Prudential Assurance Company Limited (Respondents)
v.
London Residuary Body and others (Appellants)

JUDGMENT

Die Jovis 16° Julii 1992

Upon Report from the Appellate Committee to whom was referred the Cause Prudential Assurance Company Limited against London Residuary Body and others, That the Committee had heard Counsel as well on Monday the 22nd as on Tuesday the 23rd days of June last, upon the Petition and Appeal of Barron Investments Limited of Finsgate, 5-7 Cranwood Street, London EC1 and of Alan Moss Bayes and Joan Estelle Bayes both of 61 Wood Vale, London N10, praying that the matter of the Order set forth in the Schedule thereto, namely an Order of Her Majesty's Court of Appeal of the 1st day of November 1991, might be reviewed before Her Majesty the Queen in Her Court of Parliament and that the said Order might be reversed, varied or altered or that the Petitioners might have such other relief in the premises as to Her Majesty the Queen in Her Court of Parliament might seem meet; as upon the case of the Prudential Assurance Company Limited lodged in answer to the said Appeal; and due consideration had this day of what was offered on either side in this Cause:

It is Ordered and Adjudged, by the Lords Spiritual and Temporal in the Court of Parliament of Her Majesty the Queen assembled, That the said Order of Her Majesty's Court of Appeal of the 1st day of November 1991 complained of in the said Appeal be, and the same is hereby, **Set Aside** and that the Order of Mr. Justice Millett of the 16th day of January 1991 be, and the same is hereby, **Restored:** And it is further Ordered, That the Respondents do pay or cause to be paid to the said Appellants the Costs incurred by them in the Court of Appeal and also the Costs incurred by them in respect of the said Appeal to this House, the amount of such last-mentioned Costs to be certified by the Clerk of the Parliaments if not agreed between the parties: And it is also further Ordered, That the Cause be, and the same is hereby, remitted back to the Chancery Division of the High Court of Justice to do therein as shall be just and consistent with this Judgment.

M.S. Shawcross. Bowles

Cler: Parliamentor:

BARRON
INVESTMENTS

263-265 WALWORTH ROAD SE17

PRUDENTIAL ASSURANCE CO LTD

V

LONDON RESIDUARY BODY

&

BARRON INVESTMENTS LTD

&

ALAN MOSS & JOAN ESTELLE BAYES

BARRON INVESTMENTS LIMITED
149A CLAPTON COMMON, LONDON E5 9AE TELEPHONE 081-802 1177 FAX 081-802 9900
Registered in England No. 2004901

On the instructions of the London Residuary Body

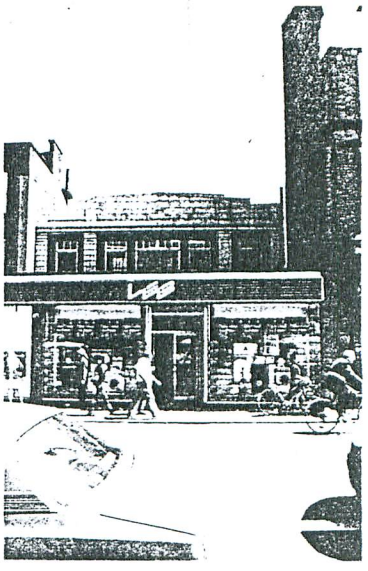
Edwin Evans

LOT 5

FREEHOLD LAND FORMING PART OF SITE OF SHOP PREMISES – INVESTMENT

Freehold Land Forming Part of Site of
263/265 WALWORTH ROAD, WALWORTH, SE17

Situated in a busy main road shopping position, being a short distance from the Elephant & Castle roundabout and Elephant & Castle Main Line Railway Station.



Being land forming the front part of the site of shop premises (currently used as a London Electricity Board Showroom).

Frontage: 35' (approx.)
Depth: 20' (approx.)
Area: 700 sq. ft. (approx.)

Tenancy: Let on an Agreement to the Prudential Assurance Co. PLC from 19.12.1930 at £30 per annum exclusive. The Agreement provides that the tenancy shall continue until the land is required for road widening purposes. The site will not be required for road widening purposes in the foreseeable future and the vendors have served Notice under Section 25 of the Landlord & Tenant Act 1954 to terminate the tenancy. The lesseess have served a Counter Notice. Copies of the aforementioned Notices are available for inspection.

London Borough of Southwark

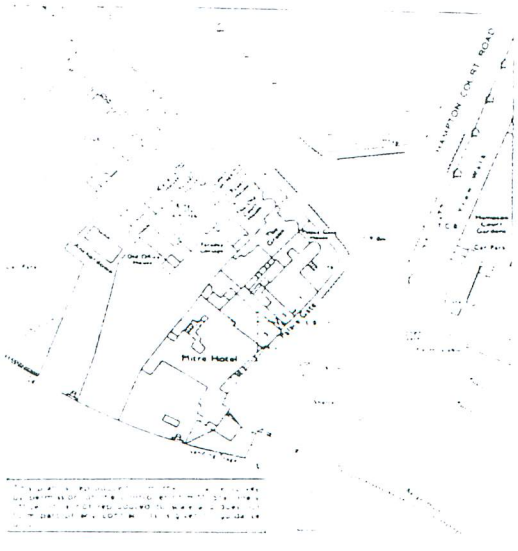
On the instructions of the London Residuary Body

LOT 6

FREEHOLD AREA OF LAND WITH RIVER FRONTAGE – INVESTMENT

Freehold Area of Land adjacent to
HAMPTON COURT BRIDGE, HAMPTON COURT, MIDDLESEX

The property consists of an area of land at several levels, immediately adjoining Hampton Court Bridge and the Mitre Hotel. The southern boundary of the site has a frontage of 80' approx. to the River Thames.



Site Area 3,000 sq. ft. (approx.)

Lease Details: The site is let to the Mitre Hotel (Hampton Court) Ltd. (now being part of the Berni Inn Group) on a lease which expired 23.12.1977 at £150 per annum exclusive. The lessee is currently "holding over".

Note: The site is considered to have potential for mooring rights subject to the necessary Thames Water Authority and other consents.

CONTRACT LOT No. 5 PROPERTY 263/265 Walworth Road. Walworth, SE17

Memorandum

I/WE Bamen Inbestments Ltd & A.M & J.E. BAYES
of 9, Paget Road, N16

hereby acknowledge that at the Sale by Auction held this day ~~I was~~ / we were the purchaser of the property described in the within Particulars, as Lot 5 for the sum of £ 51,000-00, and having paid the Auctioneers, stated below, the sum of £ 5,100-00 as a deposit and in part payment of the purchase money, I/WE HEREBY AGREE to pay the remainder of the purchase money and complete the purchase in accordance with the within Conditions of Sale.

Dated this 21st day of July 1988

Purchase Money	£ 51,000.00
Deposit	£ 5,100.00
Balance	£ 45,900.00

Signature RW Jelleeoe

As ... Sedy, St. Vincent House, ... Street, London. WC2H 7HH

we hereby ... receipt of the said deposit of £5,100-00 ... in accordance with the Conditions of Sale.

Abstract of Title to be sent to A.M Bayes
Clifford Watts Compton
67 Stoke Newington Road
London N16 8AG

AUCTIONEERS. Edwin Evans.
253 Lavender Hill.
Clapham Junction.
London. SW11 1JE
Tel: 01-228-5864

Estates Gazette
LAW REPORTS

Chancery Division

January 16 1991

(Before Mr Justice MILLETT)

PRUDENTIAL ASSURANCE CO LTD v LONDON RESIDUARY BODY AND OTHERS

[1991] 25 EG 120

Landlord and tenant — Construction of agreement — Clause providing for tenancy of land to continue until the landlord, being the LCC in their capacity as highway authority, required it for road widening — Reversion passed to the GLC, then to the London Residuary Body and then to the second, third and fourth defendants in the present case, who had purchased the land from the London Residuary Body — Effect of a notice to quit served on the tenants before the purchase — Was the clause as to the continuance of the tenancy repugnant to its nature? — Held, after discussion of authorities, that the notice to quit was valid

In this case the plaintiffs, the Prudential Assurance Co Ltd, raised issues as to the true construction of a tenancy agreement and the effect of a notice to quit purporting to determine it — By a memorandum of agreement in 1930 the LCC granted a tenancy, on a leaseback basis, to a tenant subject to a provision in clause 6 that the tenancy was to continue until the land in question was required by the council for the widening of Walworth Road, when it was terminable on two months' notice — As mentioned above, the reversion became vested in the London Residuary Body and then in the three other defendants to the present proceedings — The tenancy had become vested in the plaintiffs, the Prudential Assurance Co Ltd, who had sublet to the London Electricity Board — The GLC was a highway authority but the London Residuary Body was not — At some stage before the sale by the London Residuary Body they had served a notice purporting to terminate the tenancy under section 25 of the Landlord and Tenant Act 1954 — This notice was ineffective under the 1954 Act, but it was accepted that it was capable of taking effect as a common law notice, provided that such a notice could be given by the London Residuary Body

In the judge's view the agreement created a yearly tenancy, subject by clause 6 of the agreement to a restriction that it was to "continue until the land was required by the council for the purpose of the widening of Walworth Road", when at least two months' notice had to be given prior to the date of determination — The question then arose as to whether this restriction or condition was repugnant to the nature of a yearly tenancy — After considering a number of authorities the judge came to the conclusion that clause 6 did not exclude the tenants' right to determine the tenancy by notice and that the restriction placed on the landlords' right was not repugnant to such a tenancy — It was true that once the reversion had been transferred to the London Residuary Body, which was not a highway authority, it was no longer possible for the landlord to require the land for the purposes mentioned in clause 6 — What was the effect of that? It was clear that the council referred to in clause 6 must be both a highway authority, which required the land for the named purpose, and the landlord, which was capable of obtaining vacant possession by serving the requisite notice — The clause predicated a situation in which the landlord and the highway authority were one and the same — In the judge's opinion, once they were different bodies clause 6 ceased to have any effect

The effect of this construction was that the London Residuary Body had served a valid notice to quit and the second, third and fourth defendants, who had purchased from the Residuary Body, were entitled to possession

In this case the plaintiffs, Prudential Assurance Co Ltd, raised a number of questions on the true construction and effect of a memorandum of agreement relating to land fronting 263-265 Walworth Road, London SE17,

of which the plaintiffs were now the tenants and of which the reversion had been transferred from the first defendants, the London Residuary Body, to the second, third and fourth defendants, Barron Investments Ltd, Alan Moss Bayes, and Joan Estelle Bayes.

Paul de la Piquerie (instructed by the solicitor to the Prudential Corporation) appeared on behalf of the plaintiffs: Stephen Lloyd (instructed by Clifford Watts Compton) represented the defendants.

Giving judgment, **MILLETT J** said: This case raises a number of questions on the true construction and effect of a memorandum of agreement dated December 19 1930 between the London County Council of the one part and Mr Samuel Nathan of the other part, which purported to grant a lease or tenancy of a piece of land fronting 263-265 Walworth Road. It appears that immediately prior to December 19 1930 Mr Nathan owned land fronting the Walworth Road and wished to redevelop the site, or part of it, by putting up a building upon it. The LCC, being the highway authority, contemplated the possible widening of Walworth Road and accordingly, on December 19 1930, acquired part of Mr Nathan's Land, consisting of the frontage of the premises to the Walworth Road, and on December 30 1930 leased it back to Mr Nathan, together with a right to put up a temporary building upon it. Without prejudging the questions I have to determine, it appears from the internal evidence of the document itself that the intention was that Mr Nathan should have the right to put up a temporary building on the frontage and to occupy it until such time as the LCC should determine to proceed with their proposal to widen the Walworth Road, whereupon he would have to give up possession. The new and permanent building which he intended to erect behind the temporary one would then have a frontage to the widened Walworth Road.

It is not in evidence whether similar transactions were entered into with adjoining premises on either side of the subject premises or further along Walworth Road.

Clause 1 of the memorandum of agreement is in the following terms:

> The Council hereby let to the Tenant and the Tenant takes from the Council the land (hereinafter called "the said Land") described in the Schedule hereto from 19th December 1930 at the rent of £30 per annum payable quarterly on the usual quarter days until the tenancy shall be determined as hereafter provided . . .

Clause 6 reads:

> The tenancy shall continue until the said Land is required by the Council for the purposes of the widening of Walworth Road and the street paving works rendered necessary thereby and the Council shall give two months' notice to the Tenant at least prior to the day of determination when the said Land is so required and thereupon the Tenant shall give vacant possession to the Council of the said Land as hereinbefore provided.

The interest granted to the tenant by that document has become vested in the plaintiff, the Prudential Assurance Co Ltd, and in 1975 it sublet the premises subject to the memorandum of agreement, together with the freehold land behind it, to the London Electricity Board, which is still in occupation, at a substantial rent.

The proposal to widen the Walworth Road was never carried into effect and must, I apprehend, have been abandoned many years ago. In the course of time the LCC's rights and obligations became vested in their successor body, the Greater London Council, and a further statutory vesting occurred on the dissolution of the Greater London Council when its property, rights and interests were vested in the first defendant, the London Residuary Body. The LCC had, rightly or wrongly, conceived that it was not open to them to review the rent of £30 a year for the subject premises, which was fixed in 1930, or to determine the tenant's interest thereunder. The LCC and their successor, the GLC, were each the highway authority. The London Residuary Body, however, is not a highway authority. After taking advice they concluded that they could deal with the reversion on the footing that the interest created by the memorandum of agreement was terminable. Accordingly, on July 21 1988 the London Residuary Body sold the subject land to the second, third and fourth defendants, and the land was transferred to them by a transfer dated August 25 1988. Since that date the reversionary interest expectant on the determination of the interest created by the memorandum of agreement has been vested in the second, third and fourth defendants and, of course, ever since it became vested in the London Residuary Body if has been vested in a party other than a highway authority.

The question I have to decide is whether the memorandum of agreement created an interest which still subsists and which is not capable of being determined by the London Residuary Body or a successor in title not being a highway authority. Prior to the auction sale, the London Residuary Body purported to serve a notice under section 25 of the Landlord and Tenant Act 1954 determining the interest on December 19 1988. The notice was served on March 31 1988. It would have been a perfectly good notice if Part II of the Landlord and Tenant Act 1954 applied to the interest. However, since the plaintiff had sublet the whole of the land to the London Electricity Board and was not in possession of any part of it, it is plain that the land was not within Part II of the Landlord and Tenant Act 1954 at all. It is now common ground that the notice was not effective as a section 25 notice. The plaintiffs in fact served a counternotice claiming a new tenancy. Those proceedings have been transferred to the High Court and are before me, but it is common ground that they are a nullity and must be dismissed.

It is also common ground that the section 25 notice is capable of taking effect as a common law notice to quit and was apt to terminate an ordinary yearly tenancy if such a notice could be given by the London Residuary Body. The defendants rely upon it as a good common law notice. The parties are agreed as to the financial consequences which would ensue should I come to the conclusion that the notice was a valid common law notice to quit.

The defendants assert that the notice is a good notice to quit upon three alternative grounds. First, they submit that on its true construction the memorandum of agreement purported to demise the land for a fixed but uncertain term and that accordingly it created no legal estate in the land. Second, they submit that if a periodic tenancy was created, either by the memorandum of agreement itself or by Mr Nathan's entry into possession and payment of rent, then any restriction on either party's right to serve a notice determining the tenancy is void as repugnant to the nature of a periodic tenancy. They submit that it was possible to envisage a situation, even in 1930, when it would become impossible for the landlord to serve such a notice, and that came about once the reversionary interest was vested in a body other than a highway authority. They submit also that in any event, on its true construction, clause 6 of the memorandum of agreement excludes any right of the tenant to give a notice determining the tenancy. Third, the defendants submit that on its true construction clause 6 restricts the landlord's right to serve notice to quit only if and so long as they are the relevant highway authority, and that any restriction on the right ceased when the land vested in the London Residuary Body.

The first question I must decide is whether, on its true construction, the memorandum of agreement created a tenancy for a fixed term for, if it did, it is common ground that it infringes the requirement that the maximum duration of a tenancy for a fixed term must be known at its inception. If it created instead a periodic tenancy, it was obviously a yearly tenancy. Mr Lloyd, who appears for the defendants, submits that the structure and language of the memorandum of agreement are inconsistent with the creation of a periodic tenancy. The document does not purport to create a periodic tenancy and the words which it employs are not appropriate for that purpose. He points to the fact that the period of the demise is expressed as being from one given date until another: "*from* the 19th day of December 1930 ***until*** the Tenancy shall be determined as hereinafter provided". Moreover he points out that clause 6 itself expressly provides that the tenancy shall continue until the said land is required by the council for the purposes of widening the Walworth Road: an express statement that the tenancy shall continue until a stated event. Mr Lloyd submits that the addition of the requirement that the council shall give two months' prior notice is merely machinery for enabling the date to be fixed by which possession shall be given.

I see the force of those submissions but I do not accept them. In my judgment, on its true construction, the memorandum of agreement was apt to create a periodic tenancy subject to a modification of the landlord's right to serve notice to quit. My ground for this conclusion is that the determining event is not, as it was in *Lace* v *Chantler* [1944] KB 368, outside the control of either party. The determining event is the expiry of a notice to quit. Clause 1 of the memorandum of agreement so provides, "until the tenancy shall be determined as hereinafter provided", thus incorporating clause 6; and although clause 6 opens with the words, "The tenancy shall continue until

the said land is required by the council for the purposes of the widening of Walworth Road" (which is also now outside the control of the landlord), it is apparent that in fact the tenancy continues until the requisite notice has been given and expires. It is not enough that the council should require the land for the stated purpose; they must state the fact in an appropriate notice, and then the tenancy continues until the notice expires. What brings the tenancy to an end is the expiry of the notice.

I am persuaded by Mr de la Piquerie that on the true construction of the memorandum of agreement it created a yearly tenancy subject nevertheless to determination by at least two months' notice by the landlord if, and only if, the land was required by the landlord "for the purposes of the widening of Walworth Road and the street paving works rendered necessary thereby". As he points out, clause 1 begins by granting a tenancy at a rent of £30 per annum payable on the usual quarter days. Had it stopped there, with nothing more, it would have created an express periodic tenancy. Had it stopped there and had clause 6 provided for the mode of determination, the words "the tenancy" in clause 6 would be construed as meaning "the yearly tenancy hereby created". The addition of the words "until the tenancy shall be determined as hereinafter provided" which link the two clauses cannot change the nature of the tenancy created by the document. In my judgment there is nothing inconsistent with the language of the document to read it as if the word "yearly" appeared between "the" and "tenancy" wherever they appear. The fact that at first sight it appears to be determinable only by notice served by the landlord does not affect the matter for reasons which I shall consider in a moment.

If I am wrong about that and the memorandum of agreement creates a tenancy for a fixed term, it is agreed that the term is uncertain and that the document infringes the rule that the maximum duration of a fixed term of years must be known at the date of its creation. It would follow that any such fixed term was void, but there would still be a yearly tenancy which came into existence when Mr Nathan entered into possession of the land and paid the rent. That tenancy would be upon all the terms of the memorandum of agreement capable of applying to a periodic tenancy, and in so far as clause 6 modifies the rights of each party to give notice to quit and is not repugnant to a periodic tenancy it would continue to apply. Accordingly, in my judgment, the question whether this was a fixed-term tenancy which was void, thus letting in a periodic tenancy, or whether on its true construction the memorandum of agreement created an express periodic tenancy, does not determine the validity of the notice to quit, which has been served.

I therefore proceed on the basis that the memorandum of agreement created a periodic tenancy, the landlord's right to serve notice to quit being modified by clause 6.

The next question I have to decide is whether clause 6 is repugnant to the nature of a yearly tenancy. The first question that arises is whether the tenant's right to determine the tenancy by notice is thereby excluded. It is plain from the decision in *Warner* v *Browne* (1807) 8 East 165 that one cannot have a periodic tenancy in which one party is precluded from giving notice to terminate. Such a restriction is repugnant to the inherent nature of a periodic tenancy. As Mr Lloyd pointed out, clause 6 expressly provides that the tenancy "shall continue until the land is required by the Council for the purposes of the widening of Walworth Road" and the relevant two months' notice has expired. He invites me to read that clause, which does not provide for any corresponding notice on the part of the tenant, as excluding the tenant's right to serve a notice. A similar point came before the Court of Appeal in *Ashburn Anstalt* v *Arnold* [1987] 2 EGLR 71*, where the language of the document was not dissimilar from the present in many respects. The agreement in that case contained the following provision:

> From and after September 29th 1973 Arnold shall be entitled as licensee to remain at the property and trade therefrom on the like terms save that it can be required by Matlodge Ltd to give possession on not less than one quarter's notice in writing upon Matlodge certifying that it is ready at the expiration of such notice forthwith to proceed with the development of the property and the neighbouring property involving *inter alia* the demolition of the property.

Until September 29 1973 it appears that Arnold had a tenancy at will or a licence at will on the payment of no rent, and thereafter was granted the rights I have quoted. The Court of Appeal held that Arnold had a tenancy and not a licence. The question arose whether Matlodge could bring Arnold's interest to an end by a notice to quit without desiring to develop the property. Having come to the conclusion that the agreement created a periodic tenancy, the Court of Appeal had to consider the question of repugnancy. The Court of Appeal dealt with the question of the tenant's right to determine the tenancy in this way:

> The plaintiffs say, however, that in this case . . . there is no provision for determination by Arnold & Co, It was said, therefore, that in the absence of notice by Matlodge, the term was uncertain in duration. We do not agree with that. As a matter of construction of the document, the possibilities are as follows: (i) Arnold & Co were not entitled to determine the arrangement at all. We reject that entirely. Bearing in mind that Arnold & Co were not required to pay any rent, such a construction is quite unreal in business terms; Arnold & Co were not obliged to occupy the premises and, if they did not occupy them, the outgoings would be nil or negligible, so there was no benefit to Matlodge in continuing the relationship.

In the present case there was a rent of £30, which may well have been a commercial rent in 1930, the time at which this document falls to be construed, and I cannot approach the matter in quite the same way. However, in my judgment, once one arrives at the conclusion that the document creates a periodic tenancy, the tenant's right of occupation as a periodic tenant must carry with it all the incidents of a periodic tenancy, and all the inherent rights, including the rights of either party to terminate the tenancy by giving the appropriate notice, save and in so far as they are expressly excluded by the document itself. In my judgment it is not a question of construing clause 6 in order to discover whether it confers a right of termination upon the tenant, but of construing the document as creating a periodic tenancy and considering whether the tenant's inherent right to terminate the tenancy by notice to quit has been excluded either expressly or by necessary implication. The landlord's right has been modified. The tenant's right has not and, in my judgment, it continues to subsist.

The next question is whether the restriction placed upon the landlord's right to terminate the periodic tenancy is repugnant to the nature of a yearly tenancy. As I have said, *Warner* v *Browne* is authority for the proposition that an absolute prohibition upon either party from giving notice to quit is repugnant to the nature of a periodic tenancy. *Breams Property Investment Co Ltd* v *Stroulger* [1948] 2 KB 1 is authority for the proposition that one can nevertheless suspend the right of one or other party from giving notice to quit for a fixed term certain, and that that is a valid condition which may be attached to a periodic tenancy without being repugnant to the nature of the periodic tenancy. In *Re Midland Railway Co's Agreement* [1971] Ch 725 the Court of Appeal went further and held that a fetter can be placed upon the right to determine a periodic tenancy for an uncertain period. In that case the agreement was for a half-yearly periodic tenancy. Clause 2 of the agreement provided for the termination by either party giving three months' written notice to quit to the other, subject to a proviso that the agreement should not be terminated by the landlord "until they should require the premises for the purposes of their undertaking". The Court of Appeal applied *Breams Property Investment Co Ltd* v *Stroulger* without distinguishing it. The Court of Appeal said at p 733:

> In *Breams Property Investment Co* v *Stroulger* . . . a curb on the lessors for three years unless they required the premises for their own use was upheld in this court, notwithstanding the earlier cases of *Warner* v *Browne* . . . and *Cheshire Lines Committee* v *Lewis & Co* . . . It follows that in a periodic tenancy a similar curb for 10, 20 or 50 years should not be rejected as repugnant to the concept of a periodic tenancy: and once the argument based on uncertainty is rejected we see no distinction in the present case.

I am bound by that decision to disregard any such distinction as may be derived from the fact that in the present case, as in that case, the period of suspension of the right to serve notice to quit was for an uncertain and indefinite period.

Mr Lloyd submits that in the present case, however, it must have been apparent from the outset that circumstances might occur by which it would be altogether out of the power of the landlord to serve a notice. That is a feature which is capable of distinguishing the present case from all previous cases. In every previous case where the landlord's right to serve a notice to quit has been suspended it has been suspended either for a fixed period or for an uncertain period, which the landlord himself could bring to an end by deciding to redevelop the property or use it for his own occupation and then serving the appropriate notice. In the present case, it is pointed out, it was always possible that the reversion could become vested in a body other than

*Editor's note: Also reported at (1987) 284 EG 1375.

a highway authority and that, it is submitted, distinguishes the present case. A provision capable of depriving the landlord of the right to determine the tenancy, it is submitted, is repugnant to the nature of a periodic tenancy.

Before dealing with this submission it is, in my judgment, necessary to construe clause 6 and see how it applies on the transmission of the reversion to a third party. ***Breams Property Investment Co Ltd*** v ***Stroulger*** is authority for the proposition that a restriction on the landlord's right to serve a notice to quit runs with the reversion and accordingly it would, if valid, continue to bind successors in title to the LCC. It is not therefore submitted that the GLC was in any different position from the LCC. But when the land was transferred to the London Residuary Body it became impossible for the landlord, which was not a highway authority, themself to require the land for the purposes of widening the Walworth Road. It was not impossible, as Mr de la Piquerie submits, that one day the land would once again come into the ownership of a highway authority, which would then be again capable of serving a notice. But the circumstances in which the land should come again into the ownership of a highway authority which wanted the land for the purposes of road widening, without a compulsory purchase order which would extinguish the tenancy, rather than going through the procedure of clause 6, seems to me to be remote in the extreme and I would, for my part, disregard it.

The real question, in my judgment, is whether on its true construction the restriction imposed upon the landlord's right to serve a notice to quit by clause 6 endures once the landlord and the highway authority are no longer one and the same. It is clear that the council referred to inclause 6 must be both the highway authority which requires the land for the purpose of widening the Walworth Road and the landlord capable of obtaining vacant possession by serving the requisite notice. The clause predicates a situation in which the landlord and the highway authority are one and the same and, in my judgment, once they are different bodies, then clause 6 ceases to have any effect. Mr de la Piquerie submits that, if that were the case, Mr Nathan would have obtained no security for his interest and for the building which he proposed to erect upon it, since the very next day the council could have rendered his interest terminable by the simple device of transferring the reversion to a third party. But that only raises a further question which has not been argued before me: whether there should be an implied term that the landlord would not assign the reversion to any party other than a highway authority. I can see the force of such a submission but, without deciding it, I have reached the clear conclusion that clause 6 is limited to the period during which the landlord and the highway authority are one and the same. It predicates a situation which no longer exists.

Accordingly, in my judgment, the London Residuary Body served a valid notice to quit and the remaining defendants are entitled to possession.

Declaration accordingly.

Estates Gazette
LAW REPORTS
edited by J Muir Watt, barrister

Court of Appeal

November 1 1991

(Before Lord Justice PARKER, Lord Justice McCOWAN and Lord Justice SCOTT)

PRUDENTIAL ASSURANCE CO LTD v LONDON RESIDUARY BODY AND OTHERS

[1992] 06 EG 145

Landlord and tenant — Construction of agreement — Agreement providing that tenancy to continue until demised land required by landlord for road widening — Whether notice to quit was effective to determine the tenancy notwithstanding that the land was not required for road-widening purposes — Appeal from decision of Millett J that valid notice to quit had been served allowed

By an agreement dated December 19 1930 the London County Council ("the LCC") as landlord granted a term of land fronting 263-265 Walworth Road, London SE17, to Samuel Nathan — The agreement represented the leaseback element following the sale of the land by Mr Nathan to the LCC — By clause 6 of the agreement the tenancy was to continue until the land was required by the LCC for road widening — The reversion to the term devolved first to the Greater London Council and then to the first defendants, the London Residuary Body ("the LRB") — The term of the tenancy is now held by the plaintiff, the Prudential Assurance Co Ltd — The second to fourth defendants are the purchasers of the reversion from the LRB — The proposal to widen the Walworth Road has never been carried into effect — In July 1988 the LRB sold the reversion to the agreement to the second to fourth defendants following the service under section 25 of the Landlord and Tenant Act 1954 of a notice purporting to determine the tenancy on December 19 1988 — By reason of the London Electricity Board being in possession, and not the plaintiff, the notice was accepted as not being effective under section 25 but was capable of taking effect as a common law notice to quit if such a notice could be given — In the court below Millett J held that a valid notice to quit had been served determining the tenancy agreement and that the second to fourth defendants were entitled to possession — The plaintiff appealed

***Held*: The appeal was allowed — Clause 6 of the agreement was nothing to do with notices to quit, which are optional notices that a landlord can decide whether or not to give; the clause refers to an obligatory notice where the land was required by the LCC for their statutory road-widening purposes — The effect of the agreement was to grant a tenancy for a term of uncertain duration limited to terminate on the land being required for road-widening purposes — The court was faced with conflicting authorities in *Lace* v *Chantler* and *Ashburn Anstalt* v *Arnold* — Unless the case is one in which the uncertain duration of the term can be controlled by both parties, as in the *Ashburn Anstalt* case, *Lace* v *Chantler* continues to be binding authority that a term of uncertain duration is bad for uncertainty as to its maximum duration — However, Mr Nathan entered into occupation and he and his successors paid rent — Mr Nathan became a tenant under a tenancy from year to year on such of the terms of the agreement as were consistent with such a tenancy — There is implied into a tenancy from year to year a term enabling either party to terminate the tenancy by six months' notice — Clause 6 was inconsistent with the nature of a periodic tenancy — However, the fetter imposed by clause 6 remained — It was not open to the LRB to serve the notice determining the tenancy because the tenancy included an implied provision that a notice to quit may not be served until the land is required for road-widening purposes**

This was an appeal by Prudential Assurance Co Ltd against a decision of Millett J given on January 16 1991 ([1991] 1 EGLR 90; [1991] 25 EG 120) relating to a number of questions on the true construction and effect of a memorandum of agreement relating to land fronting 263-265 Walworth Road, London SE17. The appellant was the tenant of the land the reversion to which had been transferred from the first respondents, the London Residuary Body, to the second, third and fourth respondents, Barron Investments Ltd, Alan Moss Bayes and Joan Estelle Bayes.

David Neuberger QC and Paul de la Piquerie (instructed by the solicitor to the Prudential Corporation plc, holding company for Prudential Assurance Co Ltd) appeared for the appellant; and Robert Reid QC and Stephen Lloyd (instructed by the solicitor to the London Residuary Body, for the first defendants, and Clifford Watts Compton, for the second to fourth defendants) represented the respondents.

Giving the first judgment at the invitation of Parker LJ, SCOTT LJ said: This is an appeal from the judgment of Millett J, given on January 16 1991. The case raises a short but, in my opinion, difficult point regarding the effect of a tenancy agreement dated December 19 1930.

The parties to the agreement were the London County Council ("the LCC"), as landlord, and a Mr Samuel Nathan, as tenant. The land comprised in the agreement was a small strip of land fronting 263-265 Walworth Road. The circumstances leading up to the agreement and constituting the factual matrix in the context of which the agreement must be construed are described by Millett J in his judgment*:

It appears that immediately prior to December 19 1930 Mr Nathan owned land fronting the Walworth Road and wished to redevelop the site, or part of it, by putting up a building upon it. The LCC, being the highway authority, contemplated the possible widening of Walworth Road and accordingly, on December 19 1930, acquired part of Mr Nathan's land, consisting of the frontage of the premises to the Walworth Road, and on December 30 1930 leased it back to Mr Nathan, together with a right to put up a temporary building upon it . . . it appears from the internal evidence of the document itself that the intention was that Mr Nathan should have the right to put up a temporary building on the frontage and to occupy it until such time as the LCC should determine to proceed with their proposal to widen the Walworth Road, whereupon he would have to give up possession. The new and permanent building which he intended to erect behind the temporary one would then have a frontage to the widened Walworth Road.

It is not in evidence whether similar transactions were entered into with adjoining premises on either side of the subject premises or further along Walworth Road.

The two critical clauses of the agreement are clauses 1 and 6. But they are, of course, to be construed in the context of the agreement as a whole.

The agreement provided, so far as relevant, as follows:

1. The Council hereby let to the Tenant and the Tenant takes from the Council the land (hereinafter called "the said Land") described in the Schedule hereto from 19th December 1930 at the rent of £30 per annum payable quarterly on the usual quarter days until the tenancy shall be determined as hereafter provided the first payment calculated from the date thereof to be made on the 25th day of March next and the last payment if need be to be apportioned up to the date of determination of the tenancy.

2. On the rebuilding by the Tenant of the premises nos 263 and 265 Walworth Road behind the line of widening of that road the Council will afford to the Tenant all facilities for the erection (subject to the provisions of the London Building Acts and the by-laws and regulations made thereunder) on the said land of temporary one storey shops or buildings of one storey and for the retention of such shops or buildings as temporary structures until the Tenant shall be required to give to the Council vacant possession of such land as hereinafter provided.

4. The Tenant agrees to keep the said one storey shops or buildings and the fixtures and fittings therein in good and tenantable repair during the tenancy reasonable wear and tear and damage by fire not due to the act default or negligence of the tenant excepted and at the termination of the tenancy as hereinafter provided to deliver to the Council vacant possession of the said land and to leave such land cleared to ground level to the satisfaction of the Council.

6. The tenancy shall continue until the said Land is required by the Council for the purposes of the widening of Walworth Road and the street paving works rendered necessary thereby and the Council shall give two months' notice to the Tenant at least prior to the day of determination when the said Land is so required and thereupon the Tenant shall give vacant possession to the Council of the said Land as hereinbefore provided.

7. The Tenant shall (subject to Clause 6 hereof) in the event of holding possession of the said Land after the determination of the tenancy or failing to clear all materials as provided by Clause 4 hereof forfeit and pay to the Council as

*Editor's note: Reported at [1991] 1 EGLR 90 at p 90M.

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liquidated and ascertained damages the sum of ten pounds for every day possession shall be held or such material shall remain and such sum shall be recoverable by the Council either as rent in arrear or as a debt due from the Tenant but this condition shall not prejudice any right the Council would otherwise have to recover or take possession of the premises.

8. The Council may re-enter upon the said land and determine the tenancy on non-payment of rent for fourteen days whether legally demanded or not or on breach by the Tenant of any of the terms of this Agreement.

9. The Council shall at its own expense when vacant possession of the said land is given to the Council as hereinbefore provided execute all road making and paving works but shall not be called upon to bear any part of the cost of clearing the said land to ground level.

10. Before any building or rebuilding on the land belonging to the Tenant and adjoining the said land is commenced the Tenant shall give seven clear days' notice in writing to the valuer for the time being of the Council so that the line of widening may be set out and agreed and the tenant shall also give to the said valuer notice when the new building has reached pavement level.

The schedule to the agreement described the land as "ALL THAT piece or plot of land situate on the east side of Walworth Road and being part of nos 263 and 265 Walworth Road . . . as is more particularly delineated and shown by red colour on the plan annexed hereto". The plan shows a line marking the eastern boundary of the proposed widened road. The line constitutes the eastern boundary of the land comprised in the agreement.

As is apparent from the passage in Millett J's judgment which I have read, the tenancy agreement represented the leaseback element of a composite sale-and-leaseback arrangement. The sale of the land by Mr Nathan to the LCC was, it seems, completed on December 19 1930. It appears from the Proprietorship Register at HM Land Registry that the LCC was registered as proprietor of the land on January 29 1931 and that the price paid to Mr Nathan was £2,750.

I can take the subsequent history of the land from the judgment of the learned judge*:

> The interest granted to the tenant by [the agreement] has become vested in the plaintiff, the Prudential Assurance Co Ltd, and in 1975 it sublet the premises subject to the memorandum of agreement, together with the freehold land behind it, to the London Electricity Board, which is still in occupation, at a substantial rent.
>
> The proposal to widen the Walworth Road was never carried into effect and must, I apprehend, have been abandoned many years ago. In the course of time the LCC's rights and obligations became vested in their successor body, the Greater London Council, and a further statutory vesting occurred on the dissolution of the Greater London Council when its property, rights and interests were vested in the first defendant, the London Residuary Body. The LCC had, rightly or wrongly, conceived that it was not open to them to review the rent of £30 a year for the subject premises, which was fixed in 1930, or to determine the tenant's interest thereunder. The LCC and their successor, the GLC, were each the highway authority. The London Residuary Body, however, is not a highway authority. After taking advice they concluded that they could deal with the reversion on the footing that the interest created by the memorandum of agreement was terminable. Accordingly, on July 21 1988 the London Residuary Body sold the subject land to the second, third and fourth defendants, and the land was transferred to them by a transfer dated August 25 1988. Since that date the reversionary interest expectant on the determination of the interest created by the memorandum of agreement has been vested in the second, third and fourth defendants, and of course, ever since it became vested in the London Residuary Body it has been vested in a party other than a highway authority.
>
> . . . Prior to the auction sale, the London Residuary Body purported to serve a notice under section 25 of the Landlord and Tenant Act 1954 determining the interest on December 19 1988. The notice was served on March 31 1988. It would have been a perfectly good notice if Part II of the Landlord and Tenant Act 1954 applied to the interest. However, since the plaintiff had sublet the whole of the land to the London Electricity Board and was not in possession of any part of it, it is plain that the land was not within Part II of the Landlord and Tenant Act 1954 at all. It is now common ground that the notice was not effective as a section 25 notice . . .
>
> It is also common ground that the section 25 notice is capable of taking effect as a common law notice to quit and was apt to terminate an ordinary yearly tenancy if such a notice could be given by the London Residuary Body.

The issue in this case is whether the section 25 notice, treated as a common law notice to quit, was effective to determine the tenancy created under, or as a result of, the agreement of December 19 1930.

*Editor's note: Reported at [1991] 1 EGLR 90 at p 91C.

The plaintiff, the appellant before us and the tenant under the agreement, is the Prudential Assurance Co Ltd. It relies on clause 6 of the agreement under which the tenancy was expressed to continue "until the said Land is required by the Council for the purposes of the widening of Walworth Road . . ." etc. It is common ground that the event contemplated, namely the land being required for road-widening purposes, has not happened. So the tenancy continues.

The effective defendants, the respondents before us, are the purchasers of the property from the London Residuary Body. Their answer to the plaintiff's simple reliance on clause 6 of the agreement is a complex one.

First, it is contended that the agreement purported to create a tenancy for a fixed term of uncertain duration. If it did, it is submitted that the agreement cannot take effect as a grant of that tenancy. *Lace* v *Chantler* [1944] KB 368, where the grant of a tenancy "for the duration of the war" was held bad, is relied on.

Second, it is contended that since Mr Nathan entered into occupation as tenant under the December 19 1930 agreement and paid rent at the rate of £30 pa he must, if the agreement cannot take effect as a grant for the period provided for by clause 6, be treated as holding under a periodic yearly tenancy on so much of the terms of the agreement as are applicable to such a tenancy.

Third, it is contended that in so far as clause 6 restricts the respective ability of the landlord and the tenant to determine the tenancy by notice to quit, the restriction is repugnant to the inherent nature of a periodic yearly tenancy and is void.

Fourth, it is contended, as an alternative to the repugnancy point, that the restrictions imposed by clause 6 on the landlord's right to serve a notice determining the tenancy cannot, as a matter of construction, or alternatively implied term, survive the transmission of the reversion to a landlord that is not the highway authority.

On these contentions the learned judge concluded, first, that the agreement properly construed granted the tenant a periodic yearly tenancy and not a tenancy for a fixed but uncertain term. He held, second, that clause 6 imposed a restriction on the landlord's right to serve a notice to quit terminating the periodic tenancy, but that the restriction was not repugnant to the nature of a yearly tenancy and was valid. He relied on and applied *Re Midland Railway Co's Agreement* [1971] Ch 725 and *Ashburn Anstalt* v *Arnold* [1989] Ch 1*, both Court of Appeal decisions. He held also that the agreement placed no fetter on the right of the tenant to terminate the yearly tenancy by a notice to quit. But, finally, the learned judge held that the clause 6 restriction on the landlord's right to serve a notice terminating the yearly tenancy fell away once the landlord and the highway authority were different bodies. When that state of affairs arose, clause 6, he held, ceased to have any effect. So the defendants succeeded below. The learned judge upheld the notice to quit that had been served by the London Residuary Body.

In considering the various matters that have been argued before us, the starting point must, in my opinion, be the nature of the tenancy brought into being by, or as a result of, the agreement of December 19 1930.

The learned judge concluded, as I have said, that, properly construed, the agreement granted a periodic yearly tenancy. I do not agree with that conclusion. Clause 1 of the agreement specified the date of commencement of the tenancy, December 19 1930, but not the date of termination. The letting was to continue "until the tenancy shall be determined as hereafter provided". Clause 6 contained the termination provisions and can, for construction purposes, be broken down into two parts. First, clause 6 provided that the tenancy "shall continue until the said Land is required by the Council for the purposes of the widening of Walworth Road . . .". Second, clause 6 provided that "the Council shall give two months' notice to the Tenant at least prior to the day of determination when the said Land is so required . . .". The first of these provides, in my judgment, the intended termination date of the tenancy. The second imposes on the council the obligation of giving two months' prior notice of the day when the land is so required, ie two months' prior notice of the day when the tenancy will come to an end.

The learned judge construed clause 6 as modifying the landlord's right to serve a notice to quit. In my opinion, however, clause 6 is nothing to do with

*Editor's note: Also reported at [1988] 1 EGLR 64; [1988] 23 EG 128.

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notices to quit. Notices to quit are optional notices that the landlord can decide whether or not to give. The notice which clause 6 is contemplating is not an optional notice. The landlord is obliged to give the notice — "the Council shall give . . ." is the language used. Clause 6 was, in my opinion, dealing with the duration of the tenancy. Once the land was required by the council for their statutory road-widening purposes, the tenancy was to come to an end. But, as a matter of machinery, the council were placed under the obligation of giving the tenant two months' prior notice specifying, in effect, the day when the land would be so required.

This construction of clause 6 is consistent with the absence of any mention in the clause, or anywhere else in the agreement for that matter, of notices to be served by the tenant terminating the tenancy. If the clause, properly construed, is dealing with the termination of a tenancy granted for a term of uncertain duration, there is no room for notices to quit. If, on the other hand, the tenancy was a periodic yearly tenancy, one would expect to find that the tenant could terminate the tenancy by a notice to quit. The learned judge thought that a provision to that effect could be implied. But an implied term enabling the tenant to serve a notice to quit would contradict the express terms of clause 6 — "The tenancy shall continue . . ." etc. A term cannot be implied into a contract if it would contradict an express term of the contract: see *Chitty on Contracts* 26th ed p 557. The judge's approach was to conclude from clause 1 that a periodic tenancy was granted and then to hold that a right for the tenant to serve a notice to quit must be treated as included notwithstanding clause 6. In my respectful opinion, this approach puts the cart before the horse. I think one should read clauses 1 and 6 in the context of the whole agreement and ask whether the clauses taken together are more consistent with an intention to grant a tenancy for a term, albeit one of uncertain duration, or to grant a periodic yearly tenancy. If that approach is adopted, I do not, I confess, see how any conclusion is possible other than that clauses 1 and 6 purported to grant a tenancy for a term of uncertain duration.

The next question is whether the grant of a tenancy for a term limited to terminate on the land being required by the council for road-widening purposes is a grant that the law will recognise. There are three Court of Appeal authorities to which I should at this point refer.

The first is *Lace* v *Chantler*, to which I have already referred. The case concerned the letting of a dwelling-house at a rent of 16s 5d a week. In the rent book it was stated, in effect although not in terms, that the tenancy was to continue for the duration of the war. A notice to quit was served by the landlord before the war had come to an end. The question was whether that notice was valid. The Court of Appeal held that the grant of a tenancy for the duration of the war was bad. But since the tenant was in occupation and paying rent on a weekly basis he was a weekly tenant and so the notice to quit was good.

At p 370 Lord Greene MR, with whose judgment MacKinnon LJ and Luxmoore LJ agreed, said:

The question immediately arises whether a tenancy for the duration of the war creates a good leasehold interest. In my opinion, it does not. 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. Mr Sturge in his argument has maintained that such a lease would be valid, and that, even if the term is uncertain at its beginning when the lease takes effect, the fact that at some future time it will be rendered certain is sufficient to make it a good lease. In my opinion, that argument is not to be sustained.

I do not propose to go into the authorities on the matter, but in *Foa's Landlord and Tenant*, 6th ed, p 115, the law is stated in this way, and, in my view, correctly: "The habendum in a lease must point out the period during which the enjoyment of the premises is to be had; so that the duration, as well as the commencement of the term, must be stated. The certainty of a lease as to its continuance must be ascertainable either by the express limitation of the parties at the time the lease is made, or by reference to some collateral act which may, with equal certainty, measure the continuance of it otherwise it is void. If the term be fixed by reference to some collateral matter, such matter must either be itself certain (eg a demise to hold for 'as many years as A has in the manor of B') or capable before the lease takes effect of being rendered so (eg for 'as many years as C shall name'). The important words to observe in that last phrase are the words "before the lease takes effect". Then it goes on: "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, although the same results may be achieved in another way by making the demise for a fixed number (ninety-nine for instance) of years determinable upon A's death, or the dissolution of the coverture between B and C." In the present case, in my opinion, this agreement cannot take effect as a good tenancy for duration of the war.

The authority of *Lace* v *Chantler* seems to me to make inescapable the conclusion that a grant of a tenancy to continue until the land is required for road-widening purposes cannot take effect as a good grant.

But Mr Neuberger QC submitted that later Court of Appeal decisions required a different conclusion.

In *Re Midland Railway Co's Agreement* there was an express grant of a periodic tenancy from half-year to half-year. Clause 2 of the agreement provided, so far as relevant, as follows:

The agreement may be determined by either party on giving to the other three months' notice, such notice to be in writing and to expire at any time thereafter without reference to the commencement of the tenancy . . . Provided that this agreement shall not be so terminated by the company [the Midland Railway Co] until they shall require the said premises for the purposes of their undertaking.

British Railways Board, the successor in title to the original landlord, purported to terminate the tenancy by serving a notice to quit. They did not require the land for the purposes of their undertaking.

Two points were relied on by the board. They contended that the proviso to clause 2 conflicted with the principle that for a tenancy to be valid there must be certainty as to the maximum duration of the estate. Alternatively, they contended that the proviso, being a fetter for a period of uncertain and potentially unlimited duration on the landlord's right to terminate the periodic tenancy, was repugnant to the nature of the periodic tenancy and must be rejected. The Court of Appeal held, on the first point, that the principle regarding terms of uncertain duration that was applied in *Lace* v *Chantler* did not apply to periodic tenancies.

At p 732D Russell LJ (as he then was), giving the judgment of the court, said:

Now it appears to us that that decision is confined to a case in which that which was purported to be done was simply to create a leasehold interest for a single and uncertain period. The applicability of this matter of certainty to a periodic tenancy was not under consideration. If *Lace* v *Chantler* had been a case in which there was simply a periodic tenancy with a proviso that the landlord would not give notice during the continuance of the war, this court might not have concluded that such an agreement, which would of course have left the tenant free to determine on notice at any time, was inoperative to create a leasehold. There is nothing in the reasoning of the judgments to lead to the necessary conclusion that such must have been so.

If you have an ordinary case of a periodic tenancy (for example, a yearly tenancy), it is plain that in one sense at least it is uncertain at the outset what will be the maximum duration of the term created, which term grows year by year as a single term springing from the original grant. It cannot be predicated that in no circumstances will it exceed, for example, 50 years; there is no previously ascertained maximum duration for the term; its duration will depend upon the time that will elapse before either party gives notice of determination. The simple statement of the law that the maximum duration of a term must be certainly known in advance of its taking effect cannot therefore have direct reference to periodic tenancies.

He declined to extend the uncertainty of term principle to periodic tenancies. He said, at p 733C:

. . . we are persuaded that, there being no authority to prevent us, it is preferable as a matter of justice to hold parties to their clearly expressed bargain rather than to introduce for the first time in 1971 an extension of a doctrine of land law so as to deny the efficacy of that bargain.

He then turned to the second point, the repugnancy point, and said at p 733F:

Our instinct, as previously indicated, is to give effect if possible to the bargain made by the parties. It may well be that if in a periodic tenancy an attempt was made to prevent the lessor ever determining the tenancy, that would be so inconsistent with the stated bargain that either a greater estate must be found to have been constituted or the attempt must be rejected as repugnant. But short of that we see no reason why an express curb on the power to determine which the common law would confer upon the lessor should be rejected as repugnant to the nature of the leasehold interest granted. In *Breams Property Investment Co Ltd* v *Stroulger* [1948] 2 KB 1, a curb on the lessors for three years unless they required

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the premises for their own use was upheld in this court, notwithstanding the earlier cases of *Warner* v *Browne* (1807) 8 East 165 and *Cheshire Lines Committee* v *Lewis & Co* (1880) 50 LJ QB 121. It follows that in a periodic tenancy a similar curb for 10, 20 or 50 years should not be rejected as repugnant to the concept of a periodic tenancy: and once the argument based on uncertainty is rejected we see no distinction in the present case.

Russell LJ ended his judgment with the following reservation: "We say nothing as to the situation which might arise in law should the defendants sell the reversion to another, when it might be arguable that the proviso would be no longer relevant."

The *Midland Railway Co's* case is authority for two propositions. First, the uncertainty of term principle that was applied in *Lace* v *Chantler* does not apply to periodic tenancies. Second, a fetter in a periodic tenancy of the right of one or other party to serve a notice determining the tenancy is not to be rejected as repugnant to the nature of the periodic tenancy if the fetter falls short of preventing the party from ever determining the tenancy. The fact that the fetter is of uncertain and of potentially unlimited duration is not enough for it to be rejected on the ground of repugnancy. These propositions are, in my opinion, binding on us. If they are unsatisfactory or are wrong, the correction must come from the House of Lords or from Parliament.

Finally, there is *Ashburn Anstalt* v *Arnold*. That case concerned an agreement for the sale of a lease. The agreement dated February 28 1973 provided under clause 5 that:

> From and after completion Arnold & Co [the purchaser] shall be at liberty to remain at the property as licensee . . . until 29th September 1973 without payment of rent or any other fee to Matlodge Ltd [the vendor] save that Arnold & Co shall pay all outgoings as long as it is in occupation of the property. From and after 29th September 1973 Arnold & Co shall be entitled as licensee to remain at the property . . . on the like terms save that it can be required by Matlodge Ltd to give possession on not less than one quarter's notice in writing upon Matlodge Ltd certifying that it is ready at the expiration of such notice forthwith to proceed with the development of the property . . . involving, *inter alia*, the demolition of the property.

Ashburn Anstalt was the successor in title of Matlodge Ltd to the freehold and in October 1985 served on Arnold & Co a notice to quit. The issue for decision was whether the 1973 agreement under which Arnold & Co remained in occupation was binding upon Ashburn Anstalt. The judgment of the court was given by Fox LJ and he dealt first with the question whether Arnold & Co was a mere licensee or a leaseholder. He referred to the authorities and concluded that the reservation of a rent was not necessary for the creation of a tenancy. He then said at p 10:

> There remains the question of the existence of a term. It is the plaintiff's case that clause 5 created no term sufficiently identifiable to be capable of recognition by the law and that no tenancy was created. For that, the plaintiff relies on *Lace* v *Chantler* . . .

Fox LJ cited the passage from Lord Greene's judgment which I have cited, and commented that:

> The ambit of the decision in *Lace* v *Chantler* was limited by the further decision of this court in *Re Midland Railway Co's Agreement*

and gave his attention to that case. He then, after citing passages from the judgment of Russell LJ, said at p 11:

> So far as *Lace* v *Chantler* is concerned, the present case, it seems to us, is distinguishable. In *Lace* v *Chantler* the duration of the war could not be predicted and there was no provision for either party to bring the tenancy to an end before the war ended and that event might be very hard to pinpoint. In the present case the arrangement, so far as Matlodge was concerned, would continue until Matlodge determined it by giving not less than a quarter's notice upon Matlodge giving the required certificate. The event entitling Matlodge to give the certificate might not, of course, occur. But the same applies to the qualifying event for the giving of the landlord's notice in the *Midland Railway Co's Agreement*.

Fox LJ then noted that Arnold & Co were free under the terms of clause 5 of the agreement to bring the arrangement to an end and continued at p 12:

> The result, in our opinion, is that the arrangement could be brought to an end by both parties in circumstances which are free from uncertainty in the sense that there would be no doubt whether the determining event had happened. The vice of uncertainty in relation to the duration of a term is that the parties do not know where they stand. Put another way the court does not know what to enforce. That is not the position here. It seems to us, therefore, that as in the *Midland Railway Co's Agreement* there is no reason why the court should not hold the parties to their agreement. That is so even though the tenancy is (or may not be) an ordinary periodic tenancy. The rights of the parties are no more subject to uncertainty than those in the *Midland Railway* case. We do not see why the mere absence of a formula referring to a periodic tenancy or occupancy should alter the position.

I have cited extensively from the *Ashburn Anstalt* case for two reasons: first, because Mr Neuberger has submitted that the termination provisions in clause 6 of the agreement in the present case are indistinguishable from the termination provisions in clause 5 of the *Ashburn Anstalt* case; second, because I find very great difficulty in following how the conclusions in the *Ashburn Anstalt* case can be reconciled with *Lace* v *Chantler*, an authority binding on the court in *Ashburn Anstalt* as on us.

The uncertainty that Lord Greene regarded as fatal in *Lace* v *Chantler* was an uncertainty as to the *maximum* duration of a term. His citation from *Foa's Landlord and Tenant* makes that clear. Thus a grant for a term to continue until Britain wins the Davis Cup would be bad. But there would be nothing the matter with a grant for 99 years terminable if within that period Britain wins the Davis Cup. This principle of law was applied by Lord Greene in *Lace* v *Chantler* and was recognised by Russell LJ in the *Midland Railway Co's* case: see pp 731A to 732B. But in the *Midland Railway Co's* case it was held that the principle did not apply to periodic tenancies.

In the *Ashburn Anstalt* case it was held that clause 5 of the agreement in question produced a tenancy and not merely a licence. It is difficult to see how the tenancy could have been a periodic tenancy. It is true, as Fox LJ noted, that a term of years need not be accompanied by a reservation of rent. It is, however, very difficult to conceive of a periodic tenancy without a reservation of rent. Even if such an interest could be created by express words, there were no words in clause 5 that could have been treated as creating a periodic tenancy. The right of occupancy was simply to continue until terminated in the manner and on the event specified in the clause. Under clause 5 the right of occupancy was, in effect, to continue until two events occurred. First, Matlodge had to certify that it was ready to proceed with the development of the property; second, Matlodge had to serve a quarter's notice in writing. The term would not come to an end until both these events had happened. Fox LJ recognised (at p 11H) that the first might never happen. The fact that the parties would know whether the second event had or had not happened could not, I would have thought, remedy the inherent uncertainty of duration of a term that depended upon both events happening. And while the *Midland Railway Co's* case was authority for the proposition that an uncertainty as to when a party to a periodic tenancy could serve a notice terminating the tenancy was not fatal to the efficacy of the provision creating that uncertainty, the case could not, in view of *Lace* v *Chantler*, be treated as authority, except in periodic tenancy cases, for the proposition that an uncertainty as to the maximum duration of a term was acceptable. The answer, I would respectfully have thought, to the question posed by Fox LJ in the last sentence of the passage from his judgment which I have cited is that, in the absence of a periodic tenancy, the principle recognised and applied in *Lace* v *Chantler* strikes down the uncertain term.

We are, in my opinion, faced with conflicting authorities in *Lace* v *Chantler* and the *Ashburn Anstalt* case. Both bind us. I have already commented that I can see no solid ground of distinction between the present case and *Lace* v *Chantler*. In both, the maximum duration of the tenancy purported to be granted was uncertain. In neither was a periodic tenancy granted. Is there a valid ground of distinction between the present case and the *Ashburn Anstalt* case? I think there is, although I do not pretend to find it very satisfactory. In clause 5 of the *Ashburn Anstalt* agreement the tenancy (as the court found there to be) was expressed to be terminable "on not less than one quarter's notice upon Matlodge certifying that it is ready at the expiration of such notice forthwith to proceed with the development . . ." etc. This double event could be brought about or not brought about by Matlodge as it might choose. It need consult no interests but its own. If it wanted to get rid of the tenant (as the court found Arnold & Co to be) it could prepare to proceed with the development, certify accordingly and serve the quarter's notice on the tenant. Or it could choose to leave the tenant and the tenancy in place. Clause 6 of the December 19 1930 agreement in the present case does not permit the termination of the tenancy to be subject to the will of the landlord in the same way. The tenancy is to continue until the land is required by the council for road-widening purposes. Whether the land is or

PRUDENTIAL ASSURANCE CO LTD v LONDON RESIDUARY BODY *(continued)*

is not so required and the time at which it is so required are matters which depend upon the proper performance by the council of their statutory duties as highway authority. The arrival of "the day of determination" cannot be governed and controlled by the council simply according to their private interests and wishes. I repeat what I have already said regarding the second part of clause 6. The service by the council of the two months' prior notice is a matter of obligation — "shall give . . ." — and not a matter of choice.

In *Lace* v *Chantler* the bringing to the end of the uncertainty of duration of the term was not within the control of either landlord or tenant. In the *Ashburn Anstalt* case the tenancy, as it was held to be, could have been brought to an end by the tenant at any time and could have been brought to an end by the landlord upon the occurrence of an event that it was within the power of the landlord to control. In the present case, the tenancy granted by clauses 1 and 6 of the agreement could not, on my construction, have been brought to an end by the tenant (it is not to the point that the tenant would be unlikely to want to do so) and, upon the occurrence of an event over which the landlord had, *qua* landlord, no control, would come to an end whether or not the landlord so wished.

In my judgment, the present case is governed by the authority of *Lace* v *Chantler*. Unless the case is one in which the uncertain duration of the term can be controlled by both parties, as in the *Ashburn Anstalt* case, *Lace* v *Chantler* continues, in my opinion, to be a binding authority.

For the reasons I have given I conclude that the tenancy purported to be granted by clauses 1 and 6 of the agreement is bad for uncertainty as to its maximum duration.

Mr Nathan entered into occupation as tenant under the terms of the agreement. He and his successors have paid the rent required by the agreement. The rent has been accepted by the successive landlords. In these circumstances it is accepted that, the tenancy which the agreement purported to grant being bad, Mr Nathan became a tenant under a tenancy from year to year on such of the terms of the agreement as were consistent with such a tenancy: see *Doe d Rigge* v *Bell* (1793) 5 Term Rep 471 where Lord Kenyon CJ said:

> Though the agreement be void by the Statute of Frauds as to the duration of the lease, it must regulate the terms on which the tenancy subsists in other respects as to the rent, the time of the year when the tenant is to quit etc.

In the ordinary way, if the parties have not agreed, expressly or impliedly, anything to the contrary, there will be implied into a tenancy from year to year a term enabling either party to terminate the tenancy by six months' notice expiring at the end of a year of the tenancy. Mr Reid submits that such a term should be implied into the tenancy from year to year to which Mr Nathan became entitled. If that is right then the notice to quit served by the LRB was valid.

Mr Neuberger, on the other hand, contends that the substance of clause 6, or so much thereof as is consistent with a tenancy from year to year, should be implied as a fetter on the right of the landlord to serve notice terminating the tenancy. He submits that a fetter preventing the landlord from serving a notice to quit until such time as the land is required by the highway authority for road-widening purposes should be an implied term of the tenancy from year to year.

In my judgment, the approach to what terms should or should not be implied into the tenancy from year to year is no different from the approach to what terms should be implied into contracts generally. The tenancy from year to year is implied by law from the circumstances that the tenant has entered into occupation and paid rent under an agreement for a tenancy that the law will not recognise. But the law does not, in my judgment, presume to add to the tenancy terms to which the parties would never at the time have agreed or to prevent the addition to the tenancy of terms to which, if the parties had directed their minds to the matter, they would plainly have agreed.

The approach to what should or should not be implied must be an objective one. The intentions of the parties must be objectively ascertained from the words that they have used and the surrounding circumstances. In *Chitty on Contracts*, 26th ed p 554 the test is stated thus:

> The court will be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it is entered into, an inference that the parties must have intended the stipulation in question. An implication of this nature may be made in two situations: first, where it is necessary to give business efficacy to the contract, and secondly, where the term implied represents the obvious, but unexpressed, intention of the parties. These two criteria overlap and, in many cases, have been applied cumulatively. Both, however, depend upon the presumed intention of the parties.

That passage from *Chitty*, in my opinion, succinctly and correctly expresses the approach that should be adopted in considering what terms should be implied into Mr Nathan's tenancy from year to year.

Clause 6 of the agreement of December 19 1930 cannot, as it stands, be treated as a term of the tenancy from year to year. It is, in my opinion, inconsistent with the nature of a periodic tenancy in that it precludes both the landlord and the tenant from terminating the tenancy by notice to quit. If the parties, the LCC and Mr Nathan, had been asked in December 1990 whether Mr Nathan should be free to terminate the tenancy by an ordinary six months' notice to quit, they would have been astonished by the question but would, I am sure, have answered that if he wanted to do so, of course he could. But if the parties had been asked whether it should be open to the landlord to terminate the tenancy by a six months' notice to quit, they would have been equally astonished but would, in my opinion, at once have replied that the landlord could do no such thing. If asked in what circumstances, if at all, the landlord should be able to serve a notice to quit, the obvious answer they would have given would have been that the landlord could serve notice to quit if the land were required for road-widening purposes.

The background to the December 19 1930 agreement as well as its actual terms make it certain, in my opinion, that these are the answers that would have been given. Prior to the sale-and-leaseback transaction, Mr Nathan had owned a commercial site with a frontage to Walworth Road. The LCC, the highway authority, was contemplating the widening of Walworth Road. To facilitate its arrangements in that regard it agreed with Mr Nathan to purchase from him the strip of his land that it would need for the road widening but to lease the land back to him until the land should be required for that purpose. The LCC would have been astonished and Mr Nathan would have been horrified by the suggestion that the LCC or a successor in title could serve notice on Mr Nathan terminating his tenancy, depriving his site of its road frontage and leaving access to the site to be obtained only by means of a back alley. Clause 6 of the agreement shows the intention of the parties that Mr Nathan should not have to give up his tenancy until the land was required for the widening of Walworth Road. The implied tenancy from year to year should, in my judgment, incorporate a corresponding fetter on the right of the landlord to terminate that tenancy.

The *Re Midland Railway Co's* case is authority, binding on us, for the proposition that the fetter to which I have referred would not be repugnant to the inherent nature of a periodic tenancy and would be valid.

The parties did not contemplate in December 1930 that the time might come when the landlord under the tenancy was not the highway authority. Otherwise they would in the agreement have catered for that contingency. If they had been asked what, in that event, the position would be, their answer would, in my opinion, have been that the fetter would continue to bind the successor landlord until the land should be required by the highway authority for road-widening purposes.

Accordingly, I would treat the tenancy from year to year as incorporating an implied term that the tenancy would be determinable by a six months' tenant's notice to quit expiring at the end of a year of the tenancy or by a two months' landlord's notice to quit in the event that the land was required by the highway authority for the road-widening purposes described in clause 6.

The learned judge, who, as I have said, treated the agreement as granting a tenancy from year to year and treated clause 6 as a contractual fetter on the power of the LCC to serve a notice to quit determining the tenancy, concluded that the clause 6 fetter was limited to the period during which the landlord and highway authority were one and the same. I think this conclusion must have been reached via an implied term route rather than as a matter of construction of the actual language of clause 6, but, whichever the route, I would respectfully dissent from the conclusion. I think the "obvious but unexpressed" intention of the parties, in the event that the landlord and highway authority were no longer one and the same, would have been that the fetter could continue until the highway authority required the land for the road-widening purposes.

A final question debated before us has been whether the event, on which the landlord's right to serve a notice to quit depends, ie the land being

required for road-widening purposes, can never now happen and, if it can never happen, what is the effect on that state of affairs?

If the event can never happen, the fetter becomes not simply of uncertain duration, which the court in the *Re Midland Railway Co's* case held did not matter, but absolute. As at present advised, I think that at that point the fetter would become repugnant to the nature of the periodic tenancy and would cease to be effective. I can see no objection in principle to a fetter being initially valid but becoming, by subsequent events, repugnant and ineffective. But this point need not be finally decided in the present case because there is no evidence that justifies the conclusion that the land will never be required for road-widening purposes.

In my judgment, it was not open to the LRB to serve notice determining the tenancy under which the Prudential, as successor in title to Mr Nathan, held the land comprised in the December 19 1930 agreement. The tenancy from year to year under which the land is held includes, in my judgment, an implied provision that notice to quit may not be served by the landlord until the land is required for road-widening purposes. That provision, on the authority of the *Re Midland Railway Co's* case, is valid and effective.

I would allow the appeal.

Agreeing, **PARKER LJ** said: I add a contribution of my own only because we are differing from the learned judge and I do so with some diffidence.

I begin with the judgment of the court in the *Re Midland Railway Co's* case which made clear that, in the absence of authority to prevent us from so doing, we should if possible give effect to the bargain between the parties.

I, therefore, begin by a consideration of the terms of, and surrounding circumstances at the time of, the 1930 agreement.

It is clear from its terms that the intention of the parties was (1) that Mr Nathan should, or at least should be able to, build on his retained land a new building which would have a frontage on to the widened Walworth Road as then contemplated; (2) that, pending such widening, he should be entitled to build on the leased-back land one-storey shops or buildings which would front on to the then existing Walworth Road; (3) that he should retain them until that land was required for road widening; (4) that he was to have two months' notice of the date when it was so required and in that two months was to remove the building and clear the site to ground level. If he failed to do so within that time he was to pay £10 per day until he had done so. All this is clear from the terms of the agreement itself and is reinforced by the physical conditions of the site. What was clearly *not* contemplated was that the tenant should ever be left with a new building with no frontage on to the existing Walworth Road and with no interest in the land between that building and such road.

In my view, there is no possible way of so construing the agreement as constituting a periodic tenancy subject to six months' notice on either side, or so as to produce the result that the council could either (1) abandon any plan of road widening and give notice of either six months or two months or (2) by alienating the land to a third party, whether a highway authority or not, thereby give their successors a right to give either a six or a two months' notice. In any of such cases the tenant, having built on the retained land so as to have a frontage on to the proposed widened road and built shops on the tenanted land with a frontage on to the existing road, would find himself in a position quite clearly contrary to the common intention of both parties. He would have no frontage on to any road.

If the above is right, it does not, in my view, matter whether the original agreement was bad, on the basis of *Lace* v *Chantler* and there must be implied a yearly tenancy, or was good. In either case the landlord could not, in my view, give notice until the widening of Walworth Road became impossible, as for example if it ceased to exist. To hold otherwise would defeat the common intention of the parties. I agree, however, with Scott LJ that the original lease was bad for the reasons he gives. For the reasons given by him and for the additional reasons which I have set out I, too, would, as I have said, allow this appeal.

McCOWAN LJ agreed and did not add anything.

Appeal allowed with costs.

Estates Gazette
CASE SUMMARIES
[1992] EGCS 100

LANDLORD AND TENANT
Notice to quit

Edited by Aviva Golden, barrister

Prudential Assurance Co Ltd *v* London Residuary Body and others

House of Lords: Lords Templeman, Griffiths, Goff of Chieveley, Browne-Wilkinson and Mustill
July 16 1992

Construction of agreement — Validity of notice — Tenancy of uncertain duration — Land let until highway authority requiring it "for road-widening purposes" — Condition never effected — Present landlord not a highway authority — Whether grant bad for uncertainty — Whether periodic yearly tenancy to be implied — Whether notice to quit valid — Judgment in favour of landlord at first instance that notice to quit valid — Tenant's appeal allowed in Court of Appeal — First instance order restored in House of Lords

In December 1930, London County Council acquired from N a small strip of land fronting 263-265 Walworth Road, London SE17, when they contemplated widening the road. They then leased it back to N together with a right to put a temporary building on it until such time as the "Land is required by the council for the purposes of the widening of Walworth Road. . ." (clause 6). By clause 1, the tenant was to pay £30 pa payable quarterly until the tenancy was determined. N's interest became vested in the Prudential Assurance Co Ltd, which in 1975 sublet the premises to the London Electricity Board, still currently in occupation. The proposal to widen the road was never carried into effect. The LCC's rights became vested in the GLC, as the successor to the LCC, and then in the London Residuary Body, which was not a highway authority. The LRB sold the land to the defendants in 1988, but prior to the sale the LRB purported to serve a notice under section 25 of the Landlord and Tenant Act 1954 determining the Prudential's interest. It was common ground that the notice was not effective under section 25.

On the issue whether, treated as a common law notice to quit, it was effective to determine the tenancy created under the agreement of December 1930, Millett J in the High Court [1991] 1 EGLR 90; [1991] 25 EG 120 upheld the notice to quit that had been served by the LRB. He held, *inter alia*, that the agreement granted the tenant a periodic yearly tenancy and not a tenancy for a fixed but uncertain term; that clause 6 imposed a restriction on the landlord's right to serve a notice to quit terminating the periodic tenancy but that the restriction was not repugnant to the nature of the yearly tenancy and was valid. The Prudential successfully appealed to the Court of Appeal which held that the notice to quit was ineffective and that the landlord could not give a valid notice until the land was required for road-widening purposes in conformity with clause 6 of the agreement: [1992] 06 EG 145. The Court of Appeal regarded itself bound by its decisions in *Re Midland Railway Co's Agreement* [1971] Ch 725 and *Ashburn Anstalt* v *Arnold* [1988] 1 EGLR 64; [1988] 23 EG 128. The LRB appealed to the House of Lords. The Law of Property Act 1925 provides by section 1(1): "The only estates in land which are capable of. . .being conveyed.. . at law are — (*a*) an estate in fee simple absolute in possession; (*b*) a term of years absolute". In *Say* v *Smith* (1530) 1 Plowden 269, a lease for a certain term purported to add an uncertain term; the lease was held valid only as to the certain term.

Held **The appeal by the LRB was allowed.**

1. The principle in *Lace* v *Chantler* [1944] KB 368, where a lease was granted for the duration of the war, reaffirmed 500 years of judicial acceptance of the requirement that a term must be certain and applied to all leases and tenancy agreements. A tenancy from year to year was saved from being uncertain because each party had power by notice to determine at the end of any year. The term continued until determined as if both parties made a new agreement at the end of each year for a new term for the ensuing year. A power for nobody to determine or for one party only to be able to determine was inconsistent with the concept of a term from year to year.

2. In *Re Midland Railway Co's Agreement (supra)*, there was no clearly expressed bargain that the term should continue until the crack of doom if

the demised land was not required for the landlord's undertaking or if the undertaking ceased to exist. In the present case there was no clearly expressed bargain that the tenant should be entitled to enjoy his temporary structures in perpetuity if Walworth Road was never widened. In any event, principle and precedent dictated that it was beyond the power of the landlord and the tenant to create a term which was uncertain.

3. A term in a lease must be either certain or uncertain. It could not be partly certain because the tenant could determine it at any time and partly uncertain because the landlord could not determine it for an uncertain period. If the landlord did not grant and the tenant did not take a certain term the grant did not create a lease.

4. In the present case the Court of Appeal were bound by the decisions in *Re Midland Railways* and *Ashburn Anstalt*. However, both those cases were wrongly decided. A grant for an uncertain term did not create a lease. A grant for an uncertain term which took the form of a yearly tenancy which could not be determined by the landlord did not create a lease.

5. (*per* Lord Browne-Wilkinson) As a result of this decision, it was difficult to think of a more unsatisfactory outcome or one further away from what the parties to the 1930 agreement could ever have contemplated. N's successor in title would be left with the freehold of the remainder of nos 263-5 which, though retail premises, would have no frontage to a shopping street: the LCC's successor in title would have the freehold to a strip of land with a road frontage but probably incapable of being used save in conjunction with the land from which it was severed in 1930. It was not a result which their contract, if given effect to, could ever have produced. However, for the House of Lords to depart from a rule relating to land law which had been established for many centuries might upset long-established titles. Therefore it was to be hoped that the Law Commission might look at the subject to see whether there was in fact any good reason now for maintaining a rule which operated to defeat contractually agreed arrangements between the parties (of which all successors in title were aware) and which was capable of producing such an extraordinary result as that in the present case.

Alan Steinfeld QC and Stephen Lloyd (instructed by Clifford Watts Compton) appeared for the appellant LRB; David Neuberger QC and Paul de la Piquerie (instructed by Berwin Leighton) appeared for the Prudential.

Certainty of term

While many generations of lawyers and surveyors have been taught that, in order to be valid, a lease must be for a term which is certain or ascertainable at its commencement, this is a principle which has given rise to considerable difficulties in recent months. It has long been accepted that, if a lease is to be granted for a single term, then that term must be fixed and certain, eg for 10 years. For many the most memorable example of a lease which failed this test is that in *Lace* v *Chandler* [1944] 1 All ER 305 which was granted for "the duration of the war".

Certainty and periodic tenancies

While the application of the doctrine of certainty to single-term leases has been relatively settled, its effect on periodic tenancies has proved more problematic. This is because a periodic tenancy is usually regarded as one for a period which will automatically renew itself unless terminated by an appropriate notice to quit. Accordingly, it is arguable that it is not "certain" at the commencement of such a tenancy how long it will last. The original answer to this was that periodic tenancies fitted into the doctrine of certainty on the basis that the ability of either party to serve a notice to quit meant that the overall term could be rendered certain. This meant that the ability of both sides to serve a notice to quit was fundamental to the validity of a periodic tenancy so that any fetter or restriction on the right to terminate would be invalid. However, this approach was rejected by the Court of Appeal in *Charles Clay & Sons Ltd* v *British Railways Board* [1971] 1 All ER 1007. There it was decided that the doctrine of certainty does not apply to periodic tenancies; accordingly it was held that a restriction on the defendant's right to serve a notice to quit, even though operative for an uncertain period, did not render the tenancy void for uncertainty, nor could it be struck out as repugnant to a periodic tenancy. This principle was subsequently accepted in *Centaploy Ltd* v *Matlodge Ltd* [1973] 2 All ER 720, although in that case it was decided that a term in a weekly tenancy under which the landlord had agreed *never* to serve a notice to quit must be struck out as repugnant.

Contract prevails

Thus by the mid-1970s the law, from a property point of view, was in a mess. An example might help to demonstrate. If L attempted to grant to T a lease "until L requires the land for development" this would be void for uncertainty (*Lace* v *Chandler*). However, assuming that T was in possession and paying rent, a court would treat T as an implied periodic tenant and would have no difficulty in reading into that tenancy a term under which L could not serve a notice to quit unless he required the land for development (*Charles Clay*). From a contract point of view all was well, since L was being held to an agreement which he had clearly entered into.

This scene was further confused by the Court of Appeal decision in *Ashburn Anstalt* v *Arnold* [1987] 2 EGLR 71. Here it was, in effect, held that an agreement that the defendant could occupy property until served with a notice that the plaintiff was ready to proceed with redevelopment was a lease which was not void for uncertainty. Despite the absence of any express terms to this effect, the court was prepared to assume that the tenant had some right to terminate and that the case therefore fitted in with the principle established in the *Charles Clay* case.

The *Prudential* case

This is the background to the recent House of Lords decision in *Prudential Assurance Co Ltd* v *London Residuary Body* [1992] 3 All ER 504. Here, the LCC had in 1930, as highway authority, acquired a strip of land with a view to implementing a road-widening scheme at some time in the future. In the meantime, they leased it back to the former owner at a fixed annual rent of £30. The terms of this agreement were that "the tenancy shall continue until the said land is required by the Council for the purposes of the widening of Walworth Road . . . and the Council shall give two months notice to the Tenant . . .". The road-widening scheme had long since been abandoned and the lease was now vested in the plaintiffs who had sublet the whole of the property, together with land lying to the rear, to the London Electricity Board, at a substantial rent. The LCC, and their successor the GLC, had thought that they could neither increase the rent nor terminate the lease. However, the London Residuary Body to whom the reversion then passed were made of sterner stuff and they were now seeking to terminate.

The trial judge had taken the view that the agreement gave rise to a yearly periodic tenancy under which the landlord had restricted its right to serve a notice to quit. Since this was merely a restriction it could not be struck out as repugnant. However, he held that, once the reversion passed into the hands of a landlord which was not a highway authority (ie with the capability of implementing a road-widening scheme) the restriction ceased to apply. Accordingly, the current landlords had served an effective notice to quit.

The Court of Appeal did not agree. Scott LJ concluded that the agreement purported to grant a single term measurable by an uncertain event, ie the future road-widening scheme. To his mind the case therefore fell within the rule in *Lace* v *Chantler* and the lease was void for uncertainty. He expressed serious doubts about the correctness of the decision in *Ashburn* which, in his view, did not involve a periodic tenancy to which the *Charles Clay* principle could be applied; he thought that it was an agreement for occupation until an uncertain event occurred and thus should have been regarded as void.

He then considered the present position of the parties in the light of the above conclusion. The former owner, and thereafter the plaintiffs, had, by taking possession and paying rent, become yearly tenants on such terms of their agreement as were consistent with a yearly tenancy. He ruled that the landlord could serve notice only if the land were required for the purposes of a road-widening scheme and, in contrast to the trial judge (who had considered the same question via a different route), that this restriction continued to apply to a landlord which was not a highway authority.

The House of Lords view

The House of Lords has categorically restored this area of the law to its former property orientation. Having considered the authorities ancient and modern, Lord Templeman had no doubt that the basic common law view was that any lease, whether fixed term or periodic, had to comply with the doctrine of certainty of term. This was reinforced by the statutory definitions contained in the Law of Property Act 1925. Thus the decision in *Lace* v *Chandler* was perfectly in accordance with principle, while those in *Charles Clay* and *Ashburn Anstalt* were not and were overruled.

Having reverted to the conventional wisdom on the doctrine of certainty the result was clear. The original agreement was an attempt to create an uncertain term and was void. The grantee was, therefore, to be treated as a tenant under an implied tenancy from year to year. There can be no fetter (at least not one which is linked to an uncertain event) on either party's right to serve a notice to quit. Accordingly, irrespective of the implementation of any road-widening scheme, the landlord was entitled to determine the tenancy by the service of a notice to quit.

Comment

There is no doubt that this decision restores the law to a simpler, more predictable and more logically consistent position. However, what Lord Templeman did not consider was whether the reversion to ancient property principles is the correct direction in which to move. He clearly felt that the application of these principles would not have disturbed the essence of the bargain struck by the parties. Of the *Charles Clay* case he said "there was no 'clearly expressed bargain' that the term should continue until the crack of doom if the demised land was not required for the landlord's undertaking: of the *Prudential* he opined that "there was no 'clearly expressed bargain' that the tenant shall be entitled to enjoy his 'temporary structures' in perpetuity if Walworth Road is never widened".

However, there will be those who disagree. It is perfectly possible to argue that, in both instances, the landlords positively agreed that they would terminate the leases only in the specified circumstances. As the law now stands this is a commercial undertaking to which they will no longer be held. It is fair to note that, in the only other speech, Lord Browne- Wilkinson expressed his reservations and suggested that this is a matter which could be considered by the Law Commission. In the meantime, practitioners must appreciate that restrictions on the right to terminate a lease must be carefully formulated so as not to fall foul of the new law.

The panel of contributors to "Legal Notes" consists of Professor Keith Davies MA LLM; John Murdoch LLB; Sandi Murdoch LLM; and John Martin, solicitor, Alsop Wilkinson.

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edited by Barry Denyer-Green, barrister

House of Lords

July 16 1992

(Before Lord TEMPLEMAN, Lord GRIFFITHS, Lord GOFF OF CHIEVELEY, Lord BROWNE-WILKINSON and Lord MUSTILL)

PRUDENTIAL ASSURANCE CO LTD v LONDON RESIDUARY BODY AND OTHERS

[1992] 36 EG 129

Landlord and tenant — Certainty of term — Whether lease for uncertain duration determinable when landlord requires land for road widening valid as a term — Whether yearly tenancy determined by a notice to quit where no road widening envisaged

By an agreement dated December 19 1930 the London County Council ("LCC") let to a Mr Nathan a strip of land with a frontage of 36 ft to Walworth Road, Southwark, London SE17, and a depth of 25ft at a rent of £30 pa from December 19 1930 "until the tenancy shall be determined as hereinafter provided" — Clause 6 of the agreement provided that the tenancy was to continue ". . . until the said land is required by the Council for the purpose of the widening of Walworth Road and the street-paving works rendered necessary thereby and the Council shall give two months' notice to the tenant at least prior to the day of determination when the said land is so required and thereupon the tenant shall give vacant possession to the Council . . . " — The Walworth Road has still not been widened and the freehold to the land is now vested in the appellant second to fourth defendants, who, on July 21 1988, purchased the property at auction from the first defendants, the London Residuary Body ("the LRB") — On March 31 1988 the LRB gave a notice to the respondent plaintiffs, Prudential Assurance Co Ltd, in which the benefit of the agreement is now vested, pursuant to section 25 of the Landlord and Tenant Act 1954 seeking to terminate the tenancy on December 19 1988 — Although that notice had no effect under the 1954 Act it was accepted that a notice under section 25 of the Act is capable of being an effective common law notice to quit — The Court of Appeal, in reversing the decision of Millett J, held that, although the agreement could be determined by a notice to quit when the land was required for road widening, the notice to quit was void and of no effect

***Held*: The appeal was allowed — The agreement, being a grant for an uncertain term, did not create a lease and the tenancy from year to year enjoyed by the tenant as a result of entering into possession and paying a yearly rent can be determined by six months' notice by either landlord or tenant — The principle in *Lace* v *Chantler* that a term must be certain applies to all leases and tenancy agreements — A power for one party only to determine is inconsistent with the concept of a term from year to year — *Re Midland Railway Co's Agreement* and *Ashburn Anstalt* v *Arnold* were wrongly decided**

This was an appeal by the second to fourth defendants, Barron Investments Ltd, Alan Moss Bayes and Joan Estelle Bayes, from the decision of the Court of Appeal ([1991] 1 EGLR 90; [1991] 25 EG 120), which had allowed an appeal by the respondent plaintiffs, Prudential Assurance Co Ltd, from the judgment of Millett J that the notice dated March 31 1988 given by the first defendants, the London Residuary Body, validly determined the agreement of December 19 1930.

Alan Steinfeld QC and Stephen Lloyd (instructed by Clifford Watts Compton) appeared for the appellants; David Neuberger QC and Paul de la Piquerie (instructed by Berwin Leighton) represented the respondents.

In his speech, **LORD TEMPLEMAN** said: This appeal arises out of a memorandum of agreement dated December 19 1930 and said to have created a lease for a term which was not limited to expire by effluxion of time and cannot now be determined by the landlord.

By the agreement, London County Council let to one Mr Nathan a strip of land with a frontage of 36 ft to Walworth Road, a thoroughfare in Southwark, and a depth of 25 ft at a rent of £30 pa from December 19 1930 "until the tenancy shall be determined as hereinafter provided". The only relevant proviso for determination is contained in clause 6, which reads as follows:

> The tenancy shall continue until the said land is required by the Council for the purpose of the widening of Walworth Road and the street paving works rendered necessary thereby and the Council shall give two months' notice to the tenant at least prior to the day of determination when the said land is so required and thereupon the tenant shall give vacant possession to the Council of the said land . . .

By the agreement, the tenant was authorised to erect "temporary one storey shops or buildings of one storey and for the retention of such shops or buildings as temporary structures" until the land was required for road widening and he was then bound to remove the temporary structures and clear the land. The council agreed to pay all the costs of road making and paving works. The agreement was clearly intended to be of short duration and could have been secured by a lease for a fixed term, say five or 10 years, with power for the landlord to determine before the expiry of that period for the purpose of the road widening. Unfortunately the agreement was not so drafted. Over 60 years later Walworth Road has not been widened, the freehold is now vested in the appellant second to fourth defendants, who purchased the property from the first defendants, the London Residuary Body, after they had issued a notice to quit. The defendants have no road-making powers and it does not appear that the road will ever be widened. The benefit of the agreement is now vested in the respondent plaintiffs, the Prudential Assurance Co Ltd. The agreement purported to grant a term of uncertain duration which, if valid, now entitles the tenant to stay there for ever and a day at the 1930 rent of £30; valuers acting for both parties have agreed that the annual current commercial rent exceeds £10,000.

A demise for years is a contract for the exclusive possession and profit of land for some determinate period. Such an estate is called a "term". Thus *Coke on Littleton*, 19th ed (1832) para 45b, said:

> Terminus in the understanding of the law does not only signify the limits and limitation of time, but also the estate and interest that passes for that time.

Blackstone in his *Commentaries*, 1st ed (1766) Book II, said, at p 143:

> Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years. And therefore this estate is frequently called a term, *terminus*, because its duration or continuance is bounded, limited, and determined: for every such estate must have a certain beginning, and certain end.

In *Say* v *Smith* (1530) 1 Plow 269 a lease for a certain term purported to add a term which was uncertain; the lease was held valid only as to the certain term. Anthony Brown J is reported at p 272 to have said:

> Every contract sufficient to make a lease for years ought to have certainty in three limitations, viz in the commencement of the term, in the continuance of it, and in the end of it; so that all these ought to be known at the commencement of the lease, and words in a lease, which don't make this appear, are but babble . . . And these three are in effect but one matter, showing the certainty of the time for which the lessee shall have the land, and if any of these fail, it is not a good lease, for then there wants certainty.

The Law of Property Act 1925, taking up the same theme, provided that:

> **1.** — (1) The only estates in land which are capable of subsisting or of being conveyed or created at law are —
> (*a*) An estate in fee simple absolute in possession;
> (*b*) A term of years absolute.

Section 205(1)(xxvii) was in these terms:

> "Term of years absolute" means a term of years . . . either certain or liable to determination by notice, re-entry, operation of law, or by a provision for cesser on redemption, or in any other event (other than the dropping of a life, or the determination of a determinable life interest); . . . and in this definition the expression "term of years" includes a term for less than a year, or for a year or years and a fraction of a year or from year to year;

The term expressed to be granted by the agreement in the present case does not fall within this definition.

Ancient authority, recognised by the 1925 Act, was applied in *Lace* v *Chantler* [1944] KB 368. A dwelling-house was let at the rent of 16s 5d per week. Lord Greene MR (no less) said at pp 370-371:

> Normally there could be no question that this was an ordinary weekly tenancy, duly determinable by a week's notice, but the parties in the rent-book agreed to a term which appears there expressed by the words "furnished for duration",

which must mean the duration of the war. The question immediately arises whether a tenancy for the duration of the war creates a good leasehold interest. In my opinion, it does not. 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. Mr Sturge in his argument has maintained that such a lease would be valid, and that, even if the term is uncertain at its beginning when the lease takes effect, the fact that at some future time it will be rendered certain is sufficient to make it a good lease. In my opinion, that argument is not to be sustained.

I do not propose to go into the authorities on the matter, but in Foa's "Landlord and Tenant" 6th ed, p 115, the law is stated in this way, and, in my view, correctly: "The habendum in a lease must point out the period during which the enjoyment of the premises is to be had; so that the duration, as well as the commencement of the term, must be stated. The certainty of a lease as to its continuance must be ascertainable either by the express limitation of the parties at the time the lease is made, or by reference to some collateral act which may, with equal certainty, measure the continuance of it, otherwise it is void . . . "

The legislature concluded that it was inconvenient for leases for the duration of the war to be void and therefore by the Validation of War-time Leases Act 1944 Parliament provided that any agreement entered into before or after the passing of the Act which purported to grant a tenancy for the duration of the war:

> **1.** — (1) . . . shall have effect as if it granted or provided for the grant of a tenancy for a term of ten years, subject to a right exercisable either by the landlord or the tenant to determine the tenancy, if the war ends before the expiration of that term, by at least one month's notice in writing given after the end of the war; . . .

Parliament granted the fixed and certain term which the agreements between the parties lacked in the case of tenancies for the duration of the war and which the present agreement lacks.

When the agreement in the present case was made, it failed to grant an estate in the land. The tenant, however, entered into possession and paid the yearly rent of £30 reserved by the agreement. The tenant entering under a void lease became, by virtue of possession and the payment of a yearly rent, a yearly tenant holding on the terms of the agreement so far as those terms were consistent with the yearly tenancy. A yearly tenancy is determinable by the landlord or the tenant at the end of the first or any subsequent year of the tenancy by six months' notice unless the agreement between the parties provides otherwise. Thus in *Doe d Rigge* v *Bell* (1793) 5 Term Rep 471 a parole agreement for a seven-year lease did not comply with the Statute of Frauds, but the tenant entered and paid a yearly rent and it was held that he was tenant from year to year on the terms of the agreement. Lord Kenyon CJ said at p 472:

> Though the agreement be void by the Statute of Frauds as to the duration of the lease, it must regulate the terms on which the tenancy subsists in other respects, as to the rent, the time of year when the tenant is to quit, etc. . . . Now, in this case, it was agreed, that the defendant should quit at Candlemas; and though the agreement is void as to the number of years for which the defendant was to hold, if the lessor choose to determine the tenancy before the expiration of the seven years, he can only put an end to it at Candlemas.

Now it is said that when in the present case the tenant entered pursuant to the agreement and paid a yearly rent he became a tenant from year to year on the terms of the agreement including clause 6 which prevents the landlord from giving notice to quit until the land is required for road widening. This submission would make a nonsense of the rule that a grant for an uncertain term does not create a lease and would make nonsense of the concept of a tenancy from year to year because it is of the essence of a tenancy from year to year that both the landlord and the tenant shall be entitled to give notice determining the tenancy.

In *Doe d Warner* v *Browne* (1807) 8 East 165 there was an agreement to lease at a rent of £40 pa and it was agreed that the landlord, W Warner, should not raise the rent nor turn out the tenant "so long as the rent is duly paid quarterly, and he does not expose to sale or sell any article that may be injurious to W Warner in his business". The tenant duly paid his rent and did not commit any breach of covenant. The landlord gave six months' notice and it was held that the notice was good. Those were the days when it was possible to have a lease for life. Lord Ellenborough CJ asked at p 166:

> . . . what estate the defendant was contended to have? and whether he were not in this dilemma; that either his estate might enure for life, at his option; and then according to Lord *Coke*, such an estate would, in legal contemplation, be an estate for life; which could not be created by parol: or if not for life, being for no assignable period, it must operate as a tenancy from year to year; in which case it would be inconsistent with and repugnant to the nature of such an estate, that it should not be determinable at the pleasure of either party giving the regular notice.

Lawrence J said at p 167:

> If this interest be not determinable so long as the tenant complies with the terms of the agreement, it would operate as an estate for life; which can only be created by deed. . . . The notion of a tenancy from year to year, the lessor binding himself not to give notice to quit, which was once thrown out by Lord *Mansfield*, has been long exploded.

In *Cheshire Lines Committee* v *Lewis & Co* (1880) 50 LJQB 121 an agreement for a weekly tenancy contained an undertaking by the landlord not to give notice to quit until the landlord required to pull down the demised buildings. Lush J, after citing *Doe d Warner* v *Browne* (1807) 8 East 165, said of that case, at p 124:

> This reasoning applies with at least equal force to the present case. This is not a mere constructive tenancy as that was. It is as explicit as words can make it that the defendants are to hold "upon a weekly tenancy at a weekly rental, and that the tenancy is to be determined by either of the parties on giving a week's notice to the other". There is this difference between the two cases, that in *Doe d Browne* v *Warner* the lessor engaged not to turn out the tenant so long as he observed the conditions, and in this case Radcliffe engages that the tenant shall hold until the company require to pull down the buildings. But, as that is an event which may never happen, the distinction is merely between the contingency of the tenant breaking the conditions and the contingency of the company wanting the premises in order to pull them down. The restriction is as repugnant to the nature of the tenancy in the one case as is in the other. It is therefore no legal answer to the ejectment to say that the contingency provided for has not happened.

These authorities indicate plainly enough that the agreement in the present case did not create a lease and that the tenancy from year to year enjoyed by the tenant as a result of entering into possession and paying a yearly rent can be determined by six months' notice by either landlord or tenant. The landlord has admittedly served such a notice. The Court of Appeal have, however, concluded that the notice was ineffective and that the landlord cannot give a valid notice until the land is required "for the purposes of the widening of Walworth Road" in conformity with clause 6 of the agreement.

The notion of a tenancy from year to year, the landlord binding himself not to give notice to quit, which was once rejected by Lord Mansfield and exploded long before 1807 according to Lawrence J in *Doe d Warner* v *Browne* (1807) 8 East 165 at p 167, was, however, revived and applied by the Court of Appeal in *Re Midland Railway Co's Agreement* [1971] Ch 725. In that case a lease for a period of six months from June 10 1920 was expressed to continue from half-year to half-year until determined. The agreement provided for the determination of the agreement by three months' written notice given by either party to the other subject to a proviso that the landlords should not exercise that right unless they required the premises for their undertaking. The successors to the landlords served six months' written notice to quit under the Landlord and Tenant Act 1954 although they did not require the premises for their undertaking. The Court of Appeal, upholding Foster J, declared that the notice to quit was invalid and of no effect because the landlords did not require the premises for their undertaking. The Court of Appeal held that the decision in *Lace* v *Chantler* [1944] KB 368 did not apply to a periodic tenancy and declined to follow *Doe d Warner* v *Browne* (1807) 8 East 165 or *Cheshire Lines Committee* v *Lewis & Co* (1880) 50 LJQB 121. Russell LJ, delivering the judgment of the court, held that the decision in *Lace* v *Chantler* [1944] KB 368 did not apply to a tenancy from year to year and said, at p 733C:

> . . . we are persuaded that, there being no authority to prevent us, it is preferable as a matter of justice to hold parties to their clearly expressed bargain rather than to introduce for the first time in 1971 an extension of a doctrine of land law so as to deny the efficacy of that bargain.

My lords, I consider that the principle in *Lace* v *Chantler* [1944] KB 368, reaffirming 500 years of judicial acceptance of the requirement that a term must be certain, applies to all leases and tenancy agreements. A tenancy from

PRUDENTIAL ASSURANCE CO LTD v LONDON RESIDUARY BODY *(continued)*

year to year is saved from being uncertain because each party has power by notice to determine at the end of any year. The term continues until determined as if both parties made a new agreement at the end of each year for a new term for the ensuing year. A power for nobody to determine, or for one party only to be able to determine, is inconsistent with the concept of a term from year to year: see *Doe d Warner* v *Browne* (1807) 8 East 165 and *Cheshire Lines Committee* v *Lewis & Co* (1880) 50 LJQB 121. In *Re Midland Railway Co's Agreement* [1971] Ch 725 there was no "clearly expressed bargain" that the term should continue until the crack of doom if the demised land was not required for the landlord's undertaking or if the undertaking ceased to exist. In the present case there was no "clearly expressed bargain" that the tenant shall be entitled to enjoy his "temporary structures" in perpetuity if Walworth Road is never widened. In any event, principle and precedent dictate that it is beyond the power of the landlord and the tenant to create a term which is uncertain.

A lease can be made for five years subject to the tenant's right to determine if the war ends before the expiry of five years. 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. Both leases are valid because they create a determinable certain term of five years. A lease might purport to be made for the duration of the war subject to the tenant's right to determine before the end of the war. A lease might be made from year to year subject to a fetter on the right of the landlord to determine the lease before the war ends. Both leases would be invalid because each purported to create an uncertain term. A term must be either certain or uncertain. It cannot be partly certain because the tenant can determine it at any time and partly uncertain because the landlord cannot determine it for an uncertain period. If the landlord does not grant and the tenant does not take a certain term, the grant does not create a lease.

The decision of the Court of Appeal in *Re Midland Railway Co's Agreement* [1971] Ch 725 was taken a little further in *Asbburn Anstalt* v *Arnold* [1989] Ch 1*. That case, if it was correct, would make it unnecessary for a lease to be of a certain duration. In an agreement for the sale of land the vendor reserved the right to remain at the property after completion as licensee and to trade therefrom without payment of rent "save that it can be required by Matlodge [the purchaser] to give possession on not less than one quarter's notice in writing upon Matlodge certifying that it is ready at the expiration of such notice forthwith to proceed with the development of the property and the neighbouring property involving, *inter alia*, the demolition of the property". The Court of Appeal held that this reservation created a tenancy. The tenancy was not from year to year but for a term which would continue until Matlodge certified that it was ready to proceed with the development of the property. The Court of Appeal held that the term was not uncertain because the vendor could either give a quarter's notice or vacate the property without giving notice. But, of course, the same could be said of the situation in *Lace* v *Chantler* [1944] KB 368. The cumulative result of the two Court of Appeal authorities *Re Midland Railway Co's Agreement* [1971] Ch 725 and *Ashburn's* case would therefore destroy the need for any term to be certain.

In the present case the Court of Appeal were bound by the decisions in *Re Midland Railway Co's Agreement* [1971] Ch 725 and *Asbburn's* case. In my opinion, both these cases were wrongly decided. A grant for an uncertain term does not create a lease. A grant for an uncertain term which takes the form of a yearly tenancy which cannot be determined by the landlord does not create a lease. I would allow the appeal. The trial judge, Millett J, reached the conclusion that the six months' notice was a good notice. He was, of course, bound by the Court of Appeal decisions but managed to construe the memorandum of agreement so as to render clause 6 ineffective in fettering the right of the landlord to serve a notice to quit after the landlord had ceased to be a road-widening authority. In the circumstances this question of construction need not be considered. For the reasons which I have given the order made by Millett J must be restored. The respondents must pay the costs of the appellants before the House and in the courts below.

LORDS GRIFFITHS, GOFF OF CHIEVELEY and **MUSTILL** agreed with the speech of Lord Templeman and the reasons given and did not add observations of their own.

*Editor's note: Also reported at [1988] 1 EGLR 64; [1988] 23 EG 128.

Agreeing, **LORD BROWNE-WILKINSON** said: I agree with the speech of my noble and learned friend Lord Templeman that this appeal must be allowed for the reasons he gives. However, I reach that conclusion with no satisfaction.

Before 1930, Mr Nathan owned shop premises, 263-265 Walworth Road, with a frontage to the street. The agreement, made in 1930 between London County Council and Mr Nathan, was part of a sale-and-leaseback arrangement whereby a part of Mr Nathan's land ("the strip") was sold to the council for road widening. Mr Nathan retained the freehold of the remainder of nos 263-265. By the agreement, the strip was leased back to Mr Nathan for continued use, with the rest of 263-265 Walworth Road, until required for road widening. Until today, the remainder of nos 263-265 together with the strip has been let and occupied as one single set of retail shop premises with a frontage to the Walworth Road. As a result of our decision, Mr Nathan's successor in title will be left with the freehold of the remainder of nos 263-265 which, though retail premises, will have no frontage to a shopping street: the council's successors in title will have the freehold to a strip of land with a road frontage but probably incapable of being used save in conjunction with the land from which it was severed in 1930, ie the remainder of nos 263-265.

It is difficult to think of a more unsatisfactory outcome or one further away from what the parties to the 1930 agreement can ever have contemplated. Certainly it was not a result which their contract, if given effect to, could ever have produced. If the 1930 agreement had taken effect fully, there could never have come a time when the freehold to the remainder of nos 263-265 would be left without a road frontage.

This bizarre outcome results from the application of an ancient and technical rule of law which requires the maximum duration of a term of years to be ascertainable from the outset. No one has produced any satisfactory rationale for the genesis of this rule. No one has been able to point to any useful purpose that it serves at the present day. If, by overruling the existing authorities, this House were able to change only the law for the future I would have urged your lordships to do so. But for this House to depart from a rule relating to land law which has been established for many centuries might upset long-established titles. I must, therefore, confine myself to expressing the hope that the Law Commission might look at the subject to see whether there is, in fact, any good reason now for maintaining a rule which operates to defeat contractually agreed arrangements between the parties (of which all successors in title are aware) and which is capable of producing such an extraordinary result as that in the present case.

House of Lords

Law Report July 23

Leases must be of certain duration

Prudential Assurance Co Ltd v London Residuary Body and Others

Before Lord Templeman, Lord Griffiths, Lord Goff of Chieveley, Lord Browne-Wilkinson and Lord Mustill

[Speeches July 16]

It was a requirement of all leases and tenancy agreements that the term created was of certain duration. Accordingly an agreement purporting to "continue until the ... land is required by the council for road widening" did not create a lease and the yearly tenancy that resulted from the tenant entering into possession and paying a yearly rent could be determined by six months' notice by either landlord or tenant.

The House of Lords so held in allowing an appeal by the second to fourth defendants, Barron Investments Ltd, Alan Moss Bayes and Joan Estelle Bayes, from the order of the Court of Appeal (Lord Justice Parker, Lord Justice McCowan and Lord Justice Scott) (*The Times* November 7, 1991) allowing an appeal by the plaintiffs, the Prudential Assurance Co Ltd, tenants of part of the site of 263-5 Walworth Road, Southwark, from the decision of Mr Justice Millett upholding a common law notice to quit by the first defendants, the London Residuary Body, who had sold the reversion to the second to fourth defendants after the issue of the plaintiffs' writ seeking a declaration that the notice was void.

Mr Alan Steinfeld, QC and Mr Stephen Lloyd for the second to fourth defendants; Mr David Neuberger, QC and Mr Paul de la Piquerie for the plaintiffs.

LORD TEMPLEMAN said that by a 1930 memorandum of agreement London County Council let a strip of land fronting a thoroughfare in Southwark at a rent of £30 per annum "until the tenancy shall be determined as hereinafter provided".

The only relevant proviso for determination was contained in a clause reading "the tenancy shall continue until the ... land is required by the council for the purposes of the widening of Walworth Road ..."

By the agreement, the tenant was authorised to erect temporary shops until the land was required for road widening and he was then bound to remove the temporary structures and clear the land.

Over 60 years later Walworth Road had not been widened, the freehold was now vested in landlords which had no road making powers and it did not appear that the road would ever be widened. The benefit of the agreement was now vested in the Prudential Assurance Co Ltd.

The agreement purported to grant a term of uncertain duration which, if valid, now entitled the tenant to stay there for ever and a day at the 1930 rent of £30. Valuers acting for both parties had agreed that the annual current commercial rent exceeded £10,000.

A demise for years was a contract for the exclusive possession and profit of land for some determinate period. Such an estate was called a "term". In *Lace v Chantler* ([1944] KB 368, 370) Lord Green, Master of the Rolls, in applying ancient authority, recognised by the Law of Property Act 1925, to hold that a tenancy for the duration of the war did not create a good leasehold interest, said:

"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 ... the duration, as well as the commencement of the term, must be stated."

The agreement in the present case lacked a fixed and certain term and failed to grant an estate in land. The tenant, however, had entered into possession and paid the yearly rent of £30 reserved by the agreement. The tenant entering under a void lease became by virtue of possession and the payment of yearly rent, a yearly tenant holding on the terms of the agreement so far as those terms were consistent with the yearly tenancy.

A yearly tenancy was determinable by the landlord or the tenant at the end of the first or any subsequent year of the tenancy by six months notice unless the agreement between the parties provided otherwise.

It was said in the present case that the tenant had become a tenant from year to year on the terms of the agreement including the clause which prevented the landlord from giving notice to quit unless the land was required for road widening.

That submission would make a nonsense of the rule that a grant for an uncertain term did not create a lease and would make nonsense of the concept of a tenancy from year to year because it was of the essence of a tenancy from year to year that both the landlord and the tenant should be entitled to give notice determining the tenancy.

Doe d. Warner v Browne ((1807) 8 East 165) and *Cheshire Lines Committee v Lewis & Co* ((1880) 50 LJ QB 121) indicated plainly enough that the agreement in the present case did not create a lease and that the tenancy from year to year enjoyed by the tenant as a result of entering into possession and paying a yearly rent could be determined by six months notice by either landlord or tenant.

In *In re Midland Railway Co's Agreement* ([1971] Ch 725) the Court of Appeal held that *Lace v Chantler* did not apply to a tenancy from year to year and declined to follow the *Warner* and *Cheshire Lines Committee* decisions.

His Lordship considered that the principle in *Lace v Chantler* reaffirming 500 years of judicial acceptance of the requirement that a term must be certain applied to all leases and tenancy agreements.

A tenancy from year to year was saved from being uncertain because each party had power by notice to determine at the end of any year. The term continued until determined as if both parties made a new agreement at the end of each year for a new term for the ensuing year. A power for nobody to determine or for one party only to be able to determine was inconsistent with the concept of a term from year to year.

The *Midland Railway* decision was taken a little further in *Ashburn Ansalt v Arnold* ([1989] Ch 1). The cumulative result of those two Court of Appeal authorities would destroy the need for any term to be certain.

In the present case the Court of Appeal was bound by the *Midland Railway* and *Ashburn* decisions. Both those cases were wrongly decided.

A grant for an uncertain term did not create a lease. A grant for an uncertain term which took the form of a yearly tenancy which could not be determined by the landlord did not create a lease.

Lord Goff agreed with Lord Templeman.

LORD BROWNE-WILKINSON, agreeing that the appeal should be allowed for the reasons given by Lord Templeman, added that he reached that conclusion with no satisfaction.

Before 1930, a Mr Nathan had owned shop premises, 263-5 Walworth Road, with a frontage to the street. By the 1930 agreement a strip of the land was sold to the council for road widening and leased back to Mr Nathan for continued use with the rest of No 263-5 until required for road widening.

Up until today, the remainder of No 263-5 together with the strip had all been let and occupied as one single set of retail shop premises with a frontage to Walworth Road.

As a result of their Lordships' decision, Mr Nathan's successor in title would be left with the freehold of the remainder of No 263-5 which, although retail premises, would have no frontage to a shopping street.

The council's successors in title would have the freehold to a strip of land with a road frontage but probably incapable of being used save in conjunction with the land from which it was severed in 1930, that is, the remainder of No 263-5. It was difficult to think of a more unsatisfactory outcome or one further away from what the parties in the 1930 agreement could ever have contemplated.

That bizarre outcome resulted from the application of an ancient and technical rule of law which required the maximum duration of a term of years to be ascertainable from the outset.

No one had produced any satisfactory rationale for the genesis of the rule. No one had been able to point to any useful purpose that it served at the present day.

His Lordship expressed the hope that the Law Commission might look at the subject to see whether there was in fact any good reason now for maintaining a rule which operated to defeat contractually agreed arrangements between the parties, of which all successors in title were aware, and which was capable of producing such an extraordinary result as that in the present case.

Lord Griffiths and Lord Mustill agreed with Lord Templeman and Lord Browne-Wilkinson.

Solicitors: Clifford Watts Compton, Stoke Newington; Berwin Leighton.

Challenge to warrant of imprisonment

Regina v Lewes Crown Court, Ex parte Sinclair

Before Lord Justice Watkins and Mr Justice Tucker

[Judgment July 6]

A defendant who sought to argue that a warrant of imprisonment Lewes Crown Court to draw up a warrant of imprisonment ordering his imprisonment for 3½ years, to be served consecutively rather than concurrently to the sentence he was already serving.

Mr Francis Moraes for the applicant; Mr Mark Shaw, who run consecutively to an existing sentence, it had to be taken that that sentence was to take effect forthwith.

However, the respondent had argued that the Divisional Court was without jurisdiction to hear the matter and that the proper forum jurisdiction. The applicant had argued that his was not an attack against the sentence but against the warrant, which was fundamentally wrong on the face of it because of a clerical error by the clerk of the court.

In his Lordship's view, the issue

ESTATES TIMES

Friday, July 24, 1992

ton Spa, Warwickshire, and a shop in Elgin, Grampian. Initial yield is 8.7% and net reversionary yield will be 11.25% on settlement of imminent rent reviews.

Rail consultation

The House of Commons transport committee has invited comments by October 1 on the railway privatisation plans. It is seeking submissions on topics including how the value of stations should be assessed. More details on 071 219 6101.

£9m investment

Catalogue retailer Betterware is to invest £9m in a 13-acre site at Park Lane, Sutton Coldfield, West Midlands, which it has bought from Evans of Leeds subsidiary Lonsdale Properties. The retailer will build a 160,000 sq ft warehouse on eight acres. Payment for the site will be deferred for two years.

Caddick in JV

Paul Caddick is to develop 48,000 sq ft of industrial and warehouse units in a joint venture with Yorkshire Water Enterprises at Normanton Industrial Estate.

£31,000 windfall from ground rent

A £30 pa ground rent investment will now produce £31,236 pa following a House of Lords ruling.

Alan Bayes, a partner of solicitor Clifford Watts Compton, his wife and investment company Barron Investments paid London Residuary Body about £50,000 four years ago for the freehold of a property in Walworth Road, London SE1.

The property had been sold to London County Council in 1930 by an individual, subject to a leaseback at £30 pa until the land was required for road widening. Prudential Assurance became the tenant of the building and sublet to London Electricity Board at a market rent.

The House of Lords held last week that the Pru's tenancy was void because the duration of the term was uncertain, leaving Bayes and the other purchasers as LEB's immediate landlord.

Julian Kostick, a partner of Clifford Watts Compton, said that Bayes' purchase of the property, subject to the Pru's tenancy, had been 'a commercial decision'.

'He now has the benefit of an occupational tenant of first-class covenant at a market rent of £31,000 instead of a nominal £30 pa,' said Kostick.

Kostick believes the case could have implications for both landlords and tenants looking to terminate a periodic tenancy.

The Rhiw Centre: substantial refurbishment

Chartwell adds to

CHARTWELL Land Investments has paid the receivers of Hardanger Group £10m for The Rhiw Centre, a shopping centre in Bridgend, Mid Glamorgan, plus two smaller retail investments.

The centre, built in 1972, has 25 shops and a current income of about £700,000 pa.

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FOR: Julian Kostick
FROM: IPK

Friday 14 August 1992

THE INDEPENDENT

Landlord's notice to quit was valid

Prudential Assurance Co Ltd v London Residuary Body and others.

House of Lords (Lord Templeman, Lord Griffiths, Lord Goff of Chieveley, Lord Browne-Wilkinson and Lord Mustill).
16 July 1992.

LAW REPORT

Friday 14 August 1992

An agreement purporting to grant a tenancy to continue until the land was required for road widening purposes was too uncertain as to its duration to create a lease, but it took effect as a yearly tenancy under which either party could serve notice to quit.

The House of Lords allowed an appeal by the London Residuary Body, in whom the rights of the original landlord – London County Council – had become vested, reversed the decision of the Court of Appeal (*The Independent*, 3 January 1992) and restored the decision of Mr Justice Millett, upholding the validity of a notice to quit served by the LRB on the tenant, Prudential Assurance Co Ltd.

The lease, dating from 1930, concerned a strip of land fronting Walworth Road, Southwark, and provided by clause 1 for an annual rent of £30, and by clause 6 that the tenancy should continue until the land was required by the council to widen the road.

The Court of Appeal held, following *Lace v Chandler* [1944] KB 368 and *Re Midland Railway Co's Agreement* [1971] 1 Ch 725, that the grant of the tenancy was bad for uncertainty as to its maximum duration, but it took effect as a yearly tenancy under which the landlord could only serve notice to quit if the land was required for road widening purposes.

The present landlords, having bought the property from the LRB, have no road-widening powers.

David Neuberger QC and *Paul de la Piquerie (Berwin Leighton)* for the tenant; *Alan Steinfeld QC* and *Stephen Lloyd (Clifford Watts Compton)* for the landlord.

LORD TEMPLEMAN said the term expressed to be granted by the agreement did not fall within the definition of a "term of years absolute" in section 205(1)(xxvii) of the Law of Property Act 1925 and therefore failed to grant an estate in land under section 1(1)(b).

But the tenant, entering under a void lease, became, by virtue of possession and the payment of a yearly rent, a yearly tenant holding on the terms of the agreement so far as they were consistent with the yearly tenancy.

A yearly tenancy was determinable by the landlord or tenant, at the end of the first or any subsequent year of the tenancy, by six months' notice, unless the agreement provided otherwise.

The idea that the tenant became a yearly tenant on terms which prevented the landlord giving notice unless the land was needed to widen the road made a nonsense of the rule that a grant for an uncertain term did not create a lease.

The principle in *Lace v Chandler*, reaffirming 500 years of judicial acceptance of the requirement that a term must be certain, applied to all leases and tenancy agreements.

A yearly tenancy was saved from being uncertain because each party had power by notice to determine at the end of any year. The term continued until determined as if both parties made a new agreement at the end of each year for a new term for the ensuing year.

A power for nobody to determine or for one party only to be able to determine was inconsistent with the concept of a term from year to year.

The decision in *Re Midland Railway Co's Agreement*, by which the Court of Appeal had been bound, was wrong.

LORD GRIFFITHS, LORD GOFF, LORD BROWNE-WILKINSON and LORD MUSTILL agreed.

Paul Magrath, Barrister

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