Dunn and another v Bradford Metropolitan District Council, Marston and another, Leeds City Council

Case No: B2/2002/0415

B2/2002/2498

Court of Appeal (Civil Division)

31 July 2002

Neutral Citation Number: [2002] EWCA Civ 1137

2002 WL 1446226

Before: Lord Justice Waller , Lord Justice Chadwick and Lady Justice Hale

Wednesday 31st July, 2002

On Appeal from Bradford County Court

(HH Judge Cockcroft) &

On Appeal from Leeds County Court

(HH Judge Grenfell)

Representation

Mr J Luba QC & Mr J Carroll (instructed by Messrs Davies Gore Lomax) for the Appellants, Mr & Mrs Dunn.

Mr C Dodd & Mr A Pema (instructed by Bradford Metropolitan District Council) for the Respondent, Bradford MDC.

Mr C Dodd & Mr A Pema (instructed by Leeds City Council Legal Services) for the Appellant, Leeds CC.

Mr A Offer & Mr B Cox (instructed by Messrs Davies Gore Lomax) for the Respondents, Mr & Mrs Marston.

JUDGMENT

Lord Justice Chadwick :

1. Part IV of the Housing Act 1985 provides security of tenure for those who occupy local authority housing under tenancies which are “secure tenancies” within the meaning of section 79(1) of that Act. A secure tenancy cannot be brought to an end by the landlord except by obtaining an order of the court — see section 82(1) of the Act. The court may not make an order for possession of a dwelling house let under a secure tenancy unless one or more of the grounds set out in Schedule 2 to the Act has been made out — see section 84(1) of the Act. And, if it does make an order for possession, the court may stay or postpone the execution of the order, or postpone the date for possession, for such period or periods as it thinks fit — see section 85(2) of the Act.

2. These two appeals raise a common question as to the court's power, under section 85(2)(b) of the 1985 Act, to postpone the date for possession under an existing possession order in circumstances where (i) the former tenancy determined in accordance with the terms of that order, (ii) the former tenant continued in possession of the dwellinghouse for some time after the determination of the

tenancy with the knowledge and acquiescence of the local authority, but (iii) the former tenant then gave up possession to the local authority without there having been execution of a warrant of possession and (iv) the application to postpone the date for possession is made after possession of the property has been given up.

3. It is not suggested that, if the court has that power, it would be appropriate, in the circumstances which give rise to the present appeals, for the dates to which possession under the existing orders should be postponed to be later than the respective dates on which possession was given up. The context in which the question arises is that, in each case, the tenant seeks to hold the local authority responsible for alleged failure to keep the dwelling house in repair during the whole of the period that the tenant remained in possession; and, for that purpose, seeks to rely on the tenant's covenants under the former tenancies. It is common ground — for reasons which I shall explain — that, if the power under section 85(2)(b) of the 1985 Act exists and were exercised so as to postpone the dates for possession under the existing orders to the dates on which possession was given up, the former tenancies would then be treated as having continued after the dates upon which they would otherwise have come to an end under the existing orders; with the consequence that the tenants' covenants would be enforceable in respect of whole of the period during which the former tenants remained in possession.

4. The question is of some general importance; in that the circumstances which have given rise to the present appeals are not unusual. It is a question which needs to be resolved in this Court. In the first of the appeals now before us — *Dunn v Bradford Metropolitan District Council* — His Honour Judge Cockcroft, sitting in the Bradford County Court, held that there was no power to postpone the date for possession under section 85(2)(b) of the 1985 Act on an application made after possession had already been given up. In the second of the two appeals — *Marston v Leeds City Council* — His Honour Judge Grenfell, sitting in the Leeds County Court, reached the opposite conclusion. He declined to follow the decision of Judge Cockcroft; preferring, instead, what he took to be the approach of His Honour Judge Collins, sitting in the Wandsworth County Court, in *Clements v Lambeth London Borough Council* .

The position of a tenant, or former tenant, who remains in possession under Part IV of the Housing Act 1985

5. As I have said, a secure tenancy cannot be brought to an end by the landlord except by obtaining an order of the court; and, on the making of an order for possession, the court may stay or postpone the execution of the order, or postpone the date for possession. Section 85(3)(a) of the 1985 Act requires the Court, when making an order for possession under which the date for possession is postponed, to impose conditions with respect to the payment by the tenant of current rent, and of arrears of rent (if any), unless it considers that to do so would cause exceptional hardship to the tenant. Where such an order is made the tenancy continues until the date on which the tenant is to give up possession pursuant to the order — see section 82(2) of that Act.

6. It follows that, where an order for possession is made on terms that the date of possession is postponed for such period as the tenant makes the payments of arrears and current rent required under the order, the tenancy does not come to an end until the tenant fails to make the payments required. But, on such failure, the tenancy determines — see *Thompson v Elmbridge Borough Council [1987] 1 WLR 1425* , 1430H — 1431A, and *Burrows v Brent London Borough Council [1996] 1 WLR 1448* , 1453F, 1458D. If, thereafter, the former tenant continues to occupy the dwelling house, his status is that of a trespasser. Even if, as frequently happens in practice, he occupies the dwellinghouse with the consent of the local authority and makes payment in respect of his occupation equal to the amount of the rent payable under the former tenancy, he does not do so as tenant. His former tenancy does not revive without a further order of the court; and the circumstances are not such, without more, as to give rise to the implication of a new tenancy. His status during such a period of occupation was described by Lord Browne-Wilkinson in *Burrows v Brent London Borough Council* , at page 1455E, as that of a “tolerated trespasser”. He is a trespasser because he has no legal right, as against the local authority as owner of the dwelling house, to be in possession. He is tolerated in the sense that the local authority are content — indeed, may well have agreed — not to evict him for so long as he makes payments in respect of his occupation. But, while he remains in occupation during what Lord Browne-Wilkinson described, again in *Burrows v Brent London Borough Council* , at p. 1454H–1455A, as “a period of limbo”, the local authority is not subject to the obligations formerly imposed upon it as landlord under the tenancy. The former tenancy having come to an end, the

mutual covenants which it contained have fallen away and cannot be enforced by either party — see *Lambeth London Borough Council v Rogers [2000] LGR 191* , 200g–h.

7. The former tenant who remains in possession after his secure tenancy has come to an end — that is to say, after the date upon which he was to give up possession in pursuance of the order for possession — cannot be evicted without due process of law — see section 3 of the Protection from Eviction Act 1977 . An order for possession made in the county court is enforced by the issue of a warrant of possession under what is now CCR 26.17 in Schedule 2 of the Civil Procedure Rules — formerly Order 26 rule 17 in the County Court Rules 1981 . A warrant of possession in the prescribed form (Form N.49) requires the bailiff of the court to give to the claimant possession of the land to which it relates. Execution of such a warrant is a process carried out by the court through its bailiff. But there is nothing in the 1977 Act, or in the rules of court, which precludes the former tenant from giving up possession to the claimant before any warrant of possession has been issued; or before a warrant has been executed by the bailiff.

8. Section 85(2) of the 1985 Act, to which I have already referred, provides that on the making of the order for possession *or at any time before the execution of the order* the court may (a) stay or suspend the execution of the order for possession of a dwelling house let under a secure tenancy or (b) postpone the date of possession. On an application made under that section in circumstances where the court has made an order for possession and the date upon which the tenant is to give up possession under that order has passed, the court has a choice. It may stay or suspend the issue of the warrant; or (if the warrant has been issued) stay or suspend the execution of the warrant by the bailiff. Or it may postpone the date of possession. And the court may do any or either of those things at any time before the warrant of possession has been executed.

9. The effect of an order, made under section 85(2)(b) of the 1985 Act, postponing the date of possession is that the original order for possession must thereafter be read as if the date on which the tenant is to give up possession in pursuance of that order is the postponed date fixed by the further order. So, in the ordinary case where the postponed date is after the date of the further order, the effect of the further order is that the tenancy has not come to an end under the provisions of section 82(2) of the Act. And the necessary consequence is that the tenancy must thereafter be treated as having continued throughout the period of limbo; so that, throughout the period, the mutual covenants in the tenancy were enforceable. Put shortly, a former tenant who, by failing to comply with the terms of a suspended possession order, has lost his tenancy and so is no longer able (while a tolerated trespasser) to require the local authority to fulfil repairing obligations as landlord, may, by persuading the court to make an order under section 85(2)(b) of the Act, cause those obligations to revive with retrospective effect — see *Lambeth London Borough Council v Rogers [2001] LGR 191* , 201. But, to achieve that end, it is necessary that he does obtain an order under section 85(2)(b) — see the decision of this Court in *Marshall v Bradford Metropolitan District Council [2002] 34 HLR 428* .

10. The common question raised by the present appeals is whether the tenant can apply for such an order after he has given up possession; that is to say, when the purpose of an order under section 85(2)(b) of the Act would not be to enable him to remain in possession. The only purpose of an order in such a case would be to impose on the parties to a former tenancy — which each intends and accepts should be treated as having determined — the mutual obligations of landlord and tenant in respect of a period during which they were (at the time) content that those obligations should not exist.

Dunn v Bradford Metropolitan District Council

11. Mrs Dunn (formerly Miss Hayley McMahon) was tenant of a two bed-roomed mid-terrace dwellinghouse known as 3 Micklethwaite Lane, Crossflatts, Bingley under a secure tenancy granted by Bradford Metropolitan District Council in June 1992. She occupied that property, with her husband (Mr Sean Dunn) and their three children, as a home. On 10 October 1996 the council obtained an order for possession in the Keighley County Court, on the grounds of non-payment of rent. The order was suspended on terms that the tenant paid instalments of arrears of rent and costs at the rate of £2.45 per week in addition to current rent (then £15.18 per week). Those terms were not met; and the tenancy determined, under that order, on or about 7 November 1996.

12. Mrs Dunn and her family remained in possession of 3 Micklethwaite Lane, making some payments. But it seems that arrears continued to accrue. On or about 1 July 1999 she agreed with the council that she would discharge the arrears at the rate of £6 per fortnight. She kept to that

agreement until 10 March 2000, when she gave up possession by handing the keys to a council officer. She and her family had found alternative accommodation. At that date the arrears of rent were £1,728 or thereabouts.

13. Mr and Mrs Dunn commenced the present proceedings in or about April 2000 by the issue of a claim in the Leeds County Court. They asserted that 3 Micklethwaite Lane had been in a state of disrepair since the commencement of the former tenancy in June 1992. The particulars of disrepair are set out in a report prepared by Mr R H Wood MCIEH, an environmental health and urban renewal consultant, following an inspection on 17 June 1999. His conclusions were expressed in the following terms:

> "Having regard to the age, character, locality and expected life of the dwelling, I am of opinion that the Landlords are in breach of the repairing obligations which may be implied into the tenancy agreement by section 11 of the Landlord & Tenant Act 1985 .
>
> The property must be considered to be prejudicial to health and, as such, a Statutory Nuisance as defined in Section 79 of the Environmental Protection Act 1990 in respect of dampness, mould growth and all associated causes together with the risk of infestation due to defects in the external fabric and issues of electrical and gas safety.
>
> I am of opinion that the Landlord is in breach of the duty of care owed by virtue of Section 4 of the Defective Premises Act 1972 ."

In the course of his report Mr Wood had made the following comments on the state of the property:

> "Like many properties of this era, the house has been altered from the original design very slightly over the years in response to available heating fuels, the need to conserve energy and the availability of new and improved building materials.
>
> In this case, these changes, together with some disrepair, some poor workmanship and what remains of the original design, came together to produce an internal climate and response of the structure such to result in the presence of dampness and mould growth which is prejudicial to health and, as such, a Statutory Nuisance.
>
> These factors can be summarised as follows : —
>
> a) Inadequate/incomplete space heating provision;
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> b) Inadequate standards of insulation to external walls;
>
> c) Cold details/cold bridging as a consequence of the original building design;
>
> d) Permanent uncontrolled ventilation resulting in excessive heat loss in some areas coupled with inadequate background ventilation in others;
>
> e) A failure to introduce extraction at source in the bathroom;
>
> f) Incomplete insulation of first floor ceilings;
>
> g) Poor design consideration given to internal plumbing installations;
>
> h) Defects in the dpc installation and/or associated details."

Mr and Mrs Dunn accepted that some of the works recommended by Mr Wood had been carried out by the council; but, on the basis of his report, they claimed damages for loss, inconvenience and

impairment of enjoyment arising out of the state of the premises at 3 Micklethwaite Lane. They put their claim under three main heads: (i) breach of express or implied covenants in the tenancy, (ii) breach of the duty imposed by section 4 of the Defective Premises Act 1972 and (iii) breach of the obligation implied under section 13 of the Supply of Goods and Services Act 1982 .

14. The council's response was to deny that there had been a subsisting tenancy since November 1996; to take a point under the Limitation Act 1980 ; to assert that all works necessary to remedy actionable disrepair had been carried out within a reasonable period of notification; to deny that condensation and mould growth were caused by lack of repair; to deny liability under section 4 of the Defective Premises Act 1972 ; and to deny that the letting of premises constituted the supply of services for the purposes of the Supply of Goods and Services Act 1982 . By a Part 20 counterclaim the council sought payment of arrears in respect of rent, alternatively mesne profits, in the sum of £1,855 or thereabouts.

15. On 12 October 2000 solicitors acting for Mr and Mrs Dunn gave notice in the present proceedings that they intended to apply for an order that the possession order made in the Keighley County Court on 10 October 1996 (in proceedings KE6 01680) be postponed to 10 March 2000 and the tenancy reinstated to that date on the grounds that it was “just in all the circumstances, pursuant to section 85 of the Housing Act 1985 , to reinstate the tenancy for the period from the termination date under the Possession Order to the date when the Claimants gave up possession of the property voluntarily on or about 10 March 2000”. After referring to the agreement of 1 July 1999, it was said that:

> “In the circumstances it would be inequitable to disregard the agreement made which re-scheduled the arrears payments to be made at £6 per fortnight and the fact that Mrs Dunn paid such instalments and that there is every likelihood that she would have continued to comply with her obligations as a tenant should the tenancy have been re-instated.”

On 17 October 2000 the district judge at Bradford ordered that there be tried as preliminary issues in the present proceedings: (i) the application to reinstate the tenancy, (ii) the applicability of the Supply of Goods and Services Act 1982 , (iii) the applicability of section 4(4) of the Defective Premises Act 1972 and (iv) whether or not notice of external defects was required. The fact that an order to re-instate the former tenancy — by postponing the date for possession under the order of 10 October 1996 — could properly be made (if at all) only in the proceedings in which that order had been made (KE6 01680) does not seem to have been appreciated; or, if it were appreciated, does not seem to have been regarded as of any materiality.

16. Those preliminary issues were tried by His Honour Judge Cockcroft on 19 January 2001. His determination of those issues appears in the final paragraph of his judgment:

> “So that I would answer the preliminary points as follows: The Claimants' application to reinstate the tenancy is dismissed, there being no right to pursue it, given that the Possession Order has been executed. So far as the Supply of Goods and Services Act is concerned, the Claimants may rely upon it to the extent that they are alleging the Defendants were in breach of any duty owed in carrying out work upon the premises but not otherwise. With respect to Section 4.4 of the Defective Premises Act 1972 , the Claimants are entitled to rely upon this Act only insofar as they may be able to establish that there was a defect in the damp proof installation which could and should have been remedied but was not attended to; otherwise they are not entitled to avail themselves of that statutory provision.”

The order made by the judge on 19 January 2001 does not, itself, record the determination of the judge on the preliminary issues that were before him. But the appeal (for which the judge gave permission) has been conducted on the basis that the first three issues identified in the order of 17 October 2000 were determined in the terms which I have just set out. The fourth of the issues identified in the district judge's order was not pursued.

Marston v Leeds City Council

17. Mr and Mrs Marston were tenants of a semi-detached dwellinghouse known as 81 Sissons Road, Leeds under a secure tenancy granted by the Leeds City Council in March 1989. They occupied that

property as their home, with their three daughters, until October 2000. They were then re-housed by the council in other accommodation.

18. By early 1995 the Marstons had fallen into arrears with their rent. A suspended possession order was made against them on 1 March 1995. It is, I think, common ground that a further order was made on 27 October 1997, suspended on payment of £4 per week off arrears of £410 in addition to current rent. By 30 November 1998 arrears had risen to £1,650 and a warrant of possession had been issued; or, at least, applied for. By an order made on that day, under section 85(2)(a) of the 1985 Act, the warrant was suspended on the same terms. By a further order made on 1 March 1999, the warrant was again suspended on the same terms. That order recorded arrears of £1,578. In those circumstances it is not in dispute that there had been a breach of the conditions under the order of 27 October 1997 — if not, also, under the earlier order of 1 March 1995 — and that the tenancy had come to an end, under section 82(2) of the 1985 Act, by or shortly after October 1997.

19. By the beginning of the year 2000 Mr and Mrs Marston were pressing the council for alternative housing. The dwellinghouse at 81 Sissons Road had been inspected by the same expert, Mr R H Wood MCIEH, in April 2000. In his report Mr Wood expressed his conclusion in terms very similar to those of his earlier report on Mrs Dunn's premises at 3 Micklethwaite Lane, Bingley. He wrote:

> "Having regard to the age, character, locality and expected life of the dwelling, I am of opinion that the Landlords are in breach of the repairing obligations which may be implied into the tenancy agreement by section 11 of the Landlord & Tenant Act 1985 .
>
> The property must be considered to be prejudicial to health and, as such, a Statutory Nuisance as defined in Section 79 of the Environmental Protection Act 1990 in that it is likely dampness and mould will return in the forthcoming winter as a consequence of prevailing conditions and remnants of mould growth still present in the property.
>
> The property is "unfit for human habitation" within the meaning of Section 604 of the Housing Act 1985 and as amended by the Local Government & Housing Act 1989 in respect of inadequate ventilation, inadequate space heating provision and general disrepair."

20. On 2 May 2000 the council's Department of Housing and Environmental Health Services wrote to Mr and Mrs Marston to acknowledge their wish to transfer. The letter contained the following paragraph:

> "However I would advise that it is the policy of the Department not to re-house Council tenants whilst they are in rent arrears and, although we do make certain allowances when they are at a low level, at £1300 plus they would be far too high to be overlooked. Once your housing application is registered it will be held in group F which is a holding group primarily for those in rent arrears, it will only be released from that group as and when rent arrears are cleared. The application will then be assessed and priority would be awarded to it based on your current housing situation and future need. Once the classification is awarded you would then be considered for a transfer with other waiting list applicants."

21. Mr and Mrs Marston consulted solicitors. Those solicitors wrote to the Legal Services Department of the council on 11 May 2000. The letter referred to the "possession order on 27 October 1998 (sic)" and to the arrangement, under the order of 30 November 1998 for the payment off of arrears at the rate of £4 per week. The writer does not seem to have appreciated that the effect of the breach of condition under the possession order of 27 October 1997, as evidenced by the order of 30 November 1998, was that the tenancy had determined under section 82(2) of the 1985 Act. The letter referred also, in detail and at length, to the unsatisfactory state of the property; and made the point that:

> "… given the extensive disrepair and breaches of express and/or implied tenancy terms, they [the Marstons] would have had a counterclaim for damages in the possession proceedings and any arrears would have been set off and extinguished."

The solicitors went on, after referring to the council's letter of 2 May 2000, to say this:

> "However, in the premises we submit that it is not reasonable for the Council to apply rigidly its policy of not transferring where there are rent arrears and that in so doing the Council is fettering its own discretion or in the exercise of its discretion the Council has failed to take relevant matters into account and has acted unreasonably."

22. On 19 July 2000 the Department of Legal Services wrote to confirm that the Marstons were not being rehoused by the council "as a result of rent arrears". The solicitors threatened judicial review. On 20 September 2000 they informed the Department of Legal Services that a date for the hearing of an application to move for judicial review had been fixed for 17 October 2000. On the following day the Marstons were advised that they had been "pre-allocated" a property at 8 Bodmin Croft, Middleton. In those circumstances the application for judicial review did not proceed. On 4 October 2000, at the invitation of the council, Mr Marston signed a formal "Notice to Terminate a Tenancy" in respect of 81 Sissons Road; and shortly thereafter, on 8 October 2000, the family moved to 8 Bodmin Croft. The council continued to collect arrears of rent, accrued in respect of 81 Sissons Road, at the rate of £4 per week, by debiting that sum against the rent account in respect of 8 Bodmin Croft. On 22 August 2001 that arrangement was regularised by Mr Marston signing, again at the invitation of the council, a formal "Statement of Acceptance — Former Tenants' Arrears" authorising the transfer of monies owing "in relation to rent for my tenancy at [81 Sissons Road]" to "and to be recovered along with the current rent for my new tenancy at [8 Bodmin Croft]".

23. The present proceedings were commenced on or about 12 February 2001 by the issue of a claim in the Leeds County Court. The claim included a claim for special damage in the sum of £16,400 or thereabouts, and damages for inconvenience, discomfort and distress. The basis of the claim was failure to comply with express or implied covenants in the tenancy; alternatively, breach of the obligations imposed by the Supply of Goods and Services Act 1982 . The council's response was to assert that the tenancy had come to an end in 1996, on breach of the conditions in the possession order of 1 March 1995; and to deny that the 1982 Act had any application. Further, reliance was placed on the Limitation Act 1980 . By a reply served on or about 30 September 2001 it was asserted, amongst other things, that the circumstances in which the Marstons were rehoused at 8 Bodmin Croft — and the correspondence to which I have referred — gave rise to an estoppel which prevented the council from denying that the Marstons had been tenants of 81 Sissons Road up until the date that they gave up possession on transfer.

24. On 21 June 2001 the Marstons applied for a variation of the possession order of 1 March 1995 and re-instatement of the former tenancy to "termination of occupation in October 2000" on the grounds that it was "just in all the circumstances to do so, pursuant to section 85 Housing Act 1985 ". In Part C of the application notice of 21 June 2001 it is said that "the value of the Claimants' claim for damages herein is such that it would extinguish any rent arrears — and would have extinguished rent arrears at the time of a possession order" and that "It is inequitable and unjust to deny the Claimants a remedy in the instant proceedings on grounds that the Claimants were not tenants up until they departed from 81 Sissons Road."

25. On 20 September 2001 His Honour Judge Grenfell directed that issues for preliminary hearing — previously ordered by the district judge — be limited to "the single issue of application to re-instate tenancy". He did so because, at that date, he understood that the appeal in *Dunn v Bradford Metropolitan District* was to be heard in this Court on November 2001. The single issue came before him on 10 October 2001. He handed down a written judgment on 31 October 2001. He addressed, but rejected, the argument based on estoppel. He thought that this was a case "of both parties simply operating under a mistaken impression as to the legal position of the claimants". He found "as a fact" that, when Mr and Mrs Marston gave up possession of 81 Sissons Road on 4 October 2000, (i) both they and the council believed (wrongly in law) that the tenancy still existed, (ii) that there was no question on the part of the council of enforcing any possession order, whether by execution or any other means, and (iii) that there was no execution of any possession order. But he refused to find that the power in section 85(2)(b) of the 1985 Act ceased to be exercisable once the Marstons had given up possession. As he put it, at paragraph 37 of his written judgment:

> "… in the absence of any 'execution' of the relevant possession order, the claimants' voluntary surrendering of possession of no 81 Sissons Road, pursuant to their agreement with the Council to be rehoused simply into another Council house, did not operate as a bar to applying for re-instatement of the old tenancy for the purpose of

maintaining their action for disrepair."

Accordingly he answered the question "were the claimants too late for re-instatement of their tenancy following voluntary surrender of possession on 4 October 2000?" in favour of the Marstons. He went on to make an order under section 85(2)(b) of the 1985 Act postponing the date for possession under the order of 1 March 1995 (and, for the avoidance of doubt, the date for possession under the order of 27 October 1997) until 4 October 2000; and, accordingly, declared that the Marstons' tenancy of 81 Sissons Road was revived up to 4 October 2000. He gave permission to appeal limited to the issues (i) whether there was an execution of a possession order and (ii), if not, whether the Marstons could make an application for re-instatement of their former tenancy.

The issues on these appeals

26. As I have already indicated, the first, and principal, issue on these appeals is whether the court has power, under section 85(2)(b) of the 1985 Act, to postpone the date for possession under a possession order in circumstances where (i) (but for the postponement of the date) the former tenancy has come to an end in accordance with the terms of that order and (ii) the former tenant has given up possession to the local authority without there having been execution of a warrant of possession.

27. The second issue, which arises only on the appeal in *Marston v Leeds City Council* , is whether, in the particular circumstances of that case as they appear from the material before the Court, the council is estopped from taking the point that the former tenancy came to an end before possession was surrendered on 4 October 2000; alternatively, is estopped from taking that point save on terms which protect the position of the former tenant. That issue is raised by respondents' notice served on behalf of the Marstons to which there has been no formal objection.

28. The third and fourth issues arise only on the appeal in *Dunn v Bradford Metropolitan District Council* . They are (third) whether Mrs Dunn (or Mr and Mrs Dunn) can rely on the Supply of Goods and Services Act 1982 other than to the extent that they are alleging the Defendants were in breach of any duty owed in carrying out work at 3 Micklethwaite Lane; and (fourth) whether, in the particular circumstances of that case, Mr or Mrs Dunn can rely on any duty arising under section 4 of the Defective Premises Act 1972 other than to the extent that they may be able to establish that there was a defect in the damp proof installation which could and should have been (but was not) remedied by the council.

The first issue: does the court have power to postpone the date for possession after possession has been given up?

29. Much of the argument in this Court was addressed to the meaning of the word "execution" in the context of the phrase "at any time before the execution of the order [for possession]" which appears in section 85(2) of the 1985 Act. It was said that in neither case had there been execution of the order for possession. Possession had been given up without the need for execution. So the point of time after which there was no longer jurisdiction to make an order under section 85(2) of the 1985 Act — on "execution of the order" — had never been reached; and the jurisdiction remained.

30. The former tenants placed reliance on the observations of Lord Denning, Master of the Rolls, in *In re Overseas Aviation Engineering (GB) Ltd [1963] 1 Ch 24* — a decision on the meaning of "completed the execution" for the purposes of section 325 of the Companies Act 1948 . He said this, at page 39:

> "The word "execution" is not defined in the Act. It is, of course, a word familiar to lawyers. "Execution" means, quite simply, the process for enforcing or giving effect to the judgment of the court: and it is "completed" when the judgment creditor gets the money or other thing awarded to him by the judgment. That this is the meaning is seen by reference to that valuable old book Rastill Termes de la Ley, where it is stated: " *Execution* is, where Judgment is given in any Action, that the plaintiff shall recover the land, debt or damages, as the case is; and when any Writ is awarded to put him in Possession, *or to do any other thing whereby the plaintiff should the better be satisfied his debt or damages* , that is called a writ of *execution* ; and when he hath the

> possession of the land, or is paid the debt or damages, or hath the body of the defendant awarded to prison, then he hath *execution* ". And the same meaning is to be found in *Blackman v Fysh [1892] 3 Ch 209* , 217, when Kekewich J said that execution means "the process of law for the enforcement of a judgment creditor's right and an order to give effect to that right". In cases when execution was to be had by means of a common law writ, such as fieri facias or elegit, it was *legal* execution; when it was had by means of an equitable remedy such as the appointment of a receiver, the it was *equitable* execution. But in either case it was "execution" because it was the process for enforcing or giving effect to the judgment of the court."

It can be seen that, in relation to a claim for possession, there are, or may be, three stages: (i) the judgment or order in the action which establishes the claimant's right to possession; (ii) the issue of a writ of possession (in the High Court) or a warrant of possession (in the County Court) for the purpose of enforcing that judgment or order; and (iii) the eviction of the defendant by the sheriff or the bailiff, acting under the authority of the writ or warrant of possession (as the case may be), and the delivery of possession to the claimant.

31. If — as Lord Denning, Master of the Rolls, explained in *In re Overseas Aviation Engineering (GB) Ltd* — execution is "the process for enforcing or giving effect to the judgment of the court", execution begins at stage (ii). In cases where execution proceeds to stage (iii), it is completed by eviction and the delivery of possession to the claimant. But what if execution does not proceed to an eviction by the sheriff or the bailiff? In my view it is impossible to contend that — in a case where a warrant of possession has been issued by the county court and the former tenant, faced with impending eviction, gives up possession to the landlord before the bailiff attends at the property to execute the warrant — the process for enforcing the order for possession continues after possession has been given up. In such a case execution of the order for possession — is completed by the delivery of possession to the claimant.

32. The expression "before the execution of the order" can only mean "before execution of the order is completed". In a case where execution is completed by the delivery of possession, without the need to proceed from stage (ii) to stage (iii), there has been execution of the order; and, in such a case, the power of the court to make a further order under section 85(2) of the 1985 Act ceases when possession is given up. On one view that was the position in which Mr and Mrs Marston found themselves on 8 October 2000. The process for enforcing the possession order (or orders) made against them had commenced — on the issue of a warrant for possession — and that process was completed when they gave up possession of 81 Sissons Road on moving to 8 Bodmin Croft. Thereafter, there was no power to make an order under section 85(2) of the Act. It would, I think, be possible to determine the first issue in the appeal in *Marston v Leeds City Council* on that ground alone.

33. For my part, however, I think it artificial to distinguish between the position of Mr and Mrs Marston and that of Mrs Dunn. In Mrs Dunn's case, there is nothing in the material before this Court to suggest that a warrant of possession had been issued, or even sought. I think it right to approach her case, therefore, on the basis that the process of enforcing the order for possession, made in October 1996, had not commenced. If execution had not commenced, I do not see how it can be said to have been completed. So, on one view at least, there has been no "execution of the order" for the purposes of section 85(2) of the 1985 Act. Should this lead to the conclusion that, notwithstanding that she gave up possession of 3 Micklethwaite Lane on 10 March 2000 by handing the keys to a council officer, the court continued, thereafter, to have power to make further orders under section 85(2) of the Act?

34. In my view that question must be answered in the negative. It is, I think, important to keep in mind that the object of the statutory scheme of which section 85(2) of the 1985 Act forms part is to provide for public sector tenants security of tenure comparable to that which — at the time that that scheme was first enacted by the Housing Act 1980 — had long been enjoyed by tenants in the private sector under the provisions of successive Rent Acts. That object is achieved, first, by the provisions in section 82(1) and 84(1) of the 1985 Act to which I have already referred. Those provisions prevent the landlord from bringing a secure tenancy to an end without obtaining a possession order from the court; and preclude the court from making a possession order unless satisfied that it is reasonable to do so. But, once a landlord has established his right to a possession order, the court has the extended discretionary powers in relation to the enforcement of that right which are conferred by section 85(2) of the Act. That may be seen as the second line of protection which the statutory scheme provides.

35. Section 85(2) of the 1985 Act is the statutory successor to section 87(2) of the 1980 Act. It confers on the court, in relation to public sector tenants, the extended discretionary powers in possession proceedings then contained in section 100(2) of the Rent Act 1977 (itself amended by section 75 of the Housing Act 1980) but first enacted as section 5(2) of the Interest and Mortgage Interest (Restrictions) Act 1920 . Without those extended powers, it would not have been open to a county court under section 138 of the County Courts Act 1888 — or, I think, to the High Court in the exercise of its inherent jurisdiction — to postpone the date of possession for more than a limited period of, say, four to six weeks — see *Kelly v White [1920] WN 220* , 221, *Sheffield Corporation v Luxford* , *Sheffield Corporation v Morrell [1929] 2 KB 180* , 186, *Jones v Savery [1951] 1 All ER 820* and *McPhailv Persons Unknown [1973] Ch 447* , 460A. The obvious purpose of the extended discretionary powers is to enable the court, in an appropriate case, to allow the former tenant to remain in possession provided that he complies with conditions as to the payment of current rent (or mesne profits) and arrears of rent. The extended discretionary powers provide the court with a means of holding the balance between the right to possession of a public sector landlord and the social need to avoid making homeless those who have to rely on public sector housing. As I have said, the incorporation of those powers into the statutory scheme introduced by the Housing Act 1980 reflects the position which had existed (in relation to private sector tenants of modest means) for the previous 60 years.

36. As this Court observed in *Brown v Draper [1944] 1 KB 309* , 313, 314, the only ways in which a tenant could lose the protection of the Rent Acts were (a) by giving up possession (in which case no order for recovery of possession against him was required) or (b) by having an order of possession made against him. It could be said, with equal validity, that the only way in which a secure tenant could lose the protection of the Housing Act 1980 (now the Housing Act 1985) is (a) by giving up possession (in which case there is no need either to make *or to enforce* an order for possession against him) or (b) by having an order for possession made *andenforced* against him. The Rent Acts were not intended to provide protection for a tenant who gave up possession voluntarily. Nor, as it seems to me, were the Housing Acts of 1980 and 1985 intended to provide protection for a secure tenant who gives up possession voluntarily — whether he does so before or after an order for possession has been made.

37. When section 85(2) of the 1985 Act is construed in the light of what I have described as the obvious statutory purpose of the extended discretionary powers which it contains, it is not, I think, open to any real doubt that the phrase “at any time before the execution of the order” must be read subject to the qualification “(and for so long as execution is required to give effect to the order)”. It cannot be right to attribute to Parliament an intention that the extended discretionary powers conferred by section 85(2) of the Act should continue to be exercisable once the former tenant had given up possession. The extended discretionary powers were conferred so that the court could maintain the former tenant in possession; once possession had been given up, there was no need for those extended powers.

38. It follows that I would hold that the court has no power, under section 85(2) of the 1985 Act, to postpone the date of possession under a previous order for possession in circumstances where possession has been given up by the tenant without the need for execution of the order.

The second issue: whether the Marstons can rely on some estoppel against the Leeds City Council?

39. Mr and Mrs Marston, by their respondents' notice, invite the Court to declare that the Leeds City Council is estopped from denying that they had the benefit of a secure tenancy of 81 Sissons Road until 4 October 2000. It is said that the estoppel arises in the circumstances that — as the judge found — both the council and the Marstons acted throughout in the belief that the secure tenancy granted in 1989 had not come to an end.

40. Counsel for Mr and Mrs Marston placed reliance on the observation of Mr Justice Oliver in *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd [1982] 1 QB 133* . at page 155C–D, that:

> “The inquiry … is simply whether, in all the circumstances … it was unconscionable for the defendants to seek to take advantage of the mistake which, at the material time, everybody shared, …”

Taylor Fashions is reported as a note to *Amalgamated Investment & Property Co Ltd v Texas*

Commerce International Bank Ltd [1982] 1 QB 84 . In the latter case Mr Justice Robert Goff adopted the same approach — see at page 104E–F. In this Court, Lord Denning, Master of the Rolls, expressed the principle in these terms, at page 122C–D:

> "When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands."

That passage received apparent approval in the speech of Lord Bingham of Cornhill in *Johnson v Gore Wood & Co [2001] 1 All ER 481* , 501 *b–e* ; although it may be said that Lord Goff of Chieveley expressed reservations as to the scope of the principle.

41. As I have said, the judge accepted that Mr and Mrs Marston continued, until 4 October 2000, to believe themselves to be tenants of 81 Sissons Road. He accepted that, in that belief, they failed to "safeguard their position in law" either (i) by borrowing money with which to repay the arrears or — and, as he put it, "most importantly" — (ii) by applying under section 85(2) of the 1985 Act to reinstate their tenancy before moving out. He went on to say this, at paragraph 13 of his judgment:

> "Plainly a person may act to his detriment by incurring expenditure in reliance upon the representation made or by altering their position in law in reliance upon it, such as by failing to take steps to safeguard his position at law. See *Crabb v Arun District Council [1976] 1 Ch 179* and *Greasley v Cooke [1980] 1 WLR 1306* . The claimants' difficulty, however, in this regard is that they were taking the advice of solicitors well before they moved out of No 81."

It is, I think, clear that the judge recognised that Mr and Mrs Marston's belief, in October 2000, that they were giving up a secure tenancy of 81 Sissons Road was informed by the advice which they had received from their solicitors. Their belief was not founded on any representation made by the council. The most that can be said is that officers in the housing and legal services departments failed, themselves, to address their minds to the question whether the secure tenancy had come to an end. As the judge put it, in the passage immediately following that which I have just set out:

> "Further, in reality, as I have already indicated, it is quite clear that no one, either at the Council or in the claimants' solicitors seems to have thought of the claimants other than as tenants. In particular, in the light of the Council's current contentions that at all material times the claimants were tolerated trespassers, it is quite remarkable that, throughout the correspondence concerning the claimants' wish to be rehoused in a larger house, the Council only contended that they could not transfer their tenancy whilst the arrears were at the level they were; that they ultimately were prepared simply to transfer the claimants to another Council house."

42. If, as the judge found, the council continued to think of Mr and Mrs Marston as tenants of 81 Sissons Road, it is not surprising that it failed to point out to the Marstons' solicitors that there could be no basis for the threatened compensation claim unless and until steps were taken to reinstate the tenancy by an application under section 85(2) of the 1985 Act. In that context it is, I think, relevant to note that, on 31 July 2000, the solicitors wrote to the Department of Legal Services:

> "Obviously the issue of rehousing should not be contingent in any way upon the progress of a compensation claim (save that it is relevant in terms that such a claim may well eliminate the arrears and hence consideration of the significance of rent arrears as a factor to be taken into consideration as to a transfer)".

The Department of Legal Services replied, in letter dated 7 August 2000:

> "The question of transfer is separate from any question of disrepair or compensation …"

But it is, I think, important to keep in mind that, at that time, (i) no claim for compensation had been issued, (ii) the council had put works of repair in hand, (iii) those works had been suspended at the request of the Marstons (see their solicitors' letter of 24 July 2000), (iv) the council was holding itself out as ready and willing to complete the works and (v) the council was taking the position that there was no question of rehousing the Marstons until there had been a substantial payment in reduction of the rent arrears (see the letter of 19 July 2000 from the Department of Legal Services. The question whether or not any compensation claim would survive if the Marstons were rehoused is unlikely to have been in anyone's mind when those letters were written.

43. Further, there is nothing in the material before this Court to suggest that a belief that a compensation claim would, or would not, survive rehousing was a factor which had any part either in the council's decision, in September 2000, to offer the Marstons a tenancy of 8 Bodmin Croft or in the Marstons' decision to accept that offer. That offer was made in the context of proceedings to review the council's decision that it would not rehouse the Marstons unless and until rent arrears had been reduced. Mr and Mrs Marston were pressing to be rehoused; they had made application for permission to move for judicial review of the council's decision; and a date for the hearing of that application had been fixed. If it were necessary to decide why the council retreated from the position that the Marstons could not be rehoused unless and until rent arrears had been reduced, I would find it difficult not to reach the conclusion that the offer of rehousing was made in order to avoid the need to defend the council's earlier stance. Be that as it may, this is not a case in which it could be said (and it is not said) that the council offered a new tenancy at 8 Bodmin Croft in order to avoid liability for a compensation claim in respect of 81 Sissons Road. Nor, in my view, can it be said (and the judge did not find) that the Marstons would not have accepted the offer of a tenancy at 8 Bodmin Croft if they had been appreciated that that would, or might, have the effect of defeating their compensation claim. The true position, as it appears from the correspondence, is that the Marstons were desperate to move from 81 Sissons Road. They had achieved the object which, with the benefit of legal advice, they had sought to achieve by the institution of proceedings for judicial review. I think it unreal to suppose that the Marstons would have rejected the offer of new housing, for which they had been pressing so hard, in order to preserve a compensation claim which was — on any basis — speculative and which they were not, at that time, pursuing save as a means of obtaining an offer of rehousing.

44. In those circumstances can it be said to be unconscionable — or, in the words of Lord Denning, Master of the Rolls, unfair or unjust — for the council to rely, by way of defence to a claim for damages for breach of repairing covenants in respect of 81 Sissons Road, on the fact that (whether or not either party appreciated it at the time) the tenancy of that property had determined, as a matter of law, some years earlier? In my view it is not unconscionable, unfair or unjust, for the council to take that position. I am not persuaded that the council's decision to offer, or the Marstons' decision to accept, a new tenancy at 8 Bodmin Croft, were based on any underlying assumption as to the continued existence of a secure tenancy of 81 Sissons Road. I think that, in the circumstances of this case, the offer would have been made and accepted even if it had been appreciated by all parties that there was no continuing tenancy of 81 Sissons Road. And, once the Marstons had decided to give up possession of 81 Sissons Road at the earliest opportunity, there was nothing that they could do, by way of an application under section 85(2) of the 1985 Act, to revive the former tenancy.

45. It follows that I would hold that the council are not estopped from denying, by way of defence to a claim for damages for breach of repairing covenants in respect of 81 Sissons Road, that the Marstons were tenants of that property until 4 October 2000. The point which I find more difficult — but which is not raised on this appeal — is whether the council can rely on the document signed by Mr Marston some ten months later, on 22 August 2001. As I have said, that document — described as “Statement of Acceptance — Former Tenant's Arrears” — contains an acknowledgement by Mr Marston that “any monies owing in relation to rent for my tenancy at [81 Sissons Road] should be transferred to and recovered along with the current rent for my new tenancy at [8 Bodmin Croft]”. The effect of that document — if the council can rely upon it — is, as it seems to me, that the council can treat the Marstons as in arrears of rent in respect of their current tenancy; notwithstanding that they may have paid all current rent as it became due. That does seem to me — at least, *primafacie* — unjust and unfair if the council are, at the same time, allowed to assert that, because the tenancy of 81 Sissons Road had determined some years ago, the Marstons cannot rely, by way of set-off against arrears of rent, on any claim for breach of the repairing covenants.

46. As I have said, that point does not arise on this appeal; and it is unnecessary to decide it. But I think it right to record that, in the course of argument, the council undertook to meet the point by waiving the arrears of rent or mesne profits in respect of 81 Sissons Road which remain outstanding.

The third issue: whether the Dunns can rely on the Supply of Goods and Services Act 1982?

47. Section 13 of the Supply of Goods and Services Act 1982 is in these terms:

> "In a contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill."

In that context, "a contract for the supply of a service" means a contract (other than a contract of service or apprenticeship) under which a person ("the supplier") agrees to carry out a service — see section 12 of the 1982 Act; and "business" includes the activities of any local authority — see section 18(1) of the Act.

48. It is accepted that Mr and Mrs Dunn can rely on the term implied by section 13 of the 1982 Act in relation to any works of repair, or works of improvement, actually carried out by Bradford Metropolitan District Council to the premises at 3 Micklethwaite Lane during their period of occupation. But, as the judge observed, that adds little or nothing to the obligation imposed on a contractor by the common law. The issue is whether the provision by a local authority of housing accommodation — either under a secure tenancy or by permitting former tenants to remain in occupation as "tolerated trespassers" — is the carrying out of a service for the purposes of the Act.

49. The judge found assistance in observations of Lord Goddard, Chief Justice, in *Brown and others v Director of Public Prosecutions [1956] 2 All ER 189* . The question in that case was whether local authority councillors, who were also tenants of council owned property, were participants "in a service … offered to the public" for the purposes of the proviso to section 76(1) of the Local Government Act 1933 . Lord Goddard (with whose judgment the other members of the Divisional Court, Mr Justice Cassels and Mr Justice Donovan agreed) said this, at page 191E–G:

> "Counsel for the appellants submitted to us and contended that housing is a service. In one sense, no doubt, it is regarded nowadays as a social service, but it does not seem to me that the provision of a house is a service within the terms of this sub-section. A landlord who has houses to let is not as a rule regarded as rendering a service. He has houses which, as a commercial proposition, he is willing to let to tenants, and a tenant who rents a house is not as a rule said to be taking advantage of a service. He is tenant of a house for which he pays a rent. I think that "to participate in any service" refers to services which local authorities provide for the public, not to the provision of a house in which a person may live."

50. It is submitted on behalf of Mr and Mrs Dunn that the development of the law in relation to consumer protection since *Brown v DPP* was decided in 1956 requires that the Court should be slow to apply those observations — which were not (in any event) made with the protection of consumers in mind — when seeking to determine what Parliament intended when it enacted the 1982 Act. Reliance is placed on the decision of His Honour Judge Tibber in *CamdenLondon Borough Council v McBride(11 November 1998)* in which it appears (from the brief note at *[1999] CLY 3737*) that the judge held that, in granting a tenancy, the local authority was providing a service to the tenant for the purposes of the Unfair Terms in Consumer Contracts Regulations 1994 (SI 1994/3159).

51. For my part, I find no assistance in the decision in *McBride* . The note of that decision with which we have been provided does not indicate the process of reasoning which led Judge Tibber to the conclusion that, by granting a tenancy, the local authority was providing a service to the tenant. But I recognise, also, the force of the submission that the assistance that can be derived from the decision of the *Divisional Court in Brown v DPP* is limited. The question is one of statutory construction: did Parliament intend that the provisions in Part II of the Supply of Goods and Services Act 1982 should have the effect of introducing implied terms into contracts for the provision of unserviced accommodation; and, in particular, into contracts of tenancy?

52. In my view the answer to that question is "No". A contract of tenancy creates an estate or interest in the demised premises. The tenant is entitled to occupy the demised premises by virtue of the right of possession which is an incident of that estate or interest. In recognising the tenant's right to occupy the demised premises the landlord is doing no more than giving effect to his grant; the landlord is not carrying out a service; he is not carrying out any activity; he is simply respecting existing property

rights. Even if it can be said that, in granting tenancies in respect of its housing stock, a local authority is carrying out a service — rather than, or as well as, fulfilling a statutory function — that service ends when the tenancy is granted. Thereafter, the landlord's obligations are found in the terms of the tenancy, express or implied. If those terms require the landlord to carry out other services — for example, maintenance, repairs, security, cleaning — the landlord may well be subject to duties of care and skill in relation to those other services. But section 13 of the 1982 Act cannot, itself, have the effect of requiring the landlord to carry out a service that he would not otherwise be required to carry out under the terms of the tenancy. And I do not think it can be said — and it has not been suggested on this appeal — that, in granting a tenancy upon terms which do not impose on the landlord, say, an obligation to ensure that the premises are fit for human habitation, the landlord has failed to act with reasonable care and skill. Parliament has thought it right not to impose that obligation directly — save in relation to a very restricted, and diminishing, class of tenancies (see section 8 of the Landlord and Tenant Act 1985) — and it would be bizarre to hold that the obligation had already been imposed indirectly through section 13 of the Supply of Goods and services Act 1982. Further, if (as I would hold) section 13 of the 1982 Act does not have the effect of introducing implied terms into contracts of tenancy, I can see no reason why Parliament should be thought to have intended the position to be different where a former tenant remains in possession as a "tolerated trespasser".

53. It follows that I would decide the third issue, which arises only on the appeal in *Dunn v Bradford Metropolitan District Council* , against the appellants.

The fourth issue: whether the Dunns can rely on any duty arising under section 4 of the Defective Premises Act 1972?

54. Section 4(1) of the Defective Premises Act 1972 provides that where premises are let under a tenancy which puts on the landlord an obligation for the maintenance or repair of the premises, the landlord owes to all persons who might reasonably be expected to be affected by defects in the state of the premises a duty to take such care as is reasonable in the circumstances to see that they are reasonably safe from personal injury caused by "a relevant defect". In that context "a relevant defect" means a defect in the state of the premises arising from, or continuing because of, an act or omission by the landlord which constitutes a failure by him to carry out his obligation for maintenance or repair — see section 4(3) of the Act. Section 4(4) is in these terms (so far as material):

> "Where premises are let under a tenancy which expressly or impliedly give the landlord the right to enter the premises to carry out any description of maintenance or repair of the premises, then … he shall be treated for the purposes of subsections (1) and (3) … as if he were under an obligation to the tenant for that description of maintenance or repair of the premises: …"

In a recent decision of this Court, *Lee v Leeds City Council; Ratcliffe and others v Sandwell Metropolitan Borough Council [2002] HLR 367* , in a judgment with which the other members of the Court (Lord Justice Tuckey and Sir Murray Stuart-Smith) agreed, I sought to explain the effect of section 4(4) of the 1972 Act:

> "Section 4(4) of the Act requires the landlord to be treated, for the purposes of subsections (1) and (3), as if he were under an obligation to the tenant for maintenance or repair of the premises where the tenancy "expressly or impliedly gives the landlord the right to enter the premises to carry out any description of maintenance or repair of the premises". In those circumstances the scope and extent of the deemed obligation is commensurate with the scope and extent of the right to enter."

55. The tenancy agreement granted to Mrs Dunn (then Miss McMahon) in 1992 contained, at clause 2.6, a covenant by the tenant to permit the Council's officers, contractors or agents to enter the premises for the purpose of inspection "or for the execution of repairs or improvement works". There is no dispute, therefore, that the premises at 3 Micklethwaite Lane were let under a tenancy which gave the landlord the right to enter the premises to carry out works of repair; nor that section 4(4) of the 1972 Act, in conjunction with subsections (1) and (4) of that section, imposed on the Council, as landlord, the duty to take reasonable care to ensure that persons who might reasonably be expected to be affected by defects in the state of the premises were reasonably safe from personal injury "caused by a relevant defect". But that does not lead to the conclusion that the Council was under a

duty in relation to personal injury caused by defects in the design of the premises which could be remedied only by carrying out works of improvement — for the reasons which were set out in *Lee v Leeds CityCouncil* . As it was put in paragraph 81 of my judgment on that appeal:

> "… Parliament, when enacting section 4 of the 1972 Act … chose to link the duty of care imposed by section 4(1) to the landlord's failure to carry out an obligation "for the maintenance or repair" of the premises — *ibid* , section 4(3). That is the framework within which the statutory hypothesis in section 4(4) must operate. Parliament did not, as it might have done, link the duty of care to a failure to remedy defects in any more general sense. The obligation to "repair" has a well recognised meaning in the law of landlord and tenant; and as the cases show, it does not arise unless the object in respect of which it is imposed is out of repair. If the defect which has caused the injury in respect of which a claim is made under section 4(1) of the Act is not a defect arising from want of repair, it cannot be a 'relevant defect' for the purposes of that section."

56. I accept, of course, that there will be circumstances in which the only practical or sensible way (having regard, perhaps, to more modern building techniques) in which premises which are out of repair can be put back into repair will be to carry out works which do constitute improvements. — as Lord Justice Dillon recognised in *Quick v Taff Ely Borough Council [1986] 1 QB 809* , at page 818. The authorities were reviewed at paragraphs 12 and 13 of my judgment in *Lee v Leeds City Council* . It is unnecessary to rehearse them again. In the light of that review I said this:

> "The cases show that, where there is a need to repair damage to the structure, the due performance of the obligation to repair may require the landlord to remedy the design fault which is the cause of the damage. They do not support the proposition that the obligation to repair will require the landlord to remedy a design defect which has not been the cause of damage to the structure; notwithstanding that the defect may make the premises unsuitable for occupation or unfit for human habitation."

57. In the present case the judge directed himself that the question which he had to decide was whether any (and if so which) of the factors identified in the expert's report — set out earlier in this judgment — could have been remedied or avoided by works of repair. He went on to say this:

> "… the only one of those factors [listed as (a) to (h)] which, in my judgment, could fall into the category of lack of repair of a relevant defect is (h). If there were defects in the damp proof course which gave rise to the presence of dampness or mould growth in the house then such would be relevant defects of the purposes of the Defective Premises Act against which the landlords, having reserved to themselves a right of entry, had an obligation to act. All the other factors listed there by Mr Wood require work to be done which I would categorise as improvements to property, that is to say neither maintaining the *status quo* nor restoring the *status quo* but going above and beyond the *status quo* and therefore outwith the concept of maintenance or repair."

He concluded that Mr and Mrs Dunn obtained no assistance from section 4 of the 1972 Act — which would, in any event, be applicable only during the period that the former tenancy had subsisted — save to the extent that they might be able to establish that there was a defect in the damp proof installation which could and should have been (but was not) remedied by the Council.

58. It is submitted on behalf of the appellants that the judge placed too narrow a construction on section 4(4) of the 1972 Act. It is said that he ought to have held that a landlord who had a right to enter in order to execute "improvement works" was under a duty "to maintain the premises in a reasonable condition or alternatively (by improvement) to prevent any material deterioration of condition which affects the enjoyment of the premises by the Appellants". By that means the appellants seek to circumvent the limited scope of a duty to "repair" by invoking the statutory hypothesis required by section 4(4) so as to impose on the landlord an enhanced obligation to maintain the premises. If that could be achieved, it would be a short step to equate an obligation to maintain "in a reasonable condition" with an obligation to maintain "in a good condition"; and so bring the case within the reasoning of this Court in *Welsh v Greenwich London Borough Council (2001) 33 HLR 40* . In that case it was accepted that an obligation to maintain "in a good condition" did impose

an obligation to put the premises into a condition which was better than that in which they were let.

59. I would accept that the landlord's right to enter extends to entry in order to carry out remedial works. That would be the position even in the absence of an express right of entry — at least in so far as those works were required to remedy defects which were a danger to health — as I pointed out in *Lee v Leeds City Council* (at paragraph 79 of my judgment). I would accept, also, that the landlord's right to enter extends to entry in order to maintain the premises. But that begs the question whether the statutory hypothesis introduced by section 4(4) of the 1972 Act requires that a landlord who has the right to enter in order to carry out remedial works — which may be necessary if the premises are to be maintained in "a good condition" or in "a reasonable condition" — must be treated as if he were under an obligation to put the premises into a better condition than they were at the time when they were first let. Does the statutory hypothesis require the landlord to be treated as if he were under an obligation to remedy design defects? I think not; for the reasons which I gave in *Lee v Leeds City Council* . At paragraph 80 of my judgment I said this:

> "80. … the first question in this context is whether the works which would be required to remedy the inherent defects in design — which are the cause of the excessive condensation and mould — are within the expression "any description of maintenance or repair of the premises". If they are not, the fact that the landlord may be entitled to enter the premises in order to carry out those works does not give rise to a deemed obligation on the tenant "for that description of maintenance or repair" …

At paragraph 81, after the passage which I have already set out earlier in this judgment, I referred to the observations of Lord Justice Ralph Gibson in *McAuley v Bristol City Council [1992] 1 QB 134* at page 145D:

> "'There is, I think, no warrant for a wide construction of the words of section 4. They apply to all landlords, and not merely to local authorities, and can operate so as to impose a substantial burden upon a landlord in respect of premises under the immediate control of the tenant and in respect of which the landlord has assumed no contractual obligation.'"

I am not persuaded that the right of entry to execute improvement works leads to the conclusion that the landlord was under a duty to maintain the premises in "a reasonable condition" or to prevent (by improvement) any material deterioration of condition which affects the enjoyment of the premises. So to construe section 4(4) of the 1972 Act would require — as it seems to me — reading the phrase "any description of maintenance or repair" as if it extended to works of improvement which went beyond maintenance or repair. I do not think that, in the absence of clear words, Parliament should be held to have intended to impose so substantial a burden on landlords.

60. It follows that I would decide the fourth issue — which, again, arises only on the appeal in *Dunn v Bradford Metropolitan District Council* — against the appellants.

Conclusion

61. For the reasons which I have set out, I would dismiss the appeal in *Dunn v Bradford Metropolitan District Council* and allow the appeal in *Marston v Leeds City Council* .

Lady Justice Hale:

62. I agree. I wish only to sound a note of caution on the meaning of the words "at any time before the execution of the order" in s 85(2) of the Housing Act 1985 . "Execution" can have a variety of meanings according to the context in which it is used. Its ordinary meaning is the carrying out or performance of some task or operation. For lawyers it can have a variety of more restricted technical meanings. At one extreme is the distinction drawn in Order 26 of the County Court rules between a "warrant of execution" against goods, and warrants of possession of land, or delivery of goods. Yet, words such as "the issue of execution" certainly encompass all of those. Indeed, in *Re Overseas Aviation Engineering [1963] 1 Ch 24* , the majority held that a charging order over land was a form of "execution" (although it was not "completed" as required in that case), and the same reasoning would no doubt apply to other court processes for enforcing orders, such as an attachment of earnings order. But the word is also capable of referring more broadly to putting something into effect. Thus, for

example, section 2(5) of the Crown Proceedings Act 1947 provides that

> "No proceedings shall lie against the Crown by virtue of this section in respect of anything done or omitted to be done by a person whilst discharging or purporting to discharge … an responsibilities which he has in connection with the execution of judicial process."

In *Quinland v Governor of HM Prison Belmarsh [2002] EWCA Civ 174* , this Court held that those words covered the actions of the Criminal Appeals Office in failing to give effect to the decision of the single judge who had considered an application for permission to appeal. A distinction was drawn between the execution of an order and the execution of judicial process.

63. Here we are concerned with the execution of an order. But the words "at any time before the execution of the order" could well suggest that the cut-off time comes only after the process of execution has been completed by the landlord obtaining possession of the premises. It would be surprising if the tolerated trespasser could not obtain a postponement after the issue of a warrant of possession but before it had been put into effect. On the other hand, it would also be surprising if he could obtain a postponement after the possession order had been put into effect, whether by the execution of a warrant of possession, or by the trespasser departing, whether in response to a warrant or in response to other events since the order was made. Such an order, it will be recalled, was sought in these cases only for the purpose of reviving the former tenancies with their covenants and only up to the date on which possession was in fact given up. It would to my mind be odd if the words "at any time before the execution of the order" did not encompass any means of giving effect to the order but did encompass a time after possession had in fact been given up.

64. Whether the conclusion in this case is reached through the route suggested above or through the route adopted by my Lord, Lord Justice Chadwick, of reading into the section "(and for so long as execution is required to give effect to the order)" does not matter. But a note of caution seems advisable lest it might matter in another case.

Lord Justice Waller:

65. I also agree. On the note of caution from Hale LJ I would simply say this. The question in the case of Mrs Dunn is whether the fact that a warrant has never been issued, but possession has been given up allows Mrs Dunn to say that her application has been made "before execution of the order". Both Chadwick LJ and Hale LJ answer that question in the negative. I agree with them that the question must be answered in the negative. It is a question of construction of the words. Hale LJ suggests that the answer can be achieved by the route expounded by Chadwick LJ or an alternative suggested by her. I content myself with saying that she may well be right that either route is available.

Order in Marston v Leeds City Council: 1. The Appellant's appeal be allowed. 2. The Respondent's cross-appeal be dismissed. 3. The Appellant's costs of this appeal and below be determined by a Costs Judge 4. The Respondent, who is in receipt of services funded by the Legal Services Commission, do pay the Appellant an amount to be determined by a Costs Judge. 5. The Respondent's costs be assessed in accordance with the Community Legal Service (Costs) Regulations 2000. 6. Permission for leave to appeal to the House of Lords refused. Order in Dunn v Bradford Metropolitan District Council: 1. The appellants/claimant's appeal be dismissed. 2. The appellants/claimants' do pay the respondent/defendant's costs of this appeal, save that the respondent/defendant do pay the appellant/claimants' costs of and incidental to: i) The respondent/defendant's application for an extension of time for the further respondent's notice dated 29 April 2002 and. ii) The respondent's notice dated 29 April 2002. 3. The appellants/claimants personal liability in costs be assessed at nil. 4. There be a legal aid taxation of the appellants/claimants' costs. 5. Permission for leave to appeal to the House of lords refused.