IN THE COURT OF APPEAL

On appeal from DJ Wicks in
THE UXBRIDGE COUNTY COURT

Claim no: 3UB01791

BETWEEN

A2 DOMINION HOMES LTD
Claimant

- and -

SUSAN HEFFERNAN
First Defendant

ANN MOORE
Second Defendant

PERSONS UNKNOWN
Third Defendant

SKELETON ARGUMENT FOR THE SECOND DEFENDANT

Ian Loveland, Arden Chambers, Counsel for the Defendant
Instructed by Hillingdon Law Centre

Estimated reading time : 1 hour

Essential reading : Skeleton argument

Concise Oxford Dictionary:

Respect '1. regard with deference, esteem or honour. 2 a avoid interfering with, harming, degrading, insulting, injuring or interrupting. b treat with consideration…..'

Lord Phillips in *LB Hounslow v Powell*: [2011] UKSC 8; [2011] 2 A.C. 186 [TAB 17]

[98]….section 3 of the 1998 Act applies to all legislation, whether enacted before or after the 1998 Act came into force. In so far as this alters the construction given to legislation before the 1998 Act came into force, the 1998 Act has the effect of amending legislation: see Ghaidan v Godin-Mendoza [2004] 2 AC 557.

Lord Mance (dissenting) in *Solihull BC v Hickin* [2012] UKSC 39; [2012] 1 W.L.R. 2295 [TAB 16]

57 The majority's opinion is, however, to the contrary. It leads to what I regard as an unhappy discordance with both the Rent Act and the Scottish legal positions. The philosophy of the Housing Act 1985 is that one statutory succession to a secure tenancy should be available between a tenant and a qualified successor, each in turn enjoying occupation as secure tenant. The majority's opinion means that, on Mrs Hickin's death in 2007, no such statutory succession could occur as between Mrs Hickin and her otherwise qualified daughter who had lived together in the house from 1967. This is because of the notional and insecure legal interest which Mr Hickin, who departed the house and family up to 25 years before Mrs Hickin's death, is said to enjoy and on which the council only relies in order to serve notice to quit on him to terminate it. If this is the law, I would suggest that Parliament might appropriately take another look at it, and see whether similar protection should not be made available to persons in Miss Hickin's position to that made specific in Scotland

Emonet v Switzerland (2009) 49 E.H.R.R. 11 [TAB 5]:

86 In the light of the above, "respect" for the applicants' family life required that biological and social reality be taken into account to avoid the blind, mechanical application of the provisions of the law to this very particular situation for which they were clearly not intended. Failure to take such considerations into account flew in the face of the wishes of the persons concerned, without actually benefiting anybody.

Lord Nicholls in *Campbell v. MGN Ltd* [2002] UKHL 22; [2004] 2 A.C. 457 [TAB 3]:

19…In applying this approach, and giving effect to the values protected by article 8, courts will often be aided by adopting the structure of article 8 in the same way as they now habitually apply the Strasbourg court's approach to article 10 when resolving questions concerning freedom of expression. *Articles 8 and 10 call for a more explicit analysis of competing considerations* than the three traditional requirements of the cause of action for breach of confidence identified in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41. (Emphasis added).

1. Background

1. The Respondent/Claimant qua landlord seeks possession of the premises.

2. As against D1 the Respondent/Claimant claimed that D1 succeeded qua joint assured tenant of the premises through the doctrine of survivorship to a sole tenancy on the death of her ex-husband (Mr Heffernan) with whom she shared the joint tenancy. D1 had not occupied the premises for many years, and so on the death of her ex-husband the tenancy immediately lost assured status and has been determined by a valid notice to quit addressed to D1 and served at the premises.

3. As against the Appellant/D2, who was Mr Heffernan's partner at the time of his death and who has occupied the premises for several years as her home, the Claimant/Respondent claims she is a trespasser.

4. D1 has played no part in this litigation. It is not known where she is, or even if she is alive.

2. The ground of defence on appeal

5. One might be forgiven, on hearing the Respondent's case, for thinking that the Appellant invites the court to embark upon a perilous legal journey, along uncharted doctrinal paths and unexplored constitutional byways in order to arrive at a quite fantastic moral destination. But when set down amidst the cartography drawn over our legal system by the Human Rights Act 1998, the Appellant's case is quite prosaic; almost one might think mundane.

6. The legal problem is this:

   (a) On Mr Heffernan's death, D1 prima facie became the sole tenant of the premises through the common law doctrine of survivorship.

   (b) The premises were not then and had not been for many years D1's home or the place where she conducted any aspect of her family life.

(c) The premises were then and had been for some years the Appellant/D2's home and the heart of her family life.

(d) But for the doctrine of survivorship, the Appellant/D2 would have succeeded to Mr Heffernan's assured tenancy under the terms of the Housing Act 1988 s.17.

(e) In the circumstances of this case, the effect of the doctrine of survivorship is that all of the legal rights in Mr Heffernan's tenancy are given to a person who has no Art 8 interest in the premises and the person who has a profound Art 8 interest in the premises is entirely ignored.

(f) In substantive terms therefore the doctrine of survivorship accord no respect whatsoever to the Appellant/D2's Art 8 interests.

(g) In procedural terms the doctrine of survivorship accord no respect whatsoever to the Appellant/D2's Art 8 interests because:

the trial court has no discretion to modify/disregard the rule; and

the doctrine was formulated and has been maintained without any regard having been given to its consistency with Art 8.

7. If the court accepts the doctrine is inconsistent with Art 8, the solution to the problem is either:

(a) As a matter of common law, the court is empowered by HRA 1998 s.3 to disapply the doctrine of survivorship in circumstances where its application would produce results inconsistent with Art 8; or

(b) As a matter of statutory obligation, the court is required per HRA 1998 s.3 – if it is possible to do so - to interpret the Housing Act 1988 s.17 in a fashion which renders the doctrine of survivorship inapplicable in circumstances where its application would produce results inconsistent with Art 8.

8. In the court below, DJ Wicks considered this argument with great care [B 41-50] , but held that he was bound by authority to reject it. His decision is appealed against on the following basis:

[B 66; esp para 20-21 at B 49-50] The Second Defendant appeals against the learned District Judge's conclusion in respect of ground 1 of the defence, that ground being:

Ground 1. In the event that Susan Heffernan was alive at the time that Darren Heffernan died, the Second Defendant is the assured tenant of the premises by succession because in the circumstances of this case the common law doctrine of survivorship is inapplicable because it is incompatible with the Human Rights Act 1998 Sch. 1 Art 8.

The learned Judge dismissed this ground of defence on the bases that he was bound to so by the judgments of the Supreme Court in *Solihull BC v Hickin* [2012] UKSC 39; [2012] 1 WLR 2295 and *Dacorum BC v Sims* [2014] UKSC 63; [2014] 3 WLR 1600.

The learned District Judge was wrong so to conclude because:

(a) *Hickin* was argued and decided without any consideration at all being given to Art 8 and so cannot be taken as offering any view on the compatibility of the rule of survivorship with Art 8; and

(b) *Sims* deals with a wholly different rule of common law (namely the rule in *Hammersmith v Monk*).

3. The Appellant/D2's submissions.

9. In this court (and in the court below), the Appellant/D2 adduces (adduced) an argument which was not made before the Supreme Court or Court of Appeal in *Solihull MBC v Hickin* [2012] UKSC 39; [2012] 1 W.L.R. 2295 [TAB 16]

10. The orthodox doctrine of survivorship is incompatible with Art 8 of the HRA 1998 Sch. 1 *for procedural reasons* because:

(i) Its absolute nature does not permit any consideration to be given by a court or other independent tribunal to whether it is necessary in a democratic society (in an HRA 1998 Sch. 1 Art 8 sense) that the tenancy vests in the surviving joint tenant:

(ii) Its absolute nature does not permit any consideration to be given by a court or other independent tribunal to whether it is necessary in a democratic society (in an HRA 1998 Sch. 1 Art 8 sense) that the tenancy should not be succeeded to by an otherwise qualified person;

(iii) No consideration was given in the making of the common law rule to its compatibility with Art 8.

(iv) The absolute nature of the common law rule has not been considered and approved by Parliament.

11. The orthodox doctrine of survivorship is incompatible with the aforesaid provisions of the HRA 1998 Sch. 1 Art 8 *for substantive reasons* because it invariably deprives an otherwise qualified successor of inter alia:

(i) possession and occupancy of a family home in which he/she would otherwise enjoy considerable security of tenure;

(ii) possession and occupancy of a family home let at a rent which is likely to be substantially less than would be paid for comparable private sector premises;

12. The Appellant/D2's submissions as to this ground have several discrete but inter-linked elements.

(i) The doctrine of survivorship is incompatible with HRA 1998 Art 8

13. The relevant incompatibility is with Art 8 HRA 1998, not Art 8 ECHR; ie the averral made is that common law rule is incompatible with a provision of a United Kingdom statute, not with a term of an international law treaty. The point is in constitutional terms trite; *common law rules are overridden by inconsistent statutory provisions*.

14. In ascertaining the requirements of Art 8 HRA 1998, this court must necessarily look to judgments on the point given by domestic appellate courts. Further, per HRA 1998 s.2 domestic courts must in determining the meaning of Art 8 HRA 1998 take account of relevant judgments of the ECtHR as to the meaning of Art 8 ECHR. The approach currently taken to s.2 by the Supreme Court is that domestic courts should adopt a very strong presumption that the meanings of articles in Schedule 1 of the HRA 1998 and their textually identical counterparts in the ECHR are the same. This general principle has been reiterated in the specific context of domestic housing law in *Manchester CC v Pinnock* at paras 46-49 [TAB 14].

15. D2's submissions rest in part on the premise that *Art 8 is concerned with the legal details of occupancy entitlements as well as with mere occupancy*.

16. *Ghaidan v Mendoza* [2004] UKHL 30; [2004] 2 A.C. 557 [TAB 7] illustrates the point perfectly. The effect of a successful Art 8 (and Art 14) defence in that case was that Mr Mendoza would live in his home as a protected tenant under the Rent Act 1977 rather than as assured tenant under the Housing Act 1988. The bundle of legal rights he derived from the 1977 Act was substantially more beneficial to him than those contained in the 1988 Act. His occupancy of his home was never under

threat; what engaged Art 8 in that case was that the legal details of his occupancy were in issue.

17. It is equally obvious that the successful pleading of an Art 8 defence against the service of a notice to quit by a landlord goes beyond merely preserving a contingent entitlement to occupy.[1] The effect of a successful defence is to restore a tenancy - and the rights contained in the tenancy - that had prima facie been determined. Similarly, in respect of an introductory tenant the likely consequence of an effective Art 8 defence is that her/his introductory tenancy becomes transformed into a secure tenancy; a very different – and for the tenant much more valuable – set of legal rights than is provided by an introductory tenancy.[2]

18. In a related but distinct sense there is now a substantial body of ECtHR case law considering the significance of Art 8 in nuisance cases. That Art 8 can go to the quality of occupancy of one's home is axiomatic to these cases. So in *Moreno Gomez v Spain (*2005) 41 E.H.R.R. 40 [TAB 15] the ECtHR observed:

> 53 Article 8 of the Convention protects the individual's right to respect for his private and family life, his home and his correspondence. A home will usually be the place, the physically defined area, where private and family life develops. The individual has a right to respect for his home, meaning not just the right to the actual physical area, but also to the quiet enjoyment of that area. Breaches of the right to respect of the home are not confined to concrete or physical breaches, such as unauthorised entry into a person's home, but also include those that are not concrete or physical, such as noise, emissions, smells or other forms of interference. A serious breach may result in the breach of a person's right to respect for his home if it prevents him from enjoying the amenities of his home.
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> 55 Although the object of Art.8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it may involve the authorities' adopting measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. Whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under para.1 of Art.8 or in terms of an interference by a public authority to be justified in accordance with para.2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole.

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[1] The point is of especial relevance to homeless persons who have been housed by a local authority per Part VII of the Housing Act 1996. Per Housing Act 1985 Sch. 1 para 4 such tenancies are not secure and so exist only at common law and can be determined by either party serving a notice to quit.

[2] The scheme of the Housing Act 1996 in relation to introductory tenancies provides that such tenancies become secure after one year unless possession proceedings have been issued. If such proceedings are dismissed at a point more than one year from the inception of the tenancy, the inevitable result of the judgment is that the tenancy becomes secure.

19. D2 will be precluded entirely from enjoying the amenities of her home by the application of the doctrine of survivorship in this case. And as one reads on into *Moreno-Gomez* one seems to find the ECtHR approving precisely what D2 is asking the court to do:

> 55 Although the object of Art.8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it may involve the authorities' adopting measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. Whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under para.1 of Art.8 or in terms of an interference by a public authority to be justified in accordance with para.2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole.

20. The premises in issue in this case are the Appellant/D2's home. They have been her home for some five years. They are where she lived with her partner Mr Heffernan. They are where she watched him die. They are where she has made and conducted her family life. *Her formal legal status (if the doctrine of survivorship is applicable) as a trespasser in her home belies the social reality of her presence in the premises*.

21. The premises in issue in this case are not D1's home. They have not been D1's home for some ten years. None of her family life is there. In the past decade, she has had nothing to do with the premises. *Her formal legal status as a joint tenant with Mr Heffernan belied the social reality of her absence from the premises*.

22. In short, the Appellant/D2 has a profound Art 8 interest in the premises, while D1 has no Art 8 interest in them at all.

23. The Appellant/D2's Art 8 interest is that the law shows 'respect' for her home and family life. When one searches for the meaning of words in Sch.1 of the HRA one must accord great weight to the meaning that the ECtHR has attached to those same words in the ECHR. That issue is returned to below. But 'respect' in Art 8 of Sch. 1 of the HRA is an ordinary word in a statute and its meaning there is conditioned by its commonly accepted meaning in everyday parlance. And if we turn our attention to the Concise Oxford Dictionary to explore the meaning of respect we find, inter alia:

> '1. regard with deference, esteem or honour. 2 a avoid interfering with, harming, degrading, insulting, injuring or interrupting. b treat with consideration…..'

24. The doctrine of survivorship completely ignores the Appellant/D2's Art 8 home and family life interests in the premises. If affords them no weight at all. It sacrifices them in their entirety to a person who has no such interests. They are afforded not a scintilla of deference, esteem or honour. They receive not a jot of consideration.

25. No role is afforded to a court or other independent tribunal to assess the necessity in this case of all of the Appellant/D2's Art 8 interests in the premises being automatically vested in D1.

26. There is no respect in the Art 8 sense here. *The rule requires unbending legal formalism irrespective of empirical reality.* Such formalism has long been regarded by the ECtHR as incompatible with Art 8's protection of respect for family life:

27. So, in *Kroon v Netherlands* (1995) 19 E.H.R.R. 263 [TAB 12], the ECtHR observed:

> 40. In the Court's opinion, "respect" for "family life" requires that biological and social reality prevail over a legal presumption which, as in the present case, flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone. Accordingly, the Court concludes that, even having regard to the margin of appreciation left to the State, the Netherlands has failed to secure to the applicants the "respect" for their family life to which they are entitled under the Convention.
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> There has accordingly been a violation of Article 8 .

28. And in *Emonet v Switzerland* (2009) 49 E.H.R.R. 11 [TAB 5]:

> The Court's assessment
>
> The principles developed by the Court
>
> 63 The Court reiterates that the essential object of art.8 is to protect the individual against arbitrary action by the public authorities. There are in addition positive obligations inherent in effective "respect" for family life. In both contexts regard must be had to the fair balance to be struck between the competing interests of the individual and of the community as a whole; and in both cases the state enjoys a certain margin of appreciation……
>
> 67 Whether the question is analysed in terms of a positive duty on the state—to take reasonable and appropriate measures to secure the applicant's rights under para.1 of art.8 —or in terms of a negative obligation, that is, an "interference by a public authority" to be justified in accordance with para.2, the applicable principles are broadly similar. An interference with the right to respect for family life entails a violation of art.8 unless it is, "in accordance with the law", has an aim or

aims that is or are legitimate under art.8(2) and is, "necessary in a democratic society" for the aforesaid aim or aims.

68 An interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a pressing social need and is proportionate to the legitimate aim pursued. The Court recognises that it is for the national authorities to make the initial assessment of necessity, though the final evaluation as to whether the reasons cited for the interference are "relevant and sufficient" is one for this Court. A margin of appreciation is left to contracting states in the context of this assessment, which varies according to the nature of the activities restricted and of the aims pursued by the restrictions. ……..

86 In the light of the above, "respect" for the applicants' family life required that biological and social reality be taken into account to avoid the blind, mechanical application of the provisions of the law to this very particular situation for which they were clearly not intended. Failure to take such considerations into account flew in the face of the wishes of the persons concerned, without actually benefiting anybody.

29. The Respondent/Claimant seeks in this case a "blind, mechanical application of the provisions of the law to this very particular situation for which they were clearly not intended". Such undiscerning legal formalism is the epitome of *disrespect* for a Convention Right.

30. In framing its laws in the field of housing policy, a signatory State to the ECHR enjoys a margin of appreciation. The most recent ECtHR restatement of this issue in the housing law context is found in *Kay v United Kingdom* (2012) 54 E.H.R.R. 30 [TAB 10]:

66 In making their initial assessment of the necessity of the measure, the national authorities enjoy a margin of appreciation in recognition of the fact that they are better placed than international courts to evaluate local needs and conditions. The margin afforded to national authorities will vary depending on the Convention right in issue and its importance for the individual in question. The Court set out its approach in Connors at [82], in which it stated:

"The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights (see, for example, Dudgeon v. the United Kingdom, judgment of 22 October 1981 , Series A no. 45, p. 21, § 52; Gillow v. the United Kingdom, judgment of 24 November 1986 , Series A, no. 104, § 55). On the other hand, in spheres involving the application of social or economic policies, there is authority that the margin of appreciation is wide, as in the planning context where the Court has found that '[i]n so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation' (Buckley v. the United Kingdom, judgment of 26 September 1996 , Reports of Judgments and Decisions 1996-IV , p. 1292, § 75 in fine). The Court has also stated that in spheres such as housing, which play a central role in the welfare and economic policies of modern societies, it will respect the legislature's judgment as to what is in the general interest unless that judgment is manifestly without reasonable foundation (see Mellacher and Others v Austria, judgment of 19 December 1989 , Series A no. 169, p. 27, § 45, Immobiliare Saffi v. Italy [GC], no. 22774/93 , ECHR1999-V, § 49). It may be noted however that this was in the context of Article 1 of Protocol No. 1, not Article 8 which concerns rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community (see, mutatis mutandis , Gillow v. the United Kingdom , cited

above, § 55; Pretty v. the United Kingdom, no. 2346/02 , ECHR2002-III; Christine Goodwin v. the United Kingdom, no. 28957/95 , § 90, ECHR 2002-VI). Where general social and economic policy considerations have arisen in the context of Article 8 itself, the scope of the margin of appreciation depends on the context of the case, with particular significance *1082 attaching to the extent of the intrusion into the personal sphere of the applicant (Hatton and others v. the United Kingdom, [GC] no. 36022/97 , ECHR 2003-…, §§ 103 and 123)."

67 Further, it is clear from the case law of the Court that the requirement under art.8(2) that the interference be "necessary in a democratic society" raises a question of procedure as well as one of substance. 46 The procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, the Court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by art.8 .

68 As the Court emphasised in McCann, the loss of one's home is the most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in light of the relevant principles under art.8 of the Convention, notwithstanding that, under domestic law, his right to occupation has come to an end.

31. **The 'measure' in issue here is the doctrine of survivorship**. That is what deprives D2 of her otherwise clear entitlement to succeed to the tenancy of her home. It is the proportionality of that measure which is in issue. The interference is 'extreme'. It intrudes grotesquely 'into the personal sphere of the applicant'. The margin of appreciation should for this reason be narrow.

32. And the margin should be narrowed further for the reason outlined below.

(ii) The doctrine of survivorship has not been the subject of considered approval in the light of Art 8 by Parliament or the higher courts

33. The inter-relationship of the common law doctrine of survivorship with the statutory scheme of succession in the Housing Act 1985 has latterly been considered (***without reference to Art 8***) in *Solihull MBC v Hickin* [2012] UKSC 39 [TAB 16].

34. In *Hickin*, the Supreme Court held by a 3-2 majority that the provisions of the Act did not displace the doctrine of survivorship. In that case, H and W were joint tenants of a council house under a secure tenancy. H left W and the family home. For many years thereafter – without seeking to have the tenancy transferred to her as a sole tenant – W lived in the house with her daughter D. On W's death, the joint tenancy vested in H. Since H was not resident in the premises, the tenancy lost security. The Claimant served a notice to quit to determine the tenancy, and

sought possession against D qua trespasser. Had W been a sole tenant, D would have been entitled to succeed (subject to any claim under ground 16).

35. For the majority, Lord Sumption (at para 3) rooted the doctrine in *Cunningham Reid v Public Trustee* [1944] KB 602 [TAB 4]. From an Art 8 perspective, this attribution is obviously problematic. *Cunningham-Reid* manifestly paid no regard to Art 8 since it predates the HRA by some 50+ years. Nor was it a case concerned with a person's home; the premises in issue were commercial property. Indeed, it was not even a possession case, but an attempt by the surviving joint tenant to fix the deceased joint tenant's estate with liability for 50 % of the rent on the remaining term of the lease.

36. The only other authority cited by Lord Sunption is *Tennant v Hutton*, an unreported Court of Appeal judgment from 1996. This case is invoked only to illustrate the point that on the death of one joint tenant there is strictu sensu no 'succession'; rather the 'tenant' – who was formerly two persons – has now become just one person.

37. Simply put, the consistency of the doctrine of survivorship with Art 8 has never been considered by the higher courts. It was not considered in *Hickin* and that is why DJ Wicks in the court below was wrong to place any reliance on *Hickin*. **[B 49-50]**

38. Yet it might be said, there cannot really be anything 'wrong' with the rule of survivorship since Parliament has taken no express steps to modify or abolish it. And - it might be added – Parliament has had obvious opportunities to do so in the many bits and pieces of housing and family legislation enacted in the past fifty years. But legislative lacunae cannot provide a basis for thinking that a rule of law, whether statutory or common law in nature, is consistent with provisions of the HRA.

39. That is the rationale which we see informing the ECtHR's understanding of the ECHR's generic 'necessary in a democratic society' principle. A cogent illustration of the point is the Grand Chamber's judgment in the prisoners' voting rights case, *Hirst v United Kingdom* [2006] 42 E.H.R.R. 41 [TAB 8]. While the Court accepted that on this issue States should enjoy a wide margin of appreciation, the breadth of that margin would diminish if a State could not demonstrate that its impugned law was the result of a properly informed and thorough lawmaking process (emphases added):

> 79 As to the weight to be attached to the position adopted by the legislature and judiciary in the United Kingdom, *there is no evidence that Parliament has ever sought to weigh the competing*

interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote. It is true that the question was considered by the multi-party Speaker's Conference on Electoral Law in 1968 which unanimously recommended that a convicted prisoner should not be entitled to vote. It is also true that the Working Party, which recommended the amendment to the law to allow unconvicted prisoners to vote, recorded that successive Governments had taken the view that convicted prisoners had lost the moral authority to vote and did not therefore argue for a change in the legislation. It may perhaps be said that, by voting the way they did to exempt unconvicted prisoners from the restriction on voting, Parliament implicitly affirmed the need for continued restrictions on the voting rights of convicted prisoners. *Nonetheless it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote*.

40. There is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of the rule of survivorship. The rule has never been subject to legislative consideration. We cannot find: 'any substantive debate by members of the legislature on the continued justification' for the rule. There is – legislatively speaking – nothing for the courts to consider and so nothing to defer to; (because, of course, nothing can come of nothing). The rule's legitimacy must lie solely in the intellectual rigour of the lawmaking process which produced it.

41. The ECtHR has underlined this principle – and confirmed that is a principle of general application - in *Animal Defenders International v United Kingdom* (2013) 57 E.H.R.R. 21 [TAB 1]

(b) Preliminary remarks

106 Whether or not the interference was so pleaded in the above cited *VgT* case, the present parties accepted that political advertising could be regulated by a general measure and they disagreed only on the breadth of the general measure chosen. It is recalled that a state can, consistently with the Convention, adopt general measures which apply to pre-defined situations regardless of the individual facts of each case even if this might result in individual hard cases. 42 Contrary to the applicant's submission, a general measure is to be distinguished from a prior restraint imposed on an individual act of expression. 43

107 *The necessity for a general measure has been examined by the Court in a variety of contexts such as economic and social policy 44 and welfare and pensions. 45* It has also been examined in the context of electoral laws 46 ; prisoner voting 47 ; artificial insemination for prisoners 48 ; the destruction of frozen embryos 49 ; and assisted suicide 50 ; as well as in the context of a prohibition on religious advertising. 51

108 It emerges from that case-law that, in order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it. 52 *The quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect*, including to the operation of the relevant margin of appreciation. 53 It is also relevant to take into account the risk of abuse if a general measure were to be relaxed, that being a risk which is *644 primarily for the state to assess. 54 A general measure has been found to be a more feasible means of achieving the legitimate aim than a provision allowing a case-by-case examination, when the latter would give rise to a risk of significant uncertainty, 55 of litigation,

expense and delay 56 as well as of discrimination and arbitrariness. 57 The application of the general measure to the facts of the case remains, however, illustrative of its impact in practice and is thus material to its proportionality. 58

109 It follows that the more convincing the general justifications for the general measure are, the less importance the Court will attach to its impact in the particular case. This approach of the Court to reviewing general measures draws on elements of its analysis in both the abovecited *VgT* and *Murphy* cases, the latter of which was applied in *TV Vest* . The *VgT (No.2)* judgment of 2009 59 is not relevant, concerned as it was with a positive obligation on the state to execute a judgment of this Court.

……..

Proportionality

113 Turning therefore to the proportionality of this general measure, the Court has, in the first place, examined the national parliamentary and judicial reviews of its necessity: which reviews are, for the reasons outlined at [106]–[111] above, of central importance to the present case.

114 Although the prohibition had been an integral part of broadcasting in the United Kingdom since the 1950s, its necessity was specifically reviewed and confirmed by the Neill Committee in its report of 1998. A White Paper with a proposed prohibition was therefore published for comment. It was at this point (2001) that the abovecited *VgT* judgment was delivered and all later stages of the pre-legislative review examined in detail the impact of this judgment on the Convention compatibility of the proposed prohibition. Following the White Paper consultation, in 2002 a draft Bill was published with a detailed Explanatory Note which dealt with the implications of the *VgT* judgment. All later specialist bodies consulted on that Bill [66] were in favour, for reasons set out in detail above, [67] of maintaining the prohibition: considering that, even after the *VgT* judgment, it was a proportionate general measure. The Government, through the DCMS, played an important part in that debate, explaining frequently and in detail their reasons for retaining the prohibition and for considering it to be proportionate, and going so far as to disclose their legal advice on the subject. [68] The 2003 Act containing the prohibition was then enacted with cross-party support and without any dissenting vote. The prohibition was, therefore, the culmination of an exceptional examination by Parliamentary bodies of the cultural, political and legal aspects of the prohibition as part of the broader regulatory system governing broadcasted public interest expression in the United Kingdom, and all bodies found the prohibition to have been a necessary interference with art.10 rights. *646

115 It was this particular competence of Parliament and the extensive pre-legislative consultation on the Convention-compatibility of the prohibition which explained the degree of deference shown by the domestic courts to Parliament's decision to adopt the prohibition. [69] The proportionality of the prohibition was, nonetheless, debated in some detail before the High Court and the House of Lords. Both courts analysed the relevant Convention case-law and principles, addressed the relevance of the abovecited *VgT* judgment and carefully applied that jurisprudence to the prohibition. Each judge at both levels endorsed the objective of the prohibition as well as the rationale of the legislative choices which defined its particular scope and each concluded that it was a necessary and proportionate interference with the applicant's rights under art.10 of the Convention.

116 The Court, for its part, attaches considerable weight to these exacting and pertinent reviews, by both parliamentary and judicial bodies, of the complex regulatory regime governing political broadcasting in the United Kingdom, and to their view that the general measure was necessary to prevent the distortion of crucial public interest debates and, thereby, the undermining of the democratic process.

42. The lawmaking process which has produced and maintained the doctrine of survivorship has obvious flaws from an Art 8 perspective. As noted above, the rule was formulated at common law many years prior to the enactment of Art 8. The point remains unconsidered by either the legislature or the higher courts. The effect of the HRA 1998 is that the courts should consider it now.

43. Nor can the judgment of the Supreme Court in *Dacorum BC v Sims* [2014] UKSC 63; [2013] 3 W.L.R. 1600 [TAB 18] plug this gap. The judgment tells us nothing whatsoever about the doctrine of survivorship or its consistency with Art 8. That is one reason why DJ Wicks in the court below was wrong to place any reliance on *Sims*. **[B 50]**

44. Indeed, what *Sims* tells us is that the rule in *Monk* is now more likely to survive Art 8 ECHR scrutiny before the ECtHR *precisely because its compatibility with Art 8 has now been carefully considered in both the Court of Appeal and the Supreme Court*. But, thus far, that consideration is manifestly lacking in respect of the doctrine of survivorship. That is a second reason why DJ Wicks in the court below was wrong to place any reliance on *Sims*

(iii) Rules of common law must be developed to remove incompatibility with Convention Rights

45. That there is nothing novel in doing so from a purely 'domestic' human rights viewpoint is clearly illustrated by *Campbell v MGN* [2002] UKHL 22; [2004] 2 A.C. 457 [TAB 3]. Presumably the limitations of the tort of breach of confidence had been perfectly well known to successive cohorts of MPs and successive governments for many years before the *Daily Mirror* decided furtively to record Ms Campbell's visits to her substance abuse clinics. The intrusion of tabloid journalists in 1990 into the intensive care room where the actor Gordon Kaye was recovering from serious injuries and the subsequent publication of a largely fabricated story about him prompted particularly extensive public discussion of our lack of a privacy law.[3] But Parliament chose not to introduce specific privacy legislation.

46. That the House of Lords in *Campbell* nonetheless felt re-evaluation and redefinition of the common law was appropriate might be explained in one of three ways. Either the court of its own volition had jettisoned a constitutional orthodoxy that the common law be deferential to legislative inaction; or that the orthodoxy was never really an orthodoxy at all; or – and for conservative constitutional theorists this is the more attractive explanation – the previous

[3] See *Kaye v Robertson* [1991] F.S.R. 62 [TAB 11].

orthodoxy had been displaced by Parliament in enacting the HRA itself whenever what is in issue is a common law rule which subsists without ever having been subject to rigorous judicial or legislative consideration of its compliance with a Convention Right. The precise implications of the notion that the HRA requires the courts to re-examine common law principles in order to assess their compatibility with convention rights are most clearly stated by both Lord Nicholls and Lord Hope in *Campbell.*

47. Lord Nicholls observes at [19]:

> "In applying this approach, and giving effect to the values protected by article 8, courts will often be aided by adopting the structure of article 8 in the same way as they now habitually apply the Strasbourg court's approach to article 10 when resolving questions concerning freedom of expression. *Articles 8 and 10 call for a more explicit analysis of competing considerations* than the three traditional requirements of the cause of action for breach of confidence identified in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41." (Emphasis added).

48. In slightly different language, Lord Hope makes the same point at [86]:

> "The language has changed following the coming into operation of the Human Rights Act 1998 and the incorporation into domestic law of article 8 and article 10 of the Convention. We now talk about the right to respect for private life and the countervailing right to freedom of expression. The jurisprudence of the European Court offers important guidance as to how these competing rights ought to be approached and analysed. I doubt whether the result is that the centre of gravity, as my noble and learned friend, Lord Hoffmann, says, has shifted. *It seems to me that the balancing exercise to which that guidance is directed is essentially the same exercise, although it is plainly now more carefully focussed and more penetrating.* As Lord Woolf CJ said in *A v B plc* [2003] QB 195, 202, para 4, new breadth and strength is given to the action for breach of confidence by these articles." (Emphasis added).

49. The Appellant submits that this concept of "more explicit analysis of competing considerations" (*per* Lord Nicholls) or "more carefully focused and more penetrating" balancing exercise (*per* Lord Hope) is a requirement of general application.

50. Lord Nicholls' principle in *Campbell* is properly to be seen as the methodological equivalent of the HRA s.3 requirement imposed on the courts in respect of statutory provisions, when common law rules are in issue. That this duty in respect of the common law may sensibly be seen as a corollary of the court's obligations under HRA s.3 in respect of statutory provisions is made clear in the Court of Appeal judgment in *HRH Prince of Wales v Associated Newspapers Ltd* [2007] EWHC 522 (Ch); [2008] Ch 57 per Lord Phillips CJ [TAB 9]:

> 25 ….. Section 3 of the Human Rights Act 1998 requires the court, so far as it is possible, to read and give effect to legislation in a manner which is compatible with the Convention rights. *The*

English court has recognised that it should also, in so far as possible, develop the common law in such a way as to give effect to Convention rights. In this way horizontal effect is given to the Convention. This would seem to accord with the view of the European Court of Human Rights as to the duty of the court as a public authority: see *Von Hannover v Germany* (2004) 40 EHRR 1, paras 74 and 78.

26 The English court has been concerned to develop a law of privacy that provides protection of the rights to 'private and family life, his home and his correspondence' recognised by article 8 of the Convention. To this end the courts have extended the law of confidentiality so as to protect article 8 rights in circumstances which do not involve a breach of a confidential relationship. Although their Lordships differed as to the result in *Campbell v MGN Ltd* [2004] 2 AC 457, there was little between them as to the applicable legal principles". (Emphasis added).

51. The propriety of this approach was expressly approved by Lord Walker in the House of Lords in the context of possession proceedings in *Birmingham CC Doherty* [2008] UKHL 57; [2009] 1 AC 367 at [109] [TAB 2]:

"Public authorities are bound to take account of human rights. As our domestic human rights jurisprudence develops and becomes bedded down, this should be seen as a normal part of their functions, not an exotic introduction. I would echo a note by Anthony Lester QC and David Pannick QC 116 LQR 380, 383 to which I have already alluded:

'The central legislative purpose [of the 1998 Act] is that of bringing the Convention rights home, that is, of domesticating them so that they are not regarded as alien rights protected exclusively by a "foreign" European court. To change the metaphor yet again, Convention rights must be woven into the fabric of domestic law. In the absence of a written British constitution, *it is especially important to weave the Convention rights into the principles of the common law and of equity* so that they strengthen rather than undermine those principles, including the principle of legal certainty'.

52. A rule of common law (including such rules within the field of housing law) is as susceptible to a challenge that it is incompatible with Art.8 at Strasbourg as the provision of a statute. See Lord Nicholls in *Lambeth LB v Kay* [2006] UKHL 10; [2006] 2 A.C. 465 at [54] [TAB 13]:

"... [I]nevitably there may be the exceedingly rare case where the legislative code *or, indeed, the common law* is impeachable on human rights grounds". (Emphasis added).

See also Lord Scott at [168-169]:

"It is right to notice, however, that *Connors* and *Blečič* do show that in two types of case where an owner is seeking to recover possession of his property the absence of any contractual or proprietary right of the home occupier to remain in possession may not be conclusive. The first type of case is where an arguable article 8 objection can be taken to some aspect of the statutory *and common law rules* that entitle the owner to possession. ..." (Emphasis added).

(iv) The rule of survivorship cannot withstand 'more carefully focused and more penetrating' analysis

53. *Hickin* offers no reason for the rule other than suggesting it avoids potentially capricious results in circumstances where the surviving joint secure tenant who wished to live in the premises and is not the spouse or a family member of the deceased tenant (and so not a statutory successor) would find his entitlement to do so overridden by the statutory succession entitlement of a qualified successor. Such caprice would of course be avoided if the rule was inapplicable only in circumstances where the surviving joint tenant had no Art 8 interest in the premises.

54. For present purposes, it is pertinent to note that no member of the Court makes any reference to evidence indicating the policy which Parliament intended to pursue when enacting the succession provisions of the Housing Act 1985 vis a vis the doctrine of survivorship. This is because the point was not considered. Nor was it considered when the Housing Act 1988 was enacted.

55. The dissenting opinion of Lord Mance in *Hickin* [TAB 16] (impliedly) hits this Art 8 nail square on the head:

> 57 The majority's opinion is, however, to the contrary. It leads to what I regard as an unhappy discordance with both the Rent Act and the Scottish legal positions. The philosophy of the Housing Act 1985 is that one statutory succession to a secure tenancy should be available between a tenant and a qualified successor, each in turn enjoying occupation as secure tenant. The majority's opinion means that, on Mrs Hickin's death in 2007, no such statutory succession could occur as between Mrs Hickin and her otherwise qualified daughter who had lived together in the house from 1967. This is because of the notional and insecure legal interest which Mr Hickin, who departed the house and family up to 25 years before Mrs Hickin's death, is said to enjoy and on which the council only relies in order to serve notice to quit on him to terminate it. If this is the law, I would suggest that Parliament might appropriately take another look at it, and see whether similar protection should not be made available to persons in Miss Hickin's position to that made specific in Scotland

56. Had the Art 8 point been pleaded in *Hickin*, the court itself could have taken 'another look' at the rule. That can now be done in this case.

57. What we see when we take that look is that it is clearly very *convenient* for the claimant landlord in cases such as this or *Hickin* that the succession rights of a potential occupant who would occupy as an assured/secure tenant are trumped by the interests of a person who has not lived in the house for years and has no wish to do so in the future. It is very *convenient* because the absentee tenant has no defence to a valid notice to quit and all that can raised by way of defence by any occupier are the minimally effective public law and Art 8 proportionality

arguments. The landlord can thus regain possession at minimal cost and expense and then – if it so wishes – re-let or sell the premises.

58. The Art 8 test is not however one of *convenience*. It is one of *necessity*. Is it *necessary* that:

(a) On the death of one joint tenant of a family, the entirety of the legal interests in that home must *invariably* vest in the other joint tenant even if the premises have not for many years been that tenant's home and he has neither performed nor accepted any of the obligations arising under the tenancy and there is another person whose home is in the premises and who satisfies the statutory succession criteria;

And is it *necessary* that:

(b) No court or independent tribunal can *ever* disapply or mitigate the rigours of this rule irrespective of the circumstances of the absentee joint tenant and the other putative successor.

59. The issue is therefore whether this lack of respect can be justified per HRA Art 8(2). This raises the three familiar questions:

(a) Does the rule pursue a legitimate Art 8(2) interest ?

(b) Is the rule sufficiently precisely defined to be 'in accordance with the law' ?

(c) Is the rule necessary in a democratic society ?

60. It is accepted that the rule of survivorship is 'in accordance with the law', as it is perfectly clear in its terms and entirely absolute in its effect. It is not accepted that, on the facts of this case, that the rule pursues a legitimate interest or that it is necessary in a democratic society.

61. The only credible Art 8(2) interest that can be served by the rule is that it protects the rights and freedoms of others. The only such rights which are conceivably implicated here are those of D1 and of the Respondent/Claimant.

62. But D1 has no Art 8 interest in these premises. She asserted no legal interest in the tenancy on Mr Heffernan's death. She makes no challenge to the notice to quit. She plays no role in these proceedings. Assuming her to be alive, she has nothing to protect now and evidently had nothing to protect at the time of Mr

Heffernan's death. Indeed, the effect of the doctrine in this case vis a vis D1 would have been to saddle her with an unwanted set of obligations until such time as 'her tenancy' was determined by the notice to quit.

63. The Respondent/Claimant is of course the freehold owner of the premises. But it owns the premises in order to rent them. And having rented them on an assured tenancy it has accepted that the use which it can make of them is controlled by the Housing Act 1988, and that a tenant's spouse can to succeed to the tenancy is a commonplace feature of the statutory scheme.

64. Had Mr Heffernan been a sole tenant (which one might think de facto he had been for ten years) D2 would succeed. Had Mr Heffernan sought a property adjustment order per the Matrimonial Causes Act 1973 s.24 he would surely have been granted it[4] and D2 would succeed (since a person who becomes a sole tenant through an MCA order is not a successor for s.17 purposes).[5] It is a nonsense to suggest that the Appellant/D2 becoming the tenant of her home is somehow inimical to the scheme of the Housing Act 1988.

65 Further, the Appellant/D2 would be a tenant subject to all of the obligations of the tenancy agreement. She would occupy on just the same terms as any other tenant. The incursion into C's interests which would be made by disapplying the doctrine of survivorship in a case such as this is minimal

66. The interests to be weighted in the scales in opposition to D2's continued occupancy of her home are too slight to make it necessary for the law to deny a court any role in assessing the propriety of applying the survivorship doctrine.

[4] A court is manifestly likely to make such an order in circumstances where the non-applicant joint tenant has (a) divorced/separated from the applicant joint tenant; (b) not lived in the premises for many years; (c) not accepted any obligations under the tenancy agreement for many years; (d) never evinced any intention to return to the premises or accept any of the obligations arising under the tenancy.

[5] This issue is pursued in ground 2 below.

(v) The 'more explicit' (or 'more focused and more penetrating') analysis requirement applies as much to rules regulating relationships between individuals as between individuals and public authorities

67. That the Human Rights Act 1988 has spurred re-evaluation of common law rules which regulate the relationships of private parties is clear and uncontroversial. See Lord Nicholls in *Campbell* at [17-18] [TAB 3]:

> "17 The time has come to recognise that the values enshrined in articles 8 and 10 are now part of the cause of action for breach of confidence. As Lord Woolf CJ has said, the courts have been able to achieve this result by absorbing the rights protected by articles 8 and 10 into this cause of action: *A v B plc* [2003] QB 195, 202, para 4. Further, it should now be recognised that for this purpose these values are of general application. The values embodied in articles 8 and 10 are as much applicable in disputes between individuals or between an individual and a non-governmental body such as a newspaper as they are in disputes between individuals and a public authority.
> "18 In reaching this conclusion it is not necessary to pursue the controversial question whether the European Convention itself has this wider effect. Nor is it necessary to decide whether the duty imposed on courts by section 6 of the Human Rights Act 1998 extends to questions of substantive law as distinct from questions of practice and procedure. It is sufficient to recognise that the values underlying articles 8 and 10 are not confined to disputes between individuals and public authorities. This approach has been adopted by the courts in several recent decisions, reported and unreported, where individuals have complained of press intrusion. A convenient summary of these cases is to be found in Gavin Phillipson's valuable article "Transforming Breach of Confidence? Towards a Common Law Right of Privacy under the Human Rights Act" (2003) 66 MLR 726, 726-728".

68. In the context of housing law, it is accepted that s.3 of the HRA bites on disputes to which both parties are private individuals. See Keene LJ in *Ghaidan v Mendoza* [2003] Ch.380 at [37-38] [TAB 6]:

> "[37]… First, the concession made on behalf of the respondent that the appellant's rights under the European Convention on Human Rights are relevant to the construction of para 2 of Sch 1 to the Rent Act 1977, even though this is litigation between two private individuals, was a proper one. Section 6(1) of the Human Rights Act 1998 ('the 1998 Act') makes it unlawful for a public authority to act in a way which is incompatible with a Convention right, and by virtue of s 6(3)(a) this court is a public authority. It follows that this court cannot act incompatibly with a Convention right, unless (see s 6(2)) the court is acting to give effect to or enforce provisions of or made under primary legislation which cannot be read or given effect in a way which is compatible with such a right.
> [38] That patently takes one to s 3 of the 1998 Act, with its obligation on the court to read and give effect to primary and secondary legislation in a way compatible with Convention rights 'so far as it is possible to do so'….".

This analysis was not questioned in the House of Lords: [2004] UKHL 30; [2004] 2 A.C. 557 [TAB 7].

(vi) Removing the incompatibility

69. Subject to existing rules as to precedent and judicial hierarchy, the court is obliged by HRA 1998 s.3 and s.6 to alter the meaning of or refuse to apply a common law rule which is incompatible with a Convention Right. In the circumstances of this case, such modification would require that the rule simply be inapplicable. The rule being inapplicable, D2 succeeds to the assured tenancy.

70. Contra the continued suggestion of the Respondent/Claimant, the Appellant/D2 is not asking here for a declaration of incompatibility per HRA 1998 s.4. S.4 applies only to statutory provisions. It has no applicability to rules of common law. S.4 presents no jurisdictional barrier to this court reaching the conclusion asked for in para 72.

71. An alternative route to the same end is to return to minority judgments in *Hickin*. The core of the opinions offered by Lord Mance and Lord Clarke was that the relevant provisions of the Housing Act 1985 (and by analogy those of the Housing Act 1988 for assured tenants) could properly be read – even without invoking s.3 of the HRA 1998 – as envisaging succession through survivorship only to persons who occupied the premises as secure (or assured) tenants when the other joint tenant died. That construction of the 1985 and 1988 Acts would of course remove the Art 8 incompatible effect of the survivorship doctrine.

72. This contention is now quite orthodox, as Lord Phillips observes in *LB Hounslow v Powell*: [2011] UKSC 8; [2011] 2 A.C. 186 [TAB 17] (emphasis added)

> [98]….section 3 of the 1998 Act applies to all legislation, whether enacted before or after the 1998 Act came into force. *In so far as this alters the construction given to legislation before the 1998 Act came into force, the 1998 Act has the effect of amending legislation*: see Ghaidan v Godin-Mendoza [2004] 2 AC 557.

<u>'Amending' s.17</u>

73. Housing Act 1988 s.17 provides (so far as relevant to this case):

> **17 Succession to assured periodic tenancy by spouse.**
>
> (1) In any case where—
>
> (a) the sole tenant under an assured periodic tenancy dies, and
>
> (b) immediately before the death, the tenant's spouse or civil partner was occupying the dwelling-house as his or her only or principal home, and

(c) the tenant was not himself a successor, as defined in subsection (2) or subsection (3) below,

then, on the death, the tenancy vests by virtue of this section in the spouse or civil partner (and, accordingly, does not devolve under the tenant's will or intestacy).

74. An assured tenancy has 2 components – an underlying contractual tenancy and a bundle of statutorily added features. The underlying contractual ty can only be assured if the requirements of s.1 are satisfied. If there is a sole T, then T must occupy the premises as her only or principal home; if there is a joint tenancy then at least one joint tenant must do so.

75. Per s.1 – a sole tenant one can only be an assured tenant if she occupies the premises as her only or principal home. If T1 and T2 are joint contractual tenants, T1 or T2 alone can preserve the assured status of the tenancy by remaining in occupation. This manifestly is to preserve T1's security should she/he be abandoned by T2.

76. S. 17 is concerned with succession to ***assured*** tenancies; ie the contractual tenancy + the super-added statutory components. It is not concerned with succession to the contractual tenancy alone.

77. So – 17(2)(b) cannot apply to a surviving joint tenant (T2) who was not in occupation when T1 died, as at the moment of vesting T2 was not capable (per s.1) of being an assured tenant and so any tenancy that might vest in her could not be assured. T2 is thus outside the scope of s.17 altogether.

78. If T2 was in occupation, then at the moment of T1's a death the tenancy which vested in her would be assured because she satisfies the s.1 requirement.

79. So while T1 was alive, although the underlying contractual tenancy was held by T1 and T2 as joint tenants, the super-added assured tenancy exists only by virtue of T1's occupation and would remain so until such time as T2 moved back into occupation

80. But if T2 had not moved back into occupation when T1 died, the assured tenancy would vest per s.17(1) in a qualified successor if there was one. And of course, in the scenario before the court today there is such a person.

81. *Hickin* indicates that 'ordinary' methods of statutory interpretation cannot yield that result. HRA 1998 s.3 however releases the court from such 'ordinary' strictures. The construction of s.17 offered above is analogous to that applied by Lords Mance and Clarke in *Hickin* to the succession provisions of the Housing Act 1985 vis a vis secure tenancies. It is not extravagant to suggest that if two members of a five person Supreme Court bench have read the 1985 Act in this way without the benefit of the expansive approach to statutory interpretation mandated by HRA 1998 s.3 it must be 'possible' per HRA s.3 to lend it that meaning (and to treat the 1988 Act in the same way).

82. Alternatively, it is now perfectly orthodox for courts to deploy HRA 1998 s.3 to add 'missing' words to legislative provisions, Lord Nicholls explains in *Mendoza* [TAB 7] (emphasis added):

> '[32]. . . . Section 3 enables language to be interpreted restrictively or expansively. But s 3 goes further than this. *It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it convention-compliant*. In other words, the intention of Parliament in enacting s 3 was that, to an extent bounded only by what is "possible", a court can modify the meaning, and hence the effect, of primary and secondary legislation.'; (emphasis added).

83. The Court might therefore removes any incompatibility between Art 8 and s.17 by reading the following (italicised) words into the Housing Act 1988 s.17:

> **17 Succession to assured periodic tenancy by spouse.**
>
> (1) In any case where—
>
> (a) the sole tenant under an assured periodic tenancy dies, and
>
> (b) immediately before the death, the tenant's spouse or civil partner was occupying the dwelling-house as his or her only or principal home, and
>
> (c) the tenant was not himself a successor, as defined in subsection (2) or subsection (3) below,
>
> then, on the death, the tenancy vests by virtue of this section in the spouse or civil partner (and, accordingly, does not devolve under the tenant's will or intestacy).
>
> *(1A) For the purposes of s.17(1)(a), a joint tenant (T1) occupying the premises as her only or principal home shall be regarded as a sole tenant if the other joint tenant (T2) did not occupy the premises as her only or principal home at the time of T1's death.*

84. For the reasons outlined at paras 64/65 above, it is risible to suggest that this result could undermine the basic features of the statutory scheme.

85. What D2 is asking the court to do is accept that the interpretive obligation arising under HRA 1998 s.3 is not limited simply to the construction of statutory provisions in isolation, but extends also adjusting the meaning of statutory provisions so that the provisions themselves have the effect of overriding or redefining Art 8 incompatible rules of common law which interlock with the statutory provisions concerned. The proposition takes us back to the trite constitutional maxim alluded to above (para 14): common law rules are overridden by inconsistent statutory provisions.

86. Should a court be of the view that the application of the orthodox doctrine would be incompatible with a Convention Right but that the court is bound by rules of precedent to apply the orthodox doctrine, then the proper course for the court to follow is to apply the doctrine but grant permission to D2 to appeal.

4. Relief sought

87. If the court finds for the Appellant/D2, D2 invites the court to order that:

1. Appeal allowed.

2. Order for possession revoked.

3. Claim for possession dismissed.

4. The Respondent shall pay the Appellant/D2's costs of this appeal and in defending these proceedings in the court below, such costs to be subject to detailed assessment if not agreed; and

5. There be detailed assessment of the Appellant/D2's publicly funded costs of this appeal.

Ian Loveland
Arden Chambers
20th February 2016

LIST OF AUTHORITIES RELIED ON

1. *Animal Defenders International v United Kingdom* (2013) 57 E.H.R.R. 21
2. *Birmingham CC v Doherty* [2008] UKHL 57; [2008] 1 A.C. 367
3. *Campbell v. MGN Ltd* [2002] UKHL 22; [2004] 2 A.C. 457
4. *Cunningham Reid v Public Trustee* [1944] K.B. 602
5. *Emonet v Switzerland* (2009) 49 E.H.R.R. 11
6. *Ghaidan v Mendoza* [2003] Ch.380
7. *Ghaidan v Mendoza* [2004] UKHL 30; [2004] 2 A.C. 557
8. *Hirst v United Kingdom* [2006] 42 E.H.R.R. 41
9. *HRH Prince of Wales v Associated Newspapers Ltd* [2007] EWHC 522; [2008] Ch. 57
10. *Kay v United Kingdom* (2012) 54 E,H.R.R. 30
12. *Kroon v Netherlands* (1995) 19 E.H.R.R. 263
13. *Lambeth LBC v Kay* [2006] UKHL 10; [2006] 2 A.C. 465
14. *Manchester CC v Pinnock* [2011] UKSC 6; [2011] 2 A.C. 104
15. *Moreno Gomez v Spain* (2005) 41 E.H.R.R. 40
16. *Solihull MBC v Hickin* [2012] UKSC 39; [2012] 1 W.L.R. 2295
17. *LB Hounslow v Powell*: [2011] UKSC 8; [2011] 2 A.C. 186
18. *Dacorum BC v Sims* [2014] UKSC 63; [2013] 3 W.L.R. 1600