

The landlord and tenant relationship

Introduction

In this chapter, we have included four questions on a variety of subjects (i.e., leases and licences, certainty of term, and the formalities of a lease) which loosely come under the heading of 'the landlord and tenant relationship'.

The lease/licence distinction has produced a welter of case law and academic discussion in articles and elsewhere — it is, therefore, a popular topic with examiners, especially now with the House of Lords ruling in *Bruton v London and Quadrant Housing Trust* [2000] 1 AC 406 (see Question 1(a)).

Certainty of term has also been the subject of interesting case law (*Prudential Assurance Co. Ltd v London Residuary Body* [1992] 3 WLR 279, overruling *In Re Midland Railway Co.'s Agreement* [1971] Ch 725 and *Ashburn Anstalt v Arnold* [1989] Ch 1 on this point). You may, therefore, expect a question on this topic which may be coupled with the doctrine of repugnancy (see, e.g., *Centaploy Ltd v Matlodge Ltd* [1974] Ch 1): Question 4.

The subject of the formalities of a lease has become complicated by the fact that there are now two separate statutory provisions governing the validity of contracts for the disposition of interests in land. The Law of Property Act 1925, s. 40, continues to apply to contracts for the grant of a lease entered into before 27 September 1989. Note that a party to an oral agreement for the grant of a lease (entered into before this date) may be able to enforce the same in equity if he or she can establish a sufficient act of part performance made on the faith of the agreement (*Steadman v Steadman* [1976] AC 536). The Law of Property (Miscellaneous Provisions) Act 1989, s. 2, now governs contracts made on or after 27 September 1989. Under s. 2, a contract for the sale or other disposition of an interest in land can only be made in writing, and therefore the doctrine of part performance has been effectively abolished in relation to contracts made after this date. You should also be familiar with the provisions of the Law of Property Act 1925, ss. 52, 53 and 54, and the Court of Appeal decision in *Crago v Julian* [1992] 1 WLR 372, to the effect that the assignment of any tenancy at law (including an oral periodic tenancy) will not be valid unless made by deed (save in the case of assignments by operation of law: *Parc Battersea Ltd v Hutchinson* [1999] 2 EG 149).

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Landlord and tenant courses vary as to the emphasis they give to the various subject areas dealt with in this chapter. The best advice we can give you is to be guided by your lecturer as to how much time you should devote to any one or more of these topics in preparing for your exam.

Q Question 1

- (a) Assess critically the legal significance of the House of Lords' ruling in *Bruton v London and Quadrant Housing Trust* (2000).
- (b) Tom, Dick and Harriet are three law students who have recently approached Acrecrest Estates Ltd with a view to renting a flat for their use during the next academic session. They have each been handed a separate (but identical) document for signature headed 'Licence Agreement', which states that 'the Licensor shall grant and the Licensee shall accept a licence to share with two others each to be separately licensed by the Licensor and to the intent that the Licensee shall not have exclusive possession of the premises, for a term of 6 months at a monthly licence fee of £240'. Tom, Dick and Harriet are unhappy about the document they have been asked to sign and seek your advice as to their legal position.

Advise Tom, Dick and Harriet.

Commentary

The first part of this question requires a critical analysis of the surprising decision of the House of Lords in *Bruton*. Unfortunately, you will not score good marks if you simply regurgitate the facts of the case and outline the ruling. The question asks you to *assess critically* the legal significance of the decision, so you must be prepared to give an incisive commentary on the case. Show the examiner that you have read (and understood) some of the academic literature on the decision: see, for example, Pawlowski, M. and Greer, S., 'Leases, Licences and Contractual Tenancies' (2000) 9(1) Nott LJ 85.

Part (b) treads more familiar territory and gives you ample opportunity to regurgitate the House of Lords decision in *AG Securities v Vaughan/Antoniades v Villiers* [1990] 1 AC 417, and the subsequent Court of Appeal decision in *Duke v Wynne* [1990] 1 WLR 766.

There is a wealth of reading on the subject of the lease/licence distinction in the context of multiple flat-sharing arrangements. Of particular interest are; Harpum, C., 'Leases, Licences, Sharing and Shams' [1989] CLJ 19; Hill, J., 'Shared Accommodation and Exclusive Possession' (1989) 52 MLR 408 and Murdoch, S., 'The Lease/Licence Distinction' [1989] EG 8911, 22.

- Test of exclusive possession confirmed in *Bruton* (2000), but grant of a tenancy may be displaced if there are 'special circumstances': *Street v Mountford* (1985)

- *Bruton* decision criticised for creating a hybrid personal tenancy and for failing to extend the category of special circumstances to include organisations offering accommodation to the homeless
- Comparison between *AG Securities v Vaughan* and *Antoniades v Villiers* (1990) — are the agreements independent or interdependent?
- Four unities of a joint tenancy present so likely that the licence agreements are a sham: *Aslan v Murphy* (No. 1)/*Aslan v Murphy* (No. 2)/*Duke v Wynne* (1990)

Suggested answer

(a) The House of Lords in *Bruton* has confirmed the principle that an agreement will confer on the occupier the status of a tenant if it gives a right to exclusive possession for a term, notwithstanding that the agreement was intended by the parties to create only a licence. Thus in *Bruton* itself, the agreement gave the occupant a right to exclusive possession because there was nothing to suggest that the occupant was to share possession with the Housing Trust or any other party. Mr Bruton did not fall to be classified as a lodger in the *Street v Mountford* sense since the Housing Trust had not retained an unlimited right to enter the accommodation for the purpose of providing attendance or services: see, *Westminster City Council v Clarke* [1992] AC 288 (HL), where the licence agreement was upheld on the basis that the council could change the subject accommodation without notice or require the occupant to share with any other person, and the council's representative was entitled to enter the property at any time pursuant to the terms of the agreement. An express reservation of *limited* rights to enter for certain defined purposes only (as in *Bruton*) served only to fortify the conclusion that the Housing Trust had granted exclusive possession. The grant of a tenancy will be displaced only where there are 'special circumstances' which are capable of negating this result: see *Street v Mountford* [1985] AC 809, *per* Lord Templeman.

The central issue in *Bruton*, therefore, was whether the fact that the Housing Trust was a charitable organisation charged with the function of providing short-term accommodation for the homeless pursuant to a licence agreement with the Council (which by its terms prohibited the grant of any tenancies) was sufficient to constitute special circumstances so as to displace the presumption of a tenancy. On this point, the House of Lords, following the earlier Court of Appeal decision in *Family Housing Association v Jones* [1990] 1 WLR 779 (which was largely indistinguishable from *Bruton* on the facts), rejected the notion that performance of socially valuable functions could amount to circumstances capable of negating the general rule in favour of a tenancy. Moreover, the fact that the Housing Trust had agreed with the Council not to create tenancies (and that it had no estate out of which it could grant them) was considered immaterial where the agreement had clearly conferred exclusive possession on the occupier.

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The House of Lords' ruling has been criticised on a number of grounds. First, it rejects the notion that a more flexible approach (exemplified by earlier case law, in particular, *Westminster City Council v Clarke* [1992] AC 288 (HL) and *Camden London Borough Council v Shortliffe Community Housing* (1992) 25 HLR 330) is more appropriate in determining the rights of the parties in the context of public sector housing for the homeless. Secondly, it is apparent in *Bruton* that the Housing Trust, being itself only a licensee of the property, could never have had the power to exclude the Council from possession and, consequently, was not in a position to confer such a right on Mr Bruton. This, it is submitted, is a compelling argument and one that should have been decisive of the appeal. The point was addressed by Millet LJ in the Court of Appeal in *Bruton* [1998] QB 834, at 845, where his Lordship concluded that 'if the grantor has no power to exclude the true owner from possession, he has no power to grant a legal right to exclusive possession and his grant cannot take effect as a tenancy'. Thirdly, the House of Lords, it is submitted wrongly, refused to extend the category of 'special circumstances' to include organisations offering accommodation to the homeless. In this connection, Lord Templeman in *Street* instanced the situation where the occupier is an 'object of charity' as displacing the intention to create a tenancy. This would have provided a 'neat solution' (see Cowan, D., [1993] Conv 157, at 160) to the problem of admitting evidence of background features (characterised also as a category of exceptional circumstances relying on the intention of the parties not wishing to enter into legal relationships) in determining the issue of exclusive possession.

The effect of the House of Lords ruling is that a grantor may create a tenancy despite having no proprietary interest in the land and irrespective of any factors giving rise to a tenancy by estoppel. This is a startling proposition, not least because it assumes the existence of a lease which does not have any proprietary characteristics. The recent decision of Neuberger J in *PW & Co. v Milton Gate Investments Ltd* [2003] EWHC 1994 (Ch) is of particular interest in this context. Although no reference is made to the *Bruton* decision, it is apparent that the judgment reflects the traditional view of the lease as conferring a property right in land. In particular, it was emphasised that (1) the relationship of landlord and tenants depends on privity of estate and (2) the general principle of freedom of contract is limited inevitably in landlord and tenant law by the proprietary nature of a lease. This led his Lordship to conclude in *Milton Gate* that a subtenancy cannot subsist without a reversionary interest to support it. In other words, the person who grants the tenancy must have some greater interest in the land so that there is something which will revert back to him at the end of the tenancy. This traditional line of reasoning is, however, difficult to reconcile with the *Bruton* ruling which presupposes that the rights of the parties may be governed purely by contractual agreement. If Mr Bruton's tenancy did not give rise to a proprietary interest, the question is, what is it? If Mr Bruton's tenancy is purely contractual then surely the very essence of a tenancy, namely, exclusive possession, is lacking unless

exclusive possession in this context may now mean exclusive possession as between grantor and grantee only. The conclusion must be that the House of Lords has unwittingly created an entirely new species of tenancy which is purely contractual in nature, personal to the contracting parties, and which cannot be assigned to or bind third parties. But the whole point of the lease/licence distinction is to draw a clear dividing line between personal and proprietary rights. It is now very difficult to distinguish between a contractual tenancy and a licence since both operate *in personam* and create no interest in land.

(b) The grant of exclusive possession remains the governing factor in determining whether or not an occupier is a tenant or a licensee: *Street v Mountford* [1985] AC 809. The labelling of the agreement (as either a tenancy or a licence) is not conclusive as the courts are more concerned with the reality (or substance) of the agreement rather than the parties' expressed intentions. A licence will be upheld, however, where the parties' intentions (as manifested by the agreement) clearly negate the right of exclusive possession and accord with the reality of the arrangement: *National Car Parks Ltd v Trinity Development Co. (Banbury) Ltd* [2001] 2 EGLR 43, affirmed on appeal: [2001] EWCA Civ 1686. The fact, therefore, that each of the three documents put forward by Acrecrest Estates Ltd are headed 'Licence Agreement' will not be conclusive since the court will be obliged to consider the substance of what has been agreed and not merely the form. In essence, the question is whether, as a matter of law, the three separate agreements will confer joint exclusive possession on Tom, Dick and Harriet, or merely a right to share the flat as licensees. The point was considered in the House of Lords decision in *AG Securities v Vaughan/Antoniades v Villiers* [1990] 1 AC 417, involving two separate appeals.

In *Vaughan*, four individual occupants each had a short-term licence agreement granting a right to use the flat in common with others with a like right and expressly negating a right to exclusive possession of any part of the flat. The licence agreements began at different dates, were for different periods and varied to some extent in the rents charged. The four occupants had replaced earlier ones when vacancies occurred. On these facts, the House of Lords held that the agreements were *independent* of each other and did not confer a right to exclusive possession on any one occupant but merely a right to share the flat with others. Because the agreements had been made on different dates and with different terms and rents, they could not be construed as creating a joint tenancy (i.e., in the absence of the four unities for a joint tenancy).

In *Antoniades*, on the other hand, the occupants were a young man and his girlfriend who wanted to live in the flat as husband and wife. The couple had each signed an agreement which stated that it conferred a personal licence only and expressly negated the grant of exclusive possession. The agreements were, in fact, modelled on those in the earlier case of *Somma v Hazelhurst* [1978] 1 WLR 1014. The House of Lords held that the two agreements were *interdependent* in that it was unreal to regard them as separate and independent licences. The couple had applied jointly to rent the

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flat and sought and enjoyed joint exclusive occupation of the whole flat. The result was, therefore, a joint tenancy protected by the Rent Act 1977. See also *Duke v Wynne* [1990] 1 WLR 766, where the Court of Appeal stressed that the labelling which parties agree to attach to their agreements is never conclusive.

Thus, where there is a steady turnover of occupants who move in at different times and pay different rents and stay for different periods, the agreements are likely to be classified as genuine and conferring 'licence' status only. (This, however, is subject to the argument that there may be a tenancy of an individual bedroom coupled with the right to share the communal parts of the flat, a point not canvassed in *Vaughan*.)

Alternatively, agreements which arise where the occupants seek accommodation together (as in the present case) and sign separate but identical agreements at the same time, paying the same rent and for the same period of time, would, it is submitted, almost certainly point to a sham and confer joint tenancy status on the occupants. One difficulty, however, may relate to the payment of rent. In *Mikeover Ltd v Brady* [1989] 3 All ER 618, the court held that the obligation to pay separate monthly sums, being several (as opposed to joint obligations) destroyed unity of interest in order to create a joint tenancy.

Subject to this point, the advice to Tom, Dick and Harriet is to sign the agreements on the basis that they will acquire a joint tenancy of the flat. The fact that they purport to agree to a sharing of the flat with each other will not affect their statutory protection (*Aslan v Murphy (No. 1)/Aslan v Murphy (No. 2)/Duke v Wynne* [1990] 1 WLR 766). In this case all three sharers will be treated as tenants. The position would be different, however, if one of the sharers had been named as tenant with the others merely contributing to the rent. Here, the natural inference would be that what was intended was a contractual flat-sharing arrangement under the tenancy of one of them only (*Monmouth Borough Council v Marlog* [1994] 44 EG 240).

Q Question 2

In November 2003, Mandy advertised on her local parish church noticeboard for a tenant for her vacant property at 16 Bumble Road, Bigglestown. John, having seen the advertisement, wrote to Mandy expressing an interest in the property.

In December 2003, Mandy met John and took him round to view the house. Mandy told him that the letting was his for £55 per week and that he could move in, in three months' time. John agreed to these terms.

After the expiration of the three months, John telephoned Mandy to inform her that he was ready to move into the property. Mandy replied, 'Sorry, I've changed my mind about the letting, and anyway I've sold the house with vacant possession to David for £85,000'.

Advise John as to his rights (if any) in relation to the property.

Commentary

This is a tricky question concerned with the formalities of a lease and the enforceability of an agreement for a lease against a third party. To score high marks, your answer should display a detailed knowledge of the relevant statutory provisions and case law.

You may find it useful to begin with a brief introduction identifying the legal issues and explaining the relevancy of the rules governing the formalities of leases. This will then pave the way for a more detailed analysis of the problem.

- **John's tenancy not a legal lease because it does not take effect in possession — s. 54(2) does not apply**
- **Valid lease in equity if enforceable by a decree of specific performance: *Walsh v Lonsdale* (1882)**
- **Compliance with s. 2(5)(a) of the Law of Property (Miscellaneous Provisions) Act 1989 — requirement of writing not necessary in case of contracts for short leases made pursuant to s. 54(2) of the 1925 Act**
- **John's equitable lease binding on David if it has been duly registered — effect of non-registration is that David will take free of John's interest regardless of David's knowledge: *Midland Bank Trust Co. Ltd v Green* (1981)**

Suggested answer

This question is concerned with the law governing the formalities for the creation of leases. The Law of Property Act 1925, s. 52(1), states that 'all conveyances of land or of any interest therein are void for the purposes of conveying or creating a legal estate unless made by deed'. By virtue of s. 205(1)(ii) of the 1925 Act, a conveyance of land includes a legal lease. A lease may, however, be valid at law even though not created by deed. Section 54(2) of the 1925 Act provides an exception to s. 52(1) in that any lease which takes effect in possession for a term not exceeding three years at the best rent which can reasonably be obtained without taking a fine, is exempted from the requirement of a deed and will take effect as a legal lease.

A lease will normally arise where a landowner (the landlord) grants to another (the tenant) the right exclusively to possess land for a fixed or ascertainable period while himself retaining a reversionary estate (i.e., a freehold estate, or a leasehold estate of longer duration than that demised to the tenant).

Even though it is possible for a landlord to grant a tenant a lease in return for no consideration in the form of a rent or premium (see *Ashburn Anstalt v Arnold* [1989] Ch 1), the vast majority of leases are granted in return for the payment of a rental sum by the tenant. (The term 'rent' has been defined as 'a payment which a tenant is

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bound by his contract to make to his landlord for the use of the land', *per* Lord Denning MR in *CH Bailey v Memorial Enterprises Ltd* [1974] 1 WLR 728.) In so far as the tenant provides consideration for the use and occupation of the land, there necessarily arises a contract between landlord and tenant. Thus, a void lease at law (i.e., not complying with the legal formality of a deed under s. 52(1)) may still take effect as a contract for a lease which equity may enforce by means of a decree of specific performance.

It can be assumed that both Mandy and John intended to enter into landlord and tenant relations and create a weekly periodic tenancy in favour of John at an agreed rental of £55 per week. A weekly tenancy will be presumed from the fact that the agreed rental is referable to a weekly period (*Adler v Blackman* [1953] 1 QB 146). At first glance, it may appear that John's tenancy takes effect as a legal lease under the exception contained in s. 54(2). In this connection, it has been held that periodic tenancies (e.g., weekly, monthly, yearly etc.) fall within the s. 54(2) exemption as being for less than three years (*Re Knight, Re ex parte Voisey* (1882) 21 Ch D 442). The difficulty, however, in the present case is that John's tenancy does not 'take effect in possession', in so far as it was agreed that John would not move in immediately but in three months' time. Accordingly, the tenancy does not fall within the s. 54(2) concession and is void at law in the absence of a deed.

Does John have an equitable lease (i.e., recognised in equity)? An equitable lease, from the perspective of the common law, is a mere contract for an estate in land, but in equity it is treated in many ways as being 'as good as a lease' (see *Walsh v Lonsdale* (1882) 21 Ch D 9). This is because a contract for a lease may be enforceable in equity by a decree of specific performance. To be so enforceable, however, the contract must comply with the requisite legal formalities as to writing.

A contract for the sale or other disposition of an interest in land (e.g., a contract to enter into a lease) must either be reduced to a written document, all its terms contained therein, and signed by both parties, or merely be evidenced in writing and signed by the person to be charged. If the contract was made before 27 September 1989, the latter rule applies by virtue of the Law of Property Act 1925, s. 40. If, on the other hand, the contract is made on or after this date, the former rule applies by virtue of the Law of Property (Miscellaneous Provisions) Act 1989, s. 2. (Section 40 also permits an oral contract to be enforced by virtue of the doctrine of part performance: see, e.g., *Steadman v Steadman* [1976] AC 536.)

The oral agreement in the present case was made in December 2003, and hence the provisions of s. 2 of the 1989 Act will apply. The absence of any signed written instrument containing all the terms of the proposed tenancy suggests that the agreement is void for want of formality, but reference should be made to s. 2(5)(a) of the 1989 Act which provides that the requirement of a written instrument is obviated in the case of contracts for short leases made pursuant to s. 54(2) of the 1925 Act.

Assuming, therefore, that John's oral agreement is valid despite the lack of writing, the question arises as to whether it is enforceable against David as an assignee of the reversion. It is unclear whether the house forms registered or unregistered land. If the house is registered, David, as assignee, will only be bound by John's equitable lease if John had registered the same against Mandy's reversionary title prior to the sale of the house by means of a notice on the register. (There is no suggestion that John moved into occupation of the house prior to the completion of the sale to David so as to render his interest an 'unregistered interest which overrides' under the Land Registration Act 2002, Schedule 3, para. 2). If, on the other hand, the house is unregistered, John's agreement for a lease, being an 'estate contract', was registrable as a Class C(iv) land charge under the Land Charges Act 1972. The effect of non-registration of the contract as against Mandy's title, prior to the sale of the freehold to David, will be that David (as a purchaser) will take the freehold estate free of John's interest, irrespective of whether he (David) actually knew of the equitable lease or not (*Midland Bank Trust Co. Ltd v Green* [1981] AC 513).

Q Question 3

In 2003, Arnold entered into partnership with his brother, Jake, for the purpose of carrying out public relations work. The partnership was called 'Communicate Associates'. In the same year, Communicate Associates purchased the freehold title to some office space.

In 2004, Arnold and Jake fell into disagreement and decided that, while they would formally carry on the partnership from the office premises for fiscal reasons, the day to day running of the business would be Arnold's responsibility. To make full use of the office premises, however, it was agreed that the partnership would grant Jake a lease of half of the office space, from which Jake would run another business in his own right. Both parties agreed and executed a lease (in 2004) which contained the following wording:

... that the Lessee shall from this day be entitled to exclusively possess the premises demised herein for five years, or in any event until such time as the Communicate Associates partnership ... shall cease to exist ... at a rental of £16,000 per year ... payable on the unusual quarter days.

Since taking up possession, Jake has been paying Communicate Associates £1,000 per month rental in advance, which Arnold has paid into the business account of Communicate Associates.

Jake is keen to demonstrate that the 2004 lease is void and that there exists instead a periodic monthly tenancy because, by so doing, he would be able to escape liability to pay the higher rent under the lease.

Advise Jake.

Commentary

This question is concerned with the doctrine of certainty of term (*Prudential Assurance Co. Ltd v London Residuary Body* [1992] 3 WLR 279) and the law relating to the capacity of a party to grant a lease of land to himself (*Rye v Rye* [1962] AC 496 and the Law of Property Act 1925, s. 72). The facts do not readily bring these issues to mind and so, if you have not carefully revised the case law and statutory provisions, the question may prove somewhat baffling!

- **Grant of lease to Jake alone permissible under s. 72(4) of the Law of Property Act 1925: *Rye v Rye* (1962) does not apply**
- **But lease void for uncertainty of term: *Prudential Assurance Co. Ltd v London Residuary Body* (1992)**
- **Effect of void lease is that Jake holds under less onerous monthly periodic tenancy arising by implication of law from payment and acceptance of monthly rent: *Alder v Blackman* (1946)**
- **Such periodic tenancy valid at law despite absence of deed or writing: s. 54(2) of the Law of Property Act 1925**

Suggested answer

In order to succeed in his contention, Jake must establish that the 2004 lease is void and that, as a matter of law, he holds the premises under a periodic (monthly) tenancy at the lower rent of £1,000 per month.

It is trite law that there must exist two separate parties to a lease (i.e., it is not possible for a person to grant a lease of land to himself). Although the Law of Property Act 1925, s. 72(3) expressly states that ‘a person may convey land to or vest land in himself’ (for this purpose, a legal lease is a ‘conveyance’ of land within the meaning of s. 205(1) of the 1925 Act), the subsection has been judicially interpreted as not having this effect (*Rye v Rye* [1962] AC 496). In this case, Lord Denning held that it was impossible for a person to grant a lease to himself, invoking the maxim *nemo potest esse tenens et dominus* (a person cannot be, at the same time, both landlord and tenant of the same premises). In *Rye*, the appellant and his brother acquired a freehold property which they co-owned in equity as tenants in common. The brothers were in partnership as solicitors and agreed that the firm should be run from the premises they had purchased. As a firm, they agreed to pay themselves an annual rent of £500. The House of Lords held that no lease was ever created because the same parties existed on either side of the landlord and tenant relationship. However, Lord Denning did expressly confirm that two lessors could properly grant a lease to one of

themselves because, in such an arrangement, there would exist different individuals on either side of the lease. Such an arrangement would be a conveyance pursuant to s. 72(4) of the 1925 Act and the covenants contained in the agreement would be enforceable under s. 82(1) of the 1925 Act just as if the lessee had covenanted with the lessors alone.

The decision in *Rye* was applied in *Ingram v Inland Revenue Commissioners* [1997] 4 All ER 395, where the Court of Appeal held that the purported grant of a lease by a nominee to his principal was of no effect since a person could not contract with himself.

In the present case, Jake and Arnold have granted a lease to Jake alone. This is permissible under s. 72(4) of the 1925 Act and the lease cannot, therefore, be attacked on this ground.

Crucial to the existence of a valid lease is the requirement that the term of the lease is for a certain or an ascertainable period. A classic illustration of this doctrine is to be found in the case of *Lace v Chantler* [1944] KB 368, where a tenancy 'for the duration of the war' was held invalid as being for an uncertain term. It is interesting to observe that there was, in fact, an exchange of a weekly sum in that case and, consequently, the court was able to infer the existence of a weekly periodic tenancy independently of the void lease at law. (The case, in fact, prompted the enactment of the Validation of War Time Leases Act 1944, which rendered such leases valid as leases for 10-year terms determinable by a month's notice on either side given after the end of hostilities as fixed by Order in Council.) The current leading authority is *Prudential Assurance Co. Ltd v London Residuary Body* [1992] 3 WLR 279, in which the House of Lords, overruling *Re Midland Railways Co.'s Agreement* [1971] Ch 725, re-affirmed that the doctrine applies to both fixed and periodic tenancies.

If the 2004 lease is void for uncertainty of term, Jake will be in a position to claim that there exists (between himself and the partnership) a less onerous monthly periodic tenancy arising by implication of law from the payment and acceptance of a monthly rent. (See *Adler v Blackman* [1946] 1 QB 146, where the landlord granted a one-year term at a rent of £2 per week. On the expiry of the fixed term the tenant held over, continuing to pay £2 a week. It was held that the tenant was a weekly tenant.)

Such a periodic tenancy will be valid at law (despite the absence of a deed or writing) because it will fall within the Law of Property Act 1925, s. 54(2), which applies to leases taking effect in possession for a term of less than three years (this includes periodic tenancies: *Re Knight, Re ex parte Voisey* (1882) 21 Ch D 442) at the best rent obtainable.

Is, however, the 2004 lease void for uncertainty of term? The doctrine of certainty of term dictates that the maximum period for which a lease is to run must be calculable with certainty. In the *Prudential* case (see above) the landlords demised the land until such time as it was required by the landlords for the purposes of widening the

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highway. The House of Lords held that no estate in land had been granted because the purported lease was uncertain as to duration. However, in view of the tenant's entry into possession of the land and payment of a yearly rent, the court was able to infer the creation of a yearly tenancy on such terms as were not inconsistent with the void lease at law. (See also, *Doe d Warner v Browne* (1908) 8 East 165 and *Doe d Rigge v Bell* (1793) 5 Durn & E 471.)

In the present case, the 2004 lease provides that Jake should be entitled to exclusive possession of the premises 'for five years, or in any event until such time as the Communicate Associates partnership . . . shall cease to exist'. If the term granted was simply for five years, the lease would, undoubtedly, be certain as to its duration as from the outset and, hence, valid. However, the additional words 'or in any event until such time as the . . . partnership shall cease', render the lease uncertain as to its maximum duration since it is unknown when the partnership (and hence the lease) will end. The lease is, therefore, void for uncertainty. (If the lease was expressed in terms of a five-year term, subject to a power of the landlord to determine earlier upon the partnership ceasing during the term, this would be valid because from its outset the maximum duration of the lease would be certain (i.e., a determinable certain term of five years).

Assuming, therefore, that the monthly tenancy governs the relationship between Jake and the partnership, Jake is under no obligation to pay the higher rent under the void lease since this would be inconsistent with the terms of the periodic tenancy.

Q Question 4

To what extent does the doctrine of certainty of term apply to periodic tenancies? What is the 'doctrine of repugnancy' in this context? (Illustrate your answer by reference to the decided cases.)

Commentary

The doctrine of certainty in relation to periodic tenancies was discussed by the House of Lords in *Prudential Assurance Co. Ltd v London Residuary Body* [1992] 3 WLR 279. For a good summary of the law of certainty of term in the context of the *Prudential* case, see Biles, M., 'One Thing is Certain and the Rest is Lies' (1994) NLJ, 4 February, 156.

- Application of certainty of term doctrine to periodic tenancies — decision in *Re Midland Railway* (1971) overruled in *Prudential Assurance* (1992)
- Periodic tenancy saved from uncertainty because each party has power by notice to quit to determine at the end of any period of the tenancy

- **Doctrine of repugnancy prohibits a total fetter on either party's right to serve notice to quit:** *Centaploy Ltd v Matlodge Ltd* (1974) and *Cheshire Lines Committee v Lewis & Co* (1880)
- **Partial fetters, however, not considered to be repugnant:** *Re Midland Railway* (1971). Ultimately, it is a matter of construing the lease: *Breams Property Investment Co. Ltd v Stroulger* (1948)

Suggested answer

The common law has always required that, for a lease to be valid, its maximum duration must be ascertained, or ascertainable, at the time when it comes into effect. The famous case on this point is *Lace v Chantler* [1944] KB 368, where the Court of Appeal ruled that a lease which had been granted 'for the duration of the war' was void for uncertainty.

The doctrine appears to come unstuck when applied to periodic tenancies where, in reality, the maximum duration is not clear from the outset and simply depends on when, or whether, one of the parties serves a notice to quit. An illusion of certainty can be achieved, however, by arguing that the maximum term is ascertainable in that its duration can be fixed by an act of one of the parties. The difficulty with this approach is that the right of one (or both) of the parties to serve notice may be contractually tied to an event which may or may not happen. In *Re Midland Railway Co.'s Agreement* [1971] Ch 725, the Court of Appeal recognised this difficulty and concluded that the requirement of certainty of term had no direct relevance to periodic tenancies.

This view, however, was exploded by the House of Lords in *Prudential Assurance Co. Ltd v London Residuary Body* [1992] 3 WLR 279. In this case, the House of Lords, overruling the *Re Midland Railway* case on this point, held that it was a requirement of *all* leases and tenancy agreements that the term created was of certain duration. Lord Templeman, who gave the leading speech, reasoned that a periodic tenancy is saved from being uncertain because each party has power by notice to determine at the end of any period of the tenancy. The relevant term continues until determined as if both parties made a new agreement at the end of each period for a new term for the next ensuing period. It is interesting to note, however, that Lord Browne-Wilkinson observed that no satisfactory rationale for the rule existed and expressed the hope that the Law Commission would look at the subject afresh to see whether there was, in fact, any good reason for maintaining the rule which operates to defeat in many cases the contractually agreed arrangements between the parties. In the *Prudential* case itself, the parties had, in fact, intended to create a lease on terms that it should continue until the subject land was required by the landlord for the purposes of the widening of a highway. In the result, this purported lease was held void for uncertainty and the land was deemed to be held on a yearly tenancy created by virtue

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of the tenant's possession and payment of a yearly rent. Moreover, since the term preventing the landlord from determining the tenancy until the land was required for road widening purposes was inconsistent with the right of either party under a yearly tenancy to terminate it on notice, it was considered repugnant to such periodic tenancy and of no effect.

The doctrine of repugnancy is closely related to the rule regarding certainty of term. The basic proposition is that a clause totally precluding a party from determining a periodic tenancy is repugnant to the nature of such a tenancy and void. A leading case is *Centaploy Ltd v Matlodge Ltd* [1974] Ch 1, where an agreement to let a garage contained the following words: 'Received the sum of £12, being one week's rent . . . and to continue until determined by the lessee . . .' Whitford J held that the document provided for a weekly tenancy and, although the term making the tenancy determinable only by the lessee did not make the periodic tenancy thus created void for uncertainty, nevertheless, a term whereby a landlord would never have the right to terminate a periodic tenancy was repugnant to the nature of such a tenancy and void. The practical significance of this finding was that, despite the terms of the agreement, the landlord was free to serve a notice to quit on the tenant bringing the weekly tenancy to an end.

A partial fetter, however, on the right to serve a notice to quit will not be considered as repugnant to the grant of a periodic tenancy. Thus, in *Re Midland Railway Co.'s Agreement* (above), it was suggested by Russell LJ (at p. 733) that a curb for 10, 20 or 50 years should not be rejected as repugnant to the concept of a periodic tenancy.

In *Cheshire Lines Committee v Lewis & Co.* (1880) 50 LJ QB 121, the claimants, a railway company, let premises to the defendants on a weekly tenancy to be determined by a week's notice on either side. The parties entered into a collateral agreement that the tenant could occupy the premises 'until the railway company require to pull them down'. The Court of Appeal held that this collateral agreement was void as being repugnant to a periodic tenancy. The case may be contrasted with *Breams Property Investment Co. Ltd v Stroulger* [1948] 2 KB 1, where various agreements for quarterly tenancies contained a clause to the effect that the landlords would not, during the period of three years from the beginning of the tenancies, serve notice to quit on the tenants except in the event of the landlords requiring the premises for their own occupation and use. The Court of Appeal held that, as the clause merely attached a condition to the quarterly right to give notice (by suspending it during the first three years of the tenancies except in the event of the landlords requiring possession for their own use), it was not repugnant to the nature of a quarterly tenancy. In effect, the doctrine of repugnancy was side-stepped by construing the lease in a particular way.

Q Question 5

In January 2003, Leisure Car Parks Ltd (Leisure) entered into a written agreement with Goodtown Developments Co. Ltd (Goodtown) to operate a car park adjacent to a shopping precinct in Banbury, Oxfordshire. The agreement was headed 'Licence Agreement' and, by its terms, Leisure agreed to pay to Goodtown, in respect of this right, a percentage of its net profits earned from the business. Clause 2 thereof provided that the agreement would continue in force from year to year until determined by either party upon two months' written notice.

Clause 4 provided: 'This licence is not intended by either party to confer upon the licensee any right or interest in the nature of a tenancy and gives no proprietary right or interest to the licensee in the licensed premises.'

Clause 7 provided: 'The licensee shall not to impede in any way the exercise of any of the licensor's rights of possession and control in respect of the licensed premises.'

Clause 8 provided: 'The licensee shall indemnify the licensor against occupier's liability and shall contribute to the cost of security in respect of the licensed premises provided by the licensor.'

Earlier this year, Goodtown gave Leisure two months' notice in writing terminating the agreement. Leisure contends that the notice is ineffective because, upon its true construction, the agreement created a tenancy protected by Pt II of the Landlord and Tenant Act 1954. Advise Leisure.

Commentary

This is a relatively straightforward question as to whether the agreement, upon its true construction, constitutes a tenancy or a licence. It will require you to examine the House of Lords' ruling in *Street v Mountford* [1985] AC 809, as well as subsequent case law, in particular, *Shell-Mex & BP Ltd v Manchester Garages Ltd* [1971] 1 WLR 612, *Esso Petroleum Co. Ltd v Fumegrange Ltd* [1994] 2 EGLR 90 and, most recently, *National Car Parks Ltd v Trinity Development Co. (Banbury) Ltd* [2001] 2 EGLR 43 (affirmed on appeal: (2001) EWCA Civ 1686). The key to answering this question well is to focus not only on the actual terms of the agreement, but also on what the agreement does not say!

- Consider the test of exclusive possession put forward in *Street v Mountford* (1985). Does the agreement, upon its true construction, confer exclusive possession?
- The agreement does not reserve any right of entry, nor contain any covenant for quiet enjoyment or repair. Significantly also, there is no power of re-entry (forfeiture) upon breach by the grantee, normally to be found in a tenancy: *Shell-Mex & BP Ltd v Manchester Garages Ltd* (1971)

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- **Clause 7 not a reservation of rights in favour of grantor but consistent with Goodtown retaining possession and control of the property: *Esso Petroleum Co. Ltd v Fumegrange Ltd* (1994). Consider the factual matrix**
- **Clauses 4 and 8 consistent with a licence agreement. Express statements of intention relevant if consistent with the agreement as a whole: *National Car Parks Ltd v Trinity Development Co. (Banbury) Ltd* (2001)**

Suggested answer

There is no doubt that the agreement is for a periodic term and at a rent. (Although the word 'rent' is not used in the agreement, the provision for the payment of a percentage of the net profits in consideration of operating the car park will be treated as rent.) The central issue, therefore is whether, upon its true construction, the agreement grants Leisure exclusive possession of the car park — if it does, it will qualify as a tenancy. If not, it will rank merely as a licence. Ultimately, this is a question of law: *Street v Mountford* [1985] AC 809.

Although clause 4 indicates the intention of the parties not to create a tenancy, this is by no means conclusive. What must be considered is the *legal* effect of the agreement and not what the parties expressed themselves as intending to make. The correct approach, therefore, is to consider the substance rather than the form of the document so that the actual labels put upon the agreement will not be determinative. The fact, therefore, that the agreement is headed a licence agreement and that the parties are referred to as licensor and licensee will not (by themselves) materially assist in determining the true nature of the parties' contract. Instead, the agreement as a whole must be looked at in order to see what indications can be found pointing towards either a tenancy or licence.

Crucial to this approach is the requirement that a tenancy must confer exclusive possession on the occupier. Exclusive possession has been defined as the ability on the part of the tenant to exclude all persons, including the landlord, from the demised premises: *Essex Plan Ltd v Broadminister* [1988] 2 EGLR 73. In this connection, I note that the agreement does not contain any reservation of rights of entry onto the car park in favour of the grantor, Goodtown. This is significant in so far as the reservation of such rights is usually indicative of a tenancy — such rights of entry would be unnecessary if the grantor had an unrestricted right of access apart from the agreement: *Addiscombe Garden Estates Ltd v Crabbe* [1958] 1 QB 513. Clause 7 of the agreement, in my view, simply reinforces the tenor of the agreement (in particular, clause 4) that Goodtown has retained rights of possession and control over the property in question which the grantee is obliged not to impede. This clearly points to the agreement being a licence since the document is consistently framed so as not to give Leisure exclusive possession.

It is also significant that the agreement does not contain any term for quiet enjoyment of the premises enjoyed by the grantee, Leisure. This too is consistent with the agreement being a licence since a covenant for quiet enjoyment presupposes that the occupier has exclusive possession of the property. Nor, for that matter, is there any provision requiring Leisure to repair and maintain the property consistently with a tenancy: *Delneed v Chin* [1987] 1 EGLR 75. Perhaps, most importantly of all, there is no mention in the agreement of a right of re-entry upon Leisure's breach of any of the terms of the agreement. Here again, a right of re-entry (or forfeiture) is consistent with a tenancy and wholly inappropriate in the context of a genuine licence: *Shell-Mex & BP Ltd v Manchester Garages Ltd* [1971] 1 WLR 612, *per* Buckley LJ at 618.

Clause 7 of the agreement is, in my view, indicative of the degree of control that Goodtown has effectively retained over the premises despite the conferment of the right to operate the car park in favour of Leisure. Although it is apparent that Leisure is to manage and administer the car park during the currency of the agreement, it is also clear that, in all other respects, Goodtown has retained rights of possession and control over the site. In *Esso Petroleum Co. Ltd v Fumegrange Ltd* [1994] 2 EGLR 90, for example, involving the occupation of two service stations, the licence agreement referred to the owner's 'right of possession and control of the service station' and required the occupier not to impede in any way the exercise of that right. These rights were held to be quite inconsistent with an exclusive right to possession of the stations. In particular, the degree of physical control by the owner was very significant. The owner could make alterations to the premises, install a car wash (as was in fact done at one of the stations) and make changes to the layout of the occupier's shop. These rights and powers of the owner were looked at together and cumulatively and were wholly inconsistent with the grant of a tenancy. Both the terms of the agreement in that case and the surrounding factual matrix pointed to that conclusion. (See also, *McCarthy v Bence* [1990] 1 EGLR 1, where the owner took a 'keen and positive interest' in the land occupied by the licensee.)

Ultimately, therefore, the question is whether Leisure has been granted a right to keep out Goodtown. It is significant that no language is used in the agreement that assumes Leisure's right of exclusive possession. In fact, the document does not in form grant Leisure any rights at all. It simply imposes obligations, including an obligation to operate the car park and to account for a percentage of the net profit. Most significantly, however, as mentioned earlier, it includes an obligation on Leisure not to impede Goodtown's right to possession and control of the premises. Interestingly, in a case involving a similarly worded agreement, both the judge at first instance and the Court of Appeal held that the absence of any conferment of exclusive possession was fatal to the agreement being treated as a tenancy: *National Car Parks Ltd v Trinity Develoment Co. (Banbury) Ltd* [2001] 2 EGLR 43: affirmed on appeal at [2001] EWCA Civ 1686. In that case also the agreement expressly stated that it was not intended to confer any rights in the nature of a tenancy and that the occupier would not impede

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the owner's right to possession and control of the property. The court found that this indicated that the grantor had retained possession of the premises as opposed to granting exclusive possession with retained rights of access. This was despite the fact that the occupier in that case was obliged under the agreement to provide maintenance, insurance and security for the premises, which were all factors not inconsistent with a tenancy.

Turning to clause 4 and 8 of the agreement, these are clearly consistent with the view that Leisure has no right to exclusive possession. On this point, the Court of Appeal in the *National Car Parks* case held that *Street v Mountford* had not ruled out the possibility of examining clauses that expressly stated that the agreement was a licence. Such statements were relevant if they reflected what was in the minds of the parties when the agreement was made. Clauses 4 and 8 do not, therefore, fall to be ignored if they are consistent with the parties' agreement as a whole.

Finally, reference may be made to *Dresden Estates Ltd v Collinson* [1987] 1 EGLR 45, where the Court of Appeal, applying the *Addiscombe* decision, concluded that the inclusion of a term stating that exclusive possession was not granted, together with the right to move the occupier to other premises, were strong indications pointing towards a licence. In that case, unlike here, there were also a number of provisions normally found in tenancies (in particular, the grant of a limited right of way for the owners to enter for the purpose of carrying out work) which pointed to a tenancy. The task of the court was, therefore, made more difficult in view of the fact that there was a conflict in the agreement between provisions suggesting a tenancy and those pointing to a licence. The Court of Appeal, however, looking at the agreement as a whole, concluded that the indications were in favour of a licence. In particular, the provision by which the occupier could be required to move to other premises was considered wholly inconsistent with a right to exclusive possession.

In the instant case, my view is that all the provisions of the agreement point clearly in favour of a genuine licence so that, regrettably, Leisure has no protection under the 1954 Act as a business tenant.

Further reading

Bright, S., 'Exclusive Possession, True Agreement and Tenancy by Estoppel' (1998) 114 LQR 345.

Bright, S., 'Leases, Exclusive Possession and Estates' (2000) 116 LQR 7.

Haley, M., 'Licences of Business Premises: Principle and Practicality' [2001] 65 Conv 348.

- Harwood, M., 'Leases: Are They Still Not Really Real?' [2000] LS 503.
- Morgan, J., 'Whether a Licence Agreement is a Lease: The Irrelevance of the Grantor's Lack of Title' [1999] 63 Conv 517.
- Morgan, J., 'Exclusive Possession and the Tenancy by Estoppel: "A Familiar Problem in an Unusual Setting"' [1999] 63 Conv 493.
- Pawlowski, M., 'Contractual Intention and the Nature of Leases' (2004) 120 LQR 222.
- Pawlowski, M. and Greer, S., 'Leases, Licences and Contractual Tenancies' (2000) 9(1) Nott LJ 85.
- Pawlowski, M., and Brown J., 'Bruton: A New Species of Tenancy?' (2000) 4 L & T Rev 119.
- Richards, E., 'Tenancy Tests' (2001) SJ 1088.
- Wilkinson, H.W., 'The Lease-licence Distinction Again?' (2001) NLJ 1489.