HOUSE OF LORDS SESSION 2008–09

[2008] UKHL 70

on appeal from: [2007]EWCA Civ 404
[2008] EWCA Civ 363
[2008]EWCA Civ 196

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Knowsley Housing Trust (Respondents) *v* White (FC) (Appellant)
Honeygan-Green (Respondent) *v* London Borough of Islington (Appellants)
Porter (FC) (Appellant) *v* Shepherds Bush Housing Association (Respondents)

Appellate Committee

Lord Hoffmann
Lord Walker of Gestingthorpe
Lord Brown of Eaton-under-Heywood
Lord Mance
Lord Neuberger of Abbotsbury

Counsel

Appellant (Knowsley):
Jan Luba QC
Adam Fullwood
(Instructed by Keoghs and Nicholls, Lindsel & Harris)

Respondents (Knowsley):
Edward Bartley Jones QC
Michael Singleton
(Instructed by Anthony Collins Solicitors LLP)

Appellants (Honeygan-Green):
Andrew Arden QC
Iain Colville
(Instructed by London Borough of Islington)

Respondent (Honeygan-Green):
Richard Drabble QC
Adrian Jack
(Instructed by Wilson Barca Solicitors)

Appellant (Porter):
Richard Drabble QC
Miles Croally
(Instructed by Sharpe Pritchard for Oliver Fisher)

Respondents (Porter):
Ashley Underwood QC
Catherine Rowlands
(Instructed by Prince Evans)

Interveners (Knowsley and Porter)
Treasury Solicitors
Christopher Baker
(Instructed by Secretary of State for Communities and Local Government)

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HOUSE OF LORDS

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Knowsley Housing Trust (Respondents) *v* White (FC) (Appellant)
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[2008] UKHL 70

LORD HOFFMANN

My Lords,

1. I have had the advantage of reading in draft the speech of my noble and learned friend Lord Neuberger of Abbotsbury. For the reasons he gives, with which I agree, I would allow the appeals in *Knowsley Housing Trust v White* and *Porter v Shepherds Bush Housing Association*, but dismiss the appeal in *Honeygan-Green v Islington London Borough Council*.

LORD WALKER OF GESTINGTHORPE

My Lords,

2. I have had the privilege of reading in draft the magisterial opinion of my noble and learned friend Lord Neuberger of Abbotsbury. I am in full agreement with it, and for the reasons that Lord Neuberger gives I would dispose of these three appeals as he proposes.

3. I venture to add one brief footnote, and I do so largely as a matter of respect for Lord Browne-Wilkinson, who gave the leading speech in this House in *Burrows v Brent London Borough Council* [1996] 1 WLR 1448. Lord Browne-Wilkinson did not, as I read the authorities, invent

the rather unfortunate phrase "tolerated trespasser." It seems to have been coined by counsel for the local authority when that case was before the Court of Appeal: see Auld LJ (1995) 27 HLR 748, 752, quoted by Millett LJ in *London Borough of Greenwich v Regan* (1996) 72 P & CR 507, 517 (decided on 31 January 1996, while *Burrows* was on its way to this House). Both Auld LJ (in *Burrows*) and Millett LJ (in *Regan*) set out the expression "tolerated trespasser" in inverted commas, rather as if they were holding it at arm's length. Millett LJ went on to explain that it was not an appropriate expression because in *Regan* the Court of Appeal (for good reason, on the facts of that case) had not considered the effect of section 85 of the Housing Act 1985.

4. When *Burrows* reached this House *Regan* was approved and section 85 was given its proper significance. Lord Browne-Wilkinson quoted the expression "tolerated trespasser"—again, in inverted commas—at pp 1452E and 1455C, and in the latter passage he could be said to have tolerated it. He did not wholly-heartedly endorse it. But it has since then become too firmly embedded to be dislodged.

LORD BROWN OF EATON-UNDER-HEYWOOD

My Lords,

5. I have had the advantage of reading in draft the opinion of my noble and learned friend Lord Neuberger of Abbotsbury. I agree with everything he says and would dispose of these appeals exactly as he suggests.

LORD MANCE

My Lords,

6. I have had the benefit of reading in draft the speech of my noble and learned friend, Lord Neuberger of Abbotsbury. I agree with him that the appeals should be allowed in *Knowsley Housing Trust v White* and *Porter v Shepherds Bush Housing Association*, but dismissed in *Honeygan-Green v Islington London Borough Council*, in each case for

the reasons he gives, subject to one qualification not critical to the outcome.

7. The qualification relates to the operation of sections 85(2) and (4) of the Housing Act 1985 and the Court of Appeal authorities of *Marshall v Bradford Metropolitan District Council* [2001] EWCA Civ 594; [2002] HLR 428 and *Swindon Borough Council v Aston* [2002] EWCA Civ 1850; [2003] HLR 610. These are areas covered in my noble and learned friend's speech at paras 94 to 113. They concern the interplay of sections 85(2), (3) and (4) in a situation where a possession order is made against a secure tenant but stayed or suspended on conditions relating (usually) to the payment of arrears, rent, mesne profits and/or costs. They are areas which were not, unfortunately, the subject of any full argument before the House.

8. Full argument and a decision on these areas would have been called for in *Porter v Shepherds Bush Housing Association*, if the parties in that case had not at an early stage during the hearing agreed that the tenant's appeal should be allowed (on the basis that *Swindon Borough Council v Aston* was wrong) and the case remitted for the County Court to exercise jurisdiction accordingly under section 85(2); after that the parties and their counsel withdrew, with permission, from the hearing before the House. While the House, in noting the parties' agreement, reserved the right to consider the case on a wider basis, the position remains that it heard no full argument in support of any such basis.

9. Section 85 provides inter alia:

> "(2) On the making of an order for possession of such a dwelling-house on any of those grounds, or at 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.

(4) If the conditions are complied with, the court may, if it thinks fit, discharge or rescind the order for possession."

10. Where the execution of an order is stayed or suspended on conditions with which the tenant complies, no problem arises. Assuming the order to be silent as to the position, the tenant can by application under section 85(4) apply for its discharge or rescission in the light of the compliance with the conditions.

11. In practice, possession orders also contain a provision, designed to avoid the necessity for a separate application under section 85(4), providing prospectively for their discharge or rescission (or for them to "cease to be enforceable") upon satisfaction of the conditions. In *Payne v Cooper* [1958] 1 QB 174 the Court of Appeal acknowledged that "As a matter of English, at first sight it might be said with force that it is only when the conditions have in fact been complied with that [the] power [to discharge or rescind] arises, and may be invoked", but, in the event and in the light of existing practice, took a pragmatic view. It held (in relation to similar statutory wording to section 85(4) contained in section 4(2) of the Rent and Mortgage Interest Restrictions Act 1923) that such a provision could be regarded as a "proleptic" exercise of the power of discharge which the statutory wording provides. A further, separate application by the tenant after compliance with the conditions was therefore unnecessary. *Payne v Cooper* was evidently overlooked by all involved in *Marshall*, where one issue was whether proleptic discharge was possible. As Lord Neuberger, indicates in paras 94 to 99, the third reason given by Chadwick LJ in para 37 in *Marshall* cannot stand in the light of *Payne v Cooper*.

12. Lord Neuberger concludes in paras 109-110 that compliance with the conditions in the context of section 85(4) and of the type of orders made in the cases before the House must mean strict compliance. While it is not critical to the conclusions that I reach, I am by no means confident that it does. Time is not normally of the essence in a non-commercial context, unless the wording makes clear expressly or by implication that it is; and *Bennion on Statutory Interpretation* (5th ed)

(2008) p 868 notes that "as with all enactments, expressions relating to time are to be construed with common sense. So a strictly literal meaning will not be applied if the purpose of the enactment requires otherwise". Here the wording of the order made in *Islington London Borough Council v Honeygan-Green* does not make clear that time is of the essence, and I fully understand the argument that Parliament may not have envisaged that minor failures to comply with the conditions set under section 85(3) would preclude the exercise of the court's power under section 85(4). So there may be a considerable case for saying that substantial compliance with such conditions suffices. It may be objected that this could involve a distinction between non-compliance which converts a tenant into a tolerated trespasser under section 85(2) and (3) and non-compliance which precludes use of section 85(4). But, I am not even sure that it would necessarily do that. Substantial performance could be regarded as the test both of compliance under paragraph 5 of the order in *Honeygan-Green* setting the conditions regarding payments and of compliance for the purposes of paragraph 6 proleptically discharging that order in the event of compliance with such conditions.

13. Whether this is so or not, however, a substantial case could be made for reading the word "substantially" into subsection (4) before the words "complied with". This would mean that, even where the court imposed precise conditions which fell to be performed punctiliously under section 85(3), the court would have a degree of flexibility in relation to the discharge or rescission of the order under section 85(4). I do not see such a result as unworkable. It might be objected that any test of substantial compliance involves uncertainty. But it would on any view be open to a court expressly to introduce conditions with which the tenant was required to do no more than substantially comply under subsection (3) as well as subsection (4). The situation most obviously in mind in subsection (4) is (as the court acknowledged in *Payne v Cooper*) one where a court is exercising its power after the event (ex post facto), at which stage it should be possible to judge with relative ease whether or not there has been substantial compliance. The extension of the operation of subsection (4) to permit prospective discharge (para 11 above) may leave some scope for uncertainty in a situation in which the parties are not bound to go to court. But that is a mere side-effect of extending the subsection to a situation other than that with which it was on its face primarily concerned. It provides no reason to treat subsection (4) as requiring more than substantial performance if it should otherwise be so construed.

14. It is of course also open to a court to avoid all these difficulties by framing conditions which are appropriate in all the circumstances,

bearing in mind amongst other things the consequences of non-compliance. In *Bristol City Council v Hassan* [2006] EWCA Civ 656; [2006] 1 WLR 2582, the Court of Appeal showed the way, by holding that it was open to a court to order a tenant to give up possession on a date to be fixed by the court on an application by the landlord, not to be made so long as the tenant paid the current rent and the regular periodic payments towards arrears, etc required by the order and to be determined (wherever possible) on the papers without a hearing. That neatly avoids all the difficulties discussed in the previous paragraphs.

15. Where there is an order for possession, a secure tenant will often fail to comply with its conditions. The secure tenant thereupon becomes a tolerated trespasser. Later, however, he or she may satisfy all arrears. *Marshall* also held that, in this situation, a provision in the order that it should "cease to be enforceable when the arrears …. are satisfied" could not and did not have the effect under section 85(4) of reviving the original secure tenancy. *Swindon* held that this position could not be redeemed by an application under section 85(2), on the ground that "an application to postpone the date of possession was not possible since the order had ceased to be enforceable" (para 20).

16. I agree that *Swindon* was wrong, for the reasons given in relation to that case in paras 111 to 113 of Lord Neuberger's speech. Otherwise the problem arises that a secure tenant who has become a tolerated trespasser, but then pays up all the arrears, cannot in any way revive his or her tenancy. However, once *Swindon* is overruled, subsections (2) and (3) of section 85 provide the sufficient solution. The tenant can, even after paying up all arrears, apply for a variation of the possession order to cover the late payment of the arrears, and so obtain discharge.

17. *Marshall* holds that section 85(4) does not enable a court proleptically to discharge a stayed or suspended order for possession in the situation mentioned in the preceding two paragraphs. In my opinion (and subject to the possibility that substantial compliance suffices), *Marshall* was right on this particular point, which represents the second reason given by Chadwick LJ in para 37:

> "Second, in a case where the secure tenancy has been brought to an end under the provisions of section 82(2) of the Act, section 85(4) does not, of itself, empower the court to discharge or rescind the order for possession. **The**

> **power to discharge or rescind conferred by section 85(4) of the Act arises only "if the conditions are complied with". In this context, "the conditions" must be a reference to the conditions (if any) imposed – either initially or by way of variation – under section 85(3) in the existing possession order.** In a case where the secure tenancy has come to an end under section 82(2), either there will have been no conditions or, *ex hypothesi*, the conditions will not have been complied with. The point is recognised by Lord Browne-Wilkinson in the *Burrows* case [*Burrows v. Brent London Borough Council* [1996] 1 WLR 1448] (at page 1455G)." (emphasis in bold added)

18. This reasoning seems to me impossible to fault. Parliament empowered the court in subsection (3) to "impose conditions" and, in the next subsection, "if the conditions are complied with" to discharge or rescind the order. The "conditions" referred to can only be one and the same set of conditions. It may be that a reference to "substantial" compliance can and should be read in. But one thing is clear: subsection (4) does not give the court power to discharge or rescind an order if the conditions set under subsection (3) have not been (either punctiliously or, if one reads the word into subsection (4), substantially) complied with. Subject therefore to the possibility that substantial compliance suffices, the power conferred by subsection (4) does not extend to situations, where, in or after breach of the conditions, arrears of rent are paid up late. However, since *Swindon* was wrongly decided, the tenant can always seek to resolve the situation, by applying under subsections (2) and (3) to vary the conditions (or in the case of an absolute order to introduce conditions: see para 21 below) in order to regularise what has in fact happened and in this way revive the original secure tenancy.

19. This analysis means that the occurrence of discharge or rescission will depend on punctilious (or, if one reads this into subsection (4), substantial) compliance with the conditions which appear in the possession order as made or varied. The contrary analysis makes discharge or rescission depend on the happenchance of payment in full of the arrears, whenever the tenant may decide or be able to procure that that should occur and even if the tenant has been up till then in very substantial non-compliance with the conditions. A tenant may default, become a tolerated trespasser, be sued by the landlord and then at the door of the court tender the whole outstanding arrears, months or maybe even years after the default. The proceedings are rendered nugatory. A landlord contemplating or bringing proceedings will have no idea whether, and no influence over whether, they will succeed or be

undermined at some future time. Such an analysis also undermines legal certainty. The onus ought in this situation to be on the tenant who has defaulted and who has become a tolerated trespasser to seek and obtain relief, which the court may then decide whether to give on further conditions (eg as to interest or costs). It is appropriate that the court should in this context have a discretion.

20. I add these three points. First, although the practice has developed otherwise, the situation most obviously in mind in subsection (4) is one where the power under subsection (4) is invoked after the event, rather than on the proleptic basis to which the Court of Appeal in *Payne v Cooper* was prepared to extend it. In that situation, the tenant would have to apply to the court for discharge or rescission of the possession order. If "the conditions" imposed under subsection (3) had been complied (or substantially complied) with, the application would be under subsection (4), and, if they had not been, it would fall naturally under subsections (2) and (3) and be for the court in its discretion to decide whether to grant a further stay, suspension or postponement on varied conditions with which the tenant could comply.

21. Second, in the case of an absolute order for possession, there is no question of the order including any additional "proleptic" paragraph under section 85(4). So there can be no question of any subsequent payment of arrears reviving the secure tenancy. The tenant's position is as described by Lord Browne-Wilkinson in the passage at p1455G referred to by Chadwick LJ in *Marshall*, para 37:

> "Finally, there is a method (albeit a clumsy one) whereby the order for possession even if an immediate unconditional order, can be discharged or rescinded if so desired under section 85(4). The power in that subsection to discharge or rescind only arises "if the conditions are complied with", a requirement which cannot be satisfied in the case of an unconditional order. But there is no reason why the order cannot be discharged by consent or, if such consent is not forthcoming, by the court varying the original order so as to impose the agreed conditions and then discharging the varied order."

All other members of the House agreed with Lord Browne-Wilkinson's reasoning. If therefore, in the case of an absolute possession order, late payment of arrears can only lead to discharge of the order by means of a

further court order under section 85(2) and (3), it cannot be unlikely that the same procedure should apply in the case of a conditional order where the conditions are not complied with and the order has thus become unconditional.

22. The third point is that there is nothing in *Payne v Cooper* which gainsays the analysis of section 85(4) which seems clear on the face of the statute. In *Payne v Cooper* an absolute possession order was made against a statutory tenant, but, on later application to suspend, vary or discharge this order under section 4 of the Rent and Mortgage Interest Restrictions Act 1923, the statutory tenant obtained a further order postponing the date for possession by 28 days on condition that the tenant pay the arrears within that period. The order further provided ("proleptically") that "on such payment the order for possession shall be discharged". The landlord challenged the court's jurisdiction to convert an absolute order into a conditional order for possession. The Court of Appeal rejected the challenge in the light of the clear contrary wording of section 4(2) (a rejection accepted as correct in this House in Lord Browne-Wilkinson's reasoning in *Burrows*: see para 21 above). The landlord further challenged the legitimacy of the proleptic discharge provision contained in the order, and, as mentioned in para 11 above, the Court of Appeal also rejected this challenge. The case was not concerned with a situation in which the tenant had failed to comply with the conditions imposed. There was no suggestion of any such failure. But the judgments contain dicta which make it clear that the Court of Appeal contemplated that proleptic discharge under the relevant wording in section 4(2) (equating with the wording in section 85(4) of the Housing Act 1985) would only be possible if the conditions imposed under the equivalent wording to section 85(2) were complied with. At p 185, Lord Evershed MR said in relation to the possibility of proleptic discharge :

> "The last two lines of the subsection are: "and if such conditions are complied with, the court may, if it thinks fit, discharge any such order". As a matter of English, at first sight it might be said with force that it is only when the conditions have been in fact complied with that that power arises, and may be invoked. In the present case it will be recalled that the judge combined all the operations into one order".

In going on to accept the legitimacy of proleptic discharge, Lord Evershed was therefore dealing only with a situation where the

conditions imposed had been complied with. Likewise, at p 189 Romer LJ explained that section 4(2) showed that the court could suspend execution or postpone the date for possession on terms

> "and that, **if those terms are complied with**, then the court may discharge or rescind the original absolute order". (emphasis added)

He continued:

> "… the county court judge made in the present case ….[a] compendious form of order directing that **on fulfilment of conditions**, the original order should be discharged, instead of making an order imposing conditions, and then **waiting to see if the conditions had been performed**, and, if they had been performed, then making another order. I agree with the Master of the Rolls in thinking there is nothing wrong, or beyond the power of the court, in making an order in that compendious form …" (emphasis added)

Again there is nothing to suggest that an order could be made imposing conditions, but providing for its proleptic discharge upon non-fulfilment (or, if one reads this into subsection (4), substantial non-fulfilment) of such conditions. Any such order would fly in the face of the statutory language, and fall outside anything contemplated by either Lord Evershed or Romer LJ.

23. There is also nothing to support such a suggestion in the previous Court of Appeal decision in *Sherrin v Brand* [1956] 1 QB 403 to which Lord Evershed referred at p 186 in *Payne v Cooper* and on which both he and Romer LJ had sat. The issue in *Sherrin v Brand* was one of succession by a family member to a statutory tenancy in circumstances where a conditional possession order had been made against the deceased tenant, with the conditions of which he had not complied. In that case, it was provided by various orders that a judgment for possession should not be enforced "for twenty-eight days and for so long thereafter as the [tenant] punctually pays …. the arrears of rent, mesne profits and costs by instalments of £10 forthwith and 13s 7d per week in addition to the current rent", and that "the judgment shall cease to be enforceable when the arrears of rent, mesne profits and costs

referred to above are satisfied". The concluding provision was regarded as a proleptic discharge of precisely the same type as fell for consideration in *Payne v Cooper*. This was expressly explained by Romer LJ in *Payne v Cooper* at p 429:

> "In my opinion, the meaning and effect of this judgment [the judgment for possession], when taken as a whole, and especially in view of the concluding paragraph, is that the defendant might remain on as tenant of the premises **so long as he performed the conditions** as to payment of the prescribed instalments in addition to the current rent; and that, **on payment of the final instalment**, the operation of the judgment would automatically cease. In other words, the judgment for possession was not intended to have an immediate effect, and would never indeed take effect at all **provided that the conditions as to payment were fulfilled**." (emphasis in bold added)

So the concluding paragraph of the judgment for possession was not, and was not regarded as, an order for discharge if the conditions were *not* complied with. There was also no question of it being necessary to treat it as such – the only issue in *Sherrin v Brand* was whether a sufficient statutory tenancy still existed (despite the failure to comply with the conditions or to pay the arrears at any stage) to enable the family member to succeed to the statutory tenancy.

24. It follows that I can see no basis for saying that a court has under section 85(4) power – whether ex post facto or proleptic - to discharge or rescind a conditional order for possession where the conditions imposed under section 85(3) have not been (either punctiliously or, if one reads the word into subsection (4), substantially) complied with and no variation of such conditions has been obtained. I do not find this analysis in any way surprising, when applied to situations in which the proleptic power recognised in *Payne v Cooper* has been exercised, and it is what the statute clearly prescribes. The method of dealing with this situation is for the tenant to seek and obtain under section 85(2) and (3) (either by consent or on contested application) a variation of the possession order to impose fresh conditions with which the tenant can comply or has already complied.

25. I also see no ground for construing paragraph 6 of the order in *Honeygan-Green* ("Upon payment of the arrears in full, claim do stand

dismissed") as intended or capable of doing anything other than that which the court was empowered to do under section 85(4). In other words, read in context, this paragraph means no more than that the possession order would be discharged upon payment of the arrears in full in compliance (or, if one reads this into subsection (4), substantial compliance) with the schedule provided by the immediately preceding paragraph. But, if the order were (in my opinion wrongly) to be construed as purporting to provide more, it was to that extent at least beyond the statutory power.

26. Lord Neuberger suggests that it might however be possible under the court's inherent common law or procedural powers to make an order suspending or staying the execution of a possession order on one set of conditions, but providing for discharge or rescission of the order in other substantially different circumstances (such as payment of the net arrears, without interest, at any such future date as the tenant might please or be able to procure). In the circumstances which I have described in para 8 above, we heard no argument upon this possibility. The court has of course substantial inherent powers as well as powers under the rules of court to vary or discharge its own orders, particular in the light of changed circumstances. But it seems to me improbable that it should be taken to have exercised such powers proleptically by paragraph 6 of the order in *Honeygan-Green* in any manner going further than its proleptic statutory power under section 85(4). I understand the common law in relation to claims to possession to be that the extent to which a court can either deny or postpone a private owner's entitlement to possession is extremely limited – a view which lay at the basis of the decision of the majority in this House in *Harrow London Borough Council v Qazi* [2003] UKHL 43; [2004] 1 AC 983 as I noted in *Doherty v Birmingham City Council* [2008] UKHL 57; [2008] 3 WLR 636, paras 129-130. CPR 3.1(2)(a), enabling a court to extend or shorten the time for compliance with any order is no different in substance from long-existing procedural powers under the former rules of court. If a court, when or after making a possession order, has a free hand under its inherent or procedural powers to suspend, stay or order its discharge proleptically (or even ex post facto), in circumstances not envisaged by the detailed statutory provisions of section 100 of the Rent Act 1977, section 85 of the Housing Act 1985 and section 9 of the Housing Act 1988 and of their predecessor provisions, one asks why such statutory provisions (developed and built on by the legislature over the last century) were necessary at all. The whole argument in *Payne v Cooper* would also have been misconceived, in so far as it proceeded on the basis that, unless the power was to be found in the relevant section (there, section 4(2) of the 1923 Act), it did not exist at all.

27. Apart from the qualification discussed in this speech, which does not affect the outcome of these appeals, I am, as I stated at the outset, in full agreement with Lord Neuberger's reasoning and conclusions in respect of all three appeals.

LORD NEUBERGER OF ABBOTSBURY

My Lords,

28. These three appeals raise questions about the effect of suspended possession orders on the status and rights of secure tenants under the Housing Act 1985 and assured tenants under the Housing Act 1988. Your Lordships were told that the resolution of these questions will affect tens of thousands of tenants who are subject to such orders, and indeed their landlords.

29. To understand the issues requires me first to give a brief (and highly simplified) summary of the legislation relating to residential security of tenure and the right to buy for secure tenants, and to set out a few centrally relevant statutory provisions.

The law governing residential security of tenure

30. Security of tenure for most residential tenants in England and Wales was first introduced by the Increase of Rent and Mortgage Interest (War Restrictions) Act 1915. As its name suggests, this was emergency war-time legislation, which accorded protection from eviction to the great majority of residential tenants, irrespective of the identity of their landlords. The 1915 Act was supplemented or replaced by a number of subsequent Rent Acts between 1919 and 1965, perhaps most significantly by the Rent and Mortgage Interest (Restrictions) Acts 1920 and 1923 and the Rent Act 1965. The legislation was then consolidated (with amendments) in the Rent Act 1968 and, finally, the Rent Act 1977. Until the 1968 consolidation, the drafting of the Rent Acts was somewhat opaque (MacKinnon LJ's description of "that chaos of verbal darkness", in *Winchester Court Ltd v Miller* [1944] KB 734, 744, was only one of many judicial derogatory descriptions), and they often required substantial constructive input from the courts.

31. Well before the 1977 Act came into force, section 33 of the Housing Repairs and Rents Act 1954 had removed Rent Act protection from tenancies under which the landlord was a local authority, a housing association or a similar entity.

32. Accordingly, by 1980, tenants of private sector landlords had protection pursuant to the Rent Act 1977, whereas tenants whose landlords were local authorities and housing associations had no statutory protection. However, chapter II of Part I of the Housing Act 1980 introduced a new form of protection for tenants of local authorities and housing associations (and other entities as now prescribed in section 80 of the 1985 Housing Act): their tenancies became secure tenancies. By chapter I of Part I of the 1980 Act, most secure tenants were given the right to buy their properties (the freehold in the case of a house, and a long lease in the case of a flat). These two chapters of the 1980 Act were repealed and re-enacted (with amendments) as, respectively, Parts IV and V of the Housing Act 1985.

33. The Housing Act 1988 changed the landscape yet again. Rent Act protection was prospectively abolished, and private sector tenants were accorded a new form of protection in that their tenancies were designated as assured tenancies under the 1988 Act (albeit that a very limited, short-lived, and limited type of assured tenancy had been introduced by sections 56 to 58 of the 1980 Act). The 1988 Act also provided that any future tenancies granted by housing associations should be assured, rather than secure, tenancies.

34. Accordingly, in very summary terms (and subject to exceptions), the current position is as follows. Private sector tenancies granted before the 1988 Act came into force remain governed by the 1977 Act, but private sector tenancies created thereafter are assured tenancies under the 1988 Act. Housing association tenancies are secure tenancies under the 1985 Act if granted between 1980 and 1988, but they are assured tenancies under the 1988 Act if granted thereafter. All local authority tenancies are secure tenancies under the 1985 Act.

35. The protection afforded to protected, secure and assured tenants is effected through the medium of circumscribing the landlord's right to possession. At least one of the grounds specified in the relevant legislation (section 98 of, and Schedule 15 to, the 1977 Act; section 84 of, and Schedule 2 to, the 1985 Act; and section 7 of, and Schedule 2 to,

the 1988 Act) normally has to be established by a landlord before the court can make an order for possession.

36. The most commonly invoked of those grounds, and the most relevant for present purposes, is non-payment of rent. Under ground 8 of Schedule 2 to the 1988 Act, this can, in some circumstances, entitle a landlord under an assured tenancy, as of right, to an order for possession. Although such a ground is often open to landlords under assured tenancies (including one of the instant cases, as my noble and learned friend Lord Walker of Gestingthorpe pointed out in argument), we were told that ground 8 is something of a last resort so far as housing associations are concerned.

37. In practice, it is normally the case under the 1988 Act, and it is always the position under the 1977 and 1985 Acts, that, in rent arrears cases, the landlord will rely on case 1 of Schedule 15 to the 1977 Act, ground 1 of Schedule 2 to the 1985 Act or grounds 10 or 11 of Schedule 2 to the 1988 Act, as may be appropriate. These grounds require a landlord, in addition to establishing that the tenant is in arrear with the rent, to satisfy the court that it is reasonable to make such an order before the court will order possession — see section 98(1)(a) of the 1977 Act, section 84(2)(a) of the 1985 Act and section 7(4) of the 1988 Act.

38. Under each of the three regimes, in any case where the landlord has to establish that it is reasonable to make a possession order, the court is given very wide and flexible powers. The relevant provisions are section 100 of the 1977 Act, section 85 of the 1985 Act, and section 9 of the 1988 Act. These three sections are very similar in their wording, but there are some differences. In the light of the issues in these appeals, it is necessary to set each of them out.

39. Section 100 of the 1977 Act provides:

> "*Extended discretion of court in claims for possession of certain dwelling-houses*
>
> (1) …. [A] court may adjourn, for such period or periods as it thinks fit, proceedings for possession of a dwelling-house which is let on a protected tenancy or subject to a statutory tenancy.

(2) On the making of an order for possession of such a dwelling-house, or at any time before the execution of such an order (whether made before or after the commencement of this Act), the court … may —

(a) stay or suspend execution of the order, or

(b) postpone the date of possession,

for such period or periods as the court thinks fit.

(3) On any such adjournment as is referred to in subsection (1) above or any such stay, suspension or postponement as is referred to in subsection (2) above, the court shall, unless it considers that to do so would cause exceptional hardship to the tenant or would otherwise be unreasonable, impose conditions with regard to payment by the tenant of arrears of rent (if any) and rent or payments in respect of occupation after termination of the tenancy (mesne profits) and may impose such other conditions as it thinks fit.

(4) If any such conditions as are referred to in subsection (3) above are complied with, the court may, if it thinks fit, discharge or rescind any such order as is referred to in subsection (2) above.

…."

40. Section 85 of the 1985 Act is in these terms:

"*Extended discretion of court in certain proceedings for possession*

(1) Where proceedings are brought for possession of a dwelling-house let under a secure tenancy on any of the grounds …([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 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.

(4) If the conditions are complied with, the court may, if it thinks fit, discharge or rescind the order for possession.

…"

41. Section 9 of the 1988 Act says this:

"*Extended discretion of court in possession claims*

(1) … [T]he court may adjourn for such period or periods as it thinks fit proceedings for possession of a dwelling-house let on an assured tenancy.

(2) On the making of an order for possession of a dwelling-house let on an assured tenancy or at any time before the execution of such an order, the court … may —

(a) stay or suspend execution of the order, or

(b) postpone the date of possession,

For such period or periods as the court thinks just.

(3) On any such adjournment as is referred to in subsection (1) above or on any such stay, suspension or postponement as is referred to in subsection (2) above, the court, unless it considers that to do so would cause exceptional hardship to the tenant or would otherwise be unreasonable, shall impose conditions with regard to 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) and may impose such other conditions as it thinks fit.

(4) If any such conditions as are referred to in subsection (3) above are complied with, the court may, if it thinks fit, discharge or rescind any such order as is referred to in subsection (2) above.
….."

42. All three sections also contain subsections (in the case of section 100 of the 1977 Act, inserted by the 1980 Act) which confer the right on the present or former spouse (or indeed civil partner) of the tenant to apply for relief under the relevant section in the same way as the tenant, provided such a spouse is "in occupation" and the tenancy "is terminated as a result of those proceedings".

43. Where a landlord seeks an order for possession solely in reliance on the tenant's arrears of rent, the court will only very rarely consider it reasonable to make an outright order for possession – that is, an order which simply directs the tenant to vacate on or before a certain date. Much more commonly in such a case, the court will consider it reasonable to make a suspended order for possession – that is, an order which, while directing the tenant to vacate, suspends the implementation of that direction so long as the tenant pays off the arrears (and costs, if any have been ordered) at a specified rate.

44. These regimes of statutory security against eviction required the legislation to address the status of a tenant whose tenancy has contractually determined. A tenancy which is protected under the 1977 Act is allowed to determine in accordance with its contractual terms, but, by virtue of section 2(1)(a), such a tenant then becomes a "statutory tenant" "if and so long as he occupies the dwelling-house [in question] as his residence". Protected tenancies and statutory tenancies are together often called "regulated tenancies".

45. By contrast, section 82 of the 1985 Act effectively extends the contractual term of a secure tenancy. Subsections (1) and (1A) provide that a secure tenancy "cannot be brought to an end by the landlord" save by obtaining an order of the court, of which the most common and relevant is an "order for possession". Section 82(2) states that where such an order is made, "the tenancy ends on the date on which the tenant is to give up possession in pursuance of the order". (Section 86 provides

that if a secure tenancy expires by effluxion of time, it is automatically followed by a periodic tenancy, which itself will be within the ambit of section 82).

46. Under the 1988 Act, the legislature adopted a fairly similar approach for assured tenancies. Except if the assured tenancy was a shorthold, section 5(1) lays down that an assured tenancy "cannot be brought to an end by the landlord except by obtaining an order of the court in accordance with the following provisions", which provisions, most importantly, and most relevantly for present purposes, include section 7 which, as mentioned, enables the court to make an order for possession. However, the 1988 Act has no provision expressly stating when an assured tenancy subject to a possession order comes to an end – in other words, section 5 of the 1988 Act has no equivalent to section 82(2) of the 1985 Act. (Section 5(2) of the 1988 Act has a similar effect to section 86 of the 1985 Act.)

47. The three Acts also contain provisions which enable specified members of a tenant's family to succeed to the tenancy on the tenant's death – see section 2(1)(b) of the 1977 Act for regulated tenancies, section 87 of the 1985 Act for secure tenancies, and section 17 of the 1988 Act for assured tenancies.

Secure tenants' right to buy

48. The "right to buy" under Part V of the 1985 Act is accorded by sections 118 and 119 to a "secure tenant" who has been such for at least five years. Section 121 provides:

> "*Circumstances in which the right to buy cannot be exercised*
>
> (1) The right to buy cannot be exercised if the tenant is obliged to give up possession of the dwelling-house in pursuance of an order of the court or will be so obliged at a date specified in the order.
>
> (2) The right to buy cannot be exercised if the person, or one of the persons, to whom the right to buy belongs —
>
> (a) has a bankruptcy petition pending against him,
>
> (b) …

(c) is an undischarged bankrupt, or

(d) has made a composition or arrangement with his creditors the terms of which remain to be fulfilled."

(It is right to mention, for completeness, that section 121(1) has been amended by section 304(1) of the Housing and Regeneration Act 2008 but this has no application to the current case: see section 304(2).)

49. Section 122 provides for the right to buy procedure to be initiated by a "secure tenant" serving notice on the landlord. Section 124 states that the landlord must then serve a notice admitting or denying the tenant's right. By section 125, the landlord is required to provide the tenant with details of the purchase price. According to section 126, this price is to be the market value of the property at the date of service of the section 122 notice, less a discount which, under sections 129 to 131, is (subject to a maximum) dependent on the length of time the tenant has been a secure tenant. Sections 125D and E (inserted in 1993) require the tenant thereafter to serve notice indicating whether he or she intends to buy, and, if no such notice is served, the landlord can serve a default notice, which, if not complied with, results in the tenant's section 122 notice being "deemed to be withdrawn".

50. By section 128, the tenant, if unhappy with the landlord's valuation, may refer the issue to the district valuer within three months of the landlord's section 125 notice. The terms on which the property is to be transferred are governed by section 139. Once all outstanding matters have been agreed, section 138(1) imposes a duty on the landlord to transfer the property to the tenant. However, by virtue of section 138(2) there is no such duty so long as the rent is more than four weeks in arrear.

51. If the tenant does not complete, sections 140 and 141 provide for the landlord to serve two successive notices requiring completion, and, if, after expiry of the second of those notices, the tenant has still failed to complete, his or her section 122 notice is "deemed to be withdrawn". Section 141(5) states that, if such a second notice is served and under section 138(2) "the landlord is not bound to complete, the tenant shall be deemed not to comply with the [second] notice".

52. Section 153A (added in 1988) provides that, where a landlord is guilty of delay in relation to any step in the procedure, the tenant can serve a notice of delay, followed, if the delay persists, by a second, "operative", notice of delay. If such an operative notice is served, and the delay persists, section 153B provides that the aggregate of the rent then paid by the tenant shall be set off against the purchase price, and, where the delay is more than twelve months, a further 50% of that aggregate is to be set off against the purchase price.

53. Sections 125A, B and C (inserted in 1986) provide that, where the property concerned is a flat, the landlord must include in its section 125 notice estimates of the likely level of service charge for a specified period. That period is five years from the date "beginning … not more than six months after the notice is given as the landlord may reasonably specify as being a date by which" the property is to be transferred. In such a case, para 16B of Schedule 6 to the 1985 Act provides that a tenant, who is in due course granted a long lease of the flat shall (subject to an allowance for inflation) not be liable for a greater sum in respect of service charges than that indicated in the section 125 notice.

54. Where a secure tenant has a right to buy, and the reversion to the tenancy is then transferred to a person who is not within section 80 of the 1985 Act, so that the tenancy ceases to be a secure tenancy, the tenant's right to buy under the 1985 Act is normally preserved against the new landlord, by virtue of and in accordance with sections 171A to H (inserted in 1986).

The facts underlying the three instant appeals

55. In *Knowsley Housing Trust v White*, the facts are as follows. Mrs White was granted a weekly tenancy of 34 Chesterfield Drive, Tower Hill, Kirkby, Liverpool by Knowsley Borough Council on 19 April 1993. As the Council was a local authority, this was a secure tenancy within the 1985 Act. On 15 July 2002, Knowsley Housing Trust ("Knowsley") acquired the whole of the Council's housing stock, whereupon Mrs White became an assured tenant under the 1988 Act. However, her right to buy was preserved by sections 171A to H of the 1985 Act.

56. Mrs White fell into arrears, and, after serving notice of intention to do so, Knowsley issued possession proceedings in the Liverpool County Court on 15 April 2004 on the grounds of non-payment of rent.

On 8 June 2004, the District Judge made the following order, which was in the form then generally in use in the County Courts:

> "… **The court orders that**
>
> (1) The defendant give the claimant possession … on or before 6 July 2004.
>
> (2) The defendant pay the claimant £2,132.52 for rent arrears.
>
> (3) The defendant pay the claimant's costs of the claim £130.00.
>
> (4) The defendant pay the total of £2,262.52 to the claimant.
>
> (5) This order is not to be enforced so long as the defendant pays the claimant the rent arrears and the amount for use and occupation and costs totalling £2262.52 by the payments set out below
>
> **in addition to the current rent**
>
> **Payments required**
>
> £5.00 per week, the first payment being made on or before 14 June 2004."

57. Although she remained in occupation, Mrs White failed to pay in accordance with these terms, and Knowsley obtained a warrant to enforce the possession order. Mrs White applied to suspend the possession order, and, on 26 October 2004, the District Judge suspended the warrant on terms that she pay a lump sum and the "current rent … together with £5 per week off the arrears". Thereafter, Mrs White did not comply with the terms of this latter order, although she made significant payments from time to time, so that her total arrears have remained, and to this day remain, at a fairly constant figure, around £2000 to £2500.

58. Meanwhile, on 20 January 2005, Mrs White served notice under section 122 of the 1985 Act claiming the right to buy the property. Knowsley admitted her right to buy, and thereafter both parties took the steps provided for by the 1985 Act with a view to completing the sale. However, on 13 February 2006, Knowsley contended that Mrs White had ceased to have the right to buy, as she was no longer an assured tenant following her failure to comply with the terms of the court orders. Mrs White then applied for a declaration that, notwithstanding that failure, she remained an assured tenant. That application was dismissed

by His Honour Judge Mackay on 14 September 2006, and his decision was upheld by the Court of Appeal (Buxton, Longmore LJJ and Sir Martin Nourse) on 2 May 2007 ([2007] EWCA Civ 404, [2007] 1 WLR 2897). Mrs White now appeals to your Lordships' House.

59. In the second appeal, *Porter v Shepherds Bush Housing Association*, the facts are as follows. Shepherds Bush Housing Association ("the Association") granted Mr Porter a tenancy of Flat 3, 1 Bolingbroke Road, London W14 on 26 July 1983. As the tenancy was granted by a housing association between 1980 and 1988, it was a secure tenancy, which, at all material times, was within the ambit of Part IV of the 1985 Act. Mr Porter fell into arrears with his rent, and the Association claimed possession in the West London County Court. On 18 August 1997, the District Judge made the following order, which reflected the standard form then in use:

> "1. The court has decided that unless you make the payments as set out in paragraph 3 you must give the plaintiff possession … on 15 September 1997.
>
> 2. You must also pay to the plaintiff £2,338.40 for unpaid rent, use and occupation of the property ….
>
> 3. You must pay the plaintiff the total amount of £2338.40 by instalments of £5 per week in addition to the current rent. The current rent is £34 per week: The first payment of both these amounts must be made on or before 1 September 1997.
>
> 4. When you have paid the total amounts mentioned, the plaintiff will not be able to take any steps to evict you as a result of this order.
>
> 5. If you do not pay the money owed and costs by the dates given and the current rent, the plaintiff can ask the court bailiff to evict you…" (paragraph numbering added).

60. Mr Porter failed to comply with the terms of para 3 of this order, although some arrears were paid off. The Association then obtained a warrant for possession, but, on 30 August 2000 pursuant to an application by Mr Porter, the District Judge ordered that the warrant be

suspended "on condition that [Mr Porter] do pay current rent and £5 per week towards the arrears, the next payment to be made on or before 13 September 2000". Mr Porter failed to comply.

61. On 29 April 2004, at a time when his arrears were some £1,400, Mr Porter issued proceedings against the Association for damages for disrepair. The Association defended the claim on the basis that, in the light of his failure to comply with the terms imposed by the two orders, Mr Porter had ceased to be a tenant, and therefore could not claim damages for disrepair.

62. On 9 January 2006, Mr Porter made a payment which put his rent account into credit, thereby discharging all the arrears. Meanwhile, on 3 January 2006, in anticipation of the arrears being cleared, Mr Porter made an application for the discharge of the suspended possession order made against him. That application was dismissed by the District Judge on 16 June 2006, and, although he gave Mr Porter permission to appeal, His Honour Judge Simpson dismissed his appeal on 22 December 2006. A second appeal by Mr Porter to the Court of Appeal (Pill, Sedley and Longmore LJJ) was dismissed on 19 March 2008 ([2008] EWCA Civ 196). Mr Porter now appeals to your Lordships' House.

63. In the third appeal, *Islington London Borough Council v Honeygan-Green* the facts are these. Islington granted Mrs Honeygan-Green a secure tenancy of 73B Crouch Hill, London N4 on 2 July 1990. On 23 May 2000, Mrs Honeygan-Green exercised her right to buy by serving a notice under section 122 of the 1985 Act. Although Islington accepted that she had the right to buy, completion of the transaction was delayed through no fault of hers: indeed, she served notices of delay on Islington in June and July 2002.

64. Meanwhile, Mrs Honeygan-Green fell into arrears with her rent, and, on 14 July 2002, Islington issued proceedings for possession against her in the Clerkenwell County Court. On 4 October 2002, the District Judge made an order that:

> "1. The defendant give the claimant possession … on or before 1 November 2002.

2. The defendant pay the claimant £482.45 for rent arrears.

3. The defendant pay the claimant's costs of the claim; £120 to be added to arrears.

4. The defendant pay the total of £602.45 to the claimant.

5. This order is not to be enforced so long as the defendant pays the claimant the rent arrears and the … costs totalling £602.45 by the payments set out below **in addition to the current rent**

   Payments required

   £50 per week, the first payment being made on or before 18 October 2002.

6. Upon payment of the arrears in full, claim do stand dismissed."

65. Mrs Honeygan-Green failed to pay the amounts stipulated in accordance with para 5 of this order, although she did make some payments. In March 2003 Islington contended that she had therefore lost her secure tenancy. Thereafter she paid off all the arrears and costs, and, pursuant to her application, the District Judge made an order on 8 July 2003 discharging the possession order.

66. However, Mrs Honeygan-Green then fell into arrears again, and Islington issued fresh possession proceedings against her on this ground on 23 February 2005. Mrs Honeygan-Green served a defence and counter-claim. In her counter-claim, she sought a declaration that, subject to her paying off any arrears which had accrued, she was entitled to buy the property pursuant to her section 122 notice of 23 May 2000. Having paid off the arrears, she then sought summary judgment on her counter-claim, in the form of an injunction requiring Islington to transfer the property to her. On 28 April 2006, His Honour Judge Marr-Johnson acceded to her application, but Islington's appeal was allowed by Nelson J on 25 May 2007. Mrs Honeygan-Green's appeal was allowed by the Court of Appeal (Pill, Keene and Maurice Kay LJJ) on 22 April 2008 ([2008] EWCA Civ 363). Islington now appeals to your Lordships' House.

The issues to be determined

67. The three appeals give rise to the following principal issues:

(a) Where a suspended order for possession, such as that made in Mrs White's case, is made under the 1988 Act, when does the tenancy come to an end?

(b) (i) Can the court, when making a suspended possession order under the 1985 Act, proleptically direct that the order be discharged once the terms have been complied with?
(ii) If so, can the court proleptically direct that the order be discharged even if the terms of the suspension have not been strictly complied with?

(c) In the case of a suspended order under the 1985 Act, without a proleptic discharge provision, can a tenant who has not complied with the terms of suspension, but has paid off the arrears and costs, seek a discharge or variation of the order?

(d) If a tenant who has served notice exercising the right to buy is then made subject to a suspended possession order, does the right to buy pursuant to the notice revive if and when the order is discharged?

68. I propose to consider those issues in turn, and then deal with the disposal of the instant three appeals. Before doing so, however, it is worth referring to the recent citation by Lord Hope of Craighead in *Kay v Lambeth London Borough* Council [2006] UKHL 10, [2006] 2 AC 465, 507 of Lord Porter's observation in *Baker v Turner* [1950] AC 401, 417 that "the rules of formal logic must not be applied … with too great strictness" to legislation conferring security of tenure on residential tenants. While normal principles of interpretation should not, of course, be jettisoned, the importance of the law in this field being substantively and procedurally clear and simple is cardinal.

When does an assured tenancy subject to a possession order end?

69. It is quite clear that a tenancy regulated by the 1977 Act does not determine when the court makes an order for possession. This is because section 2(1)(a) provides that, even if the protected (ie the contractual) tenancy has determined before, or as a result of, the possession order,

the statutory tenancy will continue so long as the tenant is in occupation —ie until the order for possession is actually executed. Accordingly, if the tenancies in the three instant cases had been within the ambit of the 1977 Act, the three tenants would have remained regulated tenants throughout the period during which the suspended possession orders remained in force, and they would still be regulated tenants.

70. This appears to have been the position under the Rent Act legislation even before it was first consolidated by the Rent Act 1968 - see *Sherrin v Brand* [1956] 1 QB 403. (It is unnecessary to decide whether the earlier case of *American Economic Laundry Ltd v Little* [1951] 1 KB 400, which may have been to a different effect, was rightly decided, as it was concerned with an outright order for possession. However, it may be worth recording my doubts whether it can be safely relied on in relation to outright possession orders under the 1977 Act.) In any event, the status, rights and obligations of a tenant, who is subject to a suspended possession order under the 1977 Act, are clear and simple. Apart from being subject to the terms of the order, he or she has all the rights and obligations of a regulated tenant under the 1977 Act.

71. The authorities suggest that the position in relation to secure tenants under the 1985 Act is rather different. In *Thompson v Elmbridge Borough Council* [1987] 1 WLR 1425, a secure tenant was subject to an order that she give up possession in 28 days, on terms that operation of the order was to be suspended so long as she paid £10 per week off the arrears and the current rent. She subsequently failed to comply with those terms. The issue was whether, and if so when, the secure tenancy had determined. The Court of Appeal held that, particularly in the light of section 82(2) of the 1985 Act, "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, … and there is a breach of the terms of the order, the tenancy … from that moment comes to an end" – per Russell LJ at 1430H – 1431A.

72. The correctness of this decision was not challenged in the argument before this House in *Burrows v Brent London Borough Council* [1996] 1 WLR 1448, where the issue was whether a new tenancy had been created by an agreement between a landlord and a secure tenant against whom an outright order for possession had been made. As neither party challenged the reasoning in *Thompson* [1987] 1 WLR 1425, there was no contention that a secure tenancy only ended when the order for possession was executed. (It is fair, if maybe a little defensive, to add that it suited both parties to accept the conclusion in

Thompson [1987] 1 WLR 1425.) However, both Lord Browne-Wilkinson and Lord Jauncey of Tullichettle (who gave the only reasoned opinions) expressly stated that *Thompson* [1987] 1 WLR 1425 was rightly decided – see at 1453 D-G and 1457C-E.

73. Your Lordships have been referred to a number of subsequent decisions of the Court of Appeal which proceeded on the assumption that the law was indeed as stated in *Thompson* [1987] 1 WLR 1425, and that a secure tenancy ended when a secure tenant, who was subject to a suspended possession order, failed to comply with the terms of the suspension. There will also undoubtedly have been tens of thousands of cases in the County Courts, and, indeed, many negotiations, much legal advice, and many actions, involving secure tenancies, which also proceeded on this assumption. For completeness, I should add that in *Harlow District Council v Hall* [2006] 1 WLR 2116, it was held following some dicta in *Burrows* [1996] 1 WLR 1448, 1457 that where the terms of suspension were expressed so as to indicate that the order for possession took effect on a specified date, but execution was suspended on terms, the secure tenancy ended on the specified date, even if the terms of suspension were complied with.

74. Until 2007, however, there had been no case, at least in a court of record, which involved considering the question whether the reasoning and conclusion in *Thompson* [1987] 1 WLR 1425, as approved in *Burrows* [1996] 1 WLR 1448, or indeed in *Hall* [2006] 1 WLR 2116, applied to assured tenancies under the 1988 Act. So, when the appeal in *Knowsley* [2007] 1 WLR 2897 came before the Court of Appeal, it was an open question whether an assured tenancy ended as soon as the tenant failed to comply with the terms of a suspended order for possession (although in *Artesian Residential Developments Ltd v Beck* [2000] QB 541, the Court of Appeal had decided that an assured tenancy determined the moment an outright order for possession was made).

75. In *Knowsley* [2007] 1 WLR 2897, the Court of Appeal held that the reasoning and conclusion in *Thompson* [1987] 1 WLR 1425 did apply to assured tenancies (relying in part on *Artesian* [2000] QB 541). In my judgment, that decision was wrong, although, particularly in the light of the reasoning in the cases just referred to, it would be unfair not to acknowledge the force of the argument to the contrary (as clearly encapsulated in the judgment of Buxton LJ).

76. Leaving *Burrows* [1996] 1 WLR 1448, *Thompson* [1987] 1 WLR 1425, *Hall* [2006] 1 WLR 2116, and *Artesian* [2000] QB 541 on one side for the moment, I consider that, on a fair and practical reading, the 1988 Act leads to the conclusion that an assured tenancy subject to a possession order does not end until possession is delivered up — ie the position of an assured tenant under the 1988 Act is, in this connection, the same as that of a regulated tenant under the 1977 Act.

77. Unlike the 1977 Act (see section 2(1)) or the 1985 Act (see section 82(2)), the 1988 Act has no express provision which indicates when an assured tenancy subject to a possession order ends. Section 5(1) describes how such a tenancy can be brought to an end, namely "by obtaining an order of the court", but neither in section 5 nor in section 7, which gives the jurisdiction to make orders for possession, is there any express guidance as to exactly when a possession order brings the tenancy to an end (contrary to what was said by Hirst LJ in *Artesian* [2000] QB 541, 549A-B). In those circumstances, it is necessary to consider whether there is anything in the scheme of Part I of the 1988 Act, or any other indication in that Act, which assists in answering that question.

78. In my opinion, consideration of the way in which Part I of the 1988 Act operates and has been drafted indicates pretty clearly that, as Mr Jan Luba QC argued for Mrs White, an assured tenancy ends only when the order for possession is executed.

79. First, it would not otherwise be entirely easy to characterise the status of a tenant in occupation under the shadow of an order for possession. The solution adopted in relation to secure tenancies was to describe such a person as a "tolerated trespasser". This appears to me to be a conceptually peculiar, even oxymoronic, status. Even more confusingly, if, after the terms of suspension are breached, and the secure tenancy ends, the court order is varied so that the breach of the terms is, as it were, forgiven, the secure tenancy is treated as having been retrospectively revived from the date of the breach (see *Burrows* [1996] 1 WLR 1448, 1454H-1455A and 1455E, and the discussion and cases cited in *Marshall v Bradford Metropolitan District Council* [2001] EWCA Civ 594, [2002] HLR 428, at paras 7-11). So, in such a case, for the period during which he was contemporaneously treated as a tolerated trespasser, a person is retrospectively to be regarded as having been a secure tenant. There are no such conceptual problems if an assured tenant subject to a possession order remains an assured tenant up to the time he goes out of possession.

80. If the Court of Appeal's decision stands, there would, I believe, be tens of thousands of former assured tenants with the anomalous, and potentially retrospectively reversible, status of tolerated trespasser. This is because there are very many cases where suspended orders have been made, and it must be relatively rare that the terms of suspension are strictly complied with, and, as was decided in *Thompson* [1987] 1 WLR 1425, once there is a breach in the terms of the suspension, the tenant becomes a tolerated trespasser. Further, this status could, in many cases, persist for a large number of years, as the financial circumstances of many assured tenants are such that they require a very long period to clear their arrears.

81. (It is true that, in common law, the status of a tenant, whose lease has been forfeited but who remains in possession, is somewhat peculiar, and that, on relief from forfeiture being granted, the lease is treated as retrospectively reinstated. However, rightly in my view, it has not been suggested that the common law approach should be applied by analogy: it is anomalous and archaic. In any event, it is an inapposite analogy, as it cannot be suggested that an order for possession under the 1988 Act relates back to the service of the possession claim — cf *Canas Property Co Ltd v KL Television Services Ltd* [1970] 2 QB 433.)

82. Secondly, the invention of the tolerated trespasser under the 1985 Act has led to difficulties and uncertainties as to his or her rights and obligations as against the landlord. There is a useful summary of these problems in *Bristol City Council v Hassan* [2006] 1 WLR 2582, para 34. Three examples which required rulings from the Court of Appeal will suffice (although there are others, including, of course, the problem raised in *Burrows* [1996] 1 WLR 1448). In *Pemberton v Southwark London Borough Council* [2000] 1 WLR 1672, the question was whether a tolerated trespasser could sue in nuisance (she could). In *Brent London Borough Council v Knightley* (1997) 29 HLR 857, there was a dispute as to whether a daughter could succeed to her deceased mother's secure tenancy when, at the time of her death, the mother was a tolerated trespasser (she could not). In *Lambeth London Borough Council v Rogers* (1999) 32 HLR 361, the issue was whether a secure tenant could sue the landlord for damages for breach of its repairing covenant during the time the tenant was a tolerated trespasser, given that the tenancy had been retrospectively revived (she could).

83. In addition, concerns over the rights of tolerated trespassers have led to arguments as to the precise terms that a suspended order for possession under the 1985 Act can and should take – see *Bristol City*

Council v Hassan [2006] 1 WLR 2582. Forms of order which appear to have an identical effect turn out not to do so – cf *Thompson* [1987] 1 WLR 1425 with *Hall* [2006] 1 WLR 2116. Quite apart from this, the rights of third parties could be detrimentally affected: it is far from clear that a landlord of a tolerated trespasser could be liable for injury to a visitor to the property concerned under the Defective Premises Act 1972. That is because such liability depends on whether the landlord can be said to be under "an obligation to the tenant for the maintenance or repair of the premises" — see section 4(1). It is fair to say that I would incline to the view that it would have such a duty. The suspended order will be on terms that the landlord is entitled to payment for the tenant's current occupation at a rate which assumes it is liable for repair (either under the terms of the tenancy or pursuant to section 11 of the Landlord and Tenant Act 1985). In those circumstances, I consider there is a very strong case for saying the landlord would be liable under the 1972 Act. In this connection, see per Simon Brown LJ in *Rogers* 32 HLR 361, 371 and cf *Brikom Investments Ltd v Seaford* [1981] 1 WLR 863, but the point is not straightforward.

84. These (and indeed other) issues, which are not without difficulty, have arisen under the 1985 Act in relation to the rights and status of tolerated trespassers. While they may be of interest to lawyers, they are simply not the sort of issues which legislation designed to protect residential tenants should require to be resolved. They would not arise if a tenant remained an assured tenant until possession was obtained.

85. The third reason I consider that an assured tenancy ends only when an order for possession is executed arises from section 9 of the 1988 Act. The fact that, after making an order for possession, the court has such very wide powers to vary or discharge the order, or to stay or suspend its execution points firmly in favour of the conclusion that an assured tenancy does not end until those powers are at an end — ie until after "execution of [the] order". As mentioned in *Megarry on The Rent Acts* (11th ed, vol 3, pp133-134), one would expect the status of the tenant to remain the same so long as the court retained control over the terms of the order, particularly as, during that period, there would always be the possibility of the tenant being in occupation under the assured tenancy.

86. That point is reinforced by the fact that the wording and structure of section 9 of the 1988 Act follow very closely indeed the wording and structure of section 100 of the 1977 Act. As already explained, it is quite clear that a tenancy regulated by the 1977 Act cannot end until the

tenant has vacated. Given that the two sections are both concerned with the determination of the tenant's right to occupy as a result of an order for possession, it seems likely that it was envisaged that such an order would determine an assured tenancy in the same way as it would a regulated tenancy.

87. This point undermines a major plank in the argument advanced on behalf of Knowsley by Mr Edward Bartley Jones QC, namely that a close examination of parts of section 9 of the 1988 Act indicates that it must have been envisaged that an assured tenancy would be ended by a possession order some time before the tenant vacated. In particular, this argument relies, perfectly logically, on the point that the references to "occupation after the termination of the tenancy" and "mesne profits" in subsection (3) appear to envisage that an assured tenancy subject to a possession order will, or at least may, end before the tenant gives up possession. The trouble with that point is that the same words are found in section 100(3) of the 1977 Act: yet, in the light of section 2(1)(a) of that Act, there can be no doubt but that a regulated tenancy does not expire pursuant to a possession order until possession is obtained. The same point applies to the reliance placed by Knowsley on the reference to the tenancy being terminated in the provisions in the two sections conferring rights on spouses.

88. In my judgment, section 100 of the 1977 Act, and therefore section 9 of the 1988 Act, contains more than one example of torrential drafting. Not only are the references to mesne profits in subsection (3) unnecessary, but "stay" and "suspend" in subsection (2) are synonymous, as are "discharge" and "rescind" in subsection (4). Section 100 of the 1977 Act owes its origin, albeit via the 1968 and 1965 Rent Acts, to the 1923 Act (which in turn replaced a provision of the 1920 Act). Accordingly, it must be construed bearing in mind that its origins are based on a provision enacted at a time when the drafting of the Rent Acts was not, as I have mentioned, noted for its clarity.

89. For these reasons, it appears to me that an assured tenancy subject to a suspended possession order does not come to an end until possession is delivered up. Logic dictates that this conclusion must also apply to an outright possession order, so on that point I would overrule the reasoning in *Artesian* at [2000] QB 541, 549A-B.

90. It is now necessary to face up to the point that this means that the effect of a possession order under Part I of the 1988 Act would be

different from one under Part IV of the 1985 Act, as stated by this House in *Burrows* [1996] 1 WLR 1448. As already explained, there is a difference between the 1985 and 1988 Acts, in that the latter has no equivalent to the former's section 82(2), and it was the wording of that subsection on which Russell LJ primarily rested his conclusion in *Thompson* [1987] 1 WLR, 1425 (see at 1430F-G) and indeed on which Sir Andrew Morritt C rested his conclusion in *Hall* [2006] 1 WLR 2116, para 13. Accordingly, although it would obviously be sensible and convenient that the point at issue should be resolved the same way under the two statutes, I do not consider that logic compels that result.

91. However, it should be added that I strongly suspect that, if the point had not been determined in *Burrows* [1996] 1 WLR 1448, I would have reached the same conclusion in relation to section 85 of the 1985 Act as that which I have reached in relation to section 9 of the 1988 Act. 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 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.

92. Given that these arguments and, indeed, the point now at issue were not actually debated in *Burrows* [1996] 1 WLR 1448, should your Lordships reconsider whether *Thompson* [1987] 1 WLR 1425 and *Hall* [2006] 1 WLR 2116 were rightly decided? When that question was raised with Mr Luba, he replied (with the apparent support of Mr Ashley Underwood QC, Mr Richard Drabble QC, and Mr Andrew Arden QC) that it was simply too late to take that course: *Thompson* [1987] 1 WLR 1425 has been assumed to be right, and has been acted on, in many tens of thousands of cases over the past twenty years or more, particularly since it had the express approval of your Lordships' House more than twelve years ago. Further, by section 299 of, and Schedule 11 to, the Housing and Regeneration Act 2008, Parliament has amended and clarified the law, so that secure and assured tenancies will only end "when the order is executed", although those provisions are not yet in force, and, when they come into force, they will largely only be prospective in their effect.

93. In my view, we should not reconsider the view expressed in this House in *Burrows* [1996] 1 WLR 1448 that *Thompson* [1987] 1 WLR 1425 was rightly decided so far as secure tenancies are concerned. In the absence of any submission to that effect from the Bar, and in the face of discouragement from counsel who are highly experienced in the field, it would be wrong for this House effectively to go back on its previous approval of a long-standing decision which had been acted on in a plethora of cases, when there is in place amending legislation having the same effect as such a reversal, in which Parliament has decided to amend the law only prospectively. Further, in *Bristol City Council v Hassan* [2006] 1 WLR 2582, the Court of Appeal has approved a form of suspended order for possession against a secure tenant which would normally avoid the secure tenancy determining unless and until the court makes a further order.

Can the court proleptically order the discharge of a possession order?

94. A suspended order for possession sometimes provides for the order to be discharged in the event of the tenant paying off all the arrears and costs; an example is in para 6 of the order in Mrs Honeygan-Green's case. In *Marshall* [2002] HLR 428, it was held that it was not open to the court to include such a proleptic discharge provision in the original order. Chadwick LJ (giving the only reasoned judgment of the Court of Appeal) said at para 37 that "[t]he power to discharge or rescind the order for possession, conferred by section 85(4) of the 1985 Act, is a power which can only be exercised in the light of the circumstances prevailing at the time", and that therefore that power "cannot be exercised in advance; because the court cannot know, in advance, whether the conditions precedent to the exercise of the power will be satisfied".

95. The consequence of that analysis is that secure tenants who have become tolerated trespassers (which will presumably be the majority of those against whom suspended orders for possession are made, as strict compliance with the terms of suspension will, I suspect, be rare) face an unattractive choice. They either have to remain tolerated trespassers indefinitely or they must incur the inconvenience and expense of applying to discharge the possession order. Many of these tenants will be people who would be unlikely to seek legal advice, and would therefore, in ignorance, be condemned to a permanent state of tolerated trespassers. In almost any case where a possession order is suspended simply on terms that the rent arrears and costs are paid off, it will be

acceptable to the landlord that the order should be discharged once all that is owing to the landlord has been paid.

96. In the rare case where circumstances may justify the order for possession not being discharged owing to events which occur after the order is made but before its execution, a landlord would not be prejudiced by a proleptic discharge provision. Once the terms of suspension were not complied with, the landlord could seek to execute the order by applying for a warrant of possession. It would then be up to the tenant to apply to the court under section 85(2). The court could then consider whether and how to vary the terms of the order (including the proleptic discharge provision).

97. In my view, on a fair reading of section 85, it is open to the court to include a proleptic discharge provision in a suspended order for possession. The section should be construed, as far as permissible, to confer as much flexibility as possible on the court, and in such a way as to minimise future uncertainty and need for further applications. The section permits a proleptic discharge provision, in my view, not least because the court can always revisit the provision, effectively at the suit of the landlord, as already mentioned, if the terms of the suspension are not complied with. The wording of section 85(4), particularly if read with the practicalities in mind, does not preclude the court from effectively committing itself in advance to discharging a suspended order, provided that (a) certain conditions are complied with, and (b) neither the landlord (by applying for a warrant of possession) nor the tenant (by applying under section 85(2)) seeks, in the meantime, reconsideration of the terms of the discharge provision.

98. This view is supported by authority which, as Sedley LJ said in *Porter* [2008] EWCA Civ 196, at para 59, does not appear to have been before the court in *Marshall* [2002] HLR 428. In *Payne v Cooper* [1958] 1 QB 174, the Court of Appeal had to consider a similar point in relation to section 4(2) of the 1923 Act, which ended with a provision whose structure was identical, and whose wording was effectively the same for present purposes, as that of section 85(4) of the 1985 Act. While accepting that "there [was] obviously much to be said for [the] view" that the court could not include a proleptic discharge provision in a suspended possession order, Lord Evershed MR said that that course had been sanctioned in the court's earlier decision of *Sherrin v Brand* [1956] 1 QB 403, and adopted in the standard form of possession order. Accordingly, he concluded that the course was within the court's power — see at [1958] 1 QB 174, 187-189. Romer LJ agreed saying, at [1958]

1 QB 174, 189-90, that he saw "nothing wrong, or beyond the power of the court, in making an order in" what he called a "compendious form".

99. The legislature presumably considered that conclusion to be acceptable, as the same structure and a very similar form of words to the closing part of section 4(2) of the 1923 Act was then used in the 1968 and 1977 Acts. If section 100(4) of the 1977 Act permits the court to make an order in such a form, as seems to me to follow, then it is very hard to see why the same conclusion does not apply to section 85(4) of the 1985 Act. The fact that a suspended order for possession against a secure tenant may determine the tenancy before execution, unlike in the case of a statutory tenant, does not make any difference in this connection, given that the effect of the discharge of a suspended order against a secure tenant is to revive the secure tenancy retrospectively.

100. Quite apart from the wording of section 85(4), it appears to me that there is a strong argument for saying that, particularly with the advent of the CPR, it would in any event be open to a court to make an order which includes a provision that, in certain events, the order would automatically be discharged, normally, one suspects, with permission to the parties to apply in the meantime. In this connection, it appears to me that CPR 3.1(2)(a) may be particularly in point.

Must the terms of proleptic discharge and suspension be the same?

101. A proleptic discharge provision in an order for possession against a secure tenant is therefore valid in principle, but it is said that, if it is in the terms such as para 6 of the order made against Mrs Honeygan-Green, it would fall foul of section 85(4) of the 1985 Act. This is because the terms justifying discharge of the order were not the same as the terms of suspension in para 5 of the order. Para 5 suspended the operation of the order for possession so long as, every week, the tenant paid £50 off the arrears (and costs) together with the current rent, whereas para 6 provided that the order would be discharged once the arrears (and costs) had been paid off, irrespective of when payment was actually made. In *Marshall* [2002] HLR 428, para 37, Chadwick LJ said that, as a result of the reference in section 85(4) of the 1985 Act to "the conditions", discharge under that provision could only be directed if the conditions of suspension, as referred to in section 85(3) were complied with.

102. I appreciate the force of this point, which is very well articulated by my noble and learned friend Lord Mance, in his opinion which I have had the privilege of seeing in draft. Nonetheless it appears to me that this point involves taking an over-technical view of section 85. If (as I have concluded) it is possible for the court to make a proleptic order discharging the order for possession, and if (as is rightly agreed) it is open to the court to vary the terms of suspension retrospectively, then it would be surprising if the court could not proleptically order that the terms of discharge should be different from the terms of suspension.

103. The view that the court does not have such power seems to me to be inconsistent with the views expressed by the Court of Appeal in two earlier cases that I have already mentioned. In *Payne* [1958] 1 QB 174, 186, in relation to the identically structured and very similarly worded last part of section 4(2) of the 1923 Act, Lord Evershed MR agreed with the reasoning of Romer LJ in *Sherrin* [1956] 1 QB 403, in a passage at 428-429. In that passage, Romer LJ approved an order for possession which was expressed to be suspended "so long as" the tenant "punctually" paid a specified amount "per week" in respect of the arrears, mesne profits and costs. The order concluded by providing that it would "cease to be enforceable when the arrears … mesne profits and costs … are satisfied." (see at [1956] 1 QB 403, 404-405).

104. I accept that in neither of those cases did the Court of Appeal expressly address the point that the terms of suspension and the terms for discharge were not the same, however, the court clearly approved the form of order in *Sherrin* [1956] 1 QB 403, whose effect seems to me to be pretty clear. It may be said that the word "satisfied" in the final part of that order could, and indeed should, be construed as referring to satisfaction of the liability to pay off the arrears "punctually" at the specified weekly rate. However, that does not appear to me to accord with the natural meaning of the final part of the order, which is simply concerned with payment of all the money which is due. This conclusion also accords with common sense. It would be surprising if the court was powerless to discharge a suspended order for possession when all the arrears and costs had been paid, just because there had not been strict compliance with the terms of suspension — for instance, if one weekly instalment had been a day late, or even if the tenant was not infrequently a little late in making some of the weekly payments.

105. The terms on which a possession order for non-payment of rent is suspended should, almost as a matter of course, include precise dates on which any payment should be made. However, particularly bearing in

mind that such orders are, in general, directed to the relatively less fortunate, and also bearing in mind the very wide powers bestowed on the court by section 85, I do not think it follows that the proleptic discharge, to be accorded once payment in full has been made, should only be available if payment was made strictly on those dates.

106. Subject to another decision of the Court of Appeal, to which I must turn in the next section of this opinion, it may be said that, if *Marshall* [2002] HLR 428 is right on this issue, discharge under section 85(4) could nonetheless be achieved by the tenant applying under section 85(2) to amend the terms of suspension retrospectively so that they reflected the payments the tenant had actually made, and then applying under section 85(4) for discharge. That argument, I accept, would reduce the absurdity. However, it would require a tenant to incur expenditure and effort in making an application to the court. Not only may many tenants be unaware of this requirement, but such an application could carry a degree of uncertainty, as there would be no obligation on the court to grant it. Again, these points are reinforced by considering the type of person who is likely to be subject to such an order.

107. Accordingly, it seems to me that the terms of section 85, taken as a whole, common sense and the reasoning in *Payne* [1958] 1 QB 174 and *Sherrin* [1956] 1 QB 403 support the proposition that section 85(4) has the effect not merely that the court ordering possession can direct that the order will be discharged if the conditions referred to in section 85(3) are met, but that the court can also then decide the extent to which compliance with the strict terms of the conditions will not be required in order for the order to be discharged. In other words, just as the court can proleptically exercise its powers under section 85(4) when making the order for possession, so can it proleptically exercise its powers under section 85(2) to vary the terms of suspension for the purpose of giving effect to its power of discharge. (Again, I consider that there is a strong argument that the court has such a power under the CPR when making any order.)

108. Save in relatively exceptional circumstances, it would, I think, be unrealistic for the court proleptically to direct that discharge could only occur if every payment was made on the precise day identified by the terms of suspension. Equally, in some cases it might be too generous to the tenant to provide for an automatic discharge on payment in full of the arrears (and costs), irrespective of when payment occurs, but, on the

other hand, as already mentioned, it is always open to the landlord to force the issue if the tenant fails to comply with the terms of suspension.

109. In the light of the arguments raised in these appeals, I should add that the terms of suspension would not be complied with if a payment due thereunder was made late. Those terms represent a series of conditions which have to be satisfied if the order is not to be executed, and should therefore, in my view, be interpreted strictly. That is a point which appears to have been taken for granted in *Thompson* [1987] 1 WLR 1425 and the cases which follow and approve it (including *Burrows* [1996] 1 WLR 1448). Also, if it were otherwise, it would be difficult to devise a test to assess whether the terms had been complied with. It was suggested that the test should be whether the tenant had substantially complied with the terms of suspension, but that could often lead to uncertainty and expense, which would be particularly undesirable for public sector residential tenants.

110. In my view, the correct analysis, in principle and in practice, is that the terms of a suspended order are to be literally applied and precisely complied with. Accordingly, if a tenant fails to comply strictly with any of the terms of suspension, the landlord can apply for a warrant. However, if the tenant then applies to the court for relief, the court may suspend or discharge the warrant (and may vary the order). Indeed, if the court considers the landlord's application for a warrant, or his resistance to the tenant's application, to have been unreasonable, then the landlord may very well find itself paying the tenant's costs.

The "Swindon v Aston trap"

111. Unlike the order in Mrs Honeygan-Green's case, the order in Mr Porter's case does not in terms direct a proleptic discharge once all the arrears and costs have been paid. Instead, it provides, in para 4, that the order for possession cannot be enforced once all the arrears and costs are paid. The effect of the reasoning in *Marshall* [2002] HLR 428 is, of course, that, in such a case, the tenant cannot apply under section 85(4) of the 1985 Act for a discharge unless he or she has strictly complied with the terms of suspension. The effect of a subsequent decision of the Court of Appeal, *Swindon Borough Council v Aston* [2002] EWCA Civ 1850, [2003] HLR 610, is that the tenant in such a case cannot apply for a variation to the order under section 85(2) either.

112. If those decisions are right, then it has been said that a tenant is caught in a trap every time a secure tenancy is made subject to an order such as that in Mr Porter's case, where the tenant does not strictly comply with the terms of suspension, but nonetheless pays off all the arrears and costs. The tenant cannot get the order discharged under section 85(4) either directly (owing to the decision in *Marshall* [2002] HLR 428*)* or indirectly by first having the terms of suspension varied under section 85(2) (owing to the decision in *Swindon* [2003] HLR 610), yet the landlord cannot enforce the order as para 4 precludes it. Given that the effect of the existence of the order is inconsistent with the existence of a secure tenancy, it would seem that, if the law is as it was held to be in those two cases, the tenant is not so much caught in a trap as confined to the purgatory of being a permanent tolerated trespasser.

113. For the reasons already given, *Marshall* [2002] HLR 428 is, in my view, wrong on this issue. So, in my opinion, is *Swindon* [2003] HLR 610 (where the terms of the order were similar, for present purposes, to those in the order made in Mr Porter's case). At the end of para 20, Pumfrey J, who gave the only reasoned judgment, said that, once the order had become unenforceable because all the arrears and costs had been paid, it was not open to a secure tenant to apply to vary the order under section 85(2). This uncharacteristically unexplained conclusion seems to me to be wrong in principle and in practice. So far as practicalities are concerned, as Mr Underwood submitted, this conclusion not only gives rise to the trap, but it puts a tenant who has paid off all the arrears and costs in a worse position than one who has not. As to principle, there is nothing in section 85(2), or elsewhere in the 1985 Act, which expressly or impliedly appears to prevent a tenant, who is subject to an order such as that in Mr Porter's case and has paid off all the arrears and costs, making an application to the court to exercise its powers under section 85(2). Indeed, the wide powers granted to the court under section 85 indicate that the tenant should have such a right, particularly in the light of the absurdity of the consequences if there is no such right.

The right to buy and possession orders

114. There are a number of Court of Appeal decisions which support the proposition that, in order to enforce the right to buy, a person must normally be a secure tenant (or, in a case such as Mrs White's, an assured tenant) throughout the period from service of the section 122 notice, exercising the right to buy, until completion is effected (see eg *Enfield London Borough Council v McKeon* [1986] 1 WLR 1007, *Muir*

Group Housing Association Ltd v Thornley (1992) 91 LGR 1, and *Harrow London Borough Council v Tonge* (1992) 25 HLR 99). That proposition was referred to in this House with approval in *Bristol City Council v Lovell* [1998] 1 WLR 446, 458F-G, and, realistically in my view, it was not challenged by any party in the instant appeals.

115. The ultimate issue in Mrs Honeygan-Green's case is whether she is entitled to maintain her right to buy pursuant to the section 122 notice she served on 23 May 2000. Her case, accepted by the Court of Appeal for reasons given by Keene LJ, was that, while section 121(1) of the 1985 Act prevented her from processing her claim once she was in breach of the terms of suspension in the possession order of 4 October 2002, she became entitled to renew her right to rely on the notice once the order was discharged on 8 July 2003.

116. Mr Arden, for Islington, contended that the right to buy pursuant to a notice served under section 122 is lost once a secure tenancy is determined pursuant to a court order for possession, and that it cannot be retrospectively reinstated by the secure tenancy being retrospectively revived by the subsequent discharge of the order.

117. I cannot accept that argument, as it seems to me to fly in the face of the provisions of section 121(1) of the 1985 Act, to produce unacceptable results under section 122(2), and to offend against the principle of retrospective revival as examined and applied in *Rogers* (1999) 32 HLR 361, which, as indicated, I consider to have been rightly decided.

118. As Mr Arden rightly accepted, section 121 has the effect of suspending a tenant's ability from exercising or pursuing the right to buy so long as any of the situations identified in subsections (1) or (2) obtain. Particularly in the light of section 121(2)(a), and the language of section 121(2)(d), it cannot realistically be argued that the section permanently removes the right to buy: it merely suspends it.

119. Accordingly, the effect of section 121(1) is to suspend, but not to remove permanently, a secure tenant's right to buy if and so long as he or she "is obliged to give up possession … in pursuance of an order of the court". Those words clearly mean that the tenant is presently so obliged, as the subsection goes on to deal separately with a future obligation. In those circumstances, in the absence of an express

provision to support such a conclusion, it does not appear to me that it is open to the court to conclude that the right to buy pursuant to a notice already served under section 122 is permanently lost once the tenant is obliged to deliver up possession. It is true that the right to buy, albeit pursuant to a new notice, would not be lost, but the right to buy enjoyed by a tenant who has served a section 122 notice is a right to buy pursuant to that notice. Part V of the 1985 Act sets out the circumstances in which such a right can be lost, and it therefore seems to me that, particularly in the light of the provisions of section 121, it cannot be a correct inference to draw from the provisions of Parts IV and V of the Act that the right is lost once a possession order becomes operative.

120. If Mr Arden's argument were correct, it would inevitably seem to mean that if any of the events identified in section 121(1) or (2) occurred, a secure tenant who had served notice exercising his right to buy would lose the right to rely on the notice, however far advanced the exercise had got, and however blameless he was for the triggering of section 121. To take the example identified by Keene LJ, a tenant against whom a vexatious bankruptcy petition was presented, would not merely have his right to rely on the notice suspended, but would forfeit the right, even if the sale was close to completion. That harsh result casts further doubt on the argument that the right to rely on a section 122 notice is lost if any of the events specified in section 121(1) or (2) occurs.

121. Further, the well-established rule that discharge of a suspended possession order revives the secure tenancy retrospectively logically carries with it the consequence that the tenant must be retrospectively treated as having had a secure tenancy throughout the period when he or she was contemporaneously "obliged to give up possession…in pursuance of an order of the court". As Simon Brown LJ said in *Rogers* (1999) 32 HLR 361, 371, "a section 85(2)(b) order is fully retrospective in effect", and the same must *a fortiori* apply to a discharge under section 85(4).

122. Quite apart from this, it is relevant to refer to my conclusion that an assured tenancy does not expire at the time of breach of the terms of suspension of a suspended order for possession, but only when the order for possession is executed. If Mr Arden's argument were correct, it would mean that the effect of a suspended possession order on a secure tenant's right to buy could be far more penal than on that of an assured tenant. This would be most surprising.

123. It is fair to say that this conclusion could have unsatisfactory, even unfair, consequences for landlords of tenants with the right to buy (although, as Mr Drabble pointed out on behalf of Mrs Honeygan-Green, there is no evidence of any serious problems in practice). The price payable is fixed by reference to values as at the date of service of the section 122 notice, and the tenant is entitled to pull out of the negotiations at any time up to completion. Accordingly, where a tenant has served a section 122 notice and a suspended order for possession is subsequently made, the landlord would appear to face the prospect of an uncertain but potentially very long period (quite conceivably many years) before the tenant could enforce the right to buy.

124. The tenant, conversely, would appear to have such a period (over whose duration he or she would often have a substantial degree of control) in which he could see how the economic situation developed, and, in a rising market, he could insist on completing the purchase at a historically very low price, or, in a falling market, he could pull out of the transaction. That would be an enormously attractive option, which, to add insult to injury from the landlord's perspective, would only arise from the tenant's breach, normally failure to pay rent. Mr Arden further suggested that a long delay between service of the section 122 notice and completion could have unfair consequences on the landlord in relation to service charges, as a result of the operation of para 16B of Schedule 6 to the 1985 Act. It is unnecessary to deal with these points to determine any of these appeals, but it is worth exploring them a little further.

125. In the Court of Appeal, it was suggested that it might be possible for the court, when making a suspended order for possession under section 85, against a tenant who has served a section 122 notice, to impose conditions relating to the exercise of the right to buy pursuant to that notice. In particular, that the court might be able to require the tenant to abandon the section 122 notice as a condition of the suspension of the order for possession.

126. While I recognise the very wide ambit of the words of section 85(3)(b), which gives the court power to "impose such other conditions as it thinks fit", I have real doubts whether it would be appropriate in principle or in practice to construe them as having such an effect. The effect of the provisions of Part V of the 1985 Act, which is concerned with the right to buy, is that a secure tenant's right to enforce the right to buy pursuant to a section 122 notice is suspended, not lost, when an order for possession becomes effective. That may well make it rather

difficult to justify interpreting a provision in Part IV of the same Act, concerned with the other rights of secure tenants, so as to enable the court to order that the right to buy pursuant to the notice will or may be lost. Quite apart from this, in many cases where the point arose the court may well be likely to find exercising such a jurisdiction difficult and contentious, and it could easily lead to arbitrary and inconsistent results.

127. An alternative possible solution involves focussing on the fact that, while section 121(1) prevents a tenant proceeding with any steps in relation to a section 122 notice, there is no such bar against the landlord. Accordingly, runs the argument, if the tenant is precluded from taking any steps, the landlord can bring matters to a head by serving successive notices under sections 140 and 141. If the tenant does not complete within the time specified in the second, section 141, notice, then, as explained, the section 122 notice is treated as withdrawn.

128. At first sight, it might seem a little strange if a landlord could serve a notice requiring the tenant to proceed with a purchase under the 1985 Act at a time when section 121 of that Act specifically precludes the tenant from so proceeding. However, there may be two answers to that. The first is that, as my noble and learned friend Lord Hoffmann said during argument, the section 140 and 141 notices may well properly be construed as requiring the tenant to arrange matters so that he or she can proceed with the steps laid down in Part V of the 1985 Act, which includes discharging the circumstances which give rise to the operation of section 121. Secondly, the notion that the landlord is not precluded from serving notices under sections 140 and 141 at a time when section 121 applies can be said to be consistent with section 141(5) of the 1985 Act. That expressly provides that where a tenant is precluded from completing because of arrears of rent (i.e. because section 138(2) applies) the landlord is still entitled to serve and rely on notices under sections 140 and 141.

129. As to Mr Arden's argument based on service charges, I suspect that it may well be possible to avoid any unfairness to the landlord in that connection by giving a realistic construction to the rather convoluted provisions of sections 125A, B and C of the 1985 Act when read together with para 16B of Schedule 6.

130. It is unnecessary to decide these points as they do not directly arise in any of these appeals. As the points are not straightforward and the competing arguments were not fully developed before your

Lordships, it would, I believe, be safer not to express any firm conclusions on them.

Disposal of the three appeals

131. If, as I understand to be the case, your Lordships have all reached the same conclusions as I have reached, then the outcome of these three appeals is as follows.

132. The appeal in *Knowsley Housing Trust v White* is allowed. Mrs White is entitled to a declaration that she is, and since the grant of her tenancy has always been, an assured tenant, notwithstanding that there is an effective suspended order for possession against her and that she is and has been in breach of the terms of suspension. The Court of Appeal understandably applied to section 9 of the 1988 Act its earlier reasoning in relation to section 85 of the 1985 Act (as approved by this House), and concluded that, from the date she failed to comply with the terms on which the order for possession was suspended, Mrs White became a tolerated trespasser. The reasoning in those earlier cases may be open to doubt, but it is inappropriate to reconsider the principles they laid down so far as secure tenancies under the 1985 Act are concerned. However, assured tenancies under the 1988 Act do not end as a result of an order for possession until the order is executed (or the tenant otherwise vacates).

133. The appeal in *Porter v Shepherds Bush Housing Association* is allowed, and Mr Porter's application for discharge of the suspended possession order made against him is remitted to the County Court. The mere fact that the tenant has paid off all the arrears and costs, so that the landlord can no longer enforce the order, cannot prevent the tenant from going back to the court under section 85(2) or for an order under section 85(4). Mr Underwood, for the Association, realistically appreciated that the contrary conclusion reached in *Swindon* [2003] HLR 610, although regarded as binding on the Court of Appeal, was unsupportable in this House. He therefore rightly agreed that Mr Porter's application should be remitted to the County Court.

134. The appeal in *Islington London Borough Council v Honeygan-Green* is dismissed. The tenant's right to rely on her notice of 23 May 2000, exercising the right to buy, was suspended on about 1 November 2002, when the order for possession took effect (in the light of the

reasoning in *Thompson* [1987] 1 WLR 1425). However, as the Court of Appeal held, her right was revived retrospectively and with immediate effect when the order for possession was discharged on 8 July 2003 (or, as I see it, if earlier, when para 6 of the order for possession took effect).

135. In accordance with what was discussed at the end of the hearing, there will (as agreed between the parties) be no order for costs in the *Porter* appeal, and in the other appeals the parties should make brief submissions as to costs within 14 days of today.