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Are you certain? Tenancies, and how (and when) they can be terminated after Mexfield.

In this article Paul Greatholder looks at a recent case about how a lease which could only be terminated if the tenant committed a breach of covenant was held to be void.

The recent case of *Mexfield Housing Co-Operative Ltd v Berrisford [2010] EWCA Civ 811* has provided a reminder of a serious potential problem in certain tenancy agreements which could cause them to be legally void. The problem arises where the termination arrangements for the tenancy do not provide a clear date for the end of the letting, including those provisions which allow a landlord to terminate the agreement only where the tenant is in breach of its terms.

Mexfield is a 'fully mutual housing association', that is, only members can be tenants, and only tenants can be members, according to its rules. Fully mutual housing associations cannot create assured or assured shorthold tenancies, and the statutory protection for tenants is therefore limited to the provisions in the Protection from Eviction Act 1977 which requires a landlord to obtain a court order before evicting them. However, the principle in the Mexfield case – that lease durations must be certain – might apply to a wide range of tenancy arrangements.

Ms Berrisford began renting residential property in Barnet from Mexfield in 1993. The agreement under which Ms Berrisford occupied was stated to be 'from month to month until determined as provided in this Agreement'. Clause 6 of the agreement apparently restricted Mexfield's right to terminate the lease to situations where there were arrears of rent or another breach of the agreement. Mexfield issued possession proceedings relying only upon service of a notice to quit (ie not arrears or a breach), and despite losing in the County Court, on appeal it was granted an order for possession. In fact thereafter Mexfield came to an agreement with Ms Berrisford to grant to her a new tenancy, but, nevertheless, the parties agreed that the question of what were Mexfield's rights should still be considered by the Court of Appeal because it was of general importance.

The argument of Mexfield in the High Court and in the Court of Appeal was that the agreement from 1993 was in fact void, and that in its place there was only an implied periodic monthly tenancy, which could be terminated by a month's notice. The Court of Appeal agreed with this argument for the following reasons.

It has been a very longstanding principle of English property law that a tenancy agreement will only be valid if it grants a tenancy for a determinate period. The leading case illustrating this is *Prudential Assurance Co Ltd v London Residuary Body [1992 AC 386],* in which the House of Lords reviewed a number of legal propositions, and held that a tenancy granted by the London County Council 'until the said land is required by the council [for road widening]' was void for uncertainty. The House of Lords in Prudential relied upon, amongst other

things, very longstanding legal assumptions, and a range of cases, including *Lace v Chantler [1944] KB 368*, in which the court held that a tenancy 'for the duration of the Second World War' was held to be invalid for uncertain length. As a result of *Lace v Chantler* Parliament was obliged to introduce specific legislation in relation to such war-time tenancies, converting them into 10 year leases with a one month break right in the event that the war ended before then, as there were a large number in existence.

What is of note is that the House of Lords in Prudential described its own decision as leading to 'an extraordinary result' which gave it 'no satisfaction'.

The Court of Appeal in Mexfield reflected the House of Lords' dissatisfaction with the state of the law. By a 2-to-1 majority, the Court of Appeal in Mexfield confirmed that the failure to create an agreement which was certain as to its length (or capable of being rendered certain) was fatal to the agreement between the parties. One Court of Appeal Lord Justice, Wilson LJ, decided that Ms Berrisford's tenancy could be saved by reference to a number of cases about equitable rights, but this view was overruled by the majority (Mummery and Aikens LJJ).

The decision in Mexfield is a reminder that a number of tenancies which do not otherwise benefit from statutory protection – such as 'excluded' business tenancies, or tenancies at a very high letting value, or tenancies where (like in Mexfield) the landlord cannot grant assured tenancies – could be held to be void, despite the apparently clear intention of the parties. The courts have indicated that there is nothing they can do about this until Parliament legislates on the issue. Both landlords and tenants with Mexfield-type leases should take advice about what rights they might have as a consequence.

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