Neutral Citation Number: [2019] EWCA Civ 1174

Case No: A2/2018/2536

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
Dingmans J
[2018] EWHC 2454 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10 July 2019

Before :

LORD JUSTICE PATTEN
LADY JUSTICE KING
and
LORD JUSTICE DAVID RICHARDS

- -

Between :

LIVEWEST HOMES LIMITED (FORMERLY KNOWN AS LAVERTY LIMITED)	**Claimant/ Respondent**
- and –	
SARAH BAMBER	**Defendant/ Appellant**

- -
- -

Russell James (instructed by **Shelter Legal Services (Plymouth)**) for the **Appellant**
Nicholas Grundy QC and **Tristan Salter** (instructed by **Clapsticks Solicitors LLP**) for the **Respondent**

Hearing date : 20 June 2019

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Approved Judgment

Lord Justice Patten:

1. The Appellant, Ms Sarah Bamber, is the tenant of a ground floor flat at 15 Mildmay Street, Greenbank, Plymouth ("the Flat") under an assured shorthold tenancy. The Respondent is her landlord, Livewest Homes Limited ("Livewest"), which is a private registered provider of social housing ("RPSH").

2. Ms Bamber has been the tenant of the Flat since 2015. Her original tenancy was granted on 20 January 2015 for a fixed term expiring on 23 January 2022. The tenancy agreement provided for a probationary or starter period of 12 months which could be extended for a further six months. During the probationary period Livewest was able to exercise a break clause by the service of two months' written notice. Clause 2.2 of the agreement stated that a notice served under the break clause would be valid if it was "in the format required by s.21 of the Housing Act 1988" ("HA 1988").

3. In August 2015 Livewest served two months' notice on Ms Bamber, purportedly in compliance with s.21 HA 1988. She requested an administrative review of the decision which was unsuccessful. Livewest then commenced possession proceedings against her which were dismissed by the District Judge on the ground that Livewest had not served a valid notice. On the Judge's construction of the tenancy agreement, Livewest was required to serve at least six months' notice in writing in accordance with s.21(1B) HA 1988.

4. Livewest appealed successfully against this decision to a circuit judge (HH Judge Cotter QC) who, in a judgment given on 25 August 2016, held that break clauses continued to be permitted by s.5 HA 1988 even after the insertion into HA 1988 of ss.21(1A) and 21(1B) by the Localism Act 2011 and that, on the true construction of clause 2.2, Livewest was not required to do more than to serve a notice which complied with s.21(1)(b) HA 1988.

5. Ms Bamber was granted permission to appeal to the Court of Appeal but those proceedings were compromised before the appeal was heard on terms that Livewest granted to the appellant a new tenancy. This was for a fixed term of seven years and also included a starter period, but the provisions of clause 2.2 are materially different from those of the first tenancy agreement.

6. The second tenancy agreement is headed "Fixed term tenancy agreement (Assured shorthold with starter period)". It then sets out details of the parties to the agreement and continues:

> "This tenancy begins on Monday 27 February 2017 and ends on Sunday 28 February 2024 ("the expiry date") unless we, or you, bring it to an end before then in one of the ways set out in this agreement".

7. The agreement then contains the terms of the tenancy including the rent and service charge provisions and various covenants by the landlord and tenant relating to the maintenance, occupation and use of the Flat. Section C2 contains a landlord's break clause in the following terms:

> "2.1 "*Break clauses*": We may end the fixed term of the tenancy in the following circumstances. These are called "break clauses".
>
> 2.1.1 During the starter period, or extended starter period, we may give you two months' written notice ending the tenancy. If we do this we will give you our reasons and you will have the right to have the decision reviewed in line with our published procedure.
>
> …
>
> 2.2 *Format of notices*: A notice under clause 2.1 may be in any written form."

8. Information about the starter period is set out on the last page of the agreement as follows:

> "This tenancy is subject to a starter period of 12 months. If you break your side of the agreement during the starter period we may give you notice requiring you to give us possession of the property. If we are concerned at your conduct of the tenancy we may, at our discretion, extend the starter period by up to 6 months by giving you written notice.
>
> If we decide to end the tenancy, or to extend the starter period, we will give you our reasons and you will have the right to have the decision reviewed in line with our Tenancies Policy.
>
> If you successfully complete the starter period you will gain the additional rights set out in the agreement."

9. On 9 August 2017, during the starter period, Livewest gave two months' written notice to Ms Bamber to terminate her tenancy in accordance with clause 2.1.1 of the tenancy agreement. That notice also complied with HA 1988 s.21(1)(b). The notice was sent to her by post and was deemed served on 11 August 2017 under clause 6.1 of the agreement. As in relation to the first tenancy agreement, Ms Bamber asked for the decision to be reviewed in accordance with clause 2.1.1, but on 20 September 2011 the review decision upheld the original decision to serve the notice.

10. Livewest issued its claim for possession on 8 November 2017. Ms Bamber served a defence in which she pleaded that the notice was invalid for non-compliance with s.21(1B) HA 1988. She also alleged that the decision to serve the notice and to seek possession of the Flat breached Livewest's public sector equality duty under s.149 of the Equality Act 2010 and was otherwise a breach of the principles of procedural fairness and natural justice. On 5 April 2018 the County Court ordered the question as to whether Livewest had served a valid notice determining the tenancy to be decided as a preliminary issue. On 5 April 2018 HH Judge Mitchell held that Livewest was not required to serve on Ms Bamber six months' written notice under s.21(1B) HA 1988. An appeal from this decision was dismissed by Dingmans J on 27 September (see

[2018] EWHC 2454 (QB)). Ms Bamber now appeals to this Court with the permission of Asplin LJ.

11. Tenancies of residential accommodation granted by private landlords after 15 January 1989 are either assured or assured shorthold tenancies ("ASTs") under the HA 1988. These include tenancies granted by what were formerly registered housing associations, which before 15 January 1989 were treated as secure tenancies within the Housing Act 1985 ("HA 1985").

12. Prior to the coming into effect of the Housing Act 1996 on 28 February 1997 an AST could only consist of an assured tenancy granted for a term certain of not less than six months and with no power for the landlord to determine the tenancy earlier than six months from the beginning of the term: see HA 1988 s.20(1). It was also necessary for the tenant to be served with a prescribed form of notice prior to the grant of the tenancy informing him that the assured tenancy would be an AST. Under s.19A HA 1988 all assured tenancies created after that date are now ASTs, with the exception of the cases specified in Schedule 2A. None of these exceptions apply in the present case. ASTs can therefore include both a periodic and a fixed term tenancy including one containing a starter or probationary period with a break clause such as in this case.

13. It is convenient at this stage to set out the relevant provisions of HA 1988 so far as they apply to an AST. Section 5 (as amended) provides:

> "(1) An assured tenancy cannot be brought to an end by the landlord except by–
>
> (a) obtaining–
>
> (i) an order of the court for possession of the dwelling-house under section 7 or 21, and
>
> (ii) the execution of the order,
>
> (b) obtaining an order of the court under section 6A (demotion order), ...
>
> (c) in the case of a fixed term tenancy which contains power for the landlord to determine the tenancy in certain circumstances, by the exercise of that power, or
>
> (d) in the case of an assured tenancy—
>
> (i) which is a residential tenancy agreement within the meaning of Chapter 1 of Part 3 of the Immigration Act 2014, and
>
> (ii) in relation to which the condition in section 33D(2) of that Act is met,
>
> giving a notice in accordance with that section,

and, accordingly, the service by the landlord of a notice to quit is of no effect in relation to a periodic assured tenancy.

(1A) Where an order of the court for possession of the dwelling-house is obtained, the tenancy ends when the order is executed.

(2) If an assured tenancy which is a fixed term tenancy comes to an end otherwise than by virtue of—

(a) an order of the court of the kind mentioned in subsection (1)(a) or (b) or any other order of the court,

(b) a surrender or other action on the part of the tenant, or

(c) the giving of a notice under section 33D of the Immigration Act 2014,

then, subject to section 7 and Chapter II below, the tenant shall be entitled to remain in possession of the dwelling-house let under that tenancy and, subject to subsection (4) below, his right to possession shall depend upon a periodic tenancy arising by virtue of this section.

(3) The periodic tenancy referred to in subsection (2) above is one—

(a) taking effect in possession immediately on the coming to an end of the fixed term tenancy;

(b) deemed to have been granted by the person who was the landlord under the fixed term tenancy immediately before it came to an end to the person who was then the tenant under that tenancy;

(c) under which the premises which are let are the same dwelling-house as was let under the fixed term tenancy;

(d) under which the periods of the tenancy are the same as those for which rent was last payable under the fixed term tenancy; and

(e) under which, subject to the following provisions of this Part of this Act, the other terms are the same as those of the fixed term tenancy immediately before it came to an end, except that any term which makes provision for determination by the landlord or the tenant shall not have effect while the tenancy remains an assured tenancy.

(4) The periodic tenancy referred to in subsection (2) above shall not arise if, on the coming to an end of the fixed term tenancy, the tenant is entitled, by virtue of the grant of another tenancy, to possession of the same or substantially the same dwelling-house as was let to him under the fixed term tenancy.

(5) If, on or before the date on which a tenancy is entered into or is deemed to have been granted as mentioned in subsection (3)(b) above, the person who is to be the tenant under that tenancy—

(a) enters into an obligation to do any act which (apart from this subsection) will cause the tenancy to come to an end at a time when it is an assured tenancy, or

(b) executes, signs or gives any surrender, notice to quit or other document which (apart from this subsection) has the effect of bringing the tenancy to an end at a time when it is an assured tenancy,

the obligation referred to in paragraph (a) above shall not be enforceable or, as the case may be, the surrender, notice to quit or other document referred to in paragraph (b) above shall be of no effect.

(5A) Nothing in subsection (5) affects any right of pre-emption–

(a) which is exercisable by the landlord under a tenancy in circumstances where the tenant indicates his intention to dispose of the whole of his interest under the tenancy, and

(b) in pursuance of which the landlord would be required to pay, in respect of the acquisition of that interest, an amount representing its market value.

"*Dispose*" means dispose by assignment or surrender, and "*acquisition*" has a corresponding meaning.

(6) If, by virtue of any provision of this Part of this Act, Part I of Schedule 1 to this Act has effect in relation to a fixed term tenancy as if it consisted only of paragraphs 11 and 12, that Part shall have the like effect in relation to any periodic tenancy which arises by virtue of this section on the coming to an end of the fixed term tenancy.

(7) Any reference in this Part of this Act to a statutory periodic tenancy is a reference to a periodic tenancy arising by virtue of this section."

14. Section 21 provides:

> "(1) Without prejudice to any right of the landlord under an assured shorthold tenancy to recover possession of the dwelling-house let on the tenancy in accordance with Chapter I above, on or after the coming to an end of an assured shorthold tenancy which was a fixed term tenancy, a court shall make an order for possession of the dwelling-house if it is satisfied—
>
> (a) that the assured shorthold tenancy has come to an end and no further assured tenancy (whether shorthold or not) is for the time being in existence, other than an assured shorthold periodic tenancy (whether statutory or not); and
>
> (b) the landlord or, in the case of joint landlords, at least one of them has given to the tenant not less than two months' notice in writing stating that he requires possession of the dwelling-house.
>
> (1A) Subsection (1B) applies to an assured shorthold tenancy of a dwellinghouse in England if—
>
> (a) it is a fixed term tenancy for a term certain of not less than two years, and
>
> (b) the landlord is a private registered provider of social housing.
>
> (1B) The court may not make an order for possession of the dwelling-house let on the tenancy unless the landlord has given to the tenant not less than six months' notice in writing—
>
> (a) stating that the landlord does not propose to grant another tenancy on the expiry of the fixed term tenancy, and
>
> (b) informing the tenant of how to obtain help or advice about the notice and, in particular, of any obligation of the landlord to provide help or advice.
>
> (2) A notice under paragraph (b) of subsection (1) above may be given before or on the day on which the tenancy comes to an end; and that subsection shall have effect notwithstanding that on the coming to an end of the fixed term tenancy a statutory periodic tenancy arises.
>
> …"

15. Section 45 defines a "fixed term tenancy" as "any tenancy other than a periodic tenancy".

16. The significant advantage to a private landlord of being able to grant an AST is that it may be terminated, and possession recovered, without the need to rely on a breach of covenant or any of the other grounds specified in s.7 HA 1988. For this reason, the landlord can also avail himself of the accelerated procedure for obtaining possession. Provided that the landlord has served the requisite s.21 notice, there will be no defence to a claim for possession and the AST will come to an end on the execution of the possession order.

17. The basic structure of these provisions remains, but in recent years additional conditions have been attached by Parliament to the making of a possession order. They include a bar on giving a s.21 notice if the provisions relating to the holding of a tenant's deposit have not been complied with (see ss.212-215 Housing Act 2004); a bar on the giving of a s.21 notice in a case where the landlord has not complied with certain prescribed requirements such as the provision of gas safety and energy performance certificates (see s.21A); and a bar on the Court's power to make an order for possession where an RPSH has failed to serve on the tenant of a fixed tenancy for a term certain of at least two years the six months' notice required under s.21(1B). The circumstances in which that type of notice is required is what is at issue on this appeal.

18. But none of these restrictions on the landlord's ability to obtain possession of premises let on an AST have altered the definition of what constitutes an AST. We were told that there has been an increased trend in recent years towards the grant of longer fixed term tenancies by RPSHs like Livewest, most of which include a starter period with a break clause so as to allow the landlord to terminate the tenancy early in its life if the tenant proves unsatisfactory. Parliament has not sought to interfere with or to restrict this development by legislation, although ASTs granted by an RPSH are now subject to external regulation which has included guidance about the use of starter periods. I will come to this a little later.

19. There is no real issue between the parties in the current proceedings about the construction of clause 2.1 of the tenancy agreement. Unlike the earlier agreement, clause 2.2 does not require the notice to be in any particular form, and Ms Bamber accepts that the notice which was served in August 2017 did give her two months' notice to determine the tenancy as required by clause 2.1.1. It is also common ground that the notice was effective as a statutory notice under s.21(1)(b) HA 1988. The only issue is whether those provisions were qualified or added to by s.21(1B) HA 1988 so as to require Livewest also to give at least six months' notice (with the information specified in the sub-section) before the Court could make an order for possession under s.21(1)(a). It was common ground below that, as granted, the 2017 tenancy agreement did create "a fixed term tenancy for a term certain of not less than two years" within the meaning of s.21(1A) HA 1988 and that Livewest has at all material times been an RPSH for the purposes of s.21(1A)(b). But the first of these is now also in dispute.

20. The inclusion within the post-1996 definition of an AST of both periodic and fixed term tenancies meant that the legislative scheme comprised in ss. 5 and 21 HA 1988 had to cater for the termination of the tenant's contractual tenancy in a number of different possible circumstances. In the case of a periodic tenancy, the landlord would retain a contractual right of termination on notice. In the case of a fixed term tenancy, the

landlord would not be entitled to terminate short of the expiry of the contractual term except in cases where he had included some form of break clause. At the expiry of the fixed term, a tenant who held over would ordinarily (absent some agreement to the contrary) continue as a periodic tenant until that was terminated on notice.

21. Section 5(1)(c) HA 1988 recognised that in the case of a fixed term tenancy with a right to break the landlord had, as a pre-condition to obtaining possession, to bring the fixed term to an end. Therefore although as provided by s.5(1)(a) an AST of any kind, whether a periodic tenancy or a tenancy for a fixed term, can only be brought to an end by the obtaining and execution of a court order, the landlord is required in every case also to take whatever steps are necessary to terminate the contractual tenancy including any fixed term. If the fixed term tenancy expires by effluxion of time then it will be followed automatically by a statutory periodic tenancy taking effect in possession on the same terms as the fixed term tenancy, unless the tenant has agreed to a surrender or the parties have agreed to enter into a new tenancy of the same premises: see s.5(2)-(5). But a landlord who does not wish to renew a fixed term tenancy will still be able to obtain possession by first serving at least two months' notice in accordance with s.21(1)(b) stating that he requires possession, and this will be effective even if a statutory tenancy has arisen in the meantime by virtue of the operation of s.5(2): see s.21(2). If the landlord has served a valid s.21 notice which has expired before the issue of the relevant possession proceedings then the Court has no discretion under HA 1988 but to make a possession order: see s.21(1); (4).

22. In broad terms s.5 HA 1988 is therefore directed (as its heading suggests) to the protection and security of tenure conferred on a tenant by an assured tenancy (including an AST) and to what are the conditions for bringing that security to an end. The purpose of s.21 is to set out the procedure for recovering possession either when a fixed term AST has come to an end (s.21(1)) or where there is a periodic AST. In each case the landlord must give the tenant at least two months' notice in writing stating that he requires possession as a pre-condition to obtaining an order for possession. But in the case of a fixed term tenancy this pre-supposes (consistently with s.5(1)(c)) that the landlord has already served an effective break clause notice. A break clause notice of at least two months which satisfies the requirements of s.21(1)(b) can, as in this case, operate both as a break clause and a s.21 notice: see *Aylward v Fawaz* (1996) 29 HLR 408.

23. The issue on this appeal is whether, as a result of s.21(1B), these procedural conditions imposed on the landlord of a fixed term tenancy who has exercised his power under the break clause to determine the contractual term have now been changed in the case of a fixed term tenancy granted by an RPSH for a term of two years or more so that, in such cases, the RPSH must now also give at least six months' notice of the kind described in the sub-section in addition to the two months' notice as required under s.21(1)(b). This is a question of statutory construction in relation to the amendments to s.21 which were introduced by the Localism Act 2011.

24. One of the arguments relied on by Livewest before Judge Mitchell was that s.21 HA 1988 required the Court to focus on the position at the date when the proceedings for possession were issued or determined and not at the time before the fixed term tenancy was brought to an end. By the time of the issue of the possession proceedings in November 2017, the operation of the break clause had determined the fixed term tenancy contractually leaving Ms Bamber with her right to remain in possession of the

Flat under a statutory periodic tenancy in accordance with s.5(2) HA 1988. She was not therefore at that time a tenant of the Flat under a fixed term tenancy for a term certain of not less than two years and (so it was said) s.21(1B) had no application.

25. Judge Mitchell rejected this argument. He held that the provisions of s.21 and, in particular, s.21(1A) fell to be applied to the position at the time when the s.21 notice came to be served. The question whether the tenancy "*is*" a fixed term tenancy of the kind described in s.21(1A) needed to be considered at that date. Otherwise, he reasoned, the provisions of s.21(1B) could never apply to a fixed term tenancy at all because its contractual termination will, as I have explained, always be a pre-requisite under s.5(1)(c) to any proceedings for possession. But he construed ss.21(1A) and (1B) as inapplicable to a case where the fixed term was brought to an end by the operation of a break clause. The requirement for six months' notice of the kind specified in s.21(1B) was limited, he held, to cases where the fixed term was due to expire by effluxion of time. In such cases the tenant needed to know in advance that the landlord did not intend to renew the tenancy so as to be able to obtain help or advice. In a case where the landlord chooses to operate a break clause during the probationary period of a fixed term tenancy it will be obvious to the tenant from the notice itself that the landlord is seeking to recover possession.

26. In his judgment on the first appeal Dingmans J gave different reasons as to why s.21(1B) has no application in the present case. He said:

> "41. Given what is common ground between the parties it is therefore necessary to turn to the issue of whether section 21(1A) applied to require that 6 months' notice in writing be given pursuant to section 21(1B) by Livewest to Ms Bamber. In my judgment on the giving of 2 months' notice in the starter period under clause 2.1.1 of the second tenancy agreement, Ms Bamber did not have "a fixed term tenancy for a term certain of not less than two years". This was because the effect of the service was to leave Ms Bamber with a statutory periodic tenancy pursuant to section 5(2) of the Housing Act. It was common ground between the parties that a statutory periodic tenancy can be brought to an end by service of a notice giving two months' notice in writing pursuant to section 21(1), and that one notice can both determine a tenancy and satisfy section 21(1), see *Fawaz v Aylward*.
>
> 42. Mr James submitted that although it was agreed that the effect of service of the notice under the break clause within the starter period was to create a statutory periodic tenancy, section 21(1B) applied because the words "it is a fixed term tenancy for a term certain of not less than two years" in section 21(1A)(a) should be read as "it was a fixed term tenancy for a term certain of not less than two years" (emphasis added). I do not accept that submission because that is not what the statute has provided. I do not accept that giving effect to the plain words of section 21(1A)(a) in this case creates an absurdity. Livewest was able to create the statutory periodic tenancy by giving notice within the starter period, and the provisions of section 21(1A) and 21(1B)

> had nothing to do with notice in the starter period. Further if a registered provider wishes to recover possession immediately on the expiry of the fixed term then a notice complying with section 21(1B) will need to be given, this is because the tenancy will remain a fixed term tenancy for a term certain of not less than two years once such a notice has been served until the conclusion of the fixed term. In circumstances where there is a limited supply of social housing it might be expected that registered providers will want to recover possession immediately on the expiry of the fixed term."

27. Mr James, on behalf of Ms Bamber, challenges this interpretation of s.21(1B) and its effect on a number of grounds. For much the same reason as Judge Mitchell rejected Livewest's argument that s.21(1A) falls to be applied at the date of the hearing, he submits that Dingmans J's approach of asking whether the tenancy "is" a fixed term tenancy at that date has the effect of rendering ss.21(1A) and (1B) nugatory. For the reasons outlined above, in no possible scenario will the tenant still be the tenant under a fixed term AST at the date of issue of the possession proceedings or the subsequent hearing. In every case of a fixed term tenancy the tenant will by then retain possession under a statutory periodic tenancy if the landlord is to comply with the requirements of s.5(1)(c).

28. It follows, he submits, that in order to give ss.21(1A) and (1B) any content and operation one has to read the reference in s.21(1A) to s.21(1B) applying if the AST "is" a fixed term tenancy as denoting the nature of the tenancy at the date of grant and not at the date of the hearing. This construction is supported by the fact that ss.21(1A) and (1B) have been inserted into s.21 as part of the procedural code dealing with the recovery of possession. They come immediately after s.21(1) which specifies that the Court shall make an order for possession if satisfied that the AST has come to an end (other than in respect of any statutory periodic tenancy) and that a s.21(1)(b) notice has been given. The terms of s.21(1B) suggest that it is intended to qualify s.21(1) in relation to fixed term tenancies of the kind described in s.21(1A). Dingmans J's interpretation of "is" makes no sense, he submits, in this context and s.21(1A) must be read simply as a description of the kind of fixed term tenancy to which the notice provisions contained in s.21(1B) apply.

29. The use of the word "is" in s.21(1A) generated a lot of argument at the hearing as to the circumstances in which, as a matter of statutory construction, one could give the relevant word a purposive construction and, so far as necessary, read it as including "was". But, before I come to those arguments in more detail, it is useful to set out what material there is relevant to the ascertainment of the purpose of the amending legislation and the mischief at which it was directed.

30. We were shown the Minister's statement made during the Committee stage of the Localism Bill in relation to clause 137 which became s.164 of the Localism Act and introduced ss.21(1A) and (1B) into HA 1988. The Minister is recorded as saying:

> "We also want to ensure that when the fixed term of an assured shorthold tenancy approaches its end, appropriate protections are in place. We would expect landlords to discuss options with

> tenants well in advance of the fixed term of their tenancy coming to an end. In many cases, we would expect the tenancy to be renewed, and we debated aspects of that this morning in considerable detail. When the landlord decides that the tenancy should not be extended, it is essential that the tenant is given time to find alternative accommodation and is supported by their landlord in doing so. The six-month notice period before a possession order can be granted provides the tenant with a reasonable time in which to find a new home. Our proposals for the tenancy standard make it clear that social landlords will be required to grant general needs tenancies with a fixed term of at least two years, so that that protection will always be applicable. As we discussed this morning, two years is the shortest period for exceptional circumstances and the Government regard a five-year period as a realistic minimum, especially for vulnerable families and those with children."

31. The proposals for the tenancy standard referred to in the statement are what became the 2012 Tenancy Standard introduced by the Homes and Communities Agency ("the HCA"), which took over the regulation of tenancies granted by an RPSH after April 2012. Paragraph 2.2.2 of the 2012 Tenancy Standard stated as follows:

> "Registered providers must grant general needs tenants a periodic secure or assured (excluding periodic assured shorthold) tenancy, or a tenancy for a minimum fixed term of five years, or exceptionally, a tenancy for a minimum fixed term of no less than two years, in addition to any probationary tenancy period."

32. Mr Grundy made the point that this recognised the acceptability of RPSHs granting fixed term tenancies which included a probationary period and that is clearly correct. But the more difficult question is whether the legislation contained in what became ss.21(1A) and (1B) of HA 1988 was intended to have no application if the fixed term was terminated by notice during the probationary period. Although the ministerial statement is limited, it does, I think, make clear that the primary concern was to provide adequate notice to tenants under a fixed term AST of at least two years that they would not have their tenancy renewed at the end of the fixed term. The giving of at least six months' notice of this fact was intended to provide them with sufficient time to find a new home.

33. The Localism Act also introduced into the Housing Act 1985, as ss.107A-107E, provisions relating to what are called flexible tenancies. These are secure tenancies which are granted as in s.21(1A)(a) "for a term certain of not less than two years" and where the tenant has been notified in advance that the tenancy will be a flexible tenancy: see s.107A(2). On the coming to an end of the tenancy the Court must make an order for possession provided that certain conditions are met. Section 107D(1)-(4) states as follows:

> "(1) Subject as follows, on or after the coming to an end of a flexible tenancy a court must make an order for possession of the dwelling-house let on the tenancy if it is satisfied that the following conditions are met.
>
> "(2) Condition 1 is that the flexible tenancy has come to an end and no further secure tenancy (whether or not a flexible tenancy) is for the time being in existence, other than a secure tenancy that is a periodic tenancy (whether or not arising by virtue of section 86).
>
> (3) Condition 2 is that the landlord has given the tenant not less than six months' notice in writing—
>
> (a) stating that the landlord does not propose to grant another tenancy on the expiry of the flexible tenancy,
>
> (b) setting out the landlord's reasons for not proposing to grant another tenancy, and
>
> (c) informing the tenant of the tenant's right to request a review of the landlord's proposal and of the time within which such a request must be made.
>
> (4) Condition 3 is that the landlord has given the tenant not less than two months' notice in writing stating that the landlord requires possession of the dwelling-house."

34. There is an obvious similarity between these provisions and those of s.21 including ss.21(1B) and 21(1)(b). Both types of notice must be served as would be the case if a fixed term AST of the kind specified in s.21(1A) expired by effluxion of time. In the case of a flexible tenancy, the tenancy can only be one granted for a term certain of at least two years so that the reference in s.107B(3)(a) to the "expiry" of the flexible tenancy can only cover the expiry of that tenancy by effluxion of time.

35. This is supported by the Minister's statement on these provisions in the Localism Bill during the debate at the Committee stage. He said:

> "Where a landlord decides that a tenancy should not be extended, however, the tenant will be given the opportunity to challenge that decision as well as sufficient time to find alternative accommodation following advice and support from their landlord. Local authority landlords are required to serve a notice on the tenant six months before the end of the flexible tenancy when they are minded not to reissue it at the end of the fixed term. In addition to that, the landlord, having had to give the early warning, is then required to serve a second notice two months before seeking possession. Taken together, those are important protections for tenants to set alongside the new freedoms that we are giving to landlords."

36. These statements confirm what I think is implicit in both s.21(1B) and the provisions in the Housing Act 1985 governing flexible tenancies, namely that the six month notice period assumes an expiry of the two year or more fixed term by effluxion of time and not as a result of its premature termination under a break clause. The requirement that the landlord should give an additional six months' notice makes no real sense except in that context. The purpose of these changes, as confirmed by the Ministerial statements I have referred to, is to give the tenant who remains until the end of a fixed term tenancy of two years or longer a proper opportunity to re-house himself.

37. The new provisions governing flexible tenancies are not, of course, identical to those relating to ASTs contained in s.21 HA 1988. But the basic structure of the legislative scheme is the same as is much of the language. Section 107A(2) HA 1985 defines a flexible tenancy as a secure tenancy which is "granted" for a term certain of not less than two years whereas s.21(1A)(a) applies the six months' notice provisions in s.21(1B) to an AST which "is" a fixed term of that period. However, s.107D(1), (2) and (4) HA 1985 use the same language as in s.21(1) HA 1988 and s.107(1),(5) and (8) are obviously modelled on s.21(2).

38. Of most interest, perhaps, is s.107D(3) which contains provisions for the giving of six months' notice containing the information that the landlord does not propose to grant another tenancy on the expiry of the flexible tenancy. This is similar in terms to s.21(1B)(a) including the use of the word "expiry".

39. Mr James submitted that "expiry" should be given a wide and general meaning so as to denote any circumstances in which the fixed term was brought to an end. He took us to a number of authorities where, in different contexts, it has been given such a meaning. But in the context of both s.107D HA 1985 and s.21 HA 1988 I consider that it should be read as limited to expiry by effluxion of time.

40. A flexible tenancy, like any fixed term tenancy, can include a proviso for re-entry in the event of a breach of covenant. Termination of the contractual term by forfeiture is expressly contemplated by s.86 HA 1985 as an alternative to effluxion of time, but in that context the legislation uses the phrase "comes to an end" to describe the combination of the two possibilities and the same language can be seen used in s.107D(2) for that reason. By contrast, s.107D(3) refers to the expiry of the flexible tenancy which is consistent with the policy objective of giving the tenant at least six months' advance warning that the tenancy will not be renewed at the end of the fixed term.

41. The same use of language occurs in s.21 HA 1988. Section 21(1)(a) and (2), which apply both where a fixed term expires by effluxion of time and when an AST is terminated by notice, use the phrase "coming to an end". But s.21(1B) refers to expiry which, consistently with the object of the six months' notice provisions, is concerned with the expiry of the fixed term by effluxion of time.

42. Against this background I can return to ss.21(1A)-(1B) and to the construction which Dingmans J relied upon. The judge was, I think, wrong to construe the word "is" in s.21(1A) as importing a requirement that the tenancy should remain a fixed term tenancy for a term certain of not less than two years as at the date of the hearing or the date of issue of the possession proceedings. I agree with Mr James (and with Judge Mitchell) that this would make the new statutory provisions inoperable and cannot have

been what Parliament intended. Dingmans J's view that the word "is" should be applied literally would also cause difficulties in a case where a fixed term tenancy granted for a term of two years or more was allowed to expire by effluxion of time before the landlord served a s.21(1B) notice. It seems unlikely to me that Parliament can have intended that the RPSH should be able to avoid giving six months' notice under s.21(1B) simply by waiting until the contractual expiry of the term. A more rational explanation is that s.21(1A) does no more than to identify the type of tenancy to which the notice provisions in s.21(1B) apply. Looked at in that way, the use of the word "is" makes sense. The use of the present tense was not itself intended to provide a condition which had to be satisfied as at the date of the possession hearing. In the case of a fixed term tenancy of the type described in s.21(1A), the operative provisions are those contained in s.21(1B) which restrict the Court's power to make the possession order sought unless the notice provisions it contains have been complied with.

43. Mr Grundy accepted that on Dingmans J's construction of s.21(1A) the provisions of s.21(1B) could never apply, but he sought to rely on this as indicating that ss.21(1A)-(1B) are, in the form enacted, inoperable and of no effect. It was not, he said, possible to overcome these difficulties by some form of purposive construction unless it was clear what the statutory purpose was and how it was intended to be achieved.

44. I am not attracted to this approach. It is certainly true that the format adopted by the legislation does give rise to some difficulties. If s.21(1B) is intended to be engaged only when the fixed term has expired by effluxion of time there is nothing express in the provisions which limits the obligation to serve the notice to such circumstances. Mr Grundy criticised the appellant's construction of these provisions under which the requirements of s.21(1B) apply in every case so that the six months' notice must have been served on Ms Bamber as a pre-condition to the making of a possession order, even though her tenancy did not expire by effluxion of time and the contents of the notice would have no application to the circumstances of her case. But, in my view, these difficulties can be overcome without giving s.21(1B) a strained meaning and without rendering the provisions as a whole inoperable.

45. The purpose of the requirement to give six months' notice to a tenant of an AST comprising a fixed term of at least two years is relatively obvious. In such cases it is desirable for the tenant to be given adequate notice of the fact that he or she will need to find alternative accommodation and to make any other arrangements consequent on having to move. The longer the tenant has been there, the more complicated those arrangements are likely to be. The need for the service of a notice informing the tenant that the landlord does not propose to grant him another tenancy is much less obvious in the break clause case. The break notice itself (which is likely to be at least two months' notice so as to comply with s.21(1)(b)) will of necessity provide that information.

46. There may be an argument that there will be cases (tenants with disabilities was a suggested example) where the tenant would benefit from being given six months' notice even when the AST was terminated by notice during the probationary period. But those are not difficulties identified in the Parliamentary material nor, in my view, are they provided for by the amendments which were introduced. The purpose of a s.21(1B) notice is to inform the tenant under the AST that the tenancy will not be renewed at the end of the contractual term: not on its termination at any earlier point in time. That information is of no relevance to a tenant whose tenancy is brought to an end on notice or by forfeiture earlier during its term. It seems to me that s.21(1B) should therefore

be read as a bar to the Court making an order for possession only where the term of the AST has expired by effluxion of time. The careful draftsman might have chosen to insert into s.21(1B) after the word "unless" words such as "where applicable". But that reading of s.21(1B) arises by necessary implication given the obvious purpose and limitation of the s.21(1B) notice itself. This, I think, was the view taken by Judge Mitchell and, in my judgment, it is the correct construction of these provisions. It also avoids giving s.21(1A) a construction which would render the intended purpose of the amendments unachievable.

47. In *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 the House of Lords considered the approach to be taken by the Court to the construction of legislation which if read literally did not carry into effect its intended purpose. Lord Nicholls of Birkenhead said at [592-593]:

> "It has long been established that the role of the courts in construing legislation is not confined to resolving ambiguities in statutory language. The court must be able to correct obvious drafting errors. In suitable cases, in discharging its interpretative function the court will add words, or omit words or substitute words. Some notable instances are given in Professor Sir Rupert Cross's admirable opuscule, *Statutory Interpretation*, 3rd ed. (1995), pp. 93–105. He comments, at p. 103:
>
> > "In omitting or inserting words the judge is not really engaged in a hypothetical reconstruction of the intentions of the drafter or the legislature, but is simply making as much sense as he can of the text of the statutory provision read in its appropriate context and within the limits of the judicial role."
>
> This power is confined to plain cases of drafting mistakes. The courts are ever mindful that their constitutional role in this field is interpretative. They must abstain from any course which might have the appearance of judicial legislation. A statute is expressed in language approved and enacted by the legislature. So the courts exercise considerable caution before adding or omitting or substituting words. Before interpreting a statute in this way the court must be abundantly sure of three matters: (1) the intended purpose of the statute or provision in question; (2) that by inadvertence the draftsman and Parliament failed to give effect to that purpose in the provision in question; and (3) the substance of the provision Parliament would have made, although not necessarily the precise words Parliament would have used, had the error in the Bill been noticed. The third of these conditions is of crucial importance. Otherwise any attempt to determine the meaning of the enactment would cross the boundary between construction and legislation: see *per* Lord Diplock in *Jones v. Wrotham Park Settled Estates* [1980] A.C. 74, 105–106. In the present case these three conditions are fulfilled.

> Sometimes, even when these conditions are met, the court may find itself inhibited from interpreting the statutory provision in accordance with what it is satisfied was the underlying intention of Parliament. The alteration in language may be too far-reaching. In *Western Bank Ltd. v. Schindler* [1977] Ch. 1, 18, Scarman L.J. observed that the insertion must not be too big, or too much at variance with the language used by the legislature. Or the subject matter may call for a strict interpretation of the statutory language, as in penal legislation. None of these considerations apply in the present case. Here, the court is able to give effect to a construction of the statute which accords with the intention of the legislature."

48. The correctness of this approach has been confirmed by the Supreme Court in *R (Noone) v Governor of Drake Hall Prison* [2010] UKSC 30.

49. If the provisions of ss.21(1A)-(1B) are given the construction relied on by Mr James then they would operate in a range of circumstances that was never intended. By contrast, the construction put forward by Mr Grundy and adopted by Dingmans J would, as I have explained, render the provisions inoperable. Neither of these outcomes can amount to what Parliament intended and neither is mandated by the proper construction of s.21(1B). The interpretation of these provisions in the manner I have suggested seems to me to give effect to the statutory purpose while not straying beyond the limits of permissible construction as explained by Lord Nicholls in *Inco Europe*.

50. I should mention for completeness an issue raised by Mr Grundy about the consequences of a failure by the landlord to serve the necessary six months' notice either at all or in time for it to expire at, or prior to, the end of the contractual term. Although the immediate and obvious consequence is that the Court cannot make a possession order, the question arises whether the landlord can remedy that situation by serving six months' notice late or whether (as Mr Grundy submits) it then becomes impossible to obtain a possession order under s.21, so that the landlord can only terminate the statutory periodic tenancy which has come into existence on the expiry of the contractual term if he can bring the case within one of the grounds for possession under s.7 HA 1988: see s.5(1)(i).

51. Interesting as this question is, it does not arise in the present case and it is not a point which we should decide in the absence of full argument. It is obvious that the notice to be served under s.21(1B) is one which only makes sense if it is given at least six months prior to the expiry of the contractual term so that the condition in s.21(1B) is not satisfied unless that is the case. But my provisional view is that the landlord could remove that difficulty by the late service of a notice and that to require him to make out grounds for possession under s.7 is not justified by the terms of the legislation or its intended purpose. That, however, is not this case and the appeal fails for the reasons I have given.

52. As an alternative argument, the references in s.21(1A)(a) HA 1988 and s.107A(2)(a) HA 1985 to a "term certain of not less than two years" were relied on before us by Livewest as meaning that the flexible tenancy or the AST must have been granted for a fixed term of that duration which could not be terminated contractually short of the

expiry of the term. If that is right then ss.21(1A)-(1B) had no application to the AST in this case and Livewest was entitled on that ground alone to an order for possession.

53. Given the foregoing discussion, it is not strictly necessary for us to decide whether Mr Grundy is right that a fixed term tenancy with a break clause allowing it to be terminated during the first year is not a tenancy for a "term certain" within the meaning of s.21(1A)(a). But, having heard argument on the point, I propose to set out my views.

54. The words "term certain" are not defined in either HA 1985 or HA 1988 but they were used as part of the definition of a secure tenancy in HA 1985 prior to the introduction of the provisions dealing with flexible tenancies. Given that a flexible tenancy is a species of secure tenancy (see s.107A(1)), it seems reasonable to suppose that the draftsman of the amendments introduced by the Localism Act adopted that definition for the purposes of the changes made to both HA 1985 and HA 1988.

55. Section 82(1)-(3) HA 1985 provides as follows:

> "(1) A secure tenancy which is either—
>
> (a) a weekly or other periodic tenancy, or
>
> (b) a tenancy for a term certain but subject to termination by the landlord,
>
> cannot be brought to an end by the landlord except as mentioned in subsection (1A) .
>
> (1A) The tenancy may be brought to an end by the landlord—
>
> (a) obtaining—
>
> (i) an order of the court for the possession of the dwelling-house, and
>
> (ii) the execution of the order,
>
> (b) obtaining an order under subsection (3), or
>
> (c) obtaining a demotion order under section 82A.
>
> (2) In the case mentioned in subsection (1A)(a), the tenancy ends when the order is executed.
>
> (3) Where a secure tenancy is a tenancy for a term certain but with a provision for re-entry or forfeiture, the court shall not order possession of the dwelling-house in pursuance of that provision, but in a case where the court would have made such an order it shall instead make an order terminating the tenancy on a date specified in the order and section 86 (periodic tenancy arising on termination of fixed term) shall apply."

56. My reading of these provisions is that a secure tenancy which is not a periodic tenancy is treated as granted for a term certain even if it can be terminated by the landlord during the term. This is made clear by the opening words of s.82(3).

57. Such a conclusion would accord with principle. "Term certain" is not, of course, terminology exclusive to the Housing Acts. The requirement that a tenancy should be granted for a term certain has been part of the common law for centuries. In *Say v Smith* (1563) Plowd 269, 272 Anthony Brown J is reported to have said that:

> "every contract sufficient to make a lease for years ought to have certainty in three limitations, viz in the commencement of the term, in the continuance of it, and in the end of it … and words in a lease, which don't make this appear, are but babble ... and these three are in effect but one matter, showing the certainty of the time for which the lessee shall have the land, and if any of these fail, it is not a good lease, for then there wants certainty".

58. In *Blackstone's Commentaries on the Laws of England*, 2nd ed. (1766), vol. II, p. 143 the principle is recorded in these terms:

> "Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years. And therefore this estate is frequently called a term, *terminus*, because its duration or continuance is bounded, limited and determined: for every such estate must have a certain beginning, and certain end."

59. A tenancy granted for a fixed term of, say, two years is limited by grant to a term certain of that duration notwithstanding that it may be brought to an end sooner by forfeiture or by the operation of a break clause. The word "certain" does not mean certain to last for the duration of the term. It means that the lease was granted for a term expressed to expire on a certain as opposed to an uncertain date. A lease granted for two years but with a break clause is nonetheless granted for a term certain of two years. It will end with certainty on that date regardless of any other circumstances.

60. There was initially some doubt as to whether the certainty requirement applied to periodic tenancies. On one view, a periodic tenancy is accommodated within the rule by treating it as granted for a term certain of one week or month as the case may be which is renewed at the end of the period. However, in practical reality, the law assumes a re-letting (or the extension of the term) at the end of each period so that it could be said that the actual maximum term is uncertain. After some judicial debate on this topic, it was settled by the House of Lords in *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386 that (as per Lord Templeman [at 394]):

> "reaffirming 500 years of judicial acceptance … the requirement that a term must be certain applies to all leases and tenancy agreements. A tenancy from year to year is saved from being uncertain because each party has power by notice to determine at the end of any year. The term continues until determined as if

> both parties made a new agreement at the end of each year for a new term for the ensuing year. A power for nobody to determine or for one party only to be able to determine is inconsistent with the concept of a term from year to year …"

61. The principle that a yearly tenancy (and indeed any periodic tenancy) is "saved from being uncertain" because each party has power to determine the tenancy at the end of each term is an important point, to which I will return below. Suffice it to say at this juncture that the law is settled in this area: the Supreme Court having reconsidered the requirement that all tenancies must be for a term certain, and giving the rule renewed (if, it must be said, grudging) approval in *Mexfield Housing Co-operative Ltd v Berrisford* [2012] 1 AC 955.

62. While accepting the existence of this requirement that all tenancies must have certainty of term, Mr Grundy submitted that the words "term certain" are otiose in the context of s.21(1A) HA 1988, such that the draftsman must have intended those words to import some additional meaning aside from the proper understanding of those words at common law. Mr Grundy submitted that, in the context of HA 1988, "term certain" must accordingly be read as excluding any fixed term open to early determination by the operation of a break clause. In making that submission, he placed some reliance on the definition of a "term of years absolute" contained in s.205(1)(xxvii) of the Law of Property Act 1925. He submitted that s.205(1)(xxvii) contrasts a term certain with one which is liable to determination by notice. Section 205(1)(xxvii) states (my emphasis added):

> "Term of years absolute" means a term of years (taking effect either in possession or in reversion whether or not at a rent) with or without impeachment for waste, subject or not to another legal estate, **and either certain or liable to determination by notice**, **re-entry, operation of law, or by a provision for cesser on redemption, or in any other event (other than the dropping of a life, or the determination of a determinable life interest);** but does not include any term of years determinable with life or lives or with the cesser of a determinable life interest, nor, if created after the commencement of this Act, a term of years which is not expressed to take effect in possession within twenty-one years after the creation thereof where required by this Act to take effect within that period; and in this definition the expression "term of years" includes a term for less than a year, or for a year or years and a fraction of a year or from year to year;"

63. In my view, Mr Grundy's approach involves a misreading of the statutory definition. Section 205(1)(xxvii) has never, to my knowledge, been read so as to preclude a term from being certain if it can be determined by a break clause. On the contrary, s.205(1)(xxvii) was cited in both *Prudential* and *Mexfield* as supporting the common law understanding of those words: see Lord Templeman at p. 391B (in *Prudential)* and Lord Neuberger at [36] in *Mexfield.*

64. In the light of those authorities, I take the view that the definition in s.205(1)(xxvii) does not seek to distinguish tenancies of a certain term from those that are liable to determination by notice. The section is merely attempting to include within its definition of a term of years absolute (at a time when the case law on the certainty of periodic tenancies was far from settled) both those tenancies whose term is fixed with certainty from the outset and those periodic tenancies whose maximum term (in practical reality) is unclear but which are nonetheless saved from uncertainty because each party has the power to determine the tenancy at the end of each term. As Lord Neuberger observed at [33] in *Mexfield*, the law in this area is now both clear and intellectually coherent.

65. I do not therefore accept Mr Grundy's submission that the words "term certain" are otiose in the context of s.21(1A) HA 1988. Certainty of term is a condition of every valid tenancy and the reference to a "tenancy for a term certain" in s.82(1)(a) HA 1985 was no more than the use of well-established nomenclature to describe a tenancy granted for a term of years. In formulating the provisions of s.107A(2)(a) HA 1985 and s.21(1A)(a) HA 1988 the draftsman has merely added the requirement for a two year minimum period to that definition.

66. I would therefore have rejected Livewest's alternative argument based on the use of the words "term certain". But, for the reasons I have given, I would dismiss this appeal.

Lady Justice King :

67. For the reasons given by Patten LJ, I agree that this appeal should be dismissed. I express no view on the point left open at [51] absent full argument.

Lord Justice David Richards :

68. For the reasons given by Patten LJ, I agree that this appeal should be dismissed. I prefer to express no view on the point left open at [51], without hearing full argument.
