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LEASES

CENTRAL ISSUES

1. Over the next three chapters, we will examine the lease in detail. In this chapter, we will concentrate on a key feature of a lease: its ability to count as a property right. This crucial aspect of a lease differentiates it from the licence, which we examined in Chapter 21. In this chapter, therefore, we will look at the three principal questions that apply to any property right: the *content* question (when will B's right count as a lease?); the *acquisition* question (how can B acquire a lease?); and the *defences* question (if B has a lease of A's land, when can C, a party later acquiring a right from A, have a defence to B's lease?). In considering the *content* question, we will see precisely how a lease differs from a licence; in considering the *acquisition* question, we will also consider the ways in which a lease may come to an end.
2. Before examining those questions, we will consider why B may wish to show that he or she has a lease. One important consequence of having a legal or equitable lease, of course, is that such a right is capable of binding C, a third party who later acquires a right from A. In addition, if B can show that he or she has a lease, this may mean that additional duties are imposed on A: in particular, such duties may be imposed by statutes that provide protection to B *if* B has a lease.
3. In Chapter 23, we will consider in more detail the statutory protection potentially available to B if he or she has a lease. We will see there that, in some cases, B can be seen as having a lease (at least, in the sense used by a particular statute) even if B has no property right. This suggests that there are two sorts of leases: a proprietary lease, and a non-proprietary lease. In this chapter, we will concentrate on the former type of lease.
4. A lease, in the sense of a property right, will often arise as part of an agreement imposing a number of duties on both A and B. In some cases, those duties, even if positive, can bind not only A and B, but also parties later acquiring the rights of A and B. We will examine this phenomenon in Chapter 24, by looking at the concept of a leasehold covenant. In Chapter 23, we will consider in more detail the statutory protection potentially available to B if he or she has a lease. In this chapter, we will see how the judges' approach to defining the content of a lease *as a property right* may have been influenced by the presence of such statutory protection.
5. The content of a lease can be simply defined: B has a lease if he or she has a right to exclusive possession of land for a limited period. In practice, however, there may be difficulties in

applying this simple test: for example, how should we deal with cases in which B1 and B2 occupy land together? And what is the effect of a term inserted by A into an occupation agreement with B with the sole purpose of denying B exclusive possession of land?

6. In considering the *acquisition* and *defences* questions, we will see the impact of the Land Registration Act 2002 on leases. We considered the general effect of that Act in Chapters 14 and 15. When considering the *acquisition* and *defences* questions, we will also need to bear in mind the possibility of B's having an equitable, rather than a legal, lease.
7. Finally, in section 5 below, we will consider a recurrent debate about the conceptual nature of a lease: should it be seen as primarily a contractual right, or, instead, as primarily a property right? It will be suggested that the debate rests on a misconception: there is no reason why a right cannot be both contractual—that is, acquired as a result of a contractual agreement between A and B—and also proprietary—that is, having a content that means it can count as a legal property right.

1 INTRODUCTION: THE IMPORTANCE OF THE LEASE

1.1 THE EFFECT OF A LEASE

Imagine a case in which A, who holds a registered legal estate in land, makes a contractual agreement with B. A promises to allow B to occupy A's land for a year; in return, B promises to pay A £200 a week. In such a case, B clearly has a permission to use A's land: he or she has, at the very least, a contractual licence (see Chapter 21, section 3). Why might B want to claim that his or her agreement with A instead gives him or her a lease of A's land?

We can answer this question by considering three different types of situation, matching the different situations that we examined in Chapter 21 when considering the effect of a licence. In the first set of situations, B wants to make a claim against A. In the second set of situations, B wants to make a claim against X, a stranger who has not acquired a right in A's land, but who has, in some way, interfered with B's use of that land. In the third set, B wants to make a claim against C, a third party who has acquired a right in A's land.

1.1.1 The effect of a lease on A

In Chapter 21, section 3.1, we saw that, even if B has a contractual licence rather than a lease, his or her position as against A is fairly secure. In our example in which A has promised to allow B to occupy A's land for a year, it is quite possible that, if A were to threaten to remove B early, B could obtain a court order preventing A from thus breaching his or her contractual duty to B.[1] Nonetheless, if B can show he or she has acquired a lease, A may come under *extra* duties to B, going beyond the express terms of the parties' agreement.

[1] See *Verrall v Great Yarmouth Borough Council* [1981] QB 202, although note *Thompson v Park* [1944] KB 408. Both cases are discussed in Chapter 21, section 3.1.2.

First, if B has a lease, A and B can be said to be in a 'landlord–tenant relationship'. The common law may then impose particular duties on the parties, even if they did not expressly undertake those duties when making their contractual agreement. These implied duties are, however, very limited:[2] for example, B has a duty not permanently to alter the physical character of the land;[3] and A's implied duties include a duty to allow B 'quiet enjoyment' of the land, meaning that A has a duty not to interfere physically with B's expected use of the land, or to interfere substantially with B's enjoyment of the land.

Second, and much more importantly in practice, particular statutes may operate to impose duties on A *if and only if* A has given B a lease. We will look at the scope of this statutory protection in more detail in Chapter 23, but its existence is crucial to understanding the context of a number of cases that we will examine in this chapter.

It is certainly apparent in the case from which the following extract is taken. The extract given below is a long one, but the length of the extract is commensurate with the importance of the decision. Lord Templeman's analysis provides the key starting point for any attempt to define the content of a lease or to distinguish a lease from a contractual licence.

Street v Mountford
[1985] AC 809, HL

Facts: Roger Street, a solicitor from Bournemouth, owned No 5, St Clement's Gardens, Boscombe. On 7 March 1983, he entered a signed written agreement with Wendy Mountford, allowing her a right to exclusive occupation of two rooms in that house (Rooms 5 and 6). Under the terms of the agreement, Mrs Mountford was under a duty to pay £37 a week to Mr Street and either party was free to terminate the agreement by giving fourteen days' notice. The agreement described itself throughout as a licence: for example, the £37 payment was described as a 'licence fee'. Under the terms of the Rent Act 1977, if the agreement gave Mrs Mountford a lease, then Mr Street was obliged to accept whatever rent was set as a fair rent by an independent officer or tribunal. Mrs Mountford claimed that the agreement did, indeed, give her a lease and applied for a fair rent to be assessed. Mr Street then applied to the county court for a declaration that Mrs Mountford had only a licence. If it were found that Mrs Mountford had a lease, the Rent Act 1977 would also limit the grounds on which Mr Street could end her occupation and would thus prevent him bringing her occupation to an end by simply giving fourteen days' notice. The county court judge found that Mrs Mountford did, indeed, have a lease. The Court of Appeal upheld Mr Street's appeal, finding that, as the written agreement made clear that Mr Street did not intend to grant Mrs Mountford a lease, Mrs Mountford had only a contractual licence. But the House of Lords held that, this contrary intention notwithstanding, the agreement between Mr Street and Mrs Mountford *did* give her a lease. Lord Templeman, with whom all of their Lordships agreed, gave the only reasoned speech. In it, the term 'tenancy' is used interchangeably with 'lease'.

[2] Judges in other jurisdictions have been more willing to impose duties on A: see *Javins v First National Realty* (1970) 428 F 2d 1071 (District of Columbia Court of Appeals). For a comparison between the English and US approaches, see Bright, *Landlord and Tenant Law in Context* (2007), pp 30–5.

[3] See *Marsden v Edward Heyes* [1927] 2 KB 1, applying *Horsefall v Mather* (1815) Holt NP 7.

Lord Templeman

At 814

A tenancy is a term of years absolute. This expression, by section 205(1)(xxvii) of the Law of Property Act 1925, reproducing the common law, includes a term from week to week in possession at a rent and liable to determination by notice or re-entry. Originally a term of years was not an estate in land, the lessee having merely a personal action against his lessor. But a legal estate in leaseholds was created by the Statute of Gloucester 1278 and the Act of 1529 21 Hen. VIII, c. 15. Now by section 1 of the Law of Property Act 1925 a term of years absolute is an estate in land capable of subsisting as a legal estate. In the present case if the agreement dated 7 March 1983 created a tenancy, Mrs. Mountford having entered into possession and made weekly payments acquired a legal estate in land. If the agreement is a tenancy, the occupation of Mrs. Mountford is protected by the Rent Acts.

A licence in connection with land while entitling the licensee to use the land for the purposes authorised by the licence does not create an estate in the land. If the agreement dated 7 March 1983 created a licence for Mrs. Mountford to occupy the premises, she did not acquire any estate in the land. If the agreement is a licence then Mrs. Mountford's right of occupation is not protected by the Rent Acts. Hence the practical importance of distinguishing between a tenancy and a licence.

At 816–9

On behalf of Mrs. Mountford her counsel, Mr. Hicks Q.C., seeks to reaffirm and re-establish the traditional view that an occupier of land for a term at a rent is a tenant providing the occupier is granted exclusive possession. It is conceded on behalf of Mr. Street that the agreement dated 7 March 1983 granted exclusive possession to Mrs. Mountford. The traditional view that the grant of exclusive possession for a term at a rent creates a tenancy is consistent with the elevation of a tenancy into an estate in land. The tenant possessing exclusive possession is able to exercise the rights of an owner of land, which is in the real sense his land albeit temporarily and subject to certain restrictions. A tenant armed with exclusive possession can keep out strangers and keep out the landlord unless the landlord is exercising limited rights reserved to him by the tenancy agreement to enter and view and repair. A licensee lacking exclusive possession can in no sense call the land his own and cannot be said to own any estate in the land. The licence does not create an estate in the land to which it relates but only makes an act lawful which would otherwise be unlawful.

On behalf of Mr. Street his counsel, Mr. Goodhart Q.C., relies on recent authorities which, he submits, demonstrate that an occupier granted exclusive possession for a term at a rent may nevertheless be a licensee if, in the words of Slade L.J. in the present case:

> 'there is manifested the clear intention of both parties that the rights granted are to be merely those of a personal right of occupation and not those of a tenant.'[4]

My Lords, there is no doubt that the traditional distinction between a tenancy and a licence of land lay in the grant of land for a term at a rent with exclusive possession. In some cases it was not clear at first sight whether exclusive possession was in fact granted. For example, an owner of land could grant a licence to cut and remove standing timber. Alternatively the owner could grant a tenancy of the land with the right to cut and remove standing timber during the term of the tenancy. The grant of rights relating to standing timber therefore required careful consideration in order to decide whether the grant conferred exclusive possession of

[4] [1985] 49 P & CR 324, 332.

the land for a term at a rent and was therefore a tenancy or whether it merely conferred a bare licence to remove the timber [. . .]

In the case of residential accommodation there is no difficulty in deciding whether the grant confers exclusive possession. 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. In *Allan v. Liverpool Overseers* Blackburn J. said:[5]

> 'A lodger in a house, although he has the exclusive use of rooms in the house, in the sense that nobody else is to be there, and though his goods are stowed there, yet he is not in exclusive occupation in that sense, because the landlord is there for the purpose of being able, as landlords commonly do in the case of lodgings, to have his own servants to look after the house and the furniture, and has retained to himself the occupation, though he has agreed to give the exclusive enjoyment of the occupation to the lodger.'

If on the other hand residential accommodation is granted for a term at a rent with exclusive possession, the landlord providing neither attendance nor services, the grant is a tenancy; any express reservation to the landlord of limited rights to enter and view the state of the premises and to repair and maintain the premises only serves to emphasise the fact that the grantee is entitled to exclusive possession and is a tenant. In the present case it is conceded that Mrs. Mountford is entitled to exclusive possession and is not a lodger. Mr. Street provided neither attendance nor services and only reserved the limited rights of inspection and maintenance and the like set forth in clause 3 of the agreement. On the traditional view of the matter, Mrs. Mountford not being a lodger must be a tenant.

There can be no tenancy unless the occupier enjoys exclusive possession; but an occupier who enjoys exclusive possession is not necessarily a tenant. He may be owner in fee simple, a trespasser, a mortgagee in possession, an object of charity or a service occupier. To constitute a tenancy the occupier must be granted exclusive possession for a fixed or periodic term certain in consideration of a premium or periodical payments. The grant may be express, or may be inferred where the owner accepts weekly or other periodical payments from the occupier.

In the present case, the agreement dated 7 March 1983 professed an intention by both parties to create a licence and their belief that they had in fact created a licence. It was submitted on behalf of Mr. Street that the court cannot in these circumstances decide that the agreement created a tenancy without interfering with the freedom of contract enjoyed by both parties. My Lords, Mr. Street enjoyed freedom to offer Mrs. Mountford the right to occupy the rooms comprised in the agreement on such lawful terms as Mr. Street pleased. Mrs. Mountford enjoyed freedom to negotiate with Mr. Street to obtain different terms. Both parties enjoyed freedom to contract or not to contract and both parties exercised that freedom by contracting on the terms set forth in the written agreement and on no other terms. But the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. 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.

[5] (1874) LR 9 QB 180, 191–2.

It was also submitted that in deciding whether the agreement created a tenancy or a licence, the court should ignore the Rent Acts. If Mr. Street has succeeded, where owners have failed these past 70 years, in driving a coach and horses through the Rent Acts, he must be left to enjoy the benefit of his ingenuity unless and until Parliament intervenes. I accept that the Rent Acts are irrelevant to the problem of determining the legal effect of the rights granted by the agreement. Like the professed intention of the parties, the Rent Acts cannot alter the effect of the agreement.

At 826–7

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. Sometimes it may be difficult to discover whether, on the true construction of an agreement, exclusive possession is conferred. Sometimes it may appear from the surrounding circumstances that there was no intention to create legal relationships. Sometimes it may appear from the surrounding circumstances that the right to exclusive possession is referable to a legal relationship other than a tenancy. Legal relationships to which the grant of exclusive possession might be referable and which would or might negative the grant of an estate or interest in the land include occupancy under a contract for the sale of the land, occupancy pursuant to a contract of employment or occupancy referable to the holding of an office. But where as in the present case the only circumstances are that residential accommodation is offered and accepted with exclusive possession for a term at a rent, the result is a tenancy.

[...] Henceforth the courts which deal with these problems will, save in exceptional circumstances, only be concerned to inquire whether as a result of an agreement relating to residential accommodation the occupier is a lodger or a tenant. In the present case I am satisfied that Mrs. Mountford is a tenant, that the appeal should be allowed, that the order of the Court of Appeal should be set aside and that [Mr Street] should be ordered to pay the costs of [Mrs Mountford] here and below.

In *Street v Mountford*, Lord Templeman thus set out a seemingly simple test for the existence of a lease: B can only have a lease if he or she has exclusive possession of land for a term (i.e. for a limited period). In the extract above, Lord Templeman does refer to the payment of rent: nothing turned on that in *Street* itself and, as we will see in section 1.1.2 below, it is now accepted that B can have a lease even if no rent is paid. We will examine the content of a lease and Lord Templeman's test in more detail in section 2 below.

Street also raises the important question of whether and, if so, how the courts' approach to defining a lease has been affected by the fact that various forms of statutory protection are, or have been, available *only* in cases in which B has a lease. This question may raise the tension between *doctrine* and *utility* that we considered in Chapter 1, section 5.2: if B, according to the doctrinal rules does (or does not) have a lease, should a court bend those rules in order to deny (or give) B the statutory protection that depends on B's having a lease? In the extract above, Lord Templeman takes the view that such statutory protection is "irrelevant to the problem of determining the legal effect of the rights granted by the agreement"; but, as we will see, there do seem to be decisions, even involving Lord Templeman himself, in which the judges' reasoning has been influenced by a desire to make statutory protection available to particular occupiers.[6] Indeed, as we will see in section 2.1 below, it has even been argued

[6] One example, which we will discuss in section 2.4 below, is the House of Lords' decision in *AG Securities v Vaughan, Antioniades v Villiers* [1990] 1 AC 417.

that the decision in *Street* itself can only be justified by the practical need to give statutory protection to Mrs Mountford.[7]

For present purposes, however, the key lesson from *Street* is a simple one: like Mrs Mountford, B may claim that he or she has a lease in order to show that A is under extra, statutory duties to B. As we will see in Chapter 23, the particular statutory duties imposed by the Rent Act 1977 are now of marginal relevance. Nowadays, a private landlord, such as Mr Street, has very little to fear from a lease: he can grant a party, such as Mrs Mountford, an 'assured shorthold tenancy'—that is, a form of lease that gives rise to no fair rent duties and places no substantial limits on Mr Street's ability to remove the tenant at the end of the agreed period.

Nonetheless, even where private landlords are concerned, there are still some statutory duties that apply if and only if B has a lease. For example, as we will see in Chapter 23, s 11 of the Landlord and Tenant Act 1985 can impose a duty on a private landlord (A) to keep in repair the structure and exterior of a dwelling house occupied by B. This particular statutory duty (which cannot be varied by the express terms of a lease) provides the context for another important House of Lords decision, *Bruton v London and Quadrant Housing Trust*,[8] which we will consider in detail in Chapter 23, section 3, as well as in section 2.6 of the present chapter. It is important to note here that, in *Bruton*, the House of Lords held that Mr Bruton had a lease, at least for the purposes of the Landlord and Tenant Act 1985, even though his agreement with A did not give him a property right. The idea that B can have a lease even if he has no property right is a controversial and important one: we will examine it further in Chapter 23, section 3—but we will not consider it in this chapter, because our focus here is on the role of a lease *as a property right in land*.

Statutory protection continues to be important in residential cases not involving private landlords. As we will see in Chapter 23, if B can show that he or she has a lease from a local authority, the Housing Act 1985 will apply to impose extra duties on that local authority. For example, the statute limits the grounds on which B can be removed and thus confers on a tenant (but not a licensee) a form of security of tenure. And if B has a lease of business premises, Pt II of the Landlord and Tenant Act 1954 may impose a statutory duty on A to renew B's lease when it reaches the end of the initially agreed period. In contrast, if B has only a licence, A is under no such statutory duty.

1.1.2 The effect of a lease on X

We have seen that the distinction between a lease and a licence can be crucial in deciding whether additional statutory duties will be imposed on A. There is a further, more fundamental distinction between a lease and a licence: a lease, unlike a licence, can count as a property right in land.

As we saw in Chapters 4 and 5, the key feature of a property right is that it is capable of binding parties other than A. In particular, if B has a *legal* estate or interest (such as a legal lease), then the rest of the world is under a prima facie duty not to interfere with B's use of the land. The consequences of such a duty can be seen in the following extract.

[7] See the extract from Hill, 'Intention and the Creation of Proprietary Rights: Are Leases Different?' [1996] LS 200, set out in section 2.1 below.

[8] [2000] 1 AC 406.

Hunter and ors v Canary Wharf Ltd
[1997] AC 665, HL

Facts: Patricia Hunter lived on the Isle of Dogs, in East London. Along with hundreds of other claimants living in that area, she claimed that her television reception had been affected by the construction, on land belonging to Canary Wharf Ltd, of the Canary Wharf Tower.[9] It was claimed that the interference began in 1989, during the construction of the tower, and continued until a relay transmitter was put up in 1991. It seems that the interference was particularly bad in Poplar, to the north of Canary Wharf, as the tower lay between that area and the BBC's Crystal Palace transmitter. It was claimed that, by causing this interference, Canary Wharf Ltd had committed the tort of nuisance. In a separate action, brought against the London Docklands Development Corporation (LDDC), Ms Hunter and the other claimants sought compensation for damage caused by the dust produced by the LDDC in building the Limehouse Link Road. That separate action alleged that LDDC had committed the torts of negligence and nuisance.

The claims raised a number of difficult legal issues, which were tried as preliminary issues of law. By the time that the case reached the House of Lords, two issues remained. In the words of Lord Goff of Chieveley, they were: '*(1) whether interference with television reception is capable of constituting an actionable nuisance, and (2) whether it is necessary to have an interest in property to claim in private nuisance and, if so, what interest in property will satisfy this requirement.*'[10] The House of Lords held that: (1) interference with television reception, at least when caused by the construction of a building on the defendant's land, cannot amount to a nuisance;[11] and (2) to sue in nuisance, a claimant must have a property right in land, and that property right must give the claimant exclusive possession of land. The claims made by Ms Hunter and other residents of the Isle of Dogs against Canary Wharf Ltd therefore failed. The claims made against LDDC succeeded, but only in relation to those claimants with a right to exclusive possession of land. As we will see in the extracts below, this meant that if Ms Hunter simply had a *licence* of the land that she occupied as her home, she could not bring a nuisance claim in respect of damage caused by the dust; whereas, if she had a *lease* of that land, she could do so.

Lord Goff

At 687

The basic position is, in my opinion, most clearly expressed in Professor Newark's classic article on *The Boundaries of Nuisance* (1949) 65 L.Q.R. 480 when he stated, at p. 482, that the essence of nuisance was that 'it was a tort to land. Or to be more accurate it was a tort directed against the plaintiff's enjoyment of rights over land [. . .]'

[9] Also known by its address, 'One Canada Square', the tower rises 235 m from ground level and remains the tallest completed building in the UK. Taller buildings are, however, under construction: for example, the Shard London Bridge is due to reach a height of 310 m in 2012.

[10] [1997] AC 665, 684.

[11] One issue considered by the House of Lords was whether it is possible for a party to have an easement to receive television signals, and, if so, whether such an easement could be acquired over the passage of time through the doctrine of prescription. This point is examined in Chapter 25, section 3.3.

[Lord Goff then examined the relevant authorities, finding that they supported Newark's view.][12]

At 692–4

It follows that, on the authorities as they stand, an action in private nuisance will only lie at the suit of a person who has a right to the land affected. Ordinarily, such a person can only sue if he has the right to exclusive possession of the land, such as a freeholder or tenant in possession, or even a licensee with exclusive possession. Exceptionally however, as *Foster v. Warblington Urban District Council* [13] shows, this category may include a person in actual possession who has no right to be there; and in any event a reversioner [e.g. a landlord] can sue in so far his reversionary interest is affected. But a mere licensee on the land has no right to sue.

[. . .] [A]ny such departure from the established law on this subject, such as that adopted by the Court of Appeal in the present case, faces the problem of defining the category of persons who would have the right to sue. The Court of Appeal adopted the not easily identifiable category of those who have a 'substantial link' with the land, regarding a person who occupied the premises 'as a home' as having a sufficient link for this purpose. But who is to be included in this category? It was plainly intended to include husbands and wives, or partners, and their children, and even other relatives living with them. But is the category also to include the lodger upstairs, or the au pair girl or resident nurse caring for an invalid who makes her home in the house while she works there? If the latter, it seems strange that the category should not extend to include places where people work as well as places where they live, where nuisances such as noise can be just as unpleasant or distracting. In any event, the extension of the tort in this way would transform it from a tort to land into a tort to the person, in which damages could be recovered in respect of something less serious than personal injury and the criteria for liability were founded not upon negligence but upon striking a balance between the interests of neighbours in the use of their land. This is, in my opinion, not an acceptable way in which to develop the law.

Lord Hoffmann

At 702–3

In the dust action it is not disputed that, in principle, activities which cause dust to be deposited on the plaintiff's property can constitute an actionable nuisance. The question raised by the preliminary issue is: who can sue? In order to answer this question, it is necessary to decide what exactly he is suing for. Since these questions are fundamental to the scope of the tort of nuisance, I shall deal with them first.

Up to about 20 years ago, no one would have had the slightest doubt about who could sue. Nuisance is a tort against land, including interests in land such as easements and profits. A plaintiff must therefore have an interest in the land affected by the nuisance . . . An example of an action for nuisance by a de facto possessor is *Foster v. Warblington Urban District Council*[14] in which the plaintiff sued the council for discharging sewage so as to pollute his oyster

[12] An exception was *Khorasandijan v Bush* [1993] QB 727, in which the Court of Appeal found that the defendant had committed the tort of nuisance by pestering the claimant with unwelcome telephone calls. In *Hunter v Canary Wharf*, the House of Lords rejected the nuisance analysis, noting that the need to prevent such behaviour can be met through use of the Protection from Harassment Act 1997, or by holding that the defendant commits a tort when intentionally causing distress: see *per* Lord Hoffmann at 707.

[13] [1906] 1 KB 648.

[14] [1906] 1 KB 648.

ponds on the foreshore. He had some difficulty in proving any title to the soil but Vaughan Williams L.J. said, at pp. 659–660:

> 'But, even if title could not be proved, in my judgment there has been such an occupation of these beds for such a length of time—not that the length of time is really material for this purpose—as would entitle the plaintiff as against the defendants, who have no interest in the foreshore, to sustain this action for the injury which is alleged has been done by the sewage to his oysters so kept in those beds.'

Thus even a possession which is wrongful against the true owner can found an action for trespass or nuisance against someone else: *Asher v. Whitlock*.[15] In each case, however, the plaintiff (or joint plaintiffs) must be enjoying or asserting exclusive possession of the land: see *per* Blackburn J. in *Allan v. Liverpool Overseers*.[16] Exclusive possession distinguishes an occupier who may in due course acquire title under the Limitation Act 1980 from a mere trespasser. It distinguishes a tenant holding a leasehold estate from a mere licensee. Exclusive possession de jure or de facto, now or in the future, is the bedrock of English land law.

The decision of the House of Lords in *Hunter v Canary Wharf* reveals a point that we examined in Chapter 4, section 1: the key feature of a legal property right is that it imposes a duty on the rest of the world. So, if B has a legal lease of A's land,[17] the rest of the world is under a prima facie duty to B not to interfere with B's use of that land. As a result, B, if he or she has a legal lease, can, for example, bring a nuisance claim against a third party whose activities interfere with B's reasonable enjoyment of the land. In contrast, if B has only a licence to use A's land (even a contractual licence), then, as we saw in Chapter 21, B does *not* have a right that he or she can assert against a third party later acquiring a right in the land. And, as shown by *Hunter v Canary Wharf*, if B has only a licence, then the rest of the world is not under a duty to B.

One point in Lord Goff's judgment may seem puzzling: his Lordship stated that a 'licensee with exclusive possession' may be able to sue in nuisance. As we saw in section 1.1.1 above, *Street v Mountford* establishes the presence of exclusive possession as the key test for the presence of a lease. So it may seem odd that a party can both be a licensee (rather than a tenant) *and* have exclusive possession. But this problem disappears when we distinguish between two types of exclusive possession. The first type is the form of exclusive possession that matters when considering the test for a lease: it is a right to exclusive possession for a limited period arising as a result of B's agreement with A. If B is a licensee, then he or she will not have such a right. There is, however, also a second form of exclusive possession. Consider a case such as *National Provincial Bank v Ainsworth*.[18] A has a freehold of a home and lives there with his partner, B. A then moves out, but B remains in occupation. At each stage, B has a licence: certainly, there is no agreement between A and B giving B a right to exclusive possession of the land. But when A moves out, B occupies alone and so assumes sole *factual*

[15] (1865) LR 1 QB 1. [16] (1874) LR 9 QB 180.

[17] An interesting question arises where B has an *equitable* lease rather than a legal lease. As noted in Chapter 5, section 7, it seems that equitable interests, whilst they can bind a third party who later acquires a right in the affected land, do *not* generally impose a duty on the rest of the world (although note the discussion there of the Court of Appeal's decision in *Shell UK (Ltd) v Total UK (Ltd)* [2010] 3 All ER 793). If so, this suggests that a party with an equitable lease *cannot* bring a nuisance claim. In *Hunter v Canary Wharf*, however, Lord Hoffmann does make the contrary (but obiter) suggestion (at 708) that a party with an equitable interest under a trust of a family home can bring a nuisance claim.

[18] [1965] AC 1175. See Chapter 1, section 5, and Chapter 4, section 5.4.

control of the land. At that point, B acquires the second type of exclusive possession: a right to exclusive possession arising as a result of B's conduct in having sole physical control of land. As we saw in Chapter 21, sections 2.2 and 3.2, B's factual control of the land then means that third parties come under a duty to B. That duty arises because, as we saw in Chapter 8, section 3, the *fact* of B's exclusive physical control gives B a legal estate in land: a freehold.[19]

In such a case, B's freehold is the same type of right as held by the claimant in *Foster v Warblington Urban District Council*[20] (referred to by Lords Goff and Hoffmann in the extract above). It is not given to B by A, but is instead acquired independently (see Chapter 4, section 4, for discussion of the concept of independent acquisition).[21] This means that, once A leaves and B takes sole physical control of the land, B not only has a licence (arising as a result of A's permission for B to remain on the land), but also a legal freehold (arising as a result of B's physical control of the land). It is in such a case that B, in Lord Goff's words, is a 'licensee with exclusive possession'. B's ability to sue in nuisance thus comes from his or her legal freehold, not from his or her licence.

1.1.3 The effect of a lease on C

When considering B's position as against C (a party who later acquires a right in relation to A's land), it is again vital to bear in mind the key difference between a lease and a licence—that is, that the licence, unlike the lease, can count as a property right in land. So, as we saw in Chapter 5, section 7, an equitable lease, as well as a legal lease, is capable of binding a third party, such as C, who later acquires a right from A.

1.2 THE PRACTICAL IMPORTANCE AND DIVERSITY OF LEASES

Leases are tremendously important in a number of different practical contexts. There is, of course, the residential sector: for many residents, a lease is the property right they hold in the land they call their home. When considering the residential sector, a number of subdivisions can be made. For example, long residential leases are often isolated as a specific category: certainly, there is a clear practical distinction between, on the one hand, a party with a 999-year lease of a flat who acquired that lease by paying a large up-front price and then pays a very small rent, and, on the other, a party with a weekly, monthly, or yearly tenancy of a flat, who pays a regular market rent. Around 30 per cent of homes in the United Kingdom are leased in this second way.[22] Those shorter leases can be divided into three groups, roughly equal in terms of numbers, according to the nature of the landlord: private, local authority, or social (e.g. housing association). As we will see in Chapter 23, the statutory rules applying to private landlords (such as Mr Street) are very different from those applying to public landlords, such as local authorities or housing associations.

[19] We noted in Chapter 8, section 3, that there is some academic doubt as to whether B's property right is legal or equitable, but, as we saw there, the cases strongly favour the view that B has a legal freehold.

[20] [1906] 1 KB 648.

[21] Because B's freehold is independently acquired, it arises *after* A's legal estate and so A (or C, a party later acquiring a right from A) can, of course, remove B from the land (see Chapter 12, section 2, for the importance of timing when considering conflicting property rights). Of course, if B has a defence to A or C's prior property right, then B will be protected (such a defence could be based, for example, on B's long possession of the land: see Chapter 8).

[22] Wilcox and Pawson (eds) *UK Housing Review 2010/11*, Table 17d.

But it would be a mistake to focus solely on the residential sector. Leases are also very important in other areas: for example, many businesses hold leases of their premises; and many farmers hold leases of their agricultural land. Again, as we will see in Chapter 23, statute has intervened in those areas to give some extra protection to business and agricultural tenants.

The following extract emphasizes the importance and diversity of leases. As demonstrated by the extract, a number of different terms can be used to describe a party with a lease: 'tenant', 'lessee', etc.; the party granting a lease can be referred to as a 'landlord', or 'lessor'; and the property right retained by the landlord or lessor is referred to as a 'reversion', on the basis that, at the end of the lease, a right to exclusive possession of the land goes back to the landlord.

Bright, *Landlord and Tenant Law in Context* (2007, pp 5–6)

The variety of letting arrangements

There is a wide variety within the landlord and tenant relationship. A lease of a house is likely to be very different from a lease of a department store. A tenant who rents a house in order to let out individual rooms to others has quite a different perspective from a tenant renting the house to provide a home for his family. Some tenancies may be intended to last for only a short period, such as a let of holiday accommodation, and some may be for extremely long periods, such as a 999 year lease. Some may be granted in return for a substantial capital payment (known as a premium) and only a nominal rent, others for no premium but for a market rent. Some landlords are motivated primarily by financial considerations, others by social concerns.

It is important to have an overview of how leases are used in practice as different types of lease raise very different legal issues. The student renting a room for the year would, for example, rightly expect the landlord to be responsible for solving the problem of a leaking roof. In contrast, the commercial tenant with a 125 year lease of an entire building would usually be responsible for the maintenance and repair of the property itself. For the landlord, also, the length of the lease will affect its expectations; with a short lease the freehold (or reversion) has a high capital value and so the landlord may take an active role in managing the property in order to preserve this capital value, but with very long term leases the capital value of the reversion will be minimal, and so the landlord may show less interest in managing the property.

At the risk of over-generalisation, there are three broad categories of lease that can be identified based on the length of the lease. The expectations of landlords and tenants in terms of what the relationship provides will differ according to which category the lease comes within. First, there are tenancies for short term occupation which usually involve the payment of a market rent and will be either periodic (weekly, monthly or annual) or for a fixed term up to five years (commercial) or seven years (residential). The tenant pays for occupation and exclusive possession for the term, while the landlord's reversion retains all, or nearly all, of the capital value of the property. Second, medium term leases are generally used to provide occupation for the tenant for up to, say, 25 years for commercial leases and 21 years for residential leases. Again, these leases will usually be at a market rent, with provision for the rent to be reviewed at regular intervals. A premium (a capital sum) may be paid for the grant of the lease, but this would be unusual. The reversion again continues to have a substantial value. In the last category, long leases, there is a greater divergence between the commercial and residential models. The longer commercial lease, typically, for a term of 125 years, may

involve the payment of a 'ground rent', that is, a market rent that reflects the value of the land only (the site value). In this arrangement, the lessee will often construct the buildings on the site, and the cost of doing so will be written off over the life of the lease, with the expectation that the building's useful life will draw to an end as the lease does. Notwithstanding the length of the lease, the reversion will carry a significant capital value because of the substantial and reviewable ground rent. In contrast, the long residential lease is typically granted for terms of 99, 125 or 999 years and a substantial premium will be paid to purchase this interest, similar to the amount that would be paid to buy a freehold interest. Here, it is the lease that will have a significant capital value, rather than the reversion. Indeed, the leaseholder will usually perceive of himself as the 'owner' of the property, as a purchaser rather than a renter or tenant. The lease is primarily being used in this context because it enables covenants, such as obligations to repair and financial commitments to contribute towards the cost of shared facilities, to be enforced against successive owners (English common law does not permit positive covenants to be attached to freehold land).

The rights and responsibilities of the landlord and tenant will be most affected by the type of letting, whether it is short term rented housing, a home purchased on a long lease, commercial property or agricultural land. Within these main divisions, there will be further differentiation according to the status of the landlord.

This passage also sets out some of the reasons why a party may acquire a lease, rather than a freehold. In Chapter 27, section 1, we will examine why a party buying a flat will almost always acquire a long lease of that flat rather than a freehold: as explained by Bright, the key point is that, if a lease is used, the 'owner' of each flat can take the benefit and burden of *positive* duties (such as duties to keep the flat in good repair).[23] In Chapter 27, we will also examine the concept of a *commonhold*—that is, a mechanism introduced with the aim of allowing such duties to bind flat 'owners' without the necessity for each such owner to have a lease of his or her flat.

In other cases, the key attraction of a lease is often that it involves a shorter commitment: for example, if moving to a town to study there for three years, B has no need to incur the extra expense necessary in acquiring a freehold. Similarly, if B is starting up a business and is unsure of its long-term prospects, a freehold is an unattractive option. In some cases, however, B may wish to establish a long-term home, but be unable to find the finance needed to acquire a freehold. In such cases, financial necessity may lead B to acquire a shorter residential lease. There is a risk in such cases that B's need for a home, and relatively weak bargaining position, may give A an opportunity to exploit B. As we saw in section 1.1.1 above, this has led to statutory intervention in B's favour: we will consider that intervention further in Chapter 23.

1.3 THE LANDLORD–TENANT RELATIONSHIP

As is made clear by the decision of the House of Lords in *Street v Mountford*, an agreement can only count as a lease if it gives B a right to exclusive possession of land for a limited period. As we saw in sections 1.1.2 and 1.1.3 above, once A has given B that core right, third parties can then also come under a duty, during that period, not to interfere with B's right

[23] Note that, as we will see in Chapter 26, the Law Commission has recently proposed that the law should be changed to allow for the possibility of attaching some positive covenants to freehold land.

to exclusive possession. In practice, of course, a standard lease agreement will generally include many other terms, imposing additional duties on A (e.g. duties to undertake major repairs), as well as duties on B (e.g. a duty to pay rent). And, in certain circumstances, those additional duties can also affect third parties: for example, it may be that, if A owns other, neighbouring land, he or she will make a binding promise to B not to use that other land in a particular way (e.g. not to build on that land, not to run a business on that land that will compete with the business B plans to operate from the leased premises, etc.). In such a case, A's promise can give B an equitable interest in A's other land: a restrictive covenant (see Chapter 26). Like any equitable interest, that restrictive covenant will be capable of binding C, a third party who later acquires a right in A's other land.

There is a further, important way in which third parties can be affected by the additional duties assumed by A or B in a lease agreement: if the contractual promise giving rise to the duty counts as a 'leasehold covenant', it can bind other parties who later step into the shoes of A or B, and thereby also enter a landlord–tenant relationship. For example, it may be possible for B to assign (i.e. to transfer) his or her lease to another party (B2). In such a case, B's contractual promise to pay A rent will bind B2. If A then transfers his or her reversion (i.e. A's legal estate) to A2, then B2 will be under a duty to pay rent to A2; and, due to the promise to repair made by A in the initial lease, A2 will be under a duty to B2 to do such repairs. In this way, later parties who step into the landlord–tenant relationship will also take the benefit and burden of at least some of the additional duties originally agreed to by A and B. A key question, of course, is *which* of those additional duties should be seen as part of the landlord–tenant relationship, and thus capable of benefiting and binding later parties. We will consider that question, and others, in Chapter 24, when looking in detail at leasehold covenants.[24]

2 THE *CONTENT* QUESTION

In this chapter, our focus is on the lease as a property right. In Chapter 1, section 3, we saw that there are three key questions when considering property rights. The first of these, the *content* question, focuses on the nature of B's right to use land. Section 1 of the Law of Property Act 1925 (LPA 1925) makes clear that a lease, referred to there as a 'term of years absolute', can count as a legal estate in land. But how do we tell if an agreement made between A and B, under which B has a right to occupy A's land, counts as a lease? The basic test, as we saw in section 1.1.1 above, was set out by Lord Templeman in *Street v Mountford*:[25] a lease consists of a right to exclusive possession of land for a limited period. There are, however, a number of specific points to consider when applying that general test.

2.1 WHERE A DOES NOT INTEND TO GRANT B LEASE

The first question to ask is whether B's right can count as a lease *even if* A, when making the agreement with B, makes it clear that he or she does not intend to grant B a lease. As we saw in section 1.1.1 above, that question was answered by the House of Lords in *Street v*

[24] In that chapter, the party here referred to as 'B2' (i.e. the party acquiring B's lease) is referred to as 'TA' (i.e. tenant's assignee). Similarly, 'A2' (i.e. the party acquiring A's estate) is referred to as 'LA' (i.e. landlord's assignee).

[25] [1985] AC 809.

Mountford: A's lack of intention to grant B a lease does *not* necessarily prevent B's right from counting as a lease.

As evidenced by the following extract, this result came as a surprise to Mr Street.

Street, 'Coach and Horses Trip Cancelled? Rent Act Avoidance after *Street v Mountford*' [1985] Conv 328, 328–9

The Rent Acts are grossly unfair to landlords. A stranger obtains a weekly tenancy of a house: half a century may pass before the owner can have his property again. In the meantime he can only charge a so-called 'fair' rent which in many cases does little more than cover the cost of keeping the property in repair. As a result of all this the capital value of the property drops to between one-third and one-half of its vacant possession value. Little wonder that over the years landlords and their legal advisers have sought various ways of avoiding the potentially horrendous consequences of being caught by the legislation [. . .]

In *Street v. Mountford* the plaintiff was—in the eyes of some—a double rogue, a landlord and a lawyer. He had studied the Court of Appeal decisions of the late 1970s which appeared to confirm a shift of emphasis from status to contract. The traditional view had been that exclusive possession meant a tenancy had been created (subject to one or two well-recognised exceptions), but the approach in the more recent cases suggested the ultimate test was one of intention. Lord Denning's judgments in particular seemed to show this development very clearly. By 1977 he felt able to say:

> 'What *is* the test to see whether the occupier of one room in a house is a tenant or a licensee? It does not depend on whether he or she has exclusive possession or not [. . .] [The test is] Was it intended that the occupier should have a stake in the room or did he have only permission for himself personally to *occupy* the room, whether under a contract or not, in which case he is a licensee?'

In 1979 the writer decided to take the Court of Appeal at its word and drafted a document, using the simplest possible terms, expressed to be a personal non-assignable licence. A declaration was appended to underline the fact that it was not the intention of the parties to create a tenancy, which would be protected by the Rent Acts. No attempt was made to avoid granting the licensee exclusive possession, as this was not seen as the dominant factor. The document was to mean what it said, the licensee was to have an exclusive right to occupy a room, but this would be revocable on notice and would be outside the scope of the statutory protection afforded to tenants. The writer employed the document from 1979 to 1983 with no problems arising [. . .]

[When the case came to the Court of Appeal] Slade LJ stated:

> 'Having regard to the form of the document and the declaration at the foot of it, I do not see how [Mr Street] could have made much clearer his intention that what was being offered to [Mrs Mountford] was a mere licence to occupy and not an interest in the premises as tenant. And I do not see how [Mrs Mountford] could have made clearer her acceptance of that offer than by her two signatures.'

The House of Lords unanimously reversed this decision [. . .] Lord Templeman's judgment, with which Lords Scarman, Keith, Bridge and Brightman concurred, turned the clock back more than a quarter of a century, and in doing so expressly disapproved of a number of decisions in recent years. The ancient wisdom is reinstated: save in exceptional 'special category' cases (e.g. master and service occupier, vendor and purchaser) the grant of exclusive possession for a fixed or periodic term in consideration of periodic payments will create a tenancy.

It is, of course, rare to see an article about a reported decision written by one of the very parties to that decision. There is, of course, a question about the writer's objectivity—but Roger Street is certainly correct in pointing out that, prior to the decision of the House of Lords in *Street*, the Court of Appeal had developed a rule that, if A did not intend to grant B a lease, no lease would arise. The question is whether the House of Lords had good reason to depart from that rule.

As noted in Chapter 1, section 5.2, we can approach this question from the perspective of *doctrine*, or from the perspective of *utility*. The following extract argues that the House of Lords' approach in *Street v Mountford* can be justified only from the latter perspective.

Hill, 'Intention and the Creation of Proprietary Rights: Are Leases Different?'
[1996] LS 200

To what extent can the parties effectively deny proprietary effect to an interest which, in terms of its characteristics and in terms of the rights and obligations of the parties *inter se*, has the appearances of an interest to which the law grants proprietary consequences? To what extent can [A] grant to [B] an interest which has the substance of a proprietary interest but determine that the agreement is purely personal to the parties?

There is a group of authorities which suggest that an interest which has the substantive characteristics of a proprietary interest will, nevertheless, not be binding on a purchaser of the property to which the interest relates if there is a sufficient indication that the parties to the transaction which establishes the interest intended to create only personal rights. Perhaps the clearest authority is *IDC Group v Clark*, which concerns the boundary between easements and contractual licences. In this case [A] and [B] were the owners of adjoining buildings. By means of a formal document [A] granted [B] the right to make an opening in a party wall so as to create a fire escape from B's property. Subsequently C acquired a lease of A's property and B2 acquired the other building from B. When the fire escape was blocked off, B2 sought to enforce against C the right granted to B by A. B2 attempted to rely on the fact that the right being claimed was in the nature of an easement which was binding on A's successors in title. C, however, argued that because in the original transaction between A and B the parties had used the words 'grant licence' the right conferred on B was in the nature of a personal licence, the burden of which did not pass.

Although the right granted by A was capable of being the subject-matter of an easement, the Court of Appeal thought that, in view of the fact that 'the simple expression "grant licence" is not one which would have been used by a conveyancer of any experience as the means of creating an easement', the grantor 'intended to grant a licence properly so called and no more.'[26] the court held that the deed created only a personal licence, the burden of which was not binding on C [. . .]

[Hill then goes on to examine a number of other cases in which A's intention, expressed in an agreement with B, is effective to ensure that B's right, whilst matching the content of a particular legal or equitable property right, takes effect only as a personal right against A.]

The pattern of authorities supports the view that as a general rule the parties to an agreement may render personal rights which, in the normal course of events, would have proprietary consequences. An exception exists, however, with regard to leases. Can the exception be explained or justified?

[Hill then notes that, prior to *Street v Mountford*, the Court of Appeal had developed the rule that A's intention not to grant a lease could prevent B from acquiring a property right, even if the agreement between A and B gave B a right to exclusive possession for a term.]

[26] *Per* Nourse LJ at 183–4.

> [. . .] This is not to deny the validity of the courts' intervention in *Street v Mountford* or the desirability of the result achieved. The point is rather that the true rationale underlying the decision is to some extent obscured by Lord Templeman's assertion that 'the Rent Acts must not be allowed to alter or influence the construction of an agreement.'[27]
>
> The context in which the distinction between leases and licences has been most relevant is the private sector of the housing market. In *Street v Mountford* the statement in the agreement between the parties that the occupier was a licensee rather than a tenant was not motivated by any desire to ensure that the occupier's interest would not be binding on any subsequent purchaser of the land; it was an attempt to avoid the statutory controls contained in the Rent Acts. In a market in which there is a severe shortage of residential accommodation for rent, the prospective occupier is in a very weak bargaining position vis-à-vis the owner. It is often the case that the prospective occupiers of residential property are desperate to find somewhere to live and have no knowledge of the scope of the protective legislation [. . .]
>
> [T]he most honest approach to the lease/licence distinction would be for the courts to recognise more explicitly the basis of their intervention. Unless external factors suggest that the parties' expressed wished should be overridden, there is no reason why an agreement which confers exclusive possession for a term at a rent should not take effect as a licence if that is what the parties intend to create. Where a transaction is freely entered into on the basis of commercial considerations there is no justification for the law's disregard of the parties' intentions.
>
> However, where there is inequality between the parties—as is the case in the private sector of the housing market—the law is entitled to look behind the form of the agreement [. . .] It is widely recognised that '[f]reedom of contract [. . .] is a particularly inappropriate model when dealing with the consumer as a contracting party.' Accordingly, it seems reasonable to look at the lease/licence distinction from the consumer law perspective rather than purely as an aspect of the law relating to real property.

Hill makes the very important point that, as shown by the decision of the Court of Appeal in *IDC Group v Clark*,[28] there are other areas of land law in which A *is* permitted to give B a personal right that matches the content of a recognized property right (such as an easement). His argument is that the same general, doctrinal approach had been applied to leases by the Court of Appeal, but that such an approach was inappropriate for dealing with the special problems caused by residential occupation. So, in *Street v Mountford*, the House of Lords created a special exception to that general approach, departing from doctrine to uphold a policy of protecting vulnerable residential occupiers.

The next extract takes a different approach. It argues that there are sound doctrinal reasons for treating leases as different from other forms of property right, such as easements. On this view, the decision in *Street v Mountford* can be justified from a doctrinal perspective, as well as from a utility perspective.

McFarlane, *The Structure of Property Law* (2008, pp 661–2)

> If the rights given by A to B entitle B to exclusive control of the land for a limited period then, providing he satisfies the acquisition question, B will have a Lease. This is the case *even if A did not intend to give B a Lease*. A's intention is of course crucial when we ask the first

[27] [1985] AC 809, 825.

[28] (1992) 65 P & CR 179.

question: what rights does the agreement give to B? However, A's intention is irrelevant when we ask the second question: do the rights given to B amount to a Lease? There are two points here. First, it is for the land law system, not A, to define a Lease. That point is not specific to property law. For example, let's say A makes an oral promise to give B £100 in two weeks' time. A and B both call the promise "a contract" and intend it to be binding. However, it does *not* give B a contractual right against A: no consideration has been provided by B. As the law's test for a contract has not been satisfied, A and B's intention to have a contract is irrelevant.

The second point that it is simply not possible for A *both* to (i) give B a right to exclusive control of a thing; and (ii) to deny that B has a property right. This point is specific to property law. It shows that (i) *if* A gives B a right to exclusive control of a thing; *then* (ii) A's intention to give B only a personal right is irrelevant. Of course, this does not mean A is trapped into giving B a Lease. If A is keen to ensure that B does not acquire a Lease, A simply needs to ensure that the rights he gives B under agreement do not amount to a right to exclusive control.

We can draw an analogy with cooking. A can choose his own ingredients when cooking: his intention is therefore crucial to what he produces. But if A chooses to (i) mix together flour, eggs, sugar, butter and baking powder; and (ii) put the mixture in a tin and heat it in the oven; then (iii) whether he likes it or not, A makes a cake. It does not matter that A intended to make a casserole: he is judged by what he produces and he has produced a cake. If A wants to make a casserole, the solution is simple: he needs to choose the right ingredients.

[...] [The decision of the House of Lords in *Street v Mountford*] might seem to be an example of a court bending the rules to thwart A's unscrupulous attempt to avoid giving B the statutory protection available under the Rent Acts. However, the decision is perfectly correct as a matter of doctrine: it is conceptually impossible for A to give B a right to exclusive control for a limited period and then to claim that B has only a licence.

On the view taken in this extract, the decision of the House of Lords in *Street* returns to the traditional, doctrinal position that, if A's agreement with B gives B a right to exclusive possession, B can acquire a lease even if A does not intend to give B a property right. Indeed, on this view, it was the Court of Appeal, in cases prior to *Street*, which departed from doctrine in order to uphold a policy: a policy of *allowing* owners of land to escape the onerous statutory duties imposed by giving an occupier a lease.[29]

2.2 INTENTION TO CREATE LEGAL RELATIONS

To have a lease, B must show he or she has been given a *right* to exclusive possession. If A and B make an agreement allowing B to occupy A's land, but that agreement is not intended to be legally binding, then A has not given B such a right. This flows from the general rule of contract law: as *Treitel* has put it,[30] '*An agreement, though supported by consideration, is not binding as a contract if it was made without any intention of creating relations*'. For example, in *Booker v Palmer*,[31] Mr Palmer agreed with a friend that an evacuee could occupy a cottage owned by Mr Palmer. The Court of Appeal found that the evacuee did not have a lease: the

[29] Certainly, Lord Denning MR openly admitted that the Court of Appeal's approach was affected by the statutory regime: see *Cobb v Lane* [1952] 1 TLR 1037, 1041; *Marcroft Wagons v Smith* [1051] 2 KB 496. See also *Marchant v Charters* [1977] 1 WLR 1181, 1184. See also Chapter 21, section 3.3.2.

[30] *Treitel's Law of Contract* (12th edn, ed Peel, 2007), [4–001].

[31] [1942] 2 All ER 674, CA.

informal agreement, under which Mr Palmer received no rent, was not intended to create legal rights. Lord Greene MR stated:[32] '*There is one golden rule which is of very general application, namely, that the law does not impute intention to enter into legal relationships where the circumstances and the conduct of the parties negative any intention of the kind.*'

This requirement for a lease is entirely consistent with doctrine: it is simply a requirement for the creation of contractual rights. As has been noted in other contexts, however, there is scope for the courts to manipulate that requirement:[33] so, if a court wishes to hold, for a particular policy reason, that B does not have a lease, it may then be inclined to find, as a matter of fact, that the agreement between A and B was not intended to create legal relations. Certainly, in *Street v Mountford*, Lord Templeman makes a very flexible use of the concept when attempting to explain the results of past cases in which B was found to have no lease.[34]

It is worth noting here that, provided the parties do intend to create legal relations, a lease can exist even if B has no duty to pay rent to A. As was noted in section 1.2 above, a long lease may be granted for a premium (a substantial one-off payment); and there seems to be no reason why a lease, like any other form of property right, cannot be granted by A to B for free. It is true that there are points in *Street v Mountford* where Lord Templeman refers to a lease as involving 'the grant of exclusive possession for a term at a rent.'[35] In that case, however, there was no issue as to whether rent was a requirement of a lease. Further, s 205(1)(xxvii) of the LPA 1925, defines a 'term of years absolute' (the phrase used to refer to a lease in s 1 of that Act) as a '*term of years (taking effect in possession or in reversion whether or not at a rent)* . . .'. As a result, in *Ashburn Anstalt v Arnold*,[36] the Court of Appeal confirmed that B's right may count as a lease even if B is under no duty to pay rent.

2.3 A RIGHT TO EXCLUSIVE POSSESSION: GENERAL POSITION

Where A and B's agreement does create contractual rights, it is necessary to see if its terms give B a right to exclusive possession of the land: in the absence of such a right, B cannot have a lease. As we have seen, in *Street v Mountford*, Lord Templeman was confident that the exclusive possession test would be simple to apply in residential cases.

Street v Mountford
[1985] AC 809, HL

Lord Templeman

At 817–18

In the case of residential accommodation there is no difficulty in deciding whether the grant confers exclusive possession. 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.

[32] Ibid, p 676. [33] See Hepple, 'Intention to Create Legal Relations' (1970) 28 CLJ 122.
[34] For example, Bright, *Landlord and Tenant in Context* (2007, p 69) notes that: '*In* Street v Mountford *Lord Templeman explained the finding of no tenancy in* Marcroft Wagons [v Smith [1951] 2 KB 496, CA] *as being due to the fact that the parties did not intend to contract at all.*'
[35] See [1985] 1 AC 809, 816. [36] [1989] Ch 1.

As explained by Lord Templeman, a right to exclusive possession is synonymous with ownership for a limited period: at one point in *Street*, his Lordship states: '*The tenant possessing exclusive possession is able to exercise the rights of an owner of land, which is in the real sense his land albeit temporarily and subject to certain restrictions.*'[37]

As we noted in Chapter 4, section 3.2, this analysis supports the view of Harris[38] that the concept of ownership is vital to understanding the content of the two legal estates in land permitted by s 1 of the LPA 1925: the freehold and the lease. According to Harris, a key aspect of any ownership interest is that it gives its holder an *open-ended* set of use privileges and control powers in relation to a resource.

As the following extract shows, that analysis seems to be reflected in the test for a lease: if the agreement between A and B gives B only a limited set of rights, then B cannot have a lease.[39]

Westminster City Council v Clarke
[1992] 2 AC 288, HL

Facts: Westminster City Council owned the Cambridge Street Hostel, Cambridge Street, London. Mr Clarke occupied Room 133E. He was provided with that room under an agreement with the council. The agreement was headed 'Licence to occupy'. It stated that Mr Clarke was permitted '*to occupy in common with the council and any other persons to whom the same right is granted accommodation at the single persons hostel at 131–137, Cambridge Street, S.W.1 in the City of Westminster*'. The first clause of the agreement stated:

> This licence does not give you and is not intended to give you any of the rights or to impose upon you any of the obligations of a tenant nor does it give you the right of exclusive occupation of any particular accommodation or room which may be allotted to you or which you may be allowed to use nor does it create the relationship of landlord and tenant. The accommodation allotted to you may be changed from time to time without notice as the council directs and you may be required to share such accommodation with any other person as required by the council.

Following complaints by other residents of the hostel, the council sought to remove Mr Clarke. Mr Clarke argued that his agreement gave him a lease, that he therefore had a secure tenancy under Part IV of the Housing Act 1985, and that the council could therefore only remove him if one of the grounds permitted by the Housing Act applied. Mr Clarke's argument failed at first instance, but was accepted by the Court of Appeal. The council then appealed successfully to the House of Lords, who found that Mr Clarke did not have a lease.

Lord Templeman

At 296

The council own a terrace of houses 131–137, Cambridge Street. The premises are used by the council as a hostel. There are 31 single rooms each with a bed and limited cooking

[37] [1985] AC 809, 816. [38] Harris, *Property and Justice* (1996), pp 72–3. See Chapter 4, section 2.
[39] See too *Hunts Refuse Disposals Ltd v Norfolk Environmental Waste Services Ltd* [1997] 1 EGLR 16, CA.

facilities. There was originally a common room which has since been vandalised. The occupiers of the hostel are homeless single men, including men with personality disorders or physical disabilities, sometimes eccentric, sometimes frail, sometimes evicted from domestic accommodation or discharged from hospital or from prison. Experience has shown the possibility that the hostel may have to cope with an occupier who is suicidal or alcoholic or addicted to drugs. There is a warden supported by a resettlement team of social workers. The hope is that after a period of rehabilitation and supervision in the hostel, each occupier will be able to move on to permanent accommodation where he will be independent and look after himself. In the case of Mr. Clarke, the hostel was designed to be a halfway house for rehabilitation and treatment en route to an independent home [. . .]

At 300–2

The question is whether upon the true construction of the licence to occupy and in the circumstances in which Mr. Clarke was allowed to occupy room E, there was a grant by the council to Mr. Clarke of exclusive possession of room E.

From the point of view of the council the grant of exclusive possession would be inconsistent with the purposes for which the council provided the accommodation at Cambridge Street. It was in the interests of Mr. Clarke and each of the occupiers of the hostel that the council should retain possession of each room. If one room became uninhabitable another room could be shared between two occupiers. If one room became unsuitable for an occupier he could be moved elsewhere. If the occupier of one room became a nuisance he could be compelled to move to another room where his actions might be less troublesome to his neighbours. If the occupier of a room had exclusive possession he could prevent the council from entering the room save for the purpose of protecting the council's interests and not for the purpose of supervising and controlling the conduct of the occupier in his interests. If the occupier of a room had exclusive possession he could not be obliged to comply with the terms and the conditions of occupation. Mr. Clarke could not, for example, be obliged to comply with the directions of the warden or to exclude visitors or to comply with any of the other conditions of occupation which are designed to help Mr. Clarke and the other occupiers of the hostel and to enable the hostel to be conducted in an efficient and harmonious manner. The only remedy of the council for breaches of the conditions of occupation would be the lengthy and uncertain procedure required by the [Housing Act 1985] to be operated for the purpose of obtaining possession from a secure tenant. In the circumstances of the present case I consider that the council legitimately and effectively retained for themselves possession of room E and that Mr. Clarke was only a licensee with rights corresponding to the rights of a lodger. In reaching this conclusion I take into account the object of the council, namely the provision of accommodation for vulnerable homeless persons, the necessity for the council to retain possession of all the rooms in order to make and administer arrangements for the suitable accommodation of all the occupiers and the need for the council to retain possession of every room not only in the interests of the council as the owners of the terrace but also for the purpose of providing for the occupiers supervision and assistance. For many obvious reasons it was highly undesirable for the council to grant to any occupier of a room exclusive possession which obstructed the use by the council of all the rooms of the hostel in the interests of every occupier. By the terms of the licence to occupy Mr. Clarke was not entitled to any particular room, he could be required to share with any other person as required by the council and he was only entitled to "occupy accommodation in common with the council whose representative may enter the accommodation at any time." It is accepted that these provisions of the licence to occupy were inserted to enable the council to discharge its responsibilities to the vulnerable persons accommodated at the Cambridge Street terrace

and were not inserted for the purpose of enabling the council to avoid the creation of a secure tenancy. The conditions of occupancy support the view that Mr. Clarke was not in exclusive occupation of room E. He was expressly limited in his enjoyment of any accommodation provided for him. He was forbidden to entertain visitors without the approval of the council staff and was bound to comply with the council's warden or other staff in charge of the hostel. These limitations confirmed that the council retained possession of all the rooms of the hostel in order to supervise and control the activities of the occupiers, including Mr. Clarke. Although Mr. Clarke physically occupied room E he did not enjoy possession exclusively of the council.

This is a very special case which depends on the peculiar nature of the hostel maintained by the council, the use of the hostel by the council, the totality, immediacy, and objectives of the powers exercisable by the council and the restrictions imposed on Mr. Clarke. The decision in this case will not allow a landlord, private or public, to free himself from the Rent Acts or from the restrictions of a secure tenancy merely by adopting or adapting the language of the licence to occupy. The provisions of the licence to occupy and the circumstances in which that licence was granted and continued lead to the conclusion that Mr. Clarke has never enjoyed that exclusive possession which he claims. I would therefore allow the appeal and restore the order for possession made by the trial judge.

The decision in *Westminster City Council* provides an interesting contrast with that in *Street v Mountford*, not least because, in each case, Lord Templeman provides the only reasoned speech. Again, there is a question of whether the decision is best viewed from the perspective of doctrine or utility. From the latter point of view, there is no doubt that the different context of *Westminster City Council* may have influenced their Lordships: there certainly seems to be more sympathy for the objectives of the council than for those of Mr Street. But there is also an important doctrinal difference between the two cases: in *Street v Mountford*, Mr Street (as he admits in the extract in section 2.1 above) quite readily gave Mrs Mountford a right to exclusive possession; in contrast, in *Westminster City Council*, the council was careful *not* to give Mr Clarke such a right. The contextual factors identified by Lord Templeman explain *why* the council chose not to give Mr Clarke a right to exclusive possession—but from a doctrinal perspective, the only relevant point is the fact that no such right was granted.

2.4 A RIGHT TO EXCLUSIVE POSSESSION: SHAMS AND PRETENCES

The comparison between *Street v Mountford*, on the one hand, and *Westminster City Council v Clarke*, on the other, gives rise to a further question: if a party such as Mr Street wishes to avoid granting an occupier a lease, can he simply insert a term in the agreement that denies the occupier a right to exclusive possession? The first point to remember, noted in section 1.1.1 above, is that a private landlord no longer has any real need to avoid granting a lease: he can simply grant an 'assured shorthold tenancy'—that is, a form of lease that gives the tenant only trifling statutory protection.

Under the previous statutory regimes, however, private landlords did, indeed, react to *Street* by inserting terms for the purpose of denying an occupier exclusive possession. As the next extract shows, that tactic was not always successful: in some cases, courts showed themselves to be willing, when asking if the agreement gave B a right to exclusive possession, to disregard particular terms inserted with the purpose of denying B such a right.

AG Securities v Vaughan and ors; Antoniades v Villiers and anor
[1990] 1 AC 417, HL

Facts: Two separate appeals were heard together by the House of Lords. In the first case, AG Securities (an unlimited company) had a long lease of a flat: No 25 Linden Mansions, Hornsey Lane, London. That flat had four bedrooms, as well as communal areas, and it was rented out to four occupiers: Nigel Vaughan and three others. The four had not moved in as a group: each moved in as and when a former occupier left and a room became available. Mr Vaughan had arrived in 1982; two of the other occupiers, in 1984; the fourth occupier, in 1985. In May 1985, AG Securities attempted to terminate the occupation of the four. The four claimed that, acting together, they jointly held a lease, arising from the terms of their agreements with AG Securities, and therefore qualified for statutory protection. AG Securities sought a declaration that the occupiers each had an individual licence. The first instance judge granted that declaration, but the Court of Appeal (Sir George Waller dissenting) held that the occupiers, acting jointly, had a lease. The House of Lords upheld AG Securities' appeal, holding that the occupiers were, indeed, licensees.

In the second case, Mr Antoniades had a long lease of the top flat at No 6, Whiteley Road, Upper Norwood, London. That flat had a bedroom, a room described as a bed–sitting room, a kitchen, and a bathroom. It was rented out to two occupiers: Mr Villiers and Miss Bridger. They were a couple and moved in together, signing separate, but identical, agreements with Mr Antoniades on the same day: 9 February 1985. Each agreement contained a term (Clause 16) stating that: '*The licensor shall be entitled at any time to use the rooms together with the licensee and permit other persons to use all of the rooms together with the licensee.*' In 1986, Mr Antoniades claimed possession of the flat. The occupiers claimed that, acting jointly, they had a lease, arising as a result of their agreements with Mr Antoniades. If they were found to have a lease, they would qualify for statutory protection and Mr Antoniades' power to remove them would be limited by statute. The first instance judge found that the occupiers did have a lease, but the Court of Appeal held that they were licensees and so allowed Mr Antoniades' appeal. The House of Lords took a different view, restoring the order of the first instance judge, and holding that Mr Villiers and Miss Bridger, acting together, had a lease.

Lord Templeman

At 458–65

Parties to an agreement cannot contract out of the Rent Acts; if they were able to do so the Acts would be a dead letter because in a state of housing shortage a person seeking residential accommodation may agree to anything to obtain shelter. The Rent Acts protect a tenant but they do not protect a licensee. Since parties to an agreement cannot contract out of the Rent Acts, a document which expresses the intention, genuine or bogus, of both parties or of one party to create a licence will nevertheless create a tenancy if the rights and obligations enjoyed and imposed satisfy the legal requirements of a tenancy. A person seeking residential accommodation may concur in any expression of intention in order to obtain shelter . . . Since parties to an agreement cannot contract out of the Rent Acts, the grant of a tenancy to two persons jointly cannot be concealed, accidentally or by design, by the creation of two documents in the form of licences. Two persons seeking residential accommodation may sign any number of documents in order to obtain joint shelter. In considering one or more

documents for the purpose of deciding whether a tenancy has been created, the court must consider the surrounding circumstances including any relationship between the prospective occupiers, the course of negotiations and the nature and extent of the accommodation and the intended and actual mode of occupation of the accommodation. If the owner of a one-bedroomed flat granted a licence to a husband to occupy the flat provided he shared the flat with his wife and nobody else and granted a similar licence to the wife provided she shared the flat with the husband and nobody else, the court would be bound to consider the effect of both documents together. If the licence to the husband required him to pay a licence fee of £50 per month and the licence to the wife required her to pay a further licence fee of £50 per month, the two documents read together in the light of the property to be occupied and the obvious intended mode of occupation would confer exclusive occupation on the husband and wife jointly and a tenancy at the rent of £100.

Landlords dislike the Rent Acts and wish to enjoy the benefits of letting property without the burden of the restrictions imposed by the Acts. Landlords believe that the Rent Acts unfairly interfere with freedom of contract and exacerbate the housing shortage. Tenants on the other hand believe that the Acts are a necessary protection against the exploitation of people who do not own the freehold or long leases of their homes. The court lacks the knowledge and the power to form any judgment on these arguments which fall to be considered and determined by Parliament. The duty of the court is to enforce the Acts and in so doing to observe one principle which is inherent in the Acts and has been long recognised, the principle that parties cannot contract out of the Acts [. . .]

Where residential accommodation is occupied by two or more persons the occupiers may be licensees or tenants of the whole or each occupier may be a separate tenant of part. In the present appeals the only question raised is whether the occupiers are licensees or tenants of the whole [. . .]

[In *AG Securities v Vaughan*, the Court of Appeal] concluded that the four [occupiers] were jointly entitled to exclusive occupation of the flat. I am unable to agree. If a landlord who owns a three-bedroom flat enters into three separate independent tenancies with three independent tenants each of whom is entitled to one bedroom and to share the common parts, then the three tenants, if they agree, can exclude anyone else from the flat. But they do not enjoy exclusive occupation of the flat jointly under the terms of their tenancies. In the present case, if the four [occupiers] had been jointly entitled to exclusive occupation of the flat then, on the death of one of [the occupiers], the remaining three would be entitled to joint and exclusive occupation. But, in fact, on the death of one [occupier] the remaining three would not be entitled to joint and exclusive occupation of the flat. They could not exclude a fourth person nominated by the company. I would allow the appeal.

In the first appeal the four agreements were independent of one another. In the second appeal [*Antoniades v Villiers*] the two agreements were interdependent. Both would have been signed or neither. The two agreements must therefore be read together. Mr. Villiers and Miss Bridger applied to rent the flat jointly and sought and enjoyed joint and exclusive occupation of the whole of the flat. They shared the rights and the obligations imposed by the terms of their occupation. They acquired joint and exclusive occupation of the flat in consideration of periodical payments and they therefore acquired a tenancy jointly. Mr. Antoniades required each of them, Mr. Villiers and Miss Bridger, to agree to pay one half of each aggregate periodical payment, but this circumstance cannot convert a tenancy into a licence. A tenancy remains a tenancy even though the landlord may choose to require each of two joint tenants to agree expressly to pay one half of the rent. The tenancy conferred on Mr. Villiers and Miss Bridger the right to occupy the whole flat as their dwelling. Clause 16 reserved to Mr. Antoniades the power at any time to go into occupation of the flat jointly with Mr. Villiers and Miss Bridger.

The exercise of that power would at common law put an end to the exclusive occupation of the flat by Mr. Villiers and Miss Bridger, terminate the tenancy of Mr. Villiers and Miss Bridger, and convert Mr. Villiers and Miss Bridges into licensees. But the powers reserved to Mr. Antoniades by clause 16 cannot be lawfully exercised because they are inconsistent with the provisions of the Rent Acts [. . .]

Clause 16 is a reservation to Mr. Antoniades of the right to go into occupation or to nominate others to enjoy occupation of the whole of the flat jointly with Mr. Villiers and Miss Bridger. Until that power is exercised Mr. Villiers and Miss Bridger are jointly in exclusive occupation of the whole of the flat making periodical payments and they are therefore tenants. The Rent Acts prevent the exercise of a power which would destroy the tenancy of Mr. Villiers and Miss Bridger and would deprive them of the exclusive occupation of the flat which they are now enjoying. Clause 16 is inconsistent with the provisions of the Rent Acts.

There is a separate and alternative reason why clause 16 must be ignored. Clause 16 was not a genuine reservation to Mr. Antoniades of a power to share the flat and a power to authorise other persons to share the flat. Mr. Antoniades did not genuinely intend to exercise the powers save possibly to bring pressure to bear to obtain possession. Clause 16 was only intended to deprive Mr. Villiers and Miss Bridger of the protection of the Rent Acts. Mr. Villiers and Miss Bridger had no choice in the matter.

In the notes of [the first instance judge], Mr. Villiers is reported as saying that: 'He [Mr. Antoniades] kept going on about it being a licence and not in the Rent Act. I didn't know either but was pleased to have a place after three or four months of chasing.' The notes of Miss Bridger's evidence include this passage: 'I didn't understand what was meant by exclusive possession or licence. Signed because so glad to move in. Had been looking for three months.'

In *Street v. Mountford*, I said:

> 'Although the Rent Acts must not be allowed to alter or influence the construction of an agreement, the court should, in my opinion, be astute to detect and frustrate sham devices and artificial transactions whose only object is to disguise the grant of a tenancy and to evade the Rent Acts.'[40]

It would have been more accurate and less liable to give rise to misunderstandings if I had substituted the word 'pretence' for the references to 'sham devices' and 'artificial transactions.' *Street v. Mountford* was not a case which involved a pretence concerning exclusive possession. The agreement did not mention exclusive possession and the owner conceded that the occupier enjoyed exclusive possession. In *Somma v. Hazelhurst* [41] and other cases considered in *Street v. Mountford*, the owner wished to let residential accommodation but to avoid the Rent Acts. The occupiers wished to take a letting of residential accommodation. The owner stipulated for the execution of agreements which pretended that exclusive possession was not to be enjoyed by the occupiers. The occupiers were obliged to acquiesce with this pretence in order to obtain the accommodation. In my opinion the occupiers either did not understand the language of the agreements or assumed, justifiably, that in practice the owner would not violate their privacy. The owner's real intention was to rely on the language of the agreement to escape the Rent Acts. The owner allowed the occupiers to enjoy jointly exclusive occupation and accepted rent. A tenancy was created. *Street v. Mountford* reasserted three principles. First, parties to an agreement cannot contract out of the Rent Acts. Secondly, in the absence of special circumstances, not here relevant, the enjoyment of exclusive occupation for a term in consideration of periodic payments creates a tenancy. Thirdly, where the language of licence contradicts the reality of lease, the facts must prevail.

[40] [1985] AC 809, 825. [41] [1978] 1 WLR 1014.

The facts must prevail over the language in order that the parties may not contract out of the Rent Acts. In the present case clause 16 was a pretence.

The fact that clause 16 was a pretence appears from its terms and from the negotiations. Clause 16 in terms conferred on Mr. Antoniades and other persons the right to share the bedroom occupied by Mr. Villiers and Miss Bridger. Clause 16 conferred power on Mr. Antoniades to convert the sitting-room occupied by Mr. Villiers and Miss Bridger into a bedroom which could be jointly occupied by Mr. Villiers, Miss Bridger, Mr. Antoniades and any person or persons nominated by Mr. Antoniades. The facilities in the flat were not suitable for sharing between strangers. The flat, situated in an attic with a sloping roof, was too small for sharing between strangers. If clause 16 had been genuine there would have been some discussion between Mr. Antoniades, Mr. Villiers and Miss Bridger as to how clause 16 might be operated in practice and in whose favour it was likely to be operated. The addendum imposed on Mr. Villiers and Miss Bridger sought to add plausibility to the pretence of sharing by forfeiting the right of Mr. Villiers and Miss Bridger to continue to occupy the flat if their double-bedded romance blossomed into wedding bells. Finally and significantly, Mr. Antoniades never made any attempt to obtain increased income from the flat by exercising the powers which clause 16 purported to reserve to him. Clause 16 was only designed to disguise the grant of a tenancy and to contract out of the Rent Acts. In this case in the Court of Appeal Bingham L.J. said:

> 'The written agreements cannot possibly be construed as giving the occupants, jointly or severally, exclusive possession of the flat or any part of it. They stipulate with reiterated emphasis that the occupants shall not have exclusive possession.'[42]

My Lords, in *Street v. Mountford*, this House stipulated with reiterated emphasis that an express statement of intention is not decisive and that the court must pay attention to the facts and surrounding circumstances and to what people do as well as to what people say.

My Lords, in each of the cases which were disapproved by this House in *Street v. Mountford* and in the second appeal now under consideration, there was, in my opinion, the grant of a joint tenancy for the following reasons. (1) The applicants for the flat applied to rent the flat jointly and to enjoy exclusive occupation. (2) The landlord allowed the applicants jointly to enjoy exclusive occupation and accepted rent. A tenancy was created. (3) The power reserved to the landlord to deprive the applicants of exclusive occupation was inconsistent with the provisions of the Rent Acts. (4) Moreover in all the circumstances the power which the landlord insisted upon to deprive the applicants of exclusive occupation was a pretence only intended to deprive the applicants of the protection of the Rent Acts.

Each of *AG Securities v Vaughan* and *Antoniades v Villiers* raises questions about how multiple occupiers of land can claim a lease. We will examine that issue in detail in section 2.5 below. For present purposes, we can focus on the appeal in *Antoniades* and the decision that the agreement created a lease even though the clear effect of Clause 16 was to deny the occupiers a right to exclusive possession.

The decision of the House of Lords can only be justified if it is permissible, when deciding if B (or B1 and B2) has a right to exclusive possession, to *disregard* particular contractual terms. In examining this question, we again have to consider both the doctrinal perspective and the utility approach.

From a doctrinal perspective, it is clear that an apparent contractual term can be disregarded if it is not, in fact, contractually binding. One well-established example occurs if an

[42] [1988] 3 WLR 139, 148.

apparent contractual term is a 'sham' (a term used by Lord Templeman in *Street v Mountford* when referring to 'sham devices').[43] Diplock LJ provided the commonly used definition of a sham, in the contractual context at least, in the following case.[44]

Snook v London and West Ridings Investments Ltd
[1967] 2 QB 786, CA

Diplock LJ

At 802

If it has any legal meaning, the term 'sham' means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intended to create [. . .] for acts or documents to be a 'sham', with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a 'shammer' affect the rights of a party whom he deceived.

As is made clear by that definition, a term can only be dismissed as a sham if *neither* party intends that the term should create genuine legal rights. One example occurs if A sells a painting to B for £10,000, but, to minimize her tax bill, persuades B to sign a contract of sale recording the price as £100. In such a case, each party intends that B should be under a legal duty to pay £10,000; neither party intends that B's duty is to pay only £100. The written 'contract' is therefore of no legal effect: it is a sham as it is not genuinely intended to create legal rights.

It is clear that this model is of very little use in a case such as *Antoniades v Villiers*. In that case, it was abundantly clear that Mr Antoniades *did* intend for Clause 16 to create genuine legal rights: the whole point of the clause was to ensure that the occupiers did not have a right to exclusive possession. It is therefore no surprise that, in *Antoniades*, Lord Templeman did not base his decision on the sham concept; instead, his Lordship based his decision to disregard the sharing clause (Clause 16) on two separate grounds. As suggested in the extract below, those grounds are not free from difficulty.

McFarlane and Simpson, 'Tackling Avoidance' in *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (ed Getzler, 2003)

At 151–2

Lord Templeman provides two grounds for denying effect to the sharing clause. First, it was said that Mr Antoniades could never insert others into occupation as [the Rent Acts prevent him from exercising his power to do so]. This reasoning cannot be supported, as it assumes

[43] [1985] AC 809, 825.

[44] The reference to documents cannot mean that either all of a document is sham, or none of it: see *Hitch v Stone* [2001] STC 214. Rather, each apparent term within a document must be seen as a relevant 'act', and will only be valid if accompanied by the necessary intention that the term should genuinely create contractual rights.

the very thing it purports to prove. The Rent Acts can only apply if the occupiers are lessees, which will only be the case if they have a right to exclusive possession. As the Rent Acts can therefore only apply if the sharing clause, which seems to deny such a right to exclusive possession, is found to be invalid, those Acts cannot also be the means by which such invalidity is proved [. . .]

Secondly, Lord Templeman held that the clause was [. . .] "a pretence [. . .] only designed to disguise the grant of a tenancy and to contract out of the Rent Acts". This reasoning is crucial as it aims to provide a means, independent of the Rent Acts, to render the sharing clause ineffective. It also seems clear that Lord Templeman contemplates going beyond the sham doctrine, as conventionally understood. First, his Lordship prefers to condemn the clause as a "pretence", rather than as a "sham device or artificial transaction." Whilst the concepts of pretence and sham had been used interchangeably in the past, Lord Templeman's explicit preference for the former term does suggest that it involves the adoption of a new means by which a clause may be rendered ineffective. Certainly, Lord Templeman's application of the concept of pretence in *Villiers* goes beyond [. . .] the orthodox 'sham test'.

At 157–8

[. . .] [A suggested justification for the 'pretence' test is that] terms can be disregarded where they are inserted for the purpose of avoiding the Rent Acts by denying a right to exclusive possession. It is true that, at a number of points in his judgment in *Villiers*, Lord Templeman emphasises that this was the owner's aim in including clause 16 in the written agreement [. . .] Nonetheless, the courts have repeatedly rejected any suggestion that they have a general, non-statutory power to disregard agreed terms simply because those terms have been agreed in order to avoid a particular characterisation of the parties' dealings. Any number of examples can be given.

First, the courts have frequently had to consider situations in which parties have, for various reasons, chosen to set up a hire-purchase transaction rather than a simple loan on the security of goods. As long as the parties have genuinely intended to create the legal rights characteristic of hire-purchase, then, even if the only reason for preferring that mechanism has been the desire to avoid creating a secured loan, the agreement will be taken at face-value by the court.[45] The validity of this approach has been upheld in cases dealing with attempts to avoid the very legislation considered in *Antoniades v Villiers*. In *Kaye v Massbetter*,[46] an owner insisted that a tenancy agreement be made with a company created for that purpose, rather than with the individual who was to occupy the property. The only reason for doing so was to avoid the Rent Acts, which do not protect company tenants, yet this device was upheld by the Court of Appeal.

From a doctrinal perspective, then, it seems that the 'pretence' test, if it amounts to disregarding terms inserted for the *purpose* of denying an occupier exclusive possession, cannot be justified. After all, if A simply decides not to grant B exclusive possession, he is perfectly free to do so. In *Antoniades v Villiers* itself, it may nonetheless be possible to reconcile the decision of the House of Lords with doctrine. It can perhaps be explained on a standard contractual principle: a term is only binding on B if A reasonably believes that B is agreeing to be bound by that term.[47] Usually, of course, B's signature of a written document ensures

[45] See *Helby v Matthews* [1895] AC 471, 475; *Re George Inglefield Ltd* [1933] Ch 1, *per* Romer LJ; *Yorkshire Railway Co v Maclure* (1882) 21 Ch D 309, *per* Lindley LJ.

[46] [1991] 2 EGLR 97.

[47] This seems to be the approach adopted by Lord Oliver in *Antoniades v Villiers*: see [1990] 1 AC 417, 469.

that it *is* reasonable for A to believe that B is agreeing to be bound by all of the terms set out in the document. But if the surrounding factual circumstances serve to make a term as set out in the document wholly implausible, it may just be possible for B to argue that such a term is not binding.

The difficulty with this attempt to exclude the pretence test, however, is that the Court of Appeal adopted that test in cases following *Antoniades*. One example is provided by the combined judgment of the Court of Appeal in the cases of *Aslan v Murphy (Nos 1 & 2)* and *Duke v Wynne*.[48] In each case, occupation of residential premises occurred under an agreement that permitted A to share occupation, or to insert other occupiers. In *Aslan*, the agreement also included a term that '*the licensor licenses the licensee to use (but not exclusively) all the furnished room* [. . .] *on each day between the hours of midnight and 10.30am and between noon and midnight, but at no other times*'. In *Aslan*, B occupied a small basement room in Redcliffe Gardens, London.

In *Duke*, B1 and B2, a married couple, occupied a three-bedroom house in Dunkeld Road, South Norwood, along with their two young sons. The Court of Appeal found that, in each case, a lease had been granted. Lord Donaldson MR, referring to the concept of a pretence, regarded it as important that, in each case, A had not, in practice, attempted to exercise his rights to share occupation, or, in *Aslan*, to remove B from the land between 10.30 a.m. and noon.

Such decisions can only be seen as doctrinally justified if it is possible to find a rationale for the wider pretence test. One such rationale is proposed in the following extract.

Bright, 'Avoiding Tenancy Legislation: Sham and Contracting Out Revisited'
[2002] CLJ 146

At 152–3

In practice, the need for a common intention and for a whole transaction to be a sham limits the usefulness of the doctrine. There could not, for example, have been a sham in this strict sense in *Antoniades v. Villiers* where a couple were asked to sign separate licence agreements containing a provision, clause 16, which stated that the "licensor shall be entitled at any time to use the rooms together with the licensee and permit other persons to use all of the rooms together with the licensee [. . .]" Given the size and layout of the accommodation, and the relationship between the couple, it was obvious that the "licensor" would not exercise this right. In holding the couple to have a tenancy and not separate licences, the House of Lords used a variety of language to explain why clause 16 should not be given its face value. Only Lord Oliver spoke of sham [. . .] In moving away from the language of sham to pretence there is the chance to introduce greater flexibility. Essentially, pretence will be found where there is no genuine intention to implement the agreement as it stands. This can also be said of sham, but there are not the same constraints about the need for a common intention and for the whole document to be a lie. Lord Donaldson M.R. clearly saw the two concepts operating differently in *Aslan*:

> '[. . .] parties may succumb to the temptation to agree to pretend to have particular rights and duties which are not in fact any part of the true bargain [. . .] [The] courts would be acting unrealistically if they did not keep a weather eye open for pretences, taking due account of how the parties have acted in performance of their apparent bargain. This identification and exposure of such pretences does not necessarily lead to the conclusion that their agreement is a sham, but

[48] [1990] 1 WLR 766.

only to the conclusion that the terms of the true bargain are not wholly the same as that of the bargain appearing on the face of the agreement.'

Throughout the speeches in *Antoniades* it is clear that the reason why the licences were found to be non-genuine was because there was never any intention to rely on clause 16. Had they been applying the *Snook* concept of sham the House of Lords would have had to find a mutuality of intention to mislead, but there is no discussion in the speeches of whether both parties intended for clause 16 not to operate, nor was there a third party that they intended to mislead. Nor did it matter that the focus was on two aspects of the transaction rather than the transaction as a whole. The essence of pretence is that the agreement is a smokescreen. It is not sufficient to strike down a device on the grounds that it was intended or designed for the sole purpose of avoiding protective legislation, even if there is no other purpose served by it. As with sham, motive is irrelevant. It does not matter that the only reason why a particular route, however tortuous, is selected is to avoid statutory provisions: the test is simply one of whether or not the device is seriously intended. The transaction must be taken at face value unless it is shown that it was not genuine in the sense that the parties never intended to rely on that device.

At 157–9

Much of value was lost when the dicta of Diplock L.J. in *Snook* became hardened law and it is clear that in *AG Securities* the House of Lords, and Lord Templeman in particular, was seeking to break away from these confines. Both sham and pretence are to do with the same thing, that is, to enable the true nature of a transaction to be revealed. The case law, although rather thin on this, does support a more sophisticated account of sham than is usually given and which accords better with "legal principle and morality". Whatever it is called, this refined doctrine of sham would be able to subsume within it the doctrine of pretence.

Where it is found that documents entered into give the appearance of creating legal rights and obligations between the parties that are not genuine, in the sense that there is no intention of honouring these obligations or enjoying the rights, then:

1. where there is a common intention to deceive, that document will be void as between those parties. It is this automatic consequence of voidness, and possible impact upon third parties, that accounts for the reluctance of courts to find a sham and the need for very clear evidence that the provisions are not genuine. If an innocent third party has relied upon the form of the document, the parties may be estopped from setting up the invalidity of the documents
2. where only one of the parties intended to deceive or inserted provisions which he had no intention of honouring and the other party was ignorant of this (or did not 'know or care') or simply went along with it through absence of choice, the party with the deceitful (non-genuine) intent:
   (i) will not be allowed to take advantage of the formal appearance of rights to the disadvantage of an 'innocent' party. This means that a person innocent of the sham will be allowed to rely upon external evidence to prove that the formal agreement is a sham/non-genuine. Similarly, when applied to the residential tenancy cases, the occupier is allowed to prove that the 'licensor' never had any intention of relying upon clauses which prevent a tenancy arising, as, for example, with the 'sharing clause' in *AG Securities* or the clause requiring a daily 90 minute departure in *Aslan*. As Lord Donaldson M.R. said in *Aslan*, it 'is the true rather than the apparent bargain which determines the question: tenant or lodger?'

> (ii) will not be allowed to set aside the formal document by proving it is a sham and thereby rely on the real/true agreement if an innocent person has relied upon the formal agreement. *Snook* [is an example] [...] the court held that there was no sham because there was no common intention to deceive but the effect was the same as saying that the 'shammer' could not set aside the sham document to the detriment of the innocent party.

Bright's argument is that the pretence test is *not* a special feature of the law of leases, developed to ensure that statutory protection is available to deserving or vulnerable occupiers. Bright instead argues that the pretence test is a logical corollary of the sham test and, indeed, can be subsumed within it. On this view, cases such as *Antoniades* and *Aslan* are simply applying standard contractual principles. The validity of that view therefore depends on a more general question about contract law: is it the case that, for a term to be contractually binding, the parties must intend *not only* that the term should create legal rights, *but also* that the term will be enforced in practice?[49]

Whatever the answer to that question, it may still be possible to justify the pretence test from the perspective of utility rather than doctrine.[50] For example, in section 2.1 above, we saw Hill's suggestion that policy, rather than doctrine, can justify the decision in *Street v Mountford* that a lease can be created even when A does not intend to give B a property right. In that article, Hill suggests:[51] '*The drafting of a residential agreement as a licence rather than a lease is analogous to the inclusion of an unfair contractual term in a consumer sale.*' On this view, the pretence doctrine is simply a means to an end: it gives judges the power (usually only given by statutes such as the Unfair Contract Terms Act 1977) to disregard terms that, whilst notionally agreed, have been forced on a reluctant occupier. Certainly, as noted by Hill, Lord Templeman did refer in *Antoniades* to the fact that '*a person seeking residential accommodation may concur in any expression of intention* [...] [and] *may sign a document couched in any language in order to obtain shelter*'.[52]

This analysis raises an important point about the utility approach: one that we encountered in Chapter 1, section 5.7. There, we saw Harris's observation that a choice as to whether the doctrinal or utility approach is to be preferred may depend on one's view as to the proper role of judges. For example, it may be plausible to take the view that whilst it is important, in a case such as *Antoniades*, to protect an occupier and to ensure that the relevant statutory protection applies, it is not for judges to take on the power to disregard terms that, according to the usual doctrinal tests, are contractually binding. On that view, it is for Parliament to make a change to the law: for example, by extending the statutory protection beyond those with leases to parties who occupy their home under a contractual licence. Indeed, as we will see in Chapter 23, section 5, the Law Commission has recently suggested just that

[49] For a view that a contractual term is, in general, binding even if the parties did not intend to enforce it in practice, see McFarlane and Simpson, 'Tackling Avoidance' in *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (ed Getzler, 2003), pp 160–3 and McFarlane, *The Structure of Property Law* (2008), p 665.

[50] For example, as we will see in Chapter 23, section 3, McFarlane and Simpson suggest that the approach in *Antoniades* may be justified as a matter of statutory interpretation, if it can be said that Parliament intended the statutory protection to apply not only to parties with a legal right to exclusive possession, but also to parties who, in practice, enjoyed exclusive possession of land for a term: McFarlane and Simpson, 'Tackling Avoidance' in *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (ed Getzler, 2003), pp 175–8.

[51] (1996) 16 LS 200, 217.

[52] [1990] 1 AC 417, 458.

change: the remaining statutory protection (of course, now much diminished in the private rental sector) should not be limited to tenants, but should also be extended to licensees.

2.5 A RIGHT TO EXCLUSIVE POSSESSION: MULTIPLE OCCUPANCY

In each of *AG Securities* and *Antioniades*, more than one person occupied land. In such a case, it could, in theory, be possible for each occupier to claim a right to exclusive possession of a *particular part* of the land (e.g. of a particular room in a flat). But the occupiers did not pursue that argument in either case; instead, it was argued (unsuccessfully in *AG Securities*, but successfully in *Antoniades*) that the occupiers, seen as a unit, had a single right to exclusive possession to the whole of the land. This is a claim to co-ownership of the land: a claim that the individual occupiers, acting a team, held a single legal estate. We examined co-ownership in Chapter 17, in section 2 of which we saw that there are two possible forms of co-ownership: the joint tenancy and the tenancy in common. In each case, there is 'unity of possession' amongst the co-owners: each is prima facie entitled to occupy all of the land. In a tenancy in common, unlike a joint tenancy, each co-owner also has an 'undivided share': a right to a particular, individual share of the benefits of the co-owned land. We also saw there that, due to s 1(6) of the LPA 1925, it is impossible for a legal estate (such as a legal lease) to be held by tenants in common: in such a case, the only permitted form of co-ownership is a joint tenancy. So, what happens if A transfers a freehold to B1 and B2, stating that B1 is to have a 40 per cent share and B2 is to have a 60 per cent share? Despite the parties' intentions, B1 and B2 hold the legal freehold as joint tenants (without an individual share). But, under s 34(2) of the 1925 Act, a trust is imposed: B1 and B2 hold that legal freehold as joint tenants, but each also has an individual share to the benefit of that legal right, arising under a trust.

In *AG Securities*, however, the House of Lords adopted a different approach to the specific question of co-ownership of a lease. It was held that the four occupiers had a lease only if they could show that, acting together, they *genuinely* had a joint tenancy of that lease. The assumption is that, if B1, B2, B3, and B4 had intended to receive a right to exclusive possession as tenants in common, no lease would arise: s 34(2) cannot operate to save the lease by allowing B1, B2, B3, and B4 to hold a legal lease as joint tenants on trust for themselves. This approach causes real problems for joint occupiers. As we saw in Chapter 17, section 2, to establish a tenancy in common, it is necessary for the occupiers to show *only* that they have 'unity of possession'—that is, that each is entitled to occupy all of the land. To establish a *genuine* joint tenancy (rather than one imposed by s 34(2)), however, the occupiers also need to show that they have not only unity of possession, but also 'unity of interest, time and title'. This means that they must show that they acquired the lease together: without individual shares, at the same time, and in the same way.

In *AG Securities*, it was impossible for the occupiers to show a genuine joint tenancy: it was clearly not the case that they had acquired a lease together, because they had not moved into the land at the same time; rather, they were part of a 'fluctuating population' of occupiers, each of whom moved in whenever an individual room happened to be vacant. In *Antoniades*, Mr Villiers and Miss Bridger had signed separate agreements with Mr Antoniades. Nonetheless, they were able to show that they had acquired a lease together: the agreements were identical and signed on the same day, and Mr Villiers and Miss Bridger moved in together, as a couple. The cases thus reflect an important difference between: (i) cases in which rooms in a house or flat are occupied by individuals who move in and move out at different times; and

(ii) cases in which the house or flat itself is occupied together by a couple (or group) who move in together and who would expect to move out together. In particular, the *decision* in *AG Securities* seems correct, because, on the facts, it was not plausible to see the four occupiers as a group, co-operating to claim exclusive possession of the entire property.

The *reasoning* in *AG Securities*, however, with its insistence on a joint tenancy requirement, can cause problems even in a case in which a couple or group *do* move in together and exercise joint exclusive control of the property (and thus have unity of possession). As the following extract shows, the difficulties arise if the occupiers undertake individual and separate duties to pay rent (and thus have no unity of interest).

Mikeover v Brady
[1989] 3 All ER 618, CA

Facts: Mikeover Ltd had a long lease of the top floor flat at 179 Southgate Road, London N1. It advertised the flat as available for occupation by two people. The flat consisted of a front room, which had a cooker and refrigerator in it, and a back room, which had a sink in it. In addition, there was a bathroom and lavatory in the attic. Mr Brady and Miss Guile, a couple, responded to the advert and moved into the flat together. Each signed a separate, but identical, agreement, headed as a licence agreement, allowing each of them to share occupation of the flat for six months, in return for paying a monthly rent of £86.66. Once that initial six months had expired, the occupiers were allowed to remain in the flat, on the same terms as set out in the initial agreements. Early in 1986, Miss Guile moved out of the flat. She informed Mr Ferster (a director of Mikeover Ltd, and the party with whom she and Mr Brady had dealt) of this in April 1986. Mr Brady wished to remain and offered to pay £173.32 as monthly rent. Mr Ferster declined that offer, stating: '*I can't accept it. I'll hold you responsible for your share only.*' Nonetheless, even on the basis that he had to pay only £86.66 a month, Mr Brady fell into arrears on the rent payment and, in early 1987, Mikeover Ltd sought to remove him from the flat. Mr Brady claimed that, as a result of the initial agreements signed by the parties, he and Miss Guile had, acting together, acquired a lease of the flat. If that were correct, Mr Brady would then qualify for statutory protection under the Rent Acts. The first instance judge, however, rejected that argument and held that the initial agreements gave each party only a licence. Mr Brady appealed unsuccessfully to the Court of Appeal.

Slade LJ

At 623–7

[Slade LJ found that the agreements should be interpreted together and against the factual background that '*the layout of the flat was such that it was clearly only suitable for occupation by persons who were personally acceptable to one another*'. On that basis:] It follows that, in our judgment, [Mr Brady's] agreement on its true construction conferred on him the right (by cl 1) to exclusive occupation of the flat in common only with Miss Guile during its currency [. . .]

It is, however, well settled that four unities must be present for the creation of a joint tenancy, namely the unities of possession, interest, title and time [. . .] In the present case there is no dispute that the two agreements of 6 June 1984 operated to confer on the defendant and Miss Guile unity of possession and title. Likewise, there was unity of time in that each of

their interests arose simultaneously and was expressed to endure for six months. The dispute concerns unity of interest. The general principle, as stated in *Megarry and Wade* is:[53]

> 'The interest of each joint tenant is the same in extent, nature and duration, for in theory of law they hold but one estate.'

'Interest' in this context must, in our judgment, include the bundle of rights and obligations representing that interest. The difficulty, from the defendant's point of view, is that the two agreements, instead of imposing a joint liability on him and Miss Guile to pay a deposit of £80 and monthly payments of £173.32, on their face imposed on each of them individual and separate obligations to pay only a deposit of £40 and monthly payments of only £86.66. On the face of it, the absence of joint obligations of payment is inconsistent with the existence of a joint tenancy.

Counsel for [Mr Brady] sought to meet this difficulty in three ways. First, he contended that the two agreements were, as he put it, 'interdependent' and must be read together. When so read, he submitted, they should be construed as placing on the two parties joint obligations. However, it seems to us quite impossible to rewrite the two agreements in this manner as a matter of construction [. . .] [o]ne cannot add up two several [i.e. separate] obligations to pay £X so as to construct a joint obligation to pay £2X.

Next counsel for [Mr Brady], as we understood him, contended that, in so far as the two agreements purported to render each of the defendant and Miss Guile merely individually liable for the payment of a deposit of £40 and monthly payments of £86·66, they were 'shams'. The true intention of the parties, he submitted, to be inferred from all the circumstances, was that they should be jointly liable to make monthly payments of £173.32 and to pay a deposit of £80 (to the return of which they should be jointly entitled in due course).

In this context, the subsequent conduct of the parties is admissible in evidence, not for the purpose of construing the agreements but on the question whether the documents were or were not genuine documents giving effect to the parties' true intentions [. . .]

However, the onus of proving a sham falls on the defendant and, in our judgment, the parties' subsequent conduct affords no support, or at least no sufficient support, to his case in this respect [. . .] we see no sufficient grounds for disturbing the judge's finding that the receipts of sums by [Mikeover Ltd] from [Mr Brady] after Miss Guile left the flat represented no more than was due from him on the footing that he was liable only for monthly payments of £86.66 [. . .] [Mikeover Ltd's] failure to accept [Mr Brady's] offer to pay the higher monthly sum does not in any way assist [Mr Brady's] contention that the provisions for payment contained in the two agreements were shams.

On these authorities, it appears to us that unity of interest imports the existence of joint rights and joint obligations. We therefore conclude that the provisions for payment contained in these two agreements (which were genuinely intended to impose and did impose on each party an obligation to pay no more than the sums reserved to [Mikeover Ltd] by his or her separate agreement) were incapable in law of creating a joint tenancy, because the monetary obligations of the two parties were not joint obligations and there was accordingly no complete unity of interest. It follows that there was no joint tenancy.

Mikeover v Brady nicely illustrates the problem caused to occupiers by the approach adopted in *AG Securities*. In *Mikeover*, the individual rent obligation would *not* have prevented Mr Brady from showing that he and Miss Guile held a lease as tenants in common, each

[53] [The reference in the case is to the 5th edn (1984): see now *Megarry and Wade's Law of Real Property* (7th edn, eds Harpum et al, 2008), [13–006].]

with a 50 per cent share of the lease—but it did prevent him from showing that they held a lease as joint tenants (i.e. only as a team and without any individual share), and, under the *AG Securities* approach, it therefore followed that the occupiers did not have a lease.

As explained in the following extract, it is not obvious why the courts should insist on there being a *genuine* joint tenancy of a lease when, as we have seen, there is no such requirement when parties acquire a freehold together.

Sparkes, 'Co-Tenants, Joint Tenants and Tenants in Common' (1989) 18 AALR 151

At 155

In the light of Lord Templeman's speech [in *AG Securities v Vaughan*], it must be asked whether a tenancy in common can exist in an informal tenancy. The House of Lords simply assumed that this could not be the case. The question is by no means easy to answer in view of the well-known inadequacy of the provisions of the Law of Property Act 1925 concerned with the imposition of a statutory [trust of land] on co-ownership.[54] Before 1926, legal tenants could be either joint tenants or tenants in common. Equally landlords could hold in common, so that for example one landlord could serve a notice to quit that was effectual in respect of his undivided share, while leaving intact the term in respect of the undivided shares of other landlords. An informal tenancy could then have created a legal leasehold estate held by tenants in common. Such a tenancy, if it could exist today, would fall squarely within the definition of a protected tenancy.

After 1925, a legal estate must be held by joint tenants. A statutory [trust of land] arises and the beneficial owners might be either joint tenants or tenants in common beneficially. These rules should apply to any legal estate, whether the estate is freehold or leasehold [. . .]

Business tenancies must often exist as equitable tenancies in common, since such tenancies are frequently held by partnerships. A business lease is likely to contain an express declaration of a beneficial tenancy in common, which is best suited for business partnership. In the absence of an express declaration, equity would presume the intention to create a beneficial tenancy in common. Similar considerations apply to agricultural holdings. The question is therefore whether there is something special about residential tenancies which marks them out as uniquely confined to joint tenancies in the technical sense. The Rent Act 1977 contains no express prohibition; nor does the Housing Act 1988 for the assured tenancy present and future [. . .]

At 163–4

Nothing is clear in the field of co-ownership of short term leases. The courts have confidently equated a co-ownership joint tenancy and a co-tenancy under the Rent Act 1977. It is tentatively submitted that it is wrong to equate these two separate concepts.

In *AG Securities v. Vaughan* the House of Lords decided that four occupiers who were free to leave independently of each other were licensees and not co-tenants. The main ground relied upon was that the occupiers did not together share exclusive possession. Some dicta rest this decision on a different ground—that is the absence of unity of interest. In the absence of this unity at most a tenancy in common was created. This now forms the ratio decidendi of the Court of Appeal decision, *Mikeover v Brady*.

In both cases, it was important to establish whether or not there was a concurrent interest in the four occupiers. If it was concurrent, whether it was a joint tenancy or a tenancy in

54 [The author here refers to a statutory trust for sale, because the article was written before the Trusts of Land and Appointment of Trustees Act 1996. As to the effect of that Act, see Chapter 17, section 5.]

> common or some other kind of relationship was (until the death of one of the parties)[55] quite irrelevant. For a tenancy in common to exist, only one of the four unities—that is unity of possession—would be necessary. An informal tenancy in common might create a statutory trust [. . .] or it might stand altogether outside conventional property law. There is no need to search for the remaining unities—that is time, title and interest.
>
> The court should look to see whether there has been a joint grant of the right to exclusive occupation of the property, or in shorthand, joint exclusive possession. The opinions delivered in *AG Securities v Vaughan* are quite consistent with the general view that it is the substantive existence of a joint right to exclusive possession that is determinative of the existence of a tenancy.

Sparkes' view is thus that the approach in *Mikeover v Brady* cannot be justified as a matter of doctrine.

There are some challenges to that view: for example, Roger Smith[56] has argued that the structure of the LPA 1925 may support the approach of the courts; McFarlane[57] has argued that if, as in *Mikeover*, the occupiers claim that a contractual agreement has given rise to a lease, then they must claim as joint tenants, because, as a matter of general contract law, it is impossible for a contractual right to be held by tenants in common. Whatever your final view on the doctrinal question, however, it is also important to consider the *AG Securities* approach from the utility perspective. From that point of view, the approach, as exemplified by the decision in *Mikeover v Brady*, certainly contrasts with the more generous stance taken towards occupiers in cases such as *Street v Mountford* and *Antoniades v Villiers*.

2.6 A PROPRIETARY RIGHT TO EXCLUSIVE POSSESSION

If I were to make a contractual promise allowing you exclusive possession of Buckingham Palace for five years, recorded in a deed, could that promise give you a property right in Buckingham Palace? Clearly not. The problem is that, whilst you have a right *against me* to have exclusive possession of the Palace, I am simply not in a position to give you a property right in relation to that land. Nonetheless, the reasoning of the House of Lords in *Bruton v London & Quadrant Housing Trust Ltd*[58] appears to mean that, in such a case, our contractual agreement *does* give you a lease.

Not surprisingly, as we will see when examining *Bruton* in Chapter 23, section 3, that decision has attracted a lot of disapproval. It is, however, very important to note that the House of Lords in *Bruton* made clear that, in our example, the contractual agreement does *not* give you a property right. The controversy excited by the decision is about the very idea that B can have a 'lease' *even though* he or she does not have a property right. In effect, *Bruton* means that there are now two sorts of leases: standard leases, which give their holder (B) a property right in land; and contractual leases, which give their holder (B) only a personal right against A. We will therefore postpone our consideration of *Bruton* to Chapter 23; in this chapter, our focus is on the standard, proprietary lease.

[55] [As we saw in Chapter 17, section 2.2, the doctrine of survivorship means that the death of a joint tenant has consequences differing from those arising on the death of a tenant in common.]

[56] See Smith, *Plural Ownership* (2005), pp 24–6.

[57] McFarlane, *The Structure of Property Law* (2008), pp 714–15. The general rule applying to contractual rights is shown by, for example, Coke, *Commentaries on Littleton* (1628, p 198a) and *Re McKerrell* [1912] 2 Ch 648.

[58] [2000] 1 AC 406.

2.7 A RIGHT TO EXCLUSIVE POSSESSION FOR A LIMITED PERIOD

To have a lease, B needs to have a right to exclusive possession *for a limited period*. This requirement is reflected in the very phrase used, in s 1 of the LPA 1925, to define a lease—that is, a 'term of years absolute'. In that context, the word 'term'—like 'terminus', or 'terminal'—indicates an end or a limit. This relatively simple requirement has, however, caused a number of practical problems.

Prudential Assurance Ltd v London Residuary Body
[1992] 2 AC 386, HL

Facts: Prior to 1930, Mr. Nathan owned shop premises: Nos 263–5, Walworth Road, Southwark, London. The London City Council (LCC) owned the road itself. LCC planned to widen the road: this would lead to its encroaching on part of the strip of land, owned by Mr Nathan, then separating his shop from the road. So the LCC bought Mr Nathan's freehold of that strip of land, agreeing, however, that Mr Nathan could continue to use it until the road-widening project went ahead. The agreement stated the strip was leased back to Mr Nathan for continued use, with the rest of 263–5 Walworth Road, until required for road widening; in return, Mr Nathan agreed to pay £30 a year in rent. It was clear that both parties intended this to be a temporary arrangement, because both believed that the road-widening project would soon go ahead. So, for example, there was no provision to allow the rent to be increased.

By 1988, however, the road widening had not occurred. The London Residuary Body (LRB), a successor of LCC, now held the freehold of the strip of land, and Nos 263–5 were owned by Prudential Assurance Ltd, which also had the benefit of the 1930 agreement. LRB attempted, by giving notice, to end Prudential's right to use the strip of land. It was agreed by valuers acting for each side that the current commercial rent for the strip of land (valuable because it allowed Nos 263–5 to have a shop frontage) was £10,000 per annum rather than the £30 that Prudential was paying under the 1930 agreement. Prudential, however, argued that LRB could not regain possession of the strip, because the land was not yet needed for road widening. Millett J found in favour of Prudential; LRB[59] appealed directly to the House of Lords.[60]

Lord Templeman

At 390–6

A demise for years is a contract for the exclusive possession and profit of land for some determinate period [. . .] The Law of Property Act 1925 [. . .] provided, by section 1(1), that:

> 'The only estates in land which are capable of subsisting or of being conveyed or created at law are—(*a*) An estate in fee simple absolute in possession; (*b*) A term of years absolute.'

[59] After giving the notice to quit, LRB sold its freehold, so, technically, the new freehold owners brought the appeal.

[60] Such a 'leapfrog' appeal is permitted where, for example, an appellant wishes to challenge the validity of previous Court of Appeal authority: in this case, *Ashburn Anstalt v Arnold* [1989] Ch 1, where the Court of Appeal had held that it was possible for B to have a lease of land until the land was needed for re-development. There is no point appealing first to the Court of Appeal because, unlike the House of Lords, it will simply be bound by that Court of Appeal authority.

Section 205(1)(xxvii) was in these terms:

> ' "Term of years absolute" means a term of years [...] either certain or liable to determination by notice, re-entry, operation of law, or by a provision for cesser on redemption, or in any other event (other than the dropping of a life, or the determination of a determinable life interest); [...] and in this definition the expression 'term of years' includes a term for less than a year, or for a year or years and a fraction of a year or from year to year; [...]'

The term expressed to be granted by the agreement in the present case does not fall within this definition [...]

When the agreement in the present case was made, it failed to grant an estate in the land. The tenant however entered into possession and paid the yearly rent of £30 reserved by the agreement. The tenant entering under a void lease became by virtue of possession and the payment of a yearly rent, a yearly tenant holding on the terms of the agreement so far as those terms were consistent with the yearly tenancy. A yearly tenancy is determinable by the landlord or the tenant at the end of the first or any subsequent year of the tenancy by six months' notice unless the agreement between the parties provides otherwise [...]

Now it is said that when in the present case the tenant entered pursuant to the agreement and paid a yearly rent he became a tenant from year to year on the terms of the agreement including clause 6 which prevents the landlord from giving notice to quit until the land is required for road widening. This submission would make a nonsense of the rule that a grant for an uncertain term does not create a lease and would make nonsense of the concept of a tenancy from year to year because it is of the essence of a tenancy from year to year that both the landlord and the tenant shall be entitled to give notice determining the tenancy.

[...] [T]he agreement in the present case did not create a lease and that the tenancy from year to year enjoyed by the tenant as a result of entering into possession and paying a yearly rent can be determined by six months' notice by either landlord or tenant. The landlord has admittedly served such a notice [...]

A tenancy from year to year is saved from being uncertain because each party has power by notice to determine at the end of any year. The term continues until determined as if both parties made a new agreement at the end of each year for a new term for the ensuing year. A power for nobody to determine or for one party only to be able to determine is inconsistent with the concept of a term from year to year [...] principle and precedent dictate that it is beyond the power of the landlord and the tenant to create a term which is uncertain [...]

In the present case the Court of Appeal were bound by the decisions in *In re Midland Railway Co.'s Agreement*[61] and *Ashburn's case*.[62] In my opinion both these cases were wrongly decided. A grant for an uncertain term does not create a lease. A grant for an uncertain term which takes the form of a yearly tenancy which cannot be determined by the landlord does not create a lease. I would allow the appeal.

Lord Browne-Wilkinson

At 396–7

As a result of our decision Mr. Nathan's successor in title will be left with the freehold of the remainder of No. 263–265 which, though retail premises, will have no frontage to a shopping street: the L.C.C.'s successors in title will have the freehold to a strip of land with a road frontage but probably incapable of being used save in conjunction with the land from which it was severed in 1930, i.e. the remainder of No. 263–265.

[61] [1971] Ch 725. [62] [1989] Ch 1.

> It is difficult to think of a more unsatisfactory outcome or one further away from what the parties to the 1930 agreement can ever have contemplated. Certainly it was not a result their contract, if given effect to, could ever have produced. If the 1930 agreement had taken effect fully, there could never have come a time when the freehold to the remainder of No. 263–265 would be left without a road frontage.
>
> This bizarre outcome results from the application of an ancient and technical rule of law which requires the maximum duration of a term of years to be ascertainable from the outset. No one has produced any satisfactory rationale for the genesis of this rule. No one has been able to point to any useful purpose that it serves at the present day. If, by overruling the existing authorities, this House were able to change the law for the future only I would have urged your Lordships to do so.
>
> But for this House to depart from a rule relating to land law which has been established for many centuries might upset long established titles. I must therefore confine myself to expressing the hope that the Law Commission might look at the subject to see whether there is in fact any good reason now for maintaining a rule which operates to defeat contractually agreed arrangements between the parties (of which all successors in title are aware) and which is capable of producing such an extraordinary result as that in the present case.

There are a number of points to note about the decision of the House of Lords in *Prudential Assurance*. Firstly, whilst the *contractual agreement* entered into in 1930 did not create a lease, because it did not give Mr Nathan a right to exclusive possession for a limited period, he (and, later, Prudential) nonetheless did acquire a lease. That lease did not arise under the agreement, but instead resulted from Mr Nathan's payment of rent and the LCC's acceptance of that rent. This form of lease is known as an 'implied periodic tenancy': it provides a particular means by which B can acquire a lease and so we will examine it in section 3.1.2 below. As Lord Templeman noted, the important point about the lease held by Prudential was that it could be terminated by the giving of notice by the landlord: because it was not based on the initial contractual agreement between the LCC and Mr Nathan, it did not give Prudential a right to use the land until it was needed for road widening.

Secondly, the dispute in *Prudential* did not involve the initial parties to the 1930 agreement: the LRB had made no express promise to allow Prudential to use the land until it was needed for road-widening. This raises the question of what would have happened if the LCC had tried to remove Mr Nathan from the land before it was needed for road-widening: could Mr Nathan have then asked for an injunction preventing the LCC from breaching its promise? As we will see in the next extract, this question was later addressed (albeit in *obiter dicta*) by the Supreme Court in *Berrisford v Mexfield*.[63]

Third, whilst the House of Lords in *Prudential Assurance* upheld the traditional rule that a lease must have a maximum duration, Lord Browne-Wilkinson expressed some displeasure with the result: it was a 'bizarre outcome' caused by an 'ancient and technical rule of law'. It should be said that it is a straightforward matter for well-advised parties to avoid the effect of the rule: for example, as noted by Lord Templeman in *Prudential Assurance*,[64] there is nothing to prevent A from giving B a lease 'for 999 years, to determine if and when the land is need for road-widening'—such a lease is for a limited period, because 999 years provides a clear maximum duration for the lease. Indeed, this tactic has been adopted by statute to save certain types of intended lease.

[63] [2011] UKSC 52. [64] [1992] 2 AC 386, 395.

Law of Property Act 1925, s 149(6)

> Any lease or underlease, at a rent, or in consideration of a fine, for life or lives or for any term of years determinable with life or lives, or on the marriage of the lessee, or any contract therefor, made before or after the commencement of this Act, or created by virtue of Part V of the Law of Property Act, 1922, shall take effect as a lease, underlease or contract therefor, for a term of ninety years determinable after the death or marriage (as the case may be) of the original lessee, or of the survivor of the original lessees, by at least one month's notice in writing given to determine the same on one of the quarter days applicable to the tenancy, either by the lessor or the persons deriving title under him, to the person entitled to the leasehold interest, or if no such person is in existence by affixing the same to the premises, or by the lessee or other persons in whom the leasehold interest is vested to the lessor or the persons deriving title under him:
>
> Provided that [. . .]

There are further provisos to s 149(6) of the LPA 1925, but the key point for our purposes is that certain forms of lease (e.g. a lease for B's life) are validated by interpreting the lease as a lease for a fixed term (ninety years), with the landlord having the power to determine the lease following the occurrence of a particular event (e.g. B's death).

It is, therefore, tempting to ask, along with Lord Browne-Wilkinson, whether the traditional rule, requiring a lease to have a maximum duration ascertainable at its outset, should be reformed. Lord Browne-Wilkinson's preference was for statutory reform, but, in the following case, the Supreme Court, sitting in a panel of seven, were given the opportunity to consider judicial reform of the rule. The case involved both of the initial parties to the agreement, so it also gave the court a chance to look at one of the loose ends from *Prudential Assurance* noted above: if a particular term of the parties' agreement prevents a lease arising, by introducing uncertainty, can it nonetheless be enforced between the initial parties as a matter of contract law?

Berrisford v Mexfield Housing Co-operative Limited
[2011] UKSC 52, SC

Facts: Ms Berrisford owned a property in Barnet, North London. She was having difficulty paying the mortgage. In 1993, as part of a 'mortgage rescue scheme', she sold the property to Mexfield, a fully mutual housing co-operative. Mexfield then agreed to allow Ms Berrisford to continue in occupation of the property, and she became a member of the Mexfield co-operative. The statutory protection available to social tenants does not apply to members of housing co-operatives: Parliament took the view that such protection was unnecessary, as, in a co-operative, the 'interests of landlord and tenants as a whole are in effect indivisible'.[65]

Clause 1 of the occupation agreement stated that:

> '[Mexfield] shall let and [Ms Berrisord] shall take the [premises] from 13 December 1993 and thereafter from month to month until determined as provided in this Agreement.'

[65] See the judgment of Lord Hope at [81], set out below. For further discussion of this analysis, see Loveland, 'Security of Tenure for Tenants of Fully Mutual Housing Co-operatives' [2010] Conv 461, 464.

Clauses 5 and 6 were as follows:

> 5. 'This Agreement shall be determinable by [Ms Berrisford] giving [Mexfield] one month's notice in writing.'
> 6. 'This Agreement may be brought to an end by [Mexfield] by the exercise of the right of re-entry specified in this clause but ONLY in the following circumstances:
>   a) If the rent reserved hereby or any part thereof shall at any time be in arrear and unpaid for 21 days [...]
>   b) If [Ms Berrisford] shall at any time fail or neglect to perform or observe any of the [terms of] this Agreement which are to be performed and observed by [her]
>   c) If [Ms Berrisford] shall cease to be a member of [Mexfield]
>   d) If a resolution is passed under [...] [Mexfield's] Rules regarding a proposal to dissolve [Mexfield]
>
> THEN in each case it shall be lawful for [Mexfield] to re-enter upon the premises and peaceably to hold and enjoy the premises thenceforth and so that the rights to occupy the premises shall absolutely end and determine as if this Agreement had not be made [...]'

Ms Berrisford remained in occupation until 2008, at which point Mexfield attempted to remove her from the property. Mexfield admitted that none of the circumstances set out in Clause 6 applied. Nonetheless, it argued that Clause 6 and, indeed, the entire occupancy agreement, was void—it fell foul of the need for a lease to have a certain term. As a result, Mexfield argued that Ms Berrisford did not occupy under the parties' written agreement, but rather under an implied (weekly or monthly) periodic tenancy, arising from her payment, and Mexfield's acceptance, of rent. On this view, Mexfield was not bound by the limits imposed in Clause 6 and was free to remove Ms Berrisford after refusing to renew the implied periodic tenancy.

In the end, Mexfield entered into a new agreement with Ms Berrisford, allowing her to remain in occupation of the property. The litigation was allowed to continue, however, to determine the status of Ms Berrisford's occupation prior to that new agreement. This is an important issue as the occupation agreement entered into by Mexfield and Ms Berrisford is of a standard form used not only by Mexfield, but also by many other housing co-operatives.

At first instance, His Honour Judge Mitchell refused Mexfield's application for summary judgment. Peter Smith J, on appeal, accepted Mexfield's analysis and made a possession order in its favour; Ms Berrisford then appealed to the Court of Appeal. The appeal was dismissed, but Wilson LJ dissented from the majority position of Aikens and Mummery LJJ. The case then proceeded to the Supreme Court.

The Supreme Court heard the case in a special panel of seven Justices. Ms Berrisford, however, did not directly challenge the traditional rule, affirmed in *Prudential Assurance*, that a lease must have a maximum duration, ascertainable from its outset. As a result, the Supreme Court were not invited to overrule *Prudential Assurance* and to discard that rule. Ms Berrisford thus accepted that the occupation agreement, on its own terms, did not create a lease. Nonetheless, she put forward two key reasons in support of the conclusion that Mexfield could remove her from the property only if one of the events set out in Clause 6 had occurred.

The first (a new argument, introduced only at the Supreme Court stage of the appeal) was that, prior to 1926, the occupation agreement would have been treated as a tenancy for the life of Ms Berrisford, which could be terminated by Mexfield during her life only under

Clause 6. If that argument was correct, then s 149(6) of the Law of Property Act 1925 would apply, with the effect that Ms Berrisford had a 90 year lease, which could be terminated by Mexfield only on her death, or if one of the events set out in Clause 6 had occurred.

Ms Berrisford's second argument, accepted by Wilson LJ in his dissent in the Court of Appeal, was that, even if Clause 6 could not form part of a valid lease, it was nonetheless contractually binding on Mexfield and so Mexfield could be prevented from removing her in breach of the terms of Clause 6.[66]

The Supreme Court allowed Ms Berrisford's appeal: it rejected both of Mexfield's arguments, and accepted Ms Berrisford's first argument. It was not, therefore, strictly necessary for the court to consider her second argument, but a number of the Justices did so in any case—Lord Clarke took the view (at [108]) that Ms Berrisford's second argument was correct, and Lord Neuberger (at [59]), Lord Hope (at [80]), and Lord Dyson (at [120]) all indicated that they found that second argument convincing. As Ms Berrisford did not ask the court to overrule *Prudential Assurance*, it did not consider doing so; but, as can be seen in the extracts below, some of the Justices expressed their views as to the (lack of) merits of the rule that a lease must have a certain term.

Lord Neuberger

At [23]

Is Such An Arrangement Capable Of Being A Tenancy As A Matter of Law?

I turn to the second issue, namely whether an agreement, which can only come to an end by service of one month's notice by the tenant, or by the landlord invoking a right of determination on one or more of the grounds set out in clause 6, is capable, as a matter of law, of being a tenancy in accordance with its terms. [Counsel for Ms Berrisford] accepts that it is not so capable. His concession is supported both by very old authority and by high modern authority.

[Lord Neuberger then considered cases and commentary, up to and including *Prudential Assurance*, confirming what Lord Templeman in that case referred to as '500 years of judicial acceptance [that] the requirement that a term must be certain applies to all leases and tenancy agreements'].[67]

At [34]–[70]

If we accept that that is indeed the law, then, subject to the point to which I next turn, the Agreement cannot take effect as a tenancy according to its terms. As the judgment of Lady Hale demonstrates (and as indeed the disquiet expressed by Lord Browne-Wilkinson and others in *Prudential* itself shows), the law is not in a satisfactory state. There is no apparent practical justification for holding that an agreement for a term of uncertain duration cannot give rise to a tenancy, or that a fetter of uncertain duration on the right to serve a notice to quit is invalid. There is therefore much to be said for changing the law, and overruling what may be called the certainty requirement, which was affirmed in *Prudential*, on the ground that, in so far as it had any practical justification, that justification has long since gone, and, in so far as it is based on principle, the principle is not fundamental enough for the Supreme Court to

[66] Mexfield also introduced a new argument before the Supreme Court. As well as its principal argument that the terms of the agreement itself could not create a lease, it also argued that the agreement itself gave Mexfield an implied contractual right to determine the lease with one month's notice. This argument was swiftly rejected by the Supreme Court as it involved an implausible interpretation of the parties' contract: see *per* Lord Neuberger at [18]–[23].

[67] [1992] 2 AC 386, 394

be bound by it. It may be added that Lady Hale's Carrollian characterisation of the law on this topic is reinforced by the fact that the common law accepted perpetually renewable leases as valid: they have been converted into 2000-year terms by s 145 of the Law of Property Act 1922.

However, I would not support jettisoning the certainty requirement, at any rate in this case. First, as the discussion earlier in this judgment shows, it does appear that for many centuries it has been regarded as fundamental to the concept of a term of years that it had a certain duration when it was created. It seems logical that the subsequent development of a term from year to year (ie a periodic tenancy) should carry with it a similar requirement, and the case law also seems to support this.

Secondly, the 1925 Act appears to support this conclusion. Having stated in s 1(1) that only two estates can exist in land, a fee simple and a term of years, it then defines a term of years in s 205(1)(xxvii) as meaning "a term of years [...] either certain or liable to determination by notice [or] re-entry"; as Lord Templeman said in *Prudential*,[68] this seems to underwrite the established common law position. The notion that the 1925 Act assumed that the certainty requirement existed appears to be supported by the terms of s 149(6). As explained more fully below, this provision effectively converts a life tenancy into a determinable term of 90 years. A tenancy for life is a term of uncertain duration, and it was a species of freehold estate prior to 1926, but, in the light of s 1 of the 1925 Act, if it was to retain its status as a legal estate, it could only be a term of years after that date. Presumably it was converted into a 90-year term because those responsible for drafting the 1925 Act thought it could not be a term of years otherwise.

Thirdly, the certainty requirement was confirmed only some 20 years ago by the House of Lords. Fourthly, while not a very attractive point, there is the concern expressed by Lord Browne-Wilkinson, namely that to change the law in this field "might upset long established titles".[69] Fifthly, at least where the purported grant is to an individual, as opposed to a company or corporation, the arrangement does in fact give rise to a valid tenancy, as explained below. Finally, it has been no part of either party's case that the Agreement gave rise to a valid tenancy according to its terms (if, as I have concluded, it has the meaning for which [Ms Berrisford's counsel] contends).

Would such a tenancy have been treated as a tenancy for life before 1926?

While [counsel for Ms Berrisford] accepts that the arrangement contained in the Agreement would not be capable of constituting a tenancy in accordance with its terms, he contends that, at any rate before 1926, the arrangement would have been treated by the court as a tenancy for the life of Ms Berrisford, determinable before her death by her under cl 5, or by Mexfield under cl 6.

There is much authority to support the proposition that, before the 1925 Act came into force, an agreement for an uncertain term was treated as a tenancy for the life of the tenant, determinable before the tenant's death according to its terms. In *Bracton*,[70] it will be recalled that the grant of an uncertain term was held to give rise to a "free tenement", provided that the formalities had been complied with. The nature of this free tenement would appear to be a tenancy for the life of the grantee. That is clear from what was said in Littleton on *Tenures* namely:

> "[I]f an abbot make a lease to a man, to have and to hold to him during the time that he is abbot [...] the lessee hath an estate for the term of his owne life: but this is on condition [...] that if the abbot resign, or be deposed, that then it shall be lawful for his successor to enter."[71]

[68] [1992] 2 AC 386, 391B. [69] [1992] 2 AC 386, 397A.
[70] *Bracton on the Laws and Customs of England* (trans Professor E Thorne) (1977, vol 3), p 50 (f176b).
[71] Littleton on *Tenures* (1481/2) vol 2, s 382.

In Co Litt vol 1, p 42a,[72] it is similarly stated that if an estate is granted to a person until, inter alia, she marries, or so long as she pays £40 "or for any like incertaine term", "the lessee hath in judgment of law an estate for life determinable if [the formalities of creation are satisfied]". This passage was quoted and applied by North J in *In re Carne's Settled Estates*.[73] The same point was made in *Sheppard's Touchstones on Common Assurances*,[74] where it is said that "uncertain leases made with [...] limitations [...] may be good leases for life determinable on these contingents, albeit they be no good leases for years".

In *Doe v Browne*,[75] Lord Ellenborough CJ and Lawrence J, both of whom rejected the contention that an agreement which was to continue so long as the tenant paid the rent and did not harm the landlord's business could be a valid term of years, said that it could be "an estate for life", but that it failed to achieve this status because the necessary formalities had not been complied with. Such formalities have now largely been done away with, and they normally only require a written, signed document. As Lord Dyson's reference to Joshua Williams's 1920 textbook shows, the perceived legal position right up to the time of the 1925 property legislation was that terms of uncertain duration were converted into determinable terms for life.

On this basis, then it seems clear that, at least if the Agreement had been entered into before 1 January 1926 (when the 1925 Act came into force), it would have been treated by the court as being the grant of a tenancy to Ms Berrisford for her life, subject to her right to determine pursuant to cl 5 and Mexfield's right to determine pursuant to cl 6.

[Counsel for Mexfield] relies on more recent authorities to support a contention that an agreement for an uncertain term was only regarded as creating a tenancy for life if, on a fair reading of the agreement, that was what the parties to the agreement intended [...]

In my judgment, however, there are three answers to that contention. The first is that the reasoning in *Zimbler v Abrahams*[76] is not strictly inconsistent with [counsel for Ms Berrisford's] analysis: if, as a matter of interpretation, the agreement in that case did involve the grant of a tenancy for life, then there was no need to invoke [counsel for Ms Berrisford's] analysis, but that does not mean that the analysis is wrong. Secondly, if *Zimbler* did proceed on the assumption that an agreement which purported to create a tenancy for an uncertain term could not give rise to a tenancy for life unless it was the parties' intention to do so, it was wrong, as it would have been inconsistent with the authoritative dicta relied on by [counsel for Ms Berrisford], in particular the clear statement in Littleton, vol 2, s 382 [...] Thirdly, even if an agreement which creates an uncertain term could only have resulted in a tenancy for the life of the tenant if that was the intention of the parties, I consider that, on a true construction of the Agreement, it was intended that Ms Berrisford enjoy the premises for life - subject, of course, to determination pursuant to clauses 5 and 6. I have in mind in particular cl 6(c), which will apply on Ms Berrisford's death, the fact that her interest is unassignable, and the fact that it was intended to ensure that she could stay in her home.

Is the agreement converted into a 90-year term by s 149(6)?

The next step in [counsel for Ms Berrisford's] argument is that, given that the Agreement would have given rise to a tenancy for life prior to 1926, the effect of s 149(6) of the 1925 Act ("s 149(6)") is that the Agreement is now to be treated as a term of 90 years determinable on the death of Ms Berrisford, subject to the rights of determination in clauses 5 and 6.

[The wording of s.149(6), extracted above, is then set out]

[72] [This is a reference to Coke's commentary on Littleton's *Tenures*].
[73] [1899] 1 Ch 324, 329, 68 LJ Ch 120, 47 WR 352.
[74] 7th edn (1821, vol 2), p 275.
[75] (1807) 8 East 165, 166–7.
[76] [1903] 1 KB 577.

As already mentioned, the 1925 Act began by limiting the number of permissible legal estates in land to two, a fee simple and a term of years. Accordingly, it was necessary for the statute to deal with interests, such as estates for lives, which had previously been, but no longer were, valid legal estates. Hence one of the reasons for s 149(6). However, it is clear from its terms that the section was not merely concerned with preserving life interests which existed prior to 1 January 1926: it also expressly applies to life interests granted thereafter. Therefore, says [counsel for Ms Berrisford], the section converts an arrangement such as the Agreement, which, according to the common law, is a life tenancy into a 90-year term.

The first argument which might be raised against this contention is that the Agreement was not a "lease [...] for life", merely a contract which would have been treated by established case law as such a lease. I do not consider that can be right. Apart from not being consistent with the wording of s 149(6), it would mean that an agreement such as that described in Littleton s 382, which existed as a continuing valid determinable life estate on the 1 January 1926, would have lost its status as a legal estate, as it would not have been saved by s 149(6): that cannot have been the legislature's intention.

[Counsel for Mexfield] contends that s 149(6) is concerned with tenancies which automatically end with the tenant's death, not with tenancies which can be determined on the tenant's death, and, in this case, the effect of cl 6(c) is that the tenancy can be determined, not that it automatically determines, on the tenant's death. I accept that s 149(6) only applies to tenancies which automatically determine on death, and I am prepared to assume that cl 6(c) can only be invoked by service of a notice. However, the argument misses the point, because the Agreement is (or would be in the absence of ss 1 and 149 of the 1925 Act) a tenancy for life, not because of the specific terms of, or circumstances described in, cl 6(c), but because it is treated as such by a well-established common law rule.

It is also suggested that s 149(6) does not apply to arrangements such as the Agreement which are determinable in circumstances other than the tenant's death—eg on the grounds set out in cl 6. I can see no reasons of principle for accepting that contention, and it appears to me that there are strong practical reasons for rejecting it. The common law rule that uncertain terms were treated as life tenancies applied, almost by definition, to arrangements which determined in other events, and it is hard, indeed impossible, to see why the rule should be limited to cases where an event automatically determines the term, as opposed to cases where an event entitles the landlord to serve notice to determine the term. In each case, the term is uncertain. At least one of the reasons the common law treated uncertain terms as tenancies for lives was, as I see it, to save arrangements which would otherwise be invalidated for technical reasons, and I find it hard to accept that the modern law requires the court to adopt a less benevolent approach to saving contractual arrangements. [...]

It is strongly pressed by [counsel for Mexfield] that the conclusion that the Agreement gives rise to a valid tenancy for 90 years determinable on the tenant's death would be inconsistent with high modern authority. In particular, he said that such a conclusion would be contrary to the outcome in *Lace v Chantler*,[77] and inconsistent with clear dicta of Lord Greene MR in that case and of Lord Templeman in *Prudential*. I accept the factual basis for that argument, but do not agree with its suggested conclusion.

The fact is that it was not argued in either of those two cases that the arrangement involved would have created a life tenancy as a matter of common law, and that, following s 149(6), such an arrangement would now give rise to a 90-year term, determinable on the tenant's death (and [counsel for Ms Berrisford] was kind enough to point out that such an argument would not have assisted, and may even have harmed, the unsuccessful

[77] [1944] KB 368.

respondent's case in *Prudential*).[78] Some of the statements about the law by Lord Greene and Lord Templeman can now be seen to be extravagant or inaccurately wide, but it is only fair to them to repeat that this was, at least in part, because the tenancy for life argument was not raised before them.

Is Ms Berrisford accordingly entitled to retain possession?

For the reasons given, I accept [counsel for Ms Berrisford's] case that (i) the arrangement contained in the Agreement could only be determined in accordance with clauses 5 and 6, and not otherwise, (ii) such an arrangement cannot take effect as a tenancy in accordance with its terms, but (iii) by virtue of well-established common law rules and s 149(6), the arrangement is a tenancy for a term of 90 years determinable on the tenant's death by one month's notice from the landlord, and determinable in accordance with its terms, ie pursuant to clauses 5 and 6.

I indicated earlier in this judgment that this conclusion would apply irrespective of whether the purported tenancy created by the Agreement was simply for an indeterminate term or was a periodic tenancy with a fetter on the landlord's right to determine. There is no difficulty if the former is the right analysis. If the latter is correct, then there is a monthly tenancy which the landlord is unable to determine unless he can rely on one or more of the grounds in cl 6. In *Breams Property Investment co Ltd v Strougler*,[79] the court concluded that a periodic tenancy with a fetter on the landlord's right to determine for three years was valid. It seems to me that the term thereby created was equivalent to a fixed term of three years (subject to a restricted right of determination in the landlord and an unrestricted right of determination by the tenant) followed by a periodic tenancy.

Accordingly a periodic tenancy with an invalid fetter on the landlord's right to determine should be treated in the same way as a tenancy for a fixed, if indeterminate, term. That seems to me to be justified in principle, logical in theory, and it ensures the law in this area is the same for all types of tenancy, whether or not periodic in nature (which was, I think, part of the reasoning in *Prudential*). On that basis, even if the tenancy created by the Agreement was a monthly tenancy with an objectionable fetter, it seems to me that it would have been treated as a life estate under the old law (subject to the right to determine in accordance with the terms of the fetter), and so would now be a tenancy for 90 years.

Ms Berrisford is still alive, and it is common ground that she has not served notice under cl 5 and that Mexfield is not relying on cl 6. In those circumstances, it follows that Ms Berrisford retains her tenancy of the premises and that Mexfield is not entitled to possession.

Ms Berrisford's alternative case in contract

This conclusion renders it unnecessary to consider two alternative arguments, which were raised by [counsel for Ms Berrisford], namely that (i) if the Agreement did not create a tenancy, it nonetheless gave rise to a binding personal contract between Mexfield and Ms Berrisford, which Ms Berrisford is entitled to enforce against Mexfield so long as it owns the premises, or (ii) if the Agreement created a periodic tenancy with an impermissible fetter on the right of the landlord to serve notice to quit, the fetter is nonetheless enforceable as against Mexfield so long as it is the owner of the premises.

However, having heard full submissions on those two arguments, I incline fairly strongly to the view that, if Ms Berisford had failed in establishing that she had a subsisting tenancy of

[78] [After all, in *Prudential Assurance*, it is likely to have been the case that Mr Nathan, the original tenant, had died by the time of the litigation (see *per* Lady Hale at [92]): a lease for Mr Nathan's life would therefore have been of little use to his successors in title, the respondents in that case.]

[79] [1948] 2 KB 1.

the premises, she would nonetheless have defeated Mexfield's claim for possession on the ground that she is entitled to enforce her contractual rights.

If the Agreement does not create a tenancy for technical reasons, namely because it purports to create an uncertain term, it is hard to see why, as a matter of principle, it should not be capable of taking effect as a contract, enforceable as between the parties personally, albeit not capable of binding their respective successors, as no interest in land or other proprietary interest would subsist.

The argument to the contrary rests in part on authority and in part on principle. So far as authority is concerned, the point at issue was specifically addressed and rejected by Lord Greene in *Lace v Chantler* in these terms:

> '[Counsel] argued that the agreement could be construed as an agreement to grant a licence. In my opinion, it is impossible to construe it in that sense. The intention was to create a tenancy and nothing else. The law says that it is bad as a tenancy. The court is not then justified in treating the contract as something different from what the parties intended [. . .] That would be setting up a new bargain which neither of the parties ever intended to enter into.'[80]

So, too, in *Prudential*, it appears that Lord Templeman treated as void a fetter for an indefinite period on the right of the landlord under a periodic tenancy to serve a notice to quit.

It does not seem to me that the observations of Lord Greene, although they are strongly expressed views of a highly reputable judge, can withstand principled analysis. As Lord Templeman made clear in *Street v Mountford*,[81] while the parties' rights and obligations are primarily determined by what they have agreed, the legal characterisation of those rights is ultimately a matter of law. If the Agreement is incapable of giving rise to a tenancy for some old and technical rule of property law, I do not see why, as a matter of principle, that should render the Agreement invalid as a matter of contract.

The fact that the parties may have thought they were creating a tenancy is no reason for not holding that they have agreed a contractual licence any more than in *Street*, the fact that the parties clearly intended to create a licence precluded the court from holding that they had, as a matter of law, created a tenancy [. . .]

[Counsel for Mexfield] relies on *Street* to support another argument, namely that the Agreement could not amount to a licence because it granted the occupier exclusive possession, which is the hallmark of a tenancy. In my view, there is nothing in that argument. The hallmarks of a tenancy include the grant of exclusive possession, but they also include a fixed or periodic term. That was emphasised by Lord Templeman in *Street* at several points in his judgment, where he referred to a tenancy having to be for "a term of years absolute", "a fixed or periodic term certain", or (in a formulation which he approved and adopted) "for a term or from year to year or for a life or lives".[82] Further, as Lord Templeman made clear more than once, the rule that an occupier who enjoys possession is a tenant admits of exceptions, even where the occupier has been granted a fixed or periodic term.[83] [. . .]

If the Agreement cannot give rise to a tenancy, then, if it is not a contractual licence, the only right that Ms Berrisford could claim would be that of a periodic tenant on the terms of the written Agreement in so far as they are consistent with a periodic tenancy, because she has been in possession purportedly under the Agreement, paying a weekly rent to Mexfield. It is worth briefly considering why she would be a periodic tenant on this basis, not least because it is Mexfield's contention that this is the right analysis.

It would be because the law will infer a contract on these terms from the actions of the parties, namely the terms they purported to agree in the Agreement, and Ms Berrisford's

[80] [1944] KB 368, 371–2. [81] [1985] AC 809.
[82] 1985] AC 809, 814E–F, 818E, and 827C and E. [83] [1985] AC 809, 818E–F and 823D–E.

enjoyment of possession and payment of rent. But the ultimate basis for inferring a tenancy (and its terms) is the same as the basis for inferring any contract (and its terms) between two parties, namely what a reasonable observer, knowing what they have communicated to each other, considers that they are likely to have intended. Given that no question of statutory protection could arise, it seems to me far less likely that the parties would have intended a weekly tenancy determinable at any time on one month's notice than a licence which could only be determined pursuant to clauses 5 and 6. [. . .]

That leaves [counsel for Ms Berrisford's] further alternative argument, namely that, if Mexfield is right and there is a periodic tenancy, then, even if the fetter on the landlord's right to serve a notice to quit is objectionable in landlord and tenant law, it can be enforced as between the original parties as a matter of contract. That was the basis on which Wilson LJ felt able to find for Ms Berrisford in the Court of Appeal. I prefer to say nothing about that point: I have already dealt with one alternative reason for allowing this appeal, so considering this argument would involve making two successive counter-factual assumptions, rarely a satisfactory basis for deciding a point of law.

Conclusion

In these circumstances, I would allow Ms Berrisford's appeal, and discharge the order made against her. It is only right to repeat that the Court of Appeal and Peter Smith J were bound by authority which made it impossible for them to reach the same conclusion as I have done on the points on which I would allow the appeal.

Lord Hope

[Lord Hope considered how Scottish law would deal with the facts of the case, noting that a lease is seen principally as a contract conferring only personal rights, and can have proprietary effect against third parties only if the requirements of the Leases Act 1449 are met. He also noted that, under the relevant Scottish housing legislation, it was very likely that a body such as Mexfield would be a registered social landlord and that an occupier such as Ms Berrisford would thus have the statutory protection of a secure tenancy]

At [80]–[81]

I have to confess that I have found it difficult to understand why English law finds it so difficult to hold that, if an agreement of this kind cannot for technical reasons take effect as a tenancy, it can be regarded as binding on the parties simply by force of contract. I appreciate the problems that would need to be faced if it was necessary for the agreement to have proprietary effect, which it would if the dispute had not been between the original contracting parties. As it is, however, the essence of the dispute between the parties in this case seems to me to be about the effect of the contract which they entered into. One might have expected it to be capable of being solved by applying the ordinary principles of the law of contract without having to resolve questions about the effect of the agreement on the parties' proprietary interests or what the agreement is to be called. But I entirely understand that the contrary view is supported by a very substantial body of authority. It can by no means be lightly brushed aside, and I am persuaded that, for all the reasons that Lord Neuberger gives, it would not be appropriate for us to consider changing the law as to what constitutes what English law will hold to be a tenancy, at least in this case.

I also wonder whether the time has not now come for the legislative fetter which prevents mutual housing associations from granting protected or statutory tenancies in England and Wales to be removed, so that they are placed on the same footing as other providers of social housing as in Scotland. The reason that was given by the Minister of State in the Department

of the Environment, the Earl of Caithness, for introducing an amendment to the Bill which became the Housing Act 1988 that provided that a fully mutual housing association cannot create an assured tenancy was that a statutory regime designed to regulate the relationship between landlord and tenant had little relevance in a situation "where, as is the nature of a co-operative, the interests of landlord and tenants as a whole are in effect indivisible.[84] That statement was repeated in the House of Commons by the Parliamentary Under Secretary of State, David Trippier, when the Lords amendment was approved.[85] The facts of this case suggest that, as least so far as Mexfield is concerned, that happy state of affairs no longer exists. The assumption on which that measure was put through Parliament seems now to rest on doubtful foundations, as financial pressures may cause the parties' interests to diverge to the detriment of the residential occupier. That is not something that this court can deal with. But I suggest that it is something that might be considered in any future programme for the reform of housing law.

Lady Hale

At [87]–[88]

Periodic tenancies obviously pose something of a puzzle if the law insists that the maximum term of any leasehold estate be certain. The rule was invented long before periodic tenancies were invented and it has always been a problem how the rule is to apply to them. In one sense the term is certain, as it comes to an end when the week, the month, the quarter or the year for which it has been granted comes to an end. But that is not the practical reality, as the law assumes a re-letting (or the extension of the term) at the end of each period, unless one or other of the parties gives notice to quit. So the actual maximum term is completely uncertain. But the theory is that, as long as each party is free to give that notice whenever they want, the legal maximum remains certain. Uncertainty is introduced if either party is forbidden to give that notice except in circumstances which may never arise. Then no-one knows how long the term may last and indeed it may last for ever.

These rules have an Alice in Wonderland quality which makes it unsurprising that distinguished judges have sometimes had difficulty with them [. . .]

At [93]–[96]

So we have now reached a position which is curiouser and curiouser. There is a rule against uncertainty which applies both to single terms of uncertain duration and to periodic tenancies with a curb on the power of either party to serve a notice to quit unless and until uncertain events occur. But this rule does not matter if the tenant is an individual, because the common law would have automatically turned the uncertain term into a tenancy for life, provided that the necessary formalities were complied with, before the Law of Property Act 1925. A tenancy for life was permissible at common law, although of course it was quite uncertain when the event would happen, but it was certain that it would. I suppose at the time of the hundred years' war there was uncertainty both as to the "when" and the "whether" it would ever end. Be that as it may, a tenancy for life is converted into a 90 year lease by the 1925 Act.

As it happens, in the particular agreement with which we are concerned, it is not difficult to conclude that the parties did in fact intend a lease for life determinable earlier by the tenant on one month's notice and by the landlords on the happening of certain specified events. So our conclusions are in fact reflecting the intentions of the parties. But it is not difficult to imagine circumstances in which the same analysis would apply but be very far from the

[84] Hansard (HL Debates), 3 November 1988, vol 501, col 395.
[85] Hansard (HC Debates), 9 November 1988, vol 140, col 337.

intentions of the parties. And that analysis is not available where the tenant is a company or corporation. So there the court is unable to give effect to the undoubted intentions of the parties. Yet, as the court pointed out in *Midland Railway*,[86] it is always open to the parties to give effect to those intentions by granting a very long term of years, determinable earlier on the happening of the uncertain event. The law, it would seem, has no policy objection to such an arrangement, so it is difficult to see what policy objection it can have to upholding the arrangement to which the parties in fact came.

It is even more bizarre that, had the "tenancy for life" analysis not been available, the conclusion might have been, not that this was a contractual tenancy enforceable as such as between the original parties, but that it was a contractual licence, also enforceable as such between the original parties. This, as I understand it, is the difference between English and Scots law. I do not understand that it makes any difference to the result.

As will be apparent, I entirely agree with the reasoning and conclusions reached by Lord Neuberger on the first question: does Ms Berrisford have a subsisting tenancy? For that reason, I do not think it necessary to express an opinion on the alternative case in contract. But it seems to me obvious that the consequence of our having reached the conclusions which we have on the first issue is to make the reconsideration of the decision in *Prudential*, whether by this court or by Parliament, a matter of some urgency. As former Law Commissioner Stuart Bridge has argued:[87]

> "If the parties to a periodic tenancy know where they stand, in the sense that the contract between them is sufficiently certain, then that should be enough. If a landlord, in this case a fully mutual housing association, decides that its tenants should be entitled to remain in possession unless and until they fall into arrears with their rent or break other provisions contained in the tenancy agreement, it is difficult to see what policy objectives are being furthered in denying the tenant the rights that the agreement seeks to create."

Quite so.

Lord Dyson

At [116]–[120]

At all events, as a result of [counsel for Ms Berrisford's] impressive and scholarly research (which was not placed before the Court of Appeal), it is clear that it is unnecessary to get rid of the uncertainty rule in this case. This is because before the enactment of the Law of Property Act 1925 ("the 1925 Act"), the tenancy purportedly created by the Agreement would have been treated as a tenancy for life, defeasible by determination on any of the grounds specified in clauses 5 and 6. Lord Neuberger has referred to some of the pre-1926 authorities at paras 37 to 39. The position is well summarised in the last edition of the standard work on land law before the 1925 legislation, *Joshua Williams' Law of Real Property*,[88] in these terms:

> 'Where land is given to a widow during her widowhood, or to a man until he shall become bankrupt, or for any other definite period of time of uncertain duration, a freehold estate is conferred, as in the case of a gift for life. Such estates *are regarded in law* as determinable life estates [. . .]' (Emphasis added).

Accordingly, a periodic tenancy determinable on an uncertain event was treated as a defeasible tenancy for life. In disputing this proposition, [counsel for Mexfield's] principal

[86] *In re Midland Railway Co's Agreement* [1971] Ch 725.
[87] [2010] Conv 492, 497.
[88] 23rd edn (1920, p 135).

submission was that, before the enactment of the 1925 Act, the question whether a periodic tenancy determinable on an uncertain event was a defeasible tenancy for life was one of construction of the particular agreement. But, as Lord Neuberger explains, it is clear from the authorities that this is incorrect. It was a rule of the common law that such a tenancy was automatically treated as a tenancy for life. It had nothing to do with the intention of the parties.

The effect of s 149(6) of the 1925 Act was to convert such a tenancy into a term for 90 years, subject to earlier termination in accordance with its terms. It follows that the Agreement is such a tenancy and all the terms of cl 6 apply with full force and effect. Mexfield cannot terminate the Agreement by serving a notice to quit as if this were a simple monthly tenancy without more.

This is a just result which plainly accords with the intention of the parties. But it may legitimately be said that it is not satisfactory in the 21st century to have to adopt this chain of reasoning in order to arrive at such a result. It is highly technical. There should be no need to have to resort to such reasoning in order to arrive at the result which the parties intended. That is why the radical solution of doing away with the uncertainty rule altogether is so attractive. There is the further point that the s 149(6) route to the right result can only be followed where the purported tenant is an individual and not a corporate entity. To treat an individual and a corporate entity differently in this respect can only be explained on historical grounds. The explanation may lie in the realms of history, but that hardly provides a compelling justification for maintaining the distinction today.

To conclude, in my view the answer to this appeal lies in the law of landlord and tenant and the appeal must be allowed. I do not find it necessary to address the alternative arguments advanced by [counsel for Ms Berrisford]. I would, however, go so far as to say that, like Lord Neuberger (paras 57 to 62), I am strongly attracted by the submission that, if by reason of the uncertainty argument the Agreement did not create a tenancy, then it was enforceable as a contract according to its terms like any other contract.

In *Prudential Assurance*, Lord Browne-Wilkinson noted that the need for certainty of term may produce 'bizarre' or 'extraordinary' results. The facts of *Berrisford* form an almost perfect example of the apparent injustice to which the rule may lead. The basis on which Ms Berrisford sold her home and then entered into an agreement with Mexfield was that she would be secure in her occupation: that she could be removed only if one of the events set out in Clause 6 occurred. Mexfield's principal argument, successful in the front of Peter Smith J and the Court of Appeal, was that, notwithstanding the clear terms of Clause 6, Ms Berrisford could in fact be removed at the whim of Mexfield, provided that she was given one month's notice of Mexfield's intention not to renew her implied periodic tenancy.

It is no surprise, then, that the Supreme Court found a way to avoid that seemingly unjust result. It is important to note, first of all, that the Supreme Court's solution does *not* reform or remove the rule, applied in *Prudential Assurance*, that a lease involves exclusive possession of land for a limited period. The Supreme Court rather found that Ms Berrisford had a right to exclusive possession of her home for a maximum period of 90 years, with Mexfield having a power to end that right only on her death or if one of the events set out in Clause 6 occurred. To find that Ms Berrisford had such a right, the Supreme Court had to take two steps. First, her agreement with Mexfield, which seemingly gave her a right to exclusive possession for an uncertain term, was re-interpreted as giving her a right to exclusive possession for her life, determinable on the grounds set out in the agreement. This re-interpretation was the result of a common law principle that applied before the Law of Property Act 1925.

Second, it was held that, as Ms Berrisford had a right to exclusive possession for her life, determinable on the grounds set out in the agreement, s 149(6) of the LPA 1925 could be applied to turn her right into a 90 year lease, again determinable on the grounds set out in the agreement. The Supreme Court's analysis can therefore be set out as follows:

The parties' agreement gives Ms Berrisford a right to exclusive possession for an uncertain term, determinable on limited grounds.

Step 1: A common law principle transforms Ms Berrisford's right into a right to exclusive possession for her life, determinable on the limited grounds set out in the agreement.

Step 2: Section 149(6) of the LPA 1925 transforms Ms Berrisford's right into a lease for 90 years, determinable on her death as well as on the limited grounds set out in the agreement.

As Lord Templeman remarked in *Prudential Assurance*, it has always been a simple matter for well-advised parties to avoid the effects of the certainty of term rule: instead of a right to exclusive possession 'until the land is needed for road-widening', a party can be given such a right 'for 999 years, or until the land is needed for road-widening'. The solution adopted in *Berrisford* effectively allows for the same tactic to be applied, even if the parties did not think of it themselves. It is important to note, however, that the solution cannot work in cases where the purported lease is given to a company—in such cases, a right to exclusive possession 'for life' makes no sense, and therefore the common law rule, operating at Step 1 above, cannot apply. Following *Berrisford*, the case for some form of legislative intervention is very strong, as it is difficult to justify a position where the same agreement has a quite different effect depending on whether the tenant is a natural person or a company.

It is tempting to ask why, if the solution in *Berrisford* (including its interpretation of the LPA 1925) is correct, it had not previously been adopted by any court. This is not, however, a strong argument against the *Berrisford* analysis. Firstly, prior to *Prudential Assurance*, there had been Court of Appeal decisions which took a more relaxed approach to the need for certainty of term;[89] as a result, in a number of cases at least, there was no need to appeal to the *Berrisford* argument. Secondly, in some cases, such as *Prudential Assurance* itself, the *Berrisford* solution would have been of no use to the occupier of the land, as the death of the original tenant meant that, even if s 149(6) applied, the landlord would in any case have a right to end the lease.

There are, nonetheless, some difficulties with the *Berrisford* analysis. Firstly, the effect of the common law rule applied at Step 1 has to be carefully defined. For example, the 1920 textbook[90] quoted by Lord Dyson[91] states that where land is given for a 'definite period of time of uncertain duration, a freehold estate is conferred, as in the case of a gift for life. Such estates are regarded in law as determinable life estates [...]'. It is important to distinguish a determinable freehold for life from a lease for life. Prior to the LPA 1925, it was possible, for example, for a testator to leave his land to B1 for B1's life, then to B2 and thus to give each of B1 and B2 a legal estate: B1's estate was known as a life estate, and B2's estate as a fee simple in remainder. B1's estate, however, was *not* a lease: it was one of the three forms of freehold estate that could exist at common law before 1926.[92] So, for example, B1 held his life estate without being in a landlord-tenant relationship; B1's life estate counted as part of his 'real

[89] See *In re Midland Railway Co's Agreement* [1971] Ch 725; *Ashburn Anstalt v Arnold* [1989] Ch 1.
[90] *Joshua Williams' Law of Real Property* (23rd edn, 1920), p 135.
[91] At [116].
[92] The other two being the fee simple and the fee tail.

property', whereas a lease held by B1 would count as part of his 'personal property'; and B1 was subject to liability for waste to B2 (see Chapter 20, section 4).

On this analysis, the common law rule operating at Step 1 thus did not convert a lease for an uncertain term into a lease for life; it rather converted it into a (freehold) life estate. This may cause two problems for the reasoning in *Berrisford*. Firstly, can that common law rule still operate even after 1926, given that the life estate no longer exists as a legal estate in land? Secondly, if the common law rule does operate, then can Step 2 apply? After all, s 149(6) of the LPA applies to leases, not to (freehold) life estates.

Whatever one's view as to the validity of the Supreme Court's reasoning in *Berrisford*, one can also ask if, rather than adopting a technical work-around to the certainty of term rule, it would be simpler and better to remove the rule itself. It must be emphasised that, as the Supreme Court were not asked by either party to overrule *Prudential Assurance*, it would have been inappropriate for it to do so. Nonetheless, it may seem odd that the law is left with a rule for which judges in the highest court in the land have twice been unable to find a persuasive justification. The following extracts consider if a rationale for the rule can be found. The first focuses on a doctrinal explanation; the second, finding that explanation unconvincing, suggests that the rule, in some cases at least, may serve a useful policy purpose.

McFarlane, *The Structure of Property Law* (2008, pp 677–8)

A Lease consists of a right to exclusive control of land for a limited period. So, if A gives B a right to exclusive control of land "until England win the football World Cup" that right does not count as a Lease. The problem is *not* that the parties will be unable to tell if the specified event has happened: if and when England win the football World Cup, they (and everyone else) will know about it. The problem is rather that it is impossible for A to know *if and when* he can regain his right to exclusive control of the land. And that uncertainty is simply incompatible with a Lease. A Lease arises where A retains his property right in the land and grants B a new property right. So, if A grants B a Lease, A does *not* lose his property right in the land. But if it were possible to have a Lease in which A does not know if and when he will again have a right to exclusive control of the land, A's property right will, in effect, be meaningless [. . .]

[In *Prudential Assurance*] Lord Browne-Wilkinson expressed frustration that the rationale for the rule was unclear, stating that "No one has produced any satisfactory rationale for the genesis of the rule" that "the maximum duration of a [Lease must be] ascertainable from the outset". However, the problem may lie with his Lordship's formulation of the rule. It is *not* the case that the maximum length of the Lease must be known at the outset: the important point is that A must be able to tell if and when he will be able to assert his right to exclusive control of the land. The rule therefore has a valid doctrinal purpose.

Bright, *Landlord and Tenant Law in Context* (2007, pp 73–4)

The explanation for the certainty requirement is sometimes said to rest in the fact that it serves to distinguish leases, as determinate interests, from freeholds, which are of uncertain duration (such as for life, indefinitely, or until the happening of some future event). There are, however, difficulties with accepting this as a continuing justification for the rule. As seen, statute clearly accepts the notion of a *lease for life* as it provides that it is to be converted into a fixed period lease determinable on death, and this makes it therefore difficult to argue that determinancy can tell us on which side of the line an interest falls. Further, there are usually

other ways of knowing if an interest is freehold or leasehold, especially as it is common (though not universal) for a rent to be paid if there is a lease. It has also been argued that the rule is simply part of the *numerus clausus* principle in land law (the idea that there is a closed list of rights that can exist as property rights) and the certainty requirement draws a line which marks the boundary between property and contract rights. At one level, this is clearly true but it does not tell why the line is drawn where it is. The rule has also been supported for promoting careful drafting, but this would need only a rule requiring linguistic certainty.

None of these explanations provides a convincing justification for retaining a rule which strikes down otherwise good commercial arrangements. Why should a landlord not be able to agree with a tenant that he can occupy a workshop 'until planning permission is obtained to redevelop the site'? [...] Although not designed for this purpose, the rule can have the benefit of releasing the landlord from what turns out to have been an improvident bargain. The commercial intention behind the workshop example is that the tenant occupies the workshop as an interim measure [...] The risk [...] is that it may become clear that planning permission will never be given, thereby creating a perpetual lease [...] This risk materialised in *Prudential Assurance* itself. The lease was to end when the land was needed for road widening. Circumstances changed, and the road was never widened. The 'lease' that had been intended to only be of short duration when granted in 1930 for a fixed rent of £30 per annum was still running in 1992, by which time the current rental value was in excess of £10,000 per annum. The fact that the letting was intended by the parties to be fairly short term and was drafted on that basis means that the arrangement, initially evenly balanced, became heavily slanted against the landlord over time. By declaring the lease void the court opens up the relationship so that it can be renegotiated to reflect current property values [...] But it is unlikely that the certainty rule was ever intended to facilitate contractual variation; and the problem remains that it strikes down not only the leases that have become unfair over time, but all leases with an unknown end-date.

As Bright notes, in particular cases (such as *Prudential Assurance*), the limited period requirement may be justifiable on the grounds that it allows a party to escape an improvident long-term contract. In *Berrisford*, in contrast, this effect of the rule was wholly unattractive: there would have been a clear injustice if Mexfield had been allowed to remove Ms Berrisford contrary to the terms of its agreement with her. One way to avoid that injustice would be to reform the rule that a lease must be for a limited period; but it must be noted that, as demonstrated by the decision of the Supreme Court in *Berrisford*, other solutions are possible. Indeed, as Lord Hope noted,[93] there is a strong case that the legislature erred in denying statutory protection to tenants of fully mutual housing co-operatives. Had Parliament taken a different view, the approach of the House of Lords in *Prudential Assurance* would have caused no difficulty to Ms Berrisford, as the implied periodic tenancy arising from her payment of rent, and Mexfield's acceptance of that rent, would have been enough to give her statutory protection and therefore to limit the grounds on which Mexfield, or any successor in title to Mexfield, could have removed her from the property.

2.8 EXCEPTIONS?

The discussion so far suggests that there is a relatively simple test for the content of a lease: does B have a right to exclusive possession of land for a limited period? In *Street v Mountford*,

[93] [2011] UKSC 52, [81].

however, Lord Templeman set out a number of exceptions: situations in which B can have a right to exclusive possession without having a lease. We need to ask if those situations really do constitute exceptions to the basic rule.

Bruton v London and Quadrant Housing Trust
[1988] QB 834, CA[94]

Millett LJ

At 843

In *Street v Mountford* Lord Templeman gave only three examples of exceptional circumstances where the grant of exclusive possession does not create a tenancy. First, where the circumstances negative any intention to create legal relations at all. Secondly, where the possession of the grantee is referable to some other legal relationship such as vendor and purchaser or master and servant. Thirdly, where the grantor has no power to create a tenancy, as in the case of a requisitioning authority. As I pointed out in *Camden London Borough v Shortlife Community Housing*,[95] the first and third of these are not exceptions to a general rule. The relationship of landlord and tenant is a legal relationship. It cannot be brought into existence by an arrangement which is not intended to create legal relations at all or by a body which has no power to create it. The existence of these two categories is due to the fact that the creation of a tenancy requires the grant of a legal right to exclusive possession.

On the view of Millett LJ, which seems to be correct, we need to focus our attention on cases in which '*possession of* [B] *is referable to some other legal relationship such as vendor and purchaser or master and servant*'. In *Street v Mountford*,[96] Lord Templeman stated that: '*an occupier who enjoys exclusive possession is not necessarily a tenant. He may be owner in fee simple, a trespasser, a mortgagee in possession, an object of charity or a service occupier.*'

In the first three of those cases we can explain the absence of a lease by simply pointing to the absence of a term: B may have exclusive possession, but he does not have it for a limited period.[97] The 'object of charity' exception may admit of two explanations. Firstly, it may be that, as in *Booker v Palmer*[98] (see section 2.2 above), A's charitable motive means that he does not intend to enter legal relations with B. This may well be the case, where, for example, B pays no rent. In that case, the absence of a lease is easy to explain.

Secondly, in *Gray v Taylor*,[99] Mrs Taylor occupied an almshouse under an agreement with the trustees of a charity. Sir John Vinelott stated:[100] '*A person who is selected as an almsperson becomes a beneficiary under the trusts of the charity and enjoys the privilege of occupation of rooms in the almshouses as beneficiary.*' As noted by Barr,[101] the analysis here seems to be that the occupier's rights come from her *status* as a 'beneficiary' of the charitable trust. The argument seems to be that the agreement between the parties, by itself, did not define Mrs Taylor's right to occupy; rather, that right flowed from, and depended on the continuation of, the charity's decision to regard her as a suitable recipient of its generosity. Equally,

[94] See Chapter 23, section 3, for discussion of the facts of the case and the decision of the House of Lords.
[95] (1992) 25 HLR 330. [96] [1985] AC 809, 825.
[97] See McFarlane, *The Structure of Property Law* (2008), p 670. [98] [1942] 2 All ER 674.
[99] [1998] 4 All ER 17. [100] Ibid, p 21.
[101] Barr, 'Charitable Lettings and their Legal Pitfalls' in *Modern Studies in Property Law* (ed Cooke, 2001), pp 247–9.

of course, this approach promotes a policy of ensuring that landlords acting with altruistic motives are not hampered by the statutory protection that may be available to B if he or she is found to have a lease. Certainly, in *Gray v Taylor*, Sir John Vinelott noted that it would be absurd if, due to that statutory protection, the charity was prevented from ending the occupation of a party who, for example, won the lottery.

The final case, of a service occupier, can also be explained without needing to create an exception to the basic test for a lease. There is a general principle, not confined to land law, that an employee in possession of property in the course of his or her employment does not hold that possession in his or her own right, but instead holds it on behalf of on his or her employer.[102] That principle may now seem outdated and can certainly be attacked,[103] but, as long as it continues to exist, it ensures that a contractual agreement between an employer and an employee simply cannot give the employee a right to exclusive possession of property *if* that property is to be used by the employee in the course of his or her employment.

2.9 SUMMARY

It seems that, despite the supposed 'exceptional categories' noted by Lord Templeman in *Street v Mountford*, B has a lease (in the sense of a property right in land) *if and only if* he or she has a right to exclusive possession of land for a limited period, given to him or her by A, a party who has the power to give B such a property right.

The main complications arise from two sources. Firstly, it is necessary to analyse the agreement between A and B to see what legal rights it creates. It may be that, when asking if B has a right to exclusive possession, an apparent contractual term can be disregarded if it is a 'pretence'—that is, if it is clear that A had no intention to enforce that term in practice. As we saw in section 2.4 above, the court's power to disregard such apparent terms is, on one view, doctrinally justified: it is simply an application of a general concept which, when properly understood, makes such terms invalid as a matter of contract law. On another view, the disregarding of such terms is not doctrinally justified, and can be justified, if at all, only from a utility perspective: it denies A an easy means of withholding the statutory protection available, in some circumstances, to parties with a lease.

The second complication occurs where B1 and B2, acting together, claim to have a lease. It is currently the law that B1 and B2 can only have a lease if they are *genuinely* joint tenants—that is, if the four unities of possession, interest, time, and title are all present. On one view, this restriction is doctrinally justified;[104] on another, more widespread, view it is not: it overlooks the possibility that B1 and B2, acting together, can acquire a lease as tenants in common and thus without the need to show unity of interest, time, or title.[105] Certainly, from the utility perspective, it is hard to find a convincing policy argument for the restriction.

As we have seen throughout this section, it is important to remember that the courts' approach to the content of a lease may be shaped by the fact that, if B has such a right, he or she may qualify (or have qualified) for significant statutory protection. On the summary given above, this utility concern may (perhaps) have been an influential factor in the

[102] See *Parker v British Airways Board* [1984] QB 1004, 1017, *per* Donaldson LJ; Bridge, *Personal Property* (3rd edn, 2002), p 20.

[103] See ibid, pp 20–1; McFarlane, *The Structure of Property Law* (2008), p 156.

[104] See Smith, *Plural Ownership* (2004), pp 24–6; McFarlane, *The Structure of Property Law* (2008), pp 714–15.

[105] See Sparkes (1989) 18 AALR 151; Bright (1993) 13 LS 38.

development of the 'pretence' test. As we will see in Chapter 23, section 3 it may also have affected an important House of Lords' decision that has also had an impact on the definition of a lease: *Bruton v London & Quadrant Housing Trust*[106].

3 THE *ACQUISITION* QUESTION

To show that he or she has a lease, B must show that he or she has *acquired* a right to exclusive possession of land for a limited period. In considering the *acquisition* question, it is vital to distinguish between *legal* leases and *equitable* leases.

3.1 LEGAL LEASES

As we saw in Chapter 4, section 4, there are, in general, two different ways in which B may acquire a legal property right. Firstly, and most commonly, B can acquire such a right through a dependent acquisition: by showing that A gave him or her the right; secondly, and more rarely, B can acquire a legal property right by an independent acquisition—that is, simply by relying on his or her own conduct. For example, as noted in section 1.1.2 above, as well as in Chapter 8, section 3, if B takes possession of land, so that he or she has exclusive physical control of that land, B independently acquires a legal freehold. It is, however, very difficult to see how B could ever independently acquire a lease: firstly, a lease consists of a right to exclusive possession for a *limited period*—if B simply takes control of land, he or she is not asserting such a limited right; secondly, a lease depends on a relationship between A and B, as landlord and tenant—and it is hard to see how such a relationship can arise solely because of B's conduct.

Nonetheless, under the provisions of the Land Registration Act 2002 (LRA 2002), it is now possible for B to acquire a lease independently.[107] As we saw in Chapter 8, section 6, if B can successfully show adverse possession of land subject to a registered lease, B can apply to be registered as the new holder of that lease. From a doctrinal point of view, this is a very strange result: B's possession of the land gives him or her a freehold, but he or she then acquires a lease by applying to the Registrar.[108] From the utility perspective, however, there may be something to be said for this result: it essentially represents a compromise solution to the difficult practical and theoretical questions raised by the adverse possession of land subject to a lease.[109]

In any case, in looking at the acquisition of leases, we can concentrate on the case of dependent acquisition—that in which B claims that A has given B a lease.

3.1.1 Basic formality requirements

As we saw in Chapter 7, B's claim that A has given him or her a legal property right, such as a lease, may be affected by formality rules.

1. A contract to grant a lease, like a contract to grant a freehold, must, in general, satisfy the need for writing signed by both A and B, as required by s 2 of the Law of Property (Miscellaneous Provisions) Act 1989 (LP(MP)A 1989) (see Chapter 7, section 3).

[106] [2000] 1 AC 406.
[107] For the background to this change, see Law Com No 271 at [14.66]–[14.73].
[108] This point is made by McFarlane, *The Structure of Property Law* (2008), pp 684–5.
[109] See Chapter 8, section 6, for discussion of those problems.

2. A's grant of the lease to B must, in general, be made in a deed, as required by s 52 of the LPA 1925 (see Chapter 7, section 4).
3. Again, in general, the transaction will not be complete, and B will not acquire a legal lease, unless and until B is registered as the holder of that lease. That registration requirement is imposed by s 4 of the LRA 2002 in a case in which A does not hold a registered estate and s 27 of that Act in a case in which A does hold a registered estate (see Chapter 7, section 5).

It is important to note that exceptions are provided to each of these three rules. In some cases, of course, none of those exceptions applies.

In considering the exceptions, it is useful to distinguish between: (i) cases in which A gives B a new legal lease; and (ii) cases in which B1 transfers his or her existing legal lease to B2.

3.1.2 Where A attempts to give B a new legal lease

If A attempts to give B a new legal lease of more than seven years, the full set of formality requirements applies: in particular, B does not acquire that legal lease unless and until he or she registers as its holder. As we will see in section 3.2 below, B's failure to register will not prevent him or her from acquiring an equitable lease—but there may be disadvantages to B in having only an equitable lease: in particular, an equitable lease can only count as an overriding interest if B is in actual occupation of the land; in contrast, a legal lease *always* counts as an overriding interest (see Chapter 14, section 5.2, and section 4.1 below). Further, as we saw in Chapter 15, section 2.1.2, once B has registered as the holder of a legal estate, s 58 of the LRA 2002 operates to vest that right conclusively in B. So, unless and until the register is changed, B is secure in knowing that he or she has a legal lease. And, indeed, even if the register is rectified, B, if he or she has not acted fraudulently or carelessly, is very likely to qualify for an indemnity payment from the Land Registry.

There is an exceptional category of leases that, even if given for seven years or less, must be registered. The leases falling within this category are defined by ss 4(1)(d)–(f) and 27(2)(b)(ii)–(v) of the 2002 Act. One example consists of a lease taking effect only after a gap of more than three months from the date of its grant by A to B.[110] In that particular case, it seems that the registration requirement is imposed as such a legal lease could otherwise cause a trap for C, a party acquiring a right after the lease has been granted to B, but before B has taken possession of the land.

If A attempts to grant B a non-exceptional lease of seven years or less, B can acquire a legal lease without needing to register his or her right. As we have seen, the general rule under s 52 of the LPA 1925 is that A must use a deed to grant B a legal lease. There is, however, an exception to the need for a deed, provided by s 54(2) of the 1925 Act.

Law of Property Act 1925, s 54(2)

Nothing in the foregoing provisions of this Part of this Act shall affect the creation by parol of leases taking effect in possession for a term not exceeding three years (whether or not the

[110] Other examples are a discontinuous lease (such as a time-share lease, in which B has a right to exclusive possession only for a limited part of each year) and leases that, under the provisions of the Housing Act 1985, would, in any case, require registration.

lessee is given power to extend the term) at the best rent which can reasonably be obtained without taking a fine.

If the requirements of s 54(2) are met, B can acquire a legal lease as a result of a purely oral grant from A: registration is not needed; nor a deed; nor even any writing. The basic policy of the exception is clear: as a matter of convenience, parties should be free to enter relatively short-lived arrangements without having to express their intentions in a particular form.

It is, however, important to note that the length of the lease is only *one* of the requirements of the exception. To acquire a legal lease without a deed, B needs to show that the lease:

- is for three years or less; *and*
- takes effect in possession; *and*
- is at the best rent reasonably obtainable without taking a fine. [111]

The third requirement will be satisfied if B is paying a reasonable market rent[112] rather than, for example, acquiring the lease by paying a one-off premium. This requirement may be seen as a means of protecting C, a party to whom A might later transfer A's estate in the land. The problem for C is that B's oral, but legal, lease may be hard to discover. Of course, in practice, B may well be in occupation of the land—but, as we saw in Chapter 15, section 5.2, B's legal lease counts as an overriding interest in its own right and so is immune from the lack of registration defence even if B is not in actual occupation of the land. The rent requirement in s 54(2) provides some protection for C: even if he or she is bound by B's oral lease, he or she will at least, receive a reasonable rent from B.

In the following case, the second of the three requirements was decisive.

Long v Tower Hamlets London Borough Council
[1998] Ch 197

Facts: Tower Hamlets LBC had a freehold of No 21 Turners Road, consisting of a ground-floor shop and a maisonette. It gave Mr Long permission to occupy the shop; Mr Long later decided to occupy the maisonette as well. As far as the shop was concerned, Mr Long, before moving in, had received a letter setting out the terms of occupation. The letter was sent in early September 1975 and stated that Mr Long's right of occupation would begin on 29 September. Mr Long indorsed and returned the letter on 8 September. At some point (claimed by Mr Long to be in 1977), Mr Long stopped paying rent. In 1995, Mr Long claimed that, because he had been occupying both the shop and maisonette, without Tower Hamlets' consent, for over twelve years, the doctrine of adverse possession extinguished Tower Hamlet LBC's freehold of that land (see Chapter 8 for a discussion of that doctrine). According to Sch 1, para 5, of the Limitation Act 1980, if Tower Hamlets LBC could show that Mr Long had occupied under a 'lease in writing', Mr Long's adverse possession claim would fail, because the twelve-year

111 For an argument that the 'best rent' requirement should be abolished, and that the 'takes effect in possession' requirement should be modified so as to require only that a lease take effect in possession within three months of its grant, see Brown and Pawlowski, 'Re-thinking Section 54(2) of the Law of Property Act 1925' [2010] Conv 146.

112 See *Fitzkriston LLP v Panayi* [2008] EWCA Civ 283, [23], *per* Rix LJ. There may thus be cases where the rent agreed by the parties is below market rent, and so s 54(2) does not apply: ibid, [27], *per* Rix LJ.

limitation period would have begun in 1984 and so would not yet have expired. But if Tower Hamlets could not show that Mr Long had a 'lease in writing', the twelve-year clock would have begun to count down from an earlier point (when Mr Long stopped paying rent) and so Mr Long's adverse possession claim could succeed. The case was therefore slightly unusual: the claim of a lease was made not by the occupier, but rather by the party granting the rights of occupation.

Tower Hamlets LBC applied for an order striking out Mr Long's adverse possession claim, on the basis that, because he had been given 'a lease in writing', the limitation period only began to run against Tower Hamlets LBC in 1984. James Munby QC, sitting as a deputy High Court judge, rejected that argument, holding that Mr Long had *not* been given a 'lease in writing'.

James Munby QC (sitting as a Deputy High Court judge)

At 205

At common law a lease could be granted in any way, even orally [. . .] Moreover, there was at common law no restraint upon the grant of a reversionary lease, that is, a lease to take effect in reversion on some future day, however distant, and conferring no right to take possession in the meantime. Such a lease [. . .] gave the lessee an immediate vested legal *interest* in the land, that interest being known as an interesse termini, though until the date when the lease was due to take effect this interest was vested in interest and not in possession. On the other hand, the lessee under a reversionary lease acquired no *estate* in the land until he had actually entered, that is, taken possession in accordance with the lease; until then all he had was an interesse termini [. . .]

At 216–17

In the first place, the words 'in possession,' when used as part of the phrase 'taking effect in possession for a term not exceeding three years,' in my judgment have their normal legal meaning. They connote an estate or interest in the land which is vested 'in possession' rather than merely vested 'in interest.' This reading is powerfully reinforced by the distinction drawn in section 205(1)(xxvii) of the Law of Property Act 1925 between a 'term of years taking effect in possession' and a 'term of years taking effect in reversion.' The words 'taking effect in possession' in section 54(2) are, in my judgment, used in the same sense in which those words are used in section 205(1)(xxvii) and thus, and this is the critical point, in distinction to the words 'taking effect in reversion.' This, as it seems to me, demonstrates that [. . .] reversionary leases were not intended to come within the ambit of section 54(2).

Moreover, there has been omitted from section 54(2) any express reference to the date of 'the making' of the lease. Thus, if [counsel for Tower Hamlets'] argument is correct, there is no limit expressed in section 54(2) to the period which may elapse before the lease 'tak[es] effect in possession,' the only requirement being that the lease, when eventually it does 'tak[e] effect in possession,' must be 'for a term not exceeding three years.'

As interpreted in *Long v Tower Hamlets LBC*, the requirement that the lease must 'take effect in possession' can also be seen as providing some protection for C: a lease under which B has no right to immediate possession may be particularly hard for C to discover.[113]

[113] It should be noted, however, that a lease can 'take effect in possession' even if B does not immediately go into occupation; the question is whether B has an immediate *right* to exclusive possession.

But whilst the decision must be correct as a matter of statutory interpretation, it reveals that the s 54(2) exception has only a limited practical impact.

Bright, 'Beware the Informal Lease: The (Very) Narrow Scope of s 54(2) Law of Property Act 1925' [1998] Conv 229, 232–3

> Whilst the reasoning behind [*Long v Tower Hamlets*] is hard to fault, the practical implications of the decision are absurd. It is easy to state that, to be safe, all leases should be entered into by deed, but this is unrealistic. Another option is to say that where there is an informal lease, the term date should be stated to pre-date the date of the agreement (presumably it is the term commencement that indicates whether a lease is in possession). This again is an unrealistic option for in most situations the parties want a binding commitment prior to the commencement date. The absurdity of the subsection is revealed when we consider what the policy is underlying it. There are many reasons why formalities may be required in land transactions but underlying section 52 is the benefit it secures for the parties to the transaction (creating evidence, warning of legal effects, protecting against outside influences) and for the court (evidential). Given the advantages of formality in this context, why are short leases exempted? The answer in part is probably that many short leases are, in fact, entered into without legal advice and if a formality requirement were imposed many parties would remain in ignorance of it. In addition to non-compliance through ignorance there is likely to be a high level of non-compliance through fear of costs. Deeds are likely to involve instructing lawyers, which means expense and delay. The disadvantages of requiring a deed outweigh the advantages to be gained from requiring one. If these ideas explain why the law permits the creation of short leases by parol, the exemption should not be restricted to those taking effect immediately in possession. Instead, the exemption should apply to those leases that are most likely to be entered into without the benefit of legal advice, informally, and where the costs of a deed would discourage compliance. Looked at in this light, the exemption should apply to short leases which are to take effect in possession within a reasonable period, and perhaps twelve months would provide a sensible cut-off.

There is another form of short legal lease that can be acquired by B without a deed, or any writing. As we saw when considering *Prudential Assurance Ltd v London Residuary Body* in section 2.7 above, B's payment and A's acceptance of rent can give rise to an *implied periodic tenancy*. In such a case, the conduct of the parties leads a court to imply, or assume, that A granted a lease to B; there is no need for any formal proof of that grant. In practice, B may occupy land for a long time under a succession of periodic tenancies (in *Prudential Assurance*, for example, the House of Lords held that the strip of land in question had been occupied in that way for over sixty years). The maximum duration of any individual periodic tenancy is, however, a year. The length of the term depends on how B pays rent: if B pays weekly, a weekly tenancy will be implied; if B pays monthly, a monthly tenancy will result; and if the frequency is calculated by reference to a year (e.g. if B pays quarterly), B will have a yearly periodic tenancy. To terminate the lease, either party needs to give notice of an intention not to renew it at the end of the current period. A week's notice is needed in the case of a weekly tenancy; a month's notice for a monthly tenancy; six months' notice is required for a yearly tenancy.

Given that the maximum length of a periodic tenancy is a year and that B will necessarily have a right to immediate possession, it may seem that any implied periodic tenancy will fall within the s 54(2) exception. Because an implied periodic tenancy can arise even if B

does *not* pay a reasonable market rent, however, it seems that it provides an independent exception to the general rule that a legal interest in land can only be acquired where a deed is used.

The position can be summarized as in Table 5.

Table 5 Formality requirements for legal leases

Type of legal lease	Deed required?	Registration required?
For more than seven years *or* in an exceptional category*	Yes	Yes
For three years or less, *and* taking effect in possession, *and* at a reasonable market rent	No	No
All other leases	Yes	No

* See Land Registration Act 2002, ss 4 and 27, for the exceptional categories (e.g. a lease taking effect in possession more than three months from the time of the grant).

3.1.3 Where B1 attempts to transfer an existing legal lease to B2

Imagine that A has a legal estate in land and then grants B1 a legal lease. It is then possible for B1 to retain his or her lease and to grant B2 a new lease (a sublease): in such a case, the formality requirements will apply in the way set out above. It is also possible for B1 to transfer his or her lease to B2. In that case, the formality requirements apply in a slightly different way:[114] firstly, if B1's lease is registered, B2 cannot acquire that right until he or she registers as its new holder; secondly, if B1's lease is not registered (e.g. because it is a lease of less than seven years), B1 *must* use a deed to transfer the lease to B2. That rule applies even if B1 acquired his or her lease orally, by relying on the s 54(2) exception. The Court of Appeal confirmed this in *Crago v Julian*.[115]

It is clear, as a matter of statutory interpretation, that the s 54(2) exception does *not* apply to the transfer of an existing lease; it applies only to the creation of a new lease. Yet this can cause problems in practice, because, if B1 has acquired his or her lease orally, he or she may be unaware that the lease can only be transferred by using a deed.

3.2 EQUITABLE LEASES

It was suggested in Chapter 5, section 1 that all equitable interests depend on A's being under a duty to B. Certainly, it seems that, to acquire an equitable lease, B needs to show that A is under a duty to grant B a lease. In Chapter 9, when considering *Walsh v Lonsdale*,[116] we saw that B can acquire an equitable lease when A comes under a *contractual* duty to grant B a lease. As we saw in Chapter 7, section 3, A can only come under such a duty if the formality rule set out by s 2 of the Law of Property (Miscellaneous Provisions) Act 1989 has been satisfied. Further, it is generally assumed that B will only acquire an equitable lease if A's duty to

[114] The terms of B1's lease may attempt to prevent B1 from granting a sublease to B2 or from transferring his or her lease to B2. In such a case, the sublease or transfer does still occur (see *Old Grovebury Manor Farm Ltd v W Seymour Plant Sales and Hire Ltd (No 2)* [1979] 1 WLR 1397), but B1's breach may give A a power to forfeit the lease (see Chapter 24, section 6.4).

[115] [1992] 1 WLR 372. [116] (1882) 21 Ch D 9.

grant a lease can be enforced by an order of specific performance—but, as we saw in Chapter 9, section 3, it is not entirely clear that the specific performance requirement is justified, either as a matter of history or of principle.

There may be situations in which A has not made a contractual promise to give B a lease but, instead, has simply tried and failed to make an immediate grant of a lease: for example, A may attempt to grant B a five-year lease, but fail to use a deed. In such a case, if B provided something in return for the failed grant (e.g. money), A will be regarded as under a duty to give B a lease and B can thus acquire an equitable lease: *Parker v Taswell*[117] provides an example of this principle. Further, B may well be able to acquire an equitable lease if he or she can show that the doctrine of proprietary estoppel imposes a duty on A to grant B a lease.[118]

If B1 has an equitable lease, arising as a result of A being under a duty to grant B1 a lease, it should also be possible for B1 to transfer that equitable lease to B2. In such a case, the basic formality rule set out by s 53(1)(a) of the LPA 1925 will apply: the transfer must be made in writing signed by B1.

It is sometimes suggested that an equitable lease is 'as good as' a legal lease. Certainly, if B has an equitable lease, this will generally be enough to entitle him or her to any statutory protection available to a holder of a lease (see section 1.1.1 above). Further, an equitable lease is capable of binding a third party who later acquires a right in relation to the land from A (see section 1.1.3 above). But certain advantages do come with a legal lease. Firstly, as we have noted, a legal lease, unlike an equitable lease, *necessarily* counts as an overriding interest and so C, a party later acquiring a right from A, will not be able to use the lack of registration defence against B's right.

Secondly, if B acquires a legal lease for value, then, under s 29 of the LRA 2002, B may him or herself be able to use the lack of registration defence against a pre-existing property right (such as a prior equitable lease created by A in favour of Z).[119] But if B has only an equitable lease, he or she cannot use that defence.

Thirdly, if B acquires a legal lease from A, B will also be able to rely on s 62 of the LPA 1925, which can imply the grant of additional rights by A (such as easements—see Chapter 25, section 3.2) into the creation of B's legal lease. But if B has only an equitable lease, s 62 cannot apply.

Finally, if B has a legal lease, it is then clear that the rest of the world is under a *prima facie* duty to B: as a result, for example, a stranger who interferes with B's enjoyment of the land will commit the tort of nuisance against B (see the discussion of *Hunter v Canary Wharf*[120] in section 1.1.2 above). If, however, B has only an equitable lease, it is far from clear that B has the same protection: B can assert a right against C, a party who later acquires a right from

[117] (1858) 2 De G & J 559.

[118] For example, it seems that B acquired such an equitable lease in *Lloyd v Dugdale* [2002] 2 P & CR 13. See further Bright and McFarlane, 'Proprietary Estoppel and Property Rights' [2005] CLJ 449. The problem for B (Mr Dugdale) was that, because he was in not in actual occupation of the land when A transferred his freehold to C, C had a defence to B's pre-existing equitable lease. B therefore tried to assert a new, direct right against C, arising as a result of a promise made by C when acquiring the freehold: we discussed that aspect of the case in Chapter 6, section 2.3.

[119] Usually, B needs to register his or her own right if he or she wishes to rely on the lack of registration defence. But s 29(4) of the Land Registration Act 2002 means that B can rely on that defence if he or she has been *granted* a lease that cannot be registered (e.g. a non-exceptional lease of seven years or less). The term 'grant' is crucial, because it excludes a party with only an equitable lease: if B has only an equitable lease, he or she has not been granted a right; rather, A is under a duty to make such a grant.

[120] [1997] AC 665.

A; but, as discussed in Chapter 5, section 7, it is not clear that the rest of the world owes a duty to B not to interfere with the land.

3.3 METHODS BY WHICH A LEASE MAY END

In sections 3.1 and 3.2, we considered the methods by which a lease can come into being. We also need to consider the various ways in which a lease may end.

3.3.1 The effluxion of time

The simplest method by which a lease may end is the passage of time: if the term for which a lease has been granted comes to an end, the lease itself ends. So, if A granted B a 21 year lease in 1990, that lease will end in 2011. We saw in section 3.1.2 above that, if B has a periodic tenancy, his right to exclusive possession will automatically be renewed at the end of each period, unless one of the parties gives sufficient notice of his or her intention not to renew. If no such notice is given, B can end up occupying A's land for a long time: in *Prudential Assurance*, for example, B's occupation, under a succession of yearly tenancies, had lasted over 60 years. It is important to note that, in such a case, B does not occupy under one, continuing lease—rather, B occupies under a succession of periodic tenancies. This technical point is important in ensuring that periodic tenancies are consistent with the need for a lease to be for a limited period: the maximum duration of each in a series of periodic tenancies is known in advance. The technical point was also important in the following case.

Hammersmith & Fulham LBC v Monk
[1992] 1 AC 478, HL

Facts: Mr Monk and Mrs Powell cohabited in a flat at 35 Nitron Street, South West London, under a joint weekly tenancy, given to them by Hammersmith and Fulham London Borough Council. As the landlord was thus a local authority, the grounds on which it could recover possession of the flat were limited by statute. In 1988, the couple fell out and Mrs Powell left the flat. She consulted with the council who agreed to provide her with alternative accommodation, if she terminated the periodic tenancy of 35 Nitron Street. The terms of the tenancy allowed for termination with four week's notice. Without Mr Monk's knowledge or consent, Mrs Powell gave this notice to quit to the council, who then sought possession of 35 Nitron St against Mr Monk.

The council's argument was that Mr Monk had occupied under a succession of weekly periodic tenancies and each new tenancy arose only because each of Mr Monk and Mrs Powell had failed to give a notice to quit. When Mrs Powell gave such a notice, their joint periodic tenancy could not continue into a new period and so the tenancy, and the statutory protection it gave to Mr Monk, was now at an end. As a result, the council now had the choice of removing Mr Monk from the land. The first instance judge held that Mrs Powell's notice to quit could not end the joint tenancy, and so dismissed the council's claim for possession. The Court of Appeal allowed the council's appeal; the House of Lords agreed that Mrs Powell's notice to quit meant that the succession of joint weekly periodic tenancies, and with it Mr Monk's right to occupy the flat, was brought to an end. The council were therefore free to claim possession of the flat.

Lord Bridge

At 482–4

For a large part of this century there have been many categories of tenancy of property occupied for agricultural, residential and commercial purposes where the legislature has intervened to confer upon tenants extra-contractual rights entitling them to continue in occupation without the consent of the landlord, either after the expiry of a contractual lease for a fixed term or after notice to quit given by the landlord to determine a contractual periodic tenancy. It is primarily in relation to joint tenancies in these categories that the question whether or not notice to quit given by one of the joint tenants can determine the tenancy is of practical importance, particularly where, as in the instant case, the effect of the determination will be to deprive the other joint tenant of statutory protection. This may appear an untoward result and may consequently provoke a certain reluctance to hold that the law can permit one of two joint tenants unilaterally to deprive his co-tenant of 'rights' which both are equally entitled to enjoy. But the statutory consequences are in truth of no relevance to the question which your Lordships have to decide. That question is whether, at common law, a contractual periodic tenancy granted to two or more joint tenants is incapable of termination by a tenant's notice to quit unless it is served with the concurrence of all the joint tenants. That is the proposition which [Mr Monk] must establish in order to succeed.

As a matter of principle I see no reason why this question should receive any different answer in the context of the contractual relationship of landlord and tenant than that which it would receive in any other contractual context. If A and B contract with C on terms which are to continue in operation for one year in the first place and thereafter from year to year unless determined by notice at the end of the first or any subsequent year, neither A nor B has bound himself contractually for longer than one year. To hold that A could not determine the contract at the end of any year without the concurrence of B and vice versa would presuppose that each had assumed a potentially irrevocable contractual obligation for the duration of their joint lives, which, whatever the nature of the contractual obligations undertaken, would be such an improbable intention to impute to the parties that nothing less than the clearest express contractual language would suffice to manifest it. Hence, in any ordinary agreement for an initial term which is to continue for successive terms unless determined by notice, the obvious inference is that the agreement is intended to continue beyond the initial term only if and so long as all parties to the agreement are willing that it should do so. In a common law situation, where parties are free to contract as they wish and are bound only so far as they have agreed to be bound, this leads to the only sensible result [. . .]

[. . .] from the earliest times a yearly tenancy has been an estate which continued only so long as it was the will of both parties that it should continue, albeit that either party could only signify his unwillingness that the tenancy should continue beyond the end of any year by giving the appropriate advance notice to that effect. Applying this principle to the case of a yearly tenancy where either the lessor's or the lessee's interest is held jointly by two or more parties, logic seems to me to dictate the conclusion that the will of all the joint parties is necessary to the continuance of the interest [. . .]

[Lord Bridge then considered a number of previous decisions, including *Doe d. Aslin v Summersett*[121] finding at 487 that there was a 'formidable body of English authority' in support of the Court of Appeal's decision that Mrs Powell's notice to quit brought the succession of weekly tenancies to an end]

[121] (1830) 1 B. & Ad. 135.

At 490–1

Finally, it is said [by Mr Monk] that all positive dealings with a joint tenancy require the concurrence of all joint tenants if they are to be effective. Thus, a single joint tenant cannot exercise a break clause in a lease, surrender the term, make a disclaimer, exercise an option to renew the term or apply for relief from forfeiture. All these positive acts which joint tenants must concur in performing are said to afford analogies with the service of notice to determine a periodic tenancy which is likewise a positive act. But this is to confuse the form with the substance. The action of giving notice to determine a periodic tenancy is in form positive; but both on authority and on the principle so aptly summed up in the pithy Scottish phrase 'tacit relocation' the substance of the matter is that it is by his omission to give notice of termination that each party signifies the necessary positive assent to the extension of the term for a further period.

Lord Browne-Wilkinson

At 491–3

My Lords, there are two instinctive reactions to this case which lead to diametrically opposite conclusions. The first is that the flat in question was the joint home of the appellant and Mrs. Powell: it therefore cannot be right that one of them unilaterally can join the landlords to put an end to the other's rights in the home. The second is that the appellant and Mrs. Powell undertook joint liabilities as tenants for the purpose of providing themselves with a joint home and that, once the desire to live together has ended, it is impossible to require that the one who quits the home should continue indefinitely to be liable for the discharge of the obligations to the landlord under the tenancy agreement.

These two instinctive reactions are mirrored in the legal analysis of the position. In certain cases a contract between two persons can, by itself, give rise to a property interest in one of them. The contract between a landlord and a tenant is a classic example. The contract of tenancy confers on the tenant a legal estate in the land: such legal estate gives rise to rights and duties incapable of being founded in contract alone. The revulsion against Mrs. Powell being able unilaterally to terminate the appellant's rights in his home is property based: the appellant's property rights in the home cannot be destroyed without his consent. The other reaction is contract based: Mrs. Powell cannot be held to a tenancy contract which is dependant for its continuance on the will of the tenant.

[. . .]

In property law, a transfer of land to two or more persons jointly operates so as to make them, vis à vis the outside world, one single owner. "Although as between themselves joint tenants have separate rights, as against everyone else they are in the position of a single owner."[122] The law would have developed consistently with this principle if it had been held that where a periodic tenancy has been granted by or to a number of persons jointly, the relevant "will" to discontinue the tenancy has to be the will of all the joint lessors or joint lessees who together constitute *the* owner of the reversion or the term as the case may be.

[. . .] the law was in my judgment determined in the opposite sense by *Doe d. Aslin v. Summersett*.[123] The contractual, as opposed to the property, approach was adopted. Where there were joint lessors of a periodic tenancy, the continuing "will" had to be the will of all the lessors individually, not the conjoint will of all the lessors collectively [. . .]

It was submitted that this House should overrule *Summersett's* case. But, as my noble and learned friend, Lord Bridge of Harwich, has demonstrated, the decision was treated

122 *Megarry and Wade, The Law of Real Property*, 5th edn (1984), p 417.
123 (1830) 1 B. & Ad. 135.

> throughout the 19th century as laying down the law in relation to the rights of joint lessors. It is not suggested that the position of joint lessees can be different. Since 1925 the law as determined in *Summersett's* case has been applied to notices to quit given by one of several joint lessees. In my judgment no sufficient reason has been shown for changing the basic law which has been established for 160 years [. . .]

The decision of the House of Lords in *Monk*, like many of the cases we have examined in this chapter, can be considered both from the doctrinal and utility perspectives. As a matter of doctrine, the result seems to be correct: a periodic tenancy, like any lease, has to be renewed if it is to continue from one term to the next. And the renewal of a periodic tenancy, like the renewal of any contract, requires the consent of all the parties to that tenancy. When Mrs Powell removed her consent, then, the periodic tenancy ended, taking with it the statutory security of tenure it gave to Mr Monk. From a utility perspective, in contrast, the result may seem concerning: Mr Monk's security of tenure was lost without his consent. The Law Commission, for example, has proposed that it should be possible for one joint tenant, such as Mrs Powell, to give a notice to quit, and thus end her involvement with the tenancy, without ending the joint tenancy itself.[124] Indeed, as we noted in Chapter 3, section 4.2.2, the approach in *Monk* has been subjected to human rights challenges, questioning its compatibility with Article 8 of the European Convention on Human Rights.[125] Whilst this is an evolving area of law, the current position is that the basic rule in *Monk* is regarded, by the English courts at least,[126] as compatible with Art 8. In Chapter 3, section 2.5.4, we saw that in *McCann v UK*,[127] the European Court of Human Rights did find a breach of Art 8 in a case where the local authority took advantage of the basic rule in *Monk* to remove Mr McCann from his home. The point here may be that, whilst the basic rule in *Monk* gives a local authority the option of regaining possession after one joint tenant fails to renew a periodic tenancy, the local authority will have to bear Art 8 in mind when exercising its discretion as to whether to use that option.[128]

3.3.2 The exercise of a power to end a lease before its term expires

There are a number of situations in which a lease may end before the planned term has expired. Firstly, the terms of the lease may give one or both of the parties a power to terminate the lease early. Such a 'break clause' is common, for example, in a commercial lease. It may be wise for a tenant taking a 21 year lease of business premises to insist on a clause allowing him or her to terminate the lease after five years: the tenant can then take advantage of that clause if the business does not prove successful.

Secondly, a change of circumstances may give a party the power to end the lease early, even if the terms of the contract do not expressly confer such a power. For example, in *National Carriers Ltd v Panalpina (Northern) Ltd*,[129] the House of Lords acknowledged, for

[124] Law Com No 297, 'Renting Homes: The Final Report' (Volume 1, 2006) paras 2.44–2.46, 4.9–4.12.

[125] See *Harrow LBC v Qazi* [2004] 1 AC 983, discussed in Chapter 3, section 4.1; see too Bright, 'Ending Tenancies by Notice to Quit: The Human Rights Challenge' (2004) 120 LQR 398.

[126] See *Wandsworth v Dixon* [2009] EWHC 27 (Admin). Note too *Ure v UK* (28027/95, Commission decision of 1996), in which the European Commission found that the basic rule in *Monk* is not incompatible with Art 8.

[127] (2008) 47 EHRR 40.

[128] This seems to be the suggestion of Lord Walker in *Doherty v Birmingham City Council* [2009] AC 367 at [121]–[123].

[129] [1981] AC 675.

the first time, that the doctrine of frustration can apply to a lease. So, if A gives B a lease of a warehouse, and both A and B know that B plans to use that warehouse for commercial storage, the purpose of the contract means that the closure of the only road giving access to the warehouse could, if continuing for a long enough period, lead to the parties' contract being frustrated.[130]

Similarly, in *Hussein v Mehlman*,[131] Stephen Sedley QC, sitting as an assistant recorder, held that, where A gave B a lease of a house, A's serious breaches of his duty to repair, rendering the house unfit to live in, interfered with the 'central purpose'[132] of the contract and so allowed B to terminate the contract by moving out and ceasing to pay rent.[133] Of course, the general contractual rule applies, and so the tenant's power to terminate the lease early will arise only where the landlord's breach is so serious as to deprive the tenant of substantially the whole of the benefit which the contract was intended to secure for the tenant.[134] We will consider both *Panalpina* and *Hussein* again in section 5 below, when looking at the contractual aspects of a lease.

If the tenant, rather than the landlord, is in serious breach of his or her obligations under the lease, the landlord may have a power to bring the lease to an end. If the landlord exercises such as a power, this is said to be a 'forfeiture': the tenant loses the right to exclusive possession due to his or her serious breach of the terms of the lease. Given the often severe consequences of forfeiture, the courts have the power to protect a tenant by granting relief from forfeiture: this power was first developed by courts of equity, and is now regulated, in part, by statute.[135] We will consider forfeiture in detail in Chapter 24, section 6.4. It is also worth noting that, even if a landlord does have the freedom to forfeit a lease, such a landlord may instead elect to keep the lease alive so as to continue to claim rent from the tenant. As the Court of Appeal confirmed in *Reichman v Beveridge*,[136] this course is open to the landlord even if the tenant has left the premises, and even if the landlord could reduce his losses by renting the premises to a different tenant. This is in part because of a long-standing rule that if the new tenant pays a lower rent, the landlord is *not* permitted to pursue the former tenant for this difference in rent: the landlord's decision to end the first lease also ends the first tenant's liability for any future rent. To this extent, it seems, the normal contractual liability rules do not apply between a landlord and a tenant.[137]

3.3.3 Where the lease is subsumed into a different legal estate

Firstly, if A has granted B a lease, it is possible for A and B to agree to B's surrender of the lease before its term expires. A surrender is a '*consensual transaction between landlord and tenant*'[138] and its effect is that '*the tenancy is absorbed by the landlord's reversion and is*

[130] In the case itself, the contract was *not* frustrated: the road was closed only for twenty months of a ten-year lease.

[131] [1992] 2 EGLR 87 (County Court). [132] Ibid, 91.

[133] That reasoning has since been confirmed by the Court of Appeal: see *Chartered Trust plc v Davies* [1997] 2 EGLR 83.

[134] The general contractual test is set out by Diplock LJ in *Hong Kong Fir v Kawasaki* [1962] 1 All ER 474, 489. For a case in which the landlord's breach was not sufficiently serious, see *Nynehead Developments Ltd v RH Fibreboard Containers Ltd* [1991] 1 EGLR 7. In such a case, the landlord is liable in damages to the tenant for the breach.

[135] See Law of Property Act 1925, s 146(1).

[136] [2006] EWCA Civ 1659. See too Chapter 24, section 6.

[137] The position is different in many other common law jurisdictions: see Bright, *Landlord and Tenant Law in Context* (2007), pp 508–11.

[138] *Per* Lord Scott in *Kay v Lambeth LBC; Leeds CC v Price* [2006] 2 AC 465, [141].

extinguished by operation of law':[139] the lease thus ceases to exist as it is subsumed into A's estate in the land. An express surrender must be made by deed, even if the lease itself was initially created orally. Most surrenders occur by operation of law, however, and are therefore excepted from the need for a deed.[140] A surrender by operation of law requires both the tenant's re-delivery of possession of the land to the landlord, and the landlord's acceptance of such re-delivery.[141] It is also worth noting that, if A grants a lease to B, and B then grants a sublease to C, the surrender by B to A of B's lease does not end C's sub-lease; rather, A then becomes C's landlord, as would be the case had B transferred his lease to A. This result is based on the basic principle that C's property right cannot be terminated without C's consent.[142]

Secondly, if A grants B a lease, and A's estate and B's lease are later acquired by the same party, it is possible for the lease to end by a merger: by being subsumed into A's estate. For example, in Chapter 21, section 3.3.1, we saw that in *Ashburn Anstalt v Arnold*,[143] Mr Arnold initially held a lease of the land; Arnold & Co then acquired a sub-lease. Cavendish Land Co Ltd later acquired the freehold subject to Arnold's head-lease. Cavendish then also acquired both the head-lease and the sub-lease. The effect of this, as noted by Fox LJ in the Court of Appeal, was that '*the head-lease and the sub-lease merged into the freehold*'.[144] In that case, merger allowed Cavendish to achieve its aim of holding its freehold free from any leases. Similarly, if B has a very long lease and then, as in *James v UK*,[145] exercises his or her statutory right of enfranchisement, B will generally want to hold his or her freehold free from any leases. It is important to note, however, that merger is not automatic. If B has a lease from A, and then acquires A's estate, it may well be that B does *not* want merger to operate. For example, Bright notes that '*A tenant of a flat who, for example, acquires the freehold reversion to the block may want the lease to continue as an independent and saleable asset.*'[146] In such a case, courts of equity focussed on B's intention and therefore held that merger did not occur: that equitable approach is now preserved by the Law of Property Act 1985, s 185.

4 THE *DEFENCES* QUESTION

If B acquires a legal or equitable lease of A's land, his or her right will be prima facie binding on C, a third party later acquiring a right relating to that land from A. As we noted in Chapter 12, however, it may be possible for C to have a defence to a pre-existing property right of B. In practice, the key defence is the lack of registration defence, provided (in relation to unregistered land) by the Land Charges Act 1972 (LCA 1972) and (in relation to registered land) by the LRA 2002.

In considering the defence, we again need to distinguish between cases in which B has a legal lease and those in which B's lease is equitable.

139 *Per* Lord Millett in *Barrett v Morgan* [2000] 2 AC 264, [270].

140 Law of Property Act 1925, s 52(2)(c) excepts surrenders by operation of law from the general deed requirement imposed by s 52.

141 See further *per* Peter Gibson LJ in *Bellcourt Estates Ltd v Adesina* [2005] EWCA Civ 208, [29]–[31].

142 See *Mellor v Watkins* (1874) LR 9 QB 400, 405; and *Kay v Lambeth LBC; Leeds CC v Price* [2006] 2 AC 465, [141].

143 [1989] Ch 1. 144 [1989] Ch 1, 6. 145 (1986) 8 EHRR 123: see Chapter 3, section 2.4.2.

146 Bright, *Landlord and Tenant Law in Context* (2007), p 73).

4.1 LEGAL LEASES

To acquire a legal lease of seven years or more of registered land, B must register as the holder of that right (see section 3.1 above). In such a case, C clearly will not be able to rely on the lack of registration defence. B can, however, acquire a shorter legal lease without needing to register as the holder of that right. Even in such a case, it is still impossible for C to rely on the lack of registration defence, because Sch 3, para 1, of the LRA 2002 ensures that B's right counts as an overriding interest: that is the case even if B is not in actual occupation of the land. If A has an unregistered legal estate and grants B a legal lease, it may be the case that, when A transfers his or her estate to C, C will register that estate for the first time. In such a case, B's legal lease is again overriding, this time under Sch 1, para 1, of the 2002 Act.

If B has a legal lease of unregistered land, then, as we saw in Chapter 13, section 3, it is impossible for C to rely on the lack of registration defence provided by the LCA 1972: the general position is that a legal estate or interest does *not* count as a registrable land charge for the purposes of the 1972 Act. This means that, as far as legal leases are concerned, the picture is clear: C will never be able to use the lack of registration defence against a pre-existing legal lease.

4.2 EQUITABLE LEASES

Where B has an equitable lease of registered land, it is possible for B to protect that right by entering a notice on the register. As noted above, the entry of a notice does not guarantee B's equitable right—but it does prevent C, when later acquiring a right, from using the lack of registration defence against B's right. If B fails to protect his or her equitable lease by entering a notice, that right will be vulnerable to the lack of registration defence *unless* B is in actual occupation of the land under Sch 3, para 2 of the LRA 2002 (where C registers a legal estate for the first time, Sch 1, para 2, of that Act has the same effect). But if B is *not* in actual occupation at the relevant time, his or her equitable lease does *not* count as an overriding interest. Unlike a legal lease, an equitable lease, by itself, does not count as an overriding interest. This flows from the fact that Sch 3, para 1 (like Sch 1, para 1) protects only '*A leasehold estate in land granted for a term* [. . .]'. As confirmed by the Court of Appeal in *City Permanent Building Society v Miller*,[147] a grant necessarily implies the acquisition of a *legal* property right: if B has an equitable lease, he or she has not been granted a lease by A; rather, A is instead under a duty to make such a grant.[148]

If B has an equitable lease of unregistered land, the applicability of the lack of registration defence provided by the LCA 1972 will depend on the means by which B acquired that equitable lease. If it arises as a result of A's contractual promise to give B a lease (or under the principle in *Parker v Taswell*),[149] B's right counts as an 'estate contract': as we saw when examining *Midland Bank Trust Co Ltd v Green*[150] in Chapter 12, section 3.1, B's failure to register such a right as a land charge[151] gives C the chance to use the lack of registration defence provided by the 1972 Act. If, however, B's equitable lease arises because A is under

147 [1952] Ch 840. See Chapter 12, section 3.6.

148 Compare fn 119 above, discussing the effect of the term 'grant' in s 29(4) of the Land Registration Act 2002.

149 (1858) 2 De G & J 559. See section 3.2 above.

150 [1981] AC 813.

151 Land Charges Act 1972, s 2(4)(iv), makes clear that an estate contract counts as a registrable land charge.

a *non-contractual* duty to grant B a lease, that lack of registration defence cannot apply and C will instead have to attempt to rely on the general 'bona fide purchaser' defence, as discussed in Chapter 14, section 4.

5 THE CONTRACTUAL ASPECT OF A LEASE

In this chapter, we have been examining the lease *as a property right* and have therefore asked the three key questions relating to such rights: the *content*, *acquisition*, and *defences* questions. There are, however, other aspects to a lease. In Chapter 23, we will examine how a lease can confer *status*, by allowing B to qualify for important statutory protection. In addition, it is sometimes stated that, due to developments in the law occurring in the last thirty years or so, the lease has become more 'contractualized'. It is certainly true that, *as well as* functioning as a property right in land, a lease almost always has an important contractual aspect. As the following extract suggests, however, we have to be very careful when framing a debate about the nature of leases as a conflict between property, on one hand, and contract, on the other.

McFarlane, *The Structure of Property Law* (2008, pp 697–8)

It is often said that there is a tension between two different views of the Lease. On the first view, the Lease is seen as primarily a *property right*; on the second, it is seen as chiefly a *contractual right* [. . .]

However, this tension is an illusion. There is *no* conflict between property rights on the one hand and contractual rights on the other. The classification of a right as a property right depends on the **content question**: does B's right impose a *prima facie* duty on the rest of the world not to interfere with B's use of a thing? The classification of a right as a contractual right depends on the **acquisition question**: does B's right arise as a result of a promise which, because it was made in an agreement for which consideration was provided, binds A? It is therefore perfectly possible for B to have a right that is *both* (i) a property right; *and* (ii) a contractual right. An example occurs where A, by means of a sale, transfers his Ownership of a bike to B. B acquires a property right; and that right arises as a result of the contractual bargain between A and B.

Indeed, in almost all cases where he has a Lease, B's right to exclusive control of land for a limited period is *both* (i) a property right; *and* (ii) a contractual right. It is a property right because it is a right, relating to a thing, that imposes a *prima facie* duty on the rest of the world. It is a contractual right as B acquires that right as a result of a promise made to B in return for which B provided consideration. In fact, B usually acquires a number of different contractual rights: (i) a right to exclusive control of the land for a limited period; (ii) the benefit of contractually agreed leasehold covenants (rights that can be enforced against parties later acquiring A's estate); and (iii) personal rights against A. All those rights are **acquired** in the same way; but their **content** differs.

This analysis does not mean that a Lease *must* arise as a result of a contract. It is possible for a Lease to arise purely by consent: A can exercise his power to grant B a Lease *without* coming under any contractual duties to B.[152] However, it does mean that it is misleading to

[152] See *per* Millett LJ (dissenting) in *Ingram v IRC* [1997] 4 All ER 395, 421–2: '*There is no doubt that a lease is property. It is a legal estate in land. It may be created by grant or attornment as well as by contract and need not contain any covenants at all.*' There was a successful appeal against the decision of the majority of

say that there is a tension between the proprietary view of the Lease and the contractual view of the Lease. A Lease is simply a property right that can, and almost always does, arise through a contract. Indeed, when analysing the practical problems that are often said to depend on a choice between the 'proprietary' and 'contractual' views, that false opposition only obscures the solution to the problems.

So, what does it mean to say that the lease has been 'contractualized'? In a very controversial decision, the House of Lords has stated that the term 'lease' can be extended to cases in which A, even if he or she has no property right in land, makes a binding promise to give B exclusive possession of that land for a limited period. In such a case, B has a lease even though the core feature examined in this chapter, B's acquisition of a property right, is missing. We will examine this decision (*Bruton v London & Quadrant Housing Trust*) in Chapter 23, section 3. In *Hammersmith & Fulham LBC v Monk*, which we examined in section 3.3.1 above, we saw that Lord Browne-Wilkinson contrasted the 'proprietary' and 'contractual' approaches to the question of whether a joint periodic tenancy can be ended by the choice of just one of the joint tenants not to renew the tenancy. His Lordship's view was that the proprietary approach would give a negative answer to that question, whilst the contractual approach favoured a positive response. As we saw, the answer given in the case was the positive one, and so the decision may thus seem to contribute to the 'contractualization' of the lease. We should be wary, however, of attaching too much weight to the result. For, as we noted in section 3.3.1 above, the crucial factor was that occupation of land under a periodic tenancy, even if it continues for a long time, occurs not under one continuous lease but rather under a succession of periodic tenancies. Each new periodic tenancy, as it is a new lease, must then require the consent of all the parties to it. The necessity of consent is not a feature exclusive to contracts: after all, the transfer of property from A to B also requires the consent of both parties.

In other cases, the so-called 'contractualization' amounts not to a denial of the proprietary status of a lease, but rather to the recognition that, where A grants B a lease, the *purpose* of the parties' contract extends beyond the simple acquisition of a property right by B.

This point has been made by Bright,[153] who has argued that the key issue relates to the *characterization* of a contract granting B a lease. The question is whether B's acquisition of a property right should be seen as: (i) the *sole* aim of the parties' contract; or (ii) only one of the aims of the contract, or even as a means to a more important end (e.g. the provision of a home or business premises). In Bright's words, is the contract: (i) for possession only; or (ii) for possession 'plus'?[154]

The traditional view of a lease, it seems, favoured the former analysis. This affected the application to the lease of normal contractual principles and, as a result, had a number of important practical consequences. Firstly, it meant that judges were very reluctant to use the particular purpose for which a lease was acquired (e.g. to give B a home) as a reason to imply contractual terms into that lease. As noted in section 1.1.1 above, certain minimal duties are implied as a result of B's acquisition of a property right (e.g. A is under a duty not to interfere with B's 'quiet enjoyment' of the land), but the courts would not go beyond those duties by looking to the particular factual circumstances in which the lease was granted.

the Court of Appeal ([2000]1 AC 293): Lord Hutton, at 310, expressly agreed with Millett LJ's analysis of the nature of a lease.

[153] See Bright, *Landlord and Tenant Law in Context* (2007), pp 30–3.

[154] Ibid, p 31.

Secondly, it meant that the doctrine of frustration was not applied to leases: even if there was a radical change in circumstances, frustrating the particular purpose for which B acquired his or her lease, B would still have a property right and so, on the traditional view, the principal purpose of the contract would have been achieved.

Thirdly, and similarly, it meant that a significant breach by A of one of his or her continuing duties under the contract (e.g. to provide repairs) could never allow B to terminate the contract: after all, B would still have the principal benefit he or she had sought under the contract—a property right in the land.

Over time, the courts have recognized that, in many circumstances, it is unrealistic to view A and B's lease agreement as *solely* a means for B to acquire a property right in land. This has led to a reversal of each of the three consequences, set out above, of that former view. Firstly, in *Liverpool City Council v Irwin*,[155] the House of Lords recognized that, where A gave B a lease of a flat in a tower block, the obvious purpose of providing B with accommodation meant that, under normal contractual principles, terms could be implied allowing B to use other parts of the block (such as the lift and stairs) and imposing a duty on A to make reasonable efforts to keep those parts working and usable by B.

Secondly, we noted in section 3.3.2 above that, in *National Carriers Ltd v Panalpina (Northern) Ltd*,[156] the House of Lords acknowledged that, where A gave B a lease of a warehouse for storage, the obvious commercial purpose of the contract meant that, under normal contractual principles, the closure of the only road giving access to the warehouse could, if continuing for a long enough period, lead to the parties' contract being frustrated.[157]

Similarly, we also saw in section 3.3.2 that, in *Hussein v Mehlman*,[158] Stephen Sedley QC, sitting as an assistant recorder, held that, where A gave B a lease of a house, A's serious breaches of his duty to repair, rendering the house unfit to live in, interfered with the 'central purpose'[159] of the contract and so allowed B to terminate the contract by moving out and ceasing to pay rent.[160]

These developments have proceeded on the eminently reasonable basis that, in many situations, the acquisition of a property right in land, whilst fundamental, is not the *only* purpose that B has in mind when entering a lease agreement with A. As we will see in the next chapter, its effect in giving B a property right is only *one* of the lease's key features.

QUESTIONS

1. If A makes a contractual agreement to allow B to occupy land, why might B want to claim that the agreement gives him or her a lease?
2. In *Street v Mountford*, the House of Lords held that A's contractual agreement with B can give B a lease even if A clearly did not intend the agreement to have that effect. Can that aspect of the decision be defended, either from a doctrinal or policy perspective?

155 [1977] AC 239. 156 [1981] AC 675.

157 In the case itself, the contract was *not* frustrated: the road was closed only for twenty months of a ten-year lease.

158 [1992] 2 EGLR 87 (County Court). 159 Ibid, 91.

160 That reasoning has since been confirmed by the Court of Appeal: see *Chartered Trust plc v Davies* [1997] 2 EGLR 83.

3. In *Antoniades v Villiers*, the House of Lords, in deciding that Mr Villiers and Miss Bridger had a joint right to exclusive possession, disregarded a term in an agreement signed by both Mr Villiers and Miss Bridger. Can that aspect of the decision be defended, either from a doctrinal or policy perspective?
4. In *AG Securities v Vaughan*, the House of Lords assumed that it is impossible for B1 and B2 to acquire a lease as tenants in common. Is that assumption correct?
5. Are there any genuine exceptions to the rule that if A gives B a right to exclusive possession of land for a limited period, B has a lease?
6. What is the effect of the Supreme Court's decision in *Berrisford v Mexfield* on the rule that a lease must be for a limited period?

FURTHER READING

Bright, 'Avoiding Tenancy Legislation: Sham and Contracting Out Revisited' [2002] CLJ 146

Bright, *Landlord and Tenant Law in Context* (Oxford: Hart, 2007, esp chs 1–3)

Bright, '*Street v Mountford* Revisited' in *Landlord and Tenant Law: Past, Present and Future* (ed Bright, Oxford: Hart, 2006)

Hill, 'Intention and the Creation of Proprietary Rights: Are Leases Different?' [1996] LS 200

McFarlane, *The Structure of Property Law* (Oxford: Hart, 2008, Pt G1B)

Sparkes, 'Co-Tenants, Joint Tenants and Tenants in Common' (1989) 18 AALR 151

23

REGULATING LEASES AND PROTECTING OCCUPIERS

CENTRAL ISSUES

1. In Chapter 22, we concentrated on a key feature of a lease: its ability to count as a property right. This can be referred to as the *property right-conferring* aspect of a lease. We also saw, in Chapter 22, section 5, that the conferral of a property right is not the *only* key feature of a lease: as now recognized by the courts, a contract giving B a lease can also be a means for B to achieve a further practical end, such as to have a home in which to live, or premises from which to run a business.
2. In Chapter 22, we also saw that the applicability of various forms of important statutory protection may be dependent on B showing that he or she has a lease. In this chapter, we will examine that statutory protection in more detail. Such protection can be important in a number of different contexts, such as, for example, if B has an agricultural or commercial lease. In this chapter, we will focus on the protection available to B where he or she occupies land as his or her home. The degree of statutory protection available to B depends on the identity of B's landlord: A. If A is a private individual, the statutory protection available to B is now very slight; where A is a local authority, however, significant statutory protection is still available to B, in the form of a 'secure tenancy'.
3. In examining this statutory protection, we will see that a lease can give B *status*: the status of a party qualifying for statutory protection. This demonstrates a further key feature of a lease: its *status-conferring* aspect. It also raises a fundamental question: is it possible for an agreement between A and B to give B the status of a party with a lease *without* giving B a property right? A key recommendation of the Law Commission's most recent review of the area is that the statutory protection available to B, a party occupying land as a home and paying rent, should no longer depend on whether or not B has a property right in that land.
4. Having focused on the *property right-conferring* aspect of a lease in Chapter 22, and its *status-conferring* aspect in this chapter, we will then move on, in Chapter 24, to examine its *relationship-creating* aspect. There, we will see that the landlord–tenant relationship arising when A gives B a lease may impose duties and confer rights not only on A

and B, but also on later parties stepping into the shoes of A or B, and thus entering into a landlord–tenant relationship. In Chapter 24, section 6, we will also see how the courts and statute have given B some protection against the risk of losing his or her lease due to a breach of one of his or her duties to A.

1 INTRODUCTION

In Chapter 22, we focused on a particular aspect of the lease: its ability to confer a property right on B. In this chapter, we will also consider the *status-conferring* aspect of a lease—that is, its ability, in certain circumstances, to allow B to qualify for important statutory protection.

Bridge, 'Leases: Contract, Property and Status' in *Land Law: Issues, Debates, Policy* (ed Tee, 2002, pp 98–9)

> The lease straddles the worlds of contract and property. It is an estate the duration of which is determined by the agreement of the landlord and the tenant. It is also highly significant as a status, tenants enjoying rights and incurring obligations that are denied to others. The law of leases is extraordinarily complex, and the search for order out of the inherent chaos can at times seem an almost futile exercise. The student of land law [. . .] tends to concentrate on the 'general principles' affecting the leasehold relationship [. . .] It is inevitable that this emphasis on 'general principles' provides a view of the law of landlord and tenant which is some way removed from the practical realities of the leasehold relationship. One obvious divergence relates to security of tenure. It may be that according to the 'general principles', a lease can be terminated by notice, but there may be statutory restrictions on such termination, nor does it necessarily follow that recovery of possession ensues upon termination of the lease. The landlord and tenant practitioner must be aware that specific types of lease are dealt with by statute in very different ways, and that engrafted on to the 'general part' are principles which may or may not apply according to the specific kind of lease.

The 'general principles' referred to in the extract can be seen as the principles, set out in Chapter 22, that govern the *property right-conferring* aspect of a lease. If we analyse a lease as no more than a grant by A to B of a property right, giving B a right to exclusive possession of land (and thus ownership powers over land) for a limited period, then the positions of A and B seem clear. Each is free to pursue his or her own self-interest: B, by making use of the land during the period of the lease; A, by recovering possession of the land when the agreed period ends. If either party wants to control the actions of the other, the basic position is that he or she can only do so by convincing the other party to agree to that limit and thus making it a term of the parties' contractual agreement. As we will see in this chapter, there are many situations in which that simple model of a lease has been found wanting.

2 THE *STATUS-CONFERRING* ASPECT OF A LEASE: BACKGROUND

The first important challenge to the simple model of a lease set out above comes from Parliament: as noted by Bridge, statutory intervention means that, in many cases, we have to look beyond the *property right-conferring* aspect of a lease. Again, it is useful to refer back to the contrasting approaches that we noted in Chapter 1, section 5.2. From the perspective of *doctrine*, the simple model of a lease, with its emphasis on the parties' property rights and their freedom of contract, may seem perfectly adequate—but from the perspective of *utility*, Parliament has accepted that the simple model may fail to secure important policy goals.

In very broad terms, there are two general reasons why Parliament may have decided that A and B cannot simply be left to determine their respective rights: firstly, it may be that the use of land is sufficiently important that a particular party's individual wishes can be overridden; secondly, it may be that differences in the parties' relative bargaining positions mean that, absent statutory protection, one may be left at the mercy of the other. In particular, given the limited availability of land (see Chapter 1, section 4), it may be that A holds too powerful an advantage when negotiating the terms of a lease with B: even if B finds the proposed terms unattractive, it may not be possible, in practice, for B to walk away and negotiate better terms elsewhere.

Of course, the particular policy goals that Parliament wishes to advance will vary according to the particular context in question. This means that, as Bridge notes in the extract above, B's position may vary according to the particular context in which he or she has acquired his or her lease.

For the purpose of considering the statutory regulation of leases, we can distinguish between four broad types of lease:

- agricultural leases;
- commercial leases;
- long-term residential leases;
- short-term residential leases.

In line with the approach taken in Part E of this book (see Chapters 16–20), our focus will be on the protection that may be available to B where he or she occupies land as his or her *home*.

In Chapter 27, section 2.1, we will see how the statutory protection applicable to long-term residential leases may be useful to B where, generally by having paid a large purchase price, he or she has acquired a long lease (e.g. 99 or 125 years) of a flat. The central problem for B, in such a case, is that B may reasonably regard himself or herself as 'the owner' of the flat: B may have made significant financial investments in the land, as well as establishing his or her home there. Yet as time passes, and the period remaining on the lease grows shorter, the prospect of B losing his or her right to exclusive possession of the land undermines B's position.[1] Of course, if we apply the simple doctrinal model set out above, in which A and B's positions are to be determined entirely by their property rights and the agreed terms of their contract, B's loss of the land at the end of the agreed period will be unavoidable. Nonetheless,

[1] 'B' here refers both to the party originally acquiring the lease and any of his or her successors in title.

as we will see in Chapter 27, section 2.2, Parliament has intervened on policy grounds to ensure that B is protected even at the end of his or her lease.

A very similar form of intervention forms the background to *James v UK*,[2] a case that we considered in Chapter 3 (see especially section 2.5.3). That case concerned the effect of the Leasehold Reform Act 1967. That Act does not apply to flats, but it protects B where he or she holds a long lease, at a low rent, of a house. B is given a statutory power to 'enfranchise'—that is, to purchase A's freehold at a price set by a statutory formula.[3] The Duke of Westminster (who was obliged by the 1967 Act to sell a number of freeholds) claimed that the 1967 Act infringed his right, protected by Art 1 of the First Protocol of the European Convention on Human Rights, to the '*peaceful enjoyment of his possessions*'. Certainly, the Act departed from the simple model in which A and B's positions are to be determined entirely by their property rights and the agreed terms of their contract. Nonetheless, as we saw in Chapter 3, the Court found that the UK had *not* infringed the Duke's Art 1 right. Taking into the account the 'margin of appreciation' afforded to the UK (see Chapter 3, section 2.5.3), the Court recognized that the Act employed a proportionate means of pursuing a legitimate aim: to give effect to B's 'moral entitlement' to the ownership of the house and thus to remedy the 'social injustice' inherent in the precariousness of B's position.[4] Whilst dealing with a specific form of statutory intervention, applying only to long-term residential leases, the *James* case also reveals the tension inherent whenever Parliament intervenes to protect B at A's expense. In some cases, at least, it seems that wider policy goals can justify a departure from the simple model based on the parties' property rights and their freedom to contract.

In this chapter, our focus is on short-term residential leases. Around 30 per cent of all homes in England and Wales are occupied by tenants with such leases.[5] The protection available to such tenants may come from many different sources: for example, the criminal law prohibits certain forms of harassment by a landlord;[6] local authorities also have regulatory powers to ensure that certain minimum housing and public health standards are maintained.[7] In addition, in just under one third of all short-term residential leases, A (the landlord) is a local authority.[8] This means that public law may also limit A's exercise of its property rights as landlord: in particular, as a public body, a local authority has a basic duty not to act inconsistently with B's rights under the ECHR. Many of the cases that we examined in Chapter 3, exploring the impact of Art 8 of the ECHR, concerned the position of residential occupiers of land owned by a local authority.

In addition, as we saw in Chapter 22, section 5, general contractual rules, when applied to leases, may provide B with some protection: for example, A's incentive to comply with his or her statutory repairing duty may be increased by the prospect of B, in the event of a serious breach by A, being able to terminate the lease (and thus being free to move out and cease paying rent).[9]

Further, statutory regulation applying to all contracts will also apply to leases and thus provide some protection to B: for example, B may able to rely on the Unfair Terms in

[2] (1986) 8 EHRR 123.

[3] A power of enfranchisement (or instead to extend the length of the lease) was extended to a holder of a long residential lease of a flat only with the introduction of the Leasehold Reform Housing and Urban Development Act 1993: see Chapter 27, section 2.2.

[4] (1986) 8 EHRR 123, 47.

[5] See Wilcox & Pawson (eds) *UK Housing Review 2010/11*, Table 17d.

[6] See the Protection from Eviction Act 1977.

[7] See the Environmental Protection Act 1990, esp ss 79–82.

[8] See Wilcox & Pawson (eds) *UK Housing Review 2010/11*, Table 17d.

[9] See *Hussein v Mehlman* [1997] 2 EGLR 87 (County Court), considered in Chapter 22, section 5.

Consumer Contracts Regulations 1999[10] to show that 'non-core' terms of the lease contract are unfair and hence not binding on B.[11] Indeed, the Office of Fair Trading produces useful guidance as to terms that, if included in a lease without being individually negotiated, may be regarded as 'unfair'.[12]

Clearly, in this chapter, we cannot consider the full scope of the protection available to a short-term residential tenant. As noted in Chapter 1, section 2, our focus is not on all of the legal rules that affect the use of land; rather, our primary concern is with property rights relating to land. In this context, it is with the statutory protection that is made available to B *because* B has a property right in the land: a lease.

In considering that protection, we can start by noting that there is a clear difference between short-term residential leases and their long-term equivalents. Generally, to acquire a long-term residential lease, B will pay a large purchase price and then a very low, often nominal, rent. In contrast, a short-term residential lease generally involves no such premium but, instead, a duty on B to pay regular, more significant sums as rent. Of course, some tenants opt for a short-term residential lease simply as a matter of convenience: they do not wish to make a long-term commitment to a particular property or area. But the absence of a purchase price may mean that many tenants acquire a short-term residential lease out of financial necessity rather than choice: such a tenant may well wish to establish a permanent home, but lack the money needed to acquire a freehold or long-term lease. As a result—in those cases, at least—there may be a particularly strong case for statutory intervention in favour of a tenant with a short-term residential lease. Certainly, as we saw in Chapter 22, the Rent Act 1977 gave significant protection to such a tenant: that was precisely why private landlords such as Mr Street (see Chapter 22, section 1.1.1) and Mr Antoniades (see Chapter 22, section 2.4) went to such lengths to try to deny B a lease. This was not because they wanted to deny B a property right—their concern was not with whether B would have a right capable of binding third parties; rather, it was because they wished to deny B the *status* that would come with a lease—that status would enable B to qualify for statutory protection.

In the following extract, Bridge develops the idea of the *status-conferring* aspect of a lease. He also explains how the statutory protection available to a short-term residential tenant has changed, very significantly, since the time of the Rent Act 1977.

Bridge, 'Leases: Contract, Property and Status' in *Land Law: Issues, Debates, Policy* (ed Tee, 2002, pp 105–8)

The lease as status

The status-conferring dimension of the landlord-tenant relationship is given little attention in modern land law courses. Yet [...] the leading cases have frequently been motivated by a

[10] It is clear that the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) may apply to leases: this was confirmed by the Court of Appeal in *Khatun v Newham LBC* [2005] QB 37. In contrast, the Unfair Contract Terms Act 1977 does *not* apply to leases (due to an express exemption: see Sch 1, para 1(b), of the Act). The 1977 Act can, however, apply to licences: this is a rare situation in which the availability of particular statutory protection depends on B *not* having a lease.

[11] Core terms are not subject to the fairness test: as a result, the Unfair Terms in Consumer Contracts Regulations 1999 cannot be used to challenge, e.g. the level of the agreed rent.

[12] The website of the Office of Fair Trading (http://www.oft.gov.uk) is a useful starting point for a tenant wishing to claim that a non-individually negotiated term in the lease agreement is unfair and so not binding on him or her.

desire on the part of the landlord to avoid legislative status and [...] there are many other cases where the courts have been faced with the interaction of the general principles of landlord and tenant law with specific statutory provisions that apply to certain kinds of lease. The landlord-tenant relationship does not exist within a vacuum, it exists within a factual context, and the type of property let (a house, a flat, a farm, an office), for instance, will make considerable differences to the legal regime applicable. There is insufficient space here to do justice to the multifarious forms of statutory intervention in the landlord-tenant relationship. However, it may be useful to mention three particular areas in an attempt to show how the legal background has moved on, even since the days of *Street v Mountford*, to illustrate why it is that private sector residential landlords have changed their practices, and to compare the operation of principle in the residential sector of property with that in the commercial field.

Part 1 of the Housing Act 1988 came into force on 15 January 1989, less than four years after the decision in *Street v Mountford*. The Conservative government had taken the view that the decline in the private rented sector of residential property was attributable to the impact of rent control, and that any revival would require landlords to obtain a commercial return for their investment. The 1988 Act sought to phase out the Rent Acts by providing that tenancies granted after the legislation came into force would be taken out of the operation of the Acts altogether. Instead, a new regime of letting, known as the 'assured tenancy', would apply to them, pursuant to which landlords could charge whatever rent the tenant agreed to pay. The assured tenant was given statutory security and a limited form of succession on death was also enacted. Eight years later, by the Housing Act 1996, the statutory security of private sector tenants was dealt a further blow. As from 28 February 1997, any new tenancy was to take effect as an 'assured shorthold tenancy', unless the parties expressly agreed otherwise, under which the landlord can recover possession once any fixed term has expired by giving notice of a sufficient length. The legislative matrix is extremely convoluted, but the sum effect is clear. Since the enactment of the Housing Act 1988 there has been a highly significant diminution in the statutory rights of the tenant of residential property in the private sector. The spectre of the Rent Acts, which cast a long shadow over residential lettings, has been vanquished, and market forces are now allowed to prevail. Over the course of the last decade, private sector landlords have ceased to care whether they grant tenancies or licences.

[...] The public sector of housing has never been subjected to the regime of the Rent Acts, as it was for many years assumed that local authorities would act in the interests of their rate-paying tenants and not be influenced by unseemly market forces. Council tenants were therefore left to resort to public law remedies in cases where they fell into dispute with their local authority landlords over matters such as the negotiation of council rents. The systematic conferment of security of tenure on public sector tenants was initiated by Margaret Thatcher's first Conservative administration, contemporaneously with its highly publicised promotion of the tenant's right to buy the reversion of their landlord. Thus there arose, in the public sector, the status of 'secure tenant', conferring security of tenure, rights to exchange tenancies, and succession rights on death.

3 THE *STATUS-CONFERRING* ASPECT OF A LEASE: PRACTICE

The final part of the previous extract refers to the 'secure tenancy'. The secure tenancy is an excellent example of the status-conferring aspect of the lease. This statutory creation[13] can

[13] Introduced by the Housing Act 1980. See now Housing Act 1985, s 79.

arise where the landlord is a local authority[14] and its chief effect is to ensure that a court order is necessary to remove the tenant without his or her consent, and that such an order can only be made if the local authority can establish one or more of a limited set of 'grounds of possession'. A form of security of tenure is conferred, as those limited grounds do *not* include the expiry of the term of the lease. Moreover, even if one of the grounds for removal arises (e.g. because the tenant is in arrears of rent), a possession order can be granted only if it would be 'reasonable' to make such an order.[15] Indeed, even if one of the grounds for possession exists, and it would be reasonable to make the order, a court still has a wide discretion: as noted by Lord Neuberger in *Manchester City Council v Pinnock*[16] (discussed in Chapter 3), a court may instead '*refuse to make any order, it may adjourn the proceedings, it may make an outright possession order which takes effect on a specific day, or it may make a suspended possession order which will not take effect so long as, for instance, the tenant pays the rent or creates no nuisance*.'

A secure tenancy can arise only where B is an individual who '*occupies a dwelling-house as his only or principal home*'.[17] It is important to note that s 79(3) of that Act states that the secure tenancy rules also '*apply in relation to a licence to occupy a dwelling-house (whether or not granted for consideration) as they apply in relation to a tenancy*'. In *Westminster City Council v Clarke*,[18] which we examined in Chapter 22, section 2.3, however, the House of Lords explained that s 79(3) was intended to deal only with those cases in which, under the approach to the definition of a lease applying before *Street v Mountford*,[19] B could have a licence involving exclusive possession (see Chapter 22, section 1.1.1). In practice, then, the protection given to a secure tenant can apply only where B has a lease. That was precisely why, in *Westminster City Council v Clarke*, it was vital to decide if B had a right to exclusive possession of the land for a limited period. It could well be argued that the policy behind the secure tenancy (in particular, the need to allow B to be secure in his or her home) applies equally where B occupies as a licensee, lacking a right to exclusive possession. Crucially, however, it is only B's acquisition of a *lease* that gives B the statutory status of a secure tenant.

As Bridge noted, in the extract above, the status-conferring aspect of a lease can change over time, as Parliament adopts different views as to the level of protection that a particular type of tenant should enjoy. For example, prior to the introduction of the Housing Act 1988, private sector tenants had enjoyed security of tenure under the Rent Acts, which limited the grounds on which a landlord could regain possession of the land, and thus allowed a tenant to remain even after the expiry of the term of the lease. Due to the statutory changes introduced from 1988, things are now very different. If A is a private party and B (the tenant) is an individual, rather than a company, B's short-term lease may be an 'assured shorthold tenancy', *or* an 'assured tenancy'.[20] A has a choice as to which tenancy to give B: the default

[14] Housing Act 1985, s 80(1). Under that section, a secure tenancy can arise in other cases (e.g. where the landlord is a development corporation, or a housing action trust), but by far the most common case is where the landlord is a local authority.

[15] Housing Act 1985, s 84(2). Under that section, a possession order may also be made, in particular circumstances, if the court is satisfied that suitable alternative accommodation will be available to the tenant.

[16] [2011] 2 AC 104, [6].

[17] Where there is a joint tenancy, it will be a secure tenancy if each of B1 and B2 is an individual and '*at least one of them occupies the dwelling-house as his only or principal home*': Housing Act 1985, s 81.

[18] [1992] AC 288.

[19] [1985] AC 809.

[20] Of all dwellings in England, around 14 per cent are occupied by tenants of private landlords: Wilcox & Pawson (eds) *UK Housing Review 2010/11*, Table 17b.

position is that it will be an assured shorthold tenancy.[21] As noted by Bridge in the extract above, that form of lease is only very lightly regulated: certainly, B acquires no security of tenure. So, parties such as Mr Street or Mr Antoniades, who once went to such lengths to avoid granting a lease, are now perfectly content to grant B an assured shorthold tenancy. In fact, assured shorthold tenancies now make up around 67 per cent of all private sector lettings.[22]

Similarly, whilst the secure tenancy remains the predominant form of local authority tenancy, statutory reform has led to the introduction of other forms, which confer less protection on the tenant. As we saw in Chapter 3, section 4.2.2, the 'demoted tenancy' (considered by the Supreme Court in *Manchester City Council v Pinnock*) was introduced by the Anti-social Behaviour Act 2003.[23] That Act gave a court the power to make a 'demotion order', turning a secure tenancy into a demoted tenancy. As Lord Neuberger stated in *Pinnock*,[24] a demotion order can be made only if: '*(a) the tenant (or someone living with him) has engaged, or has threatened to engage, in (i) "housing-related anti-social conduct"*[25] *or (ii) conduct which consists of or involves using the "premises for unlawful purposes"*[26]*, and (b) it is reasonable to make the order.*' If a demotion order is made, '*the demotion results in much reduced rights of security of tenure for the tenant.*' The reduction in the security of tenure available to particular local authority tenants was the result of a Parliamentary desire to address the perceived problem of anti-social behaviour. Similarly, in Chapter 3, section 4.2.2, we also noted the existence of introductory tenancies (considered by the Supreme Court in *Leeds City Council v Hall* and *Birmingham City Council v Frisby*).[27] As Lord Hope noted in those appeals,[28] Parliament allowed local authorities to create such tenancies when wishing, in effect, to put a tenant on probation, the idea being that the introductory tenancy would mature into a secure tenancy (and thus confer security of tenure) only if the tenant behaved appropriately during the term of the introductory tenancy.

As we noted in Chapter 3, section 4.2.2, an important feature of demoted and introductory tenancies is that each allows for *mandatory* grounds of possession: the statutory framework sets out circumstances in which a judge is not given any discretion to refuse a possession order. This feature is also present when a local authority, acting to meet its duty to a homeless person, grants such person a non-secure tenancy under Part VII of the Housing Act 1996 (such a tenancy was considered by the Supreme Court in *Hounslow London Borough Council v Powell*).[29] This explains why, in each of *Powell* and *Manchester City Council v Pinnock*, the Supreme Court considered whether the statutory framework could be interpreted in such a way as to afford sufficient protection for a tenant's right, under Art 8 of the European Convention of Human Rights, to respect for his or her home. In the case of a secure tenancy, such a question is more easily answered: a judge has the discretion to decide whether or not it would be 'reasonable' to grant a possession order, and to decide whether or not to postpone or suspend such an order, and that discretion can be exercised in such a way as to ensure Art

[21] Before 1 October 2010, a tenancy with a rent of over £25,000 per year was excluded from the Housing Act regime, and so could not be an assured or an assured shorthold tenancy. As from 1 October 2010, that limit has been raised to £100,000: The Assured Tenancies (Amendment) (England) Order 2010 – SI 2010 No 908 (25 March 2010).

[22] Department for Communities and Local Government, Live Table 731 (figures for 2007–8).

[23] That Act inserted provisions into the Housing Act 1996.

[24] [2011] 2 AC 104, [8].

[25] As defined in s 153A of the Housing Act 1996.

[26] As explained in s 153B of the Housing Act 1996.

[27] [2011] 2 AC 186. These appeals were heard along with *Hounslow LBC v Powell*.

[28] Ibid, [15]–[19].

[29] [2011] 2 AC 186. Lord Hope discusses the nature of such tenancies at [11]–[14].

8 is not infringed.[30] Where Parliament has decided, however, that it is permissible for a local authority to grant a non-secure tenancy, it may be more difficult, as we saw in Chapter 3, section 4.2.2, to reconcile the framework set out by statute with the demands of Art 8.

The introduction of demoted and introductory tenancies thus provides a good example of how Parliament's policy to the status-conferring aspect of a lease may change over time. Indeed, in passing the Localism Act 2011, Parliament has recently set out a new approach to the provision of public sector and social housing. The aim of Part 7 of the Act is to give local authorities and registered providers of social housing greater 'flexibility' and thus to reduce the statutory protection available to tenants.[31] For example, a local authority may be able to grant a new type of tenancy, known as a 'flexible tenancy'. Such a tenancy, whilst technically still a form of secure tenancy, will confer less statutory protection than the current, general form of secure tenancy: in particular, there will no longer be security of tenure, as a flexible tenancy will have a stated maximum duration, and the landlord will therefore be able to serve a notice and to claim possession of the land at the end of that period.[32]

There may be a number of reasons why Parliament's views as to the proper level of statutory protection for residential tenants may change over time. Firstly, it may be felt that giving significant protection to tenants can be counterproductive. If the level of that protection means that potential landlords are deterred from renting out their land, the supply of available housing will be reduced. In this way, the cost of protecting those in need of accommodation *and* fortunate enough to have found it already may be that others, also in need of accommodation, have more difficulty in finding a home. It may also be felt that security of tenure can, in certain cases, encourage anti-social conduct, if a tenant, or those occupying with a tenant, feel that they cannot be evicted no matter how they behave.

Secondly, there is a political question. Parliament's willingness to enforce a departure from the simple model of a lease (for example, by preventing A from regaining exclusive possession at the end of the agreed lease period) will depend on its view of the importance of the parties' property rights and their freedom to contract. Certainly, the political consensus from the mid-1990s or so has been broadly in favour of reduced state intervention and greater deregulation: as we will see in Chapter 29, that consensus has also shaped the degree of protection available to a mortgage borrower.

4 THE *STATUS-CONFERRING* ASPECT OF A LEASE: ITS IMPACT ON THE DEFINITION OF THE LEASE

The status-conferring aspect of a lease gives rise to an important question: if particular statutes give B important protection *if and only if* B has a lease, will judges be tempted to widen (or narrow) the definition of a lease in order to ensure that B does (or does not) receive such

[30] It is true that *Harrow LBC v Qazi* [2004] 1 AC 983 (see Chapter 3, section 4.1.1) concerned an Art 8 challenge in the context of a secure tenancy. This was because the secure tenancy was held by two joint tenants and, technically, it ended due to the choice of one of those joint tenants not to renew it. The local authority therefore did not need to rely on any of the grounds for possession set out in the Housing Act 1985. See further Chapter 22, section 3.3.

[31] The policy behind the changes is set out in, for example, the consultation paper issued by the Department for Communities and Local Government in November 2010 entitled 'Local Decisions: A Fairer Future for Local Housing'.

[32] In addition, the class of people with a statutory right to succeed to a secure tenancy will be reduced by s 160 of the Localism Act 2011.

protection? For example, we noted in section 3 above that the Rent Acts formerly gave significant protection to a tenant of a private landlord. In *Street v Mountford* (see Chapter 22, sections 1.1.1 and 2.1), Lord Templeman stated that: '*I accept that the Rent Acts are irrelevant to the problem of determining the legal effect of the rights granted by the agreement. Like the professed intention of the parties, the Rent Acts cannot alter the effect of the agreement.*'[33] This strict view can be seen as favouring the 'doctrinal' approach, as opposed to the 'utility' approach (see Chapter 1, section 5.2): if Parliament has decided that statutory protection should be available only to those with a lease, the term 'lease' should be given its usual meaning. A contrasting approach would be to interpret the term 'lease' in a way which ensures that the statute succeeds in protecting those who, in the view of the court, deserve protection. The tension between these two approaches was apparent in Chapter 22, section 2.4, when we considered the courts' response to 'shams' or 'pretences' used by a landlord in an attempt to prevent a lease arising. It is also clear in the House of Lords's decision in *Bruton v London & Quadrant Housing Trust Ltd*,[34] and in commentators' response to that decision.

To understand the background to *Bruton*, we first need to look at the reason why Mr Bruton wished to claim that he had a lease. It was provided by s 11 of the Landlord and Tenant Act 1985, which essentially[35] ensures that, where B has a lease, for less than seven years, of a dwelling, A is under the following duties:

Landlord and Tenant Act 1985, s 11

[. . .]

(a) to keep in repair the structure and exterior of the dwelling-house (including drains, gutters and external pipes);

(b) to keep in repair and proper working order the installations in the dwelling-house for the supply of water, gas and electricity and for sanitation (including basins, sinks, baths and sanitary conveniences, but not other fixtures, fittings and appliances for making use of the supply of water, gas or electricity), and

(c) to keep in repair and proper working order the installations in the dwelling-house for space heating and heating water.

The policy behind this statutory duty seems clear: if B has a short-term lease, it seems unreasonable for B to have to bear the cost of repairs that may ultimately benefit A when A regains exclusive possession of the land.[36] In addition, having rented a home in a particular condition, B may reasonably expect a certain basic level of maintenance and repair. In practice, it may be that B's need for accommodation and relatively weak bargaining position make it impossible to leave the matter to the parties' freedom to contract: hence the mandatory statutory duty. Those policy concerns would also seem to apply in a case in which B has a licence rather than a lease—it is difficult to see how B's acquisition of a property right makes him or her more deserving of the protection afforded by s 11. Nonetheless, the statute makes

[33] [1985] AC 809, 819. [34] [2000] 1 AC 406.

[35] There are some exceptional situations in which the duty does not arise: see Landlord and Tenant Act 1985, s 14.

[36] As a result of s 166 of the Localism Act 2011, s 11 of the 1985 Act will also apply to any future secure tenancies of seven years or longer; and any future assured tenancy for a fixed term of seven years or longer, granted by a registered provider of social housing, as long as it is not a shared ownership lease.

clear that the duty it imposes can only be implied into a *lease*. It is in this way that B's acquisition of a lease provides the *status* needed to qualify for the statutory protection.

Bruton v London & Quadrant Housing Trust Ltd
[2000] 1 AC 406, HL

Facts: The London Borough of Lambeth ('the council') owned a block of flats, Oval House, in Brixton, London. It planned to demolish the block and build new flats, but there were delays to that project. In the meantime, the council gave the London & Quadrant Housing Trust, a charitable body that sought to provide accommodation to the homeless and those in need, a licence to use the flats for that purpose. It was clear that its agreement with the council gave the Trust only a licence: in particular, the council had no statutory power, in the circumstances, to give the Trust a lease. Mr Bruton was one of the parties housed by the Trust in Oval House. The agreement entered into by Mr Bruton and the Trust was described as a licence. It stated that:

> The trust has the property on licence from [the council] who acquired the property for development [. . .] and pending this development, it is being used to provide temporary housing accommodation. It is offered to you on the condition that you will vacate upon receiving reasonable notice from the trust, which will not normally be less than four weeks.

Mr Bruton claimed that his agreement with the Trust, in fact, gave him a lease; that the Trust was therefore under a statutory repairing duty, imposed by s 11 of the Landlord and Tenant Act 1985; and that the Trust had failed to perform that duty. The Trust argued that Mr Bruton could not have a lease: the Trust had no power to grant Mr Bruton a property right in the land because it had no such right itself (it had only a licence from the council). Judge James, sitting at Lambeth county court, found in favour of the Trust. The Court of Appeal dismissed Mr Bruton's appeal (Sir Brian Neill dissenting)—but the House of Lords found that Mr Bruton *did* have a lease and thus that the Trust was, therefore, under the statutory repairing duty.

Lord Hoffmann

At 413–6

Did this agreement create a 'lease' or 'tenancy' within the meaning of the Landlord and Tenant Act 1985 or any other legislation which refers to a lease or tenancy? The decision of this House in *Street v. Mountford*[37] is authority for the proposition that a 'lease' or 'tenancy' is a contractually binding agreement, not referable to any other relationship between the -parties, by which one person gives another the right to exclusive occupation of land for a fixed or renewable period or periods of time, usually in return for a periodic payment in money. An agreement having these characteristics creates a relationship of landlord and tenant to which the common law or statute may then attach various incidents. The fact that the parties use language more appropriate to a different kind of agreement, such as a licence, is irrelevant if upon its true construction it has the identifying characteristics of a lease. The meaning of the agreement, for example, as to the extent of the possession which it grants, depends upon the intention of the parties, objectively ascertained by reference to the language and relevant

[37] [1985] AC 809.

background. The decision of your Lordships' House in *Westminster City Council v. Clarke*[38] is a good example of the importance of background in deciding whether the agreement grants exclusive possession or not. But the classification of the agreement as a lease does not depend upon any intention additional to that expressed in the choice of terms. It is simply a question of characterising the terms which the parties have agreed. This is a question of law.

In this case, it seems to me that the agreement, construed against the relevant background, plainly gave Mr. Bruton a right to exclusive possession. There is nothing to suggest that he was to share possession with the trust, the council or anyone else. The trust did not retain such control over the premises as was inconsistent with Mr. Bruton having exclusive possession as was the case in *Westminster City Council v. Clarke*. The only rights which it reserved were for itself and the council to enter at certain times and for limited purposes. As Lord Templeman said in *Street v. Mountford* such an express reservation 'only serves to emphasise the fact that the grantee is entitled to exclusive possession and is a tenant.'[39] Nor was there any other relationship between the parties to which Mr. Bruton's exclusive possession could be referable.

Mr. Henderson, who appeared for the trust, submitted that there were 'special circumstances' in this case which enabled one to construe the agreement as a licence despite the presence of all the characteristics identified in *Street v. Mountford*. These circumstances were that the trust was a responsible landlord performing socially valuable functions, it had agreed with the council not to grant tenancies, Mr. Bruton had agreed that he was not to have a tenancy and the trust had no estate out of which it could grant one.

In my opinion none of these circumstances can make an agreement to grant exclusive possession something other than a tenancy. The character of the landlord is irrelevant because although the Rent Acts and other Landlord and Tenant Acts do make distinctions between different kinds of landlords, it is not by saying that what would be a tenancy if granted by one landlord will be something else if granted by another. The alleged breach of the trust's licence is irrelevant because there is no suggestion that the grant of a tenancy would have been ultra vires either the trust or the council [...] If it was a breach of a term of the licence from the council, that would have been because it was a tenancy. The licence could not have turned it into something else. Mr. Bruton's agreement is irrelevant because one cannot contract out of the statute. The trust's lack of title is also irrelevant, but I shall consider this point at a later stage. In *Family Housing Association v. Jones*,[40] where the facts were very similar to those in the present case, the Court of Appeal construed the 'licence' as a tenancy. Slade L.J. gave careful consideration to whether any exceptional ground existed for making an exception to the principle in *Street v. Mountford* and came to the conclusion that there was not. I respectfully agree. For these reasons I consider that the agreement between the trust and Mr. Bruton was a lease within the meaning of section 11 of the Landlord and Tenant Act 1985.

My Lords, in my opinion, that is the end of the matter. But the Court of Appeal did not stop at that point. In the leading majority judgment, Millett L.J. said that an agreement could not be a lease unless it had a further characteristic, namely that it created a legal estate in the land which 'binds the whole world.'[41] If, as in this case, the grantor had no legal estate, the agreement could not create one and therefore did not qualify as a lease. The only exception was the case in which the grantor was estopped from denying that he could not create a legal estate. In that case, a 'tenancy by estoppel' came into existence. But an estoppel depended upon the grantor having purported to grant a lease and in this case the trust had not done so. It had made it clear that it was only purporting to grant a licence.

[38] [1992] AC 288. [39] [1985] AC 809, p 818. [40] [1990] 1 WLR 779. [41] [1998] QB 834, 845.

My Lords, I hope that this summary does justice to the closely reasoned judgment of Millett L.J. But I fear that I must respectfully differ at three critical steps in the argument.

First, the term 'lease' or 'tenancy' describes a relationship between two parties who are designated landlord and tenant. It is not concerned with the question of whether the agreement creates an estate or other proprietary interest which may be binding upon third parties. A lease may, and usually does, create a proprietary interest called a leasehold estate or, technically, a 'term of years absolute.' This will depend upon whether the landlord had an interest out of which he could grant it. *Nemo dat quod non habet*.[42] But it is the fact that the agreement is a lease which creates the proprietary interest. It is putting the cart before the horse to say that whether the agreement is a lease depends upon whether it creates a proprietary interest [. . .]

Secondly, I think that Millett L.J. may have been misled by the ancient phrase 'tenancy by estoppel' into thinking that it described an agreement which would not otherwise be a lease or tenancy but which was treated as being one by virtue of an estoppel. In fact, as the authorities show, it is not the estoppel which creates the tenancy, but the tenancy which creates the estoppel. The estoppel arises when one or other of the parties wants to deny one of the ordinary incidents or obligations of the tenancy on the ground that the landlord had no legal estate. The basis of the estoppel is that having entered into an agreement which constitutes a lease or tenancy, he cannot repudiate that incident or obligation [. . .] Thus it is the fact that the agreement between the parties constitutes a tenancy that gives rise to an estoppel and not the other way round. It therefore seems to me that the question of tenancy by estoppel does not arise in this case. The issue is simply whether the agreement is a tenancy. It is not whether either party is entitled to deny some obligation or incident of the tenancy on the ground that the trust had no title.

Thirdly, I cannot agree that there is no inconsistency between what the trust purported to do and its denial of the existence of a tenancy. This seems to me to fly in the face of *Street v. Mountford*. In my opinion, the trust plainly did purport to grant a tenancy. It entered into an agreement on terms which constituted a tenancy. It may have agreed with Mr. Bruton to say that it was not a tenancy. But the parties cannot contract out of the Rent Acts or other landlord and tenant statutes by such devices. Nor in my view can they be used by a landlord to avoid being estopped from denying that he entered into the agreement he actually made.

For these reasons I would allow the appeal and declare that Mr. Bruton was a tenant. I should add that I express no view on whether he was a secure tenant or on the rights of the council to recover possession of the flat.

Lord Hobhouse

At 417–8

The claim made in the action seeks to enforce a contractual cause of action. The breach of contract alleged against the defendant housing trust is the failure to maintain and keep in repair the flat in which the plaintiff, Mr. Bruton is living. He relies upon a written agreement between himself and the housing trust dated 31 January 1989. The written agreement does not contain any undertaking by the housing trust to repair the flat. But Mr. Bruton alleges that the agreement creates a relationship of landlord and tenant between the housing trust and himself and that therefore an undertaking to repair by the housing trust is compulsorily implied by statute—section 11 of the Landlord and Tenant Act 1985.

Counsel for the housing trust accepted before your Lordships that a contractual relationship of landlord and tenant suffices to make the provisions of the Act applicable. The

[42] [No one can give what he does not have.]

question therefore is whether the agreement creates such a relationship. The answer to this question is, in my judgment, determined by the decision in *Street v. Mountford*. The agreement was an agreement to give Mr. Bruton the exclusive possession of the flat for a period or periods of time in return for the periodic payment of money; the grant of exclusive possession was not referable to any other relationship between the parties. It follows that the relationship created was that of landlord and tenant and the provisions of the Act apply to the agreement. Mr. Bruton is entitled to succeed [. . .]

The Court of Appeal were influenced by the way in which the case for Mr. Bruton was argued before them. They understood that his case depended upon establishing a tenancy by estoppel. This was not a correct analysis. He needed to do no more than rely upon the written agreement he had with the housing trust and its legal effect. The only concept of estoppel which was possibly relevant was that which arises from the agreement [. . .] The present case does not depend upon the establishing of an estoppel nor does any problem arise from the fact that the housing trust did not have a legal estate. The case of Mr. Bruton depends upon his establishing that his agreement with the housing trust has the legal effect of creating a relationship of tenant and landlord between them. That is all. It does not depend upon his establishing a proprietary title good against all the world or against the council. It is not necessary for him to show that the council had conveyed a legal estate to the housing trust. I therefore cannot agree with the reasoning of the Court of Appeal and would allow this appeal.

The decision of the House of Lords in *Bruton* has proved to be controversial, to say the least. The essential point is that, prior to the decision, it had been assumed that, to take advantage of the *status-conferring* aspect of a lease, B necessarily had to have a property right—but the House of Lords departed from that assumption. It was held that Mr Bruton's agreement with the Trust, *even if it did not give him a property right in the land*, could nonetheless give Mr Bruton the status of a tenant and therefore allow him to take advantage of s 11 of the Landlord and Tenant Act 1985.

As Bright notes in the following extract, this suggests that there are two forms of lease: the standard proprietary lease, and a new, purely contractual, lease.

Bright, 'Leases, Exclusive Possession and Estates' (2000) 116 LQR 7, 8–9

Certain propositions emerge clearly from the speeches in the House of Lords:

1. Mr Bruton had a right to exclusive possession;
2. the relationship of landlord and tenant existed between Mr Bruton and the Housing Trust;
3. this relationship does not give a title good against all the world; and
4. the fact that the Housing Trust had no estate did not matter.

Cumulatively, these propositions illustrate an understanding about the essential nature of leases that was not shared by the Court of Appeal. Although both courts agree that exclusive possession is necessary in order for there to be a lease, there are contrasting views as to whether this is an absolute or relative concept. In the House of Lords, exclusive possession was found on the basis of the contractual agreement between Mr Bruton and the Housing Trust. The agreement gave Mr Bruton the right to exclusive possession: he did not have to share possession with anyone else, and the Housing Trust retained only limited rights over

the premises. The Housing Trust's lack of title is not relevant. In contrast, Millett L.J. regarded exclusive possession as looking beyond the relationship between the two contracting parties. According to this view, exclusive possession, meaning possession to the exclusion of the whole world, is essential for a lease; if 'the grantor has no power to exclude the true owner from possession, he has no power to grant a legal right to exclusive possession and his grant cannot take effect as a tenancy'.[43] This means that Mr Bruton could not have exclusive possession and, thus, he could not have a lease. If it is possible to have exclusive possession in the relational sense referred to in the House of Lords, the further question arises as to the nature of the resulting relationship. We are told that it is a relationship of landlord and tenant but not whether it is an "estate". Given that relativity of title is a fundamental aspect of English land law, it could be classified as an estate in this relative sense. This is hard to accept, however. For derivative title, at least, the principle of *nemo dat quod non habet*—no one can convey what he does not own—is also fundamental to English land law. The Housing Trust did not have an estate, and so could not grant an estate to Mr Bruton. Indeed, this is implied when Lord Hoffmann states that a 'lease may, and *usually does*, create a proprietary interest called a leasehold estate [...] This will depend upon whether the landlord had an interest out of which he could grant it' (emphasis added). If usually, then it must be that sometimes there can be a lease which is not an estate.

On this point, too, the Court of Appeal had differed. The premise in the Court of Appeal was that a lease is (always) a proprietary concept: 'A tenancy is a legal estate'.[44] There is much to be said for this view. Although there can be tenancies of sorts which do not confer estates, the tenancy at will and the tenancy by estoppel, these are generally treated as special cases and would not be described as 'leases' without qualification. Moreover, much previous case law proceeds on the assumption that all leases are estates in land, an assumption which has, on occasion, been made explicit: 'I myself find it impossible to conceive of a relationship of landlord and tenant that has not got that essential element of tenure in it, and that implies that the tenant holds of his landlord, and he can only do that if the landlord has a reversion. You cannot have a purely contractual tenure.'[45] More recently, Neuberger J. stated that "a lease involves not only a contract, but also an estate in land".[46] [...] It is, therefore, a surprise that both Lord Hoffmann and Lord Hobhouse of Woodborough state clearly in *Bruton*, with little discussion of the point, that, though usual, an estate in land is not an essential element of a lease. A lease, in the words of Lord Hoffmann 'describes a relationship between two parties who are designated landlord and tenant. It is not concerned with the question of whether the agreement creates an estate or other proprietary interest which may be binding upon third parties'.

If this is a correct reading of what Lord Hoffmann says and it is possible to have leases which are not estates, contractual rights of occupation will need to be classified as either proprietary leases giving an estate in land and enforceable against all third parties, or as contractual leases conferring exclusive possession and giving rights against all who interfere with possession other than those who can show a better right to possession, or as licences. There will be consequential issues to be addressed. Will 'contractual leases' count as leases for all statutory purposes? Can 'contractual leases' be created informally? It would appear so, as the formality requirements set out in the Law of Property Act 1925, ss.52 and 54, and the Law of Property (Miscellaneous Provisions) Act 1989, s.2, apply only to interests in land. The rules on certainty of term presumably apply to 'contractual leases'—otherwise the outcome in *Prudential Assurance Co. Ltd v. London Residuary Body* [1992] 2 A.C. 386

43 [1998] QB 834, 845, *per* Millett LJ. 44 Ibid.
45 *Milmo v Carreras* [1946] KB 306, 310, *per* Lord Greene MR.
46 *Re Friends Provident Life Office* [1999] 1 All ER (Comm.) 28, 36.

would have been different and the agreement upheld as a contractual tenancy [. . .] What status will a 'contractual lease' have vis-à-vis third parties?

The essence of the House of Lords' decision in *Bruton* is that B can have the status of a tenant even if his or her agreement with A does not give B a property right: B may instead have a 'non-estate tenancy'.[47]

In the following extract, it is suggested that the House of Lords could have reached that conclusion in a more conventional way: by utilizing the well-established notion of a 'tenancy by estoppel'.

Routley, 'Tenancies and Estoppel: After *Bruton v London & Quadrant Housing Trust*' (2000) 63 MLR 424, 424–8

As generally understood, a tenancy by estoppel results where a person purports to grant a tenancy of land, but does not in fact have a sufficient interest in the land to create a tenancy: he is then estopped from denying that the relationship of landlord and tenant exists between him and the grantee [. . .] As between the parties it is as though they are actually landlord and tenant *even though in fact they are not*.

The authorities describe a tenancy by estoppel as a different creature from the more familiar estoppel by representation, as a development from the doctrine of estoppel by deed, but extended in the field of landlord and tenant to all grants whether merely written or oral. A tenancy by estoppel could be said to be the result of the operation of estoppel by grant. Unlike its cousin, estoppel by grant does not rely upon any express representation as to title: 'It is the product of a fundamental principle of the common law which precludes a grantor from disputing the validity of his own grant.'[48]

[. . .] Confusion between the doctrines of estoppel by representation and estoppel by grant gave rise to some of the difficulties in *Bruton* [. . .] Millett LJ [in the Court of Appeal] found that there is no estoppel 'unless the grantor's denial of title is inconsistent with his grant.'[49] There was no estoppel here, because there was no inconsistency between the nature of the alleged grant (a licence), and therefore there could not be any tenancy. The principles of estoppel and of *Street v Mountford* were irreconciliable:

> '*Street v Mountford* rejects the professed intentions of the parties in favour of the true effect of the transaction. Estoppel by convention gives effect to the professed intentions of the parties. Any attempt to combine them produces a hopeless circularity.'[50]

I fear that Millett LJ may have been too bemused by the elegance of that conundrum to notice its flaws: it is an oversimplification to say that estoppel 'gives effect to the professed intentions of the parties'. While Millett LJ acknowledges the difference described above between estoppel by representation and by grant, he then applies the 'representation' test to the facts of the case before him, basing his conclusion of no estoppel on a finding of no misrepresentation.

[47] To use the term applied by Lord Scott when considering the *Bruton* tenancy in *Kay v Lambeth London Borough Council* [2006] 2 AC 465, [145]–[147]. We examined the human rights aspects of that case in Chapter 3, section 2.1.1.

[48] *Per* Millett LJ in *Bruton* in the Court of Appeal: [1998] QB 834, 844.

[49] Ibid, 845.

[50] Ibid.

> The flaw in that reasoning is that this estoppel does not arise from a representation, but from the grant, and if one correctly concludes via *Street v Mountford* that the grant was in fact the grant of a tenancy, then the Trust's denial of title *is* inconsistent with that grant, and, despite the fact that both the Trust and [Mr Bruton] thought that a licence was being granted, a tenancy by estoppel arises [. . .]
>
> The whole corpus of law relating to landlord and tenant derives from the status of landlord and tenant, from privity of estate, from the fact of ownership of a proprietary interest in land, not from the fact of having entered into an agreement which might or might not have created such a proprietary interest.
>
> An agreement in the form of a lease, but which does not create a proprietary interest, cannot be a lease. And the order of cart and horse is not as Lord Hoffmann would have it, but as it has always been.
>
> Which is precisely why the common law imposes an estoppel upon the man who purports to grant a lease by means of an agreement in the form of a lease which purports to create one: to prevent him from saying 'I did not have the interest out of which to create a lease, therefore I could not have granted one, therefore the grantee is not my tenant, and I am not bound by any obligations as landlord.' But it must never be overlooked that a 'tenancy by estoppel' is not a tenancy: not a proprietary interest.

Routley's argument is that the House of Lords in *Bruton* reached the correct result, but by the wrong route. Certainly, given the policy behind s 11 of the Landlord and Tenant Act 1985, it would seem unreasonable for the Trust to use its own lack of a property right as a means to escape a statutory repairing duty. Routley suggests that the unfairness comes from the fact that the Trust entered an agreement seemingly giving Mr Bruton exclusive possession of the land for a limited period: as a result, the Trust should have been prevented from denying that Mr Bruton had a lease. This form of estoppel thus has the same effect as the estoppel by representation (see Chapter 10, section 1): it does not, in fact, give B a lease, but it prevents A from denying that B has a lease. That reasoning could thus have been used to prevent the Trust denying its statutory repairing duty.

Routley's argument is convincing—but, as he admits, it does not fit with the reasoning of the House of Lords. The key aspect of that reasoning seems to be the separation of the *status-conferring* and *property right-conferring* aspects of the lease. The agreement between Mr Bruton and the Trust, whilst it could not give Mr Bruton a property right in the land, *did* give him the status needed to qualify for statutory protection. The validity of that approach can be seen as a question of statutory interpretation: when Parliament used the word 'lease' to define the scope of the repairing duty, did it intend that term to be confined to cases in which B has a property right in land?

This suggestion is pursued in the following extract.

McFarlane and Simpson, 'Tackling Avoidance' in *Rationalizing Property, Equity and Trusts: Essays for Edward Burn* (ed Getzler, 2002, pp 175–6)

> [It may] be significant that Lord Hoffmann posed the question: 'Did this agreement create a 'lease' or 'tenancy' within the meaning of the Landlord and Tenant Act 1985 or any other legislation which refers to a lease or tenancy?'[51] and also that counsel for the housing trust,

[51] [2000] 1 AC 406, 413.

in the words of Lord Hobhouse, accepted that 'a contractual relationship of landlord and tenant suffices to make the provisions of the Act applicable.'[52] It can be argued that *Bruton* [. . .] does not involve a re-working of the general test for a lease but rather involves an attempt to further the presumed purpose of a legislative scheme by looking not for a lease in the technical sense of a legal right to exclusive possession but instead for a lease in the wider, non-juristic sense of an arrangement which confers practical control of property. The decision can thus be seen as based on an implicit assumption that the legislature's use of the concept of a tenancy to determine the bounds of particular protection for occupiers is simply a means to achieve an underlying purpose of giving such protection to those who, in practice, occupy property as one occupies a home. Provided such occupation exists, the precise legal rights enjoyed by the occupier are therefore not decisive in determining the application of the statute [. . .]

Hence, it may just be possible to justify the decision in *Bruton* by arguing that "lease" and "tenancy", when used in the Landlord and Tenant Act 1985, include an occupier under an agreement which only fails to confer a legal right to exclusive possession because of the grantor's lack of title. It could be said that the purpose of the legislation is to regulate the relationship between grantor and occupier, and the lack of title of the grantor, whilst it will prevent the occupier gaining rights against the true owner or those claiming through him, should not deny the occupier the protection of the Act: put simply, in such a situation the fact that the occupation agreement is technically unable to confer a lease in the full legal sense is not the fault of the occupier [. . .]

McFarlane and Simpson also explore whether this 'statutory interpretation' approach can be used to explain the 'pretence' concept applied by the House of Lords in *Antoniades v Villiers*.[53] As we saw in Chapter 22, section 2.4, there is a debate as to whether that concept provides a doctrinal justification for ignoring terms in the parties' contract that, if valid, would prevent B from acquiring a right to exclusive possession of the land. McFarlane and Simpson suggest that, in *Antoniades*, the House of Lords may have been motivated by an understandable desire to ensure that the statutory protection then provided by the Rent Acts should extend not only to parties with a legal right to exclusive possession, but also to parties, such as Mr Villiers and Miss Bridger, who, *in practice*, enjoyed exclusive control of a home in return for paying rent. As the authors go on to note in the following passage, however, this approach to statutory interpretation, whilst it may be able to explain the results in *Bruton* and *Antoniades*, seems to be inconsistent with the seminal decision of the House of Lords in *Street v Mountford*.[54]

McFarlane and Simpson, 'Tackling Avoidance' in *Rationalizing Property, Equity and Trusts: Essays for Edward Burn* (ed Getzler, 2002, p 177)

Lord Templeman's [speech in *Street v Mountford*] is founded on a rejection of the previously prevailing idea that the term 'tenancy' could be given an unorthodox meaning when used in the Rent Acts. A heresy had sprung up in the Court of Appeal which allowed an owner wishing to avoid the burdens of such legislation to do so provided he demonstrated an intention not to grant a lease. It seems clear that this heresy was motivated by sympathy towards such an owner, and a consequent willingness to narrow the application of the Rent Acts. Lord

[52] Ibid, 417. [53] [1990] 1 AC 417. [54] [1985] AC 809.

Templeman firmly emphasises that the orthodox, traditional definition of a lease as the grant of exclusive possession is the true test to apply. This can be defended on the simple grounds that when Parliament selects a concept such as 'lease' or 'tenancy', with an established juridical meaning, to communicate with judges there is no reason to believe it intends an unorthodox meaning of that term to be applied. Therefore whilst the result in *Street* may be favourable to occupiers rather than owners, its methodology is avowedly neutral.

The authors of the extract go on to make the point that, if the terms 'lease' or 'tenancy' can be interpreted in a novel way when used in a statute, this will not necessarily lead to an *increase* in the availability of statutory protection. For example, a court could find that, because of the special duties imposed on A if B has a lease, the term should be given a particularly narrow definition. Indeed, as we noted in Chapter 22, section 2.1, it seems that the Court of Appeal adopted just such an approach in the period leading up to *Street v Mountford*. Even if it is agreed that a judge, when interpreting a statute, should try to advance its purpose, we have to ask *how* a judge should discern that purpose. After all, as noted above, it may seem that the policy underlying s 11 of the Landlord and Tenant Act 1985 should apply even if B's agreement with A has not given B a property right. But it is doubtful that a court can make that decision given that: (i) the statute expressly limits its scope to cases in which B has a 'lease'; and (ii) as noted by the authors of all the extracts in this section, the term 'lease' is generally understood as applying only where A's agreement with B gives B a property right in land.

The solution, of course, is for Parliament to make its policy clearer. One resolution would be for the statutory protection currently available to those with leases to be extended to parties with licences. The lease would then be left to play its role as a concept conferring a property right; it would not have to perform the further task of conferring the status needed to qualify for statutory protection. In fact, as we will see in the next section, the Law Commission has proposed just such a change.

5 THE *STATUS-CONFERRING* ASPECT OF A LEASE: REFORM?

There have long been calls for the reform of the statutory regulation of short-term residential leases. One of the central complaints has been that the law is too complex, with occupiers and landlords often unsure of their positions. Certainly, any protection that the law aims to provide for occupiers will be undermined if, in practice, those occupiers are unaware of their legal rights.[55]

In 2006, the Law Commission, following what it described as '*one of the largest consultation exercises* [it had] *ever undertaken*',[56] published its report on *Renting Homes*. The report considered the statutory protection available to short-term residential tenants and suggested significant changes, based on three objectives of '*simplification, increased comprehensibility, and flexibility*'.[57] It produced a very detailed draft Bill (the Rented Homes Bill) and stated

[55] For a good example of this problem, exploring occupiers' ignorance of the legal protection given to them by the Protection from Eviction Act 1977, see Cowan, 'Harassment and Unlawful Eviction in the Private Rented Sector – a Study of Law in (-)action' [2001] Conv 249.

[56] Law Commission Report No 297, *Renting Homes* (2006), [1.3].

[57] Ibid, [1.9].

that its proposals were based on '*two radical changes to the legislative approach to the regulation of rented housing*'. Those changes are set out in the extract below:

Law Commission Report No 297, *Renting Homes* (2006, [1.4]–[1.6])

First, we recommend the creation of a single social tenure. At present, local authorities can only let on secure tenancies; registered social landlords only on assured tenancies. Our recommendations are 'landlord-neutral'. They enable social housing providers, referred to in the Bill as 'community landlords', and those private sector landlords who so wish to rent on identical terms. This has long been sought by local authorities and registered social landlords. This offers the prize of vastly increased flexibility both to policy makers and landlords in the provision and management of social housing.

Secondly, we recommend a new 'consumer protection' approach which focuses on the contract between the landlord and the occupier (the contract-holder), incorporating consumer protection principles of fairness and transparency. Thus our recommended scheme does not depend on technical legal issues of whether or not there is a tenancy as opposed to a licence (as has usually been the case in the past). This ensures that both landlords and occupiers have a much clearer understanding of their rights and obligations.

The terms of the contract, underpinned by our statutory scheme, will be set out in model contracts that we anticipate will be free and easily downloadable. They will benefit landlords by explaining their rights and obligations, thus reducing the ignorance many landlords have about their responsibilities. They will benefit occupiers who will also have a clear statement of their rights and obligations, which sets out the basis on which they occupy accommodation, and the circumstances in which their rights to occupy may come to an end.

The aim of simplification would be achieved in a number of ways. Firstly, the current focus on the identity of the landlord, and, with it, the different statutory categories of lease (e.g. 'assured shorthold tenancy', 'assured tenancy', 'secure tenancy', etc.), would be removed. Secondly, and most importantly for our current purposes, the *status-conferring* aspect of a lease would be lost: to qualify for statutory protection, it would no longer be necessary for B to show that he or she has a lease. The new scheme would instead regulate 'occupation contracts'. There would be two forms of such contract: the 'standard contract', lightly regulated and offering no security of tenure (similar to the current assured shorthold tenancy), and the 'secure contract', more heavily regulated and providing security of tenure, to be used (like the current secure tenancy and assured tenancy) by local authorities or social landlords.

Law Commission Report No 297, *Renting Homes* (2006)

At [3.9]

A number of points about the definition of 'occupation contract' should be noted at the outset.

1. It is specifically provided that an occupation contract can be either a tenancy or a licence. This avoids historic complications whereby statutory schemes only applied where premises were 'let'. This definition recognizes that the distinction between a lease/tenancy and a licence exists. This will often be important. For example, where a landlord sells their legal estate in a property to another, it is highly relevant whether that estate is

subject to a lease or a licence. These issues continue to be determined by application of the current law. We also make explicit that, where an occupation contract is a tenancy, any land registration requirements must be satisfied.

2. The contract must be made between a landlord and an individual (the 'contract-holder'). The contract must confer the right to occupy premises as a home. Where the contract is made with two or more persons, at least one must be an individual. Contracts relating to the occupation of premises for purposes other than occupation as a home fall outside the scope of our scheme. In many situations, such agreements fall within the scope of other statutory schemes, for example business tenancies [. . .]
3. Despite the breadth of the definition, not all contracts which confer the right to occupy premises as a home fall within the scope of the Bill [. . .][58]
4. Most of the ancillary tests currently used to define the scope of statutory protection are removed. Thus, there is no requirement that the rent should be above or below a defined rent limit. Nor is there any requirement that the premises must be occupied as the 'only or principal home'.
5. Most importantly in the context of the social rented sector, there is no 'landlord condition'. Our emphasis on the principle of landlord neutrality means that the scheme will, for the first time, enable the creation of a single type of contract that can apply throughout the social rented sector, irrespective of the identity of the landlord.
6. Once created, an occupation contract continues in existence either until it is terminated in accordance with the provisions of the scheme, or unless the premises or the contract come within the scope of the exceptions listed in paragraph 3 of schedule 1[59] [. . .]

At [3.18]–[3.21]

In place of the current multiplicity of statutory statuses, the scheme provides for just two types of occupation contract: secure and standard.

Secure contracts

Secure contracts are modelled on secure tenancies which currently can only be created by local authorities. As with secure tenancies, secure contracts have a high degree of security of tenure protected by the Bill. They can be created only on a periodic basis. The reason for this is that in the context of the high security of tenure granted by the Bill for a secure contract, having a fixed term would not be useful [. . .] The idea of the secure contract is to provide a security gold standard for use in the social sector. To allow fixed term secure contracts would at best muddle the picture, and at worst, undercut that objective.

Standard contracts

Standard contracts are modelled on the current assured shorthold tenancy granted by private landlords. Although they have a low degree of security of tenure protected by statute, there is nothing preventing landlords entering contracts which have a greater degree of security than the Bill requires. Often this happens because it is in the landlord's interest to do so, for example to minimize void letting periods. Standard contracts can be either fixed term or periodic.

[58] [One example of a type of contract not covered by the Bill occurs where B pays to *share* occupation of A's land with A.]

[59] [That is, if a change in circumstances means that the contract now falls into one of those types not covered by the Bill.]

In the case of standard contracts only, the Bill provides that a landlord is able to specify periods where, notwithstanding the existence of the contract, the premises cannot be used for occupation. The purpose of this provision is to enable, for example, universities to enter occupation contracts with their students for the whole academic year, but also enable them to regain possession during vacation periods when the accommodation is needed for conferences. It would be a disproportionate administrative burden for there to be separate contracts for each academic term or semester.

Under the proposals, A would be obliged to give B a written copy of any occupation contract.[60] Such a contract would include four classes of 'matters' or 'terms': (i) key matters; (ii) fundamental terms; (iii) supplementary terms; and (iv) additional terms.[61]

Contractual terms regulating the key matters (the identity of the land; the date when occupation is to start; the sums to be paid by B as rent or as other payments; the period of the rent) would be exempt from regulation under the Unfair Terms in Consumer Contracts Regulations 1999, because those Regulations do not permit a party to challenge core contractual terms.

Fundamental terms would be those imposed by statute: the parties could not vary them. One such term would replicate the statutory repairing duty currently imposed by s 11 of the Landlord and Tenant Act 1985. Of course, under the Law Commission's proposals, that duty would no longer depend on B showing that he or she has a lease from A.

Supplementary terms would be those required in the contract as a result of a decision by an appropriate authority, rather than under the statute itself.

Additional terms would be any added by the parties. Control over those terms would come from the 'consumer protection' approach and, in particular, by the application of the Unfair Terms in Consumer Contracts Regulations 1999. As we noted at the start of section 2 above, those Regulations can currently apply both to lease and to licence agreements. But their operation is restricted by: (i) the need for A to be '*acting for purposes relating to his trade, business or profession*';[62] and (ii) the fact that the unfairness test does not apply to terms individually negotiated by A and B. Under the Law Commission's proposals, those two restrictions would no longer apply where A and B enter an occupation contract.

The Law Commission's proposals have not been enacted. Indeed, the housing provisions of the Localism Act 2011 introduce a yet further type of tenancy (the 'flexible tenancy') which increases the complexity of the statutory regulation of leases. Further, the 2011 Act follows its predecessors in organizing statutory protection around the question of whether or not B has a lease, and so does not adopt the Law Commission's contract-centred approach. Nonetheless, as noted in the following extract, the Law Commission's proposals had a positive reception.

Bright, *Landlord and Tenant Law in Context* (2007, p 224)

These reform proposals have received widespread support. Many organizations have for some time been arguing that there should be a single form of tenancy available for all social

[60] Law Commission Report No 297 (2006), [2.7]–[2.9]. [61] Ibid, [2.10].

[62] Unfair Terms in Consumer Contracts Regulations 1999, reg 3. In addition, B must be acting '*for purposes which are outside his trade, business or profession*': that will always be the case in relation to short-term residential agreements.

lettings, irrespective of landlord type. Further, the emphasis placed on transparency and fairness through requiring a written contract which sets out the rights and obligations of both parties should help foster a 'mind-set' in which tenants are seen as consumers with rights and expectations, and landlords as service providers opting in to a regulated regime. Whether or not the proposals will progress to become law will depend, of course, on the political process. Legislation of this sort is complex and not politically eye-catching but it would be most unfortunate if these very welcome proposals never make it to the statute book.

For our present purposes, the key aspect of the Law Commission's proposals consists in the decision to decouple statutory protection from the presence of a property right. The thinking behind the decision to regulate occupation contracts, rather than only leases, is set out in one of the Consultation Papers that preceded the report.

Law Commission Consultation Paper No 162, *Renting Homes 1: Status and Security* (2002, [9.39]–[9.40])

We have thought very carefully about whether the lease-licence distinction should be retained as a means to determine which agreements should fall within our proposed scheme, and those which should fall outside. Considerable conceptual difficulties are caused by the distinction between exclusive occupation and exclusive possession. It is not readily understandable by the public at large.

As we have already argued, we regard the contract between the landlord and the occupier as central to the operation of our scheme. We see no reason why any distinction should be drawn between a contract which comprises a lease and a contract which comprises a licence. This distinction is essential where the proprietary consequences of the contract are concerned, and should remain so, but it should not affect the statutory regulation of the contract as between the contracting parties themselves.

Certainly, one advantage of the Law Commission's scheme would be the elimination of the current *status-conferring* aspect of the lease. In addition to its practical benefits, such a change could have an important conceptual effect: it would permit the courts to consider the doctrinal definition of the lease (as a property right in land), free from the concern that the same definition may also have to be used to advance the policy goals behind a particular statute.

QUESTIONS

1. Why might Parliament intervene to give a tenant extra rights beyond those expressly agreed between that tenant and his or her landlord?
2. '*The distinction between a lease and a licence should only matter if a third party is involved: it should make no difference when considering the positions of A (the landlord/licensor) and B (the tenant/licensee).*' Do you agree?
3. What is a 'tenancy by estoppel'? Should the House of Lords in *Bruton v London & Quadrant Housing Trust* have found that Mr Bruton had a tenancy by estoppel?
4. Does the Law Commission's 'consumer protection' model provide the best way in which to regulate short-term residential leases?

FURTHER READING

Bridge, 'Leases: Contract, Property and Status' in *Land Law: Issues, Debates, Policy* (ed Tee, Devon: Willan, 2002)

Bright, *Landlord and Tenant Law in Context* (Oxford: Hart, 2007, chs 5 and 6)

Dixon, 'The Non-Proprietary Lease: The Rise of the Feudal Phoenix' [2000] CLJ 25

Law Commission Report No 297, *Renting Homes* (2006, especially Pts 1 and 2)

McFarlane and Simpson, 'Tackling Avoidance' in *Rationalizing Property, Equity & Trusts: Essays for Edward Burn* (ed Getzler, London: LexisNexis, 2002)

Pawlowski, 'The *Bruton* Tenancy: Clarity or More Confusion?' [2005] Conv 262

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LEASEHOLD COVENANTS

CENTRAL ISSUES

1. Both the positive and negative obligations of landlord and leaseholder have long been enforceable by the principle of privity of estate. The appropriate legal framework now differs according to whether the lease was granted before or after the enactment of the Landlord and Tenant (Covenants) Act 1995 on 1 January 1996.
2. *Pre-1996 leases (the burden)* A leaseholder's covenants (provided that they touch and concern the lease) are enforceable against a purchaser of the lease by privity of estate (see *Spencer's Case*).[1] The burden of the landlord's covenants (provided that they relate to the subject matter of the lease) is enforceable against the purchaser of the freehold reversion by s 142 of the Law of Property Act 1925.
3. *Pre-1996 leases (the benefit)* The leaseholder's covenants and the landlord's covenants (both having reference to the subject matter of the lease) are enforceable by a purchaser of the freehold reversion and by a purchaser of the lease, respectively, under ss 141 and 142 of the 1925 Act.
4. *Pre-1996 leases* The contractual liability of the original parties to the lease continues throughout the term of the lease.
5. *Post-1996 leases* The benefit and burden of the leaseholder's and landlord's covenants (provided that they are not expressed to be personal) are enforceable against and by purchasers of the lease and the freehold reversion under s 3 of the 1995 Act.
6. *Post-1996 leases* The original leaseholder is automatically released from contractual liability upon his or her assignment of the lease under s 5 of the 1995 Act, and the original landlord may apply for a release from his or her liability upon his or her assignment of the freehold reversion under ss 6 and 8 of the Act.
7. A sub-lessee is not within the privity of estate relationship, but is obliged (inter alia) to observe the negative leaseholder covenants in the head lease under the doctrine in *Tulk v Moxhay*.[2]
8. The primary remedy for breach of a leasehold covenant that has not been waived is for the landlord to exercise a right of re-entry to forfeit the lease.

[1] (1583) 5 Co Rep 16a. [2] (1848) 2 Ph 774.

9. The landlord may re-enter peacefully or by serving proceedings for possession. Before a landlord is able exercise a right of re-entry for breach of covenant (other than to pay rent), a notice must be served in accordance with s 146(1) of the 1925 Act.
10. A tenant (and subtenant or mortgagee) may apply for relief from forfeiture based upon a breach of either the covenant to pay rent or a breach of any other of the tenant's covenants.

1 INTRODUCTION

A lease will not only contain the grant of the leasehold term by the landlord to the tenant, but also covenants detailing the respective obligations of the landlord and the tenant. Certain covenants are implied, but, in a written lease, these covenants will be supplemented by often extensive and detailed covenants stipulating the tenant's obligations to the landlord and the landlord's, often more limited, obligations to the tenant. The landlord's covenants will include a covenant for quiet possession, and may also include obligations to repair and insure; a tenant's covenants will include a covenant to pay the rent and covenants governing his or her use of the premises, as well as covenants detailing the tenant's responsibilities for repair and maintenance, and to meet the cost of the landlord's obligations in this regard, by paying a management or service charge.

In this chapter, we will examine the mechanisms by which both negative and positive leasehold covenants bind, on the one hand, subsequent purchasers of the lease from the original tenant and, on the other, subsequent purchasers of the freehold reversion from the landlord. We will also consider the law governing the enforcement of leasehold covenants and, in particular, the process of forfeiture by which a landlord can bring the lease to an end for a failure by the tenant to perform the tenant's covenants.

The legal regulation of leasehold covenants is applicable to all leases that are capable of assignment. As we saw in Chapter 23, most short-term tenancy agreements of residential accommodation will contain a restriction on assignment of, or otherwise dealing with, the leasehold term. If an existing tenant wishes to leave the premises, he or she will normally surrender his or her tenancy to the landlord, who can then let the premises to another tenant.

The most common types of lease in which the enforcement of leasehold covenants is important are in the commercial context or in the ownership of flats, where the long lease structure is employed. Indeed, in Chapter 27, we will see that the long lease is employed in the ownership of flats, precisely because it provides a mechanism whereby positive obligations can be enforced against subsequent flat owners. In the commercial context, a lease of business premises will usually be capable of assignment (unless it is for a very short term), although it is common for the tenant's ability to assign or otherwise dispose of his or her term to be qualified by the need to obtain the landlord's consent, which cannot be unreasonably refused. Many of the cases that we will be considering are set in the commercial context, perhaps because commercial landlords and tenants are more inclined to litigate. Our focus will, however, be on the residential long lease.