POSSESSION
- A Unified Concept?

by

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There is little that it is more wrong to feel confident about in the world of property law than the concept of possession. For a single word, it appears in a large number of deceptively familiar guises, and just when the property litigation practitioner feels, as we all do periodically, that s/he has acquired a grasp of what it actually means, along comes another case, another set of facts, or possibly just another judge with new ideas, and what felt like the safe boundaries of known territory turn out to have their fence posts driven into shifting sands; and off we go again.

Even the great practitioners of our time, now elevated into the judicial stratosphere, profess to find the concept “slippery” and “elusive”. What is legal possession? What is factual possession? Or adverse possession? Does the word “exclusive” in the phrase “exclusive possession” add anything of substance to the underlying concept (whatever that is) or is it merely emphatic? Can we get any clues from the oxymoronic “vacant possession”? Do we yet have a definitive answer to the question of how to identify the line between exclusive occupation under a licence and exclusive possession under a tenancy? Where does ouster fit in? What is the relationship of the concept of possession to degrees of occupation? Is it even possible to share possession?

It is tempting to speculate that these issues of definition arise because the concept takes on different meanings in different contexts. But those of us with an instinct for order, who regard consistency not as the hobgoblin of little minds but rather as the cornerstone of legal reasoning, are keen to examine those contexts, and the confusion, in an attempt to derive a coherent set of principles, even if we are to be denied a single principle, the property law version of a Theory of Everything. I cannot claim this paper achieves that; in fact one of my conclusions is that such an endeavour is strictly speaking unachievable. My intention is threefold: to throw a spotlight on the issues; to identify the distinctions between the various formulations of the concept of possession; and finally to address the somewhat metaphysical question of whether we can derive a coherent and consistent set of principles of possession, or whether it is a movable feast, whose quality changes depending on context.
An estate in possession

It is as well to remind ourselves at the outset of this fundamental concept, albeit a concept which rarely troubles us in practice. There are now only two estates, fee simple and leasehold. In each case, the estate vests in a person either “in possession” or “in interest”. Thus a person granted a reversionary lease, that is to say, a lease which is to commence on a future date, has vested in him a leasehold estate in interest but not in possession, since although the lease exists it gives no present right to enjoy any estate in land: *Long v Tower Hamlets LBC* [1996] 2 All ER 683. This is to be contrasted with, for example, a concurrent lease, granted when another party has the right under an existing leasehold interest to actual possession. The concurrent lease vests in its owner in possession, albeit it carries with it no entitlement to physical occupation of the demised premises whilst the pre-existing lease endures, because it grants an immediate fixed right to enjoy an estate in land, through the benefit of the covenants in the pre-existing lease, including the covenant to pay rent.

This is a relationship of right, rather than one of fact. It can feel counter intuitive to the practitioner, since as we shall see so much of the case law on the question of the right to so called legal possession focuses in fact on the right to possess the land in a particular physical sense, to occupy the land to the exclusion of all others. But the notion of possession in this original sense, which describes the nature of the legal relationship between a person and an estate in land, can prove illuminating when one comes to consider the complexities of the law on the problems of possession encountered in practice. The legal right “in possession” might but does not always carry with it the right to factual possession of the land. Whether or not it does is contingent; it is not a necessary incident of a legal interest in possession that it confers a right to factual possession, as the case of an overriding lease well demonstrates. The holder of the superior interest retains that interest in possession, but grants away some of its incidents. In the case of the grant of a leasehold interest the grant necessarily includes the right to possession in the sense in which we more typically encounter it; but less well understood is that both the superior and the inferior rights vest in the grantee “in possession”.

We can conclude that a legal right to an estate in possession may, but may not, permit factual occupation by its owner. Where it does not, that does not reduce the status of it
as a right “in possession”; it merely tells us that some of the incidents of that right have been granted to a third party. It is possible for two or more persons each to have a distinct legal interest in possession in an estate in the same land. It seem however that it is possible for only one party at a time to have the legal right to possession of land in relation to which there may be multiple legal interests in possession.

Factual possession

It is well established that the concept of factual possession is connected to a particular quality of actual occupation of land. But the relationship between occupation and factual possession is curiously asymmetric. Not everyone in occupation of land is in factual possession of it. Moreover not everyone with the right to factual possession of land is in occupation of it, nor do they need to be in order to retain the right to factual possession of it. It is not I think correct to say that anyone who enjoys or exercises the incidents of the right to factual possession of the land can only do so by occupying it; one thinks of a non occupying largely absentee owner who hires a contractor to maintain hedges growing on his land but able to be reached only from the public highways; or an owner collecting fees from licensees. Neither of those is in physical occupation of the land.

We derive our strongest sense of what factual possession means from the cases on adverse possession, which consider what quality of occupation by a squatter is required in order for it to be characterised as possession. In defining factual possession the courts are attempting to specify what behaviours by a person who has no legal right to possession are sufficient to found that person’s claim to have acquired title, by reference to occupation that looks like that of a person occupying lawfully pursuant to a legal right to possession. The actual descriptions developed by the court focus not on what are the essential characteristics of factual possession pursuant to a legal right; but rather on what the fullest expression of the right to factual possession looks like when manifested by the occupation of the person entitled to possession of the land. A person with a legal right to possession need do nothing at all on the land pursuant to his legal right of possession, and will by minimal and/or occasional occupation of the land be regarded as exercising or enjoying that right. By contrast a person demonstrating factual possession for the purposes of preventing the paper title owner from asserting his rights must use the land not merely as an occupying owner might but to the fullest
extent that an occupying owner could. In this context, a person in factual “possession” adverse to the true owner must be in actual occupation in some reasonably full sense.

Thus we see that the development of the concept of factual possession in the context of the adverse possession cases is necessarily connected to the concept of use and occupation. By looking at the matter in this way (because that is what required to establish a claim in adverse possession), we are provided with an account of factual possession at its fullest. The danger lies in forgetting the context, and wrongly conflating the requirements of adverse factual possession with cases in which it is necessary to consider whether a person enjoys, or by contrast has parted with, possession of the land. It is only in this context that there is an almost universal relationship between possession and occupation. I say almost universal because in theory I think it would be possible adversely to possess land merely by collecting licence fees from a licencee who occupied the entirety of the disputed land. However, as discussed later, a sufficient degree of control would have to be retained in order of this to qualify as factual possession on the part of the squatter.

Factual “possession” then, in the sense of actual occupation, is not a necessary ingredient of the concept of possession as we understand it. Still less so is animus possidendi, the intention to possess, the second requirement of adverse possession. Although the two requirements are sometimes cited as the very definition of legal possession, it is not in my view sustainable to argue that legal possession involves any mental element, any more than it requires any degree of actual occupation. Someone who wakes from a coma forgetting the details of his entire life will retain legal possession of land in his name. Someone in factual possession of land for eleven years, who has a brain storm in the twelfth year with the result that whilst remaining in occupation of the land he avowedly has no intention of continuing to exclude all others from it, will not succeed in establishing adverse possession. So although there is a connection between them, it is quite wrong to equate legal possession with the two requirements of adverse possession.

The connection between them is this. The characterisation of possession in the adverse possession cases necessarily involves two essential characteristics of possession without which the squatter cannot establish factual possession: firstly, the relevant

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1 Allowance is made for the nature of the land.
occupation must include the requisite element of element of control over the land; and secondly, it is single and indivisible. A party who is in factual possession properly so called, whether pursuant to a right to possess or adversely to the rights of the true owner, does so to the exclusion of all others. This is not to say that others are not allowed to occupy, or to use, the land, and of course contractual or informal rights can be granted in both those respects. We know that a person in possession of land can divest himself of certain incidents of that right, curtailing his own ability to enjoy the land, without parting with possession of the land. The question then becomes to what extent those incidents can be divested out of the right of the person entitled to possession without him having granted away so much of the ability to enjoy his estate in the land as to have lost the right to possess it. Where the consideration of factual possession in the adverse possession cases requires a description of the bundle of rights involved in possession at its fullest, this question invites consideration of what is at the core of that bundles of rights; what is the quality, the essential element, the sine qua non of possession, by reference to which it can be determined when it has been granted away, and when it has been retained?

It is within this arena that the more familiar versions of issues of possession are rehearsed, in two areas in particular: (1) easements, and (2) licenses.

**Easements and ouster**

In the field of the acquisition of easements by prescription, little has caused more consternation over the last decade or so then the question whether a right to park cars can be acquired by twenty years user as of right. The types of property capable of being adversely affected range from individual residential units all the way up to major development sites. The establishment of such a right can have a devastating impact on the value of the burdened land.

An owner of land over which rights are claimed often tries to argue that the user on which the claim is based involves exclusive possession of the land and accordingly cannot be an easement. Before the new regime was introduced under the Land Registration Act 2002, this would have been a risky strategy, because it might have led

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2 As indeed the trespasser with merely factual possession may purport to do, and may rely on such acts as evidence both of his factual possession and of his intention to possess.
to a claim by the party exercising the rights to have acquired title to the burdened land by adverse possession, rather than the more limited easement based on long user.

This fear has now largely been removed, since the acquisition of title by adverse possession is available only in very limited circumstances. For this reason the party claiming the right will want to allege that it does not involve the wholesale ouster of the paper title owner from his land, and so is capable of forming the subject matter of an easement. Once established and registered such a right is binding on all future purchasers of the burdened land. Moreover, the owner of the burdened land can do nothing with that land, whether by way of use or by way of development, which would interfere any more than minimally with the enjoyment of the right. The property owner stands to lose both practically and financially if such a right is established.

It has therefore become common for an owner to defend a claim to a right to park cars by saying that such user deprives the owner of any meaningful use of the land. The owner is in effect ousted, or dispossessed, by the use of the burdened land for the parking of cars. It is well established, and uncontroversial, that a claimant can acquire a right to park a single car anywhere over a large piece of land capable of accommodating numerous parked cars. What remains controversial is where the rights being claimed involve the use of the entire surface of the burdened land, whether what is claimed is the right for one car to park on a single defined car parking space, or for several cars to park on a number of car parking spaces comprising the whole of the surface of the burdened land.

This was the situation in the leading case of Batchelor v Marlow [2001] EWCA Civ 1051, a decision of the Court of Appeal which remains binding, notwithstanding the remarks made by their Lordships in Moncrieff v Jamieson [2007] UKHL 42. In Batchelor the Defendants ran a garage business near to land owned by Mr Batchelor. At first instance, Mr Nicholas Warren QC, sitting as a deputy judge of the Chancery Division, held that they had acquired an exclusive prescriptive right to park up to 6 cars on Mr Batchelor’s land, between 8.30 a.m. and 6 pm, Monday to Friday. It was common ground that only six cars could be parked on the burdened land. The question on appeal was whether such a right is capable of being a valid easement.

It was agreed between the parties, and expressly approved by the Court of Appeal, that the essential question in the case was as set out by Judge Baker QC in London and
Blenheim Estates Ltd v Ladbroke retail Parks Ltd [1992] 1 WLR 1278: whether the right alleged is such that it would leave the servient owner without any reasonable use of his land, whether for parking or anything else. If so, the right could not be an easement, though it might be some larger or different grant. Lord Justice Tuckey concluded that Mr Batchelor had no use at all during the whole of the time the parking space is likely to be needed, and, further, that his right to use the land was curtailed altogether for intermittent periods throughout the week. Such a restriction would make Mr Batchelor’s ownership of the land illusory.

So in Batchelor the applicable law was not controversial, although its application has proved to be, not least because of the observations of their Lordships in Moncrieff. This case went to the House of Lords on appeal from Scotland, and concerned the question of whether a right to park a car in a single defined space was to be implied as ancillary to an express grant of a right of way. However their Lordships took the opportunity to consider more broadly the status of car parking rights as easements. Their observations were obiter, and Lord Neuberger expressly stated that he was making no decision on the broader question, not least because it had not been fully addressed in argument.

Their Lordships did not suggest that the test applied in Batchelor was necessarily wrong, and certainly did not overrule Batchelor: accordingly, the correct test remains whether the user on which the claim is based effectively deprives the servient owner of any reasonable use of its land. That leaves the focus very much on the question of physical occupation of the land in question by the person alleging the right. But Lord Neuberger and Lord Scott did query whether parking a car on the entirety of the surface of the burdened land necessarily deprives the owner of any reasonable use. For example, the land could be built over above the height of the vehicle. Pipes could be run under the land. The land was available to be walked or driven over when the car was not parked there. In a case which involved the right of a specified number of cars to park over an area capable of accommodating no more than that number, it was likely that there would be strips of land surrounding and possibly between the car parking spaces which could be landscaped. Thus in considering the test, we still have the language of use and occupation, and it seems to be a necessary consequence of this that if the servient owner can still be said to have the ability to make some physical use of, or in some way to occupy, the land, then he has not been “ousted” and the grant is capable of being an easement rather than some larger grant.
Lord Scott however went further and queried whether the underlying test was in fact whether the owner of the burdened land retained legal possession of it, subject to a right to park. One telling example he gave was of an owner of a viaduct who permits a third party to transport water along the length of the viaduct. Even though there is no obvious practical use which the servient owner can make of the part of the viaduct along which the water travels, nonetheless he retains effective legal possession of it. Such a right, it was suggested, leaving legal possession with the existing owner albeit with severely curtailed not to say *de minimis* prospects of use and occupation, does not amount to exclusive possession, and is therefore capable of forming the subject matter of an easement.

However, this approach might be thought to beg the question of what legal possession is. Can it sensibly be argued that legal possession in this sense is retained if there is no prospect of the legal owner making any physical use of its land whatsoever? Is it possible to retain legal possession if one signs away any prospect at all of physical use and occupation of the land? Lord Scott focussed on the question of the ability of the servient owner to continue to exercise control over the use of the land; but given the manner in which a viaduct works, it may be a challenge to imagine in what way the servient owner could in any realistic sense control the use of that part of the viaduct through which the water ran.

On the other hand the viaduct comprises more than the mere channel through which the water runs, and the servient owner would retain the ability and the right to do whatever he liked with the structural supports on which the channel carrying the water rested, and indeed with the land supporting the entire structure, subject always to the restriction that he could not do anything which more than minimally interfered with the right of the dominant land owner to use the viaduct channel for the purpose of carrying water. So perhaps the example is not such a bad one. But one sees in these judicial wonderings a sense that the correct test is migrating away from the idea of leaving the servient owner with reasonable user towards the concept of the legal owner retaining the ability to exercise control over the servient land. Whilst on most facts those two concepts will overlap, the car parking cases have highlighted that it may be control rather than use which characterises the concept of possession. This brings the authorities on this question more into line with those on the lease/licence issue to which I refer in more detail in the next section.
Notwithstanding these ruminations, and in spite of practitioners’ concerns as to the correctness of the decision in Batchelor, the test as set out and applied by Lord Justice Tuckey continues to be good law. Unless and until the question reaches the Supreme Court the test must continue to be applied. What seems to have happened is that although the courts are bound by the test in Batchelor, they answer the question it poses in a different way, even in circumstances where the considerations are similar to those in Batchelor. So although officially the test remains the same; the flavour of decisions being taken is distinctly post Moncreiffian.

So in Kettel and Bloomfold Ltd [2012] EWHC 1422, HHJ David Cooke, sitting as a Deputy of the Chancery Division, considered whether the right of long lessee of a flat to park a car in a defined space left the freehold owner with no reasonable use of the land so as to make his ownership of it illusory. The Deputy Judge approached the question from the starting point that the freeholder could do anything, with the exception of anything which was inconsistent with the right to park a car. He could pass on foot or by vehicle across the space when there was no car parked on it, and authorise others to do the same; he could choose, change and repair the surface, keep it clean and remove obstructions; he could lay pipes or other service media under it; he may in principle build above it or run overhead projections such as wires. All of these rights were likely to be of importance and value to the freeholder. Accordingly the right to park a car in a single car parking space was capable of being an easement, even though the right was exclusive, and unlimited in time. And it is interesting to note that that was an express grant, not one acquired by prescription.

A similar approach to exclusivity was taken, albeit not involving car parking, in the case of Eaton Bray Ltd v Leonine Holdings Ltd, (19 January 2011, Central London County Court, unreported). The lessee of a flat was granted an exclusive right to use part of the basement, retained by the landlord, as a loggia (the building was on a bank of the River Thames). The lessee constructed ceiling height walls around the loggia, which accordingly could only be accessed from the communal basement through a door to which the lessee kept the key. The lessee installed a shower and furniture, and a staircase through the ceiling of the loggia into the lessee’s flat overhead. The Judge held that this user did not amount to exclusive possession of the loggia, and did not deprive the freehold owner of any reasonable use of it, nor of legal possession and ultimate control of it. It was therefore capable of being, and was, an easement. The
freeholder owner could be given a key, and could make any use of the loggia not inconsistent with the rights of the lessee to enjoy it for relaxation and recreation. Such uses could include the installation of air conditioning or other plant and machinery to service the building, and taking deliveries from a riverboat through the loggia into the common parts of the basement.

Thus even user which appears to involve exclusive occupation of the servient land may yet be an easement where uses remain to the servient landowner which in the context of the land in question are significant. His ownership is not in such circumstances illusory. The emphasis again is on control: notwithstanding what looked like the grant of pretty full factual possession in the sense in which that concept is explored in the adverse possession cases, the servient owner did not grant legal possession. The test there would perhaps revert to those adverse possession cases: could the dominant owner exclude the world at large? Answer: no, he could not exclude the servient owner in the limited circumstances in which the servient owner could exercise his rights and use the space, subject to the limitation of not interfering with the exercise of the rights granted. But it has to be said at the margins the distinction may lie more in tone and emphasis than reality: one could equally see the grant here being couched in terms of exclusive possession, subject to reservations in favour of the landlord, and in practice I think the arrangement would not look very different if expressed as a lease.

So the courts are developing a theory of possession at least in this context which follow the lead of Lord Scott and emphasise retention of control as the essential component of possession. This element is also found in the lease/licence cases, which demonstrate a similar attitude to the dividing line between the grant of possession and something less than that.

**Lease/licence and exclusivity**

Whether or not a lease has been granted depends on whether the grantee has a right to exclusive control of land for a limited period. The courts ask if the tenant has by the lease been granted the right to “exclusive possession” of the land. As Lord Templeman put it in *Street v Mountford*, if the grantee has exclusive possession he has ‘*the rights of an owner of land, which is in the real sense his land albeit temporarily and subject to*
certain restrictions’. Thus if under the agreement the grantor retains the power to: (i) allow other people into occupation of the land; or (ii) move the grantee into different accommodation, the authorities tell us that there clearly is no lease since the grantee has no right to exclusive control.

It seems settled authority that an agreement allowing the licensor to terminate the occupier’s rights of occupation and require him to move elsewhere cannot for that reason be a lease. But I question how this situation differs from a rolling break clause in a lease? We see increasingly frequent examples on 1954 Act renewals of tenants arguing for a one year term with a rolling break operable from the commencement of the term and landlords seeking redevelopment break clauses exercisable with effect from one year after commencement. If the ability to terminate after a specified period does not prevent those agreements from being leases (all other things being equal), why should a similar feature in a residential context (which is where these observations have mostly arisen) be any different?

I venture to suggest that the courts have gone wrong here, because they have mistakenly treated a term which goes to duration as a term which affects the quality of the occupation; misled it would seem because they applied the test of “control” uncritically, without differentiating control in the form of power to bring the lease to an early end, from control of occupation. There is a cogent argument, in my view a convincing one, that an agreement allowing someone exclusive occupation of premises for a period of time the length of which is in the control of the grantor is nonetheless a tenancy if the occupier is during the term granted a degree of control which allows him to exclude the landlord from the land (save in accordance with specified exceptions and reservations).

That observation may not take us much farther forward however, because although ruling out of consideration irrelevant control in the form of bringing the lease to an end as an index of exclusive possession, it does not take us any closer to identifying what degree or extent of control must be retained on the one hand or passed on the other. Nonetheless, it is consistent with the general doctrine that the question of legal possession in this sense is synonymous with the exercise of control over who does what in on or over the land.
The question of the relationship between licences and the extent of the right of occupation conferred has had particular resonance in agricultural law. Under section 2 of the Agricultural Holdings Act 1986, an agreement under which *inter alia* a person is granted a licence to occupy land for use as agricultural land takes effect, with the necessary modifications, as if it were an agreement for the letting of land for a tenancy from year to year, if the circumstances are such that if his interest were a tenancy from year to year he would in respect of that land be the tenant from year to year unless the agreement is a grazing or mowing agreement within section 2(2)(a). The licence in question must be a licence “to occupy” and to satisfy this requirement the right of occupation must be an exclusive right under which the grantee is entitled to prevent the grantor and any other person authorised by the grantor from making any use of the land: Lord Diplock in *Bahamas International Trust Co Ltd v Threadgold* [1974] 1 W.L.R. 1514, HL. But is that not the definition of a tenancy; or (which amounts to the same thing) the definition of the grant of exclusive possession? How can section 2 ever have any application, if the only type of arrangement it applies to is one which is called a licence but in fact possesses the inherent characteristics of a tenancy? This demonstrates the oddity in, and in my view the conceptual flaw at the heart of, the idea of a licence which grants the right to exclusive occupation.

Another example of the anomaly, also taken from the agricultural arena, is found in the leading case of *Pye v Graham* [2003] 1 AC 419. In that case the squatters had originally occupied the disputed land under a grazing licence, which is generally accepted as not granting the right to exclusive possession, and as having the characteristics of a licence. After that expired, the squatters stayed on in occupation. The evidence was that they carried on doing no more than they had done under the grazing licence. If, after their permission to occupy the land determined, (1) they did no more than they did under the grazing licence and (2) what they did under the grazing licence was not exclusive, then how could what they in fact did be sufficiently exclusive to satisfy the requirements necessary to establish adverse possession? The requirement of factual possession quite clearly states that the squatters must occupy the land to the exclusion of all others. The *animus possidendi* requirement states that the squatter must intend to exclude all the world including the paper title owners. Neither of those tests was satisfied when the squatters occupied under the grazing licence. They carried on in occupation after the expiry of the grazing licence exactly as they had behaved under
the grazing licence. How then could either requirement, never mind both of them, be satisfied for the period after its expiry?

The law has got itself into difficulties here with the very notion of an exclusive licence. The conventional response (and it is at this point in my view that the disparate contexts in which the question of possession arises do meet at something of a nexus) is that the distinction between lies in the degree of control retained alternatively granted away by the person entitled to possession of the property. If the grantor retains some element of control over the use of the land, then he has not granted exclusive possession. Which brings us full circle: if the right to occupy under a licence is exclusive, even of the grantor, in what sense has grantor retained control? If the licensee has the right to object to anyone coming on to his land, including the legal owner, because he has been granted exclusive rights, then in what way does the legal owner retain any effective control?

This question has perhaps arisen most commonly in residential cases, and the answer is commonly fact specific. On the particular facts of any given arrangement, the landowner will have retained a sufficient basket of rights for it to be incorrect to view the arrangement as one involving a grant of possession. So a lodger in a house will be unable to object to the owner going in and out to clean, to retrieve chattels or open windows, and so on, and the quality of his occupation will continue to be that of a licensee; whereas an occupier of a bedsit can lock the door, take off all his clothes, and do what he likes in there, provided he abides by the rules governing his occupation (the covenants) and lets the landlord in in accordance with pre-agreed criteria (to inspect, to take a common example). Put this way the distinction sounds both convincing and relatively easy to apply. Where services or attendance are to be provided, the question is whether such services or attendance in fact require as a condition of their provision an open ended right for the landlord to enter without restriction and without the need for prior permission of the occupier. But that analysis sits far less easily, and is far less obvious to apply, in the agricultural cases, in which the distinctive element, the retention of control, is less easy to ring-fence.

The difficulty has spawned some truly tortuous analysis, leading to such pronouncements in such prestigious practitioners' texts as Woodfall as: “although there can be no tenancy without exclusive possession, there may still be a licence even
though the licensee enjoys de facto exclusive possession”. That strange hitherto unknown species – “de facto exclusive possession” - arises from the case of Onyx v Beard [1996] EGCS 55. In that case permission was granted to members for the time being of a club to occupy premises for an indeterminate period, albeit the arrangement could be determined on one month’s notice, for no consideration. In fact properly analysed this is not a lease/license case at all: what was granted could have no more been a contractual licence than it could have been a tenancy, since the agreement was made with a moving shifting population of club members and it was held rightly that there was no legal entity in which the alleged “rights” could have vested. By the same token, there was no entity with which the alleged contractual licence could have been concluded, and indeed it was specifically held that it was an informal arrangement. In reality the agreement was no more than a gratuitous permission to a shifting number of people loosely affiliated through membership of a non legal entity; and whilst a month’s notice was stipulated, it is difficult to see how that could have been enforced except perhaps by way of an estoppel. This is a truly spectacular example of how awry the ideas can go once one departs from principle and intermingles the concepts of occupation and possession, without reference to the underlying tenets of property law.

As we know, the significance of the distinction was heightened because of the great raft of legislation during the second half of last century which bestowed protection on tenants, but not on licensees, or, in the case of the Agricultural Holdings Act, not on non-exclusive licensees. As the shackles of those great protecting statutes have been loosened, the distinctions have lost much of their earlier significance in practical terms. But the consequence has been that the law on exclusive licenses remains in a bit of a mess. Whether the case will ever arrive which is able to tidy up the mess is questionable, but I will keep looking.

The sharing of possession?

No. Just no.

Before I commence on a slightly more rigorous analysis, I should clarify that I distinguish between on the one hand the sharing of occupation cases, where sensible
questions as to the nature and extent of the occupation of several occupiers are asked against the background of acknowledged legal principle; and on the other hand the sharing of possession cases. My firm view is that no sensible meaning can be given to this phrase which can co-exist with the inherent characteristics of the doctrine of legal possession. This is notwithstanding that the phrase “sharing possession” is commonly found in alienation provisions.

Working from the principles we have been examining, possession is vested in a single entity. That entity may like a many headed monster comprise more than one legal person (up to four in the case of the legal title), but there is a single vesting in all of those heads jointly. That is what is signified by unity of possession, one of the conditions of joint ownership of an interest in land. If at any time those heads change, or increase or reduce in number (leaving aside the special rule as to survivorship upon death), then possession can only vest in the newly constituted legal entity by way of assignment. That is to say, legal possession must be transferred from the legal entity in which the interest was vested, to the legal entity in which it is to be held. An assignment as we all know involves a parting with possession.

So there is no “sharing” of possession when an interest in property vests in joint owners. They all possess the interest as a single entity. Nor is there sharing of possession when an assignment is made by A to B, or A and B jointly to C and D; or A and B jointly to A, B and C. Possession is by definition, as we have seen, an exclusive concept. One can grant rights of occupation, and retain possession; and in that sense one is sharing the right factually to occupy the land. But we have seen that the grant of exclusive possession of the land, without the retention of a sufficient degree of control, is the grant of possession, not the sharing of it. By the same token, the grant of a licence to occupy, (even an exclusive licence if such a thing exists), is not the grant of possession, by definition. The same applies to the grant of rights in the nature of easements; by definition, possession is retained by the servient owner. What other situation could possibly be covered by the idea of “sharing possession”?

As set out above, to give another party legal possession is to part with possession and it is clear on the authorities that a breach of covenant against sharing possession is regarded as a different breach from that of parting with possession: Akici v L R Butlin [2006] 1 WLR 201 (CA). The only way to make sense of the idea of the sharing of
possession is to give possession the same meaning as “factual possession”. What is referred to is allowing another entity to occupy the premises as if they were the occupying owner, but without any belief or intention on the part of either the true owner or the occupying owner that the occupier can keep out the true legal owner, or that the arrangement even if legally binding is anything other than contractual; in other words, a licence.

It is said in Akici that the prohibition will apply to joint possession, but not to a sharing of the use of the property falling short of shared possession, which seems with respect to be a circular definition. As we have seen, though there may be joint owners, there cannot sensibly be said to be joint possessors in the sense of possession being enjoyed simultaneously by two different entities, not themselves sharing unity of possession, under separate but equivalent rights. The only basis on which it makes sense for two parties, who do not have joint possession in the legal sense, each to have possession is in the sense introduced at the outset of this paper; where the relevant interest is an interest in possession. Thus the owner of a concurrent lease has an interest in possession, as does the owner of the pre-existing lease.

But this is not what is meant by the authorities on the sharing of possession, whose facts betray only occupation, albeit sometimes with contractual foundation. This is perhaps the most egregious example of confusion between occupation and possession, and is perhaps driven by a desire to make unlawful something which is not precluded by the terms of the lease – the grant of a licence, or rights to use – but which offends what is taken to be the spirit of the lease. “To part with possession is one thing: it is very much another to share possession or to permit premises to be occupied by some other company without yielding up possession”: per Megarry J, VT Engineering v Richard Barland & Co, (1968) 19 P & CR 890. Really?

**Conclusions**

There is a coherence to be found in the way in which possession is treated in the authorities, but it is imperfect. Leaving aside the archaic use of the word when describing the relationship of a person to an estate in land, it would seem that at the heart of the concept of possession is a set of interconnected defining characteristics,
centring on the ability to control the land, and its counterpart, exclusivity. There are anomalies, and if the set of principles I have identified is correct then those anomalies must be regarded as mistakes in need of correction, since they cannot be accommodated within them.

What follows is a summary of the principles which emerge, and which together might perhaps comprise the doctrine of possession.

(1) The concept of possession as we encounter it in our daily practices involves the right to control the use and occupation of land to the exclusion of all others.

(2) Possession in the typical sense is exclusive: only one entity, albeit comprising multiple heads, can enjoy it at a time.

(3) The word “exclusive” when applied to possession is emphatic not qualificatory. It highlights an inherent quality of possession. Its use may therefore accurately if pedantically be regarded as involving a tautology.

(4) Analysis of the concept of possession is intimately connected to questions of occupation, because legal possession confers the right to occupy the land to the exclusion of all others, and often (but not always) manifests in actual occupation of land.

(5) Legal possession is not lost merely by curtailing the practical possibility of enjoying that right by the grant to third parties of other rights, whether of property, contractual, or permissive, over the land.

(6) The factor which differentiates occupation which qualifies as possession and occupation which does not is the degree of control which the occupier has over the use and occupation of the land.

(7) The litmus test of whether an occupier has sufficient control to establish possession is the original ability to exclude from the land all the world, including (if the occupation be adverse) the entity in fact legally entitled to possession. This is a secondary sense in which possession is exclusive.

(8) That ability is “original” in the sense that the owner may choose to grant rights, or take possession subject to pre-existing rights, which curtail the ability of the owner actually to occupy or use the land in quite extensive ways, and which confer a right on the grantee to exclude the owner from
entering or occupying or using his land in any way which is inconsistent with the rights of use or occupation granted.

(9) Provided the occupier retains the right to exclude from the land persons who have been granted no such property or contractual or permissive rights, the owner retains possession.

(10) At these margins, there is no or virtually no relationship between occupation, or use, and possession. Thus we see that the relationship between actual occupation and possession is contingent, and the real defining element of possession is control.

(11) There are serious problems with the idea of exclusive possession under a licence, notwithstanding the reference to such a possibility in the authorities. Those problems are resolvable by reference to the degree of control test.

(12) There are serious challenges to the idea of exclusive possession posed by the ouster cases. Those challenges too can be met by reference to the degree of control test.

(13) The idea of sharing of possession if offensive to the underlying concept of possession and must be regarded as an anomaly, or a concept involving a significantly different type of possession, than that identified here.

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