Neutral Citation Number: [2019] EWHC 1012 (QB)

Case No: QB/2018/0292

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/04/2019

Before:

MRS JUSTICE THORNTON DBE

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Between:

MARIAN DAHIR MOHAMED	**Applicant**
- and -	
THE MAYOR & BURGESSES OF THE LONDON BOROUGH OF BARNET	**Respondent**

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Matthew Lee (instructed by **Duncan Lewis Solicitors**) for the **Applicant**
Jane Hodgson (instructed by **HB Public Law**) for the **Respondent**

Hearing date: 28 March 2019

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Approved Judgment

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Mrs Justice Thornton:

Introduction

1. This is an appeal against a decision by HHJ Luba QC at the Central London County Court, following the trial of a preliminary issue in relation to proceedings for possession of residential premises sought by the London Borough of Barnet ("the Council"). By his decision, dated 26 September 2018, the Judge concluded that the agreement for occupation between the Appellant, Ms Mohamed, and the Council is not an agreement that attracts the security of tenure provisions of the Housing Act 1985.

2. The appeal raises the issue of whether the occupation of accommodation by Ms Mohamed has secure status for the purposes of Part IV of the Housing Act 1985 or whether, as the Council contends, it is a simple non-protected arrangement. This turns on the construction of paragraph 6b) of Schedule 1 to the Housing Act 1985. In particular; does paragraph 6b) require a single provision providing for vacant possession on expiry of a specified period or when required? Or, is it sufficient, in the present case, to simply provide for possession 'when required'?

<u>Background</u>

3. The facts were comprehensively set out by HHJ Luba in his judgment at paragraphs [6] to [17]. In summary, in 2016 Ms Mohamed found herself to be homeless and approached the Council seeking assistance for herself and her daughter. The Council found Ms Mohamed to be intentionally homeless and therefore owed no housing duty under the Housing Act 1996. However, pursuant to the Council's duties under the Children Act 1989 it provided Ms Mohamed with accommodation at 38B Maybury Gardens ("the property").

4. The property in question is owned by a private owner, Mr Kumar, who had engaged the services of an agent, Rent Connect to utilise the property to his advantage. Accordingly, on 7 October 2015, Rent Connect, on behalf of Mr Camilla, entered into a licence agreement pursuant to which the property was let by Rent Connect to the Council for the purpose of providing temporary accommodation. The agreement was for an initial period of 12 months and thereafter from month to month ("the 2015 Licence Agreement").

5. In April 2017, the property was provided to Ms Mohamed by the Council. It was provided to her pursuant to a written agreement described as a 'Temporary Accommodation Agreement' dated 7 April 2017. On the same day, the Council appears to have entered into a supplemental agreement with Rent Connect, described as a "Supplemental Agreement – booking licence to occupy".

6. Pursuant to the agreement she made with the Council, Ms Mohamed moved in to occupy the premises. The Council later took the view that it should recover possession. It served a Notice to Quit on 26 February 2018. The Notice to Quit expired on 25 March 2018, after which the Council brought possession proceedings in the Central London County Court.

7. At the trial of the preliminary issue on 26 September 2018, HHJ Luba found for the Council on the issue of security of tenure. However, he dismissed the Council's claim for possession on grounds of failure of service of the Notice to Quit. The Council has since served a further Notice to Quit, the effectiveness of which depends upon the outcome of this appeal.

The licence agreements between Rent Connect and the Council

8. Clause 2.2 of the 2015 Licence Agreement provides that the Licensee (the Council) has agreed to hold the Property on licence for the Licence Period. The Licence period is defined as "*an initial period of 12 months from and including Licence Rent Commencement Date and thereafter from month to month until determined in accordance with Clause 5*". The Licence Rent Commencement Date is defined as 'from and including 7 October 2015'.

9. Clause 2.3 provides that the Licensee is permitted to use the Property for the Permitted Use. The Permitted Use is defined as the:

> "*…use of the Property for the purpose of providing temporary housing accommodation in accordance with either the Licensee's Homelessness Prevention Strategy or under the provisions of Part VII of the Housing Act 1996*."

10. Clause 5 provides as follows:

> *"5.1 This Agreement is effective from the Licence Commencement Date until the expiry of any Notice of Termination given by either of the Parties*
>
> *5.2 Either Party may terminate this Licence by giving the other not less than 14 days' notice in writing of its intention and upon termination; the Licensee will make arrangements with the Licensor to jointly check the condition of Property and its contents*
>
> *5.3 Recovering Possession*
>
> *Where the Licensee wishes to terminate the Licence and the property is vacant notice to terminate may be by way of a telephone message, followed by a written Notice to Terminate delivered by post or email. The Licensee will use its best endeavour to inform the Licensor in advance when it is aware of the Property becoming vacant and whether the Licensee is likely to want to continue to Licence and the accommodation*
>
> *5.4 Termination by the Licensee*
>
> *The Licensee may immediately terminate this Licence if the Licensor has not met repairing obligations at clause 3.2 or when the void work required is longer than 2 working days. The Licensee will notify the Licensor of their intention to terminate the Licence.*

> *5.5 Termination by the Licensor*
>
> *Where the Licensor wishes to terminate the Licence, he may do so by way of a telephone message followed by a written Notice to Terminate AND thereupon all interest of the Licensee and the Occupant in respect of the Property shall cease and determine at the expiry of the notice period."*

11. The termination provisions in the 2017 Supplemental Agreement provide that:

> *5 Termination*
>
> *5.1 This agreement is effective from the 07 of April 2017 until the date of notice of termination.*
>
> *5.2 The initial Notice to terminate will be by way of a telephone message, followed by written Notice to Terminate by email.*
>
> *5.3 In the event that the contact [sic] is terminated for whatever reason, this agreement will terminate with effect from the date of the termination of the contract.*
>
> *5.4 The exercise of rights to terminate the agreement shall not affect any existing rights of obligations of any of the parties in the Contract."*

12. HHJ Luba QC was critical of the drafting of the licence agreements, describing the 2015 agreement as '*unsatisfactory to say the least*' and the 2017 Supplemental agreement as '*even more poorly drafted*'. Before this Court, Ms Hodgson accepted the criticisms on behalf of the Council but contended they had no material bearing on the issues for this Court. Although the issue was live before HHJ Luba, both Counsel helpfully agreed that this Court should proceed on the basis of the 2015 agreement, rather than the 2017 agreement, and I do so.

The licence to occupy between Ms Mohamed and the Council

13. The licence to occupy entered into by Ms Mohamed and the Council provides for the provision of temporary accommodation at 38 Maybury Gardens from 7 April 2017 with a nightly accommodation charge and states that the agreement is not intended to create the relationship of landlord and tenant between the parties. Ms Mohamed will not be entitled to any statutory security of tenure and the accommodation can be terminated at any time by the Council by written or verbal notice or by notice to quit served on Ms Mohamed.

14. It was common ground that the agreements between the Council and Rent Connect are the material agreements for the purposes of considering paragraph 6b) of Schedule 1 to the Housing Act 1985, not the agreement between Ms Mohamed and the Council.

The judgment below

15. HHJ Luba gave a detailed extempore judgement. His conclusions are set out at paragraphs [40]-[52], as follows:

Conclusion

40. I am faced with what, at first impression, are 2 conflicting decisions of the Court of Appeal.

…

41. Mr Lee, as I understood it, simply submitted that the Hickey case, being the most recent decision, was authoritative. Moreover, it had not been reached per incuriam because, as the Court of Appeal indicates at para 19 of its judgment, it had had regard to the judgment of Mann LJ in Abdi. In the event, for reasons given by Sir Martin Nourse at paragraph 19, the Court of Appeal had felt able to distinguish the case of Abdi as being "a case where the facts were different". Of course the facts are different in all cases, but Sir Martin Nourse continued, "Having carefully considered the observations of Mann LJ, I am of the opinion that, while they are confirmatory of the views I have expressed in relation to sub- paragraph a) they are not of assistance in relation to sub- paragraph b).

42. Unfortunately, Sir Martin Nourse does not go on to explain why the Court of Appeal's decision in Abdi is not of assistance on the application of Sched 1 paragraph 6b) in a case such as the instant case.

43. Ms Hodgson, advancing an argument based on exchanges taking place between the court and the bar, seeks to distinguish Hickey in this way. She points out that Hickey is a case in which there was provision on the face of the agreement for termination at the end of a specified period, namely at the end of the term of the lease. The problem in Hickey was that there was no further provision allowing termination otherwise by the owner, or by the "lessor" for the purposes of Sch. 1 para 6 on his desiring such termination, whether before or after the expiry of the term. However, says Ms Hodgson, in the Abdi case, the Court of Appeal had been concerned with a case without a fixed term or specified period of duration and therefore one only needed to be concerned with whether the landlord or lessor had reserved the power to terminate by notice at will.

44. In that context, she explained, Hickey was not the applicable authority in the instant scenario but rather Abdi was and the Court of Appeal had distinguished Abdi on the basis that it was not a case which required a twin-track provision precisely because the agreement itself was not an agreement for a specified period. Alternatively, as a fallback, Ms Hodgson contended that in the instant case there was a twin-track provision because the agreement <u>did</u> refer to a specified period, namely a period of "not less than 14 days", which is the period

mentioned in the clause 5.2. Accordingly, she submitted, it was open to this landlord to terminate at will or to rely on termination at the end of a specified period. This alternative or fallback submission, she was easily able to identify as arguable because the Court of Appeal had so described it in the Abdi case.

45. With great respect to Mann LJ in the case of Abdi, I do not accept the proposition that "specified period" in Sched 1 para 6b) is referable to the period of notice given by a lessor who is terminating the arrangement when required by him. It seems to me on a proper reading of Sch 1 para 6b) that that reference to "a specified period" is a reference to the specified period of the provision of the accommodation by the provider to the local authority. In other words, it is referable to the normal case of a fixed term or determinate arrangement.

46. It is precisely, in my judgment, because that is the proper understanding of the term "a specified period" that the alternative is provided, i.e. there must be provision for termination, in addition, whenever required by the lessor. That is for the good policy reasons explained by Sir Martin Nourse in paragraph 18 of the Hickey judgement. I accordingly reject the fallback position of Ms Hodgson. It seems to me, with respect, entirely artificial. All the more artificial where, in the instant case she asked me to accept as a specified period a period of "not less than 14 days' notice". Of course, "not less than 14 days" might be a period of as much as one year, or more, or less. It is difficult to describe a provision which opens with the words "not less than" as specifying any particular period.

47. Accordingly, I reject the fall-back position.

48. Ms Hodgson's claim for possession on this point, therefore, turns or falls on her main proposition that in the case of an indeterminate term such as Abdi, the requirement for the double-headed termination provision identified in Hickey cannot run. That is because, by definition, the agreement does not contain a specified period. What it does contain is simply a provision for termination by the parties on notice and, most importantly in the instant case, clause 5.5 termination by the licensor on notice i.e. on request.

49. Mr Lee struggled manfully to argue against this justification for the distinction between the judgments in Hickey and Abdi. He failed to satisfy me that Ms Hodgson's submissions were incorrect. It seems to me that these two judgments are precisely reconcilable. They provide, see Hickey, that where an agreement is for a specified period, i.e. a fixed term and will therefore terminate at the end of the fixed term

there must be a second or supplementary provision allowing for termination by the lessor when he or she requires, even if that be before the end of the express term.

50. In contrast, see Abdi, where there is no express term under the occupation arrangement, termination will only be when required by either of the parties. In this case, as in Abdi, there is an express term enabling the landlord to terminate.

51. In these circumstances and for those reasons, I am satisfied that in the instant case, reading both the agreement of 2015 and the supplemental agreement of 2017, there is provision for the lessor to obtain vacant possession, "when required", namely by giving the requisite notice. I understood Mr Lee to be contending the giving notice to terminate did not inexorably lead to the proposition that the landlord would obtain "vacant possession", that term appearing in Sch 1 para 6b). To my mind there is nothing in that point. As the Court of Appeal recognised expressly in Hickey, a lease for a finite period necessarily rests on the premise that at the end of the term, vacant possession will be given. Likewise, where an agreement provides for termination by notice, that is on the necessary premise that at the expiry of notice, vacant possession will be given.

52. For all those reasons, I am satisfied that on this preliminary point the Council has established that the terms of Sch 1 para 6 are satisfied and, accordingly, the agreement in this case for occupation by the defendant is not an agreement which attracted the security of tenure provisions of the Housing Act 1985.

<u>The legal framework</u>

16. The Housing Act 1985 contains several parts. Part II is concerned with the provision of housing accommodation. Part IV is concerned with secure tenancies and the rights of secure tenants. Section 79 is the first section in Part IV of the Act. That section provides:

"79 Secure tenancies

(1) 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.

(2) Subsection (1) has effect subject to—

(a) the exceptions in Schedule 1 (tenancies which are not secure tenancies),

.....

17. Pursuant to section 79(3), the provisions of Part IV apply in relation to a licence to occupy a dwelling-house as they apply in relation to a tenancy.

18. Pursuant to Section 82 of the Act, a secure tenancy cannot be ended by the landlord except by obtaining an order of the Court for possession. Section 84 sets out specified grounds for possession (e.g. rent arrears or nuisance). The tenancy will end on the date when the tenant is evicted following the order of the Court.

19. The Encyclopedia of Housing Law and Practice comments as follows on the effect of section 79 and subsequent provisions:

"In outline, the tenants of local authorities, housing action trusts, new town corporations, urban development corporations and others are prima facie to enjoy security of tenure and other rights under this Part, but (a) many are excluded by Sch.1,"

20. Schedule 1 to the Act sets out in 12 paragraphs a list of circumstances in which tenancies are not secure tenancies.

21. Thus, for example, Paragraph 4 covers accommodation for homeless persons:

> *"A tenancy granted in pursuance of any function under Part VII of the Housing Act 1996 (homelessness)…is not a secure tenancy unless the local housing authority concerned have notified the tenant that the tenancy is to be regarded as a secure tenancy".*

22. Paragraph 6 is titled "Short-term arrangements." It provides as follows:

> *"A tenancy is a not a secure tenancy if –*
>
> *(a) the dwelling-house has been leased to the landlord with vacant possession for use as temporary housing accommodation,*
>
> *(b) the terms on which it has been leased include provision for the lessor to obtain vacant possession from the landlord on the expiry of a specified period or when required by the lessor,*
>
> *(c) the lessor is not a body which is capable of granting secure tenancies, and*
>
> *(d) the landlord has no interest in the dwelling-house other than under the lease in question or as a mortgagee"*

23. Lettings made under paragraph 6 have been referred to as 'private sector leasing schemes' and have been used by some local authorities to provide accommodation for the homeless (Encyclopaedia of Housing Law).

24. The following is common ground between the parties:

i) the landlord condition and the tenant condition in section 79 are satisfied,

ii) paragraph 6 of Schedule 1 applies to licences as well as leases (*Tower Hamlets v Miah* [1992] 2 WLR 761),

iii) if the exception to security of tenure in paragraph 6 is to apply, the requirements of all four sub-paragraphs must be satisfied (*Hickey* at para 12),

iv) save for paragraph 6b) which the parties cannot agree on, the requirements of paragraph 6 are satisfied in the present case.

The Court of Appeal decisions in Abdi and Hickey

25. Paragraph 6b has been considered by the Court of Appeal in *London Borough of Tower Hamlets v Abdi* (1993) 25 HLR 80 ("*Abdi*") and *Haringey LBC v Hickey* [2006] EWCA Civ 373 ("*Hickey*").

26. *Abdi* was decided in 1992. As a housing authority, Tower Hamlets Council had statutory responsibility for housing the homeless. It housed Ms Abdi and her family pursuant to a licence arrangement with a private landlord. From a review of the judgment the material clauses in the licence agreement were as follows:

> "2. *This Licence shall subsist until revoked as hereinafter provided.*
>
> ...
>
> *6. The terms on which the Licensee shall permit the nominees to be temporarily accommodated at the Premises shall reserve and acknowledge the right of the Grantor to enter the Premises for any reason at any time without having to give any previous notice to the Licensee or their Nominees and further shall ensure that the Licensee can give vacant possession of the Premises to the Grantor on termination of this Licence.*
>
> ...
>
> *8. This Licence may be terminated by the Grantor giving to the Licensee not less than 7 days' notice in writing."*

27. In his judgment, Mann LJ considered paragraph 6b as follows:

> *"As to subparagraph (b), Mr Tyrrell submitted that that was not satisfied because neither is there a specified period in the licence nor is there a provision for vacant possession when*

required by the licensor. Mr Underwood drew our attention to clauses 2, 6 and 8.

…

Mr Underwood submits that, taken together, the three clauses provide for the licensor to obtain possession on the expiry of a specified period, that is to say, seven days, or alternatively when required. The first submission is plainly arguable. The second is, in my judgment, unanswerable. There was provision for the licensor to obtain possession when he required, that is to say, by the giving of a seven-day notice. Accordingly, I reject Mr Tyrrell's submissions in regard to subparas (a) and (b) and I should remark that he accepted they were not conspicuously encumbered by merit. I, accordingly, conclude that there was no secure licence and, the notice to quit being accepted as sufficient to end the contractual licence."

28. *Hickey* was decided in 2006. A private landlord let a flat with vacant possession to the housing authority. The following extracts from the judgment explain the relevant clauses in the agreement between the landlord and the housing authority:

"By a lease dated July 4, 1996 and made between… Mr Patel… and... the Council Mr Patel let, and the Council took with "vacant possession" ...the premises for a term of one year and nine months… This was not the first nor as will appear the last lease of the premises… However apart from the length of the terms granted and the rents they were all for present purposes in the same form.

…

Clause 5(9)(a) contained what was in effect a covenant by the Council at the end or sooner determination of the term peaceably to leave and yield up the premises to Mr Patel "with vacant possession".

…

Clause 5(3) provided:

"In the event that the [Council] shall decide to terminate this Lease before the expiry of the Term then notwithstanding anything hereinbefore contained the [Council] may terminate this Lease by giving to [Mr Patel] not less than four weeks previous notice of the date of termination of this Lease (to expire at any time)…"

29. There was, however, Sir Martin Nourse noted, no corresponding power to the lessor to determine the head lease.

30. In his judgment, Sir Martin Nourse considered sub paragraph 6b as follows:

"15. The construction of sub-paragraph (b) is more difficult. As applied to the present case, the requirement is that the terms on which the premises have been leased by the head lease include provision for Mr Patel to obtain vacant possession from the Council "on the expiry of a specified period or when required by [Mr Patel]". Mr Grundy, who has appeared for the Council both here and below, accepts that the head lease must include express provision to the effect stated. He also accepts, as is clear, that the head lease includes provision for Mr Patel to obtain vacant possession on the expiry of a specified period, i.e. at the end of the term. He further accepts, as is also clear (see paragraph 3 above), that the head lease does not include provision for Mr Patel to obtain vacant possession when required by him. The question then is: What is the provision that the head lease must include?

16. Two views are possible:

(1) The head lease must either include a provision for Mr Patel to obtain vacant possession on the expiry of a specified period or it must include a provision for Mr Patel to obtain vacant possession when required by him. On this view, sub-paragraph (b) is satisfied because the head lease includes a provision for Mr Patel to obtain vacant possession on the expiry of a specified period.

(2) The head lease must include a single provision for Mr Patel to obtain vacant possession either on the expiry of a specified period or when required by him. On this view sub-paragraph (b) is not satisfied because the head lease only includes a provision for Mr Patel to obtain vacant possession on the expiry of a specified period.

17. Mr Wonnacott was disposed to accept that either view was grammatically possible. I think that that may well be so. But the opening words of sub-paragraph (b), "the terms on which it has been leased include provision", are to my mind more suggestive of a single provision for obtaining vacant possession in either event than of two alternative provisions. Moreover, if there were two alternative provisions, the second would, as Mr Wonnacott submits, be otiose, since every lease effectively provides for the lessor to obtain vacant possession on the expiration of a specified period.

18. I have also had regard to Mr Wonnacott's argument based on the policy of the 1985 Act. He submits that paragraph 6, being an exception to the general policy that residential tenants of local authorities and similar bodies should have security of tenure, is there to encourage private landlords, who want to be able to get their properties back on short notice, to enter into temporary arrangements with such bodies. It would be contrary

to the policy of the exception to prevent private landlords from obtaining vacant possession before the expiration of their leases and when required by them.

19. For these reasons I have come to the conclusion that sub-paragraph (b) of paragraph 6 is not satisfied in the present case. I should add that both counsel referred us to a passage in the judgment of Mann LJ in Tower Hamlets London Borough Council -v- Abdi [1993] 1EGLR 68, 71. That was a case where the facts were different. Having carefully considered the observations of Mann LJ, I am of the opinion that, while they are confirmatory of the views I have expressed in relation to sub-paragraph (a), they are not of assistance in relation to sub-paragraph (b)."

31. Accordingly, the tenancy was found to be secure.

Encyclopedia of Housing Law analysis

32. The following commentary on paragraph 6b) appears in the Encyclopaedia of Housing Law:

"This provision is designed to preserve so-called North Wiltshire type schemes. The provisions of sub-paras (c) and (d) are designed to pre-empt any evasive use of this paragraph. As originally employed-and indeed, as continued by this paragraph-the scheme was designed to avert the effects of Rent Act 1977. The letting to the local authority or housing association as housing association intermediate landlord would itself be outside Rent Act 1977 security provisions, while the tenancy between intermediate landlord and occupant would not be protected at all, because of subsections 13-16 1977 Act. The effect of the paragraph is to ensure that the occupant will not be secure under this Act either. The paragraph will also apply where the arrangement between the authority and the landlord is one of licence opposed to lease: Tower Hamlets LBC v Miah (1991) 24 HLR 199 CA. See also Tower Hamlets LBC v Abdi (1993) 25 HLR 80, CA. Paragraph 6a only requires vacant possession as between the head landlord and the authority; it is irrelevant that the property is occupied by a sub-tenant of the authority at the date of the grant or re-grant of the lease: Haringey LBC v Hickey [2006] EWCA Civ 373.

Paragraph 6(b) is only satisfied where a lease entitles the owner of the property to obtain vacant possession both at the expiry of the fixed term of the lease and at any point that he requires possession. Where the lease only entitled the owner to obtain possession on expiry, para 6b) was therefore not satisfied: Haringey LBC v Hickey above.

While there is an overlap between this paragraph and para 4, above (accommodation provided in discharge of homelessness functions) this paragraph may also apply in circumstances where paragraph 4 does not (e.g. where temporary accommodation is provided in the National Assistance act 1948 or the Children Act 1989). Accordingly, the fact that both paragraphs may apply the same circumstances does not restrict the operation of the other, i.e. they are not mutually exclusive Westminster CC v Boraliu [2008] EWCA Civ 1339"

Submissions on behalf of Ms Mohamed

33. On behalf of Ms Mohamed, Mr Lee contended that HHJ Luba QC was wrong to decide the accommodation agreement did not provide for security of tenure. The Court of Appeal authorities of *Abdi* and *Hickey* are inconsistent. Both were brief in their reasoning and provided limited assistance, but *Hickey* is the preferred authority because it refers to *Abdi* (as providing no assistance) and considered matters in greater detail. The analysis in *Hickey* at paragraphs [15]-[18] is to be construed as general guidance on how paragraph 6b should be interpreted which is binding on this Court. A single twin-track provision for possession on expiry of a specified period or when required is required. As applied to the present arrangements, a provision for Rent Connect to obtain possession on the expiry of each monthly period or when required was necessary but did not exist. A single provision of this nature ensures the necessary clarity for security of tenure.

Submissions on behalf of the Council

34. Ms Hodgson submitted that the Judge below was correct to conclude that the two Court of Appeal decisions were reconcilable. The analysis of Sir Martin Nourse in *Hickey* is not general guidance but analysis applicable to the facts of that case, namely a fixed term arrangement. In the present case the licence arrangements between Rent Connect and the Council were for an initial fixed term following by a monthly indeterminate term. Accordingly, the appropriate analysis for this court to follow is that of *Abdi* where the Court of Appeal must be taken to have accepted that arrangements for an indeterminate term need only make provision for termination when required by the Landlord and not at the end of a specified period, because there is no specified period in a periodic licence arrangement. Thus, paragraph 6b) applies to all types of leases and licences, whether fixed term or indeterminate. However, in the case of a fixed term licence/lease, there must be provision for the Landlord to get it back at the end of the term or when required. In contrast, there need only be provision for possession 'when required' in any indeterminate arrangement.

Discussion

35. Paragraph 6b of Schedule 1 to the Housing Act 1985 provides that:

"6. A tenancy is not a secure tenancy if:

...

> *b) the terms on which it has been leased include provision for the lessor to obtain vacant provision from the landlord on the expiry of a specified period or when required by the lessor."*

36. This Court is not required to determine the legal meaning of paragraph 6b) in the abstract, but only as applied to the relevant facts of the present case. The legal meaning is that which conveys the intention of Parliament in enacting the provision. The text should be considered in context, which, at its broadest extends to the Act as a whole as well as the legal, social and historical context (Bennion on Statutory Interpretation, sections 8.2, 8.4, 8.8 and 9.2)). The doctrine of precedent requires this Court to follow the ratio decidendi (the reason for deciding) of decisions of the Court of Appeal. It is generally accepted that the ratio decidendi alone is binding as a precedent, although statements by judges in the course of giving reasons for their decisions which do not form part of the ratio (obiter dicta) may be strongly persuasive, particularly when they are the carefully considered observations of eminent judges (R (Youngsam v Parole Board [2019] EWCA Civ 229 per Leggatt LJ at [40)]**.** The two judgments of the Court of Appeal must be read in the light of the facts of each case and in light of each other (Cross & Harris on Precedent in English Law (Clarendon 1992) at 43 and 45).

37. Each party before me contends for a different construction of the paragraph. Mr Lee submits that, as applied to the facts of the present case, the licence between the Council and Rent Connect must contain a single, twin track, provision providing Rent Connect with possession each month (as the arrangement is a periodic monthly licence) or when required. In the absence of any such clause, paragraph 6b) is not satisfied and Ms Mohamed's occupation attracts security of tenure. Ms Hodgson submits that the agreement for a periodic monthly licence need only provide for possession 'when required', which it does, by provision of a clause requiring possession on not less than 14 days' notice. Paragraph 6b) is satisfied and Ms Mohamed does not have security of tenure.

38. Part IV of the Housing Act is concerned with secure tenancies and the rights of secure tenants. Section 79 provides for security of tenure, for both leases and licences, subject to the exceptions in paragraph 1. Paragraph 1 contains 12 exceptions including paragraph 6) which provides for 'short term arrangements'.

39. It seems to me that both constructions of paragraph 6b), urged upon me by Mr Lee and Ms Hodgson are grammatically possible. Sir Martin Nourse appears to have inclined to the same view in *Hickey*:

"16. Two views are possible:

> *(1) The head lease must either include a provision for Mr Patel to obtain vacant possession on the expiry of a specified period or it must include a provision for Mr Patel to obtain vacant possession when required by him. On this view sub-paragraph (b) is satisfied because the head lease includes a provision for Mr Patel to obtain vacant possession on the expiry of a specified period.*

> *(2) The head lease must include a single provision for Mr Patel to obtain vacant possession either on the expiry of a specified period or when required by him. On this view sub-paragraph (b) is not satisfied because the head lease only includes a provision for Mr Patel to obtain vacant possession on the expiry of a specified period.*
>
> *17. Mr Wonnacott was disposed to accept that either view was grammatically possible. I think that that may well be so…"*

40. Much of the debate before me centred on how this Court should approach the two Court of Appeal authorities of *Abdi* and *Hickey* and whether they were inconsistent or not. The case of *Abdi* concerned an indeterminate licence arrangement between the Council and the private landlord. It allowed the private landlord to determine the licence "*on not less than 7 days' notice in writing*". Mann LJ considered that it was 'plainly arguable' that the requirement satisfied the stipulation in para 6b) for possession on 'expiry of a specified period' and 'unanswerable' that it enabled possession 'when required'. Accordingly, there was no secure licence.

41. The case of *Hickey* concerned a letting arrangement between a private landlord and a housing authority for a series of fixed terms. The private landlord was entitled to vacant possession at the end of the term, but not sooner. Sir Martin Nourse arrived at the view that paragraph 6b) was not satisfied and the tenancy was secure because the wording of the paragraph was 'more suggestive of a single provision for obtaining vacant possession in either event than of two alternatives provisions'. Sir Martin Nourse considered *Abdi* concerned different facts and provided no assistance, but gave no reasons for his view.

42. Mr Lee contended that the two authorities of *Abdi* and *Hickey* were inconsistent and that this Court should follow *Hickey* on grounds that it was the later and more detailed authority. Nor was *Hickey* decided per incuriam because it considered *Abdi*. Ms Hodgson rejected any inconsistency. The cases had material factual differences. *Abdi* concerned an indeterminate licence for occupation whereas *Hickey* was about a fixed term arrangement. In the case of the former, paragraph 6b) was to be construed as mandating a 'when required' provision and not an additional 'on expiry of a specified period'. Mr Lee criticised Ms Hodgson's approach for introducing unnecessary complexity. Given the implications for security of tenure, the provision should be easy to understand, and its content should not depend upon an unnecessarily complex assessment of the underlying facts. This, he said, required a single provision containing both requirements for possession in every type of arrangement.

43. At first sight, *Hickey* and A*bdi* do appear to be inconsistent**.** The former requires a single provision providing for both types of possession (on expiry of a specified period or when required). The latter indicates that alternative requirements will suffice.

44. However, the judgments must be read in light of their facts, as Sir Martin Nourse recognised in *Hickey*. He said of *Abdi* that "the facts were different" and Mann LJ's analysis of paragraph 6b) was not of assistance. Whilst Sir Martin Nourse did not give reasons for his view there are, it seems to me, two material differences between the cases.

45. The first concerns the requirement for possession 'when required'.

46. Sir Martin Nourse' analysis of the facts in *Hickey* is at [15]. The last point he makes is as follows:

> *".... the head lease does not include provision for Mr Patel to obtain vacant possession when required by him... The question then is: "What is the provision that the head lease must include?"*

47. This then is the factual context in which he arrives at his view that the wording of paragraph 6b) is 'more suggestive' of a 'single provision for obtaining vacant possession in either event than of two alternative provisions" [17]. He turns to the policy of the Act for one of his two justifications for his interpretation:

> *para 6......is there to encourage private landlords, who want to be able to get their properties back on short notice, to enter into temporary arrangements with such bodies.* ***It would be contrary to the policy of the exception to prevent private landlords from obtaining vacant possession before the expiration of their leases and when required by them."*** *[18]*

The emphasis in bold is my emphasis.

48. As referenced in his last sentence above and putting it simply - the purpose of paragraph 6b) is to ensure that landlords can get back their property whenever they want. In *Hickey* however, Mr Patel could not take back his property whenever he wanted. He had to wait until the end of the fixed term. In *Abdi*, the licence arrangement between the Council and the private landlord allowed the private landlord to determine the licence "*on not less than 7 days' notice in writing*". Mann LJ considered it 'unanswerable' that the clause enabled possession 'when required'. Accordingly, there was no secure licence.

49. The other difference between the two authorities relates to the arrangements in the head lease (i.e. the arrangements between the housing provider and the private sector landlord).

50. The head lease in *Hickey* was a fixed term arrangement. The head lease in *Abdi* was an indeterminate arrangement. As the Editors of the Housing Law Encyclopaedia suggest, *Hickey* is authority for the proposition that:

> *"Paragraph 6(b) is only satisfied where a lease entitles the owner of the property to obtain vacant possession both at the expiry of <u>the fixed term</u> of the lease or at any point that he requires possession. Where the lease entitled the owner to obtain possession on expiry, para 6b) was therefore not satisfied: <u>Haringey LBC v Hickey</u> above."*

The underlining of 'fixed term' is my emphasis.

51. As HHJ Luba found at [34] of his judgment, *Abdi* is authority for the proposition that a provision which enables the licensor to terminate by giving 7 days' notice is a

provision for termination when required by the lessor. The question also arises as to whether the case is authority for the proposition that provision for termination of an indeterminate arrangement 'when required' is sufficient to satisfy paragraph 6b).

52. Mann LJ's analysis was brief and did not expressly address the question whether both requirements of the paragraph are necessary or whether they can be treated as alternative requirements. He considered it was 'plainly arguable' that a provision for possession on 7 days' notice constituted 'possession on expiry of a specified period' as well as it being 'unanswerable' that it constituted possession when required. On this basis the one provision could be said to satisfy both requirements of the paragraph. However Mann LJ did not consider it necessary to decide the 'plainly arguable' point about the specified period. Given this, it seems to me that his decision assumes that a requirement for possession 'when required' under an indeterminate arrangement to occupy is sufficient to satisfy paragraph 6b).

53. This was the analysis reached by HHJ Luba in his judgment:

> *"48. Ms Hodgson's claim for possession on this point, therefore, turns or falls on her main proposition that in the case of an indeterminate term such as Abdi, the requirement for the double-headed termination provision identified in Hickey cannot run. That is because, by definition, the agreement does not contain a specified period. What it does contain is simply a provision for termination by the parties on notice and, most importantly in the instant case, clause 5.5 termination by the licensor on notice i.e. on request.*
>
> *49. Mr Lee struggled manfully to argue against this justification for the distinction between the judgments in Hickey and Abdi. He failed to satisfy me that Ms Hodgson's submissions were incorrect. It seems to me that these two judgments are precisely reconcilable. They provide, see Hickey, that where an agreement is for a specified period, i.e. a fixed term and will therefore terminate at the end of the fixed term there must be a second or supplementary provision allowing for termination by the lessor when he or she requires, even if that be before the end of the express term.*
>
> *50. In contrast, see Abdi, where there is no express term under the occupation arrangement, termination will only be when required by either of the parties. In this case, as in Abdi, there is an express term enabling the landlord to terminate."*

54. There is, it seems to me, a logic in the distinction between a fixed term and indeterminate arrangement. I agree with the analysis of HHJ Luba that a proper reading of Sch 1 para 6b) suggests that reference to "a specified period" is a reference to the specified period of the provision of the accommodation by the provider to the local authority. In other words, it is referable to the normal case of a fixed term or determinate arrangement. As Ms Hodgson put it in her submissions before this Court, the parties to the arrangement between Rent Connect and the Council would not have been able to answer the question "when does this arrangement end?" The comments

of Lady Hale about periodic tenancies in *Berrisford v Mexfield Housing Co-operative Ltd* [2011] UKSC 52 at [87] are apt in this context:

> *"… periodic tenancies obviously pose something of a puzzle if the law insists that the maximum term of any leasehold estate be certain … In one sense the term is certain, as it comes to an end when the week, the month, the quarter or the year for which it has been granted comes to an end. But this is not the practical reality, as the law assumes a re-letting (or the extension of the term) at the end of each period, unless one or other of the parties gives notice to quit. So, the actual maximum term is completely uncertain…"*

55. In his judgment HHJ Luba went on to explain the consequences of the distinction for the fixed term arrangement in Hickey

> *"It is precisely, in my judgement, because that is the proper understanding of the term "a specified period" that the alternative is provided, i.e. there must be provision for termination, in addition, whenever required by the lessor. That is for the good policy reasons explained by Sir Martin Nourse in paragraph 18 of the Hickey judgment".*

56. It follows from HHJ Luba's analysis above that he disagreed with the statement by Mann LJ in *Abdi* that it is 'plainly arguable' that a provision for possession on 7 days' notice constitutes 'possession on expiry of a specified period'.

> *"45. With great respect to Mann LJ in the case of Abdi, I do not accept the proposition that "specified period" in schedule one para 6b) is referable to the period of notice given by a lessor who is terminating the arrangement when required by him."*

57. In written submissions provided after the hearing at my request, both Counsel agreed with HHJ Luba and neither sought to raise the point before me. I have not therefore heard full argument on the point. Moreover, I remind myself that obiter comments are not binding on this Court, particularly where the analysis of the superior court is brief, as here.

58. Accordingly, it follows that I do not accept Mr Lee's submission that the two authorities are inconsistent. In the words of HHJ Luba they are 'precisely reconcilable" [49], particularly when considered in the context of the policy aim of enabling private landlords to obtain vacant possession before the expiration of their leases/licences and when required by them.

59. Applying my analysis to the present case: The licence arrangement between Rent Connect and the Council was for an initial fixed term of 12 months followed by a periodic (monthly) occupation. It was a periodic arrangement by the time Ms Mohamed took occupation in April 2017. Ms Hodgson submitted that the facts are analogous with the case of *Abdi*. Mr Lee disputed this saying the arrangement is a hybrid fixed term/periodic one. I accept Ms Hodgson's submission that the facts are akin to the indeterminate arrangement in *Abdi.* As mentioned above, I accept Ms

Hodgson's submission that the parties to the arrangement between Rent Connect and the Council would not have been able to answer the question "when does this arrangement end?" In *Abdi* the provision was for possession on 'not less than 7 days' notice'. Clause 5.2 provides for possession 'on not less than 14 days' notice'. I can see no material difference between the two notice requirements. In line with Mann LJ's decision in *Abdi*, I find that Rent Connect can obtain possession when it requires. This is sufficient because the licence is periodic. Accordingly, paragraph 6b) is satisfied and Ms Mohamed has no security of tenure. The difficulties of applying the construction of paragraph 6b) proposed by Mr Lee is apparent when applied to the facts of this case. Clause 5.2 provides for Rent Connect to take possession on not less than 14 days' notice. It is difficult to see how there can be any security of tenure with a provision such as this. Yet on Mr Lee's interpretation there would be security of tenure because Clause 5.2 does not also provide for possession at the expiry of every month.

Conclusions

60. For the reasons given above, the appeal is dismissed. The requirements of paragraph 6b) of Schedule 1 to the Housing Act 1985 are satisfied by the provision for vacant possession on 'not less than 14 days' notice' – i.e. when required. Accordingly, Ms Mohamed does not have security of tenure.