Bruton tenancies

The facts of ***Bruton v London & Quadrant Housing Trust*** **(1999) 3 WLR 150** are quite complex. They have arguably given rise to a new type of tenancy referred to as a 'Bruton tenancy'. In 1975 Lambeth Council compulsorily purchased a mansion block and before starting on a proposed redevelopment, the Council granted a written licence (it had no statutory authority to grant a tenancy) to London & Quadrant HT so that they could give short-term occupancy agreements to people on its waiting list. Mr Bruton entered into such an agreement with the L&Q and was granted a weekly licence. He later brought proceedings against L&Q under **s. 11 Landlord and Tenant Act 1985** for breach of a repairing obligation. Such proceedings are only available to tenants. **At first instance**, it was held that he had a licence and therefore s. 11 did not apply. The **Court of Appeal** by a majority upheld the decision of the lower court but the **House of Lords,** with the leading judgment being given by **Lord Hoffmann**, held that although L&Q had no estate out of which it could grant a tenancy, the agreement did satisfy the criteria of **Street v Mountford** and a tenancy was created.

In the process the **House of Lords also held that *Bruton* did not have an estate binding on third parties**. This decision has been criticised because it contradicts a key principle of law, the *nemo dat* rule i.e. you cannot give what you have not got. **Lord Hoffmann** was of the view that the test was simply one of exclusive possession, and that it did not matter that L&Q did not have a legal estate, as it was the agreement between the parties that created the lease.

Lord Hoffman:

"First, the term 'lease' or 'tenancy' describes a relationship between two parties who are designated landlord and tenant. It is not concerned with the question of whether the agreement creates an estate or other proprietary interest which may be binding upon third parties. A lease may, and usually does, create a proprietary interest called a leasehold estate or, technically, a 'term of years absolute'. This will depend upon whether the landlord had an interest out of which he could grant it. *Nemo dat quod non habet*. But it is the fact that the agreement is a lease which creates the proprietary interest. It is putting the cart before the horse to say that whether the agreement is a lease depends upon whether it creates a proprietary interest."

"Secondly, I think that Millett LJ may have been misled by the ancient phrase 'tenancy by estoppel' into thinking that it described an agreement which would not otherwise be a lease or tenancy but which was treated as being one by virtue of an estoppel. In fact, as the authorities show, it is not the estoppel which creates the tenancy, but the tenancy which creates the estoppel. The estoppel arises when one or other of the parties wants to deny one of the ordinary incidents or obligations of the tenancy on the ground that the landlord had no legal estate. The basis of the estoppel is that having entered into an agreement which constitutes a lease or tenancy, he cannot repudiate that incident or obligation."

"Thirdly, I cannot agree that there is no inconsistency between what the trust purported to do and its denial of the existence of a tenancy. This seems to me to fly in the face of Street v Mountford [1985] 2 All ER 289, [1985] AC 809. In my opinion, the trust plainly did purport to grant a tenancy. It entered into an agreement on

> terms which constituted a tenancy. It may have agreed with Mr Bruton to say that it was not a tenancy. But the parties cannot contract out of the Rent Acts or other landlord and tenant statutes by such devices. Nor in my view can they be used by a landlord to avoid being estopped from denying that he entered into the agreement he actually made."

This leaves the lease in an awkward conceptual state, as it would now appear that a lease is not always a proprietary right. It can simply be a contractual state of affairs between the involved parties, and whether it is binding on third parties or not will depend on the circumstances in which the contractual affairs take place. It appears that there may now be some sort of contractual or non-proprietary lease.

It is argued that **Lord Hoffmann** was just looking for the convenient answer in ***Bruton***, as this solution imposed a duty on L&Q to comply with the statutory repair obligations. However, this in itself seems flawed: if L&Q themselves only had a licence, how could they undertake works on the premises?

The reasoning in ***Bruton*** has been applied in subsequent cases, see for example ***London Borough of Islington v Green*** 2005 and ***Kay v London Borough of Lambeth*** 2006. These cases did however manage to confine ***Bruton*** to its facts in dealing with Local Authority housing.