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Old Issues, New Incentives, New Approach? Property Guardians and the Lease/Licence Distinction

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Cases:

Camelot Property Management Ltd v Roynon (24 February 2017, Bristol County Court)
Camelot Guardian Management Ltd v Khoo [2018] EWHC 2296 (QB)

Street v Mountford [1985] A.C. 809
Antoniades v Villiers, AG Securities v Vaughan [1990] 1 A.C. 417
Bruton v London & Quadrant Housing Trust [2000] 1 A.C. 406

Abstract

This article considers the test for a lease in *Street v Mountford* [1985] A.C. 809 (HL) and how it has been interpreted in the novel situation of property guardians. One guardian case, *Camelot Guardian Management Ltd v Khoo* [2018] EWHC 2296 (QB), suggests a shift away from *Street* towards greater respect for freedom of contract and a greater readiness to find only a licence. There is a lack of consistency and the opposite is seen in *Camelot Property Management Ltd v Roynon* (24 February 2017, Bristol County Court). This article also examines how the test could be adjusted to reduce the strain in the law and incentivise better practice by landlords.

Introduction

Following the end of widespread secure tenancies and rent control[1] and the rise of the assured shorthold tenancy, the lease/licence distinction apparently lost relevance and the supply of cases diminished from the 1990s.[2] What is left is that with an assured shorthold tenancy, a landlord usually needs to give only two months' notice to recover possession, where for licensees four weeks' notice is required.[3] There are other advantages in a lease, such as standing in various torts, statutory repair obligations[4] (soon to be enlarged to include provisions for fitness for human habitation),[5] but, on the whole, the incentives for landlords to go to the trouble of creating only a licence, rather than a short lease, have diminished greatly.

[1] Rent Act 1977, Housing Act 1985 and predecessors.
[2] The Landlord and Tenant Act 1954 Pt 2 applies to commercial leases but can be easily contracted out of: Regulatory Reform (Business Tenancies) (England and Wales) Order 2003 (SI 2003/3096).
[3] Housing Act 1998, s 21; Protection from Eviction Act 1977, ss 3–5. The processes of possession and eviction, required for both residential leases and licences, will add to these time periods. When s 21 cannot be used is beyond the scope of this article.
[4] Landlord and Tenant Act 1985, ss 11–14 for leases of less than seven years.
[5] Homes (Fitness for Human Habitation) Act 2018, in force from 20 March 2019.

The business model of property guardian companies is to take disused buildings, convert them into residential units and rent them out to 'guardians' – private individuals – to prevent squatting until the owner wants the building back. The guardian companies promise to return the building vacant on very short notice.[6] We may also surmise that these companies might not want to assume repair obligations. These are then the incentives to create licences. The attraction to the guardians is, of course, that the price is relatively low.

Licence status have been challenged by occupiers in two recent cases, *Camelot Property Management Ltd v Roynon*[7] in the county court and *Camelot Guardian Management Ltd v Khoo*,[8] which reached the High Court on appeal. First, this article analyses these cases and the devices the companies used to try to avoid creating a lease. *Khoo* is much more pro-landlord than *Roynon* in the way the court interpreted the terms. Second, it looks at the underlying approaches to the test for a lease and how that influences the matter of interpretation. The favoured approach went from status to (freedom of) contract up to *Somma v Hazelhurst*[9] and back to status in what is still the leading case, *Street v Mountford*.[10] The status approach reached its zenith in *Bruton v London & Quadrant Housing Trust*,[11] where the substance of the relationship between the occupier and landlord was almost paramount. *Khoo*, alongside the almshouse case of *Stewart v Watts*,[12] shows the return of the dominance of freedom of contract, although *Roynon* did not follow this path. This lack of consistency can be traced to conflicting statements by Lord Templeman during the 'status period', which did not do enough to settle the law. Third, this article considers ways of resolving the issues and incentivising better practice by landlords.

The place to begin is the basic test. There is a lease, according to *Street v Mountford*, if there is exclusive possession, for a rent and a term certain.[13] The second and third conditions are rarely in issue so the cases usually turn on whether there was a grant of exclusive possession. The courts, at least during the status period, have been astute to look to the substance not the form, viewing mere labelling as a licence with suspicion and viewing pretences, terms not intended to be acted upon, as mere disguise, particularly in the domestic sphere.[14]

Camelot v Roynon

In 2014, Mr Roynon took two rooms in a guardian scheme run by a Camelot company. He also had access to shared kitchen, washing and living areas. In 2016, he was given notice to quit valid for a licence, but not a tenancy. Camelot brought possession proceedings which he resisted. He paid a monthly fee that amounted to rent for a periodic term certain, so his claim to be a tenant turned on whether he had exclusive possession.

The agreement was labelled a licence, but little turned on that. It expressly stated that no right was given for the 'licensee' to use a specific room; instead it was for the guardians to

[6] Five weeks in *Camelot Guardian Management Ltd v Khoo* [2018] EWHC 2296 (QB) at [7].
[7] 24 February 2017, Bristol County Court.
[8] [2018] EWHC 2296 (QB).
[9] [1978] 1 W.L.R. 1014. This was observed by R. Street, 'Coach and Horses Trip Cancelled?: Rent Act Avoidance After Street v. Mountford' [1985] 49 Conv. 328.
[10] [1985] A.C. 809.
[11] [2000] 1 A.C. 406.
[12] [2016] EWCA Civ 1247; [2018] Ch. 423 at [50].
[13] [1985] A.C. 809, 816.
[14] *Street v Mountford* [1985] A.C. 809, 819, 825. Lord Templeman called them 'sham devices', but a sham is when the whole document is not too be acted on. He issued a clarification in *Antoniades v Villiers, AG Securities v Vaughan* [1990] 1 A.C. 417, 462.

agree sleeping quarters amongst themselves (clause 4). The agreement forbade the staying overnight of guests, the presence of more than two guests at once and unsupervised guests at any time. There was a right to inspect without notice. It was not disputed that Roynon took two rooms but never moved, that those rooms were labelled with his name by Camelot and that Camelot notified the other guardians of his arrival.

HHJ Ambrose found further facts. When a new guardian moved in, Camelot offered a choice of the unoccupied rooms and this discussion was not between fellow guardians but between Camelot and the new guardian. The other guardians were merely notified. A guardian might move to a bigger room on request, and Camelot's 'guardian manager' would facilitate this if possible. Occasionally this did happen. Contrary to clause 4, there was no evidence that the guardians had ever allocated the rooms amongst themselves nor that they had informed Camelot of those arrangements.

One matter was that there was clearly no exclusive possession of the shared areas. In *AG Securities v Vaughan*, a case of a house of multiple occupancy, the issue of whether it is possible to have exclusive possession of one's room and thus a tenancy but not of the communal areas had been left open.[15] The judge decided this question in the affirmative. Of course, being decided in the county court, this decision does not bind any court.

That left the prohibitions of guests, which were problematic. Possession is ultimately exclusionary power and immunity from supervisory control,[16] so genuine clauses that take it away, such as the provision of services and conditions of use, will mean there is no lease. However, the judge considered them to be akin to a prohibition on keeping pets. Moreover, Camelot had not reserved to itself powers that had clearly negatived exclusive possession in the past, such as requiring guardians to move on request[17] or providing services such as cleaning.[18] There was no express use of the term 'pretence' in the judgment, but HHJ Ambrose was clear that since actual practice did not reflect the arrangements of clause 4, it could not be relied on, which is one of the rules of pretences.[19] Therefore, Roynon had exclusive possession of his room, thus a lease, which then was an assured shorthold under the Housing Act 1988.

That was a generous interpretation. While pretence could be readily inferred from the fact that the parties did not actually act on the impugned clause, this really only applied to the matter of allocation. It added to the overall air of unreality, but it would be quite a leap to declaring the prohibition clauses to be pretences, and the judge did not do this. Instead, he made in effect the bold argument that romantic partners were like pets.

Camelot v Khoo

Mr Khoo entered into a property guardian agreement where he took one room in 2015. When the building's owner indicated it wanted it back in 2017, Camelot served Khoo one month's notice, which of course is only valid for a licence. While the court of first instance considered

[15] [1990] 1 A.C. 417, 471. The argument that one could have a tenancy of one's room and this was enough to satisfy the test in *Street* had not been pleaded. Cf the inconclusive consideration of this issue in *Parkins v Westminster City Council* (1998) 30 H.L.R. 894 and *Uratemp Ventures Ltd v Collins* [2001] UKHL 43, [2002] 1 A.C. 301.
[16] K. Gray and S. F. Gray, *Elements of Land Law* (5th edn, OUP 2009) para.2.1ff.
[17] *Westminster City Council v Clarke* [1992] 2 A.C. 289.
[18] *Huwyler v Ruddy* (1996) 28 H.L.R. 550.
[19] *Camelot Property Management Ltd v Roynon* at [44].

that Khoo had exclusive possession, the judge held that he nonetheless only had a licence.[20] Butcher J dismissed the appeal, but for different reasons.

The agreement stated that it was not a tenancy and was an agreement 'to let you share living space', but not have exclusive occupation nor the right to use any specific room.[21] It recited that the relevant Camelot company was not entitled to grant 'possession or exclusive occupation'.[22] Again, the agreement provided that it was for the guardians to allocate the rooms amongst themselves and that they were obliged to notify Camelot thereafter. The prohibitions on guests were substantially the same as in *Roynon*, with some additions. There was a prohibition against sleeping away for more than two nights out of seven without prior written consent, where consent would normally be given for up to four weeks per year, but Camelot was under no obligation to give it.

Butcher J said that determining if there is a right to exclusive possession is a matter of construction, and the contractual rules from cases such as *Arnold v Britton* applied.[23] He considered the possibility of there being 'sham devices or pretences' and considered that it was permissible to look to how the arrangements operated in practice as well as how they were specified in the agreement.[24] He noted that a sham or pretence usually imports a degree of dishonesty, and the court will be slow (but not unrealistically so) to find dishonesty.

He was particularly impressed by the prohibition on overnight guests and the conditions for sleeping away. No pretence had been made out, and the natural meaning of the words meant that exclusive possession had not been granted. Both sides knew of the nature of the agreement, and just because the procedure had never been used did not mean it was a pretence. One passage bears quotation in full:

> Although Mr Khoo may in fact have been permitted exclusive occupation of a room or rooms, that does not in the circumstances of this case overcome the strong presumption that parties to a transaction intend its terms, both as to rights and obligations, to be effective.[25]

The tenor of the judgment is most unlike that of *Roynon* and rather than straining to find for the guardian, Butcher J makes freedom of contract the starting point and echoes the judgment in *Somma v Hazelhurst* (later disapproved in *Street v Mountford*)[26] where the Court of Appeal said that:

> We can see no reason why an ordinary landlord … should not be able to grant a licence … Nor can we see why [the parties'] common intentions should be categorised as bogus or unreal or as sham merely on the ground that the court disapproves of the bargain.[27]

Butcher J further noted that Camelot's business model depended on not creating tenancies and that a contextual approach to interpreting the agreement, taking this into account, accorded with its natural textual meaning to not confer exclusive possession.[28] For Butcher J, this meant the process of interpretation did not have to be strained.

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[20] Ibid at [2]. Unfortunately the reason is not given in the High Court's judgment.
[21] Ibid at [9], [13].
[22] Ibid at [11].
[23] [2015] UKSC 36; [2015] A.C. 1619.
[24] *Camelot Guardian Management Ltd v Khoo* [2018] EWHC 2296 (QB) at [19].
[25] Ibid at [33]–[35].
[26] [1985] A.C. 809, 825.
[27] [1978] 1 W.L.R. 1014, 1025.
[28] *Camelot Guardian Management Ltd v Khoo* [2018] EWHC 2296 (QB) at [29].

There are two responses. First, if the context is important, that should be enough and drawing the occupier's attention to the landlord's business model should be sufficient. However, Butcher J's argument did not go this far and still requires terms that negative exclusive possession. This gives landlords a perverse incentive to impose onerous and artificial terms on their occupiers, which, outside of legal doctrine, benefit no one. Worse still, the incentive is now for a landlord to occasionally enforce these terms against an occupier *pour enourager les juges* to fit their claims within Butcher J's reasoning.

Second, if contextual interpretation is permissible, Butcher J's interpretation of the terms is somewhat one-sided, even strained. A typical guardian would likely see the prohibitions on guests as utterly unrealistic if not by physical arrangement, but in what one expects from independent accommodation under today's social norms. The guardian may well see them as technicalities neither party, in reality, really wants, even if they are valid legally. Yet in *Khoo* this context of the *occupier's* position was ignored. It cuts both ways; if the landlord's plans can colour the interpretation of the agreement, it is hard to see why the occupier's cannot, and this would go to determining what is a pretence.

The Source of the Tension

The difference in reasoning between *Khoo* and *Roynon* clearly shows the flexibility of the process of interpretation in the lease/licence cases. This is the continuance of a past observation,[29] and it has been further noted that there is a policy element in the test from *Street*.[30] If so, then the interpretation of the terms must be subject to that policy, even if that policy is ultimately freedom of contract. This brings us to how it was set.

In *Street v Mountford*, Lord Templeman noted that pretences were used 'whose only object is to disguise the grant of a tenancy and to evade the Rent Acts'[31] but also '[t]he only intention that is relevant is the intention that is demonstrated by the agreement to grant exclusive possession for a term at a rent.'[32] These are the status and contract approaches respectively.

In *Antoniades v Villiers, AG Securities v Vaughan*, he said '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 because in a state of housing shortage a person seeking residential accommodation may agree to anything to obtain shelter.'[33] He later qualified this statement by saying that the search is for the meaning of the language of the agreement,[34] but then noted that '[a] person seeking residential accommodation may sign a document couched in any language in order to obtain shelter.'[35]

The precedence of one approach over the other was never made clear. It is therefore not surprising that different courts have taken different approaches. The approach in *Roynon* was rooted in status and the approach in *Khoo* freedom of contract.

From *Bruton* to *Stewart*

Bruton v London & Quadrant Housing Trust is significant because the House of Lords further commented on the approach to lease/licence cases. In *Bruton*, the occupier, some seven years

[29] P. F. Smith, 'Those who do not Remember the Past' [1989] 53 Conv. 128, 130.
[30] S. Bridge, 'Street v Mountford – no hiding place?' [1986] 50 Conv. 344, 344.
[31] [1985] A.C. 809, 825.
[32] Ibid 826.
[33] [1990] 1 A.C. 417, 458.
[34] Ibid 458.
[35] Ibid 458.

after moving in, sought repairs pursuant to the Landlord and Tenant Act 1985, s 11, which only applies to leases.[36] The complication was that his landlord only had a licence from the head landlord and so argued they could not grant a lease, which is an interest in land they did not have to grant. *Nemo dat quod non habet*.

The House decided that Mr Bruton did have a lease after all, even if it was 'non-proprietary'. It should be noted that without this proposition of law, there probably could not be a lease in many property guardian arrangements. Lord Hoffmann justified this outcome on the basis that lease or tenancy describes the *relationship* between landlord and tenant and any doctrinal issues are to be resolved later.[37] Note that this statement does not go so far as to endorse a full-bloodied pro-consumer all-status approach holding all private arrangements will be tenancies. It is tolerably clear from the judgment that had the landlord made the appropriate arrangements, they could have granted a licence. Moreover, Lord Hoffmann echoed the tension in *Street* and *Antoniades* by holding that the question of lease or licence was one of law, but within that it depended on the 'choice of terms'.[38] Nonetheless, the message from *Bruton*, it is submitted, is that it takes genuine, not artificial or doctrinal, reasons to create licences rather than tenancies.

Furthermore, Lord Hoffmann's further comments suggest he would have disapproved of the use of context in *Khoo*. While on the facts in *Bruton* there had been no breach of the licence with the head landlord, if there had, 'that would have been because it was a tenancy.'[39] In other words, the intermediate landlord should be careful to arrange the terms with both other parties carefully and is not permitted to rely on his or her business arrangements to escape from any adverse consequences. Particularly given Lord Hoffmann's promotion of contextual interpretation in his wider jurisprudence, *Bruton* counsels against its overuse. It also suggests that the recital in *Khoo* that the guardian company is not allowed to grant exclusive possession should not carry much weight.

However, if one looks at the almshouses cases, the tide appears to be turning. In *Gray v Taylor*,[40] decided in 1998, the Court of Appeal declared the dweller a licensee on the basis that potentially low-cost charity-run accommodation fell into one of the exceptions (along with service occupancy and acts of friendship), where tenancies are not created even if there is exclusive possession at a rent for a term. Clearly the exceptions are status-based. But in a materially identical case, *Stewart v Watts*, decided in 2016 by a differently constituted Court of Appeal, the same decision was reached but by construing the terms as meaning no exclusive possession was conferred, i.e. via contract.[41] That approach was of course repeated in *Khoo*, but not *Roynon*.[42]

Resolution

Bruton was not cited in either *Roynon* or *Khoo*, and while the leading cases of *Street v Mountford* and *Antoniades v Villiers* were, there was no engagement with Lord Templeman's

[36] Ibid.
[37] [2000] 1 A.C. 406, 415.
[38] Ibid 413.
[39] Ibid 414.
[40] [1998] 1 W.L.R. 1093, 1098.
[41] [2016] EWCA Civ 1247; [2018] Ch. 423 at [50]. The Court went to hold that *Gray v Taylor* was correctly decided, but said nothing of the difference in reasoning.
[42] The only other recent case where this was discussed was *Gilpin v Legg* [2017] EWHC 3220 (Ch); [2018] 1 P. & C.R. DG18 [62]ff, which is inconclusive.

more discursive (and contradictory) points quoted above nor the underlying approaches.[43] It is clear that a comprehensive review needs to takes place in the Court of Appeal or above, although this may be difficult to achieve practically, given the low values at stake compared to the cost of litigation.

It may be possible to radically change the test in *Street*, but such reengineering is beyond the scope of this article. Instead, consider how it could be reformed. The points made above regarding *Bruton* suggest a pragmatic, mixed approach is appropriate and that it is necessary to cut through doctrine and consider the underlying issues. Ultimately, tenants enjoy greater protection than licensees and, within that, a certain level of protection. We must consider status as well as the degree of freedom of contract. Indeed, status is still determinative in the exception cases. Moreover, in commercial cases where there is equality of bargaining power, the courts have tended to give more weight to the label 'licence', which can only be because of status.[44]

In any event, it is surely necessary to take a more robust approach to the onerous and artificial conditions guardian companies impose. Requiring an 'air of total unreality' to find pretence, as Butcher J appeared to do,[45] appears to require an unreality as great as sharing a bedroom with strangers, where conditions restricting staying away or guests staying are considered perfectly realistic. The interpretation of these conditions can be rebalanced away from the landlord to the occupier. This would be in line with even the most landlord-friendly interpretation of Lord Templeman's and Lord Hoffmann's comments, which temper the degree of freedom of contract even if they do not completely subordinate it. Moreover, it is not clear why dishonesty is required; disingenuity should be enough. If such terms restricting use are never relied on, the courts should be readier to find they are pretences. Leaving a strict burden of proof on the occupier renders this principle toothless.

If, as Butcher J says, the interpretation of an occupation agreement is on contractual principles, then support for these propositions can be found in the law of contract. It is said that there is still a role for *contra proferentem* where there is an imbalance of power.[46] The age-old justification remains the same: there is no true freedom of contract in such circumstances. Lord Templeman's comments about accommodation-seeker behaviour where there is a shortage of (affordable) accommodation are still relevant today.

The doctrinal benefits this would bring are the elimination of the uncertainty and difficulty in interpreting the terms. The practical benefit would be the elimination of the incentive to create such onerous and artificial conditions, which in substance benefit no one. One should note that Mr Street did not attempt to employ these devices and wonder why he was treated more harshly than Camelot in *Khoo*. Landlords of his time would have been unable, in the general case, to remove their tenants at all.

This would mean most property guardians would have tenancies, a position quite justifiable for the reasons given in *Street*. It is hard to see how these minimal extra burdens would pose an existential threat to guardian companies' businesses, especially given that getting possession and eviction orders will add months to the time needed to vacate a building in any event.

[43] In *Camelot Guardian Management Ltd v Khoo* [2018] EWHC 2296 (QB) at [19] Lord Templeman's comments about attempts to evade the Rent Acts were quoted but not discussed.
[44] E.g. *National Car Parks Ltd v Trinity Development Co (Banbury) Ltd* [2001] EWCA Civ 1686; [2002] 2 P. & C.R. 18 at [28].
[45] *Camelot Guardian Management Ltd v Khoo* [2018] EWHC 2296 (QB) at [36].
[46] *Persimmon Homes Ltd v Ove Arup and Partners Ltd* [2017] EWCA Civ 373; [2017] P.N.L.R. 29 [52]; cf E. Peel, 'Whither Contra Proferentem?' in A. Burrows and E. Peel (eds), *Contract Terms* (OUP 2007).

Moreover, these so-called temporary arrangements often go on for many years. Furthermore, the benefits are modest, and the title of the new Homes (Fitness for Human Habitation) Act 2018 is offered to illustrate the minimal decencies lessee status brings the right to enforce.

If the courts do think that reduced protection for guardians is justifiable, the better route is that of the service occupancy cases. A licence is granted irrespective of exclusive possession if the occupation is required by and is of material assistance in carrying out the occupier's employment duties.[47] Both the test and its driver look to true nature of the relationship between landlord and occupier – status – rather than the terms, which can be gamed. By this route the courts could hold that if one has exclusive possession of one's room but not of the common parts, no tenancy is created. If contract does not work, we must revert to status. At least the doctrinal and practical benefits would accrue.

[47] *Norris v Checksfield* [1991] 1 W.L.R. 1241.