§ Law in Context

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Property Law

Commentary and Materials

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Leases and bailment

17.1. Introduction

As we saw in Chapter 7, the essential similarity between leases and bailments is that, in both cases, possession becomes vested in a non-owner for a limited period. If the thing in question is land, the interest created is a lease, and if it is a chattel the interest created is a bailment. However, as we see in this chapter, the differences between leases and bailments are much greater than the similarities. Although the common law originally considered each to be part of the law of personal property, they have very different historical roots and have developed along separate lines so that, even now, there is almost no resemblance between the two legal institutions. This causes some difficulty in our legal system. A lease of land is a sophisticated but somewhat inflexible institution, not easily adjustable to meet changing social and commercial expectations (see, for example, *Prudential Assurance* v. *London Residuary Body* [1992] 2 AC 386, discussed below), and this can limit its usefulness. On the other hand, it is a clearly defined property interest which is relatively easy to protect and enforce against third parties, and it would be very useful if a similar interest could be created in goods, particularly commercially tradable ones like aircraft, works of art or computer equipment. However, although bailments of such goods are often called leases, they remain in law bailments, and it is very doubtful whether even the most careful drafting can give a bailee of goods the same rights and protection as a lessee of land.

17.2. Leases and bailments compared

17.2.1. Consensuality

Leases are consensual, in the sense that they can only come into existence as a result of a deliberate grant of rights by one person to another. The grant may be implied by law rather than expressed, and is somewhat attenuated in the case of the anomalous tenancy by sufferance (see section 17.3.1.4 below, under the heading 'Sufferance'), but nevertheless it remains the essential origin of the interest. Further, there is nearly always an enforceable contract between the original lessor and the original lessee, i.e. the lessee almost invariably provides consideration for the grant of possession in the

form of rent and/or payment of a capital sum premium. Consensuality is, however, required only for the initial creation of the lease. Once it has come into existence, either party can assign their interest to anyone else (because their interests are proprietary) and their role in the leasehold relationship created by the grant of the lease will then shift to their assignee, whether the assignment was unauthorised by the other or not, and even if it was expressly prohibited.

Bailments, on the other hand, need not be consensual, even in their inception. Some bailments arise by express grant, which necessarily involves consensuality but not necessarily consideration. Others may be authorised by the bailor but not involve consensus between bailor and bailee. For example, when you post a parcel to an overseas address, you impliedly authorise the post office to transfer possession of the parcel, and the duty to transport it to the addressee, to a string of carriers. You will have a direct bailment relationship with each of those carriers, even though you and they may not be specifically aware of each other's existence, and will certainly not have entered into any direct contractual relationship. There are yet other bailments which are more or less wholly unauthorised. The extent of this category of bailment is uncertain, but it appears to encompass all cases where a person consciously takes someone else's goods into their possession. It would therefore include the relationship that arises between the owner of lost goods and their finder, and also that between the owner of stolen goods and their thief. In these cases, of course, there is no question of consensus between bailor and bailee.

17.2.2. Contract

It follows from the above that, while there is nearly always a legally enforceable contract between the original parties to a lease, this is not the case in all bailments. This has important repercussions when considering the rights and duties of the parties. In the case of a lease, the rights and duties of the parties derive both from the nature of the property interest each holds in the land and the consequent ongoing proprietary relationship between them, and from the terms of the contract made between the original parties. The same is true of consensual bailments supported by consideration: the rights and duties of the parties derive from the proprietary relationship that arises out of the fact that the one has possession of goods owned by the other, as well as from the contract in which they agreed the terms on which this should happen. However, in the case of non-consensual bailments, there is no underlying agreement at all between the parties, which means that their rights and duties are dictated solely by the incidents that the law has ascribed to their respective property interests and to that relationship. And, in gratuitous consensual bailments, there is the added complication that any rights and obligations which the parties have expressly or impliedly agreed between themselves are not contractually enforceable.

17.2.3. Enforcement

The presence or absence of a contract also has important repercussions on the actions and remedies available for breach of any of the terms of the relationship.

Leases are primarily enforced by specialised property actions (actions claiming forfeiture, possession, recovery of rent etc.) but the parties may also bring ordinary contract actions for damages for breach of a term of the lease and, increasingly but controversially, may rely on other contract doctrines such as specific performance, rescission for repudiatory breach, and frustration. The enforcement of bailments is based on wholly different principles. If there is a contract between the parties, it is enforceable in the same way as any other contract relating to chattels. But, as explained in Chapter 7, English law has failed to develop property actions for the enforcement of interests in chattels and, instead, the parties are forced to rely on tort actions. So, whereas the enforcement of leases is governed by property and contract principles, the enforcement of bailments is governed by varying mixtures of contract and tort.

17.2.4. Duration and purpose

Leases are classified according to the duration of the interest granted, whereas in the case of bailments the classification depends primarily on either the purpose for which possession is granted or (in the case of unauthorised bailments arising for example by mistaken receipt or finding) on the means by which it was acquired. Duration and purpose are treated quite differently in the law of leases and the law of bailments. In the case of land, it is duration which marks the lease off from the fee simple, and, perhaps as a result, the rules governing allowable durations of leases are inflexible and (at present at least) rigidly enforced by the courts (see below). No such rules apply to bailments. The law of leases, on the other hand, is not much interested in the purpose for which possession is granted. A person in possession of land as a lessee may *prima facie* use it for any purpose she wants: any restriction that the lessor wants to impose must be imposed by contract. The same is not necessarily true of bailments, even those where possession is deliberately granted by the bailor. In some bailments, such as consensual hire of goods, the bailee may do more or less whatever she wants with the goods, whereas in others the way in which the bailee may use the goods is strictly confined (consider, for example, what you are entitled and required to do with a coat as a cloakroom attendant, a dry cleaner, or a person who hired it from a clothes-hire shop).

17.2.5. Beneficial use

This brings us to a difference of fundamental importance between leases and bailments. In both, possession is split off from ownership, but whereas in a lease of land possession connotes beneficial use, in a bailment of goods there is no necessary connection between the two. More specifically, a grant of a right to possession of land for a leasehold term automatically carries with it the full right to make beneficial use of the land, in an income sense (i.e. full rights to make income use, in the Honoré sense). The tenant is entitled to use the land for whatever purposes she wants or for none at all, at all or any times, and to allow any other person use of the land on whatever terms she chooses, and to keep all income

benefits from the land (apples from the trees). This inherent right to use can be (and often is) cut down by contract. So, for example, a lease of a shop would normally contain a contractual stipulation that the tenant can use the premises only as a shop, and it might specify the type of shop and the hours in which the shop may stay open, or even positively require the tenant to keep the shop open and trading during normal retail hours. But these are only contractual restrictions, and subject to them the tenant remains entitled to do whatever she likes and to take whatever income benefit accruing from the land that she wants.

The same is not true of bailments. The extent to which a bailee may make beneficial use of the chattel and take income benefits that accrue during her possession varies depending on the type of bailment, and in some cases it may be wholly absent. In other words, bailment can be wholly onerous, and the right to exclude the owner from beneficial use (which exists in all authorised bailments) does not necessarily entitle the bailee to make beneficial use of the goods for herself.

17.2.6. Proprietary status

Leases are traditionally regarded as necessarily proprietary – by granting a lease, the lessor grants an estate in the land which is recognised both by the common law and by statute as a property interest. Recently, the House of Lords has taken the view that there can be such a thing as a non-proprietary lease (see *Bruton* v. *London and Quadrant Housing Trust* [2000] 1 AC 406, discussed in Notes and Questions 17.5 below), but this is at best anomalous and it remains true that, in principle, leases are property interests.

The proprietary status of bailments, on the other hand, has always been a matter of controversy: some would deny proprietary status to all types of bailment; others take the view that bailees always necessarily have a proprietary interest in the goods; while others say that it is not possible to give a clear-cut answer, and that in most types of bailment the interest is proprietary in some senses but not in others. We look at this in detail below.

17.2.7. Inherent obligations of the possessor

The *caveat emptor* principle is more or less firmly established in relation to leases. With some very limited common law and statutory exceptions which neither the courts nor Parliament have shown enthusiasm to extend, the lessor gives no warranties about the state and condition of the land or that it is fit for the purposes for which it is let. This creates a curious lacuna of responsibility in the landlord–tenant relationship – neither has a *prima facie* responsibility for repair. In the case of bailments, the picture is dramatically different. Even gratuitous bailees can have a liability to take care of the goods in some circumstances, and, in the case of non-gratuitous bailments, it is the bailee's obligation to take care of the goods which forms the defining characteristic of the relationship.

17.3. Leases

With these differences in mind, we now look more closely at the nature of the lease, and at various aspects of the leasehold relationship.

17.3.1. Nature of the lease

We saw in Chapter 7 that a great deal turns on whether a grant of a right to occupy land creates a lease or a mere personal permission to be there. It has been established by the House of Lords in *Street* v. *Mountford* [1985] AC 809, discussed in Chapter 7, that the necessary and sufficient conditions for it to amount to a lease are that possession of the land should be granted for a duration that is certain. In Chapter 7, we dealt with the difficult question of when the grant of a right to occupy land amounts to a grant of possession for these purposes. Here we concentrate on the question of duration, which gives rise to other, equally difficult, problems.

The first problem is this. When we say that possession must be granted for a duration that is certain, what exactly do we mean by 'certain', and what is the effect of a grant of the right to possession for a period which is not certain? The second arises out of the first: is it possible to grant a right to possession of land for a limited period *without* conferring a proprietary leasehold interest on the grantee? And, if it is, is it possible for the thing created to be a proprietary interest which is not a lease, or even a lease which is not a proprietary interest? We consider these questions in the following paragraphs.

17.3.1.1. Duration: the four basic categories

Since 1925, there have been four categories of lease, classified according to the duration of the tenant's interest:

1 fixed-term tenancy;
2 periodic tenancy;
3 tenancy at will; and
4 tenancy at sufferance.

We look at the distinctive features of each of these before considering the overall requirement that the duration of a lease must be certain.

17.3.1.2. Fixed-term tenancies

The legal position

A fixed-term lease is a lease for a fixed period which is specified in advance in the lease itself. At the end of the specified period, the lease automatically expires. The period is usually specified by reference to a number of years or a specific date (for example, a lease for ten years, or until 25 December 2010). The question of whether it can be specified by reference to any other future event is one we consider below.

There are no restrictions on the length of the period: it may be for one day or 1,000 years. Also, the period may be discontinuous. In *Smallwood* v. *Sheppards* [1895] 2 QB 627, a lease of a fairground site to a proprietor of swings and roundabouts for three successive bank holidays in a year was held to be valid, and it was accepted in *Cottage Holiday Associates Ltd* v. *Customs and Excise* [1983] QB 735 that this meant that a time-share arrangement whereby the occupant was entitled to possession of a holiday cottage in Cornwall for one week a year for eighty years was a valid lease for a single period comprised of eighty discontinuous weeks.

Length of fixed-term leases in practice

Leases for as short a time as a few days are unusual but not unknown. Very long leases, on the other hand, are commonly used, particularly in two situations. The first is where the tenant is required under the lease to develop the land by erecting buildings on it at its own expense. In such a case, terms of, for example, 99 or 125 years have traditionally been used, as a rough measure of the estimated life of the buildings, on the basis that the tenant ought to be entitled to the full benefit of the buildings it paid for. This continues to be a factor in determining the length of the term in modern commercial development leases where the development is to be financed by the tenant.

The second common situation in which a very long lease will be used is where the parties would like to grant the tenant a fee simple interest in the land but are deterred from doing so because the land in question is physically dependent on other land (typically, a horizontally divided slice of land, such as a maisonette or flat). It is possible to grant a fee simple interest in a horizontally divided slice of land, but until recently it was highly inadvisable to do so, because positive covenants (for example, to keep common structural parts in repair) are not enforceable between adjoining freehold owners except by using not always reliable contract mechanisms. This is a consequence of the courts' decision to confine the effect of *Tulk* v. *Moxhay* to restrictive covenants, as we saw in Chapter 6. This is not a problem in leaseholds because positive obligations can easily be made enforceable between tenants of a common landlord. Consequently, those who wish to acquire an ownership-type interest for an indefinite period in a horizontally divided slice of land until recently had no realistic alternative to the long lease, typically for a symbolic period of 99 or 999 years. This has long been a standard form of tenure for residential flats, and its resemblance to ownership is increased by extensive statutory rights for tenants holding such leases to buy out their landlord's interest or obtain an extended lease when the original lease expires (exercisable by tenants individually under the Leasehold Reform Act 1967 as amended or collectively under Part III of the Landlord and Tenant Act 1987 as amended) or insist that the landlord hands over management to a manager approved by the tenants (see the amendments made by the Commonhold and Leasehold Reform Act 2002). The close approximation to ownership is reflected in the market price of such leases.

A long lease of a residential flat will typically be granted for a premium (an initial lump-sum payment) and a nominal rent, and the amount of the premium, and the capital value of the lease as and when the tenant chooses to sell it, can be expected to be much the same as the market price for an equivalent freehold property, and (assuming full statutory rights apply) is likely to remain stable, subject to market fluctuations, throughout the term of the lease.

Commonhold as an alternative to the long residential lease

However, the Commonhold and Leasehold Reform Act 2002 has introduced, with effect from September 2004, a commonhold system to be used as an alternative to the long lease where there are developments of multiple units. The commonhold regime (very similar to the systems variously known as strata titles, condominium and commonhold which have long operated in the United States, Australia, New Zealand, Canada and many other Commonwealth countries) enables holders of individual units within a residential or commercial development to each hold a fee simple interest in their own unit, and also jointly hold the fee simple in the common parts of the development via a company of which the unit-holders are the sole members.

It remains to be seen whether commonhold will prove popular. While it has the advantage for unit-holders that collectively they will be solely responsible for the management of the development, the rights conferred on unit-holders as against each other (individually and collectively) are less extensive than those that long leaseholders have against landlords under the statutory provisions noted above, and this may prove to be a problem. For further details of the statutory scheme and an assessment of its likely effects, see Farrand and Clarke, *Emmet and Farrand on Title*, Chapter 28A.

Commercial premises

Leases of commercial premises such as offices and shops and industrial premises are usually relatively short. A review carried out by the British Property Federation and the Investment Property Database of new leases granted in 1999–2000 gives an average duration of 15.7 years (BPF/IPD, *Annual Lease Review 2000*). In this country, it is very common for businesses to trade from leasehold rather than freehold premises, and at first sight a lease length of 15–20 years might seem rather strange – not long enough for stable businesses in need of permanent premises, and too long for short-lived or expanding ones. However, there are several factors which introduce flexibility. First, landlords are willing to commit themselves to relatively long leases because it is possible to include rent review provisions in the lease, providing for the rent payable under the lease to be periodically increased (or, exceptionally, decreased) to keep in line with market rents. The House of Lords confirmed the validity of provisions allowing rents in leases to be reviewed in this way in *United Scientific Holdings Ltd* v. *Burnley Borough Council* [1978] AC 904, and such provisions are now routinely included in leases of all types of

commercial premises. Tenants, on the other hand, have a variety of mechanisms available to enable them either to stay longer than the originally agreed term or to leave early. There is a statutory security of tenure system for commercial tenants which entitles them to apply for a new lease (on essentially the same terms but at a market rent) when their old lease expires. The new lease must be granted by their landlord unless the landlord can demonstrate that it requires the premises for redevelopment or for its own use. However, the adoption of this scheme is now virtually voluntary, as a result of recent changes made to the governing statute, Part II of the Landlord and Tenant Act 1954 which greatly simplify the procedure for opting out: for further details, see Farrand and Clarke, *Emmet and Farrand on Title*, Chapter 27.

Assignment and premature termination of fixed-term lease

As to leaving prematurely, most leases, whether of residential or commercial premises, are fairly easily traded, so a tenant who wants to move out early should be able to sell the lease, depending on the state of the market and on how onerous the terms of the lease are. We look at this in more detail below where we consider the statutory regulation of rights to alienate and the effect that alienation has on the enforcement of the terms of the lease.

For tenants not willing to rely on the market to provide a buyer when they need one, it is possible (and in commercial leases fairly common) to include in the lease a break clause, i.e. a contractual provision giving the tenant, or indeed the landlord, an option to terminate the lease early, either after a fixed number of years or on the happening of a future event. The courts construe break clauses quite strictly. In particular, if the option to terminate is made exercisable on the happening of a future event, it will be invalid unless the future event is sufficiently certain. This does not require the parties to be able to predict at the outset *when*, if ever, the future event is going to occur. It does, however, require that, if the event does occur, it will be objectively ascertainable that it has done so. So, an option for the tenant to terminate the lease before the end of the term 'if it gives the landlord six months' written notice of its desire to do so' is valid, whereas an option to terminate 'at the end of the first year of the lease if too much rain falls in that year' is void. This becomes relevant in relation to the rules about certainty of duration of leases, as we see below.

17.3.1.3. Periodic tenancies

Nature

A periodic tenancy continues from period to period (for example, from week to week, month to month, or year to year) until terminated by either party giving notice to quit to the other. A periodic tenancy can therefore last indefinitely, but each party has the option to bring it to an end at any time by serving notice to quit. The periodic tenancy was a comparatively late development, not finally recognised

by the courts until 1702, by which time it had become common in practice as a means of giving tenants a marginally less precarious interest than the tenancy at will, as Simpson notes in *A History of the Land Law* (Extract 17.1 below), and analysis of its nature can still cause the courts difficulty, as can be seen from *Hammersmith and Fulham London Borough Council* v. *Monk* [1992] 1 AC 478, discussed below.

In practice, the precariousness of a periodic tenant's interest is lessened by three factors. First, the courts strictly enforce common law and statutory regulations as to the length of notice required to terminate periodic tenancies (as to which see sections 5 and 3 of the Protection from Eviction Act 1977, as amended by the Housing Act 1988, and also *Queens Club Garden Estates Ltd* v. *Bignell* [1924] 1 KB 117). Secondly, statutory regimes applicable to residential, business and agricultural tenants (which are beyond the scope of this book) confer varying degrees of security of tenure on periodic tenants.

Contractual fetters on notice to quit

Thirdly, the parties themselves may decide to include as a term of the tenancy a contractual fetter on the landlord's (or the tenant's) right to terminate by serving notice to quit. This will usually take the form of a postponement of the right to serve notice to quit until a specified future date or the happening of a future event. The courts' approach to these restrictions on the right to terminate by notice to quit is markedly different from their approach to contractual rights to terminate fixed-term tenancies early. They will treat any such restriction as invalid not only if it is uncertain but also if it is repugnant to the nature of a periodic tenancy. A restriction which removes the landlord's right to serve notice to quit altogether comes within this latter category, and is therefore void (*Centaploy Ltd* v. *Matlodge Ltd* [1974] Ch 1) and presumably it would be equally repugnant to the nature of the periodic tenancy to have a provision removing the tenant's right to serve notice to quit. However, it is not clear whether a very long postponement of either party's right to terminate by notice to quit would be void on repugnancy grounds. *Doe d Warner* v. *Browne* (1807) 8 East 165; 103 ER 305, and *Cheshire Lines Committee* v. *Lewis & Co.* (1880) 50 LJ QB 121, discussed in Lord Templeman's speech in *Prudential* (below), would seem to suggest that, but in *Midland Railways Co.'s Agreement, Charles Clay & Sons Ltd* v. *British Railways Board* [1971] Ch 725, the Court of Appeal expressed the view that nothing short of a complete removal of either party's right to terminate would fall foul of the repugnancy rule (Russell LJ at 733, giving the judgment of the Court). The decision in *Midland Railway Co.'s Agreement* was overruled by the House of Lords in *Prudential* (below) on the question of when a postponement of the right to serve notice to quit would be void for uncertainty, but nothing was said about the separate question of when it would be void for repugnancy.

As to the requirement of certainty, this is much stricter than in the case of break provisions. Where the right to serve notice to quit is postponed until the

happening of a future event, the future event must be certain in the sense that the parties must be able to predict *at the outset* when it will occur. This matches the test for certainty of duration for fixed-term leases, as we see below.

17.3.1.4. Tenancy at will

A tenancy at will is a tenancy which can be ended at any time by either party. It is of ancient origin (Megarry and Wade, *The Law of Real Property*, p. 655, describe it as 'probably the original type of tenure onto which the doctrines of estates were superimposed'), but, although it appears always to have been accepted as a form of tenancy, it has few, if any, of the hallmarks of a property interest. It is said to terminate automatically if either the landlord or the tenant dies or alienates his interest (*Wheeler* v. *Mercer* [1957] AC 416 at 427 *per* Viscount Simonds, who described it as 'unlike any other tenancy, except a tenancy at sufferance, to which it is next-of-kin. It has been properly described as a personal relation between the landlord and his tenant'; and see also *ibid*., p. 432 *per* Lord Cohen), and Megarry and Wade suggest it might more properly be regarded as 'a mere relationship of tenure unaccompanied by ... any estate or interest which can exist as a right *in rem*'.

At one time the tenancy at will was also said to be anomalous in that it did not conform to the rule that the duration of a tenancy must be certain. However, there now seems no great difficulty in accommodating it within the formula for ascertaining certainty of duration laid down by the House of Lords in *Prudential*: see further below.

The precariousness of the relationship created by the tenancy at will might lead one to ask why anyone would ever willingly enter into one, whether as landlord or tenant, especially since the periodic tenancy gives both parties very nearly as much flexibility (either can terminate their obligation whenever they want on giving the appropriate notice) but considerably more security (both know they will be given the requisite period of notice before their right to rent or possession, as the case may be, ends). The main reason is that statutory security of tenure for tenants generally applies to periodic tenancies but not to tenancies at will (see *Wheeler* v. *Mercer* [1957] AC 416 on the protection of business tenants under Part II of the Landlord and Tenant Act 1954). Landlords who want, or are prepared to allow, someone to take possession as a temporary measure, but do not want to create a tenancy attracting security of tenure, might therefore choose a tenancy at will, and in appropriate cases (i.e. where it is clear that the tenant's possession was intended to be temporary but there was no express agreement as to duration) the courts will infer that a tenancy at will was what was intended by them. The classic cases are where a prospective tenant has been let into occupation while the detailed terms of the lease are still being negotiated, or a purchaser let into possession before completion of the purchase, or a tenant holds over after the end of a contractual tenancy and the landlord allows him to remain temporarily, whether for humanitarian reasons, or while negotiating terms for a new lease: see, for example, *Javad* v. *Aquil* [1991] 1 WLR 1007.

In addition, there are other cases where a tenancy at will arises by operation of law, most importantly where a tenant goes into possession under a lease which proves to be void (see *Prudential* below: if no rent was paid the tenant will be taken to have a tenancy at will – his possession has throughout been with permission, but can now be terminated or given up at will – whereas if rent was paid there will be a periodic tenancy, as we see in section 17.3.1.5 below).

Tenancy at sufferance

A tenancy at sufferance arises whenever a person is in possession without either the positive assent or the positive dissent of the landlord. Typically, it arises where a tenant holds over after the end of a tenancy without the landlord's consent but before any active objection has been made by the landlord: *Remon* v. *City of London Real Property Co. Ltd* [1921] 1 KB 49, CA, in which Scrutton LJ described it as a 'tenure ... probably invented to prevent [the former tenant] obtaining a title by adverse possession ...' (at 59). By its very nature, it can never be deliberately granted by a landlord. It is an *ex post facto* rationalisation of a position which, for strategic reasons, the courts wish to categorise as tenancy rather than trespass. It probably does not extend to cover the position of a former tenant holding over in spite of active objection from the landlord (*Remon*) although the gradations can be quite subtle here: compare the classic description of a tenancy at sufferance as describing the situation that arises when 'that which cannot be changed has to be endured'.

Extract 17.1 A. W. B. *A History of the Land Law* (2nd edn, Oxford: Clarendon Press, 1986), pp. 253–4

[I]n the developed law the periodic tenancy is recognized as a form of lease; the typical example is the yearly tenancy, which will continue until it is determined by six months' notice on either side, and such tenancies are extremely common. Such periodic or 'running' leases obviously pose a problem in legal analysis which is glossed over in modern textbooks, for in a sense they do not conform to the rule which requires a lease to be for a fixed term – they are in effect leases for an uncertain duration, determinable by notice. They are not leases for a fixed term with an option to renew; such an analysis is quite unrealistic. In short they are anomalous, and when they first came before the courts at the end of the fifteenth and the beginning of the sixteenth centuries they provoked a great deal of controversy. In 1506, a lease for one year, and then from year to year as the parties pleased, at a fixed rent, was held to be a lease at will only. A case in 1522 on the same type of lease provoked a long discussion in the Common Pleas, and the judges were divided. Upon grounds of convenience, for such arrangements were common, Brudenell CJ and Pollard J were prepared to hold that by such an arrangement a lease for one year was created at once, followed by successive one-year terms for each year in which the arrangement was continued; if the tenant, with the consent of the landlord, continued in possession for one day of a new year, then a fixed term for the

whole of that year was created. Fitzherbert and Brooke JJ were not so sympathetic. Such an arrangement, in their view, created a lease for one year and no more; thereafter the tenant who remained in possession became a tenant at will only. If the arrangement was expressed as a lease for *years* 'at the will of the parties', or 'for as long as the parties pleased', then they would treat it as a lease for a fixed term of two years (to give effect to the plural 'years') followed by a tenancy at will. For two centuries thereafter the dispute as to the nature of periodic tenancies continued its arid course. In 1601, [in *Agard* v. *King* Cro Eliz 775] Gawdy and Fenner JJ adopted the view of Brudenell CJ and Pollard J. Popham CJ introduced another quaint construction, for he held that a lease 'from year to year as the parties pleased' created a term of two years (from year to year = two years) followed by a tenancy at will. Popham's view was adopted in 1606 [in *The Bishop of Bath's Case*, 6 Co Rep 35b] where the court was confronted with a lease 'for a period of one year and so from year to year for as long as both parties should please'; three years are mentioned, and these are added up to confer a term of three years followed by a tenancy at will. This sort of absurd construction would lead one to say that a lease from 'year to year to year to year' would create a term of four years; neither common sense nor logic recommends it. Eventually, the view of Brudenell and Pollard triumphed when the great Holt CJ adopted it in 1702 [in *Leighton* v. *Theed* (1702) 1 Ld Raymond 707] and in the course of the eighteenth century the dispute died out.

Notes and Questions 17.1

Read the above extract and *Hammersmith and Fulham London Borough Council* v. *Monk* [1992] 1 AC 478, either in full or as extracted at www.cambridge.org/propertylaw/, and consider the following:

1 In the light of the decision in *Prudential* (below), can periodic tenancies now be said to 'conform to the rule which requires a lease to be for a fixed term', as Simpson says?

2 The analysis described by Simpson in the above extract as 'quite unrealistic' was subsequently adopted by the House of Lords in *Hammersmith* v. *Monk*. Is Simpson nevertheless right?

3 Would it have been justifiable for the House of Lords in *Monk* to have distinguished *Summersett's Case* on policy grounds, i.e. to have held that, although one of the joint holders of the *landlord's* interest can effectively terminate a periodic tenancy, termination by *tenant's* notice to quit requires the concurrence of *all* holders of the tenancy?

4 As a result of this decision, all joint tenants must concur in exercising a break clause in a fixed-term tenancy, and in surrendering a fixed-term tenancy to the landlord, but any one of them can terminate a periodic tenancy by serving notice to quit without the concurrence of the others. How does the House of Lords justify this distinction in this case? Is it justifiable?

5 Lord Bridge says that the 'third principle strand' which he identifies in the arguments for Mr Monk 'confuse[s] the form with the substance'. Explain what he means. Is he right?

6 Joint holders of a periodic tenancy (as any other tenancy) now hold the tenancy on trust for themselves under a trust of land (see Chapter 16). Does this make any difference to the arguments put in this case? In particular, will service of notice to quit by one without the concurrence of the others now constitute a breach of trust, and if it does (a) will it be effective and (b) can it be restrained by injunction? (See *Notting Hill Housing Trust* v. *Brackley* [2001] EWCA Civ 601, CA, on the position under a trust of land under the Trusts of Land and Appointment of Trustees Act 1996, and *Crawley Borough Council* v. *Ure* [1996] QB 13, CA, on the position under a pre-1996 Act trust for sale)

7 What hardship is caused to joint tenants by the decision in *Hammersmith* v. *Monk*? What hardship would have been caused if the House of Lords had come to the opposite conclusion?

17.3.1.5. Certainty of duration

One of the defining characteristics of a leasehold, as opposed to a freehold, interest is that it is of a limited duration, and it has long been accepted that the limit of the duration must be certain. But what does 'certain' mean in this context? In *Prudential Assurance Co. Ltd* v. *London Residuary Body* [1992] 2 AC 386 (extracted at www.cambridge.org/propertylaw/), the House of Lords held that it means that both parties must know from the outset the earliest date on which their commitment under the lease can be brought to an end – or, as the House of Lords put it, the maximum duration of their liability under the lease. If the lease is for a fixed duration, this appears to mean that the lease must be for a specific period of time, with a known end date (it is difficult to think of any event other than the happening of a date which would satisfy the test), although it may legitimately be made terminable earlier on the happening of an objectively ascertainable event, either at the option of one or other of the parties, or automatically. If the lease is periodic, it means that either there must be no fetter on the right of each party to terminate by notice to quit, or, if there is a fetter, it must either be for a fixed period of time (i.e. until a specified date), or, if fixed by reference to an objectively ascertainable future event, it must be phrased as an alternative to a specified future date, the right to terminate by serving notice to quit returning on whichever of the alternatives occurs first (see the examples in *Prudential*). Consequently, a fixed-term lease 'until the landlord requires the land for road-widening' was held void, as would be an annual periodic tenancy in which the landlord's right to terminate by notice to quit was postponed 'until the landlord requires the land for road-widening'. This reasserted what the House of Lords took to be the orthodox position as formulated by the Court of Appeal in *Lace* v. *Chantler* [1944] KB 368, where a lease granted

during the Second World War 'for the duration of the war' was held to be of uncertain duration and therefore void.

The consequence of a lease being held to be of uncertain duration is that the lease is void. However, if the tenant has already taken possession under the void lease, he will acquire by operation of law either a legal periodic tenancy (if rent was paid) or a tenancy at will. Consequently, the landlord (and the tenant) will be entitled to bring the relationship to an end immediately, by serving the appropriate notice to quit if it is a periodic tenancy, or by merely notifying the other party if it is a tenancy at will.

If, on the other hand, the lease was a periodic tenancy to start with, but there is a fetter on the right to terminate by notice to quit which postpones the right for an uncertain duration, the fetter will be void but the lease itself will be valid. Again, the effect will be that either party can take immediate steps to terminate by giving the appropriate notice to quit.

In both cases, the clearly expressed intentions of the parties will be defeated. Their intentions would in many cases be effectuated if, instead of this rigid, complex certainty rule, we adopted the more general, flexible rule that the duration of a lease must be measured by reference to the happening of an objectively ascertainable future event, so that, when that event occurs, it is clear to both parties that it has done so. Why then have we adopted the rigid, complex rule?

The majority in the House of Lords in *Prudential* expressed distaste for the complex rule and opted for it only in order to avoid upsetting long-established property relationships. The minority gave it more positive support. Part of their motivation appears to have been a desire to produce a formulation of the rule that accommodates not only fixed-term leases but also periodic tenancies, tenancies at will and tenancies at sufferance. The complex rule achieves this, although it is not wholly clear why such uniformity is thought necessary. In addition to this, however, those positively in favour of the rigid, complex rule also clearly considered that the general, flexible rule was inherently objectionable.

In order to evaluate these objections, it is useful to look more closely at the sorts of future events which might be used to measure the duration of a lease:

1 Some future events have the twin characteristics of inevitability and predictability – they must occur, and we know in advance when that will be. However, it is difficult to think of any future event that falls into this category apart from a specified future date (1 July 2015) or the end of a specified period of time (10 years from today). There can be no objection on the grounds of certainty of duration either to a fixed-term lease which is to last until such an event, or to a periodic tenancy in which the right to terminate by notice to quit is postponed until the happening of such an event, and such leases are indeed valid under the *Prudential* test and under any reasonably conceivable alternative test.
2 There are other events which are inevitable but we do not know in advance when they will occur. Most, if not all, of these refer in one way or another to the life of some person or thing – for example, a lease granted to you 'until the death of your aunt', or perhaps 'until your aunt ceases to be employed by' the landlord, or 'for so long as you

remain the registered owner' of some specified chattel, such as a ship, which has a limited lifespan, or a lease to an existing tenant of premises adjoining his existing premises 'for so long as you remain tenant of your existing premises'. Following *Prudential*, a lease for such a duration is void (as is a fetter on the right to terminate a periodic tenancy until the happening of such an event). It is difficult to see why this should be the case. At any given point in time the parties know where they stand, and so do all third parties. There is no possibility of the limitation in the lease operating in any way which is contrary to the intentions or expectations of the parties – the uncertainty as to the end date, and the precise perimeters of the uncertainty, are patent from the outset. It is not at all difficult to think of plausible reasons why the parties might want to link the duration of their relationship to such an event. What possible objections can there be to permitting them to do so?

3 Those first two categories of inevitable event must be distinguished from events which may never happen, which raise additional problems. There are distinguishable sub-categories here as well. There are some future events which are due to happen on a specific date, but which might just end up happening earlier or later, or perhaps even never happening at all. As examples, take a lease of training facilities granted to an athletics team 'until the start of the next Olympic Games', or a flat let to a law student 'until the end of your LLB course'. Such a lease is void under the *Prudential* test (consider why). As in the previous category, there are plausible reasons why the parties might want to link their relationship to such an event, and so if possible they ought to be permitted to do so, especially where, as in the examples given, it is very likely that everything will turn out precisely as anticipated. What are the objections to permitting it? The first is that a change in the predicted date (the Olympic Games might be postponed for four years, or the student might fail exams and take a year out to resit) might make the lease operate in a way that was significantly different from that intended by one or both of the parties. The second is that, if the event never happens at all, the lease will last perpetually. This is not only (probably) contrary to the expectations of the parties: it also converts the lease into a freehold rather than a leasehold estate – the interest loses the essential characteristic of limited duration. Are these two objections sufficient to justify invalidating the lease altogether and substituting instead a periodic tenancy, thus *guaranteeing* that the parties intentions will be frustrated, even if the anticipated event does indeed happen on schedule? Since it is overwhelmingly likely that the event will happen as and when anticipated, a more appropriate approach might be to treat it as a valid lease which does not expressly state what is to happen in the unlikely circumstances of the event not happening on the due date, an omission which can be rectified by an implied term. If you were to ask the parties at the outset what was to happen in that eventuality they could probably tell you, and it should be possible for the court to infer from the other terms of the lease and from the surrounding circumstances what their response would be.

4 Does the same apply where not only is the event not inevitable, but the parties do not know at the outset when it will occur if it occurs at all? The *Prudential* lease ('until the landlord requires the land for road-widening') comes within this category, and so too does the *Lace* v. *Chantler* lease (technically at least, the perpetual continuation of the

Second World War was a logically possible outcome, although perhaps not a realistic possibility). Although this may look superficially like a variation on category 3 above, in fact it is much closer to category 2. The parties are well aware from the outset that the duration of their commitment is uncertain in point of time, and presumably they deliberately elected to choose that so that it could be precisely geared to the happening of the future event. In some of these cases the parties will have intended the lease to mean exactly what it says – in other words, that if the event never happened the lease should last perpetually. Lord Browne-Wilkinson thought this was the parties' original intention in the *Prudential* case. If this is the case, the only possible justification for invalidating the lease is the structural reason given above – a lease of unlimited duration is not a lease at all but rather the grant of an interest for a freehold estate. If this is thought to be a significant objection, the answer might be to let it take effect instead as an assignment of the grantor's freehold interest (in much the same way as a purported subletting for a term longer than the unexpired residue of the lessor's lease automatically takes effect as an assignment of that lease) with a right of re-entry for the grantor exercisable if and when the event occurs. In other cases, the parties will not have intended that, but will have omitted to make express provision for what is to happen if the event is delayed longer than expected, or never happens at all. Like category 3, the obvious remedy here would be an implied term if it is sufficiently clear what the parties intended, resorting to invalidity only if they have left the matter so unclear that any implied term would be imposing on them terms they never would have agreed.

5 Finally, there are those events which are predictable but not inevitable – in other words, we know in advance when, if at all, they will occur but there is just a chance that they may never happen at all. An example (it is difficult to think of many others) would be a lease to you 'until your aunt reaches the age of 45' (she may die before then). Such a lease is probably void under the *Prudential* test, although the problem is not so much one of certainty of duration as the possibility of (almost certainly unintended) perpetual duration. This is really just a simplified version of category 2, and an even more obvious candidate for the implied term solution. In nearly all cases it can be inferred that the parties intended either that the lease should last until the forty-fifth anniversary of the aunt's birth, or that it should end on her death if she dies under 45, and one would not expect it to be particularly difficult to decide which it was.

However, these categories are not distinguished in *Prudential*, and no consideration is given to the alternative methods by which the parties' intentions can be respected without violating the doctrine of estates.

Notes and Questions 17.2

Read *Prudential Assurance Co. Ltd* v. *London Residuary Body* [1992] 2 AC 386, either in full or as extracted at www.cambridge.org/propertylaw/, and consider the following:

1 In a periodic tenancy, is a postponement of the right to serve notice to quit for 99 years void or valid?

2 Would a licence to occupy for the duration of the war be effective? (See *Lace* v. *Chantler* [1944] KB 368.) What about a licence to occupy 'until average temperatures in England have become significantly affected by global warming'?

3 Does preserving the integrity of the system justify defeating the parties' intentions, if those intentions are clear?

4 One of the justifications given by Lord Templeman is that the object of the parties could be achieved by other means – for example, granting the lessee a 99-year lease terminable by the landlord on deciding to use the land for road-widening. Consider the adequacy of this alternative. Would any of the other alternatives suggested by Lord Templeman have effectuated the parties intentions entirely?

5 The House of Lords held that, although the lease was void, the tenant nevertheless held the land under a valid periodic tenancy. Explain why. What would have been the position if no rent had been payable during the period of the tenant's occupation? Consider why the courts adopt this device to avoid making the occupation retrospectively unlawful: see further section 17.3.1.6 below.

17.3.1.6. Grant of possession not giving rise to fixed-term/periodic tenancy

Supposing I, an owner, grant you a right to possession of my land for a limited period: will you necessarily thereby acquire a lease, even if the certainty of duration rule is not satisfied?

The position in principle is clear. The answer must be yes, unless the transaction is such as to give you another recognised type of possessory property interest (we consider below what these interests might be). This is because, although possession is by its nature proprietary in the sense that it is enforceable against third parties, it is not of itself a free-standing property interest. It is the central ingredient of ownership, but the only way in which I, as owner, can transfer it to you is by granting you a known species of property interest which carries with it a right to possession. I am not free to grant you the right to possession on any terms I choose, but only on terms that give rise to a known species of property interest. Although there are suggestions to the contrary in recent cases (which we look at in detail below) we know from *Hill* v. *Tupper* (Extract 5.1 above) that this is true: property interests can only be subdivided in recognised ways.

There is of course another way in which you, as non-owner, can get possession from me: you can simply take it without my consent, by taking physical control of the land with the intention of excluding the whole world, including me. If you do not have that intention you are not in possession. But, even in that case, what you will acquire is a title to a known species of property interest (i.e. a possessory title to ownership, which will mature into an absolute title to ownership if and when my better title is extinguished by the Limitation Act 1980: see Chapters 7 and 10), not possession as a free-standing interest in itself.

In other words, in principle a person in possession of land must either have a possessory title to ownership (i.e. as an adverse possessor) or have a lease of the land, or have some other proprietary interest in the land which carries with it the right to possess it.

We have said that this is clear in principle, but it has to be said that this is not a view uniformly recognised by the courts. In order to assess the significance of these apparent departures from principle, however, it is first useful to enumerate the recognised ways in which possession can be split off from ownership in the case of land, apart from by the grant of a lease.

The list is not long: if you are in possession of land and you are not the absolute beneficial owner, or a trespasser with a possessory title to ownership, or a tenant, you will fall within one of the following categories:

1 *A legal mortgagee who has exercised his right to possession*. A legal mortgagee has an inherent right to possession of the mortgaged land. As we see in Chapter 18, this is because a legal mortgagee of land either has, or is deemed to have, a lease of the land.
2 *A mortgagor allowed to remain in possession by the mortgagee*. It is established law that an owner who has granted a legal mortgage but has been allowed to remain in occupation pending default is in possession. This is so whether he has been allowed to remain in possession at the will of the mortgagee or on contractually enforceable terms that the mortgagee will not exercise its right to possession until default. After some uncertainty, the courts concluded that, in such circumstances, the mortgagor does not have a merely personal right to occupy as against the mortgagee, nor is he a subtenant of the mortgagee (unless it is clear that this was what the parties intended). Instead, he has a *sui generis* possessory right, enforceable against third parties and enforceable against the mortgagee. See further Chapter 18.
3 *A pledgee*. If it is possible to have a pledge of land (which, as we see in Chapter 18, is not certain), then what the pledgee has is possession of the land and a right to remain in possession until performance of the obligation secured by the pledge. This is because this is what a pledge is – a delivery of possession of a thing as security for the payment of a debt or performance of some other obligation.
4 *A beneficiary under a private trust of land*. In a private trust of land, which necessarily involves ownership being split between trustee and beneficiary, a beneficiary in some circumstances has a right to possession enforceable against the trustee and the rest of the world (although capable of being overreached (and therefore not affect third parties) by certain transactions entered into by the trustee). So, although it is technically possible for a trustee of land to grant a beneficiary a lease of the land (or any other interest in it), it is also possible for a beneficiary to have a right to possession *qua* beneficiary as against the trustee – i.e. the right to possession can be attributable solely to the trustee–beneficiary relationship. As we noted in Chapter 7, this is not true of a public charitable trust (or a private purpose trust, although this is less likely to arise). In a public trust, the 'beneficiary' of the trust is the abstract purpose of the trust (e.g. to provide housing for homeless persons). Any land held by the trustees is held on trust to carry out that purpose, not on trust for those on whom the trustees choose to confer benefit (i.e. the homeless people they house). If therefore those people are given a right

to possession of the land enforceable against the trustees, this cannot be referable to any trustee–beneficiary relationship – it can only arise because the trustees have granted them some property interest such as a lease.

5 *A holder of statutory rights of occupation*. There are some statutory rights of occupation which are purely personal in that they are non-transmissible and automatically cease on death or change of status, but which are nevertheless enforceable against the whole world, including the owner. Examples include the statutory tenancy which arises after the expiry of a contractual tenancy protected by the Rent Acts, and the statutory rights of occupation conferred on spouses which originated in the Matrimonial Homes Act 1967, and is now in the Family Law Act 1996. The 'tolerated trespass' status considered in the next section should probably also be treated as coming within this category. There is no doubt that such occupiers are in possession of the land, and that their possession is solely attributable to their statutory rights (or, in the case of *Stirling* v. *Leadenhall Residential 2 Ltd* [2001] EWCA Civ 1011 to the court order permitting them to remain in possession, paying mesne profits as trespassers, pending execution of a possession warrant). In other words, the statutory or court-sanctioned status entitles them to a right of possession.

6 *Miscellaneous anomalous use rights*. In *Foster* v. *Warblington Urban District Council* [1906] 1 KB 648, CA, Fletcher Moulton LJ considered the juridical nature of an 'oyster laying' – the right to deposit oysters, caught elsewhere, in marked beds on land privately owned by someone else, in a place where oysters are not naturally found (the idea being to fatten the oysters for consumption). He concluded that it is a private property right, and that interference with the enjoyment of the right (in this case, by the local authority polluting the oysters with sewage, an event confirmed by a subsequent outbreak of typhoid fever among the guests at a mayoral banquet in Winchester who had eaten them) was therefore actionable as a nuisance or trespass. However, he and the other members of the Court of Appeal unanimously held that the control that the oyster merchant, the holder of the right, exercised over the oyster beds amounted to *de facto* possession of them, and that that of itself was sufficient to entitle him to bring an action in nuisance, whether or not he could prove he had lawful title to the beds, or had acquired title by adverse possession, or had some other proprietary right in them such as the 'oyster laying' posited by Fletcher Moulton LJ. It is implicit in Fletcher Moulton LJ's judgment that the oyster merchant's possession of the oyster beds could quite properly be attributable to the oyster laying – in other words, that his right to use the oyster beds for the particular purpose of depositing and fattening oysters carried with it a right to take a degree of control over the beds, in order to prevent interference with the oysters, which amounted to exclusive possession of the beds. Such a right to make a particular use of land which entitles the user to exclude all others, including the true owner, is anomalous (consider why it cannot amount to an easement or a profit à prendre), pre-dating the rigid classification of incorporeal hereditaments that we now have. There may well be other similar isolated survivors, but they have no great significance for present purposes.

So, if we leave aside this last anomalous category, what it comes down to is that a person in possession of land may be an absolute owner, a trespasser with a title to

ownership good against the whole world except the absolute owner, a tenant, a mortgagee, a mortgagor, a pledgee, a beneficiary under a private trust, or a person with statutory occupation rights.

The position taken here is that this is an exhaustive list, with tenancy as the residual category. In other words, if I as an owner allow you to take or remain in *possession* of my land (which necessarily entails conferring on you a *right* to exclude me as well as the rest of the world) for anything less that a perpetual duration, and in law it does not amount to a grant to you of any of these other types of property interest, you will be a tenant. If the certainty of duration rule (or indeed formalities rules) prevent it from being a fixed-term tenancy, then it will take effect by operation of law as a tenancy at will terminable at will, or (once the concept of periodic tenancy had become accepted in the eighteenth century) a periodic tenancy terminable by due notice to quit, provided the court can infer that from periodic payments of rent. (See Simpson, *A History of the Land Law*, pp. 252–5, citing *Littleton on Tenures*, section 68 on tenancies at will, and quoting Blackstone, *Commentaries*, Book II, Chapter 9, section II.) We see this basic principle in operation in *Prudential* in the previous section: the tenancy until the land was required for road-widening was void because of uncertain duration, but a periodic tenancy was implied because the 'tenant' undoubtedly had been in possession paying a periodic rent.

The contrary view is that the list is not exhaustive, and that it is perfectly possible for you to be in possession of my land without your having any possessory property interest whatsoever. This view, which as we see below has attracted considerable judicial support (if not much by way of direct decision), appears to arise at least partly out of the lingering confusion between possession (the proprietary right to exclude the whole world including the owner) and exclusive occupation (the personal right to use the land and exclude the owner from beneficial use). Although the House of Lords decision in *Street* v. *Mountford* [1985] AC 809 went some way towards reaffirming the distinction between the two concepts (by reaffirming that possession, as opposed to occupation, is a necessary condition for a tenancy), the terminology used by Lord Templeman in his leading speech does not always clearly mark the distinction, and this has proved a fertile source of misunderstanding in subsequent cases.

There are four passages in his speech which have caused particular problems. In each of these he considers the possible interests that an occupier of residential accommodation might have. In three of them at the crucial point he uses the term 'possession' when the context suggests he means 'occupation', and in the fourth, although he uses the term 'occupation', in subsequent cases it has sometimes been assumed that he meant possession. Here are the four passages:

Passage 1

> There can be no tenancy unless the occupier enjoys exclusive possession; but an occupier who enjoys exclusive *possession* [emphasis added] is not necessarily a tenant. He may be owner in fee simple, a trespasser, a mortgagee in possession, an object of

> charity or a service occupier. To constitute a tenancy the occupier must be granted exclusive possession for a fixed or periodic term certain in consideration of a premium or periodical payments. The grant may be express, or may be inferred where the owner accepts weekly or other periodic payments from the occupier.

Here he describes an owner in fee simple, a trespasser, a mortgagee in possession, an object of charity and a service occupier as all being in *possession* and not just in occupation. However, while this is true of the first three categories, as we have seen, it is certainly not true of the last two, and he himself makes this clear in the succeeding paragraphs. In relation to 'object of charity' he goes on to refer to cases in which it was held that there was no tenancy because there was no intention to create legal relations at all – cases involving what Lord Denning described in *Facchini* v. *Bryson* [1952] 1 TLR 1386 as 'a family arrangement, an act of friendship or generosity, or such like'. It goes without saying that, if there is no enforceable agreement between the parties, the occupier can have no *right* to exclude the grantor, just a personal permission to be there. Such a person is by definition not in possession, merely in occupation. As to 'service occupier', he makes it clear in the paragraphs immediately following the one just quoted that he does not regard service occupiers as having possession:

> Occupation by service occupier may be eliminated. A service occupier is a servant who occupies his master's premises in order to perform his duties as a servant. In those circumstances, the possession and occupation of the servant is treated as the possession and occupation of the master and the relationship of landlord and tenant is not created: see *Mayhew* v. *Suttle* (1854) 4 E&B 347; 119 ER 137. The test is whether the servant requires the premises he occupies in order the better to perform his duties as a servant:
>
> > Where the occupation is necessary for the performance of services, and the occupier is required to reside in the house in order to perform those services, the occupation being strictly ancillary to the performance of the duties which the occupier has to perform, the occupation is that of a servant.
>
> See Mellor J in *Smith* v. *Seghill Overseers* (1875) LR 10 QB 422 at 428.

This is clearly inconsistent with possession passing from master to servant, giving the servant a stake in the room entitling him to exclude the master. So, service occupiers are not tenants because they do not have possession. It is not correct to describe them as persons who have possession but are nevertheless not tenants.

Passage 2

> Exclusive possession is of first importance in considering whether an occupier is a tenant: exclusive possession is not decisive because an occupier who enjoys exclusive *possession* [emphasis added] is not necessarily a tenant. The occupier may be a lodger or service occupier or fall within the other exceptional categories mentioned by Denning LJ in *Errington* v. *Errington* [i.e. 'the circumstances and conduct of the parties

> show that all that was intended was that the occupier should be granted a personal privilege with no interest in the land'].

Although all these categories are referred to as having possession not occupation, Lord Templeman has already explained that this is not the case for service occupiers, nor for the categories given by Denning LJ, which were cases where there was no intention to create legal relations at all. As to lodgers, Lord Templeman referred to them earlier as the paradigm residential occupier who does not have possession:

> In the case of residential accommodation there is no difficulty in deciding whether the grant confers exclusive possession. An occupier of residential accommodation at a rent for a term is either a lodger or a tenant. The occupier is a lodger if the landlord provides attendance or services which require the landlord or his servants to exercise unrestricted access to and use of the premises. A lodger is entitled to live in the premises but cannot call the place his own ... If, on the other hand, residential accommodation is granted for a term with exclusive possession, the landlord providing neither attendance nor services, the grant is a tenancy; any express reservation to the landlord of limited rights to enter and view the state of the premises and to repair and maintain the premises only serves to emphasise the fact that the grantee is entitled to exclusive possession and is a tenant.

Passage 3

In the following passage, it is clearest of all from the context that, although he uses the term 'possession', he means occupation:

> Sometimes it may be difficult to discover whether, on the true construction of an agreement, exclusive possession is conferred. Sometimes it may appear from the surrounding circumstances that there was no intention to create legal relationships. Sometimes it may appear from the surrounding circumstances that the right to exclusive possession is referable to a legal relationship other than a tenancy. Legal relationships to which the grant of exclusive *possession* might be referable *and which would or might negative the grant of an estate or interest in the land* [emphasis added] include occupancy under a contract for the sale of the land, occupancy pursuant to a contract of employment or occupancy referable to the holding of an office.

The words in italics confirm that the categories given here are intended to be (as indeed they are) examples of purely personal, non-proprietary rights. This is confirmed by the reference to occupancy under a contract for the sale of land. As we saw in section 17.3.1.1 above, a purchaser allowed into possession before completion and a tenant allowed into possession pending negotiations for a new or renewed lease have traditionally been classified as tenants at will or, sometimes, periodic tenants. It was only once such tenancies came to attract security of tenure that the courts had reason to doubt whether the parties intended to give the occupier proprietary rather than purely personal rights during the interim period. In appropriate cases, therefore, the courts have discerned a difference in the *nature*

and quality of the rights granted by the owner, and accepted that, in order to avoid security of tenure, the grantor has elected to grant only the very limited right of personal occupation (so giving rise to a licence), rather than the more extensive rights over the land which would arise out of a grant of possession (and therefore the grant of a lease). There do not appear to be any cases prior to *Street* v. *Mountford* (and there are none cited there) where the courts have held that such an occupier can be in *possession* and yet not have a tenancy. In subsequent cases, however, this passage has been taken to be authority for that proposition.

Passage 4

The impression that the terms 'possession' and 'occupation' are being used indiscriminately in these three passages, as if they mean the same thing, is reinforced by the fourth passage, where a similar list of categories reappears, this time given as examples of a person in *occupation* who has no tenancy:

> In *Errington* v. *Errington* [a no intention to create legal relations case] and in the cases cited by Denning LJ there were exceptional circumstances which negatived the *prima facie* intention to create a tenancy, notwithstanding that the occupier enjoyed exclusive *occupation* [emphasis added]. The intention to create a tenancy was negatived if the parties did not intend to enter into legal relationships at all, or where the relationship between the parties was that of vendor and purchaser, master and service occupier, or where the owner, a requisitioning authority, had no power to grant a tenancy. These exceptional circumstances are not to be found in the present case, where there has been the lawful, independent and voluntary grant of exclusive possession for a term at a rent.

And see also, in the same vein, his criticism of the judge in *Murray, Bull & Co. Ltd* v. *Murray* [1953] 1 QB 211, which he said was wrongly decided, who he said 'failed to distinguish between, first, conduct which negatives an intention to create legal relationships, second, special circumstances which prevent exclusive *occupation* from creating a tenancy and, third, the professed intention of the parties'.

The way in which subsequent courts have tended to interpret these passages is exemplified in the Privy Council decision in *Ramnarace* v. *Lutchman* [2001] UKPC 25, where the issue was whether a person who went into rent-free occupation of land with the permission of the owner, on the understanding that she could live there until she could afford to buy the land, was a tenant at will or a licensee. Relying on *Street* v. *Mountford*, the Privy Council came to the entirely orthodox conclusion that she was a tenant because she had been granted possession, but it is clear from the judgment of Lord Millett that he regards *Street* v. *Mountford* as providing authority for the proposition that possession of land 'may be referable to a legal relationship other than a tenancy or to the absence of any legal relationship at all' (see paragraph 16 of his judgment). We consider the objections to this proposition in Notes and Questions 17.3 below.

There are other cases in which the courts have assumed that *Street* v. *Mountford* is authority for the proposition that a person in possession may be merely a

licensee. It is not easy to understand what is meant by this proposition. If it is intended to mean that possession can be, and is here, a free-standing proprietary status, which in this instance happens to be held by someone who also holds a purely personal right to occupy (i.e. the licence), then the licence appears to be otiose: once a person has been granted a right to exclude all others, including the owner, for a period on terms (i.e. possession), what further role does the licence (a personal right to exclude the owner) have to play? So, the proposition that a person may have been granted possession of land as well as a licence to be on the land seems no different in content from the proposition that possession of land may be, and is here, granted as a free-standing proprietary interest – and, as we saw above, there are formidable *numerus clausus* objections to this.

If, on the other hand, the proposition that a person in possession of land may be a licensee is intended to mean that possession is in some sense an *ingredient* of the licence granted – i.e. you are granted a licence, by virtue of which you become entitled to possession of the land – we are left with an irreconcilable contradiction in terms.

By virtue of a licence, a grantee has a personal right to exclude the grantor but no right to be on the land or to exclude others which is enforceable against anyone other than the grantor (cf. the classic definition of a licence as that which 'properly passeth no interest nor alters or transfers property in any thing, but only makes an action lawful, without which it would have been unlawful': Vaughan CJ in *Thomas* v. *Sorrell* (1673) Vaugh 330 at 351). But possession is by definition an exclusive right to be on the land which *is* enforceable against everyone. If that is what you as a licensee hold, it is difficult to see how anyone could describe you as coming within the *Thomas* v. *Sorrell* definition of a licensee (and nearly as difficult to see how your position could possibly differ from that of a tenant).

Notes and Questions 17.3

Read *Ramnarace* v. *Lutchman* [2001] UKPC 25; [2001] 1 WLR 1651; [2002] 1 P&CR 28, either in full or as extracted at www.cambridge.org/propertylaw/, and consider the following:

1 At paragraph 16, Lord Millett appears to be saying that possession can be 'attributable' to proprietary interests in land which do not themselves confer a right to possession on the interest holder: 'a purchaser who is allowed into possession before completion and an occupier who remains in possession pending the exercise of an option each has in equity an immediate interest in the land to which his possession is ancillary. They are not tenants at will.' It is not entirely clear what this means. If you have a contractual right to purchase a fee simple, or an option to purchase which, once exercised, will mature into a contractual right to purchase, you *do* have an immediate equitable interest in the land, but it is not an interest which entitles you to take possession of the

land. It does not entitle you to take possession of the land now – your vendor is entitled to possession now, not you, and if you went into possession he would be entitled to mesne profits and an order for possession. Nor does it give you a present right to possession in the future: all it gives you is a present right to have in the future an interest in land which *will* entitle you to possession, and that is not at all the same thing. The position may well change once you have paid over the purchase price and complied with all the terms of the contract, if the date for completion has passed and title has still not been passed over to you. By that stage the vendor will hold the title on a bare trust for you, and you *will* have acquired an equitable interest in the land which entitles you to possession as against your trustee – i.e. the interest of an absolute owner in equity. The authority Lord Millett cites in support of this proposition is *Essex Plan Ltd* v. *Broadminster* (1988) 56 P&CR 353 at 356. In that case, in the passage referred to, Hoffmann J assumes that this novel proposition – possession can be 'ancillary and referable to' an equitable right to call for a legal estate – follows from Passages 3 and 4 of Lord Templeman's speech in *Street* v. *Mountford*. Is he right?

2 How does Mrs Ramnarace's situation differ from the situations Lord Millett was describing in paragraph 16?

3 For other instances where the court has held or suggested that a person may be in possession while remaining just a licensee, see, for example, *Westminster City Council* v. *Clarke* [1992] 2 AC 288, *Hounslow London Borough Council* v. *Twickenham Garden Developments Ltd* [1971] Ch 233 at 257 and *Manchester Airport plc* v. *Dutton* [2000] QB 133. In *Dutton*, the issue was whether the claimant could be said to be in possession for the purposes of bringing an action to evict trespassers, which does not necessarily raise the same considerations. Nevertheless, these cases lead Gray and Gray to conclude that '[i]n [more] recent years it has become established that possession, although one of the badges of a tenancy, is not necessarily denied to all kinds of licensee' (Gray and Gray, *Elements of Land Law* (3rd edn), p. 355).

17.3.1.7. The tolerated trespasser status

As we noted above, the courts have had considerable difficulty in categorising the status of tenants entering into possession during negotiations for a lease, or holding over after the end of their tenancy, particularly in cases where the category chosen would determine whether or not the tenant acquires statutory security of tenure. In order to avoid giving occupiers in such situations statutory protection that the courts considered unintended and inappropriate, the courts have variously categorised such arrangements as giving rise to tenancies at will or at sufferance, or as licences rather than as tenancies. In the case of secure tenancies granted under the Housing Act 1985, none of these avenues of escape is available, for reasons which will become apparent. In *Burrows* v. *Brent London Borough*

Council [1996] 1 WLR 1448 (also extracted at www.cambridge.org/propertylaw/), the House of Lords faced the difficulty that any forbearance by the landlord, allowing the tenant to remain after the landlord had succeeded in obtaining a court order bringing the tenancy to end for just cause (non-payment of rent, annoyance to neighbours etc.), would appear to give rise to a new tenancy or licence attracting security all over again, which in its turn could not be ended without repeating the whole procedure. In order to avoid this inconvenient result, the House of Lords came up with a new status for such occupiers – that of 'tolerated trespasser', described by Clarke LJ in *Pemberton* v. *Southwark London Borough Council* [2000] 1 WLR 1672, CA, as 'a recent, somewhat bizarre, addition to the dramatis personae of the law'. It might perhaps have been better (or at least have less potential to mislead) if they had opted instead for the rather less wide-ranging description used by Lord Jauncey at one point – 'a state of statutory limbo'. This was the approach taken by the courts at the beginning of the twentieth century, when they had to consider the juristic nature of the status of tenants given security of tenure under the emerging Rent Acts. The Acts permitted tenants (and their successors) to remain in possession after their tenancies had ended, under what was called a 'statutory tenancy'. The nature of the statutory tenancy initially caused the courts some difficulty: it was non-assignable, but binding on third parties and not terminable except on grounds specified by statute, and by processes laid down by statute. Eventually, after flirting with analyses drawing on tenancies at will, the court settled for the conclusion that the status was *sui generis* – a status of irremoveability conferred by statute.

In cases subsequent to *Burrows*, however, the courts have shown little inclination to keep the status of 'tolerated trespass' similarly confined. Immediately after *Burrows*, it might have been possible to argue that 'tolerated trespass' was similarly a *sui generis* status that could only arise out of that particular statutory leasehold relationship (see *Pemberton* v. *Southwark London Borough Council* [2000] 1 WLR 1672, CA, and *Lambeth London Borough Council* v. *Rogers* (2000) 32 HLR 361; [2000] 03 EG 127, CA, referred to in *Pemberton*). However, in *Stirling* v. *Leadenhall Residential 2 Ltd* [2001] 3 All ER 645; [2001] EWCA Civ 1011, the court found it to exist in a different context, simply by virtue of a court order permitting the retention of possession pending execution of a possession warrant, on payment of stated regular amounts by way of mesne profits.

What is clear from these subsequent cases is that the 'tolerated trespass' is not necessarily going to be a temporary short-lived state, bridging a short gap until the former tenant breaches the terms of the agreement and leaves, or something else happens which re-establishes him as a tenant. In *Pemberton*, the 'tolerated trespass' lasted for five years, during which all payments to be made by the tenant appeared to have been made promptly. So, during what may be an extended period like this, what precisely is the relationship between former tenant and former landlord? It is now established that the 'tenant' has exclusive possession as against the 'landlord', and is in possession with the landlord's permission (or perhaps acquiescence? – see

Stirling v. *Leadenhall*) rather than adversely, but that none of the terms of the former tenancy apply (*Pemberton*). This means the landlord can take no action against the 'tenant' for any breach of covenant, other than a failure to pay the sums agreed under the agreement, nor can the 'tenant' rely on any of the express or implied obligations of the landlord under the former tenancy, for example as to repair. Whatever rights and obligations they have towards each other therefore appear to arise from the fact that the 'tenant' has possession (and therefore, as it was held in *Pemberton*, can bring actions in nuisance against the 'landlord') and the fact that the premises remain the 'tenant's' home for the purposes of the Human Rights Act (see further *Pemberton*). The situation is further complicated, and the artificiality heightened, by the fact that, in the *Burrows*-type case, the 'tenant' (but not, it would seem, the 'landlord') can at any time apply to have the possession order discharged, and it seems likely that, if it does so at a time when the terms of the agreement have been complied with, the court will agree. Once this is done, the old secure tenancy will revive with retrospective effect, allowing the parties to take advantage of the former tenancy terms in respect of events that took place during the limbo period (see *Rogers*). 'Trespass' is not, therefore, a wholly satisfactory epithet.

Notes and Questions 17.4

Read *Burrows* v. *Brent London Borough Council* [1996] 1 WLR 1448; [1996] 4 All ER 577, either in full or as extracted at www.cambridge.org/propertylaw/, and consider the following:

1 Why, according to Lord Browne-Wilkinson, is a tenant holding over after the end of a secure tenancy in a different position from a tenant holding over after the end of any other type of tenancy?

2 Lord Browne-Wilkinson describes the secure tenancy as *sui generis*, and says decisions on other holding-over situations are not helpful here, and Lord Jauncey refers to the occupation as 'deriving' from the provisions of the 1985 Act, and refers to the Act as giving the court the power 'to create a state of statutory limbo'. Does this mean that the status of tolerated trespasser cannot arise in any circumstances other than following on after a secure tenancy?

3 Explain how the facts of this case differ from those in *Greenwich London Borough Council* v. *Regan* (1996) 28 HLR 469; (1996) 72 P&CR 507. What did the Court of Appeal in *Regan* decide was the status of the tenant in that particular case?

4 Explain how, according to Lord Browne-Wilkinson, a secure tenancy terminated by an immediate unconditional possession order can be revived *after* the date specified in the order as the date on which possession must be given up.

5 Lord Jauncey took the view that the wording of section 85 of the Housing Act 1985 itself supports the contention that a tenant against whom a possession order has been made might remain in possession in a capacity other than that of tenant: explain his argument, and consider its validity.

6 What were the absurdities that persuaded the Court of Appeal that the effect of the agreement was to grant Ms Burrows a new tenancy? Explain how they are avoided by the analysis adopted by the House of Lords, and examine the reasons given by Lord Browne-Wilkinson for his conclusion that Parliament could not have intended such an agreement to give rise to a new tenancy.

7 It was not argued in this case that the effect of the agreement was to create a licence, or a tenancy at will, or a tenancy at sufferance. Why not? If it had been argued, what arguments could have been put by Lord Browne-Wilkinson for saying that it did not fall within each of these categories?

8 Explain what, as a result of this decision, the difference is between a licence, a tenancy at will, a tenancy at sufferance, and the status of tolerated trespasser.

9 If a tolerated trespasser remains in possession as such for ten years, will he be entitled to apply to the Land Registry to be registered as proprietor as an adverse possessor? See section 11.2.2 above.

10 Lord Browne-Wilkinson said: 'the parties plainly did not intend to create a new tenancy or licence, but only to defer the execution of the order so long as Miss Burrows complied with the agreed conditions.' Is this more correctly categorisable as a fixed-term tenancy of uncertain duration?

11 Does a 'tolerated trespasser' have an interest in land? If so, what is it?

17.3.1.8. Non-proprietary leases?

At this point we need to return to a question posed in Chapter 10. Suppose I am in practical control of land but have no property interest in it, and I then purport to grant a lease of it to you. If you move in, take exclusive physical control of the land and pay me rent, do you acquire a lease of the land? In Chapter 10, we concluded that you would be precluded from having a tenancy because of the *nemo dat* rule, but that you would have a tenancy by estoppel. As we noted there, a tenancy by estoppel has two essential features. The first is that, even though there is no tenancy as far as the rest of the world is concerned, the purported grant is effective as between you and me, in the sense that I will be estopped from denying the existence of, or acting in any way inconsistent with the existence of, the tenancy. The second essential feature is that the estoppel can be fed, so that, if I subsequently acquire a sufficient interest in the land, your tenancy by estoppel will automatically be transformed into a real tenancy, enforceable against the whole world.

Now we must consider a variation on this situation. Suppose that the facts are identical, except that I am completely honest with you throughout. I tell you that I have no interest in the land which would enable me to grant you a lease, and when I hand over exclusive physical control to you I tell you that what I am granting to you is necessarily a licence, not a lease. What is your position then? At first sight, it might seem quite straightforward. Because of the *nemo dat* rule, you cannot have a lease. And, because both of us know that I am unable to grant you a lease, and I never pretended that that was what I was doing, there does not seem room for me to be estopped from denying it.

In *Bruton* v. *London & Quadrant Housing Trust* [1998] QB 834, CA, the Court of Appeal held that such a situation could not give rise to a tenancy (nor, for reasons which will be considered below, a tenancy by estoppel). However, the House of Lords ([2001] 1 AC 406) disagreed, and concluded unanimously that, although there was no tenancy by estoppel, there *was* a lease – but one which was not enforceable against third parties.

In order to appreciate the arguments that persuaded the House of Lords, it is necessary to look more closely at the factual context. Local authority landowners do not have the same powers to dispose of their land as absolute owners have. They are given specific statutory powers of disposition, and, if they purport to make a disposition that they have no power to make, the disposition will be void. Local authorities who own residential accommodation do have statutory powers to let it to residential occupiers. As a result of the decision in *Street* v. *Mountford* [1985] AC 809, if they do grant possession to residential occupiers, the grant will almost certainly be construed as a tenancy, even if it is called something else. Consequently, the occupier will be entitled to require the local authority to keep the property in repair under section 11 of the Landlord and Tenant Act 1985, and will also be a secure tenant and as such entitled to security of tenure under the Housing Act 1985 as amended. There are circumstances in which local authorities wish to avoid these consequences, and the *Bruton* case concerned a stratagem designed to enable them to do so.

The stratagem requires two steps to be taken. First, the local authority transfers occupation and control of the residential property to a body to whom it has no statutory power to dispose, in this case a housing trust. Whatever the terms of the transfer, so the argument goes, it cannot confer any proprietary interest on the housing trust because, if it did, that would be an *ultra vires* disposition and therefore void. The transfer will, however, put the housing trust in unchallengeable factual control of the property, and therefore put it in a position to take the second step, which is for it to grant exclusive occupation of the property to a residential occupier. The housing trust is then able to argue that, whatever the terms of the agreement it makes with the residential occupier, it cannot amount to a tenancy because of the *nemo dat* rule.

The policy issue confronting the House of Lords was therefore whether a local authority and a housing trust, each of which had the power and the capacity to

grant occupiers tenancies of houses – which, if granted, would have had the inevitable consequence of making the grantor liable for repair – were able to avoid that consequence by structuring the transaction in this way. The House of Lords held that they could not do so, but only by adopting an analysis which involved acceptance of the principle that a lease need not necessarily be proprietary.

Their reasons for doing so, and the reasons which persuaded Millett LJ to come to the opposite conclusion in the Court of Appeal, are given in the following extracts from the judgments. The question of whether there are alternative analyses that might have led to the same conclusion as that reached by the House of Lords, but doing less violence to conventional property law principles, is considered subsequently.

Meanwhile, however, the conclusion appears to be that yes, according to the House of Lords (or, more accurately, as a result of their decision: see *Milmo* v. *Carreras* [1946] KB 306, CA, extracted at www.cambridge.org/propertylaw/) there is such a thing as a non-proprietary lease. It comes into operation whenever the *nemo dat* rule precludes the grant of a proprietary lease, provided that the grantor makes no secret of his lack of capacity (if he did, it would be a tenancy by estoppel) and the intention of both grantor and grantee is that the grantee should have the same rights in the land as he would have if he did have a lease.

Notes and Questions 17.5

Read *Bruton* v. *London & Quadrant Housing Trust* both in the Court of Appeal ([1998] QB 834; [1998] 3 WLR 438; [1997] 4 All ER 970) and in the House of Lords ([2000] 1 AC 406; [1999] 3 WLR 150; [1999] 3 All ER 481), and *Milmo* v. *Carreras* [1946] KB 306, CA, either in full or as extracted at www.cambridge.org/propertylaw/, and consider the following:

1 Why was the fact that 'the trust was a responsible landlord performing socially valuable functions' held not to be 'an exceptional circumstance', rendering Mr Bruton a licensee rather than a tenant? Should it have been?

2 By the time the case reached the House of Lords, how long had Mr Bruton been living in the flat? In the circumstances that had arisen, who should have been responsible for repairing the flat?

3 Is the decision of the House of Lords that Mr Bruton *has* a lease of the flat, or that he is to be treated for the purposes of the Landlord and Tenant Act 1985 as if he has a lease of the flat?

4 According to Lord Hoffmann, is Mr Bruton's 'lease' enforceable against third parties? If not, is it a property interest or is it an interest personal to Mr Bruton?

5 Explain the difference between lack of *capacity* to grant a lease and lack of *title*. Why, according to Millett LJ, does lack of capacity prevent a tenancy by estoppel

from arising, whereas lack of title does not? In this case, the council lacked capacity, whereas the trust lacked title. Why then, according to Millett LJ, did the agreement between the trust and Mr Bruton not give rise to a tenancy by estoppel? (See further section 10.5.5.3 above.)

6 How does this non-proprietary lease differ from a tenancy by estoppel? If, during the course of the 'lease', the grantor acquires a sufficient proprietary interest, will the lease automatically become proprietary?

7 There are other possible analyses of the situation in *Bruton* which would have allowed the House of Lords to avoid the conclusion that Mr Bruton had a non-proprietary lease. Consider the following:
   a. Could it have been argued that, even if Mr Bruton was only a licensee, he still had a 'lease' for the purposes of section 11 of the Landlord and Tenant Act 1985, and therefore the housing trust was bound by the statutory duty to repair? Some public-sector licences come within the definition of 'secure tenancy' under the Housing Act 1985 as amended (see section 19(3)) and consequently the licensee is entitled to the limited degree of security of tenure conferred by that Act. There are some very specific detailed exclusions from the status of secure tenancy, including some (but not all) lettings/licences to homeless persons and students, but it is not clear from the facts whether any of these exceptions would have applied here. Assuming none of them applied, it is at least arguable that Mr Bruton was a secure tenant of the housing trust: the relevant wording of the Housing Act 1985 as amended does not appear to exclude the possibility that the 'landlord' of a secure tenancy may be a public sector body which lacks the capacity and/or title to grant a lease (see sections 79 and 80). Since 'lease' in section 11 of the Landlord and Tenant Act 1985 (defined in section 17 of the Act) clearly applies to tenancies which are 'secure tenancies', should it not apply also to licences which are 'secure tenancies'? There seems no reason in principle why the grantors of one should have different repairing obligations from the grantors of the other.
   b. Alternatively, could it be argued that Mr Bruton had a lease which was granted to him by *the council* (which did have capacity and title to do so), acting by its agent, the housing trust, and that therefore the council had a statutory duty to repair under section 11 of the Landlord and Tenant Act 1985? Whatever the agreement between the council and the housing trust actually said, the council authorised the housing trust to give occupiers of the premises a degree of control over the premises which amounted in law to possession. In other words, even though the agreement purported to prohibit the housing trust from granting leases, its sole purpose was to authorise the trust to grant on the council's behalf rights to residential occupiers which would in law amount to leases.
   c. Another possible analysis is to distinguish possession acquired as a matter of fact, which does not give rise to a lease, from possession granted by a person with capacity to an owner, which does. Mr Bruton can be said to have acquired possession of the house by moving in and establishing the requisite degree of physical control over it, with the intention of excluding all others, with the

connivance of the person who had *de facto* physical control of the house, although no title to it. On this analysis, possession is not *granted* to Mr Bruton by anyone, so he does not have a lease and is not entitled to rely on section 11 of the Landlord and Tenant Act 1985. By virtue of being in possession, he has a better right to possession than anyone other than the council, which has not granted away the right to possession that it has by virtue of being fee simple owner. The council has, however, in effect contractually bound itself to the trust, which has in turn contractually bound itself to Mr Bruton, that its better right to possession will not be asserted against a person let into possession by the trust on agreed terms. Whether this is something that could be relied on by Mr Bruton as a defence to a possession action brought by the council is another matter.

8 Consider what effect, if any, the decision of the House of Lords in *Bruton* has on what was said in *Milmo* about the relationship created by the contract made between the tenant and the intended subtenant. Would Milmo have succeeded in obtaining a possession order against Carreras? Would Milmo be liable to Carreras for repairs under section 11 of the Landlord and Tenant Act 1985?

17.3.2. Alienability

17.3.2.1. Inherent alienability

A lease is a property interest, and for present purposes this has several important consequences.

Alienability of tenant's interest

The first is that the lease itself – i.e. the tenant's interest – is inherently alienable. Subject to any contractually agreed restriction, the tenant is free to assign the lease without obtaining the consent of, or even informing, the landlord. And, if the tenant dies or goes bankrupt, the lease is unaffected – it simply passes by operation of law on to whoever becomes entitled to the tenant's property under the rules considered in Chapter 8. The precise effect that assignment of the lease has on the enforceability of the terms of the lease, which is complicated, is summarised below, but the position in principle is that, as the lease passes from one person to another, whether by assignment or by operation of law, the person for the time being holding the lease steps into the shoes of the original tenant, becoming entitled to possession of the land on the same terms as those originally agreed between the original contracting parties.

Subleases and other derivative interests granted by the tenant

The second consequence of the proprietary status of a lease is that the tenant is free to grant derivative property interests (including, importantly, mortgages, charges and subleases) out of its lease without reference to the landlord, again subject to any contractual agreement to the contrary. A sublease is essentially a sub-contracting of the right to possession to a third person for a period which is less than the tenant's term (if it is the same or longer, it takes effect as an outright

assignment of the tenant's lease: *Milmo* v. *Carreras* [1946] KB 306, CA, above). A subletting does not operate in the same way as an assignment: in a subletting the tenant is not disposing of its interest to the subtenant but carving a lesser interest out of it. The subtenant does not therefore step into the tenant's shoes as an assignee does, but takes possession from him on terms agreed between the two of them, which may well be different from the terms contained in the headlease. Consequently, there is no direct relationship between head landlord and subtenant: the intermediate tenant remains liable to the head landlord to observe the terms of the headlease, and simultaneously, while the subtenancy continues, the subtenant is liable to the intermediate tenant to observe the terms of the sublease.

Effect of termination of lease on derivative interests

In principle, since derivative interests such as subleases and mortgages and charges of the lease are carved out of the lease, they will automatically be extinguished when the lease ends. This is not always a just or convenient result, particularly where the tenant ends the tenancy voluntarily and/or prematurely by surrender, disclaimer or serving notice to quit, or loses it by forfeiture. The courts have a variety of statutory and equitable jurisdictions which enable them to grant relief in some form or another to the derivative interest holder in some but not all of these cases: for details reference should be made to standard landlord and tenant textbooks.

Alienability of landlord's interest

Another consequence of the proprietary status of the lease is that it is enforceable against third parties, in particular against any person to whom the landlord assigns her interest. This leaves the landlord free to assign her interest at any time to whomever she wants without reference to the tenant (again, subject to any agreement to the contrary). The assignment will have no effect on the validity or enforceability of the lease (assuming any necessary registration requirements have been satisfied), and, subject to the complications noted below, the assignee will step into the assignor's shoes as landlord under the lease. The same applies on any assignment of the landlord's interest by operation of law.

Concurrent leases and other derivative interests granted by the landlord

The landlord's interest is, necessarily, one that carries with it the right to possession for a period which is longer than that which has been granted to the tenant – usually the freehold interest in the land. This interest is an interest which is reversionary on the lease, i.e. the right to possession will revert to the landlord when the lease ends. There is no reason why the landlord should not grant derivative interests, such as mortgages or charges or easements, out of this reversionary interest (in principle not binding on the tenant, although this may be affected by enforceability rules: see Chapters 14 and 15 above). It may even grant another lease of the same land to another person out of the reversion, with the

intention that this second lease, which may be shorter or longer than the first lease, will run concurrently with the first lease. This second lease (called a concurrent lease or lease of the reversion) cannot grant the tenant a better right to possession than that already granted to the first tenant (although there may be exceptional circumstances where registration rules could make this happen: see Chapters 14 and 15 above). What it does do is to, in effect, give rise to a temporary loan of the landlord's reversion to the second tenant for the period when the two leases overlap. The relationship that this creates between the landlord, the first tenant and the second tenant helps explain why anyone would want to do this. If I grant you a lease of my flat for five years from 1 January 2002 at a rent of £10,000 a year, with a covenant by me to carry out repairs to the flat, and then grant my brother another lease of the flat from 1 January 2003 for two years at a rent of £6,000 a year, the effect will be that, for the period of my brother's lease, he will step into my shoes as your landlord under your lease. In other words, he will be entitled to collect and keep for himself your rent of £10,000 a year for those two years, and he will also be liable to you for carrying out whatever repairs are needed during that time. During that two-year period the relationship between you and me will be in abeyance – I have effectively sub-contracted all the rights and liabilities attaching to it to my brother. The relationship between me and my brother during that time will be governed by the terms of the two-year lease I granted him – i.e. he will have to pay me £6,000 a year and comply with whatever other terms we agreed in that lease. If the lease I had granted him was for a period expiring *after* the end of your lease – say from 1 January 2003 until 31 December 2010 – the effect would be the same except that, when your lease ended in 31 December 2006, he would become entitled to possession of the flat, continuing to pay me the £6,000 a year under his lease until it ended in 2010. Concurrent leases are sometimes created deliberately for commercial reasons, but they can also be ordered by the court under the Landlord and Tenant (Covenants) Act 1995 (although in those circumstances they are called overriding leases: see below), and even arise inadvertently (see, for example, *Fuller* v. *Judy Properties Ltd* (1992) 64 P&CR 176, CA).

17.3.2.2. Restrictions on alienability

The original landlord and tenant can, and frequently do, agree contractual restrictions on the tenant's right to assign or sublet. Contractual restrictions on the landlord's right to alienate are equally possible in principle but unusual in practice. Contractual restrictions on the tenant's alienation rights are more common in leases at a full rent, less so in long residential leases granted at a low rent and for a premium (consider why). It is important to appreciate that such restrictions, whether imposed on the landlord or on the tenant, are effective in contract only – they cannot invalidate any assignment or subletting actually made, even if made in breach of contract. The breach of contract will of course be actionable by the other party.

Some statutory security of tenure regimes also impose restrictions on tenants' alienation rights, either directly (see, for example, sections 91–93 of the Housing

Act 1985, applicable to public sector residential tenancies which qualify as secure tenancies) or indirectly, whether by giving holding-over tenants purely personal rights not to be removed (as under the Rent Acts regime which is now being phased out, under which tenants acquired after the expiration of their contractual tenancies a 'protected tenancy', described by the courts as a mere 'status of irremoveability': *Keeves* v. *Dean* [1924] 1 KB 685) or by making the security of tenure depend, in effect, on the tenant's continuing to occupy the premises for its own purposes after the end of the contractual term (e.g. under Part II of the Landlord and Tenant Act 1954, applicable to business tenants).

17.3.2.3. Statutory control of contractual restrictions

A landlord's freedom to restrict the tenant's right to alienate by imposing contractual restraints has long been restricted both by market forces and by statute. The basic statutory position (which at first sight looks odd) is that *absolute* prohibitions against alienation are valid, whereas *qualified* ones – that the tenant may not alienate without the consent of the landlord – are automatically subject to a proviso that the landlord may not unreasonably withhold consent (section 19(1)(a) of the Landlord and Tenant Act 1927). It leaves the landlord with only three options: he can remove the tenant's right to alienate altogether; he can impose no restraints whatsoever, leaving the tenant to do whatever it wants; or he can allow the tenant to alienate after obtaining his consent, which he may not unreasonably withhold. In most cases, it seems that market forces compel him to choose either the second or third option: absolute prohibitions against alienation are rarely found, either in commercial or in residential leases of any significant duration. This may not explain why section 19(1) omitted to regulate or invalidate them in the first place, but it probably does explain why the anomaly has not subsequently been removed.

This leaves landlords with limited room for manoeuvre. The second option – imposing no restrictions at all on the tenant's inherent alienation rights – may be appropriate in situations where the identity and financial standing of the person holding the lease is relatively unimportant (for example, long residential leases granted at a premium and a nominal rent, where restrictions are rarely imposed), or where the tenant has invested heavily in the premises and demands a fully marketable property interest (as in building leases, where restrictions are actually prohibited by statute except during the last seven years of the term: see section 19(1)(b) of the Landlord and Tenant Act 1927). In other cases, where landlords need or want more control, they are required to accept the statutory limitation that their consent to any application by the tenant to assign or sublet may not be unreasonably withheld (nor, since the Landlord and Tenant Act 1988 came into force, unreasonably delayed). This limitation has been strictly construed by the courts, who have insisted that the reasons on which the landlord's decision is based must be related to that particular lease and that particular landlord–tenant relationship (see Balcombe LJ in *International Drilling Fluids Ltd* v. *Louisville Investments (Uxbridge) Ltd* [1986] Ch 513 at 519, Extract 17.2 below) and that

the reasonableness of the decision must be assessed by reference to objective criteria and not by reference to any pre-ordained standards set by the landlord (*Re Smith's Lease* [1951] 1 All ER 346). This insistence that landlords must make objectively justifiable decisions has been further reinforced by section 1(6) of the Landlord and Tenant Act 1988 which has reversed the burden of proof, so that the onus is now on the landlord to prove that its response to a tenant's application to assign or sublet was both reasonable and prompt, although subsequently somewhat eroded for landlords of commercial premises by the Landlord and Tenant (Covenants) Act 1995. As a recompense for losing their right to insist that tenants who have assigned their interests in the lease should nevertheless remain liable for the rent for the rest of the term of the lease, landlords of non-residential leases can now lay down in advance specific criteria for 'reasonableness': section 22 of the Landlord and Tenant (Covenants) Act 1995, adding provisions of extraordinary complexity to section 19 of the Landlord and Tenant Act 1927.

Extract 17.2 ***International Drilling Fluids Ltd* v. *Louisville Investments (Uxbridge) Ltd* [1986] Ch 513 at 519**

BALCOMBE LJ: . . . From the authorities I deduce the following propositions of law:

1 The purpose of a covenant against assignment without the consent of the landlord, such consent not to be unreasonably withheld, is to protect the lessor from having his premises used or occupied in an undesirable way, or by an undesirable tenant or assignee: *per* A. L. Smith LJ in *Bates* v. *Donaldson* [1896] 2 QB 241, 247, approved by all the members of the Court of Appeal in *Houlder Brothers & Co. Ltd* v. *Gibbs* [1925] Ch 575.
2 As a corollary to the first proposition, a landlord is not entitled to refuse his consent to an assignment on grounds which have nothing whatever to do with the relationship of landlord and tenant in regard to the subject-matter of the lease.
3 The onus of proving that consent has been unreasonably withheld is on the tenant [now reversed by section 1(6) of the Landlord and Tenant Act 1988].
4 It is not necessary for the landlord to prove that the conclusions which led him to refuse consent were justified, if they were conclusions which might be reached by a reasonable man in the circumstances: *Pimms Ltd* v. *Tallow Chandlers Co.* [1964] 2 QB 547, 564.
5 It may be reasonable for the landlord to refuse his consent to an assignment on the ground of the purpose for which the proposed assignee intends to use the premises, even though that purpose is not forbidden by the lease: see *Bates* v. *Donaldson* [1896] 2 QB 241, 244.
6 There is a divergence of authority on the question, in considering whether the landlord's refusal of consent is reasonable, whether it is permissible to have regard to the consequences to the tenant if consent to the proposed assignment is withheld.
7 Subject to the propositions set out above, it is in each case a question of fact, depending upon all the circumstances, whether the landlord's consent to an assignment is being unreasonably withheld.

Notes and Questions 17.6

1 In *Mount Eden Land Ltd* v. *Straudley Investments Ltd* (1996) 74 P&CR 306 at 310, CA, Phillips LJ approved Balcombe LJ's propositions and said that he would add to them that it would normally be reasonable for a landlord to refuse consent or impose conditions on a grant of consent in order to prevent his rights under the lease being prejudiced, but not in order to improve or enhance those rights. Approval of the Balcombe propositions was also given by the House of Lords in *Ashworth Frazer Ltd* v. *Gloucester City Council* [2001] 1 WLR 2180.

2 Despite Balcombe LJ's conclusion that reasonableness is a question of fact in every case, the question of the reasonableness of a landlord's decision has continued to attract considerable litigation: for examples of what has and has not been considered by the courts to be reasonable, see Farrand and Clarke, *Emmet and Farrand on Title*, paragraphs 26.156–26.161.

17.3.3. Effect of alienation on enforceability

17.3.3.1. Introduction: the basic principle

We said at the beginning of this chapter that the rights and obligations of the landlord and tenant under a lease derive partly from the nature of their proprietary relationship and partly from the terms of the contract made between the original parties. In this section, we look at how enforcement of the terms of the lease is affected by either or both of the original parties assigning their interest.

Automatic transmission of benefit and burden of proprietary terms: the privity of estate principle

The basic principle is that which applies to all property interests which involve a continuing relationship between grantor and grantee: whoever acquires the respective property interests of the grantor and of the grantee automatically becomes bound by, and entitled to the benefit of, all the terms which bound the original grantor and grantee, in so far as they relate to that interest. This applies not only to those terms that arise out of the inherent nature of the proprietary relationship created, but also to any additional terms contractually agreed between the original grantor and grantee which relate to that property interest. This is traditionally termed the privity of estate principle. In the case of a lease, it means that all the terms of the lease originally enforceable by and against the original tenant and landlord are *prima facie* enforceable by and against whoever happens to hold the lease and the landlord's reversionary interest at the relevant time: assignees of the original landlord and the original tenant simply step into the shoes of their predecessors. In so far as it relates to leases, this automatic transmission principle is now enshrined in section 3 of the Landlord and Tenant (Covenants) Act 1995.

Post-assignment liability: the privity of contract principle

In the case of leases the picture is complicated by an additional factor. This is traditionally termed the 'privity of contract principle'. Where this principle applies (and its scope has been curtailed, although not removed altogether, by the Landlord and Tenant (Covenants) Act 1995), the original contracting parties remain *contractually* liable for compliance with the terms of the lease even after they have parted with their interest under the lease. However, the right to *enforce* this contractual liability does not remain with the other original contracting party but instead passes to whoever acquires *their* property interest. In other words, where this principle applies, even after assigning all interest in the premises, the original landlord can be sued in contract for any breach of any of the landlord's obligations under the lease by whoever happens for the time being to hold the tenant's interest, and the original tenant can be sued post-assignment by whoever happens to hold the landlord's interest.

Combined effect of automatic transmission of benefit and burden and post-assignment liability

Before Parliament intervened to curtail the operation of the privity of contract principle in 1995, the combined effect of these two principles was this:

1 only the current holders of the landlord's and tenant's interests were entitled to the benefit of the terms of the lease, and only they could enforce the terms of the lease; but
2 they could enforce the terms of the lease not only against each other but also against the original parties to the lease.

This remains the picture after the 1995 Act, except that the circumstances in which post-assignment liability can arise are now limited. In the following sections we look at all this in more detail.

17.3.3.2. Non-proprietary terms

As a matter of general property principle, when one person grants a property interest to another, the terms they agree between themselves only acquire proprietary status (i.e. become enforceable by and against their successors) in so far as they relate to the property interest granted. Suppose you and I are neighbours, and we agree that you can have a right of way over my drive to reach the road from your garden, for a fee simple duration, provided you give me weekly piano lessons. Even if I grant you the easement by deed and record the piano lessons in the deed as the consideration for the grant, the provision about piano lessons will not become a term of the easement. So, if you and I subsequently sell our houses, your buyer will be entitled to the right of way over my drive, but will not be required to give me or my buyer piano lessons. The obligation to provide piano lessons is personal to you and me.

This is just as true of leases as it is of any other property interest. In the past, it has not always been easy to tell whether a particular term in a lease was purely

personal, or whether it was intended to have proprietary effect so that it would be enforceable between successors as well as between the original parties. The test used to be whether the term 'had reference to the subject-matter of the lease' (see sections 141 and 142 of the Law of Property Act 1925) which was taken to mean the same as 'touch and concern the land'. This test, which attracted considerable and not easily reconcilable case law, still applies to leases granted before 1 January 1996. However, for leases granted after that date, the position has now been simplified by the Landlord and Tenant (Covenants) Act 1995. Section 3(6) of the 1995 Act makes *all* landlord covenants and tenant covenants enforceable by and against successors *except* those 'which (in whatever terms) [are] expressed to be personal to any person' (section 3(6)(a), reinforced by section 2(1)(a), which expressly provides that the Act applies to all landlord covenants and tenant covenants 'whether or not the covenant has reference to the subject-matter of the tenancy'). It follows that *any* term of a lease can now be made personal to the original parties and not affect successors in title, however closely related to the subject-matter of the lease.

Whether the converse is also true – that any term, however *unrelated* to the lease, can be made to have proprietary effect – is not so clear. On the face of it, this is what the Act seems to say. Section 3 expressly states that the benefit and burden of *all* 'landlord covenants' and 'tenant covenants' pass automatically, unless they are expressed to be personal. 'Landlord covenant' and 'tenant covenant' are given the broadest possible definitions in section 28(1): 'covenant' is defined to include 'term, condition and obligation', and a landlord/tenant covenant is defined as a 'covenant falling to be complied with by' the landlord/tenant. And it is implicit in the wording of section 2(1)(a) just quoted that landlord and tenant covenants may have *no* 'reference to the subject-matter' of the lease. However, this does not sit easily with fundamental property principles, which would not normally allow contracting parties to give proprietary effect to an inherently personal obligation – for example, our piano lesson arrangement – by the simple expedient of including it in a totally unrelated lease agreement (see *BHP Petroleum Great Britain Ltd* v. *Chesterfield Properties Ltd* [2002] 2 WLR 672, CA).

17.3.3.3. Derivative interest holders

Derivative interest holders – most importantly for present purposes, subtenants – have an interest carved out of the tenant's interest, which is in turn carved out of the lessor's interest. However, they do not themselves become subject to or entitled to the benefit of any of the terms of the lease. In the traditional terminology, they are not privy to the estate created by the grant of the lease. In practical terms, this means that a subtenant has no right to possession as against the landlord (although the landlord is nevertheless not entitled to possession as against the subtenant during the lease: consider why) and the tenant's covenants in the lease to pay rent, carry out repairs etc. are not enforceable by the landlord against the subtenant.

Equally, the tenant's rights and liabilities as against the landlord remain wholly unaffected by any sublease the tenant may have granted. So, if a ten-year lease includes a covenant by the tenant not to cause a nuisance on the premises, and the tenant sublets for most of the term with the knowledge and consent of the landlord to a subtenant who causes a nuisance, the landlord cannot sue the subtenant but can sue the tenant. This applies whether the tenant is the original tenant or an assignee: the tenant for the time being who is liable to the landlord because of the privity of estate principle remains liable despite having sublet.

17.3.3.4. Statutory restriction of post-assignment liability

As a result of the Landlord and Tenant (Covenants) Act 1995, no tenant can be made liable for breaches of covenant committed after he has assigned the lease, provided the assignment was lawful (i.e. not made in breach of covenant). The only exception is that, in some circumstances, a tenant who assigns the lease can be made to guarantee the liabilities of his immediate successor, by entering into an 'authorised guarantee agreement'. As far as landlords are concerned, they are not automatically released from liability on assignment as tenants are, but they can apply for release (initially to the tenant, and then to the court if the tenant refuses). For details of the operation of the statutory scheme, and an examination of its tortuous genesis and the difficulties it was designed to resolve, see Law Commission, *Landlord and Tenant Law: Privity of Contract and Estate* (Law Commission Report No. 174, 1988) and Clarke, 'Property Law'.

17.4. Bailment

17.4.1. Essential features of bailment

The essential prerequisite for a bailment relationship is that goods should be in the possession of someone who is not their owner, on terms that the owner is entitled to have the goods back (the very same ones, not substitutes or the money equivalent). Bailment applied only to goods, not to land or to intangibles.

When goods are temporarily passed on by their owner to someone else, it is important to establish whether the transferor is transferring *ownership* to the transferee but with the intention that the transferee will hold on trust for the transferor (so creating a trust relationship), or whether the transferor is transferring the full beneficial ownership but on the understanding that the transferee will repay to the transferor the value of them (a debt relationship), or whether the transferor is merely transferring *possession* and so creating a bailment relationship. Consider the case of cash taken from a prisoner when she is imprisoned. The cash is handed over to the prison governor and the prisoner is entitled to get it back when she is released. But precisely what she will get back depends on whether the governor acquires ownership of the cash but on terms that he holds it on trust for her (in which case he must invest it for her benefit and account to her for the capital and interest when the trust ends on her release), or acquires absolute

ownership but then owes her that amount to be repaid on release (in which case she should be repaid precisely the same amount, with interest if applicable, even if the cash has been lost or was poorly invested), or acquires only possession, in which case he must return the very notes and coins to her (to her disadvantage if the value of the currency has fallen during her sentence). In *Duggan* v. *Governor of Full Sutton Prison* [2004] EWCA Civ 78, it was held that the governor acquired full beneficial ownership of the cash – unsurprisingly, since that meant that his duty to repay was on terms set by the statutory provisions entitling him to take it in the first place, which did not require the payment of interest. The possibility that he might be holding as bailee was not, however, canvassed (consider why).

17.4.2. Categories of bailment

The classic categorisation of bailments was given by Holt CJ in *Coggs* v. *Bernard* (1703) 2 Ld Ray 909; 91 ER 25. The issue in the case was whether Bernard, the defendant, was liable to Coggs for loss caused when a cask of Coggs' brandy broke open while being transported by Bernard. At Coggs' request, Bernard took several hogsheads of brandy belonging to Coggs from one cellar to another. In the process, one of the casks was 'staved' and several gallons of brandy were spilt. We are not told why Bernard carried out this service for Coggs, except that he was not paid to do so nor was he a common (i.e. professional) porter or carrier, and we are not told how the damage occurred except that Bernard 'managed them so negligently, that for want of care in him' the damage was caused. It was decided that Bernard was liable. In considering why this should be the case, Holt CJ distinguished six types of bailment:

> The first sort of bailment is, a bare naked bailment of goods, delivered by one man to another to keep for the use of the bailor; and this I call a depositum ... The second sort is, when goods or chattels that are useful, are lent to a friend gratis, to be used by him; and this is called commodatum, because the thing is to be restored in specie. The third sort is, when goods are left with the bailee to be used by him for hire; this is called locatio et conductio, and the lender is called locator, and the borrower conductor. The fourth sort is, when goods or chattels are delivered to another as a pawn, to be a security to him for money borrowed of him by the bailor; and this is called in Latin vadium, and in English a pawn or a pledge. The fifth sort is when goods or chattels are delivered to be carried, or something is to be done about them for a reward to be paid by the person who delivers them to the bailee, who is to do the thing about them. The sixth sort is when there is a delivery of goods or chattels to somebody, who is to carry them, or do something about them gratis, without any reward for such his work or carriage, which is this present case.

For more than two centuries after *Coggs* v. *Bernard*, it remained uncertain how far beyond these categories bailment extends. As a consequence of the Privy Council decision in *The Pioneer Container* [1994] 2 AC 324 (discussed in Notes and Questions 17.7 below), however, it can now be taken that a bailment

relationship arises whenever a person voluntarily takes the goods of another into his possession. This applies even if the owner was unaware of the fact or objected to possession being taken, as appears from *Mitchell* v. *Ealing London Borough Council* [1979] QB 1 and *Sutcliffe* v. *Chief Constable of West Yorkshire* (discussed below). Consequently, it appears settled that finders and thieves are bailees.

The only other qualification is that a bailment relationship cannot arise between the owner and the possessor of an object if the possessor is unaware of the existence of the owner, either because he mistakenly believes that he himself is the owner, so I am not your bailee if I pick up your pen from the floor believing it to be mine, at least until I realise my mistake, although see *AVX Ltd* v. *EGM Solders Ltd*, *The Times*, 7 July 1982 (extracted at www.cambridge.org/propertylaw/), or because he mistakenly believes someone else is the owner. This latter point was established by the Court of Appeal in *Marcq* v. *Christie Manson & Woods Ltd* [2003] EWCA Civ 731, where it was said that Christies could not be the bailee of the true owner of a painting which was in their possession because it was handed to them by a thief who had stolen it from the true owner and wanted Christies to auction it for him.

17.4.3. Characteristics of bailment

We have already (at the beginning of this chapter) noted the significant characteristics of bailment, in particular that possession as a bailee does not necessarily entitle the bailee to make use of the goods for his own benefit (in only two of the six *Coggs* v. *Bernard* categories – loan and hire – is the bailee entitled to use the goods himself). The precise rights conferred on the bailee in other cases depend on the category.

Also, it is possible to have a consensual bailment that is not enforceable in contract. In three of the six *Coggs* v. *Bernard* categories there will usually be no contract because there is no consideration (gratuitous custody, loan, and carriage of or performance of some service on goods). The agreed terms of these relationships are nevertheless enforceable. It is also clear that bailment relationships can give rise to rights and obligations between bailor and bailee even in non-consensual bailments. So, for example, the bailment relationship that was held to exist in *The Pioneer Container*, between the owner of the goods (the bailor) and the shipowner (the sub-bailee) in whose ship the goods were lost, entitled the shipowner to take advantage of the exclusive jurisdiction clause in the contract it had entered into with its immediate bailor (the shipper). In such cases, it is the bailment relationship itself which is the source of the rights and obligations, as was made clear in *The Pioneer Container*.

In other words, bailment is an independent source of obligations, not just a relationship. In order to establish the duties and obligations of the parties, it is permissible (and necessary) to look not only at the terms agreed between them which are contractually enforceable (if any) and at the law of tort, but also at an independent pool of rules which we can call the law of bailment. This might, for example, make a term agreed between owner and possessor give rise to enforceable

rights and liabilities even though not supported by consideration and therefore not enforceable through contract rules. It might also have to be called upon to give us answers to questions such as the permissible use the possessor might make of the goods in question. This would seem to establish a sufficient common thread to mark bailment relationships off from other, non-possessory, transactions or relationships involving goods (although this is not universally accepted: see, for example, the arguments to the contrary put by McMeel, 'The Redundancy of Bailment').

17.4.4. Liabilities of the bailee

Leaving aside specific duties imposed on the bailee by contract or agreement, the bailee's principle duty is to return the goods at the end of the bailment. In some types of bailment, such as those arising out of finding and theft, that might involve a positive duty to seek out the owner, as suggested in *Parker* v. *British Airways Board* [1982] QB 1004 (discussed in Notes and Questions 11.5 above), and in all cases the bailee is expected to return the goods promptly and in the manner contemplated by the terms of the bailment (as demonstrated in *Mitchell*).

While the bailment continues, the bailee is liable to take care of the goods. Much of Holt CJ's judgment in *Coggs* v. *Bernard* is taken up by a consideration of the different standards of care imposed on each of the categories of bailee he identified, and indeed the main object of the categorisation was to differentiate between levels of liability. However, in this respect bailment is heavily dominated by tort, and it is apparent from what is said below in *Mitchell*, *Sutcliffe* and *AVX* that bailees' liabilities have followed the general tort trend in being assimilated into a general duty to take reasonable care of the goods, reasonableness being determined in each case by the particular circumstances of the case.

This applies only for so long as the bailee remains entitled to hold the goods under the terms of the bailment, and only for so long as he is acting in accordance with its terms. Once a bailee steps outside the terms of the bailment, however, the courts seem inclined to treat him as what they term an insurer of the goods – in other words he is strictly liable for any loss or damage, as Ealing London Borough Council was held to be in the *Mitchell* case. It would seem to follow from this that a thief (who is not entitled to hold the goods) and a finder who makes no effort to find the owner, are both strictly liable for any loss or damage to the goods. This would make sense of what Lord Donaldson said about the rights and liabilities of finders in *Parker* v. *British Airways Board* (see section 11.6.4 above).

What is less readily understandable is that the gratuitous custody category of bailee appears to incur duties to look after the goods just as much as (and not very differently from those imposed on) the bailee who takes custody for reward. This was accepted unquestioningly in *Coggs* v. *Bernard* (and indeed Mr Bernard was himself a gratuitous bailee for custody, and duly held liable for the loss of the brandy). At first sight, gratuitous custody looks like an act of simple kindness or altruism, whereas custody for reward looks more like a commercial contract for the

provision of services. On closer examination of the circumstances in which custody arises, however, it becomes apparent that many gratuitous custodies are prompted by commercial considerations rather than altruism, as for example when you deposit your coat in the cloakroom in a restaurant. And that, even where this is not the case, custody, whether undertaken altruistically or not, involves an assumption of responsibility for someone else's property, which is something characteristically regulated by law. Whether this is altogether fair on bailees like Mr Bernard and Ealing London Borough Council is another matter.

In any event, the fact that the law has always imposed liabilities on gratuitous bailees demonstrates how far removed the law of bailment is from the law of contract (which as a rule does not enforce promises unless supported by consideration) and from the law of equity (which in principle does not assist donees). Furthermore, it appears that the standard of care expected from the gratuitous bailee will be determined (and may well be increased) by any undertakings he may have expressly or impliedly given as to the type or level of service he will be providing, or the circumstances in which it will be provided: this is apparent from both *Coggs* v. *Bernard* and from *Mitchell*, where the council's liability arose out of its failure to keep to the undertaking that it had given to hand over the furniture where and when it said it would.

A final point to emphasise is the decisive role that possession plays here: a gratuitous *bailee* of goods (i.e. someone who has them in his possession) has a duty to take reasonable care of them during the bailment, but the same is not true of someone who has a degree of control over the goods which falls short of possession: see *Tinsley* v. *Dudley* [1951] 2 KB 18.

Notes and Questions 17.7

Read *The Pioneer Container, KH Enterprise* v. *Pioneer Container* [1994] 2 All ER 250, PC; *Mitchell* v. *Ealing London Borough Council* [1979] QB 1; *Sutcliffe* v. *Chief Constable of West Yorkshire* (1995) 159 JP 770; [1996] RTR 86; *The Times*, 5 June 1995; and *AVX Ltd* v. *EGM Solders Ltd*, *The Times*, 7 July 1982, either in full or as extracted at www.cambridge.org/propertylaw/, and consider the following:

1 According to the Privy Council in *The Pioneer Container*, in what circumstances will a bailment relationship arise? If it was not created consensually, what are the terms of the relationship?

2 Examine the reasons given by the Privy Council in *The Pioneer Container* for concluding that the shipowner could take advantage of the exclusive jurisdiction clause in its contract with the shipper. What does this tell us about the sources of the terms of a bailment relationship? Does it make sense *in the factual context of this case* to say that one of its terms might be (at the option of one of the parties) a term of a contract that that party entered into with a third party? Would it make sense in other factual contexts?

3 If there is no contract between bailor and bailee (either because the bailment did not arise consensually, or because it was consensual but there was no consideration), are its terms enforceable? If so, by what mechanism? In particular, are the agreed terms of a gratuitous bailment (such as in *Mitchell*) enforceable, and, if so, how?

4 Explain the significance of the fact that in *Mitchell* the council could not prove whether the furniture was stolen from the garage before or after it failed to meet Mr Mitchell as arranged. Why was the onus of proof on the council?

5 Consider what the position would have been if, when Mrs Mitchell was evicted, she had left her furniture behind in the flat, the local authority had taken no steps to put it into storage, and it had then been stolen from the flat. Would the local authority have been a gratuitous bailee of the furniture? Would it have been liable to Mrs Mitchell for its loss?

6 What duties are owed by a bailee to a bailor? What standard of care is expected from a bailee? Does it make any difference whether the bailment is for reward or (as in *Mitchell* and *Sullivan*) gratuitous? Should it?

7 It appears from *AVX Ltd* v. *EGM Solders Ltd* that a person in possession of the goods in the mistaken belief that he is the owner has no duty whatsoever – but he *must* take reasonable steps to ascertain that they are indeed his goods. If he fails to do so and the goods are lost or damaged, is he liable as insurer, or is it a lesser standard of care, appropriate to someone who has goods thrust upon them?

17.4.5. Is bailment proprietary?

In Chapter 5, we identified three possible indicia of a proprietary interest, as opposed to a personal right. These are exclusivity (the interest carries with it a right to exclude others from enjoyment), exigibility/enforceability against non-parties (the interest is attached to the thing, in the sense that those subsequently dealing with that thing will be bound by the interest holder's rights in the thing), and alienability (the interest can be passed from one person to another, so in that sense is not personal to the original holder). As we noted in Chapter 5, the third of these is by no means necessary for an interest to be proprietary, but we probably can say that an interest that *does* have this characteristic is proprietary. Measured by these criteria, does bailment confer a proprietary interest on the bailee?

17.4.5.1. Possession and exclusivity

The first point to make is that, since a bailee has possession, not only does he necessarily have the right to exclude the whole world, but also his interest is necessarily proprietary because possession is proprietary. It was argued above in relation to leases that a person in possession of land who does not hold any other proprietary interest in the land which carries with it the right to possession must necessarily have a lease of the land. For the same reason, it must follow that the

interest of a bailee is a property interest. This is now widely accepted. Sir William Holdsworth, (1933) 49 LQR 576, p. 580, had this to say:

> It is obvious that, if A has let ... his chattel to B, and has transferred its possession to B, and if he then sells to C, C can only take it subject to B's legal rights, whether C has notice of those rights or not.

Similarly, Nigel Furey, in 'Goods Leasing and Insolvency', pp. 788–9, argues that goods-leasing contracts are binding on the trustee in bankruptcy of both owner and lessee *once possession has passed to the lessee*, because the passing of possession confers real rights on the lessee. In coming to this conclusion, he relies on the following from Goode, *Proprietary Rights and Insolvency in Sales Transactions*, p. 7:

> [P]ossession is itself a real right, exercisable against everyone except a person having a better right to possession. A person who, though not the owner, holds possession with the intention of asserting ownership is treated by the law as the owner, and as entitled to legal protection as such, against everyone except the true owner or a person deriving title through or under him or acting with his authority. Since the true owner usually shows up, we can for practical purposes disregard this second best possessory title. This leaves us with the possessory rights of the holder of a limited interest, i.e. a bailee who is in possession not as mere custodian but for an interest of his own, e.g. under a pledge, a lien or a hiring, hire-purchase or conditional sale agreement.
>
> It is important to note that what confers a real right on the bailee in the first instance is not the agreement pursuant to which possession is to be given to him but the delivery of possession itself. For example, an agreement to supply equipment on lease for five years does not of itself give the intended lessee a right *in rem*, and if the lessor were to become bankrupt before delivering possession the lessee's remedy would be restricted to a proof in the bankruptcy.
>
> Once possession has been given to the lessee, thereby conferring on him a real right in the leased goods, the quantum of that right is measured by the terms of the leasing agreement, so that he may hold possession against the trustee for the rest of the five-year period.

McMeel, in 'The Redundancy of Bailment', also concludes that bailment is proprietary, for this and other reasons, and further support is provided by the Court of Appeal in *Bristol Airport* v. *Powdrill* [1990] Ch 744, where it was held that an aircraft lease confers a proprietary interest on the lessee, albeit for the purpose of the Insolvency Act 1986, which, as the Court of Appeal noted, defines property 'in the widest possible terms'.

17.4.5.2. Alienability

The only doubts that can arise surround the questions of alienability and enforceability against third parties. As far as alienability is concerned, an interest can be said to be alienable if the interest can be passed on to someone else in the same

form, so that the assignee holds the interest on the same terms as the assignor. It is not necessary that the assignor should cease to be liable after assignment: as noted above, until the Landlord and Tenant (Covenants) Act 1995 lessees of land continued to be liable under the lease after assignment. Since a person assumes the character of a bailee simply by voluntarily assuming possession of a thing, as established by *The Pioneer Container*, it must follow that, when a bailee purports to transfer his interest and delivers possession to his transferee, the transferee will become *a* bailee of the owner – but this does not necessarily mean that the first bailee's interest has been assigned. The decision in *The Pioneer Container* unfortunately is of no direct help here, as it concerned a sub-bailment rather than an assignment of a bailment. However, it is difficult to see why an assignment of the bailment should *not* result in the transferee taking on the same terms as the transferor, since by the act of accepting the transfer he can be said to be assuming possession on the same terms as those that bound his transferor.

17.4.5.3. Enforceability against third parties

The issue here is whether a person who purchases or takes a mortgage or charge over goods that have been bailed is bound by the interests of a bailee of the goods. There are shipping cases (discussed in Chapter 9 above) concerning purchasers and mortgagees who have been held not entitled to interfere with the performance of charterparties which would seem to support the proposition that bailments are enforceable against third parties, since charterparties which confer possession on the charterer are bailments: see further Clarke, 'Ship Mortgages', pp. 693–5. However, these cases have not escaped criticism by the courts, and it has been argued by William Swadling in 'The Proprietary Effect of a Hire of Goods', p. 491, that these cases are supportable only 'as examples of a peculiar rule of maritime law derived from the Law Merchant [which] provide no authority outside that area'. It has to be said that there is nothing in these cases themselves to suggest that the courts thought they were dealing with a principle special to maritime property, and indeed, except in so far as a matter is covered by the Merchant Shipping Acts, ships are treated in property law in the same way as any other goods. However, in the absence of more recent direct authority, the question of enforceability probably remains open.

17.4.5.4. Other proprietary indicia

Nevertheless, there are other ways in which bailees are treated as having more than a personal right in respect of the bailed goods. Because the bailee has possession, bailees have the *locus standi* to bring actions for trespass and wrongful interference with goods. Also, a bailee has, in his own right, an insurable interest in the thing bailed, and is entitled to insure for the full value of the thing, not just for his own personal loss or to cover any personal liability he may owe to the bailor in the event of loss of the thing (*Hepburn* v. *A. Tomlinson (Hauliers) Ltd* [1966] AC 451, and see Palmer, *Bailments*, pp. 56 and 364–74). The same is not true of licensees of goods

or agents holding goods on behalf of their principals – they can insure only to recover their own personal loss, or on behalf of their licensor/principal. As Lord Pearce explained in *Hepburn* v. *A. Tomlinson (Hauliers) Ltd* [1966] AC 451:

> So far as concerns an agent who has no interest and is effecting an insurance for others, however, his unilateral intention is of importance to this extent that, unless he intends to effect the insurance on behalf of his principal, he is simply wagering and there is nothing which an undisclosed principal can ratify.
>
> The bailee of goods, however, is in a very different position. He has a right to sue for conversion, holding in trust for the owner such of the damages as represent the owner's interest. He may likewise sue in negligence for the full value of the goods, though he would have had a good answer to an action by the bailor for the loss of the goods bailed (*The Winkfield* [1902] P 42, CA). It would seem irrational, therefore, if he could not also insure for their full value. Both those who have the legal title and those who have a right to possession have an insurable interest in the real or personal property in question. There seems, therefore, no reason in principle why they should not be entitled to insure for the whole value and recover it. They must, however (like plaintiffs in actions of trover or negligence), hold in trust for the other parties interested so much of the moneys recovered as is attributable to the other interests . . .
>
> In *Castellain* v. *Preston* (1883) 11 QBD 380 at 398, however, Bowen LJ, having referred to mortgagees and bailees and admitted their right to recover, made observations to the effect that no part owner could recover for more than the interest which he had intended to insure. Taken in their full meaning his words create some difficulty, but the judgment was not reserved and his remarks were *obiter*. His real point was that a part owner could not recover for himself (so as to put into his own pocket) more than the value of his interest; for if he intended to do that he would simply be wagering.
>
> A bailee or mortgagee, therefore (or others in analogous positions) has, by virtue of his position and his interest in the property, a right to insure for the whole of its value, holding in trust for the owner or mortgagor the amount attributable to their interest. To hold otherwise would be commercially inconvenient and would have no justification in common sense.

This provides additional support for the conclusion reached by Gerard McMeel in 'The Redundancy of Bailment' (see above) that bailment is proprietary, and reinforces the conclusion that (despite his arguments to the contrary) there are sufficient common characteristics in the different categories of bailment to make it an analytically useful concept.