The Meaning of 'right to possession' after *Bruton*: The More Things Seem to Change, The More they Stay the Same

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Abstract— This article hopes to make a useful and clarificatory contribution to the academic discussion following the decision in *Bruton v London & Quadrant Housing Trust*. First, it discusses the meaning of the 'right to possession', arguing that this definition remains unchanged in the wake of *Bruton* as 'the right to exclude all those without superior relative title'. It then focuses on two prominent interpretations of *Bruton*. It will demonstrate that whether Bruton is taken to be a case about contractualisation of leases, or relativity of title, the definition of the right to possession remains unchanged. It concludes by noting that any suggestion that there now exists a third 'quasi-proprietary' interest cannot stand and should be roundly rejected.

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Introduction

The decision of the House of Lords in *Bruton v London and Quadrant Housing Trust*[1] has generated a flurry of academic discussion.[2] Despite, or perhaps because of, this spirited discussion there is little consensus as to the effect of the decision, even over twenty years later. This article will seek to provide a fresh perspective on this issue through a focus on the meaning of the 'right to possession', asking how that term is properly defined, and whether its definition has been altered by the decision in *Bruton*. The meaning of the 'right to possession' is particularly important to define accurately, as it is 'a key part of what it means to own property'.[3]

Two interpretations of *Bruton* are most prominent within academic discussion. The first views the decision in *Bruton* as generating a purely personal, contractual interest (the 'contractual lease theory'). The second sees *Bruton* as a decision based on relativity of title (the 'academic reconceptualization theory'). This article will demonstrate the following four propositions:

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[1] [2000] 1 AC 406 (HL).

[2] Michael Harwood, 'Leases: Are They Still Not Really Real?' (2000) 20 LS 503; S Murdoch, 'Of Carts and Horses' [1999] EG 9930, 90; Jan Luba, 'The House of Lords and Landlord and Tenant' [1999] L&T Rev 115; Susan Pascoe, '*Street v Mountford* Gone Too Far' [1999] JHL 87; Susan Bright, 'Leases, Exclusive Possession and Estates' (2000) 116 LQR 7; Martin Dixon, 'The Non-contractual Lease: the Rise of the Feudal Phoenix' (2000) 59 CLJ 25.

[3] Kevin Gray, 'Property in Thin Air' (1991) 50 CLJ 252; JW Harris, *Property and Justice* (OUP 1996) 68-75; Thomas W. Merrill, 'Property and the Right to Exclude' (1998) 77 Nebraska LR 730.

1) The 'right to possession', despite some contentions to the contrary, is properly defined as the 'right to exclude all those without superior relative title'.

2) If the interpretation of *Bruton* which we call the 'contractual lease theory' is accepted: (i) the definition of the 'right to possession' remains unchanged, but (ii) the definition of the word 'lease' must be modified in light of *Bruton*.

3) If, alternatively, the 'academic reconceptualization theory' is accepted: (i) the definition of the 'right to possession' remains unchanged, and (ii) the definition of the word 'lease' remains unchanged.

4) There is no support in the case law for an intermediary interpretation between the two laid out above.

First, the meaning of 'right to possession' will be considered as it stood before the decision in *Bruton*. The common idea that the 'right to possession' is the 'right to exclude all others' will be shown to be untenable, as it cannot be squared with the fundamental doctrine of relativity of title. Next, it will be shown that this definition of 'the right to possession' remains unchanged after *Bruton*. We will consider two possible interpretations of the decision, showing both interpretations to be compatible with our definition. The final contention will be that any suggestion that *Bruton* created an intermediary category (i.e. an interest which could bind some third parties but not others) is not supported by the case law. We thus conclude that there is nothing in *Bruton* or later cases to suggest that the 'right to possession' means anything other than the 'right to exclude all those without superior relative title'. A summary of our argument can be found in tabular form in the Appendices.

1. The Meaning of the 'Right to Possession' before *Bruton*

A. The Distinction between Leaseholds and Licences

This section will seek to show that the 'right to possession' is properly defined as 'the right to exclude all those without superior relative title'. Attempts to define the 'right to possession' along the lines of the 'right to exclude the whole world' are misplaced. This is because they are inconsistent with the doctrine of relativity of title, a concept at the core of English land law. Establishing the position before *Bruton* with precision is important, as it will affect the later analysis of whether the decision in *Bruton* has moved away from any previous position.

The 'right to possession' is a key distinguishing feature between legal estates and merely personal interests. The difference between these two classes of interest is that a legal estate is proprietary, meaning it binds at least some strangers, i.e. people other than the parties to the agreement, whereas a personal interest binds only the parties to the agreement.[4] After 1925[5], the only estates which can subsist at law are the fee simple absolute in possession (colloquially called a fee simple or a freehold) and

[4] *Thomas v Sorrell* (1673) 124 ER 1098 (CP) 1109 (Vaughan CJ), 'a dispensation or licence properly passeth no interest nor alters or transfers property in any thing, but only makes an action lawful, which without it had been unlawful'. See also *Muskett v Hill* (1839) 5 Bing NC 694 (CP) 707; *Heap v Hartley* (1889) 42 Ch D 461 (CA) 468.
[5] Law of Property Act 1925, s 1(1).

the term of years absolute (colloquially called a leasehold[6]). Although the precise incidents of the fee simple are debated,[7] it is beyond doubt that, as the interest is an estate, it is fully alienable, and one of its characteristics is that it entails a 'right to possession'. The meaning of the 'right to possession' in the context of fees simple has not led to controversy.[8]

Where a line does have to be drawn is between the proprietary leasehold estate and the personal licence. It is here that the meaning of the 'right to possession' is key.[9] The landmark case on the difference between these two interests is *Street v Mountford*.[10] Mr Street granted Mrs Mountford permission to stay in two rooms in exchange for £37 per week. The agreement purported to be a licence and it was expressly stated that Mr Street did not intend to grant a leasehold estate. Lord Templeman, giving the sole judgment of the House of Lords, held that the

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[6] Also colloquially called a 'lease', but we refrain from using this language. In *Bruton*, Lord Hoffmann, at least on one interpretation of His Lordship's judgment, introduced a previously unknown distinction between a leasehold and a lease, so to use them interchangeably would now be unwise.

[7] Simon Douglas, 'The Content of a Freehold' in Nicholas Hopkins (ed), *Modern Studies in Property Law, Volume 7* (Hart 2013).

[8] This is because, although the 'right to possession' is a result of recognising an interest as being in a fee simple, it is not a condition for that interest arising. Fees simple can either be transferred from another or originally generated. Transfer from another is easy to recognize, and, although the circumstances which must be present to generate an original fee simple are hotly debated, this debate relates to the question of whether the person claiming the interest has met the requirements to be in possession, not whether they have the 'right to possession'.

[9] The 'right to possession' can also distinguish between a lease and an easement, though the same rules as here would apply. See Stuart Bridge, Elizabeth Cooke and Martin Dixon (eds), *Megarry and Wade: The Law of Real Property* (9th ed, Sweet & Maxwell 2019) para 16-033.

[10] [1985] AC 809 (HL).

agreement nevertheless did result in the grant of a leasehold estate. His Lordship stressed the importance of the substance of the agreement in determining the type of interest it created, and the irrelevance of the label which the parties attached to it. His Lordship stated that to:

> 'constitute a tenancy[11] the occupier must be granted exclusive possession for a fixed or periodic term certain in consideration of a premium or periodical payments.'[12]

Strictly speaking, Lord Templeman talks of the grant of 'exclusive possession', rather than the grant of the 'right to possession'. There are two reasons why we think the 'right to possession' is a simpler and more reflective phrase to use. First, possession is necessarily an exclusive concept.[13] Two persons can only be in possession if their possession is joint and several.[14] Any reference to a concept of 'exclusive possession' is thus

[11] Again, because the distinction between 'lease/tenancy' and 'leasehold estate' was only introduced by Lord Hoffmann in *Bruton* in 2000, Lord Templeman does refer to a 'tenancy' here, but more specifically he is referring to a leasehold estate.

[12] *Street* (n 10) 818E (emphasis added). Despite there being three requirements stated here, the definition of the 'right to possession' is of primary importance, as payment of rent is no longer a requirement of tenancy (*Ashburn Anstalt v Arnold* [1988] Ch 1 (CA)) and the courts are clearly not content with the requirement of certain term (*Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386 (HL) 396-397 (Lord Browne-Wilkinson).

[13] *JA Pye (Oxford) Ltd v Graham* [2002] UKHL 30, [2003] 1 AC 419 [70] (Lord Hope): 'Exclusivity is of the essence of possession'.

[14] ibid [38] (Lord Browne-Wilkinson). For the difference between joint and several possession, and possession by an individual, see, for example, *Antoniades v Villiers* [1990] 1 AC 417 (HL).

redundant,[15] so simply 'possession' will suffice. Second, although Lord Templeman speaks of the 'grant of possession', it is safe to assume what His Lordship means is the 'right to possession'.[16] This is because, when construing an agreement to determine whether it is a lease or a licence, it only makes sense to analyse the contents of the agreement, i.e. the rights conferred under it. 'Possession' *simpliciter* can only relate to a relationship one has with land as a matter of fact, irrespective of any legal entitlement. 'Possession' thus cannot be the focus of one's construction of a legal agreement. Rather than referring to 'exclusive possession', then, we will refer to the 'right to possession' throughout this article. This is simply to avoid confusion and should not affect the substance of the argument.

What is necessary is thus the grant of the 'right to possession'. Lord Templeman defined this right in the following terms:

> 'a tenant armed with exclusive possession ['the right to possession'] can keep out strangers and keep out the landlord unless the landlord is exercising limited rights reserved to him by the tenancy agreement to enter and view and repair.'[17]

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[15] This was recognized in the Australian case of *Western Australia v Ward* (2002) 213 CLR 1 [503] (McHugh J). See also Jonathan Hill, 'The Proprietary Character of Possession' in Elizabeth Cooke (ed), *Modern Studies in Property Law Volume 1* (Hart 2001) 27.

[16] We are bolstered in this conclusion by His Lordship's reference at 824E to the previous case of *Shell-Mex v Manchester Garages* [1971] 1 WLR 612 (CA), where His Lordship comments that the key issue was whether the agreement conferred 'the right to exclusive possession'.

[17] *Street* (n 10) 816C (Lord Templeman). Lord Templeman makes clear that the agreement must 'confer the right to exclusive possession … No

The following diagram represents a hypothetical hierarchy of interests in the same piece of land. The concept of a 'superior relative title holder' will be explained in more detail in the next section. The 'landlord' and 'tenant' are represented on the same level, as a leasehold consists of carving a derivative interest from the landlord's fee simple, meaning the landlord's and tenant's interests will always be of the same relative strength.

<table>
<tr><td colspan="2">(i) The supreme owner/registered proprietor</td></tr>
<tr><td colspan="2">(ii) A superior relative title holder</td></tr>
<tr><td>(iiia) The 'landlord'</td><td>(iiib) The 'tenant'</td></tr>
<tr><td colspan="2">(iv) Strangers/the world at large</td></tr>
</table>

In determining whether the 'right to possession' has been conferred, according to Lord Templeman, the grantee must be able to '*keep out strangers and keep out the landlord*'. This means the right to exclude (iiia) the landlord and (iv) strangers. It does not include the ability to keep out (i) the legal owner, or (ii) a superior relative title holder.

Another definition of the 'right to possession', which is different in a subtle but important manner, appears in cases, articles and textbooks. These definitions do require the 'right to

other test for distinguishing between a contractual tenancy and a contractual licence appears to be understandable or workable'.

exclude all others', which we say is inconsistent with Lord Templeman's definition in *Street*. In *Watts v Stewart* Sir, Terence Etherton MR said:

> legal exclusive possession entitles the occupier to exclude *all others*, including the legal owner, from the property.[18]

This formulation would require significantly more than Lord Templeman's definition. It would require the right to exclude not only (iiia) the landlord, and (iv) strangers, but also (i) the legal owner and (ii) a superior relative title holder. Which of these conflicting approaches is correct? We say that only Lord Templeman's definition can be right. Those based on a requirement of the 'right to exclude all others' must be mistaken, due to their inconsistency with the fundamental principle of relativity of title which underlies English land law.

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[18] [2016] EWCA Civ 1247, [2018] Ch 423 [31] (Sir Terence Etherton MR). This may have been an oversight on His Lordship's part, but it is repeated so often in textbooks and commentary that we think it merits discussion. Instances of definitions along these lines can be found at: *Megarry and Wade* (n 9) para 16-013 'the right to exclude all other persons'; Mark Pawlowski, 'Occupational Rights in Leasehold Law: Time for Rationalisation?' [2002] Conv 550 'the right to exclude the world (including the landlord)'; Simon Gardner and Emily Mackenzie, *An Introduction to Land Law* (4th edn, Hart 2014) 237 '[you have] exclusive possession… if your right entitles you to occupy the house on your own: that is, to *exclude everyone else* if you wish'; *Woodfall: Landlord and Tenant* (Sweet & Maxwell 2017) para 1.023; Susan Bright, *Landlord and Tenant Law in Context* (Hart 2007) 71; Susan Bright, '*Street v Mountford* Revisited' in Susan Bright (ed), *Landlord and Tenant Law: Past, Present and Future* (Hart 2006) 32; *Aldridge Leasehold Law* (Sweet & Maxwell 2022) para 1.001A.

B. Relativity of Title in English Land Law

To explain why only Lord Templeman's definition (the right to exclude the landlord and strangers) can be right, and the alternative definition (the right to exclude all others) may be misplaced, we must consider the doctrine of relativity of title, which forms the 'bedrock' of English land law.[19] A summary of the following argument can be found in Appendix A.

Given that, according to the Land Registry,[20] over 87% of land in England has a registered proprietor,[21] it is tempting to think of land as being 'owned' by the one registered proprietor, whose 'fee simple' title, except in exceptional circumstances,[22] is indefeasible. This, however, tells only half of the story. In fact, many fees simple can exist in the same land, even if one of them is registered.

This is because possession in itself is a source of title in English law.[23] The discussion in this article will proceed from the premise that possession, i.e. exclusive factual control over land coupled with an intention for the possessor to possess on their

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[19] *Wells v Pilling Parish Council* [2009] EWHC 556 (Ch), [2008] 2 EGLR 29 [7].

[20] HM Land Registry, Performance Report (15 July 2021) <www.gov.uk/government/publications/hm-land-registry-annual-report-and-accounts-2020-to-2021/performance-report> accessed 29 May 2022.

[21] The 'registered proprietor' is the sole fee simple holder, or joint and several holders, whose interest is recorded and protected by the Land Register.

[22] For example, rectification of the Register for mistake. See *Swift 1st Ltd v Chief Land Registrar* [2015] EWCA Civ 330, [2015] Ch 602.

[23] *Asher v Whitlock* (1865-66) LR 1 QB 1 (QB); *Alan Wibberley Building Ltd v Insley* [1999] 1 WLR 894 (HL) 898 (Lord Hoffmann).

own behalf,[24] generates an original fee simple title. This may sound surprising, but it is commonly accepted in the context of adverse possession,[25] and the rule is no different for consensual possession.[26] Dr Luke Rostill has convincingly and thoroughly shown that this proposition is correct as a matter of authority.[27] It is, moreover, also generally desirable as a means of having some form of structured regulation of interests which exist below the paramount title,[28] with no prejudice to that paramount title holder/registered proprietor.

If we accept that the doctrine of relativity of title is defensible, this raises the question of how it operates in practice. Specifically, how can multiple fees simple exist in the same land, if each entails a 'right to possession', and possession is necessarily single and exclusive?[29] The answer is that, although possession itself must be exclusive, i.e. only one person can be in possession at any one time, the *right* to possession need not be exclusive.

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[24] *JA Pye* (n 13) [40] (Lord Browne-Wilkinson).

[25] This is so even after the Land Registration Act 2002. See Schedule 6 Para 5(4)(c), 9(1) and 11(2), which recognize the adverse possessor as still having an interest before registration.

[26] This is widely accepted academically, see Ben McFarlane, *The Structure of Property Law* (Hart 2008) 154–156; Nicholas Roberts, 'The Bruton Tenancy: a Matter of Relativity' [2012] Conv 87; Amy Goymour, '*Bruton v London & Quadrant Housing Trust* [2000]: Relativity of Title, and the Regulation of the "Proprietary Underworld"' in Simon Douglas, Robin Hickey and Emma Earing (eds), *Landmark Cases in Property Law* (Bloomsbury 2015); cf. Adam Baker, 'Bruton, Licensees in Possession and a Fiction of Title' [2014] Conv 495.

[27] Luke Rostill, '*Possession, Relative Title and Ownership in English Law*' (OUP 2021). See also Robin Hickey, *Possession and the Rights of Finders* (Hart 2010) ch 5.

[28] In what Goymour has termed the 'proprietary underworld'; see Goymour (n 28).

[29] *JA Pye* (n 13) [70] (Lord Hope) 'Exclusivity is of the essence of possession'.

Multiple people can have rights to possession in the same land; these rights exist in a hierarchy determined through application of the priority rules. The concept of 'relativity of title' is the idea that, when faced with two parties claiming entitlement to land, the court simply asks which party has the *better* claim,[30] rather than saying one party has the *best* claim, and all other interests or entitlements are invalid.

This is demonstrated in the following example:

> Example 1: Atticus purchases and is transferred a fee simple estate in Blueacre, and is registered as proprietor. When Atticus goes on holiday, Belinda enters into possession of Blueacre, changing the locks. When Belinda goes to the shops, Charles enters into possession, again changing the locks and barricading himself in.

Atticus has a fee simple by virtue of a transfer to him, and its protection by registration means it takes priority over all other interests.[31] Belinda will have a fee simple by virtue of her possession,[32] as will Charles by virtue of his later possession. Atticus is the registered proprietor, meaning his claim will be stronger than both Belinda's and Charles'. When considering who has a stronger claim between Belinda and Charles, we must use the priority rules for unregistered title, as both their titles are

[30] *Ocean Estates v Pinder* [1969] 2 AC 19 (HL) 24-25 (Lord Diplock).
[31] Law of Property Act 1925, s 29.
[32] Being dispossessed will not deprive Belinda of her fee simple, as these interests are not dependent on continued possession. See Rostill (n 29) 55.

unregistered.[33] This is a simple 'first in time' rule,[34] so Belinda has the stronger title.

From Belinda's perspective, then, the arrangement can be represented by the following table, representing her right to exclude others from Blueacre.

Belinda's rights to exclude	
No right to exclude	Right to exclude
Superior title holder/ registered proprietor (Atticus)	Inferior title holder (Charles)
	Strangers

Belinda has a right to exclude Charles and strangers, as she has a stronger title than them. She has no right to exclude Atticus, as Atticus has a stronger title than her. She was at one point in possession, hence her interest is a fee simple and she does have a 'right to possession' of Blueacre.

The key message is that, in order to have a 'right to possession', one need not necessarily have the right to exclude all others. One need only be able to exclude all those without stronger relative title. Importantly, there cannot be a different definition of the 'right to possession' for paramount estates and

[33] This is so even though Atticus' title is registered. Strictly speaking, a more accurate characterisation is that it is not the *land* that is registered, but titles to the land, and here Atticus's registered title is not relevant when assessing a dispute between Belinda and Charles.

[34] *Mercer v Liverpool, St Helen's and South Lancashire Railway Co* [1903] 1 KB 652 (CA) 662 (Sterling LJ).

for inferior or 'relative' estates. To hold that 'paramount' estates could have different requirements to 'relative' estates would be to create four estates which would subsist at law: the paramount fee simple, 'relative' fee simple, paramount leasehold, and 'relative' leasehold. This is not possible, however, as Section 1(1) of the Law of Property Act 1925 tells us that only two estates can subsist at law: the fee simple and the leasehold.

As such, we can see that only Lord Templeman's definition in *Street* of the 'right to possession' is correct. The alternative definition is inconsistent with the fundamental doctrine of relativity of title. To show this, let us see what would happen if we accepted, as a requirement for leasehold estates, the more stringent alternative definition of the 'right to possession' as the 'right to exclude all others'. The same stringent definition would have to be used as one of the incidents of a fee simple.[35] This is because leasehold estates are always derived from fees simple, and the principle of *nemo dat quod non habet* means those with an interest in a fee simple cannot grant a leasehold interest consisting of a more stringently defined right, which they do not have.

Accepting the stringent alternative definition of the 'right to possession' as the 'right to exclude all others' would, however, mean that no two fees simple could exist in the same land. Logically, only one interest can consist of the right to exclude all others. Due to Section 1(1) LPA, all other 'fees simple' which did

[35] Technically, the 'right to possession' as a requirement for leasehold estates may be more limited than the grantor freeholder's 'right to possession', as that grantor may reserve limited access rights for maintenance and the like. This has no bearing on the argument above, which relies on the fact that the leaseholder's 'right to possession' cannot be more extensive than the freeholder's.

not meet this more stringent definition, such as the originally acquired interest of a possessor, could not subsist at law.

The conclusion that only one fee simple can subsist at law in one piece of land would, however, be fundamentally inconsistent with the doctrine of relativity of title. It would be to ask which fee simple is the *best*, and to hold all others invalid at law. Relativity of title, however, demands asking, as between the parties who happen to be before the court, whose fee simple is *better*. The 'loser', i.e. the party who was found to have the inferior interest, would not have their interest condemned as invalid. It would still bind some third parties, but would simply not bind the other party before the court with a superior interest.

The criticism that a definition of the 'right to possession' as the 'right to exclude all others' is inconsistent with the doctrine of relativity of title proceeds from the assumption that this doctrine is worth retaining as a feature of English land law. Although space precludes a full defence of this premise, it should suffice to make two points. First, there is the argument from history. Relativity of title has underpinned English land law for centuries,[36] and it would thus require serious thought to dispense with, and this is so even in a system dominated by registration.[37] Secondly, relativity of title is normatively attractive, as it ensures there is a system of regulation in the 'proprietary underworld', i.e. for interests which exist below the registered title, where to

[36] See Rostill (n 29).

[37] Indeed, it is telling that in the 2nd edition of *Land Law* (OUP 2012), 243, Elizabeth Cooke made the claim that relativity of title 'used to be an important concept but it is no longer'. Professor Cooke tellingly took one step back from this position, changing the wording for the 3rd edition (OUP 2020) to 'used to be an important concept, but is now rather less important than it was'.

dispense with relativity of title would leave these interests entirely unregulated.[38]

An interpretation of Lord Templeman's definition of the 'right to possession' as the 'right to exclude all those without superior relative title' is thus the only tenable one in the current system of relativity of title. Any interpretation along the lines of the 'right to exclude all others' is misplaced, unless relativity of title is to be done away with, and there are strong historical and normative reasons for not doing so.

2. The Meaning of the 'Right to Possession' after *Bruton*

It has thus been shown that the proper definition of the 'right to possession' in the context of leases is the 'right to exclude all those without stronger relative title'. The next section will consider the case of *Bruton*, and ask whether this decision affects this definition of the 'right to possession'. There are two possible interpretations of this decision, namely the 'contractual lease theory' and the 'academic reconceptualization theory'. It will be shown that, regardless of which of these two interpretations of the decision one accepts, the meaning of the 'right to possession' has remained the same as Lord Templeman's definition from *Street*, elaborated above. It will then be shown that these are the only two tenable interpretations of the case law. As such, there is no room for an argument that the meaning of the 'right to possession' has

[38] An argument made in much more detail by Goymour (n 28).

changed after *Bruton* by reliance on any other interpretation of that decision.

A. The Facts and the Judgments

The facts of *Bruton* are as follows. Lambeth Borough Council ('the Council') was the freeholder of a block of flats. The Council granted the London & Quadrant Housing Trust ('the Trust') a licence to use the building as short-term housing for the homeless. The Trust then entered into an agreement with Mr Bruton for sole occupation of a flat on a weekly basis, in exchange for nominal rent. The agreement was specifically labelled a 'weekly licence'. Nevertheless, Mr Bruton brought an action against the Trust for breach of an implied covenant to repair under Section 11 of the Landlord and Tenant Act 1985. This would require the existence of a 'lease' between Mr Bruton and the Trust. The Trust argued that there was no such lease; they were, as stated in the agreement, a licensor and not a landlord, and so were not subject to the duty.

The majority of the Court of Appeal,[39] in a judgment delivered by Millett LJ, applied an orthodox approach. His Lordship drew no distinction between a 'lease' and a 'leasehold estate', and thus required the successful grant of the 'right to possession'. Finding that Mr Bruton had a merely personal right against the Trust, that he had no right to exclude any strangers, and thus no 'right to exclusive possession'.[40] Given this was a requirement for a leasehold estate, and there was no indication that a 'lease' and a 'leasehold estate' were different, Mr Bruton did not have a 'lease', and so was not entitled to statutory protection.

[39] *Bruton v London & Quadrant Housing Trust* [1998] QB 834 (CA).
[40] ibid 845F.

The House of Lords reached the opposite conclusion, namely that Mr Bruton did have a 'lease'. Lord Hoffmann, whose speech garnered the support of all of Their Lordships, rightly rooted his discussion in the criteria laid down in *Street*. His Lordship's conclusion on those criteria was as follows:

> The decision of this House in *Street v Mountford* is authority for the proposition that a 'lease' or 'tenancy' is a contractually binding agreement, not referable to any other relationship between the parties, by which one person gives another the right to exclusive occupation of land.[41]
>
> In this case, it seems to me that the agreement, construed against the relevant background, plainly gave Mr. Bruton a right to exclusive possession. There is nothing to suggest that he was to share possession with the Trust, the council or anyone else. The Trust did not retain such control over the premises as was inconsistent with Mr. Bruton having exclusive possession.[42]

B. The Problem

The issue with this reasoning is that Lord Hoffmann seems to have held that Mr Bruton was successfully granted the 'right to possession', as defined in *Street*. As discussed above, however, this would require a successful grant of the 'right to exclude all those without superior relative title'. But here there was no suggestion that Mr Bruton had the right to exclude strangers. Indeed, he could not have successfully been granted such a right, as he derived his interest from the Trust, which had a mere licence. The Trust did not have the right to exclude strangers, so they could

[41] *Bruton* (HL) (n 1) 413E.
[42] ibid 413H.

not have given one to Mr Bruton - *nemo dat quod non habet*. Given the conclusion in *Bruton* seems on the face of it to be inconsistent with the orthodox landmark case on the requirements for a lease (*Street*), yet Lord Hoffmann expressly sought to follow that decision, the interesting questions which follow are: firstly, how did Lord Hoffmann reach this unorthodox conclusion, and secondly, what are the ramifications of His Lordship's reasoning? We must consider two incompatible interpretations of the decision.

C. Interpretation One: The 'Contractual Lease Theory'

This section will set out the first possible interpretation of *Bruton*, namely that it recognized a purely contractual lease.[43] It will then be explained that, if this interpretation is followed, the inconsistency between *Street* and *Bruton* is resolved by recognising *Bruton* as giving a new meaning to the word 'lease'. This would require no modification of the definition of the 'right to possession', as has been suggested academically. A summary of this argument can be found in Appendix B.

The key to understanding this interpretation of *Bruton* is to closely analyse this section of Lord Hoffmann's judgment:

> 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

[43] An interpretation of His Lordship's words supported by Lower 'The *Bruton* tenancy' [2010] Conv 38, Dixon (n 2), and Pawlowski and Brown, 'Bruton: a new species of tenancy?' (2000) 4 L&TR 119. See also *Hill and Redman's Law of Landlord and Tenant* (LexisNexis 2021) [47].

> 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.[44]

This passage introduced a hitherto unknown distinction between a 'lease' and a 'leasehold' estate. Lord Hoffmann proposes that the word 'lease' describes neither a proprietary interest nor an estate, but a *relationship* between two parties. The 'lease' *usually* creates a leasehold estate, but it need not.[45]

The question remains, however, of what the incidents of this relationship are. A common academic view is that this relationship is constituted by the successful grant of the 'right to possession', where this concept refers not to the traditional definition from *Street* but a new, modified, definition. This position can be seen in the following two excerpts from academic commentary:

1. The orthodox meaning of exclusive possession [the 'right to possession'] falls to be modified so as to mean exclusive possession [the 'right to possession'] as *between grantor and grantee*, a term hitherto unknown to property lawyers.[46]

[44] *Bruton* (HL) (n 1) 413B.
[45] ibid.
[46] Pawlowski (n 20) (emphasis added).

2. Lord Hoffmann's analysis fails to address the question of whether there can truly be said to be a grant of exclusive possession [the 'right to possession'] where the grantor had no ['right to possession'] to give.[47]

This approach would say that, because the grantee has by contract gained the right to exclude the grantor, they have the 'right to possession', but only as against the grantee. This would indeed be an entirely new definition of the 'right to possession', which, as explained above, has required the 'right to exclude all those without superior relative title', not simply the right to exclude the grantee.

Lord Hoffmann did not purport to change the definition of the 'right to possession' from *Street*. Given His Lordship's eminence as a judge, it would be preferable to avoid the conclusion that His Lordship either i) inadvertently made an oversight by applying a definition His Lordship though was satisfied but was not, or ii) surreptitiously changed the definition. Fortunately, such an explanation is forthcoming. His Lordship did not change the definition of 'the right to possession', but changed the meaning of the word 'lease', by divorcing it from the 'leasehold estate' and giving it its own meaning.

A lease was traditionally seen as indistinguishable from a leasehold estate, both of which referred to a successful grant of the 'right to possession', i.e. the successful conferral of a proprietary interest. Leases have, however slowly been 'contractualised', such that some precepts of contract law apply to their operation. One can trace this development chronologically:

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[47] Jill Morgan, 'Exclusive Possession and the Tenancy by Estoppel' [1999] Conv 493.

1977: Terms can be implied into leases in a similar manner as terms are implied into contracts.[48]

1978: Rent is a contractual payment rather than a service issuing out of the land.[49]

1981: It is possible for a lease to be frustrated.[50]

1992: There can be a repudiatory breach of a lease which excuses the other party from performance.[51]

1992: A notice to terminate by one joint tenant is sufficient (the contractual view trumping the traditional view that joint tenants are treated as one).[52]

We can thus see an increasing readiness to draw parallels between leases and contracts. *Bruton* can be seen as the ultimate culmination[53] of this movement towards the contractualisation of the lease, recognizing that the word 'lease' could simply refer to

[48] *Liverpool v Irwin CC* [1977] AC 239 (HL). See also *Barrett v Lounova (1982) Ltd* [1990] 1 QB 348 (CA) 356.
[49] *United Scientific Holdings v Burnley BC* [1978] AC 904 (HL).
[50] *National Carriers v Panalpina* [1981] AC 675 (HL).
[51] *Hussain v Mehlman* [1992] 2 EGLR 87 (HC). The Law Commission proposed giving this statutory effect for residential tenancies, *Renting Homes* LC 297 para 4.14.
[52] *Hammersmith & Fulham LBC v Monk* [1992] 1 AC 478 (HL) 483 (Lord Bridge), 'As a matter of principle I see no reason why this question should receive any different answer in the context of the contractual relationship of landlord and tenant than that it would receive in any other contractual context'.
[53] Or the '*reductio ad absurdum*', if one prefers. See Stuart Bridge in Louise Tee (ed.), *Land Law: Issues, Debates, Policy* (Willian 2002) 116-120.

the obligation to grant the 'right to possession', rather than the successful grant of the right itself. Lord Hoffmann recognized that every leasehold estate starts with a contract by which A promises to grant B a leasehold estate. The promise to grant 'the right to possession' will include rights to exclude the grantor, and thus could take effect as a personal licence. The novelty of His Lordship's approach is to see the obligation to grant the 'right to possession' as a 'lease', rather than only as a personal licence against the grantor, coupled with an unperformed obligation to grant the further right to exclude all those without superior relative title.

The meaning of the word 'lease'	
Before *Bruton*	After *Bruton*
Indistinguishable from a 'leasehold estate'.	Different to a 'leasehold estate'.
Requires a successful grant of the 'right to possession'.	Requires only a promise to grant a leasehold estate, i.e. a promise to grant the 'right to possession'.

This shows that the effect of Lord Hoffmann's judgment is to define 'lease' as a contract under which A promises to grant B the 'right to possession', whether or not A actually does so or can do so at the time of the promise. The meaning of the 'right to possession' thus remains unchanged. The grant of this right is simply promised for a 'lease' and successfully granted for a

'leasehold estate'. Professor Pawlowski's contention that *Bruton* must have changed the meaning of the 'right to possession' is thus misplaced.

This explains how Lord Hoffmann was able to find a 'lease' without there being a successful grant of the 'right to possession'. Was this approach justified? The important realisation from this analysis is that Lord Hoffmann i) did not change the definition of the 'right to possession', and ii) the third-party effect of the *Bruton* lease is indistinguishable from a contractual licence. This means the only effect of the decision was to broaden the scope of statutory lease protection.[54] This was indeed a departure from orthodoxy,[55] but whether this extension was justified is a highly politically charged question. The question is essentially the extent to which the state should intervene to curtail freedom of contract and thereby regulate the free market

[54] This interpretation of *Bruton* means terming the contract a 'lease' rather than simply a licence coupled with a promise to grant a leasehold estate does not affect the applicability of formalities, recognition as an overriding interest or assignability. The *Bruton* 'lease' i) does not require formalities for creation (e.g. under the Law of Property (Miscellaneous Provisions) Act 1989, s. 2 or the Law of Property Act 1925, ss. 52 and 54, which apply only to 'interests in land'), ii) would not qualify as an overriding interest, as these also must be interests in the land (*National Provincial Bank v Ainsworth* [1965] AC 1175 (HL)), iii) would not be assignable, as the alienability of the lease flows from its proprietary status (*Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 (HL)), see generally Susan Bright (n 2) 9.

[55] The finding of a contractual lease was arguably inconsistent with previous authority from lower courts. See *Milmo v Carreras* [1946] KB 306 (CA) 310 (Lord Greene MR) 'You cannot have a purely contractual tenancy'; *Re Friends Provident Life Office* [1999] 1 All ER 28 (Comm) 36 (Neuberger J).

to protect otherwise vulnerable consumers.[56] The impact on charity housing providers also cannot be overlooked.[57] The thrust of this article is not concerned with these questions, and so we will leave the question open of whether Lord Hoffmann's redefinition of the word 'lease' was justified. It suffices to highlight that this is not a question for those land lawyers interested in the classification of interests and their effects on third parties, but rather for those interested in Landlord and Tenant law, specifically the apt level of state intervention in the housing market.

D. Interpretation Two: 'The Academic Reconceptualisation Theory'

The 'contractual lease theory' is not, however, the only interpretation of *Bruton*. A prevalent academic view[58] is that the

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[56] See, for example, the factors mentioned by the Law Commission in its 1996 Report (*Landlord and Tenant: Responsibility for State and Condition of Property*, LC 238). The policy context here has been described as 'raising complex issues' Susan Bright 'Exclusive Possession, True Agreement and Tenancy by Estoppel' (1999) 114 LQR 345, 350.

[57] The decision has been seen as particularly harsh on charity housing providers, who are not seeking to circumvent the protection of the statutes by granting such interests: see Deborah Rook 'Whether a Licence Agreement Is a Lease: The Irrelevance of the Grantor's Lack of Title' [1999] Conv 517; Warren Barr 'Charitable Lettings and their Legal Pitfalls' in Elizabeth Cooke (ed), *Modern Studies in Property Law, Volume 1* (Hart 2001) 239. This adverse effect was also noted by Sir Brian Neill in the Court of Appeal (n 41) 841.

[58] See Roberts (n 27); Goymour (n 28); Roger Smith, 'The Jurisprudence of Lord Hoffmann in Property Law' in Davies and Pila (eds), *The Jurisprudence of Lord Hoffmann* (Hart 2015); John-Paul Hinojosa, 'On Property, Leases, Licences, Horses and Carts: Revisiting *Bruton v London & Quadrant Housing Trust*' [2005] Conv 114; Kim Lewison, 'Megarry & Wade: The Law of Real Property (Publication Review)' [2009] Conv 433.

decision in *Bruton* can be rationalised in a different way, namely by reliance on the doctrine of relativity of title.[59] It should be noted that the proponents of this view do not argue this to be consistent with the words used by Lord Hoffmann himself.[60]

The argument is as follows:[61]

i) Even though the Trust merely had a licence from Lambeth Council, they did go into possession of the premises.

ii) This possession allowed them to generate an original fee simple interest, relatively weaker than the fee simple interest of Lambeth Council.

iii) The interest they granted to Mr Bruton was an orthodox leasehold estate, carved from their original fee simple.[62]

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[59] We should note that the 'academic reconceptualization' theory of *Bruton*, although placing reliance on the doctrine of relativity of title, is entirely distinct from it. The 'academic reconceptualization thesis' could be rejected, for example by saying it simply does not square with Lord Hoffmann's words, without prejudicing the validity of relativity of title as a whole, and its weight when considering the orthodox definition of 'the right to possession'.

[60] Roberts (n 27). Interestingly, Smith (n 60) notes that in personal discussions with Lord Hoffmann after the case, His Lordship was a proponent of the 'relativity of title' theory. It will be left to the reader to decide whether this is in fact consistent with the words His Lordship used.

[61] See also Appendix C for a summary.

[62] A variation on this argument is advanced by Goymour (n 28). She argues that even if the Trust did not go into possession, Mr Bruton did, and his possession would be ascribed to the Trust, giving them the necessary original fee simple to grant him a leasehold estate. Goymour

As such, we can immediately see that the 'relativity of title' theory concludes that Mr Bruton had an orthodox leasehold estate. This conclusion is entirely consistent with the analysis of the meaning of the 'right to possession' above. Although Mr Bruton had no right to exclude the Council, the Council was a superior relative title holder compared to him, so he need not have a right to exclude them to have the 'right to possession'. If reconceptualised in this way, the definition of the 'right to possession' in *Bruton* was in fact no different to that advanced by Lord Templeman in *Street*.

E. A Third Interpretation : A New Definition of the 'Right to Possession'?

It has thus been shown that, if one adopts either i) the 'contractual lease' theory or ii) the 'academic reconceptualisation theory' of *Bruton*, this requires no modification of the meaning of the 'right to possession' as elucidated above. There remains the possibility, however, that there may be a third interpretation of the decision, which would necessitate a modification of the meaning of the 'right to possession', a view advanced by Dr Natalie Mrockova. We conclude that this interpretation is neither supported by the decision in *Bruton* itself nor its treatment in later cases, and as such the proposition that the 'right to possession' remains unchanged after *Bruton* still stands. A summary of this argument can be found in Appendix D. We will begin by considering the only two major later cases which have commented on the decision in *Bruton*.

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reaches this conclusion by a tentative analogy with the doctrine of tenancy by estoppel, though whether this is convincing is beyond the scope of this article. We should note that this argument leads to the same conclusion as above, namely that Mr Bruton had an orthodox leasehold estate.

I. *Kay v Lambeth Borough Council*[63]

The precise facts and wider issues at stake in *Kay* need not trouble us here. What is relevant to our discussion are Lord Scott's comments on whether if the grantor of the '*Bruton* lease' surrenders the lease, then the lease becomes binding on the paramount owner (the Council). This point turned on whether the '*Bruton* tenant' derived their interest from the Council, which can also be phrased in terms of whether the Council is bound by the '*Bruton* lease'. Lord Scott rejected this view, saying:

> But these rights never were enforceable against Lambeth.[64]

His Lordship also said:

> They [Mr Bruton] never were *sub*-tenants holding, via a grant from the Trust, an interest created by Lambeth [the Council]. They were tenants of the Trust holding an interest created by the Trust.[65]

This shows that *Bruton* leases are not binding on the paramount owner. This is not particularly illuminating, as this holding is entirely consistent with both theories of *Bruton*.[66] This is entirely what one would expect of the 'purely contractual lease' theory, as that theory recognizes Mr Bruton as having a merely personal right against the Trust, with no rights against anyone

[63] [2006] UKHL 10, [2006] 2 AC 465.
[64] ibid [143].
[65] ibid [145].
[66] Though His Lordship did at one point describe Mr Bruton's interest as a 'non-estate tenancy' (ibid [144]), seeming to lend support to the 'contractual lease theory'. This was interpreted by David Hughes and Martin Davis, 'Human Rights and the Triumph of Property' [2006] Conv 522, 536 as an 'embarrassment over the very notion of a *Bruton* tenancy, and attempt to reassert basic property principles'.

else, and so none against the Council. Equally, it is entirely consistent with the 'academic reconceptualization' theory, as the orthodox leasehold estate this theory recognizes does include a right to exclude superior relative title holders,[67] so the *Bruton* tenant would have no right to exclude the paramount owner.

II. *Berrisford v Mexfield*[68]

The facts of *Berrisford* are also not in issue. We are entirely concerned with one passage from Lord Neuberger's judgment:

> It has been suggested (although not in argument before us) that the notion that the agreement could give rise to a contractual licence if it cannot be a tenancy is somehow inconsistent with the reasoning of the House of Lords in *Bruton v London & Quadrant Housing Trust* [2000] 1 AC 406. In that case, Lord Hoffmann said that an agreement can give rise to a tenancy even if it does not create an estate or other proprietary interest which may be binding upon third parties: p 415 … The point being made by Lord Hoffmann was that the fact that the trust was only a licensee, and therefore could not grant a tenancy binding on its licensor, did not prevent the agreement with Mr Bruton amounting to a tenancy as between him and the trust. The tenancy would thus have been binding as such not only on Mr Bruton and the Trust, but also on any assignee of Mr Bruton or the Trust. The *Bruton* case was about relativity of title which is the traditional bedrock of English land law.[69]

[67] As explained in Section 2.B above.
[68] [2011] UKSC 52, [2012] 1 AC 955.
[69] ibid [65].

Lord Neuberger thus suggests that *Bruton* tenants have rights against not only the parties to the agreement, but also their assignees. Are any other third parties bound? Lord Neuberger's choice not to elaborate has rightly been described as 'tantalising'.[70] We must latch onto His Lordship's proposition that 'the *Bruton* case was about relativity of title'. Lord Neuberger can here be seen as giving support to the 'academic reconceptualization theory' of *Bruton*, as elaborated above. Indeed, it is difficult to see how Lord Neuberger could argue that assignees of the parties[71] are bound without endorsing the full 'academic reconceptualization theory'. Reaching this conclusion without recognising that the Trust had an estate would be in contravention of *nemo dat quod non habet*. As already explained, however, this thesis does not lead to the conclusion that only assignees are bound. It also holds that all those without superior relative title are bound, as the interest recognized is an orthodox leasehold estate. Lord Neuberger can thus be seen to be implicitly adopting the 'academic reconceptualization' theory of *Bruton*.[72]

III. Dr Mrockova's Thesis

Dr Natalie Mrockova has advocated for the view that, contrary to our main thesis, the meaning of the 'right to possession' must have been different in *Bruton* as compared with *Street*.[73] Her first reason is that Mr Bruton had no right to exclude third parties, so

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[70] Judith-Anne MacKenzie and Aruna Nair, *Textbook on Land Law* (18th ed, OUP 2020) 220.

[71] Especially the Trust if it were to assign its licence with the Council to a third party.

[72] Rostill (n 29) has noted Lord Neuberger could only maintain that *Bruton* was 'about relativity of title' if the rule that adverse possessors generate an original fee simple also applied to consensual possessors.

[73] Natalie Mrockova, 'The Meaning of Exclusive Possession after *Bruton*' [2021] Conv 183.

could not have had the 'right to possession' as properly defined.[74] Our reason for disagreeing with this conclusion was set out in full when considering the 'contractual lease' theory. In short, Lord Hoffmann's reasoning was that to have a 'lease' one need not be successfully granted the 'right to possession'. It suffices that one is in a relationship with another party who is obligated to give this right to you, which was the case on the facts of *Bruton*.

Mrockova does, however, reach a further conclusion which is inconsistent with our thesis, namely that the '*Bruton* lease' is 'quasi-proprietary'.[75] She takes this to mean that it binds a different subset of third parties to either i) a leasehold estate, or ii) a contractual licence. She thus recommended that a new term be introduced, namely 'relative exclusive possession',[76] which would denote the right to exclude the other party to the agreement, as well as their assignees. If this conclusion were correct, this would be contrary to our view that *Bruton* can either be explained as i) a licence coupled with a promise to grant a leasehold estate, or ii) a successfully granted leasehold estate, with reliance on relativity of title.

The authority Mrockova cites in support of the proposition that there is an intermediary interpretation of *Bruton* is Lord Neuberger's judgment in *Berrisford*.[77] As we have already sought to show, however, that passage from Lord Neuberger's judgment is not only authority for the proposition that assignees of the parties are bound. If taken to its logical conclusion, the passage supports the view that all those without superior relative title are bound. As such, *Berrisford* is an endorsement of the 'academic reconceptualization theory', and thus a recognition of

[74] ibid 192.
[75] ibid 194.
[76] ibid 196.
[77] ibid 195.

an orthodox leasehold estate. In light of this, and, for want of any other authority, there is nothing to support the view that the *Bruton* lease is 'quasi-proprietary' in the way Mrockova suggests. Given the two interpretations laid out above do not support the view that *Bruton* changed the definition of the 'right to possession', and there is no intermediary interpretation supported by the case law, we must conclude that *Bruton* did not change the meaning of the 'right to possession'.

Conclusion

This article has sought to show that the correct definition of the 'right to possession' is the 'right to exclude all those without superior relative title'. It cannot be defined, as has sometimes been suggested, as the 'right to exclude all others', as this would be inconsistent with the fundamental doctrine of relativity of title.

This proposed definition was, contrary to some academic opinion, not altered by the decision of the House of Lords in *Bruton*. We proposed two possible interpretations of the decision. The 'contractual lease theory' is consistent with the definition of the 'right to possession' laid out above. On this view, the only change required is that a 'lease' has been separated from a *successful* grant of a leasehold estate. A 'lease' will now be a relationship in which A promises to grant B a leasehold estate. The 'academic reconceptualization theory' of the decision as one to do with relativity of title adheres to the meaning of the 'right to possession', as it conceived of *Bruton* simply as recognising a perfectly orthodox leasehold estate. On this view a 'lease' remains the successful grant of a leasehold estate.

Finally, any suggestion that there can be an intermediary category, where the *Bruton* lease binds some but not all third parties, is misplaced. This interpretation does not accord with the

definition of the 'right to possession', and thus cannot be seen to have been the impact of *Bruton*.

Appendices

A. Appendix A

This is a summary of the argument for proposition 1), namely: 'the proper definition of 'the right to possession' is 'the right to exclude all those without superior relative title'.

1. People in possession generate for themselves an original fee simple interest.

2. This fee simple interest must entail a 'right to possession'.

3. The fee simple generated by possession does not entail the right to exclude those with superior relative title.

A1. *The 'right to possession' for a fee simple generated by possession must be defined as 'the right to exclude all those without superior relative title'.*

1. Only two estates can subsist at law, the fee simple and the term of years.

2. The incidents of all fees simple must thus be the same.

A2. *The 'right to possession' for a fee simple generated by possession must have the same definition as the 'right to possession' for all other fees simple.*

C1. *Taking A1. and A2. together, the 'right to possession' for all fees simple must be defined as the 'right to exclude all those without superior relative title'.*[78]

[78] There is no indication the same definition does not also apply to 'the right to possession' as a requirement for leasehold estates.

B. Appendix B

This is a summary of the argument for proposition 2), namely: 'if the 'contractual lease theory' of *Bruton* is accepted, the decision did not alter the definition of 'the right to possession'.

1. Mr Bruton was not successfully granted the 'right to possession', as his personal right against the Trust meant he had no right to exclude strangers.

2. Lord Hoffmann severed the word 'lease' from 'leasehold estate'. His Lordship defined 'lease' as a relationship in which A promises to grant B a leasehold estate.

3. The Trust had promised Mr Bruton a leasehold estate/ promised him the 'right to possession'.

4. Mr Bruton thus had a 'lease' by virtue of this promise, despite the fact the Trust had no current means to fulfil the promise.

5. The 'right to possession' need not be modified to explain *Bruton*, as the decision is explained by modifying the definition of 'lease'.

C2. *Accepting the 'contractual lease theory', the decision in Bruton did not change the definition of 'the right to possession' from C1.*

C. Appendix C

This is a summary of the argument for proposition 3), namely: 'if the 'academic reconceptualization theory' of *Bruton* is accepted, the decision did not alter the definition of 'the right to possession'.

1. Possession generates a fee simple interest.

2. The Trust went into possession, thus generating a fee simple interest.

3. Mr Bruton's lease was carved from this fee simple interest, making it an orthodox leasehold estate.

4. Mr Bruton was thus successfully granted the right to exclude all those except the Council.

5. Mr Bruton was successfully granted the right to exclude all those without superior relative title.

6. Mr Bruton was granted the 'right to possession' as defined in C1.

C3. *Accepting the 'academic reconceptualization theory', did not alter the definition of 'the right to possession' from C1.*

D. Appendix D

This is a summary of the argument for proposition 3), namely: 'if the 'academic reconceptualization theory' of *Bruton* is accepted, the decision did not alter the definition of 'the right to possession'.

1. Dr Mrockova suggested *Bruton* recognized a 'quasi-proprietary' interest. This interest supposedly bound both the parties to the contract and their assignees. The interest was thus neither a leasehold estate nor a licence, demanding a redefinition of the 'right to possession'.

2. Mrockova relied on Paragraph 65 of *Berrisford* for this

proposition.

3. Paragraph 65 of *Berrisford* actually supports the 'academic reconceptualization theory', rather than any intermediary interpretation.

C4. *There is no tenable intermediary interpretation of* Bruton, *meaning, given the validity of C2 and C3, the definition of 'the 'right to possession' from C1 remains valid after* Bruton.