***PROCTER v PROCTER*: PARTNERS BEWARE THE PARADOX OF NON-EXCLUSIVE EXCLUSIVE POSSESSION**

By Bruce Walker – Barrister, Enterprise Chambers 19/2/2021

The result in *Procter v. Procter*

1. The Court of Appeal in ***Procter v Procter* [2021] EWCA Civ 167** held that a tenancy can be inferred to a partnership of 5 who occupy premises, despite 3 of their number being the freeholders. In short, the 5 have possession exclusive of 3 of their number.

A tenancy inferred

2. It is well settled that a tenancy can be inferred from the grant of exclusive possession, at a rent, for a period[1].

Inferred tenancy ABC to ABCDE: can 5 have possession exclusive of 3 of their number?

3. But suppose 3 freeholders ("**A**") enter partnership with 2 others ("**B**"), and their partnership of 5 ("**A+B**") occupy the freeholders' land together, paying the 3 freeholders for use of the land. Can the 5 have "exclusive possession" to infer a tenancy? Specifically, can 5 be said to have possession exclusive of 3 of their number (the 3 freeholders) to infer a tenancy?

What is "exclusive possession"?

4. To infer a tenancy, the House of Lords has defined "exclusive possession" as the tenant's ability to *"keep out the landlord"* or *"exclude his landlord"*[2]. How can 5 partners *"keep out"* 3 of their number? Those 3 freeholders are intended to be in occupation.

5. In the wider context of English land law, "possession" has 2 elements[3]. The second is an "intention to possess", which requires an *"intention … to exclude … the owner with the*

---

[1] *Street v. Mountford* [1985] AC 809 at 826.

[2] *Street v. Mountford* at 816, 827.

[3] Factual possession and an intention to possess: *Powell v. McFarlane* (1977) 38 P&CR 452 at 470-1. Approved in *Pye (Oxford) v. Graham* [2003] 1 AC 419 at [40]-[43].

paper title …"[4]. If some of the partners assert "possession" by the 5, amounting to "exclusive possession" required for a tenancy, how can the 5 be said to *"intend … to exclude"* 3 of their number? Those 3 freeholders are intended to be in occupation.

The paradox addressed

6. That paradox was addressed by the Court of Appeal in ***Procter v Procter*** **[2021] EWCA Civ 167**. The 5 (**A+B**) were a family farming partnership of 2 parents and their 3 adult children. The 3 freeholders (**A**) were the 2 parents and 1 of the adult children. The Court of Appeal held that the 5 could have exclusive possession against 3 of their number, so a tenancy to the 5 could be inferred.

7. How did the Court reach that conclusion? The starting point is the 1925 legislation. The end point is 3 cases from the 19th century in which exclusive possession was not mentioned. Properly understood in their era, those 3 cases were not even "tenancies" from **A** to **A+B**, they were to **B** alone who shared occupation with his "landlord" **A**.

Statute

8. Section 72(2) Law of Property Act 1925 permits **A** to convey to **A+B**. A "conveyance" includes a lease[5], which must be in writing to qualify under section 72[6]. So, section 72(2) validates a *written* lease from **A** to **A+B**[7]. But not an *oral* tenancy, nor a tenancy *inferred from conduct*.

9. Why would statutory validation be needed, if a tenancy from **A** to **A+B** was already valid at common law? One might be forgiven for presuming that common law did not previously allow such a transaction.

Freeholds and deeds at common law

10. Certainly that was true for freeholds. At common law, **A** could not convey directly to **A+B**. Such a conveyance would take effect to **B** alone[8]. A recent case stated the old common law more broadly: a *deed* by **A** in favour of **A+B** had the effect of vesting the

---

[4] *Pye v. Graham* at 437.

[5] S.205(1)(ii) LPA 1925

[6] *Rye v. Rye* [1962] AC 496.

[7] Section 72(2) had a predecessor, s.50 Conveyance Act 1881, in substantially the same terms. Rather than mere writing, a deed was required by section 2(iv) of that Act.

[8] Perkins' Profitable Book 15th 1827 s.203. Conveyancers circumvented the problem by using the Statute of Uses 1535: a conveyance **A** to **X**, to the use of **A+B**, would take effect as a conveyance direct to **A+B**.

legal estate in **B** alone[9]. But that statement was confined to *deeds*, and all the supporting law was confined to freehold conveyances or deeds[10].

11. The Court of Appeal in *Procter* at [57] doubted the principle was confined to deeds, based on the 3 cases from the mid-1800s, mentioned above and examined below.

Contracts – even more restrictive

12. Contract law stopped shorter. An attempt by **A** to covenant with **A+B** jointly created no contract at all. For obvious reasons: **A** cannot contract with himself. That could not be saved by adding **B** as *jointly* entitled or liable with **A**[11]. The rule was retrospectively changed by s.82 LPA 1925, so such covenants and agreements take effect between (1) **A** and (2) **B** alone. So contract law was aligned with freehold conveyances at common law: transactions from **A** to **A+B** took effect with **B** alone.

Tenancies – first blush

13. What of tenancies? Given the above, one might expect the following.

14. If a deed could not effect a *freehold* conveyance from **A** to **A+B** jointly, one might expect a deed could not effect a *lease* from **A** to **A+B** jointly. At best, a deed from **A** to **A+B** might grant a lease to **B** alone.

15. Equally, if a *deed* could not effect a lease to **A+B** jointly, then one might expect an *oral agreement* could not effect a tenancy to **A+B** jointly. Again, at best, such an oral tenancy might be to **B** alone. This might satisfy the Court of Appeal's doubt mentioned above.

16. Likewise, a tenancy *inferred from conduct* might be to **B** alone (at best). But **B** shared occupation with his "landlord" **A**, so the absence of exclusive possession would prevent the inference of a tenancy to **B** alone. Or would it?

Merger and legal tenancies in common

17. To understand the common law, the Court of Appeal first considered two principles: (1) merger and (2) pre-1926 legal tenancies in common.

---

[9] *Lie v. Mohile* [2014] 2 P&CR 13 at [16].

[10] Megarry & Wade's Law of Real Property 1st Ed p158; Perkins 1827 *op cit*; Sheppard's Touchstones 1820 p82.

[11] *Faulkner v. Lowe* (1848) 154 ER 628; *Ellis v. Kerr* [1910] 1 Ch 529. For the rule between **A** and **A**, see *Grey v. Ellison* (1856) 65 ER 990. Dealt within *Procter v. Procter* at [59]-[64].

18. As for merger, if **A** became both landlord and tenant, there was no automatic merger to extinguish his tenancy, rather the courts looked at **A**'s intention[12]. So **A** could oddly become his own landlord by merger[13]. That was impossible by grant, both at common law and under section 72 LPA 1925[14].

19. As for legal tenancies in common, before 1926 land could be held *at law* by co-owners two ways: a joint tenancy or a tenancy-in-common. After 1925, *at law*, only a joint tenancy was possible.

20. A combination of both principles was applied in a pre-1926 case[15]. **A+B+C** owned the freehold and granted a written lease to **A** alone. It was reasoned that **A** occupied 1/3 by his freehold (the legal freehold having been severed to create a legal freehold tenancy-in-common in equal 1/3 shares, in which 1/3 of the lease granted by **A** to himself had merged) and 2/3 by his lease from **B+C**. The written lease was held valid (as to 2/3), but its covenants were void because **A** could not covenant with himself and others. The logic works. Equally the sense: the parties had a written bargain and **A** had possession exclusive of **B+C**, so the court upheld the lease as a legal estate, but could not save its covenants.

21. But what if the facts were reversed[16]: a claimed tenancy from **A** to **A+B+C**? **A**'s 1/3 severed tenancy would merge in his freehold interest, so *he* would occupy by reason of his freehold. As for **B+C**, *they* would occupy by a 2/3 severed tenancy. But "tenants" **B+C** would occupy with the freeholder **A**, so not have possession exclusive of their "landlord" **A**. How could a tenancy be inferred to **B+C**, absent exclusive possession?

<u>3 common law cases from the 1800s</u>

22. Similar facts arose in 3 authorities, on which the Court of Appeal relied in *Procter*. In none was exclusive possession argued, nor mentioned in the judgments. Properly understood, they are "tenancies" from **A** to **B** alone, with shared occupation.

---

[12] Prior to the Judicature Acts, the Courts of Law held that the tenancy automatically merged in the higher freehold estate (unless **A** held the two in different capacities), whereas the Courts of Equity had no such rule, but looked at **A**'s intention. After the Judicature Act 1873, the equitable rules prevailed.

[13] If **A+B+C** granted a written lease to **A** alone, which was registered, then **B** and **C** died, **A** would be sole landlord (by survivorship) and sole tenant, with no obligation to close the registered leasehold title.

[14] The decision in *Rye v. Rye* [1962] AC 496. Gray's Elements of Land Law 5th pa 4.2.4.

[15] *Napier v. Williams* [1911] 1 Ch 361.

[16] And assume the facts arose before s.50 Conveyancing Act 1881, and before the Judicature Acts, so that the common law applied, as in the 3 cases dealt with next.

23. In the first[17], Colnaghi (**A**) had a headlease. He entered partnership with Bluck (**B**). Their partnership (**A+B**) paid "rent" to Colnaghi. There was no written sublease to the partnership, nor evidence of any oral agreement. The partnership terminated and Colnaghi claimed possession against Bluck. Tindal CJ put this question to the jury: *"If Mr Bluck, as one of the partners in the firm … became tenant to Mr Colnaghi"* then Bluck was bound to give up possession. But Tindal CJ did not address the 2 prior questions.

    a. First, whether in law there could be a tenancy from Colnaghi to Colnaghi + Bluck jointly (**A** to **A+B**). Plainly not, since Colnaghi's 2 interests would have merged in that era, so he would occupy by his headlease, and Bluck would occupy by any subtenancy[18]. This was not a "paradox" case of tenancy from **A** to **A+B**. It was a "tenancy" from **A** to **B** alone, where **A** and **B** shared occupation.

    b. Second and consequently, whether in law a subtenancy from Colnagi to Bluck alone could be inferred, since Bluck shared occupation with Colnaghi his "landlord", so had no exclusive possession.

24. In the second case[19], the same 2 matters were again not considered.

25. The third case[20], with 4 judgments, is even more problematic. Harvey (**A**) had a headlease. He entered partnership with his 3 sons (**B**). Their partnership of 4 (**A+B**) paid the headlease rent. The issue was whether the 3 sons had voting rights by statute, for which they had to prove they were tenants, so the question for the Court was: *"whether the relation of landlord and tenant was created between the [3 sons] and any one"*.

    a. The 3 sons argued that they occupied *"jointly with their father, as tenants to him"*. That was a surprising submission. Occupying *"jointly with their father"* would mean they had no possession exclusive of him, and were doubly not *"tenants to him"* (if joint status *with* him, and no exclusive possession *of* him).

    b. Cockburn CJ acknowledged that Harvey could not become his own tenant at common law: *"true it is that a man cannot become tenant to himself"*. If so, it is difficult to see why that principle did not apply in *Procter*. Any inferred tenancy should *prima facie* have taken effect as a tenancy to **B** alone, who would then not have possession exclusive of **A** on the facts, so no tenancy could be inferred.

---

[17] *Colnaghi v. Bluck* (1838) 173 ER 577.

[18] By the reasoning in *Napier v. Williams*.

[19] *Rowley v. Adams* (1844) 49 ER 1178.

[20] *Rogers v. Harvey* (1858) 141 ER 1.

c. Cockburn CJ continued: *"so [Harvey's] share would merge in the rest, I see no reason why the demise should not enure for the benefit of the others [the 3 sons]; and then the three sons … would be tenants in common"*. That reasoning has 3 crucial elements to unravel.

i. First, Harvey's share in any sublease would not *"merge in the rest"* but merge in his own headlease[21].

ii. Second, in saying the subtenancy *"enure[d] for the benefit of the [3 sons]"*, Harvey must have been occupying by his headlease into which his 1/4 severed interest in any sublease had merged, and his 3 sons must have occupied by a 3/4 severed sublease from Harvey[22].

iii. Third, since the 3 sons then shared occupation with their "landlord" Harvey, they did not have possession exclusive of their landlord, so no subtenancy to the 3 sons could be inferred.

iv. In summary, Cockburn held a tenancy from **A** to **B** alone, yet knew that **A** shared occupation with **B**, and still did not mention the problem of exclusive possession. This too was not a "paradox" case of tenancy from **A** to **A+B**, it was a case of "tenancy" from **A** to **B** alone, where **A** and **B** shared occupation.

d. Williams J followed previous authority, holding the 3 sons were *"at lowest as tenants at will to their father"*. Even a tenant at will must have exclusive possession, but Williams J did not explain how the 3 sons had possession exclusive of Harvey their "landlord", with whom they shared occupation.

e. Crowder J held himself bound by the same authority, and held *"There was, therefore, a tenancy of some sort"*. He did not identify the landlord, nor address exclusive possession.

f. Byles J reached the same conclusion as Cockburn CJ, but did not address exclusive possession.

26. In *Procter* at [68] the Court of Appeal held that the 19th century judges must be presumed to have known of the necessity for exclusive possession to create a tenancy, and so held those 3 cases were authority for the common law proposition that **A** can grant exclusive possession to **A+B**.

---

[21] A correction made by the Court of Appeal in *Procter* at [49].

[22] Again, by reasoning similar to *Napier v. Williams*.

27. That is a difficult conclusion. Can it be presumed the judges considered a point neither argued nor mentioned in judgment? Today's judges are acutely conscious of exclusive possession, since *Street v. Mountford* and *Pye v. Graham* and other 20th century cases. But mid-19th century judges did not have that benefit. If the mid-19th century judges *did* know the requirement for exclusive possession, it is surprising they did not mention it.

28. The Court of Appeal's conclusion is all the more difficult because Cockburn CJ clearly found a tenancy from **A** to **B** alone (after merger of **A**'s interests), in which **A** and **B** shared occupation, so **B**'s want of exclusive possession should have prevented the inference of a tenancy to **B**. Properly understood, the other two cases were also "tenancies" from **A** to **B** alone, with shared occupation.

29. Nevertheless, founded on those mid-1800s cases, the Court of Appeal in *Procter* concluded at [58] and [69] that there was no conceptual difficulty in an express grant of tenancy at common law from **A** to **A+B**, even if not written.

Exclusive possession in **A+B** endorsed by statute?

30. The Court of Appeal was confirmed in its conclusion, reasoning at [69] that section 72 LPA 1925 contemplates a tenancy from **A** to **A+B**, so contemplates that **A** can grant exclusive possession to **A+B**.

31. If intended to support the proposition that common law always permitted such a grant of exclusive possession, that is difficult reasoning. If common law already permitted a tenancy and exclusive possession from **A** to **A+B**, one is left wondering why section 72(2) was enacted for leases. Surely it is more likely that section 72(2) was permitting something not previously allowed at common law[23].

32. The trial judge addressed the point that way. He held that section 72 carried with it the right to exclusive possession for **A+B** as against **A** – such exclusive possession being a result of the statute for written leases.

A foundation in **A+B**'s possession being joint and single, so excluding **A**?

33. In reasoning that **A** could grant exclusive possession to **A+B**, the Court of Appeal at [70]-[73] identified that possession by **A+B** is necessarily joint and single[24]. Such single joint possession of **A+B** would be exclusive of **A** alone, since it was reasoned that **A** gave up

[23] It had been allowed by the predecessor to s.72(2) – section 50 Conveyancing Act 1881, but the same question would arise for s.50 – why was it enacted, if a common law already permitted a tenancy and exclusive possession from **A** to **A+B**.

[24] *Pye v Graham* at 445.

his right to possession (i.e. was excluded from possession) in return for receiving rents and profits from **A+B**[25]. That reasoning raises awkward issues.

34. First, for **A+B**'s possession to be "joint and single", presupposes that **A+B** have "possession". That is a prior question, which includes the question whether **A+B** have an "intention to possess", namely an intention to *"exclude the owner … with the paper title"*. How can **A+B** intend to exclude **A**? That is a paradox of intention.

35. Second, the reasoning contrasts with exclusive possession in *Street v Mountford*, which requires the ability of **A+B** as tenant, to *"keep out the landlord"* **A**, to infer a tenancy. How can **A+B** keep out **A**? It is not a theoretical keeping out **A**, in exchange for **A**'s receiving rents and profits, as the Court of Appeal reasoned. It is the real exclusion of **A** from the land, if a tenancy is to be inferred. That is a paradox of action.

36. That paradox has been previously rejected by the Court of Appeal in a case of a purported exclusive licence from **A** to **A+B** jointly as a farming partnership[26]. That is a key authority, because it is unencumbered by the effect of section 72 LPA 1925, so applies pure common law. It was held there, that **A** could not grant exclusive possession to **A+B** jointly: "I *cannot give myself a licence jointly with somebody else, for I already have a right to go on the land … the person to whom the licence is granted [must] have the right to exclude the grantor of the licence from the land, as any other tenant has a right to exclude his landlord for the purposes for which the tenancy is made. If it is a tenancy, that is to something giving the grantee the right to exclude the grantor … that results in the anomaly [(our paradox)] that [A+B] can exclude [A] as landlord though she may come onto the land as tenant"*.

Capacities?

37. The final reason the Court of Appeal relied on in *Procter* at [73] and [77], was that **A** can act in two different capacities: freeholder landlord, and tenant partner.

38. Yet different capacities did not save the claimed exclusive licence[27], in which **A** acted in 2 capacities: administratrix grantor, and partner grantee (with **B**).

---

[25] Reliance was placed on *Churcher v. Martin* (1888) 44 Ch D 312. But that was a case where trustees occupied, and since the office of trustees is joint, occupation by one was necessarily joint occupation by all.

[26] *Harrison-Broadley v. Smith* [1964] 1 WLR 456 at 465, CA. A decision approved by the House of Lords in *Bahamas International Trust Co Ltd v. Threadgold* [1974] 1 WLR 1514 HL.

[27] *Harrison-Broadley v. Smith*.

39. Nor did Cockburn CJ make such a distinction in the 1800s where such different capacities arose, saying simply: *"a man cannot become tenant to himself"*[28].

40. In principle, capacities is a difficult distinction. A man does not have a separate legal identity simply by being a partner. So an attempt to create an oral (or inferred) tenancy from **A+B** as freeholder to **A+B** as partners fails[29], and the differing capacities does not save it. Nor should a transaction between **A** and **A+B** be saved by differing capacities of A (who has no separate legal identity from himself).

The practical consequences of the new "exclusive possession"

41. So what are the real-world consequences of the newly defined exclusive possession?

42. In some partnerships, there will be a formal written lease to the partners from some of their number, validated by section 72(2) LPA 1925. There is no need to consider the paradox of overlapping parties and exclusive possession.

43. But in some partnerships, those partners who own the freehold may only intend to grant a licence to allow their other partners to share their premises. They will expect their own occupation to preclude a tenancy, for want of exclusive possession in the others. That appears no longer true: all the partners jointly will have "exclusive possession". It is unlikely to be good enough expressly to agree a licence not a tenancy, since the partners jointly will have exclusive possession and be paying a periodic rent, giving rise to a tenancy. A 5-pronged instrument for manual digging is a fork, even if the manufacturer calls it a spade[30].

44. Such a tenancy may then gain statutory protection.

45. The consequences may be far-reaching for solicitors, doctors and farmers, among other partnerships.

Bruce Walker
Enterprise Chambers

Email: BruceWalker@enterprisechambers.com
Tel: 0113 246 0391

---

[28] *Rogers v Harvey*.
[29] *Rye v Rye*.
[30] *Street v Mountford* at 819.