



Press Summary

9 March 2022

Croydon London Borough Council (Appellant) v Kalonga (Respondent)

[2022] UKSC 7

On appeal from: [2021] EWCA Civ 77

Justices: Lord Briggs, Lady Arden, Lord Kitchin, Lord Leggatt, Lord Stephens

Background to the Appeal

The Appellant local housing authority, Croydon Borough Council (“**Croydon**”), granted the Respondent, Ms Kalonga, a fixed-term secure tenancy of five years from 25 May 2015 over 61 The Crescent, Croydon, Surrey (the “**Property**”). On 2 August 2017, Croydon served Ms Kalonga with notice that it intended to seek possession of the Property on the grounds of rent arrears and anti-social behaviour. Each of those acts would have constituted a breach of her tenancy conditions and, subject to the issues in the appeal, a ground for seeking possession under Schedule 2 to the Housing Act 1985 (the “**1985 Act**”). [10] – [11]

There are two issues in the appeal. The first is whether Croydon was able to determine Ms Kalonga’s tenancy and seek possession in those circumstances or whether it was prevented from doing so in light of the statutory protections for secure tenancies under the 1985 Act as they apply to fixed-term tenancies granted by public sector landlords. That issue turned on the proper construction of the statutory regime governing secure tenancies, now to be found in Part IV (sections 79 and following) of the 1985 Act. The second issue is whether Ms Kalonga’s tenancy agreement contained a forfeiture clause, under which Croydon could terminate Ms Kalonga’s lease because of some fault on her part. [1], [13]

Ms Kalonga succeeded on both preliminary issues at first instance in the High Court and before the Court of Appeal. The Court of Appeal held that the only way to bring a secure fixed-term tenancy to an end under the 1985 Act during the period of the fixed-term was by the exercise of a forfeiture clause to obtain a termination order in lieu of forfeiture pursuant to section 82(3) of the 1985 Act. That required compliance with the provisions under the Law of Property Act 1925 governing forfeiture, including the right for the tenant to seek relief from

forfeiture. Croydon had not purported to rely upon forfeiture in seeking to terminate Ms Kalonga's fixed-term tenancy and the Court of Appeal held that her tenancy agreement did not, in any event, contain a forfeiture clause. As a result, Croydon could not terminate Ms Kalonga's fixed-term tenancy prior to the end of the five year fixed-term. Croydon appealed to the Supreme Court. Ms Kalonga's tenancy had expired by effluxion (passage) of time before the High Court gave judgment on 2 June 2020 but the Court of Appeal and Supreme Court elected to hear the case given the importance of the issues involved. [14] – [15]

Judgment

The Supreme Court unanimously allows the appeal in part. Lord Briggs gives the leading judgment with which all other members of the Court agree.

Reasons for the Judgment

The construction of the relevant provisions of the 1985 Act advanced by the parties and by the courts below all gave rise to significant difficulties which either did not reflect the language used or gave rise to unpalatable results which did not reflect the purpose of the legislation. The provisions had to be interpreted so as to accommodate sensibly all situations, not just that of Ms Kalonga. On Ms Kalonga's interpretation, a social housing landlord could never terminate a fixed-term secure tenancy early, including for beneficial public purposes such as to permit a redevelopment, even where it has made express contractual provision to do so via a relevant break clause in the tenancy agreement. On Croydon's case, a model tenant under a fixed-term tenancy containing no break clause would be exposed to the constant risk of eviction on any of the "no-fault" grounds in Schedule 2 to the 1985 Act, for example to enable the landlord to redevelop. Such a tenant's contractual and proprietary rights under their tenancy agreement would therefore be substantially interfered with. [25] – [37]

A different solution was therefore required. In order to reach this solution, the critical question was whether Parliament intended via the security of tenure provisions of the 1985 Act to grant greater protections to social housing tenants compared with the contractual and proprietary rights under their tenancy agreements or to replace and to some extent reduce or remove them. [7], [38]

A fixed-term tenancy confers substantial security of tenure. Legislation to improve tenants' rights should not be construed lightly as taking that away. The 1985 Act did not demonstrate that Parliament intended the possession regime to apply to all fixed-term secure tenancies. Those without provisions for early termination were immune until the end of the fixed-term. Parliament could not be taken as intending to expose a tenant to a loss of contractual security of tenure earlier than the landlord could have obtained possession under the terms of the tenancy. [38] – [40]

The key to reaching this conclusion was attention to the words of section 82(1) and, in particular, reading "*subject to termination by the landlord*" with "*cannot be brought to an end by the landlord except...*" in section 82(1) of the 1985 Act. The latter phrase assumed that a

fixed-term tenancy could be brought to an end by the landlord in accordance with the terms of the tenancy agreement. Without a provision for earlier termination however, an unexpired fixed-term created a bar to termination. Even where there was such a provision for earlier termination, until the necessary conditions were met, the tenancy was not “*subject to termination by the landlord*”. The same was true in relation to forfeiture. A fixed-term tenancy without a forfeiture or break clause could not be terminated until the fixed-term expired by effluxion of time. A fixed-term tenancy with a forfeiture clause however could not be terminated otherwise than by termination in lieu of forfeiture under section 82(3) of the 1985 Act. In short, a landlord is able to seek possession against a tenant with a secure fixed-term tenancy where there is a presently exercisable break or forfeiture clause. That approach prevents the tenant being deprived of their contractual and proprietary rights but also means that the landlord may rely upon a contractual right to terminate or forfeit where it has been granted one under the tenancy agreement where such a right has actually become exercisable. [41] – [47]

The Court’s conclusion in relation to issue one was fatal to Croydon’s case because, regardless of whether Ms Kalonga’s tenancy agreement contained a forfeiture clause, Croydon had not sought to rely upon it. Lord Briggs nevertheless went on to decide the second issue. Whether a particular clause amounted to a forfeiture clause was a matter of substance, not form, and a landlord would not be permitted to dress up a forfeiture clause as something else to avoid relief from forfeiture being available to the tenant. Ms Kalonga’s tenancy agreement permitted Croydon to seek an order for possession from the Court “*at any time*” if the tenant breached the terms of the agreement. That was a forfeiture clause applying the established test derived from *Clays Lane Housing Co-operative Ltd v Patrick* [1985] 17 HLR 188 and the Courts below had been wrong to conclude otherwise. [48] – [59]

The cumulative result was that Ms Kalonga’s tenancy agreement contained numerous provisions granting Croydon the right to bring her secure fixed-term tenancy to an early end. Some of those were forfeiture provisions predicated on some fault on the part of Ms Kalonga and some merely break clauses which required no fault on her part (though none of this latter category was satisfied or relied upon on the facts of the case). The Judge was therefore right to dismiss the claim in circumstances where Croydon had not sought termination in lieu of forfeiture but her declarations were only partially correct because the tenancy agreement did contain a forfeiture clause. That meant that Croydon’s appeal succeeded in part. [60] – [64]

References in square brackets are to paragraphs in the judgment

NOTE:

This summary is provided to assist in understanding the Court’s decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: [Decided cases - The Supreme Court](#)