Chapter 11: Leases - the basic requirements

Assessment question

'Whether a transaction under which someone acquires the right to use another's property is a lease or a licence depends largely, but not exclusively, on whether the transaction grants "exclusive possession."'

Discuss.

Specimen answer

The Basic Test of Exclusive Possession

The first major case to discuss the *way* in which a lease should be distinguished from a licence was *Wells* v *Hull Corporation*. The facts of this 1875 case are very far removed from twentieth century cases, which usually involve residential properties. Hull Corporation owned a dry dock which it 'let' for short periods (usually a week) to shipowners for the purposes of carrying out repairs. The court held that in considering whether the transaction constituted a lease or a licence revolved around the issue of whether the grantee shipowner had been given 'exclusive possession' of the dock. The grantee would have 'exclusive possession' if he had been granted the *overall general control* of the dock.

On the facts, the shipowners were held only to have licences as they lacked the necessary control of the dock. Under the terms of the standard form used by the Corporation, the Corporation continued to operate the dock gates, the pumps, and also supervised the cleaning out of the dock at the end of each day's repair work. These clauses meant that the shipowners did not have exclusive possession.

Moving forward more than a hundred years, it can be said that nowadays the most obvious type of licensee in modern conditions is the traditional lodger. His 'landlady' (in the colloquial sense) retains control of his room, cleaning out, tidying up and changing bed linen. In *Marchant* v *Charters* [see p.359] a case in 1977 which presumably survives *Street* v *Mountford*, the grantee was not a lodger in the time-honoured sense but the occupant of a service flat. The grantor provided daily cleaning and regular changes of bed linen; the grantee was held to have only a licence.

Service Occupancies

Reading *Wells* v *Hull Corporation*, one might get the impression that there was a hard and fast rule, 'If a grant gives exclusive possession it must amount to a lease.' Even in the nineteenth century this was not the case, for the law has long recognised the concept of the 'Service Occupancy' under which an employee has a licence to occupy his employer's house/flat. The employee usually has exclusive possession, but he in law will only have a licence if the house/flat is provided so that he can be 'ready on the job'. Normally the employee is required by his contract of employment to live in the accommodation, but in *Crane* v *Morris* (1965) the employee was permitted but not obliged to live in a house which the employer had provided very close to the place of work. The employee was held to be a service occupier licensee.

In *Norris* v *Checksfield* (1991) an employee, who was already working as a coach fitter, was granted by his employer exclusive possession of a bungalow very near the depot. It was envisaged by the employer that in the near future the employee would take a coach driver's test and would then be 'on call' to cover for emergencies such as a regular driver going sick. The employee never took the test; it was held that he was only a service occupier licensee.

Possessory Licences from 1945 to 1985

After the second world war there were a number of cases which seemed to indicate that if a transaction (which was not a service occupancy) granted exclusive possession, a licence not a lease would arise if it could be proved that 'the intent of the parties' was that there should only be a licence.

This problematic line of cases possibly started with *Marcroft Wagons* v *Smith* in 1951. There, the existing tenancy of a house had terminated, but the grantors allowed the daughter of the ex-tenants to continue to live there for six months while she sought alternative accommodation. They charged her the same rent as before, but refused to give her a rent book or any other documentation. The daughter was held to be only a licensee. The Court of Appeal held that a lease had not been 'intended'. As a result of this and other cases, grantors thought, 'If we draft our grants so that they are *called* possessory licences we are on to a winner. We will escape all the restrictions of the Rent Acts'.

Things come to a head in Street v Mountford

In this case Street granted Mountford the exclusive possession of a flat. The document they both signed included the kind of provisions you would expect in a residential lease, but it also explicitly stated that the transaction was not a lease, only a licence. The Court of Appeal held that the subjective 'intent of the parties' was decisive, and that Mountford only had a licence. Celebrations by grantors of residential properties were however very short-lived. When *Street* reached the House of Lords, the House overruled the Court of Appeal. In particular, the House held that the test for whether a transaction was a lease or a licence was NOT the subjective 'intent of the parties'.

The House of Lords held (in effect reverting to the nineteenth century position) that it was the objective test of exclusive possession which determined whether a transaction was a lease or a licence. A transaction which granted exclusive possession created a lease unless it fell within certain exceptions. The exceptions recognised by the Lords were four in number. Service occupancies and occupation by virtue of an office (e.g. a vicar in his vicarage) were two. The other two exceptions are where a purchaser of premises is allowed into possession ahead of completion, and where somebody allows friend(s) to occupy his premises as an act of generosity.

The 1974 case of *Heslop* v *Burns* is a clear illustration of this last exception. There an impoverished couple lived rent free in the house of a wealthy benefactor. They were held only to be licensees. Whether *Marcroft* v *Smith* comes within this exception is more debatable. The grantors had some understandable sympathy for the daughter, but they did charge her rent!

Non-exclusive Licences

Another trick adopted by residential grantors even prior to *Street* was examined by the House of Lords in *Antoniades* v *Villiers.* There the two partners to a cohabitation had each signed a separate 'non-exclusive' licence over a very small flat. One of the clauses of each agreement read, '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.' The House of Lords held that the documents had to be read together as creating one lease. The two agreements were interdependent, such that either both would have signed the agreement or neither would have signed. The clause included in the agreement was rejected as a 'pretence'.

A case decided at the same time as *Antoniades, AG Securities* v *Vaughan* has, however, shown a way forward for grantors still determined to give only licences over their property. The grantors had granted four non-exclusive licences over a four bedroom flat, each licence commencing on a different day, for a different duration and at a different rent. The House of Lords held that there were four licences notably because the four unities were not

present. This case overruled the Court of Appeal decision that the four documents should be read as creating one lease.

Grantors retaining rights over the premises

It is quite clear that if a grantor retains keys to premises, the use of which he has granted to other(s), that does not prevent the transaction from giving exclusive possession and therefore being a lease. But what if the grantor inserts into a grant a clause deliberately designed to negate exclusive possession? In *Aslan* v *Murphy,* Aslan granted to Murphy the use of a tiny basement flat, but with a strange looking clause inserted that stated that Murphy had no right to use the premises between 1030 and 1200 every day. The licensor also had 'the right' to introduce into the flat another occupant. In practice, these clauses were never enforced, and the Court of Appeal in effect held that they were 'pretences' (cf. *Antoniades* v *Villiers*). Murphy was held to have a lease.

This robust approach of in effect deleting from transactions clauses inserted by grantors which *on paper but not in reality* negate the granting of exclusive possession calls into question the 1971 decision of the Court of Appeal in *Shell-Mex* v *Manchester Garages*. Shell granted the use of a filling station to the defendants for one year. The grant included a strange clause under which Shell could alter the layout of the premises. The clause even entitled Shell to move the very extensive underground storage tanks. The Court of Appeal held that the defendants only had a licence.

It is submitted that if this case were to recur the courts would apply (in the commercial field) the same approach as has been applied to dwellings. The artificial clauses about layout would be ignored as 'pretences'; the garage would have exclusive possession and therefore a one year lease protected by the Landlord and Tenant Act 1954, Part II.