

Chapter 19

Question 1: If A makes a contractual agreement to allow B to occupy land, why might B want to claim that the agreement gives him or her a lease?

The best way to approach this question it is to compare the effects of B's having a lease with the effects of B's having a licence. First, if B has a lease, this can give B particular rights against A, in addition to the rights that A has expressly agreed to give B. For example, in *Street v Mountford*, the House of Lords found that Mrs Mountford (B) had a lease: as a result Mr Street (A) was under certain statutory duties to Mrs Mountford. Those duties would not have arisen had the agreement between A and B given B a contractual licence. Moreover, if B has a lease, then B, unlike a licensee, is in a landlord-tenant relationship with A: the consequences of this, many of which benefit B, are examined in detail in Chapter 21.

Second, if B has a lease of A's land as a result of a contractual agreement with A, then B has a property right in A's land. This gives B important additional protection against third parties. As shown by the decision of the House of Lords in *Hunter and others v Canary Wharf Ltd*, if B has a lease, B may be able to sue a third party in nuisance if that third party interferes with B's enjoyment of land; but no such nuisance action will be available to B if B has only a contractual licence. Further, a lease, unlike a contractual licence, is capable of binding a third party who later acquires A's land.

Question 2: In *Street v Mountford*, the House of Lords held that A's contractual agreement with B can give B a lease even if A clearly did not intend the agreement to have that effect. Can that aspect of the decision be defended, either from a doctrinal or policy perspective?

In the extracts set out in section 2.1, each of Street and Hill expresses concerns about the approach of the House of Lords. Nonetheless, it may be possible to defend the decision. First, Hill suggests that a policy in favour of protecting vulnerable occupiers, who are not in practice free to negotiate the terms of their occupation, may mean it is 'reasonable to look at the lease/licence distinction from the consumer law perspective rather than purely as an aspect of the law relating to real property'. Second, McFarlane suggests a doctrinal argument in favour of the decision, pointing out that it simply returns to the traditional test for a lease: if A gives B a right to exclusive possession of land for a limited period, then B has a lease even if A intended to give B some other type of right.

Question 3: In *Antoniades v Villiers*, the House of Lords, in deciding that Mr Villiers and Miss Bridger had a joint right to exclusive possession, disregarded a term in an agreement signed by both Mr Villiers and Miss Bridger. Can that aspect of the decision be defended, either from a doctrinal or policy perspective?

In *Antoniades v Villiers*, the House of Lords held that Mr Villiers and Miss Bridger had a joint right to exclusive possession, even though a term of their agreement with Mr Antoniades stated that he had a right to force Mr Villiers and Miss Bridger to share occupation of the flat with further occupiers. In effect, that term was ignored in deciding if the agreement gave the couple a joint right to exclusive possession of the flat.

It may be possible to defend the decision on policy grounds. Lord Templeman noted that, if the term in question prevented the couple from having a lease, it would be very easy for a party such as Mr Antoniades to deny an occupier the statutory protection given, by the Rent Acts, to those with a lease. From this perspective, the decision in *Antoniades* can perhaps be seen as part of the 'consumer protection' approach discussed in the answer to Question 2 above. This view raises the question of whether the *Antoniades* approach is still relevant today, given that the Rent Acts no longer apply to new tenancies, and very little statutory protection is now given to residential tenants renting from private landlords.

It may also be possible to defend the decision on doctrinal grounds. One means to do so is to argue that the decision is not dependent on a special policy applying to residential occupiers, but instead flows from a general principle that states that apparent contractual terms have no effect if they are 'pretences': that is, if neither

party intends that the term will, in practice, be enforced. This argument is made by Bright in the extract set out in section 2.4. That approach is doubted by McFarlane & Simpson: as seen from the extract in the same section, they do not accept that there is a principled basis for the 'pretence' test. Nonetheless, they suggest a different doctrinal justification for the particular decision in *Antoniades*: as suggested in Lord Oliver's speech, it may be that, due to the very cramped nature of the flat, it simply was not reasonable for Mr Antoniades to believe that the couple were genuinely agreeing to share occupation with a further occupier.

Question 4: In *AG Securities v Vaughan*, the House of Lords assumed that it is impossible for B1 and B2 to acquire a lease as tenants in common. Is that assumption correct?

The difficulties arising where multiple occupiers claim a lease are discussed in section 2.5. For example, as shown by *Mikeover v Brady*, if B1 and B2 wish to claim that they have a lease from A, they need to show that they have unity of possession; unity of interest; unity of time; and unity of title. This is due to the assumption, made by the House of Lords in *AG Securities v Vaughan*, that it is not enough for B1 and B2 simply to show that they have unity of possession, and are thus tenants in common of a lease.

In the extract set out in section 2.5, Sparkes suggests that the assumption is mistaken: there is no doctrinal reason why B1 and B2 should have to show anything more than unity of possession. As also seen in section 2.5, Smith and McFarlane each take the opposite view, each for different reasons. It is also important to consider the issue from the policy perspective: it may seem strange that, given the support for occupiers shown by the decisions in *Street v Mountford* and *Antoniades v Villiers*, a technical approach should be taken to deny a lease in a case such as *Mikeover v Brady*.

Question 5: Are there any genuine exceptions to the rule that, if A gives B a right to exclusive possession of land for a limited period, B has a lease?

As noted by Millett LJ in the extract from set out in section 2.8, Lord Templeman, in *Street v Mountford*, set out a number of situations in which B has a right to exclusive possession of A's land, but does not have a lease. These situations were described by Lord Templeman as exceptions to the general rule that exclusive possession constitutes a lease. Millett LJ, however, queries whether all these situations are true exceptions to the rule. Certainly, it may be that some of the cases can be explained by the fact that a lease consists of exclusive possession of land *for a limited period*; and that some other cases depend on the fact that, for a lease to exist, B must have a *right* to exclusive possession of A's land. On this view, it may be that the cases of a charitable or service occupier are the only true exceptions; and it can be argued that those exceptions should be rejected.

Question 6: What is the effect of the Supreme Court's decision in *Berrisford v Mexfield* on the rule that a lease must be for a limited period?

It should be noted from the outset that the Supreme Court was not invited to discard the rule that a lease must have a maximum duration, ascertainable from its outset: therefore the traditional rule, applied in *Prudential Assurance v London Residuary Body*, has been fully retained. However, several Justices expressed their views as to the rule's lack of merit, and so future statutory or judicial reform is a possibility.

The real significance of the case is not as to the rule itself, but is rather as to the consequences of applying the rule. Given that the purported lease was void for uncertainty, the consequence appeared to be that Mrs Berrisford only held an implied periodic tenancy, and therefore Mexfield could refuse to renew that tenancy and evict Mrs Berrisford. Instead, the Supreme Court found a way to avoid this seemingly unjust result. First, the Supreme Court decided that, applying a common law principle which existed before LPA 1925, Mrs Berrisford's right was a right to exclusive possession for life. Secondly, the Supreme Court applied section 149(6) of LPA 1925, which transformed Mrs Berrisford's lease for life into a lease for 90 years, determinable only on her death, or on the grounds set out in her agreement with Mexfield. As none of those grounds applied, Mexfield was not entitled to evict Mrs Berrisford. The decision significantly affects the consequences of a purported lease being void for uncertainty. However, it is important to note that this solution only applies where the tenant is a

natural person. The case therefore provides no assistance if a lease with an uncertain term is granted to a company. It is also important to note that this solution is of no use to the tenant where the original tenant has died, since the landlord would in any case have the right to end the lease. These points mean that the decision may well be a prompt for legislative reform, and such reform could, in principle, attack the basic rule that a lease must be for a certain term.