

Property law - rights of a tenant



Part 1

In this scenario, Raj has allowed his sister-in-law, Joyce, to live in his property. The question is whether Joyce enjoys the rights of a tenant, or if she is actually a mere licensee. There is, in English property law, a crucial distinction between the tenant and the licensee; the former enjoying significantly greater and more secure rights than the latter. It is often not, however, a clear cut distinction. In the present case, the terms of the occupation agreement that the parties drew up will need to be considered.

Firstly, the document itself needs to be considered. The first term of it expressly states that Joyce is living in Raj's house as a licensee, and not as a tenant or lessee (that is, that no lease has been created). The document itself, however, might well represent a contract, which would put Joyce in the position of a contractual licensee (following such cases as *R v Tao* (1977)). Even a contractual licensee, however, enjoys no proprietary interest in the property in question, as was evidenced in the case of *Ashburn Anstaldt v Arnold* (1989). A contractual licence can be contrasted to a bare licence, which is simply a personal permission, granted in this case by Raj to Joyce, without Joyce paying consideration, for her to enter his property. The purpose of the bare licence is to provide a defence against an allegation of trespass, so long as the licensee does not overstep the permission of the licence, as happened in the case of *Tomlinson v Congleton Borough Council* (2003). A contractual licence, by contrast, must involve (as in any contract) valuable consideration moving from the licensee. This was established by Megaw LJ in *Horrocks v Forray* (1976). Joyce pays a monthly rent of £600 to

Raj, and this could well qualify as the consideration put the licence agreement on a contractual footing.

The second term of the occupation agreement states that Raj can nominate a third party to share the premises with Joyce. This relates to the issue of exclusive possession, which is an essential element of any lease or tenancy. This was described as “ the proper touchstone” of a lease by Windeyer J in *Radaich v Smith* (1959). Two seminal cases highlighted this distinction between leases and licenses. In *Street v Mountford* (1985), Lord Templeman stated that a tenant is entitled “ to keep out strangers and keep out the landlord unless the landlord is exercising limited rights reserved to him by the tenancy agreement to enter and view and repair.” In *AG Securities v Vaughan* (1990), however, it was held that a licensee has “ no legal title which will permit him to exclude other persons”. The agreement in the present case expressly allows for Raj to install a third party at his wish. This certainly argues strongly against anything other than a license governing the situation.

Certain factors, however, suggest that it is not such a simple case of Joyce being merely a licensee. She pays a periodic monthly rent of £600, and the occupation agreement states that she will live there for a fixed term of four years commencing 1 October 2005. To return to *Street v Mountford* (1985), the House of Lords, in that case, identified three inherent components of a lease or tenancy. The first was exclusive possession, which has been discussed already, and which is not apparently in evidence in this case. The second, however, is that the lease or tenancy must be granted for a fixed or periodic term certain. This means that the maximum duration of the lease or

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tenancy must be clearly ascertainable from the outset. Although the strict application of this rule was relaxed somewhat, the principle was reaffirmed in *Prudential Assurance Co Ltd v London Residuary Board* (1992). The 2005 agreement that granted Joyce the right to live in Raj's house clearly identified a term of four years after which the right would expire. In this respect, then, it would seem that the arrangement more closely resembles a lease. This is also a characteristic, however, of the contractual licence. The third element identified in *Street v Mountford* was the consideration that was discussed above. This too would suggest the arrangement is more akin to a lease, or at least a contractual licence, than a bare licence.

It seems, then, that although the arrangement shares some of the characteristics of a lease, the rights enjoyed by Joyce are, in fact, only those of the licensee; that is, a person whose presence is only grounded upon the personal permission of the licensor. Joyce's position is stronger than that of a bare licensee, however, by virtue of the contractual arrangement. A further blurring of the limits in this area exists between contractual licenses and equitable or estoppel-based license, which has increasingly become proprietary in character. A contractual licence does not, however, confer any proprietary interest on the licensee, as was illustrated in *Cowell v Rosehill Racecourse Co Ltd* (1937) by Latham CJ who stated that " fifty thousand people who pay to see a football match do not obtain fifty thousand interests in the football ground." A longer contractual licence, however, such as the one enjoyed by Joyce, for a period of four years, begins to resemble a proprietary interest in Raj's property, despite the absence of a right of exclusive possession.

It is in relation to this last area that the decisive factor is most relevant. That factor is that when determining whether Joyce's occupancy is a tenancy or a licence, the parties' intentions (which were clearly that a mere licence should be granted to Joyce) are largely irrelevant. In *Aslan v Murphy* (1990), the court found that its task was to "ascertain the true bargain between the parties". A crucial case of relevance to the present one was that of *Addiscombe Garden Estates Limited v Crabbe* (1958), in which an arrangement which purported to be a licence was in fact held to be a lease. Despite the fact that Raj and Joyce clearly intended the occupancy to be on the basis of a licence, and the contractual agreement was labelled as a licence, the court is at liberty to overturn this if the reality is that Joyce enjoys a lease. It seems unlikely, however, because of certain terms of the agreement, that Joyce enjoys a sufficient proprietary interest in the property to become a lessee or tenant; but rather her position resembles that of a contractual (as opposed to a bare) licensee.

Part 2

Section 11 of the Landlord and Tenant Act 1985 relates to the repairing obligations in short leases. Briefly, it obliges the lessor (that is, the party owning the greater estate, usually the freehold, out of which the lease has been carved) to undertake certain works and repairs to ensure that the property remains in good working order. An example is the obligation on the lessor to "keep in repair the structure and exterior of the dwelling house (including drains, gutters and external pipes)". In recent years, this section has been considered in a number of cases.

A crucial case in the development of property law was *Bruton v London Quadrant Housing Trust* (1999). The relevance of section 11 to this case was that the claimant (or plaintiff as he then was) claimed that he was a lessee of the property in question, which was owned by the Trust. Of course, if he was a mere licensee, he would not benefit from the statutory protection afforded by the Act. The county court found that he was a licensee and there was therefore not any breach of section 11. The House of Lords overturned this, however.

Subsequently, in *Sykes v Harry* (2001), the section was considered again. In this context, the issue considered by the court at first instance (and subsequently re-considered by the Court of Appeal was whether the landlord's (that is the lessor's) statutory duty under section 11 relating to the repair of properties subject to a short lease was co-extensive with the landlord's contractual duty to keep in repair (that is, the obligation created by the lease instrument). Potter LJ stated that there is "implied into the tenancy a covenant by the tenant that the landlord may, at reasonable times of day, and on 24 hours written notice, enter the premises for the purpose of viewing their condition and state of repair." Although at first instance the judge had found that the landlord's duty to take care had been coextensive with the contractual duty of repair, the Court of Appeal overturned this using section 4 of the Defective Premises Act 1972, and the duties imposed on the landlord under this as the principal factor.

Later that year, in *Southwark London Borough Council v McIntosh* (2001), section 11 was once again before the court. Here the property in question, which was owned by the council, became defective due to the effects of

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severe damp. The question before the court was whether the landlord (the council) was in breach of its section 11 duty of repair. The landlord appealed against a first instance decision that it was in breach, and the High Court said that the tenant had failed to establish sufficient evidence to the effect that the damp had been caused by the landlord's breach of its section 11 duties. As such, there was no liability and the appeal was allowed.

In *Shine v English Churches Housing Group* (2004), the question of damages awarded under section 11 was considered. The first instance judge had awarded damages to the tenant due to the landlord's breach of section 11, but the Court of Appeal found these damages to be "manifestly excessive".

Research strategy

My research began, in both instances, with a textbook. I used the contents page and the index of such books and Gray and Gray's *Land Law*, 3rd Edition; and their *Elements of Land Law* to identify key sections, such as "lease" and "license". I conducted some background reading on these two legal interests in property, in order fully to understand the potential issues relating to each. It became apparent that there is often a blurred boundary between the type of legal interest a party enjoys in a property, despite what that interest might be labelled as.

Having conducted this initial reading of key sections in various textbooks, I began to look for specific cases in which the issue of the lease/license distinction, and the application of section 11 had been considered. For this I used both textbooks, and electronic resources. I accessed LexisNexis Butterworths online, and was able to start by doing basic keyword searches

in the case locator engine. From here I was able to read the judgments in the various cases, as well as (in some instances) abstracts of the key issues.

In researching section 11, I began by finding the statute itself at the Office of Public Sector Information (again, available online) and was able to locate cases where it had been considered and applied.

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