Southward Housing Co-Operative Ltd v Walker and another

[2015] EWHC 1615 (Ch)

Chancery Division

Hildyard J

08 June 2015

Brynmor Adams (instructed by Glazer Delmar) for the Claimant

Toby Vanhegan and Tobias Eaton (instructed by South West London Law Centre) for the Defendants

Oliver Jones (instructed by Treasury Solicitor) for the Interested Party

Hearing dates: 19 & 20 January 2015

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HONOURABLE MR JUSTICE HILDYARD

The Hon. Mr Justice Hildyard :

*Introduction*

1. This case concerns the nature and effect of tenancies granted by fully mutual housing co-operatives and in particular how they can lawfully be brought to an end and a possession order obtained.

2. The Defendants have also applied for a declaration of incompatibility in relation to section 80 of the Housing Act 1985 (“HA 1985”) and paragraph 12(1)(h) of Schedule 1 to the Housing Act 1988 (“HA 1988”) pursuant to section 4 of the Human Rights Act 1998 (“the HRA”).

3. Thus, there are issues of both private and public law involved and, given the number of tenancies potentially affected, these are of general importance.

4. In these circumstances, the Secretary of State for Communities and Local Government (“the SoS”) was added as an interested party by order of Chief Master Marsh on 20 November 2014.

5. The facts are not substantially in issue and the trial was conducted on the basis of witness statements standing as evidence without cross-examination.

6. Each party was represented by Counsel: Mr Brynmor Adams in the case of the Claimant; Mr Toby Vanhegan with Mr Tobias Eaton in the case of the Defendants; and Mr Oliver Jones in the case of the SoS. I am grateful to them all for their helpful and efficient submissions in a case of some legal complexity.

*Background Facts*

*The parties*

7. As further elaborated below, the Claimant is a fully mutual housing association. It is a non-profit-seeking housing co-operative registered under the Industrial and Provident Societies Act 1965 and under section 5 of the Housing Associations Act 1985.

8. The Defendants are members of the Claimant co-operative and have acquired a share in it.

*Their agreement*

9. The Claimant granted to the Defendants a tenancy of a property at 8 Kimber Road, Wandsworth (“the Property”) on the terms of a tenancy agreement (“the Agreement”) dated 4 April 2011.

10. The Agreement is headed “Tenancy Agreement” and is stated to be a weekly tenancy. The recitals set out the characteristics of the Claimant which make it a fully mutual co-operative and why the tenancy granted by the Agreement is not an assured tenancy.

11. By clause 1 of the Agreement, the Defendants are required to pay the rent (set at £106.28 per week) due weekly in advance on Monday.

12. By clause 4(2) of the Agreement it is provided that the Defendants shall have “the security [which I take to mean the right to occupy the property without interruption or interference as provided for in clause 4(1) of the Agreement] so long as he/she occupies the property as his/her only or principal home and abides by the terms of this agreement”.

13. Clause 4(2) of the Agreement further provides that the Claimant “will only end this tenancy with a Notice to Quit on one of the grounds set out in clause 7 of this agreement”.

14. By clause 7(1) of the Agreement, the Claimant agreed to give the Defendants at least one month’s notice in writing when it wished to terminate the Agreement.

15. By clause 7(3) of the Agreement, the Claimant agreed that before commencing proceedings for possession it would end the tenancy by serving a written notice to quit giving at least one calendar month’s notice (not having to end on the last day of a month) and that it would not begin proceedings until the expiration of the notice to quit.

16. Also by clause 7(3) of the Agreement, the Claimant agreed that the Defendants could only be required to give the Claimant possession by order of the County Court and that it would not seek an order for possession except on specified grounds.

17. The specified grounds include non-payment of rent which is due, and/or persistent delay in the payment of rent lawfully due.

18. The Agreement, unsurprisingly in view of its stated nature, did not include any provision for forfeiture.

*Accumulating rent arrears*

19. Over the course of the period from September 2011 to December 2013 significant rent arrears accumulated on the Defendants’ rent account.

20. Notwithstanding various letters (dated 9 November 2011, 12 January and 16 May 2012) sent to them reminding them of accruing arrears, the Defendants repeatedly failed to pay rent on time or at all.

21. The Defendants, who have four young children, have explained in their evidence (by witness statements) that (a) except for some temporary employment in the case of the Second Defendant in July 2013, both are unemployed; (b) their household income has consisted of jobseeker’s allowance (“JSA”), child benefit, child tax credit and housing benefit; (c) they have fallen into arrears because of occasional breaks in the payment to them of JSA, further to steps taken by the Job Centre to sanction it during four periods over the course of September 2011 to September 2013, after which its restoration was delayed; and (d) there have also been corresponding interruptions in the payment to them of housing benefit.

22. The Second Defendant has associated the breaks in payment of JSA and housing benefit with “changes of circumstances such as JSA sanctions/returning to work”. He has explained the resulting difficulties as follows:

“Where my JSA and housing benefit have been stopped this has often left my family to meet our essential living expenses from our child benefit and child tax credit alone. Despite our best efforts to pay all essential bills there was no way we could pay our rent/rent arrears without both JSA and housing benefit being in payment.”

23. By the end of October 2013, the Defendants’ arrears of rent stood at some £3,644.35.

24. Nevertheless, in response to notice to quit and the issue of proceedings for possession (as elaborated below) the Defendants’ evidence is that they have now been able to organise themselves better. The Second Defendant has stated that it is now his intention to return to work and to keep both the Claimant and the Housing Benefit Department better informed of “my changes of circumstances”.

25. After restoration of payment of housing benefit and JSA in October 2013, the Defendants had by September 2014 reduced their arrears to approximately £1,000 and have promised to repay arrears still outstanding at £20.00 per month.

*Notice to Quit*

26. In the meantime, however, on 1 August 2013 (when the arrears of rent which had accumulated over the previous year stood at about £2,608.63, and after repeated warnings of the Claimant’s concern about the level of rent arrears over the course of some two years) the Claimant served a notice to quit on the Defendants.

27. This required them to deliver up possession of the Property on 2 September 2013 or “the day on which a complete period of your Tenancy expires next after the end of four weeks from the service of this notice”.

28. After a brief email to the Claimant from the Second Defendant on 10 August 2013, stating that he had made an appointment to see a council officer “regarding our claim for benefit”, and a further email on 30 August 2013 advising the Claimant that there had been a problem with his application, the Claimant received no substantive further response from the Defendants.

29. By letter dated 17 September 2013, which started by noting that the Claimant had not received a reply to a specific request by letter dated 30 August 2013 for an update, the Claimant notified the Defendants that it had received its management committee’s approval to proceed to court unless payment of the arrears (by then standing at £3,380.59) was made within 14 days.

*Possession proceedings*

30. On 25 October 2013 the Claimant commenced proceedings in the Wandsworth County Court for possession, arrears of rent, charges for use and occupation and costs. The proceedings were thereafter transferred to the High Court, first to the Queen’s Bench Division and then to the Chancery Division.

31. In about February 2014 housing benefit paid £2,708.48, which reduced the arrears substantially. The arrears had been reduced to £1,043.51 on 2 June 2014.

32. Further to directions given by Chief Master Marsh in March 2014, the matter came on for trial on 19 January 2015.

*Outline of Claimant’s position*

33. The Claimant contends that it has validly terminated the Agreement in accordance with its express terms, that the Agreement conferred or gave rise to no security of tenure, and that it is therefore absolutely entitled to a possession order.

34. It is necessary to explain further the basis on which the Claimant contends that the Agreement gave rise to no security of tenure. That has to do with the Claimant’s particular statutory status, and the nature of a fully mutual housing co-operative. I start with the relevant legislative framework.

35. A “co-operative housing association” is currently defined by section 5 of HA 1985 as follows:

(1) A “co-operative housing association” is a “fully mutual housing association” registered under the Co-operative and Community Benefit Societies Act 2014.1

(2) A “fully mutual housing association” is an association that restricts membership to persons who are tenants or prospective tenants of the association and precludes the granting or assignment of tenancies to persons other than members.

(3) A “housing association” means – broadly – a society, body of trustees or company which is established for the purpose of providing or constructing housing accommodation and which does not trade for profit or does not issue dividends exceeding rates set by HM Treasury.

36. An equivalent definition is set out by section 1 of the Housing Associations Act 1985.

37. The Claimant is registered with the Financial Conduct Authority (which is responsible for societies registered under the Industrial and Provident Societies Act 1965) and therefore satisfies the definition of a “co-operative housing association” in section 5 of HA 1985 and section 1 of the Housing Associations Act 1985. The Claimant is also registered with the Homes and Communities Agency as a Non-Profit Provider of Social Housing.

38. The Claimant’s case is that by virtue of its status as a fully mutual housing association, that tenancy cannot be a secure tenancy because the Claimant is not a landlord within section 80 of the HA 1985. That is because:

(1) To qualify as a secure tenancy pursuant to HA 1985, a tenancy must, pursuant to section 79, satisfy the landlord condition in section 80 and the tenant condition in section 81. Section 80 essentially created secure tenancies where the landlord belonged to a list of specified authorities or bodies (primarily local authorities).

(2) On enactment, section 80(2) provided (relevantly) that section 80 would apply to non-fully mutual housing associations, but would not apply to fully mutual housing associations. The Claimant submits that this position has been confirmed on numerous occasions: they rely on *Mexfield Housing Co-operative Ltd v Berrisford* [2012] 1 AC 955 (“the *Mexfield* case”) *per* Lord Neuberger at [9] and Lord Hope at [72]; Jonathan Parker LJ in *Bhai v Black Roof Community Housing Association Ltd* [2001] 2 All ER 865 at [13]; and Patten LJ in *Joseph v Nettleton Road Housing Co-Operative Limited* [2010] EWCA Civ 228 at [6].

(3) Further, from 15 January 1989 new housing association tenancies were also excluded from the scope of the secure tenancy regime in HA 1985, although they were then – subject to exceptions – brought within the scope of the assured tenancy regime in HA 1988 (see below): see the summary set out by Jonathan Parker LJ in *Bhai v Black Roof Community Housing Association Ltd* (cited above) at [14ff].

39. The Claimant further submits that the Agreement is not an assured tenancy either. The basis of this submission is as follows:

(1) Section 1 of HA 1988 establishes that where a dwelling-house is let as a separate dwelling this is an assured tenancy for the purposes of the Act if the tenant is an individual who occupies the housing as his principal home and the tenancy is not otherwise excluded from the assured tenancy regime by reason of Schedule 1.

(2) Schedule 1 sets out those tenancies that cannot be assured tenancies. Paragraph 12(1)(h) of Schedule 1 refers to a “fully mutual housing association”. Section 45 defines “fully mutual housing association” as having the same meaning as in Part I of the Housing Associations Act 1985. The exclusion of fully mutual housing associations from the assured tenancy regime has again been confirmed on numerous occasions: see the *Mexfield* case *per* Lord Neuberger at [9] and Lord Hope at [72]; Patten LJ in *Joseph v Nettleton Road Housing Co-Operative Limited* [2010] EWCA Civ 228 at [5].

(3) The question of whether tenancies granted by fully mutual housing co-operatives should be granted assured tenancy status was expressly considered during the passage of HA 1988. During the Commons debates, the then Parliamentary Under-Secretary of State for the Environment, David Trippier, said as follows:

“Amendments Nos. 2, 166, 3, 45 and 46 are concerned with tenancies where the landlord is a fully mutual housing association – usually referred to as a housing co-operative. The Bill provides that such tenancies cannot be assured tenancies. We included this on the argument that a statutory regime designed to regulate the relationship between landlord and tenant has little relevance in a situation where, as is the nature of a co-operative, the interests of the landlord and tenants as a whole are, in effect, indivisible.”

40. The Defendants, on the other hand, rely on two main types of defence. The first relates to the nature of the tenancy, and how it can be terminated and possession granted. The second is a human rights and discrimination defence.

41. More particularly the Defendants defend the claim for possession on four main grounds, as follows:

(1) By analogy with the decision in the *Mexfield* case, the Agreement is to be treated as one for an uncertain term which, by virtue of section 149(6) of the Law of Property Act 1925, is to be treated as a tenancy for a term of 90 years: so that they are tenants pursuant to a 90 year lease that has not been determined in accordance with its terms or otherwise forfeit.

(2) The statutory provisions excluding fully mutual housing-co-operatives from security of tenure should be interpreted compatibly with Articles 8 and 14 ECHR to provide the Defendants with assured or secure tenancies.

(3) The decision to serve a notice was unlawful in a public law sense.

(4) The making of a possession order would be disproportionate.

42. Further or alternatively, the Defendants seek a declaration of incompatibility in relation to the exclusion of tenants of fully mutual housing co-operatives from security of tenure.

43. I turn to deal with each of these grounds.

*Is this case analogous with* Mexfield*?*

*The Supreme Court decision in* Mexfield

44. In the *Mexfield* case, in which the Claimant was also a fully mutual housing co-operative, the “occupancy agreement” in question (quoted at paragraph 5 of the judgment) provided for the claimant to let and the defendant to take a property from month to month for a weekly rent. The only provisions in the agreement which expressly provided for its determination were clauses 5 and 6, which were in the following terms:

“5. This agreement shall be determinable by [the defendant] giving [the claimant] one month’s notice in writing.

6. This agreement may be brought to an end by [the claimant] by the exercise of the right of re-entry specified in this clause but ONLY in the following circumstances: (a) If the rent reserved hereby or any part thereof shall at any time be in arrear and unpaid for 21 days…(b) If [the tenant] shall at any time fail or neglect to perform or observe any of the [terms of] this agreement which are to be performed or observed by [her] (c) If [the defendant] shall cease to be a member of [the claimant] (d) If a resolution is passed under…[the claimant’s] rules regarding a proposal to dissolve [the claimant].

“THEN in each case it shall be lawful for [the claimant] to re-enter upon the premises and peaceably to hold and enjoy the premises thenceforth and so that the rights to occupy the premises shall absolutely end and determine as if this agreement had not been made…”

45. When the defendant fell into arrears the claimant, rather than relying on clause 6(a), served a notice to quit on the defendant on 11 February 2008, expiring on 17 March 2008. The Supreme Court presumed that the claimant did not invoke clause 6(a) “because it is a forfeiture provision, and [the defendant] soon paid off the rent arrears, so it would have been a foregone conclusion that she would have obtained relief from forfeiture”.

46. As described in the judgment of Lord Neuberger (at paragraph 9), the claimant then brought proceedings for possession, “arguing that, despite the apparent limited circumstances in which, and the limited method by which, it could terminate the agreement (sc. under clause 6), it none the less was entitled to put an end to [the defendant’s] tenancy by serving a notice to quit.”

47. The question was whether the agreement was a monthly tenancy determinable by either side with one month’s notice, and if so whether the notice to quit was effective.

48. The Supreme Court, allowing the appeal, held as follows (references to paragraphs being to paragraphs in the judgment of Lord Neuberger of Abbotsbury MR unless otherwise stated):

(1) In the absence of any indication to the contrary, a tenancy granted “from month to month” is a monthly tenancy, and in the absence of contrary indication may be determined by either party giving one month’s notice to the other (see paragraph 16).

(2) However, as Baroness Hale of Richmond JSC lucidly explained (at paragraph 87):

“periodic tenancies…pose something of a puzzle if the law insists that the maximum term of any leasehold estate be certain. The rule was invented long before periodic tenancies were invented and it has always been a problem how the rule is to apply to them. In one sense the term is certain, as it comes to an end when the week, the month, the quarter of the year for which it has been granted comes to an end. But that is not the practical reality, as the law assumes a re-letting (or the extension of the term) at the end of each period, unless one or other of the parties gives notice to quit. So the actual maximum term is completely uncertain. But the theory is that, as long as each party is free to give that notice whenever they want, the legal maximum remains certain. Uncertainty is introduced if either party is forbidden to give that notice except in circumstances which may never arise. Then no one knows how long the term may last and indeed it may last for ever.”

(3) In the *Mexfield* case, the restrictions on the claimant in clause 6 of the agreement were such that the agreement on its true construction could not be terminated on one month’s notice except in the limited circumstances prescribed: thus, there was just such a “contrary indication” as Lord Neuberger described, and (echoing Baroness Hale’s explanation) the claimant was “forbidden” from giving notice except in circumstances which might never arise.

(4) The conclusion that the term provided for was of uncertain length was fortified by the inclusion of a forfeiture provision: for there would be little point in such a provision if the claimant had the right to determine on one month’s notice (see paragraph 19), and also by the further consideration that it seemed (to quote Lord Neuberger)

“unlikely that the defendant’s security was intended to be so tenuous as to be determinable by the claimant on one month’s notice at any time from the day the agreement was made” (paragraph 20).

(5) Accordingly, since the hallmark of a monthly tenancy was that the tenancy be automatically determinable by either party giving the other one month’s notice, the agreement, which lacked that hallmark, could not give rise to a monthly tenancy (see paragraph 20).

(6) In such circumstances, where the claimant’s right of determination was so restricted, the agreement had to be construed as an agreement for an uncertain term and could not be a tenancy in the sense of being a term of years (paragraph 24). The rule against uncertainty of term, forged as long ago as the thirteenth century, might well be “not…satisfactory” (*per* Lord Neuberger), “curiouser and curiouser” (*per* Baroness Hale), “highly technical” (*per* Lord Dyson JSC): but the Supreme Court did not support jettisoning it “at any rate in this case” (see paragraph 35).

(7) The question then was as to what the agreement constituted if (as all were agreed) it was incapable of taking effect as a periodic tenancy.

(8) It seems that “the perceived legal position right up to the time of the 1925 property legislation was that terms of uncertain duration were converted into determinable life terms” (see paragraph 41).

(9) Lord Neuberger cited *Littleton on Tenures* (1481/2, vol 2, section 382) and pre-1925 authorities as establishing that this perceived legal position applied whether or not it was the result intended by the parties to the agreement in question. In possible dilution of that, more recent authorities, and especially the reasoning of the Court of Appeal in *Zimbler v Abrahams* [1903] 1 KB 577 at 582-583, may support the argument that an agreement for an uncertain term should only be regarded as creating a tenancy for life if, on a fair reading of the agreement, that was what the parties to the agreement intended (see paragraph 43).

(10) It was not necessary to decide the issue as to the relevance of intention in the *Mexfield* case. The association had been founded by a bank as part of a mortgage rescue scheme, which bought mortgaged properties from individual borrowers who were in difficulty and let the properties back to them under the terms of “occupancy agreements” such as that in question. Lord Neuberger concluded that “on a true construction of the agreement, it was intended that [the defendant] enjoy the premises for life – subject, of course, to determination pursuant to clauses 5 and 6” (see paragraph 44).

(11) Pursuant to section 149(6) of the Law of Property Act 1925, any lease at a rent for life is now to be treated as a term of 90 years determinable on the life of the defendant, subject to the rights of determination in clauses 5 and 6 (see paragraphs 45 to 53).

(12) The claimant had not relied on clause 6, nor had the defendant served notice under clause 5; the defendant was entitled to retain her tenancy and the claimant was not entitled to possession.

*Is the analysis in* Mexfield *applicable in this case?*

49. The question which then arises is to what extent that analysis in the *Mexfield* case applies in the instant case.

50. The starting point, as in the *Mexfield* case, is the question as to the nature and effect of the Agreement on its true construction. More particularly: is the Agreement for a certain or uncertain term?

*Is the term of the Agreement uncertain?*

51. The answer depends upon whether there is a fetter in the Agreement on the parties’ ability to terminate the Agreement such as to prevent the Agreement taking effect as a weekly periodic or any tenancy: for it is plain from Lord Neuberger’s judgment in the *Mexfield* case that what is expressed to be a periodic tenancy with a fetter on the landlord’s right to determine falls to be treated in the same way as a tenancy for an indeterminate term (see paragraphs 54 to 56).

52. That in turn depends on whether, on its true construction, the restriction or fetter (which the exclusive definition of grounds on which the Agreement can be terminated represents) applies to the issue of possession proceedings or to service of a notice to quit (or both).

53. If the former, the contractual provision would be enforceable and still give rise to a defence in possession proceedings; but the right to serve a notice to quit would be unfettered, and therefore a periodic tenancy could exist.

54. If the latter, then the fetter on termination would be inconsistent with the characterisation of the tenancy as a weekly periodic tenancy, and (subject to questions of intention) the Agreement could not take effect as such: as pre-1925 it would have taken effect as a defeasible lease for life, it would now be treated as a 90 year lease pursuant to section 149(6) of the Law of Property Act 1925.

55. The Claimant submitted that because the termination provision, in relevant part, considers the termination of the Agreement and the issue of proceedings conjunctively, it is possible to construe the Agreement so as to attach the fetter to the issue of possession proceedings rather than to the service of a notice to quit.

56. Put another way, any restriction does not affect the term or nature of the Agreement: it operates not as a matter of property but as a matter of contract, restricting only the grounds on which proceedings for possession are to be permitted.

57. The Claimant bolstered this submission and its preferred construction by reference to what it presented as being the clear intention of the parties to create a weekly periodic tenancy and not a long lease.

58. The Defendants submitted that such a construction is both (a) incorrect as a grammatical matter and (b) inconsistent with what they portrayed as the true intention of the parties despite the formal description of the tenancy: being to create a long-term agreement.

59. It is clear from the *Mexfield* case (see paragraph 17) that:

“…a tenancy agreement has to be interpreted in the same way as any other written contract, so the precise rights and obligations of the parties under it must depend on the terms which the parties have agreed and the circumstances in which they were agreed. However, in some circumstances, there may be principles of law which result in the parties’ intentions being frustrated or modified, and, as is clear from the reasoning in *Street v Mountford* [1985] AC 809, the legal consequences of what the parties have agreed is a matter of law rather than dependent on what the parties intended.”

60. I discuss the second part of that quotation, and the question whether the parties’ intentions must yield to an applicable principle of law, a little later. For the present my focus is on the true interpretation of clause 7 of the Agreement on ordinary principles of contractual construction, and in particular on whether that clause was intended only to restrict the circumstances in which the Claimant would bring proceedings for possession, and not the circumstances in which it could serve notice to quit.

61. As to the circumstances (what used to be called the factual matrix), it seems to me to be clear that the parties envisaged that the Defendants would be long-term tenants, and would be entitled to continue to remain in the property provided that the adumbrated conditions were fulfilled.

62. Although the factual background is not like that in the *Mexfield* case (which was held to be such as to support an intention to create a tenancy for life), it seems unlikely (as it was in the *Mexfield* case) that the Defendants were liable to be given one month’s notice even if none of the grounds set out in (a) to (j) in clause 7(3) applied.

63. Further, although the structure and wording of clause 7 do draw a distinction between (a) notice to quit and (b) proceedings for possession, and clause 7(3) (in which the words in particular issue appear) does seem principally directed at possession proceedings, the more natural construction of the words is that the grounds relate not only to possession proceedings but also to the giving of notice to quit.

64. In my judgment, the better construction is that the right to serve notice to quit is dependent upon the existence of one or more of the grounds specified in clause 7(3).

65. It follows that the Agreement must be treated, as was the occupancy agreement in the *Mexfield* case, as one for an uncertain duration.

66. As to that, Lord Templeman said in *Prudential Assurance Co Ltd v London Residuary Body and Others* [1992] 2 AC 386 at 394H:

“In any event principle and precedent dictate that it is beyond the power of the landlord and the tenant to create a term which is uncertain.”

*Does the uncertainty of term mean that a tenancy for life must have arisen by operation of law?*

67. The question then is whether that conclusion has the inexorable effect that the Agreement would, prior to 1925, have been treated, not as a tenancy, but as a lease for life, so that post-1925 it is treated as a lease for 90 years pursuant to section 149(6) of the LPA 1925.

68. Two sub-questions arise: these are (a) whether it was the intention of the parties to create a lease for life and, if not, (b) whether contrary intention of the parties is nevertheless negated by an overriding principle of law (and see paragraph [66] above).

69. In the *Mexfield* case, all the justices of the Supreme Court were agreed that in the particular circumstances of that case it was intended that the defendant should enjoy the premises for life; that, to put that into more legal language, the parties did in fact intend a lease for life determinable earlier by the tenant on one month’s notice and by the landlord on the happening of certain specified events.

70. That meant that they did not have to consider the conundrum that arises if that is not the intention of the parties, and where, accordingly, the inexorable application of a rule that transmogrifies into a 90 year term an agreement that is incapable of constituting a tenancy (which is what Lord Neuberger acknowledged was the “Carrolian” consequence (see paragraph 34)), defeats the intention of the parties.

71. In the present case, in my view, just that conundrum arises. For in my judgment it is plain that even if the parties envisaged that the Defendants in this case would stay at the property for a long time, it was not the intention of the parties that they should be legally entitled to enjoy the premises for life.

72. I accept the Claimant’s submissions that the terms of the Agreement show a clear contrary intention:

(1) The front page of the tenancy states: “The tenancy begins on Monday 4th April 2011 and is a weekly tenancy.”

(2) Rent is payable weekly (Clause 1(1)-(2)).

(3) In contrast to the *Mexfield* case, there is no factual background to the grant of the tenancy which suggests that the tenancy was intended to be for life (*cf* the *Mexfield* case at paragraph 19). The Claimant does not operate a mortgage rescue scheme as Mexfield did.

(4) Most importantly, to my mind, the Agreement is repeatedly expressed as determinable by a “notice to quit”, which is a hallmark of a periodic tenancy (Clause 2[2](b), Clause 4[2], Clause 6[2], Clause 7[3]). The *Mexfield* tenancy had a conventionally-drafted right of re-entry, which is consistent with a fixed term, and no express provision for notice to quit.

73. Thus, just the conundrum envisaged by Baroness Hale in paragraph 94 of her judgment in the *Mexfield* case arises in this case. The application of what the Supreme Court took to be a two-part rule of law would confound the accepted approach to the construction of any agreement, including a tenancy agreement, substitute for the meaning of the contract on its true interpretation an entirely different contract, and thereby contradict the intention of the parties. How is this bizarre conundrum to be resolved?

74. It is clear that the first part of the perceived rule of law (the rule against uncertainty) must, at least at this level of the hierarchy, be taken as applicable, whatever the power of the arguments against the modern utility and justification for chains apparently forged in the thirteenth century. Although Lord Neuberger left open the possibility of its review in another case (see paragraph 35), that would be a matter arguable only in the Supreme Court itself (absent legislative intervention in the meantime). Furthermore, the arguments are not all one way: there are substantial arguments in favour of retaining the rule: and see an article *‘Certainty of Terms and Leases: Curiouser and Curiouser’* (2012) 75(3) MLR 401.

75. The question then is whether the second part of the rule, providing for the “Carollian” transmogrification of an agreement that cannot qualify as a tenancy by reason of the uncertainty of its term into a lease for life and then into a 90 year term, is equally remorseless even where, in a case like this one, it confounds the plain intention of the parties.

76. The Claimant contends that the Supreme Court, which did not have to decide the issue, left open the possibility that the general rule might yield to the plain contrary intention of the parties. The Defendants, naturally, are content to abandon their intentions and exceed their expectations by gratefully embracing the remorseless application of what they characterise as a rule of law.

77. The starting point is to determine whether the Claimant is right in its submission that (a) the Supreme Court in *Mexfield* left open the question of whether an agreement for an uncertain term was only regarded as creating a tenancy for life if, on a fair reading of the agreement, that was what the parties to the agreement intended (see paragraphs 43 to 44); so that (b) it is open to this court to conclude that a lease for life would only arise at common law if, on a true construction of their agreement, the parties intended it, or at least is consistent with that.

78. As previously noticed, the Supreme Court found that the application of the ‘rule’ secured the result that the parties had intended, that the defendant should be entitled to enjoy the property for life (subject of course to determination pursuant to clauses 5 and 6). So the Supreme Court never had to resolve the conundrum that Baroness Hale envisaged and which has arisen now.

79. However, it was undoubtedly part of Mexfield’s argument before them that “there is no rule that a grant to an individual containing a term producing uncertainty is automatically a defeasible lease for life. Whether the terms of a particular agreement have that effect is a matter of construction of the agreement”. (The quotation is from the record of Counsel for the claimant’s argument, see page 960*D* of the report.) In support of the argument Counsel relied especially on *Zimbler v Abrahams* [1903] 1 KB 577 and a post-1925 case, *Clays Lane Housing Co-Operative Ltd v Patrick* (1984) 49 P&CR 72, both in the Court of Appeal.

80. The question in *Zimbler v Abrahams* was whether an agreement by which the owners of a house purported to let it to the defendant at a weekly rental “as long as he lives in the house and pays rent regular” should be treated as a weekly tenancy, or whether it purported to be an attempt to create an immediate demise for the life of the defendant. If the latter, it would be void as not being by deed, but might be, and was in the result, given effect by characterising it as an agreement for a lease of which specific performance could be granted.

81. *Clays Lane Housing Co-Operative Ltd v Patrick*, like the present case, concerned a weekly tenancy granted by a housing co-operative which specified restricted circumstances in which the landlord co-operative could serve notice to quit (again similar in scope to those in the present case). The defendant sought to resist possession on two grounds: (a) that the tenancy was a secure tenancy within the meaning of section 28 of HA 1980; (b) that clause 7(b) of the tenancy constituted a right of re-entry or forfeiture in respect of which they were entitled to relief; and (c) that the agreement, in the alternative, constituted an agreement to grant a lease for life, taking effect under section 149(6) of the LPA 1925 as an agreement for a term of 90 years determinable after the death of the tenant on one month’s notice. The focus seems to have been primarily on (a) and (b); as to (c), there is little elaboration of the way the argument was put, but there is no reference to the ‘rule’ here in issue, and the argument appears to have been based on inferring such an agreement.

82. The Court of Appeal allowed the claimant’s appeal and rejected all three of the defendant’s arguments. As to (c), Fox LJ (giving the judgment of the court) was terse in his rejection of the argument:

“An alternative argument advanced by the defendant is that, upon the proper construction, the tenancy agreement constituted an agreement to grant a lease for life which takes effect under section 149(6)…as an agreement for a term of 90 years determinable after the death of the tenant on one month’s notice. That, in our opinion, is quite unreal. The agreement does not in terms grant a lease for life and there is no justification for inferring such an agreement. Neither party can possibly have intended such a result. In our opinion, the agreement granted what it purported to grant, namely a weekly tenancy determinable in specified events upon four weeks’ notice.”

It does not appear that the argument based on certainty was raised or addressed.

83. Lord Neuberger did not consider that *Zimbler v Abrahams* was of any material assistance; and neither he nor any other members of the Supreme Court addressed *Clays Lane Housing Co-Operative Ltd v Patrick* at all.

84. Lord Neuberger, in rejecting the claimant’s argument that an agreement for an uncertain term was only regarded as creating a tenancy for life if, on a fair reading of the agreement, that was what the parties to the agreement intended, said this (at paragraph 44):

“In my judgment…there are three answers to that contention. The first is that the reasoning in *Zimbler v Abrahams* is not strictly inconsistent with [Counsel for the successful defendant’s] analysis: if, as a matter of interpretation, the agreement in that case did involve the grant of a tenancy for life, then there is no need to invoke [Counsel for the defendant’s] analysis, but that does not mean that the analysis is wrong. Secondly, if *Zimbler v Abrahams* did proceed on the assumption that an agreement which purported to create a tenancy for an uncertain term could not give rise to a tenancy for life unless it was the parties’ intention to do so, it was wrong, as it would have been inconsistent with the authoritative dicta relied on by [Counsel for the defendant], in particular the clear statement in *Littleton*, vol 2, section 382. (I also note that neither counsel in *Zimbler v Abrahams* relied on the point made by [Counsel for the applicant]: see pp 578-580.) Thirdly, even if an agreement which creates an uncertain term could only have resulted in a tenancy for the life of the tenant if that was the intention of the parties, I consider that on a true construction of the agreement, it was intended that [the defendant] enjoy the premises for life – subject of course to determination pursuant to clauses 5 and 6…”

85. There is no indication in any of the other judgments of any disagreement with any of these three points. Baroness Hale recognised the dangers of an inflexible rule, but nevertheless agreed with Lord Neuberger. Lord Clarke also agreed with Lord Neuberger. Moreover, Lord Dyson, after referring also to *Joshua Williams’s Law of Real Property,* 23rd ed (1920), said this (at paragraph 117):

“…a periodic tenancy determinable on an uncertain event was treated as a defeasible tenancy for life. In disputing this proposition, [Counsel for the claimant’s] principal submission was that, before the enactment of the 1925 Act, the question whether a periodic tenancy determinable on an uncertain event was a defeasible tenancy for life was one of construction of the particular agreement. But, as Lord Neuberger MR explains, it is clear from the authorities that this is incorrect. It was a rule of the common law that such a tenancy was automatically treated as a tenancy for life. It had nothing to do with the intention of the parties*.*” [My emphasis]

86. At first blush, these statements, and the Supreme Court’s unanimity, suggest that the conundrum is not capable of being resolved by reference to the contrary intention of the parties. I must admit that I was initially persuaded that this was so, however odd and unsatisfactory the result.

87. However, and with diffidence and anxiety, I have eventually concluded that there is a solution which does give effect to the intention of the parties. The solution revolves around the difference between, on the one hand, accepting (as plainly one must) that the ‘rule’ can be applied in circumstances where the parties had no inkling or intention that it would, and, on the other hand, accepting that its application is mandatory even where the parties’ intentions were to the contrary and their agreement contains fundamental terms that simply cannot be carried over into a 90 year lease.

88. As to the latter, it is important I think that Lord Neuberger cast the second of his three answers to *Zimbler v Abrahams* in terms of whether the rule depended for its application on the intention of the parties, rather than in terms of whether the rule might yield to contrary intention.

89. Similarly, although Lord Dyson referred to a tenancy with an uncertain term “automatically” being treated as a tenancy for life, and with that result being “nothing to do with the intention of the parties”, even that formulation does not seem to me to exclude the disapplication of the rule where it would be contrary to the parties’ intentions and bring into being an agreement which does not contain vital agreed provisions, such as provisions for its termination.

90. In the latter context, what I have especially in mind is the fact that, unlike in the *Mexfield* case, the Agreement in this case did contain provisions for each side to give notice to quit, but did not contain any provision for forfeiture. The Defendants have seized on this. They submit that a lease for a term of 90 years cannot be terminated by service of a notice to quit, “because that would defeat the very nature of the tenancy as having a fixed term of 90 years”. In this they would appear to be correct: but to my mind it starkly emphasises how bizarre it would be to adopt the ‘rule’ in such circumstances.

91. I have concluded that the ‘rule’ does not depend for its application on the parties’ intentions; but the judgments of the Supreme Court in the *Mexfield* case leave open the possibility that it may be disapplied where those intentions and fundamental aspects of their agreement would be confounded by it.

92. I am fortified in this conclusion by the consideration that the origin of the ‘rule’ must have been intended to save agreements that would otherwise fail, in accordance with the maxim *ut res magis valeat quam pereat*, not to destroy the essence of their bargain and foist on them a long term relationship against their will and which one of them may not be able to terminate.

93. Further, even though not perhaps directly in point, cases such as *Lace v Chantler* [1944] KB 368, as well as *Zimbler v Abrahams* and *Clays Lane Housing Co-Operative Ltd v Patrick,* do at least serve to illustrate and emphasise the ordinary reluctance (in each case, in fact, refusal) of the court to foist on the parties a “new bargain which neither of the parties ever intended to enter into” (*per* Lord Greene MR in *Lace v Chantler* at page 372).

94. Lastly in this context, I think it is permissible to take into account the following additional matters in support of my approach:

(1) All members of the Supreme Court appear to have been receptive to the analysis that, if an agreement could not take effect as a tenancy (for want of certainty of term), it could nevertheless subsist as a contractual licence taking effect between the parties according to its terms (see especially *per* Lord Mance JSC).

(2) All members of the Supreme Court recognised that, unless the insistence on certainty of term is ultimately abandoned, some such solution must be devised in the case of corporate tenants (see especially *per* Baroness Hale at [4] to [95]).

(3) All members of the Supreme Court concurred that the contractual licence would have the same effect as between the parties (and again see [95]).

(4) Lord Hope of Craighead DPSC was plainly puzzled why the solution of a contractual licence was not both obvious and sensible (see paragraph 80), as well as being plainly the solution offered under Scottish law.

(5) That solution of a contractual licence may not have been contemplated when the ‘rule’ was devised: and not a single authority post-1925 was found in support of the inexorable application of this aspect of the ‘rule’; and it seems odder still that pre-1925 authority should be treated as mandating the negation of an entirely workable agreement and its replacement with a different relationship which is not only not what they intended but is quite contrary to their intention and the structure of their underlying contract.

*95.* In short, I consider that the solution of a contractual licence is not precluded by the *Mexfield* case, is open to this court, and should be adopted.

*If the Agreement is to be treated as a 90 year lease, how can it be terminated?*

96. If the tenancy is in law to be re-characterised, in order to give it effect between the parties, as a periodic licence, it is common ground that it was determined by the notice to quit. It is accepted that the Defendants can rely on the terms of the contract and that therefore the notice must be served in accordance with those terms. There is no dispute in the present case that the relevant terms have been complied with.

97. However, I must recognise that I may be wrong; and if, contrary to my own view, a 90 year lease has arisen by operation of law, the position is potentially more complicated. I turn to consider the position that would then arise.

98. The creation by inexorable operation of a ‘rule’ of law of an interest which is drastically different from that which the parties intended raises particularly acute problems in the context of determining what is the required procedure for termination of the Agreement. Put shortly, this is because the Agreement, being intended to be for a weekly periodic tenancy, provides only for notice to quit as the means of terminating it and does not (unlike in the *Mexfield* case) contain any provision for re-entry/forfeiture.

99. In the *Mexfield* case, the relevant clause (clause 6) enabled the landlord (claimant) to exercise a right of re-entry in the circumstances defined. There was no provision for notice to quit. Clause 6 was easily read in to the 90 year lease which the Supreme Court held resulted as explained above.

100. In this case, there is no provision for re-entry. Clause 7 is, entirely consistently and indeed demonstratively of the intention of the parties that the tenancy be a periodic tenancy, a notice to quit clause.

*Does the provision in the Agreement for notice to quit survive?*

101. As mentioned previously, the Defendants have seized on this. They submit that a lease for a term of 90 years cannot be terminated by service of a notice to quit, “because that would defeat the very nature of the tenancy as having a fixed term of 90 years”.

102. Then they submit that the Claimant neither purported to nor could it forfeit the lease: for there is no forfeiture clause, and (they submit further) no such clause can be implied, since this would be wholly inconsistent with the principles of contractual interpretation set out by the House of Lords in *Investors Compensation Scheme v. West Bromwich Building Society* [1998] 1 WLR 896, and with the principle set out in *David Blackstone Limited v. Burnetts* [1973] 1 WLR 1487 at 1496D, where the court held that the basic principle is that the court leans against forfeiture.

103. Thus, if the Defendants are correct, the Agreement is either:

(1) wholly incapable of termination before the Defendants’ deaths or termination by the effluxion of time because no expressly drafted forfeiture clause was included in the agreement; or

(2) terminable, but only if the strict requirements for forfeiture of a long lease are complied with, namely:

(a) a formal demand for rent must be made;

(b) a notice pursuant to section 166 of the Commonhold and Leasehold Reform Act 2002 (“CLRA 2002”) must be served;

(c) waiver of the right to forfeit must have been avoided;

(d) an application for relief from forfeiture by the tenant must be resisted.

104. The effect of the Defendants’ primary argument, if correct, is that a ‘rule’ (the requirement of certainty of term) which was devised to prevent potentially perpetual tenancies results in the creation of one. The Defendants do not shrink from the preposterous result: they rely on the law as compelling it. The question is whether the law has an answer.

105. It is noted in *Woodfall ‘Landlord and Tenant’* at 17.196 that “[b]y its nature a tenancy for a term certain cannot be determined by notice to quit”. No authority is cited: but perhaps none is necessary: the two notions are inconsistent.

106. Without elaboration, the Claimant’s skeleton argument floated the idea that clause 7 (the notice to quit clause) might be “treated much like a break clause”.

107. A break clause is in the nature of an option to terminate a lease. The option may be reserved to the landlord or (more usually) granted to the tenant; or it may be mutual.

108. An option is a unilateral contract calling and providing for a binding bilateral contract to come into existence upon the conditions to which the option and its exercise are subject being fulfilled. Strict compliance is ordinarily required.

109. A notice to quit is not in the nature of an option. It does not call for a bilateral contract, or bring one into being upon the fulfilment of prescribed conditions. It is a power to terminate unilaterally. In cases where an invalidly exercised notice to quit has been treated as a consensual break clause it seems to me that it is because the recipient then agreed to treat it as valid: see, for example, *Elsden v Pick* [1980] 1 WLR 898 and *Hounslow L.B.C. v Pilling* [1993] 1 WLR 1242 [in the Court of Appeal].

110. I do not think that clause 7 of the Agreement was intended to be or is easily re-characterised as a break clause, properly so-called. The Claimant’s submission that it should be so was tentatively ventured but not fortified. I am not persuaded by the argument, at least as presently advanced.

111. However, the alternative is that the long lease into which the Agreement, on the hypothesis underlying this part of this judgment, is transmogrified is not subject to any termination provision at all. In my view, that is so unpalatable, and so alien to the parties’ intentions, that some solution must be found.

112. In my judgment, the only solution (on the hypothesis stated) is to treat clause 7 as an innominate process for termination. I agree with the Claimant that then “the real question for the Court is whether the exercise of the mechanism amounts to an act of forfeiture, with the result that the extensive common law and statutory provisions regulating forfeiture come into play”.

*If treated as a term of a long lease, is clause 7(3) a forfeiture provision?*

113. In support of its argument that clause 7(3) of the Agreement is not a forfeiture provision and its exercise does not amount to a forfeiture, the Claimant relies on the Court of Appeal’s decision in *Clays Lane Housing Co-operative Ltd v Patrick*.

114. In that case, the Court of Appeal was considering a tenancy with fetters on the landlord’s ability to serve a notice to quit not dissimilar to those in the present case. The court concluded that termination in accordance with those fetters did not amount to forfeiture.

115. The Claimant referred in particular to the following statement in the judgment of the court delivered by Fox LJ (at pages 193-194):

“A provision is not a forfeiture provision merely because it operates where there has been default by the tenant. It is fundamental, in our view, that the forfeiture provision should bring the lease to an end earlier than the “natural” termination date (using “natural” in the sense which we have indicated).”

116. The Court had earlier in its judgment defined the natural termination date as follows:

“The reference to “natural” termination in this definition means in the case of a lease for a fixed term, the contractual expiry date and, in the case of a periodic tenancy, the date on which the tenant could be terminated by notice to quit.”

117. In that case, what was granted, being a weekly tenancy, could be brought to an end by one week’s notice to quit at common law, and four weeks’ notice under the Protection from Eviction Act 1977. The “natural” termination date contemplated by the contract was the end of each week of the tenancy.

118. However, as previously mentioned, the Court of Appeal in the *Clays Lane* case rejected any argument that the fetters on the service of notice to quit gave rise to an agreement for a 90 year lease as “quite unreal”. So it did not have to consider what the “natural” termination date was to be taken to be where a weekly tenancy is transmogrified into a long lease, not by intention or agreement of the parties, but by operation of law.

119. If the lease is, by operation of law, a lease for 90 years, is the “natural” termination date the end of each week contemplated by the Agreement? Or is it the end of the 90 year term implied by law? The Claimant submitted that it is the former. That appears to assume a sort of parallel universe, in which the Agreement survives in one, and the lease in another. Against that, the Defendants contend that clause 7 can only be treated as valid at all if it is saved as a forfeiture clause, with all that implies in terms of the extensive common law and statutory provisions regulating its exercise.

120. Partly because I find the underlying hypothesis difficult to accept, the choice seems to me to be unsatisfactory. In my view, on the basis of the hypothesis, the Agreement in effect disappears, except as regards provisions within it that can consistently be included within the long lease. I do not think it logical or consistent to treat as the “natural” termination date the date contemplated by the very contract that has been replaced by reason of its uncertainty as to term. Equally, to characterise as a provision for re-entry and forfeiture a clause which was not intended to be such, and to apply restrictions on its invocation and implementation (see further below) which can certainly never have been envisaged, seems equally contrived and inconsistent with the parties’ signed bargain.

121. I have on a fine balance concluded that the hypothesis of a long lease compels the construction of clause 7 as a provision for re-entry or forfeiture. The “natural” termination point is at the expiry of the 90 year term brought into being to replace the contractually agreed termination point by operation of law.

*If clause 7 is to be treated as a forfeiture provision, what are the conditions of its exercise?*

122. As previously foreshadowed, the Defendants contend that if clause 7 is to be treated as a forfeiture clause, all the common law and statutory protections apply.

123. First, they submit that since clause 7 does not exclude (as almost all forfeiture clauses would ordinarily exclude) the common law obligation to serve a rent demand before forfeiture can be exercised, the common law requirements applicable to a formal demand apply with full force. These are that

(1) the demand must be made by the landlord or his agent,

(2) it must be made on the very last day to save the forfeiture,

(3) it must be made at a convenient time before and at sunset, and must be continued actively or constructively until sunset,

(4) it must be made at the proper place, and

(5) it must be made of the precise sum then payable to the landlord.

124. Secondly, they submit that the Claimant cannot rely upon section 210 of the Common Law Procedure Act 1852 (“the CLPA”) and section 139(1) of the County Courts Act 1984 (which applies the first part of section 210 of the CLPA to the county court [see *Woodfall* at *17.193*]) to avoid the requirement for a formal demand complying with the above, because it did not attempt to levy distress at the property, and has produced no evidence on this point. A strict search must be made on the demised premises after the last day for saving the forfeiture, and before the writ issues, or at least before the proceedings are served, to ascertain that there is no sufficient distress on any part of the demised premises.

125. Thirdly, they submit that, in any event, the Claimant had no right to serve a notice to quit under the terms of the Agreement, since no rent was due because the Claimant had not complied with section 166 of CLRA 2002. They contend that section 166 applies by virtue of section 166(9) because the tenancy is a long lease within the meaning of sections 76 and 77 of CLRA 2002: see in particular section 76(2)(c). They then argue that the failure to serve a notice pursuant to section 166 CLRA 2002 means that no rent is due. If no rent is due, then under the terms of the tenancy the Claimant has no right to serve a notice to quit to terminate the tenancy.

126. Fourthly, they submit that if, contrary to their other submissions as adumbrated above, the Claimant had the right to forfeit the tenancy, then it is submitted that it has waived that right by demanding and accepting rent from the Defendants. In *David Blackstone*, cited above, it was held that “an unambiguous demand for future rent in advance . . . does in law amount to an election and does constitute waiver if, at the time when it is made, the landlord has sufficient knowledge of the facts to put him to his election . . . there is a fundamental inconsistency between contending that a lease has been determined and demanding rent on the basis of its future continuance”: see page 1498F of the judgment. On that footing, the Defendants contend that the Claimant has elected to continue the tenancy, and asserted its continued existence, and has therefore waived the right to forfeit, if such right exists.

127. Lastly, if there has been a valid forfeiture which has not been waived, the Defendants by their Counterclaim seek relief from forfeiture.

128. The Claimant sought to rebut each of the Defendants’ substantive objections in turn. It also resists the grant of any relief from forfeiture if the service of its notice to quit is to be re-characterised as an act of forfeiture. I turn to elaborate upon its arguments.

129. First, the Claimant rejected any suggestion that there was a requirement for a formal demand for rent in accordance with the strict common law regime adumbrated in paragraph [123] above on the simple basis that more than half a year’s rent was outstanding at the material time and in such circumstances section 210 of the CLPA applies.

130. However, the difficulty with this is the requirement in section 210 of the CLPA (as in section 139 of the County Courts Act) to show that no sufficient distress is to be found on the premises. Although the Claimant sought to argue that the Defendants did not raise the issue of distress in their pleadings, and mentioned it for the first time in their skeleton argument, it seems to me that the burden was always on the Claimant to demonstrate satisfaction of the conditions of the CLPA/County Courts Act. As to that, no distress had been levied or sought to be so.

131. In such circumstances, the Claimant submitted that it is clear from *Rickett v Green* [1910] 1 KB 253 that the insufficiency of goods to satisfy arrears of rent may be demonstrated by other evidence; and I agree that it is. So the question is whether the available evidence, which was sparse (as the Claimant acknowledged but sought to blame on the point not having been taken earlier by the Defendants), was enough to demonstrate such insufficiency.

132. As to that, the Claimant contended that an inference could be drawn from “the nature of the Agreement”, and from the Defendants’ evidence as to their circumstances and from their failure, for a prolonged period, to pay the rent arrears. I do not accept that the nature of the Agreement is such as of itself to absolve the Claimant from any need to prove insufficiency. However, the depiction of their parlous financial circumstances in the Defendants’ own evidence does make it extremely unlikely that goods belonging to the Defendants (or either of them) to a value equal to the outstanding rent at the relevant time would have been found. Again, on a fine balance I accept this.

133. That deals also with the Defendants’ second point (see paragraph [124] above).

134. As to the Defendants’ third point, raising the issue as to the application of section 166 of CLRA 2002 (see paragraph [125] above), the central question is whether the lease coming into effect (on this hypothesis) by operation of law is a “long lease” within the meaning of sections 76 and 77 of CLRA 2002. The Claimant argues that the tenancy is not a long lease because of section 77(1), but this does not bite because section 77(1)(a) is not satisfied.

135. Section 76(2)(c) includes within the definition of “long lease”:

“*(c) [a lease that] takes effect under section 149(6) of the Law of Property Act 1925…*”

136. Section 77(1) however excludes the following leases from the definition of “long leases”:

*“(1) A lease terminable by notice after a death, a marriage or the formation of a civil partnership is not a long lease if—*

*(a) the notice is capable of being given at any time after the death or marriage of, or the formation of a civil partnership by, the tenant,*

*(b) the length of the notice is not more than three months, and*

*(c) the terms of the lease preclude both its assignment otherwise than by virtue of section 92 of the Housing Act 1985 (assignments by way of exchange) and the sub-letting of the whole of the demised premises.”*

137. The Claimant submits that each of these requirements is satisfied. Certainly section 77(1)(b) and (c) appear to be so: see respectively section 149(6) (which provides for “at least one month’s notice”) and clause 3(19) of the Agreement, which contains a prohibition on assignment or subletting of the whole premises. However, the Defendants contend that section 77(1)(a) is not satisfied. They submit that notice is not capable of being given at any time because of the effect of the succession provisions in clause 5 of the Agreement: if effective, they say those provisions prevent the Claimant from being able to serve a notice at all.

138. I agree that clause 5 of the Agreement, which provides for and requires the Claimant, if the tenant dies (provided that the tenant was not a successor) to consent to transfer the tenancy to the tenant’s spouse or co-habitee or family member provided the successor agrees to become and remain a member of the Claimant, by its terms prevents notice being given by reason of death. In my view, the question which thus arises is whether the provisions of clause 5 of the Agreement survive its transmogrification into a 90 year lease.

139. In my judgment, and in agreement with the Claimant, if section 149(6) is the statutory provision which gives life to the lease, it cannot apply only in part.

140. Section 149(6) expressly provides that the lease brought into being by operation of law takes effect

“as a lease…for a term of ninety years determinable after (as the case may be) the death… of, … the original lessee or the survivor of the original lessees, by at least one month's notice in writing given to determine the same… by the lessor… to the person entitled to the leasehold interest, or if no such person is in existence by affixing the same to the premises…”

141. In my judgment, it follows from the application of section 149(6) that the 90 year term must be terminable on death. Insofar as clause 5 might be inconsistent with that, it must be overridden.

142. It then follows that the Claimant therefore did not need to serve a section 166 notice and that the Defendants are accordingly in arrears of rent as claimed.

143. The Claimant dismisses as misconceived the Defendants’ argument that the Claimant has lost or waived any right to forfeit the tenancy (see paragraph [126] above) by waiver, in demanding and accepting rent from the Defendants.

144. The Claimant submits that if service of the notice to quit on 1 August 2013 amounted to an act of forfeiture, then (a) instalments of rent had fallen due on 29 July 2013 and the preceding 12 weekly rent days, without demand, payment or acceptance of rent, and (b) demand for or receipt of rent after the act of forfeiture cannot amount to a waiver. As to (b), the Claimant relies on *Civil Service Co-Operative Society Ltd v Trustee of Sir J.R.D McGrigor, Bart.* [1923] 2 Ch 347.

145. Any analysis is complicated by the need at one and the same time to re-characterise, in line with the relevant hypothesis, the notice to quit as an act of forfeiture and then work out its consequences, given that in reality what was done was indeed service of a notice to quit, followed by proceedings for possession, rather than immediate re-entry or action for ejectment.

146. Nevertheless, as it seems to me, the hypothesis requires the service of the notice to quit to be treated as an unequivocal election tantamount to an act of forfeiture, and that the Claimant is correct that the *Civil Service* case shows that no acts of the Claimant thereafter can be relied on as constituting waiver.

147. I do not consider that the *Blackstone* case relied on by the Defendants assists them. In that case the plaintiff made an unambiguous demand for future rent after a breach of which the plaintiff was at that time treated as having knowledge and which the plaintiff subsequently relied on as giving rise to forfeiture. Unsurprisingly, that demand in those circumstances was treated as an election to treat the tenancy as continuing and the right to forfeit as having been waived. That is not the position in this case.

148. For comprehensiveness, I should perhaps confirm that I do not regard the Claimant’s letter to the Defendants dated 17 September 2013 (and thus after the act of forfeiture relied upon) as constituting a waiver. It is true that in that letter the Claimant, before proceeding to court (though having approval from its management committee to do so) invited proposals from the Defendants to clear residual arrears. For the reasons stated above, that invitation could not, in my view, constitute a waiver, since (a) it related only to past arrears and (b) by then the Claimant had unequivocally elected to proceed on the basis of the act of forfeiture.

*Should relief from forfeiture be granted?*

149. Although the Defendants have sought such relief, they have provided no solid proposals for discharge of arrears, payment of costs, or payment of future rent beyond their assurances in their witness statements of their commitment to reduce arrears and keep up with rent in the future, and the Second Defendant’s indication of his intention to return to work to that end.

150. The high point of these assurances, including an attempt to distinguish past conduct from future intentions and a plea, is in paragraphs 25 to 29 of the Second Defendant’s witness statement (dated 1 September 2014), as follows:

“25. I admit that in the past I have not managed my finances as well as I could have done however most of the time it was not a lack of willingness to pay which led to a lack of payment towards our rent but rather a lack of means. Without housing benefit and repeated sanctions to my JSA we simply could not afford to pay what we needed to towards our rent/arrears. When my benefits stopped I tried my best to get them put back into payment but there was *[sic]* always delays and further requests for information.

26. My solicitor has repeatedly informed me that it is important that I prioritise my rent and now that my JSA and housing benefit are in payment I feel confident that I will be able to sustain my payments towards my rent/rent arrears. I recognise that my rent account is my responsibility and I will do everything possible to save my home.

27. It is my intention to return to work and once I obtain employment I will be able to increase payments towards my arrears…

28. I do not believe it is fair that my landlord should be able to evict my family where we are able and willing to pay our rent/rent arrears without proper consideration of our personal circumstances and the effect the eviction will have on my family.

29. In summary I do not want to lose my home and I am committed to keeping up with my rent and reducing my rent arrears. I believe that my recent payment history shows that I am taking responsibility for my rent account and I am certain that my experience dealing with agencies, such as the law centre, means I am better placed to access help should I get into difficulties with my rent/benefits in the future.”

151. As explained by Arden J (as she then was) in *Inntrepreneur Pub Company v Langton and another* [2000] EGLR 234, (2000) 79 P&CR D7, the court’s jurisdiction is discretionary, but

“the discretion to grant relief is based on solid principles and not simply to be exercised in a manner which the court considers fair on the particular facts before it. Apart from history, there are no doubt sound reasons of policy why the discretion should be circumscribed and consistently exercised. If the courts do not uphold the terms of the lease except in limited situations, there will be a strong disincentive to landlords to invest in property and let it out on lease. By enforcing rights of property, the law promotes the use and availability of this resource within society…

…

The courts have granted relief where the tenant has not paid off arrears…there is no fixed period that the court may specify. However in my judgment the courts exercise their discretion to permit the tenant relief against forfeiture on terms that rent due is paid in the future on a basis which is consistent with the principles already identified, namely that the landlord should be able to recover the property in accordance with his legal right unless he can be put in the same position as if no forfeiture had occurred. The future is uncertain; the more distant future yet more uncertain. So the period fixed for the payment of arrears must be one within the immediately foreseeable future so that the court can say with a sufficient degree of certainty that the rent outstanding will be paid. Even then, the tenant has no right to relief. The court may decline to grant relief if for example the landlord has changed his position before the tenant makes an application for relief (see *Gill v Lewis* (1956) 2QB 1) because there has been excessive delay in making the application for relief.

Because the relief from forfeiture is discretionary, the court must in my judgment have regard to the individual circumstances of this case…”

152. Of course I have great sympathy for the predicament of the Defendants. I leave aside the possibly unintentional suggestion that sometimes they have simply been unwilling to pay. I take full account of the young age of their children, their attachment to the house and area, and the general advisability of continuity. But I would have to be satisfied that the Claimant would recover in full in the very near future and that the problem would not re-emerge.

153. At present, I am not so persuaded. As it is, of course, the matter is hypothetical: my primary basis of proceeding is that the case is distinguishable from the *Mexfield* case, so that (a) the tenancy is a periodic tenancy which the Claimant had every right to recover at the end of the term, (b) there is no question of the notice to quit being a forfeiture, and (c) accordingly there is no recourse to relief from forfeiture. If I am wrong in that primary conclusion, it may be that the question of relief should be further considered at the relevant time.

*Public Law Issues*

154. I turn to the plethora of issues of public law raised by the Defendants and which also concern the SoS as well as the Claimant. The Defendants rely on these if their private law defences fail, as indeed I have concluded they do.

155. The overall gist of the Defendants’ contentions in this context is that if the Agreement is not transmogrified into a long lease (and I have held that it is not), and if the tenancy provided for by the Agreement is exempted from secure and assured status (which they also dispute), that exemption is discriminatory; and that even if not discriminatory, it would be unreasonable and disproportionate, and a breach of the Defendants’ rights under articles 8 and 14 of the ECHR and/or article 1 of the First Protocol (“A1P1”), for the Claimant to seek and the court to make a possession order against them.

156. The discrimination asserted is said to arise because the effect of such exemption (if applicable) is that the only protection afforded to the Defendants is the limited protection afforded by the Protection from Eviction Act 1977 (“the 1977 Act”). The argument in summary is that this protection is so limited in comparison to that provided by assured tenancy status (in the private sector) or secure tenancy status (in the public sector) that it constitutes unjustifiable discrimination against the Defendants just because of their status as the tenants of a fully mutual housing co-operative.

157. The Defendants contend that such exemption falls within the ambit of Article 8 of the ECHR so as to engage the prohibition of discrimination in Article 14 ECHR even if there is no interference for the purposes of Article 8 itself. They contend that, if the relevant statutory provisions cannot be interpreted in such a way that the exemption is not applicable, then the legislation should be declared incompatible.

158. The Defendants submit also that the Claimant is a public authority pursuant to section 6(3)(b) of the HRA, and that its decision to serve the notice to quit, issue and pursue the proceedings and seek an order for possession is contrary to its obligations under section 6 of that Act.

159. They submit alternatively that even if that is not so, the court itself is, pursuant to section 6(3)(a) of the HRA, a public authority and bound to act in a way consistent with and to avoid a breach of the Defendants’ human rights.

160. The Claimant and the SoS do not accept any of this. Counsel for the SoS, for whose powerful submissions on these public law issues, both written and oral, I am especially indebted, summarised in his skeleton argument the SoS’s position as follows:

(1) The Claimant is not a public authority for the purposes of section 6 of the HRA.

(2) The Defendants’ Article 8 ECHR, Article 14 ECHR and AIP1 rights are not engaged either by HA 1985, HA 1988 or by the possession order sought in the present case.

(3) If they are engaged, then any interference with them is justified and proportionate. There are good reasons for treating the tenants of fully mutual housing associations differently from other categories of tenant.

(4) It is in any event not possible to construe HA 1985 or HA 1988 in the manner contended for by the Defendants. Their only remedy could be a declaration of incompatibility, to which they are not entitled.

161. Counsel for the Claimant supported each of these propositions, in addition to well-crafted separate submissions of his own. I deal with each in turn, but before doing so it may be helpful to explain how the various provisions of the ECHR may be engaged.

*Potentially relevant provisions of the ECHR*

*Article 8*

162. Article 8 of the ECHR provides as follows:

“Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

163. I did not understand the Defendants to assert any free-standing breach of their Article 8 rights in this case whether by reason of the nature of the tenancy as such or by comparison with other types of tenancy or at all. In any event, I agree with Counsel for the SoS that such an assertion would be misconceived.

164. Put shortly, this is because (a) the fact that the Defendants’ tenancy is not a secure or assured tenancy does not of itself interfere with their right to respect for their “home” and (b) Member States have a wide margin of appreciation in implementing social and economic policies in matters concerning housing, and in the UK it is for Parliament’s legislative choice as to who should or should not be afforded secure or assured tenancies and on what terms, balancing the need for protection against the fact that the greater the controls on the abilities of landlords to terminate tenancies, the less likely are those tenancies to be granted in the first place: see, for example, *Donoghue* at [34].

165. More particularly as to (a):

(1) “Home” is an autonomous concept under Article 8. It requires that the individual have “*sufficient continuing links*” with the place in question (*Gillow v UK* (1986) 11 EHRR 335 at [46]), but does not require that the individual have a legal right under domestic law to occupy the place (*Buckley v United Kingdom* (1996) 23 EHRR 101, [63]).

(2) The fact that the Defendants’ tenancy is not a secure or assured tenancy does not interfere with their right to respect for their home. A state does not owe its citizens any positive obligation to provide housing: *Kay v Lambeth London Borough Council* [2006] 2 AC 465 at [90] *per* Lord Hope. Article 8 is concerned with interferences with an individual’s right to respect for his “home”, and not with that individual’s property rights in domestic law (and see *Harrow London Borough Council v Qazi* [2004] 1 AC 983 at 990, *per* Lord Hope at [50]-[52].)

(3) Nor is there an infringement of Article 8 if the State fails to intervene to protect the Article 8 rights of those who do have a “home” but are evicted by private landlords: *McDonald v McDonald* [2014] EWCA Civ 1049 at [19] *per* Arden LJ. *A fortiori*, the state does not owe any obligation to ensure that the housing that people do have carries with it any particular degree of security of tenure.

(4) In a similar vein, Article 8 will not be engaged merely because a person has lost a legal right to remain in possession (let alone where he or she has not been granted one in the first place). The Supreme Court has held that Article 8 is engaged where a person is “at risk of being dispossessed of his home at the suit of a local authority…” (see *Manchester City Council v Pinnock* [2011] 2 AC 104 per Lord Neuberger at [45]: emphasis added).

(5) Indeed, the Supreme Court has very recently re-emphasised that Article 8 is not engaged simply by the service of a notice to quit in accordance with the terms of the tenancy, even though such service may be possible because a particular protection (whether statutory or at common law) has not been afforded to the tenant: *Sims v Dacorum Borough Council (Secretary of State for Communities and Local Government intervening)* [2014] UKSC 63 at [22]. As Lord Neuberger observed in *Sims* (giving the judgment of the court), “No judgment of the Strasbourg court begins to justify such a proposition”.

166. Turning more particularly to (b) in paragraph [164] above:

(1) As the European court said in *Blecic v Croatia* (2005) 41 EHRR 13 at [65]:

“State intervention in socio-economic matters such as housing is often necessary in securing social justice and public benefit. In this area, the margin of appreciation available to the state in implementing social and economic policies is necessarily a wide one. The domestic authorities’ judgment as to what is necessary to achieve the objectives of those policies should be respected unless that judgment is manifestly without reasonable foundation. Although this principle was originally set forth in the context of complaints under article 1 of Protocol No 1…the state enjoys an equally wide margin of appreciation as regards respect for the home in circumstances such as those prevailing in the present case, in the context of article 8. Thus the court will accept the judgment of the domestic authorities as to what is necessary in a democratic society unless that judgment is manifestly without reasonable foundation, that is, unless the measure employed is manifestly disproportionate to the legitimate aim pursued.”

(2) The state is thus permitted to make its own judgment as to how to balance competing interests. This was confirmed by the European court in *Tysiac v Poland* (2007) 45 EHRR 42 at [113]:

“…the boundaries between the state’s positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are none the less similar. In both the negative and positive 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; and in both contexts the state enjoys a certain margin of appreciation.”

(3) The legislative choices made by Parliament as to who should or should not be afforded secure or assured tenancies and on what terms have been subject to challenge on numerous occasions, without success. For example:

(a) In *Sheffield CC v Smart & Central Sutherland Housing Co Ltd v Wilson* [2002] EWCA Civ 4 the eviction of a person who had been granted housing under s. 193 of the Housing Act 1996 as unintentionally homeless (which housing is expressly excluded from the scope of the secure tenancy regime) was found to be lawful. The court placed particular emphasis on the balance of interest legitimately struck by the legislature in setting out the exclusions in the statutory scheme (see, for example, [40]-[41]).

(b) In *Poplar Housing v Donoghue* [2001] EWCA Civ 595 it was held that Parliament’s decision that certain tenants would be granted more limited rights under assured shorthold tenancies pursuant to section 21 of HA 1988 was also within its wide margin of discretion (at [69]). Parliament was entitled to prefer the needs of those dependent on social housing as a whole over the relevant tenants who were not afforded security of tenure.

(c) In *McLellan v Bracknell Forest* [2001] EWCA Civ 1510 a similar result followed in relation to the provision of introductory tenancies (see [61]-[63]). The challenge to the level of security afforded was rejected.

(4) The margin of appreciation left to national legislatures also reflects the difficulties of striking a balance between the interests of landlords, the interests of tenants, and the public interest: the interests of tenants in security must be balanced against the fact that the greater the controls on the abilities of landlords to terminate tenancies, the less likely are those tenancies to be granted in the first place: see, for example, *Donoghue* at [34]. What balance is in the overall public interest in the context of a Member State’s social policy is best left to the domestic legislature. As Lord Hope of Craighead observed, albeit in a slightly different context, in *Hounslow v Powell* [2011] UKSC 8, at [10]:

“The legislature has excluded [certain] types of tenancy from the statutory scheme which applies to secure tenancies for very good reasons, which are firmly rooted in social policy. In seeking democratic solutions to the problems inherent in the allocation of social housing, Parliament has sought to strike a balance between the rights of the occupier and the property rights and public responsibilities of the public authority”.

167. However, though Article 8 will not be engaged merely because a person has lost a legal right to remain in possession (let alone where he or she has not been granted one in the first place), an order requiring that person to give up possession is a different matter: that is an interference with that person’s right to respect for his “home”, rather than with the nature or quality of that person’s property rights.

168. Thus, the Supreme Court has held that Article 8 is engaged where a person is “at risk of being dispossessed of his home at the suit of a local authority…” (see *Manchester City Council v Pinnock* [2011] 2 AC 104 *per* Lord Neuberger at [45]).

169. In other words, it is not the nature of the protection or its denial in a particular context but the order for possession that may potentially interfere with the Defendants’ Article 8 rights: see *Sims* at [21]. If the Claimant is a public authority, it is the proportionality of that order that the court must assess in light of all of the circumstances in accordance with the principles set out above. Of course, if the Claimant is not a public authority, then there has been no actionable interference for the purposes of Article 8 at all. I return later to this question as to the status of the Claimant as a public authority when dealing more fully with what the Defendants described in their skeleton argument as “the final human rights argument…that the making of a possession order would breach the defendants’ rights under article 8…”.

*Article 14 ECHR*

170. Before that, it is convenient first to deal with what I think was the Defendants’ primary public law argument, to the effect that, since (a) a possession order is sought in this case, (b) it falls within the ambit of Article 8 so as to engage the protections of Article 14, even if there is no actionable interference for the purposes of Article 8 itself (for the reasons explained above).

171. Article 14 ECHR provides as follows:

“Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

172. Both the Claimant and the SoS accepted that, following *Larkos v Cyprus* (2000) EHRR 597 and *Secretary of State for Transport v Blake* [2013] EWHC 2945 (Ch) at [27], the exemption of fully mutual housing associations from secure and/or assured tenancy status “falls within the ambit” of Article 8 so as potentially to engage the protection of Article 14 ECHR, even though there is no interference for the purposes of Article 8 itself, as explained above. Thus, a difference in treatment might engage Article 14 if on a ground prohibited by that Article.

173. Accordingly, and in summary, it was for the Defendants to show that (a) as tenants of a fully mutual co-operative of which they are members, they have a status which is protected by Article 14, and (b) there was a difference in their treatment based on a ground prohibited by Article 14 and for which there is no justification.

*Does exclusion from security of tenure constitute discrimination for the purposes of Article 14?*

174. I have already explained that it is common ground between all the parties that the exemption of fully mutual housing associations from secure and/or assured tenancy status “falls within the ambit” of Article 8 so as to engage Article 14 ECHR, even though there is no interference for the purposes of Article 8 itself.

175. Three questions then fall to be considered under this heading:

(1) whether any difference in treatment accorded to the Claimant by reason of the exemption of fully mutual housing association tenancies from statutory protections that might otherwise apply is based on a ground prohibited by Article 14;

(2) what is the nature of any difference in treatment;

(3) whether any difference in treatment is justified.

*Have the Defendants a protected characteristic?*

176. As to (1) in paragraph [175] above, Article 14 includes discrimination on “any ground such as sex, race, colour, language…or other status”. The question thus becomes whether the ground of any discrimination is some “other status” of the Defendants within the intended meaning of the Article.

177. In *Kafkaris v Cyprus* (Application No 21906/04) (unreported 12 February 2008, but cited and quoted by Lord Neuberger of Abbotsbury in *R (RJM) v Secretary of State for Work and Pensions* [2008] UKHL 63; [2009] 1 AC 311 at [37]), the ECtHR said that article 14:

“safeguards persons who are in analogous or relevantly similar positions against discriminatory differences in treatment that have as their basis or reason a personal characteristic (‘status’) by which persons or a group of persons are distinguishable from each other.”

178. Although not without limit, it is clear that a generous meaning should be given to the words “or other status”: see *per* Lord Hope of Craighead in *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484, para. 48, cited by Lord Neuberger of Abbotsbury in *R (RJM) v Secretary of State for Work and Pensions* at [44] to [46]. Lord Neuberger also noted:

“The decisions of the ECtHR as to whether the “other status” requirement of article 14 is satisfied not only support such a wide reading, but they also indicate that “other status” should not be too closely limited by the grounds which are specifically prohibited in the article. Thus, military rank, as against civilian (*Engel v The Netherlands (No 1)* (1976) 1 EHRR 647), residence or domicile (*Johnston v Ireland* (1986) 9 EHRR 203), and previous employment with the KGB (*Sidebras v Lithuania* (2004) 42 EHRR 104) have all been held to fall within “other status” in article 14.”

179. Personal characteristics constituting prohibited grounds are generally concerned with innate and immutable characteristics, not with what people do or what happens to them: *R (Clulow) v Secretary of State for Work and Pensions* [2013] EWHC 3241 (Admin).

180. Further, as Lord Bingham explained in the *Clift* case (at para. 28) the relevant “personal characteristic” is not to be defined by the very differential treatment of which a person complains. However, a “personal characteristic” may be acquired: a “lifer” serving a life sentence or a homeless person (and thus the personal characteristic of homelessness) are approved examples (in *Clift* and *RJM* respectively).

181. In this case, the Defendants contend that the fact that they are tenants of a fully mutual housing co-operative constitutes their “other status”. They did not articulate the basis for this contention. However, they sought to invoke as an analogy the position of tenants of the Government of Cyprus having under the law of Cyprus no protection from eviction on expiry of their leases, unlike private tenants renting from private landlords, and whose status was recognised by the ECtHR in *Larkos v Cyprus* Application No. 29515/95.

182. In *Larkos* the applicant, who was a Cypriot citizen and a retired civil servant, was required by the Government of Cyprus to vacate a house which he had been renting from it and living in with his wife and children for over 40 years. He claimed his treatment was discriminatory in that simply because of being a government tenant he was being denied the protections provided to private tenants. The applicant succeeded in establishing unjustified discrimination.

183. However, the judgment of the court is, to my mind and with respect, somewhat brief as to the reasons for (impliedly) accepting that the applicant had “other status”. The court moves almost directly to the conclusion that no justification for discrimination between government tenants and private tenants had been shown. There is some suggestion that only civil servants could become government tenants, which might imply some “other status”; but that is far from clear. Beyond the general message that the ECtHR may be disposed to extrapolate from the fact of unjustified differenc in treatment of a defined section of the public an assumption as to “other status”, the requisite indicia remain vague, and certainly not binary.

184. In addition to the passages from the speech of Lord Neuberger in the *RJM* case already cited, perhaps the most helpful guidance remains that provided by Lord Walker of Gestingthorpe in that case at [5]:

“The other point on which I would comment is the expression “personal characteristics” used by the European Court of Human Rights in *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1876) 1 EHRR 711, and repeated in some later cases. “Personal characteristics” is not a precise expression and to my mind a binary approach to its meaning is unhelpful. “Personal characteristics” are more like a series of concentric circles. The most personal characteristics are those which are innate, largely immutable, and closely connected with an individual’s personality: gender, sexual orientation, pigmentation of skin, hair and eyes, congenital disabilities. Nationality, language, religion and politics may be almost innate (depending on a person’s family circumstances at birth) or may be acquired (though some religions do not countenance either apostates or converts); but all are regarded as important to the development of an individual’s personality (they reflect, it might be said, important values protected by articles 8, 9 and 10 of the Convention). Other acquired characteristics are further out in the concentric circles; they are more concerned with what people do, or with what happens to them, than with who they are; but they may still come within article 14 (Lord Neuberger instances military status, residence or domicile, and past employment in the KGB). Like him, I would include homelessness as falling within that range, whether or not it is regarded as a matter of choice (it is often the culmination of a series of misfortunes that overwhelm an individual so that he or she can no longer cope). The more peripheral or debateable any suggested personal characteristic is, the less likely it is to come within the most sensitive area where discrimination is particularly difficult to justify. There is an illuminating discussion of these points (contrasting Strasbourg jurisprudence with the American approach to the Fourteenth Amendment) in the speech of Baroness Hale of Richmond in *AL (Serbia) v Secretary of State for the Home Department* [2008] 1 WLR 1434, paras 20-35.”

185. That guidance too suggests some interplay between (a) the reasons for differential treatment and (b) whether the differential treatment is indicative of some personal characteristic or “other status”. That seems to be so notwithstanding Lord Bingham’s statement in *Clift* that he did not consider “a personal characteristic can be defined by the differential treatment of which a person complains”.

186. However regarded, it is a matter of judgment along a sliding scale or a pattern of concentric circles. The further away from a characteristic which is innate and immutable and plainly pertaining to a person’s personality, the less likely is the conclusion of “other status”; the less the identified group said to be discriminated against is treated as separate and characterised by factors which might objectively be regarded as to do with or pertaining to the person, the less likely a conclusion that the discrimination is by reference to and reason of “other status”.

187. In my judgment, that which is said in this case to occasion the Defendants’ differential treatment is difficult to describe as a “personal characteristic”. The characteristic is not innate but acquired; it has nothing to do with what the person is, as distinct from what that person has chosen to do; the choice made is most unlikely either to reflect or to have affected the person’s character; and the circumstances of fully mutual housing association tenants differ greatly. In short, any circle is far from the centre.

188. As to authority, no case, including *Larkos,* has even come close to recognising the status of being a tenant of a housing association that is fully mutual (as opposed to some other housing association) as being a prohibited ground for the purposes of Article 14. Indeed, in *Lancashire County Council v Taylor* [2005] 1 WLR 266, the Court of Appeal held that the status of a tenant farmer who had breached one type of covenant (as compared to a tenant farmer who had breached a different type of covenant) was not protected by Article 14: see [49] *per* Lord Woolf CJ (with whom Sedley and Gage LJJ agreed).

189. In my judgment, any differential treatment or discrimination is not the consequence of any “other status” such as to bring this case within Article 14.

190. Further and in any event, where the basis for the difference in treatment is chosen (as in this case) even if Article 14 is engaged, the measure in question is subject to less intense scrutiny: in *Carson and others v United Kingdom* Application 42184/05, [2008] ECHR 1194 at [80] the ECtHR said this in relation to a characteristic which was, and could be changed as, a matter of choice (place of residence)

“The Court therefore agrees with the Government and the national court that the individual does not require the same high level of protection against differences of treatment on this ground as is needed in relation to differences based on inherent characteristic, such as gender or racial or ethnic origin.”

*The nature of any difference in treatment*

191. Furthermore, to establish infringement of Article 14, the Defendants had to show in addition that the exclusion of their tenancy, by reason of their landlord being a fully mutual housing association, from the security of tenure provisions in the HA 1985 and the HA 1988 does constitute differential and discriminatory treatment such as to fall within Article 14 if they had some “other status” (which I have not accepted).

192. The Defendants contended that the difference in treatment is plain, material and discriminatory. They pointed to various legislative restrictions applicable to secure and assured tenancies that they say are not applicable to their tenancies, thus establishing a difference in treatment. They submitted that this is illustrated and demonstrated by the fact that their tenancy (if not a long lease) can be terminated by a valid notice to quit whereas a secure or assured tenancy continues until execution of the warrant of possession. They submitted that in consequence, for example, a tenant in their position is unable to enforce the landlord’s covenants, such as repairing obligations, once the tenancy has been terminated.

193. As the Claimant and SoS had to acknowledge, it is, of course, correct that these *legislative* restrictions do not apply to tenancies granted by fully mutual housing associations. However, as both of them noted, correctly in my view, it does not automatically or necessarily follow that the Defendants’ treatment is less favourable, in the round, than that of secure or assured tenants.

194. As the SoS pointed out, the nature of any difference in substance will depend on the nature of the Defendants’ contractual rights, in particular those at clause 7(3)(a)-(j) of the tenancy agreement (which the SoS does not address in his skeleton argument). It is evident that many of the protections the Defendants seek are contained in the tenancy agreement granted by the Claimant.

195. The Claimant gave various examples of this by comparison with the position of an assured shorthold tenant. Thus, for example, after service on them of a notice to quit the Defendants have a contractual protection from eviction appreciably stronger than the protection afforded to an assured shorthold tenant. The landlord under an assured shorthold tenancy can serve a section 21 notice, which gives rise to an absolute right to possession without proving any ground for possession or that it is reasonable to make a possession order. On the Claimant’s case, it can only obtain possession by establishing one of the grounds in clause 7(3)(a)-(j) of the tenancy agreement. These contractual requirements replicate the statutory grounds in HA 1985 and HA 1988.

196. Further, the Defendants’ tenancy agreement gives rise to a contractual right to succeed (clause 5) and replicates the rights of a secure tenant in relation to assignment (clauses 4(4) and (5)) and subletting (clause 3(19)). An assured shorthold tenant enjoys no right to buy. Section 89 HA 1980 applies in the same way to an assured or assured shorthold tenant faced with a possession claim on a mandatory ground (such as section 21 or Ground 8).

197. As the Claimant pointed out, even if the comparator is a tenant under an assured non-shorthold tenancy, such an assured tenant in rent arrears to the extent of the Defendants would still face a mandatory possession ground for possession under Ground 8 of Schedule 2 HA 1988.

198. The SoS added to this that, in any event, the Defendants are afforded considerable advantages by reason of their status as tenants of fully mutual housing associations, including having a far greater role in the management of the Claimant by reason of its democratic nature than would be the case in relation to a non-fully mutual housing association. It is by no means clear that the tenants of fully mutual housing associations will generally be in a worse position than the tenants of other housing associations, and the Defendants have not established this general proposition.

199. In short, the Defendants’ contentions in this regard, in focusing on the differences in statutory protection, ignore the overall position, which includes contractual rights. Any difference in treatment, if not eliminated, is much attenuated.

*Justification for difference in treatment*

200. In any event, any residual or remaining difference in treatment would have to be demonstrated by the Defendants to be unjustified. As noted, above, a wide margin of appreciation is afforded to the State in the context of social housing legislation. To succeed, the Defendants must show that the scheme put in place by Parliament is manifestly inappropriate and disproportionate to any legitimate aim pursued and so outside the generous margin of appreciation afforded to domestic legislatures (as explained previously).

201. The Claimant, in submitting that the Defendants could not do so, relied especially on the following factors as justifying the line drawn in the existing domestic legislation between tenants of fully mutual co-operatives and other tenants:

(1) The exclusion from security of tenure is long-standing. Parliament has declined to remove these exclusions despite numerous amendments of the relevant housing acts.

(2) The extent of any difference in practical terms is small. Indeed, in many regards tenants of fully mutual co-operatives are in a better position than an assured shorthold tenant. The Defendants and tenants in their position benefit from contractual protections which are equivalent to security of tenure.

(3) Tenants of fully mutual co-operatives are further protected by the democratic nature of the co-operative. In contrast, a secure tenant, assured tenant or long leaseholder has no influence over the decision to terminate his tenancy.

(4) Tenants of fully mutual co-operatives are also part owners of their landlord. Additional protections for tenants of such a landlord cannot be given without detracting from their rights as landlords. Co-operatives justifiably enjoy a wide discretion through their tenancy agreements and constitutional documents to strike a balance between the rights of an individual tenant as against the other members of the co-operative. Parliament has declined to substantively interfere with the balance of corresponding rights and obligations as between members of a mutual organisation.

202. The SoS supported the Claimant’s position in this regard, stressing in particular what Mr Neil Riddell, Deputy Head, Affordable Housing and Investment Division, the Department for Communities and Local Government, stated in his witness statement filed on behalf of the SoS:

“The fundamental difference between housing co-operatives and other housing associations is the absence of a landlord and tenant relationship in the case of co-operatives. Other housing associations tend to operate their tenancies according to a strong landlord and tenant relationship, with tenants generally having little direct input into the decisions made in relation to the management of where they live. In contrast, housing co-operatives are locally owned by the members themselves, and decisions are taken locally and exclusively by members/tenants. Those who work and live in the sector would argue that every part of a co-operative’s operations differ substantially from those of other housing associations because in a co-operative the interests of the tenants and landlord are indivisible; they are the same people.

…

Another fundamental difference between housing co-operatives and other housing associations is scale. While housing associations vary in size, many are larger scale national organisations which may have tens of thousands of homes…In contrast, the Confederation of Co-operative Housing (CCH), the main co-operative sector body, stresses that most housing co-operatives are comparatively small with an average of less than 100 homes.”

203. Now I accept that there is room for debate whether theory and practice as to the indivisibility of interests are in step and unison. As Lord Hope of Craighead put it in *Mexfield* at [81]:

“The facts of this case suggest that, at least so far as Mexfield is concerned, that happy state of affairs no longer exists. The assumption…seems now to rest on doubtful foundations, as financial pressures may cause the parties’ interests to diverge to the detriment of the residential occupier.”

204. However, and as Lord Hope then immediately made clear:

“That is not something that this court can deal with.”

205. Thus, although the Defendants sought to rely on Lord Hope’s observations, the reality is that his judgment confirms that (a) the distinction and any difference of treatment presently accorded by statute to tenancies entered into by fully mutual housing co-operatives and other forms of tenancy is not irrational or manifestly inappropriate; (b) it is within the margin of appreciation left to domestic legislatures including Parliament; and (c) if there is to be any change, it is not for the Supreme Court, and still less, this court: it is a matter for Parliament.

*Can section 3 HRA be used to “read down” HA 1985 or HA 1988 so as to treat the tenancy granted as a secure or assured tenancy?*

206. Also implicit within that assessment and conclusion, to my mind, is that it would trespass impermissibly into matters reserved to Parliament for this court to “read down” (as the Defendants urge it should, if necessary, do pursuant to section 3 HRA) the phrase “housing co-operative” in section 80(1) of HA 1985, so that it includes a fully mutual housing co-operative, or read down paragraph 12(1)(h) in Schedule 1 to HA 1988 so that such tenancies are not excluded from assured tenancy status.

*207.* Section 3(1) HRA provides that:

“So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.”

*208.* The latitude given to the court in securing this objective of compatibility is far-reaching and flexible. Lord Nicholls of Birkenhead explained this in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at [30]-[33]:

“30. …the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear… Section 3 may require the court to…depart from the intention of the Parliament which enacted the legislation…

…

32. …In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is “possible”, a court can modify the meaning, and hence the effect, of primary or secondary legislation.

33. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the court should adopt a meaning with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms that which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed…”

*209.* Building on that explanation, and collating the views expressed in previous decisions, Lord Bingham of Cornhill made clear in *Sheldrake v Director of Public Prosecutions* [2005] 1 AC 264 at [28] that section 3, though imposing a “very strong” interpretative obligation, and constituting the “primary remedial measure”, cannot be used in a manner which

“would not go with the grain of it, or would call for legislative deliberation, or would change the substance of a provision completely or would remove its pith and substance, or would violate a cardinal principle of the legislation…”

210. In my judgment, resort to and use of section 3 in this case to “read down” HA 1985 or HA 1988 would do just that, and so subvert the will of Parliament.

211. The Defendants also seek to pray in aid section 4 of the HRA: I return to that last, since their assertion as to the incompatibility of the legislation with the Defendants’ Convention rights seems to me best dealt with once each right asserted has been assessed.

*Article 1 Protocol 1*

212. Although pleaded (in paragraph 19 of the Amended Defence and Counterclaim), the Defendants’ reliance on Article 1 Protocol 1 was restrained and not substantially elaborated. However, it is on the record, and was not abandoned: and I should address it, even if relatively briefly, to explain why I consider that it cannot avail the Defendants.

213. Article 1 Protocol 1 provides as follows:

“Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

214. The short point is this. I agree with Counsel for the SoS that when an individual tenant takes a tenancy on terms including the landlord’s right to recover possession on service of a good notice to quit (and the absence of the protections of a secure or assured tenancy2), then the service of a notice to quit does not constitute an interference for the purposes of Article 1 Protocol 1: *Sheffield CC* at [46] *per* Laws LJ (with whom Kay and Thorpe LJJ agreed). When the right is activated, the tenant is deprived of nothing that he was entitled to keep. Similarly, in *Sims* the Supreme Court emphasised that there was no breach of the tenant’s Article 1 Protocol 1 rights where a joint tenancy was terminated in accordance with its terms: see [15].

215. Thus, although the Defendants pleaded various factors to be taken into account on the assumption of the application of A1P1, the basis of its application was not explained or sustained. In my judgment it is not sustainable.

*Section 6 of the HRA*

216. I return now to the issue raised by the Defendants as to the status of the Claimant, and in particular whether it is a public body for the purposes of section 6 HRA.

217. As previously indicated, if it is, the court must in response to an application for possession consider the proportionality of the measure. In *Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening)* [2011] 2 AC 104, Lord Neuberger MR (as he then was) confirmed, at [45], that:

“Any person at risk of being dispossessed of his home at the suit of a local authority should in principle have the right to raise the question of the proportionality of the measure, and to have it determined by an independent tribunal in light of article 8, even if his right of occupation under domestic law has come to an end”.

218. Section 6(1) of the HRA provides that it is “unlawful for a public authority to act in a way which is incompatible with a Convention right”. Subsections (2), (3) and (5) then provide as follows:

“(2) Subsection (1) does not apply to an act if–

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

(3) In this section *“public authority”* includes–

(a) a court or tribunal, and

(b) any person certain of whose functions are functions of a public nature,

but does not include either House of Parliament or a person exercising functions in connection with proceedings in Parliament.

…

(5) In relation to a particular act, a person is not a public authority by virtue only of subsection (3)(b) if the nature of the act is private.”

219. The Defendants contend that section 6(3)(b) applies to the Claimant, on the bases that (a) it provides housing in the public sector (and in this case granted the Defendants a tenancy after a referral from the local housing authority and further to an arrangement between the Claimant and that authority) and (b) its functions are of a public nature.

220. The Defendants rely especially on *R(Weaver) v London and Quadrant Housing Trust* [2010] 1 WLR 363. There, the Court of Appeal explained that in determining whether a body is a public authority there is “no single test of universal application” (*per* Lord Nicholls in *Aston Cantlow and Wilmcote with Billesley Parochial Church Council v Wallbank* [2003] UKHL 37; [2004] 1 AC 546) and the courts should adopt what Lord Mance in *YL v Birmingham City Council (Secretary of State for Constitutional Affairs intervening)* [2007] UKHL 27; [2008] AC 95 described as a “factor-based approach”.

221. In *Weaver* the Court of Appeal held, on the particular facts before it, that the Housing Trust, in managing and allocating housing stock (including taking decisions concerning the termination of tenancies), was performing public acts. This conclusion was driven by the following key considerations:

(1) The Trust received significant capital payments from public funds to provide subsidised social housing: [12], [68] *per* Elias LJ; [101] *per* Lord Collins.

(2) The Trust worked in close harmony with local government and helped to fulfil the latter’s statutory obligations, in particular through allocation agreements which circumscribe the freedom of the Trust to allocate properties. This was not merely a result of choice but of the statutory duty to co-operate. These links were reinforced by the voluntary transfer of housing stock from the local authority to the Trust: [69] *per* Elias LJ; [101] *per* Lord Collins.

(3) The provision of subsidised housing, as opposed to the mere provision of housing itself, is a function that can be described as governmental: [70] *per* Elias LJ.

(4) The Trust was subject to regulations designed to further the objectives of government policy in the provision of subsidised housing. The regulations over matters such as rent and eviction were designed to protect vulnerable members of society: [71] *per* Elias LJ; [101] *per* Lord Collins.

*Is the Claimant a public authority for the purposes of section 6 of the HRA and acting as such?*

222. It is of course correct that the Claimant provides social housing. But that is not, in isolation, sufficient (and see *per* Elias LJ in *Weaver* at [72]).

223. In contrast to the position in the *Weaver* case (see paragraphs [220]-[221] above) which did not concern a fully mutual housing co-operative, and where the claimant was and is a large social landlord managing some 70,000 homes (compared to the Claimant’s 36 homes), the unquestioned evidence shows that:

(1) The Claimant does not rely on any public subsidy to operate. The Claimant was set up with the benefit of a Housing Corporation grant and finance from private mortgages. The grant is repayable to the Housing Corporation on a disposal of the Claimant’s properties, so is in effect a loan. The Claimant has received no further public funds. It derives its income from rent charged to its tenants/members and interests on reserves.

(2) The Claimant does not take the place of local government in providing social housing; its allocations are not controlled by a local authority, nor has it obtained its housing stock from local government. The Claimant has an informal nominations arrangement with Wandsworth Council, but the Claimant retains ultimate autonomy over the approval of new tenants. There has been no voluntary transfer of housing stock from a public authority to the Claimant.

(3) The Claimant does not charge market rents. However, it does not provide “subsidised” housing; it receives no subsidy. It has low rents because it exists for the benefit of its members (rather than to make profit). As a very small landlord, it does not contribute significantly to the achievement of the Government’s housing objectives.

(4) Whilst there is an incidental, albeit small, public benefit in the provision of housing by the Claimant, its *raison d’être* is the provision of a benefit for its members. Indeed, it is a requirement of its registration as an industrial and provident society for it to operate for the benefit of its members, rather than for society at large.

(5) Fully mutual housing associations are not subject to statutory regulation in the same way as other housing associations. The very complaint made by the Defendants in these proceedings is that their tenancy is not afforded assured or secure status by the statutory regime. This is because the government has decided that such protections are not necessary or appropriate. Any tenant becoming a member of a fully mutual housing association will sign up to the association’s principles and thus must be taken to be aware of its regulatory status. As a result, it cannot be said that fully mutual housing associations form part of a public interest scheme to protect the vulnerable or less well off.

(6) The Claimant is regulated by the Financial Conduct Authority as a co-operative, and by the Homes and Community Agency (“HCA”) as a housing association. Unlike London and Quadrant, the Claimant is regulated as a small provider. Regulation does not extend far beyond annual scrutiny of its accounts and regulatory return.

224. Moreover, and as stressed by the Claimant, its mutual nature, and the fact that its members own and control it, is a further inconsistency with the notion that the Claimant stands as a public authority in respect of the Defendants or that it exercises functions which can properly be described as public for the Defendants’ benefit.

225. In all the circumstances disclosed by the evidence filed on behalf of the Claimant and not disputed by the Defendants, I accept the submission of the Claimant and the SoS that the Claimant should not be considered to be exercising functions of a public nature for the purposes of section 6(3)(b).

226. Furthermore, I also accept that the Claimant’s act of seeking a possession order should be considered to be private in nature for the purposes of section 6(5).

*Can a defence to the possession claim based on Articles 8 and 14 be maintained even if the Claimant is not a public body acting as such?*

227. I return once again (see paragraph [169] above) to what the Defendants described as “the final human rights argument” that, even if the Claimant is not a public authority, nevertheless the court is (by virtue of section 6(3)(a) of the HRA), and it must “act to avoid a breach of the Defendants’ human rights”. They submit that the Convention has “horizontal effect” and applies even in disputes between private individuals, so that the court must in adjudicating such disputes give full effect to such rights.

228. By this route, the Defendants seek to raise a defence that (a) Articles 8 or Articles 8 and 14 in combination, must be applied by the court, and that (b) when so applied, should lead to the conclusion that it would not be proportionate to make a possession order in all the circumstances of the case.

229. The circumstances relied on are undoubtedly such as to elicit sympathy. The property has been the family home for over three years, the defendants live there with four young children, they have no other accommodation and, if evicted, the family risk street homelessness which would obviously have a detrimental impact on the physical and mental health of all the family members. Further, the Defendants stress that they have been trying hard to reduce the arrears of rent, and look after the property well.

230. Nevertheless, such considerations and the sympathy they elicit do not entitle the court to subject a private landlord to considerations of proportionality in the private act of seeking possession from a defaulting tenant. In *McDonald v McDonald* [2014] EWCA Civ 1049*,* the Court of Appeal unequivocally rejected the argument that a tenant of a private landlord can defend a claim for possession on the basis that it would not be proportionate to make a possession order against him pursuant to Article 8 ECHR.

231. I agree with the Claimant that this conclusion must apply *mutatis mutandis* to an argument founded on Articles 8 and 14 or A1P1 ECHR. This aspect of the defence must therefore be rejected.

232. For comprehensiveness, I should perhaps add that I also agree with the Claimant that, on the facts of the case, the proportionality defence is misconceived. In *Thurrock v West* [2012] EWCA Civ 1435, the Court of Appeal held (*per* Etherton LJ at paragraphs 33 to 35):

“There is, however, nothing exceptional in this context about the housing needs of a couple who have limited financial means and are the parents of a young child. Indeed, such a family unit is entirely typical of those with a need for social housing. They are no less typical because, as emphasised by Mr Sullivan, they have not defaulted on any financial obligations or committed any nuisance or other wrongdoing as occupiers and they have had a long association with the locality. The fact that they have occupied the Property for some time is in itself irrelevant since Parliament has limited the number of successions to a secure tenancy however long a person’s association with, and emotional ties to, a property, and that legislative policy does not infringe art.8 …

…In the present case, there is no suggestion that the Council has or would refuse to rehouse the respondent’s family. Indeed, as Lord Neuberger observed in Corby BC at [30], the fact that the respondent and his family have a right to be re-housed weighs against the art.8 defence…”3

*Finally, should a declaration of incompatibility be made pursuant to section 4 HRA?*

233. Turning lastly to the question of remedies, I have dealt with section 3 HRA above; but the Defendants also pray in aid section 4 of the HRA. They contend that if a compatible interpretation cannot be given, then a declaration of incompatibility should be made.

234. Section 4(2) of the HRA provides as follows:

“(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

… ”

235. Thus, where flexible interpretation cannot reconcile the UK legislation with the Convention right in question, a declaration of incompatibility may be made pursuant to section 4 of the HRA.

236. That is, however, always an exceptional course and a last resort; and, in my judgment, there is no justification for it in this case. In any event, though the Defendants do seek one by their Counterclaim, such a declaration would make no difference to the outcome of the possession claim in this case.

*Conclusion*

237. The Defendants have raised many interesting points: and I again express sympathy with their predicament as a family; but in my judgment none of those points avails them. Their defence fails. Their counterclaim must be dismissed.

238. It follows that the court must make an order for possession, and make orders in respect of arrears of rent and/or use and occupation charges/mesne profits and costs.

239. I shall hear any argument in this regard after this judgment is handed down.