A. G. Securities (An unlimited company) (Appellants) v. Vaughan and others (Respondents)

JUDGMENT

Die Jovis 10° Novembris 1988

Upon Report from the Appellate Committee to whom was referred the Cause A. G. Securities against Vaughan and others, That the Committee had heard Counsel on Monday the 10th and Tuesday the 11th days of October last, upon the Petition and Appeal of A. G. Securities (an unlimited company) of 22, Little Russell Street, London, WC1, praying that the matter of the Order set forth in the Schedule thereto, namely an Order of the Court of Appeal of the 21st day of December 1987, might be reviewed before Her Majesty the Queen in Her Court of Parliament and that the said Order might be reversed, varied or altered or that the Petitioners might have such other relief in the premises as to Her Majesty the Queen in Her Court of Parliament might seem meet; as upon the case of Roderick Lyons, Simon Russell and Christopher Cook lodged in answer to the said appeal; and due consideration had this day of what was offered on either side in this Cause:

It is Ordered and Adjudged, by the Lords Spiritual and Temporal in the Court of Parliament of Her Majesty the Queen assembled, That the said Order of Her Majesty's Court of Appeal of the 21st day of December 1987 complained of in the said Appeal be, and the same is hereby, **Set Aside** and that the Order of His Honour Judge Owen of the 16th day of February 1987 be, and the same is hereby **Restored:** And it is further Ordered, That the First, Second, Third and Fourth Respondents do pay or cause to be paid to the said Appellants the Costs incurred by them in the Court of Appeal up to the 14th day of October 1987 and that the Second, Third and Fourth Respondents do pay or cause to be paid to the said Appellants the costs incurred by them in the Court of Appeal after the 14th day of October 1987 and also the Costs incurred by them in respect of the said Appeal to this House, the amount of such last-mentioned Costs to be certified by the Clerk of the Parliaments if not agreed between the parties; And it is also further Ordered, That the Cause be, and the same is hereby, remitted back to the Clerkenwell County Court to do therein as shall be just and consistent with this Judgment.

Cler:
Parliamentor:

Judgment: 10.11.88

HOUSE OF LORDS

A.G. SECURITIES (AN UNLIMITED COMPANY)
(APPELLANTS)

v.

VAUGHAN AND OTHERS
(RESPONDENTS)

ANTONIADES

(RESPONDENT)

v.

VILLIERS (A.P.) AND ANOTHER (A.P.)
(APPELLANTS)

Lord Bridge of Harwich
Lord Templeman
Lord Ackner
Lord Oliver
of Aylmerton
Lord Jauncey of Tullichettle

LORD BRIDGE OF HARWICH

My Lords,

I gratefully adopt the full account given in the speech of my noble and learned friend Lord Templeman of the facts on which these two appeals depend.

A. G. Securities v. Vaughan and Others

The four respondents acquired their contractual rights to occupy the flat in question and undertook their relevant obligations by separate agreements with the appellants made at different times and on different terms. These rights and obligations having initially been several, I do not understand by what legal alchemy they could ever become joint. Each occupant had a contractual right, enforceable against the appellants, to prevent the number of persons permitted to occupy the flat at any one time exceeding four. But this did not give them exclusive possession of the kind which is distinctive of a leasehold interest. Having no estate in land, they could not sue in trespass. Their remedy against intruders would have been to persuade the appellants to sue as plaintiffs or to join the appellants as defendants by way of enforcement of their contractual rights.

The arrangement seems to have been a sensible and realistic one to provide accommodation for a shifting population of individuals who were genuinely prepared to share the flat with others introduced from time to time who would, at least initially, be strangers to them. There was no artificiality in the contracts concluded to give effect to this arrangement. On the contrary, it seems to me, with respect to the majority of the Court of Appeal,

- 1 –

to require the highest degree of artificiality to force these contracts into the mould of a joint tenancy.

Antoniades v. Villiers and Bridger

Here the artificiality was in the pretence that two contemporaneous and identical agreements entered into by a man and a woman who were going to live together in a one-bedroom flat and share a double bed created rights and obligations which were several rather than joint. As to the nature of those rights and obligations, the provisions of the joint agreement purporting to retain the right in the respondent to share the occupation of the flat with the young couple himself or to introduce an indefinite number of third parties to do so could be seen, in all the relevant circumstances, to be repugnant to the true purpose of the agreement. No one could have supposed that those provisions were

ever intended to be acted on. They were introduced into the agreement for no other purpose than as an attempt to disguise the true character of the agreement which it was hoped would deceive the court and prevent the appellants enjoying the protection of the Rent Acts. As your Lordships all agree, the attempt fails.

I would allow both appeals.

LORD TEMPLEMAN

My Lords,

In each of the two appeals now under consideration, the question is whether the owner of residential accommodation granted a tenancy or granted licences.

In the first appeal, the appellant company, A.G. Securities, owned a block of flats, Linden Mansions, Hornsey Lane, London. Flat No. 25 consists of six living-rooms in addition to a kitchen and bathroom. The company furnished four living-rooms as bedrooms, a fifth as a lounge and a sixth as a sitting-room. In 1974 furnished lettings became subject to the Rent Acts. If the company granted exclusive possession of the flat to one single occupier or to two or more occupiers jointly in consideration of periodical payments, the grant would create a tenancy of the flat. If the company granted exclusive possession of one bedroom to four different occupiers with joint use of the lounge, sitting-room, kitchen and bathroom, each of the four grants would create a tenancy of one bedroom. Exclusive possession means either exclusive occupation or receipt of rents and profits.

The company entered into separate agreements with four different applicants. Each agreement was in the same form, and was expressed to be made between the company as "the Owner" and the applicant as "Licensee." The agreement contained, inter alia, the following relevant clauses:

> "1. The Owner grants to the Licensee the right to use in common with others who have or may from time to time be

> granted the like right the flat known as 25, Linden Mansions, Hornsey Lane, N.6 but without the right to exclusive possession of any part of the said flat together with the fixtures furniture furnishings and effects now in

the said flat for six months from the - day of - 19 - and thereafter until determined by either party giving to the other one month's notice in writing to take effect at any time.

"2. The Licensee agrees with the Owner as follows:

(1) To pay the sum of £- per month for the right to share in the use of the said flat such sum to be payable by equal monthly instalments on the first day of each month . . .

(3) To share the use of the said flat peaceably with and not to impede the use of the said flat by such other persons not exceeding three in number at any one time to whom the Owner has granted or shall from time to time grant licence to use the said flat in common with the Licensee and not to impede the use by such other persons of the gas electricity and telephone services supplied to the flat provided that each shares the cost of such services.

(4) If at any time there shall be less than three persons authorised by the Owner to use the said flat in common with the Licensee upon reasonable notice given by the Owner to meet with any prospective licensee nominated by the Owner at the flat to provide an opportunity to such prospective licensee to agree terms for sharing the cost of services in accordance with clause 2(3).

(5) Not to assign this agreement nor permit any other person except as licensed by the Owner to sleep or reside in or share occupation of the said flat or any part of it at any time."

The flat was kept fully occupied; whenever one agreement was terminated the company invited applications to fill the vacancy. The company's agent produced a draft of the agreement to an applicant. The monthly sum payable by the applicant was not necessarily the same as the monthly sum payable by any of the continuing occupiers of the flat because inflation and other factors caused the value of an agreement to fluctuate. The company and its agent gave no directions or explanations about the manner in which the applicant and other persons not exceeding three in number would use the flat in common. The applicant was sent off to the flat to agree terms with the three continuing occupiers. There he would be offered a vacant bedroom and the use of the lounge, sitting-room, kitchen and bathroom with the

other occupiers each of whom had his own bedroom. It was the practice that whenever a bedroom fell vacant upon termination of an agreement, each of the three continuing occupiers, in order of seniority, decided whether to change his bedroom. The applicant for the vacancy was then offered the bedroom which the other three least coveted. The applicant, if content, signed his

agreement and moved into his bedroom. If he were unable to share the use of the common parts of the flat peaceably he could terminate his agreement, or the other three occupiers could terminate their agreements or prevail upon the company to terminate the agreement of the unpopular occupier.

The respondent, Mr. Vaughan, signed an agreement in 1982 to pay £86.66 per month. The respondent, Mr. Lyons, signed an agreement dated 2 March 1984 to pay £99 per month. The respondent, Mr. Russell, signed an agreement dated 1 August 1984 to pay £125 per month, and the respondent, Mr. Cook, signed an agreement dated 28 January 1985 to pay £104 per month. From 28 January 1985 onwards, each of the four respondents occupied one bedroom and shared the use of the lounge, sitting-room, kitchen and bathroom.

The respondents claim that under and by virtue of the four agreements signed by them respectively, they became tenants of the flat. The company contends that each respondent is a licensee.

In the second appeal, the appellant, Mr. Antoniades, is the owner of the house, 6, Whiteley Road, Upper Norwood. The attic was converted into furnished residential accommodation comprising a bedroom, a bed sitting-room, kitchen and bathroom. The furniture in the sitting-room consisted of a bed-settee, a table-bed, a sideboard and a chair.

The appellants, Mr. Villiers and Miss Bridger, spent three months looking for a flat where they could live together. In February 1985 they were shown the attic flat. The bedroom lacked a bed; the appellants expressed a preference for a double bed which Mr. Antoniades agreed to provide. Mr. Antoniades and Mr. Villiers entered into an agreement dated 9 February 1985. The agreement was described as a licence, Mr. Antoniades was described as "the licensor" and Mr. Villiers was described as "the licensee." The agreement recited that "the licensor is not willing to grant the licensee exclusive possession of any part of the rooms hereinafter referred to" and that "the licensee is anxious to secure

the use of the rooms notwithstanding that such use be in common with the licensor and such other licensees or invitees as the licensor may permit from time to time to use the said rooms."
The material provisions of the agreement were as follows:

> "By this licence the licensor licences the licensee to use (but not exclusively) all those rooms (hereinafter referred to as 'the rooms') on the top flat (1 bedroom, 1 bed-sitting-room, the kitchen and bathroom) of the building ... 6, Whiteley Road S.E.19 . . . together with the use of the furniture fixtures and effects now in the rooms (more particularly set out in the schedule of contents annexed hereto) from 14 February 1985 for the sum of £87 per calendar month on the following terms and conditions:
>
> (1) The licensee agrees to pay the said sum of £87 (on the 14th of each month) monthly in advance . . .

> (3) The licensee shall use his best endeavours amicably and peaceably to share the use of the rooms with the licensor and with such other licensees or invitees whom the licensor shall from time to time permit to use the rooms and shall not interfere with or otherwise obstruct such shared occupation in any way whatsoever ....
>
> (10) The licensee shall not do or suffer to be done in the rooms any act or thing which may be a nuisance cause of damage or annoyance to the licensor and the other occupiers or users of the rooms ....
>
> (12) The licensee . . . will not use the rooms in any illegal or immoral way ....
>
> (16) The licensor shall be entitled at any time to use the rooms together with the licensee and permit other persons to use all of the rooms together with the licensee ....
>
> (17) This licence is personal to the licensee and shall not permit the use of the rooms by any person whatsoever and only the licensor will have the right to use or permit the use of the rooms as described in clause 16. The licensee under no circumstances will

have the right to allow any other people of his choice to use the rooms in any way ....

(22) The licensee (occupier) declares that he is over 18 years old and understands this licence ....

(23) The real intention of the parties in all surrounding circumstances is to create this licence which is not coming under the Rent Acts and is binding as written.

24. This licence represents the entire agreement of the parties and no oral or other agreements were made and no different explanations or representations were made and only agreements in writing will be legally binding.

25. The licensee read and understood this licence and received copy and the licensee understands that all rooms and all parts of the dwelling will be shared and no exclusive possession of any part of the whole will be allowed to the licensees by the licensor under any circumstances."

There then followed the schedule of furniture and then a new clause as follows:

"26. Subject to clause 21 this licence may be terminated by one month's notice in writing given by either party at any time and the licensor reserves the right of eviction without court order."

That agreement was signed by Mr. Villiers in five places and each of his signatures was witnessed.

Either then or thereafter, Mr. Villiers signed an addendum to the agreement whereby Mr. Villiers:

"Agrees that the licence signed on 9 February 1985 does not come under the Rent Acts and the flat is for single people sharing and if Mr. Villiers marries any occupier of the flat then Mr. Villiers will give notice and vacate the flat at 6, Whiteley Road London S.E.19. The owner Mr. Antoniades did not promise any other accommodation in any way. No

persons will have exclusive possession of the above flat as agreed."

Mr. Antoniades entered into a separate agreement and a separate addendum with Miss Bridger. The agreement and the addendum were in the same form, bore the same date, were executed on the same day and were signed and witnessed in the same way as the agreement and addendum entered into by Mr. Villiers.

Thereupon Mr. Villiers and Miss Bridger entered into occupation of the rooms comprised in the agreement. Mr. Antoniades has never attempted to use any of the rooms or authorised any other person to use the rooms.

The appellants, Mr. Villiers and Miss Bridger, claim that they became tenants of the whole of the attic flat. Mr. Antoniades contends that each appellant is a licensee.

My Lords, ever since 1915 the Rent Acts have protected some tenants of residential accommodation with security of tenure and maximum rents. The scope and effect of the Rent Acts have been altered from time to time and the current legislative protection is contained in the Rent Act 1977. Section 1 of the Act of 1977, reproducing earlier enactments, provides that:

> "Subject to this part of this Act, a tenancy under which a dwelling-house (which may be a house or part of a house) is let as a separate dwelling is a protected tenancy for the purposes of this Act."

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. The Rent Acts protect a tenant but they do not protect a licensee. Since parties to an agreement cannot contract out of the Rent Acts, a document which expresses the intention, genuine or bogus, of both parties or of one party to create a licence will nevertheless create a tenancy if the rights and obligations enjoyed and imposed satisfy the legal requirements of a tenancy. A person seeking residential accommodation may concur in any expression of intention in order to obtain shelter. Since parties to an agreement cannot contract out of the Rent Acts, a document expressed in the language of a licence must nevertheless be examined and construed by the court in order to decide whether the rights and obligations enjoyed and imposed create a licence or a tenancy. A person seeking

residential accommodation may sign a document couched in any language in order to obtain shelter. Since parties to an agreement cannot contract out of the Rent Acts, the grant of a tenancy to two persons jointly cannot be concealed, accidentally or by design, by the creation of two documents in the form of licences. Two persons seeking residential accommodation may sign any number of documents in order to obtain joint shelter. In considering one or more documents for the purpose of deciding whether *a* tenancy has been created, the court must consider the surrounding circumstances including any relationship between the prospective occupiers, the course of negotiations and the nature and extent of the accommodation and the intended and actual mode of occupation of the accommodation. If the owner of a one-bedroomed flat granted a licence to a husband to occupy the flat provided he shared the flat with his wife and nobody else and granted a similar licence to the wife provided she shared the flat with the husband and nobody else, the court would be bound to consider the effect of both documents together. If the licence to the husband required him to pay a licence fee of £50 per month and the licence to the wife required her to pay a further licence fee of £50 per month, the two documents read together in the light of the property to be occupied and the obvious intended mode of occupation would confer exclusive occupation on the husband and wife jointly and a tenancy at the rent of £100.

Landlords dislike the Rent Acts and wish to enjoy the benefits of letting property without the burden of the restrictions imposed by the Acts. Landlords believe that the Rent Acts unfairly interferes with freedom of contract and exacerbate the housing shortage. Tenants on the other hand believe that the Acts are a necessary protection against the exploitation of people who do not own the freehold or long leases of their homes. The court lacks the knowledge and the power to form any judgment on these arguments which fall to be considered and determined by Parliament. 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.

The enjoyment of exclusive occupation for a term in consideration of periodical payments creates a tenancy, save in exceptional circumstances not relevant to these appeals; see Street v. Mountford [1985] 1 A.C. 809 826, 827. The grant of one room with exclusive occupation in consideration of a periodic payment creates a tenancy, although if the room is not a dwelling, the tenant is not protected by the Rent Acts: see Curl v. Angelo [1948] 2 All E.R. 189. The grant of one room with exclusive occupation as *a* dwelling creates a tenancy but if a tenant shares

some other essential living premises such as a kitchen with his landlord or other persons, the room is not let as a separate dwelling within the meaning of section 1 of the Rent Act 1977: see Neale v. Del Soto [1945] K.B. 144 and Cole v. Harris [1945] K.B. 474. Section 21 of the Act of 1977 confers some rights on a tenant who shares essential living premises with his landlord, and section 22 confers protection on a tenant who shares some essential living premises with persons other than the landlord.

If, under an agreement, the owner of residential accommodation provides services or attendance and retains

possession for that purpose the occupier is *a* lodger and the agreement creates a licence. Under an agreement for the exclusive occupation of a room or rooms consisting of a dwelling for periodic payments then, save in the exceptional circumstances mentioned in Street v. Mountford [1985] A.C. 809, a single occupier, if he is not a lodger, must be a tenant. The agreement may provide, expressly or by implication, power for the owner to enter the dwelling to inspect or repair but if the occupier is entitled to the use and enjoyment of the dwelling and is not a lodger he is in exclusive occupation and the agreement creates a tenancy.

Where residential accommodation is occupied by two or more persons the occupiers may be licensees or tenants of the whole or each occupier may be a separate tenant of part. In the present appeals the only question raised is whether the occupiers are licensees or tenants of the whole.

In the first appeal under consideration the company entered into four separate agreements with four separate persons between 1982 and 1985. The agreements were in the same form save that the periodical sum payable under one agreement did not correspond to the sum payable pursuant to any other agreement. The company was not bound to make agreements in the same form or to require any payment. The agreement signed by Mr. Vaughan in 1982 did not and could not entitle or compel Mr. Vaughan to become a joint tenant of the whole of the flat with Mr. Cook in 1985 on the terms of Mr. Vaughan's agreement or on the terms of Mr. Cook's agreement or on the terms of any other agreement either alone with Mr. Cook or together with any other persons. In 1985 Mr. Vaughan did not agree to become a joint tenant of the fiat with Mr. Cook or anybody else. In 1985, in the events which had happened, the company possessed the right reserved to the company by clause 2(3) of Mr. Vaughan's agreement to authorise

Mr. Cook to share the use of the flat in common with Mr. Vaughan. In 1985 Mr. Vaughan orally agreed with Mr. Cook that if the company authorised Mr. Cook to use the flat in common with Mr. Vaughan, then Mr. Vaughan would allow Mr. Cook to occupy a specified bedroom in the flat and share the occupation of the other parts of the flat excluding the other three bedrooms. Mr. Vaughan's agreement with the company did not prevent him from entering into this oral agreement with Mr. Cook Under the standard form agreement the company did not retain power to allocate the four bedrooms but delegated this power to the occupiers for the time being. If the occupiers had failed to allocate the bedrooms the company would have been obliged to terminate one or more of the agreements. The respondents claim that they are joint tenants of the flat. No single respondent claims to be a tenant of a bedroom.

The Court of Appeal [1988] 2 W.L.R. 689 (Fox and Mustill L.JJ., Sir George Waller dissenting), concluded that the four respondents were jointly entitled to exclusive occupation of the flat. I am unable to agree. If a landlord who owns a three-bedroom flat enters into three separate independent tenancies with three independent tenants each of whom is entitled to one bedroom and to share the common parts, then the three tenants, if they agree, can exclude anyone else from the flat. But they do not enjoy exclusive occupation of the flat jointly under the terms

of their tenancies. In the present case, if the four respondents had been jointly entitled to exclusive occupation of the flat then, on the death of one of the respondents, the remaining three would be entitled to joint and exclusive occupation. But, in fact, on the death of one respondent the remaining three would not be entitled to joint and exclusive occupation of the flat. They could not exclude a fourth person nominated by the company. I would allow the appeal.

In the first appeal the four agreements were independent of one another. In the second appeal the two agreements were interdependent. Both would have been signed or neither. The two agreements must therefore be read together. Mr. Villiers and Miss Bridger applied to rent the flat jointly and sought and enjoyed joint and exclusive occupation of the whole of the flat. They shared the rights and the obligations imposed by the terms of their occupation. They acquired joint and exclusive occupation of the flat in consideration of periodical payments and they therefore acquired a tenancy jointly. Mr. Antoniades required each of them, Mr. Villiers and Miss Bridger, to agree to pay one half of each

aggregate periodical payment, but this circumstance cannot convert a tenancy into a licence. A tenancy remains a tenancy even though the landlord may choose to require each of two joint tenants to agree expressly to pay one half of the rent. The tenancy conferred on Mr. Villiers and Miss Bridger the right to occupy the whole flat as their dwelling. Clause 16 reserved to Mr. Antoniades the power at any time to go into occupation of the flat jointly with Mr. Villiers and Miss Bridger. The exercise of that power would at common law put an end to the exclusive occupation of the flat by Mr. Villiers and Miss Bridger, terminate the tenancy of Mr. Villiers and Miss Bridger, and convert Mr. Villiers and Miss Bridges into licensees. But the powers reserved to Mr. Antoniades by clause 16 cannot be lawfully exercised because they are inconsistent with the provisions of the Rent Acts.

When Mr. Antoniades entered into the agreements dated 9 February 1985 with Mr. Villiers and Miss Bridger and when Mr. Antoniades allowed Mr. Villiers and Miss Bridger to occupy the flat, it is clear from the negotiations which had taken place, from the surrounding circumstances, and from subsequent events, that Mr. Antoniades did not intend in February 1985, immediately or contemporaneously, to share occupation or to authorise any other person to deprive Mr. Villiers and Miss Bridger of exclusive occupation of the flat. Clause 16, if genuine, was a reservation by a landlord of a power at some time during the currency of the tenancy to share occupation with the tenant. The exclusive occupation of the tenant coupled with the payment of rent created a tenancy which at common law could be terminated and converted into a licence as soon as the landlord exercised his power to share occupation. But under the Rent Acts, if a contractual tenancy is terminated, the Acts protect the occupiers from eviction.

If a landlord creates a tenancy under which a flat is let as a separate dwelling the tenancy is a protected tenancy under section 1 of the Rent Act 1977. After the termination of a protected tenancy the protected tenant becomes a statutory tenant under section 2 of the Act. By section 3(1):

> "So long as he retains possession, a statutory tenant shall observe and be entitled to the benefit of all the terms and conditions of the original contract of tenancy, so far as they are consistent with the provisions of this Act."

By section 98 a court shall not make an order for possession of a dwelling-house which is subject to a protected tenancy or a statutory tenancy unless the court considers that it is reasonable to make such an order and is satisfied either that alternative accommodation is available or that certain other conditions are satisfied. The landlord cannot dispense with an order of the court and enter into possession in exercise of his common law powers.

Where a landlord creates a tenancy of a flat and reserves the right to go into exclusive occupation at any time of the whole or part of the flat with or without notice, that reservation is inconsistent with the provisions of the Rent Acts and cannot be enforced without an order of the court under section 98. Where a landlord creates a tenancy of a flat and reserves the right to go into occupation of the whole or part of the flat with or without notice, jointly with the existing tenants, that reservation also is inconsistent with the provisions of the Acts. Were it otherwise every tenancy agreement would be labelled a licence and would contract out of the Rent Acts by reserving power to the landlord to share possession with the tenant at any time after the commencement of the term.

Clause 16 is a reservation to Mr. Antoniades of the right to go into occupation or to nominate others to enjoy occupation of the whole of the flat jointly with Mr. Villiers and Miss Bridger. Until that power is exercised Mr. Villiers and Miss Bridger are jointly in exclusive occupation of the whole of the flat making periodical payments and they are therefore tenants. The Rent Act prevents the exercise of a power which would destroy the tenancy of Mr. Villiers and Miss Bridger and would deprive them of the exclusive occupation of the flat which they are now enjoying. Clause 16 is inconsistent with the provisions of the Rent Acts.

There is a separate and alternative reason why clause 16 must be ignored. Clause 16 was not a genuine reservation to Mr. Antoniades of a power to share the flat and a power to authorise other persons to share the flat. Mr. Antoniades did not genuinely intend to exercise the powers save possibly to bring pressure to bear to obtain possession. Clause 16 was only intended to deprive Mr. Villiers and Miss Bridger of the protection of the Rent Acts. Mr. Villiers and Miss Bridger had no choice in the matter.

In the notes of Judge Macnair, Mr. Villiers is reported as saying that:

> "He [Mr. Antoniades] kept going on about it being a licence and not in the Rent Act. I didn't know either but was pleased to have a place after three or four months of chasing."

The notes of Miss Bridger's evidence include this passage:

"I didn't understand what was meant by exclusive possession or licence. Signed because so glad to move in. Had been looking for three months."

In Street v. Mountford [1985] A.C. 809, 825, I said that:

"Although the Rent Acts must not be allowed to alter or influence the construction of an agreement, the court should, in my opinion, be astute to detect and frustrate sham devices and artificial transactions whose only object is to disguise the grant of a tenancy and to evade the Rent Acts."

It would have been more accurate and less liable to give rise to misunderstandings if I had substituted the word "pretence" for the references to "sham devices" and "artificial transactions." Street v. Mountford was not a case which involved a pretence concerning exclusive possession. The agreement did not mention exclusive possession and the owner conceded that the occupier enjoyed exclusive possession. In Somma v. Hazelhurst [1978] 1 W.L.R. 1014 and other cases considered in Street v. Mountford, the owner wished to let residential accommodation but to avoid the Rent Acts. The occupiers wished to take a letting of residential accommodation. The owner stipulated for the execution of agreements which pretended that exclusive possession was not to be enjoyed by the occupiers. The occupiers were obliged to acquiesce with this pretence in order to obtain the accommodation. In my opinion the occupiers either did not understand the language of the agreements or assumed, justifiably, that in practice the owner would not violate their privacy. The owners real intention was to rely on the language of the agreement to escape the Rent Acts. The owner allowed the occupiers to enjoy jointly exclusive occupation and accepted rent. A tenancy was created. Street v. Mountford reasserted three principles. First, parties to an agreement cannot contract out of the Rent Acts. Secondly, in the absence of special circumstances, not here relevant, the enjoyment of exclusive occupation for a term in consideration of periodic payments creates a tenancy. Thirdly, where the language of licence contradicts the reality of lease, the facts must prevail. The facts must prevail over the language in order that the parties may not contract out of the Rent Acts. In the present case clause 16 was a pretence.

The fact that clause 16 was a pretence appears from its terms and from the negotiations. Clause 16 in terms conferred on Mr. Antoniades and other persons the right to share the bedroom occupied by Mr. Villiers and Miss Bridger. Clause 16 conferred power on Mr. Antoniades to convert the sitting-room occupied by Mr. Villiers and Miss Bridger into a bedroom which could be jointly occupied by Mr. Villiers, Miss Bridger, Mr. Antoniades and any person or persons nominated by Mr. Antoniades. The facilities in the flat were not suitable for sharing between strangers. The flat, situated in an attic with a sloping roof, was too small for sharing between strangers. If clause 16 had been genuine there would have been some discussion between Mr. Antoniades, Mr. Villiers and Miss Bridger as to how clause 16 might be operated in practice and in whose favour it was likely to be operated. The addendum imposed on Mr. Villiers and Miss Bridger sought to add plausibility to the pretence of sharing by forfeiting the right of Mr. Villiers and Miss Bridger to continue to occupy the flat if their double-bedded romance blossomed into wedding bells. Finally and significantly, Mr. Antoniades never made any attempt to

obtain increased income from the fiat by exercising the powers which clause 16 purported to reserve to him. Clause 16 was only designed to disguise the grant of a tenancy and to contract out of the Rent Acts. In the report of this case in the Court of Appeal [1988] 3 W.L.R. 139, 148, Bingham L.J. said that:

> "The written agreements cannot possibly be construed as giving the occupants, jointly or severally, exclusive possession of the flat or any part of it. They stipulate with reiterated emphasis that the occupants shall not have exclusive possession."

My Lords, in Street v. Mountford [1985] A.C. 809, this House stipulated with reiterated emphasis that an express statement of intention is not decisive and that the court must pay attention to the facts and surrounding circumstances and to what people do as well as to what people say.

In Somma v. Hazelhurst [1978] 1 W.L.R. 1014, a young unmarried couple applied to take a double bedsitting-room in order that they might live together. Each signed an agreement to pay £38.80 per month to share the use of the room with the owner and with not more than one other person at any one time. The couple moved into the bedsitting-room and enjoyed exclusive occupation. In terms the owner reserved the right to share living and sleeping quarters with the two applicants. If the couple

parted and the youth moved out, the owner could require the damsel to share her living and sleeping quarters with the owner and with a stranger or with one of them or move out herself. The couple enjoyed exclusive occupation until the owner decided to live with them or until one of their agreements was terminated. The right reserved to the owner to require the applicants or one of the applicants to share with the owner or some other third party was contrary to the provisions of the Rent Acts and, in addition was, in the circumstances, a pretence intended only to get round the Rent Acts.

In Aldrington Garages Ltd, v. Fielder [1978] 37 P. & C.R. 461, Mr. Fielder and Miss Maxwell applied to take a self-contained flat in order that they might live together. Each signed an agreement to pay £54.17 per month to share the use of the flat with one other person. The couple moved into the flat and enjoyed exclusive occupation. In terms if the couple parted and Mr. Fielder moved out, the owner could require Miss Maxwell to share her living and sleeping quarters with a stranger or move out herself. Mr. Fielder and Miss Maxwell enjoyed exclusive occupation unless and until one of their agreements was terminated. The right reserved to the owner to require Miss Maxwell to share with a third party if Mr. Fielder's agreement was terminated and to require Mr. Fielder to share with a third party if Miss Maxwell's agreement was terminated was contrary to the provisions of the Rent Acts and in addition was, in the circumstances, a pretence intended only to get round the Rent Acts.

In Sturolson & Co. v. Weniz [1984] 17 H.L.R. 140, the defendant and a friend applied to take a self-contained flat for the occupation of the defendant, his wife and the friend. The defendant and his friend signed agreements to pay £100 per month

to share the flat with such other persons as might be nominated or approved by the owner from time to time. The defendant, his wife and the friend, moved into the flat and enjoyed exclusive occupation. In terms the defendant and the friend paid between them £200 per month for a flat which could be invaded by one or more strangers at any time. The owner's agent gave the game away by saying that the owner was happy so long as he received £200 per month from the flat. The defendant and the friend enjoyed exclusive occupation. The right reserved to the owner to require them to share with others was contrary to the provisions of the Rent Acts and was in any event a pretence intended only to get round the Rent Acts.

In Street v. Mountford [1985] A.C. 809 at p. 825, this House disapproved of the decisions of the Court of Appeal in Somma v. Hazelhurst [1978] 1 W.L.R. 1014, Aldrington Garages Ltd, v. Fielder [1978] 7 H.L.R. 51 and Sturolson & Co. v. Weniz [1984] 17 H.L.R. 190, which held that the occupiers were only licensees and not tenants.

In Crancour Ltd, v. Da Silvaesa [1986] 18 H.L.R. 265, 276 in which leave was given to defend proceedings under R.S.C. Ord. 113, Ralph Gibson L.J. referring to the disapproval by this house in Street v. Mountford [1985] A.C. 809, 825, of the decision of the Court of Appeal in Somma v. Hazelhurst, said:

> "As I understand the reference to the sham nature of the obligation,' namely that of sharing the room in common with other persons nominated by the landlord, the House of Lords is there saying, first, that the agreement in that case constituted the grant of exclusive possession; secondly, that the written obligation to share the room was not effective to alter the true nature of the grant; and thirdly, that, on the facts of the case, it should have been clear to the Court of Appeal that the landlord cannot have intended the term as to sharing occupation to be a true statement of the nature of the possession intended to be enjoyed by the 'licensees.'"

I agree with this analysis.

In Hadjiloucas v. Crean [1988] 1 W.L.R. 1006, two single ladies applied to take two-roomed flat with kitchen and bathroom. Each signed an agreement to pay £260 per month to share the use of the flat with one other person. The two ladies moved into the flat and enjoyed exclusive occupation. In terms, if the agreement of one lady was terminated, the owner could require the other to share the flat with a stranger. The county court judge decided that the agreements only created licences. The Court of Appeal ordered a retrial in order that all the facts might be investigated. Since, however, the two ladies applied for and enjoyed exclusive occupation unless and until one of their agreements was terminated, the ladies acquired a tenancy protected by the Rent Acts. The reservation to the owner of the right at common law to require one of the ladies to share the flat with a stranger was a pretence.

My Lords, in each of the cases which were disapproved by this House in Street v. Mountford [1985] A.C. 809, and in the

second appeal now under consideration, there was, in my opinion, the grant of a joint tenancy for the following reasons:

26. The applicants for the flat applied to rent the flat jointly and to enjoy exclusive occupation.

27. The landlord allowed the applicants jointly to enjoy exclusive occupation and accepted rent. A tenancy was created.

28. The power reserved to the landlord to deprive the applicants of exclusive occupation was inconsistent with the provisions of the Rent Acts.

Moreover in all the circumstances the power which the landlord insisted upon to deprive the applicants of exclusive occupation was a pretence only intended to deprive the applicants of the protection of the Rent Acts.

The Court of Appeal [1988] 3 W.L.R. 139 (Bingham and Mann L.JJ.) decided in the second appeal under consideration that Mr. Villiers and Miss Bridger were licensees. I would restore the order of Judge Macnair who declared that Mr. Villiers and Miss Bridger were tenants protected by the Rent Acts.

LORD ACKNER

My Lords,

Each of these appeals raises essentially the same question - what was the substance and reality of the transaction entered into by the parties?

In the first appeal, each of the respondents commenced his occupation of the flat on different dates, each of their agreements covered different periods and each agreement provided for different payments for that occupation. In such circumstances there could not have been a grant of a joint tenancy to all four respondents. At no stage in the litigation was it suggested that the particular facts justified the conclusion that each respondent had, by virtue of his agreement, exclusive possession and therefore a tenancy of the room which he in fact occupied, together with the right to share the rest of the accommodation in the flat with the other occupants, thereby achieving the protection provided by section 22 of the Rent Act 1977.

Thus by the simple process of elimination, it is apparent that the substance and reality of the transaction was that each respondent achieved by virtue of his agreement no more than a licence to share the flat and he must therefore give up possession following the lawful termination of that licence.

In the second appeal it is clear, when reality is brought to bear, that the agreements relied upon by the respondent created a tenancy of the flat, although he sought vigorously to disguise them as mere licences to occupy the flat.

Accordingly, for the reasons given by my noble and learned friends, Lord Templeman and Lord Oliver of Aylmerton, I would allow both these appeals.

LORD OLIVER OF AYLMERTON

My Lords,

Since lettings of residential property of an appropriate rateable value attract the consequences of controlled rent and security of tenure provided by the Rent Acts, it is not, perhaps, altogether surprising that those who derive their income from residential property are constantly seeking to attain the not always reconcilable objectives on the one hand of keeping their property gainfully occupied and, on the other, of framing their contractual arrangements with the occupants in such a way as to avoid, if they can, the application of the Acts. Since it is only a letting which attracts the operation of the Acts, such endeavours normally take the form of entering into contractual arrangements designed, on their face, to ensure that no estate is created in the occupant for the time being and that his occupation of the land derives merely from a personal and revocable permission granted by way of licence. The critical question, however, in every case is not simply how the arrangement is presented to the outside world in the relevant documentation, but what is the true nature of the arrangement. The decision of this House in Street v. Mountford [1985] A.C. 809 established quite clearly that if the true legal effect of the arrangement entered into is that the occupier of residential property has exclusive possession of the property for an ascertainable period in return for periodical money payments, a tenancy is created, whatever the label the parties may have chosen to attach to it. Where, as in that case, the circumstances

show that the occupant is the only occupier realistically contemplated and the premises are inherently suitable only for single occupation, there is, generally, very little difficulty. Such an occupier normally has exclusive possession, as indeed she did in Street v. Mountford, where such possession was conceded, unless the owner retains control and unrestricted access for the purpose of providing attendance and services. As my noble and learned friend, Lord Templeman, observed in that case, the occupier in those circumstances is either a lodger or a tenant. Where, however, the premises are such as, by their nature, to lend themselves to multiple occupation and they are in fact occupied in common by a number of persons under different individual agreements with the owner, more difficult problems arise. These two appeals, at different ends of the scale, are illustrations of such problems.

The relevant facts have been fully set out in the speech of my noble and learned friend, Lord Templeman, which I have had the advantage of reading in draft, and I reiterate them only to the extent necessary to emphasise the points which appear to me to be of critical importance.

Antoniades v. Villiers and Bridger. The appellants in this appeal are a young couple who at all material times were living

together as man and wife. In about November 1984 they learned from a letting agency that a flat was available in a house at 6, Whiteley Road, London S.E.19, owned by the respondent, Mr. Antoniades. They inspected the flat together and were told that the rent would be £174 per month. They were given the choice of having the bedroom furnished with a double bed or two single beds and they chose a double bed. So, right from the inception, there was never any question but that the appellants were seeking to establish a joint home and they have, at all material times, been the sole occupants of the flat.

There is equally no question but that the premises are not suitable for occupation by more than one couple, save on a very temporary basis. The small living-room contains a sofa capable of being converted into a double bed and also a bed-table capable of being opened out to form a narrow single bed. The appellants did in fact have a friend to stay with them for a time in what the trial judge found to be cramped conditions, but the size of the accommodation and the facilities available clearly do not make the flat suitable for multiple occupation. When it came to drawing up the contractual arrangements under which the appellants were to

be let into possession, each was asked to and did sign a separate licence agreement in the terms set out in the speech of my noble and learned friend under which each assumed an individual, but not a joint, responsibility for payment of one half of the sum of £174 previously quoted as the rent.

There is an air of total unreality about these documents read as separate and individual licences in the light of the circumstance that the appellants were together seeking a flat as a quasi-matrimonial home. A separate licensee does not realistically assume responsibility for all repairs and all outgoings. Nor in the circumstances can any realistic significance be given to clauses 16 and 17 of the document. It cannot realistically have been contemplated that the respondent would either himself use or occupy any part of the flat or put some other person in to share accommodation specifically adapted for the occupation by a couple living together. These clauses cannot be considered as seriously intended to have any practical operation or to serve any purpose apart from the purely technical one of seeking to avoid the ordinary legal consequences attendant upon letting the appellants into possession at a monthly rent. The unreality is enhanced by the reservation of the right of eviction without court order, which cannot seriously have been thought to be effective, and by the accompanying agreement not to get married, which can only have been designed to prevent a situation arising in which it would be quite impossible to argue that the "licensees" were enjoying separate rights of occupation.

The conclusion seems to me irresistible that these two so-called licences, executed contemporaneously and entered into in the circumstances already outlined, have to be read together as constituting in reality one single transaction under which the appellants became joint occupiers. That of course does not conclude the case because the question still remains, what is the effect?

The document is clearly based upon the form of document which was upheld by the Court of Appeal as an effective licence

in Somma v. Hazelhurst [1978] 1 W.L.R. 1014. That case, which rested on what was said to be the impossibility of the two licensees having between them exclusive possession, was overruled in Street v. Mountford [1985] A.C. 809. It was, however, a case which related to a single room and it is suggested that a similar agreement relating to premises containing space which could, albeit uncomfortably, accommodate another person is not necessarily

governed by the same principle. On the other hand, the trial judge found that apart from the few visits by the respondent (who, on all but one occasion, sought admission by knocking on the door) no one shared with the appellants and that they had exclusive possession. He held that the licences were "artificial transactions designed to evade the "Rent Acts," that a tenancy was created and that the appellants occupied as joint tenants.

His decision was reversed by the Court of Appeal [1988] 3 W.L.R. 139 on, broadly, the grounds that he had erred in treating the subsequent conduct of the parties as admissible as an aid to construction of the agreements and that in so far as the holding above referred to constituted a finding that the licences were a sham, that was unsupported by the evidence inasmuch as the appellants' intention that they should enjoy exclusive possession was not shared by the respondent. The licences could not, therefore, be said to mask the real intention of the parties and fell to be construed by reference to what they said in terms.

If the documents fall to be taken seriously at their face value and to be construed according to their terms, I see, for my part, no escape from the conclusion at which the Court of Appeal arrived. If it is once accepted that the respondent enjoyed the right - whether he exercised it or not - to share the accommodation with the appellants, either himself or by introducing one or more other persons to use the flat with them, it is, as it seems to me, incontestable that the appellants cannot claim to have had exclusive possession. The appellants' case therefore rests, as Mr. Colyer frankly admits, upon upholding the judge's approach that the true transaction contemplated was that the appellants should jointly enjoy exclusive possession and that the licences were mere sham or window-dressing to indicate legal incidents which were never seriously intended in fact, but which would be inconsistent with the application to that transaction of the Rent Acts. Now to begin with, I do not, for my part, read the notes of the judge's judgment as showing that he construed the agreement in the light of what the parties subsequently did. I agree entirely with the Court of Appeal that if he did that he was in error. But though subsequent conduct is irrelevant as an aid to construction, it is certainly admissible as evidence on the question of whether the documents were or were not genuine documents giving effect to the parties' true intentions. Broadly what is said by Mr. Colyer is that nobody acquainted with the circumstances in which the parties had come together and with the physical lay-out and size of the premises could seriously have imagined that the clauses in the licence which, on the face of them, contemplate the respondent and an apparently limitless number of other persons moving in to share the whole of the available accommodation, including the bedroom, with what, to ail intents and purposes, was

a married couple committed to paying £174 a month in advance, were anything other than a smoke-screen; and the fact the respondent, who might be assumed to want to make the maximum

profit out of the premises, never sought to introduce anyone else is at least some indication that that is exactly what it was. Adopting the definition of a sham formulated by Purchas L.J. in Hadjiloucas v. Crean [1988] 1 W.L.R. 1006, 1013, Mr. Colyer submits that the licences clearly incorporate clauses by which neither party intended to be bound and which were obviously a smoke-screen to cover the real intentions of both contracting parties. In the Court of Appeal [1988] 3 W.L.R. 139, 149, Bingham L.J. tested the matter by asking two questions, viz.: (1) On what grounds, if one party had left the premises, could the remaining party have been made liable for anything more than the £87 which he or she had agreed to pay, and (2) On what ground could they have resisted a demand by the respondent to introduce a further person into the premises? For my part, however, I do not see how this helps. The assumed negative answers prove nothing, for they rest upon the assumption that the licences are not sham documents, which is the very question in issue.

If the real transaction was, as the judge found, one under which the appellants became joint tenants with exclusive possession, on the footing that the two agreements are to be construed together, then it would follow that they were together jointly and severally responsible for the whole rent. It would equally follow that they could effectively exclude the respondent and his nominees.

Although the facts are not precisely on all fours with Somma v. Hazelhurst [1978] 1 W.L.R. 1014, they are strikingly similar and the judge was, in my judgment, entitled to conclude that the appellants had exclusive possession of the premises. I read his finding that, "the licences are artificial transactions designed to evade the Rent Acts" as a finding that they were sham documents designed to conceal the true nature of the transaction. There was, in my judgment, material on which he could properly reach this conclusion and I, too, would allow the appeal.

A.G. Securities v. Vaughan and others

The facts in this appeal are startlingly different from those in the case of Antoniades. To begin with the appeal concerns a substantial flat in a mansion block consisting of four bedrooms, a

sitting-room and usual offices. The trial judge found, as a fact, that the premises could without difficulty provide residential accommodation for four persons. There is no question but that the agreements with which the appeal is concerned reflect the true bargain between the parties. It is the purpose and intention of both parties to each agreement that it should confer an individual right on the licensee named, that he should be liable only for the payment which he had undertaken, and that his agreement should be capable of termination without reference to the agreements with other persons occupying the flat. The judge found that the agreements were not shams and that each of the four occupants had arrived independently of one another and not as a group. His finding was that there was never a group of persons coming to the flat altogether. That has been challenged because, it is said, the evidence established that initially in 1977 and 1978 there was one occupant who was joined by three others who, although they came independently and not as a trio, moved in at

about the same. Central heating was then installed, so that the weekly payments fell to be increased and new agreements were signed by the four occupants contemporaneously. Speaking for myself, I cannot see how this can make any difference to the terms upon which the individuals were in occupation. If they were in as licensees in the first instance, the mere replacement of their agreements by new agreements in similar form cannot convert them into tenants, and the case has, in my judgment, to be approached on the footing that agreements with the occupiers were entered into separately and individually. The only questions are those of the effect of each agreement vis-à-vis the individual licensee and whether the agreements collectively had the effect of creating a joint tenancy among the occupants of the premises for the time being by virtue of their having between them exclusive possession of the premises.

Taking first, by way of example, the position of the first occupier to be let into the premises on the terms of one of these agreements, it is, in my judgment, quite unarguable, once any question of sham is out of the way, that he has an estate in the premises which entitles him to exclusive possession. His right, which is, by definition, a right to share use and occupation with such other persons not exceeding three in number as the licensor shall introduce from time to time, is clearly inconsistent with any exclusive possession in him alone even though he may be the only person in physical occupation at a particular time. He has no legal title which will permit him to exclude other persons to whom the licensor may choose to grant the privilege of entry. That

must equally apply to the additional licensees who join him. None of them has individually nor have they collectively the right or power lawfully to exclude a further nominee of the licensor within the prescribed maximum.

I pause to note that it has never been contended that any individual occupier has a tenancy of a particular room in the flat with a right to use the remainder of the flat in common with the tenants of other rooms. I can envisage that as a possibility in cases of arrangements of this kind if the facts support the marking out with the landlord's concurrence of a particular room as the exclusive domain of a particular individual. But to support that there would, I think, have to be proved the grant of an indentifiable part of the flat and that simply does not fit with the system described in the evidence of the instant case.

The real question - and it is this upon which the respondents rely - is what is the position when the flat is occupied concurrently by all four licensees? What is said then is that since the licensor has now exhausted, for the time being, his right of nomination, the four occupants collectively have exclusive possession of the premises because they can collectively exclude the licensor himself. Because, it is argued, (1) they have thus exclusive possession and, (2) there is an ascertainable term during which all have the right to use and occupy, and (3) they are occupying in consideration of the payment of periodic sums of money, Street v. Mountford [1985] A.C. 809 shows that they are collectively tenants of the premises. They are not lodgers. Therefore they must be tenants. And because each is not individually a tenant, they must together be joint tenants.

My Lords, there appear to me to be a number of fallacies here. In the first place, the assertion of an exclusive possession rests, as it seems to me, upon assuming what it is sought to prove. If, of course, each licence agreement creates a tenancy, each tenant will be sharing with other persons whose rights to be there rest upon their own estates which, once they have been granted, they enjoy in their own right independently of the landlord. Collectively they have the right to exclude everyone other than those who have concurrent estates. But if the licence agreement is what it purports to be, that is to say, merely an agreement for permissive enjoyment as the invitee of the landlord, then each shares the use of the premises with other invitees of the same landlord. The landlord is not excluded for he continues to enjoy the premises through his invitees, even though he may for

the time being have precluded himself by contract with each from withdrawing the invitation. Secondly, the fact that under each agreement an individual has the privilege of user and occupation for a term which overlaps the term of user and occupation of other persons in the premises, does not create a single indivisible term of occupation for all four consisting of an amalgam of the invidual overlapping periods. Thirdly, there is no single sum of money payable in respect of use and occupation. Each person is individually liable for the amount which he has agreed, which may differ in practice from the amounts paid by all or some of the others.

The respondents are compelled to support their claims by a strange and unnatural theory that, as each occupant terminates his agreement, there is an implied surrender by the other three and an implied grant of a new joint tenancy to them together with the new incumbent when he enters under his individual agreement. With great respect to the majority in the Court of Appeal, this appears to me to be entirely unreal. For my part, I agree with the dissenting judgment of Sir George Waller in finding no unity of interest, no unity of title, certainly no unity of time and, as I think, no unity of possession. I find it impossible to say that the agreements entered into with the respondents created either individually or collectively a single tenancy either of the entire flat or of any part of it. I agree that the appeal should be allowed.

LORD JAUNCEY OF TULLICHETTLE

My Lords,

These two appeals which arise out of very different circumstances raise the question of whether arrangements permitting *a* plurality of persons to occupy furnished accommodation for a financial consideration constitute leases to which the Rent Acts would apply or licences to which they would not. The facts have been fully set out in the speech of my noble and learned friend Lord Templeman and it is therefore unnecessary for me to rehearse them in any detail.

At the date of the commencement of the proceedings on 27 June 1985 each of the four defendants were in occupation of the flat by virtue of separate agreements dated as to one in 1982, two in 1984, and one in 1985. Each agreement stipulated a different monthly payment and a different starting date. In other respects the agreements were in identical terms. It is accepted that these agreements were perfectly genuine and were not intended in any way to cloak the intentions of the parties. The Court of Appeal [1988] 2 W.L.R. 689 (Fox and Mustill L.JJ.; Sir George Waller dissenting) concluded that there was a joint tenancy created by a single implied agreement for the grant of exclusive possession to the defendants when the fourth defendant's agreement was signed. The Court of Appeal further concluded that in the event of one of the four occupants leaving the flat and being replaced by another who had entered into a similar agreement a new joint tenancy would arise by implied surrender and regrant.

During the course of argument a good deal was said about the recent decision in this House of Street v. Mountford [1985] A.C. 809. In that case it was, to quote the words of my noble and learned friend Lord Templeman, at p. 823, "clear that exclusive possession was granted and so much is (sic) conceded." In the present case exclusive possession is the primary issue since without it there can be no joint tenancy. Street v. Mountford establishes the legal consequences which may, in given circumstances, flow from an arrangement whereby the occupier of residential property has exclusive possession thereof, but it does not directly assist in determining whether or not he has such exclusive possession.

My Lords, the flat had four bedrooms and each agreement contemplated that up to four persons could share the flat at any one time. It would look very much as if the parties intended that each occupier would have his or her own bedroom and would share communal facilities with the others, and this is what happened in practice. However, this case is not concerned with whether each occupier had exclusive possession and hence a tenancy of a bedroom but with whether the four defendants together had exclusive possession and hence the joint tenancy of the fiat as *a* whole.

When the first occupant alone is in the flat he may have de facto possession thereof but that possession is certainly not exclusive since he is bound in terms of clause 2(3) to share the flat with up to three other persons licenced by the owner. It is not without significance that there is no obligation on the owner to grant licences to other persons in terms identical to those contained in the first agreement. Thus the owner could allow a friend or relation to occupy the flat without payment or he could

permit one of the occupants to keep a dog or a cat notwithstanding the prohibitions in clause 2(7) in the first agreement. Similarly there is no exclusive possession in anyone when the second and third occupants move in. The conclusion that when the fourth occupant moves in a single agreement is implied to create a joint tenancy is somewhat startling when it is remembered that the individual occupants are not said to be connected in any way nor to be in occupation as a result of any preconceived arrangement inter se. When the consequences of this conclusion are examined in detail I am, with all respect to the Court of Appeal, driven to the view that it is unsound.

Normal attributes of a lease to joint tenants include a demise for a specific period with exclusive possession at a single rent for payment of which each joint tenant is liable to the lessor in full subject to relief from his co-tenants. No one tenant can terminate the lease during its currency but where the stipulated period has expired and the joint tenants hold over due notice by one will terminate the lease since the continuance of the springing interest requires the consent of all parties to the lease. There is, to say the least, a substantial interlocking of interests of the joint tenants. In the present case, as I have already remarked, each defendant arrived independently in the flat and there is nothing in any agreement to suggest that the right of one defendant to share the flat could be determined by anyone other than the owner or himself. Indeed I have no doubt that each of the four defendants would have been horrified if he or she had thought that his or her right to remain in the flat after the expiry of the initial six month period could be determined by the independent action of a fellow-occupant.

My Lords, if the arrival of a fourth occupant converted three persons occupying under licence agreements into joint tenants under a single implied agreement one must ask what is the rent payable and the duration of the lease. Each of the four defendants were paying a different monthly sum under their respective agreements and when the fourth defendant arrived the first, second and third defendants were occupying on a monthly basis, their initial six month period having expired, whereas he was entitled to occupy for an initial period of six months. It has not been suggested that it would be possible to have a joint tenancy with different terms for each tenant. In these circumstances what would be the term for the implied joint tenancy resulting from the arrival of the fourth defendant? Would it be six months, thereby conferring on the first, second and third defendants rights which they did not possess under their own agreements or would it be simply one month thereby depriving the

fourth defendant of rights which he demonstrably had under his own agreement?

I pose this question merely to demonstrate the problems created by the theory of a single implied agreement consequent upon the arrival of a fourth occupant. The matter however does not end there because it follows that if there is no joint tenancy until the arrival of the fourth defendant there ceases to be a joint tenancy as soon as one occupant leaves unless there is a simultaneous insertion of a substitute in his place. If there is a gap in time between the departure of one occupant and the arrival of another the remaining defendants revert to the status of licencees. Thus the nature of the rights of three out of four of the occupants of this flat would depend not on the terms of their agreement with the owner but on whether or not at any one time there happened to be a fourth occupant in the flat.

The concept of surrender and regrant in leases and as it operated prior to 1707 in relation to resignations in favorem of Scots Peerages, involved the grantee surrendering his existing rights in exchange for new or altered rights. The implied surrender and regrant in this case would arise not because of any act upon the part of the surrendering grantee but solely because

of the chance advent of a stranger. I am not persuaded that this is a situation in which it would be appropriate to make such an implication.

I should be surprised indeed if a joint lease could be created by four separate documents of different dates in favour of four independent persons each paying a different rent and also for different periods of six months. Such an arrangement would, as Sir George Waller pointed out [1988] 2 W.L.R. 689, 703, be notably deficient in the four unities of interest, title, time and possession. My Lords, I have no doubt whatever that the plaintiffs and defendants intended that each defendant should have, under his or her agreement, certain" rights of occupation in the flat and that such rights should be entirely independent of those of every other defendant. I have also no doubt that the parties have achieved this result and that the plaintiffs are well founded in maintaining that there were four licence agreements relative to shared occupation of the flat which did not in aggregate confer exclusive possession thereof upon the four defendants. It follows that there was no joint tenancy thereof.

I would therefore allow the appeal.

In this appeal the defendants entered into occupation together on the same day with the intention, which was known to the plaintiff, of living together as man and wife. The defendants were only interested in occupying the flat together. The plaintiff made clear to them that he was not prepared to grant a lease which would be subject to the Rent Acts but would only grant individual licences. The defendants then signed separate agreements in identical terms in which they each undertook, inter alia, to pay one half of the financial consideration required by the plaintiff. Two issues arise in this appeal namely:-

29. Whether the two agreements fall to be read together and constitute a single agreement between the plaintiff on the one hand and the two defendants on the other, and

30. If so, what effect is to be given to the joint agreement having regard to its substance and reality.

My Lords, I do not doubt that the two agreements must be read together. The initial approach to the plaintiff was made by the first defendant who indicated that he wanted the flat for himself and the second defendant. The two defendants visited the flat together with their references and at the request of the first defendant the plaintiff provided a double bed. There is no suggestion that the defendants asked to sign separate agreements and they only did so because of the anxiety of the plaintiff to avoid granting a lease. As I have already remarked, the agreements were in identical terms and it would in all the circumstances be quite unrealistic to treat them other than as a single agreement in favour of the two defendants.

What effect is then to be given to the agreements? If they are construed solely by reference to their terms and without

regard to surrounding circumstances the conclusion must be that there was no intention to confer exclusive possession of the flat upon the two defendants. The narrative in the preamble so states and clause 16 is unambiguous in its terms. However, it would not be right to look at the agreements without regard to the circumstances which existed at the time when they were entered into. Furthermore, the defendants maintain that so far as they purport not to confer exclusive possession upon them they are a sham. Accordingly, although the subsequent actings of the parties

may not be prayed in aid for the purposes of construing the agreements they may be looked at for the purposes of determining whether or not parts of the agreements are a sham in the sense that they were intended merely as- "dressing up" and not as provisions to which any effect would be given.

The agreements were clearly drawn up with the decision of the Court of Appeal in Somma v. Hazelhurst [1978] 1 W.L.R. 1014 in mind. The agreements in that case were very similar to those in this appeal but they related to a bedsitting room containing two beds rather than to a flat. The Court of Appeal held that the young couple were only licensees of the bedsitting room but the decision was disapproved by this house in Street v. Mountford wherein my noble and learned friend Lord Templeman concluded [1985] A.C. 809, 825 that the obligation on the couple "to share the room in common with such other persons as the landlord might from time to time nominate" was a sham and that they were entitled jointly to exclusive possession of the room and were thus joint tenants.

The attic flat with which this appeal is concerned consists of a bedroom containing a double bed and other furniture, a sitting room containing inter alia a settee bed, a table bed and a chair, a kitchen, bathroom and hall. It was thus possible for someone else to sleep in the flat and indeed for some five or six weeks a friend of the defendants stayed there after permission had been obtained from the plaintiff. When the agreements are looked at in detail the operation of certain clauses produces bizarre results. Clause 2 imposes on the licensee responsibilities for payment of all gas and electricity consumed in the flat as well as in the entrance hall, staircase and vestibule of the building. Joint responsibility by each o± the two licensees for power consumed in the flat would be an entirely reasonable arrangement so long as they alone were using the power but would become curious, to say the least, if others nominated by the licensor were sharing the flat and consuming power. The responsibility for power consumed by others in the hall, staircase and vestibule is of the latter character. Obligations in clauses 4, 5, 6 and 7 anent the condition of the flat and the contents are again reasonable only so long as the two licensees are occupying the flat alone. Is it conceivable that the defendants assumed these obligations in the knowledge that the extent of their liability to the licensor might be measured not by their own actions but by the actions of others nominated to share the flat over whom they had no control? To answer this question it is necessary to consider clause 16 which is critical to the appeal.

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. Mr

Antoniades, in his powerful address to your Lordships, argued that the sole purpose of the clause was to enable him to use the flat if some disaster befell his own house and he had no roof over his head. Had the clause so specifically stated, different considerations might have applied. Unfortunately the clause is quite unlimited in its terms and purports to entitle the licensor to pack the fiat with as many people as could find some sleeping space therein. The judge found as a fact that when the defendants' friend slept in the settee bed the conditions in the flat were cramped. This can also be inferred from the plan which was made available to your Lordships and from which it appears that it would be quite unrealistic for anyone to sleep in the flat elsewhere than in the double bed in the bedroom and in either the table bed or bed settee in the small sitting room. In the latter event there would be little remaining room in the sitting room when the bed was up. This situation certainly does not suggest that the parties ever contemplated that other persons would be nominated to share the flat. When subsequent events are looked at the matter becomes even clearer. Although the licensor granted permission to the defendants to have the friend to stay for some weeks he made no charge therefor and during the 17 months which elapsed between the defendants' entry to the flat and service upon them of notice to quit the licensor made no attempt to occupy the flat himself or through anyone nominated by him. In all these circumstances I am driven to the conclusion that the parties never intended that clause 16 should operate and that it was mere dressing up in an endeavour to clothe the agreement with a legal character which it would not otherwise have possessed. It follows that it should be treated pro non scripto.

If clause 16 is ignored and regard is had to the circumstances in which the defendants came to occupy the flat in the first place and to the size of the flat, clauses 2, 4, 5, 6 and 7 all indicate an intention that the two licensees should have exclusive possession of the flat and this indication is confirmed by the remainder of the agreement notwithstanding the protestations of lack of exclusivity of possession in the narrative in the preamble. In my view the substance and reality of these agreements was to confer upon the defendants exclusive possession of the flat for a term in consideration of periodical payments. Street v. Mountford [1985] A.C. 809 establishes that in such a situation a tenancy is created. I would therefore allow the appeal.

URL: *http://www.bailii.org/uk/cases/UKHL/1988/8.html*