NO DOCUMENTS - WHAT NEXT?

by

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1. The answer to the question: “No documents-what next?” of course very much depends on the context in which you ask it. One might for example have to give a very different answer if one had just been involved in a car accident than one might give if stopped in the street by a policeman in North Korea. However, the context in which I have chosen to attempt to answer the question is that of a property owner faced with an individual or company occupying its property without the benefit of a formal written lease.

2. The very recent Court of Appeal case of BARCLAYS WEALTH TRUSTEES V ERIMUS [2014] 2 P&CR 4 has provided an example of the problems which can arise. In my view, that case has simply restated long-standing orthodoxy. Thus I do not purport in this talk to “break any new ground” or do anything other than remind my audience of what they no doubt already knew. However, on the basis that: (a) I was specifically invited to talk to you on this topic; and (b) it doesn’t do any harm to have ones memory jogged, I shall sally forth regardless.

General Principles: Street v Mountford

3. The problem arises of course as it is perfectly possible to create a valid oral tenancy.

4. A lease for three years or less at the best rent which can reasonably be obtained without taking a fine (i.e. a market rent) may be created orally or in writing. A lease for more than three years must be by deed. Further of course, by section 2 of the 1989 Act an agreement for lease made on or after 27th September 1989 must be made in writing with all the agreed terms incorporated. However this does not apply in relation to an agreement to grant a short lease, that is one taking effect in possession for a term not exceeding three years. At the best rent which can reasonably be obtained without taking a fine. A periodic lease is of course a lease for less than three years.

5. The circumstances in which a lease can be created orally or (with a written document, unintentionally) were definitively explored by the House of Lords in STREET V MOUNTFORD [1985] AC 809.

6. That case involved a written agreement for the occupation of two rooms in house in Boscombe. The brief written agreement described itself as a "licence" and with a view, clearly, to avoiding the provisions of the Rent Act 1977. The House of Lords held that, despite this label, the agreement created a tenancy. It was, crucially, accepted by the landlord that the effect of the agreement was to grant exclusive possession of the rooms to the tenant. However, the landlord sought to argue that, despite this, it was, as was stated, a licence.

7. Lord Templeman made a number of relevant observations.

8. Firstly, he emphasized that a tenancy is an estate in land which entails exclusive possession of premises for a term at a rent. He said:

> *"In the case of residential accommodation there is no difficulty in deciding whether the grant confers exclusive possession. An occupier of residential accommodation at a rent for a term is either a lodger or a tenant. The occupier is a lodger if the landlord provides attendance or services which require the landlord or his servants to exercise unrestricted access to and use of the premises… If on the other hand residential accommodation is granted for a term at a rent with exclusive possession, the landlord providing neither attendance nor services, the grant is a tenancy; any express reservation to the landlord of limited rights to enter and view the state of the premises and to repair and maintain the premises only serves to emphasise the fact that the grantee is entitled to exclusive possession and is a tenant….There can be no tenancy unless the occupier enjoys exclusive possession; but an occupier who enjoys exclusive possession is not necessarily a tenant. He may be owner in fee simple, a trespasser, a mortgagee in possession, an object of charity or a service occupier. To constitute a tenancy the occupier must be granted exclusive possession for a fixed or periodic term certain in consideration of a premium or periodical payments. The grant may be express, or may be inferred where the owner accepts weekly or other periodical payments from the occupier."*

9. He emphasised that, it is the substance and effect of the agreement which the court has to look at. The labels which the parties attach to it are not necessarily decisive:

> *"…the consequences in law of the agreement, once concluded, can only be determined by consideration of the effect of the agreement. 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. The manufacture of a five-pronged implement for manual digging results in a fork even if the manufacturer, unfamiliar with the English language, insists that he intended to make and has made a spade."

He continued:

"My Lords, the only intention which is relevant is the intention demonstrated by the agreement to grant exclusive possession for a term at a rent."

10. However he made clear that there were certain circumstances in which an agreement which granted exclusive possession to the occupier in return for a regular money payment might not be a tenancy:

"The intention to create a tenancy was negatived if the parties did not intend to enter into legal relationships at all, or where the relationship between the parties was that of vendor and purchaser, master and service occupier, or where the owner, a requisitioning authority, had no power to grant a tenancy. These exceptional circumstances are not to be found in the present case where there has been the lawful, independent and voluntary grant of exclusive possession for a term at a rent…

Legal relationships to which the grant of exclusive possession might be referable and which would or might negative the grant of an estate or interest in the land include occupancy under a contract for the sale of the land, occupancy pursuant to a contract of employment or occupancy referable to the holding of an office. But where as in the present case the only circumstances are that residential accommodation is offered and accepted with exclusive possession for a term at a rent, the result is a tenancy."

11. The effect of this landmark decision was summarised by Lord Hoffmann in the subsequent House of Lords case of BRUTON V LONDON AND QUADRANT [2000] 1 AC 406:

The decision of this House in Street v. Mountford*…is authority for the proposition that a "lease" or "tenancy" is a contractually binding agreement, not referable to any other relationship between the parties, by which one person gives another the right to exclusive occupation of land for a fixed or renewable period or periods of time, usually in return for a periodic payment in money. An agreement having these characteristics creates a relationship of landlord and tenant to which the common law or statute may then attach various incidents. The fact that the parties use language more appropriate to a different kind of agreement, such as a licence, is irrelevant if upon its true construction it has the identifying characteristics of a lease. The meaning of the agreement, for example, as to the extent of the possession which it grants, depend upon the intention of the parties, objectively ascertained by reference to the language and relevant background... the classification of the agreement as a lease does not depend*

upon any intention additional to that expressed in the choice of terms. It is simply a question of characterising the terms which the parties have agreed. This is a question of law".

Residential accommodation

12. The question of the status of an occupier of residential accommodation who is there pursuant to an oral, or indeed an inferred, agreement is these days of much less moment. Following the amendment to the Housing Act 1988 by section 96 of the Housing Act 1996, with effect from 28th February 1997, an oral tenancy of residential accommodation will (save in certain exceptional circumstances) be an assured shorthold tenancy and thus terminable by the landlord merely on service of the requisite notice.

Commercial premises

13. However the exact status of an occupier of commercial premises **does** of course matter because the protection afforded by Part II of the Landlord and Tenant Act 1954 extends to both oral and written tenancies but does not extend to licences or to tenancies at will.

14. The difference between a tenancy at will and a periodic tenancy is as follows. A tenancy at will exists where the tenancy is on terms that either party may determine it at any time. A periodic tenancy, on the other hand, is one which continues from period to period indefinitely until determined by proper notice. For example, from year to year, quarter to quarter, month to month, or week to week. Failing agreement to the contrary, the notice of determination required is half a period in the case of a yearly tenancy but a full period in other cases. The essence of a tenancy at will is that it is terminable by either party on demand.

15. Issues can arise occasionally when someone is let into occupation of commercial premises before a written agreement is concluded or, more often, when a tenant holds over following the termination of a tenancy which was excluded from the 1954 Act.

16. The leading case is still JAVAD V AQIL [1991] 1 WLR 1007. That was a case in which a person was let into occupation before the grant of a lease.

17. The facts were as follows. The tenant was a manufacturer of leather goods. He was desperate to find new accommodation for his enterprise. He agreed with the landlord that he could go into occupation of the premises (two rooms on Brick Lane London). He did so on 26th June 1985. On entry he made payment to the landlord of £2,500 which, was expressed in a receipt signed by the landlord to be "rent for three months in advance." That arrangement was made in anticipation of the parties ultimately being able to agree the terms of a lease. A draft lease was thereafter prepared by the landlord's then solicitors and formed the basis of negotiations between the parties. The draft provided for a term of 10 years, at a rent of £10,000 per year, payable quarterly in advance. The tenant was to pay on completion, inter alia, a deposit of £2,500 in respect of potential damage to the property and arrears. Meanwhile the tenant remained in possession, apart from a brief period during which he absented himself on account of differences with the landlord, and on a further two occasions he paid rent on a quarterly basis (11th November 1985 and 10th January 1986). The tenant also spent £2000 installing electrical wiring at the premises. The parties failed to reach agreement on the question of the deposit, the negotiations eventually broke down, and the landlord, having demanded that the tenant vacate on 14th February 1986, commenced proceedings in the county court for possession, asserting that the tenant was in occupation as a tenant at will. The tenant asserted that he was a periodic tenant protected under the 1954 Act. The Judge held for the landlord and the Court of Appeal upheld his decision.

18. The tenant submitted that, on proof of occupation and payment of rent by reference to a period, a rebuttable presumption arose in favour of there being a periodic tenancy. The Court of Appeal rejected this. The Court held that the extent of any right granted depended on the intention of the parties to be gleaned from the facts of the case. The court approved a statement made by Ormrod LJ in the earlier case of LONGRIGG BOROUGH & TROUNSON V SMITH [1979] 2 EGLR 42 as follows:

"The old common law presumption of a tenancy from the payment and acceptance of a sum in the nature of rent dies very hard. But I think the authorities make it quite clear that in these days of statutory controls over the landlord's rights of possession, this presumption is unsound and no longer holds. The question now is a purely open question; it is simply: is it right and proper to infer from all the circumstances of the case, including the payments, that the parties had reached an agreement for a tenancy?"

19. Nicholls LJ said this:

"As with other consensually-based arrangements, parties frequently proceed with an arrangement whereby one person takes possession of another's land for payment without having agreed or directed their minds to one or more fundamental aspects of their transaction. In such cases the law, where appropriate, has to step in and fill the gaps in a way which is sensible and reasonable. The law will imply, from what was agreed and all the surrounding circumstances, the terms the parties are to be taken to have intended to apply. Thus if one party permits another to go into possession of his land on payment of a rent of so much per week or month, failing more the inference sensibly and reasonably to be drawn is that the parties intended that there should be a weekly or monthly tenancy. Likewise, if one party permits another to remain in possession after the expiration of his tenancy. But I emphasise the qualification "failing more." Frequently there will be more. Indeed, nowadays there normally will be other material surrounding circumstances. The simple situation is unlikely to arise often, not least because of the extent to which statute has intervened in landlord-tenant relationships. Where there is more than the simple situation, the inference sensibly and reasonably to be drawn will depend upon a fair consideration of all the circumstances, of which the payment of rent on a periodical basis is only one, albeit a very important one. This is so, however large or small may be the amount of the payment."

20. Most importantly for present purposes, he added:

"Where parties are negotiating the terms of a proposed lease, and the prospective tenant is let into possession or permitted to remain in possession in advance of, and in anticipation of, terms being agreed, the fact that the parties have not yet agreed terms will be a factor to be taken into account in ascertaining their intention. It will often be a weighty factor. Frequently in such cases a sum called "rent" is paid at once in accordance with the terms of the proposed lease: for example, quarterly in advance. But, depending on all the circumstances, parties are not to be supposed thereby to have agreed that the prospective tenant shall be a quarterly tenant. They cannot sensibly be taken to have agreed that he shall have a periodic tenancy, with all the consequences flowing from that, at a time when they are still not agreed about the terms on which the prospective tenant shall have possession under the proposed lease, and when he has been permitted to go into possession or remain in possession merely as an interim measure in the expectation that all will be regulated and regularised in due course when terms are agreed and a formal lease granted."

21. Thus the fact that the parties are negotiating for the grant of a written tenancy but have not yet agreed the terms is a crucial factor militating against the finding that the arrangement is a periodic tenancy.

Subsequent cases

22. The approach adopted in the Aqil case has basically been approved in every subsequent case.

23. LONDON BAGGAGE COMPANY V RAILTRACK [2000] L&TR 439 is a holding over case the facts of which were as follows. The tenant occupied a left luggage unit on the station concourse at Charing Cross pursuant to a lease which commenced on 30th October 1994 and terminated on 29th September 1998. On 23rd February 1998 the landlord served a notice pursuant to section 25 of the 1954 Act terminating the tenancy and indicating that it would oppose the grant of a new tenancy under ground (f) as it wanted to demolish and relocate the left luggage facilities. The tenant failed to serve the counter notice that was then required. However it remained in occupation. The landlord's agent made a note on its computer system that rent should not be accepted. However five quarters rent were paid by the tenant after September 1998 and, whereas none of these was passed on to the landlord by the agent, only one of these was returned to the tenant. During this period negotiations took place with a view to the tenant being granted a new lease of the new luggage office which the landlord intended to build. These negotiations finally ended in February 2000. On 14th March 2000 the tenant commenced proceedings for a declaration that it held the existing luggage office under a periodic tenancy within the 1954 Act. The judge rejected this claim.

24. Pumfrey J identified five considerations which he said applied. These are as follows:

    (i) There is no rule that in a case in which the tenant holds over after the previous tenancy has been determined, tender and acceptance of rent will raise the presumption of a periodic tenancy.

(ii) In deciding whether a periodic tenancy has come into existence, the court will look at the intention of the parties and all the surrounding circumstances.

(iii) The intention of the parties, to which regard must be had, must be ascertained objectively. The parties' subjective and uncommunicated intentions are irrelevant.

(iv) Where a contractual relationship is said to arise from conduct, the onus is on the party relying on the contract.

(v) The holding over during the negotiation for a new tenancy is a classic instance of a case in which the only relationship which it is necessary to imply is a tenancy at will.

25. A case which went the other way is WALJI V MOUNT COOK [2002] 1 P&CR 13. The facts are somewhat complicated but are relevant. The case involved shop premises in Great Portland Street London. The premises were held on a headlease by R. The tenants were brothers who traded in partnership as "Fads Boutique". They occupied and traded from the premises before the grant of the sub-lease. On 10th February 1989 R granted a sub-lease of the premises to new company, F, which the brothers had set up to take such a lease. Two of the brothers were sureties. The sub-lease was for a term of seven years from 25th March 1989. However the new company never traded and was struck off the register in 1991 whereupon its sole asset (the sub-lease) vested in the Crown as bona vacantia. Meanwhile the brothers continued to occupy the premises and paid rent by cheques drawn on the partnership account. In May 1995 the mesne landlord R served notices addressed to the now struck off company under section 25 of the 1954 Act. No acknowledgment or counter notice was served.

26. However, crucially the Judge held that there took place in May 1995 a meeting between one of the brothers and the director of R. At that meeting the Judge held that the brother pointed out that the company had been struck off. The brother and the director agreed in principle that the brothers would be granted a new 7 year sub-lease on the same terms as the former sub-lease but with an increase in rent if air-conditioning was installed. Nothing was said about the legal position pending the legal formalities. Neither party turned their mind to it. No legal formalities were ever

completed. The brothers continued in occupation and paid the same rent as before. The term in the original sub-lease expired at least notionally on 25th March 1995.

27. In the meantime, in a letter from Rs solicitors addressed to the company it was assertedthat it was "holding over". In the meantime, in correspondence with the freeholder, with whom it was negotiating a surrender of the headlease, R asserted that the tenant was occupying pursuant to a lease which had expired in 1996. R surrendered the headlease on 26th June 1997 at a price of over £1 million. The freeholder then brought proceedings seeking possession and the brothers asserted that they had a periodic tenancy protected by the 1954 Act. Both the Judge at first instance and the Court of Appeal held for the tenants.

28. The Court of Appeal, having recited the facts in detail and referred at length to Aqil stated that the Judge had sensibly and reasonably drawn the inference of a periodic tenancy from (a) what had been expressly agreed and (b) all the surrounding circumstances.

29. The key was the meeting in May 1995 between one of the brothers and the director of the then mesne landlord R. The major factors, the court held, were as follows:

    (i) the brothers had been in occupation and had been paying the rent for some time;
    (ii) in May 1995 R had been told that F (the tenant under the Underlease) no longer existed;
    (iii) with that knowledge and on that basis R permitted the brothers to remain in occupation and accepted rent from them;
    (iv) the terms of the proposed new underlease to the brothers were agreed subject to contract or lease;
    (v) there were no continuing negotiations and neither side pressed for the grant of the lease; and
    (vi) there was no indication that R was concerned (as would often be the case where a landlord lets someone into possession during negotiations for a lease) that the brothers should not be tenants with statutory protection

30. I think that this must be regarded as very much a case on its own facts. It is very much against the trend of the modern authorities. These lean very much against the imposition of a periodic tenancy where persons are in occupation of business premises without the benefit of a written agreement when there is a prospect of there being a written document in future. In the Barclays Wealth case (to which I am about to turn) the Waljicase was regarded as an example of:

> *"a case in which the negotiations either broke down or came to an end but the tenant was allowed to remain in occupation paying the rent and other outgoings. In time the correct inference in such a case might be that the parties had chosen to regulate their legal relationship by something other than the grant of a new long lease and a periodic tenancy might then be implied."*

Barclays Wealth Trustees v Erimus Housing [2014] 2 P&CR 4

31. This case is unusual in that, reflecting perhaps the present market, it was the *landlord* who was asserting that the tenant had a periodic tenancy. The facts were as follows.

32. E was the tenant of office premises on the 4th to 7th floors of a building in Middlesbrough. It held them under a lease dated 9th November 2004 expiring on 31st October 2009. The lease was contracted out of the 1954 Act.

33. In May 2009 the landlord's agent wrote proposing discussions on the terms of a new lease. A meeting took place on 6th October 2009 and the landlord then wrote proposing a new lease of six years with breaks every two years at a modest increase in rent. The tenant made counter-proposals in an email dated 15th January 2010 by which time of course the term had expired with E still in occupation and paying the same quarterly rent as under the expired lease. Sporadic negotiations continued. The next communication was on 16th November 2010 in which the tenant confirmed that it was "holding over". Further negotiations took place at what the Court of Appeal described as "a relatively leisurely pace" until 15th June 2011 when it was confirmed in an email exchange that terms had been agreed for a renewal of the lease.

34. However no new lease was ever executed. On 26th August 2011 the tenant E confirmed that it in fact wanted to vacate the premises. It indicated that it wished to

vacate in March 2012. Nothing further occurred until an email on 3rd February 2012. Eventually the tenant served notice on 21st June 2012 that it would vacate on 28th September 2012, which it did. This was of course nearly three years after the term date.

35. The issue in the case was whether the notice served by the tenant on 21st June 2012 was effective to bring to an end the tenancy of the premises which continued after the tenant held over at the end of the 2004 lease. If the legal effect of the tenant's continued occupation was to create a tenancy at will on the same terms as to rent as the expired lease then it was common ground that the notice given on 21st June 2012 which expired on 28th September 2012 (when E vacated the premises) was effective to terminate the tenancy. However the landlord contended that E in fact held over under a periodic yearly tenancy which could not be terminated except by at least six months' notice served to expire on 31 October 2013. By May 2012 it was too late for them to serve an effective contractual notice for 31 October 2012 or to comply with the 1954 Act which would have applied to a new periodic tenancy as opposed to a tenancy at will. Section 24(2) of the Act would have required E to have given the contractual period of notice. Thus in effect the landlord was claiming that the tenant owed it rent until 31st October 2013.

36. The Judge at first instance found for the landlord. The Court of Appeal allowed the tenant's appeal. Having recited the facts, it cited at length from the judgment of Nicholls LJ in the Aqil case.

37. Patten LJ said this:

> *"When a party holds over after the end of the term of a lease he does so, without more, as a tenant on sufferance until his possession is consented to by the landlord. With such consent he becomes at the very least a tenant at will and his continued payment of the rent is not inconsistent with his remaining a tenant at will even though the rent reserved by the former lease was an annual rent. The payment of rent gives rise to no presumption of a periodic tenancy. Rather, the parties' contractual intentions fall to be determined by looking objectively at all relevant circumstances. The most obvious and most significant circumstance in the present case, as in* Javad v Aqil *, was the fact that the parties were in negotiation for the grant of a new formal lease. In these circumstances, as in any other subject to contract negotiations, the obvious and almost overwhelming inference will be that the parties did not intend to enter into any intermediate contractual arrangement inconsistent with remaining parties to ongoing*

negotiations. In the landlord and tenant context that will in most cases lead to the conclusion that the occupier remained a tenant at will pending the execution of the new lease. The inference is likely to be even stronger when any periodic tenancy would carry with it statutory protection under the 1954 Act which could be terminated by the tenant agreeing to surrender or terminating the tenancy by notice to quit…This point is given additional force in the present case by the fact that the intended new lease, like the old lease, was to be contracted out."

38. All that was required, the Court held, was that negotiations were continuing. There was no need for them to have any particular intensity as long as the parties remained of the intention that there should be a new lease on terms to be agreed.

Conclusion

39. Thus, in this particular context, when faced with the question: "No documents-what next?" my answer would be: "it depends on what you want to assert".

40. If you want to assert that there is an existing periodic tenancy, then, so long as there are ongoing negotiations such that it is envisaged that a written lease will be entered into on terms to be agreed, then you will, in all probability not succeed. As the Court of Appeal has recently reaffirmed, the weight of modern authority is against you.

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