UPPER TRIBUNAL (LANDS CHAMBER)

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LANDLORD AND TENANT – Rent (Agriculture) Act 1976 – respondent's husband employed in agriculture by appellants' predecessors in title – husband becoming protected occupier of a dwelling – husband leaving employment and the dwelling – respondent remaining in dwelling – respondent then granted tenancy of other accommodation by landowners – status of respondent in original dwelling and (in consequence) her status in subsequent accommodation – Housing Act 1988 section 34.

IN THE MATTER OF AN APPEAL AGAINST A DECISION OF THE FIRST TIER TRIBUNAL (PROPERTY CHAMBER)

BETWEEN:

JAMES WILLIAM HOOK
FIONA ANNE HOOK

Appellants

and

MS ANNE HAWKINS

Respondent

Re: 1 New Shifford Farm Cottage,
New Shifford,
Witney,
Oxfordshire, OX29 7QP

Before: His Honour Nicholas Huskinson

Sitting at: Royal Courts of Justice
on
30 April 2019

Joseph Steadman, instructed by Knights PLC for the appellant
Brooke Lyne, instructed by Advocate (formerly known as Bar Pro Bono Unit) for the respondent

The following cases are referred to in this decision:

Burgoyne v Griffiths (1990) 23 HLR 303
Re: McLaughlin [2018] UKSC 48
Lace v Chantler [1944] 1 KB 368
Durman v Bell (1988) 20 HLR 340

DECISION

Introduction

1. This is an appeal from the decision of the First-Tier Tribunal Property Chamber (Residential Property) (the FTT) dated 18 July 2018 whereby the FTT decided that it did not have jurisdiction to hear the application which had been made to it by way of a reference of a notice proposing a new rent under an assured periodic tenancy. The reason the FTT concluded it did not have jurisdiction was because it decided that no assured tenancy existed, but that instead the occupier (namely the respondent) held the relevant property from the landowners (namely the appellants) upon a "protected tenancy".

2. The FTT made reference to a "protected tenancy" and also made reference to the protection of the Rent (Agriculture Act) 1976 and the Rent Act 1977. It is common ground that, having regard to the facts related further below, there is no question of the respondent or her husband having enjoyed any protection under the Rent Act 1977. Also it may be noted that under the 1976 Act no provision is made for the existence of a "protected tenancy". I understand the FTT's decision to be to the effect that the respondent at the relevant time enjoyed a statutory tenancy of the relevant property pursuant to the 1976 Act and therefore the FTT did not have jurisdiction to deal with the application because no assured tenancy was in existence.

3. The tenancy which the FTT decided was not an assured tenancy was a tenancy of 1 New Shifford Farm Cottage, New Shifford, Witney, Oxfordshire OX29 7QP (hereafter called "the present property"). The tenancy of this property was granted orally by the appellants' predecessors in title namely Mr P Luckett and his sister Mrs Eileen Taylor (who I will call the original landowners) to the respondent in 1995. The appellants purchased the present property from the original landowners in about 2015.

4. It is common ground between the parties that this tenancy of the present property constituted a periodic assured tenancy within the Housing Act 1988 section 1 unless it was a relevant licence or tenancy for the purposes of the Rent (Agriculture) Act 1976. Section 34 of the Housing Act 1988 made provision for the phasing out of the Rent Acts such that new agricultural occupancies were restricted to special cases. The relevant provisions commenced on 15 January 1989. Section 34(4) provides:

> "(4) A licence or tenancy which is entered into on or after the commencement of this Act cannot be a relevant licence or relevant tenancy for the purposes of the Rent (Agriculture) Act 1976 (in this subsection referred to as "the 1976 Act") unless –
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> (a) it is entered into in pursuance of a contract made before the commencement of this Act; or
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> (b) it is granted to a person (alone or jointly with others) who, immediately before the licence or tenancy was granted, was a protected occupier or statutory

tenant, within the meaning of the 1976 Act, and is so granted by the person who at that time was the landlord or licensor (or one of the joint landlords or licensors) under the protected occupancy or statutory tenancy in question."

5. Accordingly it was necessary for the FTT to decide whether the tenancy of the present property, when it was granted to the respondent, was granted in circumstances where paragraph (b) of section 34(4) applied (there is no suggestion that paragraph (a) applied). This required the examination of the history of the occupation by the respondent (originally with her husband) of various properties belonging to the original landowners or one of them.

The facts

6. As described below, the respondent's husband Mr Trevor Hawkins was at one time employed in agriculture by the original landowners. It is convenient to note here that there was no documentary evidence before the FTT or before me regarding any of the transactions between the original landowners (or either of them) on the one hand and the respondent or her husband on the other hand. Thus there is no contract of employment or any written material relating to the occupancy of any of the relevant properties.

7. At the hearing before the FTT the respondent gave evidence. However it seems clear from the findings of the FTT in paragraph 31 of its decision that the facts accepted by the FTT were those put forward by the respondent in her email of 4 June 2018 and her subsequent letter of 27 June 2018.

8. In summary the relevant facts are as follows:

(a) On 12 April 1975 the respondent married her husband Trevor Hawkins (TH).

(b) At about the same time TH started full-time employment for the original landowners as a farm worker on the original landowners' farm at Shifford, the work consisting of arable farming and care of livestock.

(c) A house was provided by the original landowners for TH and the respondent to live in namely 2 New Cottages, Old Shifford (the original property). TH and the respondent moved in and lived in the original property for many years during which time a daughter was born to them in 1975 and a son was born to them in 1984.

(d) No rent was paid by TH or the respondent to the original landowners for the occupation of the original property.

(e) In April 1990 TH and the respondent separated. TH left his employment and left the family home at the original property. The respondent remained living in the original property with their two children.

(f) Divorce proceedings between TH and the respondent were commenced. In June 1991 a decree absolute was pronounced and they ceased to be man and wife.

(g) Throughout these events the respondent remained in a good relationship with the original landowners. After the departure of TH the original landowners continued not her seek the payment of any rent while the respondent remained in the original property.

(h) In about 1992 or 1993 the original landowners informed the respondent that the original property was needed for another farm worker and that they would find somewhere for her to live. As a result the original landowners provided Carlan Cottage, Church View, Bampton, Oxfordshire for occupation by the respondent for which she paid £200 per month. Nothing was put in writing. The respondent and her children did not want to leave the original property but were reassured that as soon as a suitable property became available at Shifford they would be informed.

(i) In 1995 the present property became vacant and one of the original landowners allowed the respondent to move into the present property with her son and daughter at an agreed rent of £200 per month. At this time the respondent did some garden work at New Shifford Farm and helped in the house on a regular basis for one of the original landowners and his wife.

(j) In September 2015 the respondent was informed in writing by the original landowners' solicitors that the present appellants were now her landlords.

9. The present appeal has been ordered to be heard as an appeal by way of review with a view to a rehearing. I enquired of the parties at the commencement of the hearing as to whether, supposing I were to reach the conclusion that the FTT's decision could not stand such that I had to re-determine the matter, either party wish to call any evidence. Both parties replied that no evidence was to be called and that they relied upon the material before the FTT.

Relevant legislation

10. As already recorded above it was agreed by both parties (in my view correctly) that no question arose of the respondent or her husband at any stage having any relevant protection under the Rent Act 1977. The status of TH and the respondent falls to be decided in accordance with the Rent (Agriculture) Act 1976, the Matrimonial Homes Act 1983 and the Housing Act 1988.

11. Before coming to the provisions of section 2 of the Rent (Agriculture) Act 1976 it is necessary first to notice that many of the expressions used in sections of the Act are expressions which are defined in the schedules to the Act. For the purpose of this decision it is not necessary to set out in detail various of these definitions. It is sufficient to record the following matters.

12. The expression "relevant licence" means any licence under which a person has the exclusive occupation of a dwelling house as a separate dwelling and which, if it were a tenancy and if a certain modifications to section 2 of the Rent Act 1968 were made (principally removing the exclusion of tenancies at a low rent and tenancies of a dwelling house comprised in an agricultural holding from being a protected tenancy) would be a protected tenancy under the Rent Act 1968. A "relevant tenancy" is a tenancy under which a dwelling-house is let as a separate dwelling and which is not a protected tenancy within the Rent Act 1968 but would be such a tenancy if certain modifications similar to those mentioned above were made.

13. As regards the expression "dwelling-house in qualifying ownership" a dwelling-house in relation to which the occupier has a licence or tenancy is in qualifying ownership for the purposes of the Act at any time if, at that time, the occupier is employed in agriculture and the occupier's employer either is the owner of the dwelling-house or has made arrangements with the owner of the dwelling-house for it to be used as housing accommodation for persons employed by him in agriculture.

14. As regards the expression "qualifying worker" a person is a qualifying worker for the purposes of the 1976 Act at any time if, at that time, he has worked whole-time in agriculture, or has worked in agriculture as a permit worker, for not less than 91 out of the last 104 weeks. Agriculture is defined, but it is not necessary to look at such definition because it is common ground that TH was a qualifying worker who worked in agriculture and that the respondent was at no time a qualifying worker.

15. The 1976 Act provides in section 2 as follows:

> 2. – (1) Where a person has, in relation to a dwelling-house, a relevant licence or tenancy and the dwelling-house is in qualifying ownership, or has been in qualifying ownership at any time during the subsistence of the licence or tenancy (whether it was at the time a relevant licence or tenancy or not), he shall be a protected occupier of the dwelling-house if –
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> (a) he is a qualifying worker, or
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> (b) he has been a qualifying worker at any time during the subsistence of the licence or tenancy (whether it was at the time a relevant licence or tenancy or not).
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> (2) Where a person has, in relation to a dwelling-house, a relevant licence or tenancy and the dwelling-house is in qualifying ownership, or has been in qualifying ownership at any time during the subsistence of the licence or tenancy (whether it was at the time a relevant licence or tenancy or not), he shall be a protected occupier of the dwelling-house if and so long as he is incapable of whole-time work in agriculture, or work in agriculture as a permit worker, in consequence of a qualifying injury or disease.

(3) A person who has, in relation to a dwelling-house, a relevant licence or tenancy shall be a protected occupier of the dwelling-house if –

(a) immediately before the licence or tenancy was granted, he was a protected occupier or statutory tenant of the dwelling-house in his own right, or

(b) the licence or tenancy was granted in consideration of his giving up possession of another dwelling-house of which he was such an occupier or such a tenant.

(4) In this Act –

"protected occupier in his own right" means a person who is a protected occupier by virtue of subsection (1), (2) or (3) above;

"statutory tenant in his own right" means a person who is a statutory tenant by virtue of section 4(1) below and who, immediately before he became such a tenant, was a protected occupier in his own right.

16. Section 3 makes provision for persons to be able to become protected occupiers by succession after the death of a person who, immediately before his death, was a protected occupier of the dwelling-house in his own right. These provisions enable, inter alia, a widow (or widower) of the occupier to succeed to the status of protected occupier of the dwelling-house.

17. Section 4 makes provision in respect of statutory tenancies which can arise after a person ceases to be a protected occupier of the dwelling-house within the terms of section 2. Section 4(1) provides:

"(1) Subject to section 5 below, where a person ceases to be a protected occupier of a dwelling-house on the termination, whether by notice to quit or by virtue of section 16(3) of this Act or otherwise, of his licence or tenancy, he shall, if and so long as he occupies the dwelling-house as his residence, be the statutory tenant of it."

Section 4 then makes provision for persons to be able to become statutory tenant of the dwelling-house after the death of a person who, immediately before his death, was a protected occupier or statutory tenant of the dwelling-house in his own right. These provisions enable, inter alia, a widow (or widower) of the occupier to succeed to the status of statutory tenant of the dwelling-house.

18. The Matrimonial Homes Act 1983 in section 1 makes provisions regarding rights concerning a matrimonial home where one spouse has an estate or entitlement in relation to the home and the other does not. Principally the section is dealing with the rights of spouses between themselves. However it is important to notice the provisions of section 1(6):

> "(6) A spouse's occupation by virtue of this section shall, for the purposes of the Rent (Agriculture) Act 1976 and …… be treated as possession by the other spouse …."

19. Section 7 and schedule 1 to the 1983 Act makes provision for the transfer of certain tenancies upon divorce. The Act provides in paragraph 1 of schedule 1:

> "Where one spouse is entitled, either in his or her own right or jointly with the other spouse, to occupy a dwelling-house by virtue of (a) ….. (b) a statutory tenancy within the meaning of the Rent (Agriculture) Act 1976 or …. then, on granting a decree of divorce, a decree of nullity of marriage or a decree of judicial separation, or at any time thereafter (whether, in the case of a decree of divorce or nullity of marriage, before or after the decree is made absolute), the court by which the decree is granted may make an order under Part II below."

It is provided in Part II (in paragraph 4) as follows:

> "4. Where the spouse is entitled to occupy the dwelling-house by virtue of a statutory tenancy within the meaning of the Rent (Agriculture) Act 1976, the court may by order direct that, as from such date as may be specified in the order, that spouse shall cease to be entitled to occupy the dwelling-house and that the other spouse shall be deemed to be the tenant or, as the case may be, the sole tenant under that statutory tenancy; and a spouse who is deemed as aforesaid to be the tenant under a statutory tenancy shall be (within the meaning of that Act) a statutory tenant in his own right, or a statutory tenant by succession, according as the other spouse was a statutory tenant in his own right or a statutory tenant by succession."

Clearly such an order by the court could impact upon the interests of the landlord. It is provided by paragraph 8 that rules of court are to be made requiring that the court before it makes such an order as aforesaid must give the landlord of the dwelling-house to which the order will relate an opportunity of being heard.

20. The Housing Act 1988 made provision for the creation of assured tenancies and for the phasing out of the Rent Acts including the Rent (Agriculture) Act 1976. As already noted above a tenancy entered into on or after the commencement date of that Act, namely 15 January 1989, cannot be a relevant licence or relevant tenancy for the purposes of the 1976 Act unless the provisions of section 34 (4) are satisfied, being the provisions set out in paragraph 4 above.

Decision of the FTT

21. The FTT gave its determination in paragraphs 30 to 39 of its decision. The FTT noted that the facts as put forward by the respondent in her email of 4 June 2018 and letter of 27 June 2018 were not disputed – these are the facts which I have recorded above. The FTT noted that the question was whether the circumstances which had occurred, including the move by the respondent from the original property to Carlan Cottage and from there to the present property, resulted in her having an assured tenancy rather than a "protected tenancy" (as the FTT put it – a

reference to a statutory tenancy within the 1976 Act would have been the relevant expression). The FTT then stated in paragraph 34 to 39 as follows:

> "34. Firstly, the Tribunal found that in 1975 the tenancy had been granted to Mr and Ms Hawkins jointly.
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> 35. Secondly, the Tribunal found that in 1975 both Mr and Ms Hawkins were protected tenants and had the benefit of the security of tenure and rent control provisions by virtue of the Rent (Agriculture) Act 1976 and the Rent Act 1977.
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> 36. The Tribunal did not agree with the Landlords' interpretation that once Mr Hawkins ceased to be an agricultural worker the protected tenancy ceased. The Tribunal was of the opinion that the 1976 Act had an inclusive not exclusive effect. Under section 5, Rent Act 1977, tenancies at a low rent would be excluded from being protected tenancies but schedule 2 paragraph 2 of the Rent (Agriculture) Act 1976 operates to include such tenancies where the tenant is an agricultural worker.
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> 37. The Tribunal was further of the opinion that as the accommodation had been let jointly to both Mr and Ms Hawkins the tenancy continued with Ms Hawkins as the sole tenant after Mr Hawkins had left and that their divorce did not alter Ms Hawkins status in this regard. Ms Hawkins continued to be a protected tenant.
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> 38. Thirdly, the Tribunal took the view that Ms Hawkins did not move from either 2 New Cottages, Old Shifford or Carlan Cottage, Bampton entirely of her own volition or because she was evicted. She moved from 2 New Cottages, Old Shifford because the then Landlords required the accommodation for an agricultural worker and was provided with Carlan Cottage as suitable alternative accommodation. The move to the Property was also of mutual benefit and because it was suitable alternative accommodation. Notwithstanding these moves were made after 15 January 1989 when the Housing Act 1988 took effect, by virtue of section 34 of the 1988 Act the protected tenancy continued. Therefore, the Tribunal found that there was no new tenancy agreement either orally or in writing and the original protected tenancy continued.
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> 39. Due to these findings the Tribunal determined that it did not have jurisdiction to hear the Application for referral of the Notice proposing a new rent under an Assured Periodic Tenancy."

Appellants' submissions

22. On behalf of the appellants Mr Steadman advanced the following submissions.

23. He drew attention to the introduction of assured tenancies by section 1 of the Housing Act 1988 in relation to tenancies granted after the commencement of that Act (15 January 1989). The first thing to do was to work backwards by looking at the latest tenancy granted to the respondent namely the tenancy of the present property which was granted in 1995. Having regard to the date

of grant of this tenancy it was an assured tenancy unless it was a tenancy which was within the special cases where a tenancy could still be one within the Rent (Agriculture) Act 1976. For this to be so the 1995 tenancy of the present property would have to be one which fell within the provisions of section 34 (4)(b) of the Housing Act 1988.

24. This required an examination of the following question, namely whether when this 1995 tenancy of the present property was granted to the respondent it was being granted to a person who immediately before it was granted was a protected occupier or statutory tenant within the meaning of the 1976 Act. If the answer to this question was yes, then as regards the closing requirement in paragraph (b) of section 34(4) it was accepted that this tenancy was granted by the person who at that time was the landlord or licensor (or one of them) under the protected occupancy or statutory tenancy in question. However Mr Steadman submitted that the answer to this question was no.

25. The analysis of the question required one to go back to the beginning of the occupancy of the original property by TH and the respondent and to trace the matter forward from there.

26. In 1975 TH and the respondent were allowed into occupation of the original property. No rent was payable. There was nothing in writing. This arrangement was all part of the terms of employment between the original landowners and TH whereby TH became an agricultural worker on their farm.

27. Section 2 of the 1976 Act made provision for a person to be a protected occupier of a dwelling-house.

28. Mr Steadman submitted that the proper analysis of the arrangement between the original landowners on the one hand and TH and the respondent on the other hand was as follows. There was a contract of employment between the original landowners and TH. He was allowed to occupy the original property as part of his terms of employment. No rent was payable. The arrangement was in effect a service occupancy whereby a licence (not a tenancy) was granted to TH (not to TH and the respondent jointly). However Mr Steadman submitted that even if a tenancy (rather than a licence) were created and even if this tenancy were a joint tenancy held by TH and the respondent (rather than held solely by TH) the analysis of the case remained the same for the reasons set out below.

29. It was accepted that as regards the original property there was created a relevant licence and also that the original property was in qualifying ownership. TH was a person who had in relation to this dwelling-house (namely the original property) a relevant licence. Accordingly the following words of section 2, which were of central importance to the case, became applicable, namely "he shall be a protected occupier of the dwelling-house if (a) he is a qualifying worker …"

30. TH was a qualifying worker. TH became the protected occupier of the original property.

31. The respondent was not a qualifying worker. She did not work in agriculture. She was living in the original property as TH's wife. Accordingly the respondent was not a protected occupier of the dwelling-house. This was so even if (contrary to Mr Steadman's argument) there had been created a joint tenancy in TH and the respondent rather than merely a licence (or tenancy) held by TH alone.

32. TH continued to work in agriculture for the original landowners until 1990. He continued to be a protected occupier of the original property.

33. The right to occupy the original property formed a term of TH's contract of employment. In 1990 TH left the employment of the original landowners and also left the original property. Thereupon TH's license of the original property terminated, see *Burgoyne v Griffiths* (1990) 23 HLR 303.

34. Section 4 deals with the situation where a person ceases to be a protected occupier of the dwelling-house on the termination of his licence (or tenancy). The section provides that "he shall, if and so long as he occupies the dwelling-house as his residence, be the statutory tenant of it".

35. Once he had vacated the original property TH personally no longer occupied the original property as his residence. However his wife (the respondent) and children continued to occupy the original property as their residence.

36. By reason of the provisions of section 1(6) of the Matrimonial Homes Act 1983 the respondent's occupation of the original property was, for the purposes of the 1976 Act, to be treated as possession by TH. Accordingly by virtue of this continuing occupation of the original property by the respondent (who in 1990 was still the spouse of TH) a statutory tenancy under section 4 arose because TH (the person who had been the protected occupier) was deemed, through the occupation of the respondent, to continue to occupy the original property as his residence.

37. It is notable that section 3 of the Act (as regards protected occupancies) and section 4 of the Act (as regards statutory tenancies) make provision for the ability of a surviving spouse to succeed to a protected occupancy or statutory tenancy. The fact that such provisions were necessary was an indication that, in the absence of such provisions, a surviving spouse would not be able automatically to claim entitlement to a protected occupancy or statutory tenancy based upon the fact that the deceased spouse had been a qualifying worker and had in consequence been a protected occupier.

38. The decree absolute of divorce was made in June 1991. Thereafter section 1(6) of the Matrimonial Homes Act 1983 no longer applied and in consequence the respondent's occupation of the original property was no longer to be treated as occupation by TH.

39. It should be noted that under section 7 and schedule 1 to the Matrimonial Homes Act 1983 it would have been possible for the respondent to apply to the court for an order directing that the statutory tenancy which TH continued to enjoy (by virtue of the respondent's continued occupation) should cease and that the respondent should be deemed to be the tenant under the statutory tenancy. No such order was ever made by the court.

40. In consequence upon the decree of divorce becoming absolute TH's statutory tenancy ended. Thereafter the original landowners permitted the respondent to continue in occupation of the original property and charged her no rent. She could not through such arrangement enjoy any protected occupancy or statutory tenancy within the 1976 Act.

41. When the original landowners and the respondent agreed that she should move to Carlan Cottage at a rent of £200 per month this created a tenancy of that property for the respondent. It was an assured tenancy. It could not be a statutory tenancy within the 1976 Act because the provisions of section 34(4) of the Housing Act 1988 were not satisfied - the respondent immediately before the grant of this tenancy of Carlan Cottage was not a protected occupier or statutory tenant within the meaning of the 1976 Act.

42. Mr Steadman stressed that, even if his analysis was wrong and a joint tenancy of the original property was created rather than a licence merely in favour of TH, the respondent herself was not and had never been a qualifying worker and accordingly she herself could not be a protected occupier within section 2 of the 1976 Act and therefore she could not, on the strength of her own status (i.e. apart from reliance upon the status of TH), have become a statutory tenant.

43. Mr Steadman noted the arguments advanced by Ms Lyne which included reference to the Human Rights Act 1998 section 3 and to Articles 8 and 14 of the Convention on Human Rights and to the decision in *Re McLaughlin* [2018] UKSC 48. There was no scope to construe the relevant statutory provisions analysed above in a manner which gave the same rights under the Rent (Agriculture) Act 1976 to the respondent as an unmarried woman (i.e. after her divorce) as she enjoyed when she was a married woman. Separately from that, any difference in her position did not stem from the simple question of whether she was a married woman as opposed to an unmarried woman. The difference in her position stemmed from the different question of whether she was or was not married to a particular person, namely TH. In any event if there were (contrary to Mr Steadman's principal argument) any apparent discrimination on the grounds of marital status, this was permissible and proportionate having regard to the scheme of the legislation. The legislation made provision for the succession in certain circumstances by a surviving spouse to a protected occupancy or statutory tenancy. Also the legislation made provision enabling a spouse upon divorce to seek an order from the court transferring to that spouse a statutory tenancy previously enjoyed by the other spouse. These provisions were proportionate and pursued a legitimate aim.

44. As regards the decision of the FTT Mr Steadman submitted it was wrong by reason of failing to analyse the matter as set out above. In particular:

(a) There was no basis on which the FTT could properly find that a tenancy (rather than a licence) had been granted. There was no written contract of employment or evidence regarding the terms of the oral arrangement beyond the fact that TH was employed in agriculture by the original landowners who provided him as part of the terms of his employment with a cottage to live in with his family. No rent was payable. The consideration provided for the occupancy was given through his agricultural work. Also there is no evidence of any defined duration of the occupancy beyond the occupancy being for the duration of this employment. This was in effect a typical service occupancy. It could not be a tenancy because the duration of the tenancy was not identifiable at the outset – see *Lace v Chantler* [1944] I KB 368 where it was held that an agreement which was expressed to last "for the duration of the war" did not create a term certain and could not be a tenancy. Similarly an agreement to occupy for the duration of someone's employment is not sufficiently certain to create a tenancy.

(b) The FTT was in error in referring to the existence of a "protected tenancy" and as treating the Rent Act 1977 as being of potential relevance.

(c) The FTT was in error in failing to recognise the important distinction between TH (who was a qualifying worker and who therefore could be a protected occupier within section 2 of the 1976 Act) and the respondent who was not a qualifying worker and therefore could not herself be a protected occupier.

(d) The FTT was therefore in error in finding that after TH had left the original property and after the divorce had become absolute the respondent's status was not altered and she continued to be a "protected tenant".

(e) Accordingly the FTT was in error in considering that the grant of the tenancy of Carlan Cottage and thereafter the grant of the tenancy of the present property both fell within the relevant provisions of section 34(4) of the Housing Act 1988.

Respondent's submissions

45. On behalf of the respondent Ms Lyne advanced the following submissions.

46. As regards the factual findings by the FTT, in particular that a tenancy rather than a licence was created and that this was a joint tenancy held by TH and the respondent, these were findings of fact made by the FTT after hearing evidence. This tribunal should not interfere with those findings.

47. Accordingly the respondent had an estate in land by virtue of her own rights as a joint tenant of the original property.

48. It is true that the respondent herself was not a qualifying worker. However during their marriage (once the Rent (Agriculture) Act 1976 had come into force) both TH and the respondent were protected occupiers within section 2 of that Act.

49. When TH left his employment and left the original property the status of the respondent remained unaltered. Before TH left she herself was a protected occupier within section 2 of the original property. This was so whether the arrangement was a joint tenancy or a joint licence. After TH left his employment and left the original property she continued to occupy the original property as her residence. By reason of her own status as a protected occupier and her own continued occupation as her residence the respondent enjoyed a statutory tenancy within section 4 of the Act after TH's departure. Ms Lyne accepted that upon the occasion of TH's departure from his job the contractual tenancy (or license if it was a licence) terminated, but that merely brought into operation section 4 which conferred upon the respondent, in her own right, a statutory tenancy of the original property.

50. If that is so then she continued to enjoy a statutory tenancy until the occasion when she left the original property, at the invitation of the original landowners, and took the tenancy of Carlan cottage in 1992/3. This tenancy of Carlan Cottage was granted in circumstances where section 34(4) of the Housing Act 1988 applied and accordingly she enjoyed a statutory tenancy of that property within the 1976 Act rather than an assured tenancy within the Housing Act 1988. Similarly when she left Carlan Cottage and was granted the tenancy in 1995 of the present property this tenancy of the present property was granted in circumstances where section 34 (4) of the 1988 Act applied and once again she enjoyed a statutory tenancy of the present property within the 1976 Act rather than an assured tenancy within the Housing Act 1988.

51. Upon this analysis the ending by divorce of the marriage between TH and the respondent made no difference to her status. The respondent was herself a protected occupier of the original property. Upon the termination of the tenancy (or licence), when TH ceased his employment, she became a statutory tenant by virtue of her own occupation. She had no need to rely upon any provision of the Matrimonial Homes Act 1983 which deemed her occupation as being equivalent to occupation by TH.

52. The inclusion in the 1976 Act of provisions whereby a surviving spouse can succeed to a protected occupancy or statutory tenancy shows that this Act is broader than merely conferring personal rights upon the agricultural worker.

53. The foregoing was Ms Lyne's principal argument. However separately from that Ms Lyne made reference to *Durman v Bell* (1988) 20 HLR 340. She submitted that it is proper to infer, from the respondent being allowed to continue in the original property for a considerable period (albeit without payment of rent) and then being transferred by agreement to another property where rent was payable, that the parties impliedly agreed to the creation of a statutory tenancy within the 1976 Act.

54. Ms Lyne also submitted that the Human Rights Act 1998 section 3 was relevant. There should not be discrimination on the grounds of marital status, see *Re McLaughlin*. The relevant statutory provisions should be "read down" so as to achieve a result that avoided such discrimination.

Discussion

55. This is an appeal by way of review with a view to a rehearing. My first task is to consider the decision of the FTT and to decide whether it is wrong such that I should decide the matter afresh.

56. The FTT analysed the arrangement between the original landowners on the one hand and TH and the respondent on the other hand in relation to the original property as giving rise to a tenancy (not a licence) which was a joint tenancy (held by TH and the respondent jointly) rather than a tenancy solely in favour of TH.

57. While this point is in my view not crucial to the decision, the FTT's decision upon this point appears to have influenced its subsequent analysis of the matter whereby it treated the respondent as having a status in her own right against the original landowners being a status which meant she could become a statutory tenant.

58. Upon this point (tenancy or licence – joint or sole) there was little evidence. Nothing was in writing. All that was known is summarised in paragraph 8 above. The only evidence of any contract is of an oral contract of employment between the original landowners and TH. No rent was payable for the occupation of the original property. The only consideration obtained by the original landowners for the occupation of the original property was the provision by TH of his work. There is no evidence of any separate contract regarding occupancy of the original property. Such evidence as there is points to the contract of employment being one under which TH occupied the original property (a cottage owned by the original landowners on or near the relevant farm) and was thereby the better able to perform his duties working on the original landowners' farm in relation to their arable and livestock interests. I consider the evidence points to this being a typical service occupancy in the nature of a licence whereby the servant is required for the better performance of his agricultural duties to live on a cottage on or near the farm where he is to work. The evidence further points to the contemplated duration of TH's occupancy of the original property being for so long as he continued in his employment. There is no evidence of any contract between the original landowners and the respondent in relation to occupancy of the original property nor did the respondent provide any consideration for such occupancy.

59. In these circumstances I conclude that, as part of his contract of employment, TH alone became entitled to a relevant licence to occupy the original property. TH was entitled, of course, under this licence to occupy the original property not only for himself but together with the respondent and in due course their children. However the fact remained that the contractual

arrangement was one whereby the original landowners granted a licence to TH to occupy the original property. This licence was a relevant licence for the purposes of section 2 of the 1976 Act.

60. I also am unable to agree with the FTT that the respondent had such status in the original property that, after TH had left and after she was divorced, she could continue to be a statutory tenant (or "protected tenant" as stated by the FTT). I respectfully consider the FTT was here in error in that it did not give proper effect to the provisions of section 2 where that section provides that "…. he shall be a protected occupier of the dwelling-house if – (a) he is a qualifying worker …" The FTT's decision does not properly recognise that, while TH was a qualifying worker, the respondent never was a qualifying worker.

61. It is necessary for the Upper Tribunal therefore to reach its own decision upon the case.

62. In my view Mr Steadman's analysis of the position is correct for the reasons he gives. I have set out his argument at some length above. I summarise my conclusions hereunder.

63. During his employment TH was a protected occupier. The respondent was not a protected occupier.

64. When TH left his employment his licence to occupy the original property came to an end, see *Burgoyne v Griffiths*. Thereupon the provisions of section 4(1) of the 1976 Act came into operation.

65. TH no longer occupied the original property as his residence. However the respondent did continue to occupy the original property as her residence. The respondent's occupation was to be treated as occupation by TH, see Matrimonial Homes Act 1983 section 1(6). Accordingly a statutory tenancy under section 4 arose because TH had ceased to be a protected occupier on the termination of his relevant licence but he was treated as still being in occupation of the original property by virtue of the respondent's occupation.

66. It would have been possible during the course of their divorce proceedings for the respondent to seek an order from the court transferring to her the statutory tenancy which TH still continued to enjoy of the original property. This did not occur and no such order was made. Had any such application been made the original landowners would have been entitled to be heard by the court as they might have wished to oppose the making of any such order.

67. When the decree of divorce became absolute the respondent's continued occupation of the original property no longer was deemed to constitute occupation by TH. Accordingly the person who had been (but who had ceased to be) the protected occupier, namely TH, thereafter no longer occupied the original property as his residence. Therefore the statutory tenancy terminated.

68. The respondent could not enjoy any statutory tenancy in her own right because she had never been a qualifying worker – and nor had she ever enjoyed a relevant licence or tenancy (the licensee, or tenant if there was a tenancy, was TH alone).

69. Accordingly I am unable to accept the principal argument advanced by Ms Lyne.

70. As regards Ms Lyne's reference to the Human Rights Act 1998 section 3 it was unclear to me what statutory provision I was being invited to "read down" so as to avoid some discrimination against the respondent on the basis of whether her status was married woman or divorced woman. However in any event I consider the statutory provisions to be clear such that no reading down is permissible. Separately I accept the submissions made by Mr Steadman (see paragraph 43 above). There is no impermissible discrimination involved in treating the respondent's status as different depending upon whether she was or was not married to TH. This does not involve discriminating against her on the basis of whether she was or was not married. It involves her position being different depending upon whether she was or was not married to a particular person.

71. As regards Ms Lyne's argument (see paragraph 53 above) to the effect that it was proper to infer the creation of a statutory tenancy within the 1976 Act from the fact that, after the divorce, the original landowners permitted the respondent to continue in occupation of the original property, I am unable to find any justification for such an inference. The facts in *Durman v Bell* were markedly different from the present – there the question was whether by inference a statutory tenancy had arisen between the landowner and the person who previously had been the protected occupier. Further and in any event if after the divorce some fresh tenancy of the original property arose in favour of the respondent, such a tenancy itself was one which was granted after 15 January 1989 and could not be a statutory tenancy within the Rent (Agriculture) Act 1976 , see section 34(4) of the Housing Act 1988.

72. Accordingly I conclude that when the tenancy of the present property was granted to the respondent in 1995 this was a tenancy which was granted in circumstances where section 34(4) of the Housing Act 1988 did not apply. The tenancy was in consequence a periodic assured tenancy. The FTT therefore does have jurisdiction to deal with the application which has been made to it by way of a reference of a notice proposing a new rent under an assured periodic tenancy.

73. It was agreed between the parties at the hearing that if I should conclude that the appellants' appeal was to be allowed, then the matter must be remitted to the FTT so that the FTT can deal on the merits with the reference of the notice proposing a new rent under an assured periodic tenancy. There is no material before me on which I could deal with this matter and I was not invited to do so.

Conclusion

74. In the result therefore I allow the appellants' appeal. I conclude that the FTT does have jurisdiction to hear the application which has been made to it by way of a reference of a notice proposing a new rent under an assured periodic tenancy. The respondent does enjoy an assured periodic tenancy of the present property.

75. I remit this matter to the FTT for the purpose mentioned in paragraph 73 above.

His Honour Nicholas Huskinson

8 May 2019