**Trinity Term**
**[2012] UKSC 39**
*On appeal from: [2010] EWCA Civ 868*

# JUDGMENT

# Solihull Metropolitan Borough Council (Respondent) *v* Hickin (FC) (Appellant)

**before**

**Lord Hope, Deputy President**
**Lord Walker**
**Lord Mance**
**Lord Clarke**
**Lord Sumption**

## JUDGMENT GIVEN ON

## 25 July 2012

**Heard on 3 July 2012**

| *Appellant* | *Respondent* |
| --- | --- |
| Jan Luba QC<br>Nicholas Nicol<br>(Instructed by Quality Solicitors Evans Derry) | Bryan McGuire QC<br>Catherine Rowlands<br>(Instructed by Solihull Metropolitan Borough Council Legal Services ) |

**LORD SUMPTION (WITH WHOM LORD WALKER AGREES)**

1. Part II of the Housing Act 1980 was enacted in order to give the residential tenants of local authorities and certain other social landlords a degree of protection broadly comparable to that enjoyed by private tenants under the Rent Act 1977. It introduced a category of 'secure tenancy', whose essential features were that the tenant enjoyed a qualified security of tenure, and that the tenancy was transmissible once only to a member of the tenant's family occupying the property. The relevant statutory provisions governing secure tenancies are now to be found in Part IV of the Housing Act 1985.

2. This appeal raises a short but difficult point of law about the effect of the provisions governing the transmission of secure tenancies, where the property is let to joint tenants. Mr. and Mrs. Hickin became the joint tenants of a three bedroom terraced house at 81 Leahill Croft, Chelmsley Wood, Solihull in 1967. The freehold owner was initially Birmingham City Council, but the property was transferred in September 1980 to Solihull Metropolitan Borough Council, who were thereupon substituted as the landlords. On 3 October 1980, Part II of the Housing Act 1980 came into force and the tenancy became a secure tenancy. Mr. and Mrs. Hickin lived in the house together until some time after 1980 when Mr. Hickin left. Thereafter, Mrs. Hickin continued to live there until her death on 8 August 2007. Their daughter Elaine, the Appellant on this appeal, has lived in the house from the inception of the tenancy and is still there. The joint tenancy was never severed or replaced and was still subsisting at the time of Mrs. Hickin's death.

3. At common law, upon the death of a joint tenant, the tenancy is vested in the survivor, or jointly in the survivors if there is more than one: *Cunningham-Reid v. Public Trustee* [1944] KB 602. Upon Mrs. Hickin's death, therefore, her absent husband would have become the sole tenant. On that footing, the Council served notice to quit on him, and then began proceedings against Elaine for possession. Her case is that the common law right of her father was displaced by section 89 of the Act, which vested the tenancy in her. After a trial on agreed facts, Deputy District Judge Hammersley rejected that contention and ordered possession. HHJ Oliver-Jones QC allowed the appeal and declared that the tenancy vested in Elaine on her mother's death. The Court of Appeal (Lord Neuberger MR, Laws LJ and Sullivan LJ) allowed the appeal and restored the order of the Deputy District Judge.

4. The Housing Act 1985 has recently been amended, but the relevant provisions are those in force in August 2007, when Mrs. Hickin died. They are as follows:

> "79. Secure tenancies
>
> (1) A tenancy under which a dwelling-house is let as a separate dwelling is a secure tenancy at any time when the conditions described in sections 80 and 81 as the landlord condition and the tenant condition are satisfied.
>
> (2) Subsection (1) has effect subject to
>
> (a) the exceptions in Schedule 1 (tenancies which are not secure tenancies),
>
> (b) sections 89 (3) and (4) and 90 (3) and (4) (tenancies ceasing to be secure after death of tenant), and
>
> (c) sections 91 (2) and 93 (2) (tenancies ceasing to be secure in consequence of assignment or subletting).
>
> (3) The provisions of this Part apply in relation to a licence to occupy a dwelling-house (whether or not granted for a consideration) as they apply in relation to a tenancy.
>
> ...
>
> 81. The tenant condition
>
> The tenant condition is that the tenant is an individual and occupies the dwelling-house as his only or principal home; or, where the tenancy is a joint tenancy, that each of the joint tenants is an individual and at least one of them occupies the dwelling-house as his only or principal home.
>
> ...
>
> 87. Persons qualified to succeed tenant
>
> A person is qualified to succeed the tenant under a secure tenancy if he occupies the dwelling-house as his only or principal home at the time of the tenant's death and either
>
> (a) he is the tenant's spouse or civil partner, or
>
> (b) he is another member of the tenant's family and has resided with the tenant throughout the period of twelve months ending with the tenant's death;

unless, in either case, the tenant was himself a successor, as defined in section 88.

88. Cases where the tenant is a successor

(1) The tenant is himself a successor if

(a) the tenancy vested in him by virtue of section 89 (succession to a periodic tenancy), or

(b) he was a joint tenant and has become the sole tenant, or

(c) the tenancy arose by virtue of section 86 (periodic tenancy arising on ending the term certain) and the first tenancy there mentioned was granted to another person or jointly to him and another person, or

(d) he became the tenant on the tenancy being assigned to him (but subject to subsections (2) to (3), or

(e) he became the tenant on the tenancy being vested in him on the death of the previous tenant, or

(f) the tenancy was previously an introductory tenancy and he was a successor to the introductory tenancy.

...

89. Succession to periodic tenancy

(1) This section applies where a secure tenant dies and the tenancy is a periodic tenancy.

(2) Where there is a person qualified to succeed the tenant, the tenancy vests by virtue of this section in that person, or if there is more than one such person in the one to be preferred in accordance with the following rules

(a) the tenant's spouse or civil partner is to be preferred to another member of the tenant's family;

(b) of two or more other members of the tenant's family such of them is to be preferred as may be agreed between them or as may, where there is no such agreement, be selected by the landlord.

(3) Where there is no person qualified to succeed the tenant, the tenancy ceases to be a secure tenancy.

(a) when it is vested or otherwise disposed of in the course of the administration of the tenant's estate, unless the vesting or other disposal is in pursuance of an order made under

(i) section 23A or 24 of the Matrimonial Causes Act 1973 (property adjustment orders made in connection with matrimonial proceedings),

(ii) section 17 (1) of the Matrimonial and Family Proceedings Act 1984 (property adjustment orders after overseas divorce, &c.), or

(iii) paragraph 1 of Schedule 1 to the Children Act 1989 (orders for financial relief against parents); or

(iv) Part 2 of Schedule 5, or paragraph 9(2) or (3) of Schedule 7, to the Civil Partnership Act 2004 (property adjustment orders in connection with civil partnership proceedings or after overseas dissolution of civil partnership, etc.)

(b) when it is known that when the tenancy is so vested or disposed of it will not be in pursuance of such an order.

(4) A tenancy which ceases to be a secure tenancy by virtue of this section cannot subsequently become a secure tenancy.

90. Devolution of term certain

(1) This section applies where a secure tenant dies and the tenancy is a tenancy for a term certain.

(2) The tenancy remain a secure tenancy until

(a) it is vested or otherwise disposed of in the course of the administration of the tenant's estate, as mentioned in subsection (3), or

(b) it is known that when it is so vested or disposed of it will not be a secure tenancy.

(3) The tenancy ceases to be a secure tenancy on being vested or otherwise disposed of in the course of administration of the tenant's estate, unless-

(a) the vesting or other disposal is in pursuance of an order made under section 24 of the Matrimonial Causes Act 1973 (property adjustment orders in connection with matrimonial proceedings), or

(b) the vesting or other disposal is to a person qualified to succeed the tenant.

(4) A tenancy which ceases to be a secure tenancy by virtue of this section cannot subsequently become a secure tenancy.

91. Assignment in general prohibited

(1) A secure tenancy which is—

(a) a periodic tenancy, or

(b) a tenancy for a term certain granted on or after November 5, 1982, is not capable of being assigned except in the cases mentioned in subsection (3).

...

(2) The exceptions are—

(a) an assignment in accordance with section 92 (assignment by way of exchange);

(b) an assignment in pursuance of an order made under—

(i) section 24 of the Matrimonial Causes Act 1973 (property adjustment orders in connection with matrimonial proceedings),

(ii) section 17(1) of the Matrimonial and Family Proceedings Act 1984 (property adjustment orders after overseas divorce, etc.),

(iii) paragraph 1 of Schedule 1 to the Children Act 1989 (orders for financial relief against parents); or

(iv) Part 2 of Schedule 5, or paragraph 9(2) or (3) of Schedule 7, to the Civil Partnership Act 2004 (property adjustment orders in connection with civil partnership proceedings or after overseas dissolution of civil partnership etc.)

(c) an assignment to a person who would be qualified to succeed the tenant if the tenant died immediately before the assignment.

...

> 113. Members of a person's family
>
> (1) A person is a member of another's family within the meaning of this Part if
>
> (a) he is the spouse or civil partner of that person, or he and that person live together as husband and wife or as if they were civil partners, or
>
> (b) he is the person's parent, grandparent, child, grandchild, brother, sister, uncle, aunt, nephew or niece."

5. The Appellant's argument is very simple. It is that sections 87 to 89 of the Act constitute an exhaustive code governing the fate of a secure periodic tenancy upon the death of a tenant. The operation of these provisions is mandatory and automatic, displacing the general law. The tenancy therefore vested automatically in her under section 89 if four and only four conditions were satisfied, namely (i) that "a secure tenant", i.e. Mrs. Hickin, had died; (ii) that the tenancy was a periodic tenancy; (iii) that the Appellant occupied the house as her only or principal home for the period of twelve months ending with Mrs. Hickin's death, and (iv) that the Mrs. Hickin was not herself a "successor" as defined in section 88. There is no issue about conditions (ii), (iii) and (iv). They were all satisfied. But the Court of Appeal held that condition (i) was not. In my view, they were right about this.

6. The relationship between Part IV of the Housing Act and the common law is not in doubt. A secure tenancy is not just a personal right of occupation. It is an estate in land whose incidents are defined by the general law, save insofar as these are modified by the Act. Subject to that proviso, as Lord Hoffmann pointed out in *Birmingham City Council v Walker* [2007] 2 AC 262 at [5], it can be "assigned, held in joint names, pass by survivorship and be disposed of by will on death", and "can in principle pass in any way permissible at common law". Sections 87 to 89 of the Act are part of a wider scheme contained in sections 87 to 91. These provisions extensively modify the general law which would otherwise govern the transmission of a secure tenancy. Their general scheme is that, subject to limited exceptions (such as property adjustment orders in matrimonial proceedings), a secure tenancy cannot be transmitted with the benefit of the statutory security of tenure, whether *inter vivos* or in the course of the administration of the tenant's estate, except to a person qualified to succeed under section 87. This means the deceased's spouse or civil partner, or any other member of the deceased's family within the very broad definition in section 113. This result is achieved in one or other of three ways. In the case of a purported disposition *inter vivos* of a periodic tenancy or a tenancy for a term certain granted on or after 5 November 1982, it is achieved by providing that the tenancy is not transferrable at all except to a qualified person: see section 91 and *Burton v Camden London Borough Council*

[2000] 2 AC 399. In the case of the death of a periodic tenant, where there is a person qualified to succeed, it is achieved by providing for the secure tenancy to vest automatically in that person: section 89(2). In three cases, namely (i) the death of a periodic tenant where there is no person qualified to succeed, (ii) the death of a tenant for a term certain, and (ii) the disposition *inter vivos* of a tenancy for a term certain granted before 5 November 1982, the Act proceeds on the footing that the tenancy may be transmitted in any manner permitted by the general law, but achieves the statutory purpose by providing that the tenancy thereupon ceases to be secure: see sections 89(3), 90 and 91(2).

7. It will be apparent that sections 87 to 91 of the Act do not wholly displace the general law, even in the area which they cover. In the first place, they are concerned only with the transmission of secure tenancies by dispositions *inter vivos* or upon death. They do not deal, at any rate expressly, with the subsisting contractual and proprietary relationship between the landlord and an existing tenant who has not died or disposed of his interest. Second, the statute necessarily operates by reference to certain basic principles of the law of property which serve to identify what are the legal characteristics of the estates in land whose transmission is being regulated. Third, in a number of cases the Act does not modify the general law governing the transmission of tenancies, but only the statutory security of tenure available where the tenancy has been transferred.

8. Against that background, the first question to be addressed is what is the legal basis on which Mr Hickin would be entitled to the tenancy apart from section 89 of the Act. This depends on the legal incidents of a joint tenancy at common law. Upon the death of one of two persons holding under a joint tenancy, the interest of the deceased person is extinguished. The survivor thereby becomes the sole tenant. But there is no transmission of the tenancy. In *Tennant v Hutton* (Court of Appeal, 9 July 1996, unreported) , Millett LJ, delivering the judgment of the Court of Appeal, put the point in this way:

> "The essence of a joint tenancy is that the property is vested in all or both of the joint tenants together. In contemplation of law there is only one tenant, though the tenant consists of two or more persons and the survivors and survivor of them. On the death of any one of them, the property becomes vested in survivors or survivor. There is no true transmission of title. The property remains vested after the death in the same tenant as it did before, though the number of persons who compose the tenant is reduced by one."

The result, at common law, is this. By virtue of section 81 of the Housing Act, both Mr and Mrs Hickin were secure tenants for as long as at least one of them occupied the property as an only or principal home. Upon Mrs Hickin's death, the

tenancy subsisted and Mr. Hickin remained the tenant. He did not succeed Mrs Hickin. He simply continued to enjoy the same rights as he had always had, under an agreement with the local authority landlord to which he was and remained party. The only change in his position was that there was no longer another person concurrently enjoying the same rights. Accordingly, he became the sole tenant. Since he was absent, there was now no one occupying the property as his or her only or principal home. The "tenant condition" in section 81 of the Act was therefore no longer satisfied, and the tenancy while continuing to exist ceased to be secure. But because a tenancy may be a secure tenancy at any time when the landlord condition and the tenant condition are satisfied (see section 79), it would have been open to Mr. Hickin to revive its secure status by returning to live in the property at any time before the tenancy was terminated by service of a notice to quit.

9. The next question is whether this result and the analysis that leads to it is excluded by the terms of the Housing Act. In *Tennant v Hutton*, which I have already cited for Millett LJ's analysis of the right of survivorship at common law, a very similar question arose under the succession provisions of the Rent Act 1977. Schedule I, Part 1 of the Rent Act provided that where a protected or statutory tenant died, a qualifying member of his family who was living with him in the property at the time of his death (and in some cases for a minimum period before) became the statutory tenant in his or her place. The facts were that a husband and wife held the property as joint tenants under a three year lease protected by the Act and lived in it with their daughter. The issue was whether, upon the death of the wife, the husband or the daughter was "the statutory tenant... by succession, after the death of the person... who, immediately before his death, was a protected tenant of the dwelling-house." The Court of Appeal held that the daughter could not succeed by statute to the tenancy of the wife, because upon the wife's death the tenancy still subsisted at common law in the husband. Millett LJ, who delivered the sole reasoned judgment, based this conclusion on the legal characteristics of a joint tenancy by reference to which the Act must be assumed to operate. The daughter, he held, "cannot claim a statutory tenancy by succession to her mother because immediately before her death her mother was not the protected tenant of the house. She was merely one of the two persons who constituted the tenant". He concluded:

> "Parliament's intention is clear and accords with a literal application of the statute. The family of a statutory tenant is to be protected from eviction when the tenancy comes to an end on the death of the tenant. When the tenancy is vested in joint tenants, the tenancy does not come to an end on the death of the first of them to die and the survivor needs no protection. There is neither need nor room for the application of the schedule and the statutory rules of succession until the death of the survivor. Until after Mrs Tennant's death, there was

> no single tenant of the house on whose death the statutory provisions could or needed to apply."

As it happens, the daughter was unrepresented in *Tennant v Hutton*. But Millett LJ recorded that he was satisfied that all the relevant material had been put before the court by counsel for the landlord. It has not been suggested before us that anything was overlooked or that the decision was wrong as applied to the Rent Act 1977. On the contrary, I think it was clearly right.

10. It does not of course follow that Part IV of the Housing Act 1985 produces the same outcome, in spite of the similar purpose of that legislation. What does follow, as it seems to me, is that there must be something in the language of the Housing Act or inherent in its purpose which excludes the operation of the relevant features of the general law relating to joint tenancies. The only possible basis for such an exclusion in the case of the Housing Act is the use of the indefinite article in the phrase "where a secure tenant dies" in section 89(1). The argument has to be (and is) that in the case of a joint tenancy "a secure tenant" means any one of the individuals constituting the joint tenant.

11. A similar argument was considered by Millett LJ in *Tennant v Hutton*. The precondition for the operation of the succession provisions of the Rent Act 1977 is "the death of a person who, immediately before his death, was either a protected tenant of the dwelling-house or the statutory tenant of it": section 2(1)(b). Millett LJ declined to read these words as referring, in the case of a joint tenancy, to the death of any one or more of the joint tenants. In my view, the argument is no better as applied to the corresponding language of section 89 of the Housing Act 1985. For the purposes of subsection (1), "a secure tenant dies" when a sole tenant dies. If the tenancy is a joint tenancy, the tenant has not died if there remains at least one living joint tenant in whom all the proprietary and contractual rights attaching to the tenancy subsist. Section 89 of the Housing Act 1985 is a mandatory provision which is wholly concerned with the transmission of the tenancy to a person other than the previous tenant, on account of the latter's death. This makes sense only on the assumption that there no longer is a previous tenant. Where there is a surviving joint tenant, the whole statutory basis for disposing of the succession to the tenancy is absent. It is no answer to this to say that the purpose of the statute is to transfer the tenancy to members of the tenant's family living in the house. That simply begs the question. It is not necessary to provide for the transmission of a tenancy on death unless there is, so to speak, a vacancy. If the tenancy subsists in the surviving joint tenant, there is none. It is obvious that section 89 implicitly excludes the possibility of the transmission of the tenancy upon death in a manner inconsistent with its terms. But the recognition of the right of the survivor under a joint tenancy is not inconsistent with the provisions of section 89 relating to the transmission of tenancies, because the survivor's right is not a matter of transmission. The survivor has the same rights as he always did.

12. It follows from the basic legal characteristics of a joint tenancy that the argument based on the use of the indefinite article in section 89(1) depends on a false distinction between "a tenant" and "the tenant". The distinction is false because the section is concerned with the tenant and the tenancy, not with the partial interest of any one individual in the tenancy. Where property is held under a joint tenancy, there is only one tenant, albeit that there are two or more people who jointly constitute that tenant. The draftsman of the Housing Act undoubtedly envisaged that secure tenancies might be held jointly. The possibility is referred to in terms in sections 81 and 88(1)(b). In construing a statute, the ordinary presumption is that Parliament appreciated the legal incidents of those relationships which it is regulating. If, therefore, the draftsman had intended "a secure tenant" in section 89 to mean any one of two or more joint tenants it is hardly conceivable that he would have left that intention to be inferred from his use of an indefinite article, instead of dealing with the point expressly (e.g. "a secure tenant, or in the case of a joint tenancy, any person having an interest under a joint tenancy").

13. It remains to consider the effect of section 88(1)(b) of the Housing Act, which assumed some importance in the argument and is the main basis on which Lord Mance has reached the conclusion that Mr. Hickin's rights as the surviving joint tenant were displaced in favour of his daughter. I do not, with respect, believe that this provision will bear the weight which Lord Mance has placed on it. Section 88 is a definition section which operates in conjunction with section 87. Section 87 is concerned with the succession to the "tenant under a secure tenancy", i.e. to a person who was a secure tenant when he or she was alive. The proviso in the final words of section 87, mean that a spouse or other member of the tenant's family occupying the property as his only or principal residence at the relevant time, is nevertheless not "qualified to succeed the tenant" if the tenant is himself a "successor". Section 88 determines who is to be treated as a "successor" for this particular purpose. Section 88(1)(b) provides that a "successor" includes a person who "was a joint tenant and has become the sole tenant". The result is that upon his wife's death Mr. Hickin was deemed to be her successor for the purpose of section 87, notwithstanding that there was no transmission of the tenancy at common law but only a continuation of the rights which as tenant had always been vested in him as the tenant. It does not, however, follow that Mr. Hickin ceased to be the tenant. On the contrary, section 88(1)(b) recognises that he became the sole tenant upon his wife's death, something which could not have happened if the tenancy passed automatically to his daughter at that point. Nor does it follow that Mr Hickin's rights as the deemed successor of his wife had to compete with the claim of his daughter to succeed her. All that follows from section 88(1)(b) is that since there was deemed to have been a succession on Mrs. Hickin's death, there could not thereafter be another one. So if Mr Hickin had exercised his right as the now sole tenant to move back into the property after his wife's death, thereby becoming a secure tenant, and had then died, no one would have been qualified under section 87 to succeed him and section 89 would not have applied. The

provisions of sections 87 and 88 are there for the protection of the landlord against being kept too long out of the property. They do not serve to create rights of succession in resident family members which would otherwise not exist.

14. In my judgment, the tenancy did not vest in the Appellant upon Mrs Hickin's death because the rights of the previous tenant still subsisted. "A secure tenant" had not died. All that had happened was that one of the two persons constituting the secure tenant had died. I am fortified in this conclusion by another consideration. If, as the Appellant argues, the tenancy vests in a third party upon the death of one of two joint tenants, then the survivor's contractual right and his interest in the property are expropriated. It is a consistent theme of the interpretation of statutes that "an intention to take away the property of a subject without giving him a legal right to compensation for the loss of it is not to be imputed to the legislature unless that intention is expressed in unequivocal terms". The words are those of Lord Atkinson in *Central Control Board (Liquor Traffic) v Cannon Brewery Co Ltd* [1919] AC 744, 752, but the principle has been restated many times, and has been applied not only to property but to other vested common law rights, including contractual rights. Yet if the Appellant is right Parliament must be supposed not only to have abrogated the subsisting tenancy of the survivor, but to have done it without express words, let alone unequivocal ones, without any provision for compensation, and without regard to the survivor's circumstances. This seems to me to be an extremely implausible construction of the Act.

15. It is fair to say that on the facts of the present case Mr. Hickin will suffer no detriment because his interest as the surviving joint tenant was of little if any real value to him. He had been out of occupation for a number of years when Mrs. Hickin died, and had no intention of returning to the former family home. The tenancy was not assignable. Its subsistence mattered only to the landlord, and then only for the purpose of enabling the landlord to terminate it by serving notice to quit. I therefore have every sympathy for Elaine Hickin's position. However, the issue before us cannot be decided simply on her particular facts. If she is right in principle, the operation of section 89 will have a much wider application. It will apply to defeat the interest of a surviving joint tenant who is out of occupation but wishes to return to the property on the death of the deceased and has every interest in doing so, for example because the survivor is the deceased's wife who left the property on account of her husband's violence or abuse. It will apply to defeat the interest of a survivor who has been in occupation throughout but is not a member of the deceased's family. If Mr. and Mrs. Hickin had been divorced, and it was Mr. Hickin who died, section 89 would on the Appellant's construction require the automatic expropriation of Mrs. Hickin's joint tenancy in favour of her daughter, notwithstanding that she was occupying the property, because in those circumstances the daughter but not the mother would be a member of the deceased's family as defined in section 113. Mrs. Hickin would on that hypothesis

have been converted by the operation of section 89 from a secure tenant to an unprotected licensee. The same result would follow if the joint tenants had never been members of the same family but had simply been sharing accommodation and the one who died had a child or other close relative living with him or her at the relevant time. I have no doubt that in the great majority of cases, the joint tenants of social landlords will be members of the same family within the very broad definition in section 113. They will therefore be qualified to succeed each other under section 87, even if their subsisting rights as joint tenants have been abrogated. But I do not think that Parliament can be taken to have legislated on the assumption that that would always be so, or that the exceptions were unimportant. Public sector landlords are likely to vary in their letting policies, both as between themselves and over time. The letting policies of housing associations, housing co-operatives and charitable housing trusts (which are also covered by Part IV) may well be even more heterogeneous, depending on their purposes. The examples that I have cited are not fanciful. What they show is that although it may seem arbitrary, even capricious, for Elaine Hickin's claim to be defeated on account of the rights of her absent father, equally arbitrary and capricious consequences follow from any alternative construction. It is difficult to say which consequences will arise more often. Nor does it matter. Any system of statutory protection which deals with interests as varied as residential tenancies and depends for its practical operation on the accidents of cohabitation, matrimonial break-up and death will inevitably give rise to anomalies at the margins. But the scope of the rights created and the circumstances in which they arise are questions to be resolved on a principled basis. It is not productive, on an issue like this one, to decide it by reference to the competing anomalies and injustices that result from each side of the argument.

16. For these reasons, I would dismiss the appeal.

**LORD HOPE**

17. For the reasons given by Lord Sumption I too would dismiss this appeal. As there is a difference of opinion and the case is far from easy, I should like to add a few words of my own to explain why I have reached this conclusion.

18. The starting point must be that the rules of the common law apply except to the extent that they are abrogated or modified by the words of the statute. Where there is a joint tenancy there is one estate which is vested in all of them, with a right of survivorship. According to that principle, Mr Hickin became the sole tenant of the dwelling-house by reason of his right of survivorship on his wife's death. The tenancy remained in being, except that there was now only one person entitled to the rights that were vested in the tenant under it. The question is

whether the provisions in Part IV of the Housing Act 1985, which confer on tenants who occupy the dwelling-house as their only or principal home the additional benefit of a secure tenancy, had the effect of depriving Mr Hickin of his right of survivorship to the tenancy at common law.

19. Mr Hickin was not qualified to succeed to the secure tenancy when his wife died, as he was residing somewhere else. The tenant condition in section 81 was, for the time being at least, no longer satisfied. But this did not mean that the tenancy itself had ceased to exist. That is indicated by section 79(1), which provides that a tenancy under which a dwelling-house is let as a separate dwelling is a secure tenancy at any time when the conditions described in section 80 and 81 as the landlord and the tenant condition are satisfied. The words "at any time when" show that there can be a period during the life of a tenancy that is recognised by the statute when these conditions, or one or other them, are not satisfied. So it would have been open to Mr Hickin to resume occupation of the dwelling-house as his only or principal home, so long as he did so before the tenancy was terminated by the operation of the notice to quit served on him by the landlord. In that event, as the tenant condition would then have been satisfied, the continuing tenancy would have become a secure tenancy. Section 89(4) excludes the resumption of that protection where a tenancy has ceased to be a secure tenancy by virtue of the provisions of that section. But that exclusion does not apply more generally.

20. This sets the scene for the way that Part IV of the 1985 Act addresses the question of how succession on the death of a tenant under a secure tenancy should be approached. If full weight is given to the right of survivorship to the tenancy at common law (which, until one reaches section 87, the Act has done nothing to abrogate or modify), the question whether there was a person qualified to succeed the tenant under a secure tenancy did not need to be answered when Mrs Hickin died. There was still a tenant, although the tenant condition was no longer satisfied. The argument to the contrary is that the common law is displaced by the fact that when she died the tenancy was a secure tenancy. In that situation the governing section is section 89, as this is what subsection (1) of that section itself provides. If there is a person qualified to succeed the tenant under the rules in sections 87 and 88, the tenancy vests in that person by virtue of section 89. As the appellant is such a person because she satisfies the conditions in section 87, the tenancy has vested in her to the exclusion of the common law right of survivorship.

21. There is nothing inherently unreasonable in such a result, so long as it can be said to have been provided for expressly by the statute or by necessary implication from the provisions that it sets out. An example of how this can be done is provided by the Housing (Scotland) Act 2001, asp 10. Chapter 1 of Part 2 of that Act provides for a form of tenancy in the field of social housing that is

known as a Scottish secure tenancy. It recognises that the tenancies to which its provisions apply can include joint tenancies. But it also recognises that there can be policy objections to the situation where not all of the joint tenants under a tenancy which is a secure tenancy occupy the dwelling-house as their only or principal home. Section 81 of the 1985 Act that applies to England and Wales permits this, so long as at least one of the joint tenants satisfies this condition. But section 20 of the 2001 Act enables the landlord under a Scottish secure tenancy, if it has reasonable grounds for believing that a joint tenant is not occupying the house and does not intend to occupy it as the tenant's home, to bring that tenant's interest in the tenancy to an end.

22. The rules about succession to a Scottish secure tenancy apply the same policy to joint tenants who no longer have their only or principal home in the house which is the subject of a secure tenancy when a tenant dies. Section 22(1) of the 2001 Act provides that, on the death of a tenant under a Scottish secure tenancy, the tenancy passes by operation of law to a qualified person. Section 22(5) gives effect to Schedule 3, which makes provision as to who are qualified persons for the purposes of that section. Paragraphs 1- 4 of Schedule 3 provide as follows:

> "1 For the purposes of section 22, a person falling within any of paragraphs 2 to 4 is a qualified person.
>
> 2 (1) A person whose only or principal home at the time of the tenant's death was the house and –
>
> (a) who was at the time –
>
> (i) the tenant's spouse, or
>
> (ii) living with the tenant as husband and wife or in a relationship which has the characteristics of the relationship of husband and wife except that the persons are of the same sex, or
>
> (b) who is, where the tenancy was held jointly by two or more individuals, a surviving tenant.

(2) In the case of a person referred to in sub-paragraph (1)(a)(ii), the house must have been the person's only or principal home throughout the period of 6 months ending with the tenant's death.

3 A member of the tenant's family aged at least 16 years where the house was the person's only or principal home at the time of the tenant's death.

4 A carer providing, or who has provided, care for the tenant or a member of the tenant's family where –

(a) the carer is aged at least 16 years,

(b) the house was the carer's only or principal home at the time of the tenant's death, and

(c) the carer had a previous only or principal home which was given up."

Paragraph 2(1)(b), when read with section 22(1) and the opening words of that sub-paragraph, makes it clear that the common law right of survivorship has been replaced with a right of succession by operation of law under the statute. It is a condition of a surviving joint tenant's continuing right to remain as a tenant that the house was his only or principal home at the time of the other joint tenant's death.

23. It would, of course, be wrong to use the 2001 Act as an aid to the construction of the provisions of Part IV of the 1985. The contrast between the wording of these two statutes is nevertheless instructive. It shows what can be done if the policy to which the statute seeks to give effect is to override the common law right of survivorship and to restrict those who are qualified as persons to whom the tenancy can pass to those for whom the house was their only or principal home.

24. I do not detect a policy imperative of that kind in the wording of Part IV of the 1985 Act. The wording of the tenant condition in section 81 indicates that the common law rights of the individual tenants under a joint tenancy are not being subjected to a requirement that they must each occupy the house as their only or principal home. Confirmation that the common law right of survivorship is not being abrogated or modified is provided by section 88(1)(b), which recognises that

a person who was a joint tenant may become the sole tenant in the exercise of that right irrespective of where his only or principal home is. The closing words of section 87 ("unless, in either case, the tenant was himself a successor, as defined in section 88") do two things. First, they restrict the succession to a qualified tenancy to one succession only. But, secondly, when read with section 88(1)(b), they also show that it is only when the last to die of the joint tenants under a secure tenancy dies that the question of who is qualified to succeed under it will arise. The words "the tenant" in the closing words refer to "the tenant" in the opening words of the section, to whose succession the question of qualification is directed because that tenant has died.

25. Against that background, I agree with Lord Sumption that the words "where a secure tenant dies" in section 89(1) must be understood as applying only where there is a vacancy because there no longer is a tenant: para 11, above. So long as at least one of the tenants under a joint tenancy survives and the tenant condition in section 81 continues to be satisfied, there will still be a secure tenant. There is no need to consider the question of succession, as the right of survivorship applies. Nor is there any question of the tenancy vesting or being otherwise disposed of in the course of the administration of the tenant's estate, as section 89(3) contemplates, because questions of that kind are rendered irrelevant by the right of survivorship. The tenancy will, of course, cease to be a secure tenancy if the person or persons who are entitled to continue as tenants under the right of survivorship do not occupy the dwelling-house as their only or principal home. In that event the landlord can serve a notice to quit, as was done in this case. The provisions about succession are designed to extend the benefit of a secure tenancy on strict conditions, and then once only, to persons who were not party to the original tenancy. But a tenancy which continues to exist has no need of them.

## LORD MANCE

*Introduction*

26. Mr and Mrs Hickin, were joint tenants at 81 Leahill Croft, a three-bedroom terraced house in Chelmsley Wood, Solihull initially from 1967 of Birmingham City Council and later from 29th September 1980 of the respondent Solihull Metropolitan Borough Council. They became secure tenants from 3rd October 1980 when Part II of the Housing Act 1980 came into force. Mr Hickin left the property at some time after 1980. Mrs Hickin continued to live there until her death on 8th August 2007. Mr and Mrs Hickin's daughter Miss Hickin has lived there since her birth in 1967.

27. Notice to quit was served by the Council on Mr Hickin on 18th January 2008 and on Miss Hickin on 6th February 2009. The Council offered Miss Hickin alternative accommodation, but Miss Hickin wishes to remain in her home. She maintains that on her mother's death she herself succeeded to a secure tenancy under what is now section 89(2) of the Housing Act 1985. The Council did not seek within the permitted period of six to twelve months after Mrs Hickin's death to recover possession from Miss Hickin on the ground that, if she was a successor under section 89, "the accommodation afforded by the dwelling house is more extensive than is reasonably required" by her: Ground 16 in Part III of Schedule 2 to the Housing Act 1985.

28. The Council denies that Miss Hickin succeeded to her mother's position as secure tenant. It submits that the effect of the continuing joint tenancy between Mr and Mrs Hickin was that Mr Hickin became sole surviving tenant at common law on Mrs Hickin's death. Since he was not in occupation of the house, he could not be a tenant under a secure tenancy under section 79 or qualify under section 87 (if otherwise applicable) to become a secure tenant by succession. The notice to quit addressed to him was therefore valid. The Council adds for good measure that, since the combination of section 87 and 88(1) treats "a joint tenant [who] has become the sole tenant" as a successor to the previous joint tenancy, there could in any event be no question under sections 87 to 89 of Miss Hickin being qualified to succeed to any interest of Mr Hickin.

29. The Council commenced possession proceedings against Miss Hickin on 1st April 2009. Deputy District Judge Hammersley upheld its claim on 10th August 2009. HHJ Oliver-Jones QC allowed Miss Hickin's appeal on 18th December 2009. The Court of Appeal (Lord Neuberger MR, Laws LJ and Sullivan LJ) allowed the Council's appeal on 27th July 2010 and restored the Deputy District Judge's order for possession. In this eminently arguable case, Miss Hickin now appeals to the Supreme Court by permission granted on 24th March 2011.

*Housing Act 1985*

30. The relevant provisions of the Housing Act 1985 are contained in Part IV headed "Secure Tenancies and Rights of Secure Tenants". They read in August 2007 as follows:

> "**79. Secure tenancies**
>
> (1) A tenancy under which a dwelling-house is let as a separate dwelling is a secure tenancy at any time when the conditions

described in sections 80 and 81 as the landlord condition and the tenant condition are satisfied.

(2) Subsection (1) has effect subject to

(a) the exceptions in Schedule 1 (tenancies which are not secure tenancies),

(b) sections 89 (3) and (4) and 90 (3) and (4) (tenancies ceasing to be secure after death of tenant), and

(c) sections 91 (2) and 93 (2) (tenancies ceasing to be secure in consequence of assignment or subletting).

(3) The provisions of this Part apply in relation to a licence to occupy a dwelling-house (whether or not granted for a consideration) as they apply in relation to a tenancy.

**81. The tenant condition**

The tenant condition is that the tenant is an individual and occupies the dwelling-house as his only or principal home; or, where the tenancy is a joint tenancy, that each of the joint tenants is an individual and at least one of them occupies the dwelling-house as his only or principal home.

**87. Persons qualified to succeed tenant**

A person is qualified to succeed the tenant under a secure tenancy if he occupies the dwelling-house as his only or principal home at the time of the tenant's death and either

(a) he is the tenant's spouse or civil partner, or

(b) he is another member of the tenant's family and has resided with the tenant throughout the period of twelve months ending with the tenant's death; unless, in either case, the tenant was himself a successor, as defined in section 88.

**88. Cases where the tenant is a successor**

(1) The tenant is himself a successor if

(a) the tenancy vested in him by virtue of section 89 (succession to a periodic tenancy), or

(b) he was a joint tenant and has become the sole tenant, or

(c) the tenancy arose by virtue of section 86 (periodic tenancy arising on ending of term certain) and the first tenancy there mentioned was granted to another person or jointly to him and another person, or

(d) he became the tenant on the tenancy being assigned to him (but subject to subsections (2) to (3)), or

(e) he became the tenant on the tenancy being vested in him on the death of the previous tenant, or

(f) the tenancy was previously an introductory tenancy and he was a successor to the introductory tenancy.

**89. Succession to periodic tenancy**

(1) This section applies where a secure tenant dies and the tenancy is a periodic tenancy.

(2) Where there is a person qualified to succeed the tenant, the tenancy vests by virtue of this section in that person, or if there is more than one such person in the one to be preferred in accordance with the following rules

(a) the tenant's spouse or civil partner is to be preferred to another member of the tenant's family;

(b) of two or more other members of the tenant's family such of them is to be preferred as may be agreed between them or as may, where there is no such agreement, be selected by the landlord.

(3) Where there is no person qualified to succeed the tenant, the tenancy ceases to be a secure tenancy

(a) when it is vested or otherwise disposed of in the course of the administration of the tenant's estate, unless the vesting or other disposal is in pursuance of an order made under

(i) section 23A or 24 of the Matrimonial Causes Act 1973 (property adjustment orders made in connection with matrimonial proceedings),

(ii) section 17 (1) of the Matrimonial and Family Proceedings Act 1984 (property adjustment orders after overseas divorce, &c.), or

(iii) paragraph 1 of Schedule 1 to the Children Act 1989 (orders for financial relief against parents); or

(iv) Part 2 of Schedule 5, or paragraph 9(2) or (3) of Schedule 7, to the Civil Partnership Act 2004 (property adjustment orders in connection with civil partnership proceedings or after overseas dissolution of civil partnership, etc.)

(b) when it is known that when the tenancy is so vested or disposed of it will not be in pursuance of such an order.

(4) A tenancy which ceases to be a secure tenancy by virtue of this section cannot subsequently become a secure tenancy.

**91. Assignment in general prohibited**

(1) A secure tenancy which is—

(a) a periodic tenancy, or

(b) a tenancy for a term certain granted on or after November 5, 1982, is not capable of being assigned except in the cases mentioned in subsection (3).

(3) The exceptions are—

(a) an assignment in accordance with section 92 (assignment by way of exchange);

(b) an assignment in pursuance of an order made under—

(i) section 24 of the Matrimonial Causes Act 1973 (property adjustment orders in connection with matrimonial proceedings),

(ii) section 17(1) of the Matrimonial and Family Proceedings Act (property adjustment orders after overseas divorce, etc.),

(iii) paragraph 1 of Schedule 1 to the Children Act 1989 (orders for financial relief against parents); or

(iv) Part 2 of Schedule 5, or paragraph 9(2) or (3) of Schedule 7, to the Civil Partnership Act 2004 (property adjustment orders in connection with civil partnership proceedings or after overseas dissolution of civil partnership etc.)

(c) an assignment to a person who would be qualified to succeed the tenant if the tenant died immediately before the assignment.

**113. Members of a person's family**

(1) A person is a member of another's family within the meaning of this Part if

(a) he is the spouse or civil partner of that person, or he and that person live together as husband and wife or as if they were civil partners, or

(b) he is the person's parent, grandparent, child, grandchild, brother, sister, uncle, aunt, nephew or niece."

*Common law joint tenancy*

31. At common law, Mr and Mrs Hickin were and remained joint tenants until Mrs Hickin's death, whereafter Mr Hickin continued as sole tenant. Millett LJ said in *Tennant v Hutton* (1996) 73 P&CR D10 that:

"The essence of a joint tenancy is that the property is vested in all or both of the joint tenants together. In contemplation of law there is only one tenant, though the tenant consists of two or more persons and the survivors and survivor of them. On the death of any one of them, the property becomes vested in survivors or survivor. There is no true transmission of title. The property remains vested after the

> death in the same tenant as it did before, though the number of persons who compose the tenant is reduced by one."

Section 3(4) of the Administration of Estates Act 1925 supplements the common law for the purposes of inheritance, by providing:

> "The interest of a deceased person under a joint tenancy where another tenant survives the deceased is an interest ceasing on his death".

32. However, as Millett LJ recognised, the concept of "the tenant" under a joint tenancy was in *Lloyd v Sadler* [1978] 1 QB 774 benevolently extended in the context of the policy of the Rent Acts "to protect the possession of a tenant against eviction by the landlord". In that case one joint tenant had left permanently to get married and the surviving tenant alone was held to remain "the protected tenant". The words "the tenant" were read in context as meaning "the joint tenants or any one or more of them". By contrast in *Tennant v Hutton* Mr and Mrs Tennant had been joint tenants under a three-year lease, and as such were protected tenants under the Rent Act 1977. Though divorced, both lived separately in the house together with their daughter Caroline until Mrs Tennant's death during the currency of the lease. On the expiry of the lease Mr Tennant became a statutory tenant under the Rent Act 1977 while he continued to occupy the house as his home. Their daughter Caroline continued to live there with Mr Tennant until he remarried and moved out permanently. She then claimed to be a statutory tenant on the basis that she had succeeded to her mother as a protected tenant under Rent Act provisions which provided who could become a statutory tenant in succession to someone who immediately before his or her death was a protected tenant pursuant to Schedule 1, paras 1 to 3 to the Rent Act 1977. The Court of Appeal dismissed her claim on the basis that on Mrs Tennant's death the contractual tenancy vested in Mr Tennant as sole surviving joint tenant and Caroline was no more than his licensee. Millett LJ said that any other result

> "would operate to the detriment of the other joint tenant rather than the landlord and would, I think, be completely unworkable. Moreover, it would be inconsistent with *Lloyd v Sadler*. If one of two joint tenants can become the statutory tenant when the other leaves the property, notwithstanding the fact that the joint tenancy is not thereby determined, he must be capable of becoming the only statutory tenant when the departing joint tenant dies."

In *Tennant v Hutton*, Mr Tennant, the surviving tenant, was, as stated, in occupation before and for some period after Mrs Tennant's death.

33. That Mr Tennant was and remained in occupation after Mrs Tennant's death was in my opinion critical to the decision. This can be seen from the provisions of the Rent Act 1977. Under section 1 (as enacted)

> "a tenancy under which a dwelling-house …. is let as a separate dwelling is a protected tenancy for the purposes of this Act".

Section 2 provided that:

> "…. (a) after the termination of a protected tenancy of a dwelling-house the person who, immediately before that termination, was the protected tenant of the dwelling-house shall, if and so long as he occupies the dwelling-house as his residence, be the statutory tenant of it; and
>
> (b) Part I of Schedule 1 to this Act shall have effect for determining what person (if any) is the statutory tenant of a dwelling-house at any time after the death of a person who, immediately before his death, was either a protected tenant of the dwelling-house or the statutory tenant of it by virtue of paragraph (a) above.

Schedule 1 provided:

> "STATUTORY TENANCIES
> PART I
> STATUTORY TENANTS BY SUCCESSION
>
> 1. Paragraph 2 or, as the case may be, paragraph 3 below shall have effect, subject to section 2(3) of this Act, for the purpose of determining who is the statutory tenant of a dwelling-house by succession after the death of the person (in this Part of this Schedule referred to as " the original tenant") who, immediately before his death, was a protected tenant of the dwelling-house or the statutory tenant of it by virtue of his previous protected tenancy.
>
> 2. If the original tenant was a man who died leaving a widow who was residing with him at his death then, after his death, the widow shall be the statutory tenant if and so long as she occupies the dwelling-house as her residence.
>
> 3. Where paragraph 2 above does not apply, but a person who was a member of the original tenant's family was residing with him at the time of and for the period of 6 months immediately before his

> death then, after his death, that person or if there is more than one such person such one of them as may be decided by agreement, or in default of agreement by the county court, shall be the statutory tenant if and so long as he occupies the dwelling-house as his residence. …."

34. Had Mr Tennant left the house before his wife's death, she would, in accordance with the decision in *Lloyd v Sadler* [1978] 1 QB 774, have remained as "the protected tenant" (and, if she had lived till the end of the lease, then have become "the" statutory tenant"). *Lloyd v Sadler* establishes that, where one joint tenant leaves, the other who remains becomes the sole statutory tenant: see per Megaw LJ at pp. 782B-C and 783D, per Lawton LJ at pp.l798A-B and 790C-E and per Shaw LJ at p.790E-H, even though this may mean that the landlord can no longer sue the departed tenant for rent. It is clear that the court would not in these circumstances have regarded Mr Tennant, after his departure, as continuing to be either a protected or the statutory tenant under section 1 or section 2(1)(a) by virtue of his wife's occupation. Lawton LJ stated as much at p.789A. Caroline would thus have become statutory tenant of the house upon Mrs Tennant's death under section 2(1)(b) read with Schedule 1 paragraphs 1 and 3 of the Rent Act 1977. In arriving at its conclusion in *Lloyd v Sadler*, the Court of Appeal recognised that its role was to find an "efficient, sensible and humane way of filling any remaining gaps in the law as to the effect of joint tenancies in the Rent Acts": p.785D per Megaw LJ, and to construe the word "tenant" in a way which avoided "unreasonable results, or results which the legislature is unlikely to have intended": p.786G-H per Megaw LJ. We should adopt a similar general approach in relation to the present scheme.

*The Housing Act 1985*

35. In the present case, while Mrs Hickin was alive she continued to reside in the house, although Mr Hickin did not. Under section 81 of the Housing Act 1985, her occupation was sufficient for the joint tenancy to meet the "tenant condition". The joint tenancy was therefore a secure tenancy when she died. Mr Jan Luba QC for Miss Hickin submits that in these circumstances the 1985 Act mandates a staged approach, starting with section 89. Where "a secure tenant dies" (section 89(1)), it is necessary to consider under section 89(2), read with sections 87 and 88, whether there is "a person qualified to succeed the tenant". Under section 87(1), a person is and can only be "qualified to succeed the tenant under a secure tenancy", "if he [or she] occupies the dwelling-house as his only or principal home at the time of the tenant's death". Here, there was only one such candidate, Miss Hickin, so no problem of priority could arise under the rules of preference in section 89(2). On this basis, Mr Luba submits that Miss Hickin, succeeded under the statute to the secure tenancy previously held by her mother; any rights which Mr Hickin might otherwise have had at common law on or after the death of his

joint tenant were to that extent over-ridden; under section 89(2), the tenancy "vests by virtue of this section" in whoever is entitled to be preferred under the rules in section 89(2), here Miss Hickin; the statutory provisions for succession render irrelevant any other disposition that a secure tenant may have purported to make, and the statute is capable of vesting the secure tenancy in a relative who was not one of the previous joint secure tenants.

36. I agree with Mr Luba that section 89 is a logical starting point. Sections 87 and 88 are definitional sections needed for the operation of section 89. It is worth noting that the 1985 Act was passed to consolidate various previous statutes including the Housing Act 1980, in which section 30(1), the equivalent of section 89(2) in the 1985 Act, was placed first, and followed by section 30(2), the equivalent of section 87, and section 31, the equivalent of section 88. I also agree that section 89(1) is capable in certain circumstances of vesting a secure tenancy in a spouse, civil partner or family member who has been in occupation for 12 months prior to a previous secure tenant's death, irrespective of any other disposition that the previous secure tenant may have purported to make. Section 89(3) makes clear that a secure tenancy will be vested and continue by succession in a spouse, civil partner or other family member qualified by occupation to succeed under section 87, over-riding any other disposition. In *Birmingham City Council v Walker* [2007] UKHL 22, [2007] 2 AC 262, in an opinion concurred in by all members of the House, Lord Hoffmann explained (para 3) that in providing for the new interest called a secure tenancy, the 1980 and 1985 Acts adopted a technique different from that used by the Rent Acts. Under section 32 of the 1980 Act, and now section 82 of the 1985 Act, the contractual tenancy was preserved, by a scheme which "added statutory incidents to that tenancy which overrode some of the contractual terms. Those overriding provisions include the provisions which prevent it being terminated except by an order of the court on the statutory grounds". They also include the provisions of section 89 under which a secure tenancy vests in statutorily specified successors, irrespective of what might otherwise be the position as a matter of contract and/or property law.

37. However, Mr Luba's further submissions assume that, when section 89(1) speaks of "a secure tenant" dying, it is sufficient to activate the statutory provisions for succession that only one of two joint tenants under a secure tenancy has died, and that the survivor can only retain any right as a secure tenant in respect of the property if in occupation, and even then only if entitled to preference in accordance with the rules stated in section 89(2). The joint tenancy is of no relevance unless either the joint tenant is the person entitled to succeed under section 89 or no one is entitled to succeed. In the latter case, the common law survivorship can take effect unconstrained by the statute.

38. Mr Bryan McGuire QC for the Council takes issue with all these submissions. He submits that it would require clear words to oust the common law

rule of survivorship, and that nothing in the statute overrides the contractual and property rights inherent in a joint tenancy which at common law enure to the benefit of the survivor. The policy of the Act, he further submits, "is to protect a secure tenant from the loss of that tenancy" and Mr Hickin was a tenant under a secure tenancy while his wife lived, even though he was not himself in occupation. Although Mr Hickin had not in fact shown any interest in doing this, he might after his wife's death have wished to resume occupation of the house. Although the Council has in fact served notice to quit on Mr Hickin because he is not in occupation, the court should not adopt an interpretation which would, or at least might in other circumstances, impinge on rights on which Mr Hickin might have wished to rely under article 1 of the First Protocol to the European Convention on Human Rights.

39. At a linguistic level, Mr McGuire submits that the statutory references to "the" or "a" tenant must in the context of a joint tenancy be read as referring to both or all joint tenants wherever they appear in sections 87 to 89. In particular, the phrase "where a secure tenant dies" in section 89(1) must refer to and can only apply on the death of all joint tenants. The succession provisions were thus inapplicable since Mr Hickin remained alive and could continue as tenant at common law after Mrs Hickin's death.

40. The phrase "where a secure tenant dies" in section 89(1) is clearly not used to cater for the rare situations where joint tenants die simultaneously. Further, the legislator, when speaking of "the tenant's" spouse or civil partner in section 89(2) cannot have had in mind joint tenants having together a third person as their spouse or civil partner. Elsewhere, in sections 81 and 88(1)(b), the Act distinguishes between the individuals holding a joint tenancy. So too in section 89(1) the phrase "where a secure tenant dies" must contemplate an individual secure tenant. On Mr McGuire's approach, therefore, the phrase must, in the case of a joint tenancy, be read as referring to the death of the last surviving joint tenant who is a secure tenant. But on that basis section 89 can never apply to enable succession to a sole surviving joint tenant. Under section 88(1)(b) anyone who has become the sole tenant, having previously been a joint tenant, is a successor for the purposes of section 87, and under section 87 there can be no statutory succession to someone who was him or herself a successor. There thus appears to be no reason, in the case of a joint tenancy, to read the "tenant" in sections 87 to 89 as referring to the last surviving tenant, or indeed to worry at all about how the word applies. It contemplates situations where a secure tenant – an individual - dies and there is a person qualified under section 89(2), read with sections 87 and 88, to succeed to the secure tenancy.

41. In support of the Council's case, Mr McGuire invites consideration of the situation of two joint tenants who both occupy a property until one dies. He points out that on Mr Luba's case the survivor could find him or herself deprived of

possession in favour of a third person, also in occupation of the property but with a prior claim to succession under the rules of preference stated in section 89(2)(a) and (b). He submits that it is unlikely that the legislator intended to override the survivorship rights of a joint tenant in this way. The Master of the Rolls was likewise strongly influenced by possible situations in which on Mr Luba's case the common law interests of a joint tenant could be overridden in favour of a third party. As one example, he took the hypothesis of a joint tenancy involving joint occupation by two friends who were not married or in civil partnership and not members of the same family within the broad definition in section 113; if one of them then died leaving a child, the secure tenancy would, on Mr Luba's case, vest in the child, leaving the surviving joint tenant without his or her former secure tenancy. The Master of the Rolls also referred to two further examples: one related to siblings who were joint tenants living together with their children, but Mr Luba's riposte to this is that the definition of family would bring them on Mr Luba's case within the rules of preference in section 89(2); the other example related to gay couples, but the riposte to this is that the definition of family in section 50(3) of the 1980 Act (the forerunner of section 113 of the 1985 Act) was clearly drawn to exclude them (as Ministerial statements on the debate in Standing Committee F on the Housing Bill on 28th February 1980, Hansard column 681-682 confirm).

42. As to the basic example of joint tenancies between friends, one of them with a child who could succeed under section 89(2), it seems likely that any apparent problems dissipate or are marginal in the light of practical realities. Joint tenants are most commonly spouses or partners. The definition of family has always included persons living together as husband and wife (and now also includes persons living together as if they were civil partners). If Mr Luba's submissions are otherwise correct, the need to address the position of a surviving joint tenant through the means of section 89 is unlikely often to disturb such expectations as otherwise attach to a joint tenancy.

*Further analysis*

43. Nonetheless, I accept that there is some oddity about a conclusion, unlikely though it may be often to arise, that a joint tenancy between two persons both actually occupying a property is automatically subordinated to any prior claim which a third person might be able to make under the rules of preference in section 89(2). There is weight in Mr McGuire's submissions that one might have expected this to be made clear and in his invocation by analogy of Millett LJ's words in *Tennant v Hutton*, quoted in paragraph 32 above. However, this appeal is not concerned with the right of survivorship as between joint tenants both in occupation. In relation to the subject matter which it does concern, it can in my view be said to be at least equally odd – indeed odder, especially when it is probably a much commoner situation - that a joint tenant, who was not in

occupation and whose tenancy was only secure by virtue of the occupation of the other joint tenant, should be treated as the surviving sole tenant after the death of the other, when such a conclusion excludes succession by a relative who would otherwise qualify under section 89(2) and brings the secure tenancy to an end, rather than continues it. Mr McGuire's arguments that Mr Hickin had valuable contractual and property rights of which he should not lightly be deprived strike a particularly hollow note in this connection; the Council's only aim in asserting such rights is to rely on their vulnerability in the face of the notice of quit which it served on Mr Hickin on 18th January 2008. If, as Mr McGuire submits, the policy of the Act "is to protect a secure tenant from the loss of that tenancy", Mr McGuire's analysis runs in a different direction to that policy and applies to the 1985 Act a less protective approach than the courts were in *Lloyd v Sadler* [1978] 1 QB 774 ready to adopt under the Rent Acts towards persons in occupation.

44. In these circumstances, Mr Luba's case comes in my view much closer than Mr McGuire's to reflecting the protective purpose of the 1980 and 1985 Acts, and I prefer it. But, although it is unnecessary to decide this definitively on this appeal, I also consider that Mr Luba probably puts his case higher than is appropriate, and that the better analysis of situations of joint tenancies lies between the opposing cases. The 1985 Act is focused on the creation and preservation of secure tenancies, and I see no reason why its provisions need or should be read as overriding common law rules where these would themselves secure the continued existence of the secure tenancy.

45. In this connection, it is highly significant that the Act recognises the existence of joint tenants, and expressly provides that the occupation of one of them is sufficient to constitute the tenancy a secure tenancy (sections 79 and 81), and that it further provides that, where a person was a joint tenant and has become a sole tenant, he is treated as a successor: section 88(1)(b). This latter definition, Mr McGuire accepts, only arises and applies where the person who was a joint tenant and has become a sole tenant was before and remains after the survivorship a tenant under a secure tenancy: see the opening words of section 87. Leggatt LJ rightly observed in *Bassetlaw D. C. v Renshaw* [1992] 1 All ER 925, 928d:

> "'Successor' [in section 88] must mean successor to the tenancy referred to in section 87. When, therefore, the draftsman in para (b) says 'he was a joint tenant and has become the sole tenant' he must be referring to the secure tenancy' referred in section 87."

In *Birmingham City Council v Walker* at para 11, Lord Hoffmann endorsed this conclusion:

> "the word 'successor' most naturally means successor to a secure tenancy. …. 'he was a joint tenant and has become the sole tenant' in section 88(1)(b) means that he was a joint tenant under a secure tenancy and has become the sole tenant under a secure tenancy."

The prime situation in which one joint tenant becomes a sole tenant is of course on death of the other joint tenant: see e.g. *Burton v Camden London Borough Council* [2000] 2 AC 399, 410E per Lord Millett.

46. If two joint tenants are both in occupation, the secure tenancy can, on the death of one, continue in favour of the survivor, even in those rare cases where the other has a spouse, civil partner or relative who would otherwise have been qualified to succeed under sections 87 and 88. This situation is outside the scope of the provisions regarding succession contained in section 89. However, it is recognised by section 88(1)(b) which provides that the conversion of the joint tenancy on the death of one joint tenant into a tenancy held by the sole surviving tenant counts as a succession preventing any relative or family member of the latter being qualified to succeed to the latter. Section 88(1)(b) expressly recognises a type of succession - by a surviving joint tenant - which falls outside the scope of the succession regulated by section 89. It is section 88(1)(a) that refers to succession falling within section 89. However, section 88(1)(b) only contemplates succession by a surviving joint tenant who, because he or she is in occupation, can continue the secure tenancy held previously as joint tenant: see the authorities cited in paragraph 45 above.

47. Where a joint tenant who is in occupation and is a secure tenant dies, and the surviving joint tenant is *not* in occupation, the secure tenancy cannot continue in the surviving tenant and the surviving tenant cannot be a secure tenant. In this situation, nothing in the Act recognises or permits any right of survivorship which can oust the mandatory statutory provisions for succession contained in section 89, read with sections 87 and 88. Where a secure tenant dies, the language of section 89(1) and (2) vests the secure tenancy immediately on the death in any person qualified under the definitional sections 87 and 88. Here, it vested and continued in Miss Hickin the secure tenancy which until her mother's death existed by virtue of her mother's occupation.

48. It is immaterial on this appeal to consider whether a person who otherwise has priority under the rules in section 89(2) enjoys any and what right to disclaim the benefit of the secure tenancy thus vested in him or her by the statute. The statutory language makes clear that his or her entitlement to the benefit of the secure tenancy arises immediately on the death. There is no opportunity for anyone else to intervene, or, in particular, for the joint surviving tenant to resume occupation which a view to foreclosing or preventing the statutory vesting. Any

objections to which this might lead seem unlikely to exist except in remote and unusual situations, and to give rise to no real objection to a solution which does justice in the great majority of foreseeable contexts.

*The majority view*

49. Since writing the first draft of this judgment, I have seen Lord Sumption's judgment reaching an opposite result and Lord Hope's judgment concurring with it and making additional remarks on Scottish law. A number of points arise, which have led me to insert paragraphs 33 and 34 above and lead to the following further observations. First, Lord Sumption notes (para 1), and I agree, that the Housing Act 1980 was enacted to give residential tenants of local authorities and certain other social landlords a degree of protection broadly comparable to that enjoyed by private tenants under the Rent Act 1977, and he relies upon the Rent Act case of *Tennant v Hutton* on which I have also relied in paragraph 32 above. In my opinion, the result he reaches, far from being comparable with or supported by the position under the Rent Act 1977, is inconsistent with it. As indicated in paragraphs 33 and 34 above, in comparable circumstances, Miss Hickin would under the Rent Act scheme succeed as statutory tenant to her mother's protected or statutory tenancy.

50. Second, the suggestion (Lord Sumption's paragraph 13) that "section 88(1)(b) recognises that [Mr Hickin] became the sole tenant" is not consistent with the case-law. Section 88(1)(b) postulates and is only concerned with situations in which the sole tenant "was a joint tenant under a secure tenancy and has become the sole tenant under a secure tenancy": see the citations in paragraph 45 above, I cannot therefore agree with Lord Hope's statement (paragraph 24) that section 88(1)(b) recognises that a person who was a joint tenant may become the sole tenant in the exercise of that right "irrespective of where his only or principal home is". That is the common law rule, but section 88(1)(b) deals and deals *only* with situations where a secure joint tenancy becomes a secure tenancy in the hands of a surviving sole tenant. That situation can *only* arise where the surviving sole tenant is in occupation at the time when the death and survivorship occur.

51. If (as in the case of Mr Hickin) the surviving sole tenant is not in occupation at that time, he cannot be a secure tenant, because he does not fulfil the tenant condition in section 81. In this situation, section 89 prescribes the consequence: on the death of a secure tenant, the secure tenancy vests in the person qualified to succeed under sections 87 and 88. This occurs automatically on the death. There is no such "window of opportunity", as Lord Hope suggests in paragraph 19 for someone like Mr Hickin (out of occupation in 2007 for up to 25 years) to resume his position as a secure tenant: see paragraph 48 above. The words "at any time when" in section 79(1) relate to the period of a tenant's life. If

on death a tenant is not in occupation, no secure tenancy then exists, and no-one can succeed under the language of section 89. When Mrs Hickin died, she was in occupation, but Mr Hickin was not qualified to succeed her under sections 87 and 88, because he was not in occupation. But Miss Hickin was qualified and can therefore succeed under section 89.

52. Third, Lord Sumption focuses on and rejects Mr Luba's submission that a successor under section 89 could oust a surviving joint tenant who remained in occupation: see e.g. paragraph 15. For the reasons given in paragraphs 41 to 44 above, I believe that the problem is over-stated, and does not raise any insuperable obstacle to acceptance of Mr Luba's submissions about what Parliament must be taken to have intended. However, as explained in paragraphs 42 to 46 above, I also think that Mr Luba put his case higher than necessary or appropriate; the better analysis is, in my view, one whereby the problem never arises: a successor under section 89 cannot oust an surviving joint tenant who was in occupation, but the secure tenancy can on a joint tenant's death vest under section 89 in a qualified successor where the surviving joint tenant is not in occupation.

53. Fourth, references to the "extreme implausibility" of Parliament having decided to "expropriate" Mr Hickin's interest appear to me unpersuasive for all the various reasons indicated in paragraphs 36, 43 and 49 above. On any view, the effect of the legislation is in certain circumstances to vest a secure tenancy on death in any spouse, civil partner or family member occupying the house with the deceased, irrespective of any other purported disposition by the deceased. In my opinion, those circumstances include the present.

54. Finally, it is of interest to note the Housing (Scotland) Act 2001 to which Lord Hope draws attention. Section 22(1) provides that "On the death of a tenant under a Scottish secure tenancy, the tenancy passes by operation of law to a qualified person". By section 22(5), Schedule 3 makes provision as to who are qualified persons for this purpose. Under paragraph 2 of Schedule 3, one such person is, as Lord Hope notes, "a person whose only or principal home at the time of the tenant's death was the house and …..(b) who is, where the tenancy was held jointly by two or more individuals, a surviving tenant". So, the Scottish drafters, presumably with the English legislation before them, had no difficulty in using the terms "the death of a tenant" in section 22(1) and "the tenant's death" in Schedule 3 paragraph 2 to refer to the death of only one joint tenant. There should be equally little difficulty in doing so under section 89(1)

55. The fact that the Scottish Act, which is differently framed, made clear the position that a surviving joint tenant could succeed to a secure tenancy provided that the house was his or her only or principal home does not, of course, mean that

a similarly enlightened position is not implicit in the English Act. In my opinion, it is.

*Conclusion*

56. In summary, Mr Hickin was not in occupation and could not succeed to or continue to hold any secure tenancy. Section 88(1)(b) did not apply to make Mr Hickin a successor, because it only applies where a joint tenant is in occupation and can succeed as a secure tenant. In contrast, Miss Hickin was qualified to succeed to her mother's secure tenancy under section 87. The effect of section 89 was to provide that, on Mrs Hickin's death, the secure tenancy enjoyed by virtue of Mrs Hickin's occupation "vest[ed] by virtue of this section" in Miss Hickin, notwithstanding the common law right of survivorship which Mr Hickin would otherwise have had despite his lack of occupation. I would accordingly allow the appeal, set aside the order made by the Court of Appeal and restore the order made by HHJ Oliver-Jones QC.

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.

**LORD CLARKE**

58. I would allow this appeal, essentially for the reasons given by Lord Mance. I add a few words of my own because the court is divided.

59. The question is one of construction of the Housing Act 1985 ("the Act"), and especially section 89(1), which provides that the section applies "where a secure tenant dies and the tenancy is a periodic tenancy". In particular, the question is whether the reference to "a secure tenant" includes a reference to a

tenant under a periodic joint tenancy. The majority say that it does not. As Lord Sumption puts it at para 11, if the tenancy is a joint tenancy, the tenant has not died if there remains at least one living joint tenant in whom all the proprietary and contractual rights attaching to the tenancy subsist. However, I respectfully disagree.

60. By section 79, a tenancy under which a dwelling-house is let as a separate dwelling is a secure tenancy at any time when the landlord condition and the tenant condition are satisfied. Section 81 provides that the tenant condition is satisfied "where the tenancy is a joint tenancy" and "each of the joint tenants is an individual and at least one of them occupies the dwelling-house as his only or principal home". It appears to me that, as a matter of language, the Act recognises that in such a case joint tenants are tenants under a secure tenancy. In these circumstances the natural meaning of "secure tenant" in section 89(1) includes an individual joint tenant under a secure tenancy. It follows that "a secure tenant dies" within the meaning of section 89(1) when a joint tenant dies and that section 89 accordingly applies in such a case. By section 89(2), where there is a person qualified to succeed the tenant, the tenancy vests by virtue of the section in that person. In this case there was such a person, namely Mrs Hickin's daughter, because she satisfied the condition in section 87(b). The vesting takes place automatically on the death, with the result that, by necessary implication, the rights of a joint tenant such as Mr Hickin, must lapse.

61. As I see it, the position would be different if, at the date of the tenant's death, there was a joint tenant who occupied the dwelling-house as his only or principal home. In that event the ordinary common law rule would apply and he or she would become a sole tenant under a secure tenancy. Thus if, on Mrs Hickin's death, Mr Hickin had occupied the house as his only or principal home, he would have satisfied the first part of the tenant condition in section 81. The effect of section 88(1)(b) is that Mr Hickin would have been treated as a successor to Mrs Hickin. As Lord Mance notes at para 45, under section 88(1)(b) anyone who has become a sole tenant, having previously been a joint tenant, is a successor for the purposes of section 87, but only where the person who was a joint tenant and has become a sole tenant was before and remains after the survivorship a tenant under a secure tenancy. This is made clear by the opening words of section 87.

62. I agree with Lord Mance's analysis at paras 46 to 48. In particular, I agree that section 88(1)(b) recognises a type of succession by a surviving joint tenant which falls outside the scope of the succession regulated by section 89. It applies only where the survivor, because he or she is in occupation, can continue the secure tenancy held previously as joint tenant. In the case where the survivor is not in occupation, the secure tenancy cannot continue in the surviving tenant and the surviving tenant cannot be a secure tenant. Thus in the present case the effect of the Act is that Miss Hickin was the successor to the secure tenancy.

63. I prefer this approach to that adopted by the majority because it seems to me to be more consistent with the language of the Act, especially section 89(1), construed in its context. It also seems to me to be consistent with the authorities referred to by Lord Mance. Both approaches contain some oddities but this solution is consistent with the approach to the Rent Acts and, indeed with the position in Scotland. I recognise that this is a minority view but I agree with Lord Mance that consideration might be given to the question whether it would be appropriate for the approach in England and Scotland to be the same.