Periodic tenancies subject to a fetter on the tenant- doctrinal dilemmas?

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This article analyses the legal status of periodic tenancies subject to a contractual fetter on the tenant's ability to terminate the tenancy. Whereas the Supreme Court decision in *Mexfield Housing Co-operative Ltd v Berrisford*[1] concerned a fetter on the landlord who could not terminate except as specified in the agreement, the issue examined in this article is whether the principle from *Mexfield* imposing a grant of a 90 year lease subject to the terms of the original agreement would apply in the same way to a fetter on the tenant. The article considers the following issues: firstly, the significance of the issue where there is a fetter on the tenant; secondly, the problematic purported assimilation of tenancies for uncertain duration and periodic tenancies subject to a fetter; thirdly, the substantive nature of objections to fetters; fourthly, whether the judicial analysis of periodic tenancies is satisfactory; and lastly, the future of periodic tenancies. Explicit within the *Mexfield* decision is an assumption of a homogeneous position between landlord and tenant, so that there would be uniformity of principle in relation to fetters. It is suggested, however, that such an assumption may be mistaken, so that a different rule should apply if the fetter is on the tenant rather than on the landlord.

1. Significance of the issue of a fetter on the tenant

The Supreme Court in *Mexfield*[2] held that an agreement for an uncertain term, which comprised a monthly tenancy subject to a fetter on the landlord, was not capable of taking effect as a tenancy on its terms, but since the agreement would have given rise to a tenancy for life prior to 1926, the effect of section 149(6) of the Law of Property Act 1925 was that the agreement was to be treated as a tenancy for a term of 90 years determinable on the defendant's death or in accordance with the clauses in the agreement. Accordingly, the landlord was not entitled to possession, and the lease could not be ended by notice to quit. The case concerned a mortgage rescue scheme where the fully mutual housing co-operative association operated a mortgage rescue scheme by buying properties from home owners having difficulties with mortgage payments and then letting the properties back to them. The Supreme Court was eager for the tenant, Ms Berrisford, not to lose her tenancy and for the landlord to be bound by the terms of the agreement. The mischief which *Mexfield* was trying to avoid was a monthly periodic tenancy which could be terminated by the landlord serving notice to quit. The judges accordingly, accepted counsel for the tenant's novel arguments to achieve a fair outcome for the tenant by adopting a solution which made the law "curiouser and curiouser".[3] Despite the fact that the Supreme Court applied this as a rule of law, it is argued that it is extremely unlikely where a fetter is on the tenant, as opposed to a landlord, that the doctrinal contours contrived in *Mexfield* would be applicable with the consequence that a 90 year lease would not be imposed on a tenant.

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[1] *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52; [2012] 1 A.C. 955.

[2] *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52.

[3] Adopting the language of Baroness Hale in *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52 at [93].

Landlords and/or tenants who need flexibility may be attracted by entering a periodic tenancy *ab initio*, and some landlords may not want to commit to a fixed term initially if they are concerned, for example, about the suitability of the tenant. A periodic tenancy may also arise where there is initially a fixed term assured shorthold tenancy or assured tenancy, and the tenancy then continues as a periodic tenancy on the express terms of the original agreement[4] under a statutory periodic tenancy[5] under section 5(2) of the Housing Act 1988. This may benefit the landlord in retaining a good tenant and may be favoured by the tenant, so that the landlord does not raise the rent unless the landlord serves a notice under section 13 of the Housing Act 1988 to increase the rent. An example of where a fetter on a tenant's ability to terminate the tenancy may arise is where the landlord is concerned that rents may fall, because of fracking in the area or a new railway line or new airport runway being built nearby or other economic or political factors which are likely to affect rental values. The landlord agrees to rent significantly below market value in exchange for a fetter that the tenant cannot terminate the tenancy unless specific terms are satisfied, for example, that the tenant loses his job or secures a job in a different town or is able to afford to buy his own place or other agreed term. The tenant readily agrees to these terms in order to secure a tenancy below market rent, but subsequently may not wish to be bound by the fetters.

If a symmetrical and uniform approach to a fetter is adopted, the same rule would apply whether the fetter is on the landlord or the tenant, and a 90 year lease may be imposed on an unwilling tenant, although many would recoil from such a prospect. If the concern of the law is formalism and not the protection of tenants, then a homogeneous approach to a fetter would be adopted. Such a homogeneous approach could be termed "de-personalised rationality" whereby "the practice of 'coherence lawyering' approaches the analysis of legal doctrine by reducing law's subject to a 'de-personalised rationality', systematising legal rules through fundamental principles and avoiding 'messy and controversial discussions about the social consequences of the rules of private law', which 'appeals to coherence, consistency, and fidelity to principle … suffic[ing] to resolve the issue'".[6] Homogeneity of doctrinal analysis would underpin a purportedly apolitical style of judicial reasoning and scholarly analysis whereby property problems would be abstracted from the social realm. Adopting formal equality and legal analysis based on "neutral" values, there would not be recognition of the effect of these commitments for differently situated people.[7]

By way of contrast, adopting van der Walt's view "from the margins", the perspective of the less propertied person provides a useful lens to illustrate the content given to our apolitical "property values".[8] *Mexfield* prioritises less-propertied parties over more propertied parties and is a significant example where, favouring justice to the tenant, benefitted the less-propertied party, the tenant, rather than the more-propertied party, the landlord. The decision

[4] See *Leeds City Council v Broadley* [2016] EWCA Civ 1213; [2017] 1 W.L.R. 738.
[5] See, for example, *Superstrike v Rodrigues* [2013] EWCA Civ 669; [2013] 1 W.L.R. 3848.
[6] L. Fox O'Mahony, "Property Outsiders and the Hidden Politics of Doctrinalism" (2014) 67 C.L.P. 409, 413 citing in part from H. Collins, "Utility and Rights in Common Law Reasoning: Rebalancing Private Law through Constitutionalization" (2007) 30 Dalhousie L.J. 1, 6.
[7] L. Fox O'Mahony, "Property Outsiders and the Hidden Politics of Doctrinalism" (2014) 67 C.L.P. 409, 414.
[8] A.J. van der Walt, *Property in the Margins* (Oxford: Hart Publishing, 2009) referred to in L. Fox O'Mahony, "Property Outsiders and the Hidden Politics of Doctrinalism" (2014) 67 C.L.P. 409, 426.

in *Mexfield* prevents Ms Berrisford becoming a property outsider.[9] However, imposing a 90 year lease on an unwilling tenant subject to the terms of the original agreement demonstrates that applying the same rule to a fetter on the tenant is undesirable, because property rights protection in a context of inequality is not equitable and stable in the long term.

The decision in *Mexfield* granting the tenant a lease for 90 years subject to the determining conditions in the original agreement arguably embodies what Alexander terms "human flourishing",[10] which enables the tenant to flourish under a lease for 90 years. Leases fulfil an increasingly important economic and social function in addition to being a market commodity dealt with by market exchange or market-alienability. Radin argues against the idea that housing should be treated as an ordinary market commodity.[11] At least as important as the economic function is a political-moral function that residential housing is one of the crucial material conditions that determine whether and how people will flourish personally and as citizens.[12] The landlord's interest is usually financial, a commodity, whereas the tenant's interest is primarily personal and only secondarily financial. Tenants enter into a lease primarily to have a home,[13] a place in which to belong, not as an investment. Therefore, *Mexfield* may not apply to a fetter on a tenant to impose a 90 year lease, because of the imbalanced, asymmetrical power relationship between landlord and tenant and due to recognition of the autonomy of the tenant's home. There are numerous examples in which there is no synchronicity between the rights, liabilities and remedies of landlord and tenant with one example being the Landlord and Tenant (Covenants) Act 1995 in the differential provisions in relation to the release provisions of original landlords and original tenants from covenants.

Nevertheless, a 90 year lease is an extremely valuable and marketable asset after it has been registered. The Supreme Court gave Ms Berrisford a "windfall" as a result of trying to implement the original terms of the agreement in the fairest way to the tenant. If the same approach was taken to a fetter on the tenant, a tenant would be given a capital asset to sell at market value following registration, although the market value would obviously be affected by the triggers which would terminate the lease. Such issues demonstrate the problematic consequences of the Supreme Court accepting a solution presented by counsel to the tenant in order to avoid abolishing the rule on certainty of leases to achieve a just result for the tenant on the facts of that particular case.

2. Problematic assimilation of tenancies for uncertain duration and periodic tenancies subject to a fetter?

In analysing how a fetter on a tenant would be treated, it is first necessary to examine whether periodic tenancies subject a fetter should be treated in the same way as tenancies for uncertain duration due to the different ontogenesis of periodic tenancies. It is well established

[9] See generally L. Fox O'Mahony, "Property Outsiders and the Hidden Politics of Doctrinalism" (2014) 67 C.L.P. 409.
[10] G.S. Alexander, "Ownership and Obligations: The Human Flourishing Theory of Property" [2013] H.K.L.J. 451.
[11] M. Radin, "Residential Rent Control" (1986) 15 Phil. & Pub. Aff. 350.
[12] G.S. Alexander, "Five Easy Pieces: Recurrent Themes in American Property Law" (2015-2016) 38 U. Haw. L. Rev. 1, 21; G.S. Alexander, "Governance Property" (2011-2012) 160 U. Pa. L. Rev. 1853, 1875.
[13] See generally L. Fox O'Mahony, "The meaning of home: from theory to practice" [2013] I.J.L.B.E. 156.

that leases for uncertain terms are not valid,[14] and information theorists[15] would argue for the straightforward approach adopted in *Lace v Chantler*[16] and *Prudential Assurance Co Ltd v London Residuary Body*.[17] This is in contrast to progressive theorists, who are attentive to a wide array of factors, especially that property should not employ simplifying rules that are insufficiently attentive to the values at stake.[18] The progressive approach arguably demonstrated in *Mexfield* undermined the common law that requires leases to have a certain duration from the outset by converting them to leases for 90 years.

As Hildyard J noted in *Southward Housing Co-operative Ltd v Walker*,[19] the requirement of certainty of term was devised to prevent perpetual tenancies.[20] The certainty of term rule distinguishes a lease from a fee simple and avoids the potential injustice from the perpetual continuation of a lease where there is no provision for periodic rent reviews.[21] Leases which would last forever would undermine the *nemo dat* rule, because there are no estates in common law which last forever.[22] Periodic tenancies used to pose a problem in legal analysis because they do not conform to the rule which requires leases to be for a fixed term and were recognised by Simpson as anomalous.[23] That is because they are in effect leases for an uncertain duration determinable by notice. Historically, periodic tenancies derived from tenancies at will,[24] and when they first came before the courts at the end of the fifteenth and the beginning of the sixteenth centuries, they provoked a great deal of controversy.[25] For two centuries thereafter, the dispute as to the nature of periodic tenancies continued. Eventually the validity of periodic tenancies was recognised by Holt C.J. in *Leighton v Theed* in 1702,[26] and in the course of the eighteenth century, the dispute died out. Thereafter, periodic tenancies arose commonly by implication of law by virtue of the conduct of the parties where a person, who had exclusive possession of a property, paid rent on a periodic basis.

It is notable that Baroness Hale in *Mexfield* stated that, "Periodic tenancies obviously pose something of a puzzle if the law insists that the maximum term of any leasehold estate be certain … it has always been a problem how the rule is to apply to them".[27] However, Baroness Hale did recognise that the rule against uncertainty applies both to single terms of uncertain duration and to periodic tenancies with a curb on the power of either party to serve

[14] See A.W.B. Simpson, *A History of the Land Law*, 2nd edn (Oxford: Clarendon Press, 1986) 253; Littleton, sec.68. See also W. Blackstone, *Commentaries on the Laws of England*, 2nd edn (Oxford, 1766) Vol.2, p.143.
[15] See, for example, T.W. Merrill and H.E. Smith, "Optimal Standardization in the Law of Property: The Numerus Clausus Principle" (2000) 110 Yale L.J. 1.
[16] *Lace v Chantler* [1944] K.B. 368.
[17] *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 A.C. 386.
[18] J.B. Baron, "The Contested Commitments of Property" (2009-2010) 61 Hastings L.J. 917 at 920, 940, 950.
[19] *Southward Housing Co-operative Ltd v Walker* [2015] EWHC 1615; [2016] 2 W.L.R. 605.
[20] K.F.K. Low, "Certainty of Terms and Leases: Curiouser and Curiouser" (2012) 75 M.L.R. 401. See also M. Pawlowski, "Perpetually renewable leases- a reappraisal" [2014] Conv. 482.
[21] C. Harpum, S. Bridge, M. Dixon (eds), *Megarry and Wade: The Law of Real* Property, 8th edn (London: Sweet and Maxwell, 2012) para.17-069 and cases in fn.298.
[22] I. Williams, "The certainty of term requirement in leases: nothing lasts forever" [2015] C.L.J. 592, 594.
[23] See A.W.B. Simpson, *A History of the Land Law*, 2nd edn (Oxford: Clarendon Press, 1986) 253-255.
[24] See *Hammersmith and Fulham London Borough Council v Monk* [1992] 1 A.C. 478 at 483 (Lord Bridge) quoting Blackstone.
[25] See A.W.B. Simpson, *A History of the Land Law*, 2nd edn (Oxford: Clarendon Press, 1986) 253-255.
[26] *Leighton v Theed* (1702) 1 Ld. Raymond 707.
[27] *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52 at [87].

a notice to quit unless and until certain events occur.[28] Lord Neuberger also equated the position of a tenancy for an uncertain term and a periodic tenancy subject to a fetter on either the landlord or the tenant when he stated that the position with regard to periodic tenancies containing a fetter on the right of either or both parties to serve a notice to quit "seems to be much the same".[29] He does not, however, cite specific authority for that proposition.

The agreement in *Mexfield* could be read in one of two ways: either as a lease for uncertain term (until ended in accordance with clause 5 or 6) or a monthly tenancy with a fetter on landlord's right to determine it. Lord Neuberger did acknowledge in relation to periodic tenancies, that there is not the long established learning which there is in relation to terms of uncertain duration.[30] Later in the judgment, Lord Neuberger stated that the decision relating to life estate under the old law and tenancy for 90 years applies whether the agreement is for an indeterminate term or a periodic tenancy with a fetter on the landlord's right to determine.[31] Lord Neuberger's analysis of *Breams Property Investments Co v Stroulger*,[32] where a periodic tenancy with a fetter on the landlord's right to determine for three years was valid, demonstrates that there is room for judicial manoeuvre in deserving cases. However, Lord Neuberger did not consider with sufficient specificity that if the circumstances were different, and if the agreement was a monthly tenancy with an objectionable fetter explicitly on the tenant, the result would have been the same giving rise to a tenancy for life converted into a fixed term of 90 years under the 1925 Act.

Lord Dyson seemed to equate tenancies for uncertain duration and periodic tenancies subject to a fetter,[33] although Lord Mance treated the agreement as "being for a term uncertain" [34] and not as a periodic tenancy subject to a fetter, and Lord Clarke also treated the agreement as an uncertain term.[35] Hildyard J in *Southward Housing Co-operative Ltd v Walker* was unequivocal that "it is plain from Lord Neuberger MR's judgment in the *Mexfield* case that what is expressed to be a periodic tenancy with a fetter on the landlord's right to determine falls to be treated in the same way as a tenancy for an indeterminate term: paras 54-56."[36] Treating both types of tenancy agreements in the same way eases judicial analysis and aids uniformity in approach and principle. However, uniformity can be a blunt instrument, which oversimplifies the technical nature of the rules without allowing for a nuanced approach in more complex cases.

Assimilation of the two types of tenancy of uncertain duration and periodic tenancies subject to a fetter is also problematic for the additional reason that it is highly unlikely that a periodic tenancy with an objectionable fetter would have been treated as a life estate under the common law. The dual transmogrification process[37] applied in *Mexfield* would be antithetical to the core essence of a periodic tenancy. The "broad brush" approach taken by the majority

[28] *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52 at [93].
[29] *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52 at [28].
[30] *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52 at [28].
[31] *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52 at [55].
[32] *Breams Property Investments Co v Stroulger* [1948] 2 K.B. 1.
[33] *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52 at [115].
[34] *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52 at [98].
[35] *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52 at [111].
[36] *Southward Housing Co-operative Ltd v Walker* [2015] EWHC 1615 at [51].
[37] See K.F.K. Low, "Certainty of Terms and Leases: Curiouser and Curiouser" (2012) 75 M.L.R. 401, 404-408.

of judges in *Mexfield*, in what could be termed "leaking" the common law's commitments across the categories[38] to achieve an incremental development of the common law without any in-depth evaluation of its applicability to periodic tenancies, is arguably misguided and erroneous. Lord Neuberger did acknowledge that the ancient rule could lead to unjust results on different facts and others also recognised that in their judgments.[39] A fetter on the tenant should indeed be such a case.

It is significant that cases subsequent to *Mexfield* have taken unequivocal steps to avoid applying the lease for life reasoning as demonstrated in *Southward Housing Co-operative Ltd v Walker*[40] and *Secretary of State for Transport v Blake*.[41] The move away from *Mexfield* in *Blake* and *Southward*, and the twisting by the judges in those cases of the actual decision in *Mexfield*, are indicative of judicial unease at the dual transmogrification process, and the preferred judicial solution in such circumstances will be the non-proprietary solution of a contractual licence. In what seems to be a choice between two extremes, the middle ground has been lost by no proprietary interest being given at all in what may be perceived to be a shift away from a progressive approach to property from the perspective of the occupiers of the premises, although the issues are inevitably complex.

3. Substantive nature of objections to fetters on rights to terminate periodic tenancy by notice to quit?

Two possible grounds have been identified for challenging the validity of a provision in a periodic tenancy purporting to restrict, postpone or remove the right of one party to terminate the tenancy by serving a notice to quit.[42] Firstly, the duration of the term of the tenancy is uncertain if it postpones the right to serve a notice to quit for an uncertain duration. Secondly, a purported restriction or postponement of either parties' right to terminate by notice to quit may be void if it is in any other way repugnant to the nature of a periodic tenancy,[43] such as postponing the right to serve a notice to quit for a period which was certain in duration, but of such a length that the right was effectively illusory. Where a provision in a periodic tenancy is repugnant to the nature of the periodic tenancy, the provision is void, but the tenancy is not invalidated.[44] A case such as *Centaploy v Matlodge*[45] can be distinguished from the scenarios in this article, because the term in that weekly tenancy did not provide for the landlord to be able to terminate at all, and the tenancy was determinable by the tenant only. Where the duration of the term is uncertain by postponing the right to serve the notice to quit for an uncertain period, *Mexfield* appears to proceed on the basis that the tenancy and not just the fetter would have been void,[46] which means that the grounds for challenging the validity of a

[38] Terminology adapted from a different context in L. Fox O'Mahony, "Property Outsiders and the Hidden Politics of Doctrinalism" (2014) 67 C.L.P. 409, 414.
[39] See, for example, *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52 at [94] (Baroness Hale).
[40] *Southward Housing Co-operative Ltd v Walker* [2015] EWHC 1615 analysed both *Zimbler v Abrahams* [1903] 1 K.B. 577 and *Clays Lane Housing Co-operative Ltd v Patrick* (1984) 49 P. & C.R. 72. See further J. Roche, "Legal history in court: lessons from Mexfield and Southward" [2016] Conv. 286.
[41] *Secretary of State for Transport v Blake* [2013] EWHC 2945.
[42] *Emmet & Farrand on Title* (London: Sweet and Maxwell) para.26.187.
[43] See C. Harpum, S. Bridge, M. Dixon (eds), *Megarry and Wade: The Law of Real* Property, 8th edn (London: Sweet and Maxwell, 2012) para.17-067.
[44] *Emmet & Farrand on Title* (London: Sweet and Maxwell) para.26.187.
[45] *Centaploy v Matlodge* [1974] Ch. 1.
[46] *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52 at [67] (Lord Neuberger) and see *Emmet & Farrand on Title* (London: Sweet and Maxwell) para.26.187.

provision are critical as to the determination of the outcome. However, Lord Dyson in *Mexfield* combined both objections, thereby purportedly removing any differentiation between them, when he stated that, "a fetter on a right to serve a notice to determine a periodic tenancy is ineffective if the fetter is of uncertain duration. Such a fetter is 'repugnant' to a periodic tenancy: see Doe d Warner v Browne (1807) 8 East 165, 166". Lord Dyson is thereby nullifying any differentiation between grounds with the consequence that on either ground, the tenancy would be void and not just the fetter.

Construction of a fetter on the landlord was in issue in *Southward Housing Co-operative Ltd v Walker*, where Hildyard J introduced a new dimension into the analysis, by stating that whether the term of the agreement was uncertain depended "on whether, on its construction, the restriction or fetter ….. applies to the issue of possession proceedings or to service of a notice to quit (or both)".[47] His view was that if the fetter was on the issue of possession proceedings, a periodic tenancy could exist, the right to serve a notice to quit would be unfettered, the contractual provision would be enforceable and give rise to a defence in possession proceedings. If, however, the fetter was on the notice to quit, "the fetter on termination would be inconsistent with the characterisation of the tenancy as a weekly tenancy, and (subject to questions of intention) the Agreement could not take effect as such: as pre-1925 it would have taken effect as a defeasible lease for life, it would now be treated as a 90-year lease pursuant to section 149(6) of the Law of Property Act 1925".[48] Hildyard J would have considered himself bound by the decision in *Mexfield* if he followed such a construction. However, this differentiation analysed by Hildyard J is problematic, because the substance rather than the form should be the determining factor.

The problem in *Southward* was that although the wording in the agreement seemed to draw a distinction between notice to quit and proceedings for possession, and the words in issue do "seem principally directed at possession proceedings", Hildyard J concluded that "the more natural construction is that the grounds relate not only to possession proceedings but also to the giving of notice to quit".[49] Accordingly the agreement had to be treated as one for uncertain duration and enabled him to reach the conclusion that there was a contractual licence. That was the inevitable conclusion on this issue, because Hildyard J was drawing a distinction where none should conceptually exist. The nature of the tenancy and the circumstances in which possession proceedings can be initiated need to be indistinguishable for the purposes of determining the nature of the property interest.

4. Is judicial analysis of periodic tenancies satisfactory?

Insights into the nature of periodic tenancies can be derived from *Hammersmith and Fulham London Borough Council v Monk*[50] where the House of Lords held that a periodic tenancy was determinable by a notice to quit given by one joint tenant without the concurrence of the other joint tenant.[51] A periodic tenancy continues therefore as long as it is the will of both parties that it should continue. A property based argument, which would be that a joint tenant

[47] *Southward Housing Co-operative Ltd v Walker* [2015] EWHC 1615 at [52].
[48] *Southward Housing Co-operative Ltd v Walker* [2015] EWHC 1615 at [54].
[49] *Southward Housing Co-operative Ltd v Walker* [2015] EWHC 1615 at [63].
[50] *Hammersmith and Fulham London Borough Council v Monk* [1992] 1 A.C. 478 confirming the decision in *Greenwich LBC v McGrady* (1982) 46 P. & C.R. 223.
[51] See also *Newlon Housing Trust v Alsulaimen* [1998] 3 W.L.R. 451.

cannot unilaterally terminate a joint tenant's rights in the home without his consent, was rejected, and a contractual approach adopted .[52] Lord Bridge differentiated the situation from exercising a break clause in a lease, surrendering the term, making a disclaimer, exercising an option to renew the term and applying for relief from forfeiture which a single joint tenant cannot exercise. Even though service of a notice to quit is a positive act, Lord Bridge rejected an analogy with those scenarios, because that would be confusing the form with the substance, and the substance of the matter is that by omitting to give notice of termination, "each party signifies the necessary positive assent to the extension of the term for a further period".[53]

Expanding this analysis vertically to the landlord and tenant relationship, it is arguable that the contractual analysis should be extended to enable a landlord and tenant to have different terms on which they can terminate the periodic tenancy, and that the law should recognise a periodic tenancy with a contractual fetter as binding between the original parties. The nomenclature "fetter" may be misleading, because it is not being referred to in the context of this article as a complete bar to termination by one party, which would be repugnant to the nature of a periodic tenancy; instead, it is used as terminology to indicate a restriction agreed by contract on one party's right to terminate. Since either tenant giving the regular notice can determine the tenancy against the will of the other tenant, a logical progression of this is that contractual effect should be given to an agreed fetter, which would enable both parties to end the tenancy, but not on mutually identical terms.

It is clear that a fetter for a specified period is valid.[54] Therefore according to Lord Templeman's analysis in *Prudential*, "A lease can be made from year to year subject to a fetter on the right of the landlord to determine the lease before the expiry of five years unless the war ends",[55] because it creates a determinable term certain of 5 years. To take an extreme example, a lease made from year to year subject to a fetter on the right of the landlord to determine the lease before the expiry of 999 years would be valid according to this reasoning, because it would comprise a determinable certain term, but the question should arise whether this is too illusory and therefore void. An analogy can be drawn with clogs on the right to redeem a mortgage.[56]

A further issue regarding the nature of a periodic tenancy is whether it is regarded as an aggregation of distinct terms or one long term.[57] If the view is adopted that it is one long term, then this provides additional support for the analysis that landlords and tenants should

[52] *Hammersmith and Fulham London Borough Council v Monk* [1992] 1 A.C. 478 at 483 (Lord Bridge) and at 491-492 (Lord Browne-Wilkinson) following *Doe d. Aslin v Summersett* (1830) 1 B. & Ad. 135, which applied to joint lessors.
[53] *Hammersmith and Fulham London Borough Council v Monk* [1992] 1 A.C. 478 at 490-491 (Lord Bridge). This is not incompatible with the other joint tenant's human rights- see *Sims v Dacorum Borough Council* [2014] UKSC 63; [2014] 3 W.L.R. 1600.
[54] *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52 at [33] (Lord Neuberger).
[55] *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 A.C. 386 at 395. Lord Templeman stated that both Court of Appeal authorities of *Re Midland Railway Co's Agreement* [1971] Ch. 725 and *Ashburn Anstalt v Arnold* [1988] 23 E.G. 128 were wrongly decided.
[56] *Samuel v Jarrah Timber* [1904] A.C. 323; *Fairclough v Swan Brewery* [1912] A.C. 565; *Jones v Morgan* [2001] EWCA Civ 995; [2001] Lloyd's Rep. Bank. 323.
[57] K. Gray and S.F. Gray, *Elements of Land Law*, 5th edn (Oxford: OUP, 2009) 330.

be able to terminate the periodic tenancy on different terms. Lord Bridge's view in *Monk* was "that the law regards a tenancy from year to year which has continued for a number of years, considered retrospectively, as a single term".[58] *Mexfield* did not explicitly consider the issue, but appears to assume that periodic tenancies are considered as a succession of terms rather than treating each successive term as part and parcel of the original term.[59]

This issue has been thrust into the spotlight in relation to the issue of liability for council tax by *Leeds City Council v Broadley*,[60] where the issue was whether the landlord, Mr Broadley, or his tenant was the owner of the dwelling within the meaning of section 6 of the Local Government Finance Act 1992 when the dwelling had no resident for the period in dispute. By the agreement, the landlord agreed to let the premises for a term of 6 or 12 months and thereafter continuing on a monthly basis until terminated by either party under the provisions of clause 3. Rent was paid per calendar month. The issue in that case focused on whether the tenant had "a material interest" i.e. "a leasehold interest which was granted for a term of six months or more" under section 6(5) and (6) of the 1992 Act and whether there was a continuation tenancy comprising of both a fixed term and periodic term. The council argued that such a tenancy offended against the rule that requires tenancies to be of sufficiently certain duration and which, if contravened, meant that the purported tenancy was beyond the power of the landlord to create. McCombe LJ quoted from *Woodfall on Landlord and Tenant*[61] and considered three 19th century cases[62] to support his conclusion[63] that there was a single grant in that case for a fixed term followed by a periodic tenancy. Accordingly, the tenant's liability for council tax continued while the tenancies subsisted as periodic tenancies even though the tenant had gone out of occupation.

The case is significant, because the Court of Appeal refused to allow the certainty rule to frustrate the decision they wished to reach. The case did not concern a fetter, but demonstrates that flexibility will be applied to circumvent the certainty rule to recognise commercial reality in appropriate cases. As McCombe LJ stated, "there is obvious benefit to both parties to the lease in giving a degree of initial certainty of the term's duration, with a degree of flexibility thereafter".[64] If flexibility is extended to the overall structural congruity of a periodic tenancy, then the room for manoeuvre can be broadened to give parties more freedom to create periodic tenancies on mutually agreed terms.

5. The future of periodic tenancies?

In *Mexfield*, the Supreme Court refused to uphold a monthly periodic tenancy, which raises questions about the future of implied periodic tenancies. It is notable that the Supreme Court went further than *Prudential*, because in *Prudential*, the term for an uncertain period until the landlord needed the road for widening was held to be a valid periodic tenancy. The Supreme

[58] *Hammersmith and Fulham London Borough Council v Monk* [1992] 1 A.C. 478 at 490 (Lord Bridge). Compare *Superstrike v Rodrigues* [2013] EWCA Civ 669.
[59] C. Harpum, S. Bridge, M. Dixon (eds), *Megarry and Wade: The Law of Real* Property, 8th edn (London: Sweet and Maxwell, 2012) para.17-081 support this analysis.
[60] *Leeds City Council v Broadley* [2016] EWCA Civ 1213.
[61] *Woodfall: Landlord and Tenant* (London: Sweet & Maxwell) para.5-076. See *Leeds City Council v Broadley* [2016] EWCA Civ 1213 at [9].
[62] *Doe d. Chadbourn v Green* (1839) 9 A. & E. 658; *R v The Inhabitants of Chawton* (1841) 1 Q.B. 247; *Brown v Trumper* (1858) 2 Beav. 11. See *Leeds City Council v Broadley* [2016] EWCA Civ 1213 at [10]-[13].
[63] *Leeds City Council v Broadley* [2016] EWCA Civ 1213 at [13] (McCombe LJ) and see also at [36] (Underhill LJ).
[64] *Leeds City Council v Broadley* [2016] EWCA Civ 1213 at [33].

Court in *Mexfield*, however, held that the tenancy in its case was not a periodic tenancy, which means that an implied periodic tenancy will not arise where the lease is void because of uncertain duration of term.[65] *Emmet & Farrand on Title* comment that it is difficult to see how the implied freely terminable periodic analysis can survive except to explain any relationship subsequently arising when, as happened in *Prudential* itself, the interests of the original landlord and/or tenant are assigned, and the assignee tenant continues in possession on the same terms,[66] but even this analysis may be doubtful following *Mexfield*.

Lord Neuberger in *Mexfield* did acknowledge[67] that if the agreement cannot give rise to a tenancy, then if it is not a contractual licence, the only right that Ms Berrisford could claim would be that of a periodic tenant on the terms of the written agreement in so far as they are consistent with a periodic tenancy, because she had been in possession purportedly under the agreement paying a weekly rent to the landlord. Lord Neuberger's view was that it was far less likely that the parties would have intended a weekly tenancy determinable at any time on one month's notice than a licence which could be terminated pursuant to clauses 5 and 6.[68]

Lord Neuberger left open the question as to whether the agreement could have taken effect as a periodic tenancy with contractual effect being given between the contracting parties to the restrictions on the right to serve a notice to quit found in the agreement. Lord Neuberger stated that he preferred to state nothing about that point, which is disappointing, because such a solution would preserve periodic tenancies as well as enable the creation of proprietary periodic tenancies with non-proprietary contractual fetters and consequently, give recognition to the complex interrelationship of proprietary and non-proprietary elements of a lease. Lord Hope compared the position in Scotland where a lease may be granted for an indefinite period between the original parties.[69]

Because the presumption of an implied periodic tenancy is no longer applied,[70] and there would be a contractual licence instead,[71] it is problematic that the contractual licence, although enforceable between the original parties personally, is "not capable of binding their respective successors, as no interest in land or other proprietary interest would subsist".[72] It is noteworthy that Hildyard J in *Southward* uses the terminology of periodic licence[73] as if he is drawing a parallel or analogy with periodic tenancies or to somehow "elevate" the status of contractual licences to create a hybrid category between a contractual licence and a periodic tenancy.

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[65] *Emmet & Farrand on Title* (London: Sweet and Maxwell) para.26.015.
[66] *Emmet & Farrand on Title* (London: Sweet and Maxwell) para.26.005.01. See also *Mundy v Hook* (1997) 30 H.L.R. 551.
[67] *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52 at [66].
[68] Other judges expressed similar views in *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52 at [80] (Lord Hope), at [100]-[103] (Lord Mance), at [107]-[110] (Lord Clarke), at [120] (Lord Dyson).
[69] *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52 at [75]-[79].
[70] See C. Harpum, S. Bridge, M. Dixon (eds), *Megarry and Wade: The Law of Real* Property, 8th edn (London: Sweet and Maxwell, 2012) para.17-086.
[71] *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52 at [59] (Lord Neuberger), at [102] and [104] (Lord Mance), at [108] (Lord Clarke), at [119] (Lord Dyson).
[72] *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52 at [60] (Lord Neuberger).
[73] *Southward Housing Co-operative Ltd v Walker* [2015] EWHC 1615 at [96] (Hildyard J).

A licence is, however, problematic, because the rights of tenants are far greater than those of a licensee and the agreement is denied proprietary status. Apart from a tenant having exclusive possession whereas a licensee does not, a tenant, and not a licensee, has the protection of various statutory repairing provisions. The House of Lords in *Bruton* v *London and Quadrant Housing Trust*[74] went to considerable lengths to find a tenancy, so that the tenant could sue to enforce repairing covenants under section 11 of the Landlord and Tenant Act 1985. It would arguably be doctrinally more coherent if a contractual lease were created rather than a contractual licence in circumstances where there is a fetter on the right of a party to terminate the tenancy. It appears, however, from *Mexfield* that the certainty of term rule operates as a bar to contractual freedom in relation to a contractual lease. Nevertheless, it is somewhat incongruous that in *Mexfield*, certainty of term was a bar to creating a contractual lease whereas in *Bruton*, contractual freedom to create a tenancy was not limited by the *nemo dat* principle or *numerus clausus* in circumstances where the landlord only had a licence and no estate out of which he could grant a proprietary tenancy. Lord Neuberger in *Mexfield* distinguished *Bruton* as being "about relativity of title which is the bedrock of English land law" in a case where he stated that the tenancy would be binding on an assignee of the tenant and the landlord,[75] thus bestowing quasi-proprietary status on a contractual lease.

Although the *numerus clausus* principle was not expressly articulated by any of the judges in *Mexfield*, implicit within the approach was a need to avoid the inevitable result of the *numerus clausus* principle, that is that the tenancy on its terms would be void for uncertainty. The approach to private law in *Mexfield*, for the sake of the protection of the tenant and the wider cause of social justice, enabled the judges to reconfigure property rights and is therefore symbolic of a progressive approach to property law. As Weir argues, the conservative influence of *numerus clausus* on property interests is being increasingly disrupted by the impact of judicial activism and by statutory property interests based on social and environmental forces, which seek to loosen the bonds of this principle.[76]

Although contractual rights are generally freely customizable, whereas property rights are restricted to a closed list of standardised forms,[77] there is in *Mexfield* an incursion into contractual freedom limiting the ability of parties to create contractual non-proprietary fetters and hold under a periodic tenancy. This is due to the subliminal effect on proprietary rights if contractual fetters were recognised to be valid. Although *numerus clausus* makes sense from an economic perspective, because permitting free customization of new forms of property would impose significant external costs on third parties, insisting on a "one size fits all" system of property rights would frustrate those legitimate objectives that can be achieved only by using different property rights that fall short of full ownership.[78] By arguing for incorporation of difficult-to-define qualities such as virtue or flourishing, progressive

[74] *Bruton v London and Quadrant Housing Trust* [1999] 3 W.L.R. 150
[75] *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52 at [65].
[76] M. Weir, "Pushing the Envelope of Proprietary Interests: the Nadir of the Numerus Clausus Principle?" (2015-2016) 39 Melb. U. L. Rev. 651.
[77] T.W. Merrill and H.E. Smith, "Optimal Standardization in the Law of Property: The Numerus Clausus Principle" (2000) 110 Yale L.J. 1, 68-69.
[78] T.W. Merrill and H.E. Smith, "Optimal Standardization in the Law of Property: The Numerus Clausus Principle" (2000) 110 Yale L.J. 1, 69.

proponents of these qualities implicitly assert that the values of simplicity and formalism in property law do not exhaust the field.[79]

Chang and Smith argue that in between the strict *numerus clausus* principle and the restriction-free *numerus apertus* principle, a compromise is to allow property customs to create new, *de jure* property forms where they impose tolerable information costs and prevent *numerus clausus* from becoming a straitjacket on property.[80] Whilst constructing their arguments within the context of U.S. law, a parallel can be drawn with English law to allow a tenancy agreement to be a proprietary interest even though it is subject to a contractual fetter on either or both parties. As they argue, a statutory monopoly on property creation would be sub-optimal, because new property forms with net social value may not be created. An intermediate institutional arrangement under which statutes and courts can both create new property forms, "might strike the right balance between frustration costs and measurement costs and between spontaneous order and designed order".[81] This would enable leases to adapt to the twenty-first century and provide protection to occupiers of land without having to resort to technical, ancient common law rules as in *Mexfield*.

The future of implied periodic tenancies is important in circumstances where *Mexfield* does not apply. *Mexfield* does not apply to sub-leases, because a tenancy for life cannot be created out of a sub-lease. It also cannot apply to corporate tenants, because a company cannot hold a tenancy for life. Accordingly, a lease identical to that in *Mexfield* granted to a company cannot take effect as a lease or as a property right, but as between the original contracting parties, may be enforceable as a contract. Lord Clarke expressed his concern that "It is a mystery to me why in 2011 the position of a tenant who is a human being and a tenant which is a company should in this respect be different".[82] It is nevertheless important that the need for proper formalities has not been undermined by *Mexfield*, because *Mexfield* only applies if all the formalities were complied with for the tenancy agreement[83] and did not apply where the agreement was oral in *Hardy v Haselden*.[84]

Despite criticising the uncertainty rule in the strongest terms, none of the judges in the Supreme Court were prepared to jettison the requirement. Lord Neuberger's observation that he would "not support jettisoning the certainty requirement, at any rate in this case"[85] leaves an aperture for future developments. Baroness Hale argued that reconsideration of the decision in Prudential case "whether by this court or by Parliament, a matter of some urgency".[86] Lord Clarke urged "that the certainty rule should now be abandoned",[87] although he agreed that it was not necessary to abandon it for the purposes of this appeal.

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[79] J.B. Baron, "The Contested Commitments of Property" (2009-2010) 61 Hastings L.J. 917 at 920, 922-923. See also A.J. van der Walt, "The Modest Systemic Status of Property Rights" (2014) 1 J. L. Prop. & Soc'y 15.
[80] Y. Chang and H.E. Smith, "The *Numerus Clausus* Principle, Property Customs, and the Emergence of New Property Forms" (2014-2015) 100 Iowa L. Rev. 2275, 2279.
[81] Y. Chang and H.E. Smith, "The *Numerus Clausus* Principle, Property Customs, and the Emergence of New Property Forms" (2014-2015) 100 Iowa L. Rev. 2275, 2308.
[82] *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52 at [105].
[83] *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52 at [39]-[41] (Lord Neuberger).
[84] *Hardy v Haseldon* [2011] EWCA Civ 1387, [2011] N.P.C. 122.
[85] *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52 at [35].
[86] *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52 at [96].
[87] *Mexfield Housing Co-operative Ltd v Berrisford* [2011] UKSC 52 at [105].

Conclusions- new equilibrium?

Periodic tenancies are undergoing an identity and existential crisis, which has exposed various doctrinal dilemmas relating to leases. The decision in *Mexfield* has important repercussions for periodic tenancies, because it was made from a microcosmic perspective to resolve the immediate problem before the Supreme Court without analysing fully the long-term consequences and implications from a macrocosmic perspective. In relation to fetters on a landlord and tenant, there is no necessity or requirement for correlation or congruence between the two situations of fetters on landlords and tenants. Because there was no thorough analysis and examination of the consequences of the decision in *Mexfield* by the Supreme Court of a fetter on the tenant, any statements in this regard are therefore *obiter*, and the arguments in favour of an asymmetrical approach are compelling. Consequently, in relation to the factual matrix of a fetter on a tenant, there are cogent reasons for arguing that the court would not construe it as a lease for life, would not apply section 149(6) of the Law of Property Act 1925, would have no compunction in holding the tenancy void, would not be mobilised by rhetoric of unfairness to the landlord, but may still enforce the agreement to take effect on the terms of the agreement between the original parties as a contractual licence. However, if shifts in the policy matrix of land law and its self-governing norms favour occupiers of land who are resisting being bound by the fetters in the original agreement, then there may arguably be a return to the *Prudential* approach of holding the agreement to be void and the parties to be bound by a periodic tenancy free of any fetters, so that either party can terminate the tenancy at the end of a period.

The irony of the decision in *Mexfield* is that an agreement which was incapable of constituting a tenancy was transmogrified into a 90 year lease.[88] *Mexfield* represents a new equilibrium protecting tenants where a lease may otherwise be void, but post-*Mexfield*, it is important that the justifications for a fixed maximum duration should only be significant for a lease as an estate. It would be doctrinally coherent to uphold the validity of the proprietary periodic tenancy and to acknowledge freedom of bargaining with contractual fetters binding between the original parties only and which would therefore be binding on the tenant. Structural congruity could still be maintained within the systemic framework of leases retaining its constitutive values. Although this result was not ruled out by *Mexfield*, such a solution is not imminent. However, in the dual dichotomy between justice-based and certainty-based land law, it is important for the dynamic institution of land law to retain the flexibility offered by such an outcome.

[88] Acknowledged in *Southward Housing Co-operative Ltd v Walker* [2015] EWHC 1615 at [70] (Hildyard J).