

**Neutral Citation Number: [2006] EWCA Civ 815**  
**IN THE SUPREME COURT OF JUDICATURE**  
**COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE BIRMINGHAM COUNTY COURT**  
**HHJ D HAMILTON**  
**CLAIM NO 4BM 80119/BM 50180A**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Thursday 22<sup>nd</sup> June 2006

**Before :**

**LORD JUSTICE MUMMERY**  
**LORD JUSTICE RIX**  
and  
**MR JUSTICE PETER SMITH**

-----  
**Between :**

**PAUL WALKER**  
**- and -**  
**BIRMINGHAM CITY COUNCIL**

**Appellant**

**Respondent**

(Transcript of the Handed Down Judgment of  
Smith Bernal WordWave Limited  
190 Fleet Street, London EC4A 2AG  
Tel No: 020 7421 4040 Fax No: 020 7831 8838  
Official Shorthand Writers to the Court)

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**MR JAN LUBA QC and MR JOHN BECKLEY** (instructed by Aston Legal Centre) for the  
Appellant  
**MS CATHERINE ROWLANDS** (instructed by Legal and Democratic Services) for the  
Respondent

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**Judgment**  
**As Approved by the Court**

### **Lord Justice Mummery:**

1. In possession proceedings brought by the Birmingham City Council (the Council) against Mr Paul Walker there is a dispute about the construction of the provisions in the Housing Act 1985 (the 1985 Act) governing the right to succeed to a secure tenancy on the death of the secure tenant. The right of one succession to a secure tenancy was conferred by the Housing Act 1980 (the 1980 Act), in which the concept of a secure tenancy of public housing first appeared. The 1985 Act consolidated the relevant provisions.
2. On 29 March 2005 the dispute was resolved in favour of the Council by DDJ Fowler on a preliminary issue. HHJ Hamilton dismissed Mr Walker's appeal on 28 November 2005. On 12 February 2006 permission for a second appeal was refused on paper. On 29 March 2006 Neuberger LJ granted permission on a renewed application.
3. The chronology of the background factual and legal events is agreed.

### **Background**

4. On 8 March 1965 the Council let a three bedroom property 7 Hatcham Road, Kingstanding, Birmingham (the Property) to Mr Bertram Walker and his wife, Mrs Betty Walker, on a joint contractual tenancy. Their son, Paul, lived with them.
5. It was a periodic tenancy. It was not, and could not have been, a secure tenancy at the time when the letting took place. No such thing was known to the law in 1965 or at any other time before the 1980 Act came into force.
6. In December 1969 Mr Bertram Walker died. Mrs Betty Walker became the sole contractual tenant of the Property by right of survivorship, which is, of course, an inherent and distinctive characteristic of a joint tenancy. She remained living there with her son. No interest or share in the Property passed to Mrs Walker, since, together with Mr Walker during his lifetime, she was already entitled to a tenancy interest in the whole. She had no need of any statutory right of succession on the death of her husband, nor could she have had such a right until the 1980 Act invented and introduced secure tenancies some 15 years later.
7. The 1980 Act was passed on 8 August 1980. Part I of the 1980 Act dealt with public sector tenants. Chapter I of Part I contained "the right to buy" provisions. Although some of the right to buy sections were mentioned in argument, they are not directly relevant to this appeal. Chapter II was the relevant part of the 1980 Act. It introduced the concept of the "secure tenancy" of a dwelling house let as a separate dwelling by, amongst others, a local housing authority. The provisions conferred security of tenure and other rights, including a right of succession.
8. As explained by Brandon LJ in **Harrison v. Hammersmith and Fulham London Borough Council** [1981] 1 WLR 650 at 661C, Chapter II of Part I did not come into immediate operation. It came into force on 3 October 1980. It was not passed to meet any urgent crisis in housing accommodation. It was enacted to promote the social purpose of giving tenants in the public housing sector, so far as reasonably practicable, the same kind of protection from being evicted from their homes without good and sufficient cause as had been enjoyed for many years under the Rent Acts by

private tenants. The Rent Acts had never applied to tenancies granted by local authorities. It was held in **Harrison** that the provisions granting security of tenure did not have retrospective effect so as to affect a case in which a notice to quit had been served before the 1980 Act had come into force.

9. Mrs Betty Walker's existing tenancy became a secure tenancy by virtue of the express application of Chapter II to tenancies granted before, as well as tenancies granted after, the commencement of the Chapter: section 47 of the 1980 Act. There was, however, no other provision giving a general retrospective effect to Chapter II. Comparison can be made with Chapter I, in which the right to buy was the subject of express retrospective provisions contained in section 27(3), whereby it was enacted that references in Chapter I to a secure tenancy were, "in relation to any time before commencement of Chapter II, references to a tenancy which would have been a secure tenancy if Chapter II had been in force." This was repeated in section 185(1) of the consolidating legislation in 1985.
10. Part II of Schedule 25 to the 1980 Act contained some transitional provisions expressly directed to events occurring or to facts existing either before the commencement of the 1980 Act or even before its enactment: see paragraphs 62, 72 and 73. None of these paragraphs are material to the succession sections with which this appeal is concerned. They were cited by Mr Jan Luba QC, who appeared for Mr Paul Walker, to demonstrate that Parliament had spelt out expressly circumstances in which particular provisions were intended to operate on pre-existing events and facts.
11. Succession to a tenancy for a term certain was dealt with in section 28(5) of the 1980 Act. This section could only apply to the case of a death after the 1980 Act came into force.
12. Sections 30-31 of the 1980 Act dealt with succession to periodic tenancies so as to provide for the succession of a secure tenancy save in five different instances, including the death of a sole tenant who had been a joint tenant, and to identify the person qualified to succeed. I shall refer to these provisions in detail below in the form in which they were re-enacted in 1985.
13. On 30 October 1985 the 1985 Act consolidating the 1980 Act was passed. The 1985 Act came into force on 1 April 1986. With slight and immaterial variations in wording and arrangement the succession provisions in the 1980 Act were re-enacted in sections 87-89 of the 1985 Act. Chapter I of Part I of the 1980 Act became Part V of the 1985 Act. Chapter II became Part IV of the 1985 Act.
14. Also on 30 October 1985 the Housing (Consequential Provisions) Act 1985 was passed. It provided that the re-enactment of provisions in the consolidating Acts, and the consequent repeal of those provisions by this Act, did not affect the continuity of the law: section 2(1). The transitional provisions in Schedule 3 provided that the general rule was that the provisions of the consolidating Acts apply in accordance with section 2 of this Act (continuity of the law), to matters arising before the commencement of those Acts as to matters arising after their commencement: paragraph 1(1).
15. On 29 February 2004 Mrs Betty Walker died, leaving Paul in occupation of the Property. On 16 August 2004 the Council served Notice to Quit on the personal

representatives of Mrs Betty Walker to expire on 13 September 2004. The notice was registered with the Public Trustee on 27 August 2004. On 21 December 2004 the Council issued proceedings claiming possession of the Property.

16. The Council has a long waiting list for family housing. It wishes to free up the three bedroom Property occupied by Mr Paul Walker for family use.

### **Succession under the 1985 Act**

17. Section 89 of the 1985 Act provides for succession to a periodic tenancy on the death of a secure tenant. There is a statutory vesting of the secure tenancy in a person qualified to succeed the secure tenant. In his summary of the statutory scheme in **R (on the application of Gangera) v. Hounslow BC** [2003] HLR 1028 at 1039 (a case in which the succession provisions of the 1985 Act were unsuccessfully challenged under the Human Rights Act 1998 and Article 8 and 14 of the European Convention as being unlawfully discriminatory) Moses J explained that it was necessary for a balance to be struck between the needs of the tenant's family and the duty of a local housing authority to manage its housing stock in the interests of the locality and of those in greatest need. He said-

‘22...Every secure tenant, whether sole or joint, is limited to one assignment or other transmission of the secure tenancy. The rule limiting succession to one transmission applies to all secure tenants equally.’

18. Sections 87 and 88 specified the persons who are and who are not qualified to succeed the tenant under a secure tenancy. The material parts read as follows.

‘87. A person is qualified to succeed the tenant under a secure tenancy if he occupies the dwelling-house as his only or principal home at the time of the tenant's death and either-

- (a) he is the tenant's spouse, or
- (b) he is another member of the tenant's family and has resided with the tenant throughout the period of twelve months ending with the tenant's death;

unless, in either case, the tenant was himself a successor, as defined in section 88.

88. (1) The tenant is himself a successor if-

- (a)....
- (b) he was a joint tenant and has become the sole tenant.’

19. The short point of construction is whether Mrs Betty Walker, who became a secure tenant on the coming into force of the 1980 Act, was herself “a successor” within the

meaning of section 88. If she was, Mr Paul Walker is not qualified within section 87 to succeed her under a secure tenancy. The one succession to a secure tenancy permitted by the legislation would have already occurred on the death of Mr Bertram Walker in 1969.

### **The Council's case**

20. Ms Catherine Rowlands, appearing for the Council, submitted that the words of the legislation are clear and straightforward in their natural and ordinary meaning, which is also supported by a purposive approach. She claimed that her construction would have the merit of being clear and simple for housing officers to apply to secure tenancies in practice.
21. Her argument on the construction of "a successor" in section 88 could not have been presented more concisely or more clearly than she has done in her written and oral arguments: Mrs Walker was the joint tenant; she became the sole tenant; Mrs Walker herself was therefore "a successor." The right to succeed once to a secure tenancy was exhausted before the 1980 Act came into force. No-one could qualify to succeed to Mrs Walker's sole tenancy of the Property.
22. In answer to the point that, on this argument, Mrs Walker had become a sole tenant by survivorship before she could ever have become a secure tenant under statute, Ms Rowlands emphasised that Mrs Walker's secure tenancy under the Housing Acts was not a new tenancy. It was common ground that the same tenancy of the Property continued to exist throughout.
23. HHJ Hamilton agreed with the Council, as did DDJ Fowler. HHJ Hamilton thought that the words of the Act were plain. He was affected by the consideration that they did not deprive Mr Paul Walker of anything that he would otherwise have enjoyed (see paragraph 13 of his judgment).

### **Discussion and conclusion on construction**

24. I am unable to agree with Ms Rowlands or with either of the lower courts that the Council is correct on a literal, purposive or any other legitimate method of statutory construction.
25. Sections 87-89 of the 1985 Act conferred a limited right on persons, who satisfied the qualifying conditions, to succeed under a secure tenancy on the death of the secure tenant. Prima facie the conditions for succession were satisfied in this case. Mrs Betty Walker was the secure tenant of the Property under a secure tenancy at the date of her death on 2004. Mr Paul Walker was a member of her family, who had been residing with her throughout the period of 12 months ending with her death.
26. It is true that between 1965 and 1969 Mrs Walker had been a joint tenant of the Property and that she had become the sole tenant of the Property on her husband's death in 1969. She was not, however, "a successor" within section 88 so as to prevent Mr Paul Walker from succeeding his mother "under a secure tenancy."
27. Secure tenancies came into existence when the 1980 Act came into force. Mrs Walker, as sole tenant of the Property, became a secure tenant of the Property on, but

not before, 3 October 1980 by virtue of the application of the 1980 Act to her tenancy. There was not and could not be any earlier succession by her “under a secure tenancy” on the death of Mr Bertram Walker in 1969. The succession provisions only impinged on a secure tenancy. There was no secure tenancy in 1969 to which she could have succeeded. So, she was not “a successor” within sections 87 and 88 of the 1985 Act.

28. Looking at the matter another way, Mrs Walker was not a successor to a secure tenancy or to a tenancy of any other kind on the death of Mr Walker. Before the death of her husband she was a tenant of the Property jointly with him. On his death she did not succeed to the tenancy of the Property. She changed from being joint tenant of the tenancy interest in the Property to becoming sole tenant of the tenancy interest in the Property by virtue only of being sole survivor of the joint tenancy. There was no statutory succession which could justify describing her as “a successor” under a secure tenancy.
29. The Council’s case does not derive any support from express, implied or necessary retrospective operation of the Housing Acts. There was no express provision in Part IV of the 1985 Act which, for the purposes of succession, retrospectively treated either the joint tenancy or the survivor’s sole tenancy as a secure tenancy before the 1980 Act came into force. There were express retrospective provisions in the legislation, as in section 27(3) of the 1980 Act and section 185(1) of the 1985 Act and in the transitional provisions, but they did not apply to succession to a secure tenancy.
30. Nor do I see anything in the language, subject matter or context of the succession provisions or in the interests of “simple fairness” indicating that they were intended to have retrospective effect by reference to the death of a tenant before the 1980 Act came into force. (See Scarman J in **Carson v. Carson** [1964] 1 WLR 511 at 517 and Lord Mustill in **The Boucraa** [1994] 1 AC 486 at 524 G–525 H for the principles of statutory construction to be applied in determining retrospectivity.)

### **The authorities**

31. Although there is no clear authority on this particular point, several cases were cited below and in argument on the appeal.
32. Reference was made in the judgment of Neuberger LJ on granting permission to appeal to the observations of Fox LJ in **Bassetlaw DC v. Renshaw** [1992] 1 All ER 925 at 928b-d. The case was on a different point in that a new tenancy of the property, which was subject to a joint tenancy in favour of husband and wife, had been granted to the wife after the 1980 came into force. It was held that she was not a “successor” within s88(1)(b) when a succession claim was made on her death. The interest of the case is that the comments of Fox LJ on sections 87 and 88 are more consistent with the case for Mr Walker than with the case for the Council. Fox LJ said-

“Section 87 is dealing with succession to a secure tenancy. It provides, in effect, that there should be no succession if the tenant was himself a successor.

Section 88 opens with the governing words ‘The tenant is himself a successor if ...: ‘Successor’ there must mean successor to the tenancy referred to in s87. When, therefore, the draftsman in para (b) says ‘he was a joint tenant and has become

the sole tenant' he must be referring to the 'secure tenancy' referred to in s87. As a matter of language, there is really nothing else he could be referring to."

33. In **London Borough of Harrow v. Tonge** [1992] 25 HLR 99 at 101 Nourse LJ mentioned, without passing any comment, the parties' agreement on the facts of that case that a succession to a secure tenancy had occurred under section 87 on the death of a tenant in 1976. In my view, the agreement of the parties in that case was based on a misunderstanding of the succession provisions and cannot assist in this case.

### **Result**

34. For the above reasons I would allow the appeal without any need for the court to consider the arguments based on the effect (if any) of Articles 8 and 14 of the Convention and section 3 of the Human Rights 1998 on the construction of sections 87 and 88 of the 1985 Act.

### **Lord Justice Rix**

35. I agree.

### **Mr Justice Peter Smith:**

36. I also agree.