‘The madwoman in the attic: freeing landlord-tenant law’

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The Madwoman in the Attic: Freeing Landlord–Tenant Law

Author’s Note

When this editorial was first written, the Supreme Court’s judgment in Mexfield was expected to be a long way away. Now, we know it will be published before this issue hits the newsstands, but too late for its result to be considered. Moreover, judgment in Jones v Kernott will be handed down on the same day, considering fundamentally the same question as Mexfield: the extent to which non-statutory rules of law should interfere with individuals’ expressed intentions. Will there be major departures or minor tweaks, convergence or divergence? As we go to press, the only thing we can be sure of is that, in such controversial areas, controversy will continue. What follows should therefore, mutatis mutandi, form just one of many criticisms and defences of the judgment in Mexfield.

In a recent editorial, discussing cases including Mexfield Housing Co-operative Ltd v Berrisford, Martin Dixon gave an illuminating description of a particular mentality:

“Many academics often regard the law of landlord and tenant as somehow intellectually inferior to ‘real’ property law. Few teach it and even less [sic] write about it and I admit that until I was asked to develop a full course for delivery to undergraduates, I treated it rather like the mad Victorian aunt locked in the attic of the great house. Occasionally seen, sometimes talked about, often making a noise in the background and largely incoherent.”

Two things spring to mind. The first is that real-property law is a fine one to talk. In this century, J.W. Harris quoted Maitland’s description as regrettably still relevant: the English law of real property is full of rules “which no one would enact nowadays unless he were in a lunatic asylum”. The second is that the classic ‘madwoman in the attic’ was not an aunt but a wife, the first Mrs Rochester; and, in the classic analysis, she wasn’t mad at all, or at least not to start with. She was just different—born and

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raised in another culture, of mixed ethnicity—until she was locked up and abused by backward provincial Victorians for transgressing their oppressive, artificial categories of gender and of race.  

And so it is with the law of landlord and tenant. Famously “hybrid, part contract, part property”, its contractual nature has been repressed and warped by backward and artificial rules of land law: most strikingly in *Prudential Assurance v London Residuary Body*, in which a result was unanimously upheld despite being, in the majority’s view, “bizarre” and based on a rule lacking “any satisfactory rationale”. The common law has however continued to progress toward declaring the truth about agreements for the occupation of land, namely that they are fundamentally contracts. The court should start by interpreting an occupation agreement on its own terms and in its own context. Only then can we see which of the various rights we think of as proprietary were intended to be granted, and to what extent, so only then can we know which statutory or common-law rules may be relevant; and those rules too must be properly interpreted. The court falls into error when it prioritises land law and leaps to an inappropriate application of insufficiently analysed traditional land-law categories and rules.

And now we await the Supreme Court’s judgment in *Mexfield*. At the hearing on 5–6 October 2011, the court showed a clear interest in contractual analysis, and they may come to a simple contractual conclusion. However, if this answer does not appeal to them, the stage will be set for a reconsideration of *Prudential*, which *Prudential* ought not to be allowed to survive.

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5 Per Lord Browne-Wilkinson in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85 at 108H.

6 *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 A.C. 386 HL.

7 *Prudential* [1992] 2 A.C. 386, HL, per Lord Browne-Wilkinson at 396H.

8 The standard-bearer of this trend is often said to be the unanimous decision of the House of Lords in *Bruton v London & Quadrant Housing Trust* [2000] 1 A.C. 406; my own view is that *Bruton* is much more about statutory interpretation.

9 As in *Bruton* in the Court of Appeal [1998] Q.B. 834.
“[T]his appeal arises out of a memorandum of agreement ... [by which] the London County Council let to one Nathan a strip of land ... at a rent of £30 per annum from 19 December 1930 ‘until the tenancy shall be determined as hereinafter provided.’ The only relevant proviso for determination is contained in clause 6 which reads: ‘The tenancy shall continue until the said land is required by the council for the purposes of the widening of Walworth Road’ ... 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 ten years with power for the landlord to determine before the expiry of that period for the purposes 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] 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 ... [V]aluers acting for both parties have agreed that the annual current commercial rent [of the strip] exceeds £10,000.”

On this rendering of the facts, this Nathan and his successor are practically thieves, trying to take an advantage they must have known they were never intended to have, attempting permanently to deprive the rightful freeholder. Lord Templeman could have stopped there, even on principles of contractual interpretation as they stood in 1992: given this factual matrix, this agreement was not intended to endure for more than a few years. He preferred however to apply Lace v Chantler [1944] K.B. 368, in which an occupation agreement expressed to last “for the duration of the war” was held to be void, on the ground that a valid lease must have a certain maximum term. Lace cited no authority in support of the alleged rule; Lord Templeman added four authorities to assert that it had “500 years of judicial acceptance”. Therefore, the plaintiff and his successor had only ever had a periodic tenancy terminable on reasonable notice on any grounds or none.

11 See further below.
Lord Browne-Wilkinson’s speech gives two additional facts—concerning the original position of the tenant and the location of the land—which transform the picture:

“Before 1930, Mr. Nathan owned shop premises, 263-265, Walworth Road, with a frontage to the street. The agreement made in 1930 between the 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 L.C.C. for road widening ... [and] the strip was leased back to Mr. Nathan for continued use ... As a result of our decision Mr. Nathan’s successor in title will be left with the freehold of the remainder of No. 263-265 which, though retail premises, will have no frontage to a shopping street: the L.C.C.’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 ...

It is difficult to think of a more unsatisfactory outcome or one further away from what the parties to the 1930 agreement can ever have contemplated. Certainly it was not a result their contract, if given effect to, could ever have produced.”14

Ergo, Mr Nathan was the original freeholder, and he had only ever intended to grant, and the LCC had only ever intended to take, something like an option over the strip, and solely for the purpose of road-widening. In this context, on the full facts, the 1930 agreement made perfect sense, and it made perfect sense that, if the LCC ceased to exist without ever requiring the strip, Mr Nathan and his successors in title should be left with something close to a restoration of their freehold. By contrast, the rule asserted by Lord Templeman made no sense: “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.”15 So why did Lord Browne-Wilkinson agree to allow the 1930 agreement to be defeated? Only one reason is given: “for this House

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14 Prudential [1992] 2 A.C. 386 at 396D–G.
15 Prudential [1992] 2 A.C. 386 at 396H.
to depart from a rule relating to land law which has been established for many
centuries might upset long established titles.”

**Mexfield**

In *Mexfield*, the (titular) claimant is a ‘fully mutual’ housing association: a non-profit-
making co-operative whose object is to provide housing exclusively for its members.
Mexfield’s Rules state that:

> “no one can be a tenant of the association without also being a member; and
> that no one can be a member without also being a tenant.”

By statute, such associations cannot grant secure or assured tenancies under the
Housing Acts 1985 or 1988. As Ian Loveland has shown, Parliament’s intention and
assumption seems to have been that members of such associations could and would
give each other by contract the same level of protection as under the statutory
regime.

In 1993, Mrs Berrisford entered into an “Occupancy Agreement” (‘the
Agreement’) with Mexfield. It granted her exclusive possession of her house and
obliged her, inter alia, to pay rent weekly, at a rate which could be increased annually,
and “not to assign, sublet or part with possession or occupation of the whole or any
part of the property”. The Agreement states that it will continue “from month to
month until determined as provided in this Agreement”. The provisions for
determination are, at cl.5, that the member may determine the Agreement by giving
one month’s notice in writing, and, by cl.6, that Mexfield may determine the
Agreement “ONLY in the following circumstances”: a) for rent arrears, b) for breach
of other provisions of the Agreement, c) “[i]f the Member shall cease to be a member
of the Association”, or d) if a resolution is passed to dissolve the Association.

Applying ordinary principles of contractual interpretation, this is a tenancy for life
subject to earlier determination in the specified circumstances. Mrs Berrisford’s death
will necessarily trigger 6(b) and (c): she will cease to occupy the property, thereby

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16 *Prudential* [1992] 2 A.C. 386 at 397A.
17 *Mexfield* [2010] EWCA Civ 811 CA at [6].
18 I. Loveland, "Security of tenure for tenants of fully mutual housing co-operative" [2010] Conv. 461,
464–465.
19 *Mexfield* [2010] EWCA Civ 811 CA at [2], [8], [10.41(1)]
20 *Mexfield* [2010] EWCA Civ 811 CA at [8].
21 *Mexfield* [2010] EWCA Civ 811 CA at [9], emphasis in original.
breaching the Agreement, and she will cease to be a member of the Association, by virtue of ceasing to be. The matrix of fact simply reinforces this conclusion. Everyone wants maximum security of tenure for his or her home—a home for life, if one chooses; normally, the interests of landlords are the opposite, but not where the landlord is the tenants. Finally, there is the effect of statute. It seems probable that the Agreement meets the statutory requirements for a valid contract to grant a life tenancy; and, by s.149(6) Law of Property Act 1925, this is converted into a contract for a term of ninety years determinable after Mrs Berrisford’s death or in accordance with cl.5 and (the rest of) cl.6.

So far, everything makes sense. Then two very strange things happened. First, in August 2008, Mexfield sought an order for possession against Mrs Berrisford relying on Prudential: saying the Agreement had no stated maximum term, so she had only a common-law monthly tenancy. No properly functioning fully mutual housing association would seek to evict its members for no reason, and there is no explanation in the available judgments, but it emerged at the hearing in the Supreme Court that these proceedings (and those against other members of Mexfield) are motivated by a new mortgagee.

Second, it appears that, in the ensuing three years, no one put forward the obvious contractual interpretation of the Agreement. The judgment at first instance is not publicly available, but it appears that counsel for Mrs Berrisford primarily challenged whether Mexfield was a fully mutual housing association. On Mexfield’s appeal, Mrs Berrisford was unrepresented; Peter Smith J.’s judgment, allowing the appeal, accepts unquestioningly that Prudential applies and contains no analysis of the terms of the Agreement. Before the Court of Appeal, Mrs Berrisford was represented by new counsel. Yet, again, the obvious interpretation of the Agreement was not made although Mummery L.J. took the trouble to flag this up in his judgment:

“I would add that ... it is not contended that the relevant provisions of the Law of Property Act 1925 (s.149(6)) apply to this case so as to convert Ms Berrisford’s tenancy into a 90 year term subject to ... clause 6 of the Occupancy Agreement.”

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22 Mexfield [2009] EWHC 2392 (Ch) at [7]–[8] and [16]–[17].
24 Mexfield [2010] EWCA Civ 811 CA at [84].
Indeed, counsel for Mrs Berrisford actually conceded “that the terms of clause 6 of the Occupancy Agreement made the maximum term of the proposed lease to Ms Berrisford uncertain.”\(^{25}\) This concession might have been based on a belief that *Prudential* and *Clays Lane Housing Co-operative Ltd v Patrick* (1985) 49 P. & C.R. 72 barred arguing in the Court of Appeal that the Agreement was a contract to grant a life tenancy subject to earlier determination. However, *Clays Lane* need not be considered here, save to say that it is irrelevant: the contract in that case had significantly different terms from those of the Agreement.

Finally, in the Supreme Court, the proper contractual analysis has been put forward, albeit by the court itself. Counsel for Mrs Berrisford argued primarily for a life tenancy on the basis of an ancient land-law rule said to convert "automatically" any lease for an uncertain term to an individual into a lease for life, subject if applicable to earlier determination, and resisted a purely contractual approach.

*Prudential* and life tenancy

Does *Prudential* bar the proper contractual interpretation of the Agreement? Lord Templeman’s speech does not: in order to get from the facts as he stated them to the result, all that was needed was a contractual analysis, thus making his approval of *Lace* obiter. Lord Browne-Wilkinson, however, made clear that a contractual analysis on the material facts would have led to the appeal being dismissed; he felt compelled to allow the appeal solely on the basis of Lord Templeman’s presentation of authority. Lords Griffiths and Mustill said they agreed with Lord Templeman but also agreed with Lord Browne-Wilkinson as to “the unsatisfactory nature of this conclusion.”\(^{26}\) This necessarily means that they agreed with Lord Templeman only as to his analysis of the authorities. They must have agreed with Lord Browne-Wilkinson’s presentation of the facts and analysis of the parties’ intentions—if they had agreed with Lord Templeman about those, they could not have found the conclusion unsatisfactory in the slightest.

Even so, the ratio of *Prudential* is not that contractual interpretation of occupation agreements must always be overridden by common-law rules of land law. Rather, the

\(^{25}\) *Mexfield* [2010] EWCA Civ 811 CA at [49].

\(^{26}\) *Prudential* [1992] 2 A.C. 386 per Lord Mustill at 397C, and see Lord Griffiths at 396B.
majority held the material facts to be such that a reasonable observer would conclude the agreement was intended to be potentially perpetual and to bind successors in title, and that on authority any such agreement was void. If this view of the ratio is right, and if the above contractual interpretation of the Agreement in *Mexfield* is right, then *Prudential* is irrelevant in Mrs Berrisford’s case—and most others.

**Prudential v principle**

What if the Supreme Court should find that *Prudential* would on the face of it apply to the Agreement in *Mexfield*? Strong arguments have been made as to why *Prudential* does not or should not apply to periodic tenancies\(^27\) or to residential tenancies.\(^28\) But is there any reason not to depart from *Prudential* altogether? Any proposed reason would have to meet the test set by counsel for the respondent in *Prudential*, David Neuberger QC, as he then was: in principle, people should be free to make their own agreements and the court should uphold those agreements, unless there is very good reason to do otherwise.\(^29\) Various reasons have been offered since 1992.

‘Certainty’?

First, and most strongly felt by traditional land-lawyers, is the argument that one should not depart from ‘500 years of authority’. But of course the Supreme Court can depart from prior authority no matter how long established. Moreover, as J. H. Baker emphasises, “[t]he duty of repeating errors” was “a modern innovation”: the House of Lords only decided to be bound by its own previous decisions in 1898.\(^30\) We have therefore since 1966 returned to the traditional and correct view, that the duty of the highest court is to develop, or progressively refine the declaration of, the law in accordance with principle; any branch of the law which is not true to principle should be pruned away, as an unhealthy sucker, no matter how long and luxuriant it has grown.

\(^{27}\) S. Bridge, "Periodic tenancies and the problem of certainty of term" [2010] Conv. 492.

\(^{28}\) I. Loveland "Security of tenure for tenants of fully mutual housing co-operative".

\(^{29}\) *Prudential* [1992] 2 A.C. 386 at 388G–389D.

The traditional land-lawyer may grudgingly concede this but argue that ‘certainty’ is particularly important in land law. The argument seems to be that agreements concerning land may remain on foot for a very long time, and they are sufficiently important that they are likely to be drafted by lawyers. Lawyers will express the agreement in terms dictated by their understanding of the common law at the time. If the court later declares that the common law is in fact different and that those terms are to be understood differently, the intention of the parties will be set at nought. This may be a serious argument in other contexts. But, in the current context, for it to have any application, one would have to believe it possible for the following scenario ever to have occurred: The parties’ lawyers say to each other: ‘What our clients want is a periodic tenancy determinable on notice at any time. Rather than saying that, we will rely on the rule in Prudential and draft the agreement to say that we want a tenancy terminable only on the occurrence of a particular event.’ It is inconceivable that this could ever have happened. As for parties who actually intended a tenancy which could only be terminated on the occurrence of an event and took the rule in Prudential into account, they will have stated their agreement as having an extremely long term subject to earlier determination, and departing from Prudential will do them no harm.

This point must be emphasised in the strongest possible terms, given the paralysing effect the word ‘certainty’ has in the realm of land law. The peculiar nature of the rule in Prudential is such that, with the greatest respect to Lord Browne-Wilkinson, departing from it cannot “upset long-established titles” or defeat legitimate expectations.31

Moreover, and crucially in terms of practical effect, Lord Templeman not only seems to have been wrong about the authorities from the thirteenth to the early twentieth centuries—as counsel for Mrs Berrisford persuasively submitted in the Supreme Court—but was plainly wrong about the past hundred years.

In Great Northern Railway Co v Arnold (1916) 33 T.L.R. 114, the landlord submitted that an agreement for the duration of the then-current war was invalid. Rowlatt J.:  

31 Prudential [1992] 2 A.C. 386 at 397A.
“said that it was perfectly clear that both parties intended that the defendant should have the premises for the period of the war, and the question was whether the law was helpless in these circumstances.”

The law in this area “was not modern”; “it was not possible to-day to say that ... [the parties’] agreement could be torn up”, and, if it were necessary to imply a fixed maximum term, he would imply one of 999 years.32 When the next war broke out, many people again entered into tenancy agreements stated to be for the duration of the war, out of common sense and reliance on *Great Northern.*33 *Lace* therefore introduced huge uncertainty—in a society in which most people rented their homes, and in February 1944: people who had been living for four and a half years with the fear of losing their homes due to the Luftwaffe now had the additional fear of losing their homes due to the Court of Appeal. Parliament, unsurprisingly, acted very swiftly by passing the Validation of War Time Leases Act 1944. Equally unsurprisingly, they only did the necessary minimum, implying a term of 10 years determinable on earlier ending of the war.34 Counsel for the appellant in *Prudential* suggested that this showed Parliament was approving an existing principle.35 Lord Templeman refrained from saying any such thing, being old enough and wise enough to realise Parliament was far too busy in 1944 to indulge in beating round the overgrown bushes of land law.

Then, after *Lace,* the same thing happened again with *Re Midland Railway Co’s Agreement* [1971] Ch. 725 and then *Prudential.* At the hearing of *Mexfield* in the Court of Appeal, counsel for *Mexfield* confirmed:

“that *Mexfield* had begun to invite its prospective members/tenants to enter into the form of Occupancy Agreement which is the subject of the present appeal on a date between 1971 and 1992, i.e. after the decision in the *Midland Railway* case and prior to its being overruled in the *Prudential* case.”

This was a period in which “neither *Mexfield* nor its prospective members/tenants had any reason to consider that clause six could not constitute a valid term of the tenancy.”36 And it appears that there are many extant agreements in this form.37

33 See e.g. *Swift v MacBean* [1942] 1 K.B. 375.
34 *Prudential* [1992] 2 A.C. 386 at 391H–392A.
35 *Prudential* [1992] 2 A.C. 386 at 387H–388A.
36 *Mexfield* [2010] EWCA Civ 811 CA at [27].
So, from at least 1916 to 1944 and from 1971 to 1992, people with proper legal advice who wanted an agreement terminable on an event will have felt safe in simply saying so, without inserting an artificial fixed term. Affirming Prudential means overriding clear intentions expressed in roughly half of the past hundred years; departing from Prudential harms no one.

**Statute?**

Second, there is the question of whether statute in effect imposes the rule in Prudential. Lord Templeman cited s.1(1) of the 1925 Act, laying down that there are only two legal estates in land, the fee simple absolute in possession and the “term of years absolute”, and then cited s.205(1)(xxvii):

“‘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 ...”

He then simply asserted that this definition “recognised” the “[a]ncient authority” of the rule that a lease or tenancy had to have a fixed maximum term. With respect, this is plainly wrong, as David Neuberger QC had submitted:

“As a matter of ordinary language, a tenancy which determines on an event is within section 205(l)(xxvii): ‘a term of years ... liable to determination by notice ... or in any other event’”.

If Parliament had wanted to say that a ‘term of years absolute’ must have a certain maximum term, it could easily have done so.

**Megarry and Wade?**

Finally, Harpum, Bridge, and Dixon, citing various academic works in Megarry & Wade: The Law of Real Property, put forward a number of reasons to support the

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37 *Mexfield* [2010] EWCA Civ 811 CA at [4].
38 *Prudential* [1992] 2 A.C. 386 at 390H-391C
39 *Prudential* [1992] 2 A.C. 386 at 389B
assertion that “the rule [in Prudential] performs an essential function in the scheme of the law of property”.\textsuperscript{40} By far the most important is the claim that the rule:

“avoid[s] the injustice that could arise from the potentially perpetual continuation of a lease that the parties had implicitly intended to be of short duration, and where they had therefore made no provision for the periodic review of the rent.”\textsuperscript{41}

If the rule in Prudential were necessary to achieve this result, then it would obviously be justified. But it is not necessary, and assertions to the contrary are a striking illustration of traditional land-lawyers’ tendency to view contract law as another country. Since at least the late nineteenth century, it has been possible to imply terms into contracts on grounds most memorably described in 1939 as ‘the officious bystander test’.\textsuperscript{42} This is what Rowlatt J. did in Great Northern: if an officious bystander had asked the parties in 1914 whether, in saying that the lease should terminate on the end of the war, they meant that the lease should terminate within 999 years, the parties would have stared at him and said, ‘Yes, of course.’

Similarly, if Lord Templeman’s statement of the material facts in Prudential had been correct, a maximum term of 10 years could have been implied. As stated in the current leading authority:

"[W]hen the instrument does not expressly provide for what is to happen when some event occurs ... the question for the court is whether [the proposed implied term] would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean.”\textsuperscript{43}

(There is an obvious analogy here to the law on common-intention constructive trusts, at the time of writing; by the time of publication, we will know whether the Supreme Court has changed that law or affirmed the existing unifying principle.) The contractual rule must also apply where the instrument fails to provide for the non-occurrence of an event. So the law of contract is perfectly capable of dealing with

\textsuperscript{40} C. Harpum, S. Bridge, and M. Dixon, Megarry & Wade: The Law of Real Property, 7th edn, (London: Sweet & Maxwell, 2008), para.17-059. None of the works cited, or any others I have found, seem to me to meet the objections below.

\textsuperscript{41} Harpum et al, Megarry & Wade: The Law of Real Property, para 17-059.

\textsuperscript{42} The Moorcock (1889) L.R. 14 P.D. 64; Shirlaw v Southern Foundries Ltd [1939] 2 K.B. 206 at 207.

\textsuperscript{43} Attorney General of Belize and ors v Belize Telecom [2009] 1 W.L.R. 1988 (PC), per Lord Hoffmann at [17] and [21].
situations in which it is clear that the parties never intended a potentially perpetual lease; the “arbitrary and crude”44 device of the rule in Prudential is not required.

What then about those necessarily rare cases, of which Prudential appears to have been one, in which the parties did intend a potentially perpetual lease? Only two objections to potentially perpetual leases are offered by Harpum et al. First, it is said that “[t]he certainty rule serves to distinguish a lease from a fee simple.”45 To labour the obvious: a fee simple is an estate held of the Crown and a lease is not. Second, there is an argument regarding s.2 Rentcharges Act 1977 which is disposed of not only by the previous point but by the authors themselves.46

Finally, it is said, that the “rule [in Prudential] can be readily circumvented by creating a fixed term of years determinable on the earlier occurrence of a specified contingency.”47 This is a reason for, not against, departing from Prudential—even in the strict sense, qua rule against potentially perpetual leases—and indeed the most important reason. The idea that it should be easy to create a legally binding agreement which will continue, unless X happens, in practical perpetuity—but only if, with the benefit of expensive arcane knowledge, one carefully avoids saying what one means and instead uses the ruse of ‘shall determine in one quadrillion years or when X happens, if earlier’—is the sort of unprincipled nonsense which brings the law into disrepute; and one of the main purposes of the highest court is to root out such poisonous weeds.

Conclusion

The law of landlord and tenant is not mad, when dealt with in the spirit of contract. Each occupation agreement should be considered first of all as an individual, on its own terms and in its own context—rather than being deemed a failure or a threat if it does not conform to a repressive nineteenth-century stereotype. This is not an argument in favour of repressive feudal stereotypes.48 What the first Mrs Rochester needed was not to move back to early nineteenth-century Jamaica but to move a long

way forward in time; and it is deeply to be regretted that her time has not yet fully come.

Where, as in the primary analysis of Mexfield above, a contractual analysis and a proper application of statute lead to a straightforward answer, inappropriate application of common-law rules relating to traditional land-law categorisations should not be allowed to confuse and subvert that resolution. And where, as in the alternative analysis above, a particular land-law rule is directly applicable but is unnecessary, unprincipled, irrational, and calculated both to produce injustice and to reinforce popular misconceptions of and hostility to law—that rule should be declared as what it is: not law at all.49

Juanita Roche*

49 “[I]f it be found that the former decision is manifestly absurd or unjust, it is declared not that such a sentence was bad law, but that it was not law”: Blackstone, Commentaries, (1765), vol 1, p.70; cited by Lord Nicholls in Re Spectrum Plus Ltd [2005] 2 A.C. 680 at [34].
* Thanks to Martin Dixon and Mark Wonnacott for comments, and for rollicking opposition; any errors or infelicities remain the author's.