

## LEASES AND LICENCES IN SINGAPORE AFTER *STREET* v. *MOUNTFORD*

*Goh Gin Chye & Anor. v. Peck Teck Kian Realty Pte. Ltd. & Anor.*<sup>1</sup>

### *Introduction*

IN the early days when licences first appeared their function was to legitimatise the presence of persons on property which would otherwise have been unlawful.<sup>2</sup> The distinction between a tenancy and a licence was then simple. The licence was then merely a defence to an action in tort, in trespass.<sup>3</sup> As the various types of licences evolved and began to be used in various situations the distinction became less simplistic.

The distinction is important for various reasons. Firstly, the Rent Acts<sup>4</sup> in England accord tenants with statutory protection and rights not dissimilar in effect from those available to a tenant under the Control of Rent Act in Singapore.<sup>5</sup> This is the practical importance of distinguishing between a tenancy and a licence.<sup>6</sup> Secondly, licences and tenancies have different attributes in law. Covenants, such as the covenant for quiet enjoyment and the covenant to keep the premises in good repair, are implied by law to protect the interests of both parties to a tenancy whereas in licences these have to be reflected as obligations in their contracts.<sup>7</sup> This is consistent with the orthodox view that licences are mere personal privileges and do not confer any interest to the licensees; therefore licensees have no interest in land needing protection. On the same reasoning the remedy available to the licensee when the licensor enters the premises without his permission is a breach of contract and not trespass. The orthodox view has to be modified as some licenses have, with the passage of time and the intervention of equity, come to be regarded as irrevocable by the licensor and third parties.<sup>8</sup> These developments further necessitate a demarcation between a tenancy and a licence. Thirdly, the distinction is important because of the different limitation periods.<sup>9</sup>

The distinction was initially based on exclusive possession. If the occupier had exclusive possession he was a tenant; if he did not, he

<sup>1</sup> [1987] 2 M. L.J. 118.

<sup>2</sup> *Per* Vaughan C. J. in *Thomas v. Sorrell* (1673) Vaugh 330 at p. 351; also see Lord Templeman in *Street v. Mountford* [1985] 1 A. C. 809 at p. 816 D.

<sup>3</sup> Megarry, *The Law of Real Property* (5th ed., 1984), at p. 798.

<sup>4</sup> See Yates and Hawkins, *Landlord and Tenant Law* (2nd ed., 1986), at p. 10.

<sup>5</sup> Cap. 58, 1985, (Rev. Ed.); see generally Tommy Koh, "Rent Control in Singapore" (1968) 8 Mal. L. R. 32.

<sup>6</sup> Lord Templeman in *Street v. Mountford*, *supra.*, n. 2, at p. 814H.

<sup>7</sup> However, the Court of Appeal has recently implied terms into contractual licences: see Yates and Hawkins, *op. cit.*, *supra.*, n. 4, at p. 9.

<sup>8</sup> *E.g.*, contractual licences held to be irrevocable because of implied or express terms: *Hurst v. Picture Theatres Ltd.* [1915] 1 K. B. 1; licences by estoppel: *Siew Soon Wan v. Yong Tons Hong* [1973] 1 M. L. J. 133; see generally W. J. M. Ricquier, *Land Law* (1985), Chapter 12.

<sup>9</sup> As in the case of contractual licences.

must be regarded as a mere licensee.<sup>10</sup> This was consistent with the elevation of the tenancy into an estate in land from its beginnings in legal history as an agreement.<sup>11</sup> In the 1950s there began a trend of decisions which advocated a different basis for distinguishing between tenancies and licences. The trend began with Lord Denning's remarks notably those in *Errington v. Errington*<sup>12</sup> that the test of exclusive possession was no longer realistic nor decisive. Subsequent decisions developed on his remarks and thus generated the idea that there could be licences which conferred exclusive possession,<sup>13</sup> that "(a)lthough a right to exclusive possession is an important indication that a tenancy and not a licence has been created, even a licence may nowadays confer such right".<sup>14</sup> Another effect of these cases, it was thought, was that the intention of the parties substituted exclusive possession as the overriding consideration in distinguishing between a tenancy and licence.<sup>15</sup> The emphasis was on a scrutiny of the circumstances and the conduct of the parties to see if these indicated an intention that the occupier should have a personal privilege with no interest in the land.<sup>16</sup> The decisions applied this test with great emphasis on what the parties had stated in the contract. The consummate example of this line of cases was *Somma v. Hazelhurst*<sup>17</sup> where the Court of Appeal held that, where the agreement was not a sham, it was possible for an agreement to specify that there was no exclusive possession and as such oust the Rent Acts.<sup>18</sup>

In 1985 the House of Lords "made waves" with its decision in *Street v. Mountford*. Lord Templeman held that the line of Court of Appeal decisions did not dislodge the traditional test of exclusive possession. The effects, which everyone had thought were the outcome of the decisions, were shown to be erroneous as Lord Templeman distinguished most of those decisions on the basis that the parties did not have an intention to create legal relations.<sup>19</sup> He demonstrated that, contrary to what many had thought to be the case, these decisions had applied exclusive possession; albeit the exceptions to exclusive possession. In so doing he reinstated<sup>19</sup> exclusive possession and showed the perceived authority of the cases to be misconceived. *Somma v. Hazelhurst* was also disapproved of by way of *obiter dicta* towards the end of his judgment, doubt thus being cast on non-exclusive licenses.

The decision effectively turned many former licensees into would-be tenants protected by the Rent Act<sup>20</sup> as many landlords had

<sup>10</sup> David J. Hayton, *Megarry's Manual of the Law of Real Property* (6th Ed., 1982), p. 334; W. J. M. Ricquier, *op. cit.*, *supra*, n. 8, at p. 146; Consumers' Association (U. K.), *Renting and Letting*, (1987, Rev. Ed.), at p. 15.

<sup>11</sup> Lord Templeman in *Street v. Mountford*, *supra*, n. 2, at p. 816B.

<sup>12</sup> [1952] 1 K. B. 290.

<sup>13</sup> See *Renting and Letting*, *op. cit.*, *supra*, n. 10, at p. 16; also see counsel for the respondent's argument in *Street v. Mountford*, *supra*, n. 2, at p. 813D.

<sup>14</sup> Hayton, *op. cit.*, *supra*, n. 10 at p. 335, n. 13.

<sup>15</sup> See W. J. M. Ricquier, *op. cit.*, *supra*, n. 8, at p. 146, n. 35; Yates and Hawkins, *op. cit.*, *supra*, n. 4, at p. 17; Roger Street, "Coach and Horses Trip Cancelled? Rent Act Avoidance after *Street v. Mountford*" [1985] Conv. (NS) 328 at p. 331; Tromans, (Case note) "Leases and Licences in the Lords" [1985] C. L. J. 351 at p. 352.

<sup>16</sup> *Cobb v. Lane* [1952] 1 All E.R. 1199. *per* Denning L. J. at p. 1202; *Street v. Mountford* (1984) 271 E. G. 1261 (C. A.), *per* Slade L. J. at p. 1264.

<sup>17</sup> [1978] 1 W. L. R. 1014.

<sup>18</sup> See Hayton, *op. cit.*, *supra*, n. 10, at p. 334, n. 9; Roger Street, *supra*, n. 15 at p. 332; *Renting and Letting*, *op. cit.*, *supra*, n. 10 at p. 16.

<sup>19</sup> Roger Street, *supra*, n. 15, at p. 331; See D. N. Clarke, "Street v. Mountford: The Question of Intent - A View From Down Under" [1986] Conv. (NS) 39 at p. 40, whose view is that the traditional test has been re-introduced with a difference.

<sup>20</sup> *Renting and Letting op. cit.*, *supra*, n. 10. at p. 13.

used contractual licences as a means of Rent Acts avoidance. The House of Lords sounded an end to the use of this device to the rejoicing of many flat-dwellers and to the dismay of the landlords. The decision has lent itself to disparate views on its status. May L. J. in a recent Court of Appeal decision,<sup>21</sup> for instance, did not regard *Street v. Mountford* "as in any way making new law or requiring any hitherto unrecognised approach to this type of problem". On the other hand, other decisions after *Street v. Mountford* have strived almost too faithfully to avoid departing from the principles stated by Lord Templeman.<sup>22</sup> In contrast, the House of Lords has been observed as having reversed an earlier trend of decisions<sup>23</sup> holding the view that exclusive possession was only a factor and not the decisive factor to be considered in deciding whether there was a tenancy or a licence. Another writer, though perhaps personally galled by the decision, considered their Lordships to have "turned the clock back more than a quarter of a century".<sup>24</sup>

The impact of *Street v. Mountford* in England is heightened in view of the Rent Acts. Although in Singapore the only similar statute is the much-criticised Control of Rent Act, the implications of the decision on tenancies in Singapore is nonetheless significant. The opportunity to consider *Street v. Mountford* arose in the Court of Appeal decision of *Goh Gin Chye Anor. v. Peck Teck Kian Realty Pte. Ltd. & Anor.*

### *The Facts*

*Goh Gin Chye* involved the claim for vacant possession of a two-storey shophouse by its owners, Peck Teck Kian Realty Pte. Ltd., from two other parties: the administrators of Tay Ping Kee (deceased) to whom the previous owners had let the premises and the occupier of the premises whom the owners alleged to be in possession as the deceased's "sub-tenant". The owners contended that the "sub-tenant's" presence was in breach of a covenant in the main lease between the previous owners and the deceased not to sublet. They also claimed possession on the basis that the subletting was for rent in excess of the statutory limit set in section 15(1)(g) of the Control of Rent Act. The matter was first heard by the District Court which held that the owners had not established the existence of a prohibition against subletting but found that there was a subletting where rent was in excess of the statutory limit. The High Court affirmed this decision. The deceased's administrators contended that the owners were not entitled to recover possession because there was no subletting. They argued that the relationship between them and the alleged "sub-tenant" was not a tenancy but a licence. This argument was rejected by the High Court.

The administrators appealed to the Court of Appeal which comprised Wee Chong Jin, C. J., Thean and Coomaraswamy JJ.. They contended that the High Court judge did not apply his mind to the

<sup>21</sup> *Bretherton v. Paton* [1986] 1 E. G. L. R. 172 at p. 174.

<sup>22</sup> E.g., see *Markou v. Da Silvaesa and Anor* 52 P. & C. R. 204, and A. J. Waite, "Leases and Licences: The True Distinguishing Test" (1987) 50 M. L. R. 226 at p. 227 where he pointed out that the Court of Appeal had read too much into a single passage from *Street v. Mountford*; *Brooker Settled Estates Ltd. v. Ayers* 19 H. L. R. 246 where O'Connor L. J. at p. 250 pointed out that the lower court had used some parts of Lord Templeman's speech to assert a proposition which the speech does not support.

<sup>23</sup> See *Tromans, supra*, n. 15 at p. 352.

<sup>24</sup> *Roger Street, supra*, n. 15 at p. 329.

question whether the agreements underlying the relationship created a licence or a tenancy. If he had done so, they argued, bearing in mind that the question turned on the intention of the parties as adduced from the evidence and also from the agreements the parties had executed, he would have concluded that there was a licence. There were altogether six agreements between the deceased and the alleged "sub-tenant". The first five had been entered into by the deceased with the sixth entered into by the administrators. The first two agreements were standard tenancy agreements. It was only from the third agreement that the terms referred to a licence: the occupier was to pay a licence fee of \$ 150 and he was granted a licence to use the premises. In essence their argument was the status of the occupancy, if it had been a tenancy at first, was changed by the third agreement to a licence since the parties had expressly agreed on it.

### *The Decision*

Thean J., who delivered the judgment of the Court of Appeal, rejected this argument. He found that the six agreements underlying the relationship pointed to a tenancy and not a licence. There had been a grant of exclusive possession under the first two agreements which were tenancy agreements in form and substance. This situation was left unchanged by the subsequent agreements as the occupier remained in exclusive possession of the premises and continued on with his business there. The subsequent agreements only differed from the first two agreements to a minor extent for they contained substantially the same terms as the earlier tenancy agreements. The key difference was the use of the terminology of a contractual licence; for example "licence fee" instead of "rent" and "licence" instead of "tenancy". He said (quoting Denning L. J. as he then was in *Errington v. Errington*<sup>25</sup>): "Parties cannot turn a tenancy into a licence merely by calling it one.". What was crucial was the substance of the agreements and not the form, the intention as perceived by the court rather than the intentions as professed by the parties. Thean J. cited various other decisions<sup>26</sup> for the same proposition and it was in this context that *Street v. Mountford* was referred to as the leading authority on the point. He then proceeded to list the principles of law drawn from the cases he cited, which he referred to as the results of the cases, before deciding in favour of the owners on the basis that the parties could not by mere words or express provisions in an agreement convert a de facto tenancy into a licence.

In his list the intention of the parties was listed first as an important consideration<sup>27</sup> in determining the relationship of landlord and tenant. He said this was to be sought from the substance of the agreement, "the conduct of the parties and the surrounding circumstances". His second principle was that on which the decision was based - viz., that the labels used by the parties should not prevail. Third, exclusive possession is a "material circumstance" to be considered. It was an essential requirement of a tenancy. The last principle was an elaboration of the third. He said exclusive possession

<sup>25</sup> *Supra*, n. 12.

<sup>26</sup> The learned judge drew upon three pre-*Street v. Mountford* English decisions: *Errington v. Errington* *supra*, n. 12; *Facchini v. Bryson* [1952] 1 T. L. R. 1386; *Addiscombe Garden Estates Ltd. & Anor v. Crabbe & Ors* [1958] 1 Q. B. 513; and to a previous decision of the Singapore Court of Appeal: *Abdul Rahim v. British and Malaya Trustees Ltd.* [1967] 1 M. L. J. 118.

<sup>27</sup> *Supra*, n. 1 at p. 1221.

was not "the sole and the only criterion; there may be circumstances negating an intention to create a tenancy".

### Comment

The first observation to be made about *Goh Gin Chye* is the fact that *Street v. Mountford* was expressly referred to for direct application of the "substance over form," principle. Lord Templeman's remarks on this point were aimed at countering the proposition of the landlord's counsel that the whole current of authority in the Court of Appeal pointed to the intention of the parties manifested in the agreement as being the paramount consideration. They had argued that the Court of Appeal in *Street v. Mountford* was right in giving heed to the fact that the parties had in their agreement stipulated that the relationship was to give rise to a licence. Lord Templeman held that it was the substance of the agreement that mattered and not the professed intentions of the parties. According to Lord Templeman, whose judgement was endorsed by the rest of their Lordships, this did not detract from the cardinal principle, freedom of contract, for the parties had a choice whether to contract; they also had a choice of the terms to be included in their agreement. However, this did not extend to the consequences that flowed from their agreement. This could only be determined by consideration of the effect of the agreement - a matter for the courts to decide.<sup>28</sup> Lord Templeman's remarks were quoted by Thean J. in his judgment.<sup>29</sup>

The second observation that can be made is that Thean J. did not directly refer to the other aspects of *Street v. Mountford* in which Lord Templeman has been noted to have "sought to introduce some order into the law for the better administration of the law and guidance of the learned judges ... who have to deal with this problem."<sup>30</sup> Any reference to the other aspects of this "guidance" (if it could be called that) is in all likelihood to be found in the list of principles promulgated by him.

A person who comes upon *Goh Gin Chye* after reading *Street v. Mountford* would notice a distinct difference in tone and emphasis between the two judgments though *Goh Gin Chye* has applied *Street v. Mountford*. According to Lord Templeman, the test of exclusive possession is the only workable or understandable test for distinguishing between a contractual tenancy and a contractual licence.<sup>31</sup> In Thean J.'s judgment the same is referred to in a less important light: he did not depict exclusive possession in the same tone and tenor as Lord Templeman. This difference in emphasis, apparent from the language, leads to the initial speculation whether the list of principles is an accurate reflection of Lord Templeman's principles in *Street v. Mountford*.

Moreover, Thean J. did not list exclusive possession as being of primary importance whilst the House of Lords in *Street v. Mountford* has been noted earlier to have re-introduced the traditional test of exclusive possession. The main thrust of Lord Templeman's judgment was that exclusive possession was the relevant test whether there was a tenancy. He said "... the only intention which is relevant is the

<sup>28</sup> Per Lord Templeman, *supra*, n. 2 at p. 819F.

<sup>29</sup> *Goh Gin Chye*, *supra*, n. 1, at p. 122C.

<sup>30</sup> *Brooker Settled Estates Ltd. v. Ayers*, *supra*, n. 22, per O'Connor L. J. at p. 250.

<sup>31</sup> *Street v. Mountford*, *supra*, n. 2, at p. 824E.

intention demonstrated by the agreement to grant exclusive possession for a term at a rent".<sup>32</sup> When one surveys his judgment, one will observe that Lord Templeman began with a discussion of the historical development of a lease and the working of the traditional test of exclusive possession. Then he proceeded to show how this test or one of its exceptions was employed in the cases that counsel for the landlord raised in support for the alternative test: the agreement of the parties.

In contrast, exclusive possession is found in the third and fourth results in *Goh Gin Chye*. The intention of the parties is what comes first on the list. This impression of inaccuracy is accentuated by his reference to a passage from Chua J.'s judgment in *Abdul Rahim v. British and Malays Trustees Ltd.*<sup>33</sup> which spoke of the intention of the parties being the "paramount consideration" prior to a discussion of *Street v. Mountford*. The juxtaposition of Chua J.'s dicta before mention of *Street v. Mountford* and the list of principles leads to the supposition that Chua J.'s dicta is the source of the first principle, i.e., the intention of the parties. Hence, Thean J. would seem to be saying that the intention of the parties was of paramount importance.

There is an alternative interpretation of the first principle as stated by Thean J.. It is possible to focus on one of his remarks which relates the requirement of intention of the parties to that required for contracts and conclude that he was referring to the intention to create legal relations. Lord Templeman had held that where there is exclusive possession but there was no intention to create legal relations, there was a licence. Thean J. said:<sup>34</sup>

"First, the intention of the parties is an important consideration in determining the relationship of landlord and tenant, as in all other contractual relationships, but in every case the intention 'must be sought not from the mere words of the agreement but from its substance and from the conduct of the parties and the surrounding circumstances.'"

However, it does not appear that Thean J. was referring to the "specific" intention to create legal relations but to the "general" test of the intention of the parties which determines much of contract law including the intention to create legal relations; such as whether there was an offer or acceptance, whether the term was a condition or a warranty, whether there was really a case of renunciation, etc. Furthermore, he did refer to an intention to create a tenancy in his last principle thus indicating that the earlier reference to the intention of the parties was not to the intention to create legal relations. In his last principle he mentioned that there were circumstances negating an intention to create a tenancy and his illustrating cases were examples where there was no intention to create legal relations. It would be inconsistent to construe Thean J. to have referred to the intention to create legal relations in the first principle which he referred to in the last principle. It would have been pointless for him to have referred to the intention to create legal relations twice over. Therefore by placing a priority on the intention of the parties, Thean J. appears to have adopted an approach somewhat different to that laid down in *Street v. Mountford*.

<sup>32</sup> *Supra*, n. 2, at p. 826H.

<sup>33</sup> *Supra*, n. 26.

<sup>34</sup> *Supra*, n. 1, at p. 122H.

On closer examination, the two decisions can be reconciled on the basis that the principles in *Street v. Mountford* have been adopted by Thean J. but have been couched in slightly different terms. First, the reference to the intention to create a tenancy in *Goh Gin Chye* is not inaccurate as Lord Templeman did not jettison this concept. Instead he made exclusive possession the test of the intention to create a tenancy. This conclusion is possible as Lord Templeman did at various points refer to the intention to create a tenancy.<sup>35</sup> So though there is no explicit reference to it, where Lord Templeman referred to intention to grant exclusive possession it was also a reference to the intention to create a tenancy, *i.e.*, they are synonymous in his usage.

Viewed in this light, Thean J.'s third and fourth principles correspond with Lord Templeman's as his Lordship said:<sup>36</sup>

"Sometimes it may be difficult to discover whether, on the 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."

Hence, albeit the difference in tone and language, exclusive possession is a "material" and "essential" requirement to be considered along with other factors "negating the intention to create a tenancy". The third and fourth principles merely reflected Lord Templeman's point that exclusive possession "is of first importance in considering whether an occupier is a tenant; exclusive possession is not decisive because an occupier who enjoys exclusive possession is not necessarily a tenant"<sup>37</sup> as the exclusive possession may be referable to a legal relationship other than a tenancy. What Thean J. did not do was differentiate between the two sets of circumstances when an occupier with exclusive possession might not be a tenant, namely where there is no intention to create legal relations and where there is another relationship other than a tenancy. He has grouped them together in his last principle.

### Conclusion

The decision of Court of Appeal in *Goh Gin Chye* does make it clear that *Street v. Mountford* applies in Singapore<sup>38</sup> differing only in the tone and language used. In deciding whether there was a tenancy or

<sup>35</sup> For example, where he approved (at p. 821B) the observations of Denning L. J. in *Errington v. Errington*, he said:

"The intention to create a tenancy was negated if the parties did not intend to enter into legal relationships at all, or where the relationship between the parties was that of vendor and purchaser, master and service occupier, or where the owner, a requisitioning authority had no power to grant a tenancy. These exceptional circumstances are not to be found in the present case."

Another instance where this occurred, which was quoted by Thean J. at p. 122G, is found at p. 822E, where he commented on the decisions of *Facchini v. Bryson*, *supra*, n. 26, and *Aadiscombe Garden Estates Ltd. and Anor v. Crabbe and Ors.*, *supra*, n. 26.

<sup>36</sup> *Supra*, n. 2, at p. 826H.

<sup>37</sup> *Supra*, n. 2, at p. 823D.

<sup>38</sup> *Goh Gin Chye* does away with any possible controversy whether English land law applies to Singapore (see W. J. M. Ricquier, "Land Law and Common Law in Singapore" in *The Common Law in Singapore and Malaysia* (Edited by A. J. Harding, 1985) at p. 227), or whether it applies since the decision actually centred on the application of the Rent Act 1977 (U. K.).

a licence the court was to consider the documents, the conduct of the parties and the surrounding circumstances and not be “swayed” by the labels used by the parties.<sup>39</sup> What the judgment has failed to point out is the fact that after *Street v. Mountford* when there is a grant of exclusive possession and the absence of factors negating any intention to create legal relations or a tenancy, there is *presumption* that the relationship is one of landlord and tenant.<sup>40</sup> The intention to create a tenancy will be presumed from the fact of exclusive possession. The judgment could have pointed out this position which is perceptible from *Street v. Mountford*. Lord Templeman had said at various points<sup>41</sup> that if there is exclusive possession for a term together with payment of rent, there is a tenancy.

The Court of Appeal in *Goh Gin Chye* could have gone further and outlined the principles from the perspective of exclusive possession since this is now the ‘touchstone’ of distinction between tenancies and licences. The inquiry would begin with whether there is exclusive possession. A brief outline of the principles is as follows:

1. Is there a grant<sup>42</sup> of exclusive possession?

1.1 Where there is a grant of exclusive possession in the absence of special factors (see point 2 below) there is a tenancy if the grant is for a term at a rent. An instance where there is no exclusive possession is the situation involving a lodger.<sup>43</sup>

1.2 In deciding whether there is a grant of exclusive possession the agreement and the surrounding circumstances have to be taken into consideration unless the landlord has conceded that there was a grant of exclusive possession as in *Street v. Mountford*.<sup>44</sup>

1.3 Where the agreement is taken into consideration the crucial matter is the substance and not the form of the agreement<sup>45</sup> but the professed intention of the parties may be relevant.

2. Are there special factors involved? These special factors can be divided into two categories:<sup>46</sup> (a) where there is no intention to create legal relations<sup>47</sup> and (b) where the facts refer to another legal relationship other than a tenancy. The intention to create

<sup>39</sup> The objective approach of looking to the substance rather than the form is not dissimilar to that used by Chua J. in *Abdul Rahim*, *supra*, n. 26, though the search is for exclusive possession and not the intention of the parties as was then understood.

<sup>40</sup> Yates and Hawkins, *op. cit.*, *supra*, n. 4, at pp. 16 and 17. Tromans, *supra*, n. 15, at p. 355; Stephen Tromans, *Commercial Leases* (1987) at p. 167; *Renting and Letting*, *op. cit.*, *supra*, n. 10 at p. 17.

<sup>41</sup> Lord Templeman, *supra*, n. 2, at pp. 818F, 822C, 825C and 826E.

<sup>42</sup> There was some uncertainty whether Lord Templeman placed as a requirement that there must be de facto exclusive possession or only a right to exclusive possession. This has been settled in the subsequent cases (particularly *Markou v. Da Silva* and *Anor*, *supra*, n. 22) that must be a grant or right to exclusive possession; see A. J. Waite, *supra*, n. 22 at p. 231.

<sup>43</sup> *Brooker Settled Estates Ltd. v. Ayers*, *supra*, n. 22 is an example; there the landlord asserted that there was no exclusive possession as the other occupants of the premises had access to all parts of the flat.

<sup>44</sup> *Street v. Mountford*, *supra*, n. 2 at pp. 816B and 818D.

<sup>45</sup> D. N. Clarke, *supra*, n. 19, at p. 40.

<sup>46</sup> This is derived from Lord Templeman’s discussion in *Street v. Mountford*, *supra*, n. 2, at pp. 821 B. 822D and 826H; see also Roger Street *supra*, n. 15, at p. 330 for a flow-chart.

<sup>47</sup> Yates and Hawkins, *op. cit.*, *supra*, n. 4; Roger Street, *supra*, n. 15 at p. 330.



legal relations would obviously precede the second category of special factors.

2.1 The most common example of the absence of the intention to create legal relations is the case of the familial ties, where the occupier is let into the premises as a family arrangement.<sup>48</sup> Other examples have been acts of friendship and generosity. The absence of consideration, rent, may be another indicator whether there is an intention to create legal relations.<sup>49</sup>

2.2 Examples of the relationships other than a tenancy are: the master and service occupier,<sup>50</sup> and the vendor and purchaser.<sup>51</sup>

The decision could have gone on to comment on the subsequent cases and how they have viewed *Street v. Mountford*. This would have encompassed a discussion of a number of English Court of Appeal decisions which misinterpreted Lord Templeman's remarks when he said:<sup>52</sup> "An occupier of residential accommodation at a rent for a term is either a lodger or a tenant." In the subsequent decisions the courts had come to the conclusion that where the facts involved residential premises and there was no evidence of a lodging arrangement, there was a tenancy. It was only in the recent decision of the Court of Appeal in *Brooker Settled Estates Ltd. v. Ayers*<sup>53</sup> that this was resolved.

By confirming that *Street v. Mountford* applies *in toto* here, *Goh Gin Chye* has sounded the knell for the device of the contractual licence as a means of getting around the Control of Rent Act. The full implications of *Street v. Mountford* have still to be worked out. There are questions yet unanswered<sup>54</sup> such as the extent of its effect, whether it is confined to residential tenancies since it basically dealt with a residential tenancy.<sup>55</sup> Subsequent decisions after *Street v. Mountford* have applied the principles without qualification to business tenancies as well. The Court of Appeal's decision in *Goh Gin Chye* seems to indicate the same as the "sub-tenant" had "continued to carry on his business there".<sup>56</sup> In a very recent English case, *Dresden Estates Ltd. v. Collison*,<sup>57</sup> the Court of Appeal suggested that the exclusive possession test might be less applicable in business tenancies as these have different attributes from residential tenancies. However, that case involved special facts and a special clause.<sup>58</sup> Another question is what

<sup>48</sup> E.g., *Cobb v. Lane*, *supra*, n. 16.

<sup>49</sup> See *Renting and Letting*, *op. cit.*, *supra*, n. 10, at p. 19; this may now be doubtful in the light the recent yet unreported decision of the Court of Appeal in *Ashburn Anstalt v. Arnold & Or.*, *The Times*, 9 November 1987.

<sup>50</sup> For a *post-Street* example see *Royal Philanthropic Society and Others v. County* [1985] 2 E. G. L. R. 109.

<sup>51</sup> This is a question of fact and in *Bretherton v. Paton* [1986] 1 E. G. L. R. 172, the court applied *Street v. Mountford* to hold that a potential purchaser of a house was a tenant; she was on the premises for a considerable period of time with no intention to complete the purchase.

<sup>52</sup> *Supra*, n. 2 at pp. 817H to 818F.

<sup>53</sup> *Supra*, n. 22.

<sup>54</sup> It is not the aim of this casenote to examine these questions but to consider the decision of the Court of Appeal in Singapore which applied *Street v. Mountford*.

<sup>55</sup> See *Yates and Hawkins*, *op. cit.*, *supra*, n. 4, at p. 16, n. 60; see, also, the discussion in *Tromans*, *op. cit.*, *supra*, n. 40, at pp. 167-8. Both *Yates and Hawkins*, and *Tromans* are of the opinion that such an argument will not succeed.

<sup>56</sup> *Goh Gin Chye*, *supra*, n. 1, at p. 120E.

<sup>57</sup> (1987) 281 E.G. 1231.

<sup>58</sup> *Stephen Tromans*, *op. cit.*, *supra*, n. 40, at p. 168.

does this decision portend for the other licences which are not of a contractual nature. Yet another question is whether a sharing arrangement along the lines of *Somma v. Hazellhurst*,<sup>59</sup> where the agreement specifically states that no consideration is involved, is still possible. Such an arrangement would be helpful in relation to rent control premises, particularly those in the midst of the shopping belt. One wonders if such an arrangement binding in honour only whereby no rent is paid in the written memorandum, which indicates that the occupant's stay is only by the grace of the owner, would be successful now.<sup>60</sup> Some of these questions have themselves to be decided by either our local courts or the judiciary in England. One can only wait and see. Perhaps in the rent control situation, the only safe thing for the owner is to be careful not to grant exclusive possession by, for instance, retaining control or keeping a room, or provide services such as cleaning, *etc.* Here again the owner has to be cautious of overdoing it for the arrangement could be held to be a sham.<sup>61</sup>

#### *Postscript*

Since this case-note went to press, Thean J. has in the recent decision of *Tan Swee Eng v. Assoland Pte Ltd.*<sup>62</sup> applied the principles he enumerated in *Goh Gin Chye*. *Tan Swee Eng* also involved the use of contractual licence as a means of Control of Rent Act avoidance. Thean J. held that although the agreement had the terminology of a licence it was in substance a tenancy and that the occupier had exclusive possession at all material times and was therefore a tenant.

TAN WEE LIANG\*

<sup>59</sup> See Roger Street, *supra*, n. 15, at pp. 332-3.

<sup>60</sup> See Roger Street, *ibid.*, at p. 331 who does not think so.

<sup>61</sup> See, e.g., *Markou v. Da Silvaes & Anor*, *supra*, n. 22.

<sup>62</sup> [1988]2M.L.J. 350.

\* LL.B. (N.U.S.), LL.M. (Cantab.), Advocate and Solicitor, Supreme Court of Singapore, Lecturer, School of Accountancy, Nanyang Technological Institute.