

Personal and proprietary tenancies

Mark Pawlowski asks whether a Bruton tenancy can bind third parties



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'A personal tenancy granted by someone with no more than a licence is binding on that person (as licensee), but not on the licensor (the freeholder), who is not a party to the contractual tenancy.'

Few property lawyers would argue with the general proposition that a tenancy creates a property interest in land. After all, a lease is an estate in land and, like the freehold estate, generates a legal right to exclusive possession of land binding against the whole world. This proposition, however, was modified in *Bruton v London & Quadrant Housing Trust* [2000], where the House of Lords ruled that a tenancy is no more than a consensually binding agreement between landlord and tenant. That tenancy will only give rise to a proprietary interest in land if the grantor itself has a sufficient interest, out of which it has granted the proprietary interest. If, therefore, as in *Bruton*, the grantor is itself a licensee with no legal title to the land, it cannot grant a leasehold estate and the so-called 'tenant' holds only a personal tenancy that binds only the immediate landlord.

The notion that some leases will be proprietary while others may be purely personal has been highlighted recently in *London Development Agency v Nidai & ors* [2009], where the purely personal nature of the tenancy was held to prove fatal to a claim to possession brought by the freehold owner of the land.

Third parties

Strictly speaking, the question whether this form of personal tenancy binds third parties was left open in *Bruton*, although Sir Brian Neill (in his dissenting judgment in the Court of Appeal) did conclude that the

tenancy Mr Bruton had acquired in that case against the Housing Trust would not have affected the rights of the Council as freeholder. The point was addressed post-*Bruton* in *Kay v Lambeth London Borough Council* [2004] and *Islington London Borough Council v Green and O'Shea* [2004]. In both of these cases, the Court of Appeal confirmed that a personal tenancy granted by someone with no more than a licence is binding on that person (as licensee), but not on the licensor (the freeholder), who is not a party to the contractual tenancy.

More recently, the House of Lords in *Kay v Lambeth London Borough Council* concluded that a *Bruton* subtenancy does not survive the surrender of a head tenancy made between the immediate landlord and the freeholder. Because the personal subtenancy is not a derivative interest created by the immediate landlord out of the estate created by the freeholder, a surrender of the head tenancy will not turn the *Bruton* tenant (with only personal rights against their immediate landlord) into the freeholder's tenant, or give them any rights against the freeholder.

The notion, therefore, that a *Bruton* tenancy does not bind third parties is now firmly rooted in the case law.

Nidai: the facts

The claimant sought possession of two shops in Lewisham, London. The shops had been built over a river using a raft of reinforced joists which rested on the retaining walls of the river. Three agreements were

THIRD PARTIES

entered into between various parties in order to build the shops. The first (the bridge agreement) involved a bridge over the river and was made between certain individuals who were referred to as the licensees and the local authority. Under this agreement, consent was given for the erection and maintenance by the

owner at the time) granting a licence in respect of the land. This licence was later assigned to a company which (in 2002) granted a lease of one of the shops to the first defendant. In 2005 the third defendant took an assignment of a lease of the other shop granted by the company (in 2003) to the second defendant.

characterised as building leases (not licences). Alternatively, they claimed that the river agreement was not a bare licence but was a licence coupled with an interest in property. On this basis, the company, it was argued, had sufficient legal interest to confer exclusive possession on the first and second defendants, binding on the claimant.

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licensees of certain works and buildings over the river and in contact with the bridge. Under the second agreement (the retaining walls agreement), which concerned the retaining walls of the river, the local authority permitted the erection of the shops on the retaining walls. The third agreement (the river agreement) related to the span of the river itself, and involved the Earl of Dartmouth (the

In 2006 the claimant purchased the land from the Earl and sought possession of the shops, arguing that the company had only licences and, therefore, no legal title to grant the purported leases. The defendants responded by contending that the bridge agreement and retaining walls agreement conferred exclusive possession of the land and that, therefore, they should be

The ruling

The deputy judge concluded that neither the bridge agreement nor the retaining walls agreement had the necessary indicia of a legal lease in order to bind the claimant. Although both agreements reserved a rent, it was difficult to construe either as having been intended to create an interest in land and to grant exclusive possession of it. The bridge agreement was primarily concerned with the grant of permission to erect a structure which might interfere with the integrity of the bridge, and to regulate that arrangement. Similarly, the retaining walls agreement was simply to permit the erection of the premises

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on the retaining walls of the river. It was thus concerned with permission to use the retaining walls for support and to deal with their maintenance. At its highest, therefore, the agreement could only be characterised as a grant of an easement of support. So far as the river agreement was concerned, this too was only a bare licence, since it could not be construed as a licence coupled with a separate and distinct interest in land.

The deputy judge held that even if that conclusion were wrong, the claimant was still entitled to possession for two quite independent reasons. First, almost the whole of the premises comprising the shops was built on or over the air-space above the bed of the river. By contrast, the only rights in respect of the shops were vested in the company by virtue of the assignment of the river agreement, which related solely to the land directly above the retaining walls. The inevitable conclusion, therefore, was that neither of the defendants would be entitled to enter the premises which were the subject of their purported leases. Secondly, the company did not purport to grant a demise of the substructure of the shops (which was expressly excluded from the leases). Thus, even if the agreements were to be construed as leases, they would have no effect in relation to anything forming the subject-matter of the purported demise to the defendants.

Commentary

The outcome of *Nidai* was that any rights which the first and third defendants may have had to occupy the shops ceased when the claimant purchased the freehold of the land in 2006.

The ruling in *Bruton* is not mentioned in the judgment, presumably because it would not have availed the defendants to argue for a *Bruton* tenancy in this case since this would have bound only the grantor company and not the claimant third party. It was critical for the defendants to establish that they had proprietary interests in land and not just personal rights arising from contract. That said, it is apparent that both defendants had the benefit of 'leases' in the *Bruton* sense in so far as they were tenants regardless of whether the company had any legal

interest in the premises. This appears to have been common ground between the parties, although it is, perhaps, a little unfortunate that the deputy judge did not make specific reference to the relevance of *Bruton* in defining the legal status of the defendants more clearly. The conclusion in the judgment (at paragraph 51) that the company 'did not have an interest in land which entitled them to grant the leases' is correct only if interpreted to mean that the defendants did not have legal leases conferring exclusive possession capable of binding the whole world.

Another issue not specifically canvassed in *Nidai* is whether the *Bruton* tenancy has the potential to bind third parties as an interest capable of being overridden under

more relaxed formulation, personal rights of an occupier were not given overriding status: *Provincial Bank Ltd v Ainsworth* [1965]. In particular, a bare or contractual licence was held not to qualify: *Strand Securities v Caswell* [1965].

Although there is some scope for arguing that the *Bruton* tenancy creates some form of quasi-estate in favour of the tenant, the better view (particularly in the light of *Green*, above) is that the *Bruton* tenant has no estate of any kind in the land. If this is right, then there is no question of such a tenancy binding third parties with overriding status. Indeed, without any form of quasi-estate, there is nothing to distinguish this form of personal tenancy from a contractual licence. Like the contractual

Paragraph 2 of Schedule 3 to LRA 2002 confers overriding status on an 'interest' belonging to a person in actual occupation of the land.

paragraph 2 of Schedule 3 to the Land Registration Act (LRA) 2002. It has been held, for example, that an interest of a tenant under a mere agreement for a lease is an overriding interest under the former s70(1)(g) LRA 1925 if the tenant is in possession or in receipt of rent and profits: *Grace Rymer Investments Ltd v Waite* [1958], at 849, and *Greaves Organisation Ltd v Stanhope Gate Property Co Ltd* [1973].

Interestingly, the 'leases' in *Nidai* were granted to the first and third defendants in 2002 and 2003, respectively, while the Earl of Dartmouth's title to the land was first registered in 2004. The claimant third party, as mentioned earlier, bought the land in 2006. So is it conceivable that the *Bruton* (personal) tenancies would have bound the claimant, despite not being legal leases (in the orthodox sense of creating estate in land), on the basis that they had overriding status? Paragraph 2 of Schedule 3 to LRA 2002 confers overriding status on an 'interest' belonging to a person in actual occupation of the land. This wording differs from that contained in s70(1)(g) LRA 1925, which referred to the 'rights' of every person in actual occupation. Interestingly, however, even under this

licensee, the *Bruton* tenant has no power to create a proprietary estate out of the land or, for that matter, to carve out a subtenancy out of his own personal right of occupation: see *Goldsack v Shore* [1950], at 714 (contractual licensee held to have no power to create sub-licence). The *Bruton* tenancy simply becomes the conferment of exclusive occupation by another name. ■

Bruton v London & Quadrant Housing Trust [1999] UKHL 26

Goldsack v Shore [1950] 1 KB 708

Grace Rymer Investments Ltd v Waite [1958] Ch 831

Greaves Organisation Ltd v Stanhope Gate Property Co Ltd (1973) 228 EG 725, at 729

Islington London Borough Council v Green and O'Shea [2004] EWCA Civ 56

Kay v Lambeth London Borough Council [2004] EWCA Civ 926; [2006] UKHL 10

London Development Agency v Nidai & ors [2009] EWHC 1730 (Ch)

Provincial Bank Ltd v Ainsworth [1965] AC 1175

Strand Securities v Caswell [1965] Ch 958