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# Supreme Court confirms certain leases are void

In an important judgment handed down by the Supreme Court on Wednesday 9 November 2011, (*Berrisford v Mexfield Housing Cooperative Limited*) the Court has confirmed that a lease which is neither for a defined length nor for a length which is capable of being made certain, is void. The Court also held that in certain limited circumstances such tenancies can be automatically converted into 90 year tenancy agreements, even if that was never the intention of the parties.

## How did this problem arise?

Since the passing of the Law of Property Act 1925, the only legal tenancies which can be created are fixed term tenancies (e.g. for a week, month, year), and periodic tenancies (e.g. those which continue from week to week, or month to month, or year to year). Before 1925 there were a number of rarer types of tenancies, such as tenancies for the life of a person. Because those tenancies did not fit into the wider scheme of the 1925 Act in relation to certainty, section 149(6) of the Act transformed tenancies for a life into 90 year long tenancies, subject to the important provision that once the tenant had died the tenancy could be terminated on one month's notice.

There had been very little caselaw on the operation of section 149(6) until the Mexfield case.

Since the 1925 Act restricted the types of valid tenancies, the Courts, including the House of Lords, had struggled to reconcile those restrictions with the facts of cases where the term length of a tenancy was not certain. The problem was such that during the Second World War, as a result of a case called Lace v Chantler, the Government legislated so that tenancies which were granted '...*for the duration of the war...*', and which would otherwise be void, were converted into 10 year terms, which could be terminated on a month's notice once the war was over.

The position (that an uncertain tenancy was void) was confirmed, albeit reluctantly, by the House of Lords in *Prudential Assurance Co Ltd v London Residuary Body [1992] 2 AC 386*.

## How did the problem apply to the tenant in this case?

Mrs Berrisford occupied property where the landlord was a mutual housing cooperative and, for that reason, her tenancy did not benefit from most of the usual protections afforded to residential tenants. The term of the tenancy was '*from month to month until determined as provided in this Agreement'.* The determination provisions in the agreement were limited; provided Mrs Berrisford did not breach the terms of her tenancy, and did not wish to bring

the tenancy to an end, the landlord (Mexfield) had no right to terminate the tenancy, at least as far as the document seemed to indicate.

After Mrs Berrisford had been in occupation for around 14 years Mexfield served notice upon her to quit her tenancy, stating that because the term was uncertain the tenancy (as drafted) was void, and therefore the arrangement became at best a monthly period tenancy which could be terminated on a month's notice.

In the county court the judge rejected Mexfield's claim for summary judgment for possession. On appeal to the High Court, and then the Court of Appeal, Mexfield's argument that the tenancy as entered into was void was reluctantly upheld.

**Effect of the Supreme Court judgment**

The Supreme Court, consisting of seven members and with Lord Neuberger (the Master of the Rolls, and widely regarded as the most influential judge in relation to property matters) giving the leading judgment, came to a slightly unexpected, albeit welcome (for Mrs Berrisford) conclusion.

Firstly the Court confirmed that the law in relation to uncertainty was still as confirmed in the Prudential case: an uncertain term is void. The members of the Court concluded that the position was of such long-standing that it would be for Parliament, not the Courts, to change the law.

Secondly, the Court decided that although Mrs Berrisford's tenancy did not describe itself as a tenancy for life that was, in fact, what it was. It is well established that the Courts will look to the substance, rather than the description, of an agreement, and in the circumstances the Courts did not have much difficulty concluding that the arrangement was of the same nature as the 'tenancies for life' which had existed pre-LPA 1925. Therefore, as a matter of law the agreement had become a 90 year tenancy agreement, terminable in accordance with the terms of the agreement, and which would otherwise come to an end on one month's notice given after the Mrs Berrisford's death.

Thirdly, although the Court did not have to decide the point, it was suggested that even if the tenancy had not been converted into a tenancy for life (for example, if the tenant had been a company which does not have a 'life'), and would therefore be void, the right of the 'tenant' to remain in occupation subject to limited restrictions on the 'landlord' recovering possession might still be enforceable as a contract between them. This opens the possibility that, in future, those occupying property under arrangements which do not qualify as tenancies might still be able to assert, or be bound by, rights and obligations at least so far as the parties to the arrangement do not change. This is relatively unchartered territory in the world of property law.

**Summary**

The decision in Mexfield is important because it is a reminder that what parties intend to contract to might not be the arrangement they in fact create. Mrs Berrisford was perhaps fortunate that an ingenious solution was found which rescued her right to occupy property, a right which would otherwise have been lost. The decision also highlights the unsatisfactory state of the law where Mrs Berrisford's solution would not apply, and contracting parties might find themselves with no tenancy at all. Finally, the decision suggests an erosion of the well-understood division between the law relating to tenancies, and that relating to other

contracts, which unless Parliament intervenes will only be further explored in a piecemeal way by further caselaw.

This briefing arose from an interview given by Paul Greatholder to Lexis Nexis Legal Current Awareness published on 15 November 2011.

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