

The distinction between a lease and a licence is so small it may be abolished. Explain and critically analyse this statement using authorities and propose any changes that could be made to better clarify this area of the law.

Introduction and Aims

In the area of commercial property, there is a growing need for those involved as either landlords or tenants to understand the nature of their relationships both practically and legally. It is critical for the entities involved in these property arrangements to fully identify the nature of their relationship, not for academic discussion but rather to understand their own rights and responsibilities.

The purpose of this work is to look at the distinctions between a lease and a licence, drawing on existing rules and case law, which seeks to maintain the distinction between a lease and a licence, to identify the key to determining when a lease exists and when a licence exists. Having undertaken this analysis, the paper will then go on to determine whether this is now a false distinction and whether there are situations where the distinction may not be as clear as the legal community would wish to achieve. The latter part of this paper will consider recommendations for the future with a discussion on whether this distinction should remain and how the legal landscape should look when considering the commercial needs of the commercial property agenda.¹

Conclusions will then be drawn, referring back to the original question to determine whether the distinction should be abolished.

What is a Lease?

To be able to determine accurately whether the distinction between a lease and licence exists, or indeed should exist, it is necessary to analyse what the components of a lease are and how they apply from a legal and commercial perspective.² This section will look at various aspects of case law and consider the evolution of the legal structure when it comes to determining what a lease actually is.

The leading case when it comes to defining a lease is that of *Street v Mountford*,³ which stated that a lease is the grant of a right to the exclusive possession of land for a determined period of time at a rent. This sets out that there needs to be exclusive possession and an element of rent being provided for that exclusive possession, which will be discussed below. This definition has evolved over the years, and this section will begin to look at the aspects of a lease which are likely to make it distinct from a licence.

¹ H Wallace, “The Legacy of *Street v. Mountford*” [1990] 41 N. Ir. Legal Q. 143

² *Camelot Guardian Management Ltd v Khoo* [2018] EWHC 2296 (QB)

³ *Street v Mountford* [1985] AC 809

The issue of whether rent is required in order for there to be a valid lease has given rise to some discussion about whether recognition of rent is usually seen as a key feature of a lease. However, the case of *Ashburn*⁴ reversed this, stating that no specific requirement for a rent is attached to a lease, even though this would normally be the case commercially. A further question which arises is whether it is possible for a landlord to grant a lease where they themselves do not have title to the property. This position arose in the case of *Bruton*, where it was held that it is still possible to have a lease provided that there is exclusive possession.⁵ Arguably, therefore, even where there are complexities associated with the title of the property, the element of exclusive possession remains dominant when it comes to determining that a lease exists. The relationship will be contractual only if the landlord does not have the title required to grant a lease. Still, the element of exclusive possession allows that tenancy to exist.⁶

What is a Licence?

In contrast to the lease, a licence is permission for a licensee to do something on the property belonging to the licensor. A licence is a personal right and a contractual right between the individuals and, by definition, is not a lease. It is argued here, based on the case of *Street v Mountford*, that the key distinction is in the availability or otherwise of exclusive possession, the judgment in *Street* stating:

“If the agreement satisfied all the requirements of a tenancy, then the agreement produced a tenancy and the parties cannot alter the effect of the agreement by insisting that they only created a licence.”

It is therefore necessary at this juncture to investigate the concept and case law surrounding exclusive possession in more detail, as this is where the distinction between a lease and a licence lies.

In the case of *Prudential*,⁷ the House of Lords stated that exclusive possession was a necessary element when it came to establishing the existence of the lease and that where there is no exclusive possession, it must naturally fall to the courts to determine that a licence is likely to exist rather than a lease. Therefore, It would seem from case law that exclusive possession is deemed fundamental, but when is exclusive possession present, and how does

⁴ *Ashburn Anstalt v Walter John Arnold and W. J. Arnold & Company Limited* [1989] Ch 1

⁵ *Bruton v London & Quadrant Housing Trust* [1999] UKHL 26

⁶ E Shapiro, P Freedman, and K Steele, *Business Lease Renewals* (Taylor & Francis, 2013)

⁷ *Prudential Assurance Co Ltd v. London Residuary Body* [1992] 2 AC 386

one determine that exclusive possession has been achieved? In the case of *Prudential*, for example, the lease was only granted until the land was needed to undertake a road widening exercise; therefore, the lease's length was uncertain, and this lack of certainty meant that no lease existed in this case. In this case, however, a periodic tenancy was held to exist, leaving the parties with some redress.⁸

A further interesting case in this regard is *Aslan*,⁹ where a landlord had included in the documentation for a bedsit the need for the occupant to leave the bedsit for at least 90 minutes a day. It was held in this case that a lease did exist and that the clause established by the landlord had the intention of creating a sham licence so that the occupant did not have the protection that would be afforded to a tenant. This case is a clear indication that where a landlord is attempting to use the concept of exclusive possession as a means of escaping liability that would be present and seeking to create a false scenario, the court will be quick to shift this balance back and look at substance over form.¹⁰

An interesting discussion of the way in which exclusive possession has been interpreted in the courts was had in the discussion of *National Car Parks*.¹¹ In this case, the agreement was set out as a licence with the express statement that there was no intention to create a tenancy. Within the agreement, there was a statement that the landowner had not reserved the right of entry and the occupier had a requirement not to impede the landowner when it came to exercising their right of possession. There was no discussion of control, and it was recognised based on the facts that there was a need for the occupier to allow temporary occupation in order for the landowner to carry out works on the land. There was no statement that there was a covenant for quiet enjoyment.

Furthermore, obligations were placed upon the occupier to ensure that the property was secure and that maintenance was up to scratch, with the occupier paying a certain percentage of the profits as a fee. In this case, the Court of Appeal held that a licence had been created and that the issue of exclusive possession had to take dominance when making a decision. It

⁸ M Haley, "Licenses of Business Premises Contract Context and the Reach of *Street v Mountford*" [2013] 64 N. Ir. Legal Q. 425

⁹ *Aslan v Murphy* [1990] EWCA Civ 2

¹⁰ *London College of Business Ltd v Tareem Ltd and another* [2018] EWHC 437 (Ch)

¹¹ *National Car Parks Ltd v Trinity Development Co (Banbury) Ltd*, 18 October 2001 (Court of Appeal) [2002] L & TR 408

was the retention of a certain number of car parking spaces for the staff of the landowner that ultimately led to this decision being made.¹²

It is argued here, therefore, that while the decision can be followed logically, there are going to be situations where it is not entirely clear whether a licence or a lease exists, and the question moves naturally to consider whether the label placed upon the agreement matters at all.¹³ Certainty of rights and responsibilities are required, but does this create a false battle for those in front of the courts?

The discussion here therefore goes on to look at whether the distinction matters and whether the distinction which is maintained before the courts is in fact required.

Does the Distinction Matter?

A lease will confer on the tenant an interest in the land, whereas a licence is merely a personal privilege which makes it lawful for the occupant to do things that would otherwise be unlawful. Crucially, a licence does not provide an estate in land.¹⁴ Therefore, where a licence is correctly documented, it does not offer security of tenure in accordance with the Landlord and Tenant Act of 1954.¹⁵ As previously noted, there may be advantages for a landlord to argue that a lease does not exist and that the occupant is present merely on a licence, as they would then not have to offer the same level of security of tenure to the occupant.

In accordance with Part 2 of the 1954 Act, a tenant who is occupying the premises for the purpose of undertaking their business would have the statutory right to renew the tenancy when it comes to the end of the term. There are some grounds upon which the landlord can oppose this renewal, but these are relatively limited in accordance with section 23. There is a clear indication, therefore, that a landlord who wishes only to offer a short-term occupational arrangement will seek to stay away from the protections afforded under the 1954 Act.

On the face of it, therefore, there is a vital distinction between a lease and a licence, which changes the nature of the relationship between the occupier and the landowner and can make a substantial difference to the security that the occupier will experience and the obligations of

¹² *Colchester & East Essex Co-operative Society Ltd v Kelvedon Labour Club & Institute Ltd* [2003] EWCA Civ 1671

¹³ AJ Waite, "Leases and Licences: The True Distinguishing Test" [1987] 50(2) *The Modern Law Review* 226–231

¹⁴ *London Development Agency v Nidai and London Development Agency v Muir and another* [2009] EWHC 1730 (Ch)

¹⁵ Landlord and Tenant Act 1954

the landowner to ensure that the lease remains available for a prolonged period of time.¹⁶ There are clearly strong commercial arguments for this security of tenure; for example, if a business has established itself in a locality and has a strong element of goodwill attached to its location, it is not desirable that it should be moved immediately by the landlord. If this were the end of the story, it would be argued here that the distinction is valid and should remain in place, with the courts looking to offer greater guidance as to when exclusive possession is felt to be present, as this is the determinant factor when it comes to the establishment of the lease and therefore the establishment of security of tenure. However, it is argued here that the story is not complete.¹⁷

To support this argument, it is helpful to look at the situation where a lease does not fall within the 1954 Act, meaning that it is possible to grant a lease that is not protected by security of tenure. In doing so, a situation arises whereby a document and a relationship could establish a lease but the key factor of security of tenure does not exist, creating a hybrid situation that is confusing for all parties. There are several ways in which this could occur. For example, the lease could be excluded from the 1954 Act and could have opted out, something which a tenant may not necessarily be aware of if they were to enter into an agreement without the necessary legal advice. There are also certain exceptions contained within section 43, which again are unlikely to be understood fully by an unwitting landlord or tenant. For example, there is an exception when it comes to leases relating to agricultural holdings, farms or mining, as well as certain military establishments, or where the tenant resides as part of their employment.

Certain tenancies of six months only will also be excluded from the security of tenure subject to certain rulings, which can again add a degree of complexity to comply with the requirements of section 43.¹⁸

Is the Distinction False?

When assessing the distinction between a lease and a licence, the courts have offered guidance that allows individuals to maintain their distinction. It is therefore argued that the distinction is ever present when it comes to a distinction between a lease and a licence, specifically in order to deal with the fact that a lease provides the security that a licence does not. It would be lacking in commercial sense to have a situation where an occupier is able to

¹⁶ S Bridge, "Leases—Contract, Property and Status," in *Land Law* (Willan, 2013) 98–131

¹⁷ B McFarlane, N Hopkins, and S Nield, *Land Law: Text, Cases and Materials* (Oxford University Press, 2021)

¹⁸ *Cricket Ltd v Shaftesbury Plc* [2000] L&TR 13

assert security, and therefore it is argued here that the distinction is not only present but is desirable.¹⁹

The courts have ensured that common sense is applied when it comes to determining whether a lease or a licence exists, with case law stating that an overall view of the relationship should be taken when making this determination.²⁰

Recommendations

Based on the above analysis and considering the evolution of case law, the paper reverts to the original question, which is to determine whether the distinction between a lease and a licence is still present and, if it is, whether it should be present or whether it is now the case that the two should be merged.²¹

It is argued here that the presence of security of tenure under the 1954 Act creates a situation where there must necessarily be a distinction between the lease and the licence. There is a myriad of lightly commercial relationships, from the opportunity to stay in a property when undertaking a particular job through to parking spaces and the more traditional office building or shop. To have one set of rules that would apply to each of these is simply impractical; therefore, even if the exact distinction were to be lost and the impact of the 1954 Act to be eradicated, there would still need to be a discussion as to the aspect of security that an individual relationship aims to reflect.

Despite this, it is argued that the position should be made clearer and more in line with commercial reality rather than seeking to encourage landlords and potentially tenants to amend documentation so that the end result that they desire is achieved. Whilst the courts have been particularly keen to ensure that the reality of the relationship is reflected in determining whether a lease or a licence exists, this desire to create a sham situation is challenging and something that should be tackled as part of any reform agenda.

Consistency of judgments from the courts and suitable guidance for the judiciary is vital to maintain certainty when applying the distinction to cases that come before them.²²

¹⁹ *Dresden Estates v Collinson* (1988) 55 P&CR 47

²⁰ *Shell-Mex and BP Ltd v Manchester Garages Ltd* [1971] 1 WLR 612

²¹ A Dunhill, D Fearon, J Holmes, and B Thomson, "Commercial Property," in *Real Estate Concepts* (Routledge, 2014) 79–96

²² C Bevan, "Leases and Licenses" [1987] 19 BLJ 53

Summary

This paper has looked at the distinction between leases and licences, focusing largely on the reason that such a distinction is perceived to be valuable and why entities would look to argue that they have one type of arrangement over another. By determining the importance of the distinction, it has been argued here that the distinction should remain very much in place but that additional guidance is necessary, particularly for the judiciary, in order to ensure that a false distinction is not created and that the commercial reality of the relationship is accurately reflected in the level of security that is provided to the parties.

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