Leases, licences and constructive trusts: Ashburn Anstalt *v* Arnold

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In Street *v* Mountford *the House of Lords delivered an authoritative ruling on the criteria for distinguishing a lease from a licence, which signalled a return to the orthodox analysis of the pre-Denning era. This article examines the recent English Court of Appeal decison,* Ashburn Anstalt *v* Arnold, *which sought faithfully to apply those orthodox criteria. The author suggests that difficult issues remain unresolved. The Court of Appeal also delivered important dicta on the scope of contractual licences, holding that such licences would only bind third parties where there were grounds for raising a constructive trust equity on the basis of intention. The author also examines this reasoning, and suggests that the focus on intention is misplaced.*

Lease and licence are essentially very different concepts. A lease (including a tenancy) is an interest in land, now regarded as an estate. A licence, as Vaughan C J observed as long ago as 1673:[1]

> ... properly passeth no interest, nor alters or transfers property in any thing, but only makes an action lawful, without which it has been unlawful.

Yet, even acknowledging that much, there comes a point in practice where the licence may appear to mimic the lease or tenancy, and if the distinction retains any consequence, it then becomes the responsibility of the law and the courts to make a precise species definition in each individual case. The art of distinguishing one from the other, which may be complicated by a number of factors, has long exercised the judicial mind. Further, where equity intervenes, as it seemed to do most particularly during the Denning era of the Court of Appeal, there may result such a blurring of the distinction, to the extent that it might well be asked: Why make the distinction? Does not the fusion of law and equity mean that those licences which most resemble leases have in equity at least a very similar if not identical result? Are not some licences therefore interests in land, albeit equitable?

That the Denning era may be over was perhaps announced by the House of Lords in *Street* v *Mountford*,[2] where a return to the established basics for making the distinction was signalled. In the recent decision of the English Court of Appeal, in *Ashburn Anstalt* v *Arnold*[3], which writes a new episode in the whole problem, the Court shows

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1 *Thomas* v *Sorrell* (1693) Vaughan 330, 351.

2 [1985] AC 809.

3 [1988] 2 WLR 706.

that it has attempted to heed that signal, though how well may remain to be seen. Certainly this Court's subsequent attempts to apply the principles of *Street* v *Mountford* do not seem completely successful. Very recently the Court's attempts to apply *Street* v *Mountford*, in *A G Securities* v *Vaughan*[4] and *Antoniades* v *Villiers*[5], have been reversed by the House of Lords.[6]

The issues in those cases were not, however, those which arose in *Ashburn Anstalt* v *Arnold*, yet it may be suggested that even in this case, which does not appear to have gone to the House of Lords, the Court of Appeal was led astray by its anxiety both to pursue *Street* v *Mountford* and to disassociate itself from the Denning years.

I ASHBURN ANSTALT V ARNOLD - THE FACTS

The facts of this interesting case can be stated quite briefly. The case arose from a series of transactions relating to premises in Kensington which had been leased for a period of 52 1/2 years from 31 December 1945.

The 1945 lease, which was registered, was originally made to one Rogers, who in 1969 transferred the lease to Arnold. Arnold then sublet, quite informally, part of the premises to the company Arnold and Co for their business of selling leather goods.

Early in 1973, the freehold reversion was acquired by Cavendish Land Co Ltd, and on 28 February in the same year Arnold sold the headlease to the firm of Matlodge for the purposes of redevelopment; and also, Arnold and Co agreed to transfer the sublease to the same firm - Matlodge. Thus for a period the freehold was owned by Cavendish, and Matlodge held all the leasehold interests. It was but a scintilla of time for on the same date that Matlodge acquired the Arnold interests, it assigned them to Cavendish. The freehold and leasehold then merged.

However, these 1973 transactions were to have repercussions. The agreement to assign the subtenancy contained two significant clauses which conferred continuing rights on Arnold. In essence, clause 5 was expressed to give Arnold a licence to remain in occupation without rent until 29 September 1973 and thereafter to continue in possession on like terms subject to Matlodge requiring possession on at least a quarter's notice, on certifying its readiness to proceed with the contemplated redevelopment; and clause 6, that Arnold would, in the projected redevelopment, be offered a shop, in a prime position, at an agreed rent, initially below the market rent.

When Matlodge assigned the benefits of its agreement to Cavendish, these two clauses were novated.

In 1979, the property was transferred to Legal and General Assurance Society, which had taken over Cavendish, and finally in 1985 Legal and General transferred the property

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4 [1988] 2 WLR 689.
5 [1988] 3 WLR 139.
6 [1988] 3 WLR 1205.

to Ashburn Anstalt, which transfer was completed on 11 October 1985. Ten days later, Anstalt served notice upon Arnold requiring almost immediate vacant possession of the property.

While there was no evidence of the exact relationship between Cavendish and Legal and General prior to take over, the latter appears to have agreed by correspondence to honour the spirit of clauses 5 and 6 of the 1973 agreement, and for the benefit of Arnold, although it seems likely that Legal and General were not legally bound so to do.

Further, the transfer to Anstalt contained the following clause:

> The vendor sells with vacant possession except where such is subject to those matters revealed in the second schedule hereto.

That schedule listed briefly and inter alia the agreement with Arnold.

II THE ISSUES FOR THE COURT

The immediate position at the outset of the litigation can be summarised as follows:

1 Ashburn Anstalt was registered owner of the freehold into which the earlier leasehold and subtenancy had merged.

2 Arnold was in actual occupation of the premises under an arrangement made with an assignee of their lease and novated to an intermediate freeholder, and acknowledged by Anstalt's vendor.

3 The agreement was expressed to be a licence, and Arnold's occupation was to be rent free and after an initial period was to be for an indefinite period. No provision was made for notice to quit generally, except that Arnold might expect some warning of impending termination against it, although with a promise of new premises in the future.

4 The transfer to Anstalt was apparently "subject to" any rights which Arnold might have (although incidentally none of the 1973 rights were registered).

In these circumstances the Court was required to resolve two alternative issues:

a) Did Arnold have a lease which, as a legal interest in land, would amount to an overriding interest binding upon the registered freeholder, notwithstanding its lack of registration?

b) If not, and they had, as Anstalt considered, a licence only, was the licence such a contractual licence as would bind a purchaser with notice as if by a

constructive trust on the authority of dicta of Lord Denning in such cases as *Errington* v *Errington and Woods*?[7]

Thus, in the one decision the Court of Appeal was able not only to review the legal tests for distinguishing a lease from a licence propounded by the House of Lords in *Street* v *Mountford*, but also the whole law which had developed to bind the third party with a contractual or equitable licence.

III THE DECISIONS

In the result the Court of Appeal determined that Arnold had in the circumstances of its agreement, a tenancy which bound Anstalt. Such tenancy was an overriding interest for the purpose of the Land Registration Act 1925 (Eng) and could not be terminated except on a quarter's notice. Even then the notice would be valid only if Anstalt could clearly demonstrate a readiness to redevelop by disclosing the nature of the redevelopment.

Nonetheless, the Court also dealt with the second issue, the possible effect in equity of a contractual licence, in case it should have been wrong in its principal determination. On this question, the Court, adhering to a long line of authority, concluded that a contractual licence will not bind a third party unless the circumstances are such as to affect the conscience of the third party or a constructive trust could properly be imposed. On this point the Court considered that the intention of the parties was the important factor.

In themselves these results were perhaps not entirely inappropriate, at least in so far as they meant:

i) that Arnold had a right to stay;
ii) that the pre-eminent feature of tenancy is exclusive possession; and
iii) that a contractual licence is extended in equity only within the established bounds of constructive trust, or other equitable principle; otherwise it is but a licence.

However, the way the Court approached the issues and reached the results may raise further questions.

Thus, if exclusive possession is the principal, possibly almost the sole, test of the tenancy, and as *The Independent* headlined its law report of *Anstalt* "Rent not essential element in tenancy",[8] what type of tenancy arises?

Secondly, on the question of the alternative issue of an equitable licence, should the question of constructive trust always be seen in these circumstances as a matter of intention?

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7 [1952] 1 KB 290.

8 29 October 1987 - and that of *The Times* 9 November 1987 was similar.

To consider these matters it is necessary to look further into the judgment of the Court given by Fox L J, with whom Neill and Bingham L JJ agreed.

A Lease or Licence?

The Court took as its starting point what Fox L J called Lord Templeman's "three hallmarks decisive in favour of a tenancy of residential accommodation, namely exclusive possession, for a term, at a rent".[9]

If these three existed, or could be explained away or waived, then Arnold had a lease. The question for the Court was how these hallmarks could be applied in the circumstances of the rent-free, indefinite rights enjoyed by Arnold.

The element of exclusive possession was not argued and did not appear as a particular problem for it was common ground agreed by the parties that Arnold had an occupation which amounted to exclusive possession. The issues therefore focused on the elements of rent, and a term.

1 Rent

In giving the judgment of the Court, Fox LJ tackled first the question of rent. Arnold had an occupation which was rent-free. Did, therefore, Lord Templeman's repeated reference to a rent as one hallmark of a tenancy mean that it was absolutely essential? Was he defining a specific element of a tenancy without which there could be no tenancy?

However, in comparison with other features of the judgment, the Court seems to have given scant consideration to the element of rent.

Relying on the rather negative indicator of the absence from the passage of Windeyer J in *Radaich* v *Smith*[10] (approved by Lord Templeman[11]) of any reference to the need for rent as essential for a tenancy, and with the more positive support of section 205(i) of the English Law of Property Act 1925, which in the definition of "term of years" (including a periodic tenancy) uses the words "whether or not at a rent", Fox LJ determined that rent was not such an inevitable part of a lease or tenancy that it could not be dispensed with:[12]

> In the circumstances I conclude that the reservation of a rent is not necessary for the creation of a tenancy. That conclusion involves no departure from Lord Templeman's proposition in *Street* v *Mountford* at p 825:

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9 Above n 3, 913.
10 (1959) 101 CLR 209, 222.
11 Above n 2, 827.
12 Above n 3, 714.

> If exclusive possession at a rent for a term does not constitute a tenancy then the distinction between a contractual tenancy and a contractual licence of land becomes wholly unidentifiable.

> We are saying only that we do not think that Lord Templeman was stating the quite different proposition that you cannot have tenancy without a rent.

Simply put then, rent is not an important factor to fix the existence of *some* tenancy. However, the reasoning of Fox L J seems rather superficial and appears to pay little heed to the possible consequences of holding that exclusive possession without a rent creates a tenancy.

It seems reasonably clear that, since *Knight's case* in 1588,[13] the common law has accepted that the reservation of a rent is not necessary to constitute a leasehold term of years. On the other hand, in the case of an indefinite tenancy it may be that the rule is modified. Traditionally the reservation of rent has been of signal importance in evidencing the type of tenancy, and the amount of notice required for its termination. Thus, for example, a weekly rental signified a weekly tenancy and so on. Consequently, for a tenancy in contrast to the term of years, rent may not be an insignificant factor in determining the type of tenancy:[14]

> Surely the distinction has been a thousand times taken, a mere general letting is a tenancy at will: if the lessor accepts yearly rent or rent measured by any aliquot part of a year, the courts have said that it is evidence of a taking for a year.... The courts have a great inclination to make every tenancy a holding from year to year if they can find any foundation for it.

Prima facie a general letting for an indefinite term especially in the absence of a rent and without other indicia creates a tenancy at will,[15] and was perhaps therefore an option the Court of Appeal might well have considered in *Anstalt* v *Arnold.*

Indeed, subsequently, Fox L J himself expressed a different view about the effect of the absence of rent, when *A G Securities* v *Vaughan* he observed: "No doubt the existence of consideration may be material to the determination of the question whether the parties intended to enter into legal relations at all."[16]

Such a tenancy at will clearly differs from a licence in the presence of exclusive possession, though it suffers many similar characteristics. Thus a tenancy at will terminates on the sale of the reversion,[17] and therefore Arnold's rights might have ended at, at the latest, the transfer to Anstalt. If the court had pursued along this line its suggestion that "Arnold and Co could 'simply walk out' subject to giving Matlodge

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13 5 Co Rep 45b, 55a.

14 *Richardson* v *Langridge* (1811) 4 Taunt 128, 132 per Chambre J.

15 See *Doe d Hull* v *Wood* (1845) 14 M&W 682; *Lynes* v *Snaith* [1899] 1 QB 486; and *Buck* v *Howarth* [1947] 1 All ER 342.

16 Above n 4, 699.

17 *Doe d Davies* v *Thomas* (1851) 6 Ex 854, 857.

'some short notice' so as to make the premises secure",[18] it might have put a rather different complexion on the Arnold occupation. There is, perhaps a striking similarity between *Anstalt* and the earlier case of *Manfield* v *Botchin*[19] where an express tenancy at will was found to exist by Cooke J. In this case premises had been let, at a rent "on demand only", pending the grant of planning permission for redevelopment of the premises by the landlord.

There may be, however, several features of the *Manfield* case which distinguish it from *Ashburn Anstalt* v *Arnold*. In the former, quite clearly, there was an arrangement called by the parties in express terms a tenancy at will. Also, the circumstances of the parties in that case, as found by Cooke J - the landlord frustrated by planning delays and the tenant unwilling to commit himself to a longer tenancy at the beginning of a new business venture - could be contrasted with the apparently less imminent redevelopment of the Arnold building, that company's more established business, and the promise to Arnold of new premises in the redevelopment. Nonetheless, it is perhaps a pity that the point was not considered by the Court of Appeal.

This point may be of only peripheral interest in New Zealand, although the wording of section 105 of the Property Law Act 1952 (and its predecessors) seems to require that there be some rent before an indeterminate tenancy becomes a statutory monthly tenancy. Nonetheless in *Robertson* v *Te Awhitu*,[20] Stanton J appears to have anticipated the finding in *Anstalt*, that a tenancy may arise from exclusive possession even without the provision of a rent.

In his judgment he observed:[21]

> In the instant case, in the absence of any explanation by the plaintiff, I think I should accept the *prima facie* inference from exclusive possession as indicating the existence of a tenancy. It is true that there is no rent fixed, but fixing or payment of rent is not necessary to create a tenancy, and there is the family relationship of the parties and the fact that some payment is being made by the defendant for the plaintiff's benefit by payment of electric light accounts. If that is not an adequate rent, the plaintiff has her remedy.

Stanton J determined no more than the fact of tenancy, and not its type. The context of the case was a dispute over a family home and of the deserted spouse's right to remain. The interpretation of what is now section 105 of the Property Law Act 1952 did not fall to be considered, though possibly the prevailing view of the effect of that section may be implicit in the decision.

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18 Above n 3, 716.
19 [1970] 2 QB 612.
20 [1954] NZLR 541. But see [1955] NZLR 624, where the Court of Appeal reversed Stanton J on the meaning of rent.
21 Above n 20, 544.

Since the opinion of Edwards J in *Tod* v *McGrail*,[22] that the "object of the statute was to abolish all tenancies save that created by the statute itself", it seems to have been generally considered that the tenancy at will can no longer arise by implication in New Zealand and that despite the reference in section 105 to rent, a monthly tenancy arises even where there is no rent. In recent years this view may be seen as being challenged but not wholly discarded.[23] If the *Anstalt* case or the observations of Stanton J have continuing relevance in New Zealand, it may be in the context of whether section 105 itself arises for consideration and therefore re-opens the question of the effect of that statutory provision.

Of much more concern to this issue may be whether the certainty of the term or any other factors raise the tenancy beyond a mere tenancy at will. So the question, even for section 105 may be whether the parties to the letting have intended a specific type of tenancy - a personal tenancy or an estate in the land.

It is clear that rebutting the prima facie presumption of a tenancy at will may depend on the intentions of the parties, the circumstances surrounding the transaction and any other indicia in the tenancy agreement.

Despite a certain vagueness in the arrangement, the Court in *Anstalt* found, at least as one possibility, that there could be a quarterly tenancy. Nonetheless it arrived at this conclusion in a way which seems unsatisfactory, and which leaves the position uncertain. The court may not have expressly addressed the issue of rebutting the prima facie presumption of a tenancy at will, but if they did so, their method is not wholly satisfying.

It may still be true that, as Chambre J pointed out in 1811 in the above quoted passage: "The courts have a great inclination to make every tenancy a holding from year to year if they can find a foundation for it." Indeed more recently in *Cobb* v *Lane*[24], Somervell L J said:

> Counsel for the Defendant submitted that, notwithstanding certain modern authorities, where there is exclusive occupation for an indefinite period a tenancy at will must be implied unless there is something in the facts to prevent that conclusion. I do not know that I very much quarrel with that. The real question may be: What facts do prevent that conclusion? Certainly under the old cases (and I doubt if this has been affected by the modern authorities), if all one finds is that somebody has been in occupation for an indefinite period with no special evidence of how he got there or of any arrangement being made when he went into occupation, it may be that the court will find a tenancy at will. I am assuming that there is no document, or clear evidence as to terms. The modern cases establish that, if there is evidence of the circumstances in which the person claiming to be

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22 (1899) 18 NZLR 568, 572.

23 *Baikie* v *Fullerton-Smith* [1961] NZLR 901, 915-916 (CA) per North J; and J F Burrows "Section 105 of the Property Law Act 1952" in Hinde (ed) *Studies in the Law of Landlord and Tenant* (Butterworths, Wellington, 1976) 45-46.

24 [1952] 1 All ER 1190, 1200.

> a tenant at will went into occupation, those circumstances must be considered in deciding what the intention of the parties was.

Again in *Heslop* v *Burns*[25] Scarman L J observed that

> [t]he legal question is a question as to the intention of the parties. The legal balance still shows a tilt in favour of a tenancy at will; for, once an exclusive occupation has been established, a tenancy at will is presumed unless there are circumstances which negative it. What has happened, of course, is not that the law has changed but that society has.

Although he later added:[26]

> The social changes to which I have alluded seem to show that less and less will the courts be inclined to infer a tenancy at will from an exclusive occupation of indefinite duration.

But this was in the context of residential tenancies and the Rent Restriction Acts.

These authorities suggest that the type of tenancy may be a matter of discernible intentions of the parties in the circumstances of the letting. Consequently the true distinction between a mere tenancy at will and any other form of tenancy may not lie in the presence or absence of rent, but the intention and more particularly in the certainty or definiteness of the tenancy term. Rent which serves to imply a particular tenancy, to define the term, is only one factor. There may be others which negative a tenancy at will, or which form a foundation for finding more substantial tenancy.

For example, in a tenancy at will the rights to terminate the tenancy must be mutual and at will:[27]

> ... it is of the essence of a tenancy at will that it should be determinable by either party on demand ... .

Therefore, a tenancy at will will be displaced by a more definite letting, if there are such indications of certainty as a provision for termination by notice otherwise than "on demand". In *Anstalt* v *Arnold* there was in fact the semblance of such a provision in that the *landlords* could require possession on at least a quarter's notice.

So the Court turned to the third element of Lord Templeman's trilogy: the term, or as the Court of Appeal read it, certainty of term.

2 Certainty of Term

Certainty of term is an acknowledged feature of the leasehold estate:[28]

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25 [1974] 1 WLR 1241, 1252.
26 Above n 25, 1253.
27 Above n 7, 296 per Denning L J.
28 *Lace* v *Chantler* [1944] 1 KB 368, 370 per Lord Greene MR.

> A term created by a leasehold tenancy agreement must be expressed either with certainty and specifically or by reference to something which can, at the time when the lease takes effect, be looked to for ascertainment of what the term is meant to be.

However, since at least *Re Midland Railway Co's Agreement*,[29] it has become the accepted view that the same notion of certainty cannot "have direct reference to periodic tenancies".

While apparently accepting this position, what seems particularly to have motivated the Court in *Anstalt* is the suggestion of Russell L J in *Re Midland Railway* that: "it is preferable as a matter of justice to hold parties to their clearly expressed bargain rather than to introduce for the first time in 1971 an extension of a doctrine of land law so as to deny the efficacy of that bargain".[30] This was cited with apparent approval by Fox L J.[31]

Therefore the Court seems to have been prepared to imply some right to serve notice in favour of Arnold, in order to give the agreement some efficacy, rather than to find specifically that it was inherently certain.

The Court considered that there were four possibilities which might exist in relation to Arnold:

(i) Arnold was not entitled to determine the arrangement because it was one sided. That the Court rejected as "quite unreal in business terms".
(ii) Arnold was required to give more than a quarter's notice (the period required for Matlodge), which "seems to us equally unreal".
(iii) Arnold was required to give a quarter's notice, so that the case became "indistinguishable from *Midland Railway*", and
(iv) Arnold could simply walk out subject to giving Matlodge "some short notice" so as to "make the premises secure".

While clearly favouring the last two possibilities the Court left open any final decision:[32]

> It is not necessary to determine which of the possibilities under heads (iii) and (iv) above is correct. The matter would be capable of resolution by the court. Whatever the correct answer, the position would be free from uncertainty.
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> The result, in our opinion, is that the arrangement could be brought to an end by both parties in circumstances which are free from uncertainty in the sense that there would be no doubt whether the determining event had occurred. The vice of uncertainty in relation to the duration of a term is that the parties do not know where they stand. Put another way, the court does not know what to enforce. That is not the position here. It seems to

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29 [1971] 1 Ch 725, 732.
30 Above n 29, 733.
31 Above n 3, 715.
32 Above n 3, 716.

> us therefore that, as in the *Midland Railway Co's Agreement*, there is no reason why the court should not hold the parties to their agreement. That is so even though the tenancy is not (or may not be) an ordinary periodic tenancy. The rights of the parties are not more subject to uncertainty than those in the *Midland Railway* case. We do not see why the mere absence of a formula referring to a periodic tenancy or occupancy should alter the position.

However by leaving open the choice between possibilities (iii) and (iv), the Court's decision might nonetheless leave the parties, and the Court, in some doubt as to where they stand. Effectively the Court seems merely to have held that "the term" element of Lord Templeman's essential trilogy could be met, not that it had been satisfied.

However, the decision in the *Midland Railway* case to hold the parties to their bargain was made in the context of a tenancy which was in form an express six monthly tenancy, for which a certain period of notice would normally be required of both landlord and tenant whether by implication or agreed between them. Indeed, there the parties expressly agreed on a quarter's notice with the proviso restricting further the landlord's service of notice. The issue in that case was simply whether, given that basis, the landlord could fetter its right to serve notice except on the occurrence of an uncertain event. At least the basic length of notice was certain and the tenants knew how much notice they had to give to terminate.

Further, *Midland Railway* can be seen as a dispute between the original parties. If the British Railways Board had replaced the Midland Railway Co as landlord it possibly had done so otherwise than by purchase. In the *Anstalt* case, Ashburn Anstalt was clearly a purchaser in no way connected with the original landlord.

When one party is thus not a party to the agreement, how can it be logical to apply a propostion that "there is no reason why the court should not hold the parties to their agreement"?

These factual and basic distinctions between *Midland Railway* and *Anstalt* where the Court offered several alternatives for the amount of tenant's notice, make the observation of the Court that they did not "see why the mere absence of a formula referring to a periodic tenancy should alter the position", stated in *Midland Railway*, rather difficult to follow.

At the risk of labouring the point it might be suggested that the *Midland Railway* case decided no more in relation to the certainty of periodic tenancies than that so long as there is a basic certainty of notice, a fetter on one party's right to serve such notice, even to the happening of an uncertain event, does not destroy the basic certainty, but that their bargain ought to be enforced.[33]

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33 See also *Breams Property Investment Co Ltd* v *Strougler* [1948] 2 KB 1.

The element of certainty as it applied to periodic tenancies may be that the parties ought to know, if no more, the precise length of notice necessary to terminate their tenancy, and *beforehand.* As Edwards J observed in *Tod* v *McGrail*:[34]

> To create a valid tenancy the duration of the term must be fixed either by the express limitation of the parties when the lease is made or by reference to some collateral act which may with equal certainty measure its continuance

which from the context of the case must be understood to include within the phrase "collateral act" the length of notice.

So in the case of periodic tenancies certainty of duration is replaced by certainty of basic measure of notice, or certainty of description.

Thus, recognising that a tenancy is not a series of individual terms, but a continuous interest, and in that sense indefinite until ended by a proper notice,[35] there must nevertheless be certainty of description as a *weekly, monthly* or other periodic tenancy, whether express or implied. As suggested above the rent may merely be a factor in determining this. Perhaps the correct view is that suggested by Whitford J in *Centaploy Ltd* v *Matlodge Ltd* "it is apparently enough if you know exactly when it will be brought to an end"[36], which implies a degree of foreknowledge.

In this case a letting of a garage by a memorandum which read: "Received ... the sum of £12-0-0 being one week's rent ... and to continue until determined by the lessee", was held to be a weekly tenancy and not void for uncertainty. Indeed it would seem that from the rent and other terms this arguably was an appropriate result and that the tenancy was sufficiently defined in its basic form, as a *weekly* tenancy.

Strangely, perhaps, in view of the earlier involvements of Matlodge in Arnold's affairs, the *Centaploy* case was not referred to in *Anstalt* v *Arnold*, where the Court seems to have been at pains to construe the tenancy as indistinguishable from that in *Midland Railway.*

In the Arnold arrangement, there was no reference to Arnold's having to serve any notice to terminate the tenancy. Clause 5 provided simply that Arnold would be required to give up possession on at least a quarter's notice when its landlord certified readiness to redevelop. This was construed, apparently, as being equivalent to a statement that the landlords would determine the tenancy as a quarter's notice if they intended to begin redevelopment. Perhaps it does mean the same thing.

However, it says nothing of the length of the tenant's notice to terminate.

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34 Above n 22.
35 *Mellows* v *Low* [1923] 1 KB 522; *Re Belajev* (1979) 22 SASR 1.
36 [1973] 2 All ER 720.

It may be that the rights of the parties as to a quarter's notice were meant to be mutual, but the agreement was silent and the Court does not provide any unequivocal guidance for the tenant. Despite observing:[37]

> In the present case there was an initial term from the date of the agreement of 28 February 1983 until 29 September 1973, the Michaelmas Quarter Day. Thereafter, the term would continue until (a certificate of readiness to proceed having been given) Matlodge should give not less then one quarter's notice to give up possession. It may be that the notice has to take effect on a quarter day calculated from the date of the commencement of the term rather than on one of the usual quarter days ...

the Court does not appear to have unequivocally considered this to be mutual, and therefore an undoubted quarterly tenancy. Rather Fox L J suggested the four possibilities as to tenant's notice, already stated. While discarding two of those as unrealistic, Fox L J left undecided over two apparently inconsistent positions.

In the end, the decision in *Anstalt* may be unsatisfactory and not sufficiently carefully reasoned. The Court seems to have concluded that because exclusive possession existed, there must be not only a tenancy but one which necessarily binds a purchaser, without asking the question what type of tenancy might in the circumstances exist. The decision is flawed because it begs that question.

B Licence or Trust?

Having resolved the issue of tenancy, the Court, apparently eagerly, broached the issue arising from the alternative assumption that Arnold had a contractual licence, and not a tenancy. Two aspects were involved:

(i) whether a contractual licence per se might amount to an equitable interest in land; and

(ii) if not, whether the "subject to" provision in Anstalt's agreement to purchase created a constructive trust in favour of Arnold.

(i) Contractual licence

In *Errington* v *Errington and Woods* Denning L J observed[38]

> [The] infusion of equity means that contractual licences now have a force and validity of their own and cannot be revoked in breach of the contract. Neither the licensor, or anyone who claims through him can disregard the contract except a purchaser for value without notice.

However, as a result of *Anstalt* v *Arnold* this is now apparently to be rejected as an accurate proposition of law. The decision may, therefore, represent the end of the

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37 Above n 3, 715.
38 Above n 7, 299.

contractual licence as perceived by Lord Denning. "It may be that, 35 years on, Lord Denning's attempts to introduce the concept of a contractual licence as a proprietory interest must finally be seen to have failed".[39] Like his earlier conception of the deserted wife's equity, it seems consigned to legal history.

The reasoning of Fox L J to this end seems impeccable. Having considered and analysed a long line of authority in both the Court of Appeal and the House of Lords, on the question of the status of licences, from *Daly* v *Edwards*[40] to *Clore* v *Theatrical Properties*,[41] he concluded:[42]

> Down to this point we do not think that there is any serious doubt as to the law. A mere contractual licence is not binding on a purchaser of the land even though he has notice of the licence.

Turning to *Errington* v *Errington and Woods*, the reasoning of Lord Denning was criticised as being "not supported by authority, nor necessary for the decision of the case and per incuriam in the sense that it was made without reference to authorities which, if they would not have compelled would surely have persuaded the court to adopt a different ratio."[43]

The Court compared earlier decisions:[44]

> It must, we think, be very doubtful whether this Court's decision in *Errington* v *Errington* [1952] 1 KB 290 is consistent with its earlier decisions in *Daly* v *Edwards* 83 LT 548, *Frank Warr and Co* v *London County Council* [1904] 1 KB 713 and *Clore* v *Theatrical Properties* [1936] 3 All ER 483. That decision cannot be said to be in conflict with any later decision of the House of Lords, because the House expressly left open the effect of a contractual licence in *Ainsworth*. But there must be very real doubts whether *Errington* can be reconciled with the earlier decisions of the House of Lords in *Edwards* v *Barrington* 85 LT 650 and *King* v *David Allen* [1916] 2 AC 54 ... in our judgment the House of Lords cases, whether or not as a matter of strict precedent they conclude this question, state the correct principle which we should follow.

The principle is therefore that a contractual licence is not per se to be seen either in law or equity as an interest in land. It may be that cases dealing with "front of house rights" or the fixing of advertisements to a wall may be distinguished from licences involving actual occupation or possession as Lord Denning suggested in *National Provincial Bank Ltd* v *Hastings Car Mart*.[45] Indeed this point may have been left open

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39 Dianne Hughes "The Death of Contractual Licences?" (1988) 85 The Law Society's Gazette 18.
40 (1900) 83 LT 548.
41 [1936] 2 All ER 483.
42 Above n 3, 719.
43 Above n 3, 725.
44 Above n 3, 725.
45 [1964] Ch 665.

when that case went to the House of Lords as *Ainsworth* v *National Provident Bank Ltd.*[46]

Nonetheless the Court of Appeal apparently took the view that a licence, whatever its subject matter or purpose, remains a licence with all the incidents of a licence, until the House of Lords specifically rules otherwise, or unless the purchaser of the land, subjected to a licence, is personally affected with a constructive or other trust which compels compliance with the licence. This approach may at least be consistent with the philosophy which seems to underline such decisions as *Ainsworth* and *Gissing* v *Gissing*,[47] that in order to affect established legal property rights there must be some clear additional element recognisable in equity.

Therefore the Court looked at the possibility of a constructive trust, arising independently of the licence.

(ii) Constructive trust

It is clear, however, that it is only Lord Denning's reasons in the *Errington* decision which are dissented from, not the ultimate result, which Fox L J concedes could have been justified on any of three grounds, as an estate contract, an estoppel, or a constructive trust.

So the Court conceded that there may be circumstances in which equity will elevate a personal licence into a proprietary right. However, this is not a blanket operation of equity but must flow from the establishment of a clear equity. Of particular importance in this process is the constructive trust principle which "has been long established and has proved to be highly flexible in practice".[48]

Patently there are cases where a licence has achieved the appearance of an interest in land as a result of a supervening equity. *Bannister* v *Bannister*[49], *Binions* v *Evans*[50] and *Plimmer* v *Mayor of Wellington*[51] are clear examples. Perhaps another, analogous, example might be *Loke Yew* v *Port Swettenham Rubber Company*.[52] In each case it was the equity expressed as an estoppel, a trust or a fraud which bound a purchaser.

Yet, "[w]e do not think that the argument [that a contractual licence might be a property interest] is assisted by the mere assertion that the interest arises under a constructive trust".[53] The constructive trust had to be established. "We do not think it

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46 [1965] AC 1175, 1254 per Lord Wilberforce.
47 [1971] AC 886.
48 Above n 3, 725.
49 [1948] 2 All ER 133.
50 [1972] Ch 359.
51 (1884) 9 App Cas 699.
52 [1913] AC 491.
53 Above n 3, 727.

desirable that constructive trusts of land should be imposed in reliance on inferences from slender materials".[54]

For the Court of Appeal, Fox L J adopted, in his own paraphrase, Lord Diplock's test for constructive trusts from *Gissing* v *Gissing*:[55]

> whether the owner of the property has so conducted himself that it would be inequitable to allow him to deny the claimant an interest in the property.

With this test in mind, the Court examined some of the authorities. It found in *Bannister* v *Bannister*,[56] and in Lord Denning's judgment in *Binions* v *Evans*,[57] "a legitimate application of the doctrine of constructive trusts,"[58] apparently because of the positive acts done by the purchaser of the land occupied by a licencee: in the one case an undertaking given, and in other the payment of a lower purchase price. Such elements were lacking in the later case of *DHN Food Distributors Ltd* v *Tower Hamlets London Borough*,[59] which the Court of Appeal now disapproved of. Clearly in *Anstalt* the Court considered that where the trust was thus found established, the purchaser must have meant to be bound, rather than merely being the consequence of the situation.

In *Ashburn Anstalt* v *Arnold*, however, it seems that the allegation of constructive trust was based not on any such positive act but on the fact that Anstalt's contract of purchase was made "subject to" any rights of Arnold & Co. Could this perhaps be seen as intending Anstalt to be bound?

The principal authority on "subject to" contracts referred to by Fox L J was *Lyus* v *Prowsa Developments Ltd.*[60] In this case a subdivider contracted to sell a section in the subdivision to the plaintiff. Before the sale was completed, the bank, as mortgagee of the subdivider, exercised its power of sale under the charge which had priority to the contract of sale of the section. The bank was therefore not bound by that contract, and could have given a title free from that contractual purchaser's equity. Nonetheless, the mortgagee sale was expressly made "subject to" the earlier contract between the

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54 Above n 3, 729.

55 Above n 3, 725. The exact words of Lord Diplock in *Gissing* v *Gissing* [1971] AC 886, 905 were, of course:

> A resulting, implied or constructive trust - and it is unnecessary for present purposes to distinguish between these classes of trust - is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny the cestui que trust a beneficial interest in the land acquired.

which may, as will be suggested subsequently, be referring to a quite different type of trust.

56 Above n 49.

57 Above n 50.

58 Above n 3, 726.

59 [1976] 1 WLR 852.

60 [1982] 1 WLR 1044.

subdivider and the plaintiff. This was seen in the circumstances as positively intending the mortgagee's purchaser to be bound by the contract. As Fox L J supposed:[61]

> There was, therefore, no point in making the conveyance subject to the contract unless the parties intended the purchaser to give effect to the contract.

Of *Lyus*, Fox L J further commented:[62]

> How far any constructive trust so arising was on the facts of that case enforceable by the plaintiff against the owners for the time being of the land we do need to consider.

Yet he had earlier opined that:[63]

> This again seems to me to be a case where a constructive trust could justifiably be imposed.

However, turning to the *Anstalt* case, the Court did not accept the view of Lord Denning in *Binions* v *Evans* that as a general proposition a "subject to" stipulation in a sale of land inevitably imposes a constructive trust. Rather:[64]

> The court will not impose a constructive trust unless it is satisfied that the conscience of the estate owner is affected. The mere fact that the land is expressed to be conveyed "subject to" a contract does not necessarily imply that the grantee is to be under an obligation, not otherwise existing, to give effect to the provisions of the contract. The fact that the conveyance is expressed to be subject to the contract may often, for the reasons indicated by Dillon J, be at least as consistent with an intention merely to protect the grantor against claims by the grantee as an intention to impose an obligation on the grantee. The words "subject to" will, of course, impose notice. But notice is not enough to impose on somebody an obligation to give effect to a contract into which he did not enter. Thus, mere notice of a restrictive covenant is not enough to impose upon the estate owner an obligation or equity to give effect to it: *London County Council* v *Allen* [1914] 3 KB 642.

Repeating the example of the restrictive covenant which had also appealed to Dillon J in *Lyus*[65] perhaps confuses the issue, for a restrictive covenant does not depend for its effect on notice alone, but upon its having been created within the well-defined parameters of a dominant and servient tenement. The same may not always need to be the case with constructive trusts. However, the point is clearly made. In the Court's view it is a matter of the intention of the parties whether a "subject to" contract imposes a trust on the purchaser.

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61 Above n 3, 727-728.
62 Above n 3, 728.
63 Above n 3, 727.
64 Above n 3, 728-9. At this point the court seems to acknowledge that Anstalt was not a party to the agreement - a point which it seems to have overlooked when deciding to apply the *Midland Railway* case.
65 Above n 60, 1051.

There has been, perhaps unfortunately, a growing development of the so-called constructive trust based on intention, or common intention, especially after *Gissing* v *Gissing*. It is questionable whether such trusts may properly be termed constructive trusts, but even so it is a potential source of confusion to take the idea out of the context of the familial case and apply it to all constructive trusts. In any event, as Lord Denning himself found, it is all too easy to take the dicta of *Gissing* v *Gissing* out of context and misapply them.

In *Lyus*, which the Court of Appeal in *Anstalt* clearly favoured, Dillon J had referred to *Re Schebsman*[66] and quoted the observation of Du Parcq L J:[67]

> It is true that, by the use possibly of unguarded language, a person may create a trust, as Monsieur Jourdain talked prose, without knowing it, but unless an intention to create a trust is clearly to be collected from the language used and the circumstances of the case, I think that the Court ought not to be astute to discover indications of such an intention.

Yet *Schebsman* was simply a question, essentially inter partes, of whether a contract between two people conferring a benefit on a third party created a trust in favour of that third party. It was, if anything, therefore a case of express trust, not constructive trust.

The reasoning of the Court of Appeal seems at first glance to be consistent with the dictum of Wild C J given, in a slightly different though conceivably analogous context: "I do not think it is a fraudulent repudiation simply to deny obligations that are found not to exist".[68] It must however depend on the nature of the obligation and as discussed below, whether there is notice of the exact obligation. On the other hand the emphasis on an intention element before the conscience of the estate owner is affected comes close to suggesting that as a more general proposition, intention or common intention is an essential element in the imposition of a constructive trust. If so it moves towards rather perilous ground.

Intention is an integral element for an express trust, but is not so for a constructive trust in every case, perhaps indeed in most cases of constructive trust. So for example in *Re Hope*[69] Spender J observed:

> A constructive trust arises irrespective of the common intentions of the parties where it would be a fraud for the legal owner to assert a beneficial interest. In such a case, the trust will be imposed upon the parties by the court.

Perhaps Edmund Davies LJ had something similar in mind when he commented in *Carl Zeiss Stiftung* v *Herbert Smith (No 2)*:[70]

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66 [1944] 1 Ch 83.
67 Above n 66, 104.
68 *Sutton* v *O'Kane* [1973] 2 NZLR 304, 314.
69 (1985) 59 ALR 609.
70 [1969] 2 Ch 276, 301.

> [t]he concept of "want of probity" appears to provide a useful touchstone in considering circumstances said to give rise to constructive trusts, and I have not found it misleading when applying it to the many authorities cited to this court. It is because of such a concept that evidence as to "good faith", "knowledge" and "notice" plays so important a part in the reported decisions. It is true that not every situation where probity is lacking gives rise to a constructive trust. Nevertheless, the authorities appear to show that nothing short of it will do.

If there is any concept linking the categories of constructive trust it is not intention but the principle of fraud. So it is respectfully submitted that the Court of Appeal in *Anstalt* should have considered the "subject to" provision from the point of view of a different trust - to have enquired whether the circumstances were such that Anstalt had notice of Arnold's equity that the principle applied to them in terms expressed by Scott L J in *Bannister* v *Bannister*:[71]

> The fraud which brings the principle into play arises as soon as the absolute character of the conveyance is set up for the purposes of defeating the beneficial interest.

It is trite law that only a bona fide purchaser *without* notice of an equitable interest takes the property free from the equity. A purchaser with notice becomes as it were a constructive trustee of the beneficial interest, because it would be a fraud to deny obligations found to exist.

Possibly the *Lyus* decision might have been explained and more appropriately decided in this way; that the contract with the subdivider created the "very peculiar trust" in favour of the purchaser and that the bank expressly declared itself trustee by adopting the trust and that the subsequent purchaser in the mortgagee sale became a constructive trustee because the "subject to" provision gave *notice* of what could only have been the equitable interest of the original contracting purchaser.

So it is submitted the first question for the Court of Appeal ought to have been whether the same clause gave notice, actual or constructive, of any *equity* in Arnold, as against a mere licence. It is arguable that clauses 5 and 6 of the agreement created an equity in favour of Arnold as against Matlodge. This agreement and hence the equity and trust was novated in the latter assignment to Cavendish. Later, Legal and General appear to have adopted the same equity, or perhaps created a new one, when in the correspondence of January and February 1985 they appear to have acknowledged the effect of the 1973 agreement.

If there were some trust or equity binding on the vendor, then, even apart from any breach of trust by Legal and General, which might raise other issues, was the "subject to" clause sufficient to give notice to Anstalt of the licence alone or of supervening equity between the licensee and the vendor? An apposite test may be that of Salmond J in *Waimiha Sawmilling Co Ltd* v *Waione Timber Co Ltd*:[72]

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71 Above n 49, 136.
72 [1923] NZLR 1137, 1175.

> The true test of fraud is not whether the purchaser actually knew for a certainty of the existence of an adverse right, but whether he knew enough to make it his duty as an honest man to hold his hand, and either to make further enquiries before purchasing or to abstain from the purchase, or to purchase subject to the claimant's rights rather than in defiance of them. If, knowing as much as this, he proceeds without further enquiry or delay to purchase an unencumbered title with intent to disregard the claimants rights, if they exist, he is guilty of that wilful blindness or voluntary ignorance which according to the authorities, is equivalent to actual knowledge, and therefore amounts to fraud.

In the result the answer may have been no different and there may not have been sufficient notice of the equity, but the question ought to have been asked before the Court leapt on the element of intention. The Court acknowledged that "subject to" might give notice, and perhaps they rejected it appropriately, but they did not examine it. Indeed, the error in *DHN* was perhaps similar - whether if there were a trust of any kind affecting the occupation of land, the circumstances were sufficient to charge a purchaser with notice of the equity or merely of the licence.

It may be that the Court began its inquiry with the wrong test in mind. The dicta of Lord Diplock in *Gissing* v *Gissing* were given in the context of a specific and quite different type of trust - which may not be a constructive trust at all.

IV CONCLUSION

The result of *Anstalt* may seem just and uncontroversial - that Arnold had a right to remain in occupation and could not be summarily evicted by Ashburn Anstalt. However, as suggested in this paper, the way in which the Court of Appeal reached this conclusion may not be entirely free of difficulty.

Two matters are perhaps clear:

1 Exclusive possession, above all else, must be regarded as the primary test of tenancy as against licence.

2 There is no particular magic about a contractual licence. A licence, even if contractual, remains essentially a licence and not an interest in land. It will not bind a purchaser unless some supervening equity is brought home to that purchaser.

However, it is submitted that several important questions remain to be answered:

a) Is any tenancy (given exclusive possession) one which necessarily binds a purchaser, or does it remain relevant to distinguish between types of tenancy?

b) Is the term of a tenancy to be regarded as certain simply because the parties ought to be held to their bargain, or does the tenancy require some inherent basic certainty, from which either of the parties may expressly depart?

c) Does the equity which binds a purchaser arise from intention alone, or may a constructive trust arise simply from notice of that equity?

Perhaps, the central pivot of the Court of Appeal's decision is the need to hold parties to their bargain. The Court considered this as an element of certainty of term - the test of tenancy. However, it is submitted that the point may not have been appropriate where one of the parties (Anstalt) was not a party to the original agreement nor the sucessor of that party without purchase. If this is so might it not point to the question of whether a constructive trust ought to arise by notice? Was Anstalt a bona fide purchaser without notice of any equity affecting Arnold?