Neutral Citation Number: 2011 EWHC 1467 (Ch)

Case No: HC11COO205

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 June 2011

Before :

MR CHARLES HOLLANDER QC (SITTING AS A DEPUTY JUDGE)

- -

Between :

THE CROWN ESTATE COMMISSIONERS	**Claimant**
- and -	
(1) THE GOVERNORS OF THE PEABODY TRUST	**Defendants**
(2) MARGARET POPLAK	
(Representative Defendant pursuant to CPR 19.7)	

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- -

Ranjit Bhose (instructed by Trowers & Hamlins) for the Claimant
Jon Holbrook (instructed by Peabody) for the First Defendant
Martin Westgate QC (instructed by Hansen Palomares) for the Second Defendant

Hearing dates: 19-20 May 2011

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JUDGMENT

MR CHARLES HOLLANDER QC (SITTING AS A DEPUTY JUDGE):

1. On 28 February 2011 the Claimant completed the sale of their reversionary interest to the First Defendant in a number of residential tenancies occupied by tenants who had been subject to and entitled to protection under the Rent Act 1977 (RA 77) . Those tenants are now the tenants of the First Defendant.

2. The First Defendant is a housing association within the meaning of s.1 of the Housing Associations Act 1985 and a not for profit private registered provider of social housing within the meaning of the Housing and Regeneration Act 2008.

3. The Second Defendant is the tenant of the First Defendant at 5 Pennethorne Close, Victoria Park Estate, London. She was formerly a regulated tenant of the Claimant. By order of Peter Smith J on 4 March 2011 she was joined as a representative defendant pursuant to CPR 19.7 to represent all such tenants, having been put forward by the Residents' Associations and their solicitors.

4. It is acknowledged by all parties that those tenants ceased to be regulated tenants (whether protected or statutory) under the 1977 Rent Act (RA 77) on the sale of the Claimant's reversionary interest. The question for determination in this action is their present status. The Claimant contends they have become *secure tenants* subject to the provisions of Part IV of the Housing Act 1985 (HA 85) and also *housing association tenants* within the meaning of RA 77 s86, and so subject to Part VI thereof. The First Defendant contends they have

become *assured tenants* subject to the provisions of Part I of the Housing Act 1988 (HA 88). The Second Defendant supports the Claimant's position and, through Mr Westgate QC, made separate submissions to me.

5. A bundle of witness statements was put before me, and the terms of the Second Defendant's tenancy were also put in evidence. However, whilst this provided the necessary background material, as was acknowledged on all sides, the issue before me was a matter of statutory construction.

6. Determination of the issue depends on the proper construction of s38(5) of HA 88. Read literally, it is applicable to the present and supports the First Defendant's case. But the Claimant and Second Defendant contend that Parliament could not have intended to achieve the result effected by the literal meaning, and contend that a more purposive construction of this definition and of s38 accords with the intention of Parliament. The Claimant and the Second Defendant relied on statements made during the passage of what became HA 88 through Parliament as evidencing the statutory purpose of Parliament, and also rely on the Human Rights Act 1998 ("HRA") as assisting their arguments as to statutory construction.

7. It is impossible to resolve the question in issue in this case without detailed analysis of the legislation affecting tenants which preceded HA 88.

The Crown Estates Commissioners

8. The Crown Estate Commissioners is a body corporate charged on behalf of the Crown with the function of holding property under its management, and in accordance with the provisions of the Crown Estate Act 1961. Properties it

holds for management are usually referred to as part of The Crown Estate. Prior to the sale, the Claimant held and managed the freehold interest in land and buildings comprising housing estates in London and known as the Victoria Park, Millbank, Cumberland Market and Lee Green Estates. It granted a number of regulated tenancies upon these estates. It is common ground between the parties that those regulated tenants cannot have remained regulated tenants following the sale as the First Defendant is incapable of being the landlord under a Rent Act tenancy (see s.15 RA 77).

9. If, as contended by the First Defendant, the tenants have become assured tenants (rather than secure and housing association tenants) they will enjoy fewer statutory rights, as referred to below. However, the effect of such a possible outcome has been mitigated by the imposition by the Claimant of contractual terms upon the First Defendant (see Ms Hart's first witness statement, at paragraphs 5 and 6, and the second, at paragraphs 9 and 10). It has also issued to each regulated tenant an individual Tenancy Addendum, enforceable by the tenant against the First Defendant, by virtue of the Contracts (Rights of Third Parties) Act 1999. One function of these Addenda is to confer upon the tenants rights which are similar (although not identical) to their statutory rights as regulated tenants, and which they will continue to benefit from irrespective of the determination as to status. The Addendum is exhibited to Ms Hart's second witness statement. Nonetheless, determination of the applicable statutory code will necessarily affect issues of management, rent-setting, succession and possession, and will determine the extent to which recourse needs to be made to provisions within the Addenda at all..

The Crown Estate Act 1961

10. The Crown Lands Act 1829 placed most of the Crown lands under the management of the Commissioner of Woods, later represented by the Commissioners of Crown Lands. The Commissioners were then reconstituted as the Claimant by The Crown Estate Act 1956, with property under its management being known as The Crown Estate: s.1 Crown Estate Act 1961. Subsections (1) and (2) provide as follows:

> "(1) The Crown Estate Commissioners (in this Act referred to as "the Commissioners") shall continue to be a body corporate for all purposes, charged on behalf of the Crown with the function of managing and turning to account land and other property, rights and interests, and of holding such of the property, rights and interests under their management as for any reason cannot be vested in the Crown or can more conveniently be vested in the Commissioners; and the property, rights and interests under the management of the Commissioners shall continue to be known as the Crown Estate.
>
> (2) Subject to the provisions of this Act, the Crown Lands Acts, 1829 to 1936, shall cease to have effect, and the Commissioners shall, for the purpose of managing and improving the Crown Estate or any part of it, have authority to do on behalf of the Crown over or in relation to land or other property, rights or interests forming part of the Crown Estate, and in relation to all matters arising in the management of the Crown Estate, all such acts as belong to the Crown's rights of ownership, free from any restraint on alienation imposed on the Crown by section five of the Crown Lands Act, 1702, or by any other enactment (whether general or particular), and to execute and do in the name of Her Majesty all instruments and things proper for the effective exercise of their powers."

11. It follows that the Claimant manages land and other property, and holds property under its management which for any reason cannot be vested in the Crown or can more conveniently be vested in the Claimant. It exercises its powers of management "on behalf of" the Crown, as is clear from ss.(2). Section 3(1) makes provision as to the Claimant's powers of selling, leasing, and disposal.

12. Some Crown land that does not form part of The Crown Estate but is not an occupied Royal Palace is managed for the Crown by the Department for Culture, Media and Sport, and by the Royal Parks Agency, the Historic Palaces Agency, and English Heritage. Crown land within occupied Royal Palaces is the responsibility of the Crown by the Keeper of the Privy Purse. There are, accordingly, numerous residential tenancies and rights of occupation on parts of Crown lands that do not comprise part of The Crown Estate.

13. Historically, the Crown was not bound by the Rent Acts: *Rudler v Franks [1947] KB 530.* This remained the position under the RA 77, as originally enacted. In its original form, s.13 RA 77 provided as follows:

> "(1) A tenancy shall not be a protected tenancy at any time when the interest of the landlord under that tenancy belongs to Her Majesty in right of the Crown or of the Duchy of Lancaster or to the Duchy of Cornwall, or to a government department or is held in trust for Her Majesty for the purposes of a government department.
> (2) A person shall not at any time be a statutory tenant of a dwelling-house if the interest of his immediate landlord would at that time belong or be held as mentioned in subsection (1) above."

14. The exemption was a personal exemption. Therefore, as and when the Crown transferred its landlord's interest under a residential tenancy to a purchaser who was capable of being the landlord under a RA 77 tenancy, and subject to compliance with any other statutory criteria, the tenancy would then become a regulated tenancy.

15. Notwithstanding this exemption, it had been the Claimant's long established practice to apply the provisions of RA 77 administratively to its tenancies (see Mr Heseltine, Secretary of State for the Environment, Hansard, HC Debate 19 May 1980, Vol.985 c103). This administrative practice became a matter of

statutory entitlement when RA 77 s.13 was substituted by s.73 Housing Act 1980 ("HA 80") with effect from 28 November 1980. S.13 RA 77 has since provided as follows:

> "(1) Except as provided by subsection (2) below—
>
> (a) a tenancy shall not be a protected tenancy at any time when the interest of the landlord under the tenancy belongs to Her Majesty in right of the Crown or to a government department or is held in trust for Her Majesty for the purposes of a government department; and
>
> (b) a person shall not at any time be a statutory tenant of a dwelling-house if the interest of his immediate landlord would at that time belong or be held as mentioned in paragraph (a) above.
>
> (2) An interest belonging to Her Majesty in right of the Crown shall not prevent a tenancy from being a protected tenancy or a person from being a statutory tenant if the interest is under the management of the Crown Estate Commissioners."

16. The new s.13(2) RA 77 meant that the Crown's exclusion from the application of RA 77 did not apply to tenancies granted by the Claimant, but only continued in cases where the tenancies were held 'directly' of the Crown. Its effect was to bring many existing tenancies granted by the Claimant within RA 77 on 28 November 1980, as well as new grants of tenancy after that date. From then onwards, the Claimant's regulated tenants were entitled to all of the statutory rights under RA 77 including those as to rent regulation, the succession provisions, and the provisions according security of tenure.

17. It remained the position that those Crown residential tenancies which remained outside RA 77, would come within RA 77 if the Crown transferred its interest to a landlord that was capable of being the grantor of a regulated tenancy.

The Rent Act 1977

18. RA 77 re enacts a scheme of statutory protection for tenants originating in the Rent and Mortgage Interest (Restrictions) Act 1920.

19. Subject to a number of exceptions s. 1 provided that a tenancy under which a dwelling house is let as a separate dwelling is a *protected tenancy*. Once the protected tenancy came to an end then the tenant continued to be protected from eviction as a *statutory tenant* for so long as the person occupied the dwelling house as his residence (s. 2). Statutory tenants and protected tenants were together known as *regulated tenants* (s. 18). Regulated tenants enjoyed security of tenure in that possession might be granted only on the grounds set out in Schedule 15 and s. 98. Regulated tenancies were also subject to a system of rent regulation under Part III of the RA 77.

20. Where the interest of the landlord was held by any of a number of listed bodies, which included housing associations and local authorities, the tenancy was not capable of being a regulated tenancy, for so long as that body was the landlord: s.15.

The position immediately prior to the coming into force of the Housing Act 1988

21. RA 77 was amended significantly on numerous occasions. As has already been seen, HA 80 took away the Crown exclusion for tenants of the Crown Estates Commissioners. Whilst for present purposes it is not necessary to track precisely the various amendments after 1977 and prior to 1988, it is necessary to identify a number of the changes over that period. What is of particular significance is the statutory position as it was prior to the coming into force of HA 88.

22. The scheme of RA 77 was originally to exclude tenants of public sector landlords from the security of tenure provisions. It was for this reason that

tenants of local authorities, housing associations and the Crown (other than, after 1980, when acting through the Crown Estates Commissioners) were excluded by ss13-15. Sections 13 to 15 provided that a tenancy was not a protected tenancy when the interest of the landlord belongs to the Crown, a local authority, or a housing association respectively. S. 15(1) provided that:

> "A tenancy...shall not be a protected tenancy at any time when the interest of the landlord under that tenancy belongs to a housing association falling within subsection (3) below; nor shall a person at any time be a statutory tenant of a dwelling-house if the interest of his immediate landlord would belong at that time to such a housing association".

23. The definition of housing association was amended several times in circumstances not material to the present. The First Defendant was a housing association, so tenants could not be protected or statutory so long as the First Defendant was their landlord. But although s. 15 excluded tenants of housing associations from the security of tenure provisions of RA77, such tenancies were nonetheless capable of being *housing association tenancies* under s. 86. S86 is part of Part VI of RA 77 and establishes a regime of rent regulation. S86 provided that a tenancy was a housing association tenancy if it would be a protected tenancy but for RA 77 s15 and the interest of the landlord belonged to a housing association.

24. HA 80 created a parallel regime for protection of certain tenants who were excluded from protection under RA 77. Part II of that Act created *secure tenancies*. The unit of protection remained a dwelling house let as a separate dwelling but a tenancy could only be a secure tenancy if it met what was referred to as the "landlord" and "tenant" conditions. The secure tenancy provisions in the 1980 Act were later consolidated into the Housing Act 1985 ("HA 85"). By HA 85 s79:

"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".

25. These provisions have been described as "ambulatory" so that, subject to any other provision, a tenant may move in and out of status as a secure tenant from time to time depending (for example) on the identity of his landlord: see *Bhai v Black Roof Housing Association (2001) 33 HLR 55.* "The landlord condition" provided by HA 85 s80 "that the interest of the landlord belongs to one of the following authorities or bodies." The list of bodies included housing associations.

26. Secure tenants enjoyed security of tenure under HA 85 s82 and Schedule 2. However, the provisions of Part VI RA 77 remained in force in relation to housing association tenancies, so a housing association tenant might be both a secure tenant and a housing association tenant, with both security of tenure and rent regulation.

The position prior to the coming into force of the Housing Act 1988

27. So far as relevant to the present, the position prior to the coming into force of HA 88 was in relation to the Claimant's tenants therefore as follows.

28. So long as the landlord remained the Claimant, the tenants held regulated tenancies: either protected or statutory tenancies under RA 77.

29. If the Claimant transferred its interest to a private landlord, the status of the tenants would remain as before.

30. If the Claimant transferred its interest to a housing association or local authority landlord, by reason of ss13-15 RA 77, the new landlord was not capable of granting a regulated tenancy. In either case the tenancies would become secure tenancies under HA 85. This was the effect of satisfaction of the landlord condition and the tenant condition in HA 85. Both housing associations and local authorities were on the list of entities in relation to whom the landlord condition was satisfied.

31. In addition, if the transfer of interest was made to a housing association, the provisions of Part VI of RA 77 applied, because in addition to being a secure tenancy, the tenancy would fulfil the definition of housing association tenancy. Part VI of RA 77 was not applicable to local authority tenants.

The Housing Act 1988

32. HA 88 reflected the then government's view that the balance between public and private sector had moved too far in favour of the public sector. The legislation was intended to facilitate a transfer of rented accommodation from public to private sector. The broad scheme was to continue existing protection for existing tenancies but to alter the scheme for those tenancies granted after the coming into force of HA 88.

33. Part I HA 88 introduced the new *assured tenancy* into the private rented sector with effect from 15 January 1989: see s.1. Whilst HA 88 provided for assured tenants to have security of tenure, the protection was less than under RA 77.

Under HA 1988 there are a number of mandatory grounds for possession within Part I of Sch.2, including Ground 8, which provides that an assured tenant is liable to be evicted where there are more than 8 weeks' rent arrears (13 weeks' arrears when Ground 8 was first enacted) and without any requirement (such as was contained in RA 77) that it be "reasonable" to order possession. Tenants with assured tenancies did not benefit from rent regulation, and were liable to pay either contractual or market rents for their homes: see ss.13 and 14 HA 88. Moreover, there is only one statutory right of succession to an assured tenancy, with the categories of person qualified to succeed being narrower than under RA 1977. Under RA 77 there are two successions.

34. One of the main effects of HA 88 was to draw a distinction between tenancies of residential dwellings in the private sector granted before or after the commencement date of HA 88 (15 January 1989). If a tenancy was entered into before that date (or pursuant to a contract made before that date), it continued to be a regulated tenancy. S.1(2) provided that (subject to irrelevant exceptions) if and so long as a tenancy fell within any paragraph in Part I of Schedule 1 of HA 88, it could not be an assured tenancy. The first of the categories of tenancy which could not be an assured tenancy was stated (subject to exceptions set out) to be:

"A tenancy which is entered into before, or pursuant to a contract made before the commencement of this Act"

35. Such an existing tenancy remained subject to RA 77 unless, upon a change of landlord, the new landlord was not capable of being the landlord under a

regulated tenancy (for example, a local housing authority). Save for that situation, a regulated tenant did not lose his status under RA 77 because his landlord sold his interest on or after 15 January 1989, or because the landlord granted him a new tenancy on or after that date: see s.34 HA 88. However, a tenancy granted on or after 15 January 1989 could not be a regulated tenancy, and (subject to exceptions principally identified in s.34 HA 88) such a tenancy would be an assured tenancy only.

36. HA 88 introduced a similar distinction in the case of the housing association group of landlords, who before then satisfied "the landlord condition" under s.80 HA 85 for the grant of secure tenancies, but whose tenants also had the benefit of the 'fair rent' control provisions of Part VI RA 77, by virtue of being housing association tenancies (see above). As from 15 January 1989 a tenancy granted by a member of the housing association group of landlords would not be a secure tenancy or a housing association tenancy, but would be an assured tenancy under HA 88. This followed from Sch.18 HA 88 which amended "the landlord condition" within s.80 HA 1985, so as to exclude registered housing associations from the list of bodies capable of being the grantors of secure tenancies. However, *existing* housing association tenants continued to enjoy that status; they also continued to be entitled to fair rent registration.

37. The transitional provisions of HA 88 are in Chapter V at ss.34-39. The heading is "Phasing out of Rent Acts and other transitional provisions". Section 35 deals with those cases where a tenancy granted on or after 15 January 1989 is not prevented from being a housing association tenancy and with the cases in which a tenancy granted on or after that date can be a secure tenancy notwithstanding that the housing association group no longer satisfies the "landlord condition" under HA 1985. A principal purpose of these provisions was to preserve and protect the status of existing regulated tenants and of housing association tenants and to prevent them from becoming assured tenants of their homes.

38. Section 38 bears the side-note: "Transfer of existing tenancies from public to private sector". It deals, principally, with cases where on 15 January 1989 the landlord's interest is held by a public body and at some later time it ceases to be held by such a body. As enacted it provided as follows:

"(1) The provisions of subsection (3) below apply in relation to a tenancy which was entered into before, or pursuant to a contract made before, the commencement of this Act if,—

(a) at that commencement or, if it is later, at the time it is entered into, the interest of the landlord is held by a public body (within the meaning of subsection (5) below); and

(b) at some time after that commencement, the interest of the landlord ceases to be so held.

(2) The provisions of subsection (3) below also apply in relation to a tenancy which was entered into before, or pursuant to a contract made before, the commencement of this Act if,—

(a) at the commencement of this Act or, if it is later, at the time it is entered into, it is a housing association tenancy; and

(b) at some time after that commencement, it ceases to be such a tenancy.

(3) On and after the time referred to in subsection (1)(b) or, as the case may be, subsection (2)(b) above—

(a) the tenancy shall not be capable of being a protected tenancy, a protected occupancy or a housing association tenancy;

(b) the tenancy shall not be capable of being a secure tenancy unless (and only at a time when) the interest of the landlord under the tenancy is (or is again) held by a public body; and

(c) paragraph 1 of Schedule 1 to this Act shall not apply in relation to it, and the question whether at any time thereafter it becomes (or remains) an assured tenancy shall be determined accordingly.

(4) In relation to a tenancy under which, at the commencement of this Act or, if it is later, at the time the tenancy is entered into, the interest of the landlord is held by a new town corporation, within the meaning of section 80 of the Housing Act 1985, subsections (1) and (3) above shall have effect as if any reference in subsection (1) above to the commencement of this Act were a reference to—

(a) the date on which expires the period of two years beginning on the day this Act is passed; or

(b) if the Secretary of State by order made by statutory instrument within that period so provides, such other date (whether earlier or later) as may be specified by the order for the purposes of this subsection.

(5) For the purposes of this section, the interest of a landlord under a tenancy is held by a public body at a time when—

(a) it belongs to a local authority, a new town corporation or an urban development corporation, all within the meaning of section 80 of the Housing Act 1985; or

(b) it belongs to a housing action trust established under Part III of this Act; or

(c) it belongs to the Development Board for Rural Wales; or

(d) it belongs to Her Majesty in right of the Crown or to a government department or is held in trust for Her Majesty for the purposes of a government department.

(6) In this section—

(a) "housing association tenancy" means a tenancy to which Part VI of the Rent Act 1977 applies;

(b) "protected tenancy" has the same meaning as in that Act; and

(c) "protected occupancy" has the same meaning as in the Rent (Agriculture) Act 1976."

39. This case depends on the proper meaning of the definition of "public body" in (5) (d), and whether it excludes land managed by the Claimant.

Proper construction of s38 (5) (d)

40. S38(5) (d) defines "public body" so as to include the case where the interest of the landlord "belongs to Her Majesty in right of the Crown." Unless an exception is made, this will include cases where the interest of the Crown is under the management of the Claimant. As stated by the editors of *Halsbury's Laws 4th Edition, Vol.12(1), at para.209:*

"Land belonging to the monarch in right of the Crown may be further distinguished as either land under the management of the Crown Estate Commissioners or land not under their management":

41. Therefore, although the Claimant is the physical grantor of tenancies, in legal terms it is seen as "managing" properties for the Crown, so that the interest of a landlord under tenancies so granted, still "belongs to Her Majesty in right of the Crown".

42. There is no exclusion in s38(5)(d) for land managed by the Crown Estates Commissioners. Taking the literal meaning, the effect is as follows. Upon the Claimant transferring its interest as landlord to another landlord then the regulated tenants become assured tenants; this would be the case even if the new landlord was a private landlord capable of being the grantor of a regulated tenancy under RA 77. This is because Section 38(1) provides that ss.(3) applies in relation to a tenancy which was entered into before, or pursuant to a contract made before, the commencement of HA 88 if (a) at that commencement or, if it is later, at the time it is entered into, the interest of the landlord is held by a public body and (b) at some time after that commencement, the interest of the landlord ceases to be so held. As (on the literal meaning) "public body" includes the Claimants but (on any view) excludes the First Defendant, ss(3) applies.

43. Ss(3)(a) goes on to provide that the tenancy "shall not be capable of being a protected tenancy, a protected occupancy or a housing association tenancy", Nor, by ss.(3)(b), is the tenancy capable of being a secure tenancy unless the interest of the landlord under the tenancy is (or is again) held by a public body. That leads to ss3(c):

> "Paragraph 1 of Schedule 1 to this Act shall not apply in relation to it, and the question whether at any time thereafter it becomes (or remains) an assured tenancy shall be determined accordingly."

44. Thus, on the literal meaning, upon the Claimant transferring its interest as landlord to another landlord, the regulated tenants become assured tenants. This is because ss38 (1) and (3) apply, and have the effect of disapplying para 1 of Sch1. Thus instead, s1 of HA 88 applies (and is not in consequence disapplied by para1 of Sch 1) and means that the tenancies become assured tenancies and cannot be protected or housing association tenancies. This would be the case even if the new landlord was a private landlord capable of being the grantor of a regulated tenancy under RA 77.

The case of the Claimant and Second Defendant

45. The Claimant and Second Defendant recognise that, if s38 is applicable to the present case, and the definition of "public body" in s38 (5)(d) is read literally, it must have the effect contended for by the First Defendant. However, the Claimant and Second Defendant contend that such a construction produces an extraordinary and unexpected result which it cannot have been Parliament's intention to procure. Thus they contend:

i) The definition of "public body" should be given a purposive construction in context

ii) S38 should be read as not applying at all to regulated tenancies, the choice of language in s38 (1) and (3) being apt to apply to an existing contractual tenancy but not a statutory tenancy

iii) There is a conflict between s35(5) and s38 which should be resolved by giving precedence to s35(5)

They thus contend that the result intended by Parliament can be achieved either by giving a purposive construction to the reference to the Crown in relation to "public body," or by giving a restricted meaning to "tenancy" in s38(1) so that it does not apply to regulated tenancies.

46. As explained above, prior to the commencement date of HA 88, on a transfer of the Claimant's interest to a housing association such as the First Defendant, the tenants would have continued to be secure tenants (see HA 85) and housing association tenants (to which Part VI of RA 77 applied). The scheme of HA 88 was not to affect existing rights. If one either reads s38 as applicable to the present, or alternatively reads the definition of "public body" as excluding property managed by the Claimant (and incorporate the same proviso as appears in Sch1 Para 11, as set out below), the Claimant and Second Defendants say that would have been achieved. However, if one reads these sections literally, they have the effect that on the transfer of interest, the status of the tenants changes, and they have the lesser rights as assured tenants only. This would mean that in a statute which was intended to preserve existing rights, and only affect rights for the future, the Claimant' tenants, alone amongst all types of tenants, have been singled out for special treatment and a different, and inferior in terms of protection, regime has been applied to them.

47. It was for this reason that I was shown references to the parliamentary debates prior to the passing of HA 88, and was addressed both on the applicability of *Pepper v Hart* and the Human Rights Act.

Discussion

48. These provisions, and in particular Part V of HA 88, can politely be described as labyrinthine. They are replete with exceptions to exceptions. I was shown unflattering comments from commentators as to the drafting in RA 77 and its predecessors, but I would not expect those commentators to have been any more generous in relation to HA 88. Much of the problem in the drafting of these provisions seems to derive from the decision of Parliament not to repeal the existing law for the purpose of existing tenancies, but only to prevent the existing law applying for tenancies granted after the commencement date. The desire to deal with a series of cases requiring transitional and other special treatment, as well a need to prevent both anti-avoidance on the part of landlords (a problem which occurred after 1957 when ill-considered statutory amendments gave rise to what is referred to as Rachmanism) and the converse problem of tenants using new statutory provisions unjustifiably to "trade up" in protection has created something of a drafting nightmare.

49. As will become apparent, both sides recognised that on their respective interpretations, there were drafting errors in these provisions. So to find in this complex and at times obscure legislation that it is necessary to give a purposive interpretation to the words used may not in itself be a difficult conclusion to reach.

50. That said, if the Parliamentary Homer indeed nodded when drafting the definition of "public body" in s35(5)(d) , it seems not a little surprising that the draftsman should have simply failed in error to include a whole sentence which he had no difficulty in inserting elsewhere when he sought to draw distinction between the Crown and the Crown Estates. When, in 1980, RA 77

was amended to apply to the Crown Estates Commissioners, s13(2) utilised a form of wording which without difficulty excluded the Crown but applied RA 77 to tenants of the Crown Estates Commissioners.

51. Equivalent language was subsequently used when the draftsman wished to procure the same consequence in a different (and otherwise irrelevant) section of HA 88. The wording which appears when the Crown is referred to at Paragraph 11 of Sch.1 provides, as one of the forms of tenancy which cannot be an assured tenancy:

> "Crown tenancies
> 11. (1) A tenancy under which the interest of the landlord belongs to Her Majesty in right of the Crown or to a government department or is held in trust for Her Majesty for the purpose of a government department.
> (2) The reference in sub-paragraph (1) above to the case where the interest of the landlord belongs to Her Majesty in right of the Crown does not include the case where that interest is under the management of the Crown Estate Commissioners or it is held by the Secretary of State as the result of the exercise by him of functions under Part III of the Housing Act 1985 ."

52. It will be seen that the draftsman, having provided for the general exclusion in Para.11(1), has then by Para.11(2) brought back within the scope of the HA 1988 provisions those cases where the "interest" of the Crown "is under the management of" the Claimant.

53. So if the definition of "public body" in s38(5)(d) involved an error, it was all the more surprising because the draftsman had available to him a well-used form of words adopted both in previous legislation and in HA 88 itself when he intended to say "the Crown but not the Crown Estate Commissioners."

Parliamentary intention and the HRA as an aid to construction

54. It is thus necessary to consider the arguments raised on behalf of the Claimant and the Second Defendant.

55. The Claimant and the Second Defendant point to the intention of Parliament in HA 88 as being to preserve existing rights. There was no intention to change what had gone before. It cannot, consistent with that intention, have been Parliament's intention to legislate in such a way as to curtail existing rights.

56. There were two separate strands to this argument. Firstly, I was shown materials which related to the passage of the bill which led to HA 88 through Parliament and invited to pay regard to these under *Pepper v Hart.* Secondly, the Claimant and the Second Defendants say that if the First Defendant's argument were right, this would amount to unjustifiable discrimination against Crown Estates tenants and in the light of HRA, I should construe HA 88 so as to avoid such a result. Although there are two separate arguments here, they were both relied upon to drive the statutory construction down the path put forward by the Claimant and Second Defendants.

Pepper v Hart

57. In *Pepper v Hart [1993] AC 593* the House of Lords permitted for the first time reliance on Hansard as an aid to statutory construction in appropriate circumstances. *Bennion on Statutory Interpretation 5th ed* summarises the rules at Section 217 on p616. The principle applies where in the opinion of the court construing the enactment, it is ambiguous or obscure, or its literal meaning leads to an absurdity. The statement must be made by or on behalf of the minister or other person who is the promoter of the bill. The statement

must disclose the mischief aimed at by the enactment, or the legislative intention underlying its words. The statement must be clear.

58. The Secretary of State for the Environment (Mr Ridley) when moving the Bill's second reading on 30 November 1987, and in answer to an intervention from Mr Winnick that the Bill was about to repeat what was wrong with the Rent Act 1957, said *"That Act applied to some existing lettings, and the Bill applies to none"* (Hansard Vol.123 at column 620). At column 612, he continued:

> *"Part 1 of the Bill concerns the private rented sector. It provides that most new lettings will be either assured tenancies or assured shorthold tenancies. The system of registered fair rents will continue for existing lettings, but will no longer be available for most new lettings".*

59. In the House of Lords, and when moving that the Bill be read for a second time, on 11 July 1978 (and after it had been considered in Standing Committee G from 10 December 1987 until 15 March 1988) Lord Caithness (with a little more precision) outlined the provisions within Chapters 1-3 of the Bill before saying:

> *"All these proposals will of course apply only to future lettings. I want to emphasise most strongly that the rights of existing tenants, in respect of both rents and security, will be protected. The Bill does, however, amend the succession rights under existing Rent Act tenancies, which in our view are very unfair to landlords." (at column 597)*

60. Whether the rules set out in B*ennion* apply might be said to beg the question in issue in the case. I will assume for purposes of analysis that I can look at these materials, at least *de bene esse.*

61. It is right that Parliament did not intend to affect existing tenancies in HA 88. But it is too simplistic to derive from this proposition that for which the Claimant and Second Defendant contend. HA 88 did not on any view affect the tenancies on land managed by the Crown Estate Commissioners. Its tenants had the same protection as before, so long as the interest remained with the Claimant. But if prior to HA 88 the Claimant had transferred its interest to another party, it would not follow even then that the tenants would retain the same protection under their new landlord. If the Claimants had transferred their interest to a local authority or a housing association, the protection would have differed thereafter, because neither body was capable of granting a regulated tenancy as a result of RA 77 s13-15.

62. So the principle was well established that if the landlord changed, the tenant was only entitled to the form of tenancy, and security, which the new landlord was capable of offering. Thus prior to HA 88 a change of landlord could have adversely affected the tenants' security.

63. Once that principle, which carries through the various legislation is recognised, then the result for which the First Defendant under HA 88 now contends does not seem unreasonable. On a change of landlord, the status of the tenant's protection depended on the protection which the new landlord was capable of giving under the relevant statute. There would always have been a change of status of the tenant on transfer of interest from the Claimant to a landlord not capable of granting regulated tenancies. The protection available to the Claimant's tenants on transfer would still be the highest form of security available under HA 88, namely the assured tenancy. Moreover, it is significant

that it was the Claimant that was the landlord. The issue does not relate to a private landlord's tenants. As a body managing property for the Crown, the Claimant could be expected to exercise care in identifying the party to whom they transferred their interest. After all, the Crown had traditionally, and by convention, treated their tenants as subject to protection even before HA 80. And, of course, the Claimant has, in the event, done precisely what would have been expected-choosing the transferee with care, and imposing requirements on the First Defendant to protect existing tenants.

The HRA

64. The argument under HRA proceeds as follows. s. 3 of the HRA requires:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights".

65. The Convention Rights in issue here are Articles 8 and Art 1 of Protocol 1 taken together with Article 14 (discrimination). If the First Defendant's construction is correct then (runs the argument) the tenants are, and were at the point of transfer, placed in a disadvantageous position as against other regulated tenants whose landlord was not the Crown Estates Commissioners. Any other regulated tenants would, on transfer of the reversion, either remain regulated or would become secure tenants. They would not become assured tenants. Thus if the First Defendant is right, there is discriminatory treatment as between the tenants of the Claimant and other tenants.

66. In *Stec v UK* [2006] 43 EHRR 1017 the ECtHR stated as follows:

"A difference of treatment is, however, discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment".

67. The facts here fall within the ambit of the right to family life (Art 8) and to possessions (Art 1 Protocol 1). Differences based on housing status have been held to be within Art 14. In *Larkos v Cyprus* 30 EHRR 597 a complaint of discrimination was made out when the tenant was a government tenant who compared himself with private tenants who enjoyed security. The arrangements for statutory protection of residential tenancies are the means by which the state gives effect to its obligation to show respect for family life and to balance the property rights of landlords and tenants (see *Larkos* at [32]). In *R (RJM) v Secretary of State for Work and Pensions* [2009] 1 AC 311 Lord Neuberger held that differences based on homelessness were within Art 14 and he said at para 44 that if persons living in a certain type of home (e.g. flats) were treated differently from those living in another type (e.g. houses) that would clearly fall within Art 14. See also *Ghaidan v Godin Mendoza* [2004] 2 AC 557.

68. It is relevant to bear in mind that the state has a wide margin of appreciation in how to draw up regimes for housing protection or other social measures and it may need to draw "bright lines" that appear to operate harshly in some cases: see for example *Spath Holme Ltd v UK (2002) No 78031/01*at p6 of the report put before me.

69. The Claimant and Second Defendant argue that these provisions, as the First Defendant interprets them, deprive the Claimant's tenants of the prospect of

continued regulated status on transfer whatever their previous circumstances. It has, it is said, irrational results and serves no legitimate aim. On the contrary, they say all the available material suggests that Parliament did not intend this result which cuts across the settled practice of preserving existing entitlements.

70. If this argument were correct, it would appear to affect large numbers of provisions of the Housing Acts and Rent Acts. It is apparent that the scheme of the legislation is that on a transfer of an interest to another landlord, the tenant should be entitled to the protection which the landlord was capable of granting. As many public bodies were not capable of granting regulated tenancies, this had the effect that protection on transfer of an interest from a body capable of granting regulated tenancies to a body not so capable was lesser. Could it be said that in every case this involved a breach of HRA because those who would on a transfer lose an element of protection are discriminated against when compared with those who do not? For example, it was the express intention of HA 88 to restrict rights of succession from those enjoyed on existing regulated tenancies. Does the same problem arise here?

71. In fact, HA 88 did not (save in relation to succession rights) alter the rights of tenants so long as their landlords continued to hold the reversionary interest. What it did, as did previous rent and housing legislation, was to provide for certain circumstances in which on a change of landlord, the protection granted would, whilst remaining significant, nevertheless changed. In recognising that such a change arose in relation to a transfer of interest from the Claimant to another party, it is also relevant to have in mind that the Crown's tenancies,

and land managed for the Crown by the Claimant, had always been treated differently to other tenancies.

72. In my view the HRA does not assist here. I do not consider it can fairly be said that tenants of the Claimant were discriminated against under HA 88, and if I am wrong on that, the scheme seems to me to fall readily within the margin of appreciation granted to Parliament. In any event, if the First Defendant's case is correct, the literal meaning of the statute reflects the actual intention of Parliament.

S.35

73. Section 35 deals with those cases where a tenancy granted on or after 15 January 1989 is not prevented from being a housing association tenancy and with the cases in which a tenancy granted on or after that date can be a secure tenancy notwithstanding that the housing association group no longer satisfies the "landlord condition" under HA 85. A principal purpose of these provisions is to preserve and protect the status of existing regulated tenants and of housing association tenants and to prevent them from becoming assured tenants of their homes.

74. Section 35(5) provides:

> "If, on or after the commencement of this Act, the interest of the landlord under a protected or statutory tenancy becomes held by a housing association, a housing trust, the Housing Corporation or Housing for Wales, nothing in the preceding provisions of this section shall prevent the tenancy from being a housing association tenancy or a secure tenancy and, accordingly, in such a case section 80 of the Housing Act 1985 (and any enactment which refers to that section) shall have effect without regard to the repeal of provisions of that section effected by this Act."

75. The Claimant and the Second Defendant contend that there is a conflict between s35(5) and the construction of s38(5)(d) invoked by the First Defendant.

76. Where s35(5) applies, and a housing association takes a transfer of the interest of the landlord under a regulated tenancy, the tenancy wil*l* become a housing association tenancy and a secure tenancy, rather than an assured tenancy. S35(5) has the effect (where it applies) that existing regulated tenants are not to become subject to the market rent provisions of HA 88, or (for example) the mandatory grounds for possession on account of a change of landlord. So if s35(5) were applicable in the present case, there would indeed be a conflict between its terms and the First Defendant's construction of s38(5)(d) which would support the argument of the Claimant and the Second Defendant. However, s44 HA 88 provides as follows:

> "(1) Subject to paragraph 11 of Schedule 1 to this Act and subsection (2) below, Chapters I to IV above apply in relation to premises in which there subsists, or at any material time subsisted, a Crown interest as they apply in relation to premises in relation to which no such interest subsists or ever subsisted.
>
> (2) In Chapter IV above—
>
> (a) sections 27 and 28 do not bind the Crown; and
>
> (b) the remainder binds the Crown to the extent provided for in section 10 of the Protection from Eviction Act 1977.
>
> (3) In this section "Crown interest" means an interest which belongs to Her Majesty in right of the Crown or of the Duchy of Lancaster or to the Duchy of Cornwall, or to a government department, or which is held in trust for Her Majesty for the purposes of a government department.
>
> (4) Where an interest belongs to Her Majesty in right of the Duchy of Lancaster, then, for the purposes of Chapters I to IV above, the Chancellor of the Duchy of Lancaster shall be deemed to be the owner of the interest."

77. Ss 35-38 are contained in Chapter V. S44 makes clear that Chapters I to IV apply to the Crown but s44 says nothing about Chapter V. So it cannot be assumed that without express words Chapter V applies to the Crown at all. Unless the contrary intention appears, a statute does not bind the Crown: see *Bennion, Statutory Interpretation 5th ed Section 34, p206.*

78. Thus to the extent that Chapter V does apply to the Crown, the statute needs to say so expressly. It does so to the limited extent of the definition of "public body", which expressly applies to the Crown by s38(5)(d) but not otherwise. So the answer to the point is that s35 and s38 do not apply to the Crown save to the extent that the statute says so expressly. So there is no conflict. It is fair to say that it might have been better if s35(5) had said "Subject to s38(5)" or something similar.

S38(3)(a)

79. The next argument raised by the Claimant and the Second Defendant is that s38(1) should be construed as not referring at all to tenancies which were by 15 January 1989 already regulated tenancies, and thus s38(3) has no application to the present. On the face of it, this argument runs into the significant difficulty that s38(1) explains the circumstances in which s38(3) applies, and s38(1) does not in any way make or support the distinction which the Claimant and Second Defendant seek to draw. On the contrary, the wording strongly supports the First Defendant's case. However, the Claimant and Second Defendant point out that if the First Defendant is correct there is a problem with the drafting of s38(3) (a) which provides:

"(3) On and after the time referred to in subsection (1)(b) or, as the case may be, subsection (2)(b) above—

(a) the tenancy shall not be capable of being a protected tenancy, a protected occupancy or a housing association tenancy;"

80. The problem is as follows. There is no mention here of the expression "statutory tenancy". The word "tenancy" is defined in s45, but the definition which in any event is "except where the context otherwise requires" does not assist. (After the conclusion of the hearing I was sent further material on this point by counsel, but I do not consider it affects my view). So the consequence of the First Defendant's interpretation is that if on 15 January 1989 a statutory tenancy is held by a public body but thereafter ceases to be so held, the tenancy becomes both an assured tenancy (HA 88 s1, for reasons set out above) and a statutory tenancy (because it was previously a statutory tenancy and is not prevented from being a statutory tenancy by s38(3)(a)), which is an absurdity. The Claimant and Second Defendant say this shows that the real purpose of s38 was to avoid tenants "trading up", that is, relying on the statute as a basis for gaining better rights than they had before, and not to curtail existing rights, and that the absence of the reference to statutory tenancy assists their case. They say it follows from this that the draftsman never intended s38(1) and (3) to apply to regulated tenancies at all, the choice of language in s38(3)(a) demonstrating this. The First Defendant acknowledges that there is a drafting problem here which needs the words "or statutory tenancy" to be read into ss (3)(a), otherwise it makes no sense. The

First Defendant says it makes no sense on any interpretation without adding in those words.

81. I acknowledge the drafting problem in this section. But it seems to me to use this drafting infelicity to reach the conclusion that s38(1) was intended to exclude from its ambit regulated tenancies is a bridge too far. Such a conclusion cannot be squared with the wording of s38(1). Nor does the drafting problem in s38(3)(a) seem to me sufficient reason to assume that Parliament made the alleged error in the definition of "public body."

82. The Claimant and Second Defendant also separately rely on the wording of s38(3)(a) *"The tenancy shall not be capable of becoming a protected tenancy."* This refers to the prevention of a tenancy *becoming* a protected tenancy, they argue, rather than an existing regulated tenancy *ceasing to be* such a tenancy. I did not find this argument persuasive, and had no difficulty in reading the words of s38(3)(a) consistently with the First Defendant's case.

Conclusion

83. The case has been conspicuously well argued by all counsel involved and I pay tribute to their work in taking me through a *tour d'horizon* of the relevant legislation from 1977 onwards in order to set the question of interpretation before me in its proper context. There is no doubt that the drafting of the provision is not straightforward and it is possible to see why it was not unreasonable to think that there was a drafting error.

84. However, ultimately, it seems to me that the words of s38(5)(d) are clear and I reject the argument that the literal construction is contrary to the intention of

Parliament. I do not think that the other points relied on by the Claimant and Second Defendant as anomalies ultimately affect the proper construction. I note that *Arden & Partington, Housing Law* take the same view of the proper construction of the section at 2-237.

85. Thus in my view the tenants of the First Defendant to whom this action is applicable have become on the Claimant's transfer of interest assured tenants and I will grant declaratory relief to that effect in a form to be agreed by counsel.