Street v. Mountford – Reconsidered

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Law Reform Commissions often take years to analyse a legal problem, and consider a formula for change. On the other hand the House of Lords can take as little as two months. And, this was the time taken by the House in Street v. Mountford.[1] However in doing so, the decision of the House in that case reveals weaknesses that are likely to cause difficulty and hence litigation in the future. What the article[2] by the respondent reveals is that the non exclusive licence cases[3] were overturned despite little argument.[4] No doubt the House may wish to take an opportunity to make comment on related cases but it is putting an unnecessary burden on counsel when the cases are not germane to the dispute in question. Indeed in Street's case the respondent conceded that the agreement conferred on the appellant exclusive possession. Thus the decisions upholding the principle that non exclusive licence did not confer exclusive possession were quite irrelevant.

The implications of change are often more difficult to assess than the measure of difficulty in formulating the language of change. And this is clearly so in Street's case. Whilst the House is not bound by its own decisions, the decision in Street's case is presented as an unanimous decision and hence even obiter dicta may carry great weight. Hence in relation to the matters of contention and difficulty it may be many years before those difficulties are resolved: in the meantime a number of basic concepts are left in doubt.[5] If this be so, then it suggests that the decision reveals weaknesses in judicial techniques; and, this is a matter of concern.

Judicial technique

Quite early in the decision in Street's case is the statement "the traditional distinction between a tenancy and a licence lay in the grant of land for a term at a rent with exclusive possession."[5A] But this is inaccurate. And what is worse, it seeks to bolster its authoritarian presentation by asserting that the distinction maintained is traditional. If the distinction is not traditional then the whole basis for the decision may fall to the ground. And judgments, particularly judgments of the House of Lords, should be posited on an accurate research basis if they are to have respect. Of course the use of the word "traditional" may simply indicate from

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1. [1985] 2 All E.R. 289 (called "Street's case").
2. See Street. Coach and Horses Trip Cancelled? Rent Act avoidance after Street v. Mountford [1985] Con. 328 (called "The Article").
3. E.g. Somma v. Hazelhurst [1985] 2 All E.R. 289.
4. The Article at 332.
5. E.g. leases of easements.

5A. [1985] 2 All E.R. 289 at 292.

now on but then that is ignoring the value that the word formerly carried.[6]

The requirements of a lease were long ago set out in Shepherd's Touchstone[7] as being –

> "1. As in other grants, so is this, there must be a lessor, and he must be a person able, and not restrained to make that lease. 2. There must be a lessee, and he must be capable of the thing demised, and not disabled to receive it. 3. There must be a thing demised, and such a thing as is demisable. 4. If the thing demised be not grantable without a deed, or the party demising not able to grant without deed, the lease must be made by deed. And if so, then there must be a sufficient description and setting forth of the person of the lessor, lessee, and the thing leased, and all necessary circumstances, as sealing, delivery, & c. required in other grants, must be observed. 5. If it be a lease for years, it must have a certain commencement, at least then when it comes to take effect in interest of possession, and a certain determination, either by an express enumeration of years, or by reference to a certainty that is exprest, or by reducing it to a certainty upon some contingent precedent by matter *ex post facto*, and then the contingent must happen before the death of the lessor or lessee. 6. There must be all needful ceremonies, as livery of seisin, attornment, and the like, in cases where they are requisite. 7. There must be an acceptance of the thing demised, and of the estate, by the lessee. But whether any rent be reserved upon a lease for life, years, or at will, or not, is not material, except only in the cases of leases made by tenants in tail, husband and wife, and ecclesiastical persons."

It should be noted that there is no requirement that there be rent except in the limited circumstances and there is no reference whatsoever to exclusive possession.

Thus the statement of Lord Templeman[8] is neither traditional nor accurate. And it brings in question a previous decision of the House of Lords without reference to that decision. In Lord Hastings v. North Eastern Railway Co.[9] the plaintiff had agreed to lease the right to make a railway over the grantor's land and this was treated by Bryne J., as an incorporeal hereditament[10] and the plaintiff was entitled to recover against the defendant as successor of the grantee. In the Court of Appeal[11] Lindley M.R., confirmed there was an agreement to grant a lease and also stated in his opinion the judgment of Bryne J. was correct.[12] That judgment in turn was again upheld by the House of Lords.[13] The decision of the House proceeds on the basis that there was an agreement for a lease of an easement.[14]

6. Cf. Carrol, Alice in Wonderland, Chapter 6.
7. Page 267.
8. At 292 (see above).
9. [1898] 2 Ch. 674.
10. 678.
11. [1899] 1 Ch. 656.
12. At 665.
13. [1900] A.C. 260.
14. Particularly Earl of Halsbury, L.C., at 264/265. As to leases of incorporeal hereditament – see Bally v. Wells (1769) WILM. 341 1 H. & N. 817 (tithes); Martyn v. Williams (1857) (a profit to dig clay together with ancillary rights); Portmore (Earl) v. Bunn (1823) 1 B. & C. 694 (right to continue an open channel through the bank of the river); Norvel v. Pascoe (1864) 34 L.J. Ch. 82 (a right to mine); and Hooper v. Clarke (1867) L.R. 2 Q.B. 200 (right to shoot and take game).

There was no material available to the members of the House of Lords to suggest that the traditional requirements for a lease were those as stated by Lord Templeman with whom the other members agreed. Nor are those comments to-day valid unless Street's case is to be treated as overruling their Lordships previous decision in Lord Hastings v. North Eastern Railway Co.[15]

The traditional view of the requirements of a lease were sufficiently flexible to encompass leases of easements. And an easement as an incorporeal heraditament had to be capable of being the subject-matter of a grant in contradistinction being perfected by livery of seisin. A person was seised of an estate. An estate gave exclusive possession. An interest did not. The requirement that an easement be the subject-matter of a grant was the most significant requirement of an easement and basic to the distinction between a grant of an easement and a grant of an estate. As a grant of an estate usually involved exclusive possession, a grant of an easement must involve an element in contradistinction to the element of exclusive possession. And as an easement in terms that gave the grantee exclusive use of a passageway conferred "beyond all question passes the property or ownership in that land, and there was no easement known to law which gives exclusive and unrestricted use of a piece of land".[16] It follows that to create an easement there must be user in common with the owner of the land and with others to whom a grant of easement has been made and a lease of an easement cannot have one of its requirements that the grantee have exclusive possession of the site over which the grantee is to exercise the easement.

The traditional statement does not differentiate between leases of estates and of interests. And as there is nothing in the judgment of Lord Templeman to suggest that he was at the time aware of the distinction or the earlier decision of the House then some explanation or limitation has to be looked for. The opening statement of generality may have to be read in light of the numerous succeeding statements[16A] that the three requirements namely exclusive possession for a term at a rent relate to residential premises. But then the judgment as a matter of judicial technique is wanting. It asks that in relation to basic concepts an exception be made. This is not the function of the judiciary but of Parliament. The latter has the resources to consider the changes needed and the impact of those changes on other principles. In Street's case the House of Lords clearly did not.

Street's Case

So far it has not been necessary to consider the actual conflict in Street's case. But it is now necessary to do so if only to appreciate that it had little if no relevance to the sharing cases. In Street's case the owner entered into an arrangement in the following terms: —

15. [1900] A.C. 260.
16. Reilly v. Booth (1810) 44 Ch. D. 12, Lopes L.J., at p. 26.
16A. E.g. at 293.

'I Mrs Wendy Mountford agree to take from the owner Roger Street the single furnished room number 5 & 6 at 5 St. Clements Gardens, Boscombe, Bournemouth, commencing 7th March 1983 at a licence fee of £37 per week. I understand that the right to occupy the above room is conditional on the strict observance of the following rules: –

1. No paraffin stoves, or other than the supplied form of heating, is allowed in the room.

2. No one but the above-named person may occupy or sleep in the room without prior permission, and this personal licence is not assignable.

3. The owner (or his agent) has the right at all times to enter the room to inspect its condition, read and collect money from meters, carry out maintenance works, install or replace furniture or for any other reasonable purpose.

4. All rooms must be kept in a clean and tidy condition.

5. All damage and breakages must be paid for or replaced at once. An initial deposit equivalent to 2 weeks licence fee will be refunded on termination of the licence subject to deduction for all damage or other breakages or arrears or licence fee, or retention towards the cost of any necessary possession proceedings.

6. No nuisance or annoyance to be caused to the other occupiers. In particular, all music played after midnight to be kept low so as not to disturb occupiers of other rooms.

7. No children or pets allowed under any circumstances whatsoever.

8. Prompt payment of the licence fee must be made every Monday in advance without fail.

9. If the licence fee or any part of it shall be seven days in arrear or if the occupier shall be in breach of any of the other terms of this agreement or if (except by arrangement) the room is left vacant or unoccupied, the owner may re-enter the room and this licence shall then immediately be terminated (without prejudice to all other rights and remedies of the owners).

10. This licence may be terminated by 14 days written notice given to the occupier at any time by the owner or his agent, or by the same notice by the occupier to the owner or his agent.

Occupier's signature
Owner/agent's signature
Date 7th March 1983

I understand and accept that a licence in the above form does not and is not intended to give me a tenancy protected under the Rent Acts.

Occupier's signature.'

The owner conceded that the document conferred exclusive possession on Mrs. Mountford, but claimed that, consistent with recent authorities such as Marchant v. Charters,[17] the ultimate test was the form of the document. Thus a document that was in the form of a licence and acknowledged by the grantee as being a licence would be upheld as a licence.[18] But alas the House of Lords would have none of it. Generally it was said that exclusive possession at a rent for a term creates a lease although at one point this was watered down to the statement to "exclusive possession is of first importance in considering whether an occupier is a tenant: ex-

17. [1977] 3 All E.R. 918.
18. The Article at 329.

clusive possession is not decisive because an occupier who enjoys exclusive possession is not necessarily a tenant".[19] The principle, whatever it is, is subject to a number of qualifications. First an occupier is likely to be classified as a lodger if attendance or services is provided.[20] Secondly there must be intention to create a legal relationship.[21] Thirdly the transaction must not in fact be ancillary to and explicable by another greater transaction e.g. for example the sale of land.[22] Fourthly must not fall into exceptional circumstances cases cited by Denning L.J., in Errington v. Errington,[23] such as a requisitioning authority allowing people into possession at a weekly rent.[23A]

The sharing cases

Notwithstanding that the amount of argument addressed to their Lordships on the correctness or otherwise of the non-exclusive licence cases was very limited,[24] Lord Templeman in a single paragraph disapproved of three recent Court of Appeal cases upholding sharing cases as not creating tenancies. In Somma v. Hazelhurst[25] the owner permitted two persons who had been living together to occupy premises. But there were separate agreements with each. Each had to share the room in common with such other persons as the owner might from time to time nominate. If exclusive possession is of such a singular and significant element then no tenancy could be imputed, particularly in a dispute between the owner and one of the occupiers. But Lord Templeman after referring to the owner as landlord stated, "The agreements signed by H and S (as the occupiers) constituted the grant to H and S jointly of exclusive possession at a rent for a term for the purposes for which the room was taken and the agreement therefore created a tenancy."[26] Lord Templeman considered that the courts must be astute to detect and frustrate sham devices. But the question remains, did the fact that H and S were living together in quasi-connubial bliss have the effect of hard facts making bad law. Had for instance the accommodation been suitable for multiple occupancy, then an arrangement to the first person must surely reserve the owner a right to permit the second, and the third u.s.v. to occupy the premises. Can it really be

19. Street's case at 297g.
20. Street's case at 293g.
21. E.g. Issac v. Hotel de Paris Ltd. [1960] 1 All E.R. 340.
22. Street's case at 300d.
23. [1952] 1 K.B. 290.
23A. The others mentioned by Denning, L.J., are (1) when a landlord told a tenant on his retirement that he could live in a cottage rent free for the rest of his days, (2) when a landlord, on the death of the widower of a statutory tenant, allowed her daughter to remain in possession, paying rent for six months, (3) when the owner of a shop allowed the manager to live in a flat above the shop, but did not require him to do so, and the value of the flat was taken into account at £1 a week in fixing his wages.
24. The Article at 332.
25. [1985] 2 All E.R. 289; the other two were Aldrington Garages Ltd. v. Fielder (1978) 37 P & C.R. 461 and Sturlson v. Weniz (1984) 272 E.G. 326.
26. Street's case 299e.

suggested that this is a sham device when the licence fee is appropriate for one person?

Further the suggestion that, once there were two persons occupying, the occupation is to two persons jointly leaves unanswered the measure of liability on covenants unresolved. Are the persons jointly, severally, and jointly and severally liable? If furthermore saddles the first occupier with potential liability for a person with an unknown financial standing to be chosen by the owner. If the first occupier discharges the indebtedness of the second occupier (e.g. to preserve his right to occupy) because he is jointly liable, what rights has the first against the second in the absence of a contract between them? What has happened, if Lord Templeman be correct, is that without so much as the parties together convenanting with the owner they are to be treated as so doing. Further, when an occupier leaves there would need to be an accounting between the leaving and remaining occupiers and releases by all parties, otherwise long after an occupier has left the premises, the owner may seek to recover from him money due by his co-occupier and conceivably from a person with whom he was never a co-occupier.[27]

These difficulties can only be avoided by treating the dictum of Lord Templeman as obiter (as indeed it was). The only other satisfactory way is for Parliament to intervene in shared residential accommodation and to indicate the circumstances in which it applies (e.g. married or living together male and female in quasi-connubial bliss) and further the measure of the obligations if separate agreements are entered into. Parliament has more resources and time than the House of Lords and decisions that confuse and create difficulties are not welcome particularly where basic concepts are changed without explanation supported by reasons.

The Australian position

In giving judgment Lord Templeman relied on the decision of the High Court of Australia in Radaich v. Smith[28] and the judgment of Windeyer J., at 222, where, correctly, there is no mention of rent. That case concerned the occupancy of a milk bar. Dixon C.J. agreed with the other members of the Court. McTiernan J. said[29] that,

> "The preamble recites that the respondents are 'to carry on the business of a milk bar'. I think that such a business could only be carried on in reasonable convenience by persons having the exclusive possession of the premises."

27. For instance first A occupies then B. A leaves and C occupies A's place. If C does not pay the occupancy fee, then Lord Templeman would make B liable. But would he also make A liable because B is liable? Again hard facts make bad law.
28. (1959) 101 C.L.R. 209.
29. At 213.

This view was repeated by Taylor J. in the terms,

> "The character of the business was such that it could only be effectively carried on if the appellant had exclusive occupation and it seems clear that, even at times when they could not lawfully be kept open for the purposes of the business, the premises were to remain under effective control."[30]

Obviously the grantee needed to be able to ensure that the milk and premises at all times complied with the requirements of the appropriate legislation and terms of the licence to retail milk.

The court rejected a provision that the provisions of the document did not create a lease.[31] Such an approach is consistent with that of the House of Lords in Street's case.[32] On the other hand, Taylor J., differed markedly in his view of legal principle. He recognised that exclusive possession may be the determining factor even though in exceptional cases "the right to exclusive possession may not create a lease". However, he continued, "I am unable to see that the fact that a particular transaction may have been induced by ties of kinship, or by friendship, or generosity could operate to bring it within this exceptional class".[33] And Windeyer said — [34]

> "Recently some transactions from which in the past tenancies at will would have been inferred have been somewhat readily treated as creating only licences. And it has been said — especially in connection with family relationships, charity or hospitality — that allowing a person to have the exclusive possession of premises does not necessarily indicate a tenancy as distinct from a licence. These decisions are largely a by-product of rent restriction statutes and other legislation here and in England. They are all explicable if they mean, as I think they all do, that persons who are allowed to enjoy sole occupation in fact are not necessarily to be taken to have been given a right of exclusive possession in law. If there be any decision which goes further and states positively that a person legally entitled to exclusive possession for a term is a licensee and not a tenant, it should be disregarded, for it is self-contradictory and meaningless."

The dicta of Taylor and Windeyer JJ. show a more disciplined approach to basic concepts than has been shown by the House of Lords.

Conclusion

The suggestion by Street that the way around the decision in Street's case is to enter into an arrangement, —

> "Supposing I say a prospective occupier of my room 'It's yours for nothing. I don't intend to deal with you on any basis but friendship. I

30. At 217. See also Menzies J., at 220 and Windeyer J., at 225.
31. Even if a "not" was inserted (accidentally dropped out).
32. Cf. Facchini v. Bryson (1952) 1 T.L.R. 1386 ("The parties cannot by mere words of their contract turn it into something else. The relationship is determined by the law and not by the law they choose to put on it." Denning, L.J., at 1389, 1390).
33. Radiach v. Smith (1959) 101 C.L.R. 209 at 220.
34. At 223 at 223.

> don't want to create any legal relationship. I am not offering you any sort of tenancy or even a contractual licence. I don't propose to charge you any rent or licence fee. But if you feel you would like to give me (say) £25 a week as a token of your appreciation, that's entirely up to you.' If the prospective occupier accepts all this, surely we have a situation where there is no intention to create a legal relationship, the occupier is a bare licensee (not a contractual licensee), the owner cannot sue for arrears of rent or licence fee or for breach of any covenant or agreement, but can get possession at any time by revoking the bare licence (if for example *ex gratia* weekly payments were to cease) as the occupier has no tenancy and therefore no Rent Act protection."

It is suggested that this proposal depends upon whether the traditional or modern requirements of a lease prevails. If the modern view does in fact prevail, then the omission of an obligation to pay a rent prevents a lease being created. However if the traditional view is revived, and indeed in Australia has never suffered a premature death, then the arrangement suggested by Street fails. And who can tell. As the decision of the House of Lords started from a false premise, the future cannot be predicted accurately. And this dilemma arises, it is suggested, from faulty judicial technique.