. The chances are that any grant of a legal lease by deed will be attached to the title deeds, so Peter can find out that way. As far as any lease is concerned, though, it should be fairly obvious to Peter that someone else is living on that part of Theirland called Yourland. To have a lease in the first place you must have exclusive possession, which would imply some sort of privacy and separate occupation. In his capacity as purchaser, Peter should exercise reasonable care and look round the property himself. His solicitor should also ask questions. Therefore a legal right, here a legal lease, will bind anyone who takes Theirland, either as a purchaser or by gift or by inheritance.

**Box C2** Unregistered land – equitable lease

This will be an equitable lease of Yourland satisfying the requirements of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989.

You can apply the same procedure as before if you have an equitable lease of Yourland:

*Step 1.* An equitable lease is an equitable interest. An equitable lease is capable of entry as a land charge under the Land Charges Act 1972.

*Step 2.* It is in your interest to enter the equitable lease as a land charge as you benefit from the interest.

*Step 3.* You should have entered your equitable lease as a class C(iv) land charge on the Land Charges Register against the name of Mr Theirland, who is the owner of the land that your lease is over:

- ▶ If you have entered your equitable lease as a class C(iv) land charge, it will bind Peter under section 198 of the Law of Property Act 1925 and he must let you remain in occupation according to the terms of the lease.
- ▶ If you have not entered your equitable lease as a land charge, it will not be binding on a purchaser of a legal estate for money or money's worth under section 4(6) of the Land Charges Act 1972. Peter paid money for the legal estate of Theirland, so, if you have not entered your equitable lease as a land charge, you will have to leave Yourland immediately.

**Q: When does my equitable lease have to be entered as a land charge?**

**A:** As soon as it has been created, or at least before Theirland is sold. You won't know if and when Mr Theirland may sell Theirland. If your equitable lease is not entered on the Land Charges Register before any sale of Theirland, a purchaser, Peter here, would not have found out about it even if he had inspected the Register and he will therefore not be bound by it.

**Q: And if I haven't entered my equitable lease as a land charge, then I have to leave immediately?**

**A:** Yes. The equitable lease is quite simply not binding on Peter and he does not have to give you any form of notice.

**Q:** *Do I have any redress if I don't protect my equitable lease?*

**A:** Not as far as your equitable lease is concerned. However, there is another avenue to pursue. If you look back to page 381 in this chapter, you will see that it is possible to have two different types of lease in the same piece of land. If you had gone into possession under your equitable lease and were paying the best rent every month, for example, an implied legal monthly periodic tenancy would also be created under section 54(2) of the Law of Property Act 1925. A lease created in this way is a legal lease. In unregistered land legal rights bind the world. You could therefore argue that even though you hadn't protected your equitable lease, your implied legal monthly periodic tenancy would still bind Peter.

**Q:** *But isn't the notice period for bringing a monthly periodic tenancy to an end by either party one month expiring at the end of one of the monthly periods?*

**A:** In the absence of any statutory provision to the contrary, yes. This means that Peter would only have to give you one month's notice to leave expiring at the end of one of the monthly periods. This is the disadvantage in having to rely on an implied legal periodic tenancy. It's better than nothing, as you would have a month to find a new home. Remember also that you are given the opportunity to protect your equitable lease on the Land Charges Register. If you have failed to do so, then perhaps you deserve the consequences.

#### Registered land

Registered land is governed by the Land Registration Act 2002. There are three categories which determine how interests are protected in registered land. They are:

- ▶ Dealings which must be completed by registration under section 27 of the Land Registration Act 2002 (Box C3).
- ▶ Interests in Schedule 3 to the Land Registration Act 2002 which override a registered disposition (Box C4).
- ▶ Interests entered as a notice under section 34 of the Land Registration Act 2002 and interests protected by a restriction under section 43 of the Land Registration Act 2002 (Box C5).

A purchaser for valuable consideration will take the land subject to the interests in these three categories.

#### **Box C3** Dealings which must be completed by registration

Under section 27 of the Land Registration Act 2002, dealings which must be completed by registration include a legal lease granted for more than seven years.

This means that a legal lease created by deed for more than seven years taking effect in possession immediately (meaning it starts immediately) must be completed by registration. These leases must be registered with their own title number. If you have this type of lease over Yourland, you must register it with its own title number at the Land Registry for it to be binding on Peter.

**Q:** *And if I don't do this?*

**A:** You will be deemed to have only an equitable lease until such time as you do register it. In order to bind Peter, an equitable lease must be an interest that overrides in paragraph

2 of Schedule 3 to the Land Registration Act 2002 (discussed in Box C4), or it must be protected by a notice (discussed in Box C5). However, you won't be able to protect it by means of a notice because, if you try to do so, the Land Registrar will simply ensure that you complete the dealing by registration properly, thereby ensuring its legal status. Assuming you have not approached the Land Registry at all, you must therefore rely on the fact that your equitable lease is an interest that overrides (discussed in Box C4).

**Box C4** Interests which override a registered disposition

Interests that override are found in Schedule 3 to the Land Registration Act 2002, and they are interests that are binding on everyone including a purchaser.

First, a legal lease granted for seven years or less is an interest that overrides a registered disposition (sale) under paragraph 1 of Schedule 3 to the Land Registration Act 2002. The types of lease in this category are as follows:

- ▶ a legal lease granted by deed for seven years or less;
- ▶ a fixed term lease created under section 54(2) of the Law of Property Act 1925 (Box B2i);
- ▶ an express periodic tenancy created under section 54(2) of the Law of Property Act 1925 (Box B2ii); or
- ▶ an implied periodic tenancy created under section 54(2) of the Law of Property Act 1925 (Box B2iii).

A legal lease created in any of these ways will override Peter's rights and will be binding on him.

Secondly, paragraph 2 of Schedule 3 to the Land Registration Act 2002 states that an interest of a person in actual occupation will override (take priority over) a registered disposition (sale). An equitable lease which meets the requirements of section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 will come into this category.

Paragraph 2 of Schedule 3 states that an interest in this category will override (take priority over) a registered disposition if:

1. The person claiming the right has a proprietary interest in the land  
*and*
2. That person is in actual occupation at the time of the disposition.

However, the interest will not be an overriding interest if:

1. When the land was purchased, the fact that the person was in actual occupation was not obvious on a reasonably careful inspection of the land and the purchaser didn't know about the interest  
*or*
2. The person in actual occupation claiming the interest did not tell the purchaser about his interest in the land if asked, and it would have been reasonable for him to have done so.

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Paragraph 2 of Schedule 3 is essentially saying that a person who is relying on the fact that he is living in the property to claim priority over a purchaser must make it obvious that he lives in the property. If asked, he should tell any purchaser about his interest if it would be reasonable to do so. If the purchaser still chooses to buy the property, he deserves to be bound by the rights of anybody who lives there.

You can now apply this when you have an equitable lease of Yourland:

1. You have an equitable lease. This is a proprietary interest in land.
2. If you are in actual occupation of Yourland at the time of the sale, your equitable lease will bind Peter and he must let you remain in occupation for the full period of time given in the lease agreement.

However your equitable lease will not bind Peter if:

1. Your actual occupation would not have been obvious to Peter if he had inspected the land reasonably carefully and he didn't know about the equitable lease; or
2. You didn't disclose your equitable lease if Peter asked you when it would have been reasonable for you to have done so. In either of these cases you must leave immediately.

### Box C5 Interests entered as a notice or protected by a restriction

These are interests which are entered as a notice on the Charges Register or protected by a restriction on the Proprietorship Register of the land which the right is over in order to bind a purchaser.

Under section 34 of the Land Registration Act 2002, an equitable lease can also be entered as a notice on the Charges Register of Theirland. If you had an equitable lease of Yourland and entered it as a notice on the Charges Register of Theirland, your equitable lease would bind Peter under section 29 of the same Act.

**Q:** *When does my equitable lease have to be entered as a notice on the Charges Register of Theirland?*

**A:** As soon as it has been created, or at least before Theirland is sold. You won't know if and when Mr Theirland may sell Theirland. If your equitable lease is not entered as a notice on the Charges Register of Theirland before any sale, a purchaser will not be given the opportunity to find out about it and he will therefore not be bound by it.

This means that an equitable lease has dual status. It can be an interest that overrides a registered disposition if the lessee is in actual occupation (Box C4), or it can be entered as a notice (Box C5). An equitable lease will lose its status as an interest that overrides if it has been entered as a notice. However, if you have failed to enter it as a notice, it will still have overriding status providing all the conditions are met. This is very convenient if you are forgetful.

**Q:** *Why would I want to enter an equitable lease by means of a notice if it has overriding status already?*

**A:** Because you must be in actual occupation for the lease to have overriding status. If you had gone abroad, for example, you would not be in actual occupation when a potential purchaser inspected the land.

You know already that it is possible to have two different types of lease in the same piece of land. This was discussed on page 381 in this chapter. Whether they are binding on a purchaser, Peter here, depends on whether either of them has been protected in registered land by the means described above.

### The effect of a contractual licence on a third party

Now look at what happens if you are occupying Yourland but do not have a lease. If you haven't ticked Boxes A and B, you will have only a licence. Assuming you are paying some form of monetary consideration, this will be a contractual licence. You need to establish whether your contractual licence is binding on Peter when he buys Theirland as shown below.



**Q:** *And the answer?*

**A:** The answer is very short. Contractual licences do not bind third parties as they are not proprietary interests in land: see *Ashburn Anstalt v Arnold & Co* (1989).

A contractual licence binds only the parties who created it. Peter will not be bound by your contractual licence.

**Q:** *So would I have to leave?*

**A:** Yes. Immediately.

**Q:** *Does Peter have to give me notice?*

**A:** No. Your contractual licence to occupy Yourland quite simply does not bind him. If you don't go when asked you are a trespasser. So this is yet another reason why it's better to have a lease than a licence. Your only remedy is to sue Mr Theirland for breach of contract. Imagine you were occupying Yourland under a contractual licence from Mr Theirland for consideration of £500 per month. There would be a breach of this contract if Peter told you to leave and you had already paid £500 to Mr Theirland for that particular month. Mr Theirland would be liable for breach of his contract to let you occupy Yourland. He would be liable for damages to the extent of your overpayment.

**Q:** *Does it matter whether the land is registered or unregistered if there is only a contractual licence?*

**A:** No. A contractual licence will not bind a third party.

### A question on leases

This example is intended to illustrate how to use the Boxes in this chapter to analyse the legal position. If you are using this method in undergraduate law exam questions, you will need to include statutory and case authority and detailed discussion of the various points of law. This information is found both in the text and from other sources.

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Dan is the frail and aged proprietor of Sandyacres, a large Victorian house.

Dan has employed Parker, a professional nurse, to care for him and particularly to be available in times of emergency because of his poor health. Parker has been given the use of a small cottage on the estate so he is able to come to Dan's assistance speedily.

Dan's niece, Penelope, is occupying the attic rooms during her university course. She pays Dan £20.00 a week.

Dan also let the self-contained basement flat to Rory for five years in a written agreement called a licence agreement. Rory moved in and is paying the full market rent of £6,000 *per annum*. Although Dan agreed to clean the inside of the basement windows and remove the rubbish every month from the hall within the flat, this has never been done.

Two months ago Dan sold the freehold of Sandyacres to Peter, who has told Parker, Penelope and Rory to leave Sandyacres immediately.

Advise the parties.

This question concerns leases and licences and all three Boxes. You need to work out whether there is any interest capable of being a lease (Box A) and then look at whether it has been created in a recognised way (Box B). Sandyacres has been sold to Peter so you will also have to look at the protection of any interest to see if it is binding on Peter (Box C).

#### Box A *The essence of a lease*

You are looking for exclusive possession, a certain term and rent: see *Street v Mountford* (1985). Exclusive possession is the right to resist anyone, including the landlord, coming onto the property. The duration of the lease must be certain: see *Lace v Chantler* (1944). Rent or consideration would support a contract, although it is not essential: see section 205(1)(xxvii) of the Law of Property Act 1925 and *Ashburn Anstalt v Arnold & Co.* (1989).

Look at each of the parties separately. You must tick Boxes A1, A2 and A3.

#### Parker A1 Exclusive possession

Parker is likely to have exclusive possession of the cottage. There is no indication that Dan goes there or that Parker is not able to resist his entry if he did. You can tick this box.

#### A2 A certain term

There is no certain term of years known at the outset. The use of the cottage will last as long as his employment, which is not a known term of years. This box cannot be ticked.

#### A3 Rent or consideration

You are not told whether Parker pays any rent. Although rent is not essential for the finding of a lease, some form of consideration would support a contract between Parker and Dan. As Parker is employed by Dan as a nurse, his nursing services provide such consideration. You can tick this box.

It appears that Parker does not satisfy the requirements for a lease as you cannot tick Box A2.

#### Penelope A1 Exclusive possession

It is unclear whether Penelope has exclusive possession of the attic rooms and the right to resist Dan's entry. This box cannot be ticked.

## A2 A certain term

'While she is at university' is not a certain term of years known at the outset. This box cannot be ticked.

## A3 Rent or consideration

Penelope pays £20.00 a week. You can tick this box.

It appears that Penelope does not satisfy the requirements for a lease as you cannot tick Box A1 or A2.

## Rory A1 Exclusive possession

Rory is in a self-contained basement flat. This implies that he has exclusive possession. The fact that the agreement calls itself a licence will not stop the courts from looking at the objective reality of whether he has been given exclusive possession: see *Street v Mountford* (1985). Assuming he has exclusive possession, you can tick this box.

## A2 A certain term

Five years is a certain term. You can tick this box.

## A3 Rent or consideration

Rory pays Dan £6,000 *per annum*. You can tick this box.

So far, it appears that Rory satisfies the requirements for a lease as you can tick all three Boxes.

**BUT A LEASE WILL NOT EXIST IF:**

A4 There is no intention to create a legal relationship or

A5 There is an act of friendship or generosity or

A6 There is a service occupancy or

A7 There is a lodger

You must consider Rory here, and it is also sensible to consider Parker and Penelope in case you can confirm further that they do not have a lease:

*Parker* – it is likely that Parker has the use of the cottage to enable him to carry out his job more efficiently. The accommodation does not have to be essential to the job, but there must be some connection: see *Norris v Checksfield* (1991). This is met here, as Parker has been given the cottage specifically to be able to go to Dan's assistance speedily. This means that there is a service occupancy and the relationship is one of employer and employee, not of landlord and tenant. A service occupancy will exclude the finding of a lease.

*Penelope* – it is likely that Dan did not intend to create a legal relationship with his niece: see *Cobb v Lane* (1952). It sounds more like a family agreement which would exclude the idea of a legally binding contract resulting in a lease. It could also be an act of friendship or generosity by Dan which would also exclude a lease: see *Marcroft Wagons Ltd v Smith* (1951).

*Rory* – the agreement envisaged that Dan would provide services to Rory, so the question is whether Rory is a lodger as defined in *Street v Mountford* (1985). Normally the provision of such services would deny exclusive possession on the basis that Dan needed unrestricted access in order to carry them out. However, the services have not been

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provided. In this case there is an argument that the clause for the provision of services is a pretence clause put in by Dan to deny exclusive possession and therefore a lease: see *Crancour Ltd v Da Silva* (1986). The fact that Dan is frail could also imply that the provision of the services was a pretence, as he would be unlikely to be fit enough to provide them. The court will look objectively at the actual arrangement and, if exclusive possession has been granted, the agreement is capable of being a lease. Taking all the circumstances into account, it is likely that Rory has exclusive possession.

### Summary of Box A

The situation so far is:

*Parker* – Parker does not have a certain term of years. He also appears to have a service occupancy, which again would exclude a lease. He therefore has a licence (permission) to be on the land, and it is a contractual licence because he gives consideration in the form of his services.

*Penelope* – It is unclear whether Penelope has exclusive possession. She does not have a certain term of years and the likelihood is that there was no intention to create a legal relationship between her and Dan. She also has a licence (permission) to be on the land, and it is a contractual licence because she pays consideration.

*Rory* – Rory has an interest in the land that is capable of being a lease. He does not have a lease at this stage as you have not yet proved that it has been created in a recognised way.

### Box B The creation of a lease

As Rory is the only person with an interest capable of being a lease, he is the only person you have to deal with here.

#### B1 By deed

Although Rory and Dan had a written agreement, there is no indication that it meets the requirements of a deed as given in section 1 of the Law of Property (Miscellaneous Provisions) Act 1989. There is no evidence of the agreement being witnessed. This box cannot be ticked.

#### B2 Under section 54(2) of the Law of Property Act 1925

##### B2i A fixed term lease

Rory was granted a lease for five years. This does not meet the requirement for a legal lease granted under section 54(2) of the Law of Property Act 1925 as leases created by this method must be for three years or less. This box cannot be ticked.

##### B2ii An express periodic tenancy

This was a fixed-term lease for five years, not an express periodic tenancy. Periodic tenancies cover periods for a year or less and the wording must indicate that the term is to continue until notice is given by either the landlord or the tenant. This box cannot be ticked.

##### B2iii An implied periodic tenancy

Rory went into possession of Sandyacres following the agreement and is paying rent by reference to a year with the intention to create a landlord and tenant relationship. A legal yearly periodic tenancy can therefore be implied: see *Martin v Smith* (1874). Rory is paying the full market rent and there is no mention of a fine, so he will have an implied legal

yearly periodic tenancy created under section 54(2) of the Law of Property Act 1925. You can tick this box.

**B3 Under section 2 of the Law of Property (Miscellaneous Provisions) Act 1989**

Providing the agreement meets the requirements of this section and is in writing, signed by or on behalf of both Dan and Rory, and contains all the terms of the lease, Rory has an equitable lease. On this assumption you can tick the box.

**B4 By proprietary estoppel**

Proprietary estoppel is covered in detail in Chapter 12. There is no indication that the requirements for proprietary estoppel have been met here. This box cannot be ticked.

*Summary of Box B*

Rory appears to have both a legal lease, an implied legal yearly periodic tenancy created under section 54(2) of the Law of Property Act 1925 (Box B2iii), and an equitable lease created under section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (Box B3).

*Box C The protection of a lease*

We are not told here whether Sandyacres is unregistered or registered property, so you need to examine both possibilities.

**Unregistered land**

Rory can claim two leases, an implied legal yearly periodic tenancy and an equitable lease.

**C1 Unregistered land – legal lease**

Rory's implied legal yearly periodic tenancy binds Peter as legal rights bind the world. The notice period for a yearly periodic tenancy is half a year expiring at the end of a year of the tenancy. Peter must give Rory half a year's notice expiring at the end of a year of the tenancy to end this tenancy.

**C2 Unregistered land – equitable lease**

It was in Rory's interest to enter his equitable lease as a class C(iv) land charge against Dan's name on the Land Charges Register under the Land Charges Act 1972 when the lease was created, or at least before Sandyacres was sold to Peter. If he had done so, his equitable lease would have bound everyone, including Peter, under section 198 of the Law of Property Act 1925. The equitable lease would also have prevailed over his legal lease: see *Walsh v Lonsdale* (1882). If Peter were bound by the equitable lease, he could not evict Rory because the equitable lease gave Rory a term of five years. Peter was therefore bound by the full five-year term.

If Rory had not entered his equitable lease on the Land Charges Register, it would not be binding on a purchaser of the legal estate for money or money's worth under section 4(6) of the Land Charges Act 1972. Peter paid money for the legal estate of Sandyacres. If Rory's equitable lease has not been entered as a land charge, Peter will not be bound by it. Peter will still be bound by Rory's implied legal yearly periodic tenancy, though, and so must give him half a year's notice to leave expiring at the end of a year of the tenancy.

**Summary of the protection of Rory's leases in unregistered land**

If Rory has protected his equitable lease he is home and dry and can stay there for five years. If he hasn't done so, Peter is not bound by it. However, an implied legal yearly

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periodic tenancy also arises which binds Peter. Peter's solution here is to give notice of half a year expiring at the end of a year of the tenancy.

### Registered land

#### C3 Dealings which must be completed by registration

Rory has not entered into a dealing which must be completed by registration under section 27 of the Land Registration Act 2002 as he does not have a legal lease granted for more than seven years.

#### C4 Interests which override a registered disposition

Under paragraph 1 of Schedule 3 to the Land Registration Act 2002, a legal lease granted for seven years or less is an interest that overrides a registered disposition. Rory's implied legal yearly periodic tenancy is a legal lease for seven years or less. It therefore overrides and takes priority over Peter's rights, even though Peter will have registered his purchase of Sandyacres at the District Land Registry. The disadvantage here is that Peter can give Rory half a year's notice expiring at the end of a year of the tenancy.

Under paragraph 2 of Schedule 3 to the Land Registration Act 2002, the interest of a person in actual occupation can be an interest that overrides. If Rory was in actual occupation of the basement flat at the time of sale to Peter, his equitable lease is binding on Peter. Peter is bound by the equitable lease and has to let Rory stay for the full five years. Rory's equitable lease is not binding on Peter if his occupation was not obvious and Peter does not know about his interest. Rory's equitable lease also does not bind Peter if Rory failed to disclose his interest to Peter if asked and it would have been reasonable for him to do so. If it is not binding on Peter, Rory must leave immediately.

#### C5 Interests entered as a notice or protected by a restriction

Rory could have entered his equitable lease as a notice on the Charges Register of Sandyacres under section 34 of the Land Registration Act 2002. If he had done so, his equitable lease would be binding on Peter. If he had not entered it as a notice, it would not be binding on Peter by this means under section 29 of the Land Registration Act 2002.

Even if Rory hadn't protected his equitable lease by a notice, if he is in actual occupation he will still be protected as his equitable lease will be an interest that overrides under paragraph 2 of Schedule 3 to the Land Registration Act 2002.

### Summary of the protection of Rory's leases in registered land

Even if Rory hasn't entered his equitable lease as a notice, it is highly likely that the fact of his occupation will protect him. The equitable lease will prevail over the implied legal yearly periodic tenancy, and so Rory must be allowed to stay there for the full five years. If Rory has to rely on the implied legal yearly periodic tenancy as an interest that overrides, Peter can give him half a year's notice to leave expiring at the end of a year of the tenancy.

### The effect of a contractual licence on a third party

The contractual licences of both Penelope and Parker will not bind a third party, here Peter: see *Ashburn Anstalt v Arnold & Co.* (1989). They will have to leave immediately. They can both sue Dan for any breach of their original contract and can claim damages, but they will still have to leave Sandyacres immediately.

## Conclusion

Rory has an interest that is capable of being a lease. Both Parker and Penelope fail to satisfy the requirements for a lease and are considered to be in the category of special circumstances which exclude a lease. They have contractual licences.

Rory appears to have both an implied legal yearly periodic tenancy and an equitable lease. If Rory was unable to claim that he had either of these leases, he also would have a contractual licence to be on the land.

If Sandyacres was unregistered land and Rory had entered his equitable lease as a land charge, he could stay at Sandyacres for the full five-year term. If he hadn't done so, Peter is not bound by the equitable lease. However, an implied legal yearly periodic tenancy also arose which would bind Peter as a legal right. Peter's solution here is to give notice of half a year to Rory expiring at the end of a year of the tenancy.

If Sandyacres was registered land Rory could enter his equitable lease as a notice on the Charges Register of Sandyacres, and in this case it would be binding on Peter. In the event he has not done so, it is highly likely that the fact of his occupation will protect his equitable lease as an interest that overrides. It is clearly more favourable for him to rely on the equitable lease, as he will be allowed to stay there for the full term of five years. If Rory has to rely on the implied legal yearly periodic tenancy as an interest that overrides, Peter can give him half a year's notice to leave expiring at the end of a year of the tenancy.

The contractual licences of both Penelope and Parker will not bind a third party, Peter here. They will have to leave immediately. They can sue Dan for any breach of their original contract and can claim damages, but they will still have to leave Sandyacres.

## The mystery of the non-proprietary lease

We have already referred to the heavily criticised case of *Bruton v London and Quadrant Housing Trust* (2000). This section looks at recent judicial decisions involving the non-proprietary lease in detail. It shows just how far people will go to try and argue the unarguable. Here are the facts of the case. Lambeth Council gave the London and Quadrant Housing Trust (LQHT) a licence to use houses owned by the Council for occupation by homeless people. It could only be a licence because statute law prevented Lambeth Council from granting LQHT a lease. Mr Bruton was a homeless person who went to live in one of the houses. His agreement with LQHT said that he had a licence, but he then claimed that he had a lease because he had exclusive possession. If he was able to claim a lease, LQHT would have to carry out repairs under the Landlord and Tenant Act 1985 but the Act would not apply if all Mr Bruton could claim a licence. The House of Lords held that Mr Bruton had exclusive possession, which meant that a lease existed and the relationship between LQHT and Mr Bruton was one of landlord and tenant.

**Q:** *But how could Mr Bruton have a lease from LQHT if LQHT had only a licence from Lambeth Council? LQHT had no leasehold estate in the land itself from which it could carve out another leasehold estate for Mr Bruton.*

**A:** You're right to ask this question. Lambeth Council held the freehold estate. If Lambeth Council had granted LQHT a lease, it would have carved a leasehold estate for LQHT out of its own freehold estate. If that had been the case, LQHT could have carved another leasehold estate for a shorter period out of its own leasehold estate for Mr Bruton and that would have been a sublease. The problem was that LQHT had only a licence from

Lambeth Council and so didn't have a leasehold estate from which to carve anything for Mr Bruton. Despite this, Lord Hoffmann said that a lease describes a relationship between two people who are landlord and tenant. A lease usually creates a leasehold estate, but this depends on whether the person granting the lease has an estate from which to grant a leasehold estate. If he doesn't, you have a landlord and tenant relationship which is purely personal between the parties and has no estate of land attached to the relationship. This decision has been argued by some to be perverse.

**Q:** *So Mr Bruton's agreement with LQHT had the legal effect of creating a relationship of landlord and tenant between them but it could not give a leasehold estate to Mr Bruton because LQHT had no leasehold estate itself?*

**A:** Yes. Although the freehold owner of the property, Lambeth Council, was not included in the relationship between LQHT and Mr Bruton, the lease relationship could still exist between LQHT and Mr Bruton with rights and duties on both sides. This meant that LQHT had to carry out the repairs. As Mr Bruton had no estate in the land, we can call this a non-proprietary lease.

**Q:** *What is a non-proprietary lease?*

**A:** It means that the lease does not have the capacity to bind a third party. This is in comparison to a proprietary lease, which does have the capacity to bind a third party. The kinds of leases we have been talking about in this chapter so far are proprietary leases and have the capacity to bind a third party. If Jemima leases Greenacres from Fred for five years, she has a leasehold estate in Greenacres for five years. Because her leasehold estate is a proprietary right in the land, it has the capacity to bind Peter if Fred sells Greenacres to him. If it does bind Peter, he will have to let Jemima stay for five years. Mr Bruton, though, had a non-proprietary lease, also called a contractual lease or a 'Bruton' lease, which did not have the capacity to bind a third party.

**Q:** *As Mr Bruton's lease was a non-proprietary lease because he didn't have a leasehold estate in the land, presumably it could never be binding on Lambeth Council?*

**A:** The House of Lords left this open because Lambeth Council was never a party in the case, but you are quite right. It was argued in a later case that a non-proprietary lease could be binding on a third party, but we'll look at those arguments shortly.

In the judgment the words 'tenancy' and 'estoppel' were used. A tenancy by estoppel arises if Fred grants you a lease and then says that he didn't have a legal estate from which to grant it. In that case he is estopped from denying the lease, and both you and Fred are bound by it.

**Q:** *So it can't have been a tenancy by estoppel in the Bruton case, can it, because LQHT never said that it was granting Mr Bruton a lease?*

**A:** That's right. LQHT only ever gave Mr Bruton a licence so the words used in the case do not mean a tenancy by estoppel. Instead, it was the agreement between the parties that formed the tenancy. The parties were estopped from denying the tenancy and were (e)stopped from trying to avoid the contractual duties that came about because of that relationship.

The story continued in *Kay v Lambeth London Borough Council* (2004); *Leeds City Council v Price* (2005). Here there were two issues. The first was whether a Bruton-type lease could

be binding on a third party, which is discussed next. The second issue was to do with human rights, which is discussed in the next section. In order to understand the arguments behind the claim that a Bruton-type lease could bind a third party you need to know more about a sublease. To create a lease, you carve a leasehold estate out of a freehold estate. To create a sublease, you carve another leasehold estate out of the existing one. This sublease must be shorter than the leasehold estate it is carved out of, even if only by a day. As example of a sublease is when Fred leases Greenacres to Jemima for 25 years. Jemima decides to live abroad for five years but wants to return to Greenacres after then so she subleases it to Hugo for five years. Now say that during this five years, Fred gives Jemima notice to leave.

**Q: Can Fred just do that?**

**A:** It depends on the terms of the lease. Fixed-term leases can have break clauses which give the parties the opportunity to bring the lease to an end earlier than the stated term if notice is given.

If this were the case and Fred brought Jemima's lease to an end following due process, Hugo's sublease would also come to an end. The same would happen if Jemima breached one of the terms in the lease, for example she didn't pay the rent. In this case Fred could forfeit the lease, which means bring it to an end, and this would bring Hugo's sublease to an end as well. The reason for this happening in both these cases is because Hugo's sublease is governed by the terms of Jemima's lease. If Jemima's lease comes to an end for either of these reasons, so does Hugo's. However, if Jemima buys Greenacres from Fred, so that her leasehold interest is merged with the freehold and she now owns the freehold of Greenacres, Hugo's sublease will carry on for the remainder of his five years. Jemima will be Hugo's landlord and Hugo will be her direct tenant. Hugo's sublease would also carry on if Jemima surrendered (voluntarily gave up) the lease to Fred and both Jemima and Fred agreed that their obligation as landlord and tenant was at an end. Jemima would disappear from the picture, Hugo's sublease would carry on for the remainder of his five years and he would become a direct tenant of Fred. The reason for the difference here when Hugo's sublease carries on is that the sublease belongs to the sublessee. Nobody else can give it up or surrender it on his behalf. To summarise: if the lessor takes possession either because he has given the lessee notice to quit or because he has forfeited the lease for breach of one of its terms, any sub-lease will be governed by the terms of the lease and will also have to be given up. In merger and surrender of a lease, any sublease will carry on for the remainder of its term. Now, to return to the case under discussion. In *Bruton v London and Quadrant Housing Trust* (2000) the original licence between Lambeth Council and LQHT was agreed in 1986. In 1995 Lambeth Council had replaced the licence agreement with a formal lease agreement. Following the *Bruton* case in 1999 Lambeth Council gave notice to LQHT that it was ending LQHT's formal lease and claimed possession. Mr Kay, an occupier of one of the houses in the same position as Mr Bruton had been, resisted possession on the basis that his Bruton-type lease was binding on Lambeth Council.

**Q: But it couldn't be, could it, because it was a non-proprietary lease and so couldn't bind third parties, here Lambeth Council?**

**A:** Mr Kay argued his case on two grounds. Just before Lambeth Council granted the formal lease to LQHT in 1995, LQHT must have surrendered its licence agreement. Now,

use the analogy with a sublease whereby, if the lessee surrenders the lease to the lessor, the sublease will continue. In our example, when Jemima surrendered her lease to Fred Hugo's sublease carried on and he became a direct tenant of Fred. Mr Kay argued that he was in a similar position to Hugo when LQHT surrendered its licence to Lambeth Council. The second time LQHT surrendered its licence to Lambeth Council, Mr Kay became a direct tenant of Lambeth Council and his non-proprietary lease carried on against it. Lambeth Council therefore could not take possession.

**Q:** *Did it matter that LQHT was granted a lease by Lambeth Council immediately after the surrender of the licence?*

**A:** No. The rights Mr Kay had against Lambeth Council in that split second of time between the surrender of the licence and the grant of the lease continued to exist against Lambeth Council. This argument failed though because, unlike a sublessee, Mr Kay never had a leasehold estate in the land that was derived from Lambeth Council and so could never be in the same position as a sublessee. It would have been different if there had been a lease between Lambeth Council and LQHT and LQHT had granted a sublease to Mr Kay. Any surrender of the lease by LQHT to Lambeth Council would have had no effect on Mr Kay, who would have become the direct tenant of Lambeth Council and could have stayed there. In the case, though, Mr Kay's interest came from LQHT remember, not from Lambeth Council.

The alternative argument put forward was that when Lambeth Council gave notice to LQHT that it was ending LQHT's lease, this affected LQHT only and only LQHT was removed from the picture. Mr Kay's non-proprietary lease had been created before Lambeth Council granted the lease to LQHT and so Mr Kay was not affected by the terms for ending the lease between Lambeth Council and LQHT. Mr Kay therefore would continue to have the same rights he had before Lambeth Council granted the formal lease to LQHT, but those rights were now against Lambeth Council due to the removal of LQHT from the picture. This argument failed as well. When Lambeth Council granted the formal lease to LQHT, it meant that LQHT now held a leasehold estate in the land. LQHT could now give Mr Kay an estate in the land, turning Mr Kay's non-proprietary lease into a proprietary lease, a normal sublease in fact. This was a tenancy by estoppel in the true sense of the word that turned a non-proprietary lease into a proprietary lease when LQHT acquired a leasehold estate. Now use the analogy with a sublease when the lessee is given notice to leave and the sublease comes to an end. In our example, when Fred gave notice to Jemima to leave, Hugo's sublease came to an end. When Lambeth Council gave LQHT notice to leave, Mr Kay was in Hugo's position and his now proprietary sublease was automatically brought to an end as well, because his sublease was governed by the terms of the lease to LQHT. Mr Kay had to go.

Further confirmation (as if we needed it) came in the form of *London Borough of Islington v Green* (2005). In this case Islington Council allowed Patchwork Community Housing to use a property as temporary housing accommodation under a licence agreement, much as in the *Bruton* case. When the Council ended the agreement Mr O'Shea, the last remaining occupant, claimed a Bruton-type tenancy that he argued was binding on the Council. It was held that whether a lease creates a proprietary interest in land depends on whether the landlord has an estate out of which he granted the lease. Although Mr O'Shea had a Bruton-type tenancy he did not have an estate in land. To resist the Council's claim Mr O'Shea would have to show he had an estate binding on the Council. Patchwork

had no estate and so could not give Mr O'Shea an estate, so possession was granted to Islington Borough Council. Mr O'Shea's counsel said he thought people would find it surprising that, as Islington had given Patchwork, a licensee, permission to create a Bruton-type tenancy, Islington could then turn round and say that Mr O'Shea was a trespasser. Lord Justice Gibson said that people would find it surprising if Islington was bound by a Bruton tenancy that went on beyond the licence agreement and contrary to the terms of the licence. So at least we can agree that we are all surprised whichever viewpoint you take.

To summarise: the courts have recognised a non-proprietary lease although the decision has been subject to criticism: see *Bruton v London and Quadrant Housing Trust* (2000). A non-proprietary lease does not have the capacity to bind a third party: see *Kay v Lambeth London Borough Council*; *Leeds City Council v Price* (2006).

### Taking possession and human rights

Annex at the end of this book contains a brief description of human rights legislation and how it works.

A number of recent cases have come before the courts challenging the right of a public authority to take possession, even though it has a right to do so, because such action is incompatible with human rights. The cases are included here to illustrate the arguments put forward in this area.

In *Harrow London Borough Council v Qazi* (2003) a wife had, without consulting her husband, given notice to quit a house let to her and her husband by the Council under a joint tenancy. This had the effect of bringing the tenancy to an end, something which was discussed in Box B2(iii) in this chapter. When the Council brought a possession action, Mr Qazi argued in the House of Lords that the Council had failed to give effect to his right to respect for his home as required by Article 8(1) of the European Convention on Human Rights and its interference was not justified under Article 8(2). Article 8 reads as follows:

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

The effect of Article 8 is that if a public authority wants to interfere with a person's right to respect for his home, this must be in accordance with the law; it must be in pursuit of one of the legitimate aims listed; and there must be proportionality between the action proposed and its effect. The courts have interpreted the words 'and is necessary in a democratic society' to mean proportionality.

The House of Lords held that the right to take possession when there was a contractual or proprietary right to do so could not be defeated by claiming a defence under Article 8 of the European Convention on Human Rights. The domestic law for taking possession itself would be deemed to comply with Article 8(2). This meant the Council didn't have to prove that its action came under one of the legitimate aims under Article 8(2) as a reason for interfering with the rights that came from Article 8(1). Providing the law had been followed, Article 8 would be satisfied. Thus the Council could take possession.

**Q: Did the decision affect private landlords?**

**A:** No, because section 6 of the Human Rights Act 1998 states that the Act applies to 'public authorities'. Public authorities are local authorities and county councils and, since *Weaver v London & Quadrant Housing Trust* (2009), registered social landlords. The *Weaver* decision widens the definition of public authorities as far as human rights are concerned.

The outcome in *Qazi* was upset by *Connors v United Kingdom* (2005). The European Court of Human Rights (ECtHR) held that the eviction of gypsies, Mr Connors and his family, had been an infringement of their rights under Article 8 even though the family had no contractual or proprietary right to remain on the site. The site in question was one provided solely for gypsies.

**Q: Why was the gypsy family treated differently?**

**A:** UK statute law had allowed the Council to evict Mr Connors with four weeks notice without giving reasons for the eviction. The procedure was discriminatory because tenants on sites not solely for gypsies had greater statutory protection under the Mobile Homes Act 1983. The fact that the Council didn't have to give reasons also meant that there were no reasons which could be examined by an independent tribunal if there was any claim for judicial review of the decision. There was also no obligation on the Council to hear any defence Mr Connors might have wanted to put forward. Article 8(2) wasn't satisfied because the Council had given no proper justification for seriously interfering with Mr Connors' rights and there was a lack of procedural safeguards to enable the court to scrutinise whether the action was proportionate. On the facts of the case, there was no actual pressing social need to evict him, nor was the eviction proportionate to the aim of the Council, which was actually to stop the gypsies being a nuisance. You could argue that the Council was being vindictive and an Anti-Social Behaviour Order might have been a better idea. Furthermore, gypsies were vulnerable in society, and under the European Convention on Human Rights the United Kingdom had a duty to facilitate their way of life, which the Council had not done. There was a breach of Article 8 and Mr Connors was awarded compensation.

**Q: So it was the UK law that was the problem?**

**A:** Yes. The lack of procedural safeguard in the UK law was incompatible with Article 8 and also the Council had failed to consider the especially vulnerable position of gypsies.

*Kay v Lambeth London Borough Council* (2004), heard in the Court of Appeal, was the next case. Lambeth Borough Council had lawfully brought leases held by the Housing Association that had granted tenancies to Mr Kay and others to an end and had begun possession proceedings against Mr Kay and the other occupiers. Mr Kay claimed that the possession order was an interference with his private and family life and his home under Article 8. The Court of Appeal followed *Qazi* and said that there was no defence under Article 8 because Lambeth Council had an unqualified right to possession under UK law. The *Connors* case was applicable only to gypsies and so *Qazi* and *Connors* were not incompatible. So far so good.

The next case was *Leeds City Council v Price* (2005) where, without authority, a gypsy family had moved onto land owned by Leeds City Council. Leeds City Council had issued possession proceedings against them two days later on the ground that it had an unqualified right to possession because the gypsies were trespassers. This unqualified

right to take possession meant that there was no defence under Article 8. Mr Price, a member of the gypsy family, argued that there was a breach of Article 8 because the Council hadn't taken into account the need to facilitate the gypsies' way of life or the exceptional personal circumstances of his family which were due to serious illness. The Court of Appeal held that the decision in *Qazi* was incompatible with the European Court's decision in *Connors* because *Qazi* appeared to say that an unqualified right to take possession would never constitute interference with an occupier's rights, or that taking possession was always justified. This had been proved otherwise in *Connors*. The Court of Appeal also didn't agree that the reasoning in *Connors* was applicable only to gypsies. It did consider itself bound by *Qazi*, though, otherwise there would be chaos if the lower courts could ignore decisions of the House of Lords by relying on an ECtHR case. Following *Qazi* therefore, it was held that there was no Article 8 defence. However, the Court of Appeal gave Mr Price leave to appeal to the House of Lords.

**Q:** *So there were conflicting decisions about the impact of the Connors case?*

**A:** Yes. The court in *Kay v Lambeth London Borough Council* (2004) said *Qazi* and *Connors* were compatible. The court in *Leeds City Council v Price* (2005) said they were incompatible and gave Mr Price leave to appeal. Mr Price duly appealed to the House of Lords. Joining him were the occupiers in *Kay v Lambeth London Borough Council* (2004), who had also decided to appeal after Lambeth Council had won the right to take possession of their homes.

Both appeals were heard together in *Kay v Lambeth London Borough Council; Leeds City Council v Price* (2006) where the House of Lords addressed three main issues:

- ▶ The effect of Article 8
- ▶ How to reconcile *Qazi* and *Connors*
- ▶ What happens when a court has to follow binding precedent from the House of Lords (*Qazi*), but then the ECtHR has said something different (*Connors*).

First, the effect of Article 8. It was held that an action for possession brought Article 8 into play. Where there was an unqualified right to possession, a public authority landlord would not have to prove justification under Article 8(2) for taking possession by giving reasons. The domestic law would automatically provide the justification needed by Article 8(2) provided the authority had fulfilled its common law and statutory requirements.

**Q:** *Presumably this was because, if the public authority had to justify why it was taking possession each time, it would be a never-ending task?*

**A:** Quite. It was also held that there could be no defence based simply on the ground that an occupier had exceptional personal circumstances such as the illness in Mr Price's family. The court went on to hold that Article 8 could be used as a defence in two instances only, as follows:

- ▶ when there was a seriously arguable case that, regardless of the occupier's personal circumstances, the actual substantive law relating to possession was incompatible with Article 8. This is known as gateway (a).
- ▶ when there was a seriously arguable case that the decision of the public authority to recover possession was an improper use of its powers at common law because it was

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a decision which no reasonable person would be justified in making; see *Wandsworth London Borough Council v Winder* (1985). This is known as gateway (b) and is known as the public law defence. This is a defence that is made in the County Court, not the High Court which is where a claim for judicial review must be made.

**Q:** *What is the difference between judicial review and a public law defence?*

**A:** Judicial review is the review of a procedure in administrative law which enables applicants with 'sufficient interest' to challenge the legality, rationality or fairness of an action or decision of a public body.

A public law defence to a decision to seek possession can be raised in the County Court when the actions of a public body are challenged on the grounds that the decision taken is a decision which no reasonable person would be justified in making. Gateway (b) is based on the availability of the defence that the public authority has abused its public law powers and 'acted unreasonably', as exemplified by *Wandsworth LBC v Winder* [1985]. This public law defence was successful in the *Winder* case.

**Q:** *So in Kay it was held that there has to be a seriously arguable case whether gateway (a) or gateway (b) is used?*

**A:** Yes. The court should decide whether the defendant has a seriously arguable case summarily having given the defendant a chance to state his case. Instances where there was a seriously arguable case would be rare. *Connors* is an example of a seriously arguable case under gateway (a) because the UK law was incompatible with Convention rights. If the case was seriously arguable under gateway (a), the County Court should give effect to the law as far as possible in a way that is compatible with Article 8 or refer the case to a superior court which can make a declaration of incompatibility under section 4 of the Human Rights Act 1998. If there was a seriously arguable case under gateway (b) the County Court should hear the public law defence from the defendant applying the principles in *Winder*. The advantage here is that rather than having to apply for judicial review, the occupier can raise a public law defence in the County Court and have it heard by the County Court. The County Court could not do this before. The gateways were not mutually exclusive and both could be open at the same time.

**Q:** *How did the Lords reconcile Qazi and Connors which was the second issue?*

**A:** Although *Qazi* appeared to say that an unqualified right to take possession would never constitute interference with an occupier's rights or that taking possession was always justified, this was not strictly true.

Although there could be no defence based on the occupier's personal circumstances, there could also be special and unusual cases, for example with gypsies, where an occupier could be particularly disadvantaged by the domestic law. In this case there might be a seriously arguable case that the law was incompatible with their rights. Also, only if the law said that an occupier's personal circumstances had to be taken into account would the occupier be given a chance to defend himself by raising personal circumstances. So, if the law had been followed, and there was still an unqualified right to possession, the court would grant possession. The only time a defence under Article 8(2) would need to be raised through gateway (a) was if the substantive law interfered with Article 8(1). If this happened the court could either interpret the law so that it was compatible or refer the case to a superior court to use its powers under section 4 of the

Human Rights Act 1998 to declare incompatibility. Alternatively, the occupier could raise a public law defence in the County Court through gateway (b). The Caravan Sites Act 1968 which applied to gypsies was to be amended to become Article 8 compatible, thereby dealing with the issues in the *Connors* case.

**Q: What happens when a court has to follow binding precedent from the House of Lords (Qazi) but then the ECtHR says something different (Connors) – the third issue?**

**A:** The courts should follow precedent. Each state is given a wide margin of appreciation by the ECtHR and could decide how best to apply the rights under the Convention in a domestic setting. If a domestic court considered that the precedent was inconsistent with a decision in the ECtHR, it should interpret the law so that it is compatible or refer the case to a superior court to use its powers under section 4 of the Human Rights Act 1998 to declare incompatibility.

**Q: And the outcome of the cases?**

**A:** In the *Kay* case, Lambeth Council had an unqualified right to possession, and so the interference was justified, therefore pleading Article 8 was no defence. In the *Price* case, the gypsies had lived on the recreation ground for two days. This was not enough to show such continuous links with the land to enable them to regard it as their home, and so Article 8 was not relevant. Even if the gypsies had been able to argue that they had a home there, the Council would still have had a legitimate aim under Article 8(2) which it could rely on to restrict the rights of the gypsies. This was to protect the rights of others under Article 8(2) in allowing the public back on the land.

**Q: What was the implication of the House of Lords decision?**

**A:** Good news for public authorities because they didn't have to justify that taking possession was compliant with Article 8 every single time they took possession. Bad news for occupiers because there was very little mileage in trying to use Article 8 as a defence in possession proceedings.

The saga of taking possession and human rights continued in *McCann v United Kingdom* (2008) and *Doherty v Birmingham City Council* (2008). There is a very clear, useful, and indeed comprehensible summary of the decisions in *Qazi*, *Connors* and *Kay* in *McCann* in paragraphs 22–28.

In *McCann*, Mr and Mrs McCann held a joint tenancy of their house which was rented from Birmingham City Council. Following an allegation of domestic violence, Mrs McCann left the original house and moved to a different Council house. Unbeknown to the Council, Mr McCann moved back into the original house. When the Council found out he was there, it asked Mrs McCann to sign a common law notice to quit the tenancy for the original house that she had moved out of. This had the effect of bringing the joint tenancy to an end for Mr McCann as well: see *Hammersmith and Fulham LBC v Monk* (1992). The same scenario had occurred in *Harrow London Borough v Qazi* (2003). When she was asked to sign the notice to quit, Mrs McCann received no legal advice and had no idea that signing it would mean Mr McCann would have to leave. Not best pleased, Mr McCann challenged the possession order of Birmingham City Council on the basis of interference with his human rights under Article 8.

In the County Court the judge refused the Council's claim for possession and held that Mr McCann's Article 8 rights had not been properly considered. He commented on what

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might be perceived as dubious goings-on by the Council surrounding Mrs McCann's signing of the notice to quit. Furthermore, if Mrs McCann hadn't signed the notice, the Council would have had to apply for a possession order under section 84 of the Housing Act 1985 to remove Mr McCann from the house. Section 84 of the Housing Act 1985 protects the tenant. It allows a landlord to seek a possession order, but only if one or more grounds in Schedule 2 is met and the court has to find the order a reasonable one to make.

If the Council had used the Act to obtain possession, Mr McCann would have been given the opportunity to argue that it wasn't reasonable to grant a possession order. He could have raised his concerns about his own housing needs and the need to have accommodation so that his children could visit him. When the Council served the notice to quit on Mrs McCann it had not shown any respect for Mr McCann's human rights as it would have had to have done had the statutory procedure under section 84 been used to obtain a possession order against Mr McCann. Result: possession order denied.

The Council appealed to the Court of Appeal. (In the interim *Harrow London Borough Council v Qazi* (2003) was heard. Remember in that case it was held by the majority that, although Mr Qazi's tenancy had come to an end, Article 8 was still engaged. However, the local authority had an unqualified right to possession and there was no infringement of Mr Qazi's right to respect for his home under Article 8(1) and therefore the Council did not have to justify its actions under Article 8(2)).

In Mr McCann's case in the Court of Appeal it was held that section 84 of the Housing Act 1985 did not apply. The notice to quit that Mrs McCann had signed had ended Mr McCann's tenancy, even though she was unaware of its consequences. Nothing exceptional had happened since the serving of the notice to quit which would affect the 'rights and wrongs of the notice to quit' and the Court dismissed Mr McCann's appeal.

Mr McCann then applied for judicial review. This was also refused on the basis that the Court of Appeal had already decided the issues and that his request for judicial review was simply an attempt to repeat the arguments a second time.

**Q:** *Presumably the only place for Mr McCann now was the European Court of Human Rights?*

**A:** Yes because he had exhausted all domestic remedies. The European Court held that the local authority house still continued to be Mr McCann's home within the meaning of Article 8, although he had no right to be there once Mrs McCann had signed the notice to quit. When the Council brought possession proceedings it interfered with Mr McCann's right to respect for his home within Article 8(1).

The Council, though, was justified in taking possession under Article 8(2) because it protected its right to regain possession when Mr McCann had no right to be there and it ensured that the local authority could allocate its housing efficiently under the Housing Acts. The question left was whether the interference was proportionate to the aim pursued and thus "necessary in a democratic society" under Article 8(2). The European Court held that the loss of a home was 'a most extreme form of interference with the right to respect for the home'. Even though the right of occupation might have come to an end, an occupier should be able to have the proportionality of such interference determined by an independent tribunal. Birmingham City Council had bypassed the statutory scheme under section 84 of the Housing Act 1985 which would have given Mr McCann the opportunity to put forward his own personal circumstances such as the issues over the alleged domestic violence and his need for accommodation for his children to be able to

visit. In bypassing the statutory scheme, the Council had not taken Mr McCann's human rights into consideration. The County Court hadn't been able to examine the proportionality of the possession because it was a summary possession claim for eviction and there was no power for the Court to do so. Mr McCann's application for judicial review had also been turned down which again meant that there was no opportunity for an independent tribunal to see whether the loss of his home was proportionate under Article 8(2) to the legitimate aims pursued. Further, judicial review wasn't well adapted to resolving sensitive factual issues which were better decided by the County Court that knew of the circumstances and facts of the case, so the availability of judicial review was not enough to be an adequate procedural safeguard. The lack of adequate procedural safeguards which would have allowed the proportionality of the decision and Mr McCann's personal circumstances to be taken into account meant that Article 8 had been violated. Mr McCann was awarded 2000 Euros to compensate him for his feelings of frustration and injustice caused by the loss of his home.

**Q: Why is McCann important?**

**A:** The importance of the *McCann* case is that the European Court held that the loss of a home is a most extreme form of interference with the right to respect for a home. Any person in this position should in principle be able to have the proportionality of the decision to take possession determined by an independent tribunal. The domestic law was at fault in that it did not allow for proportionality to be considered outside a judicial review application. It would be in exceptional cases only that a person would have an arguable case that would require a court to look at the case, so the floodgates wouldn't be opened. The problem was that the Court in *McCann* didn't give any guidelines as to when a case would be deemed exceptional. Note also that in *McCann* the European Court found that even if the Court had considered Mr McCann's case, possession could still have been ordered, and most probably would have been.

In *Doherty v Birmingham City Council* (2008) the Doherty family had been given a licence to stay on a caravan site owned by Birmingham City Council. Some 17 years later the Council wanted to improve the land and brought summary proceedings for possession. Mr Doherty claimed that this was in breach of his right to respect for his home under Article 8 of the European Convention on Human Rights and the Council could not act in contravention of those rights.

If you refer back to *Kay* you will remember that Article 8 could be used as a defence when there was a seriously arguable case that the substantive law was incompatible with Article 8, referred to as gateway (a). The problem in *Doherty* itself was the substantive law. Protection to mobile home owners was available under the Mobile Homes Act 1983 but did not apply to gypsies who occupied local authority sites. The law itself was at fault and incompatible with Article 8.

To counteract the use of Article 8 as a defence under gateway (a) when this happened, a court had to give effect to the law as far as possible in a way that was compatible with Article 8 or else it had to refer the case to a higher court which could make a declaration of incompatibility under section 4 of the Human Rights Act 1998.

As far as *Doherty* was concerned, the court couldn't use section 3(1) of the Human Rights Act 1998 which allows a court to interpret the legislation to avoid a violation by giving effect to the law so that it is compatible with Article 8. This was because the court couldn't change a provision which said one thing to mean something completely different.

**Q: What about the declaration of incompatibility argument?**

**A:** A declaration of incompatibility was unnecessary. This was because the law relating to gypsies occupying local authority sites was being rectified in the Housing and Regeneration Act 2008 which had received royal assent in July 2008. If this was not so, then, there would be a need for a declaration of incompatibility. However, the Act was not retrospective so in itself was of no use to Mr Doherty.

This left the public law defence, referred to as gateway (b). Section 6(2)(b) of the Human Rights Act 1998 states that a court still has to enforce primary legislation even if it can't be interpreted in a way that is compatible with the Convention. This is so unless the decision of the authority is, when subject to judicial review principles, arbitrary, unreasonable or disproportionate. In *Doherty* the Council was not acting unlawfully because it was simply enforcing the legislation.

In Mr Doherty's case, the House of Lords remitted the case back to the High Court via gateway (b) to look at whether no reasonable person would have taken the decision to recover possession. It was held, moving away from *Kay*, that the personal circumstances of the occupier could be considered in examining whether the decision to recover possession was reasonable. This extends the '*Wednesbury*' definition of unreasonableness and a defence could include the personal circumstances of those being evicted. In this case the examination of the possession claim could have included taking into account the personal circumstances of the gypsies such as the length of time they had been on the site (17 years). In remitting the case back to the High Court, the judge was to review the reasons the Council had given for the notice to quit, resolve any issues about facts and then, taking into consideration the length of time the Doherty family had been on the site, decide whether that decision was sufficiently justifiable. It wasn't the view of the judge that counted: it was whether a reasonable person would find the Local Authority's decision to take possession justifiable.

**Q: In *McCann*, the ECtHR said that domestic law and procedure led to breaches of Article 8. How did the House of Lords in *Doherty* respond to *McCann*?**

**A:** The House of Lords considered *McCann*, which was decided shortly before the House of Lords gave their opinions. Their views varied, but they were united in deciding that a five strong panel of Lords could not change the decision of a seven strong panel of Lords in *Kay*. So they did not make any changes. Lord Hope considered that the public law defence grounds would cover 'disproportionate' decisions, but Lord Walker didn't think that the public law defence grounds were the same as 'proportionality'. So there still appears to be a difference between the domestic law and the ECtHR decisions.

This difference was highlighted again in the ECtHR in *Čošić v Croatia* (2009) where the court repeated

In this connection the Court reiterates that the loss of one's home is a most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality and reasonableness of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, his or her right of occupation has come to an end (see *McCann v. the United Kingdom*, no. 19009/04, § 50, 13 May 2008).

However, the lower courts since have had to follow *Qazi* and *Kay* as expanded in *Doherty*.

In *London Borough of Wandsworth v Dixon* (2009) Mr Dixon's sister had served a notice to quit of the joint tenancy of a flat thereby bringing it to an end and upsetting the other joint tenant, Mr Dixon who had to move out: see *Hammersmith and Fulham LBC v Monk* (1992). The Council had also refused to re-house Mr Dixon because illegal drugs had been found in his possession. Mr Dixon claimed breach of his human rights. The court held that there was no defence to the end of the joint tenancy under Article 8 of the European Convention on Human Rights through gateway (a) because, following *Qazi and Kay*, there was no seriously arguable case that the substantive law was incompatible with Article 8. The Council had an unqualified right to possession and the domestic law would provide the justification needed by Article 8(2) (i.e. the need to get back the property to be able to re-house others) provided the Council had fulfilled its common law and statutory requirements, as it had.

**Q:** *So was there a valid argument under gateway (b)?*

**A:** Mr Dixon tried to argue that the test in gateway (b) had been changed by *Doherty* to include proportionality. If this had been the case, his personal circumstances would have to have been taken into account. The court held that *Doherty* was an exceptional case because of the discriminatory effect of the statute law in place at the time of the possession. Mr Dixon's case was not the same, his case being made on his personal circumstances only, and so was not exceptional. Following *Kay* there was no seriously arguable case that Wandsworth Borough had taken a decision which no reasonable person would take. Even if proportionality had come into it, Mr Dixon had made representations to the Council and the Council's careful decision making process would have satisfied Article 8.

**Q:** *Did the decision in McCann affect the outcome in Dixon?*

**A:** No. The court took the view that *McCann* was not the same as the *Dixon* case because in *McCann* the local authority had behaved badly. In *Dixon*, the notice to quit had been freely given by Mr Dixon's sister, not sneakily obtained by the Council. It was not an exceptional case.

**Q:** *But couldn't you argue that McCann said that anybody should be able to have the proportionality of a possession order assessed by an independent tribunal even though such cases would be exceptional?*

**A:** Yes, so you can then start to argue that the decision in *Dixon* is not compatible with Article 8 rights for exactly that reason. Mr Dixon is appealing on this point.

In *Doran v Liverpool City Council* (2009) Ms Doran occupied under a licence. The Council issued possession proceedings against Ms Doran because there had been disputes with other residents. She argued the public law defence under gateway (b) saying that the allegations about the disputes were untrue, the other residents were to blame and she ought to have the chance to refute the allegations. The Court of Appeal held that after *Doherty* the factors that could be taken into account when deciding whether the decision was one that no reasonable person would make were not restricted and there was no precise formula as to what could and couldn't be taken into account. Such factors could include personal circumstances. In deciding whether the decision was one which no reasonable person would make though, the court would look to public law principles, not those of the European Convention on Human Rights, i.e. not to proportionality as such. The Council had evidence of anti-social behaviour by Ms Doran and her family and it had evidence that the

licence had been breached. The decision was reasonable given the facts known to the Council at the time and the Council did not have to conduct its own judicial investigation.

In *Central Bedfordshire Council v Taylor* (2009) the defendants had no legal right to be on the land but claimed that their personal circumstances should have been taken into account and they should have been entitled to a proportionate decision under Article 8. The Court followed *Kay* and held that where the Council had an absolute right to possession, as here where the occupier was a trespasser, a defence based purely on the personal circumstances of the occupier would not stand. The law itself was deemed to provide the necessary safeguards in justifying the interference under Article 8(2). As far as gateway (b) was concerned, after *Doherty* a public authority could take account of personal circumstances if these circumstances were known at the time but it didn't follow that taking possession would ever be unreasonable when the occupiers were trespassers as in *Kay*.

In *Stokes v London Borough of Brent* (2009) the Council had issued a possession order against a traveller, Ms Stokes, who was a trespasser on the Council's land. She argued that there was a seriously arguable case that the Council's decision came under *Wednesbury* unreasonableness in gateway (b). The court held that on the material before the court there was no seriously arguable case to answer that the Council's decision was one which no reasonable person would take. Ms Stokes had lived on the caravan pitch for a short time only and, for the most part of that time, she had been a trespasser. The decision of the Council to seek possession was not one which a reasonable person would consider unjustifiable.

**Q: Is there a case where there was a seriously arguable case under gateway (b)?**

**A:** In *McGlynn v Welwyn Hatfield District Council* (2009) the Court of Appeal decided that there was a seriously arguable case that a reasonable council would not have issued proceedings in the circumstances. The Council had served a notice to quit on Mr McGlynn. Following his reply, the Council sent a letter which had led Mr McGlynn to believe that legal action to take possession would not continue unless there was a further significant breach of the tenancy agreement causing nuisance. Ten months later the Council sought a possession order. Given the lapse of time between the notice to quit and the possession proceedings, it was seriously arguable that a reasonable Council would not have issued possession proceedings without satisfying itself that there had been a significant further breach of the tenancy agreement. Whilst the Council did not have to carry out a judicial investigation, in the circumstances it had not done enough. The lack of information that had been available to the district judge about the council's decision-making process meant that he was wrong to conclude that Mr McGlynn did not have a seriously arguable defence. The case was remitted to the County Court to see whether the decision was reasonable.

And the overall position now? There has been a very clear message from the European Court of Human Rights in *McCann* and *Čoščić* that the loss of a home is a most extreme form of interference with the right to respect for a home. Any person in this position should in principle be able to have the proportionality of the decision to take possession determined by an independent tribunal if a defence under Article 8 is raised. Whilst there is an extended public law defence in *Doherty*, it arguably does not meet the requirements of *McCann* and a full scale examination of proportionality under Article 8(2). Such full scale proportionality would include an examination of the personal circumstances of the defendant.

**Q:** *Wouldn't this be a lot of work for everybody, the local authority, the court and the person who was being evicted?*

**A:** Yes. But it should be remembered that the local authority or public body already has a duty to act in accordance with human rights, so if the local authority has made a proportionate decision, it should be able to show how it came to the decision.

Thus, there is conflict between the ECtHR and the Supreme Court. *Kay* has now been taken to the European Court on the basis that the UK law has not followed *McCann*. There is also a queue of cases on this issue in the Court of Appeal or waiting for the Supreme Court. We await what happens next.

### Further reading

- S. Bright, 'Uncertainty in Leases – Is It a Vice?', 13 *Legal Studies* (1993) 38
- C. Harpum, 'Leases, Licences, Sharing and Shams', 48 *Cambridge Law Journal* (1989) 19
- P. Smith, 'What is Wrong with Certainty in Leases?', *Conveyancer and Property Lawyer*, Nov/Dec (1993) 461
- P. Sparkes, 'Certainty of Leasehold Terms', 109 *Law Quarterly Review* (1993) 93
- R. Street, 'Coach and Horses Trip Cancelled? Rent Act Avoidance after *Street v. Mountford*', *Conveyancer and Property Lawyer*, Sep/Oct (1985) 328

### The non-proprietary lease

- S. Bright, 'Leases, Exclusive Possession and Estates', 116 *Law Quarterly Review* (2000) 7
- M. Dixon, 'The Non-proprietary Lease: the Rise of the Feudal Phoenix', 59 *Cambridge Law Journal* (2000) 25
- J. Morgan, 'Exclusive Possession and the Tenancy by Estoppel: "a familiar problem in an unusual setting"', *Conveyancer and Property Lawyer*, Nov/Dec (1999) 493
- M. Pawlowski, 'Occupational Rights in Leasehold Law: Time for Rationalisation?', *Conveyancer and Property Lawyer*, Nov/Dec (2002) 550. A reply: J-P. Hinojosa, 'On Property, Leases, Licences, Horses and Carts: Revisiting *Bruton v London & Quadrant Housing Trust*', *Conveyancer and Property Lawyer*, Mar/Apr (2005) 114
- P. Routley, 'Tenancies and Estoppel – after *Bruton v London & Quadrant Housing Trust*', 63 *Modern Law Review* (2000) 424

### Taking possession and human rights

- S. Bright, 'Article 8 Again in the House of Lords: *Kay v Lambeth LBC*; *Leeds CC v Price*', *Conveyancer and Property Lawyer*, May/June (2006) 294
- G. and H. Griffiths, 'Article 8 and possession proceedings – the saga continues', *Conveyancer and Property Lawyer* 5 (2008) 437
- D. Hughes and M. Davis, 'Human Rights and the Triumph of Property: the Marginalisation of the European Convention on Human Rights in Housing Law', *Conveyancer and Property Lawyer*, Nov/Dec (2006) 526
- I. Loveland, 'Defending ground 8 residential possession claims through article 8 of the European Convention on Human Rights', *Conveyancer and Property Lawyer*, 5 (2009) 396.