CASE COMMENTARY

Back to Basics – Tenancy or Other Legal Relationship?

Brumwell v Powys County Council **[2011] EWCA Civ 1613**

Facts

Mr Brumwell claimed that he occupied a caravan site in Rhayader, Powys, as a business tenant and sought a new tenancy under Part II of the the Landlord and Tenant Act 1954. In the appeal, he sought to overturn the decision of HHJ Jarman QC in the Swansea County Court who had ruled that he did not have tenancy of the caravan site and, accordingly, had no rights under the 1954 Act.

Mr Brumwell's asserted tenancy was not based on a straightforward lease but on a combination of three agreements with Powys County Council – an operator agreement in respect of the management of the site, a service occupancy agreement in respect of a residential bungalow on the site and a contract for part-time employment as a security man at the site. Mr Brumwell's case was that the service occupancy and employment agreements were a sham, but that the operator agreement was not – and that its true effect was to grant a lease of the caravan site to him.

Court of Appeal ruling

Lloyd Jones J, giving the judgment of the Court of Appeal, held that the service occupancy and employment agreements were not shams and that, on a proper construction, the effect of the operator agreement was that Mr Brumwell ran the caravan site as an agent for the Council. His Lordship reached his conclusion on the effect of the operator agreement by analysing its provisions and assessing whether its features lent more support to the proposition that Mr Brumwell managed the business as a principal in his own right or as an agent. Having found that the other two agreements were not shams, he was fortified in his conclusion that the operator agreement was not a lease because, when taken together, all three

agreements were coherent and made sense as explaining the legal relationship the Council wished to have with Mr Brumwell.

Commentary

Although the case arose under the 1954 Act, its primary interest lies with the more basic question of whether an agreement relating to the occupation of land has the status of a lease or licence. This case, therefore, provides an opportunity for a brief exploration of first principles.

The decision of the House of Lords in *Street v Mountford* [1985] AC 809 is treated as the touchstone authority on how one differentiates between a lease and a licence. In that case, the claimant had, by a written agreement headed "licence agreement", granted the defendant the right to occupy two rooms for £37 a week, subject to certain terms and conditions and a right to terminate by 14 days' notice. There was no dispute that the defendant enjoyed exclusive possession of the rooms. Shortly after entering into this arrangement, the claimant sought a declaration as to whether what he had granted was a tenancy or a licence. At first instance, the court held that it was a tenancy; the Court of Appeal reversed that decision and the House of Lords, in turn, upheld the decision of the trial judge.

Lord Templeman emphasised the importance of exclusive possession as a key characteristic which sets a lease apart from a licence. He stated (at 825):

> "But in my opinion in order to ascertain the nature and quality of the occupancy and to see whether the occupier has or has not a stake in the room or only permission for himself personally to occupy, the court must decide whether upon its true construction the agreement confers on the occupier exclusive possession. If exclusive possession at a rent for a term does not constitute a tenancy then the distinction between a contractual tenancy and a contractual licence of land becomes wholly unidentifiable."

And then again (at 826):

> "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. Sometimes it may be difficult to discover whether, on the true construction of an agreement, exclusive possession is conferred. Sometimes it may appear from the surrounding circumstances that there was no intention to create legal relationships. Sometimes it may appear

> from the surrounding circumstances that the right to exclusive possession is referable to a legal relationship other than a tenancy. 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."

Lord Templeman's comments show that, although exclusive occupation is an important element, it is, nevertheless, not absolute. An occupier may enjoy exclusive occupation of premises, but if that occupation isattributable, for example, to his employment and is provided for the better performance of his duties, then such occupation will not amount to a tenancy because it is referable to "a legal relationship other than a tenancy".

The ruling in *Street* has been considered and applied on occasions too numerous to mention; it is important to note, however, that although Lord Templeman limited his observations to residential premises, his guidance has been assimilated for the treatment of commercial premises as well – see, for example, *London & Associated Investment Trust Plc v Calow & Another* (1987) 53 P & CR 340 and, more recently, *Mann Aviation Group (Engineering) Ltd (In Administration) v Longmint Aviation Ltd* [2011] EWHC 2238 (Ch).

The *Brumwell* case did not concern residential property and it did not present itself as a straightforward alternative between the use of premises as a tenant or as licensed lodger. This was not a case where the landlord shared occupation or provided Mr Brumwell with attendance or services. Instead, the case should be treated as an example of what Lord Templeman had in mind when he said that "sometimes it may appear from the surrounding circumstances that the right to exclusive possession is referable to a legal relationship other than a tenancy". In the instant case, Mr Brumwell was acting as an agent of Powys County Council, running the caravan business on the site on behalf of the Council and not in his own right. That placed the relationship between the parties at the service occupancy end of the spectrum.

Although the Court of Appeal in *Brumwell* did not consider it necessary to refer specifically to the *Street* ruling (or, indeed, any other authority), the principles established by that decision were clearly applied and followed. In *Street*, Lord Templeman spoke of the court taking into account the purpose of the grant, the terms of the grant and the surrounding

circumstances: *ibid*, at 817. In keeping with that approach, the Court in *Brumwell*, having decided that the service occupancy and employment agreements were not shams, took them into account in order to ascertain the effect of the operator agreement and carefully considered the terms of that agreement against the surrounding circumstances. As they were intended to be part of the same transaction, it was clearly necessary for them to be read together. Against that background the language of the operator agreement strongly supported a conclusion that Mr Brumwell was an agent of the Council, even though in some ways the language adopted in it could have been consistent with him having the right to manage the business on his own. For example, a recurring phrase in the operation agreement was that Mr Brumwell was appointed "to manage the Undertaking", and the Undertaking was defined as the caravan site and the camping site. If this were the only agreement under consideration, one might have considered that it was intended as a form of user covenant, but that was not persuasive enough in the context of the related agreements.

Similarly, but perhaps more starkly, were the provisions for payments by Mr Brumwell to the Council in respect of the operator agreement. Under the terms of that agreement, it was agreed that:

> "The Parties hereby agree that the Council shall be paid by the Operator [Mr Brumwell] the sum of £32,890.00 for the first year of the term and such sum to be paid by four equal instalments . . . and the Council shall be paid in respect of the second year of the term such sum as shall be agreed between the parties before the commencement of the second year of the term and which in any event shall not be less than the sum paid in the first year of the said term such sum to be paid by four equal payments in similar manner to the previous year".

Three observations come to mind. First, it seems unusual for an employee to be paying money to an employer; secondly, the agreement that the money be paid quarterly and "for the first year of the term" is obviously reminiscent of the payment of a quarterly rent; and, thirdly, it includes what looks very much like an upward only rent review for the second year of the term. The payment that Mr Brumwell was to receive was the income that would be generated from the campsite business and he would have to pay the £32,890 regardless. In this regard, the Court did note that a business carried on at an individual's own financial risk usually indicates that he is acting as principal and not as an agent. This factor, therefore, did lend weight to the argument that Mr Brumwell was, in fact, renting the site.

But set against that, and in the end of more persuasive force, was the high degree of control the Council had retained over the site and its operation, matters which one would have thought were no concern of the Council if Mr Brumwell was not its agent. For example, the operator agreement regulated, *inter alia,* the cleaning of the site, the emptying of the bins, keeping the toilets and showers in working order, the marketing and advertising of the campsite and imposed requirements regarding the employment of such staff as was necessary to assist Mr Brumwell in carrying out his functions. The Council also controlled what the campsite was to be called (the "Wyeside Caravan and Camping Park") and the agreement expressly provided that both the fees and charges had to be approved by it. In addition, Mr Brumwell was required to charge for any services rendered to users of the park. All these features (and more) left the Court of Appeal in no doubt that, despite the fact that the payment structure looked like a rental agreement, the real purpose of the agreement was that Mr Brumwell managed the business as an agent and not as a tenant in his own right.

Because of this finding, no questions of security of tenure under Part II of the 1954 Act arose for consideration. The opening words of s.23(1) state that: "Subject to the provisions of this Act, this part of this Act applies to any tenancy where property…". If there is no tenancy, Part II does not apply. Thus, although the case does not break any new ground under the 1954 Act, it serves as a useful reminder that, in the right circumstances, it can be important to go back to basics and assess the true nature of the parties' relationship before assuming that an occupier of land enjoys statutory protection under the 1954 Act.