Neutral Citation Number: [2013] EWCA Civ 912

Case No: B5/2012/0763

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE CENTRAL LONDON COUNTY COURT
His Honour Judge Moloney QC
Claim No: ICL02029

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/07/2013

Before :

LORD JUSTICE LAWS
LORD JUSTICE RIMER
and
LORD JUSTICE BEATSON

- -

Between :

CAROLINE FRANCIS	**Appellant**
- and -	
(1) BRENT HOUSING PARTNERSHIP LIMITED	**Respondents**
(2) THE LONDON BOROUGH OF BRENT	
(3) VINETTE WILLIAMS	

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- -

Mr Jan Luba QC and **Ms Gillian Ackland-Vincent** (instructed by **Edwards Duthie Solicitors**) for the **Appellant**
Mr Ranjit Bhose QC and **Mr Simon D. Butler** (instructed by **Mr Ash Vyas, Brent Housing Partnership Limited**) for the **First and Second Respondents**
Mr Adrian Davis (instructed by **Guile Nicholas)** for the **Third Respondent**

Hearing date: 7 May 2013

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Approved Judgment

Lord Justice Rimer :

Introduction

1. The claimant/appellant, Caroline Francis, started these proceedings in the High Court of Justice, Queen's Bench Division, on 15 February 2010. She asserted in them that she was a tenant of a flat at 25C Stonebridge Park, London NW10 ('No 25C') and that the second defendant/respondent, the London Borough of Brent ('Brent') was her landlord. The first defendant/respondent, Brent Housing Partnership Limited, is Brent's managing agent to which there is no further need to make separate reference.

2. Brent owns the freehold of No 25C and there is no dispute that Ms Francis occupied it from June 1981 to about 22 May 2005. In order to enable Brent to carry out necessary repairs to No 25C, Ms Francis then assumed temporary occupation of a flat at 1 Kingthorpe, Stonebridge, London NW10 ('No 1') under an agreement with Brent made on 18 May 2005. On the face of it, that agreement entitled her to return to No 25C when the works were completed. Her complaint is that during her occupation of No 1, Brent let No 25C to the third defendant/respondent, Vinette Williams. By her claim, she sought an order for possession of No 25C, injunctions directed at enabling her to resume undisturbed possession of it, and damages against all defendants.

3. The proceedings were transferred to Central London County Court, which directed the trial of a preliminary issue, namely whether Ms Francis was a tenant of No 25C. That issue was tried before His Honour Judge Moloney QC. The outcome of his extempore judgment of 8 March 2012 was: (i) an order dated 12 March 2012 determining that Ms Francis had a secure tenancy of No 1 but no tenancy of No 25C; and (ii) an order of 28 March 2012 requiring her to pay the defendants' costs, subject to section 11 of the Access to Justice Act 1999. Judge Moloney refused permission to appeal, but Lewison LJ granted it.

4. The issue is whether the judge was right or wrong in holding that Ms Francis had no tenancy of No 25C. Jan Luba QC (who did not appear below) and Gillian Ackland-Vincent (who did) represented Ms Francis. Ranjit Bhose QC (who did not appear below) and Simon Butler (who did) represented the first two respondents. Adrian Davis represented Vinette Williams in both courts, and before us he simply adopted the arguments advanced by Mr Bhose. It was not suggested to us that Ms Williams's involvement in the litigation was and is other than that of an innocent third party who became enmeshed in a dispute that arose primarily between Ms Francis and Brent.

5. To understand the issues, I must first tell the story.

The facts

6. By a written agreement of 26 May 1981, Brent granted Ms Francis a secure tenancy of No 25C commencing on 1 June 1981. She then occupied No 25C with her two young sons, Nathan and Marcus. Under section 79 of the Housing Act 1985:

> 'A tenancy under which a dwelling-house is let as a separate dwelling is a secure tenancy at any time when the conditions described in sections 80 and 81 as the landlord condition and the tenant condition are satisfied'.

As the interest of the landlord in relation to No 25C at all times belonged to Brent, a local authority, 'the landlord condition' was unquestionably satisfied. As for 'the tenant condition', section 81 provides, so far as material, that:

> 'The tenant condition is that the tenant is an individual and occupies the dwelling-house as his only or principal home; …'.

There is no dispute that down to 18 April 1991 Ms Francis was a tenant of No 25C and that she occupied it as her 'only or principal home'. She was therefore a secure tenant of No 25C. There is also no dispute that from 18 April 1991 to about 22 May 2005, when she moved to No 1, she continued to occupy No 25C as her 'only or principal home'. There is, however, a question as to whether during that latter period she was ever a tenant of No 25C.

7. That question arises because, on 21 March 1991, the Willesden County Court made an outright order for possession of No 25C against Ms Francis on the ground that arrears of rent had accrued. The court ordered her to give possession on 18 April 1991 and judgment was entered against her for £2,733.26 arrears and £150 costs. Under the then law (that is, prior to the changes to the Housing Act 1985 introduced by Section 299 of, and Schedule 11 to, the Housing and Regeneration Act 2008), the effect of that order was to terminate Ms Francis's secure tenancy on 18 April 1991. In fact, with Brent's consent, she remained in occupation of No 25C and continued to pay the equivalent of rent (and what she paid was also referred to as 'rent') and to make payments towards reducing the arrears. Subject to the events of May 2005, it is not, however, disputed that her continued occupation of No 25C was not as a tenant but as what was then known as a 'tolerated trespasser'.

8. A summary of the events from 18 April 1991 to May 2005 is as follows. Brent sought to enforce the possession order in May 1992. In September 1992, Ms Francis applied for a stay of execution, of which the outcome was that Brent's warrant for possession was suspended and a stay granted on terms that Ms Francis paid weekly instalments of £5.00 off her arrears in addition to her current rent. That meant that she had to pay a total of £8.56 every week.

9. By 30 July 1996, Ms Francis's arrears were £1,802.46 and, by 7 January 1998, £3,346.11. Brent obtained another possession warrant but on 6 April 1998, on Ms Francis's application, District Judge Morris suspended it until further order. Ms Francis managed to reduce the arrears. Moving on two years, on 31 January 2000 District Judge Steel suspended a further possession warrant on condition that Ms Francis paid the current weekly rent of £20.48 plus instalments of £7.12 per week off the arrears of £1,899.33. According to a letter of 1 March 2001 to Brent from the Mary Ward Legal Centre, Ms Francis was ordered by a further order of 30 January 2001 to pay the current rent plus £7.12 per week towards her arrears. The Centre proposed a variation to the terms of the order, under which she was to maintain payment of the current rent plus £2.66 per week. That led to an agreement with Brent under which she was to pay the current weekly rent plus £2.70 per week off the arrears. By 28 January 2002, her rent account with Brent was in credit, as it thereafter usually remained, until 12 April 2004 after which it continued to be in debit.

10. By the end of 2004, Brent had decided No 25C was in need of repair. It was this that led to Ms Francis's move to No 1. Brent wrote to her on 9 November 2004 advising

her that she would have to move whilst they carried out the work. They advised her that it would take 'approximately 5 days at which time you will return to your home'. That forecast proved to be an underestimate by about five years. The progress of the matter took more time and on 19 April 2005 Brent wrote further to Ms Francis advising her on the practical steps she needed to take in relation to the move to No 1 and enclosing a disturbance payment claim form.

11. The need for Ms Francis to make that move led to the signing on 18 May 2005 by Brent and Ms Francis of the 'decant agreement' that is at the heart of the issues. I must set it out almost in full.

The decant agreement

12. The decant agreement is described at the top of its first page by a legend reading 'temporary secure tenancy agreement while works are carried out to tenant's permanent accommodation'. It was made between Brent (described as the Council) and Ms Francis (described as 'the Tenant' and whose address was given as No 25C). The definitions section defined: (i) 'permanent accommodation' as No 25C; (ii) 'the secure agreement' as meaning 'a secure tenancy agreement dated 01 June 1980 … in respect of No 25C', which the judge found (and as to which no question arises) was a mistaken reference to Ms Francis's secure tenancy agreement of 26 May 1981; (iii) 'the temporary accommodation' as meaning No 1; (iv) 'the agreement' as meaning 'this agreement for a temporary weekly periodic secure tenancy of the temporary accommodation'; and (v) 'the commencement date' as being 24 May 2005. The recitals were as follows:

> '2.1 [Brent] is required to perform works to the Tenant's permanent accommodation which is let to the Tenant by [Brent] pursuant to the secure agreement.
>
> 2.2 [Brent] has agreed to make available the temporary accommodation for the Tenant's occupation while [Brent] performs the works to the permanent accommodation.
>
> 2.3 On completion of the works to the permanent accommodation the Tenant will give up occupation of the temporary accommodation and resume occupation of the permanent accommodation.'

13. The material operative parts of the agreement were as follows:

> '**Now the Parties Hereby Agree and Declare**
>
> 3. The agreement will commence on the commencement date and will terminate:
>
> 3.1 28 days following receipt by [Brent] from the Tenant … of a notice to quit; or
>
> 3.2 on the date stated in an Order of possession of the Court being the date the Tenant is ordered to give up possession of the temporary accommodation; or
>
> 3.3 in accordance with clause 8 of the Agreement

4. The agreement is subject to [Brent's] standard terms and conditions of a secure tenancy which are by this clause incorporated into the agreement

5. From the commencement date:

5.1 the secure agreement will continue on the same terms and conditions but as a non-secure tenancy by virtue of the Tenant's failure to comply with section 81 of the Housing Act 1985; and

5.2 the parties to the secure agreement will be suspended from all rights and obligations imposed by the secure agreement

5.3 the parties shall be entitled to the rights and bound by the obligations imposed by this the [sic] agreement

6. On completion of the works and on [Brent] being satisfied that the permanent accommodation is available for occupation by the Tenant [Brent] will serve a notice on the Tenant … certifying that the works to the permanent accommodation have been completed, that the permanent accommodation is again available for occupation by the Tenant under the secure agreement and requiring the Tenant to give up occupation of the temporary accommodation within 21 days of the date of the notice and resume occupation of the permanent accommodation

7. The Tenant within 21 days of the date of the notice specified in clause 6 of the agreement will:

7.1 give up occupation of the temporary accommodation; and

7.2 resume occupation of the permanent accommodation under the secure agreement.

8. On the date the Tenant gives up occupation of the temporary accommodation in accordance with clause 7.1 of the agreement the agreement will terminate by surrender.

9. On the date the Tenant resumes occupation of the permanent accommodation in accordance with clause 7.2 of the agreement:

9.1 The secure agreement will resume as a secure tenancy by virtue of the Tenant complying with section 81 of the Housing Act 1985; and

9.2 The parties to the secure agreement will again be bound by all the rights and obligations imposed by the secure agreement.

10. Should the Tenant be in breach of clause 7.2 of the agreement [Brent] will be at liberty to terminate the secure agreement by serving a notice to quit on the Tenant … and the secure agreement will terminate on the first day of the rent period under the secure agreement and at least 28 days following its service on the Tenant

> 11. Should the Tenant be in breach of clause 7.1 of the agreement [Brent] will be at liberty to commence possession proceedings against the Tenant for recovery of the temporary accommodation on Ground 8 of Schedule 2 to the Housing Act 1985.'

More facts

14. On about 22 May 2005, Ms Francis moved out of No 25C and into No 1. In correspondence in March and May 2006, Brent informed her solicitors that the repair works to No 25C were complete. Her solicitors did not agree, as they explained in letters of March 2006 and September 2008; and on 8 October 2008 Brent confirmed that further works were being carried out to No 25C. On 29 October 2008, Brent informed Ms Francis that No 25C was ready for her re-occupation and asked her to contact it so that arrangements could be made for her return. It pointed out that her rent in respect of No 1 was £4,195.73 in arrears and asked how she proposed to reduce the arrears.

15. On 13 November 2008, Ms Francis instructed her solicitors that the works to No 25C were still not complete: she said the secondary glazing had not been done, there were no radiators in the bedrooms and no repairs had been done to the main bedroom. The solicitors relayed that to Brent on 17 November 2008. On 3 December 2008, Brent wrote to Ms Francis to the effect that it would re-decorate the main bedroom but would do nothing more. It advised her that the rent arrears for No 1 were now £4,695.08.

16. The state of the arrears in relation to No 1 led to Brent serving proceedings on Ms Francis for possession of No 1. On 26 January 2009, Deputy District Judge Bennett made an outright order requiring her to give up possession of No 1 on 23 February 2009, entered judgment against her for £5,422.17 in respect of the arrears and ordered her to pay £14.84 a day until possession was given up. The effect of that order was to terminate Ms Francis's tenancy of No 1 on 23 February 2009, after which she continued to occupy No 1 as a tolerated trespasser. On 18 February 2009, Ms Francis applied to set that order aside on the ground that she had not had notice of the earlier hearing, but Deputy District Judge Muskath dismissed her application with costs on 20 April 2009. Ms Francis's application for permission to appeal against that order was refused by His Honour Judge Copley on 1 May 2009 (a hearing attended by Brent), but he treated her application as one to suspend Brent's possession warrant, which he suspended on terms that she paid £500 by 2.30 pm that day and also the current rent plus £12 per week off the arrears. That order recognised that Ms Francis's tenancy of No 1 had been a secure tenancy: had she had a non-secure tenancy, the court would have had no jurisdiction to suspend the warrant.

17. The works at No 25C were completed in December 2009. In January 2010, Brent advertised No 25C to prospective new tenants. At about this time, Ms Francis (who still had keys to No 25C) attempted to resume possession of it, but she was promptly removed from such possession. On 28 January 2010, Brent invited Ms Williams to view No 25C. On 9 February 2010, Brent wrote Ms Francis a letter, headed 'The Tenancy of [No 25C]', of which I quote part:

> 'As you are aware, it came to my attention that you had gained entrance and taken up occupation of [No 25C]. I attended with the police on 27 January 2010 and

> you were removed from the property along with some of your possessions. The removal of your personal effects from the communal area was completed on 28/29 January, 2010.
>
> When you were initially decanted to [No 1] it was on a temporary basis. However, at that point the extent of the works was not known and along with some other delays, your stay in the property extended beyond 12 months. The policy and practice is that where someone has been displaced for a period in excess of 12 months, the decant becomes permanent. As you have occupied [No 1] since 22 May, 2005 this is now considered to be your permanent home.
>
> Tenants who are permanently decanted are entitled to a payment of compensation in the sum of £4,700 for the permanent loss of their home. I can find no record of you having been informed of this. Please accept my apologies for that oversight on our part.
>
> Please find enclosed the Home Loss Application which you need to complete and return to us as soon as possible. I would further advise that if there are any rent arrears on your account at the time of processing your forms, it will be deducted from your entitlement.'

18. It is worth noting that: (i) so far as this court is aware, nothing had been said to Ms Francis in or before May 2005 as to the existence of the claimed 'policy and practice'; and (ii) save that the move to No 1 was indeed intended to be 'temporary' (pending the completion of the repair works to No 25C), nothing, so far as this court is aware, had been said to Ms Francis to the effect that if the works took longer than originally expected, she was at any risk of not being allowed to return to No 25C at all. Following the writing of that apparently insensitive letter, Brent on 9 February 2010 entered into a secure tenancy agreement with Ms Williams in respect of No 25C. Ms Francis commenced her proceedings on 15 February 2010. Their purpose was to prevent Ms Williams' occupation of No 25C and to achieve her own restoration to occupation of No 25C, of which she claimed to be the tenant.

19. Ms Francis failed in her application for an injunction restraining Ms Williams from moving into No 25C. Ms Williams did move in and has since remained in occupation of No 25C as a tenant. Ms Francis did not appeal against the refusal to grant her such an injunction. She did, however, continue her proceedings with a view to establishing (a) her claim to have a tenancy of No 25C which had priority over Ms Williams' tenancy, and (b) her restoration to occupation of No 25C. The only question for the judge raised by the preliminary issue was whether she was a tenant of No 25C. The judge held that she was not and that since the making of the decant agreement the only tenancy she had had was a secure tenancy of No 1. It is the conclusion that Ms Francis had and has no tenancy of No 25C that is challenged before this court.

The judge's judgment

20. The judge noted that Ms Francis did not need to show that she had a secure tenancy of No 25C. The question was whether she had *any* tenancy of it: if she did not, she had no prior legal estate in No 25C to which Ms Williams would have been subject.

21. The judge referred to the decant agreement, whose apparent scheme he regarded as clear. It reflected that Ms Francis had a secure tenancy of No 25C; that in order to enable the carrying out of necessary repairs, she was to move into temporary alternative accommodation at No 1; as such move meant that she was no longer in occupation of No 25C as her 'only or principal home', she would no longer satisfy the section 81 'tenant condition' and so her secure tenancy of No 25C would be converted into a non-secure tenancy; she would, however, have a secure tenancy of No 1; and, when the works to No 25C were complete, she was entitled to move back to No 25C, when her tenancy of No 1 would end and her tenancy of No 25C would again become a secure one.

22. If, however, that was the scheme of the agreement, the judge observed that it was agreed that from 1991 up to the time of the making of the agreement, Ms Francis was not a tenant of any sort of No 25C: that was because, as a result of the possession order of 21 March 1991, her continued occupation of No 25C was as a tolerated trespasser. Whilst she continued to pay what would popularly be, and was, called 'rent', she could in principle have been removed from occupation at any time upon the obtaining of a warrant. The judge said that 'she was not a tenant but a tolerated trespasser, and that was a misapprehension as to her status on the part of the makers of [the decant agreement]'.

23. So, was Ms Francis a tenant of No 25C? Whilst it was not argued before the judge that she was other than a tolerated trespasser down to the making of the decant agreement, it was asserted that she became a tenant, indeed a secure tenant, at the time of its making. As the judge put it, this was 'essentially because she and [Brent] must have agreed expressly or impliedly that she would become so'. The judge noted that although there had been a time when Ms Francis had been in arrears with her rent due in respect of No 25C, 'in fact she recovered from that position and for a large part of the period immediately before the making of the decant agreement she had been in credit (or in very modest deficit because of the usual problems with her Housing Benefit)'. The judge continued:

> '10. So she had performed her obligations, she had largely restored her standing, nothing that she had done had been inconsistent with her reinstatement as a tenant; and then we see (she says through her counsel) this decant agreement, which expressly recognises her as a secure tenant and sets out an elaborate mechanism for the preservation and perpetuation of her rights in No 25C and her restoration to it as a single tenant once the works are completed'.

24. The judge, however, pointed out that what the decant agreement in fact said was that Ms Francis's secure tenancy was one 'based on the [tenancy agreement of 26 May 1981]' and he said it was perfectly clear that the parties to the agreement had overlooked the possession proceedings and their consequences. He said that it 'appears on the face of the document that they were quite unaware that she had ceased to be a tenant some 14 years before'. The question, in his view, was whether he could 'properly imply in those circumstances a sufficiently clear agreement to grant a new tenancy; indeed a new secure tenancy, of No 25C in those circumstances'.

25. His answer was negative. He invoked the assistance of the 'mythical officious bystander' and asked himself what would have happened if, on the point of signing the decant agreement, such bystander had reminded the parties that Ms Francis was

not a secure tenant, but merely a tolerated trespasser. He said that in that event Brent might have adopted one of a number of alternative courses, of which the grant of an immediate secure tenancy of No 25C was only one. He concluded 'in short, that there is no or no sufficient evidence before me from which I can properly infer that such was the express or implied intention of the parties in the circumstances'.

26. The judge noted that the fact that the decant agreement was entered into under an apparent mutual mistake as to Ms Francis's interest in No 25C did not render it wholly void or without effect. He said that:

> 'In some respects it remains perfectly clear and perfectly workable, and there would appear to be no reason not to give it its natural effect. It purports to create an immediate secure tenancy of … [No 1]. It also purports to give Ms Francis a legitimate expectation of returning to No 25C, perhaps even returning to No 25C as a secure tenant following the completion of the works. But those contractual consequences are not the same as conferring on her a present interest in [No 25C] in the form of a tenancy, whether a non-secure tenancy, as it is described in the decant agreement itself, or a secure tenancy or any other kind of tenancy'.

27. The judge concluded that, as Ms Francis had no tenancy of No 25C immediately before the decant agreement and such agreement did not grant her such a tenancy, she was not a tenant of No 25C. He also rejected an alternative argument to the effect that, if Ms Francis was wrong on her primary argument, she anyway had a new tenancy of No 25C as from 20 May 2009 by force of new provisions introduced by section 299 of, and Schedule 11 to, the Housing and Regeneration Act 2008.

The appeal

(a) Was Ms Francis a 'secure tenant' of No 25C at the date of the decant agreement?

28. The primary ground of appeal against the judge's decision is that he was wrong not to find that the parties, by their conduct -- in particular by the terms of the decant agreement into which they entered -- were recognising that at the date of that agreement Ms Francis had a secure tenancy of No 25C.

29. The legal background against which that question arises was luminously explained by the House of Lords in *Burrows v. Brent London Borough Council* [1996] 1 WLR 1448. Lord Browne-Wilkinson delivered the main speech and Lord Jauncey of Tullichettle delivered a substantive concurring one. Lord Keith of Kinkel agreed with Lord Browne-Wilkinson's speech, and Lords Griffiths and Steyn agreed with the speeches of both Lords Browne-Wilkinson and Jauncey.

30. That decision shows that the Willesden County Court's order of 21 March 1991 requiring Ms Francis to give up possession of No 25C on 18 April 1991 had the effect of *terminating* her secure tenancy on the latter date: see section 82(2) of the Housing Act 1985 in its form as it was at the material times, and *Burrows*, at 1451D to E, per Lord Browne-Wilkinson. Ms Francis, however, remained in occupation of No 25C thereafter, and did so until about 22 May 2005 when, following the signing of the decant agreement, she moved to No 1. Subject to the effect of the decant agreement, it is not in question that throughout this period she occupied No 25C not as a secure

tenant under the terms of the 1981 tenancy agreement, but as a 'tolerated trespasser', the phrase used by Lord Browne-Wilkinson at 1452E.

31. Three important matters should be noted. First, the termination of Ms Francis's secure tenancy on 18 April 1991 did not mean that the tenancy was incapable of revival. In particular, were either she or Brent to have applied to the court for, and to have obtained, the substitution for 18 April 1991 of a new, future date for the giving of possession, her secure tenancy would thereupon have revived with retrospective effect and would then have continued until the arrival of such future date: see section 85 of the Housing Act 1985, and *Burrows,* at 1452H to 1453D. Second, it was not, however, open to the parties *by agreement* to alter or vary the order of Willesden County Court, including the terminating impact of the possession order it made: see *Burrows,* at 1452B, per Lord Browne-Wilkinson; and at 1459C, per Lord Jauncey of Tullichettle. Third, despite the effect of such a possession order, it was open to the parties to enter into a *new* tenancy or licence in respect of the dwelling-house.

32. As to the third point, it is a question of fact in each case as to whether the parties have done so: see *Burrows,* at 1454F to H, per Lord Browne-Wilkinson. In *Burrows,* no such new tenancy or licence had been entered into, and the decision made it plain that the creation of such a new tenancy or licence will not readily be inferred. In particular, circumstances in which the former landlord agrees to forbear from enforcing the possession order if the former tenant continues to comply with specified conditions will not, without more, ordinarily justify the finding of the creation of a new tenancy or licence. Lord Browne-Wilkinson, at 1454G, said:

> 'It cannot be right to impute to the parties an intention to create a legal relationship such as a secure tenancy or licence unless the legal structures within which they made their agreement force that conclusion'.

33. I admit to some difficulty in understanding the precise sense, as opposed to the general thrust, of those words; in particular I am unclear as to the sense of the reference to 'the legal structures'. Later authorities, however, recognised the high evidential bar that Lord Browne-Wilkinson was undoubtedly setting. In *Newham LBC v. Hawkins* [2005] HLR 42, in a judgment with which Bennett J and Auld LJ agreed, Arden LJ said this:

> '37. For the reasons explained by Lord Browne-Wilkinson, a new tenancy will not generally arise from the fact that a tolerated trespasser remains in possession with the landlord's consent. Rather more is required to take the case out of the everyday situation where landlords simply allow former tenants to remain in occupation if they make satisfactory payments and their occupation is otherwise satisfactory. …
>
> 40. This is not a case in which it was open to the tolerated trespasser to make an application under s. 82. She could have applied, for instance, for the order for possession to be postponed. If she had done that, her original tenancy would have revived. *This is not therefore a case where the court is compelled to conclude that the acts of the parties could be referable only to an intention to create a new tenancy*.' (Emphasis supplied)

34. This court returned to the same theme in *Lambeth LBC v. O'Kane* [2006] HLR 2, in which again Arden LJ delivered the lead judgment, with which Sir Martin Nourse and Auld LJ agreed. In the course of her judgment, she said:

> '60. The *Burrows* case establishes that "special circumstances" are required before a new tenancy can be found between a tolerated trespasser and the former landlord who has permitted him to remain in occupation. …
>
> 64. … The speech of Lord Browne-Wilkinson makes it clear that *it is not enough that the facts are consistent with a new tenancy: they must actually force that conclusion*.' (Emphasis supplied)

35. There was no issue before us as to the high evidential hurdle that needed to be surmounted by a tolerated trespasser seeking to claim that his status of tolerated occupation has graduated to a right of occupation under a new tenancy. Mr Luba submitted, however, that in this case that hurdle had been surmounted. He placed passing reliance on the fact that, at any rate by the end of 2004, Brent was recognising an obligation to carry out repairs to No 25C, which he said was consistent with a recognition that Ms Francis was a tenant of it. In my view, however, that consideration is of no weight. Since, as a tolerated trespasser, Ms Francis could at any stage have applied to the court for a postponement of the original possession order -- and, if successful, thereby have magically revived her defunct tenancy -- Brent had to be ready for such an eventuality. It could not safely allow No 25C to fall into a state of disrepair of which Ms Francis could then be entitled to complain; and *Lambeth LBC v. Rogers* (1999) 32 HLR 361 was just such a case. Accordingly, the sort of consideration to which Mr Luba referred provides no support for an inference that Ms Francis's continued occupation was referable to the grant of a new tenancy.

36. Mr Luba's main argument focused on the decant agreement. He said it showed an unequivocal intention by both sides to create, or recognise the existence of, a secure tenancy of No 25C. Indeed, he said that nothing less than the existence of such a tenancy would achieve the parties' objective under the agreement, namely to create a legal relationship under which if, after the works to No 25C were completed, Ms Francis did *not* vacate No 1 and move back into No 25C, Brent could bring proceedings against her for possession of No 1 in reliance on Ground 8 of Schedule 2 to the Housing Act 1985 (see paragraph 11 of the decant agreement, quoted in paragraph 13 above).

37. There is no need here to set Ground 8 out verbatim, although I shall have to do so later when dealing with certain alternative arguments advanced by Mr Luba. It is one of the discretionary grounds for possession of a dwelling-house let under a secure tenancy (in this case, the relevant tenancy being that of No 1). Its conditions are, by reference to the circumstances of this case, that: (i) No 1 was made available to Ms Francis for occupation 'while works were carried out [to No 25C] which [she] previously occupied as [her] only or principal home'; (ii) Ms Francis was the secure tenant of No 25C when she ceased to occupy it as her home; (iii) she 'accepted' the tenancy of No 1 'on the understanding that [she] would give up occupation when, on completion of the works, [No 25C] was again available for occupation by her under a secure tenancy'; and (iv) the works have been completed and No 25C is so available.

38. As the decant agreement plainly intended the case to be one to which Ground 8 could, if necessary, be applied, it is obvious that for the scheme of the agreement to work in all its intended respects Ms Francis had to be a secure tenant of No 25C immediately before the decant to No 1. Mr Luba submitted that the judge was therefore in error in failing to find that the facts forced the conclusion that, by the time of the signing of the decant agreement on 18 May 2005, Ms Francis was a secure tenant of No 25C, even though before then she was a tolerated trespasser.

39. The argument is in my view a compelling one although it has its difficulties. Mr Luba emphasised that the parties must be taken by the decant agreement either to have intended to create, or at least to have recognised the existence of, a secure tenancy held by Ms Francis of No 25C, and I understood him to favour the former alternative. His argument was, however, noticeably light on an attempt to identify the terms and conditions of the tenancy so created or recognised. The problem is that the agreement plainly did not purport to *grant* a secure tenancy to Ms Francis: nowhere does one find in it even an implied murmuring of the language of grant, let alone that of an express grant. That is because it was manifestly not directed at granting a tenancy to Ms Francis. All that it purported to do was to record the parties' recognition that she *already* had a secure tenancy of No 25C; and her secure tenancy purportedly recognised was that created by the tenancy agreement of 26 May 1981: see the definitions in, and recital 2.1 to, the decant agreement quoted in paragraph 12 above.

40. That interpretation of the agreement does, however, lay bare an obvious problem. That is because the secure tenancy created by the agreement of 26 May 1981 had, in consequence of the court order of 21 March 1991, terminated on 18 April 1991. That fact was, at the time of the signing of the decant agreement, *res judicata* between Brent and Ms Francis and it was open to neither to assert otherwise to the other. Importantly, *Burrows* shows that it was not open to them, by agreement, to vary or alter the impact of the order of 21 March 1991 insofar as it terminated Ms Francis's tenancy: they could not, therefore, revive it contractually. The only way in which the terminating impact of the March 1991 order might have been revoked was by a return to the court and the obtaining of a postponement to a future date of the time when Ms Francis must give up possession of No 25C. That course could have been taken when Brent was proposing the decant agreement but it was not. If such a course had been successfully taken immediately prior to the signing of the decant agreement, no question could have arisen as to the correctness of the recital in the agreement as to Ms Francis's status as a secure tenant. Such a course could also have been taken *after* the decant agreement had been signed; and if it had led to a revival of the original secure tenancy, that would no doubt have 'fed' the recital in the decant agreement and have enabled it to be read as correctly meaning what it said. But that course was not taken either, and so there was no such feeding.

41. The judge was of the view that, in signing the decant agreement, the parties had simply forgotten the making of the earlier possession order and had signed the decant agreement in unawareness of it. There was, however, no evidence before him from either party to such effect and so in that respect he was simply making an educated guess. He may have been right, although I regard it as equally possible that neither of the parties had overlooked the prior order or its effect but that Brent nevertheless thought that the form of decant agreement that it promoted for signature by the parties would achieve the commercial end that both it and Ms Francis intended to achieve,

namely the removal of Ms Francis on a temporary basis, the conferring on her of the right to return in due course to No 25C and, if necessary, the conferring on itself of the right to compel her to do so by recourse to Ground 8. If, in the event, the agreement was inoperative either to clothe Ms Francis with the status of a secure tenant of No 25C, or validly to recognise that she had such a status, it was destined to defeat the parties' combined commercial objective: it would leave it open to Ms Francis to argue that she could not be removed from No 1 if Brent had sought to invoke Ground 8, just as it would probably leave it open to Brent to deny that she had any right to return to No 25C. It is obvious that neither party to the decant agreement contemplated any such outcome when they entered into it. Nothing could have been further from their respective intentions.

42. My view as to the correct disposition of this ground of appeal has wavered. I have, in particular, been concerned as to whether the statements by each of Lord Browne-Wilkinson and Lord Jauncey in *Burrows* that the parties cannot agree to vary or alter the impact of a possession order such as that of March 1991 meant that the parties' express recognition in the decant agreement that the original secure tenancy was still alive reflected an agreement of a nature that *Burrows* shows was writ in water and so signified nothing.

43. In my view, however, absent any evidence from either party that the decant agreement was vitiated by relevant mistake, the court ought not to find that it was. There is no justification for any conclusion that, prior to the signing of the decant agreement, Brent thought, understood or believed that Ms Francis was anything other than a tolerated trespasser in No 25C. She had in fact been such for 14 years and, although the relationship had had its ups and downs, Brent appears to have regarded her as, for practical purposes, a permanency. When, however, in due course the need arose to remove her from No 25C for repair purposes, Brent and Ms Francis agreed to deal with this by the decant agreement.

44. It is apparent from the agreement that Brent was expressly recognising Ms Francis as its secure tenant. That is what the agreement recited that it was doing. Moreover, it was doing so in a contract between it and Ms Francis under which each party was about to change its and her position in material respects and in which, in order to enable their changes of position to work in the way they were plainly intended to work, it was important that Ms Francis was in fact a secure tenant such as the agreement recognised. Is it in these circumstances open to Brent to repudiate the recognition of the secure tenancy in Ms Francis to which it so signed up?

45. I have come to the conclusion that it is not. In the absence of any evidence that the decant agreement was entered into on the basis of a mistake by either side, I prefer to approach it on the assumption that the parties had a full grasp of the relevant history but were nevertheless evincing a combined intention that, as from the moment of the signing of the decant agreement, Ms Francis was to be recognised as having the status of a secure tenant of No 25C. They reflected that recognition by reciting that she was still a secure tenant under the 1981 agreement. In that respect, they were in error since she was not and could not be such a tenant. But that consideration ought not to stand in the way of achieving what the parties plainly intended to achieve. The form of their agreement may have been wrong. But the substance of what they must have intended by it was that she should be regarded as a secure tenant on the terms and conditions currently applicable under the 1981 agreement if it were still in force. I of course

recognise that that is not what they actually said, but that in my view was the substantive commercial intent of what they did say.

46. In my judgment, that is how the reasonable man would interpret the decant agreement. It is he whose services are traditionally invoked in the interpretation of contracts, 'interpretation [being] the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation they were at the time of the contract' (*Investors Compensation Scheme Ltd v. West Bromwich Building Society* [1998] 1 WLR 896, at 912H, per Lord Hoffmann). The reasonable man, when presented both with the decant agreement and the relevant background leading up to it, including the March 1991 order, would not throw up his hands in contempt and say that the agreement had fundamentally misfired. He would recognise the parties' error but would also recognise that their commercial objective was to bind each to a recognition that Ms Francis was a secure tenant of No 25C and that a reasonable and commercial interpretation of their ill-chosen words was that the terms and conditions of such tenancy were as I have just described.

47. I would therefore respectfully disagree with the judge's decision on the primary ground argued before him and us, and uphold the primary ground of Ms Francis's appeal. I would answer the preliminary issue in the terms of a declaration that, upon the signing of the decant agreement, Ms Francis became a secure tenant of No 25C and, following her removal to No 1, remained a tenant of No 25C.

(b) Did Ms Francis acquire a 'replacement tenancy' on 20 May 2009?

48. Mr Luba's alternative arguments were advanced on the premise that Ms Francis did not have a secure tenancy of No 25C at any time after 18 April 1991. For reasons given, I would not regard such premise as applicable and so it is not strictly necessary to deal with Mr Luba's alternative arguments. Since, however, we heard from both sides on them, I shall consider them, and do so on the premise that I am wrong in my conclusion on the primary ground and that in fact Ms Francis had no secure tenancy of No 25C at any time after 18 April 1991.

49. If so, Ms Francis was in the like position as thousands of occupiers of council housing who were in a state of limbo as a result of the making of an old, but unenforced, possession order. Section 299 of, and Schedule 11 to, the Housing and Regeneration Act 2008 ('the 2008 Act'), which came into effect on 20 May 2009, changed the law with regard to tolerated trespassers. Part I provided that thenceforth a secure tenancy ended only when a possession order was executed. Part 2 enacted a new scheme to confer 'replacement tenancies' on qualifying tolerated trespassers who had earlier lost their secure tenancies on the making of a possession order. Any such replacement tenancy arose as from 20 May 2009. It is Ms Francis's assertion that she acquired a replacement tenancy of No 25C on that date, which was before Brent granted Ms Williams her tenancy of No 25C.

50. I must set out the material parts of some paragraphs of Part 2:

> '15. In this Part of this Schedule "an original tenancy" means any secure tenancy … -

(a) in respect of which a possession order was made before the commencement date, and

(b) which ended before that date pursuant to the order but not on the execution of the order.

16. (1) A new tenancy of the dwelling-house which was let under the original tenancy is treated as arising on the commencement date between the landlord and the ex-tenant if –

(a) on that date –

(i) the home condition is met, and

(ii) the ex-landlord is entitled to let the dwelling-house, and

(b) the ex-landlord and the ex-tenant have not entered into another tenancy after the date on which the original tenancy ended but before the commencement date.

(2) The home condition is that the dwelling-house which was let under the original tenancy –

(a) is, on the commencement date, the only or principal home of the ex-tenant, and

(b) has been the only or principal home of the ex-tenant throughout the termination period.

(3) In this Part of this Schedule "the termination period" means the period –

(a) beginning with the end of the original tenancy, and

(b) ending with the commencement date. …

17. The new tenancy is to be –

(a) a secure tenancy if –

(i) the original tenancy was a secure tenancy, or …

21. (1) The new tenancy and the original tenancy are to be treated for the relevant purposes as –

(a) the same tenancy, and

(b) a tenancy which continued uninterrupted throughout the termination period.

(2) The relevant purposes are –

(a) determining whether the ex-tenant is a successor in relation to the new tenancy,

> (b) calculating on or after the commencement date the period qualifying, or the aggregate of such periods, under Schedule 4 to the Housing Act 1985 (qualifying period for right to buy at a discount),
>
> (c) determining on or after the commencement date whether the condition set out in paragraph (b) of Ground 8 of Schedule 2 is met, and
>
> (d) any other purposes specified by the appropriate national authority by order.'

51. Ground 8, referred to in paragraph 21, provides:

> 'The dwelling-house was made available for occupation by the tenant (or a predecessor in title of his) while works were carried out on the dwelling-house which he previously occupied as his only or principal home and –
>
> (a) the tenant (or predecessor) was a secure tenant of the other dwelling-house at the time when he ceased to occupy it as his home,
>
> (b) the tenant (or predecessor) accepted the tenancy of the dwelling-house of which possession is sought on the understanding that he would give up occupation when, on completion of the works, the other dwelling-house was again available for occupation by him under a secure tenancy; and
>
> (c) the works have been completed and the other dwelling-house is so available.'

52. As it seems to me, there are obvious difficulties in the way of an argument that Ms Francis acquired a replacement tenancy of No 25C on 20 May 2009. To make good such a case, she must show that on that date she satisfied the conditions of paragraph 16. In my view, it is plain that she did not satisfy that part of the 'home condition' specified in paragraph 16(2)(b). Her problem is that, as the judge found, upon her move from No 25C she became a secure tenant of No 1, and she could only have become such if No 1 was her 'only or principal home' (the 'tenant condition' under section 81 of the Housing Act 1985). As No 1 became her 'only or principal home', No 25C could not at the same time also have been such a home; and of course the decant agreement expressly recognised that it could not and would not (see clause 5.1 of the agreement, quoted in paragraph 13 above).

53. Mr Luba nevertheless advanced three propositions in support of his submission that Ms Francis acquired a replacement secure tenancy of No 25C on 20 May 2009. He recognised that, under paragraph 15, Ms Francis's 'original tenancy', namely that created in 1981, was a secure tenancy in respect of which a possession order had been made on 21 March 1991 and which had ended on 18 April 1991, the date on which she was ordered to give up possession. He also recognised the three conditions prescribed by paragraph 16 for the arising of a 'new tenancy'. His first submission, however, was that the 2008 Act contemplated its application to Ground 8 cases, which it dealt with in paragraph 21, and he invoked paragraph 21 in support of his argument that Ms Francis acquired a new tenancy of No 25C on 20 May 2009.

54. With respect to Mr Luba's appropriately succinct development of what I would regard as a hopeless point, paragraph 21 is irrelevant to the making of any such case. Ms Francis can only claim to have acquired a new tenancy on 20 May 2009 if she satisfied the paragraph 16 conditions. If she did, she does not need paragraph 21. If she did not, paragraph 21 cannot help her. Paragraph 21 is not directed at identifying when a new tenancy arises. It works on the basis that a new tenancy *has* arisen. Its only role is, for certain specified purposes, to infill the gap between the termination of the old tenancy and the creation of the new one. It provides that, for those purposes, the old tenancy and the new tenancy are to be treated as 'the same tenancy' and as one that continued throughout the 'termination period'.

55. The only specified purpose said by Mr Luba to be presently relevant is that identified in paragraph 21(2)(c), namely 'determining on or after the commencement date whether the condition set out in paragraph (b) of Ground 8 … is met,'. By reference to paragraph (b), Mr Luba said it required the satisfaction of two conditions: first, (and by reference to this case), that Ms Francis had 'accepted the tenancy of [No 1] on the [described understanding]'; and, second, that such understanding included that, on the completion of the works, '[No 25C] was again available for occupation by [her] under a secure tenancy'. Mr Luba's submission was that paragraph 21 means, therefore, that Ms Francis's original secure tenancy of (in this case) No 25C is to be treated as having continued down to 20 May 2009 (when the claimed new tenancy arises), since otherwise the second condition of paragraph (b) could not be met. In short, the submission was that, accepting for the purposes of the argument that Ms Francis had a secure tenancy of No 1, she was at the same time treated as having a continuing secure tenancy of No 25C.

56. That submission is, I consider, incorrect and affords no help to Ms Francis. First, as I have said, paragraph 21 applies only to a case in which a new tenancy has arisen under paragraph 16: if no new tenancy of No 25C has arisen under that paragraph, it cannot arise under paragraph 21. Second, the point of the provision of paragraph 21 relating to Ground 8 is to cure a problem that, but for such provision, would render Ground 8 unworkable.

57. Ground 8 provides a ground by which, by reference to our facts, Brent may be able to compel the recovery of possession of No 1 from Ms Francis upon the completion of the works to No 25C. The type of problem to which paragraph 21(2)(c) is directed is the case in which, following the decant to No 1 under a secure tenancy, Ms Francis's tenancy of No 1 comes to an end by the making of an outright possession order – which, as it happens, is exactly what occurred in this case on 26 January 2009 (see paragraph 16 above). That created the consequential problem that Ground 8 ceased to be available to Brent, because Ground 8 applies only to claims to recover possession from secure tenants.

58. The effect of paragraph 16 was, however, to give Ms Francis a new secure tenancy of No 1 on 20 May 2009. But that would not, without more, overcome all the problems in the way of recourse by Brent to Ground 8 in order to recover possession of No 1 with a view to decanting Ms Francis back to No 25C. That is because Ms Francis would not have 'accepted' the new tenancy of No 1 on the understanding described in Ground 8: the new tenancy of No 1 was not 'accepted' by her at all, or at any rate not on any understanding relevant for Ground 8 purposes; it was simply thrust upon her by operation of the 2008 Act, whether she wanted it or not. The purpose of paragraphs

21(1) and (2)(c) was, therefore, to provide that her old and new tenancies of No 1 should be treated as one *continuing* tenancy; and such treatment would then enable Brent to satisfy the Ground 8 'acceptance' condition in any bid to recover possession of No 1.

59. Paragraph 21 has, however, nothing to do with the status of, in our case, Ms Francis's position in relation to No 25C. Contrary to Mr Luba's submission, there are not two conditions in Ground 8. There is but one condition, namely the 'acceptance' condition, under which the tenancy of No 1 was accepted on the understanding that, when the works to No 25C were completed, No 25C would 'again' be available for occupation by her under a secure tenancy. That may well assume that, immediately prior to her decant to No 1, Ms Francis had occupied No 25C under a secure tenancy, whereas for the purposes of this submission I am assuming that she had not. But I cannot derive anything from paragraph 21 that can be said to be directed at changing the facts actually applying to the status of Ms Francis's prior occupation of No 25C so as to make any such factual assumption retrospectively correct. Paragraph 21 is focusing on the old and the new tenancies of only one dwelling-house, and in the context of paragraph 21(2)(c) those tenancies are the old and the new tenancies of No 1. Ground 8 of course focuses on a case in which the dwelling-house from which the tenant decanted had in fact been occupied under a secure tenancy at the point of decant. But if in fact it had *not* been so occupied, that is not a piece of history that it is any part of paragraph 21's role to re-write. I would reject Mr Luba's submission based on paragraph 21.

60. Mr Luba's next submission was that immediately before 20 May 2009, Ms Francis did not have a secure tenancy of either No 25C or No 1: both her tenancies had come to an end by possession orders. He submitted that in those circumstances, it was open to the judge to find that she had a new tenancy of No 25C. He said that the paragraph 16 conditions were all satisfied in relation to No 25C, unless only Ms Francis fell foul of the condition in paragraph 16(1)(b), namely that the grant to Ms Francis of the tenancy of No 1 was the entry into 'another tenancy' that precluded the arising of a replacement tenancy of No 25C. His submission was that it was not so precluded. The judge had held, he said correctly, that the reference to 'another tenancy' meant, on our facts, another tenancy of No 25C, so that the paragraph 16(1)(b) condition did not prevent the arising of a new tenancy of No 25C.

61. I would reject that submission too. For reasons earlier given, its problem is that the judge found, rightly in my view, that Ms Francis's enjoyment of her secure tenancy of No 1 meant that she could not satisfy the 'home condition' necessary for the arising of a new tenancy of No 25C. Whilst Mr Bhose, under a respondent's notice, submitted that the judge was wrong to interpret 'another tenancy' as referring to another tenancy of, in this case, No 25C rather than 'another tenancy' of another residential property (here, No 1), I propose to express no view on that question, which does not need to be answered.

62. Mr Luba's final submission was that, if he was wrong on his prior two submissions, he had to accept that the judge was right that the parties were labouring under a common mistake when entering into the decant agreement. Mr Luba submitted that that mistake vitiated the entire agreement, including the grant of the secure tenancy of No 1. Whilst the judge found that there was a mistake in relation to the assumption of the existence of a secure tenancy in relation to No 25C, he had nevertheless found that

the agreement was effective to grant Ms Francis a secure tenancy of No 1. Mr Luba submitted that that conclusion was wrong in principle and that the effect of the mistake was to render the purported tenancy of No 1 a nullity. That, he said, opened the door to the conclusion that there was no barrier to the arising of a new tenancy of No 25C under paragraph 16: all the conditions of paragraph (1) would have been satisfied, including in particular the paragraph (1)(b) condition.

63. I would not accept that submission either. The judge found as a fact that the decant agreement granted Ms Francis a secure tenancy of No 1, and following the making of the agreement she went into possession of No 1. She thereafter paid rent to Brent as such a tenant and Brent accepted it. When in due course she defaulted in her rent payments, Brent sued her for possession on the ground that she had fallen into arrears and it obtained a possession order in reliance on Ground 1 of Schedule 2 to the Housing Act 1985, a ground for possession of a dwelling-house let under a secure tenancy. Her subsequent successful application for a suspension of Brent's possession warrant can only have been sought, and granted, on the basis that her tenancy of No 1 had been under a secure tenancy. Mr Luba's submission that, in light of all this, Ms Francis never had a secure tenancy of No 1 at all flies in the face of reality and invites an impermissible re-writing of history.

Disposition

64. I would allow Ms Francis's appeal in the terms indicated in paragraph 47 above.

Lord Justice Beatson :

65. I agree.

Lord Justice Laws :

66. I also agree.