



23 June 2010

PRESS SUMMARY

Austin v Mayor and Burgesses of the London Borough of Southwark [2010] UKSC 28

On Appeal from: [2009] EWCA Civ 66

JUSTICES: Lord Hope (Deputy President), Lord Walker, Lady Hale, Lord Brown, Lord Kerr

BACKGROUND TO THE APPLICATION

The Appellant's brother, who is now deceased ("the Deceased"), held a secure tenancy under the Housing Act 1985 ("the 1985 Act") of a property owned by the London Borough of Southwark ("the Authority"). The Appellant contends that he lived in his brother's home for the 12 months preceding his death, caring for him during his terminal illness. The Appeal arises from the efforts of the Appellant to resist the Authority's efforts to evict him from the property.

On 4 February 1987, a conditional suspended possession order ("the CSPO") was issued by the court against the Deceased on the ground he was in arrears of rent. The CSPO's terms provided that it would not become enforceable if he paid the sum due by 4 March 1987. He failed to pay by the specified deadline and so the CSPO became enforceable. However, the Authority did not take any action to evict him and he remained in the premises until his death some 18 years later, paying the rent as it became due plus sums towards the outstanding arrears.

Two principal issues arise in the Appeal.

Firstly, whether pursuant to s.82(2) of the 1985 Act the secure tenancy was terminated by the Deceased's failure to pay the arrears of rent by the date specified in the CSPO so that he remained in the property as a so-called 'tolerated trespasser'; or, alternatively, whether the tenancy continued until his death, with the effect that the tenancy could transmit to the Appellant via the Deceased's estate.

Secondly, whether the statutory right of a former secure tenant to apply to the court to postpone enforcement of a possession order, pursuant to s.85(2) of the 1985 Act, terminates on the death of a tenant, or is capable of transferring to the Appellant so as to allow him to apply to the court to postpone the possession order.

JUDGMENT

The Supreme Court unanimously allows the appeal, holding that the tenant's right to apply to the court to postpone enforcement of a possession order, and thus revive the secure tenancy, can survive death and transmit to a successor. The case is remitted to the county court for determination of the Appellant's application for postponement of the possession order. Lord Hope delivered the leading judgment and Lady Hale delivered a separate concurring judgment.

REASONS FOR THE JUDGMENT

The First Issue: The Effect of s.82(2)

- It has been assumed since the Court of Appeal's decision in *Thompson* [1987] 1 WLR 1425 that a secure tenancy is terminated immediately upon any term of a conditional possession order being breached [Lord Hope, para [15]].
- *Thompson* was criticised in the House of Lords decision of *Knowsley* [2009] AC 636. However, notwithstanding reservations concerning the merits of the decision, the House of Lords refrained from disturbing it on the basis that: (i) 20 years had elapsed and tens of thousands of cases had proceeded on the basis that it accurately stated the law; and (ii) Parliament had legislated in respect of the issue in the Housing and Regeneration Act 2008 ("the 2008 Act"), and had opted to change the law only with *prospective* effect. A subsequent judicial decision with retrospective effect would thus run contrary to the will of Parliament [Lord Hope, paras [17]-[18]].
- There is much to be said for the view that s.82(2) should be interpreted as only terminating a secure tenancy when the possession order is actually executed: (i) the conclusion in *Thompson* was unsupported by reasoning and no examination was conducted of the consistency of the court's interpretation with the other provisions of the 1985 Act; (ii) subsequent references to *Thompson* by the House of Lords were cursory and/or uncritical and could not be regarded as lending it any great support; (iii) the 1985 Act contemplates circumstances in which a secure tenancy would remain in force notwithstanding that a conditional possession order was outstanding; and (iv) this construction would avoid the creation of so-called 'tolerated trespassers' [Lord Hope, paras [20]-[23]].
- However, the alternate interpretation of s.82(2) is not unarguable and so the question is whether the Supreme Court should depart from the view taken by the House of Lords in *Knowsley*. The House of Lords 1966 Practice Statement on departure from its own previous decisions applies equally to the Supreme Court [Lord Hope, paras [24]-[25]].
- For the same reasons identified in *Knowsley*, essentially the passage of time and the need to respect the will of Parliament as expressed in the 2008 Act, it would not be appropriate for the Supreme Court to disturb the understanding of s.82(2) that has prevailed since *Thompson* [Lord Hope, paras [28]-[31]].

The Second Issue: The Effect of s.85(2)

- The effect of s.85(2) must be resolved by construing the 1985 Act as a whole. The right is created and defined by a statute and it is the legislation which determines it metes and bounds; its ambit cannot be determined by what the common law would treat as an 'inheritable' right [Lord Hope, para [36]].
- The statutory language used in s.85(2) is wide and unqualified. There is no suggestion that the power of the court to order the postponement of the enforcement of a possession order is not exercisable after the tenant's death. Given the broad character of the words used, it would be reasonable to expect express provision to be made if any such limitation was intended. Moreover, there are a number of readily foreseeable circumstances in which it would be desirable for the court to exercise the power after the tenant had died. The wording of the section does not compel the conclusion that the court would be powerless to provide relief in these circumstances [Lord Hope, para [38]].
- Part IV of the 1985 Act contains other indications that support this construction [Lord Hope, para [39]].
- The tenant's death does not prevent the court from exercising its power under s.85(2) of the 1985 Act to postpone the effect of a possession order. This preserves the discretion of the court to do what is just in all the circumstances of the case, which itself provides a protection

for the landlord that would be absent if an alternate construction was adopted [Lord Hope, paras [40]-[41]].

- **Lady Hale** noted the unforeseen and undesirable consequences of the notion of ‘tolerated trespass’ to which the decision in *Thompson* had given rise. If Parliament had not legislated in the field, in the form of the 2008 Act, then it would have been incumbent upon the Supreme Court to set the matter aright [paras [44]-[56]].

NOTE

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: www.supremecourt.gov.uk/decided-cases/index.html