

Licences of business premises: contract, context and the reach of *Street v Mountford*

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Part II of the Landlord and Tenant Act 1954 confers on those business tenants within its remit the primary right to apply to court for the grant of a new lease at a market rent.¹ The laudable ambition is, as Lord Wilberforce explained, ‘to provide security of tenure for those tenants who had established themselves in business in leasehold premises so that they could continue to carry on their business there’.² In marked contrast with the Rent Act 1977 and the Housing Act 1980, the Part II provisions do not constitute a tenants’ charter.³ The restrictions imposed by Parliament are, therefore, of comparatively modest design and when, as in recent times, market forces favour the tenant, these become of much reduced importance. Seemingly distant are the days when, as Briggs LJ acknowledged, ‘spiralling property prices meant that unscrupulous private landlords could reap large profits’.⁴ Due to this coincidence of factors, the business tenancy code has proved resilient to shifts in political and social ideology.⁵ Unlike its agricultural and residential counterparts, it has managed to evade the culling effect of deregulation and now ‘stands alone as a code of major practical significance involving restrictions on the landlord’s freedom of contract’.⁶ The prevailing sentiment is that the 1954 Act has functioned satisfactorily⁷ and the official rhetoric remains supportive of the principle that, ‘business tenants should normally have a right to renew their tenancies’.⁸ The underlying irony, however, is that since 1969 Parliament has innovated reforms that fundamentally dilute the impact of regulatory

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1 For tenants who are unable to obtain a renewal, flat-rate compensation might be available under s 37 to help them re-establish their business elsewhere.

2 *O’May v City of London Real Property Co Ltd* [1983] 2 AC 726, 747.

3 See M Haley, ‘The Statutory Regulation of Business Tenancies: Private Property, Public Interest and Political Compromise’ (1999) 19 Legal Studies 207.

4 *Lambeth LBC v Loveridge* [2013] EWCA Civ 494, [1].

5 See R J Heffron and P Haynes, ‘Striking a Statutory Balance: Constant Change in Residential Leases versus Static Change in Commercial Leases’ (2012) Conv 195.

6 Law Reform Advisory Committee for Northern Ireland, *A Review of the Law relating to Business Tenancies in Northern Ireland* (Discussion Paper No 3, 1992) [2.2.5].

7 See, for example, Law Commission, *A Periodic Review of the Landlord and Tenant Act 1954 Part II* (Law Com No 208, 1992); Law Commission, *Part II of the Landlord and Tenant Act 1954* (Working Paper No 111, 1988) and the conclusions of the Department of the Environment, HC Deb 20 November 1985, vol 87, col 245.

8 Department for Communities and Local Government, *Landlord and Tenant Act 1954: Review of Impact of Procedural Reforms* (DCLG Report 2006) [4].

control. Such developments as the introduction and further facilitation of contracting-out⁹ and the ability to grant short leases that fall beyond the reach of statutory protection¹⁰ ensure that the Part II machinery has become optional at the behest of the parties.

Within this relaxed legal framework, it might be assumed that the traditional utilisation of licence agreements as an avoidance measure would fall into desuetude.¹¹ This is particularly so in the aftermath of *Street v Mountford*,¹² which effectively sounded the death knell for the private sector residential licence.¹³ Some 30 years on, there has been a steep decline in judicial and academic commentary concerning the lease or licence distinction. This period of quietude might suggest that licences are similarly moribund in the commercial sector. Licences of commercial premises are, however, enjoying a renaissance, being the preferred choice of many business occupiers. This unusual state of affairs is due to prevailing market forces, which have for some years disadvantaged the landowner and yet sowed doubt as to the long-term future of many businesses. The licence offers the perfect compromise. For the landowner, the risk of holding a portfolio of vacant commercial properties is reduced and, from the occupier's perspective, the dangers inherent in being tied to a long-term relationship are avoided. Despite this market revitalisation, however, the law remains in an unpredictable and thoroughly unsatisfactory state, out of kilter with modern reality. It is to be expected that any recasting of a commercial licence agreement would be premised upon neutral and coherent legal reasoning, fashioned to the policy and mischief underpinning the legislation to be sidestepped. Similarly, it is to be hoped that there is some cogent and compelling justification for an outcome that allows a commercial entity or, indeed, third party¹⁴ to unravel a bargain voluntarily entered. Nevertheless, the prevailing judicial approach to the construction of commercial sector licence agreements demonstrates no such overarching traits.

The present state of the law is directly attributable to Lord Templeman's speech in *Street v Mountford* and the manner in which it has been applied in the lower courts.¹⁵ As will become clear, this decision unfolds on three levels. First, it acknowledges that exclusive possession is the vital indicator of a tenancy. Secondly, it emphasises that the substance of the agreement must triumph over its outward form. Thirdly, it encourages the judiciary to be 'astute to detect and frustrate sham devices and artificial transactions whose only object is to disguise the grant of a tenancy'.¹⁶ The latter advice was a deliberate attempt to staunch the flow of licences of residential property. Uncertainty has arisen, however, as to the applicability of this tripartite approach within the commercial context. Some judges have applied it slavishly, failing to prioritise explicitly the context in which the agreement arises.¹⁷ Such cases often involve a shift of emphasis from construction to the reconstruction of contractual bargains.

9 S 38A of the 1954 Act allows contracting-out by private arrangement following the giving of an informational 'health warning' to the tenant and the tenant's timely declaration of agreement.

10 S 43(3).

11 Licence agreements fall totally outside the Part II framework: *Shell-Mex & BP Ltd v Manchester Garages* [1971] 1 WLR 612.

12 [1985] 1 AC 809.

13 See P Sparkes, 'Breaking Flat Sharing Licences' (1989) 5 JSWL 293. The advent of the landlord-friendly assured shorthold tenancy in the Housing Act 1988 also made residential licence agreements unnecessary.

14 For example, HMRC in *Grimsby College Enterprises Ltd v Revenue & Customs Commissioners* [2010] UKUT 141 and the freeholder in *London Development Agency v Mehmet* [2009] EWHC 1730 (Ch).

15 See P F Smith, 'A Dent in *Street v Mountford*' (1987) Conv 220.

16 *Street v Mountford* (n 12) 825.

17 A myopia demonstrated by Deputy Judge Paul Baker QC in *London & Associated Investment Trust plc v Calow* (1987) 53 P&CR 340, 352: 'I cannot see any differentiation for this purpose between a residence on the one hand and a solicitor's office on the other.'

Others, most notably Arden LJ in *NCP Ltd v Trinity Development Co (Banbury) Ltd*,¹⁸ have paid it little more than lip service, preferring instead to adopt a results-led style of reasoning. This article will argue that the latter of these diametrically opposed standpoints is correct and that there should be no roving commission to determine the existence or non-existence of a licence of commercial premises.

Although the traditional perception is that licence agreements are employed to the disadvantage of the occupier, this article will challenge that preconception. Unlike in the housing sector, for commercial licensees there are real attractions and substantial benefits associated with a licence of business premises.¹⁹ From this perspective, it will be argued that the *ratio* of *Street* is properly to be confined to the residential sector. It is there that the mischief it addressed is localised and where there is acute need 'to protect a person whose bargaining power is handicapped by his personal circumstances'.²⁰ While the protective impulse to seek out artifice in the housing context has undeniable socio-economic merit,²¹ the investigative stance and forensic approach promoted by Lord Templeman are unsuitable for universal application.²² Within the commercial sector, there is no scope for the interventionist ideal²³ and paternal sentiments are misplaced, unnecessary and counterproductive. As Bridge commented: 'one would have thought that with the greater awareness of the full implications of the bargain which comes with legal advice and business knowhow, the courts can afford to be less paternalistic and leave them to sort out their rights and duties between themselves'.²⁴

A persistent failure of the lower courts to acknowledge this difference, however, entails that the crucial intersection between contract and regulatory context is overlooked. Despite judicial protestations to the contrary,²⁵ even a cursory examination of the authorities reveals an ingrained predilection towards identifying a relationship of landlord and tenant.²⁶ As Bridge acknowledged: 'The message is clear that courts will look at such contracts with a heavy bias in favour of a tenancy'.²⁷

Perceptions and perspective

The statutory regulation of the landlord and tenant relationship marked a shift from contract to status. Inevitably, this introduced new distinctions, accentuated existing differences and emphasised definition and function as dictating the degree of statutory protection afforded (if any). It is in this context that the demarcation between a lease of land and a licence to occupy assumes significance. Comprehensive statutory protection has throughout been restricted to qualifying tenants. As Bridge explained, 'the existence of a

18 [2002] 2 P&CR 18.

19 Especially so the so-called 'easy-in, easy-out' licence (as discussed below).

20 Purchas LJ in *Cranbour Ltd v Da Silveira* (1986) 52 P&CR 204, 227.

21 See P Vincent-Jones, 'Exclusive Possession and Exclusive Control of Private Rented Housing: A Socio-Legal Critique of the Lease-Licence Distinction' (1987) 14 Journal of Law and Society 445.

22 There is, as Deputy Judge Richard Southwell QC acknowledged in *Mehta v Royal Bank of Scotland* (2000) 32 HLR 45, 53, 'no simple all embracing test . . . The search for such a test would be a search for a chimera'.

23 In *Clear Channel UK Ltd v Manchester CC* [2006] 1 EGLR 27, [28], Jonathan Parker LJ lamented the licensee's attempt to overturn its licence agreement, deriding it as, 'surprising and . . . unedifying'.

24 S Bridge, '*Street v Mountford* – No Hiding Place' (1986) Conv 344, 351. This view is evidently shared by Arden LJ in *NCP v Trinity Development* (n 18) [29], who, by way of a brave departure from traditional constraints, was determined to uphold a commercial licence, seemingly at the expense of legal principle.

25 See, for example, Buckley LJ in *Shell-Mex & BP* (n 11) 619.

26 See *Pankhania v London Borough of Hackney* [2002] EWHC 2441 (Ch), where (at [11]) Deputy Judge Rex Tedd QC found it to be 'an inexorable inference' that exclusive possession had been granted in relation to a car park.

27 Bridge (n 24) 352.

tenancy is the *sine qua non* of the protected breed'.²⁸ Licence agreements are dismissed as too personal, transient and precarious²⁹ to be the subject of full legal protection. Hence, such informal arrangements represent the traditional and most convenient method by which the statutory rights of the occupier can be bypassed.³⁰

On the scale of legislative intervention, the protection of the family home consistently ranks highest in priority. It is here that the inequality of bargaining power between the parties is most pronounced and the countervailing social rights of property in more urgent demand.³¹ Unsurprisingly, the greater the degree of protection afforded the more enterprising and imaginative are the attempts to take advantage of loopholes existing within the relevant legislative code.³² Hence, 'the mad maelstrom of the Rent Acts'³³ afforded the battleground on which the majority of the lease or licence cases, including *Street v Mountford*, have long been fought. It also offers the prime vantage point from which the case-law concerning the identification of avoidance and evasion may properly be understood and the sins of landlordism fully exposed.³⁴

As mentioned, and unlike in the residential sector, the parties can directly contract out of Part II of the Landlord and Tenant Act 1954. Hence, landlords of commercial property can already grant long fixed-term tenancies that afford no renewal or compensation entitlements.³⁵ There is no need to utilise a licence to achieve the same outcome. Indeed, and again very unlike the housing rental market, the conventional wisdom is that such long leases better serve the interests of the commercial landowner. The licence does not, therefore, have innate appeal for many commercial landlords and, most certainly, is not appraised simply as an avoidance measure. It is a device that, in the current economic climate, predominantly serves the interests of the occupier. Nevertheless, for some property owners there may still be discernible advantages. The landowner's plans may be uncertain, for example, it might be debating whether to sell, redevelop or occupy the property itself for business purposes. A licence would amount to an eminently sensible arrangement in circumstances where the occupier moves in under the auspices of an agreement for lease, pending the grant of the lease itself³⁶ or the occupier is to have a trial period as licensee with an option to take a lease.³⁷ The landowner might, moreover, be awaiting a change in market forces before committing to a more permanent relationship. In the context of the statutory renewal machinery, the creation of a licence could be necessary to ensure that the

28 S Bridge, 'Down to Business with *Street v Mountford*' (1987) Conv 137, 137.

29 Licence agreements cannot bind third parties: *London Development Agency v Mehmet* (n 14).

30 This is not to say that licensees are denied all statutory rights. For example, the Agricultural Holdings Act 1986 treats certain licences as if they are tenancies; see also ss 1–3 of the Protection from Eviction Act 1977; ss 76–85 of the Rent Act 1977; and s 79 of the Housing Act 1985.

31 As Lord Templeman observed in the conjoined appeals *AG Securities v Vaughan*; *Antonides v Villiers* [1990] 1 AC 417, 458, 'in a state of housing shortage a person seeking residential accommodation may agree to anything to obtain shelter'.

32 For example, as a means of outflanking the Rent Act 1977 landlords foisted inner city 'holiday' lets and unwanted board and attendances upon occupiers.

33 Danckwerts LJ in *Myer v Mercantile Properties Ltd* (1961) 179 EG 693, 695. R Street, 'Coach and Horses Trip Cancelled? Rent Act Avoidance after *Street v Mountford*' (1985) Conv 328, 328, complained (after his defeat in the House of Lords) that: 'The Rent Acts are grossly unfair to landlords.'

34 As the Law Commission report, *Landlord and Tenant: Reform of the Law* (Law Com No 162, 1987) [4.14] accepted: 'It is all the more deplorable when it relates to rules which are intended to protect the vital interests of individuals who include some of the most vulnerable in our society.'

35 This possibility extends to all fixed-term tenancies: see M Haley, 'Contracting Out and the Landlord and Tenant Act 1954: The Ascendancy of Market Forces' (2008) Conv 281.

36 *Cameron Ltd v Rolls-Royce plc* [2007] EWHC 546 (Ch).

37 *Essex Plan Ltd v Broadminster* (1988) 56 P&CR 353.

licensor (in the guise of mesne landlord) itself retains renewal rights.³⁸ If the licensor holds as tenant under a lease that prohibits assignment and sub-letting, the licence agreement will represent the only way in which the tenant can lawfully part with possession. Similarly, a tenancy proper cannot exist where the licensor itself occupies under a licence agreement.³⁹ The ability to deny a licensee exclusive possession might also bestow practical advantages by allowing the licensor to reserve more extensive rights over the premises. This might be crucial where there is to be occupation of, say, a stall in an indoor market or a retail concession in a theatre or department store.⁴⁰ In the process, the licensor might be able to prevent the arrangement being treated as 'leasing or letting of immovable property' for VAT purposes.⁴¹ A denial of exclusive possession will enable the licensor to move the licensee to other parts of the premises, require the licensee to share the accommodation with others and control such mundane matters as signage, advertising and opening hours.⁴² The licensor can, therefore, legitimately retain a degree of territorial control that is anathema to the existence of a tenancy and totally unrealistic in the residential context.⁴³

Although the licence is conventionally appraised as a means of promoting the licensor's interests at the expense of the licensee, this is clearly not so in the commercial sector. As indicated, in this market, the licence is primarily tailored to the interests and demands of the occupier. From the licensee's viewpoint, the arrangement might be highly responsive to existing and future business plans. The benefits focus on it being a much more fluid and adaptable arrangement than the formal and heavily stylised relationship of landlord and tenant. Indeed, there is evidence that leases in the UK tend to be longer than elsewhere in the world and that many business tenants do not appreciate many of the legal implications of signing tenancy agreements.⁴⁴ It has, therefore, been argued that those taking leases for the first time 'are vulnerable to abuse given the complexity and length of many lease documents'.⁴⁵ By way of contrast, the licence will be drafted in less arcane language than that employed in a lease and will spell out more clearly the rights and obligations of the parties. The licence can, in particular, prove a highly attractive and cost-effective option for small and start-up businesses that face an uncertain future⁴⁶ and are reluctant to be tied to a more regulated and long-term relationship.⁴⁷ Such is evidenced by the market growth of the so-called 'easy-in, easy-out' licences of office space within the many business centres

38 See *Graysim Holdings Ltd v P&O Property Holdings Ltd* [1995] 4 All ER 831.

39 *London Development Agency v Mehmet* (n 14). There a company had no title to grant leases in respect of two shops so the freeholder was entitled to possession.

40 For example, in *Smith v Northside Development Ltd* (1988) 55 P&CR 164, there was a licence to share floor space in a unit at Camden Lock Market.

41 VAT is payable as regards licences where the licensee has the right to occupy that area as owner and to exclude others from enjoying that right (HMRC Reference: Notice 742, June 2012); see the failed attempt in *Grimsby College v Revenue & Customs Commissioners* (n 14).

42 See, for example, the garage forecourt cases: *Shell-Mex & BP* (n 11); *Eso Petroleum Co Ltd v Fumegrange Ltd* (1994) 68 P&CR D15, where the rights and control retained there by the licensors were, when viewed cumulatively, utterly inconsistent with the occupiers having exclusive possession of the premises.

43 *NCP v Trinity Development* (n 18) illustrates that clauses denying exclusive possession of a shoppers' car-park can be upheld whereas equivalent terms would be struck out in the residential context.

44 See the government-funded research undertaken by N Crosby, C Hughes and S Murdoch, *Do Small Business Need Protecting in Commercial Lease Negotiations?* (ERES 2005). Download available from <www.centaur.reading.ac.uk>.

45 Ibid 16. The authors add, at 1: 'Many small business tenants are unrepresented at the commercial stage of negotiations and take the first terms on offer'. They note also that these tenants also remain unaware of the voluntary industry Codes of Practice that are published from time to time.

46 For example, as regards a business that operates on fixed-term supply contracts.

47 A licence can be for an uncertain duration whereas a tenancy cannot: *Mexfield Housing Co-operative Ltd v Berrisford* [2012] 1 AC 955.

operating in the UK. These facilities range from the small owner-operated centres (frequently offered by local authorities) to large premises managed by mainstream property groups. Located in the city centre or out-of-town commercial site, they are targeted primarily at new businesses. These agreements allow the licensee to move into a serviced business centre, office block or executive suite on the payment of a licence fee (usually payable monthly) and the provision of a modest and refundable cash deposit. Legal and surveying costs incurred in relation to a licence agreement are much reduced; no capital premium will be payable and no stamp duty land tax or other registration fee will become due. This type of licence also enables the occupier to manage effectively its monthly outgoings without having to make a substantial payment to move in, to pay several months of rent in advance or to be locked into to a rent review clause.⁴⁸ Many licensors will provide office services, meeting rooms and office equipment on a pay-for-use basis. The agreement might also feature such items as security and concierge services, broadband facilities, parking rights and furnishings as part of an inclusive package. This may well generate further savings on staffing costs and initial capital outlay. Serviced office space has, therefore, become a cost-effective option that can achieve substantial long-term savings for the licensee. Such was demonstrated in a cost comparison survey undertaken by the Chartered Institute of Purchasing and Supply, which revealed that serviced space can offer savings for the occupier of up to 91 per cent.⁴⁹ The survey, as conducted in eight major cities, showed average savings of up to 50 per cent for those firms taking a licence of space in a business centre.

Although leasehold premises are readily to be found, they are much more difficult to leave. This is problematic as the evidence assembled by the Crosby, Hughes and Murdoch research shows 'that many small businesses will need to change their business premises within fairly short time frames'.⁵⁰ This might be because they outgrow the existing premises, there is a change in the market, or the area becomes unsuitable. Under a licence agreement, however, the relationship will terminate either on the date specified or agreed between the parties, or, absent agreement, by one party giving the other reasonable notice.⁵¹ The licensee will be released from continuing liability as soon as the contract ends. There is no risk of an unwanted continuation tenancy arising under the 1954 Act nor is there any threat of forfeiture for breach of covenant. The inherent flexibility of this style of arrangement entails also that, if and when the business changes or expands, there will be the possibility of licensing further space within the building and again without the formality and costs associated with the grant of a lease. Until that time, the licensee only ever pays for the space that it needs and can upsize or downsize, while maintaining the same address, with the minimum of disruption. Not surprisingly, many businesses view this type of arrangement as ideal in the prevailing economic climate. It offers a modern, attractive and smarter means of satisfying their accommodation needs.

The need for certainty in matters commercial is of paramount importance and demands that an agreement within the business community be construed so as 'to give it the meaning and effect which both parties must have intended given the terms and structure of their contract'.⁵² The factual matrix in which the agreement is sited cannot be ignored and it

48 It also shields the occupier from the self-help remedy of distress for rent as there is neither a rent payable nor a tenancy in existence.

49 *True Cost of the Flexible Office Survey* (Chartered Institute of Purchasing and Supply 2001).

50 Crosby et al (n 44) 5. The research (at 11) shows, moreover, that the practice of including break clauses in leases differs according to the size of the tenant's business.

51 In *Smith v Northside Development* (n 40), one month's notice to terminate was held to be reasonable.

52 Patten LJ in *Gavin v Community Housing Association Ltd* [2013] EWCA Civ 580, [42].

would plainly be counterintuitive for the courts to unravel this style of informal and occupier-orientated relationship. Nevertheless, under the current law there is no guarantee that a professionally styled licence agreement, freely entered into at arm's length between commercial entities, will be upheld.⁵³ The courts instead profess a keen ability to decipher the existence of a tenancy against the expressed intentions of the parties. Of vital importance, therefore, is what Partington described as the 'murky distinction between the "genuine transaction" and the "mere sham"'.⁵⁴ As will become apparent, the legal techniques practised by the judiciary when distinguishing between the real agreement and an inauthentic version thereof are roughly hewn and, although high in rhetoric, tend to be low on substance and principle. They also fail to discriminate between the protective measures required in the residential market and the very different demands of the commercial sector.

Avoidance or evasion?

While lawful avoidance is perfectly permissible,⁵⁵ illegitimate evasion most certainly is not.⁵⁶ Unfortunately, the boundary between the two is far simpler to state than it is to identify on any given facts. As Lord Greene MR pointed out, it is because of the 'highly technical and highly variegated relationship of landlord and tenant . . . almost inevitable that fine distinctions will be found to prevail'.⁵⁷ The standard explanation is as offered by Gavan Duffy J: 'You do not evade an Act by doing something which is not forbidden by the Act, but you do evade an Act by doing something which is prohibited under the guise of doing something else'.⁵⁸ Accordingly, evasion involves an element of deception and artifice and arises where the contract does not 'reflect the true intention of the parties in entering into an agreement in order to conceal the reality of the transaction'.⁵⁹ The court, moreover, must be 'especially careful to see that the wool is not being pulled over its eyes'⁶⁰ and, if an artificial transaction is detected, effect must be given to the concealed bargain.⁶¹ While the language may be assuring, less convincing is the manner in which the judiciary undertakes the delicate task of distilling the true agreement from the apparent bargain. As Bridge put it, 'beyond a scintilla of a doubt is that the lease–licence issue is one of the most complex and daunting a court may have to contend with'.⁶² The primary obstacle is that a tenancy agreement and a contractual licence will contain a similar package of core terms, relating to, for example, duration, termination, payment, maintenance and use. As Buckley LJ observed of the licence agreement in *Shell-Mex & BP Ltd v Manchester Garages*, 'many of the clauses in it are clauses which could appropriately find their place in a tenancy agreement . . . but it

53 See *Grimsby College v Revenue & Customs Commissioners* (n 14) (occupation of Engineering Centre and right to share equipment); *Dellneed Ltd v Chin* [1987] 1 EGLR 75 (management agreement of a restaurant); *University of Reading v Johnson-Houghton* [1985] 2 EGLR 113 (use of gallops for horse training).

54 M Partington, 'Non-Exclusive Occupation Agreements' (1979) 42 MLR 331, 331

55 It is, as Lloyd J emphasised in *Brumwell v Ponys County Council* [2011] EWCA Civ 1613, [28], 'perfectly legitimate for the parties to enter into agreements the substance of which was designed to prevent that legislation from applying'.

56 It is not possible for the landlord, as Lawton LJ commented in *O'Malley v Seymour* (1983) 7 HLR 70, 81: '[To] arrange his affairs one way, which brings his property within the Rent Acts, and then dress them up in another way so as to give the impression that it is outside the Rent Acts'.

57 *Oxley v Regional Properties Ltd* [1944] 2 All ER 510, 512.

58 *Copley v Newmark* [1950] VLR 17, 19.

59 Lloyd Jones J in *Brumwell v Ponys County Council* (n 55) [28].

60 Geoffrey Lane LJ in *Aldrington Garages Ltd v Fielder* (1983) 7 HLR 51, 60.

61 *AG Securities v Vaughan*; *Antoniades v Villiers* (n 31).

62 Bridge (n 24) 346.

is not to say that they do not equally appropriately find their place in a licence'.⁶³ A cosmetic difference, however, is that the licence will be drafted in language redolent of a non-proprietary relationship. The agreement will be labelled as a licence, identify the parties accordingly, avoid any reference to the word 'rent' and expressly deny exclusive possession. Against this backcloth, the role of the court is to construe the contractual documentation in an even-handed manner and divine a meaning corresponding to 'the intention of the parties, objectively ascertained by reference to the language and relevant background'.⁶⁴ Of course, the court is well aware that, even if both parties have signed the contract, this does not mean that they intended to be bound by those terms. This is of heightened concern within the residential sector where avoidance measures have historically been rife.

While exclusive possession (i.e. the legal right to exclude others from the property)⁶⁵ had long been prized as the decisive indicator of a tenancy,⁶⁶ this was to change during the decades preceding the House of Lords' decision in *Street v Mountford*. A series of seminal cases featuring Lord Denning forged a novel approach, which relegated the importance of exclusive possession. In doing so, Lord Denning 'began the trend of making what had seemed clear and self-evident subtle and confusing'.⁶⁷ The majority of these decisions were reached in the context of the Rent Acts, but the Denning approach was to apply also to commercial properties.⁶⁸ Although a finding of exclusive possession still offered prima facie evidence of a tenancy, it was no longer to be conclusive in favour of a lease, 'if the circumstances negative any intention to create a tenancy'.⁶⁹ The intentions of the parties were, thereby, promoted as the relevant test⁷⁰ and this theme was quickly reinforced in *Cobb v Lane*.⁷¹ Lord Denning MR advanced the cause further in *Abbeyfield (Harpenden) Society Ltd v Woods*, where he acknowledged that:

The modern cases show that a man may be a licensee even though he has exclusive possession, even though the word 'rent' is used, and even though the word 'tenancy' is used. The court must look at the agreement as a whole and see whether a tenancy really was intended.⁷²

Some 10 years later, and in self-congratulatory mode, Lord Denning MR admitted to having 'revolutionised' the law over the preceding 25 years.⁷³ He emphasised that the issue lying at the core of the lease or licence distinction was whether it was 'intended that the occupier should have a stake in the room or did he have only permission for himself personally to occupy the room, whether under a contract or not?'.⁷⁴ The techniques employed to discern

63 (n 11) 845.

64 Lord Hoffmann in *Bruton v London & Quadrant Housing Trust* [2001] 1 AC 406, 413.

65 As Lord Templeman commented in *Street v Mountford* (n 12) 816: 'A tenant armed with exclusive possession can keep out strangers and keep out the landlord unless the landlord is exercising limited rights reserved to him by the tenancy agreement to enter and view and repair'.

66 See *Lynes v Snaith* [1899] 1 QB 487; *Glenwood Lumber Co v Phillips* [1904] AC 405.

67 S Tromans, 'Leases and Licences in the Lords' (1985) CLJ 351, 352.

68 See *Matchams Park (Holdings) Ltd v Dommett* (1984) 272 EG 549 (CA) (sports stadium); *Manchester CC v NCP* (1982) 262 EG 1297(CA) (car park).

69 Denning LJ in *Errington v Errington* [1952] 1 KB 290, 297. He added, at 298, 'if the circumstances and the 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, he will be held to be a licensee only'.

70 A change which Street (n 33) 328 described as marking 'a shift of emphasis from status to contract'.

71 [1952] 1 All ER 1199. It was also followed by the lower courts, for example, in *Murray Bull & Co Ltd v Murray* [1953] 1 QB 211, the court did not even debate whether exclusive possession had been granted.

72 [1968] 1 WLR 374, 375.

73 *Marchant v Charters* [1977] 1 WLR 1181, 1184.

74 Ibid 1185.

the 'intentions of the parties' were, however, cumbersome and not always in harmony with factual reality. An inherent irony was identified by Lewison: 'What was once a consequence of a finding that a licence existed had been transformed into a determining factor in establishing the existence itself'.⁷⁵

Although the term 'intention' appears as a simple word of well-understood meaning, it has generated much judicial consideration in the context of landlord and tenant law.⁷⁶ Some insight was provided by Lord Wilberforce, who claimed that: 'When one speaks of the intentions of the parties to the contract, one is speaking objectively . . . What the court must do must be to place itself in the same factual matrix as that in which the parties were'.⁷⁷ In doing so, the court must always discover what the parties intended to do and not what relationship they hoped to bring about.⁷⁸ The relevant matrix, however, is usually a construct of the written agreement between the parties. Hence, it was the outward expression of accord from which the parties' intentions were traditionally gleaned.⁷⁹ Accordingly, in an attempt to identify the intentions of the parties, the courts were regularly seduced by a balance sheet-style approach, segregating those terms that indicated a tenancy into the credit column and those consistent with a licence into the debit column.⁸⁰ As Tromans noted: 'If the debits outweighed the credits, then the occupant had merely permission to occupy as opposed to a stake in the property'.⁸¹ In cases where the agreement accurately states the intentions of the parties, the matter is straightforward 'Unless the parties' professed intentions differed from their true intention, or failed to reflect the true substance of the real transaction, this is conclusive'.⁸² If, of course, the parties misunderstand the nature of their agreement, the court must identify and enforce the real transaction. This will arise where, as Mustill LJ explained, 'the language of the document (and in particular its title or description) superficially indicates that it falls into one legal category, whereas when properly analysed in the light of the surrounding circumstances it can be seen to fall into another'.⁸³ In both scenarios, the court is simply exercising its skills of construction so as to give fair effect to the true agreement on the terms expressed therein.⁸⁴

Different considerations, however, emerge when it is alleged that the agreement contains an artificial provision inserted for the purpose of negating statutory protection or is in its overall nature a sham transaction. The court is then invited to adopt a broader approach and look beyond the written agreement to investigate the substance and reality of the transaction. The task is one which is undertaken with regard to such surrounding circumstances as the size of the property, the nature of the relationship between the parties, any pre-contractual negotiations and the conduct of the parties. The artificiality might be readily apparent in the context of the agreement, neon-lit when projected against the

75 K Lewison, *Lease or Licence: The Law after Street v Mountford* (Longman 1985) 5.

76 See M Haley, 'Section 30(1)(g) of the Landlord and Tenant Act 1954: The Unjust Relegation of Renewal Rights' (2012) 71(1) CLJ 118.

77 *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989, 996, 997.

78 *Cameron v Rolls-Royce* (n 36).

79 See *Eastleigh BC v Walsh* [1985] 1 WLR 525.

80 As, indeed, occurred in the Court of Appeal in *Street v Mountford* (1984) 16 HLR 27.

81 Tromans (n 67) 352. He added, *ibid*: 'Exclusive possession was merely one item on the balance sheet to be thrown in on the credit side: a weighty item no doubt, but only one item nonetheless.'

82 Millett J in *Camden LBC v Shortlife Community Housing Ltd* (1993) 25 HLR 330, 345.

83 (n 60) 1019.

84 As Geoffrey Lane LJ remarked in *Aldington Garages Ltd v Fielder* (n 60) 62: 'If what the parties have agreed is truly a licence and not a tenancy dressed up in the verbiage or trappings or clothing of a licence then the owner is entitled to succeed.'

known factual matrix.⁸⁵ Such would occur when, say, exclusive possession is denied by use of a sharing clause, but there exists no space physically to accommodate another.⁸⁶ Similarly, the sharing clause might be so unlimited that it is clearly fictitious for, as Lord Jauncey observed of such a provision: 'If the clause is read literally the licensor could permit any number of persons to share the flat with the two defendants, even to the extent of sharing the joys of the double bed'.⁸⁷

In less obvious cases, however, there are three major obstacles to a broad-ranging inquiry. The first is the lawyer's inbred hesitancy (absent a claim for rectification based on mistake) to disregard the unequivocal language of the agreement.⁸⁸ As Lord Goddard CJ observed: 'Written agreements, more especially when executed after professional advice and assistance are not to be lightly set aside'.⁸⁹ Until *Street v Mountford*, the fact that the overriding purpose was to avoid legislative controls did not itself invite scrutiny and the judicial attitude towards the circumvention of regulatory controls was one of complacency. As Lewison acknowledged, 'by a carefully drafted agreement whose effect was clearly understood by all parties a property owner could effectively contract out of the Rent Act'.⁹⁰ This view was shared also by Griffiths LJ who bemoaned 'how easy it is for a landlord to avoid the provisions of the Rent Act'.⁹¹ The most notorious illustration of this lack of oversight was offered in *Somma v Hazlehurst*, where Lord Denning MR adopted a formalist approach and, by upholding a patently unrealistic sharing clause, gave effect to a licence agreement.⁹² This decision was so shocking that it was even denounced in Parliament.⁹³

The second obstacle takes the form of the parol evidence rule, which prevents a party to a written contract from adducing extrinsic evidence that contradicts, varies or qualifies the written terms of the contract. This rule of construction can be overcome only in strictly delimited circumstances. There has to be something about the agreement that invites the court's scrutiny, for example, an absence of express declaration of purpose, a lack of clarity on the face of the contract as to its purpose or some doubt cast on the veracity of the contract.⁹⁴ This could arise where the contract is too elaborate with regard to the transaction, much of the documentation is redundant or there is an important inconsistency in terms.⁹⁵ At this point, the court can take into account any relevant, extraneous facts within the knowledge of both parties and employ this information to give appropriate effect to the agreement.⁹⁶ Such extrinsic considerations have included, for example, the

85 In *Aslan v Murphy* [1989] 3 All ER 130, the agreement excluded the occupier from the accommodation for 90 minutes each day as a ploy to deny him exclusive possession. The Court of Appeal held that this term was colourable and utterly unrealistic.

86 *Demuren v Seal Estates* (1983) 7 HLR 83.

87 *AG Securities v Vaughan; Antoniadis v Villiers* (n 31) 476.

88 See generally P Sparkes, 'Breaking Flat Sharing Licences' (n 13).

89 *R v Fulham, Hammersmith and Kensington Rent Tribunal ex p Zereke* [1951] 2 KB 1, 7. This embraces the manner in which the agreement describes itself: *Horford Investments Ltd v Lambert* [1974] 1 All ER 131.

90 Lewison (n 75) 11.

91 *Street v Mountford* (1984) 16 HLR 27 (CA), 40.

92 [1978] 2 All ER 1011. A similarly dubious clause was also upheld in *Aldington Garages* (n 60).

93 Rt Hon Mr Frank Allaun, HC Deb 6 December 1978, vol 959, col 1403, declared it to be an 'astonishing case' and 'an abuse of the [Rent] Acts'.

94 *Samrose Properties v Gibbard* [1958] 1 All ER 502.

95 See *Walsh v Griffiths-Jones* [1978] 2 All ER 1002.

96 *Addiscombe Garden Estates Ltd v Crabbe* [1958] 1 QB 513. There a licence agreement to occupy a lawn tennis club was rejected.

intelligence and education of the parties,⁹⁷ the full appreciation by the parties of an agreement freely entered into⁹⁸ and the fact that both parties were businessmen.⁹⁹ Importantly, the parol evidence rule does not apply when there is an allegation of sham.¹⁰⁰

The third obstacle concerns the accepted, but restrictive, definition of a sham offered in *Snook v London & West Riding Investments Ltd*.¹⁰¹ There, Diplock LJ established the seemingly indispensable requirement that the parties 'must have a common intention that acts or documents are not to create the legal rights and obligations which they give the appearance of creating'.¹⁰² Accordingly, a sham arises where the parties say one thing while intending another. The inhibiting nature of this rule of common intention was evident from the Court of Appeal decision in *Antoniades v Villiers*.¹⁰³ Although the two agreements in issue were the product of considerable artifice, they were not dismissed as sham agreements. The appellate court concluded that it was necessary for all the parties to intend that the occupiers had exclusive possession. As the landlord plainly did not share that intention, there could be no sham. Although the House of Lords was to reverse this decision,¹⁰⁴ it does reveal the traditional strictures associated with the identification of sham transactions. Indeed, Lord Templeman later expressed the wish that he had employed the word 'pretence' in his speech in *Street* rather than the phrases 'sham devices' and 'artificial transactions'.¹⁰⁵

Accordingly, it is not enough that there exists an ulterior motive or that the agreement overtly benefits the licensor.¹⁰⁶ Similarly, it matters not that the court disapproves of the transaction.¹⁰⁷ If there is nothing done to disguise the substance of the agreement, the court cannot interfere.¹⁰⁸ The tenants in *Demuren v Seal Estates*, however, were able to demonstrate a sham because there was evidence of a prior oral agreement for a lease.¹⁰⁹ In *Grimsby College Enterprises Ltd v Revenue & Customs Commissioners*, Briggs J would have no truck with a licence agreement, which he regarded as 'an artifice, designed to present to the outside world in general (and, no doubt, HMRC in particular) a picture of the relationship between the parties very different from that which had been agreed'.¹¹⁰ Nevertheless, it cannot be doubted that the onus of proving subterfuge and connivance rests heavily on the shoulders of the party contending that the written agreement should not be taken at face value.¹¹¹

It is hardly surprising that, in the rental housing context, this narrow, judicial approach generated much contemporary criticism.¹¹² Clarke lamented the absence of 'a measure of

97 *Somma v Hazlehurst* (n 92).

98 *Sturrolson & Co v Wenig* (1984) 272 EG 326. The absence of misrepresentation, mistake or undue influence is indicative of whether a party intended to be bound by the contract as drafted.

99 *Mackenzie v Kennett* (1962) 181 EG 9.

100 *Elmdene Estates Ltd v White* [1960] AC 528.

101 [1967] 2 QB 786.

102 *Ibid* 802.

103 (1988) 56 P&CR 334.

104 [1990] 1 AC 417. It held that the two contracts were in reality one and, so construed, the sharing clause was, as Lord Bridge admitted (at 454), 'repugnant to the true purpose of the agreement'.

105 *Ibid* 462; see S Bright, 'Beyond Sham and into Pretence' (1991) 11 OJLS 136.

106 *Farrell v Alexander* [1977] AC 59.

107 As Adams J stated in *Donald v Baldwin* [1953] NZLR 313, 321: 'The law will not be hoodwinked by shams: but real and lawful intentions cannot be dismissed merely because they are disliked.'

108 *Brumwell v Ponys County Council* (n 55).

109 (n 86); see also *O'Malley v Seymour* (n 56).

110 (n 14) [22].

111 See *Hadjiloucas v Crean* (n 83).

112 See, for example, A Arden, 'High Court Guerillas' (May 1979) Roof 78.

sanity and logic to this area of the law'.¹¹³ Partington criticised the courts for having adopted a piecemeal approach, incrementally built up on a case-by-case basis, rather than devising general principles and concluded that: 'The result of these cases is to leave the law in turmoil.'¹¹⁴ Gray and Symes regretted 'a more general retrenching of judicial opinion in favour of the entrepreneurial interest as opposed to the residential tenant'.¹¹⁵ Griffiths LJ felt that the distinction between a lease and licence had become so eroded that: 'Parliament may have to consider bringing licences under the same umbrella of protection as tenancies.'¹¹⁶ The legislature itself believed that the law had been brought into ridicule and disrepute.¹¹⁷ It is against this background of academic, judicial and political dissatisfaction that Lord Templeman's speech in *Street v Mountford* is to be evaluated and the rejection of the licence as drafted by Mr Street understood.¹¹⁸

The legacy of *Street*

The setting for *Street v Mountford* was straightforward: it concerned residential property and the circumvention of the Rent Act 1977; there was no allegation of a sham agreement; it was not a sharing case and exclusive possession was not denied.¹¹⁹ It was, therefore, a simple matter of construing an agreement that was styled as a personal, non-assignable licence in circumstances where direct contracting-out of the governing legislation was impermissible. At first instance, Ms Mountford was held to be a tenant, but this finding was overturned in the Court of Appeal.¹²⁰ As Slade LJ acknowledged: 'I do not see how the plaintiff could have made much clearer his intention that what was being offered to the defendant was a mere licence to occupy and not an interest in the premises as tenant'.¹²¹ As there was no misrepresentation as to the parties' intentions, this outcome was on all fours with the Denning authorities. The House of Lords, however, unanimously reversed this decision and, in doing so, jettisoned decades of entrenched, albeit lax, legal reasoning as authored by Lord Denning. This, as Mr Street subsequently complained:

turned the clock back more than a quarter of a century . . . The ancient wisdom is reinstated . . . The parties' intention as to the interest they wished to create is entirely irrelevant, however genuine and however unambiguously expressed.¹²²

The obvious difficulty faced by Lord Templeman was, having disapproved of many of the pre-existing authorities, how in future the court was to distinguish between a tenancy and a residential licence. The House was, as Partington explained, 'torn between a desire to uphold contractual arrangements and an awareness, however dimly perceived, that the Rent

113 D Clarke, '*Street v Mountford*: The Question of Intention – A View from Down Under' (1986) Conv 39, 43.

114 Partington (n 54) 337. With acute foresight he added, *ibid*: 'Unless one of these cases reaches the House of Lords, and is heard by a particularly robust court, the chances of the judiciary providing a broader set of principles seem remote'.

115 K Gray and P Symes, *Real Property and Real People* (Butterworths 1981) 424. The authors' lament was that recent decisions had 'inflicted serious harm upon the social philosophy expressed in the Rent Act' (*ibid*).

116 *Street v Mountford* (n 80) 40. An idea mooted also in the Law Commission report (n 34) [4.6].

117 Rt Hon Mr Donald Anderson observed that such narrow legalism 'can only add substance to the claims of those who say that the courts are wholly out of touch with the needs of ordinary people' (HC Deb 7 March 1979, vol 963, col 1312).

118 Mr Street later described himself as, 'a double rogue, a landlord and a lawyer' (n 33) 328.

119 Hence, as Mustill LJ pointed out in *Hadjilovcas v Crean* (n 83) 1022, 'the decision has nothing directly to say about the manner in which the existence of such an intention [to grant exclusive possession] should be ascertained'.

120 *Street v Mountford* (n 80).

121 *Ibid* 39.

122 *Street* (n 33) 329.

Acts have a social purpose that should not be too easily thwarted'.¹²³ Lord Templeman's policy-led solution was disarming in its straightforwardness in that 'the only intention which is relevant is the intention demonstrated by the agreement to grant exclusive possession for a term at a rent'.¹²⁴ The House, thereby, breathed new life into the orthodox notion that exclusive possession is, as a general rule, the crucial factor in determining the existence of a tenancy. As Lord Templeman acknowledged: 'No other test . . . appears to be understandable or workable'.¹²⁵ Few would object to this reassertion of exclusive possession as the dominant characteristic of a tenancy.¹²⁶ From this perspective, it matters not whether the tenancy is of residential, agricultural or commercial property. As it is to do with legal rights, rather than *de facto* use,¹²⁷ it sits well with traditional notions of private property and the vital ability to exclude all others from the land.¹²⁸ This is in contradistinction to a lodger who, being a character that features prominently in Lord Templeman's speech, 'is entitled to live in the premises but cannot call the place his own'.¹²⁹

Although there can be no tenancy without exclusive possession, it is trite law that, as Lord Templeman explained, 'an occupier who enjoys exclusive possession is not necessarily a tenant'.¹³⁰ By way of an exception to the general rule, one scenario which has emerged in the commercial sphere concerns a prospective tenant who is allowed to occupy, pending the grant of a lease or sale. Although the occupier may enjoy exclusive possession, if the transaction never goes ahead the occupier will be a licensee during the interim period.¹³¹ For this exception to operate, the parties must genuinely intend that the transaction will eventually take place.¹³² As Mann J emphasised in *Cameron Ltd v Rolls-Royce plc*, the relevant transactions must be contractually interrelated and the licence must be 'ancillary to a relationship which is part of a bigger picture'.¹³³

Lord Templeman was not, however, content with the re-establishment of exclusive possession as the distinguishing feature of a tenancy. He advocated that the judiciary should adopt an interventionist stance, proactively seeking out rogue terms and colourable agreements.¹³⁴ Within the parameters of the case before him, this invitation appears as understandable as it is reasonable. Directly within his line of sight was the private-sector residential landlord who sought indirectly to contract out of socially imperative

123 Partington (n 54) 336. As Lord Templeman later acknowledged in *AG Securities v Vaughan*; *Antoniades v Villiers* (n 31) 458: 'Parties to an agreement cannot contract out of the Rent Acts; if they were able to do so the Acts would be a dead letter.'

124 *Street v Mountford* (n 12) 826.

125 *Ibid* 824. He reinforced this fundamental proposition in *AG Securities v Vaughan*; *Antoniades v Villiers* (n 31).

126 But see *Street* (n 33) 328: 'Regrettably the apple cart has now been upset, and perhaps damaged beyond repair.'

127 An occupier can have the sole occupation of premises without having exclusive possession: *Vesely v Levy* [2007] EWCA Civ 367.

128 See generally K Gray, 'Property in Thin Air' [1991] CLJ 252.

129 *Street v Mountford* (n 12) 818. Albeit a quaint notion, a lodger is an occupier whose landlord provides attendances and services, which require unrestricted use and access to the premises.

130 *Street v Mountford* (n 12) 818. He provided the examples of when there was no intention to create a legal relationship or the relationship between the parties was that of a vendor or purchaser, master and servant occupier, or similar.

131 *Isaac v Hotel de Paris Ltd* [1960] 1 WLR 239.

132 *Essex Plan v Broadminster* (n 37).

133 (n 36) [22].

134 See C Harpum, 'Leases, Licences, Sharing and Shams' (1989) CLJ 19.

legislation.¹³⁵ Outside this sphere, his call to action is both controversial and unhelpful. The use of licence agreements within the commercial context fell well outside his range of vision. This is a very different world, which is not populated with lodgers and in which it is possible directly to contract out of the statutory protection otherwise afforded. Three decades on from Lord Templeman's speech, the danger still remains that 'these passages are plucked from their context'.¹³⁶ It is incontrovertible that the existence of exclusive possession can readily be denied as regards business premises and the court must be particularly chary of interfering with a bargain voluntarily entered into between commercial parties. The factual matrix in which the agreement is sited must always be crucial and the extreme differences between the types of residential property and, say, a market stall, office or car park simply cannot be ignored.¹³⁷ The multiplicity of uses to which business premises may be put,¹³⁸ coupled with the diverse range of terms that may genuinely be agreed, serve only to underscore the fundamental differences that exist.¹³⁹ It necessarily follows that 'the indicia, which may make it more apparent in the case of a . . . residential occupier that he is indeed a tenant, may be less applicable or be less likely to have that effect in the case of business tenancies'.¹⁴⁰

Although the skills of legal drafting remain prized, the unavoidable consequence of *Street v Mountford* is that the outward form of the agreement can no longer prevail over its substance. This entails that 'the categorisation of the agreement as a licence or a tenancy is for the law to decide, not the parties'¹⁴¹ and, 'the parties cannot alter the effect of the agreement by insisting that they only created a licence'.¹⁴² Lord Templeman was, thereby, signalling to the lower courts a preparedness to disregard artificial provisions that gave the misleading appearance that exclusive possession was denied. The court, as he later commented, 'must pay attention to the facts and surrounding circumstances and to what people do as well as to what people say'.¹⁴³ Somewhat optimistically, Lord Templeman believed that distinguishing between fact and fiction would be a straightforward task, adding that: 'In the case of residential accommodation there is no difficulty in deciding whether the grant confers exclusive possession'.¹⁴⁴ On this point, his judgment proved to be flawed and, as Hill concluded: 'Subsequent cases have shown that the formula suggested by Lord Templeman is in practice too simplistic'.¹⁴⁵ Even in the residential sector, difficulties were generated by the more sophisticated use of the sharing clause¹⁴⁶ and the employment of

135 As he admitted in *AG Securities v Vaughan; Antoniadis v Villiers* (n 31) 459: 'The duty of the court is to enforce the Acts and in so doing to observe one principle which is inherent in the Acts and has been long recognised, the principle that parties cannot contract out of the Acts.'

136 Mustill LJ in *Hadjiloucas v Crean* (n 83) 1020.

137 See *Hunts Refuse Disposals Ltd v Norfolk Environmental Waste Services Ltd* [1997] 1 EGLR 16.

138 For example, the use of land and a farmyard with sheds for peat extraction and storage was upheld as a licence in *Crow v Waters* [2007] 2 P&CR DG14.

139 As Hutchison LJ explained in *Hunts Refuse Disposals* (n 137) 18, 'while one would ordinarily expect that someone in occupation of a small house for a fixed term at a rent had exclusive possession, one would I suggest have no such preconceptions about a person given the right to tip rubbish in the excavated parts of a large plot of land, on other parts of which, it seems, quarrying was continuing'.

140 Glidewell LJ in *Dresden Estates Ltd v Collinson* (1988) 55 P&CR 47, 52.

141 Mustill LJ in *Nicolaou v Pitt* (1989) 21 HLR 487, 492.

142 Lord Templeman in *Street v Mountford* (n 12) 819.

143 Lord Templeman in *AG Securities v Vaughan; Antoniadis v Villiers* (n 31) 464.

144 *Street v Mountford* (n 12) 817.

145 J Hill, 'Shared Accommodation and Exclusive Possession' (1989) 52 MLR 408, 409.

146 See *AG Securities v Vaughan; Antoniadis v Villiers* (n 31) .

so-called 'mobility clauses' (requiring the occupier to move to other accommodation if deemed necessary by the landlord).¹⁴⁷

An attempted denial of exclusive possession in a private-sector residential licence agreement is, understandably, viewed with much caution and suspicion by the courts and is subject to the closest scrutiny. Post-*Street*, landlords who seek successfully to deny exclusive possession in that sector are driven to such elaborate lengths as providing services¹⁴⁸ or manufacturing a multi-occupancy scheme within which each occupier signs a distinct licence agreement containing different rights and obligations.¹⁴⁹ Matters are, however, much different in the commercial sphere where the licensor can genuinely reserve a high degree of control over the premises and the presence of exclusive possession is not readily to be inferred.¹⁵⁰ An authentic retention of territorial control, coupled with an express denial of exclusive possession, must ensure that the licence agreement is upheld. Accordingly, in *Shell-Mex & BP Ltd v Manchester Garages*,¹⁵¹ a licence agreement prevailed in circumstances where the possession and control retained by the licensor (particularly concerning the products that could be sold and layout and equipment on the forecourt) ran contrary to the grant of exclusive possession. Similarly, in *Smith v Northside Developments*,¹⁵² no grant of exclusive possession could arise where there was a sharing of floor space between the occupiers, or in *Clore v Theatrical Properties Ltd*¹⁵³ where the licensee occupied under a trade concession agreement to sell refreshments in a theatre. Other contexts in which exclusive possession has been held not to exist include where occupation is limited to only part of the day or week;¹⁵⁴ where the right is to occupy part of the premises for storage and the licensor has the right to vary which part can be used;¹⁵⁵ and where there is occupation of a lock-up market stall.¹⁵⁶ This offers safe ground for judges who must necessarily conclude that there is no tenancy.

Problems arise when it is less evident that exclusive possession has been denied both at law and in fact. While the court might instinctively be repelled by any notion of 'the judge awarding points for drafting',¹⁵⁷ it is at this point that other indicators are sought. Indeed, there are a series of contractual terms that, whether by inclusion or omission, tend to signpost the true nature of the relationship. The covenant for quiet enjoyment, a reference to 'rent' and the reservation of a right of re-entry point towards a lease. In addition to an express denial of exclusive possession, the lack of a covenant for quiet enjoyment and the absence of a forfeiture clause suggest a licence agreement.¹⁵⁸ A blanket prohibition on alienation is also indicative of a licence agreement.¹⁵⁹ This allows the court to take an impressionistic overview of the transaction. Such occurred in *Venus Investments Ltd v Stocktop*

147 Glidewell LJ explained in *Dresden Estates* (n 140) 53: 'You cannot have a tenancy granting exclusive possession of particular premises, subject to a provision that the landlord can require the tenant to move to somewhere else'.

148 *Huntyler v Ruddy* (1996) 28 HLR 550.

149 *AG Securities v Vaughan*; *Antoniades v Villiers* (n 31).

150 *Venus Investments Ltd v Stocktop Ltd* [1996] EGCS 173 (CA).

151 (n 11) 841.

152 *Smith v Northside Development* (n 40).

153 [1936] 3 All ER 483.

154 In *Manchester City Council v NCP Ltd* [1982] 1 EGLR 94, the Court of Appeal saw sound commercial sense in such an arrangement.

155 *Dresden Estates v Collinson* (n 140).

156 *Gloucester City Council v Williams* (1991) 155 LG Rev 348.

157 Lord Templeman in *Street v Mountford* (n 12) 826.

158 *Shell-Mex & BP* (n 11); *Eso Petroleum v Fumegrange* (n 42).

159 *Barnes v Barratt* [1970] 2 QB 657.

Ltd,¹⁶⁰ where the agreement contained neither a forfeiture clause nor a right for the grantor to enter and inspect the premises. As it did not resemble a commercial lease, the Court of Appeal held it to be a licence agreement. A similar broad-brush approach was adopted in *NCP Ltd v Trinity Development Co (Banbury) Ltd*.¹⁶¹ There, the Court of Appeal found it to be telling that the agreement, to occupy a multi-storey car park, was unusually framed so as only to impose a series of obligations on the occupier.¹⁶² It was significant that the agreement did not start, as a tenancy would, with a conferral of an express right of occupation. Arden LJ emphasised that an absence of terms, characteristically found in a tenancy agreement, evidenced that a licence had been created. She felt able to uphold this highly stylised contract even though the degree of territorial control retained by the landowner was modest.¹⁶³ For those who advocate a strict adherence to the views of Lord Templeman, this will be viewed as a highly dubious decision. Such proponents would argue that an insufficiency of control must entail that the express denial of exclusive possession is a fiction. Although it is denied at law, it is not denied in fact. Hence, the conclusion drawn by Arden LJ might be regarded as the illegitimate promotion of form over substance. Nevertheless, the outcome was desirable and the means by which it was justified embodied both commercial realism and robust common sense.

Most contentious, however, is the weight to be given to the descriptive labels attached by the parties to their ostensible agreement. Although Lord Templeman protested that: 'Words alone do not suffice. Parties cannot turn a tenancy into a licence merely by calling it one',¹⁶⁴ in the commercial sector such descriptors are taken to offer prima facie evidence of the parties' intentions.¹⁶⁵ The difficulty lies in gauging the weight to be given to the professed intentions of the parties. In the residential rental market, scant attention is paid to such declarations. Since the *NCP* case, however, a very different ethos prevails in the commercial sector. There Arden LJ appeared to toe the traditional line by accepting that the labels attached to the agreement were not determinative. In homage to Lord Templeman, she admitted that the court must instead have regard to the substance and not merely to the appearance of that agreement. Nevertheless, she quickly veered off-message and, waylaid by the outward form of the contract before her and the context in which it arose, conceded:

It would in my judgment be a strong thing for the law to disregard totally the parties' choice of wording and to do so would be inconsistent with the general principle of freedom of contract and the principle that documents should be interpreted as a whole.¹⁶⁶

She did, however, acknowledge that the interpretative worth of an express declaration of intention would vary according to the respective circumstances of the parties. By way of a concession to the residential rental market, she cautioned that 'it must be approached with healthy scepticism, particularly, for instance, if the parties' bargaining positions are asymmetrical'.¹⁶⁷ It was, therefore, central to her judgment that this was an arm's length

¹⁶⁰ (n 150).

¹⁶¹ (n 18).

¹⁶² For example, to operate a car park, to pay for security, to insure against specified risks, to account for profits, to allow the licensor to carry out certain repair works and to provide for 40 free car-parking spaces for the licensor's nominees.

¹⁶³ See M Haley, 'Licences of Business Premises: Principle and Practicality' (2001) Conv 348.

¹⁶⁴ *Street v Mountford* (n 12) 821.

¹⁶⁵ An examination of the agreement as a whole necessarily includes some consideration of what the parties had indicated they intended to do: *Dresden Estates v Collinson* (n 140).

¹⁶⁶ (n 18) [28]. Buxton LJ at [42] agreed that it would, indeed, be an 'extreme' response to exclude from the construction process those parts of the agreement which stated the intention of the parties.

¹⁶⁷ *Ibid* [26].

agreement between two business parties who, having been legally advised, could be taken to have appreciated the implications of creating a licence instead of a tenancy. It is clear that Arden LJ could see no valid reason why the court should seek to overturn such commercial agreements. For the disciple of Lord Templeman, however, this may appear as legal heresy and a throwback to a bygone era when the 'intentions of the parties' dominated legal thinking.

This context-driven approach to construction later received the approval of Jonathan Parker LJ, who agreed that, in the commercial sphere, the form of the contract could not be ignored.¹⁶⁸ He explained:

Where the contract so negotiated contains not merely a label but a clause which sets out in unequivocal terms the parties' intention as to its legal effect, I would in any event have taken some persuading that its true effect was directly contrary to that expressed intention.¹⁶⁹

He felt it inappropriate that a party who agreed that 'the contract should not create a tenancy, should then invite the Court to conclude that it did'.¹⁷⁰ The clear message is that, provided the contract is between commercial parties, professionally drafted and not shown to contain misleading terms, it will be taken at face value and for what it says. Without doubt, within the commercial arena this sounds a retreat from *Street v Mountford* and resurrects a jurisprudence that, in the residential sector, has long been discredited. Nevertheless, this judicial response simply demonstrates that Lord Templeman's promulgation of the law does not work well outside the field of private sector housing.¹⁷¹ As Mustill LJ observed sagely: 'It is a matter for regret that this important jurisdiction . . . should appear to be governed by rules which do not always yield a direct and unequivocal solution'.¹⁷²

Conclusion

Undoubtedly, *Street v Mountford* is a seminal case on the landscape of landlord and tenant law. It has exerted a major impact on judicial thinking and the refinement of the lease or licence distinction both on a jurisprudential and a practical level.¹⁷³ The social and political context in which *Street* was decided, moreover, made it inevitable that prior legal thinking, which had been predicated on the intentions of the parties as divined solely from the terms of the agreement itself, would be abandoned. The interests of social justice were to prevail over a contractual framework constructed to favour the interests of the residential landlord.

The reinstatement by Lord Templeman of exclusive possession as the decisive feature of a tenancy has proved to be both sensible and workable. The emphasis upon the substance and reality of the transaction, as tested by an examination of the surrounding circumstances, adds a sense of reality, which had previously been absent. The decision in *Street*, and particularly the directive that the courts should actively seek out pretence agreements, however, can only be understood and properly applied in the context of the Rent Acts and the perceived need to shield the vulnerable from the unscrupulous. In both *Street* and *AG Securities v Vaughan*, Lord Templeman alluded repeatedly to the basic policy considerations underlying Rent Act protection and the

¹⁶⁸ *Clear Channel v Manchester CC* (n 23).

¹⁶⁹ *Ibid* [29].

¹⁷⁰ *Ibid* [28].

¹⁷¹ As Ralph Gibson LJ put it in *Cranbour v Da Silva* (n 20) 211: 'The task of the court in applying the principles laid down in *Street v Mountford* is not that of applying the words of a statute'.

¹⁷² *Hadjilovcas v Crean* (n 82) 1025.

¹⁷³ O'Connor LJ explained in *Brooker Settled Estates Ltd v Ayers* (1987) 282 EG 325, 326: '[Lord Templeman] sought to introduce some order into the law for the better administration of the law and guidance of the judges, particularly in the county court'.

blanket prohibition against the contracting-out of its provisions. The rallying cry for the judiciary to adopt an interventionist stance was not designed to pervade the commercial sector, where there are few concerns about inequality of bargaining power and in which it is perfectly permissible to contract out of the governing legislative code. It is also significant that a licence of commercial premises represents a transaction which benefits the occupier as opposed purely to promoting the interests of the landowner. There is simply no need for judicial vigilance in this very different world where both parties are commercial entities, are well equipped to obtain legal advice and able to contract freely on such terms as they can best negotiate.

Nevertheless, the courts have clearly struggled to adapt the decision of the House of Lords to the commercial context. The Law Commission rightly predicted that: 'It is not likely to have ended the battle; rather it settled a series of skirmishes and moved the front line'.¹⁷⁴ At one extreme, some judges have denied that there is any difference whatsoever between the two sectors, whereas at the other some have advocated a return to ascertaining the intentions of the parties from the text of the written agreement. Of these polar opposites, the latter is clearly correct. It is indisputable that the modern licence agreement has a vital role in facilitating the occupation of commercial premises. There should be no obstacle preventing the parties from creating a licence agreement of business premises if that is what they desire. All that should be required is for the parties to structure their relationship appropriately and genuinely intend to be bound by those terms. If the courts fail to recognise the obvious differences between residential licences and their commercial counterparts, it might be necessary for Parliament to take more drastic steps. This could result in the repeal of the Landlord and Tenant Act 1954, which is likely to have negative effects in the longer term for those who seek a tenancy agreement. Alternatively, the legislature could subject contractual licences to the same statutory regulation as tenancies and, thereby, 'eliminate the importance of the distinction between leases and licences in a large number of cases'.¹⁷⁵ As neither option is attractive or viable, it is to be hoped that the judiciary will, instead, adopt robust common sense to the construction of licences of business premises and recognise that, in the commercial world at least, rights of occupation should not depend on distinctions that are otherwise so difficult to draw.

¹⁷⁴ Law Commission (n 34) [4.8].

¹⁷⁵ *Ibid* [4.9].