

What is a Personal Tenancy?

Mark Pawlowski looks at the non-proprietary nature of a tenancy

IN BRIEF

- ▶ Property as a relative concept.
- ▶ The recent trend towards the loosening of the categories of proprietary entitlement within leasehold law.
- ▶ Criticisms of the *Bruton* ruling.

The concept of property is elusive. To most property lawyers, it is the 'twin indicia of assignability of benefit and enforceability of burden' which provide the hallmarks of a right of property (see K Gray and S Gray, *Elements of Land Law*, (2009, 5th ed.), at 96-97). At the same time, however, the authors highlight the inherent circularity of this approach since 'if naively we ask which entitlements are "proprietary", we are told that they are those rights which are assignable to and enforceable against third parties. When we then ask which rights these may be, we are told that they comprise, of course, the entitlements which are traditionally identified as proprietary'.

Interestingly, K Gray poses an alternative definition, namely, that property consists primarily in 'control over access' and that 'propertiness is represented by a continuum along which varying kinds of "property" status may shade finely into each other' (see, K Gray, *Property in Thin Air*, [1991] CLJ 252, at 296). This suggests that the concept of property is not absolute, but relative depending on the extent to which control over access is afforded legally-enforceable protection. Ultimately, therefore, it is the degree of *excludability* of others from enjoyment of the land which determines the 'propertiness' of property.

This understanding of property (as a relative concept on a continuum) provides theoretical justification for the recent trend towards the loosening of the categories of proprietary entitlement within leasehold law. More significantly, the House of Lords in *Bruton v London & Quadrant Housing Trust* [2000] 1 AC 406 [1999] 3 All ER 481, has adopted the view that a tenancy is no more than a consensually binding agreement between the parties, which will only give rise to a proprietary interest in land if the grantor himself has a sufficient interest out of which he has granted it. In the absence of such interest, the parties' rights are purely personal and the hybrid (contractual) tenancy binds only the immediate grantor but not third parties. This was later confirmed by

the Court of Appeal in both *Kay v Lambeth London Borough Council* [2004] EWCA Civ 926 [2004] All ER (D) 344 (Jul) and *London Borough of Islington v Green and O'Shea* [2005] EWCA Civ 56 [2005] All ER (D) 184 (Jan)—a personal tenancy granted by someone with no more than a licence to use property is binding on that person (as licensee), but not on the licensor (the freeholder) who is not a party to the contractual tenancy.

It is apparent from the foregoing that some leases will be proprietary, while others may be purely personal. The former will confer exclusive possession against the whole world, while the latter will bind only the immediate landlord and confer no exclusivity of possession against persons with a superior title. Although, no doubt, this reasoning accords with the more radical approach to the meaning of property as 'control over access', it does raise fundamental questions concerning the legal distinction between different categories of property entitlement.

Criticism

One of the main criticisms that can be levelled against the *Bruton* ruling is the lack of focus on the extent to which the contractual freedom of landlord and tenant is necessarily limited by reason of the inherent nature of a lease. The point was judicially recognised in *PW & Co v Milton Gate Investments Ltd* [2003] EWHC 1994 Ch, where Neuberger J held that, despite the parties' contractual intentions, the termination of a headlease (on the service of a break notice) lead inevitably to the destruction of any subtenancy unless the determination was by consensual arrangement (ie surrender). His Lordship's primary reason for reaching this conclusion lay in, what he described as, 'the tenorial nature of a lease'. Thus, just as a tenant could not grant a subtenancy for a term equal to or greater than his subtenancy, so a tenant could not effectively agree with his landlord that any subtenancy will survive the expiry of the headlease according to its terms.

Two important themes emerge from His Lordship's analysis, namely, that:

- (1) the relationship of landlord and tenant depends fundamentally on privity of

estate (as opposed to merely privity of contract); and

- (2) the parties' ability to contract freely in the leasehold context is qualified by the nature of the lease itself. Unfortunately, neither of these two fundamental propositions feature in the *Bruton* ruling which, as we have seen, propounds the notion that a tenancy need not necessarily have any proprietary characteristics and that the rights of the parties may be governed exclusively by contractual agreement. If the *Bruton* tenancy is to be characterised as proprietary (in the non-conventional sense) conferring limited powers of excludability against the immediate landlord, how is this type of 'property' to be distinguished from the occupational rights of a contractual licensee? Is the *Bruton* tenancy not simply the conferment of exclusive occupation (ie a contractual licence) by another name?

Conclusion

The problem, however, is not just a conceptual one. There may also be practical implications. In *Bruton*, the upshot of a finding of a 'tenancy' in Mr *Bruton*'s favour was that he was entitled to the enforcement of the landlord's implied covenants under s 11 of the Landlord and Tenant Act 1985. Presumably, other landlord and tenant statutes will benefit the *Bruton* tenant in this context. In this connection, it is implicit in the *Green* decision that a personal tenancy will attract statutory security of tenure, rent control, succession rights, etc, under the housing legislation.

The danger here is that courts may be forced to accept (albeit unwittingly) that this type of legislation, originally aimed at tenants in the orthodox sense, is now also available to other residential occupants enjoying purely personal rights against their immediate landlords. If the contractual licence has now become synonymous with the personal tenancy, this seems an inevitable conclusion.

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