

THE LEASE FOR LIFE AND THE REQUIREMENT OF CERTAINTY

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This article explores the relationship between the lease for life and the requirement of certainty of duration which applies to leases. It has been suggested that as a result of this requirement, a lease for life cannot validly be granted. This article seeks to demonstrate that this proposition is incorrect, and that the lease for life is a variant form of the recognised freehold life estate. As such it is not subject to the requirement of certainty.

I. INTRODUCTION

The lease for life or lives enjoys a curious twilight existence in Singapore law. On the one hand, unlike the position in England, there are no statutory impediments to the creation of such a lease.¹ On the other hand, there can be no doubt that very few leases for life have actually been created in Singapore, at least in recent years. Leases for life were quite common in England in the nineteenth century and the early part of the twentieth century. The reasons for this are connected with the limitations on the leasing powers formerly available to tenants in tail, ecclesiastical corporations and certain universities and colleges.² The relaxation of these restrictions reduced the use of the lease for life, and the final nail in the coffin of the lease for life in England was section 149(6) of the *Law of Property Act 1925*,³ which converted the lease for life into a term of 90 years determinable after the death of the original lessee⁴ by at least one month's notice in writing.

There is no Singapore equivalent of section 149(6) of the *Law of Property Act*, and therefore there is no statutory bar to the creation of new leases for life. However, it is difficult to see any commercial reason nowadays for the creation of such an interest, although occasionally the lease for life may still have a role to play in family settlements.⁵ Even if for some reason a client wanted to grant such an interest, many practising lawyers might well prefer to follow the model of modern English law and to create a lease for a term of years terminable by notice on earlier death. The

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¹ See *Law of Property Act 1925* (U.K.), 15 & 16 Geo. 5, c. 20, s. 149(6).

² See Megarry & Wade, *The Law of Real Property*, 6th ed. (London: Sweet and Maxwell, 2000), para. 14-006.

³ *Supra* note 1.

⁴ If the lease is expressed to be determinable on the death of any person other than the lessee, then the notice may be served after the death of that person: s. 149(6)(c).

⁵ As illustrations of contemporary uses of the lease for life in other jurisdictions, see, e.g., the facts of *Re Sorensen and Sorensen*, 90 D.L.R. (3d.) 26 (1977) [*Sorensen*] and *Stewart v. Stewart* [2003] N.Z.F.L.R. 400.

difficulty is that even though it is unlikely that lawyers would purposely draft a lease for life, such a lease may well arise inadvertently particularly where a lease is not professionally drafted.

An illustration of this is provided by the case of *Zimbler v. Abrahams*⁶ where the landlord's agent signed the following document: "I the undersigned . . . have let to Mr. Abrahams . . . the house . . . at a weekly rental of 23s., and I agree not to raise Mr. Abrahams any rent as long as he lives in the house and pays rent regular. I shall not give him notice to quit." The landlord, treating the defendant as a weekly tenant, gave him notice to quit. However, it was held by the Court of Appeal that the document amounted to an agreement to grant a lease for life, in respect of which the defendant was entitled to specific performance. *Zimbler v. Abrahams* was discussed at some length in the Singapore High Court decision of *Lim Kim Yiang v. Foo Suan Seng*,⁷ where Yong Pung How C.J. distinguished it on the facts, but said nothing to suggest that it was not good law in Singapore.

In recent years, however, doubts have been expressed by some of the textbook writers as to the continuing validity of the lease for life in Singapore and in other common law jurisdictions which have not adopted legislation equivalent to section 149(6) of the English *Law of Property Act*. The attack comes this time not from legislation but from the common law requirement that a lease can only be granted for a period of certain duration. This requirement, although not new, was stated in its modern form in 1944 by the English Court of Appeal in the leading case of *Lace v. Chantler*⁸ and reasserted more recently in 1992 in forceful terms by the House of Lords in *Prudential Assurance Co. Ltd. v. London Residuary Body*.⁹

II. THE REQUIREMENT OF CERTAINTY OF DURATION

In *Lace v. Chantler*,¹⁰ a lease was granted at a weekly rent for the duration of the war. It was held that this did not create a good leasehold interest:

A term created by a leasehold tenancy agreement must be expressed either with certainty and specifically or by reference to something which can, at the time when the lease takes effect, be looked to as a certain ascertainment of what the term is meant to be. In the present case, when this tenancy agreement took effect, the term was completely uncertain. It was impossible to say how long the tenancy would last.¹¹

The result therefore was that a weekly tenancy arose from the fact that the tenant was paying a weekly rental. This could be determined in the usual way by one week's notice even though the war had not come to an end.

It is clear that there was some unease in the profession at this assertion of the doctrine of certainty. Many leases had been granted for the duration of the war. These were converted by subsequent legislation into ten-year leases determinable

⁶ [1903] 1 K.B. 577 [*Zimbler*].

⁷ [1992] 1 S.L.R. 573.

⁸ [1944] K.B. 368 [*Lace*].

⁹ [1992] 2 A.C. 386 [*Prudential Assurance*].

¹⁰ *Lace*, *supra* note 8.

¹¹ *Ibid.* at 370, *per* Lord Greene M.R.

by notice after the end of the war,¹² but this legislation only applied to the Second World War.¹³ Moreover, some years later in 1971 in *Re Midland Railway Co.'s Agreement*,¹⁴ the Court of Appeal held that the doctrine of certainty did not apply to periodic tenancies. Further inroads were made into the doctrine of certainty by the Court of Appeal in *Ashburn Anstalt v. Arnold*,¹⁵ but both these cases were overruled by the House of Lords in *Prudential Assurance Co. Ltd. v. London Residuary Body*.¹⁶ In the words of Lord Templeman: “My Lords, I consider that the principle in *Lace v. Chantler* reaffirming 500 years of judicial acceptance of the requirement that a term must be certain applies to all leases and tenancy agreements.”¹⁷

Prior to *Prudential Assurance*, it was possible to argue that the lease for life—like the periodic tenancy—was outside the doctrine of certainty. There was no need to discuss the lease for life specifically in *Prudential Assurance* because such leases can no longer be created in England in any case. However, the statement by the House of Lords that all leases and tenancy agreements are covered by the doctrine of certainty raises serious questions as to the continuing validity of the lease for life.

The textbook writers offer different views on this question. Gray and Gray state unequivocally that “Longevity being an unpredictable quality, a lease for life offends against the prescription that leases must be of fixed maximum duration”.¹⁸ This is an extreme view, but it is of purely academic interest in the context in which it was written. In England a lease for life is automatically converted by statute into a 90-year lease determinable on death.

The view that the lease for life is no longer valid as a matter of common law can be supported by reference to *Lace v. Chantler*¹⁹ itself where Lord Greene M.R. quoted with approval from Foa’s *Landlord and Tenant*²⁰ the following words: “Consequently, a lease to endure for ‘as many years as A. shall live,’ or ‘as the coverture between B. and C. shall continue,’ would not be good as a lease for years . . .”

The force of these words, however, is weakened by the fact that subsequently in his judgment²¹ Lord Greene M.R. referred to *Zimble v. Abrahams*²² and seems to have assumed that it was correctly decided. Moreover, the doctrine of certainty is not a new one. Lord Templeman himself referred to 500 years of judicial acceptance of the doctrine. Simpson traces the doctrine back at least to the time of Littleton.²³ Leases for life were once quite common. It seems strange that nobody noticed that they offended one of the basic principles of the law relating to leases.

A more moderate view is presented in Tan Sook Yee’s *Principles of Singapore Land Law*.

¹² *Validation of War-Time Leases Act* (U.K.), 7 & 8 Geo. 6, c. 5.

¹³ *Ibid.* s. 7(2).

¹⁴ [1971] Ch. 725 [Midland].

¹⁵ [1989] Ch. 1.

¹⁶ *Prudential Assurance*, *supra* note 9.

¹⁷ *Ibid.* at 394.

¹⁸ Gray and Gray, *Elements of Land Law*, 3rd ed. (London: Butterworths, 2001) at 344.

¹⁹ *Lace*, *supra* note 8 at 371.

²⁰ *The Relationship of Landlord and Tenant*, 6th ed. (London: Sweet and Maxwell, 1924) at 115.

²¹ At 372. It appears therefore that the words quoted from Foa’s *Landlord and Tenant* should be understood only as explaining the requirement of certainty as it applies to leasehold estates. They should not be understood as casting doubt on the validity of the freehold life estate.

²² *Zimble*, *supra* note 6.

²³ Simpson, *A History of the Land Law*, 2nd ed. (Oxford: Clarendon Press, 1986) at 252.

If it is accepted that a lease for life can exist as a non-freehold estate, does the holding in *Prudential Assurance* affect its validity from the point of certainty of duration? Does a lease for life satisfy the certainty requirement? Inasmuch as no one can predict how long any life will be, the term of a life is uncertain. On the other hand, it is certain that one day the life will end; to this extent there is certainty as compared with a term 'for the duration of the war'.²⁴

The "certainty requirement" is a requirement that the *duration* of the lease should be certain. The difficulty with this approach, therefore, is that it essentially redefines the term "certain" to mean "not perpetual". Clearly this is not the normal use of the word. One would not usually say that the length of a person's life was certain when all one really meant was that that person would surely die one day. Moreover, it does not appear that the doctrine of certainty was understood in this sense in *Lace v. Chantler*.²⁵ If one refers to the examples given in Foa's *Landlord and Tenant*, which were quoted with approval in the case, it can be seen that it is certain that one day *A*'s life will end and it is also certain that one day the coverture between *B* and *C* will end. Nevertheless, a lease for as many years as *A* shall live or for so long as the coverture between *B* and *C* shall continue, is void as a leasehold estate for uncertainty of duration.

A further difficulty is that just as it is a feature of leasehold estates that they are of *certain* duration, so it is one of the characteristics of freehold estates that they are of *uncertain* duration.²⁶ The life estate is a recognised freehold estate because the duration of a person's life is uncertain. It would be odd indeed if the concept of certainty were to be understood completely differently depending on whether it is used with reference to a leasehold estate or to a freehold estate. In other words, it surely cannot be said that the freehold life estate is of uncertain duration (because one can never know the length of a person's life) while the lease for life is of certain duration (because one knows that the life will eventually come to an end).

III. THE LIFE ESTATE AND THE LEASE FOR LIFE

It is submitted that there is a simple solution to the problems discussed in the last section. The key is to recognise that in spite of its name, the lease for life is not in fact a leasehold estate. It is rather a variant form of the freehold life estate, which is not therefore subject to the requirement of certainty of duration.²⁷

Before considering the case law which supports this view, it is necessary to refer briefly to the treatment of the freehold life estate in the English *Law of Property Act 1925*, as this may possibly be the cause of some confusion. As has been seen, leases for life were converted by the Act into 90-year leases determinable on death.

²⁴ Tan Sook Yee, *Principles of Singapore Land Law*, 2nd ed. (Singapore: Butterworths Asia, 2001) at 384.

²⁵ *Lace*, *supra* note 8.

²⁶ Tan Sook Yee, *Principles of Singapore Land Law*, *supra* note 24 at 27.

²⁷ This was the view of Megarry and Wade, *The Law of Real Property*, 5th ed. (London: Stevens and Sons, 1984) at 646 where it was said: "Leases for life, however, stood outside the rule (requiring certainty of duration), for they conferred a recognised freehold estate." This sentence is omitted from the current (6th) edition (2000), which does, however, still say (at para. 14-006): "A lease for life or lives had the advantage of giving the lessor a freehold estate, instead of a mere term of years, so that even before the action of ejectment was invented he could recover the land itself."

By contrast, the life estate which formerly existed as a freehold estate at common law was converted into an equitable life interest.²⁸ This might appear to suggest that the lease for life and the freehold life estate are two different legal entities—or at least were regarded as such by the draftsmen of the 1925 property legislation.²⁹ In fact, however, the reason for the different treatment appears to have been the different economic roles played by the lease for life and the life estate. Life interests granted at a rent were commercial transactions and as such, it was appropriate for them to continue as legal interests after the 1925 property legislation came into force. By contrast, life interests granted without payment of rent or services were family arrangements and best dealt with as equitable interests under the law relating to settled land or trusts of land.³⁰

The case of *Jones v. Jones*³¹ was decided in 1868 before the introduction of universal suffrage in the United Kingdom. Subject to certain conditions, property owners were entitled to be registered as voters. John Jones was registered as being the owner of a leasehold house and garden. In fact, he held the property under a lease for life, and an objection was made to his registration on the grounds that the statement in the list of voters was inaccurate. The objection was dismissed. In the words of Bovill C.J., “Most persons who hold property on a lease for lives consider it as leasehold, and it is only the strict law which calls it freehold”.³² Brett J. said, “Assuming this property to be freehold it was held under a lease; the description of it therefore was, if not accurate, at any rate sufficient . . .”³³

As a result of the changes wrought by the 1925 legislation, there is hardly any modern discussion in the English case law of the nature of the lease for life. It is worthy of note, however, that in *Re Midland Railway Co.’s Agreement*,³⁴ Russell L.J. said, “A lease for life was outside the requirement (of certainty), probably because this was recognised as an estate of freehold”. As has already been noted, this case was overruled in *Prudential Assurance*,³⁵ but nothing was said in that case to cast doubt on the remarks of Russell L.J. concerning the lease for life.

IV. AUSTRALIA

As there is no Singapore authority on the question at hand and given the dearth of English authority, it is proposed to review the position of the lease for life in the principal common law jurisdictions. The leading modern case on the nature of the lease for life is undoubtedly the decision of the Supreme Court of New South Wales in *Borambil Pty. Ltd. v. O’Carroll*,³⁶ which was affirmed on appeal to the Privy

²⁸ *Law of Property Act 1925* (U.K.), 15 & 16 Geo. 5, c. 20, s. 1.

²⁹ It is perhaps worthy of note, however, that there is nothing in Wolstenhome and Cherry’s *Conveyancing Statutes*, 12th ed. (London: Stevens & Sons, 1932) to suggest any such view.

³⁰ If created before 1997, such life interests of a family character would be subject to the law governing settled land (*Settled Land Act 1925* (U.K.), 15 & 16 Geo. 5, c. 18). If created after 1996, such interests would be subject to the law governing trusts of land (*Trusts of Land and Appointment of Trustees Act 1996* (U.K.), 1996, c. 47).

³¹ (1868) L.R. 4 C.P. 422.

³² *Ibid.* at 424.

³³ *Ibid.* at 424.

³⁴ *Midland*, *supra* note 14 at 732.

³⁵ *Prudential Assurance*, *supra* note 9.

³⁶ [1972] 2 N.S.W.L.R. 303 [*Borambil*].

Council.³⁷ Francis O'Carroll was granted a lease for life of certain property. A fair rent was subsequently registered in respect of the premises in accordance with the relevant provisions of the *Landlord and Tenant (Amendment) Act 1948*³⁸ of New South Wales. The question arose whether a lease for life was a lease within the meaning of the statute. Jacobs J.A. essayed an exhaustive analysis of the lease for life and the relationship between this and the life estate. As *Borambil* is not a well-known case, even amongst land lawyers, it is worth setting out his conclusions in some detail.

[A]lthough it may be said that usually the word lease is to be taken to refer to chattels real it can by no means be said that it is so limited and that the phrase 'lease for life' is an inept phrase ... The word 'leasehold' is probably only appropriate to a lease for years, because a lease for life is a freehold, but it does not follow that the word 'lease' is inappropriate to the freehold estate constituted by the grant of a life tenancy or lease for life.

There is no distinction in attributes at common law between the tenant for life under a lease at a rent and the tenant for life under a grant by way of settlement. Every tenant for life has by the common law, as incident to his estate, and without express grant, the right to take in reasonable measure three kinds of estovers—housbote (which includes firebote), ploughbote, and haybote, unless he be prevented from taking them by some special covenant: Coke on Littleton, 41b. In modern times, and indeed for centuries past, there has been a very great difference between the position of a tenant for life under a lease for life at a rent and a tenant for life under a settlement. The difference in the attributes of the interests, however, was achieved by attaching different obligations in each case by way of covenant or by way of condition in the settlement ... The distinction would appear to be that where the property is let at a rent for life the letting is properly described as a lease for life. Where no commercial rent is stated then it is more usual to refer to the interest for life as a life tenancy.³⁹

Jacobs J.A. went on to conclude that in spite of this, the lease for life was a lease within the meaning of the legislation which enabled a fair rent to be fixed. This was because of the wide definition of the term "lease" in the statute. The other members of the court delivered concurring judgments. The judgment was affirmed on appeal to the Privy Council, whose opinion is concerned mainly with a detailed analysis of the statutory provisions, but their Lordships expressed their agreement with the review of the authorities conducted by Jacobs J.A.

Borambil was followed in the subsequent case of *Greco v. Swinburne Pty. Ltd.*,⁴⁰ one of the few to raise expressly the question of the relationship between the lease for life and the requirement of certainty of duration of leases. The case involved a claim for statutory compensation in respect of loss caused by the refusal of a planning permit. The argument was made that the claimants had no interest in the land, and this argument was based in part on the fact that the claimants had only a lease for life.

³⁷ (1973) 3 A.L.R. 391 (P.C.).

³⁸ Act No. 25 of 1948.

³⁹ *Borambil*, *supra* note 36 at 306.

⁴⁰ [1991] 1 V.R. 304.

The Supreme Court of Victoria referred to *Borambil* and rejected the argument that a lease for the lifetime of the survivor of the two lessors was void for uncertainty.

In *Australian Maritime Safety Authority v. Quirk*,⁴¹ questions arose as to the determination of rent under a rent review clause contained in a lease for life. Following *Borambil*, the Supreme Court of New South Wales rejected the argument that the lease was void for uncertainty. Bryson J. said,

[A] grant of a right of possession for the lifetime of a person, whether or not expressed to be a lease, is not void for uncertainty on the ground that the length of the person's life cannot be known; the consequence of that uncertainty is not the consequence which emerged in *Lace v. Chantler*,⁴² but the grant creates a freehold estate for life ... [The] authorities show that it is very common, indeed usual to speak of an estate for life created in terms appropriate for a lease as a lease.⁴³

V. NEW ZEALAND

The New Zealand courts had occasion to consider the validity of the lease for life before *Borambil*. In *Sinclair v. Connell*,⁴⁴ property was sold below its value subject to the purchaser agreeing to allow the vendor to occupy the property as tenant free of rent during her life. *Lace v. Chantler*⁴⁵ was cited to the court as authority for the submission that the duration of the term of the lease was not sufficiently certain. This argument was rejected by the court. Tompkins J. quoted a passage from Hill and Redman's *Law of Landlord and Tenant*⁴⁶ to the effect that a lease for the life of the lessee created a freehold estate in England before 1926.⁴⁷

However, it is only fair to point out an unusual feature of this case, namely, the fact that there was no rent payable under the agreement. It is true that the court described the agreement allowing the tenant to occupy the property as an agreement for a lease and, of course, it was supported by consideration, being part of the transaction for the sale of the property. However, the feature which distinguishes the lease for life from the life tenancy under a settlement is usually the payment of rent. The fact that the tenant's occupation was rent-free makes the arrangement appear at first sight much closer to the latter than to the former. The case may not therefore appear as strong an authority for the views advanced in this article as the Australian cases considered previously. On the other hand, this was a commercial transaction rather than a family settlement. The facts of the case show that it can be difficult to draw a clear line between the lease for life and the life tenancy.

⁴¹ [1998] N.S.W.S.C. 150.

⁴² *Lace*, *supra* note 8.

⁴³ At 9-10 of the Lexis transcript.

⁴⁴ [1968] N.Z.L.R. 1186.

⁴⁵ *Lace*, *supra* note 8.

⁴⁶ 14th ed. (London: Butterworths, 1964) at 51.

⁴⁷ At 1189.

VI. CANADA

The validity of the lease for life does not appear to have been expressly considered in Canada, although there are reported cases which assume its validity.⁴⁸ An unusual form of lease—similar, but not identical to, a lease for life—was considered in *Black v. Blair Athol Farms Ltd.*⁴⁹ The duration of the lease was “for the term commencing on the 2nd day of January, 1992, and ending on the 31st day of December in the year of the Lessor’s death”. The Manitoba Court of Appeal considered *Lace v. Chantler*⁵⁰ and *Prudential Assurance*⁵¹ and stated that the law in Canada on the issue of certainty of leases was the same as English law.⁵² The court did not rule on the issue of whether leases for life were valid in Manitoba because the agreement in question could not be said to create a lease for life, which must determine on the death of the person to whom the lease depends, whether it be the lessee or some other person. The duration in this case was for a term ending on 31 December after the lessor’s death and was therefore uncertain.

VII. UNITED STATES OF AMERICA

It is interesting to note that the American courts have taken the same approach to the lease for life as that adopted in *Borambil*.⁵³ The issue seems to have arisen first in the context of the covenants that could be implied in a lease for life. The question was whether a covenant for quiet enjoyment could be implied in the case of a lease for life, as this was in truth the grant of a freehold estate. It was eventually settled that where there was a reservation of rent, such a covenant could be implied.⁵⁴

The law on the nature of the lease for life is conveniently summarised in *American Jurisprudence* in terms which it is submitted apply with equal force in Singapore.

An estate of freehold is an estate of indeterminate duration, in fee or for life ... Life estates are freehold estates not of inheritance⁵⁵ ... it is well settled that a life estate may be created by a deed, lease, or devise, either with or without a stipulation for the payment of rent.⁵⁶

VIII. CONCLUSION

The common law offers a structure for real property, which not only has stood the test of time, but which also has its own internal logic. On the one hand, there are the freehold estates, which are interests in land of an uncertain duration. These are

⁴⁸ See, e.g., *Sorensen*, *supra* note 5, applied in *Groves v. Christiansen* 86 D.L.R. 296 (1978).

⁴⁹ 110 Man. R. (2d) 84 (1996) [*Black*].

⁵⁰ *Lace*, *supra* note 8.

⁵¹ *Prudential Assurance*, *supra* note 9.

⁵² *Black*, *supra* note 49, at 92.

⁵³ *Borambil*, *supra* note 36.

⁵⁴ See *Black v. Gilmore*, 9 Leigh 446 (1838); *Tinkham v. Wind*, 319 Mass. 158, 65 N.E.2d 14 (1946). For a general discussion of the nature of a lease for life and the differences between this and other forms of tenancy, see *Thompson v. Baxter*, 107 Minn. 122, 119 N.W. 797 (1909).

⁵⁵ 28 Am. Jur. 2d. ESTATES §11.

⁵⁶ 28 Am. Jur. 2d. ESTATES §66.

represented in modern Singapore law by the fee simple and the life estate. On the other hand, there is the leasehold estate, where the duration of the interest has to be certain.

Looking more particularly at the life estate, it makes no difference to its essential nature whether it is granted by way of gift or in consideration of the payment of rent. It is perhaps unfortunate that where the life estate is granted subject to the payment of rent, it is usually called a “lease for life”. The terminology is confusing, as it has led some commentators to assume that it is subject to the rules applicable to true leasehold estates. It is probably too late to adopt a new name for the “lease for life”, but once it is recognised for what it truly is—a form of the freehold life estate—it becomes quite clear that it is not subject to the requirement of certainty, which is only applicable to leasehold estates.