

Knowsley Housing Trust v White, Porter v Shepherds Bush Housing Association, Islington LBC v Honeygan-Green [2008] UKHL 70

Court: House of Lords (Lord Hoffmann; Lord Walker; Lord Brown; Lord Mance; Lord Neuberger)

Relevant to: GIB:1.5.5(ii)(a)

Related cases: *Burrows v Brent LBC* [1996] 1 WLR 1448

Importance: **

The background: Three appeals were heard together: each raised issues relating to the scope of the “tolerated trespasser” concept (see pp.671-674). As noted on p.674, n 87, the *Knowsley* appeal concerned the application of the tolerated trespasser concept to a case where B initially had an assured tenancy from a private landlord. The other two appeals concerned the context in which the concept more usually applies: where B initially had a secure tenancy from a local authority or housing association.

The questions: The *Knowsley* appeal raised the question of whether the tolerated trespasser concept should *ever* apply in a case where B initially has an assured tenancy. There was no prior House of Lords authority on that question. The two other appeals related to cases where B initially had a secure tenancy: as noted on p.671, *Burrows v Brent LBC* provides House of Lords authority that the tolerated trespasser concept could apply in such a case.

Each of the *Porter* and *Honeygan-Green* cases raised the question of whether a judge making a suspended possession order against B could provide for the automatic resumption of B’s status as a secure tenant (and therefore the automatic ending of B’s time as a tolerated trespasser) by including a “proleptic discharge provision”: i.e. by stipulating in the order that if a particular event occurs, the suspended order for possession will be discharged and B will become a secure tenant without the need for any application to court. For example, a suspended possession order might provide that the order be discharged if B pays of all arrears of rent and costs due to A. The advantage of such orders to B is that, if B does meet the “discharge provision”, his status as a tolerated trespasser (beginning with the grant of the suspended possession order) will end, and his secure tenancy will automatically revive, without the need for B to make an application to court. The decision of the Court of Appeal in *Marshall v Bradford Metropolitan DC* [2001] EWCA Civ 594 was that such orders could *not* be made, as they are inconsistent with the scheme set out by the Housing Act 1985.

The *Honeygan-Green* case also raised a question concerning the right to buy arising under the Housing Act 1985: if B serves a notice that he wishes to exercise this right, and then a suspended possession order is made against B, after which B remains in occupation of the land as a tolerated trespasser, does B’s right to buy revive, along with his secure tenancy, if the possession order is discharged?

The decisions: In answer to the first question, the House of Lords held that the tolerated trespasser concept *cannot* apply in a case where B initially has an assured tenancy, thereby

reversing the Court of Appeal's decision in *Knowsley*. That result flows from the fact that B's initial assured tenancy will only end if a possession order in A's favour has been executed and B has delivered up possession of the land to A (see Lord Neuberger at [76]) – there is hence no gap in B's status as an occupier of the land in which the tolerated trespasser concept can apply. It is important to note that the same position will apply to secure tenancies with the coming into force of the Housing and Regeneration Act 2008 (see section 299 and Schedule 11 of that Act).

In relation to the *Porter* and *Honeygan-Green* appeals, the House of Lords held that it is possible for a judge to make a suspended possession order including a “proleptic discharge provision”, thereby reversing the Court of Appeal's decision in *Marshall*. In relation to the *Honeygan-Green* appeal, the House of Lords held that B's right to buy will automatically revive if a suspended possession order is discharged.

The effect of the decisions: The effect of the decisions in the three appeals is to limit the application of the “tolerated trespasser” concept. First, it is now clear that there is no room for the concept in a case where B initially has an assured tenancy from a private landlord. Second, even where B initially has a secure tenancy from a local authority or housing association, if a judge has made a suspended possession order including a provision for ‘proleptic discharge’, B's status as a tolerated trespasser will end automatically, without the need for an application to court, if B fulfils the discharge provision.

Evaluating the decision: In [G1B:1.5.5\(ii\)\(a\)](#), we noted a number of problems with the “tolerated trespasser” concept. The practical problems caused by the concept are referred to by Lord Neuberger at [82] – [84]. His Lordship also noted (at [79]) that the concept was “conceptually peculiar, even oxymoronic”. The emphasis of the House of Lords was on avoiding the practical problems that come with the concept. It is interesting to note that, at [68], Lord Neuberger approved of:

“Lord Porter's observation in *Baker v Turner* [1950] AC 401, 417 that ‘the rules of formal logic must not be applied...with too great strictness’ to legislation conferring security of tenure on residential tenants. While normal principles of interpretation should not, of course, be jettisoned, the importance of the law in this field being substantively and procedurally clear and simple is cardinal.”

This approach to the interpretation of legislation such as the Housing Act 1985 has been welcomed (see e.g. *Bridge* [2009] Conv 268) and seems to be a sensible way to give effect to the needs of practical convenience which, ironically enough, led to the creation of the concept of the tolerated trespasser: see [pp.672-673](#). Along with the practice of granting postponed possession orders (see [pp.673-674](#)), and the changes introduced by the Housing and Regeneration Act 2008 (see section 299 and Schedule 11 of that Act), it forms part of a move to limit the situations in which B occupies land under the “oxymoronic” status of a tolerated trespasser.