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PERPETUITIES REFORM IN IRELAND? THE LAW REFORM COMMISSION'S PROPOSALS

Lucy-Ann Buckley*

Introduction

The rule against perpetuities, and the related rules against inalienability and accumulations, have long been a source of confusion and misery to students and practitioners of law. The rule against perpetuities,¹ in particular, often appears so arbitrary, capricious and contradictory that it is not uncommon even for experienced practitioners to be caught by the array of traps and pitfalls that await the unwary. The difficulty caused by the complexity of the rule is compounded by the fact that many people are unaware of the extent of its application: the rule is commonly assumed to apply wholly or mainly in the context of trusts and settlements, and it is often forgotten that such diverse matters as the granting of future easements and commercial options to purchase also fall within its scope. Given the uncertainty that also surrounds the concept of the 'life in being', it is not surprising that the rule has led to a rich vein of litigation, and the frustration of many an intended settlement.

Those with any exposure in this most technical of arenas will be aware of the myriad phantoms that may arise to defeat testamentary and other dispositions. Those former law students who can bear to throw their minds back will recall, with various degrees of fondness or abhorrence, the many tales of unborn widows, magic gravel pits, fertile octogenarians and precocious toddlers which beguiled their study of Real Property and Equity. Yet are these creatures truly as wholly unreal as they must appear to those compelled to study them? Does the rule against perpetuities serve any useful purpose in the modern world? Has the time come to abolish the perpetuities doctrine, as has been argued by the Irish Law Reform Commission² in a recent report?³

Any discussion of perpetuities reform must address a number of key issues. The primary question is, of course, whether the rule against perpetuities is truly obsolete: if it is, or if its objectives are achieved by other means, or if the law is for some reason unworkable, the case for abolition is strong. If the rule is not obsolete or wholly unworkable, and still fulfils social or economic functions, is it in need of reform? If so, is that reform feasible and worthwhile, or is the rule as it stands now so complex and unsatisfactory as to make appropriate reform impossible? If this is the case, it may well be preferable to abolish the existing rule completely, and replace it with a more appropriate mechanism.

This article will examine the utility of the rule against perpetuities in modern society, with a view to ascertaining the need for reform or abolition of the law. It will begin by offering a brief account of the development of the rule, and the rationales for the limitations on the freedom of ownership and alienability thus imposed. It will then

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¹ Hereinafter referred to as 'the rule'.

² Hereinafter referred to as 'the LRC'.

³ Law Reform Commission, *Report on the Rule against Perpetuities and Cognate Rules* (LRC 62-2000) (December 2000), hereinafter referred to as 'the Report'.

focus on the difficulties caused by the rule, and consider the arguments in favour of amendment and abolition. The approaches taken in neighbouring jurisdictions will be outlined briefly, and compared with the proposals put forward by the LRC. Finally, it will be argued that, while the rule against perpetuities is now in many respects obsolete, there is still a case for a rule of this kind in modern law in certain contexts, and that for this reason the wholesale abolition of the rule, without an adequate substitute to deal with particular contingencies, is undesirable.

The rule against perpetuities: historical development and rationales

The rule against perpetuities essentially requires that any future interest in any kind of property must vest within the so-called perpetuity period, which consists of any life or lives in being (including any period of gestation) and a further 21 years thereafter.⁴ If there is no life in being, the period is simply 21 years. If, at the outset, there is the slightest possibility that vesting may occur outside the perpetuity period, the interest granted is void. This rule is strictly applied, no matter how improbable a contingency may appear, and irrespective of what actually occurs – even if the interest has apparently vested prior to a court hearing. Historically, it was not possible to ‘wait and see’ what in fact happened, and this approach still applies in Ireland, although it has been statutorily altered elsewhere, as will be discussed below.

The rule was originally designed to prevent property being tied up without an owner for over-long periods (or in perpetuity), and hence being removed from economic life.⁵ It was initially aimed at the type of settlement or trust, common in landed families, which secured property for successive generations and retained land and other assets within the family group. The rule also sought to prevent deceased settlors from restricting the financial freedom of later generations (the so-called ‘dead hand’ rationale).⁶ The perpetuity period⁷ therefore represented a balance between the desire of landowners to retain land within lines of descent, and the greater need of society to ensure that land generally remained marketable – an interest that began to prevail with the opening up of trade, from the end of the feudal period,⁸ and culminated in the Settled Land Acts 1882-1890. The doctrine of overreaching introduced by that legislation meant that interests in land could be transformed into interests in capital, the availability of which to the national economy was again ensured by the rules against perpetuities and inalienability. At this point, the policy of the courts,

⁴ Due to constraints of space, this article will focus on the rule against perpetuities only. The related rule against inalienability is concerned with the freedom to alienate property, when vested: property must not be rendered inalienable for longer than the perpetuity period. The rule against accumulations prevents the compulsory accumulation of income for longer than the perpetuity period. Both of these rules are discussed in the LRC’s report on perpetuities, but the reforms suggested are beyond the scope of this paper.

⁵ Similarly, the rule against inalienability seeks to prevent property being frozen in ownership, and thus being removed from the marketplace, and the rule against accumulations strives to prevent the reduction of liquidity.

⁶ Other rules, such as the Rule in *Whitby v. Mitchell* (1890) 44 Ch D 8, also apply in this context.

⁷ The perpetuity period corresponded to the practice commonly used in strict settlements, whereby land was settled on a person (‘X’) for life, with remainder to his eldest son in tail. Consequently, the longest period that could elapse before the entail could be barred was the life of X plus the period of his son’s minority, until recently 21 years.

⁸ Para 1.05 of the Report.

promoting freedom of alienation, finally began to fit with legislative policy, which, until then, had largely tended to preserve the expectations of settlors.⁹

As Gray has pointed out, the rule against perpetuities ‘represents one of the most remarkable attempts made by the common law to give legal effect to a number of distinct (but not unrelated) elements of social and economic policy’.¹⁰ Not only does the rule attempt to reconcile the principle of freedom of alienation with the need to ensure that land is not so tied up as to prevent free alienation by subsequent owners,¹¹ but it also seeks to avoid uncertainty in the context of land ownership, which is likely to lead to litigation and high administrative costs in the running of settlements.¹² Since uncertainty is increased by dependence on remote events, excessive remoteness is to be avoided. Other concerns include the avoidance against undue concentrations of wealth, often centred on an ‘urge to family aggrandisement’,¹³ whereby large proportions of a nation’s wealth might be confined to the control of a few family groups; as Leach notes, this was a very real danger in years gone by.¹⁴ It has even been argued that the rule gave effect to a social desire for the survival of the fittest, by ensuring unrestricted economic competition and preventing land being perpetually bound to the ‘weak’.¹⁵ Finally, the rule is said to guard against capricious or eccentric settlements, although as Gray notes, ‘the success of the rule in restraining capricious donation can be seriously over-estimated’.¹⁶

It might be argued that, as the scope of the rule has expanded and social circumstances have altered, the objectives of the rule have changed. While the original emphasis was very much on restricting the otherwise unbounded freedom of landowners, by guarding against unduly remote vesting and over-long settlements, the modern application of the rule has, if anything, been paternalistic in its promotion of freedom. Particularly in a commercial context, the rule will frequently operate to redress imbalances in bargaining and to negate undesirable contracts. This is most easily seen in the granting of future or conditional easements and options to purchase.¹⁷ In either of these situations, it is highly undesirable from a vendor’s point of view for options to be exercisable for prolonged periods, yet this is what may happen if time limits for the exercise of options are not adequately specified in contracts. Similarly, from a landowner’s viewpoint, the possibility of easements arising many years after the supposed completion of a transaction greatly reduces the marketability of land. The rule against perpetuities, by ensuring that some limit is placed on these possibilities, and rendering void any transactions breaching the rule,

⁹ *Ibid.*

¹⁰ Gray, *Elements of Land Law* (2nd ed., 1993), p 646.

¹¹ Gray terms this ‘the inherent contradiction of free alienation’: Gray, *supra* n 10, p 647.

¹² Epstein, ‘Past and Future: the Temporal Dimension in the Law of Property’ (1986) 64 Wash ULQ 667, cited in Gray, *supra* n 10, p 647.

¹³ Leach, ‘Perpetuities: Staying the Slaughter of the Innocents’ (1952) 68 *LQR* 35, 40.

¹⁴ *Ibid.*, p 39.

¹⁵ Simes, ‘Policy Against Perpetuities’ (1954-55) 103 Univ Penn L Rev 707, 722, cited in Gray, *supra* n 10, p 650.

¹⁶ Gray, *supra* n 10, p 651.

¹⁷ The grant of an easement subject to the satisfaction of a condition is a contingent interest in property, as the condition may not be fulfilled within the perpetuity period. Hence, the grant is subject to the rule against perpetuities: *Dunn v. Blackdown Properties Ltd.* [1961] Ch 433. Likewise, options to purchase confer contingent interests in property, and are subject to the rule. They will therefore be void if they are exercisable outside of the perpetuity period. See further para 3.09 of the Report.

effectively protects some parties from the undesirable consequences of their bargains – an interesting deviation from the original aims of the rule.

Whether this consequence is desirable is of course open to debate. It might well be argued that commercial parties, who are most likely to make contracts of this kind, are among those best able to obtain legal advice and defend their interests. In this regard, the effect of the rule against perpetuities may be seen as an unwarranted attack on the freedom of contract. On the other hand, the effects of the rule may justly be viewed as part of the greater principle of caveat emptor, and as an incentive for contracting parties to ensure that appropriate vesting periods are specified, thus promoting the overall economic good. In this context, the rule might still be viewed as performing a valuable social function, even if that function is not the one originally envisaged.

The rule in practice: problems, contradictions and confusion

Although the objectives of the perpetuities doctrine may be considered admirable, it has not been uncontroversial in application. Strangely, the most denigrated consequences of the rule have all resulted from what should be one of its key benefits, namely, the promotion of certainty. The primary concern of the rule is to ensure that vesting cannot occur outside of the permitted period. However, the emphasis in the decided cases on possibilities, rather than probabilities, and the further, somewhat startling freedom given (solely in this context) to the legal imagination, have only succeeded in bringing the law on perpetuities into disrepute.

The key to the difficulties experienced by settlors lies in the date at which possible contraventions of the rule are assessed. Courts have been adamant in considering possible events as at the date of effect of the instrument in question, and in excluding later events from analysis.¹⁸ The desire for certainty led the common law courts to reject the option which would allow participants to ‘wait and see’ what occurred, and the obsessive concern with what *might* conceivably happen led to a focus on remote, theoretical possibilities rather than likely eventualities. While a ‘wait and see’ approach would lead to failure only if it were clear that vesting *must* occur outside of the perpetuity period, the common law approach ensured that settlements failed unless it was established that vesting *could only* occur within the period.

It is the doctrine’s obsessive concern with remote, outside chance that has led to some of the most infamous features of the rule, for which it has justly been reviled. The key examples of law run mad are outlined in almost all major textbooks, as well as in the LRC’s report – prime candidates include the ‘fertile octogenarian’ and ‘precocious toddler’ cases, which will be discussed at a later stage in this paper. Even apart from these most notorious instances, examples abound: in *Re Wood*¹⁹, the so-called ‘magic gravel pit case’, the court ignored the fact that the relevant gravel pits were exhausted prior to the hearing and within six years of the testator’s death. It then held void a gift to such of the testator’s issue as were alive when the pits were exhausted, on the grounds that it was theoretically possible that the pits would not be exhausted within 21 years of the testator’s death.²⁰ In *Re Stratheden and Campbell*,²¹ the case of ‘the

¹⁸ Para 2.06 of the Report.

¹⁹ [1894] 3 Ch. 381.

²⁰ On cases of this kind, involving administrative contingencies, the LRC comments that courts will often interpret settlements arbitrarily, e.g. by assuming the contingency would be fulfilled within a

regiment without a colonel', a gift to a volunteer corps 'on the appointment of the next lieutenant-colonel' was held to be void, as it was in theory possible that no colonel would be appointed within the following 21 years. Yet another trap for the careless draftsman has been 'the unborn widow' (or widower).²² The difficulty in this instance arises where a life estate is granted to a surviving spouse of a donee, since the surviving spouse may not be born at the time of the testator's death. Although a gift to such a surviving spouse will be valid, as such a person must necessarily marry the donee during his or her lifetime, a subsequent gift to the children of the marriage is void, as it may vest outside the perpetuity period.²³ As Leach has commented on this possibility, '[n]o one has ever found a case where this has actually happened; but since some ingenious fellow pointed out that it might happen, many perfectly innocent gifts have been stricken down'.²⁴

Moves towards reform: arguments in favour of abolition and change

Given the difficulties caused by the strict application of the rule against perpetuities, one might well ask why the rule has endured as long as it has: surely the case for reform is clear? Yet it was not until the twentieth century that a clamour for reform was heard, and in many cases, the apparently sound arguments advanced by reformers were countered by apparently equally persuasive arguments by traditionalists. The two sides generally agreed on the validity of the original policy objectives for the rule, but while reformers tended to emphasise the redundancy of those aims, and the change in socio-economic circumstances, as well as the inconsistencies in the application and consequences of the rule, traditionalists contended that the policy needs met by the rule were by no means obsolete. It must also be noted that the reformist camp suffered from some internal division, between those pleading for reform, and those arguing for outright abolition.

A brief survey of the literature in this area clearly illustrates the divisions in thought. The American professor, Barton Leach, for many years a vigorous advocate for reform, did not particularly advocate abolition. Despite repeatedly illustrating the problems caused by the rule, and arguing that the social situation prevailing at its inception had altered, he concluded that '[t]he Rule is basically sound. The job is one for the repair shop, not the scrap yard'.²⁵ Morris and Wade, among the staunchest advocates of the rule, contended that '[t]he Rule expresses a perfectly reasonable policy. It strikes a fair balance between the desires of members of the present generation, and similar desires of succeeding generations, to do what they wish with

reasonable time, in order to uphold the gift. Hence, the attempts by particular courts to mitigate the harshness of the rule may lead to arbitrariness in its application. See para 2.12 of the Report.

²¹ [1894] 3 Ch 265.

²² See, e.g., *Re Hancock* [1896] 2 Ch 173 (CA).

²³ E.g. 'to A for life, remainder to any wife he may marry for life, remainder to such of their children as shall be living at the death of the survivor of A and such wife'. If A is a bachelor, he may marry a wife who was not born at the time instrument comes into effect. In this situation, the gift to A's wife is valid, as A is a life in being, and any wife must marry A during his lifetime. However, the gift to A's children is void, as it may vest outside the perpetuity period, if A's wife survives A by more than 21 years. See further para 2.20 of the Report.

²⁴ Leach, *supra* n 13, p 45. As in most cases involving a breach of the rule against perpetuities, this outcome can be avoided by careful drafting.

²⁵ *Ibid.*, p 59.

the property which they enjoy'.²⁶ Even they, however, admitted that the desire of the rule for certainty 'can be bought at too high a price' in some situations.²⁷ The English Law Commission criticised the rule for the complexity, harshness and uncertainty of its operation, and for the breadth of dispositions it covered,²⁸ yet also opted for reform. The LRC, echoing these earlier criticisms, has, however, taken the opposite view as to the appropriate solution, and advocates abolition.

Analysing the arguments on the perpetuities issue, Emery has noted that proponents of the rule usually focus on the economic and social undesirability of tying property up in trusts for too long (as this may hamper investment and therefore impinge on national economies), and on the 'dead hand' rationale.²⁹ He points out that both of these arguments are often contested, as '[s]ome argue that the economic and social values enshrined in the rule do not deserve protection, others that those values are adequately protected by other rules and practices, so that the perpetuity rule is otiose'.³⁰ It is also argued by many writers that even if the rationales are accepted, the current law is unsuited to achieving the desired purposes.³¹

The basic problem with the rule as it stands is succinctly expressed by Mee: 'The Rule against Perpetuities sees an attempt by the law to create a theoretical model which will be applied with mathematical precision. Unfortunately, not only is the result unsatisfactory because of its divorce from real life, it is also imperfect as a logically consistent system'.³² How just is this criticism? The unfortunate consequences of the rigid application of the rule have already been briefly outlined, but how valid are the charges of obsolescence, inconsistency and unreality?

Is the rule against perpetuities obsolete or redundant?

With regard to obsolescence, it cannot be denied that changes in the legal and socio-economic structure have rendered it increasingly unlikely that large-scale dynastic settlements, such as the rule against perpetuities was originally designed to combat, will occur in large numbers. Contemplating the potential consequences of removing the rule, the LRC notes that Ireland's socio-economic background is different to England's, and that there are very few landed gentry who might be inclined towards the type of settlement the rule guards against.³³ Taxation also discourages this type of

²⁶ Morris and Wade, 'Perpetuities Reform at Last' (1964) 80 *LQR* 486.

²⁷ *Ibid.*, p 492.

²⁸ Law Commission Consultation Paper No 133 (October 1993), Part IV A, discussed in Emery, 'Do We Need a Rule Against Perpetuities?' (1994) 57 *MLR* 602, 606.

²⁹ Emery, *supra* n 28, p 603.

³⁰ *Ibid.*, p 603.

³¹ Somewhat stranger is an argument, advanced briefly by the LRC, regarding legal education. The LRC contends that since universities now have to choose between spending a huge amount of time teaching the rule, and spending time on more useful areas, the chances are that they will choose not to teach the rule sufficiently. This will mean that rule '...will become an even more dangerous weapon in the hands of many practitioners...' (para 4.19 of the Report). One might retort that the content of the law should not be driven by what universities can find the time to teach, and that if the problems caused by the rule were truly serious, the implications of the rule would surely be taught in full. However, this issue seems peripheral in the larger debate.

³² Mee, 'Return of the Fertile Octogenarians' (1992) 14 *DULJ* 182, 192 (hereinafter 'Mee (1992)').

³³ Para 4.20 of the Report.

settlement,³⁴ and the LRC therefore feels that it is unlikely that removing the rule would lead to longer discretionary trusts than presently exist.³⁵

Since it considers it unlikely that removing the rule would lead to vast numbers of the type of settlement the rule discourages, the LRC argues that ‘... the purposes served by the Rule in the modern world are at best slight’.³⁶ It notes that the contention that the rule is necessary to prevent land being withdrawn from commerce was understandable at a time when land was the only real asset, but argues strongly that this is no longer the case. Dynastic ambitions which might incite testators to retain specific land for future generations have waned, and in any event the legal context has altered, as the Settled Land Acts, conferring a power of overreaching, no longer permit land to be removed from the market place. While it may justly be contended that the Settled Land Acts do not deal with the tying up of capital, and that trustees at present are prevented from taking investment risks, the LRC feels that ‘... this argument has probably been overstated’,³⁷ as the amount of money involved is small in comparison to overall economy. In addition, the LRC challenges the assumption that risk is always better than prudent investment, arguing that this is not necessarily the case.³⁸

With regard to the ‘dead hand’ argument, the LRC argues that the rule against perpetuities is in fact of very little use in promoting freedom and flexibility for future generations. Indeed, the rule itself does not purport to advance this freedom: its sole aim is to prevent the unduly remote vesting of contingent interests. It is therefore of no assistance in many changing family situations, and has nothing to say on the remodelling of trusts or the suitability of settlements over time.³⁹ The LRC therefore strongly contends that a better way of implementing a policy of flexibility would be to adopt legislative measures on the variation of trusts, a view greatly amplified in the report published concurrently with the report on the rule against perpetuities.⁴⁰

For all the forgoing reasons – changes in social and economic structures, changes in tax law, statutory powers of overreaching – it seems fair to say that the rule against perpetuities probably *is* obsolete in relation to settlements and trusts, and will become even less necessary if the powers of variation of trusts advocated by the LRC are enacted.⁴¹ However, just because the rule appears to be obsolete in some regards, does not mean that it is necessarily redundant in all respects. Owing to the possible change in focus of the rule outlined earlier, it may be argued that the rule continues to play a valuable role in the context of some commercial transactions. The LRC itself, despite

³⁴ *Ibid.*, para 4.21.

³⁵ *Ibid.*, para 4.22. However, given the frequency of changes in revenue law, this is not an entirely satisfactory argument.

³⁶ Para 4.01 of the Report.

³⁷ *Ibid.*, para 4.06.

³⁸ *Ibid.*, para 4.02 *et seq.*

³⁹ *Ibid.*, para 4.10.

⁴⁰ Law Reform Commission, *Report on the Variation of Trusts* (LRC 63-2000) (December 2000).

⁴¹ However, note Mee’s contention that the proposed variation of trusts legislation may be inadequate to deal with difficulties that might arise with perpetual trusts. Mee also argues that a means of ensuring a ‘balance between the generations’ on the issue of property control is still required, and that the LRC’s proposals do not discuss how this is to be achieved, in the absence of a perpetuities-type rule. See Mee, ‘From Here to Eternity? Perpetuities Reform in Ireland’ (2000) 22 *DULJ* 91, 96 (hereinafter referred to as ‘Mee (2002)’).

its concern regarding the impact of the rule on commercial transactions,⁴² notes the risk that permitting the grant of future easements could render land unsaleable, particularly as easements are notoriously difficult to terminate, once granted.⁴³ It also notes that permitting third parties to exercise options to buy leasehold land might discourage maintenance and development of the land by the lessee.⁴⁴ Accordingly, it is suggested here that the value of the rule in the commercial context cannot easily be dismissed.

It is certainly legitimate to argue, as the LRC does, that the present perpetuity period is inappropriate in a commercial context. As things stand, the perpetuity period will often be too long (for example, if a Royal Lives clause is used) or too short (21 years, where there are no lives in being). This, however, is a different point: the issue here is the length of the period, not the application of the principle. More serious is the charge that the rule ‘represents an unwarrantable interference with the freedom of contract of parties dealing at arms’ length.⁴⁵ The LRC argues that the ‘dead hand’ argument is irrelevant in a commercial context, and the impact of the rule on ‘harmless agreements’⁴⁶ is unconscionable. The answer to this charge must lie in the definition of ‘harm’: if, as has been argued, it is undesirable that potential interests should remain uncertain for prolonged periods, thus threatening the marketability of assets, agreements which would have this effect are not ‘harmless’. Furthermore, the remedy is surely in the hands of those drafting agreements, as the LRC repeatedly emphasises the ease with which the rule can be circumlocuted. The true argument, in this context, seems to be that drafters do not address their minds to the full implications of the rule, and hence do not take steps to avoid it: while this lack of awareness may well inform actions for professional negligence, it is not easy to see why it should affect an issue of legal policy.

This is not to say that reform is not desirable in this area: if the LRC is correct in its assessment of the difficulties caused by the present rule in the commercial context, it is worth considering whether the same end might be achieved by different means. One possibility would be ameliorating the present rule with a *cy-près* power, whereby courts might modify dispositions to bring them in line with the rule against perpetuities (for example, by removing offending phrases or reducing vesting periods). This issue is not discussed in the LRC’s report, as it was deemed irrelevant once the abolition of the entire rule was preferred. While constraints of space do not permit a detailed discussion of a potential *cy-près* power in the present paper, it is something that merits further consideration – although it might well be argued that increasing judicial discretion in this area would lead to even more confusion regarding the application of the rule. Other possibilities would include a ‘wait and see’ rule or the imposition of an automatic statutory time limit for the vesting of commercial interests. However, the LRC feels that the ‘wait and see’ approach would not alleviate the difficulties in this area,⁴⁷ and the possibility of a statutory time period for

⁴² Para 3.04 of the Report. This concern is not new: as far back as 1989, the LRC considered this one of the most urgent issues raised by the rule, although the reforms suggested at that time were not adopted by the legislature. See *Report on Land Law and Conveyancing Law: General Proposals* (LRC 30-1989), p.5, cited at para 3.04 of the Report.

⁴³ Para 3.07 of the Report.

⁴⁴ *Ibid.*, para 3.23.

⁴⁵ *Ibid.*, para 3.49.

⁴⁶ *Ibid.*, para 3.50.

⁴⁷ *Ibid.*, para 4.30.

commercial transactions would probably be defeated by the difficulty of drafting a satisfactory definition of what should count as a ‘commercial transaction’.⁴⁸

Is the rule against perpetuities inconsistent?

While a good case may be made for the continued (if limited) relevance of the rule against perpetuities in modern society, it cannot be denied that the law as it stands is riddled with inconsistencies, both in the detail of the law and at a more general policy level. From a policy point of view, the LRC contends that the approach of the law in relation to alienability is inconsistent, since it imposes heavy restrictions on settlors under the rule, while allowing almost complete freedom of testation.⁴⁹ The further incoherence of policy in this area is illustrated by the consequences of failure where settlements are concerned, as a finding that a settlement is void will usually result in a windfall for a person whom the settlor has deliberately chosen not to benefit. Far from upholding freedom of disposition, therefore, the law effectively deprives the intended recipient and benefits someone who was definitely not intended.⁵⁰

This view is contested, to some extent, by Emery, who considers that the alienability argument ‘although easily overstated, does have a certain force’,⁵¹ as risk capital is tied up, even though specific assets may be sold or overreached. He reasons that the ‘...alienability argument does suggest that for a legal system to place no restriction on disponents’ imposition of perpetual trusts is likely to be a bad thing’.⁵² He particularly focuses on the inflexibility that will inevitably arise from dead hand control, and on the paradox, described by Gray,⁵³ that ‘to permit unlimited freedom of disposition to one generation would risk denying it entirely to future generations’.⁵⁴ It seems, from these arguments, that if policy requires a measure of control over the power to alienate, full consistency cannot be achieved in this context.

Inconsistency is also found in the detail of the law. For example, a special power of appointment (but not a general one) is void, if it is possible that a power might be exercised outside of the perpetuity period. Confusingly, the court will allow a ‘wait and see’ approach in this context (but not in others), and will also examine the facts existing at the date of the appointment, rather than only those facts existing at the commencement of the perpetuity period.⁵⁵ Although Morris and Leach commend this as avoiding ‘manifest absurdity’,⁵⁶ the LRC rightly notes that it is difficult to

⁴⁸ This difficulty previously defeated the English Law Commission, which preferred to confine the rule to specific areas, necessarily excluding many commercial situations, with a small number of express exclusions from the rule and a statutory power to specify further exemptions. The LRC, however, feels that this approach is flawed, as it assumes that the legislature will keep up to date with problems posed by the rule and be willing to amend the legislation when required. In addition, this approach is reactive not proactive, and may only operate after injustice has been done. See para 3.54 of the Report.

⁴⁹ *Ibid.*, para 4.07. Freedom of testation in Ireland is to some extent limited by the provisions of the Succession Act 1965, which, among other things, gives certain automatic entitlements to a surviving spouse.

⁵⁰ *Ibid.*, para 4.08.

⁵¹ Emery, *supra* n 28, p 603.

⁵² *Ibid.*, p 604.

⁵³ *Supra* n 10, p 647.

⁵⁴ Emery, *supra* n 28, p 604.

⁵⁵ Para 2.34 of the Report.

⁵⁶ Morris and Leach, *The Rule against Perpetuities* (1962, 2nd ed.), p 152, cited at n 80, para 2.35 of the Report.

reconcile this approach with the refusal to adopt a ‘wait and see’ approach elsewhere, thus permitting absurdities in less select situations.⁵⁷

Again, while options to purchase will generally be void if they are exercisable outside of the perpetuity period, the rule does not apply to all types of option, for example, options to renew leases.⁵⁸ The issue of enforcement by and against third parties is also complex.⁵⁹ The possible exemption for pre-emption rights seems inconsistent, and also increases the difficulties posed by this area, as it can be hard to distinguish between these and options to purchase.⁶⁰ Since the rule also applies to personalty, share options should also be included, though three separate lines of analysis apply here, some of which would exempt share options.⁶¹ Pension funds also fall within the rule, although legislative protection is now provided in this regard, and a different ‘settlement’ analysis also ameliorates rule.⁶² In practice, most pension schemes now effectively fall outside rule, although rule may still apply in some circumstances, with potentially disastrous consequences in some cases.⁶³

Noting that the courts seek to avoid the worst consequences of a strict application of the rule by developing rules of construction likely to uphold settlements, the LRC argues that this occasionally leads to strained and unnatural interpretations.⁶⁴ This may facilitate individual legatees, but makes the overall application of the rule even more unpredictable. Indeed, the whole issue of drafting and interpretation also leads to a broader challenge to the rule: since it is clear that in most cases settlors may achieve their objectives by careful drafting, what is to be gained by a rule which impinges only on those who use an incorrect legal formulation? As Leach comments, ‘...there is a serious objection to a rule which declares that [a] scheme can be carried out by some words and cannot be carried out by others’.⁶⁵ More practically, as the LRC itself asks, if it is relatively easy for a rule to be evaded, of what use is that rule?⁶⁶ Indeed, the LRC considers that ‘...the rule is now so anomalous that its victims are usually ill advised donors who violate its letter rather than its spirit.’⁶⁷ If this is indeed the case, and if Leach is correct in his contention that there have been almost no cases where the impugned settlement could not have been redrafted to come within the rule,⁶⁸ it is admittedly difficult to see how the rule may be said to fulfil any public policy objectives. If it may be said that a countervailing policy would prefer that dispositions should be upheld, the rule is indeed not only futile, but counter-productive.

The answer to this charge possibly lies in a misunderstanding of the perpetuities doctrine. The object of the rule is not to cause transactions to fail, but to ensure that

⁵⁷ Para 2.35 of the Report.

⁵⁸ *Ibid.*, para 3.19.

⁵⁹ *Ibid.*, para 3.16 *et seq.*

⁶⁰ *Ibid.*, para 3.27.

⁶¹ *Ibid.*, para 3.28 *et seq.*

⁶² *Ibid.*, para 3.33 *et seq.*

⁶³ *Ibid.*, para 3.44.

⁶⁴ *Ibid.*, paras 2.41-2.43.

⁶⁵ Leach, *supra* n 13, p 47. However, one might compare this to the need to use the correct words of limitation to confer an interest in land: the law seeks certainty as to what exactly is being conveyed.

⁶⁶ Para 2.22 of the Report.

⁶⁷ *Ibid.*, para 4.18.

⁶⁸ Leach, *supra* n 13, p 36.

vesting occurs within what is deemed to be an appropriate period. The avoidance of a transaction is merely a result of a failure to comply with the overriding principle. For this reason, the possibility of ‘evading’ the rule by careful drafting is not a sign of the rule’s weakness, but of its success: the point is surely that the parties have been compelled to ensure that vesting must occur within the perpetuity period, in order to ensure the validity of the transaction. The consequences of breaching the rule simply provide an incentive to comply with it.

Is the rule against perpetuities divorced from reality?

The charge that the rule against perpetuities is divorced from reality may be considered already established, in light of the cases discussed earlier in this article. Certainly, the focus on possibilities rather than probabilities, even where it is definitively established that those possibilities have been negated prior to the hearing, has lent an aura of unreality to much of the law in this area. This unreality has been particularly notorious in the so-called ‘fertile octogenarian’ and ‘precocious toddler’ cases, where the courts have refused to regard a woman as being incapable of childbearing, irrespective of her age,⁶⁹ or to rule out the possibility of very young children becoming parents.⁷⁰

In fact, as both the LRC⁷¹ and (writing previously) Mee, have pointed out, it may soon no longer be possible to regard the possibility of fertile octogenarians as an absurdity, given advances in medical science and fertility treatments. Indeed, it is now apparently possible for dead persons to become parents long after the expiry of the gestation period traditionally incorporated in the rule.⁷² Mee has also discussed the possibility of young children becoming parents, and the implications of recent legislation for these aspects of the rule.⁷³ In this context, the court decisions derided by generations of academics may now be regarded as prescient, though it may justly be said that the implications of these changes for the application of the rule are potentially horrendous.

As it stands, the potential fertile octogenarian is a somewhat more remote figure in Irish than in English law, due to the decision in *Exham v Beamish*,⁷⁴ where Gavan Duffy J refused (albeit obiter, as it transpired)⁷⁵ to apply the English precedent requiring a court always to assume that a woman would be capable of childbearing, on the ground that this would bring the law into disrepute. He therefore stated that medical evidence would be admissible to show that future childbearing would be a

⁶⁹ *Jee v. Audley* (1787) 1 Cox Eq Cas 324.

⁷⁰ *Re Gaites Will Trust* [1949] AC 653.

⁷¹ Para 2.18 of the Report.

⁷² Following a recent *cause celebre*, Diane Blood utilised the sperm of her dead husband and subsequently gave birth to their son on 11 December 1998. At the time of writing, she is expecting her second child by identical means. See <http://news.bbc.co.uk/1/hi/uk/england/1809296.stm> and the decision of the English High Court in *R. v. Human Fertilisation and Embryology Authority, ex p Blood* (1996) 3 WLR 1176.

⁷³ Mee (1992), *supra* n 32, p 188. Mee points out that the position is also complicated by legislation, such as the Status of Children Act 1987, which effectively (if indirectly) extends the scope of the rule to potential non-marital and adoptive children. This appears to nullify the effect of *Exham v. Beamish* [1939] IR 336, as age and fertility are no longer the only relevant criteria for parenthood. Mee also points out that adoption is technically possible (if unusual) for both very young and very old adopters.

⁷⁴ [1939] IR 336.

⁷⁵ Para 2.15 of the Report.

medical absurdity. Hence, Irish courts have adopted only a rebuttable presumption of fertility. However, as Mee has pointed out,⁷⁶ Gavan Duffy J's approach apparently only covers 'physical impossibility'. Consequently, 'it would still be necessary to invalidate gifts on the basis of utterly unrealistic possibilities, the absurdity of which did not happen to stem from a conflict with the expectations of medical science'.⁷⁷ Similarly, since (in Mee's view) the requirement of impossibility in the judgment seems to mean only that the eventuality must be extremely unlikely, difficulties arise in deciding 'where extreme improbability shades into practical impossibility'.⁷⁸ Where, in light of advances in medical science, should the borderline be drawn?

Thus, while nothing can save rulings such as that regarding the 'magic gravel pit' from the charge of unreality, it does appear that the same can no longer be said in relation to the fertile octogenarian cases, at least, given advances in medical science. Nor is it possible to dismiss the 'precocious toddler' out of hand – quite apart from the changes in the legal context outlined by Mee, it is necessary to consider the potential consequences of the increasingly early attainment of sexual maturity in the West, and the relaxation of social mores. As a result, the most that can currently be said under this heading is that while much of the case law on perpetuities clearly *is* disconnected from reality, the disparity is becoming less obvious in some contexts as time passes.

Reform or abolition? Potential solutions to the perpetuities crisis

Given the apparent validity of at least some of the charges against the current rule against perpetuities, what should be done to improve the law in this area? Is abolition the only solution, or is it possible for reformers to salvage those few aspects of the rule that still fulfil a social or economic function? Although Ireland is only now addressing the issue of reform of the perpetuities doctrine, other jurisdictions enacted legislation to deal with the problems in this area some time ago.⁷⁹ Although this brief article does not allow space to outline all the different approaches taken, it may be noted that, apart from abolition, most jurisdictions have opted for one or more of the options outlined by Megarry and Wade: removing the traps that cause difficulties in practice, introducing a judicial power of *cy-près* to assist in rescuing gifts, and introducing a 'wait and see' approach to allow time for the validity of a disposition to be tested.⁸⁰ Of these, the adoption of a 'wait and see' policy has perhaps proved the most popular choice, and is in fact the approach taken in England and Wales, and in Northern Ireland. A brief outline of the approach taken in these jurisdictions is therefore appropriate, and the changes enacted will be considered, before the LRC's recommendations for reform of the law in Ireland are discussed.

Reform of the law in England and Northern Ireland: 'wait and see'

The rule against perpetuities was substantially modified in England and Wales by the Perpetuities and Accumulations Act 1964, and in Northern Ireland by the almost identical Perpetuities Act (N.I.) 1966. The Acts effectively combine some of the

⁷⁶ Mee (1992), *supra* n 32, p 187.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ See Leach, 'Perpetuities Reform by Legislation' (1954) 70 *LQR* 478 for an account of reforms made in the USA.

⁸⁰ *Supra* n 26, p 486-7.

possibilities touched on by Megarry and Wade, in that they abolish some of the more derided possibilities contemplated by the case law, and also establish a ‘wait and see’ rule for dispositions taking effect after specified dates.⁸¹ Under section 3 of both Acts, a gift will not fail merely because of the possibility that vesting might occur outside of the perpetuity period, but will be void if it is shown that vesting cannot occur within the period. Until this contingency is definitely established, it is possible to ‘wait and see’ what occurs.⁸²

The ‘wait and see’ provisions, including the statutory definition of the perpetuity period, only apply where a disposition is void at common law for breach of the rule against perpetuities. The 1964 and 1966 Acts define the perpetuity period by reference to the statutory list of lives included in section 3 of each statute; the period is thus the lives listed, plus a further 21 years thereafter. The list of lives is complex, and has been criticised even by some of the staunchest supporters of the rule against perpetuities. Thus, Megarry and Wade comment that ‘[t]he one matter on which the Act invites serious criticism is its treatment of ‘lives in being’ for the purposes of the ‘wait and see’ rule’,⁸³ and argue that the common law approach on this issue would have been perfectly adequate.⁸⁴ They contend that the legislation lists far more lives than are ever likely to be relevant, and that the lives specified are not in fact the right lives for certain situations.⁸⁵ Thus, the legislation frequently includes the wrong lives, and excludes the right ones, with the result that the wait and see period is unduly prolonged on some occasions, and unnecessarily restricted in others.⁸⁶ They also note that the list of lives should not apply to commercial transactions, where lives in being have no meaning,⁸⁷ and comment critically on the commercial application of the Act.⁸⁸ However, much of this is contested by Deech, who points out a number of gaps if the common law definition of lives was left unmodified, and particularly notes the risk that the only lives in being at common law might be those validating the gift, thus leaving no life to measure the ‘wait and see’ period.⁸⁹

Be that as it may, there is no doubt that the definition of lives contained in the legislation has added considerably to the complexity of an already complex area. Apart from any other considerations, the breadth of the range of lives listed in the Acts seems likely to pose evidential difficulties in ascertaining when exactly the lives have terminated. Generally speaking, a person is a life for the purposes of the legislation if he or she is an individual in being at the commencement of the perpetuity period. As Pearce and Mee point out, there are effectively ten categories of lives which may apply,⁹⁰ and although the legislation does specify that categories of lives may be excluded where evidential difficulties may render it impracticable to

⁸¹ 16 July 1964 under the 1964 Act and 24 March 1966 under the 1966 Act.

⁸² A similar approach applies in the context of powers, and special powers are no longer void merely because they might be exercised outside of the perpetuity period. Under the ‘wait and see’ rules, special powers are only void where they are not fully exercised within the period.

⁸³ *Supra* n 26, p 495.

⁸⁴ *Ibid.*, p 501.

⁸⁵ *Ibid.*, p 502.

⁸⁶ *Ibid.*, p 504 – 5.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*, p 522.

⁸⁹ See generally Deech ‘Lives in Being Revived’ (1981) 97 *LQR* 593, discussed in Todd, *Textbook on Trusts* (1999, 4th ed.), p 182.

⁹⁰ Pearce and Mee, *Land Law* (2000, 2nd ed.), p 103.

ascertain the date of death of the survivor,⁹¹ it is not clear what counts as ‘impracticable’ in this context. One might well consider a ‘royal lives’ clause preferable, as dealing with a straightforward set of persons, despite any evidential problems that might arise.⁹² However, the Acts do offer a statutory alternative to the measurement of the perpetuity period by lives in being, by permitting instead the express designation of a perpetuity period for any number of years, up to a maximum of eighty.⁹³ Although it was generally considered that this could only be done expressly, thus precluding the mere fixing of a defined date, it now seems that this may not always be necessary.⁹⁴

The 1964 and 1966 Acts deal successfully with many of the most pernicious problems posed by the common law rule against perpetuities by abolishing, for example, the scope of the fertile octogenarian and precocious toddler doctrines. The Acts contain a rebuttable presumption that males under 14 years and females under 12 or over 55 years are incapable of childbearing.⁹⁵ The Acts also provide a saving clause in respect of the ‘unborn widow or widower’: under section 5 of both Acts, if a disposition would be void because vesting is partly defined by reference to the death of a surviving spouse of a life in being, and this has not occurred by the end of the ‘wait and see’ period, the disposition is to be treated as if it had specified the end of the ‘wait and see’ period as the time for vesting. A similar provision applies with regard to ‘age reduction’, whereby limitation periods specifying ages of persons for vesting may be reduced to twenty-one years in some circumstances, if this would be sufficient to save the gift.⁹⁶ Finally, in relation to contracts and options, the Acts provide a perpetuity period of 21 years in respect of any disposition which confers an ‘option to acquire for valuable consideration any interest in land’.⁹⁷

‘Wait and see’: the critics’ verdict

Although the changes wrought by the 1964 and 1966 Acts are detailed and far-reaching, the Acts have not succeeded in resolving the issue of perpetuities in either Northern Ireland or England and Wales, and academics and practitioners continue to debate the merits of retaining the rule. Analysing the legislative regime in Northern Ireland, Pearce and Mee argue in favour of abolition, given what they see as the rule’s slight practical utility in modern times; foreshadowing the LRC’s approach, they further suggest that any problems arising from unduly long dispositions could be dealt with by a judicial power to vary the terms of dispositions.⁹⁸ In the English context, Gray comments that ‘[p]erhaps the only major technical criticism which might be

⁹¹ Section 3(4)(a) of the 1964 Act.

⁹² Interestingly, Todd notes that the legislation ‘does not provide for ‘royal lives’ clauses, partly because it was hoped, forlornly as it turned out, that this would fall into desuetude’ (*supra* n 89, p 183). Obviously, such clauses remain valid at common law.

⁹³ Section 1(1) of the 1964 and 1966 Acts. The Law Commission for England and Wales has recently proposed a statutory 125 year perpetuity period. See *The Rules against Perpetuities and Excessive Accumulations* (Law Com No 251) (1998), para 8.10 *et seq.*

⁹⁴ *Re Green’s WT* [1985] 3 All ER 455, discussed in Todd, *supra* n 88, p 183.

⁹⁵ Section 2(1)(a) of the 1964 and 1966 Acts.

⁹⁶ Section 4 of the 1966 Act.

⁹⁷ Section 9(2) of the 1964 Act and section 10(3) of the 1966 Act. The rule against perpetuities does not apply to options to acquire the leasehold reversion or superior freehold on a lease if the option is exercisable only by the lessee or his successors in title not later than one year after the end of the lease: section 9(1) of the 1964 Act and section 10(1) of the 1966 Act.

⁹⁸ Pearce and Mee, *supra* n 90, p 101-102.

made of the new statutory perpetuity rule is that it should have abrogated the old common law entirely',⁹⁹ rather than creating the present dual regime. However, Gray goes on to note that '[s]ince for all practical purposes the rule can be evaded by cautious drafting, the salutary truth is that the percentage of wealth caught by the rule has always been infinitesimal and wholly disproportionate to the in terrorem impact exerted by the rule on the minds of donors and their lawyers'.¹⁰⁰ Although the common law rule has been almost totally marginalized by the enactment of the statutory 'wait and see' approach, the new legislation is 'merely a vehicle for highly artificial and disingenuous manipulations of actuality'.¹⁰¹ Gray argues that the rule, as it stands in England and Wales, is a hollow sham, and is so attenuated that almost every imaginable disposition has now become possible. He comments:

'Dispositions are re-drafted to conform to the 'rule'; contingencies are shamelessly fiddled until they are finally 'met'; and the declared intent of grantors is subverted without a second thought – all in supposed fidelity to a principle whose underlying motivations are now largely forgotten or utterly irrelevant'.¹⁰²

It seems, at this point, that the bodies responsible for advocating law reform in England and Wales and in Northern Ireland have now reached the point where they are willing to contemplate a break with the rule, yet cannot bring themselves to do so entirely. Thus, the Land Law Working Group in Northern Ireland has expressed the view that, if no law on restraining perpetuities existed, no valid case could be made for introducing one at this point. However, the Group was reluctant to advocate an outright abolition of the present law, citing a concern that a concealed mischief might reappear at a later date.¹⁰³ A similar ambivalence was demonstrated by the English Law Commission in its consultation paper: provisionally stating that the rule should be either abolished or reformed, the Commission was unable to determine at that time which option was preferable.¹⁰⁴ The Commission's subsequent report considered the existing law overly complex, partly because of the necessity to deal with fixed statutory perpetuity periods as well as two separate categories of lives in being at common law and under the legislation. The Commission therefore proposed that a fixed statutory perpetuity period of 125 years should be introduced, as this is probably the maximum period obtainable by the use of lives in being.¹⁰⁵ The 'wait and see' approach would then allow any gift 125 years in which to vest in interest, thus disposing of any need for a 'royal lives' clause or the equivalent. The new period would apply automatically, but generally only prospectively, although trustees under existing trusts should be permitted to opt into the new system in certain cases. The Law Commission also recommended the exclusion of certain dispositions from the application of the rule, as being outside the scope of the original rationale. Such interests include future easements, options, pension funds and restrictive covenants, thus effectively removing some of the most common commercial-type interests from

⁹⁹ Gray, *supra* n 10, p 671.

¹⁰⁰ *Ibid.*, p 672.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Final Report of the Land Law Working Group* (1990), para 2.12.10.

¹⁰⁴ *The Rules against Perpetuities and Excessive Accumulations* (LC Consultation Paper No. 133) (October 1993), para 5.91.

¹⁰⁵ *Supra* n 93, paras 8.10 *et seq.*

the rule.¹⁰⁶ However, the Commission felt unable to arrive at a satisfactory definition of what should count as a commercial transaction, in order to provide a blanket exemption in this area.

Although any improvement in the law must naturally be welcomed, the Law Commission's recommendations, if implemented, seem likely to increase the difficulties posed by the law (not least, in understanding it), without necessarily resolving all the outstanding problems. Even with the proposed amendments, as the LRC points out, it would still be possible to fall foul of the rule in some situations.¹⁰⁷ One must therefore ask why the law in this area should be further complicated, as the result of the proposed reforms would be three different perpetuity regimes in England and Wales, the application of which would depend on the date of disposition. It also seems likely that further amendment would be necessary in due course,¹⁰⁸ making it clear that (yet again) no definitive solution is being offered.

Reform of the law in Ireland? The LRC's recommendations

Many of the options adopted in England and other jurisdictions are analysed in the LRC's report, as the LRC considers the cases for reform and abolition. The LRC itself admits that it is perfectly possible to advocate either option, and accepts that reform has been the preferred choice in many jurisdictions,¹⁰⁹ perhaps due to a fear of the consequences of abolition.¹¹⁰ A 'wait and see' approach such as that adopted in Northern Ireland is perfectly feasible, and might be combined with the removal of traps and inconsistencies in a similar manner to the approach taken there and in England and Wales. On balance, however, the LRC concludes that there are compelling reasons to abolish the rule, but little justification of retention.¹¹¹ In particular, the LRC argues that although 'wait and see' would ameliorate the worst difficulties caused by the current rule, the relief provided would be limited.¹¹² It would not assist intended legatees where the vesting occurs outside the perpetuity period, and does not affect the length of the period, which is particularly short when there are no lives in being (for example, in a commercial context). It also leads to considerable uncertainty, as the validity of a settlement may be unclear for many years. Finally, it is a principle that 'will unquestionably require a substantial amount of litigation to clarify its application'.¹¹³ Similar views are expressed by Mee, who notes the danger that statutory reform, particularly prospective reform, as in England, Wales and Northern Ireland, would lead only to further confusion, as people would then have to contend with both the old and new systems.¹¹⁴ As previously noted, the LRC's rejection of the 'wait and see' approach means that there is little reason to consider issues such as the possible adoption of a *cy-près* power, as this would be irrelevant in the context of abolition.¹¹⁵

¹⁰⁶ This would obviously leave residual dangers in some commercial transactions, as discussed earlier in this article.

¹⁰⁷ Para 4.26 of the Report.

¹⁰⁸ *Ibid.*, paras 4.25 *et seq.*

¹⁰⁹ *Ibid.*, para 4.22.

¹¹⁰ *Ibid.*, para 4.31.

¹¹¹ *Ibid.*

¹¹² *Ibid.*, para 2.23.

¹¹³ *Ibid.*, para 2.23 (citing Morris & Leach, *supra* n 56, p. 91).

¹¹⁴ Mee (1992), *supra* n 32, p. 192.

¹¹⁵ Para 4.33 of the Report.

The policy decision in favour of abolition necessarily raises the question of whether that abolition should be retrospective in effect. The arguments for and against are fully considered: the LRC notes that while a new perpetuity system might cut across previous arrangements by settlors, this is not the case where the wholesale excision of the rule is concerned; for this reason, most jurisdictions that opt for abolition do so retrospectively.¹¹⁶ The LRC also dismisses concerns as to the constitutionality of a retrospective change,¹¹⁷ and argues that a law which helped to fulfil a donor's intentions and to ensure that property reached the intended donee, cannot be overturned as arbitrary.¹¹⁸

The main argument against a retrospective application lies in the potential injustice to persons who would have received particular property, had the rule against perpetuities been applied and a disposition failed. However, the LRC suggests that this concern could be met by specifying that retrospective application would not apply if this would deprive a person who has acted in reliance of such an expectation.¹¹⁹ This might be demonstrated by the sale or mortgage of an expectant interest, or by repairs or improvements to the property. No reference is made to any requirement that the person in question should have been acting in good faith, but presumably this is implicit in the LRC's argument. The LRC also considers that the legislation abolishing the rule should specify that dispositions made prior to the commencement of the Act, on the basis that a settlement was invalid, should not be disturbed; again, it is not specified that such a disposition must be bona fide.

Overall, the LRC contends that greater justice lies in the retrospective abolition of the rule, as this has the merit of honouring the settlor's intentions and benefiting the desired beneficiary, rather than giving an unmerited windfall to a third party on the basis of an antiquated and arcane rule.¹²⁰ On this basis, the Commission also opposes any delay between the enactment and commencement of the amending legislation, since implementation of the settlor's wishes does not require additional arrangements. Broadly, the LRC feels that if the aim of reform is to help settlors, then the sooner this is done, the better.¹²¹

The proposed legislation

The amending legislation proposed by the LRC is brief and to the point. Section 2 provides that certain legislation¹²² and rules of law,¹²³ including the rule against

¹¹⁶ *Ibid.* Retrospective abolition is also particularly appropriate in the context of special powers of appointment: since no interest exists until the power is exercised, a retrospective abolition of the rule against perpetuities would not result in anyone being deprived of an interest under such powers. See para 4.33 of the Report.

¹¹⁷ *Ibid.*, para 4.35.

¹¹⁸ *Ibid.*, para 4.39.

¹¹⁹ *Ibid.*, para 4.40.

¹²⁰ *Ibid.*, para 4.45. However, note Mee's criticism that it is incorrect to describe the benefit to such a third party as a 'windfall', as it is in fact an interest vested in possession. Mee argues that there is no valid distinction between a property right vested in interest and one vested in possession in this context, and that a person should not be deprived of his or her property entitlements, of whatever kind, without adequate justification. See Mee (2002), *supra* n 41, p 105.

¹²¹ *Ibid.*, para 4.47.

¹²² The Contingent Remainders Act 1877 and the Accumulations Act 1892.

perpetuities,¹²⁴ shall not apply and shall be deemed never to have applied to any interest in property to which the section applies. ‘Interest’ is broadly defined, and includes ‘any estate, right, title or other interest, legal or equitable’,¹²⁵ as well as any interest to which the rules and provisions listed in section 2 are deemed never to have applied. This second part is intended to ensure that even interests previously invalidated by the rules listed in section 2, are now revived.¹²⁶ Section 3, which is largely modelled on equivalent South Australian legislation,¹²⁷ provides some exemptions to the retrospective application of the Act, where this is required to avoid injustice or the breach of constitutional rights. It therefore excludes situations where, prior the passing of the Act, property was distributed or otherwise dealt with under the rules now abolished by the Act. It also excludes situations where a person’s acts or omissions prior to the passing of the Act would render that person’s position materially altered, to his or her detriment, after the passing of the Act. Section 3(3) provides that, in the event of conflict with any person’s constitutional rights, the scope of the section shall be modified only to the extent required to avoid such conflict.

Analysis of the proposed changes: consequences and implications

Given that the LRC’s recommendation is for abolition, rather than reform, there are few fine points of law to be discussed in the context of the proposed legislation. Indeed, apart from the minor caveats mentioned previously, the proposed Act seems clear enough. The question, at this point, is really one of policy: is total abolition of the rule truly the best solution available?

It is clear from the discussion so far that the issue of perpetuities is a difficult one, offering no easy solutions, and that problems will inevitably arise, no matter the selected method of reform. ‘Wait and see’ attempts to ameliorate the strict application of the rule by allowing time to run before reaching a definitive decision on the validity of a disposition. However, as has been seen, the outcome has not been entirely satisfactory, with charges of uncertainty, hypocrisy and complexity being levelled by critics, as well as continuing allegations of irrelevance in respect of the rule as a whole. Thus, the quest continues in England, Wales and Northern Ireland for the holy grail of perfect perpetuities protection.

Abolition, on the other hand, as advocated by the LRC, brings its own problems. While it would certainly have the merit of simplicity and consistency, it does leave unprotected a number of situations which would arguably benefit from a perpetuities-type rule. As has been noted, the objectives of the rule in relation to land are now largely achieved by the Settled Land Acts, and it is possible that the LRC’s proposed variation of trusts legislation might successfully deal with any outstanding issues in relation to trusts.¹²⁸ There is therefore no need for a perpetuities rule in this context: indeed, the existence of one only adds unnecessary complexity to the area, as the

¹²³ Including rules of equity: footnote 2 to the proposed Bill. This is intended to avoid the risk of a restrictive interpretation of the proposed Bill, if enacted.

¹²⁴ The rule against perpetuities is stated to include the rule in *Whitby v. Mitchell*; the other rules specified are the rule relating to accumulations and the rule in *Purefoy v. Rogers*.

¹²⁵ Section 1 of the proposed Bill.

¹²⁶ Footnote 1 to the proposed Bill.

¹²⁷ Para 4.42 of the Report.

¹²⁸ See, however, Mee’s comments on this point. Mee (2002), *supra* n 41, p 96.

resultant duplication only serves to confuse practitioners, while offering nothing extra in terms of achieving policy objectives. Taxation also offers a deterrent against prolonged trusts, although this should not be relied on as an immutable deterrent, given the constant changes being made in the area of revenue law. In this context, therefore, abolition must be welcomed as the cleanest method of reform.

However, while land and trusts law now render the rule obsolete in specific contexts, no such additional protection exists in relation to future easements or options to purchase. As a result, a total abolition of the perpetuities doctrine would leave this type of transaction open to prolonged periods of uncertainty and might even result in the devaluation or reduced marketability of assets. At the very least, it is highly likely that practitioners acting for concerned parties in the commercial context will be faced with important questions that they cannot answer, leading to increased transaction costs and potential refusals to contract. For these reasons, total abolition in the commercial context is not to be recommended, without some mechanism to fill the gap left by the rule.

How are these conflicting aims – abolition in most contexts, but retention in specific areas – to be reconciled? Indeed, how can the law ensure the application of a rule in most commercial contexts, without going too far and sabotaging ‘harmless’ commercial agreements? It might be argued that a total abolition would be best at the present time, as it would always be possible to legislate later for any difficulties that might arise. In this regard, the LRC’s proposed legislation would offer a blank canvas for future reforms, or a new perpetuities-type system, if one were eventually found necessary. However, it is submitted that it would be undesirable to rely on future amendments as a ‘fall back’ position. Quite apart from the likelihood that legislative will to revisit this area would be distinctly lacking, consistency and predictability demand that the issue be resolved in a single phase. Certainly, it would not be desirable to imitate those US states that abolished the rule completely, only to re-enact it a few years later.¹²⁹

It is therefore argued that the issue of specified commercial transactions must be addressed now, in conjunction with the abolition of the rule in other contexts. A possible solution might be the adoption of a default time period for vesting (for example, 30 years), to deal with situations where the contracting parties neglect to specify a time limit for the exercise of options or the granting of an easement. It might be even more appropriate to specify a maximum permissible vesting period (say 50 years) for this type of transaction, since it seems to be universally agreed that the period available by the use of lives in being is inappropriate in the commercial context. This could be done quite easily and simply by adding a short section to the LRC’s proposed Bill, although clearly the wording of any such section would have to be considered carefully to decide what interests should be included under this heading. The nature and length of a statutory period would also have to be considered carefully (for example, whether the legislation should have a default or a maximum vesting period, or both). A possible model is section 9(1) of the Perpetuities Act (N.I.) 1966 and its English equivalent: as mentioned previously, the legislation stipulates a 21 year perpetuity period for options to acquire for valuable consideration any interest

¹²⁹ See Leach, *supra* n 13, p 37.

in land. This, however, is only one potential solution, and is not put forward here as the best method available.

This article began by analysing the reasons for the adoption of the perpetuities rule, and the social and economic purposes which it may be said to serve. It noted that, while many of these purposes may now be deemed obsolete, the rule does still have an important role to play, albeit in far fewer areas than those to which it currently applies. It noted that the application of the rule has been problematic, and that the judicial interpretation of the doctrine has in many respects brought the rule into disrepute. For these reasons, it is probably true to say that the current perpetuities law has reached a point where it is no longer possible simply to ‘muddle along’, and that reform is not only desirable but urgently required. It is also true to say that, by and large, abolition of the rule is probably the best solution available, particularly in the context of settlements and trusts, where other statutory mechanisms now achieve the rule’s objectives. However, the wholesale abolition of the rule does leave a number of gaps in the law, which require attention. For this reason, while the LRC’s thoughtful and reasoned recommendations are to be welcomed, it is suggested that the issue of particular commercial transactions should be re-examined prior to the enactment of any legislation on the rule against perpetuities.

[DISCLAIMER]

This is the author's final version of this article;
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