

Chapter 20

Question 1: Why might Parliament intervene to give a tenant extra rights beyond those expressly agreed between that tenant and his or her landlord?

This question is considered in sections 20.1 and 20.2, where we examine the background to the *status-conferring* aspect of a lease. It is suggested that, broadly speaking, there are two principal reasons why Parliament may give a tenant extra rights, in addition to those expressly agreed between the tenant and his or her landlord. First, it may be that, given the special importance attached to the use of land, there are good reasons for protecting a tenant's continued use of land: this may be done, for example, by allowing a tenant to remain in occupation beyond the agreed end of the lease, and by controlling the level of rent the tenant can be asked to pay. Second, it may be that, given the shortage of suitable land, a tenant is at a disadvantage when bargaining with a potential landlord and so may be unable, in practice, to secure the necessary protection by means of an agreement.

Of course, as noted in section 20.2, this is not to say that the arguments in favour of Parliamentary intervention are conclusive. For example, as noted by the Bridge extract, the Conservative government in the 1980's took the view that over-regulation of leases was counter-productive: it would deter potential landlords from making their land available to occupiers. There is clearly a political aspect to the question of how far Parliament should intervene in the market for rented accommodation.

Question 2: 'The distinction between a lease and a licence should only matter if a third party is involved: it should make no difference when considering the positions of A (the landlord/licensor) and B (the tenant/licensee).' Do you agree?

The suggestion above focuses on the *property right-conferring* aspect of the lease. It is certainly the case that a key difference between a lease and a licence is that the former, unlike the latter, counts as a property right in land and is therefore capable of having an effect on third parties. It has never been the case, however, that this is the *only* difference between a lease and a licence. For example, as noted in section 19.1, if A and B are in a landlord-tenant relationship, the common law has long implied certain duties into that relationship, even if those duties have not been expressly agreed to by the parties: this point is developed in Chapter 21.

The important suggestion made by the question above is that, when deciding what legislative protection to give to occupiers of land, Parliament should not make the availability of that protection depend on whether an occupier has a lease or a licence. For example, in Chapter 19, when considering cases such as *Street v Mountford* or *Antoniades v Villiers*, we saw that, to determine if an occupier had particular protection against an owner of land, the courts had to decide if that occupier had a lease. This in turn meant that the courts had to ask if the occupier had a right to exclusive possession of the land for a limited period.

Yet it is not obvious that the presence or absence of such a right is relevant to the question of whether an occupier deserves additional legislative protection. McFarlane and Simpson argue (see the extract in section 20.4.1.4) that in *Bruton v London & Quadrant Housing Trust*, the occupier did not in fact have a right to exclusive possession; but that the policy of the Landlord and Tenant Act 1985 demanded that he should nonetheless receive the protection of that Act.

Question 3: What is a 'tenancy by estoppel'? Should the House of Lords in *Bruton v London & Quadrant Housing Trust* have found that Mr Bruton had a tenancy by estoppel?

In *Bruton v London & Quadrant Housing Trust* (see section 20.4.1), the House of Lords held that Mr Bruton had a lease, and so qualified for the protection of the Landlord and Tenant Act 1985, even though the Housing Trust, with whom Mr Bruton made his occupation agreement, had no right to exclusive possession of the land

occupied by Mr Bruton. As set out in the extract in section 20.4.1.2, Routley suggests that the result in the case can best be understood on the grounds that Mr Bruton had a ‘tenancy by estoppel’. As noted by Routley, such a tenancy arises where A purports to give B a right to exclusive possession of land for a limited period, but, due to the fact that A has no right to exclusive possession, the agreement between A and B cannot, in fact, give B such a right. The ‘tenancy by estoppel’ is based on the fact that if B claims that he has a lease, A cannot deny that fact. As a result, whilst B does not in fact have a lease, A must treat B *as though* B has a lease.

If a tenancy by estoppel had been held to exist in *Bruton*, Mr Bruton could thus have accepted that he had no right to exclusive possession, and nonetheless argued that, due to its agreement with him, the Housing Trust had to treat him *as though* he had a lease, and so had to perform the statutory duties imposed by the Landlord and Tenant Act 1985.

It is important to note, however, that the House of Lords did not adopt this analysis. For example, Lord Hoffmann expressly stated that ‘the question of tenancy by estoppel does not arise in this case.’ His Lordship’s view was that, as soon as the Housing Trust promised to give Mr Bruton a right to exclusive possession for a limited period, Mr Bruton had a lease, *even if* the Housing Trust had no right to exclusive possession. As noted by Bright in the extract set out in section 20.4.1.1, the controversial aspect of that analysis is that, unlike the tenancy by estoppel view, it involves admitting that an agreement between A and B can give B a lease even if it does not give B a property right in land.

Question 4: What is the wider significance of the Renting Homes (Wales) Act 2016 for the status-conferring aspects of a lease?

Whilst of course it will apply only in Wales, the Renting Homes (Wales) Act 2016 also has a broader significance: taking on a proposal first made by the Law Commission in a 2002 Consultation Paper (and then a 2006 Report), it opts against using the distinction between a lease and a licence as a means to determine whether or not an occupier of land is entitled to particular statutory protection. As discussed in section 20.5, this means that an occupier of a home can qualify for statutory protection even if he or she does not have a lease. If such a radical change were also adopted in England, then the reason why an occupier such as Mr Bruton wished to show he had a lease would no longer apply. One effect of such a change would be to remove some of the pressure that courts may currently feel to find that an occupier has a lease – as suggested at the end of section 20.5, this might then allow the doctrinal definition of a lease to be developed in a more coherent way.