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Recent case law highlights

Corr (administratix of the estate of Thomas Corr (deceased) v IBC Vehicles Ltd [2008] UKHL 13

Whether damages recoverable by estate where tortfeasor causes suicide

This case clearly decides that damages under the Fatal Accidents Act 1976 attributable to suicide are recoverable. What the case does not so unambiguously decide is the issue of contributory fault where the deceased was not *M'Naghten* insane but was still suffering from a disabling mental condition.

Mr Thomas Corr was employed by IBC. He was working on a prototype line of presses when a machine almost decapitated him; he was in fact struck to the right side of his head. The accident caused physical disfigurement as well as severe anxiety and depression. While suffering from an episode of severe depression, he committed suicide by jumping from the top of a multi-storey car park. He had possessed the capacity to manage his own affairs and his appreciation of danger was not lessened by his condition; this was a deliberate act with the intention of killing himself. On the other hand, at the time of his suicide he was suffering from a severe depressive episode which impaired his capacity to make reasoned and informed judgments about his future.

The contentious aspect of the estate's case was a claim to recover the financial loss attributable to the suicide, with IBC, the appellant, having conceded duty of care and breach, that the depressive illness suffered by Mr Corr was caused by the accident, and that his suicide was caused by that illness. To Lord Bingham, who delivered the leading judgment in this case, the real issue dividing the parties was whether the damages claimed under the 1976 Act were too remote.

The House first dismissed the argument that IBC did not have a duty to protect the deceased from self harm; given that Mr Corr acted in a way he would not have done so but for the injury caused by the employer's breach, his conduct did not fall out of the scope of the duty his employer owed him.

The next issue was whether the act of suicide was reasonably foreseeable. It was accepted that foreseeability is to be judged by the standards of the reasonable employer, as of the date of the accident and with reference to the very accident which occurred, but with reference not to the actual victim but to a hypothetical employee. IBC submitted that while psychological trauma and depression were a foreseeable result of the accident, Mr Corr's conduct in taking his own life was not. Lord Bingham, citing the case of *Hughes v Lord Advocate* [1963] AC 837, stated that the principle that a tortfeasor who reasonably foresees the occurrence of some damage need not foresee the precise form which the damage may take applies. Suicide cannot be regarded as to be so unusual as to be outside the bounds of what is reasonably foreseeable.

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Lord Scott also noted that the defendant cannot limit his liability by contending that the extent of the injuries could not have been reasonably foreseen; the defendant must take his victim as he finds him, applying the case of *Smith v Leech Brain & Co Ltd* [1962] 2 QB 405 together with *Page v Smith* [1996] AC 155. If Mr Corr's psychiatric damage caused by the accident at work is damage for which the employers must accept liability, it is difficult to se on what basis they could escape liability for additional injury, self-inflicted but attributable to his psychiatric condition.

The House also dismissed the notion that the suicide was a *novus actus interveniens*. The rationale of that principle is fairness. In the present case Mr Corr's suicide was not a voluntary and informed decision, but the response of a man suffering from a severely depressive illness which impaired his capacity to make reasoned and informed judgments about his future as a consequence of the employer's tort. It is in no way unfair to hold the employer responsible for the consequence of its breach of duty. It was not now necessary to find Mr Corr *M'Naghten* insane to allow the claimant to recover for loss attributable to suicide, firstly as suicide was no longer a crime (where a finding of *M'Naghten* insanity was necessary to exculpate the deceased from criminal responsibility), and secondly that there was no need to find a clear cut-off line between to decide if the deceased was responsible or not. As for *volenti*, an argument addressed only at Mr Corr's suicide, this was not something to which he consented with his eyes open but an act performed because of the psychological condition the breach of duty had induced.

At first instance, the trial judge had decided against the claimant on liability and made no findings as to contributory negligence. In the Court of Appeal, Ward LJ observed that it had not been the subject of much argument and Sedley and Wilson LJJ omitted to deal with the issue. In the House of Lords, both parties addressed the issue with brevity. Consequently, the House gave only frustratingly limited observations. Lord Bingham declined to enquire independently into this issue, but stated that he did not think that any blame should be attributed to the deceased for the consequences of a situation which was of the defendant's making, not his own. Lord Walker agreed, as Mr Corr's conduct could not be regarded as 'blameworthy' when his judgment was so impaired by severe depression. Lord Scott, on the other hand, noted that Mr Corr remained an autonomous individual who retained the power of choice. Consequently, damages would fall to be reduced for contributory negligence. Lord Mance and Lord Neuberger left open the possibility of reducing damages for contributory negligence in principle, as in this case Mr Corr's decision making ability had been impaired rather than obliterated.

Although the House of Lords clearly lays down the principle that losses attributable to suicide are capable of being recoverable, the *ratio* of the case with regard to contributory negligence is not so obvious. Only Lords Bingham and Walker decided that contributory negligence was not recoverable in a case such as this as a matter of principle.

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Recent case law highlights - Continued

Lord Scott went on to state that damages should be reduced by 20%, and while Lords Mance and Neuberger declined to go this far given the history of the case, they also stated that damages could, in principle, be reduced for contributory negligence.

(case note by David Sawtell)

Carver v BAA Plc [2008] EWCA Civ 412

Cost implications of narrowly beating a Part 36 offer

The issue for their Lordships in this case was this: if a claimant beats a payment of money into court by a modest amount, has she obtained a judgment "more advantageous" than the defendant's Part 36 offer, or is the court entitled to look at all the circumstances of the case in deciding where the balance lies?

The Court of Appeal agreed with the trial judge, taking the latter broad view and upholding the order that the claimant pay the defendant's costs of the claim after the period for accepting the payment had expired.

The Civil Procedure Rules changed with effect from April 6th 2007 so that a payment into court no longer applies to the Part 36 offer to settle procedure. The costs consequences following judgment are now set out in CPR 36.14 under which this case was decided. Where a claimant fails to obtain a judgment *more advantageous* than a defendant's Part 36 offer, or the judgment against the defendant is as *at least as advantageous* to the claimant as the proposals contained in the claimant's Part 36 offer, the court will, unless it considers it unjust to do so, order that the defendant is entitled to his costs from the date when the Part 36 offer expired and interest on these costs (emphasis added)1.

The brief facts of this case are that the claimant was injured by a faulty lift for which BAA was responsible. She made a claim for personal injury. Liability was conceded within 4 months of the date of the accident. What followed was a series of protracted communications between the claimant and the defendant in an attempt to reach a settlement. The claim was eventually valued at trial as £4686.26 inclusive of interest.

During the course of attempted negotiations, the defendant made a Part 36 offer of £4,006. It subsequently made a Part 36 payment into court of £4,000 in addition to £525 that had been paid as an interim payment. The total of the payment into court therefore amounted to £4,525. The claimant asserted the claim was worth considerably more, in excess of £19,000 and did not accept either of the offers.

1.This is the situation unless the offer has been withdrawn, changed so that the terms are less advantageous to the offeree and the offeree has beaten the less advantageous offer, or it was made less than 21 days before the trial and the court has not abridged the date when the offer expired.

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Recent case law highlights - Continued

The defendant wrote to the claimant on several occasions stressing the duty to attempt to reach a settlement. In an effort to settle the defendant made a without prejudice offer save as to costs for £20,000 inclusive of interest and costs, though not expressed as an offer to settle under Part 36. The claimant made a without prejudice Part 36 offer of £12,500 plus costs. This offer was subsequently withdrawn, the claimant stating that she was willing to accept the defendant's offer of £20,000, plus costs. As no agreement was reached the matter went to trial, nearly 4 years after the date of accident, one and a half years after the defendant's original Part 36 offer of £4,006 and over one year after the payment into court of £4,525.

The final award of £4,686.26 beat the defendant's Part 36 payment into court by £51, after making an allowance for the interest at the date of the payment in and at the date of the judgment. The issue to then be determined was who was the winner? A considerable argument ensued about costs. The trial judge concluded that "On no view does it seem to me can it be said that for an excess of a few pounds within a margin of £50-87 odd could it be said that the monetary judgment obtained today is more advantageous than the position in June last year". Having regard to the exchanges and conduct between the parties, the judge commented that the case never ought to have been fought. The position of the claimant following judgement was no more advantageous than it was when the Part 36 payment was made. It would therefore be unjust to make the defendant pay the costs. The defendant was entitled to recover its costs from the date of the Part 36 payment into court. The claimant was entitled to recover her costs from the letter of claim to the defendant's Part 36 offer. No order for costs was made during the period of the Part 36 offer being made and the Part 36 payment into court.

The Court of Appeal in upholding the trial judge's decision made several observations on the rationale for taking a broad approach in deciding who the real winner is. Quoting Lady Justice Smith in *Hall & ors v Stone* [2007] EWCA Civ 1354, Lord Justice Ward cited with approval the principle that

> "In these days where both sides are expected to conduct themselves in a reasonable way and to seek agreement where possible, it may be right to penalise a party to some degree for failing to accept a reasonable offer or for failing to come back with a counter offer".

His Lordship also cited the observation of Sir Thomas Bingham M.R. in *Roache v Newsgroup Newspapers Ltd* [1998] E.M.L.R 161 as quoted in the recent case of *Jones v Associated Newspapers Ltd* [2008] 1 All ER 240:

> "The judge must look closely at the facts of the particular case before him and ask: who, a matter of substance and reality, has won? Has the plaintiff won anything of value which he could not have won without fighting the action through to a finish? Has the defendant substantially denied the plaintiff the prize which the plaintiff fought the action to win?"

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Recent case law highlights - Continued

The Court of Appeal averred that in non-money claims where there is no yardstick of pounds and pence by which to make the comparison, all the circumstances of the case have to be taken into account. In the context of the new Part 36, "more advantageous" is an "an open-textured phrase"; it permits a more wide-ranging review of all the facts and circumstances of the case in deciding whether the judgement, which is the fruit of the litigation, was worth the fight. The modern approach to litigation dictates that compromise is an object worthy of promotion, for compromise is better than contest for both the litigants concerned, for the court and for the administration of justice. The costs, both financial and emotional, of continuing to litigate are factors to take into account when deciding whether the battle was worth it; money is not the sole governing criterion.

(case note by Andrea Vasili)

Tameside and Glossop Acute Services NHS Trust v Thompstone [2008] EWCA Civ 5

Periodical Payment orders

This case involved the hearing of four conjoined appeals by NHS Trusts and Health Authorities who appealed against decisions concerning the making of Periodical Payment Orders (PPOs) under s.2 of the Damages Act 1996. All four cases involved severely injured claimants claiming future losses, particularly the cost of future care, and in all four liability had been admitted. Damages for future care were also to a large extent agreed and the issues in the appeal surrounded whether a PPO should be made and what form that order should take. The appellants' contentions on all issues were rejected and all four appeals were dismissed. However, the case was viewed by the Court of Appeal as the first opportunity for a number of issues surrounding PPOs and the operation of the legislation to be considered. They viewed their role throughout the decision as laying down guidance for those thereafter having to deal with such issues. Hence the importance of this eagerly awaited decision.

It should be noted that the Court of Appeal and counsel involved anticipated a likely attempt to take the question of the legislation's proper construction to the House of Lords. It therefore remains to be seen which of the issues decided in this case will receive further appellate consideration. The full text of the decision also contains a useful summary of the development and theory behind PPOs.

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Tameside and Glossop Acute Services NHS Trust v Thompstone [2008] EWCA Civ 5 - Continue

The Law

Since 1st April 1995 the court has been required to consider whether to make an order for periodical payments under section 2(1) of the Damages Act 1996 (brought in by way of amendment by the Courts Act 2003) which provides as follows:

> ***"2 Periodical payments***
> *(1) A court awarding damages for future pecuniary loss in respect of personal injury–*
> *(a) may order that the damages are wholly or partly to take the form of periodical payments, and*
> *(b) shall consider whether to make that order."*

Section 2(8) and (9) provide as follows:

> *"(8) An order for periodical payments shall be treated as providing for the amount of payments to vary by reference to the retail prices index (within the meaning of section 833(2) of the Income and Corporation Taxes Act 1988) at such times, and in such a manner, as may be determined by or in accordance with Civil Procedure Rules.*
>
> *(9) But an order for periodical payments may include provision–*
> *(a) disapplying subsection (8), or*
> *(b) modifying the effect of subsection (8)."*

The judges in each of the four cases at first instance had treated the case of *Flora v Wakom (Heathrow) Ltd [2006] EWCA Civ 1103* as authority on the construction of these subsections. It was held there that s.2(8) identified a default position and s.2(9) allowed the court to make the orders identified therein, not simply in exceptional circumstances, but whenever it appeared appropriate and fair to do so.

In three of the four cases the judge had decided to make a PPO and under s.2(9) modify s.2(8) by rejecting the RPI as a suitable index and holding that the appropriate measure for indexation was the Annual Survey of Hours and Earnings for the occupational group of care assistants and home carers (ASHE 6115), produced by the Office of National Statistics.

A number of issues received detailed consideration by the Court of Appeal in the case, which I shall deal with in turn:

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Tameside and Glossop Acute Services NHS Trust v Thompstone [2008] EWCA Civ 5 - Continue

Issue 1

Whether, (1) as a matter of law and statutory construction, or (2) as a matter of law and precedent, s.2(8) can only be modified in 'exceptional circumstances'

The appellants attempted to argue that *Flora* had been decided per incuriam and was therefore not binding. It was said that an argument based on the decision of the Court of Appeal in *Cooke v United Bristol Healthcare NHS Trust [2004] 1 WLR 251* as to why s.2(9) should only apply in exceptional circumstances, had not been made or considered in *Flora*. The argument was that it should be impermissible to have two ostensibly parallel systems of compensation producing a different outcome. Therefore if full compensation (the 100% recovery principle) is achieved in lump sum awards where a discount calculated by reference to the RPI is applied (currently 2.5%), it must also be consistent with the 100% recovery principle to make PPOs indexed by reference to the RPI. In answer to this argument it was stated that a lump sum award and periodical payments are entirely different in character as mechanisms for providing compensation and therefore the same problems and considerations do not apply. The court was highly unimpressed with the 'hopeless' argument that *Flora* had been decided per incuriam. It was stated that *Cooke* had been considered and cited at length and that even if the precise argument had not been considered the point was certainly there to be taken. In those circumstances the decision was not per incuriam.

Issue 2

Whether the words 'modifying the effect of' in s.2(9) was limited to modification of the RPI specified in s.2(8) and did not apply to the substitution of an alternative index

It was argued that the modification relates to the 'index' and therefore must be limited to increasing or decreasing the RPI. It was also argued that *Flora* did not deal with how the index could be modified but only when. Therefore the index must remain the RPI and no consideration could be given to an alternative. The court did not agree with this argument, stating that while a judge would be free to modify the RPI if that was the most accurate way of ensuring 100% compensation, it was clear from *Flora* that this was not the limit of the judge's powers. It was also clear from the wording of s.2(9) that it does not confine itself to 'modification of the index' and therefore the language includes applying another measure for indexation.

Issue 3

Whether the remedy of modification should be denied by application of the principle of Distributive Justice

It was argued that the principle of distributive justice meant that s.2(9) should not be used to disapply the RPI, save in exceptional circumstances. However the court held that the principle did not allow it to ignore basic principles and therefore that it could not be used to influence the calculation of financial loss where the 100% recovery principle is fundamental. In this situation it is 'corrective justice' and not distributive justice which the court should be concerned with.

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Tameside and Glossop Acute Services NHS Trust v Thompstone [2008] EWCA Civ 5 - Continue

Issue 4

Whether there was a legal burden on the claimant to prove that there was an alternative to the presumed RPI

It was argued that there is a legal burden on the party who seeks to persuade the court to modify the effect of s.2(8) and that they must show on the balance of probabilities that there is an appropriate alternative to the RPI. The court stated that the judge is bound by s.2 to consider whether to make a PPO and that this exercise should not be complicated by considerations of legal burdens. Regarding s.2(8) and (9) it must be determined what is appropriate, fair and reasonable, with the claimant bearing only an evidential burden. As the court must consider whether a PPO is appropriate and will meet the claimant's needs, this will have to involve the question of indexing. Whether the RPI should be replaced will depend on the alternatives available and is bound to be a comparative exercise. Suitability should be tested against the following criteria:

Accuracy of match of the particular data series to the loss of expenditure being compensated

Authority of the collector of the data

Statistical reliability

Accessibility

Consistency over time

Reproducibility in the future

Simplicity and consistency in application

Issue 5

Whether the use of an earnings related index such as ASHE 6115 contravenes the principle on which future losses should be assessed as set out in Cookson v Knowles [1979] AC 556

It was argued that the use of such an index contravenes the principle that there should be no increase in a multiplicand to attempt to take account of inflation and that this should be catered for through the selection of an appropriate multiplier. The appellants argued that the use of such an index will in effect be altering the multiplicand annually and thus contravene the principle in *Cookson*. The court felt that this submission was misconceived as that case was concerned with a lump sum award, whereas the present case concerns PPOs which are a wholly different creature, having neither a multiplicand nor multiplier. As such no question can arise of any contravention of the principle in *Cookson*.

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Issue 6

The appropriateness and suitability of ASHE 6115 as an instrument for indexation

The court expressed the view that the issue, despite being expressed as such by the appellants, was not a matter of law. There had already been findings against them at first instance and therefore this was in effect a complete rehearing of issues already decided by the trial judges. However the court was willing do so "*not least because it is of general importance that there should be a definitive statement on these issues at appellate level*". The criteria to be applied were those seven already stated above.

The appellants attempted to argue that the index was unsuitable for use on a number of grounds. They argued that the multiplicand to which the index was to be applied did not exclusively contain care costs and that the index did not sufficiently target the particular carers in the case. These arguments were rejected by the court stating that "*the very nature of the use of an index means that one cannot prove, in the way in which the law requires facts to be proved, that a particular situation is specifically represented in the index. But that does not disqualify the index. All that has to be established is that the composition of the index is sufficiently close to the subject-area in which it is to be used to render that use reasonable and representative*".

The appellants also unsuccessfully argued that the index had other failings which disqualified its use. These were on the basis of the index's possible reclassification, compositional change, movement on the distribution, wages drift, volatility and workability. However, the court were in agreement with all of the findings of the judges at first instance that the ASHE 6115 meets all the requirements for indexation and that it can be achieved without undue complexity. The court stated that it hoped, as a result of these proceedings, it would be accepted that "*the appropriateness of indexation on the basis of ASHE 6115 has been established after an exhaustive review of all the possible objections to its use, both in itself and as applied to the recovery of costs of care and case management*". It was also stated that it will not be appropriate to re-open the issue in future proceedings unless evidence and argument can be produced which is significantly different from, and more persuasive than, that used in the present case.

Issue 7

The process of determining whether a PPO is appropriate

As a result of s.2 a judge now has an obligation to consider whether to make a PPO in every case in which an award is being made for future pecuniary loss, in theory even where neither party wishes for one to be made. The Court of Appeal recognised that these appeals provided the first opportunity for consideration of the correct approach to the exercise of this new power and stated three principles in that approach. The first is that the decision of allocation of the heads of damage between lump sum and PPO and indexation are inter-related and they should be considered together. The second is that the consideration of the claimant's 'needs' was not limited to those needs he demonstrated for the purpose of proving the various heads of damage but also included those things that he needs in order to enable him to organise his life in a practical way. The third is that the test which the judge must apply is an objective one, having regard to the wishes and preferences of the parties and all the circumstances of the case, but primarily focussing on what best meets the claimant's needs.

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Tameside and Glossop Acute Services NHS Trust v Thompstone [2008] EWCA Civ 5 - Continue

Issue 8

The use of expert evidence

During the appeals there arose an area of dispute between the parties as to the evidence and argument which the judge should be asked to consider when making a decision under s.2. The court stated that, even where the parties agree on all issues, a report from an independent financial adviser as to the form of order which he considers will best meet the claimant's needs is likely to be of assistance to the judge who is asked to approve the order. In the hope that cases would not be burdened with evidence on satellite issues it was stated that judges should have regard to the defendant's general preferences advanced on instructions without the need for evidence to be called. While it was accepted that there is nothing in the legislation to suggest that a defendant should not be permitted to call his own IFA, the court stated that in their view "*it will only be in a rare case that it will be appropriate for a defendant... to call expert evidence to seek to demonstrate that the form of the order preferred by the claimant will not best meet his needs*". They considered that judges should require a demonstration that the point clearly arises before they permit the evidence of a second IFA to be adduced.

Case Note by John Brown

National Westminster Bank plc v Patrick King [2008] EWHC 280 (Ch)

Jurisdiction of the County Court

The High Court has power under section 40(2) of the County Courts Act 1984 to order the transfer of proceedings to a county court even where those proceedings would otherwise fall outside the jurisdiction of the county court.

This simple conclusion was reached after extensive consideration of the legislation and its history by David Richards J. A county court has an unlimited jurisdiction to make charging orders, but a very limited jurisdiction to enforce them by way of order for sale under CCA 1984, s23(c): see the White Book, CPR Part 73.10.

The claimant, NatWest, obtained a final charging order on Mr King's property in the Portsmouth County Court. As the amount secured exceeded the County Court's limit of £30,000 the application for an order for sale was commenced in the Chancery Division of the High Court. Master Bragge ordered the case to be transferred to the Portsmouth County Court. District Judge Wilson, sitting in Portsmouth, was concerned whether, notwithstanding the order for transfer, the Portsmouth County Court had jurisdiction to determine the applicaton. He decided, by reason of s23(c), that the County Court did not have jurisdiction and ordered that the case be transferred back to the High Court.

However, Richards J had regard to the clear and unambiguous wording of section 40(2), that "the High Court may order the transfer of any proceedings before it to a county court". Having looked at the history of this power of transfer, it was clear that transfer down was an important tool to ensure that County Court-level cases were decided at the appropriate level, despite the jurisdictional limits. As a consequence, where a case has been transferred by the High Court to the County Court, it is implicit in the CCA 1984 (although, unfortunately, not explicit) that the County Court is given the requisite jurisdiction.

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Manelva Honeygan-Green -and- London Borough of Islington [2008] EWCA Civ 363

Effect of an order for possession on progress made towards acquisition under "Right to Buy" legislation.

The primary issue in this case was the effect on a secure tenant's right to buy under Part V of the Housing Act 1985 ("the 1985 Act"), and on any progress made under Part V towards acquisition, where the tenancy has been "revived" as a result of the court discharging an order for possession under its section 85(4) powers.

Brief summary of the law

Under Part V of the 1985 Act, a secure tenant in certain circumstances enjoys the right to buy the freehold or leasehold of his dwelling house or flat respectively. There are a series of stages in the process of acquisition prescribed by 1985 Act, beginning with the tenant serving written notice on the landlord under section 122, followed by (if appropriate) the ascertainment of the purchase price, culminating in the conveyance of the freehold or grant of a lease. However, the right to buy "cannot be exercised" in a number of situations. One of these is where the tenant is or will be obliged to give up possession on a specific date under a court order (section 121(1)).

Part IV of the 1985 Act deals with secure tenancies and the right to secure tenancies. A possession order can be sought against a secure tenant where there are appropriate grounds (section 84). Where such an order is made, the period of tenancy ends on the date on which the tenant is to give up possession. In practice however, the date on which the tenant is to give up possession is not the same date the tenant in fact vacates the property, as this is usually effected by way of execution of a warrant of eviction on a date after the date of legal possession.

However, termination of the tenancy is not necessarily final. The court has the power even after the order has become effective but before it has been executed, to discharge or rescind the order for possession (section 85(4)). If it does so, the tenancy and its covenants revive and the tenancy is treated as merely having been in a state of statutory "limbo" prior to the revival. Also revived would be the tenant's right to buy and his "qualifying period" under section 119(1) assessed on the assumption that the tenancy continued throughout. However, the substantive dispute in this case was whether, on such a revival, the tenant has to bring the Part V process afresh, or whether the stages previously accomplished before the possession order temporarily terminated the tenancy, revive along with the tenancy and its covenants.

The Decision

Lord Justice Keene, delivering the leading judgment, held that if the secured tenancy is revived by a court order before tenancy if given up, the accrued steps taken before the limbo period ensued revive with the tenancy, subject to any contrary decision of the court. The tenant does not need to begin the process under Part V again by serving a fresh section 122 notice. The prohibition in section 122(1) relates only to the taking of a step exercising the right to buy while a possession order meeting the terms of that sub-section is in existence. No step in the Part V process can be taken in that time.

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Manelva Honeygan-Green -and- London Borough of Islington [2008] EWCA Civ 363

A number of previous cases have dealt with the issue of revival of secure tenancies following an order for possession being rescinded or discharged under section 85 of the 1985 Act. In *Greenwich London Borough v Regan* [1996] 28 HLR 469, a case in relation to orders for possession, it was stated that:

> "the statutory provisions contemplate the possibility that the court may revive or reinstate the existing secure tenancy which must thereafter be treated as having continued throughout without interruption" (per Millet LJ at para 5).

Further, "Once the order for possession which brings the tenancy to an end is rescinded or discharged...the tenant's right to remain in occupation must be referable to the original tenancy, which *ex hypothesis*, has never been determined" (ibid, para 6).

Endorsing Millet LJ's interpretation of the effect of the statutory provisions in Part IV, Lord Browne-Wilkinson held in *Burrows v Brent London Borough Council* [1996] 1 WLR 1448 went on to comment on the rationale for the regime:

> "The whole scheme of that Part [IV] is to afford protection to the secure tenant and that is achieved in section 85 by conferring on the court flexible powers to continue an existing secure tenancy, to revive a determined secure tenancy or to create a statutory limbo which will afford a defaulting tenant an opportunity to have restored to him all the benefits of the secure tenancy when he has complied with stipulated conditions".

Following on from the principles enunciated above; that where an order for possession is subsequently discharged it is fully retrospective in effect, Lord Justice Keene reversed the decision of the intermediate court, upholding the substantive decision of the trial judge who reasoned that:

> "If all the other incidents of a secure tenancy must be deemed retrospectively to have survived the limbo period, I see no logical reason why the right to buy should be treated differently".

(case note by Andrea Vasili)