

# Old common law rule



## **Introduction**

The old common law rule of "The demise of nemo dat quod non habet" that a person cannot convey a greater title than that person already has and a person holding a licence cannot convey the superior title of a lease. This old common law rule had been followed for many years, until the House of Lords decision in *Bruton*. The House of Lords in *Bruton* held that someone with no interest in land can grant a lease provided that the exclusive possession is given in the agreement. I will explain and critically evaluate the House of Lords decision in the followings.

## **House of Lords Decision**

The House of Lords took the opposite view with the Court of Appeal and held that the agreement between the Trust and Mr. *Bruton* was a lease. I will explain the decision below.

## **Applying *Street v Mountford***

The House of Lord decision in *Street* had been strictly applied.[1] According to *Street*, the agreement between the Trust and Mr. *Bruton* could be a lease/tenancy if the three elements of 1) exclusive possession; 2) term and 3) rent are satisfied. The agreement permitted Mr. *Bruton* to occupy a flat in the block on a short-term basis for a weekly sum of ? 18. The elements of term and rent are thus satisfied.

## **Whether *Bruton* had exclusive possession**

Whether the requirement in *Street* can be satisfied depends on whether Mr. *Bruton* had exclusive possession. Although the agreement expressively referred it as a licence, it is irrelevant. Lord Hoffmann said that the language

used, such as licence, is irrelevant. It is the true construction that identifies it as a lease.[2]

Exclusive possession is a question of law that depends on the characteristic of the terms agreed. Lord Hoffmann said that the Trust plainly gave Mr. Bruton a right to exclusive possession and there was no suggestion on shared possession."[3]

### **Effect of the reservation clause**

Although the Trust reserved limited right of entry for the purpose of inspection and repair, still exclusive possession was given to Mr. Bruton. Lord Hoffmann used the case of Westminster City Council [1992] as reference . In Westminster City, the only rights which it reserved were for itself and the council to enter at certain times for limited purposes. He further relied on the judgment of Lord Templeman in Street, and deduced that such an express reservation " only further reinforced the entitlement of Mr. Bruton to exclusive possession."[4]

### **Special Circumstances - Charitable objective**

Could the charitable objective and the lack of interest in land of the Trust be considered to be special circumstances? Lord Hoffmann stated that the character of the landlord is irrelevant. He said that " 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."[5] Therefore, the charitable objective of the Trust did not constitute to a special circumstance.

**Could a landlord with no interest in land grant a lease/ tenancy**

The general rule is that if the landlord has no interest in land, he is in lack of capacity to grant a lease.

The House of Lords relied on *Family Housing Association* to justify that there was no special circumstance existed for making an exception to the principle in *Street*. The House of Lord considered that *Family Housing Association v. Jones* was wrongly distinguished in the Court of Appeal. Lord Hoffmann regarded the fact in this case was very similar to that in *Bruton*. The crucial element is that in *Family Housing Association*, the grantor have no legal title, nonetheless, Slade L. J. concluded that the grantor have no legal title was not constitute an exception to the principle in *Street*. Therefore, the Housing Trust could grant *Bruton* a tenancy despite that the Trust had no interest in land.

**Tenancy by Estoppel**

MilletL. J. in the Court of Appeal said that an agreement could not be a lease unless it created a legal estate in the land which " binds the whole world". He said that the only exception in this case that the grantor could grant a lease was by " tenancy by estoppel".

Lord Hoffmann thought that " MilletL. J. was misled by the term of tenancy by estoppel that an agreement which could not otherwise be a lease or tenancy but which was treated as being one by virtue of an estoppel." [6] Lord Hoffmann and Lord Hobhouse thought that " tenancy by estoppel" was not a correct analysis. In this case, estoppel arises from the agreement, not the other way round.

## **Critical Evaluation**

### **Contrary to the intention of legislation/ Parliament**

According to section 32(3) of the Housing Act 1985, the Council had no power to grant the Housing Trust a tenancy. Therefore the intention of the legislation was that the trust could only have the capacity to grant licence to homeless people on a temporary basis. The House of Lords decision totally ignored the intention of the legislation. The duty of a Judge is not to make law, but to interpret the intention of the Parliament. In this case, I think that the intention of the Parliament in section 32(3) is to provide temporary accommodation for homeless people through the Housing Trust by granting licence. The intention of Parliament should be supreme and should be strictly followed by the Judges.

### **Street v Mountford should be distinguished**

Although the agreement expressly stated that it is in the form of a licence. The House of Lords still found that the agreement was a tenancy because the agreement grants exclusive possession to Mr. Bruton.

Charitable objective of the Trust should be constituted as a special circumstance that constructs the agreement as a licence despite the rule in Street. Lord Hoffmann regarded that the charitable objective of the Trust is irrelevant and there was no distinction among other landlords. Again, Lord Hoffmann did not follow the intention of the Legislation/ Parliament. The Rent Acts and other Landlord and Tenant Acts do make distinctions between different kinds of landlords. In my opinion, the characteristic of charity does prohibit the Trust from granting a tenancy, since providing a temporary accommodation for people in need required a high degree of flexibility.

Therefore a charitable trust should only grant licence rather than tenancy. The decision in Street should be distinguished due to these special circumstances.

### **No exclusive possession**

I think that exclusivity of possession should be judged in an objective basis. All the terms in the agreement and the intention of the parties should be taken into account. Therefore the reservation clause should be interpreted objectively. As it was an express clause, there was strong evidence showing that the Trust intended not to give exclusive possession to Mr. Bruton. Moreover, with the right of entry is reserved by the Trust, it could hardly be concluded that exclusive possession was given to Mr. Bruton.

### **Floodgate**

After Bruton, a new type of tenancy called 'personal tenancy' is created. In Bruton, the grantor with no interest in land can still grant a lease. This decision totally departed from the old rule that a person holding a licence cannot convey a lease. After Bruton, *Kay v Lambeth* [2004] and *London Borough of Islington v Green and O'Shea* [2005] both confirmed that 'a personal tenancy could be granted by someone with no interest in land.' [7]

The nature of personal tenancy seems to be similar to that of a contractual licence. Unfortunately, the House of Lords did not distinguish personal tenancy from contractual licence. The result would be potentially dangerous since a licence granted by the landlord maybe eventually interpreted as a personal tenancy by court according to Bruton. A floodgate situation would be resulted, since every licensee would argue that a personal tenancy should be granted instead of a licence.

**Registration**

The personal tenancy creates no interest in land and the nature of a personal tenancy is similar to that of a contractual licence. A contracts or leases (but not oral lease) are registrable under LRO s. 2 but a contractual licence is not registrable under L. R. O, s. 2.. Therefore it is doubtful whether a personal tenancy created in Bruton is registrable.

**Conclusion**

After the above analysis, I do not think that the decision of the House of Lord in Bruton is a good decision. It created uncertainty in whether someone with no interest in land can grant a lease or not. Although in Bruton, and the latter case of Kay [2004] and Green [2005] confirmed that a grantor with no interest in land can grant a personal tenancy. But the old common law rule of " The demise of nemo dat quod non habet" still needed to be considered. And Lord Hoffmann did not give a concrete reason on not applying the old common law rule.

It also blurred the requirement of satisfying an exclusive possession. In Bruton, the tenant of the personal tenancy 'has enforceable rights against the landlord and against strangers,'[8] except the original grantor (the council), which has a superior title.[9] As the tenant cannot enforce his right against someone who has the superior title, the element of exclusive possession in the personal tenancy is in doubt. The House of Lords created an uncertainty in determining whether exclusive possession had been given in the assignment. Lastly, certainty in law and the intention of the Parliament should be strictly observed. And the decision of the House of Lord in Bruton

disrupted the legal certainty and contravened the intention of Parliament.

Therefore, it cannot be a correct decision.

1. Per Lord Templeman in *Street v Mountford*, supra at p. 818
2. Per Lord Hoffmann in *Bruton v London & Quadrant Housing Trust*, supra at p. 413
3. Per Lord Hoffmann in *Bruton v London & Quadrant Housing Trust*, supra at p. 414
4. Per Lord Hoffmann in *Bruton v London & Quadrant Housing Trust*, supra at p. 414
5. Per Lord Hoffmann in *Bruton v London & Quadrant Housing Trust*, supra at p. 414
6. Per Lord Hoffmann in *Bruton v London & Quadrant Housing Trust*, supra at p. 414
7. Mark Pawlowski, James Brown, Case Comment *Bruton: A new species of tenancy?*, *Landlord & Tenant Review* 2000
8. M. Harwood, "Lease: Are They Still not Really Real?" (2000) 20 *Legal Studies* 503 at p. 513
9. John-Paul Hinojosa, *On Property, Lease, Licences, Horses and Carts: Revising Bruton v London & Quadrant Housing Trust*, *Conveyancer and Property Lawyer* 2005