ON DISTINGUISHING A LEASE FROM A LICENCE

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The distinction between a tenancy and a mere licence to occupy land is basic and fundamental. As an estate in land, a tenant must be granted exclusive possession; and certain rights and obligations naturally flow from the relationship of landlord and tenant. A licence is primarily a personal privilege; often a contractual right, but the only obligations are those arising from the particular bargain made between the licensor and licensee. Yet in the last half century, the courts in many jurisdictions have struggled to find the correct test to apply to distinguish the one form of occupancy of land from the other — and have disagreed in their results. Perhaps the problem is partly the result of parties attempting to place their bargain either in the one category or the other, as would best serve their own interest, either at the drafting stage[1] or in later argument over the nature of the relationship.[2] On the other hand, the courts have "upgraded" the licence, perhaps even to the status of an equitable interest in land,[3] sometimes in an attempt to achieve justice in what began as essentially informal arrangements.[4] Now the House of Lords in *Street v Mountford*[5] has, in a unanimous decision, restored a measure of sanity and simplicity to this area of the law. Further, English law has been brought into line with the leading Australian authorities, and it can be confidently predicted that the new test will be applied in New Zealand.

Mr Street, the owner of a block of residential flats, allowed Mrs Mountford to occupy one of the units. The agreement signed by both parties was drafted as a residential licence; the tenant signed an acknowledgement at the foot of the agreement that:

> I understand and accept that a licence in the above form does not and is not intended to give me a tenancy protected under the Rent Acts.

This form of agreement was but one example of a practice that had grown enormously in the last decade in England stimulated by a series of favourable Court of Appeal decisions,[6] of using the licence as a device to avoid the Rent Acts. Notwithstanding the unequivocal statement of the parties' intention, the House of Lords reversed the trend and declared that a tenancy had been created.

The enormous practical impact of *Street v Mountford* in England, both as it affects existing "residential licences" and the prospects for the residential property market, will not concern an Antipodean audience where residential tenancy legislation is not nearly so severe[7] and, in any event, is usually drafted

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[1] E.g. *Addiscombe Garden Estates v Crabbe* [1957] 3 All E.R. 563, [1958] 1 QB 513.

[2] E.g. *Booker v Palmer* [1942] 2 All E.R. 674; *Fuller v Brooks* [1950] N.Z.L.R. 94.

[3] A view propounded in the latest edition of Megarry and Wade, *Law of Real Property* (5th ed. 1984) at 798-799.

[4] *Hardwick v Johnson* [1978] 1 W.L.R. 683 (contractual licence) and *Greasley v Cooke* [1980] 1 W.L.R. 1306 (licence by estoppel) are but two of many recent English cases — see Megarry & Wade, *op.cit.*, 802-808.

[5] [1985] 2 All E.R. 289.

[6] *Aldrington Garages v Fielder* (1978) 37 P.& C.R. 461; *Somma v Hazlehurst* [1978] 1 W.L.R. 1014, [1978] 2 All E.R. 1011.

[7] The English Rent Acts provide for a statutory tenancy to arise on the termination of the

to apply to licences in any event.[8] The more far reaching significance of the decision is the decisive restoration — some would say reaffirmation — of a test of substance, not of form, for distinguishing a lease from a licence.

The original test was certainly one of substance — the issue was simply one of exclusive possession; it could be stated positively (if there is exclusive possession it is a tenancy) and negatively (if there is not, it is a licence).[9] In some senses, an issue of substance has always remained for the label attached by the parties to the agreement they have made has never been decisive,[10] but the decisiveness of the test of exclusive possession was rejected in a series of cases,[11] in most of which the influence of Lord Denning can be seen. Perhaps the best summary of what may be termed the "intention test" was in the words of Denning L.J. (as he then was) in *Errington v Errington.*[12]

> . . . a person who is let into exclusive possession is, *prima facie*, to be considered a tenant; nevertheless he will not be held to be so if the circumstances negative any intention to create a tenancy. Words alone will not suffice. Parties cannot turn a tenancyinto a licence merely by calling it one. But if the circumstances and the conduct of the parties show that all that was intended was that the occupier should be granted a personal privilege with no interest in the land, he will be held only to be a licensee.

The House of Lords, in rejecting this approach, has held that the basic test is for a court to "decide whether on its true construction, the agreement confers on the occupier 'exclusive possession.' "[13] "No other test for distinguishing between a contractual tenancy and a contractual licence appears to be understandable or workable."[14] Since therefore, in *Street v Mountford*, Mr Street's counsel conceded the agreement granted exclusive possession to Mrs Mountford, the result in that case was that a tenancy was created.

Once again, therefore, English law has a test of "exclusive possession" — but it is not the same as the original. For the House of Lords concedes that "exclusive possession is not decisive because an occupier who enjoys exclusive possession is not necessarily a tenant"[15] and at the end of his opinion Lord Templeman indicates a series of exceptions where exclusive possession is not decisive. Moreover, exclusive possession must be granted for a term at a rent;[16] a fixed or periodic term is a fundamental requirement of any tenancy, but the payment of rent has never been a necessary criterion. It is worth listing the exceptions that can be drawn from the decision in *Street v Mountford*, being cases where the existence of exclusive possession does not result in a tenancy being created. Significantly, nearly all the existing

contractual tenancy and this may subsist for the duration of the life of the tenant and even be transmitted to a member of the tenant's family: this contrasts sharply with the ninety day period under the Residential Tenancies Bill 1985 (N.Z.), clause 50 (cf Residential Tenancies Act (S A) s.65 (120 days), Residential Tenancies Act (Vict) s 123 (six months).

[8] See the Property Law Act 1952 s.104A(1); the definition in clause 2 of the Residential Tenancies Bill defines tenancy in relation to any residential premises as "the right to occupy the premises (whether exclusively or otherwise) in consideration for rent"

[9] *Lynes v Snaith* [1899] 1 QB 486; *Glenwood Lumber Co. v Phillips* [1904] A.C. 405.

[10] *Addiscombe Garden Estates v Crabbe* [1957] 3 All E.R. 563 at 567 D-E; *Daalman v Oosterdijk* [1973] 1 N Z L R 717 at 721.

[11] Eg *Errington v Errington* [1952] 1 K B. 290(CA), *Isaac v Hotel de Paris Ltd.* [1960] 1 W L.R. 239 (PC), *Marchant v Charters* [1977] 1 W.L.R 1181 (CA)

[12] Ibid at 297

[13] [1985] 2 All E.R at 299a.

[14] At 298e

[15] At 297g

[16] My italics, see Lord Templeman's opinion at 293f, 294b and 300b.

English[17] and New Zealand authorities[18] are then reconciled in their result if not their reasoning:

(a) Where no rent is being paid, the nature of the transaction is likely to be a licence.[19] This is not only the result of the repeated emphasis on "exclusive possession for a term at a rent" but also results from the inherent likelihood that in such informal arrangements the parties did not intend to enter into contractual relationships.

(b) "It may appear from surrounding circumstances that there was no intention to create legal relationships."[20] In such cases, the parties did not intend to contract and no tenancy can arise; the occupant must have the status of licensee.

(c) "The right to exclusive possession may be referable to a legal relationship other than a tenancy."[21] Three examples of this are given in *Street v Mountford*, namely occupancy under a contract for the sale of land,[22] occupancy pursuant to a contract of employment or occupancy referable to the holding of an office.

(d) Finally, "it may be difficult to discover whether, on a true construction of an agreement exclusive possession is conferred".[23] In such a case, the court cannot apply the test laid down in *Street v Mountford* until it resolves the prior issue of whether exclusive possession was granted.

In rejecting the primacy of the "intention" test formulated in *Errington v Errington*[24] and *Isaac v Hotel de Paris*[25] and other cases, the House of Lords stated that "the only intention which is relevant is the intention demonstrated by the agreement to grant exclusive possession for a term at a rent". In so doing, it adopted "the logic and the language"[26] of Windeyer J. in the High Court of Australia in *Radaich v Smith*[27] where he said:

> Whether when one man is allowed to enter upon the land of another person pursuant to a contract he does so as licensee or as tenant must, it has been said, "be in the last resort a question of intention" per Lord Greene, M.R. in *Booker v Palmer*. But intention to do what? Not to give the transaction one label rather than another. Not to escape the legal consequences of one relationship by professing that it is another. Whether the transaction creates a lease or a licence depends upon intention only in the sense that it depends upon the nature of the right which the parties entering upon the land shall have in relation to

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[17] With the exception of the most recent cases on 'residential licences', e.g. *Somma v Hazlehurst* [1978] 1 W.L.R. 1014; *Murray Bull & Co. Ltd v Murray* [1952] 2 All E.R. 1011 was also overruled.

[18] The New Zealand cases are fully discussed below.

[19] *Booker v Palmer* [1942] 2 All E.R. 674; *White v Belk* [1979] 1 N.Z.C.P.R. 121.

[20] *Marcroft Wagons v Smith* [1951] 2 KB 496; *Isaac v Hotel de Paris Ltd* [1960] 1 W.L.R. 239 and *Heslop v Burns* [1974] 1 W.L.R. 1241 are all cases which the House of Lords in *Street* assigns to this category though, in the view of this writer, it is, with respect, hard to explain *Marcroft Wagons v Smith* in this way. *Baikie v Fullerton-Smith* [1961] N.Z.L.R. 901 can be so justified; see discussion below.

[21] *Street v Mountford* at 295-296b and at 300c; *Allan v Liverpool Overseers* (1874) L.R. 9 Q.B. 180 is an old example.

[22] The New Zealand case of *White v Belk* [1979] 1 N.Z.C.P.R. is a good example of this category.

[23] *Street v Mountford* at 300d; examples of cases where the parties have argued whether exclusive possession was granted or not include *Addiscombe Garden Estates Ltd v Crabbe* [1958] 1 Q.B. 513, *Shell-Mex & BP Ltd v Manchester Garages Ltd* [1971] 1 W.L.R. 612 and, in New Zealand, *Fuller v Brooks* [1950] N.Z.L.R. 94.

[24] [1952] 1 K.B. 290.

[25] [1960] 1 W.L.R. 239.

[26] *Supra* at 300h.

[27] (1959) 101 C L.R. 209 (H.C. of A.) at 222.

the land. When they have put their transaction in writing this intention is to be ascertained by seeing what, in accordance with ordinary principles of interpretation, are the rights that the instrument creates. If those rights be the rights of a tenant, it does not avail either party to say that a tenancy was not intended. And conversely if a man be given only the rights of a licensee, it does not matter that he be called a tenant; he is a licensee. What then is the fundamental right which a tenant has that distinguishes his position from that of a licensee? It is an interest in land as distinct from a personal permission to enter the land and use it for some stipulated purpose or purposes. And how is it to be ascertained whether such an interest in land has been given? By seeing whether the grantee was given a legal right of exclusive possession of the land for a term or from year to year or for a life or lives. If he was, he is a tenant. And he cannot be other than a tenant, because a legal right of exclusive possession is a tenancy and the creation of such a right is a demise. To say that a man who has, by agreement with a landlord, a right of exclusive possession of land for a term is not a tenant is simply to contradict the first proposition by the second.

It has been pointed out[28] with some force that to say "the legal right to exclusive possession is a tenancy and the creation of such a right is a demise" is, with respect, begging the question in those cases where either it is not accepted by both parties that exclusive possession is given by the agreement, or where, as the exceptions to the *Street v Mountford* principle accept, exclusive possession is not the decisive factor. In such cases, the courts are still saddled with the issue of what the parties intended to do. This is perhaps best expressed in the words of Ferguson J. in *Danita Investments Pty v Rockstrom*[29] where in applying the approach of Windeyer J. in *Radaich v Smith* he observed:

. . . in determining questions of this sort the court is not concerned with the legal relationship the parties to the transaction intended to bring about, it is concerned with the legal relationship that at law arose from what they intended to do, which is a very different thing. If A and B intend that A should transfer his property in a chattel to B for a cash consideration, that is a sale. The fact that they may have intended the transaction to be a bailment is of no moment: it is what they intended to do that is the important thing, for it is that intention that brands the transaction with its true nature.

Consequently, while *Street v Mountford* indicates that the court is not concerned with the relationship the parties to a transaction intended to bring about, the court will still have to determine, within the facts and circumstances of the case, what the parties intended to do, especially when one of the admitted exceptions to the principle of *Street v Mountford* is raised.

It is significant that very few cases were overruled in their result by *Street v Mountford*; those that were [30] nearly all related to commercial arms-length residential occupancies where the "landlord" had attempted to evade the English Rent Acts. This means that the flexible device of the licence to occupy land remains for utilisation in non-commercial, informal and exceptional situations.

The New Zealand authorities on the issue of distinguishing a lease from a licence are not extensive. In *Daalman v Oosterdijk*[31] McMullin J. "looked to the substance of the deed, and not the form" and held that a residential occupancy of a flat in a tenement building under a "management agreement" was a tenancy. His approach is consistent with, and appeared to apply, the decision in *Radaich v Smith*; and certainly accords with the approach of the House of Lords in *Street v Mountford*. However, McMullin J. did not

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[28] Bradbrook, MacCallum and Moore in *Residential Tenancy Law & Practice (Victoria & South Australia)*, 81.

[29] (1963) N.S.W.R. 1275 at 1277.

[30] See the cases cited in nn. 6 and 17 above.

[31] [1973] 1 N.Z.L.R. 717 (at 721).

refer to the earlier New Zealand Court of Appeal decision in *Baikie v Fullerton Smith.*[32] In that case, a tenant of glasshouses had his lease forfeited for non-payment of rent and the landlord had re-entered. The former tenant sought to make payment of the arrears of rent, but the owners of the land would only contemplate allowing him back into possession under a new agreement with fresh terms. The former tenant undertook to sign the new agreement and was, on that basis, allowed back into possession, but subsequently refused to honour his undertaking. It was held he had been allowed back into possession as a licensee. The decision was on the basis that the owners "never intended to create a new tenancy unless and until an agreement acceptable to them had been executed"[33] and it is clear that all members of the court gave great weight to the primacy of the "intention of the parties" as set out in the opinion of the Privy Council in *Isaac v Hotel De Paris Ltd.*[34] However, the result reached in the case can be amply justified on the grounds that the owners of the land never intended to enter into legal relations with their former tenant until he signed, as he promised to do, the new agreement, a matter stressed in the judgments of North and Cleary JJ.[35] That being so, the decision is fully justified under the terms of one of the exceptions under the terms of one of the exceptions set out by Lord Templeman in *Street v Mountford.* Similar considerations apply to *White v Belk*[36] where Thorp J. recognised the then inconsistency between *Radaich v Smith* and the English decisions prior to *Street v Mountford.* He considered himself bound by *Baikie v Fullerton Smith*; but since the occupancy of land in that case was ancillary to a contract of sale, without periodical rental and with no clear certainty of term, the decision that a licence was created was inevitable and justified on at least two of the different exceptions to the basic principle set out in *Street v Mountford* and listed above.

Consequently, it is submitted that New Zealand courts will be justified in applying the test of substance now uniformly applicable to England and Australia; not only because of the benefit of comity with these jurisdictions but because, properly viewed, the decision in *Street v Mountford* lays down the more sensible and logical approach to the often difficult problem of distinguishing a lease from a licence.

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[32] [1961] N.Z.L.R. 901
[33] Ibid., 905
[34] *Supra*
[35] At 913-914 and 920-921 respectively
[36] *Supra*