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RESCUING UNCERTAIN LEASES IN ENGLISH LAW: A STUDY IN COMPATIBILITY FOR TRANSPLANTATION

Berrisford v. Mexfield Housing Co-operative Ltd[1]

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The common law rule that requires certainty in the terminus of leasehold estates has been the subject of trenchant criticism even as it has been upheld repeatedly by the courts. In *Berrisford v. Mexfield Housing Co-operative Ltd* [2011] 3 W.L.R 1091, the English Supreme Court has once again upheld the rule but has suggested that its harshness may be tempered by two different techniques. This note studies the viability of these techniques in Singapore and questions if the rule may be too severely criticised.***

I. "BEGIN AT THE BEGINNING… AND GO ON TILL YOU COME TO THE END: THEN STOP."[2]

Beginnings and endings, particularly endings, feature most prominently in the context of leases. In particular, the law requires that a leasehold estate, or a term of years absolute, must have a fixed terminus from the outset. One cannot simply begin at the beginning and go about until one finds that one has come to the end. The end must be in sight before one begins one's journey. This rule of law would thus invalidate the grant of a fixed term lease until the occurrence of an uncertain event, such as a lease until the Singapore football team makes it to the World Cup Finals. The same rule renders void a periodic tenancy in which either party's right to terminate is fettered by a similar event.

The rule has received much criticism in the modern day, with esteemed commentators such as the Kwa Geok Choo Professor in Property Law observing that "[i]t is far from clear that the historic rationales for the rule retain today the force which they may once have enjoyed."[3] In *Prudential Assurance Co. Ltd. v. London Residuary Body*,[4] whilst Lord Browne-Wilkinson joined in affirming the rule, he described it

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*** This note is an adaptation for the Singapore context of a case note on the same subject matter, *infra* note 25.

1 [2012] 3 W.L.R. 1091 (S.C.) [*Mexfield*].
2 Lewis Carroll, *Alice's Adventures in Wonderland* (London: Macmillan, 1865) c. 12.
3 Professor Kevin Gray in Kevin Gray & Susan Francis Gray, *Elements of Land Law*, 5th ed. (Oxford: Oxford University Press, 2009) at 326.
4 [1992] 2 A.C. 386 (H.L.) [*Prudential Assurance*].

as "ancient and technical", productive of "bizarre outcome[s]" and devoid of "satisfactory rationale" or "useful purpose".[5] The rule is said to be objectionable "on the ground that it frequently denies efficacy to perfectly sensible arrangements derived from a process of conscious bargain between autonomous persons."[6] Despite these criticisms, the rule was applied as recently as 2007 by the Singapore High Court in *Chiam Heng Luan v. Chiam Heng Hsien*.[7]

In *Berrisford v. Mexfield Housing Co-operative Ltd*,[8] a seven-member panel of the English Supreme Court retained the rule, but avoided the "bizarre outcome" its straightforward application would have engendered by transforming a lease of otherwise uncertain duration into a 90-year tenancy. The subject of this note is to consider whether *Mexfield* is transplantable, either in full or in part, to Singapore.

II. Up the Rabbit-Hole

Unlike Alice, whose adventures took her down the rabbit-hole,[9] Ms. Ruza Berrisford's quest took her up the English court system, all the way to the Supreme Court. The curiosity in Ms. Berrisford's adventure lies in the fact that the dispute had become academic by the time she reached the Court of Appeal. Mexfield Housing Co-operative Ltd ("Mexfield") was founded by a bank as a fully mutual housing association as part of a mortgage rescue scheme. In 1993, Mexfield purchased 17 Elton Avenue, Barnet, from Ms. Berrisford and let it back to Ms. Berrisford under an "Occupancy Agreement". The premises were to be let "from month to month" until determined in accordance with the agreement.[10] While there was no restriction on when Ms. Berrisford could determine the tenancy, Mexfield's rights to bring the tenancy to an end were specifically limited by clause 6 of the agreement. One of the limited instances under which Mexfield's rights to determine the tenancy would become exercisable was upon Ms. Berrisford's failure to pay rent for 21 days. When Ms. Berrisford did fall into arrears, Mexfield served upon her a notice to quit, though without apparently relying on its right to do so under clause 6.

At first instance, Mexfield succeeded by way of summary judgment[11] on an orthodox application of the rule against leases of uncertain duration. The "Occupation Agreement" could not create a valid tenancy as envisaged by the parties because, on the basis of the rule in *Prudential Assurance*,[12] any fetter on the right of either party to determine a periodic tenancy would render the period of the tenancy uncertain, which would have the effect of invalidating the lease. In its place, by Ms. Berrisford's actions in taking possession of the premises and paying a monthly rent, would be a monthly tenancy without the offensive fetter. As such, Mexfield would have been perfectly entitled to determine the tenancy by serving a month's notice on

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5 *Ibid.*
6 Gray & Gray, *supra* note 3 at 326.
7 [2007] 4 S.L.R.(R.) 305.
8 *Mexfield*, *supra* note 1.
9 Carroll, *supra* note 2, c. 1 "Down the Rabbit-Hole".
10 *Mexfield*, *supra* note 1 at para. 2.
11 *Mexfield Housing Co-operative Ltd v. Berrisford* [2009] EWHC 2392 (Ch).
12 *Prudential Assurance, supra* note 4.

Ms. Berrisford for no reason at all. Although Mexfield succeeded before Peter Smith J., it entered into a fresh "Occupancy Agreement" with Ms. Berrisford after being invited to do so by his Lordship.[13]

The fact that the appeal had by now become "academic" did not pre-empt the Court of Appeal from hearing it. The court chose to do so because such agreements are common in England and the court was of the view that it would be helpful to decide if the lower court was correct in its conclusion.[14] Previously unrepresented, Ms. Berrisford came to be represented by Mr. Wonnacott before the Court of Appeal. Mr. Wonnacott presented three arguments on appeal, though one was abandoned midway through the hearing as "an academic question too far".[15] First, he submitted that, although *Prudential Assurance* had the effect of negating the offending clause at common law, nevertheless equity could intervene to prevent Mexfield from seeking possession against Ms. Berrisford, as both were immediate parties to the tenancy agreement. Secondly, it was argued that, to the extent that no effect could be given to the clause as a term of a tenancy, the parties should be taken to have entered into a licence for Ms. Berrisford to occupy the premises so that the clause could nevertheless constrain Mexfield's right to recover possession since no similar objection applies to licences. Although Wilson L.J. was persuaded by the first submission, ingenuity nevertheless failed to prevail against authority and the majority of the Court of Appeal (Aikens and Mummery L.JJ.) reluctantly ruled against Ms. Berrisford.

On appeal to the Supreme Court, Mr. Wonnacott presented further reasons why his client's "academic" appeal should be allowed. There may be disappointment in some quarters that a call was not made for the rule to be abandoned[16] given the increasingly trenchant judicial criticism of the rule since *Prudential Assurance*. Whereas Lord Browne-Wilkinson was alone in criticising the rule in *Prudential Assurance*, Lord Dyson joined Lord Neuberger and Lady Hale in open criticism of the rule's apparent irrationality,[17] while the remaining Law Lords concurred in Lord Neuberger's leading judgment. However, there was in any event no inclination to effect such a dramatic change to a long-established rule.[18] Not only was there a fear that such a change in the law "might upset long established titles",[19] such a change would have been incompatible with the *Law of Property Act 1925* which envisages only two estates in English law,[20] the fee simple and the term of years.[21] Whilst the latter concern is irrelevant in Singapore, where the life estate may still be created at law, it will be demonstrated over the course of this note that an abandonment of the rule would be more drastic than it might appear at first blush.

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[13] *Berrisford v. Mexfield Housing Co-operative Ltd* [2011] 2 W.L.R. 423 at para. 3, Wilson L.J. [*Mexfield* (C.A.)].

[14] *Ibid.* at para. 4, Wilson L.J. The case is noted in Kelvin F.K. Low, "Leases and the Fixed Maximum Duration Rule Yet Again, But With a Twist" (2011) 127 Law Q. Rev. 31.

[15] *Ibid.* at para. 12. Mr. Wonnacott had sought to argue that equity could provide relief against forfeiture even in favour of non-owners of property rights.

[16] *Mexfield*, *supra* note 1 at para. 37.

[17] *Ibid.* at para. 115.

[18] *Ibid.* at paras. 35-37, Lord Neuberger; para. 96, Lady Hale; para. 115, Lord Dyson.

[19] *Ibid.* at para. 37, Lord Neuberger citing Lord Browne-Wilkinson in *Prudential Assurance*, *supra* note 4 at 397.

[20] (U.K.), 15 & 16 Geo. V., c. 20, s. 1(1).

[21] *Mexfield*, *supra* note 1, at para. 36, Lord Neuberger.

Three different arguments were put before their Lordships. First, that the grant of *leasehold* estates of uncertain durations were treated as grants of determinable *freehold* life estates by an ancient common law rule, which by the operation of s. 149(6) of the *Law of Property Act 1925*,[22] are transformed into determinable 90-year *leasehold* estates. A 90-year tenancy with the same fetters would not fall foul of the certainty of term rule so that the fetters would remain valid and enforceable as between landlord and tenant. Secondly, if the "Occupation Agreement" did not create a valid *lease*, it nevertheless created a valid and enforceable *licence* as between the parties. Finally, the fetters, even if they were not enforceable *in rem* as a term of the tenancy, should nevertheless be enforced by the courts *in personam* as a matter of contract.

III. The Three Potions

A. *It's Always 90 Years Now?*

Over the course of her adventures in Wonderland, Alice is informed by the Hatter that, in retaliation for "murdering the time", Time wouldn't do a thing he asked so that "[i]t's always six o'clock now."[23] According to *Mexfield*, by a process of transmogrification and re-transmogrification, all grants of leasehold estates of uncertain durations are always grants of 90-year leases now in England. As they now have a fixed terminus in England, the fetters would now be valid after all. The process takes two stages. The first stage is the conversion or leasehold estates of invalid duration into freehold life estates[24] and the second via statutory intervention which converts all freehold life estates to 90-year determinable leasehold estates. The efficacy of this 'rule' in England has been called into question, both as a matter of precedent and practicality[25] but that is of less concern to the Singapore conveyancer. In Singapore, this solution simply cannot operate as both stages of this solution face insurmountable statutory obstacles. The first transmogrification stage cannot operate because of the presence of a Singapore statutory provision absent in England. The second stage fails because of the absence of an English statutory provision in Singapore.

1. *Transmogrification and the Torrens System*

The most obvious complication to applying the Supreme Court's solution in *Mexfield* in Singapore, at least so far as the first stage of the solution is concerned, is Singapore's adoption of the Torrens system of land registration. The first stage of the transmogrification and re-transmogrification exercise is dependent upon the transformation of a grant of a lease of uncertain duration into the grant of a freehold life estate. Whether this is, as the Supreme Court suggests, a rule of law or, as modern authority prior to *Mexfield* suggests, merely a rule of construction, on either view,

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[22] *Supra* note 20.

[23] Carroll, *supra* note 2, c. 7 "A Mad Tea-Party".

[24] *Mexfield*, *supra* note 1 at paras. 43, 44, Lord Neuberger; para. 117, Lord Dyson.

[25] See Kelvin F.K. Low, "Certainty of Terms and Leases: Curiouser and Curiouser" (2012) 75 Mod. L. Rev. 401.

such a transformation is only possible if any requisite formalities are complied with.[26] In *Mexfield*, Lord Neuberger suggested that "such formalities have now largely been done away with, and they normally only require a written, signed document".[27]

It is doubtful that this state of affairs will remain the case in England and Wales.[28] In Singapore, this is demonstrably not the case. Section 45 of the *Land Titles Act*[29] provides that "[n]o instrument until registered… is effectual to pass any estate or interest in land". Whilst a lease for a term which does not exceed seven years would constitute an overriding interest under s. 46(1)(c)(vi) and thus be exempt from the need for registration, the first stage of the Supreme Court's solution in *Mexfield* contemplates a freehold estate, which does not fall within any of the categories of overriding interests exempt from registration. If the first stage of the Supreme Court's solution is to operate at all in Singapore, it must do so only in equity. It is plausible that this first stage in *Mexfield* can be applied in conjunction with the rule in *Parker v. Taswell*,[30] through which a grant that is *void* at law (for non-compliance with formalities) will be construed as instead an agreement to make a grant, which if compliant with the different formality rules for such agreements,[31] could create an equitable interest by the further application of the doctrine of *Walsh v. Lonsdale*.[32] But even this conventional understanding is not entirely free from doubt in Singapore.

It is commonly thought that the doctrine of *Walsh v. Lonsdale*, through which equity regards as done that which ought to be done, requires the availability of specific performance as a remedy. The routine availability of specific performance in Singapore must now be reconsidered in light of *E C Investment Holding Pte Ltd v. Ridout Residence Pte Ltd*.[33] Before the High Court, a challenge on the orthodoxy that specific performance is available almost automatically (subject to the equitable bars) was mounted. Loh J. in the High Court accepted authority from Canada and Australia which diverged from the orthodoxy and instead applied a more pragmatic approach where specific performance would not be available where the land had merely been purchased for resale or commercial profit.[34] In the Court of Appeal, Chao Hick Tin J.A. declined to rule on this point conclusively, instead relying on the equitable and discretionary nature of the remedy of specific performance to deny specific performance of the particular contract in that case.[35] This obstacle may prove to be readily circumvented. Since the Court of Appeal's decision, it appears that the orthodoxy prevails.[36] Furthermore, in cases like *Mexfield*, where leasehold

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[26] *Doe v. Browne* (1807) 8 East. 165 (K.B.).
[27] *Mexfield*, *supra* note 1 at para. 41.
[28] See Low, *supra* note 25.
[29] Cap. 157, 2004 Rev. Ed. Sing.
[30] (1858), 2 De G. & J. 559 (Ch.).
[31] *Civil Law Act* (Cap. 43, 1999 Rev. Ed. Sing.), s. 6(*d*).
[32] (1882) 21 Ch.D. 9 (C.A.).
[33] [2012] 1 S.L.R. 32 (C.A.) [*E C Investment Holding*].
[34] *E C Investment Holding Pte Ltd v. Ridout Residence Pte Ltd* [2011] 2 S.L.R. 232 (H.C.). For criticism of the High Court decision, see Kelvin F.K. Low, "Conflict in Land Law Jurisprudence: Selected Issues II" in Yeo Tiong Min, Hans Tjio & Tang Hang Wu, eds., *SAL Conference 2011: Developments in Singapore Law between 2006 and 2010—Trends and Perspectives* (Singapore: Academy Publishing, 2011) 550 at 554-556.
[35] *E C Investment Holding*, *supra* note 33 at para. 103
[36] *Tan Kim Guan v. Tan Tee Theng* [2012] SGHC 53 at para. 5, Choo Han Teck J.

interests are normally acquired in consideration for the payment of rent rather than a premium, it is unlikely that the lease is to be acquired for any reason other than actual occupation[37] so that the concerns raised in *E C Investment Holding* are unlikely to arise.[38]

Notwithstanding the possibility of marrying the first transmogrifying process with the rule in *Parker v. Taswell* and the doctrine of *Walsh v. Lonsdale*, one is still left with an incomplete solution to the supposed problem since corporate tenants cannot be granted life estates.[39] Nor would the solution be available if the uncertain lease were a sublease since freehold interests cannot be carved out of leasehold interests.[40] It is difficult to see what benefits there are, especially once the difficulties with re-transmogrification are added into the mix.

2. *Re-transmogrification: An Impossibility*

The other, even more insurmountable, difficulty with the Supreme Court's preferred solution lies in the re-transmogrification process. *Mexfield* tells us that a leasehold estate of uncertain duration would be converted by a rule of law to a freehold life estate. But that is only half of the solution; we still need to re-transmogrify the freehold life estate to a 90-year determinable leasehold estate to achieve the desired result. In England, this is effected by s. 149(6) of the *Law of Property Act 1925*. Part of the appeal of *Mexfield* lies in the conclusion that the parties are regarded by law as having entered into a leasehold relationship, which was their original intent to begin with, albeit in a roundabout fashion and not on precisely the same terms.

Without the re-transmogrifying effects of s. 149(6) of the *Law of Property Act 1925*, their Lordships' solution in *Mexfield*, if it operates at all, only does so halfway. Not only is the duration of the relationship different from that which the parties envisaged, as the solution demands in England, it is of an entirely different character. A solution which imposes upon the parties a different (freehold) relationship to that intended (leasehold) is obviously much less attractive. This is particularly so if one bears in mind the distinctions between leasehold and freehold estates. Despite suggestions that leasehold estates are separated from freehold estates merely by accident of history,[41] this is not the case. Leasehold covenants more effectively bind successors-in-title than freehold covenants. The latter only bind successors-in-title if they are substantively negative[42] whereas positive leasehold covenants can also bind successors-in-title.[43] The result of a half solution in *Mexfield* would be that some at least of Ms. Berrisford's and Mexfield's intended leasehold covenants (such as those, if any, relating to repairs)[44] will not survive the rescue process, thus defeating the object of respecting their autonomous intent.

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[37] Indeed, it is likely that the lease would contain covenants against assignment and sub-letting.
[38] *E C Investment Holding*, *supra* note 33 at paras. 75-87, Chao Hick Tin J.A.
[39] *Mexfield*, *supra* note 1 at para. 92, Lady Hale.
[40] *Ibid.* at para. 43, Lord Neuberger. See also *Kusel v. Watson* (1879) 11 Ch.D. 129 (C.A.).
[41] Gray & Gray, *supra* note 3 at 325.
[42] See *e.g.*, *Rhone v. Stephens* [1994] 2 A.C. 310 (H.L.).
[43] See *e.g.*, *Williams v. Earle* (1868) L.R. 3 Q.B. 739.
[44] *Contra ibid.*

B. *The Mock Licence's Story*

Once, Alice was told, the Mock Turtle was a "real Turtle."[45] According to *Mexfield*, if a lease of uncertain duration may not be rescued by the aforementioned process of transmogrification and re-transmogrification, as appears to be the case in Singapore, then it may nevertheless take refuge from the rule on certainty of duration by pretending to be a mock licence. Although concurring in the 90-year rule solution, Lord Mance[46] and Lord Clarke[47] appear to have favoured this second argument, which also found some favour with Lord Neuberger.[48] However, Lady Hale regarded this solution as "even more bizarre" than the first,[49] which she had already considered "curiouser and curiouser".[50]

Given the unworkability of the first solution in Singapore, the second alternative holds potentially greater appeal than it does in England. One of the drawbacks of this second solution in England is that, as an alternative solution, it lacks the elegance of universal application. In Singapore, given the impossibility of the first solution applying, the second solution would have such universal application should the Singapore courts adopt it. Whenever anyone, freeholder or leaseholder, purports to grant a lease of uncertain duration, then the grantee, whether corporation or individual, would always only get a licence. What then are its pitfalls? Some of their Lordships suggested that a mock licence better reflects the parties' intentions than the orthodoxy, which would imply a periodic lease as between the parties without any contractually agreed but legally offensive fetter. As such, it is suggested that it accords better with ordinary principles of construction.

Such a conclusion is questionable. The rights of a tenant could hardly be more distinct from that of a licensee. A tenant acquires rights of exclusive possession.[51] A licensee does not, since a licence is a mere permission which makes it lawful for the licensee to do what would otherwise be a trespass.[52] If a legal system strictly respects this distinction, then the use of the device of a mock licence to rescue a failed lease would be absurd. In England, the line between a lease and a licence is not quite so clearly drawn. Thus, some courts have conceived of the possibility that some licensees may acquire sufficient possessory rights to bring actions in trespass[53] or nuisance.[54] However, even so, the ability of such licensees to bring such actions against their licensors' successors-in-title has never been tested and it may not be desirable to further blur the line between tenants and licensees by permitting such actions. Furthermore, even if such claims in tort are permitted both

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[45] Carroll, *supra* note 2, c. 9 "The Mock Turtle's Story".
[46] *Mexfield*, *supra* note 1 at paras. 99-102.
[47] *Ibid.* at paras. 107-110.
[48] *Ibid.* at paras. 58-68.
[49] *Ibid.* at para. 95.
[50] *Ibid.* at para. 93.
[51] *Street v. Mountford* [1985] A.C. 809 (H.L.).
[52] *Thomas v. Sorrell* (1673), Vaugh. 330; 124 E.R. 1098.
[53] See *e.g.*, *Hounslow London Borough Council v. Twickenham Garden Developments Ltd.* [1971] Ch. 233 at 257, Megarry J.; *Manchester Airport plc. v. Dutton* [2000] Q.B. 133 (C.A.). But note Chadwick L.J.'s dissenting judgment in the latter case.
[54] See *e.g.*, *Newcastle-under-Lyme Corporation v. Wolstanton, Limited* [1947] Ch. 92 at 106-108, Evershed J.; *Hunter v. Canary Wharf Ltd.* [1997] A.C. 655 at 688, 692 (H.L.), Lord Goff of Chieveley; 717, Lord Cooke of Thorndon.

as against complete strangers and their licensors' successors-in-title, it has never been suggested by anyone that the binding effect of leasehold covenants ought perhaps be replicated for such licensees. Even if it were not a concern in *Mexfield*,[55] there must surely be many cases of leases of uncertain duration where the parties expected their rights to persist against the successors-in-title of their counterparties. In Singapore, in the absence of a significant body of case law that already blurs the lines between the lease and the licence,[56] it is suggested that this solution is even less desirable as it would in itself create that blurring effect.

It must, however, be conceded that the orthodox solution clearly does not reflect the parties' intentions. Even so, the truth is that neither solution reflects the parties' intentions accurately. The parties intended exactly what the lease provided for: a lease of uncertain duration. The lease implied by the orthodox view was a fiction, but resorting to parties' intention as a justificatory tool to hold that a licence had been created is equally fictitious. The price of the common law's subscription to the *numerus clausus* principle[57] inevitably results in the frustration of some parties' intentions where they purport to create property rights outside the closed list recognised by law. The law of property constrains parties far more than the law of contract and it bears remembering that even the latter does not subscribe to freedom of contract above all else.

C. *Exploiting an Identity Crisis*

At one point in her adventures, Alice suffers from a particularly serious case of an identity crisis.[58] Like Alice, the lease at common law suffers from an identity crisis—is it a contractual or a proprietary right?[59] This identity crisis can cause no small degree of discomfort among lawyers trying to make sense of the rules. For example, it appears as if a lease may be determined by such contractual doctrines as frustration[60] and repudiatory breach.[61] Yet its determination as a vested estate has never been satisfactorily explained. Neither frustration nor repudiatory breach has the effect of divesting vested property rights. The cases seem explicable only on the

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[55] Particularly owing to the non-assignment clause (cl. 6(c)) on the part of Ms. Berrisford: see *Mexfield*, *supra* note 1 at para. 44, Lord Neuberger). However, it must be noted that there is no similar clause on the part of Mexfield.

[56] It is also notable that the temptation to permit non-owners to sue in private nuisance to recover damages for interference with comfort or amenities is perhaps better served in Singapore by the tort of harassment: see *Malcomson Nicholas Hugh Bertram v. Mehta Naresh Kumar* [2001] 3 S.L.R.(R.) 379 (H.C.).

[57] A legal system that recognises the *numerus clausus* principle admits of a closed list of property rights. For a comparative discussion of the ubiquity of the *numerus clausus* principle within a broad range of legal systems, including the common law, see Bernard Rudden, "Economic Theory v. Property Law: The *Numerus Clausus* Problem" in John Eekelaar & John Bell, eds., *Oxford Essays in Jurisprudence, Third Series* (Oxford: Clarendon Press, 1987) at 239.

[58] Carroll, *supra* note 2, c. 5 "Advice from a Caterpillar".

[59] See *e.g.*, Stuart Bridge, "Leases—Contract, Property and Status" in Louise Tee, ed., *Land Law: Issues, Debates, Policy* (Devon: Willan Publishing, 2002) at 98.

[60] See *e.g.*, *National Carriers Limited v. Panalpina (Northern) Limited* [1981] A.C. 675 (H.L.); *Singapore Woodcraft Manufacturing Co Pte Ltd v. Mok Ah Sai* [1979-1980] S.L.R.(R.) 159 (H.C.).

[61] See *e.g.*, *Progressive Mailing House Pty. Ltd v. Tabali Pty. Ltd* (1985) 157 C.L.R. 17 (H.C.A.); *Hussein v. Mehlman* [1992] 2 Estates Gazette Law Reports 287 [1992] E.W. Misc. 1 (County Court); *Tan Soo Leng David v. Lim Thian Chai Charles* [1998] 1 S.L.R.(R.) 880 (H.C.).

basis that a landlord's grant to the tenant of the latter's leasehold estate is somehow in a perpetually executory state even where the lease is a fixed term lease simply because rent is payable periodically, which cannot be correct.

However, paradoxically, this identity crisis provides us with arguably the most principled solution to the problem of grants of leases of uncertain duration. Unfortunately not considered by their Lordships in the Supreme Court, a glimpse of this argument may be derived from Wilson L.J.'s judgment in the Court of Appeal. There, Mr. Wonnacott argued that although *Prudential Assurance* had the effect of negating the offending clause at common law, nevertheless equity could intervene to prevent Mexfield, as an immediate party to the tenancy agreement, from seeking possession as against Ms. Berrisford, another immediate party to the tenancy agreement.[62] *Prudential Assurance* involved a dispute between the landlord and the tenant's successor-in-title and may thus be regarded as inapplicable to disputes between the immediate parties to the lease. Whatever the reasons may be for excluding leases of uncertain duration from the *numerus clausus* of property rights recognised by the common law, there is little reason to disregard their agreement *inter partes*. It is surely possible for parties to agree a periodic lease with no offensive fetters and then separately agree by way of contract that either or both were not to exercise their rights to determine the lease except upon fulfilment of certain conditions. Should it matter then that the parties' collateral agreement is contained within the same document as the lease? Scots law appears to reach the same result according to Lord Hope.[63] Nor is the treating of a failed or unenforceable grant of a lease as a valid contract particularly innovative given the familiar rule in *Parker v. Taswell*.[64] It may be that Mr. Wonnacott's invocation of equity at the Court of Appeal was unnecessary given that it was Mexfield that was seeking possession. If Mexfield were to be bound by contract, then Ms. Berrisford surely need not rely on equity to remain in the property. After all, "[a]n unaccepted repudiation is a thing writ in water".[65] Ms. Berrisford would only have had to resort to equity's auxiliary jurisdiction had she been unlawfully turned out and had herself sought possession as against Mexfield.

IV. Through the Singaporean Looking Glass

The Supreme Court's decision is unlikely to be of great value to the Singapore courts owing to significant differences in the land law of both jurisdictions.[66] The preferred solution of their Lordships, an exercise in dual transmogrification, is simply impossible to effect in Singapore and a half-hearted attempt at a similar exercise would cause more problems than it resolves. The alternative 'licence' solution is less problematic and possibly even more attractive in Singapore than it appears in England but it is doubtful if the benefit of rescuing failed leases of uncertain duration is worth the cost of blurring the line between a lease and a licence. A more valuable solution

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[62] *Mexfield* (C.A.), *supra* note 13 at para. 16.
[63] *Mexfield*, *supra* note 1 at paras. 74-80.
[64] *Supra* note 30.
[65] *Howard v. Pickford Tool Co. Ltd.* [1951] 1 K.B. 417 at 421 (C.A.), Asquith L.J.
[66] For a recent judicial reminder of the distinctions, see *United Overseas Bank Ltd v. Chia Kin Tuck* [2006] 3 S.L.R.(R.) 322 (H.C.) at para. 21, V.K. Rajah J. (as he then was).

would be that presented by Scots law, and Singapore lawyers would perhaps gain more from studying the dissenting judgment of Wilson L.J. in the Court of Appeal. Whatever its imperfections, the exploitation of the dual natures of the lease would have the benefit of universal application to what is, after all, a 'problem' caused by a universal rule at common law. It would allow the Singapore courts to balance respect for the immediate parties' autonomy with due deference for the *numerus clausus* principle.

This critical study of *Mexfield* also demonstrates that whatever the criticisms of the rule of certainty of terms for leases, the divide between freehold and leasehold estates remains worth defending. Freehold estates are not kept apart from leasehold estates purely by accident of history. Their very natures remain distinct. Leasehold covenants more readily bind successors-in-title than freehold covenants. An abolition of the rule of certainty of terms for leases would blur the line between leasehold and freehold estates and has the potential to severely erode our entire learning on restrictive covenants in Singapore since the device of a perpetual lease could then be used to create binding positive covenants, moving us towards the precipice of abandonment of the *numerus clausus* principle.