Trinity Term
[2010] UKSC 28
On appeal from: [2009] EWCA Civ 66

JUDGMENT

Austin (FC) (Appellant) *v* Mayor and Burgesses of the London Borough of Southwark (Respondent)

before

Lord Hope, Deputy President
Lord Walker
Lady Hale
Lord Brown
Lord Kerr

JUDGMENT GIVEN ON

23 June 2010

Heard on 21 and 22 April 2010

Appellant	*Respondent*
Jan Luba QC Desmond Rutledge (Instructed by Anthony Gold Solicitors)	Richard Drabble QC Shaw Kelly (Instructed by Southwark Legal Services)

LORD HOPE (with whom Lord Brown and Lord Kerr agree)

1. The appellant is the brother of the late Alan Austin ("the deceased") who was the tenant of a dwelling-house at 52 Michael Faraday House, Thurlow Street, London. The London Borough of Southwark ("the Council") granted the deceased a tenancy of the premises on 12 July 1983. It was a secure tenancy under the Housing Act 1980. The provisions of that Act were consolidated in the Housing Act 1985 ("the 1985 Act"). In June 1986 the Council brought a claim against the deceased in Lambeth County Court for possession of the premises, relying on the fact that he was in arrears of rent. An order for possession was made against him on 4 February 1987. It was a conditional suspended possession order, issued in the form then current which was Form N28. It provided that it was not to be enforced so long as the deceased paid the arrears of rent, amounting to £3,312.98, by 4 March 1987. The deceased failed to comply with the terms of the order, so on 4 March 1987 it became enforceable. But he remained in the premises, paying rent plus amounts towards the arrears, until his death 18 years later on 8 February 2005.

2. Prior to his death the deceased had been suffering from a chronic illness which proved to be terminal. The appellant maintains that he moved in to live with his brother in October 2003 and became the deceased's full-time carer. The Council does not accept the appellant's claim that he resided at the premises prior to the deceased's death. This has not yet been established as a fact. The deceased died intestate. No grant of probate or administration has been made, and he has no personal representative. On 11 September 2006 the Council served a notice to quit on the appellant, and in January 2007 it issued proceedings against him in Lambeth County Court for possession of the premises. Those proceedings are currently stayed, pending the outcome of this appeal.

3. On 29 March 2007 the appellant lodged an application in Lambeth County Court seeking to be appointed to represent the deceased's estate in the possession proceedings which had been brought in 1986, pursuant to CPR 19.8. If so appointed, his intention is to apply to the County Court under section 85(2)(b) of the 1985 Act for postponement of the date for possession in the order that was issued against the deceased in 1987. If that application is successful, it would have the effect of reviving the deceased's secure tenancy. The appellant would then seek to show that he was resident in the premises throughout the period of twelve months that ended with the deceased's death. If that is found to have been the case, the deceased's secure tenancy will vest in the appellant by virtue of section 87 of the 1985 Act.

4. On 5 September 2007 the appellant's application to be appointed to represent the deceased's estate in the original possession proceedings was dismissed by HHJ Welchman. On 29 January 2008 Flaux J dismissed the appellant's appeal against its dismissal: [2008] EWHC 355 (QB). On 16 February 2009 the Court of Appeal (Pill, Arden and Longmore LJJ) dismissed the appellant's appeal against the order of Flaux J: [2009] EWCA Civ 66. He now appeals to this Court.

The issues

5. It has until now been assumed that a secure tenancy ends at the moment when the tenant is in breach of the terms of a conditional suspended possession order. In his annotations to the 1985 Act in *Current Law Statutes* the annotator, Andrew Arden, seems to have entertained no doubt on the point. He said of section 82(2) that when the tenancy is brought to an end by the court under that subsection it ends on the date the court specifies, not at any later date when the tenant is actually evicted. In *Thompson v Elmbridge Borough Council* [1987] 1 WLR 1425, 1430-1431 Russell LJ described the effect of the subsection in this way:

> "In my judgment, once the defendant in proceedings of this kind where there is a suspended order for possession, ceases to comply with the conditions of the order, namely, 'the punctual payment of the current rent and arrears,' and there is a breach of the terms of the order, the tenancy, whatever it may be, from that moment comes to an end."

6. In *Burrows v Brent London Borough Council* [1996] 1 WLR 1448, 1457 Lord Jauncey of Tullichettle, referring to the decision in *Thompson*, said that if the court makes an order but postpones the date of possession the tenancy will not be terminated under section 82(2) until any condition imposed under subsection (3) has been breached by the tenant. He added these words:

> "However, the court's power to make an order postponing the date of possession is not restricted to exercise on the first application for an order for possession but may be exercised on the application of either party at any time prior to execution of that order and even after the secure tenancy has ended by reason of section 82(2). This is made clear by the words in section 85(2) 'or at any time before the execution of the order:' see also *Greenwich London Borough Council v Regan*, 28 HLR 469, 476, per Millett LJ. In such an event the secure tenancy is reinstated or revived subject to any conditions imposed under subsection (3)."

7. Encouraged by observations to the contrary effect by Lord Neuberger of Abbotsbury in *Knowsley Housing Trust v White* [2009] AC 636, para 91, the appellant now seeks to challenge this assumption. He submits that a secure tenancy does not end on breach of a conditional suspended possession order but endures until the order for possession is executed. That is the first issue in this appeal. On the assumption that a secure tenancy ends on breach of the terms of a conditional suspended possession order, a former tenant who continues in occupation assumes an unusual status. It has come to be known as that of a "tolerated trespasser". Commenting on this expression in *Knowsley*, paras 3-4, Lord Walker of Gestingthorpe described the phrase as rather unfortunate, but he concluded that it was too firmly embedded to be dislodged. If the appellant is right on the first issue, however, the deceased was still a tenant when he died. The description of him and so many other secure tenants who are in the same position as he was as "tolerated trespassers" will be consigned to history.

8. The appellant has an alternative argument, should he not succeed on the first issue. Until now it has been assumed that the right of a former secure tenant to apply for postponement of the date for possession to enable him to remedy the default, and thus revive a secure tenancy under section 85(2) of the 1985 Act according to the principles described by Millett LJ in *Greenwich London Borough Council v Regan* (1996) 28 HLR 469, 476, did not survive the death of the former secure tenant. In *Brent London Borough Council v Knightley* (1997) 29 HLR 857, 862 Aldous LJ said that the right to apply for a postponement of an order for possession was not an interest in land capable of being inherited. It was held that the daughter of a deceased tolerated trespasser who had resided with her could not apply under that subsection for the revival of the tenancy. The appellant submits that that case was wrongly decided. So the second issue is whether the former tenant's statutory right to apply to postpone the date for possession, and thus revive the secure tenancy, survives his death and passes to the estate of the deceased former tenant.

9. In support of the position which he seeks to advance on the second issue the appellant submits that the statutory right to apply to the court under section 85(2) is a "possession", the enjoyment of which is protected within the meaning of article 1, Protocol 1 of the European Convention on Human Rights. If so, he submits that a construction of section 85(2) which holds that the right determines on death would be contrary to that provision and should not be adopted. Those are the third and fourth issues. The fifth issue is whether, if the statutory right to apply under section 85(2) endures beyond the death of a former tenant, the deceased was a person who had an interest in a "claim" for the purposes of CPR 19.8 and, if so, what claim. But the respondent accepts that, if the claimed right did exist at the date of the deceased's death, the appellant would be entitled to apply to the court under that rule.

The statutory provisions

10. It is not necessary to do more to describe the general background than to refer to Lord Neuberger's summary of the law governing residential security of tenure in *Knowsley* [2009] AC 636, paras 30- 47. There were three appeals in that case. They raised issues about the effect of suspended possession orders on the status and rights of secure tenants under the 1985 Act and assured tenants under the Housing Act 1988. It was held that an assured tenancy subject to a suspended possession order ended only when possession was delivered up, but that reconsideration of the approach that had been adopted to secure tenancies under the 1985 Act was inappropriate since it derived from long-standing authority, had been applied in numerous cases and would be resolved by section 299 of and Schedule 11 to the Housing and Regeneration Act 2008 ("the 2008 Act") which had amended and clarified the law. I shall come back to examine that part of the decision in *Knowsley* later. As we are concerned in this case only with secure tenancies, I shall concentrate on the relevant provisions of the 1985 Act as originally enacted and on the amendments that were introduced by the 2008 Act. It should be noted that the relevant provisions of the 2008 Act were, for the most part, prospective only. They took effect from the commencement date of Schedule 11, which was 20 May 2009: Housing and Regeneration Act 2008 (Commencement No 5) Order 2009 (SI 2009/1261).

11. Section 79(1) of the 1985 Act provides that a tenancy under which a dwelling-house is let as a separate dwelling is a secure tenancy at any time when the conditions described in sections 80 and 81 as the landlord condition and the tenant condition are satisfied. Section 80(1) provides that the landlord condition is that the interest of the landlord is vested in one or more of the authorities or bodies listed in that subsection, which include a local authority. Section 81 provides that the tenancy condition is satisfied if the tenant is an individual and occupies the dwelling-house as his only or principal home.

12. Section 82 deals with security of tenure. As originally enacted, subsections (1) to (3) of this section were in these terms:

> "(1) A secure tenancy which is either –
>
> (a) a weekly or other periodic tenancy, or
>
> (b) a tenancy for a term certain but subject to termination by the landlord,
>
> cannot be brought to an end by the landlord except by obtaining an order of the court for the possession of the dwelling-house or an order under subsection (3).

(2) Where the landlord obtains an order for the possession of the dwelling-house, the tenancy ends on the date on which the tenant is to give up possession in pursuance of the order.

(3) Where a secure tenancy is a tenancy for a term certain but with a provision for re-entry or forfeiture, the court shall not order possession of the dwelling-house in pursuance of that provision, but in a case where the court would have made such an order it shall instead make an order terminating the tenancy on a date specified in the order and section 86 (periodic tenancy arising on termination of a fixed term) shall apply."

13. As amended by para 2 of Part 1 of Schedule 11 to the 2008 Act with effect from 20 May 2009, the opening subsections of section 82 now provide:

"(1) A secure tenancy which is either –

(a) a weekly or other periodic tenancy, or

(b) a tenancy for a term certain but subject to termination by the landlord,

cannot be brought to an end by the landlord except as mentioned in subsection 1A.

(1A) The tenancy may be brought to an end by the landlord –

(a) obtaining –

(i) an order of the court for the possession of the dwelling-house, and

(ii) the execution of the order,

(b) obtaining an order under subsection (3), or

(c) obtaining a demotion order under section 82A.

(2) In the case mentioned in subsection (1A)(a), the tenancy ends when the order is executed."

14. Section 83 provides that the court shall not entertain proceedings for the possession of a dwelling-house let under a secure tenancy unless the landlord has served on the tenant a notice complying with the provisions of that section. Section 84 deals with the grounds on which an order for possession may be made. In cases where the tenant is in arrears of rent they require the landlord to satisfy the court that it is reasonable to make such an order before the court will order possession. In such a case the court is given very wide and flexible powers by section 85.

Subsections (1) (2) and (3) of this section, as originally enacted, were in these terms:

> "(1) Where proceedings are brought for possession of a dwelling-house let under a secure tenancy on any of the grounds set out in …. ([being] cases in which the court must be satisfied that it is reasonable to make a possession order), the court may adjourn the proceedings for such period or periods as it thinks fit.
>
> (2) On the making of an order for possession of such a dwelling-house on any of those grounds, or at any any time before the execution of the order, the court may –
>
> (a) stay or suspend the execution of the order, or
>
> (b) postpone the date of possession,
>
> for such period or periods as the court thinks fit.
>
> (3) On such an adjournment, stay, suspension or postponement the court –
>
> (a) shall impose conditions with respect to the payment by the tenant of arrears of rent (if any) and rent or payments in respect of occupation after the termination of the tenancy (mesne profits), unless it considers that to do so would cause exceptional hardship to the tenant or would otherwise be unreasonable, and
>
> (b) may impose such other conditions as it thinks fit."

By para 3(2) of Part 1 of Schedule 11 to the 2008 Act the reference to mesne profits in section 85(3)(a) was omitted with effect from 20 May 2009.

The first issue

15. The question to which this issue is directed is about the effect of section 82(2) of the 1985 Act. Does the secure tenancy end when the tenant is in breach of the conditions of the suspended possession order? Or does it end only when possession is delivered up when the possession order is executed? As I said earlier, it was for a long time assumed that the law was as stated in *Thompson v Elmbridge Borough Council* [1987] 1 WLR 1425. In that case a secure tenant had fallen into arrears of rent. The local authority obtained an order for possession in the same form as that which was set out in the order which the Council obtained against the deceased in this case. It stated that it was not to be enforced for 28 days in any event, and for so long thereafter as the tenant paid the arrears of rent by stated instalments in addition to the rent. She failed to comply with the terms of the order

and the question was whether, and if so when, the secure tenancy had come to an end. Russell LJ rejected an analogy which was sought to be drawn with the position under the Rent Acts. Basing his decision simply on the terms of section 82(2), he said that where there was a breach of the terms of the order the tenancy came to an end from the moment of the breach: see para 5, above, where the words that he used are set out.

16. In *Burrows v Brent London Borough Council* [1996] 1 WLR 1448 a secure tenant had fallen into arrears with the rent and the council obtained a final order for possession of the premises. Shortly before the order was due to take effect the council entered into an agreement with the tenant that she would not be evicted provided she complied with certain conditions, which she failed to do. The question was whether a new tenancy had been created by this agreement. Reference was made to the Court of Appeal's decision in *Thompson* [1987] 1 WLR 1425, but the soundness of that decision was not questioned by either side. Lord Browne-Wilkinson referred to it at p 1453 when he was summarising the local authority's argument that the old tenancy came to an end when the tenant failed to comply with the conditions imposed by the possession order. Lord Jauncey, with whom Lord Griffiths and Lord Steyn agreed, at p 1457 went further. He summarised the law in a way that indicated that in his opinion *Thompson*, which by then had been followed by the Court of Appeal in *Greenwich London Borough Council v Regan* (1996) 28 HLR 469, was rightly decided.

17. There the matter rested until it came under the scrutiny of the House of Lords more than a decade later in *Knowsley Housing Trust v White* [2009] AC 636. Lord Neuberger observed in that case at para 73 that a number of cases in the Court of Appeal had proceeded on the assumption that the law was as stated in *Thompson*: see, for example, *Harlow District Council v Hall* [2006] 1 WLR 2116. He also said that there would also have been tens of thousands of cases in the county courts, many negotiations, much legal advice and many actions which had also proceeded on that assumption. In para 91 however, having added that he strongly suspected that, if the point had not been determined in *Burrows* [1996] 1 WLR 1448, he would have reached the same conclusion in relation to section 85 of the 1985 Act as that which he had reached in relation to section 9 of the Housing Act 1988 in relation to assured tenancies, he said:

> "There is a powerful case for saying that 'the date on which the tenant is to give up possession in pursuance of the order' in section 82(2) of the 1985 Act can, and therefore should, mean the date specified in a warrant of possession which is duly executed (or acted on by the tenant). Furthermore section 121 of the 1985 Act [circumstances in which the right to buy cannot be exercised] appears to me to be arguably inconsistent with the decisions in *Thompson* [1987] 1 WLR 1425 and in *Hall* [2006] 1 WLR 2116, in

> that it appears expressly to assume that a tenant who 'is', as well as a tenant who 'will be', obliged to give up possession pursuant to a court order, would remain entitled to pursue the right to buy, and only a person who is a secure tenant can have that right."

18. Despite these reservations, he refrained from moving the House to hold that *Thompson* [1987] 1 WLR 1425 and *Hall* [2006] 1 WLR 2116 were wrongly decided so far as secure tenancies were concerned. He set out his reasons for doing so in paras 92 and 93. One was the response that was received from counsel in that case, all highly experienced in the field of social housing law. Mr Luba QC said that it was simply too late to take that course, as *Thompson* had been assumed to be right, and had been acted on, in many tens of thousands of cases over the past 20 years or so. The other was that, by section 299 of and Schedule 11 to the 2008 Act, Parliament had amended and clarified the law so that secure and assured tenancies would only end when the order for possession was executed by means of provisions that were largely prospective in their effect. Agreeing with these submissions, Lord Neuberger said that it would be wrong for the House effectively to go back on its previous approval of *Thompson* in *Burrows* [1996] 1 WLR 1448, when there was in place amending legislation having the same effect as such a reversal, in which Parliament had decided to amend the law only prospectively.

19. Mr Luba's position for the appellant in this case, as he frankly accepted, is the reverse of that which he adopted in *Knowsley* [2009] AC 636. He submits nevertheless that this Court should now take the step from which the House held back in that case and hold that *Thompson* [1987] 1 WLR 1425 was wrongly decided. There are, then, two questions that must be addressed. The first is whether, as Lord Neuberger indicated, section 82(2) can be read as meaning that, notwithstanding that the tenant is in breach of the conditions in the possession order, the tenancy continues until the date specified in a warrant for possession which is duly executed or acted upon. The second is whether, if it can be so read, it should now be held that this is indeed its meaning and *Thompson* should be overruled.

20. As to the first question, it is a remarkable fact that a conclusion about the meaning of section 82(2) which, admittedly with the benefit of hindsight, is so obviously unsatisfactory and conceptually confusing should have been reached with so little reasoning. The Court of Appeal's decision on the point in *Thompson* [1987] 1 WLR 1425 was expressed by Russell LJ in a single sentence at pp 1430-1431. It amounted to little more than an assertion. No attempt was made to see whether the meaning that he attributed to the subsection was consistent with provisions that were to be found elsewhere in the 1985 Act. As for the references to *Thompson* in *Burrows* [1996] 1 WLR 1448, I think that Lord Neuberger was perhaps being a little generous when he said in *Knowsley* [2009] AC 636, para 72

that Lord Browne-Wilkinson and Lord Jauncey expressly stated that *Thompson* was rightly decided. Lord Browne-Wilkinson referred to that case at p 1453 when summarising the submissions that were before the court in *Greenwich London Borough Council v Regan* (1996) 28 HLR 469 and accepting counsel's analysis of that case. Lord Jauncey went further in endorsing what was said in *Thompson*, but I do not detect in his treatment of it any attempt on his part to reach a view of his own as to whether section 82(2) had to be read in the way that Russell LJ had indicated. I would not attach much weight to the uncritical way in which the decision in *Thompson* was treated by the House of Lords in *Burrows.*

21. The wording of section 82(2) needs therefore to be examined more closely in its context. There are, of course, other ways in which a tenancy may come to an end. But, as the section as a whole is concerned with security of tenure, it deals with the steps that must be taken by the landlord. The landlord must first obtain an order for possession of the dwelling-house. In the case of a secure tenancy for a term certain with a provision for re-entry or forfeiture, the court is required to make an order terminating the tenancy on a date specified in the order, which – unless the court orders that both termination and possession are to take effect on the same date – will be followed by a periodic tenancy: section 82(3). Section 82(2) adopts a different approach. It does not say, as it could have done, that the date specified in the order is to be the date when the tenancy terminates. It refers instead to the date when the tenant "is to give up possession in pursuance of the order". That phrase can, I think, be read as indicating that the date when the tenancy is to terminate is to be found in the possession order itself. That is how Russell LJ read it in *Thompson* [1987] 1 WLR 1425, at pp 1430-1431. But the words "is to give up possession" can also be read, as Lord Neuberger said in *Knowsley* [2009] AC 636, para 91, as contemplating the date when possession will actually be given up under a warrant for possession which is duly executed or acted upon.

22. I think that the context tends to favour Lord Neuberger's indication that the tenancy ends only when the order for possession is executed. The fact that the court is given such wide powers by section 85, including the power to discharge or rescind the possession order if the conditions are complied with, suggests that it was envisaged that the tenancy could still be in existence during the period when the court can exercise this control. Then there are the indications in section 121, to which Lord Neuberger referred in para 91, that the section was drafted on the assumption that a tenant who is obliged to give up possession pursuant to a court order is nevertheless still entitled to exercise the right to buy which is a right that, as section 118 makes clear, only a secure tenant can have. The reference in section 85(3) to payments after the termination of the tenancy and mesne profits might seem to indicate the contrary. But, as Lord Neuberger pointed out in paras 87 and 88, this is best seen as an example of torrential drafting as the same wording appears in section 100(3) of the Rent Act 1977 where it cannot have that effect.

Apart from this point, I do not find anything in the context that supports the interpretation that was given to section 82(2) in *Thompson* [1987] 1 WLR 1425.

23. The conclusion which I would draw is that there is much to be said for Lord Neuberger's interpretation. Perhaps the strongest point in its favour is that reading section 82(2) in the way he has suggested avoids what he described in *Knowsley* [2009] AC 636, para 80 as the anomalous and potentially retrospectively reversible status of tolerated trespassers. The conceptual problems that this gives rise to do not seem to have been anticipated by the judges who guided the law in a different direction in *Thompson* [1987] 1 WLR 1425 and *Burrows* [1996] 1 WLR 1448. A fair and practical reading would, as Lord Neuberger suggests, eliminate these difficulties. But it seems to me that the contrary view is not unarguable.

24. The question then is whether this Court should now hold that the interpretation of section 82(2) that Lord Neuberger has suggested is indeed what this subsection means and that *Thompson* [1987] 1 WLR 1425 should be overruled. As is of course very well known, the House of Lords issued a Practice Statement on 26 July 1966 which stated that it would still treat former decisions of the House as normally binding, but that it would depart from a previous decision when it appeared right to do so: *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234. Its application was considered and applied from time to time by the Appellate Committee during the 40 years or so that were to elapse until 1 October 2009 when the appellate jurisdiction was transferred from the House of Lords to this Court: see, for example, *R v National Insurance Commissioner, Ex p Hudson* [1972] AC 944, 966 per Lord Reid; *R v Knuller (Publishing, Printing and Promotions) Ltd* [1973] AC 435, 455 per Lord Reid; *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443; *Fitzleet Estates Ltd v Cherry* [1977] 1 WLR 1345, 1349 per Lord Wilberforce ; *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* [1979] AC 508; *Vestey v Inland Revenue Commissioners (Nos 1 and 2)* [1980] AC 1148; *R v Secretary of State for the Home Department, Ex p Khawaja* [1984] AC 74; *R v Howe* [1987] AC 417; *R v Kansal (No 2)* [2002] 2 AC 69; *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309; and *Horton v Sadler* [2007] 1 AC 307, para 29 per Lord Bingham of Cornhill.

25. The Supreme Court has not thought it necessary to re-issue the Practice Statement as a fresh statement of practice in the Court's own name. This is because it has as much effect in this Court as it did before the Appellate Committee in the House of Lords. It was part of the established jurisprudence relating to the conduct of appeals in the House of Lords which was transferred to this Court by section 40 of the Constitutional Reform Act 2005. So the question which we must consider is not whether the Court has power to depart from the previous decisions of the House of Lords which have been referred to, but whether in the circumstances of this case it would be right for it to do so.

26. In *R v Knuller (Publishing, Printing and Promotions) Ltd* [1973] AC 435, 455 Lord Reid made the following observations about the Practice Statement which I think are particularly in point in this case:

> "I have said more than once in recent cases that our change of practice in no longer regarding previous decisions of this House as absolutely binding does not mean that whenever we think that a previous decision was wrong we should reverse it. In the general interest of certainty in the law we must be sure that there is some very good reason before we so act. … I think that however wrong or anomalous the decision may be it must stand and apply to cases reasonably analogous unless or until it is altered by Parliament."

In *R v National Insurance Commissioner, Ex p Hudson* [1972] AC 944, 966, on the other hand, he said that it might be appropriate to do so if to adhere to the previous decision would produce serious anomalies or other results which were plainly unsatisfactory. In *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309, para 31 Lord Steyn said that, without trying to be exhaustive, a fundamental change in circumstances such as was before the House in *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, or experience showing that a decision of the House results in unforeseen serious injustice, might permit such a departure. In *Horton v Sadler* [2007] 1 AC 307, para 29 Lord Bingham said that the power had been exercised rarely and sparingly but that too rigid an adherence to precedent might lead to injustice in a particular case and unduly restrict the development of the law. The House, he said, will depart from a previous decision where it appears right to do so.

27. Two previous decisions of the House are before us in this case: *Burrows v Brent London Borough Council* [1996] 1 WLR 1448 and *Knowsley Housing Trust v White* [2009] AC 636. Of these the one that gives rise to most concern is *Knowsley*. In para 92 of his speech in that case Lord Neuberger addressed the question directly as to whether, given that the point at issue was not actually debated in *Burrows*, the cases of *Thompson* [1987] 1 WLR 1425 and *Hall* [2006] 1 WLR 2116 were rightly decided. His answer, as he explained in para 93, was that it should not reconsider the view expressed by the House in *Burrows* that *Thompson* was rightly decided so far as secure tenancies were concerned. It is true that this was the approach that had been contended for by counsel. But there was much more in it than that. The fact that the decision in *Thompson* was of such long standing and had been acted upon in so many cases was a powerful factor in his assessment. So too was the way the need for an amendment of the law had been dealt with by Parliament.

28. I am not persuaded that we should depart from the decision which the House took in *Knowsley* [2009] AC 636 that the view expressed about *Thompson* [1987] 1 WLR 1425 in *Burrows* [1996] 1 WLR 1448 should not be reconsidered and departed from. It is true that we have had the benefit of a more complete argument on the point than was before the House in *Knowsley*. But the fact remains that the law was regarded as having been settled by *Thompson* and the effects of reversing that decision now are incalculable. As Lord Neuberger said, it has been assumed to be right and has been acted upon in many tens of thousands of cases. The area of greatest concern is the effect that a retrospective reversal would have on social landlords who for so long have assumed that those who had failed to comply with the conditions in a suspended possession order were no longer tenants with a right to enforce the implementation of repairing covenants. Although we have not seen any direct evidence on the point, it is a reasonable assumption that the consequences of reviving these covenants and the opportunity that this would give for claiming damages for breach of these obligations was one of the factors that led to the decision that the law should be amended by the Housing and Regeneration Act 2008 only prospectively.

29. In August 2007 the Department for Communities and Local Government issued a consultation paper on tolerated trespassers. It set out four options for changes to the legislation relating to secure and assured tenancies. One was to do nothing. The second was to deal only with tenants who were subject to future possession orders. The third was to restore tenancy status to all existing tolerated trespassers. The fourth was to restore this status to tolerated trespassers who had complied with the terms of the possession order. In its summary of responses to the consultation in April 2008 the Department noted that the overwhelming majority of those who responded were in favour of legislation to prevent the creation of future tolerated trespassers. It also noted that, while there was strong support for amending the legislation to restore the tenancies of all existing tolerated trespassers, there were dissenting voices. Those who opposed this option suggested that it could be seen to reward tenants who had repeatedly failed to meet their obligations and that it would remove potential leverage against difficult tenants. They drew attention too to the need to protect landlords from liability for actions taken in accordance with the law at the time. The Government's position was that the opportunity should be taken to prevent the creation of future tolerated trespassers and restore tenancy status to all existing tolerated trespassers. In an impact assessment issued in November 2008 it was indicated that, following consultation, the options had been narrowed down to two: do nothing, and restore tenancy status to all tolerated trespassers.

30. The 2008 Act received the Royal Assent on 22 July 2008. Section 299 introduces Schedule 11. Part 1 of the Schedule amends the relevant legislation for the future. Part 2 restores tenancy status to existing tolerated trespassers. These provisions were brought into force by the Housing and Regeneration Act 2008

(Commencement No 5) Order 2009 (SI 2009/1261). Significantly, however, what Part 2 of the Schedule does is to provide for the creation of replacement tenancies. As paragraph 16 states, these are new tenancies. Paragraph 18 provides that the new tenancy is to have effect on the same terms and conditions that were applicable to the original tenancy immediately before it ended. Absent from the Schedule however is any provision for the revival or restoration of the pre-existing tenancy. This carefully crafted system avoids the problems to which the dissenting voices had drawn attention during the consultation process. For us now to declare that *Thompson* [1987] 1 WLR 1425 was no longer good law would undermine the system with the result that those problems would, after all, become unavoidable. Such a result would contradict the will of Parliament.

31. Reverting to what Lord Reid said in *R v Knuller (Publishing, Printing and Promotions) Ltd* [1973] AC 435, 455, I think that, far from there being some very good reasons for reversing the decision that the House took in *Knowsley* [2009] AC 636, the position in this case is the other way round. There are very good reasons for accepting that the law as declared in *Thompson* [1987] 1 WLR 1425, however unsatisfactory it can now be seen to be, should not be disturbed. I would therefore reject the appellant's argument on the first issue.

The second issue

32. This issue is directed to the effect of section 85(2) of the 1985 Act. The question is whether the former tenant's statutory right to apply to postpone the date for possession, and thus revive the secure tenancy, survives death and passes to the estate of the deceased former tenant. The answer to it depends on how the wording of this subsection should be construed in the context of the scheme of Part IV of the 1985 read as a whole.

33. In the Court of Appeal it was submitted that the short answer to this question was that the point was decided in *Brent London Borough Council v Knightley* (1997) 29 HLR 857 and that that case was binding authority in that court for the proposition that the right to apply for the postponement of the order for possession under section 85(2) is not an interest in land capable of being inherited. So it could not survive the deceased's death. Having examined the decision, Arden LJ, with whom Pill LJ agreed, concluded that it bound the court to hold that the former tenant's right to apply under section 85(2) terminates on the tenant's death: [2009] EWCA Civ 66, para 42. Longmore LJ said that, even if the matter had not been expressly decided by *Knightley*, the correct view must be that the right is not exercisable by a deceased's personal representatives: para 54.

34. The appellant in *Knightley* (1997) 29 HLR 857 was the daughter of the tenant under a secure tenancy. Upon her mother's death she claimed the right to succeed to the tenancy under section 89 of the 1985 Act. The council refused to accept her claim on the ground that, as the mother had died, there was no tenancy to which the daughter could succeed as it had been terminated pursuant to a conditional possession order for non-payment of rent. In other words, the mother was no more than a tolerated trespasser. The judgment of the Court of Appeal was delivered by Aldous LJ. At p 862 he noted that the law as to the effect of section 82(2) had recently been clarified by the decision of the House of Lords in *Burrows* [1996] 1 WLR 1448. Given that, at her mother's death, there was no tenancy to which the daughter could succeed, everything depended on whether it was open to her to apply for an order under 85 to postpone the order for possession and revive the tenancy. He concluded that her submissions to that effect were untenable.

35. Aldous LJ set out the reasoning on which that conclusion was based in the following paragraph at p 862:

> "The right to apply for a postponement of an order for possession is not an interest in land capable of being inherited. Further, the right to apply under section 85 is a right given to the tenant and in subsection (5) to the tenant's spouse or former spouse. Section 87 also gives a right to apply to a person who is qualified to succeed as a tenant under a secure tenancy. That section only applies where there is a tenancy in existence. That was not the case here. To be a tolerated trespasser of the kind contemplated in *Burrows*, the person must be a trespasser tolerated by the law. The appellant was not such a person. In my view, there is no right given to a person in Miss Knightley's position to apply to revive a tenancy and no tenancy existed at the time when her mother died."

36. Endorsing that decision in the Court of Appeal [2009] EWCA Civ 66, Longmore LJ introduced his remarks with this comment in para 53:

> "Aldous LJ, with whom the other members of the court agreed, said in terms that the right was 'incapable of being transmitted'. That conclusion applies to transmission by will or on intestacy just as much as any other transmission eg by assignment between living persons."

What Aldous LJ actually said, in the passage which I quoted in para 35, was that the right was not "capable of being inherited". There is an important distinction between these two phrases. Had Aldous LJ appreciated that the question which is

really at issue here is whether the right is capable of being "transmitted", not whether it is capable of being "inherited", he might perhaps have arrived at a different answer. The right to apply to the court for the exercise of the powers that are given to it by section 85(2) is a right conferred by the statute. So the answer to the question whether the right can be exercised after the tenant has died is to be found by construing the statute. It does not depend on whether it is thought to be a right that is capable of being inherited at common law.

37. Addressing himself, in para 54, to the terms of the statute, Longmore LJ said that Parliament plainly intended that the person who would otherwise be entitled to a secure tenancy if it had been revived should not be able to revive it in his or her own name. To hold that the deceased's estate can apply to revive it for the purpose of enabling that person to obtain a secure tenancy would be to circumvent, if not flout, that intention by means of a legal device. I have to confess that I do not follow this reasoning. It seems to confuse the provisions about succession on the death of the tenant under a secure tenancy with the situation that section 85 is dealing with, which is the exercise of powers by the court on the making of a possession order. Of course, one thing may lead to another. But the sections must be taken in the order in which they appear, and they must be taken separately.

38. The first thing that strikes one, on reading the words of the subsection, is that the powers that it refers to are said to be exercisable "at any time before the execution of the order." The possibility that the tenant may have died in the meantime is not mentioned. If it had been the intention that the powers should not be exercisable on the tenant's death it would have been easy to say so. Indeed, given the width of the phrase that is actually used, one would have expected words to that effect to have been inserted. Cases could arise, for example, where the tenant has died before the possession order has taken effect to end the tenancy. There would seem to be no reason why the deceased's personal representative should not be able to seek the exercise of the power to postpone giving effect to the possession order, for example to enable the deceased's affairs to be put in order and any licensee or sub-tenant to be re-housed. Another example of a case where one would expect the personal representative to be able to apply would be where the deceased tenant, having made good a previous default, has applied for the date for possession to be postponed but dies the day before his application is to be heard. The wording of the subsection does not compel a reading that would deny the jurisdiction of the court to exercise its powers in such circumstances.

39. There are other indications in this Part of the Act that support this approach. When it contemplates what is to happen on death, it says so. Sections 87 to 90, which deal with succession on the tenant's death, constitute the prime example. It is worth noting too that section 90, which deals with fixed term tenancies, contemplates that the tenancy may continue after the secure tenant dies and vest in

someone else in the circumstances referred to in subsection (3). One would expect the powers under section 85(2) to be exercisable after the tenant's death in such circumstances, and there is nothing in its wording that suggests the contrary. Also, the rights that were given to the tenant's spouse or former spouse who is in occupation when proceedings for possession are brought by section 85(5) are not said to come to an end when the secure tenant dies. That subsection was repealed by section 299 of and Schedule 11, paras 1 and 3 to the 2008 Act. But it was there when section 85 was enacted, and it indicates the width and variety of the circumstances in which the powers under section 85(2) were intended to be available.

40. For these reasons I would hold that *Knightley* (1997) 29 HLR 857 was wrongly decided and that it should be overruled. In my opinion the fact that the former secure tenant has died does not deprive the court of its jurisdiction to exercise the power conferred on it by section 85(2)(b) of the 1985 Act to postpone the date of possession under a possession order. It follows that it is open to the appellant, who seeks to represent the estate of the person who was served with a claim for possession, to apply under CPR 19.8 for the date for possession to be postponed. I have to say that I regard this solution to his case to be preferable to the solution for which Mr Luba contended under the first issue. It is directed precisely to the situation that arises where a former tenant who has become a tolerated trespasser has died. Above all, it preserves the discretion of the court under section 85(2) to do what is just in all the circumstances. This is a protection for the landlord which would be entirely absent if the first solution were to be adopted.

Conclusion

41. In view of the conclusion that I have reached in the appellant's favour on the second issue I do not need to say anything about the remaining issues. Mr Drabble QC for the Council did not suggest that, if the second issue were to be answered in the appellant's favour, the deceased was not a person who had an interest in a "claim" for the purposes of CPR 19.8 which in the events that have happened could be invoked by his estate. The claim which the appellant can invoke for this purpose is the claim for possession that was issued against the deceased in 1986.

42. I would allow the appeal. I would order that the appellant be appointed to represent the estate of the deceased under CPR 19.8(1)(b) and would remit his application under section 85(2) of the 1985 Act for postponement of the 1987 possession order to Lambeth County Court for determination.

LORD WALKER

43. I am in full agreement with the reasoning and conclusions in Lord Hope's judgment. I have nothing to add except to express my admiration for the concurring judgment of Lady Hale, who has written the definitive obituary of the "tolerated trespasser." Indeed her trenchant analysis clearly demonstrates that this unfortunate zombie-like creature achieved a sort of half-life only through a series of judicial decisions in which courts failed, or did not need, to face up to the theoretical and practical contradictions inherent in the notion. But in common with all the members of the Court I agree that Parliament is best fitted to give the tolerated trespasser his quietus, as it has by the Housing and Regeneration Act 2008.

LADY HALE

44. I agree that this appeal should be allowed for the reasons given by Lord Hope but wish to add a few words on the issue of "tolerated trespassers". In my view, had it not been for Parliament's intervention, it would have been the duty of this Court to set the matter right. There is no reason to believe that Parliament intended that such an anomalous status should arise as a result of the provisions of the 1980 and 1985 Housing Acts. There is little reason to believe that the full implications of their decision were apparent to the Court of Appeal when they decided *Thompson v Elmbridge Borough Council* [1987] 1 WLR 1425. That decision was assumed to be correct by the House of Lords in *Burrows v Brent London Borough Council* [1996] 1 WLR 1448 but it suited both parties in that case for them to do so. And the issue did not strictly arise in *Knowsley Housing Trust v White* [2008] UKHL 70, [2009] AC 636, which was concerned with a different statutory regime. Thus there is no House of Lords case which has addressed the issue full on and reached a reasoned conclusion about it. If there had been, it would have had to address all the conceptual and practical problems which have arisen since *Thompson*. These were forcefully spelled out by Lord Neuberger in *Knowsley*, but it is worth reiterating them here, because in *Knowsley* the parties did not want the House to address the matter, whereas in this case the Court has expressly been asked to do so.

45. A tolerated trespasser is an oxymoron. A trespasser is someone who should not be there. But tolerated trespassers were allowed to be there. Indeed, in some cases the local authority had no right to evict them. The Court of Appeal decided in *Harlow District Council v Hall* [2006] 1 WLR 2116 that if the order fixed a date for possession, but postponed its enforcement on terms, the tenancy came to an end on the date fixed, even if the trespasser complied with the terms. In other cases, the local authority had expressly agreed that the trespasser could stay. The

House of Lords decided in *Burrows v Brent London Borough Council* [1996] 1 WLR 1448 that even a written agreement not to evict the trespasser if she complied with certain terms did not create a new tenancy. Even without such an agreement, the local authority were often quite uninterested in enforcing the order. They may not have realised that the order had been breached; they may have realised that the order had been breached but also that this was not the trespasser's fault but the result of the way the housing benefit system worked; they may have obtained the order without any intention of actually evicting the trespasser, but in order to obtain a money judgment and encourage more punctual payment of what both still regarded as rent; and they may not have wanted to have to rehouse a trespasser, who was by definition homeless, if she was in priority need. These were not people whom the local authority were reluctant to have there and were waiting for the machinery of eviction to take its course. These were people whom the authority wanted to have there, provided that they could be persuaded to pay most, if not all, of their rent.

46. In normal circumstances this would give rise to some sort of right to be there, whether a licence or (more probably, given *Street v Mountford* [1985] AC 809) a tenancy and, if the landlord and tenant conditions required by section 79 were satisfied, this would be a secure tenancy. But the House of Lords was persuaded in *Burrows* to hold that a new tenancy would not arise, save in special circumstances. The practical reason for this was that local authorities did not want to have to go back to court for a new possession order if the new agreement was breached. The chain of reasoning which persuaded the House relied mainly on the decision in *Greenwich London Borough Council v Regan* (1996) 28 HLR 469, that the old tenancy could be revived by a successful application under section 85(2) at any time before the possession order was actually executed. No-one argued that the same sensible policy result could have been reached by overruling *Thompson*.

47. So we had a situation in which people became trespassers in their own homes, whether they or their landlords knew that this was so and irrespective of whether the landlords were content for them to stay. During the time that they were trespassers, neither the landlord nor the tenant could enforce the covenants under the tenancy agreement, although the tenant might be able to sue the landlord for nuisance. The statutory scheme for determining the rent did not apply. The trespasser could not exercise the right to buy even if he was now fully paid up. His spouse, partner or member of his family living there with him could not succeed. Technically, they were all homeless. Yet all these consequences could be retrospectively reversed by a successful application under section 85(2). The tenancy miraculously sprang back into life and it was as if the trespasser had been a tenant all along.

48. Whether the court always realised that this would be the effect of its order may be doubted. The standard form of possession order granted in the county

courts has changed over the years. The pre-1993 form N28, which was used in this case, did not specify a date upon which possession was to be given up. It merely adjudged that the landlord "do recover against the defendant possession of the land mentioned". It ordered that the judgment for possession should not be enforced for 28 days in any event "and for so long thereafter as the defendant punctually pays to the plaintiff or his agent the arrears of rent, mesne profits and costs by 4th March 1987". This was in fact 28 days after the date of the order, which was 4th February 1987. The order was also most unusual in ordering the defendant to pay off the whole arrears plus costs within that time rather than by the more usual instalments. This does not induce confidence that either the plaintiff landlord or the court had addressed their minds to the exact consequences if this was not done. Was it an order for possession forthwith, postponed for 28 days and suspended on terms? Or was it an order for possession on 4th March? Or was it an order for possession at some indeterminate future date? The standard form changed in 1993 and again in 2001. Paragraph 1 of the 2001 order required that "the defendant give the claimant possession of [. . .] on or before [. . .]". If this form was used, the Court of Appeal held in *Harlow District Council v Hall* that the tenant became a trespasser on that date, even if she faithfully complied with the terms for postponing enforcement. But the standard form did not have to be used and, in *Bristol City Council v Hassan* [2006] 1 WLR 2582, the Court of Appeal approved an order providing that "the date on which the defendant is to give up possession of the premises to the claimant is postponed to a date to be fixed by the court on an application by the claimant". It is a fair assumption that there are many old possession orders around which had an effect which the court making them would have avoided if it had known how to do so. The acquisition of trespasser "status" was accidental not intentional. It was also very common. Strict compliance with the terms of suspension would, in Lord Neuberger's view, be rare.

49. All of this nonsense could have been avoided if a different construction had been put upon section 82(2) of the Housing Act 1985. The whole edifice was built upon the extempore judgment of a two judge Court of Appeal in *Thompson*. Section 82(1), so far as is material, provides that a secure tenancy "cannot be brought to an end by the landlord except by obtaining an order of the court for the possession of the dwelling house . . .". This does not affect the ways in which the tenancy may be brought to an end by the tenant or by agreement between the landlord and the tenant. But it does mean that the landlord cannot end the tenancy without getting a possession order. Section 82(2) then provided that "where the landlord obtains an order for the possession of the dwelling-house, the tenancy ends on the date on which the tenant is to give up possession in pursuance of the order".

50. Clearly, the construction put upon section 82(2) in *Thompson* and in subsequent cases is a tenable one. The subsection did say "is to give" rather than actually "gives" up possession. Equally clearly, as Lord Neuberger demonstrated

in *Knowsley*, it is not the only tenable construction. The order made in this case did not specify a date on which the tenant had to give up possession, so why choose an unspecified and indeterminate date upon which the tenant puts himself in a position whereby he *may* be required to give up possession in pursuance of the order? Even if the order does specify a date or an event upon which possession is in theory to be given up, that is never the end of the story. Unless the tenant leaves voluntarily, the landlord will have to get and have executed a warrant for possession. The tenant is not obliged to leave until a warrant has been obtained and cannot be forced to do so until the date specified in the warrant. So an even more tenable interpretation is that it refers to the date specified in a warrant of execution. But that too is not the end of the story, because the landlord may obtain a warrant and never execute it. That, in fact, is what happened in *Thompson*; the possession order was obtained on 31 January 1985; its terms were breached at the latest by 5 September 1985; and a warrant was obtained on 8 January 1986; the proceedings by the tenant's husband then ensued. It is therefore difficult to say that the tenant "is to" give up the property until he actually does so, whether of his own accord or with the encouragement of the bailiffs.

51. This construction is reinforced by section 85(2), which allows the court to stay or suspend execution or postpone the date of possession "at any time before the execution of the order". If the tenancy continues until then, there is no need for it to be resurrected with retrospective effect. This construction is also, as Lord Neuberger observed in *Knowsley*, arguably more consistent with section 121. This provides that the right to buy cannot be exercised by a "tenant" who "is obliged to give up possession of the dwelling house in pursuance of an order of the court", thus assuming that even if a person is currently obliged to give up possession he is nevertheless still a tenant until he actually does so.

52. Arguably inconsistent with this construction was section 85(5), which gave the current or former spouse or civil partner of a tenant the same rights in relation to adjournment, stay, suspension or postponement of possession proceedings under section 85 as he or she would have if his or her "home rights" had not been affected by the termination of the tenancy. This may be explained as an example of "torrential drafting" in which the same provision is inserted into different statutory schemes irrespective of its applicability.

53. Thus there is indeed a powerful case for construing the date referred to in section 82(2) as "the date specified in a warrant of possession which is duly executed (or acted on by the tenant)", as Lord Neuberger put it in *Knowsley*, at para 91. When the linguistic case is put together with the conceptual and practical problems which arise from any other construction, the case becomes overwhelming. Legislation designed to protect residential tenants should be clear, simple and consistent in its effects, not dubious, complex and arbitrary. It is scarcely surprising that the Government's view, when consulting on what became

Schedule 11 to the Housing and Regeneration Act 2008, was that the result of *Thompson* had been "unintended".

54. Were it not for that Act, I would consider it "right" for this Court to sort the matter out. The decisions in *Thompson* and the cases which proceeded on the unquestioned basis that *Thompson* was correct were not merely wrongly decided. They set the law on a course which was wrong in principle and wrong in practice. They produced a position with which no-one was happy – neither the landlords nor the tenants – as is shown by the response to the Government's consultations. Even if some local authority landlords might have welcomed not being under a contractual obligation to repair properties for which the occupier was not paying the full rent, they would also have acknowledged that it could not be right for them to be able to charge the equivalent of the full rent which was calculated on the basis that they did have an obligation to repair. In such circumstances, it would ordinarily be our duty to recognise that the law had always been what we hold it to be.

55. Does the 2008 Act make a difference? I am persuaded that, in this case, it does. It has abolished the problem for tenancies granted after it came into force. It has given those formerly considered "tolerated trespassers" a new tenancy which is in most respects the same as the tenancy they would otherwise still have had. In other respects, of which repairing covenants are likely to be the most important, the court has the discretion to tailor a just solution. The only gap which counsel have identified is the gap exemplified by this case – where the tolerated trespasser has died before an application under section 85(2) has been made or determined. But this case solves that problem.

56. Parliament has therefore recently devised a considered and carefully balanced solution to the problem. We would be obliged to respect the will of Parliament if it had devised a wholly new scheme or amended a scheme which we thought had been properly interpreted by the courts. I am persuaded that we should also do so in this case even if we believe that the premise which led them to devise the new scheme was wrong. In agreement with the other members of the Court, therefore, I would reluctantly dismiss the appeal on the first issue but happily allow it on the second.