Neutral Citation Number: [2024] EWCA Civ 73

Case No: CA-2023-000782

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE KING'S BENCH DIVISION
The Hon. Mr Justice Lane
[2023] EWHC 825 (KB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 05/02/2024

Before :

LORD JUSTICE LEWISON
LADY JUSTICE MACUR
and
LORD JUSTICE NEWEY

- -

Between :

ARMIN RAHIMI	**Appellant**
- and -	
CITY OF WESTMINSTER COUNCIL	**Respondent**

- -
- -

Martin Westgate KC and Sarah Steinhardt (instructed by **Shelter Legal Services**)
for the **Appellant**
Nicholas Grundy KC and Daniel Crehan (instructed by **Bi-borough Legal Services**)
for the **Respondent**

Hearing dates : 18/01/2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 05/02/2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Lewison:

Introduction

1. The issue on this appeal is whether Mr Rahimi is entitled to succeed to a secure tenancy of Flat 5, Brackley Court, Pollitt Drive in the City of Westminster on the death of his grandmother, Mrs Hussain. That, in turn, depends on whether at the date of her death, Mrs Hussain was the tenant under a tenancy of the flat granted to her alone. Although Westminster CC had originally granted the tenancy to her and her husband, Mr Kazam, as joint tenants, at the date of Mrs Hussain's death Mr Kazam was no longer living there.

2. HHJ Hellman held that Mrs Hussain was the sole tenant under a tenancy granted to her alone by Westminster by way of implied surrender and regrant, following the departure of her husband, Mr Kazam. But on appeal Lane J reversed his decision and held that there had been no surrender and regrant. His decision is at [2023] EWHC 825 (KB).

The facts

3. The evidence is sparse, and disclosure by Westminster produced very few documents. The essential facts are as follows.

4. On 9 February 2005 Westminster granted Mr Kazam and Mrs Hussain a joint tenancy of the flat. The tenancy began on 21 February of that year. The tenancy was contained in a signed written agreement, incorporating tenancy conditions. The introduction to the tenancy conditions stated:

> "If you have signed this agreement with someone else like your husband, wife or partner, you are a joint tenant. In joint tenancies each tenant is jointly and individually responsible for all the conditions in part 2 of this agreement. This means that if one tenant leaves the home the other tenant must still keep to these conditions."

5. Clause 1 e of the agreement stated:

> "If you have a joint tenancy, each joint tenant is responsible for paying the rent, other charges and any rent owed. Even if one joint tenant leaves, both tenants will still be responsible for the full weekly charges for the property and any rent already owed."

6. That tenancy either was or became a secure tenancy.

7. On 11 May 2011 solicitors for Mr Kazam wrote to the Housing Benefit department at Westminster. They said that Mr Kazam had "departed his home in the above property on 18th March 2011" and that he was "waiting for your department to arrange for him for private accommodation". On 23 May 2011 Praxis Community Projects wrote to Westminster's Homelessness Unit saying that Mr Kazam should be treated as

homeless or threatened with homelessness "because he has been asked to immediately leave as he was staying with his partner. He is staying with his daughter [on a] temporary basis." In about June 2012 Mr Kazam was rehoused in Westminster in social housing owned by a housing trust. Whether that happened because of Mr Kazam's homelessness application or because he was allocated a tenancy through different channels is unknown.

8. In the meantime, Westminster made changes to an internal document entitled "Amendment to Housing Tenancy Details". Section 2 of the document stated:

> "This form is to modify accounts for either "details", "dates" or "parties/agreements"."

9. Under the heading "Parties and agreements" a box had been ticked recording "joint to sole" and the comments said: "Please remove Mr A.M Kazam … From rent account." That document was signed and countersigned by officers of Westminster; and was to take effect on 1 August 2011. Westminster's evidence confirmed that Mr Kazam had been removed from the rent account in about July 2011. Westminster's management software thereafter recorded Mrs Hussain as the sole tenant. Nevertheless, in Westminster's internal records the start date of the tenancy (2005) remained unchanged. There was no evidence that either Mr Kazam or Mrs Hussain were aware of the contents of Westminster's internal records.

10. It was not disputed that after July 2011 the rent for the flat was paid by Mrs Hussain alone, and that no rent was demanded from Mr Kazam.

11. In 2017 Mr Rahimi was a refugee from Iran, living in a refugee camp in Greece. Mrs Hussain supported his application for a visa to come to the UK. She made a witness statement in support of that application in which she said:

> "I have a secure tenancy through Westminster Council and I enclose a copy of my tenancy agreement confirming the same. My husband was previously living with me, but now he's been provided with his own apartment in the same block since he is a lot older than me and is unable to get upstairs. This means that there is only me living at the property. There is enough space for Armin to live with me and we could put a sofa bed in the living room for him. My tenancy agreement says that I am allowed to take in lodgers so I am permitted to have Armin living with me."

12. The enclosed agreement was the original joint tenancy agreement that had been granted to Mrs Hussain and Mr Kazam back in 2005.

13. Mr Rahimi arrived in the UK on 13 September 2017 and lived with his grandmother, Mrs Hussain, until her death on 10 July 2020.

14. On 27 May 2021 Westminster served a notice to quit addressed to Mr Kazam at the property. The notice was served on the basis that he had succeeded to the tenancy by right of survivorship; but as he was no longer living in the flat the tenancy had ceased to be a secure tenancy. On 2 August 2021 Westminster issued proceedings for

possession. Mr Rahimi defended those proceedings on the basis that he was entitled to succeed to the secure tenancy.

15. In the course of her evidence, Ms Nwosu (who was Westminster's only witness) said:

> "The tenancy was not terminated and subsisted at the time of Mrs Hussain's death. A new tenancy was not granted to Mrs Hussain."

16. That evidence was not challenged in cross-examination.

The statutory framework

17. Subject to certain exceptions, a tenancy under which a dwelling-house is let as a separate dwelling is a secure tenancy at any time when the landlord condition and the tenant condition are satisfied: Housing Act 1985 section 79 (1). The tenant condition is that the tenant is an individual and occupies the dwelling-house as his only or principal home; or, where the tenancy is a joint tenancy, that each of the tenants is an individual and at least one of them occupies the dwelling-house as his only or principal home: Housing Act 1985 section 81.

18. A secure tenancy is, in general, incapable of assignment: Housing Act 1985 section 91 (1). For this purpose, a deed of release by one joint tenant to another counts as an assignment: *Burton v Camden LBC* [2000] 2 AC 399. A purported release does not, therefore vest the tenancy in a sole tenant. There are some exceptions to the general principle. Section 91 (3) permits assignments (a) by way of exchange in accordance with section 92; (b) pursuant to certain court orders made in family proceedings and (c) to a person who would be qualified to succeed the tenant if the tenant died immediately before the assignment.

19. Before amendments made by the Localism Act 2011 succession to a secure tenancy was governed by sections 87 to 90 of the Housing Act 1985. Section 87 provided:

> "A person is qualified to succeed the tenant under a secure tenancy if he occupies the dwelling-house as his only or principal home at the time of the tenant's death and either—
>
> (a) he is the tenant's spouse or civil partner , or
>
> (b) he is another member of the tenant's family and has resided with the tenant throughout the period of twelve months ending with the tenant's death;
>
> unless, in either case, the tenant was himself a successor, as defined in section 88."

20. This is the "one succession" rule. It is common ground that Mr Rahimi is a member of Mrs Hussain's family and that he resided with her throughout the period of twelve months ending with her death.

21. Section 88 relevantly provided:

> "(1) The tenant is himself a successor if—
>
> (a) the tenancy vested in him by virtue of section 89 (succession to a periodic tenancy), or
>
> (b) he was a joint tenant and has become the sole tenant, or
>
> …
>
> (e) he became the tenant on the tenancy being vested in him on the death of the previous tenant."

22. Although a literal reading of section 88 (1) (b) would suggest that even if, as Mr Rahimi contends, Mrs Hussain became the sole tenant as a result of a surrender and regrant she would have been a successor, authority binding on this court decides that that is not so. It is only if a person becomes sole tenant under the same tenancy that section 88 (1) (b) applies: *Bassetlaw DC v Renshaw* (1991) 21 HLR 603. If therefore, there was a surrender and regrant amounting to the grant of a fresh tenancy to Mrs Hussain alone, a succession is still available. If, on the other hand, the joint tenancy continued in being, it would have vested by right of survivorship in Mr Kazam. Because he did not occupy the property as his home, the tenancy would at that point have ceased to be a secure tenancy, with the consequence that Westminster validly terminated it by notice to quit. In that case, Mr Rahmi is not entitled to succeed.

The trial judge's judgment

23. In an extempore judgment at the end of a one-day trial, HHJ Hellman held that there had been an implied surrender and regrant. He considered the position of each of the three protagonists. So far as Mr Kazam was concerned, the judge held that he unequivocally relinquished possession by (i) moving out of the property; (ii) requesting alternative accommodation from Westminster; and (iii) accepting a new social housing tenancy. So far as Westminster was concerned, the judge held that Westminster accepted Mr Kazam's surrender because (i) it removed him from the rent account; and (ii) (he inferred) Westminster was instrumental in rehousing Mr Kazam. So far as Mrs Hussain was concerned, she unequivocally agreed to the termination of the joint tenancy because she "excluded [Mr Kazam] from the property by asking him to leave", as recorded in Mr Kazam's letter to Westminster's homelessness unit.

24. He noted that Mrs Hussain became solely responsible for paying the rent, but he regarded that as equivocal, because there was no evidence that she agreed to assume sole responsibility once and for all. The actual payment of rent was consistent with the continuation of the joint tenancy, and Mr Kazam contributing when and if he returned to live at the property. He also discounted the contents of Mrs Hussain's witness statement in support of Mr Rahimi's application for a visa.

25. On that basis, the judge held that Mr Rahimi had succeeded to the tenancy.

26. Westminster appealed against that decision.

The first appeal

27. The first appeal was heard by Lane J. He held at [61] that there was no evidence of unequivocal concurrence in any surrender by Mr Kazam. At [62] he rejected the submission that "one should look holistically at the alleged re-grant and other conduct". He said that he did not accept that a collection of "what are, at best, individually equivocal events can somehow be combined to surmount the high evidential threshold which the case law demands". He went on to say at [63] that the trial judge's finding that Mrs Hussain unequivocally agreed to the surrender by excluding Mr Kazam was wrong, not least because there was no evidence of exclusion. At [64] he said that Mrs Hussain's acts alleged to constitute her agreement to Mr Kazam's surrender could not constitute such an agreement, because they preceded the alleged act of surrender. At [67] he rejected the submission that Westminster had granted Mrs Hussain a fresh tenancy because the trial judge did not make such a finding and there was in any event no evidence that could have supported that finding.

Surrender and regrant

28. The classic exposition of the principle of surrender and regrant is that of Parke B in *Lyon v Reed* (1844) 13 M & W 285, 305-6:

> "This term is applied to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterwards estopped from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. Thus, if lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former….
>
> It is needless to multiply examples; all the old cases will be found to depend on the principle to which we have adverted, namely, an act done by or to the owner of a particular estate, the validity of which he is estopped from disputing, and which could not have been done if the particular estate continued to exist. The law there says, that the act itself amounts to a surrender. In such case it will be observed there can be no question of intention. The surrender is not the result of intention. It takes place independently, and even in spite of intention."

29. In the case of a joint tenancy, the estoppel must bind both the landlord and all the joint tenants. One of two joint tenants cannot, in the absence of express words or authority (which may be inferred), surrender the rights held jointly. If property or rights are held jointly, a transfer must be by, or under, the authority of all interested: *Leek & Moorlands BS v Clark* [1952] 2 QB 788. To similar effect, in *Greenwich LBC v McGrady* (1982) 6 HLR 36 Sir John Donaldson MR said:

> "In my judgment it is clear law that if there is to be a surrender of a joint tenancy, that is a surrender before its natural termination, then all must agree to the surrender."

30. By contrast, in the case of a joint tenancy, one of two joint tenants may terminate it by service of notice to quit without the agreement of the other, but that did not happen in this case. Thus, in the present case, it is necessary for Mr Rahimi to show that there was an arrangement to which Westminster, Mrs Hussain and Mr Kazam were all parties which was inconsistent with the continued existence of the joint tenancy.

31. In considering this question, it has been said more than once that the conduct relied on must be "unequivocal": *Tarjomani v Panther Securities Ltd* (1982) 46 P & CR 32 ("in my judgment the conduct of the tenant must unequivocally amount to an acceptance that the tenancy has been terminated" - Peter Gibson J); *Brent LBC v Sharma* (1993) 25 HLR 257 (Stuart-Smith LJ approving Woodfall on Landlord and Tenant para 1-1849); *Zionmoor v Islington LBC* (1998) 30 HLR 822 ("the parties are estopped from relying upon the absence of a written instrument in circumstances where their conduct is unequivocally inconsistent with the continuance of the tenancy" - Chadwick LJ); *Bellcourt Estates Ltd v Adesina* [2005] EWCA Civ 208, [2005] 2 EGLR 33 ("So one asks if there has been unequivocal conduct of both parties which is inconsistent with the continuance of the existing tenancy" - Longmore LJ); "the conduct of the parties must unequivocally amount to an acceptance that the tenancy has been surrendered" - Peter Gibson LJ)); *Artworld Financial Corporation v Safaryan* [2009] EWCA Civ 303, [2009] L & TR 20 (Jacob LJ at [13] approving Woodfall on Landlord and Tenant para 17.020); *Sable v QFS Scaffolding Ltd* [2010] EWCA Civ 682, [2010] L & TR 30 ("the conduct of the parties must unequivocally amount to an acceptance that the tenancy has ended" - Morgan J, sitting in this court). That is not to say that there must be a single unequivocal act. As Dyson LJ explained in *Artworld* at [30]:

> "…the totality of the landlord's conduct can amount to an acceptance of possession even though the individual acts might each only be equivocal. The court must look at the cumulative effect of the acts relied. If taken together they amount to a resumption of possession, that is enough, even though, viewed in isolation and without regard to the others, each might be capable of being explained away, each case will depend on its own facts."

32. One example of such conduct is where the landlord, with the consent of the tenant, has let the property to a different tenant during the currency of the term.

33. In *Brent LBC v Sharma* Ms Vyas was the sole tenant of a flat where she lived with Mr Sharma. In 1987 she left the flat and went to live in Milton Keynes. In November 1988 she wrote to Brent, saying:

> "I Meera Vyas, official tenant of 33, Donovan Court wish to inform you that I am no longer sharing the flat with Mr. R.A. Sharma of 33, Donovan Court.

> I have moved and have no objection if Mr. R.A. Sharma is granted the transfer of the flat to his name, so he may continue to live there with his two children."

34. In the following month Brent adjusted its housing account in relation to the flat and no longer debited Ms Vyas with any rent. However, Brent refused to grant a transfer of the tenancy to Mr Sharma; it never treated him as the tenant and did not grant him a tenancy. Later that month Brent attempted to serve notice to quit, but service was ineffective. In the following year, Brent began proceedings for possession. The trial judge concluded that Brent "had unequivocally by their conduct shown that there was no longer a continuing existing tenancy, and he based that upon the fact that in their internal records they had no longer debited any rent to [Ms Vyas]". Upholding his judgment, Stuart-Smith LJ said at 259-60:

> "In my judgment, the court is entitled to look at the whole of the conduct of the landlord prior to the issue of proceedings. If, by the time of the issue of the proceedings, it is quite plain that the landlord has accepted by his conduct, or shown by his conduct, that the tenancy no longer existed, then the conditions giving rise to a surrender by operation of law are established. It is quite plain that the tenant, the second defendant, treated the tenancy as at an end as from the service of that letter. In my judgment, the combination of no longer charging rent to the tenant, the service of the notice to quit — which, as my Lord in the course of argument said, was really a belt and braces effort by the council, but which clearly showed that from the expiration of the notice they were treating the tenancy as at an end — coupled with the fact that for months the tenant, to their knowledge, was not in possession or occupation of the premises and the fact that they did not demand any rent during that period, is really overwhelming evidence that they were showing by their conduct that the tenancy no longer existed."

35. Agreeing, Scott LJ said that by the contents of her letter and her occupation of other premises in Milton Keynes, Ms Vyas had made it clear that she was abandoning her tenancy. Part of the landlord's conduct that was relevant was its internal action in no longer charging rent to Ms Vyas. He concluded by saying:

> "The council's conduct in December 1988 may, correctly viewed, have been equivocal. But, in my judgment, by February 1989 at the latest the council's conduct had become entirely unequivocal. If both tenant and landlord are unequivocally treating a tenancy as at an end, the law has no business to insist on its continuance."

36. In my judgment, therefore, Lane J was wrong to say at [62] that individually equivocal acts cannot be combined to surmount the evidential threshold.

37. In *Ealing Family Housing Association Ltd v McKenzie* [2003] EWCA Civ 1602, [2004] HLR 21 Mrs McKenzie was the sole tenant of a flat ("Flat 2") where she lived with her husband. She left Flat 2 because of domestic violence. She told the landlord

that she no longer intended to return and asked for a transfer. The landlord told her that if she accepted a transfer, she would have to terminate her tenancy of Flat 2. On 7 July 2000 the landlord offered her a tenancy of another flat ("No 38"). On 11 July she signed a tenancy agreement for No 38, and on 17 July she moved in. Also on 17 July she signed a document which purported to be a notice to quit to be served on Ealing, but it was ineffective. She served a second notice to quit on 30 January 2001, but that was also ineffective. The trial judge held that there had been a surrender by operation of law on July 11. But this court disagreed. Rimer J said:

> "[16] The material events that had happened by the end of July 11 were (1) Mrs McKenzie moving out of Flat 2 and her statement to Ealing that she had no intention of resuming occupation of it, (2) Ealing's offer to Mrs McKenzie on July 7 of a tenancy at No.38, one accompanied, according to the judge's findings, by a statement that if she accepted it she would have to terminate her tenancy at Flat 2, and (3) the signing on July 11 by Ealing and Mrs McKenzie of the new tenancy agreement of No.38.
>
> [17] I do not accept that these events can have effected an implied surrender of Mrs McKenzie's tenancy of Flat 2. Mrs McKenzie did not give up possession of Flat 2 to Ealing on July 11, 2000 and nor could she. It was still occupied by Mr McKenzie. There is no evidence that she even did so much as to give Ealing any keys she may still have had to Flat 2. Nor did she do anything else on July 11 pointing to the giving up by her of the tenancy on that day. The most that can be said about the events of July 11 is that there was an implied, or perhaps even an express, oral agreement between Mrs McKenzie and Ealing that, in consideration of a grant of the new tenancy of No.38, she would terminate her current tenancy of Flat 2."

38. Of more interest to this case is what Rimer J said about the judge's alternative finding that there was a surrender on 17 July. The trial judge's reasoning was that Ealing had made clear to Mrs McKenzie that if she was to get No 38 she had to give up Flat 2 and the notice to quit demonstrated conclusively Mrs McKenzie's intention to quit and deliver up possession of Flat 2. Once again this court disagreed. But Rimer J went on to say at [20]:

> "But there were other matters in evidence before him, to which he made no express reference in his judgment, which appear to me to be directly supportive of that conclusion. In particular, there was the evidence that as from July 17, 2000 Ealing terminated Mrs McKenzie's rent account for Flat 2 and opened a new one for her in respect of No 38. In addition, Ealing gave instructions to its staff to treat Mr McKenzie as an illegal occupier. Both facts appear to me to point unequivocally to the inference that as from July 17, 2000 Ealing was accepting that Mrs McKenzie's tenancy of Flat 2 had been terminated."

39. Thus, the judge's alternative finding, that there was a surrender on 17 July, was upheld. But in that case not only did Ealing close Ms McKenzie's rent account for Flat 2 (of which she was the sole tenant), but it also opened a new one for No 38. Thus, the only person liable for the rent for Flat 2 was discharged from liability and instead accepted a liability for the rent for No 38.

Was there unequivocal conduct?

40. On behalf of Mr Rahimi, Mr Westgate KC submitted that it was not necessary to find unequivocal conduct apart from the grant of a new tenancy to Mrs Hussain. As he put it, if there was the creation of a new sole tenancy to Mrs Hussain then the question of unequivocal conduct falls away, because the grant of the new tenancy is itself the unequivocal conduct inconsistent with the continued existence of the joint tenancy. Although Mr Grundy KC said that that argument was fallacious, I do not consider that that is so, provided that any new tenancy that Westminster granted to Mrs Hussain was granted with (at least) the consent of Mr Kazam.

41. In *Thomas v Cook* (1818) 2 B & Ald 118 Mr Thomas let a house to Mr Cook on an annual tenancy. Mr Cook sublet the house to Mr Perkes. In 1817 Mr Cook was in arrear with rent; and Mr Thomas directed Mr Perkes to pay the rent to him rather than to Mr Cook. Mr Cook refused to accept Mr Perkes' bill for the rent due; but Mr Thomas agreed to take it in payment of the rent due from Mr Cook; and said that he would have no more to do with Mr Cook. Later in the year, Mr Thomas distrained on Mr Perkes' goods for rent. The judge directed the jury that the question was whether Mr Thomas had, with the consent of Mr Cook, accepted Mr Perkes as his tenant. The jury found as a fact that he had. Mr Cook was not, therefore, liable for use and occupation. On appeal, the judges all held that on the basis of that finding of fact, there had been a surrender by operation of law. Although that case supports Mr Westgate's argument that if Westminster had granted a new sole tenancy to Mrs Hussain with Mr Kazam's consent it would have amounted to a surrender and regrant, it does not touch on the question whether that is what happened in this case, because in *Thomas* that was a question of fact for the jury.

42. In *Graham v Whichelo* (1832) 1 Cr & M 188 Mr Graham let a house to Mr Whichelo and Mr Hull for a three year term from 25 May 1827, with an option to renew for a further four years, which they occupied as partners in a picture dealing business. In 1828 the partnership was dissolved, and Mr Whichelo retired from the business. In 1829 Mr Hull entered into a new partnership with Mr Smart, and they traded as Hull & Co. Mr Graham sued for rent due. The action was discontinued against Mr Hull, who was by then bankrupt. Mr Whichelo defended the action on the basis that there had been a surrender by operation of law and that Mr Graham had accepted Messrs Hull and Smart as his tenants. Mr Graham had in fact issued receipts for rent as rent received from Hull and Smart. That defence failed. Bayley B said at 193:

> "It seems to me that this case is distinguishable from *Thomas v Cook*. In that case the lessee underlet, and the lessor accepted the underlessee as his tenant, and the original lessee assented; so that all the three parties assented to the arrangement by which the underlessee became the immediate tenant to the original landlord. Now, if it could have been made out in the present case that the plaintiff agreed to give up Whichelo, that

> Whichelo assented, and that Smart agreed to become tenant, the principle of *Thomas v Cook* would apply, but I am of opinion that this case is very different, because there was no agreement on the part of Graham to give up Whichelo, or on the part of Smart to be bound as tenant."

43. Thus, what is required is an agreement by the landlord to accept the incoming tenant, with the "assent" of the outgoing tenant. On the facts, there was no such agreement.

44. In *M'Donnell v Pope* (1852) 9 Hare 705 Mr M'Donnell claimed rent from the estate of Ms Anna Pope for the period from July 1847 to October 1849. The defence was that Ms Anna Pope was not liable for rent beyond January 1848. The two issues in the case were: first, whether the premises were originally let to Anna Pope alone or to her and Charlotte Pope, and second, whether on the assumption that they were originally let to Anna Pope alone, Mr M'Donnell had adopted Charlotte Pope as his tenant thereby discharging Anna Pope's estate. On the first issue Turner V-C held that, on the facts, the property had been originally let to Anna Pope alone. On the second issue the Vice Chancellor accepted the principle that a new letting to a third party with the consent of the original tenant operated as a surrender by operation of law; but he held on the facts that there had been no grant of a new tenancy during the period for which rent had been claimed.

45. In *Sable v QFS Scaffolding Ltd* [2010] EWCA Civ 682, [2010] L & TR 30 Morgan J, sitting in this court, said at [10] ix):

> "where the tenant requests the landlord to let the property to a third party, and the landlord does so, the lease is surrendered at the time of the new letting; the surrender does not take place before the time of the new letting; it is essential that the new letting is effected with the consent of the original tenant; if the original tenant does not consent or know of the new tenancy, there is no surrender; the original tenant's consent may be inferred from conduct or from long acquiescence in the new arrangement."

46. He added at [63]:

> "The position in the present case is very different from the cases discussed in Woodfall at paras 17.030 and 17.031. Those cases proceed on the basis that it can clearly be seen there is a new letting of the premises. In such a case, where the original tenant requests that the new letting takes place, or otherwise unequivocally assents to it, then there is an implied surrender immediately before the new letting. This implication of a surrender is made because there is a plain inconsistency between the existence of two incompatible tenancies, namely, the original tenancy and the new letting. The coming into existence of the new letting with the assent of the original tenant means that one must imply that the original tenancy has ended. The time at which it is appropriate to make that implication is immediately before the new letting takes effect

> and the implication is for the purpose of enabling the new letting to be effective."

47. Thus, in *Collins v Claughton* [1959] 1 WLR 145 Mr Claughton was the sole tenant of a house in Leeds. He and his wife signed a letter to the landlord which said:

> "As I have come to an agreement with my wife on changing name on rent book into her name, Amy, would you be kind enough to grant same as she is going to see it is paid in the future herself."

48. The landlord agreed and changed the name on the rent book. This court held that that amounted to a surrender and regrant.

Change of possession

49. It was, I think, common ground that where it is alleged that a new tenancy has been granted to someone other than the original tenant, there must be a change of possession; and that that principle applies equally where it is alleged that a new tenancy has been granted to one of two joint tenants. But a change of possession need not be a change of physical occupation, which is (or may be) different from legal possession.

50. In *Metcalfe v Boyce* [1927] 1 KB 758 PC Boyce was the quarterly tenant of a house. In 1912 the county police authority decided that in future the Chief Constable should be the tenant of houses occupied by serving officers; and that he should pay the rent and rates. PC Boyce consented to this arrangement. Thereafter rent demands were addressed to the county authority. The receipt of rent was also acknowledged in the name of the county authority. But PC Boyce's name remained on the landlord's records as the tenant. The Divisional Court held that there was evidence on which the trial judge was entitled to infer that PC Boyce agreed with the Chief Constable that he would occupy the house as a servant and not as a tenant; and that the Chief Constable and the landlord agreed that the Chief Constable should become tenant in place of PC Boyce. On the basis of those findings of fact, Salter J held there had been a surrender by operation of law; although MacKinnon J held that there was either a surrender by operation of law or an assignment by operation of law.

51. In *Haringey LBC v Ahmed* [2017] EWCA Civ 1861, [2018] HLR 9 Mr Ahmed was the sole tenant of a house. At his request that tenancy was replaced by a new letting to himself and his mother as joint tenants. Hamblen LJ said at [48]:

> "In the present case … the first agreement would have been an agreement with Mr Ahmed as sole tenant. Although he did not enter into possession of the Property he had the right to do so. At his request that tenancy was replaced by letting the Property to Mr Ahmed and Mrs Ahmed as joint tenants under the second agreement. He thereby relinquished his right to sole possession. The second agreement was a valid agreement, being in writing and duly executed, and it was an agreement with a different tenant. It also stated on its face "Amend tenancy". In these circumstances, I accept the Council's case that Mr Ahmed's

> act, in signing the second agreement, was an unequivocal act inconsistent with the continuation of the first agreement. This surrender was accepted unequivocally by the Council when it granted a tenancy under the second agreement, at which point the first agreement terminated."

52. Thus, a change from occupation as a tenant to occupation as a service occupier without possession; or a change in possession from possession as sole tenant to joint possession as one of joint tenants, satisfied this requirement. I would also hold that if joint possession is replaced by sole possession, that is also enough.

53. These cases support Mr Westgate's general submission. I would, therefore, accept Mr Westgate's argument that if Westminster granted a new tenancy to Mrs Hussain either at Mr Kazam's request or with his consent, that would be sufficient to satisfy the requirement of unequivocal conduct. I do not find in the authorities any requirement that the consent or agreement of the outgoing tenant must itself be independently unequivocal. But although the argument may not be fallacious in itself, it begs the question.

The real question

54. The real question on this appeal is not what is the *effect* on the joint tenancy of the grant of a new sole tenancy to Mrs Hussain with Mr Kazam's consent. On the contrary, the principal question is *whether* Westminster granted a new sole tenancy to Mrs Hussain, with the consent of Mr Kazam. The distinction between the two is illustrated by the decision of this court in the *Sable* case. In that case Mr Sable granted a lease of a builder's yard to a company (LDC) that carried on two businesses from the site. Joint administrative receivers were appointed of LDC, and a new company (QFS) was formed with a view to a possible takeover of one of the businesses. Mr Sable and QFS began negotiations for the grant of a new lease to QFS, but no new lease was ever granted. QFS subsequently approached the receivers, who purportedly executed a deed assigning the lease to QFS. Mr Sable brought possession proceedings against QFS, arguing that the lease was surrendered by operation of law, that QFS was in occupation of the premises during the negotiations as a tenant at will, and that the tenancy at will was determined by Mr Sable, so he was entitled to possession. The trial judge found for Mr Sable, holding that LDC was party to the creation of a new tenancy, albeit only a tenancy at will, in favour of QFS, and that tenancy could not be valid if LDC's interest under the lease had continued to exist. He held that that amounted unequivocally to an acceptance by LDC that the tenancy had ended. This court allowed an appeal by QFS. Of particular relevance to this appeal Morgan J said:

> "[59] The landlords' case on this appeal proceeds by the following steps. The first step is that the landlords granted a tenancy at will to QFS. The second step is that LDC, through its receivers, assented to the grant of that tenancy at will….
>
> [60] I question the first step in the above reasoning. It is true that it was common ground before the judge, and before us, that if (I stress "if") the Lease had been surrendered the conduct of the landlords and of QFS would have justified the implication of the grant of a tenancy at will…. It must be emphasised that

> the implication of a direct tenancy at will or licence from the landlords to QFS is only appropriate where there has been a surrender of the Lease, or some other way in which the Lease had been determined. …
>
> [62] If, therefore, the implication of a tenancy at will or a licence is only appropriate where there has been a surrender, it seems to me to be the wrong starting point to assume the existence of a tenancy at will and then to go on to ask whether there has been a surrender. That process involves assuming the answer "yes" to the question (has there been a surrender?) and then going on to pose and attempt an answer to that very question. One is assuming the answer to the question before one starts."

55. In essence, I consider that that is the real fallacy at the heart of Mr Westgate KC's primary argument. It assumes the grant of a sole tenancy to Mrs Hussain with Mr Kazam's consent, whereas whether such a tenancy was granted is the very question in issue. Mr Westgate KC sought to meet this point by saying that Westminster had not appealed against the trial judge's finding that a new sole tenancy had been granted to Mrs Hussain. That is, in my judgment, an overly narrow view of Westminster's grounds of appeal. The whole thrust of the appeal was that the trial judge had been wrong to hold that there had been a surrender and regrant. That, to my mind, is the clear meaning of grounds 1 and 4 of Westminster's grounds of appeal to the High Court, taken together. Moreover, it was conceded on Mr Rahimi's behalf on the first appeal at [60] that the trial judge had made no finding that a new tenancy had arisen.

56. If I am right in thinking that it is wrong to assume the grant of a new sole tenancy to Mrs Hussain as the starting point, it then becomes necessary to identify other conduct which is inconsistent with the continuing existence of the joint tenancy.

57. *Laurence v Faux* (1861) 2 F & F 435 does not, in my view take matters much further. All that is says is that the giving of rent receipts in the name of a third party is strong evidence of a change of tenant. But in this case the issue of rent demands to Mrs Hussain is not evidence of any change of tenant.

58. *Tower Hamlets LBC v Ayinde* (1994) 26 HLR is another case which turned on its facts. The issue was whether the council had granted a new tenancy to Ms Ayinde. The trial judge held that it had, and his decision was upheld by this court. What is of particular interest in the context of this case is that Nourse LJ said that the case turned on well-established principles of the law of landlord and tenant; but the cases to which he referred (notably *Marcroft Wagons Ltd v Smith* [1951] 2 KB 496) lay down the ordinary principles which apply when the court is asked to infer the grant of a tenancy by conduct. In *Marcroft*, having referred to the Rent Acts, Denning LJ said at 506:

> "In these circumstances, it is no longer proper for the courts to infer a tenancy at will, or a weekly tenancy, as they would previously have done from the mere acceptance of rent. They should only infer a new tenancy when the facts truly warrant it. The test to be applied in Rent Restriction Acts cases is the same test as that laid down by Lord Mansfield in cases of holding

> over: "The question therefore is, quo animo the rent was received, and what the real intention of both parties was?": see *Doe v Batten*, followed by this court very recently in *Clarke v Grant*. If the acceptance of rent can be explained on some other footing than that a contractual tenancy existed, as, for instance, by reason of an existing or possible statutory right to remain, then a new tenancy should not be inferred."

59. The real question, then, is whether it is a proper inference that Westminster granted a new sole tenancy to Mrs Hussain with Mr Kazam's consent.

Did Westminster grant a new tenancy to Mrs Hussain?

60. One short (and possibly over-simplified) answer to this question is that neither the trial judge nor Lane J made a finding to that effect. Although it was accepted that the trial judge must have made such a finding implicitly, he did not explain on what basis he made that finding. Moreover, as I have said, Westminster's evidence that no new tenancy had been granted to Mrs Hussain was not challenged in cross-examination.

61. It is also important to remember that this is not a case of a stranger to the original tenancy asserting the grant of a new tenancy to them, but a case in which it is said that a new tenancy was granted to someone who was already a joint tenant of the same property.

62. In order to sustain the conclusion that Westminster granted a new tenancy to Mrs Hussain, one would need to find some communication or interaction between the putative landlord and the putative tenant which supports that conclusion. But in this case, nothing that passed between Westminster and Mrs Hussain was inconsistent with the continuation of the joint tenancy. Despite Mr Kazam's departure, Mrs Hussain remained liable for the rent, as the tenancy agreement made clear. That, to my mind, is a very strong pointer against the conclusion that a new sole tenancy was created. Indeed, section 81 expressly contemplates a secure tenancy granted to more than one individual where only one of them occupies the dwelling-house as their only or principal home. The judge said that Westminster would have been "most unlikely" to have rehoused Mr Kazam if they had formed the view that he would remain a tenant of another social housing property in the borough. But that, with respect, overlooks the fact that Mr Kazam's application to Westminster was on the basis that he was homeless. If Westminster had accepted that he was homeless and in priority need, it would have had a duty to secure housing for him unless he was intentionally homeless. That duty would have arisen even if the Mr Kazam was a joint tenant of another social housing property if it was unreasonable for him to continue to occupy that property. Moreover, if Westminster had wished the joint tenancy to be terminated, it could (and no doubt would) have required service of a notice to quit by either or both joint tenants on the basis that a new tenancy would then be granted to Mrs Hussain. In addition, Mr Kazam was not rehoused until June 2012, over one year after he left the property, and nearly a year after Westminster changed its internal records.

63. Nor can I find any support for the trial judge's finding that Mr Kazam relinquished legal possession. Neither of the letters written on his behalf mentioned the joint tenancy. He made no request for that tenancy to be transferred to Mrs Hussain alone.

There was no evidence that he returned the keys. The mere fact that he left the property (even at Mrs Hussain's request) does not support the conclusion that he relinquished joint legal possession. As I have said, occupation is not the same as possession. Nor is there any evidence that he consented to the grant of a new tenancy to Mrs Hussain alone. Indeed, there is no evidence that he even knew about any arrangement between Westminster and Mrs Hussain. Although the trial judge said that Mr Kazam was "excluded" from the property, we have been shown no evidence to support that conclusion; and Mr Westgate KC accepted that there was none. The highest that it can be put is that Mrs Hussain asked him to leave and he complied with her request. For the same reason, when he turned to the conduct of Mrs Hussain, his finding that she "excluded" Mr Kazam cannot be sustained. In addition, of particular relevance in relation to Mrs Hussain is the trial judge's acceptance that there was no evidence that she ever agreed to be solely responsible for the rent.

64. The trial judge discounted the evidence that in support of Mr Rahimi's application for asylum she relied on the original tenancy granted in 2005. In my judgment he was wrong to do so. In *Brent v Sharma* (in a passage I have quoted) Stuart-Smith LJ said:

> "In my judgment, the court is entitled to look at the whole of the conduct of the landlord prior to the issue of proceedings."

65. What is true for the landlord's conduct must be equally true for the tenant's conduct, as Mr Westgate KC accepted. Mrs Hussain's reliance on the original joint tenancy agreement is also inconsistent with the grant of a new tenancy to her alone.

66. The trial judge placed considerable reliance on the fact that Westminster removed Mr Kazam from the rent account. As I have said, there is no evidence that either Mr Kazam or Mrs Hussain were aware of the contents of Westminster's internal records. But in any event, since both joint tenants were severally liable for the rent, those records are equally consistent with the continuation of the joint tenancy. Where joint tenants are severally liable to pay the rent, the landlord may choose whether to demand rent from one of them or from both of them. Moreover, Westminster's internal records did not amend the start date of the tenancy which remained 2005. The only part of Westminster's records which might point to a relevant change is the tick against the line "joint to sole". But even that is more consistent with the continuation of the existing tenancy than the grant of a new one, because if there had been the grant of a new tenancy to Mrs Hussain alone it would never have been a joint tenancy. In addition, although Mr Westgate KC argued that the internal records were relevant to the question of estoppel, he accepted that they were of little relevance to the question whether Westminster granted Mrs Hussain a new sole tenancy, because that depended on the inference that a new contract had been created. Since neither Mr Kazam nor Mrs Hussain were aware of those internal records, they can have little if any bearing on the question whether Westminster granted a new tenancy to Mrs Hussain alone.

67. Everything that happened after Mr Kazam's departure can be explained on some other footing than that Westminster granted a new sole tenancy to Mrs Hussain.

68. In short, applying the test in *Marcroft*, I consider that there was no proper basis upon which it could be inferred that Westminster granted a new sole tenancy to Mrs Hussain. The upshot is that she remained a joint tenant until her death, and at that

point the joint tenancy vested in Mr Kazam by right of survivorship. Westminster validly terminated it, and Mr Rahimi is not entitled to succeed to it.

69. Mr Westgate KC submitted that the proper course, if we considered that the trial judge's conclusion could not be sustained, was to remit the case for a further hearing. But the principle of finality in litigation is an important one, and I was unable to understand what useful purpose a remittal would have, except to permit Mr Rahimi to re-run the argument on the basis of the same materials that were before the trial judge. I would not accede to that submission.

Result

70. I would dismiss the appeal.

Lady Justice Macur:

71. I agree with my Lord Lewison LJ's exposition of the relevant law and his reasoning that the principal issue in this appeal is whether Westminster granted a sole tenancy to Mrs Hussain with the agreement of Mr Kazam. However, I respectfully disagree with his conclusion, and consequently that of Lane J on the first appeal, that there is no proper basis upon which a judge at first instance could infer that Westminster did grant a new sole tenancy to Mrs Hussain following Mr Kazam's departure.

72. I regard the internal document which is described in paragraphs [8] and [9] above to be of particular significance. It is signed and countersigned by two council officials, two days apart from each other and two months after the receipt of the first of the letters sent on Mr Kazam's behalf. (See [7] above). I agree with Mr Westgate KC that it is impossible to describe the relevant entries in the document as an "administrative error."

73. I agree that there is no evidence that either Mrs Hussain or Mr Kazam were aware of this document, and therefore, it cannot give rise to an estoppel on the basis of an independent and unequivocal act by Westminster, but I consider it could supply strong inferential evidence of the grant of a new tenancy when seen in context of the cumulative circumstances of this case.

74. Whilst I find it surprising therefore that Ms Nwoso was not cross examined on the contents of the internal document in light of the assertion in her witness statement dated 14 February 2022 to the effect that: "Mr Kazam did not serve a Notice to Quit. The tenancy was not terminated and subsisted at the time of Mrs Hussain's death. A new tenancy was not granted to the late Mrs Hussain. I refer to a screen from the Claimant's computer records showing the date of the tenancy as 21 February 2005 …", I do not regard this as fatal to Mr Westgate KC's submissions. The assertion rested upon the premise that a notice to quit was not served by either joint tenant and that the local authority's computer records were not changed but is devoid of reference to any other context.

75. As to context, I agree that the facts of separation, (whether by "exclusion" or otherwise), the rehousing of Mr Kazam, the removal of his name from the rent account, Mrs Hussain's continued sole occupation prior to the arrival of Mr Rahimi, and her arranging housing benefit to make payment of the rent, are equivocal and may

be explained on some other basis than Westminster granting a new tenancy to Mrs Hussain after Mr Kazam's departure. Nevertheless, for the reasons given in paragraphs [31] to [36] above, Lane J was wrong to say that individually equivocal events cannot be combined to surmount the evidential threshold, and I consider that it would be possible, although not inevitable, for a judge at first instance to conclude that a sole tenancy had been granted.

76. I do not ignore the whole of the conduct of Mrs Hussain in this assessment. In my view the trial judge was entitled to discount the evidence that Mrs Hussain had exhibited a copy of the original joint tenancy to her statement in support of her grandson's application for residence in the UK, as inconsistent with the grant of a new tenancy. It was open to HHJ Hellman to place little weight upon this fact for the reasons he gave in paragraphs 57 and 58 of his judgment. That is, the purpose of exhibiting the tenancy agreement was to establish the fact of a secure tenancy, and not necessarily a sole tenancy, to support the applicant's entry and residence in the UK.

77. Rightly in my view, Mr Grundy KC conceded that, subject to the arguments he had advanced on surrender, there was evidence upon which HHJ Hellman could infer that a new tenancy had been granted to Mrs Hussain alone. I agree with Mr Westgate KC, and with Ms Steinhardt's submission in the first appeal, that the first instance judge must be assumed to have made such a finding for him to have made the order affirming the appellant's right of succession to possession of his grandmother's property. Mr Grundy KC concedes this point.

78. However, I do not consider that it is possible to sustain the trial judge's implicit finding to this effect in the absence of explicit reasoning on the point, and recognising that the respondent's arguments in this appeal have not been marshalled to this end.

79. Consequently, I would allow the appeal and remit to the County Court for a rehearing.

Lord Justice Newey:

80. Like Macur LJ, I agree with Lewison LJ's exposition of the relevant law and that the key question raised by the case is whether Westminster granted a new sole tenancy to Mrs Hussain, with Mr Kazam's consent. As Lewison LJ has explained, Lane J concluded in paragraph 67 of his judgment that there was no evidence before His Honour Judge Hellman which could have supported such a finding. Lewison and Macur LJJ differ as to whether Lane J was correct in this respect.

81. No one suggests that there is direct evidence of a fresh tenancy having been granted. The question is whether there is material from which a grant could be inferred. In that connection, evidence of conduct which is just as consistent with the continuation of the original joint tenancy will not suffice. Lewison LJ cites *Marcroft Wagons Ltd v Smith* [1951] 2 KB 496 on this point. Authorities addressing contractual issues in other contexts also show that, where parties' behaviour can be explained by reference to pre-existing rights, that may prevent a contract arising. For example, in *The Aramis* [1989] 1 Lloyd's Rep 213, Stuart-Smith LJ said at 229-230:

> "What the court has to determine is whether that is evidence of a new contract between shipowner and holder of the bill of

> lading …. Since there is no evidence of any express agreement, it has to be inferred from the conduct of the parties. If their conduct is equally referable to and explicable by their existing rights and obligations, albeit such rights and obligations are not enforceable against each other, there is no material from which the court can draw the inference."

Bingham LJ, another member of the Court, said at 224:

> "it would, in my view, be contrary to principle to countenance the implication of a contract from conduct if the conduct relied upon is no more consistent with an intention to contract than with an intention not to contract."

82. Lewison LJ expresses the view in paragraph 68 of his judgment that, applying the test in *Marcroft*, there was no proper basis upon which it could be inferred that Westminster granted a new sole tenancy to Mrs Hussain. For my own part, I find his reasoning convincing.

83. The matters which lead me to agree with Lewison LJ include these:

i) Mrs Hussain was entitled to remain in occupation, and under an obligation to pay the rent, regardless of whether she was granted a fresh tenancy. The fact that she did so cannot of itself, therefore, provide evidence of such a grant, and Judge Hellman noted that he had "no evidence that she agreed to assume sole responsibility once and for all" for the rent;

ii) Mrs Hussain did not suggest in either her witness statement of 26 May 2017 or that of 30 April 2018 that any tenancy other than the joint one had been granted. To the contrary, she produced a copy of the 2005 tenancy agreement by way of confirmation that she had a secure tenancy. It is fair to say, as Judge Hellman did, that the statement in which she did so was "not directed to the basis on which she held a secure tenancy because that was not an issue in the application for Mr Rahimi to be allowed to join his family in the United Kingdom", but I do not think that renders the matter irrelevant. If Mrs Hussain had agreed with Westminster that she should be granted a replacement tenancy, her statements might have been expected to reflect that fact;

iii) Ms Nwosu said in the witness statement which she adopted as her evidence in chief at the trial that the original tenancy "was not terminated and subsisted at the time of Mrs Hussain's death" and that "[a] new tenancy was not granted to the late Mrs Hussain". She was not challenged on this evidence notwithstanding the "general rule in civil cases … that a party is required to challenge by cross-examination the evidence of any witness of the opposing party on a material point which he or she wishes to submit to the court should not be accepted": see *Griffiths v TUI (UK) Ltd* [2023] UKSC 48, [2023] 3 WLR 1204, at paragraph 70(i), per Lord Hodge. It is fair to say that Ms Nwosu accepted during cross-examination that she had not been the relevant housing officer in 2011, but there is no question of that having made it unnecessary to challenge what she said. The fact that Ms Nwosu appears to have witnessed the "Amendments to Housing Tenancy Details" document on which Mr

Westgate KC placed particular reliance made it the more important to put Mr Rahimi's case to her;

iv) Mr Westgate described the disclosure given by Westminster as "extremely thin". As, however, was explained to us, Westminster was required to give standard disclosure, which would have included both documents adversely affecting its case and documents supporting Mr Rahimi's case. There having been no complaint that Westminster failed in its obligations, there is no good reason to suppose that there are other documents in Westminster's hands which would support an inference that Mrs Hussain was granted a fresh tenancy. Yet it is surely overwhelmingly likely that some such documentation would have come into existence if Westminster had agreed a new tenancy with Mrs Hussain;

v) The evidence does not show Mrs Hussain to have "excluded" Mr Kazam from the property, but, even supposing that she did, that would not evidence the grant by Westminster of a replacement tenancy;

vi) Nor can the letters written to Westminster on Mr Kazam's behalf in May 2011 assist Mr Rahimi. It would not have been at all surprising if, following Mr Kazam's departure from the flat and, especially, his rehousing, Westminster had thought it appropriate for the joint tenancy to be brought to an end and a fresh tenancy to be granted to Mrs Hussain alone. However, (a) there is no evidence that Mrs Hussain was even aware of the May 2011 letters or had any contact with Westminster about Mr Kazam's rehousing, (b) there is no reason to suppose that Westminster encouraged either Mrs Hussain or Mr Kazam to serve a notice to quit, as it might have been expected to do in advance of the grant of a substitute tenancy and (c) there was no particular disadvantage to Westminster in allowing the joint tenancy to continue;

vii) With regard, finally, to the "Amendments to Housing Tenancy Details" document, (a) this will not have come to the attention of either Mrs Hussain or Mr Kazam, (b) the tick against "joint to sole" under the heading "Parties and agreements" is apt to refer to a perceived change in *parties* without any *agreement* to that effect having been concluded, (c) as Lewison LJ has pointed out, a tenancy granted to just Mrs Hussain would never have been a joint tenancy, (d) Mr Kazam was not rehoused until the following year and (e) Westminster's computer records continued to give the date on which the tenancy commenced as February 2005, when the original tenancy came into being.

84. As Macur LJ mentions, Mr Grundy KC did not in his oral submissions challenge the proposition that there was evidence before Judge Hellman from which the grant of a new tenancy could be inferred. I have considered whether that means that Mr Rahimi's appeal should be allowed regardless of whether there was in fact such evidence. However, Westminster had contended in its skeleton argument for the appeal that "the finding of Lane J that there was no evidence to support a finding of Mrs Hussain and the Council entering into a new tenancy is unarguably correct", and Mr Westgate KC addressed the point fully both in Mr Rahimi's skeleton argument and orally. That being so, I do not think any concession by Mr Grundy KC can have prejudiced Mr Rahimi or make it appropriate to reject Lane J's conclusion that there

was no evidence warranting a finding of a fresh tenancy when, like Lewison LJ, I too am of that view.

85. In all the circumstances, I agree with Lewison LJ that the appeal should be dismissed.