

**IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT, CHANCERY DIVISION
MR JUSTICE PETER SMITH
LOWER COURT NO: CC/2008/APP 0828**

Royal Courts of Justice
Strand, London, WC2A 2LL

15/07/2010

Before:

**LORD JUSTICE MUMMERY
LORD JUSTICE WILSON
and
LORD JUSTICE AIKENS**

Between:

RUZA BERRISFORD **Appellant**
- and -
MEXFIELD HOUSING CO-OPERATIVE LTD **Respondent**

**Mr Mark Wonnacott (instructed by the Mary Ward Legal Centre, London WC1) appeared
for the Appellant.**

**Ms Kerry Bretherton and Ms Laura Tweedy (instructed by Rickerbys LLP, Cheltenham)
appeared for the Respondent.**

Hearing date: 25 March 2010

Lord Justice Wilson:

A: THE QUESTION

1. Where a clause of an agreement for a tenancy (or purported tenancy) from month to month purports to preclude the landlord from bringing the tenancy to an end unless the tenant falls into arrears of rent or commits another breach of the agreement, can the landlord ignore the preclusive clause and bring the tenancy to an end, irrespective of any arrears or other breach on the part of the tenant, by service of a month's notice to quit?

Such is the primary – and in my view the only – question to be answered in this appeal, which is brought by Ms Berrisford and to which the respondent is Mexfield Housing Co-operative Ltd (“Mexfield”). The answer to it is not as straightforward as one would assume.

B: INTRODUCTION

2. In 1993 Ms Berrisford and Mexfield entered into what they described as an “Occupancy Agreement” but which had various features indicative of an intention to create a tenancy. Mexfield purported to “let” and Ms Berrisford purported to “take” a property in Barnet at a “rent”

of £89 per week, adjustable each year in the light of inflation. In the agreement there was a clause of the type described in the question set out in [1] above: I will set the clause out in [9] below. Ms Berrisford has enjoyed exclusive possession of the property ever since 1993.

3. By notice sent to her on 11 February 2008, Mexfield purported to give to Ms Berrisford notice to quit the property on 17 March 2008; such notice is conceded to have been valid in the event that she had only a monthly periodic tenancy. Then, in April 2008, Mexfield issued proceedings for possession of the property. Ms Berrisford raised various defences but Mexfield issued an application for summary judgment. In November 2008 a judge in the Central London County Court refused Mexfield's application. But, apparently wishing to use the proceedings against Ms Berrisford as a test case, Mexfield appealed; and on 5 October 2009 Peter Smith J, sitting in the Chancery Division of the High Court, handed down a judgment ([2009] EWHC 2392 (Ch)) in which he answered the question set out in Section A above in the affirmative. So he allowed Mexfield's appeal and made a possession order in relation to the property in its favour. In the course of argument before him, however, Mexfield had agreed, at his invitation, to enter into a fresh Occupancy Agreement with Ms Berrisford. It was duly entered into on 21 October 2009 and, apart from the amount of rent, which under the old agreement had, by reason of inflation, increased over the years to £171 pw and which under the fresh agreement stands at £185 pw, it is in all material respects in terms identical to those of the old agreement. Thus Mexfield no longer aspires to obtain possession of the property.
4. It follows that, as between these parties (or, at least, for so long as no dispute arises between them in relation to the effect of the fresh agreement), this appeal is academic. So why have we entertained it? There are many occupancy agreements in this form. Mexfield has regularly been using such agreements. Other landlords with similar legal status (as to which see Section C below) have also done so: an example is contained in the facts of the recent decision of this court in *Joseph v Nettleton Road Housing Co-operative Ltd* [2010] EWCA Civ 228. Mexfield tells us, off the cuff, that since about 1992 it has entered into perhaps 500 such agreements and that a substantial number of them still subsist. It also tells us that the legal effect of this form of agreement is troubling district judges throughout England and Wales when confronted with actions for possession brought by Mexfield. At present there is, of course, authority as to the validity – or, rather, lack of validity – of the preclusive clause: it is that of Peter Smith J in the ruling under appeal. We have taken the view that it would be helpful for this court to decide whether his ruling was correct.
5. Were we to have decided that the ruling of Peter Smith J was incorrect, the decision would not have reflected adversely on him. Ms Berrisford was unrepresented before him and, understandably, proved incapable of putting forward any real opposition to Mexfield's appeal, still less the highly learned – yet cleverly economical – argument put by Mr Wonnacott, who, in the light of the restoration to her of Community Legal Funding, appears before us on her behalf. Furthermore the defences with which other counsel who first represented her sought before the circuit judge to resist summary judgment bear virtually no relation to Mr Wonnacott's argument. Even Mexfield's argument to the circuit judge appears to me to have lacked its present focus. Indeed I must add that, by a respondent's notice, Mexfield sought before us to deploy alternative reasons for its – theoretical – entitlement even on a summary basis to the possession order, including a contention – which is in dispute – that, were Mexfield constrained by the preclusive clause to serve a notice to quit in the event only of arrears of rent or of other breach on the part of Ms Berrisford, then she had indeed fallen into such arrears at the relevant date (whenever that was, being a point which is also in dispute). But at the hearing we informed Ms Bretherton (who has represented Mexfield in all three courts) of our view that in the unusual circumstances it would, with respect to her, be a waste of time for us to decide more than the point of legal principle.

C: THE STATUS OF MEXFIELD

6. The “Rules” of Mexfield declare it to be a non-profit-making association, the primary object of which is the provision on the co-operative principle of housing accommodation for occupation exclusively by members of the association under the terms of agreements granted to them by the association. The rules define an agreement as “any form of tenancy agreement, lease, underlease or an agreement for a lease under the terms and conditions of which the member occupies one of the Association’s houses”. They provide that no one can be a tenant of the association without also being a member; and that no one can be a member without also being a tenant. Their effect is that Mexfield is not just a housing association within the meaning of s.1(1) of the Housing Associations Act 1985 but a “fully mutual” housing association within the meaning of s.1(2) thereof and thus also of s.45(1) of the Housing Act 1988.
7. Mexfield’s status as a fully mutual housing association has important consequences. Mexfield cannot create an assured tenancy: see s.1(2) of, and paragraph 12(1)(h) of Schedule 1 to, the Housing Act 1988. Nor can it create a secure tenancy: for its status is such as to prevent the “landlord condition” set for secured tenancies by s.80 of the Housing Act 1980 from being satisfied. So its members/tenants have no *statutory* protection against eviction, apart from s.3 of the Protection from Eviction Act 1977, which requires that they be not evicted without court order. Moreover the court’s power to postpone execution of a possession order is limited by s.89(1) of the Housing Act 1980 to a maximum period of only six weeks.

D: THE TERMS OF THE AGREEMENT

8. The terms of the Occupancy Agreement between Mexfield and Ms Berrisford were of course, provided by Mexfield to Ms Berrisford for her consideration in advance. She accepted them and the agreement was dated 13 December 1993. The agreement recited that, in anticipation of her occupation of the property, she had become a member of Mexfield. It provided as follows:

“1. The Association shall let and the Member shall take the [property] from the 13th day of December 1993 and thereafter from month to month *until determined as provided in this Agreement.*” [Emphasis supplied]

Clause two, together with the fourth schedule, specified the rent, stipulated that Ms Berrisford should pay it weekly in advance and provided for its annual increase in accordance with the R.P.I. plus 2%. By other clauses she agreed, among other things, to pay the rent and not to assign, sublet or part with possession or occupation of the whole or any part of the property; and Mexfield agreed, among other things, to give her possession of the property at the commencement of the agreement and not to interfere (save in specified circumstances referable to the condition of the property) with her right peacefully to occupy it.

9. The only terms of the Occupancy Agreement which provided for its determination were the two clauses which follow:

“5. This Agreement shall be determinable by the Member giving the Association one month’s notice in writing.

6. This Agreement may be brought to an end by the Association by the exercise of the right of re-entry specified in this Clause but ONLY in the following circumstances:-

a) If the rent reserved hereby or any part thereof shall at any time be in arrear and unpaid for 21 days after the same shall have become due ...

b) If the member shall at any time fail or neglect to perform or observe any of the stipulations conditions or provisions contained in this Agreement which are to be performed and observed by the Member

c) If the Member shall cease to be a member of the Association

d) If a resolution is passed under ... the Association's Rules regarding a proposal to dissolve the Association

THEN in each case it shall be lawful for the Association to re-enter upon the premises and peaceably to hold and enjoy the premises thenceforth and so that the rights to occupy the premises shall absolutely end and determine as if this Agreement had not been made (but without prejudice to any right of action or remedy of the Association)."

E: SUMMARY OF THE ARGUMENT

10. In defence of the ruling of Peter Smith J, Ms Bretherton submits that the decision which over-arches proper analysis of this case is that of the House of Lords in *Prudential Assurance Co Ltd v London Residuary Body* [1992] AC 386. By reference to it, Ms Bretherton primarily submits that the Occupancy Agreement entered into by Mexfield with Ms Berrisford dated 13 December 1993 was entirely void (and, for that matter, that the hundreds of other such agreements entered into with Mexfield at its invitation since 1992 were, and, to the extent that they still purport to subsist, are, entirely void); and that, instead, the fact that Ms Berrisford was afforded exclusive occupation of the property, in consideration of her payment of the stipulated rent to Mexfield, created a tenancy of the property, to be *implied* by the conduct of both parties, which was to endure from month to month at the stipulated rent and which was therefore validly determined by the month's notice to quit dated 11 February 2008. Ms Bretherton's subsidiary submission is that, even were the entire Occupancy Agreement not to have been void, at any rate clause six thereof was void, with the result that Ms Berrisford enjoyed thereunder only an *express* tenancy from month to month pursuant to clause one, which – again – was validly determined by the notice dated 11 February 2008.
11. Mr Wonnacott, by contrast, submits that there was no reason in law to allow Mexfield to have escaped from the effect of the contractual term (clause six) into which it entered with Ms Berrisford; and that, in circumstances in which (at any rate on its primary case) Mexfield sought an order for possession of the property otherwise than in accordance with clause six, her opposition to the order should have been upheld even on a substantive basis and *a fortiori* on a summary basis. In the end, by a dramatic reduction of his argument, as if boiled in an open pan at a fierce temperature, Mr Wonnacott submits that, although the effect of the *Prudential* case is that at *common law* clause six had no effect, *equity* would have intervened to prevent Mexfield, as one of the original contracting parties, from seeking possession against Ms Berrisford, as the other original contracting party, in breach of the clause. Alternatively he submits that, since the parties clearly intended that clause six should define Ms Berrisford's exposure to eviction, then, if and to the extent that, as a term of a tenancy, no effect could have been given to it, the parties must be taken to have entered into a *licence* for her to occupy the property, which, as between the contracting parties thereto, should have confined Mexfield's right to possession to clause six.
12. Indeed, until half way through the hearing before us, Mr Wonnacott sought further to argue not only that, under whichever of his two presentations, clause six should have been binding upon Mexfield but also that, even in the event that Mexfield had complied with clause six, such was only a forfeiture clause and that Ms Berrisford would have been entitled in equity to seek relief against forfeiture. In this regard he cited *On Demand Information PLC v Michael Gerson (Finance) PLC* [2002] UKHL 13, [2003] 1 AC 368, for the proposition that equity can grant relief against forfeiture of property held by a non-owner even otherwise than pursuant to a tenancy. But in the end, wisely and perhaps in order to keep the point of principle appropriately sharp, Mr Wonnacott asked us not to rule upon the availability of relief against forfeiture. It was indeed an academic question too far, which raised difficult issues as to whether clause six was a "forfeiture" clause at all and, if so, as to the ambit of equitable relief from forfeiture. Accordingly the only remaining issue is whether Mexfield was, in one way or the other, bound by clause six –

or, strictly, whether, if the proceedings had continued, Ms Berrisford would have had a real prospect of so establishing.

F: THE *PRUDENTIAL* CASE

13. The facts of the *Prudential* case were that in 1930 Mr Nathan was the owner of a shop in the Walworth Road; that the London County Council (“the LCC”) had in mind to widen the road; that Mr Nathan sold to the LCC a strip of land, 12 yards by eight yards, to the front of his shop; that the LCC leased it back to him at a rent of £30 p.a.; that the parties agreed that “the tenancy shall continue until the said land is required by the council for the purposes of the widening of” the road, whereupon the council had to give to Mr Nathan two months’ notice to quit; that in the event the LCC never required the strip for the purposes of widening the road; that Mr Nathan’s interest under the tenancy passed to the Prudential; that the LCC’s interest in the land passed to the London Residuary Body (“the LRB”); that the LRB gave to the Prudential six months’ notice to quit; and that the LRB then sold its interest in the land to the second to fourth defendants, being an investment company and two individuals none of whom had road-widening powers.
14. Reversing the decision of this court, the House of Lords held that the Prudential was obliged to give possession of the strip to the second to fourth defendants. In giving the leading speech Lord Templeman stated:
 - (a) at 390 C – H that for four hundred years a lease had been able to be created only by a contract for the exclusive possession of land for a determinate period;
 - (b) at 391 C – G that in *Lace v Chantler* [1944] KB 368 this court had rightly held that a lease expressed to be for the duration of the Second World War was invalid;
 - (c) at 394A – 395G that in *In re Midland Railway Co’s Agreement* [1971] Ch 725 this court had wrongly upheld, as valid, a proviso attached to the mutual right of the parties to end the tenancy by three months’ notice to quit, namely that the landlords should not exercise their right unless they required the land for the purposes of their railway undertaking;
 - (d) at 391 H – 392 A and 395 A – B that a provision for termination (or, as it would become, earlier termination) on the happening of an uncertain event could be validly incorporated within a maximum specified term of years, such as Parliament achieved when, in reversing the effect of *Lace v Chantler*, it provided, by s.1(1) of the Validation of War-Time Leases Act 1944, that a purported tenancy for the duration of the war should have effect as a tenancy for a term of 10 years subject to a right to each party to determine it by a month’s notice to quit in the event that the war ended prior to expiry of that term;
 - (e) at 394 F – G that a periodic tenancy did not fall foul of the requirement that at the outset its maximum length should be certain because, by refraining from serving a notice which would determine the tenancy at the end of one period, each party should be taken to have agreed that a new term should endure for the following period, and so on; and
 - (f) at 393 G – H that, not having been incorporated within a maximum specified term of years as in (d) above, the agreement in the case before the House that the tenancy should continue until the land was required for road-widening failed to create a valid lease but that the entry of Mr Nathan into possession and payment of a yearly rent created a tenancy from year to year which, by its notice, the LRB had validly determined.
15. Although the other four members of the House agreed with Lord Templeman, Lord Browne-Wilkinson expressed, at 396D, “no satisfaction” for subscribing to what he described, at 397B, as “such an extraordinary result”; and two of the three other members associated themselves with Lord Browne-Wilkinson’s observations. He pointed out, at 396F, that the decision left the Prudential with ownership of a shop without street frontage; and left the second and fourth

defendants with possession of a strip probably incapable of use otherwise than in conjunction with the shop. He observed, at 396H, that the rule which required that the maximum duration of the term be ascertainable at its outset appeared neither to have a satisfactory rationale nor to serve a useful purpose.

16. Mr Wonnacott accepts that in this court we are bound by the decision in the *Prudential* case. He submits, however, that the decision does not dictate the dismissal of Ms Berrisford's appeal. The *Prudential* was the successor in title to Mr Nathan and, in particular, the second to fourth defendants were the successors in title to the LCC. As against the second to fourth defendants, therefore, the *Prudential* could retain possession of the strip only if it could establish a *property* right in respect of it, viz. a valid lease of it determinable only in the event that it was required for road-widening and thus still subsisting. This the *Prudential* failed to establish. The decision of the House of Lords (submits Mr Wonnacott) says nothing about the intervention of equity to enforce, as between the original parties thereto, terms of a *contract* which, because of the rule reaffirmed in the decision, fails to create a valid lease.
17. In my view there is considerable force in Mr Wonnacott's submission that the impact of the *Prudential* case upon the present case is limited. Their Lordships were, for the reasons given above, enquiring only into *property* rights. There was therefore no reference to equity in general nor to specific performance in particular. When, at 393H, Lord Templeman held "that the agreement in the present case did not create a lease", he seems to me to have been implying that the failure of the agreement in that regard was irrespective of whether it had other effects. But we should note in particular two passages in the short speech of Lord Browne-Wilkinson. He said, at 396G:

"It is difficult to think of a more unsatisfactory outcome or one further away from what the parties to the 1930 agreement can ever have contemplated. *Certainly it was not a result their contract, if given effect to, could ever have produced. If the 1930 agreement had taken effect fully*, there could never have come a time when the freehold to the remainder of the [shop premises] would be left without a road frontage." [Emphasis supplied]

And he said, at 397B:

"I must therefore confine myself to expressing the hope that the Law Commission might look at the subject to see whether there is in fact any good reason now for maintaining a rule which operates *to defeat contractually agreed arrangements between the parties (of which all successors in title are aware)* ..." [Emphasis supplied]

The meaning behind those two passages is clear to me: it is that the fact that effect might be given to the 1930 agreement as a contract was irrelevant as against successors in title, even though they had been aware of its terms.

G: THE CONTRIBUTION OF EQUITY

18. So what, if anything, can equity contribute to our answer to the question before us? I refer to five authorities.
19. First, *Warner v Browne* (1807) 8 East 162. Mr Warner let premises to Mr Browne at rent of £40 p.a., payable quarterly; and they agreed that Mr Warner should not eject Mr Browne provided that he duly paid the rent and did not sell from the premises any article injurious to Mr Warner's business as a brush-maker. The Court of King's Bench held that, having given Mr Browne six months' notice to quit, Mr Warner was entitled to eject him even though he had duly paid the rent and sold no article injurious to Mr Warner's business. The Lord Chief Justice, Lord Ellenborough, held that the tenancy could not be for Mr Browne's life, albeit determinable earlier in accordance with the proviso, because it had not been created by deed; and that therefore it was a tenancy from year to year, to the nature of which the purported proviso was repugnant.

20. But hard on the heels of *Warner v Browne* came *Browne v Warner*: for Mr Browne filed in the court of the Lord Chancellor, the great Lord Eldon, a bill for specific performance of his agreement with Mr Warner, in particular of the proviso, and at once obtained an interim injunction against his ejection. Mr Warner entered a demurrer or, as we would say, applied for summary judgment. The Lord Chancellor rejected his application: (1807) 14 Ves Jun 156. He held that the parties had arguably entered into an agreement for a lease rather than a lease and that a court of equity might enforce the agreement; so he continued the injunction. Six months later, having filed an Answer, Mr Warner tried again to persuade Lord Eldon to discharge the injunction in advance of full trial. Mr Warner's motion is an example of the astonishing scope for interlocutory proceedings in Chancery at that time. But again he was unsuccessful: (1808) 14 Ves Jun 409. He alleged that, when he let the premises to Mr Browne, he was himself the holder only of a lease of the premises for six months; but, as Lord Eldon pointed out, such was as inconsistent with a tenancy from year to year as it was with the proviso. He held that the real questions were whether, although at common law there had been held to be a tenancy, in equity there was anything more than an agreement and, if not, whether it should be executed; and he concluded that the court could not proceed safely otherwise than by acting upon the written contracts of men as framed. The final outcome of *Browne v Warner* in Chancery is unknown. The dispute was probably settled.
21. Second, *Parker v Taswell* (1858) 27 LJ (Ch) 812. In 1855, by a written agreement signed by his agent, Mr Taswell purported to let two farms to Mr Parker for a term of ten years. But by s.3 of the Real Property Act 1845 a lease exceeding three years was "void at law unless also made by deed". In 1857 Mr Taswell sued at law for possession of the farms. Mr Parker accepted that in that court he had no defence to the action. But he sued Mr Taswell in the Court of Chancery for specific performance of the agreement and thus for an injunction to restrain prosecution of the action at law. On appeal the Lord Chancellor, Lord Chelmsford, upheld the grant of such relief to Mr Parker. He said, at 814:
- "[I]t was said that as the agreement contained words of present demise, it was void by the 3rd section of the [Act of 1845]; and it was insisted, on the part of the defendant, that, if it were void as a lease, it was not good as an agreement. Certainly, in no sense, even if it were under seal, could it be considered a lease, it not having been executed by the landlord himself; and therefore the landlord could not be bound by its covenants. But, assuming that it had been signed by the landlord, and contained words of present demise, and was void at law as a lease, under the 3rd section, was it void for every other purpose? ... The language of the 3rd section was very cautious. A lease required by law to be in writing was to be "void at law", unless made by deed. If the legislature had intended that the instrument should not be available for any purpose, it would have said that it should be void both at law and in equity, or to all intents and purposes. This was precisely the case in which equity ought to carry into effect the obvious intention of the parties."
22. Third, *In re King's Leasehold Estates* (1873) LR 16 Eq 521. In 1871 Mr Warren, holding a lease of premises in Stepney with a residue of eleven years, sublet them to Mr King for a term not exceeding his own term and with the proviso that he would not serve notice to quit in the interim unless Mr King failed to pay the agreed rent. In 1873 the East London Railway Company compulsorily purchased Mr King's sublease at a price reflective of the latter's representation that in effect it had nine years to run. But its perusal of the terms of the sublease led the railway company to contend that the proviso was invalid in failing to provide for a fixed term and that the sublease was only from year to year and so did not have nine years to run; so the company refused to pay the full agreed price to Mr King.
23. Mr King's action against the railway company in the Court of Chancery succeeded. Sir Richard Malins, Vice-Chancellor, applied the reasoning of Lord Eldon in *Browne v Warner*. He said, at 527,

“Therefore, upon principle, I am perfectly satisfied that a tenant who has an agreement with his landlord that the landlord will not turn him out so long as he pays his rent, has a right to retain possession as long as the landlord’s interest exists. What his right would be against [a landlord who holds a freehold interest] may be more difficult; it may not extend beyond his own life. Lord Eldon did not go into that question, but held that he had an interest. I am clearly of opinion that a tenant with such an agreement would not be allowed by this Court to be turned out of possession, although he has no defence at law.”

24. A paradox – so I interpolate – is that Mr King *might* have had a defence even at common law to a claim for possession by Mr Warren in breach of the proviso. For the proviso was incorporated within a maximum specified term of years, viz. eleven years: see [12(d)] above. But that quirk of the common law could have no bearing on the extent of the relief given in equity to the beneficiary of such a proviso. Equity, as Sir Richard in effect observed, would hardly be likely to enforce a proviso against a landlord who happened himself to be a leaseholder but not against a landlord who happened to be a freeholder.

25. Fourth, *Zimble v Abrahams* [1903] 1 KB 577, a decision of this court. Mr Abrahams had become a weekly tenant of a house off the Commercial Road. Subsequently, in 1896, the landlords’ agent signed an agreement which, following adjustment of the punctuation, included a proviso that “as long as [Mr Abrahams] lives in the house and pays rent regular, I shall not give him notice to quit”. Heedless of the proviso, the landlords served notice to quit. But – albeit with a degree of reluctance – this court upheld the dismissal of their action for possession on the basis that Mr Abrahams was entitled to specific performance of the agreement. The court applied the decisions in *Browne v Warner* and *Parker v Taswell*, cited above. Vaughan Williams LJ said, at 582, that, although the parties could not have *succeeded* in creating, subject to the proviso, a lease for Mr Abrahams’ life (being, until 1925, a recognised freehold estate) because their agreement was not by deed, such was what they had *intended*. Stirling LJ said, at 582-3,

“[W]e have in this case a document which, though it may have been intended to operate as a demise, may still be looked upon as an agreement for a lease capable of specific performance. If the true construction of the document is that it was not a demise which turned out to be inoperative, but an agreement for a lease, the case for specific performance is a fortiori.”

26. And fifth, *Siew Soon Wah v Yong Tong Hong* [1973] AC 836. In 1958 a tenancy of shop premises in Kuala Lumpur was created. The tenant then paid \$8000 in consideration of the landlord’s promise, at first oral but in 1964 reduced to writing, that the tenancy should be “permanent”. The landlord’s interest passed to his children, who served a notice to quit on the tenant. In the ensuing proceedings the children were treated as standing in the landlord’s shoes for all material purposes, in particular for the purposes of their being privy to the agreement with the tenant. The Privy Council upheld the reversal by the Federal Court of Malaysia of the trial judge’s grant of an order for possession of the premises in favour of the children. It was held that the effect of the agreement was to grant a tenancy for as long as Malaysian law allowed (viz. 30 years) provided that the tenant paid the rent and wished to continue to occupy it. “Is the respondent entitled to specific performance of that agreement?” asked Viscount Dilhorne, who delivered the judgment of the Council, at 844G. In my view importantly, he thereupon proceeded, at 844H – 845B, to refer with approval to the decision in *In Re King’s Leasehold Estates* cited above. He cited, at 645D, the decision of this court in *Inwards v Baker* [1965] 2 QB 29 for the proposition that, even in the absence of a contract, the expenditure of money on a property, with the encouragement of the owner, could give rise to an equity which would defeat the owner’s claim to possession. He concluded, at 846C, that in the circumstances an equity or equitable estoppel arose in favour of the tenant which, subject to the proviso, protected his occupation until 1988.

H: CONCLUSION

27. At the hearing Mr Wonnacott hazarded a guess – and Ms Bretherton later confirmed its validity – that Mexfield had begun to invite its prospective members/tenants to enter into the form of

Occupancy Agreement which is the subject of the present appeal on a date between 1971 and 1992, i.e. after the decision of this court in the *Midland Railway* case and prior to its being overruled in the *Prudential* case, both cited above. During that time neither Mexfield nor its prospective members/tenants had any reason to consider that clause six could not constitute a valid term of the tenancy. Following the decision in the *Prudential* case, however, Mexfield does not appear to have considered its impact on the validity of this form of agreement in general and on clause six in particular; nor is there evidence that any lawyer advising a prospective member/tenant did so. So, for the next 18 years, Mexfield and its prospective members/tenants, such as Ms Berrisford, continued to enter into agreements in the same form; and one assumes in Mexfield's favour that, until a very late stage (possibly at around the time of issue of the present proceedings), it understood, as no doubt its members/tenants understood, that clause six constituted a valid term of the tenancy.

28. The law says, however, that clause six cannot constitute a valid term of the tenancy. What then results?
29. There is no doubt that, although Ms Bretherton refrained from so doing, one can pick holes in the quintet of cases which I have presented as The Contribution of Equity in Section G above. The rulings of Lord Eldon in *Browne v Warner* were only interlocutory. Lord Chelmsford's decision in *Parker v Taswell* was suggested by Vaughan Williams LJ in *Zimbler v Abrahams*, at 581-2, to have neutralised the effect of s.3 of the Act of 1845. The proviso in *In re King's Leasehold Estates* might have been valid even at law: see [22] above. The decision in *Zimbler v Abrahams* was reached with some reluctance and, in *Lace v Chantler* cited above, Lord Greene, at 372, expressed some doubt about its *ratio decidendi*. And why did the decision in the *Siew* case veer away from contract towards the principle set out in *Inwards v Baker*, cited above, and thus proceed to attach significance to the detriment reflected by the payment of \$8000?
30. Nevertheless the facts of four of the quintet almost precisely replicate the term which we have in clause six and which precludes service of a notice to quit in the absence of arrears of rent or of other breach; in each the term was held or taken to be void and yet in each case the equitable doctrine of specific performance came (or in the *Siew* case appeared to come) to the tenant's aid. The fifth – *Parker v Taswell* – is an unqualified endorsement of the proposition that the failure, for whatever reason, of an agreement to create a valid lease in no way precludes its specific performance as between those bound by it so as to carry into effect its obvious intention. Cumulatively the quintet clearly defies Ms Bretherton's central proposition – unsupported by other authority – that, if an agreement fails to achieve the intention of the parties to create a lease terminable as therein provided, it thereby also fails to secure enforceability as a contract. I stress that each of the five claims in equity was brought against the original contracting landlord (or, in the *Siew* case, against his children treated as standing in his shoes); and I leave out of account the decision of Cozens-Hardy J in *Mardell v Curtis* (1899) WN 93, in which, confronted with yet another term analogous to our clause six, he brushed aside the objection of the landlord that, in that he was a purchaser for value of the property from the person who had entered into the contract with the tenant, the term, not running with the land, could not expose him to a decree of specific performance.
31. So in my view the proper analysis of this case is as follows:
 - (a) To the extent that, by clause six, the tenancy agreement purported to limit the landlord's ability to determine it to the circumstances there specified, it rendered the maximum term of the purported tenancy uncertain and the purported tenancy was therefore void.
 - (b) Subject to Mr Wonnacott's alternative submission in support of the existence of a licence, the parties agree that the only tenancy between the parties (and thus, however limited its significance in the circumstances of this case, the only *property* interest arising between them) was a tenancy of the property from month to month, thus determinable by the notice to quit served by Mexfield upon Ms Berrisford. Ms Bretherton prefers that we should infer the tenancy from month to month

from factors *dehors* the agreement, viz. from the conduct of Mexfield in letting Ms Berrisford into exclusive possession of the property in 1993 and from her conduct in paying the rent for it monthly (or, more accurately, every four weeks). I consider, however, that the monthly tenancy derived from the terms of the Occupancy Agreement itself, in particular from clause one, which was supported in part by clause five. Clause one provided for a habendum “from month to month until determined as provided in this Agreement”. The entire agreement, including clause six, was valid in contractual terms and, notwithstanding the failure of that clause in property terms, I see no reason why the words of clause one were not apt to generate a tenancy of a reduced character, viz. from month to month.

(c) Mexfield, however, served upon Ms Berrisford its month’s notice to quit notwithstanding – so we assume – that none of the four circumstances specified in clause six had arisen.

(d) In that event Ms Berrisford had a right to specific performance of the Occupancy Agreement, in particular of clause six. Although it may be, for example, that in 1993 she agreed to rent the property only as a result of the security of tenure afforded to her by clause six (or, for example, agreed to pay a rent as high as that stipulated therein in light of the security afforded to her thereby), Ms Berrisford did not need to establish detrimental reliance upon the clause. Having provided consideration for the agreement, equity would, subject to the scrutiny which it generally applies to applications for the exercise of its discretion, have ordered specific performance of clause six. Where the obligation to be enforced is, as in clause six, of a negative character, the equitable remedy will generally take the form of an injunction; but where, more particularly, the obligation to be enforced is, as in clause six, not to take proceedings save in specified circumstances, the remedy will take the form of a dismissal of any proceedings taken in breach of it.

32. It follows that my answer to the question set out in Section A above is in the negative; and that I would have allowed the appeal. On my analysis Mr Wonnacott has no need to seek, by his alternative submission, to present the Occupancy Agreement as having created in favour of Ms Berrisford a licence rather than a tenancy in order to secure the enforceability of clause six. But, although in the agreement there were straws in the wind suggestive of a licence, as in its title itself, more solid material was surely blown in the contrary direction, for example the references to “let” and “rent” and in particular the provision to Ms Berrisford of exclusive possession of the property. Nor would one readily hold that, since prior to 1992, Mexfield has been in wholesale breach of its rule that all its members should be its tenants.
33. Having now read the judgments of my colleagues, I add this footnote. Contrary, I believe, to the understanding of Aikens LJ, I, for my part, do not understand it to have been any part of Mr Wonnacott’s main submission that clause six defined the extent of the *interest in land* held by Ms Berrisford; and I hope that my judgment will not be understood to have subscribed to any such suggestion, which would clearly have fallen foul of the *Prudential* case.

Lord Justice Aikens:

34. I have read the judgment of Wilson LJ but I regret that I am unable to agree with the result he proposes. I will set out what I see as the key facts and a summary of the arguments of the parties, but I will not repeat citations of cases that have been made by Wilson LJ.
35. Ms Berrisford is a member of Mexfield, which is a company limited by guarantee. The Rules of Mexfield were drawn up in 1992. Under Rule 8 no one is entitled to be a member of Mexfield unless that person “is a tenant or a prospective tenant of the Association”.
36. Ms Berrisford signed an “Occupancy Agreement” with Mexfield on 13 December 1993. This provided that Mexfield “shall let” and that Ms Berrisford “shall take” the flat, as described in a schedule, from 13 December 1993 “and thereafter from month to month until determined as provided in this agreement”. The rent was set at £89 per week.

37. Clause 6 of the Occupancy Agreement states that the agreement may be brought to an end by Mexfield by a right of re-entry but only in the circumstances set out in the clause. The first is if rent is in arrear and unpaid for 21 days after it has become due. The third is if Ms Berrisford ceases to be a member of Mexfield. None of the other circumstances is relevant to this appeal.
38. Clause 6 of the Occupancy Agreement therefore provides a security of occupation that the common law would not provide if this were a common law tenancy. This is because it was common ground at the hearing before us that if the nature of the occupation of Ms Berrisford is a “tenancy”, then it is a periodic common law tenancy and has no statutory protection at all. The reason for this is dealt with in [5] of Patten LJ’s judgment in *Elton Joseph v Nettleton Road Housing Co-operative Ltd* [2010] EWCA Civ 228 and also at [6] and [7] of Wilson LJ’s judgment above.
39. Mexfield served a Notice to Quit (“N/Q”) on Ms Berrisford on 11 February 2008. The N/Q expired on 17 March 2008. It is Mexfield’s case that this determined this common law periodic “tenancy” and that there is no defence to its action for possession. It had also alleged by Mexfield that Ms Berrisford was in arrears of rent by more than 21 days. But that issue was not tried out below because Mexfield sought summary judgment on its action for possession based principally on the N/Q. It was agreed before us that we could not deal with the arrears of rent argument because there were no findings below on which we could give a judgment on appeal. As Wilson LJ has recorded, Ms Berrisford has a new tenancy anyway, so that the issue of possession is not a live issue.
40. On 20 November 2008, HHJ Mitchell gave judgment in favour of Ms Berrisford on Mexfield’s application to strike out Ms Berrisford’s defence to its possession claim. The judge’s conclusion was reversed by Peter Smith J in his judgment handed down on 5 October 2009. Arden LJ gave Ms Berrisford permission to appeal on 11 December 2009.

The arguments of the parties

41. It is easiest to set out the arguments by putting that of Ms Bretherton, on behalf of Mexfield, first. She submits:
 - (1) By its terms, the Occupancy Agreement purports to be a lease, as opposed to a contractual licence. It gives Ms Berrisford exclusive possession of a defined property, for a rent, payable from time to time.
 - (2) However, because of clause 6, the term of the tenancy created by the Occupancy Agreement is uncertain. Therefore the lease purportedly created by the terms of the Occupancy Agreement is void for being for an uncertain period: see *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 86 (“the Prudential case”).
 - (3) In its place there is to be implied (by the periodic payment of rent every month) a monthly periodic tenancy. Because it is a common law tenancy (see [37] above), Mexfield is entitled to give a N/Q and at its expiry the tenancy comes to an end. Thereafter Mexfield was entitled to possession. Thus Peter Smith J was correct to grant Mexfield summary judgment.
42. The argument of Mr Wonnacott, for Ms Berrisford, is:
 - (1) The Occupancy Agreement has two aspects. First of all it is a *contract* between Mexfield and Ms Berrisford by which Mexfield agrees that she will have exclusive occupancy of the flat identified for a sum – “rent” – and subject to clause 6. Secondly, (at least for the purposes of this primary argument) the Occupancy Agreement gives Ms Berrisford some kind of interest or right concerning the occupation of the land identified which is enforceable by equitable remedy.

(2) Whatever may be the position about the grant of any interest in or concerning occupation of the land (ie. the flat) by the Occupancy Agreement, the *contract* and its terms cannot be impugned. There is nothing at law to stop parties agreeing to a *contract* in the terms of the Occupancy Agreement.

(3) Moreover, the courts, exercising their equitable jurisdiction and using the equitable remedies of injunction and specific performance, will enforce that contract by injunction if necessary: see the cases referred to at [19]-[26] of Wilson LJ's judgment, but in particular: *In re Kings's Leasehold Estates* (1873) LR 6 Eq 521 at page 527, per Malins V-C. Malins V-C summarised the position thus: "I am perfectly satisfied that a tenant who has an agreement with his landlord that the landlord will not turn him out so long as he pays his rent, has a right to retain possession as long as the landlord's interest exists.....although he has no defence at law". Therefore this court should recognise that right.

(4) Today a court would not grant an injunction but would make a declaration of Ms Berrisford's right to retain possession on the basis of the contract between the parties.

(5) Alternatively, on the true construction of the Occupancy Agreement, it is not a grant in the nature of a tenancy, but grants a contractual licence in favour of Ms Berrisford. Although the terms of the agreement have the air of a tenancy rather than a licence, the parties cannot have intended that the agreement would have granted an interest to Ms Berrisford that (given the statutory regime against which the Occupancy Agreement was signed) would give her less protection to her occupancy than the parties obviously contemplated by the terms of clause 6. Therefore they must have intended that she have a contractual licence, which can be upheld by the grant of an injunction or declaration, on the principle set out in *Re King's Leasehold Estates*.

43. Ms Bretherton answers those arguments as follows:

(1) It is not possible to separate the contractual element of the Occupancy Agreement from the interest in the land element. The two go together, as is clear from *the Prudential case*. A careful reading of that case shows that the House of Lords had to consider the position of the original parties to the lease as it was in 1930. Therefore if, as in that case, the lease is void for uncertainty, the contract must also be void. The contract fails because its fundamental object is to achieve an interest in land of an uncertain duration; something that 500 years of land law has said is not possible.

(2) So nothing can be based on the contract element alone.

(3) The argument that, in default of being a tenancy, the Occupancy Agreement creates a contractual licence is contrary to Court of Appeal authority: viz. *Lace v Chantler [1944] KB 368*. It also fails to take account of the Rules of Mexfield, requiring all members to be "tenants".

The Issues for Decision

44. There are two issues for decision. First, can the contract contained in the Occupancy Agreement be enforced by Ms Berrisford *as if* it created an interest in land, as opposed to a contractual licence? Secondly, if it cannot, does the Occupancy Agreement amount to a "contractual licence" as opposed to some form of lease or tenancy?

Issue One: Equitable enforcement of the Occupancy Agreement as if it were a contract for some kind of interest in land?

45. There is no doubt that, in origin, the relationship between a landlord and his tenant was solely a contractual one. However, from earliest times the tenant was given an estate in the land to which he had exclusive occupation, in return for the payment of rent and the fulfilment of other covenants. Therefore any lease or tenancy agreement serves a dual purpose: it records a contract

between the original parties who are landlord and tenant and it creates an interest in land for the tenant, which (subject to any valid contractual or statutory restrictions) is transferable.

46. There is also no doubt that, for hundreds of years, English law has held that the commencement of a lease and the maximum duration of its term must be certain, or be capable of being rendered certain, before the lease takes effect. Thus in *the Prudential case*, Lord Templeman refers (at page 390F-G) to the report of a sixteenth century case called *Say v Smith* (1563) Plowd. 269, in which Anthony Brown J is reported to have said:

“...every contract sufficient to make a lease for years ought to have certainty in three limitations, viz. in the commencement of the term, in the continuance of it and in the end of it; so that all these ought to be known at the commencement of the lease, and words in a lease which don’t make this appear are but babble....and these three are in effect but one matter, showing the certainty of the time for which the lessee shall have the land and if any of these fail, it is not a good lease, for then there wants certainty”.
47. Lord Templeman explained that the rule about the certainty of term is given statutory form in section 1(1) of the Law of Property Act 1925 which stipulates that the only estates in land that are capable of existing or being conveyed or created at law are an estate in fee simple absolute in possession and “a term of years absolute”. The definition of a “term of years absolute” is set out in detail in section 205(1)(xxvii) of the same Act. This explains that it can be for a term less than a year or more than a year or a fraction of a year or from year to year.
48. This requirement of certainty of term explains why, in *Lace v Chantler* [1944] 1KB 368, the Court of Appeal held that a lease granted during the Second World War “for the duration of the war” was void for uncertainty at common law. That decision was specifically approved in the *Prudential case*.
49. Mr Wonnacott accepts that the terms of clause 6 of the Occupancy Agreement made the maximum term of the proposed lease to Ms Berrisford uncertain. As I understood his argument, he accepts that when the Occupancy Agreement was created, it must therefore have been ineffective to grant a lease on the terms as stated in the Occupancy Agreement. I am not sure whether Mr Wonnacott also accepts that the effect of Ms Berrisford entering into possession of the flat and paying rent was that she became a monthly tenant on the terms of the Occupancy Agreement in so far as they could apply to a monthly tenancy. Acceptance of that proposition would, in my view, strike at the root of his main argument, on the footing that it seems improbable (to say the least) that there are in existence one tenancy from month to month between A and B and, at the same time, a contract for a tenancy for some uncertain period which can be specifically enforced as between the two contracting parties. So for the present I will assume that Mr Wonnacott does not accept this second proposition.
50. The question that arises is: what happens when **the contract** that purports to grant a lease, i.e. an interest in land to the tenant, fails to grant one because the maximum term of the lease is uncertain. Does *the contract* survive independently of the failed lease so that *the contract* can be enforced as between the original parties to it, if necessary by the court using an equitable remedy of injunction or declaration?
51. Mr Wonnacott rightly points out that this specific question was not considered in the *Prudential case*, because the parties that were before the courts in that case were not the original parties to the lease that was granted in 1930, i.e. the London County Council as landlord and Mr Nathan as tenant. The parties before the House of Lords were the original parties’ successors in title. Thus Prudential Assurance Co Ltd was the successor to the original tenant; the London Residuary Body was the successor to the original landlord. Between them there was no privity of contract, but only “privity of estate”.

52. Nevertheless, it is vital to consider precisely how the House of Lords analysed the position in the *Prudential* case. The leading speech was given by Lord Templeman. At page 392 he considers the position when the agreement was made in 1930. Lord Templeman says that the agreement "...failed to grant an estate in the land". That must be because the term of the proposed tenancy was uncertain; indeed, Lord Templeman states specifically that this is the reason at page 392F-G of his speech. He then refers to two other cases (*Doe d Warner v Browne* (1807) 8 East 165; *Cheshire Lines Committee v Lewis & Co* (1880) 50 LJQB 121) and reiterates, at page 393H, that the agreement in the case before the House did not create a lease on the terms stipulated in the original agreement. Therefore, the tenancy from year to year enjoyed by the tenant as a result of entering into possession and paying a yearly rent could be determined by six months' notice from either landlord or tenant.
53. Lord Templeman then considers two Court of Appeal decisions: *In re Midland Railway Co's Agreement* [1971] Ch 725 and *Ashburn Anstalt v Arnold* [1989] Ch 1. He concludes that the effect of both of those cases was to hold that leases which purported to grant terms that were uncertain were valid. Lord Templeman's view was that both cases were wrongly decided because "... a grant for an uncertain term does not create a lease. A grant for an uncertain term which takes the form of a yearly tenancy which cannot be determined by the landlord does not create a lease...": see page 395G. So he allowed the appeal.
54. It is clear that in the *Prudential* case Lord Templeman analysed the position of the original parties to the agreement made in 1930. He concluded that, as a matter of law, the agreement could not take effect as a lease on its terms. All the other four law lords agreed that the appeal must be allowed, for the reasons given by Lord Templeman. Lord Browne-Wilkinson expressed the view that there could be no satisfaction in this conclusion because it was so far from what the original parties to the contract had contemplated. As he said (at page 396G) "...it was not a result their contract, if given effect to, could ever have produced". Moreover, it meant that it defeated "...contractually agreed arrangements between the parties...": (page 397B). Lords Griffiths and Mustill agreed with those sentiments. I respectfully also agree with them.
55. There have been various justifications for this "certainty" rule, which are set out in *Megarry & Wade: The Law of Real Property* (7th Ed. 2008) at paragraph 17-059. The rule has been criticised as "arbitrary and crude". However, it remains the law and, despite Lord Browne-Wilkinson's suggestion that it be considered by the Law Commission, nothing has been done to alter it and it must be applied to this case unless there is some way around it.
56. What follows from the conclusion that the Occupancy Agreement failed, as a matter of law, to grant Ms Berrisford a lease on the terms set out in that agreement? Can effect be given to the Occupancy Agreement as a *contract*, bearing in mind that the aim of the Occupancy Agreement, on this first argument, is to grant Ms Berrisford an interest in land? Considering the matter in principle, in my view if the object of the original contract between the parties is to create an interest in land and that object is not achievable at law because the interest in land created would be of an uncertain term, then neither law nor equity should be able to enforce *the contract* between the original parties. It seems to me that, as a matter of principle, it is both illogical and unsound to suggest that a *contract* which aims to grant an interest in land, which grant fails because it is of uncertain term, can nevertheless survive as a separate and free-standing *contract*, which can be enforced as if it were the lease which cannot be made because of an uncertain term.
57. Mr Wonnacott accepted that *the law* would not come to his aid to enforce a contract whose aim is to create a lease that is void for uncertainty of term. But he submits that *equity* will do so because, historically, equity would grant specific performance of the contract which was made at the same time as the proposed interest in land and it would protect the position of the "tenant" by granting an injunction against the landlord who attempted to gain possession at law.
58. In my view, however, that broad proposition, which seems superficially attractive, is not borne out by a close scrutiny of the cases. We all know the equitable doctrine, or maxim, that equity

looks on that as done which ought to be done. Thus in the famous case of *Walsh v Lonsdale* (1882) 21 Ch D 9, the Court of Appeal held (on an interlocutory application only) that the rights of the parties to an agreement for a lease where the tenant had entered possession, ought to be framed on the basis of the contract and treated, in equity, as if a lease had been granted on the contract terms. But, in that case there was no principle of land law, e.g. as to certainty of the term of the lease, to prevent the contract for the lease from becoming a lease.

59. Similarly, in *Parker v Taswell* (1858) 27 LJ (Ch) 812, to which Wilson LJ has referred in [21] above, the position was that there was a valid agreement for a lease, but the lease itself would be void “at law” unless made in a deed, by virtue of section 3 of the Real Property Act 1845. On appeal from the Vice-Chancellor, the Lord Chancellor, Lord Chelmsford, said that the 1845 Act did not prevent equity giving effect to the parties’ agreement in equity. So he ordered specific performance of the contract “in equity”. The only reason why the lease was not created was lack of a formality, viz. a deed. If the agreement had been embodied in a deed, then it could have taken effect as a lease. But in the present case the Occupancy Agreement was incapable of taking effect as a lease at all, because of the lack of certainty of term. In my view the decision of Lord Chancellor Chelmsford is not authority for the proposition that equity will enforce a contract so that it acts as a lease in circumstances where a lease on those terms would be treated as void for uncertainty of term.
60. I must next analyse *Browne v Warner* (1807) 14 Ves Jun 156. It was an interlocutory decision only, when the defendant sought a demurrer to a Bill in Equity seeking specific performance of an agreement concerning the occupation of a house in the City of London. It is clear from the extract of the decision of Lord Ellenborough CJ in the preceding King’s Bench proceedings (quoted by Lord Templeman in the *Prudential* case at page 393A-D) that there was an agreement between the parties which was not a deed. There was an argument about whether the estate the defendant Mr Browne (the “tenant”) contended for was an estate for life (regarded then as a valid estate but only if created by deed), or a tenancy from year to year, in which case it would be of uncertain duration if it contained the proviso to which Wilson LJ has referred at [19] above. Lord Chancellor Eldon agreed with the King’s Bench ruling that the agreement could not be a valid estate for life, not being by deed. But if it was arguable that it was an agreement for a tenancy from year to year then it might be specifically enforced. Lord Chancellor Eldon considered that it was arguable that there was an “...imperfection in this instrument..”. Whether that was so and what the terms were was to be decided at another hearing, so he refused the demurrer to the Bill.
61. Lord Chancellor Eldon’s ruling at the second hearing does not add any new principle. The plaintiff had obtained an injunction against ejectment until the hearing of the Bill for specific performance of the agreement between the parties. Having considered new arguments raised by the defendant, Lord Eldon continued the interlocutory injunction until the main hearing, upon certain terms.
62. In my view, neither decision of Lord Eldon supports the proposition that equity will specifically enforce a contract which purports to grant an interest in land for an uncertain term. There is nothing in the reports that suggests that Lord Eldon even thought such a broad proposition arguable.
63. In the case of *In re King’s Leasehold Estates* (1873) LR Eq 521, Sir Richard Malins V-C commented upon the two decisions of Lord Eldon in *Browne v Warner*. Malins V-C states, at page 527, that Lord Eldon held at the demurrer hearing that the plaintiff had an interest in the land concerned. That, in my view, is incorrect. Lord Eldon did no more than say it was arguable that there was an agreement between the parties, who “looked to some future instrument, that should more clearly stated how the enjoyment and benefit, designed for each of them, was to be secured”. Malins V-C also states that Lord Eldon expressed the concluded opinion that the plaintiff tenant had an equitable interest, by which I take Malins V-C to mean an equitable

interest in the land. Again, I think that this reads more into Lord Eldon's judgments than is permissible.

64. At page 527 of the report, after he has reviewed Lord Eldon's decisions in *Browne v Warner*, Malins V-C is reported as stating:

"Therefore, upon principle, I am perfectly satisfied that a tenant who has an agreement with his landlord that the landlord will not turn him out so long as he pays his rent has a right to retain possession as long as the landlord's interest exists. ...I am clearly of opinion that a tenant with such an agreement would not be allowed by this Court [of Chancery] to be turned out of possession, although he has no defence at law".
65. Lord Eldon did not state either principle in the two reports of *Browne v Warner* that Malins V-C refers to and we were shown no other decision that warrants such a broad statement. Moreover, if the first of those two principles were correct then it seems to me that *Lace v Chantler* [1944] IKB 368 would have been wrongly decided, by Lord Greene MR no less. Further, it would mean that the two cases overruled by the House of Lords in the *Prudential* case, viz. *In re Midland Railway Co's Agreement* [1971] 1 Ch 725 and *Ashburn Anstalt v Arnold* [1989] Ch 1 would have been correctly decided and should not have been overruled. Indeed, if such a broad principle exists then it is difficult to see how the decision in the *Prudential* case itself can stand with it.
66. Malins V-C decided in favour of Mr King on a much more conventional ground which is entirely sustainable. This was that he had entered into a contract with the railway company whereby it would agree to buy his interest in the premises for a sum of £470 and that contract could not be impugned. If the railway company had misunderstood the effect of Mr King's interest, that was too bad. The decision is good on that ground.
67. Mr Wonnacott also relied on the Privy Council decision in *Siew Soon Wah v Yong Tong Hong* [1973] AC 836. The landlords claimed that they were entitled to possession of premises having given a valid notice to quit. The tenant firm argued that it was entitled to retain possession for as long as it wished to do so at an agreed monthly rental. On appeal, the Federal Court of Malaysia had held that, upon the true construction of the agreement between the parties, the agreement was valid to grant as long a lease as the statute law of Malaysia allowed, viz 30 years. The Privy Council upheld that decision.
68. Viscount Dilhorne gave the advice of the Privy Council. He referred, at pages 844-845, to the decision of Malins V-C in *In re King's Leasehold Estates* and sets out the quotation reproduced at [64] above. Viscount Dilhorne also referred to the well-known Court of Appeal decision in *Inwards v Baker* [1965] 2 QB 29, where the Court had said that an "equity" in favour of a son had been granted by a father who had permitted his son to build a bungalow on the father's land in the expectation and belief that he (the son) would be able to remain there for as long as he wished. Lord Dilhorne stated, at page 846, that in the instant case, the tenant had occupied the premises and paid rent and must have done so in consideration of a tenancy for 30 years. In those circumstances "...there arose in the [tenant's] favour an equity or equitable estoppel protecting his occupation of [the premises] for the period of 30 years".
69. It is to be noted that Lord Dilhorne does not say that the tenant had an equitable interest in the land or some kind of interest in the land that could be enforced by injunction or specific performance; but only an "equity" or an "equitable estoppel". I therefore cannot regard the Privy Council decision as being authority for the proposition that an agreement for a lease of uncertain duration will be regarded as granting some kind of equitable interest in land or an interest in or concerning the land that can be enforced by injunction or specific performance.
70. My conclusion, having reviewed the cases, is that none support the bare proposition that if two parties enter into a contract by which A purports to agree to grant to B a tenancy of premises for an uncertain term (e.g. "for as long as you continue to pay the rent") which is therefore void as a

lease, and B enters possession and pays rent on a monthly basis, then, as between A and B, equity will enforce that contract by granting B an injunction against A when A attempts to obtain possession from B having given a valid notice to quit. I accept, of course, that B may be able to retain possession on such grounds as equitable or proprietary estoppel, but those arguments are not relied on in this case.

71. I therefore reject Mr Wonnacott's principal argument.

Issue two: does the Occupancy Agreement take effect as a contractual licence?

72. I regard this argument as hopeless in the light of the decision of the Court of Appeal in *Lace v Chantler*. At page 371-2, Lord Greene MR said:

"Lastly, [counsel for the "tenant"] argued that the agreement could be construed as an agreement to grant a licence. In my opinion it is impossible to construe it in that sense. The intention was to create a tenancy and nothing else. The law says that it is bad as a tenancy. The court is not then justified in treating the contract as something different from what the parties intended and regarding it merely as a contract for the granting of a licence. That would be setting up a new bargain which neither of the parties ever intended to enter into. The relationship between the parties must be ascertained on the footing that the tenant was in occupation and was paying a weekly rent. Accordingly, it must be the relationship of weekly tenant and landlord and nothing else".

73. Precisely the same reasoning applies in the present case. The only difference is that my conclusion on the effect of the Occupancy Agreement, taken with Ms Berrisford entering into possession of the flat and paying rent on a monthly basis means that there was a monthly tenancy in this case. Neither party intended that there should simply be a contractual licence.

Disposal

74. I would therefore dismiss the appeal. I must add that I do not reach this conclusion with enthusiasm. It is clear what the parties intended to contract and it is equally clear that because of the old rule about "uncertainty of term" in a lease the parties' contractual intentions cannot be fulfilled in this case. As Mr David Neuberger QC (as he then was) argued in the *Prudential* case, "...it is undesirable that parties should not be bound by bargains they had freely entered into. In the general law of contract there is no reason why an agreement cannot be of an indefinite duration or perpetual" see page 388G of the report. The law has held for centuries that this cannot be done with tenancy agreements. It is time that this rule was re-examined by Parliament.

Lord Justice Mummery:

75. The court is divided on the second appeal in this landlord and tenant test case.
76. There is much to be said for allowing the appeal, as Wilson LJ proposes. It would avoid (a) defeating the clear intentions of the parties; (b) unsatisfactory outcomes in other cases of this kind (and there may be many of them); and (c) going against the general merits of the case, which are more with the tenant, Ms Berrisford, than with her landlord, Mexfield. To the ordinary person it would not seem reasonable or just that the law should allow Mexfield to disregard the provisions in clause 6 of its standard form Occupancy Agreement (as used in 1993) restricting to specified grounds its right to recover possession. Although Ms Berrisford is not entitled to the statutory protection of an assured tenancy, or of a secure tenancy, or to the benefit of the provisions of the Human Rights Act 1998 that might be available against a public sector landlord, she is on the face of the Occupancy Agreement entitled to the protection from re-possession agreed upon by the parties.

77. Further, the very last thing that these parties intended was to make an agreement that was not binding on them, was void at law and would give rise to legal arguments at three levels in the judicial hierarchy. (It may even be four by the time that this is all over.)
78. Mr Wonnacott's legal submissions, which are summarised in the judgments of my Lords, are seductively short and simple. He distinguishes the decision in *Prudential* that re-affirmed the centuries-old legal requirement that, to be valid, a lease of land must be for a term: that is, it must, from the outset, have a maximum duration that is certain or is capable of being made certain before the lease can take effect. He points out that *Prudential* is a property case contested and determined as between successors in title. This case is different: it is between the original contracting parties. Mr Wonnacott then deploys and develops the fundamental distinctions between privity of estate and privity of contract, between the necessary legal incidents of interests in property and the personal obligations binding on the parties which are, in appropriate cases, enforceable through the intervention of equity (see, in particular *In re King's Leasehold Estates* (1873) LR 6 Eq 521 at 527). Peter Smith J, when deciding the case in Mexfield's favour, did not have the benefit of this lucid legal analysis of the situation or the supporting citation of authority.
79. However, at the end of the day, I am driven to take the same course as that proposed by Aikens LJ: the current state of the law requires us to dismiss this appeal. Echoing what Lord Browne-Wilkinson said in *Prudential* 18 years ago, the outcome is not one that could ever have been contemplated by the parties and the impact of landlord and tenant law, especially in this particular area of residential letting, needs to be re-examined and possibly amended.
80. The main point emphasised in this judgment is that the intervention of equity, on which Mr Wonnacott relies, has to be squared with the general principle that "Equity follows the law." See Snell's Equity (31st ed) paragraphs 5-05 to 5-07 for a discussion of the maxim. If an interest in land, such as a fee simple absolute, exists at law, that is what also exists in equity. If a claimed interest in land does not satisfy the basic legal requirements for its existence, then it will not, as a general rule, exist as an interest in land either at law or in equity. Equity's recognition of analogous legal interests is subject to particular circumstances affecting conscience and enforceable in equity, though they do not exist at law; for example, facts that would support the existence of a trust or an estoppel in relation to land. In the absence of those features equity would follow the law. It would not normally intervene to contradict the law or to modify legal rights.
81. In my judgment, if the Occupancy Agreement is incapable of creating a valid lease at common law, because it does not satisfy the legal requirement of certainty of term, then equity cannot validate it or otherwise intervene to make it enforceable by specific performance or injunction. Mr Wonnacott relies on the personal obligations created by the contractual provisions in clause 6 of the Occupancy Agreement. However, that clause is inconsistent with the existence of a lease. By placing fetters on the right to serve a notice to quit before the occurrence of an event the time of which is uncertain, clause 6 precludes the existence of certain limit to the maximum duration of the term. It contravenes the fundamental rule that a lease cannot be created for an uncertain maximum term. As explained earlier the duration of the lease must, from the outset, be for a term and that means that the end of the term must be certain from the start. If it is not, there is no valid lease.
82. It is true that the certainty requirement may be satisfied, even though the lease is capable of being validly brought to an end prior to the expiration of the maximum term. It is satisfied in the case of a periodic tenancy, such as a monthly tenancy terminable by notice which is analysed as a series of individual leases for the fixed maximum duration of each period in question, subject to termination. But it is not satisfied in this case, because of the effect of the restriction on the power to serve a notice to quit to specified events which may never occur, thus making the term indefinite and uncertain and the lease void.

83. The same applies whether one is concerned with the lease itself or with a contract for the grant of a lease. If the contract is for the creation of a lease that would be void, that contract will fail to have legal effect for the same reason as the lease would fail. Clause 6 of the Occupancy Agreement prevents the lease from ever taking effect as a lease, because the term attempted is void for uncertainty. It cannot be relied upon as the basis for equitable relief, because equity would follow the law and would only enter into the picture, if there were circumstances available to support a trust or an estoppel or to attract any other equitable doctrine of unconscionability, thus calling on equity's role of preventing insistence on the inequitable use of legal rights. What Mr Wonnacott is asking the court to do in the circumstances of this case is to depart from the law when, in the absence of equitable considerations, it would normally follow the law.
84. I would add that during the hearing there was mention in passing of a lease for a term of years determinable with a life. However, it is not contended that the relevant provisions of the Law of Property Act 1925 (s.149(6)) apply to this case so as to convert Ms Berrisford's tenancy into a 90 year term subject to prior determination by notice in accordance with clause 6 of the Occupancy Agreement.
85. Finally, I agree with Aikens LJ that, for the reasons given by him, Ms Berrisford's possession of Mexfield's premises was not under a contractual licence with the benefit of clause 6 of the Occupancy Agreement: see *Lace v Chantler* [1944] KB 368. The void lease cannot be construed as taking effect as an occupational licence coupled with clause 6. The natural implication from the circumstances of exclusive possession and the payment of rent is that of a periodic common law tenancy terminable by notice to quit and without the clause 6 restriction to specified grounds for re-possession.
86. For the reasons given by Aikens LJ and the above reasons the appeal is dismissed.