Neutral Citation Number: [2024] EWCA Civ 1561

Case No: CA 2024 001030

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE BUSINESS AND PROPERTY COURTS
Mr Justice Zacaroli
[2024] EWHC 845 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 December 2024'

Before:

LADY JUSTICE ASPLIN
LORD JUSTICE MALES
and
LORD JUSTICE BIRSS

- -

Between:

THE LONDON BOROUGH OF HACKNEY	**Appellant**
- and -	
YISROEL WEINTRAUB	**Respondent**

- -
- -

Michael Paget (instructed by **London Borough of Hackney**) for the **Appellant**
Duncan Heath (instructed by **Clarke Mairs Law Limited**) for the **Respondent**

Hearing dates: 5 December 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 13 December 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Asplin:

1. The main issue on this appeal is whether a tenant in local authority accommodation who uses the property for limited purposes and does not sleep there can, nevertheless, satisfy the "tenant condition" in section 81 Housing Act 1985 (the "1985 Act") for the purposes of exercising the right to buy, if they only intend to recommence full use of the property once they have exercised that right.

Secure tenancies and the right to buy

2. Before turning to the essential facts and the manner in which the issues were addressed by the trial judge, HHJ Saunders, and on appeal by Zacaroli J, it is helpful to have an overview of the requirements for a secure tenancy and the right to buy. Secure tenancies are addressed in section 79 of the 1985 Act. Section 79(1) of the 1995 Act provides that:

> "(1) A tenancy under which a dwelling-house in England is let as a separate dwelling is a secure tenancy at any time when the conditions described in sections 80 and 81 as the landlord condition and the tenant condition are satisfied."

Sub-section (1) has effect subject to sub-section (2) which contains various exceptions which are irrelevant to this appeal. Sub-sections (3) and (4) are concerned with licences which are not relevant here. A "dwelling-house" is defined in section 112 as a "house or a part of a house". Nothing turns on that.

3. There is no dispute that the "landlord condition" referred to in section 79(1) and described in section 80 was satisfied in this case. The question is whether the "tenant condition" in section 79(1) and described in section 81 was satisfied. It is headed "The tenant condition". Where relevant, it is in the following form:

> "The tenant condition is that the tenant is an individual and occupies the dwelling-house as his only or principal home…"

4. If the tenant condition was satisfied at the relevant times, the Respondent, Rabbi Weintraub, was a secure tenant at those times and accordingly, subject to the conditions set out in the rest of Part V of the 1985 Act, has the right to buy a long lease of the dwelling-house, pursuant to section 118. The tenant must remain a secure tenant throughout the process. Once the secure tenant has claimed to exercise the right to buy and the right has been established and all matters relating to the grant have been agreed or determined, the landlord is required to grant a lease of the premises in question: section 138(1)(b) of the 1985 Act. The process is explained in more detail in the recent case of *Howe v Brent London Borough Council* [2024] EWCA Civ 1444, in particular, at [6], [28] and [29].

5. The central question before HHJ Saunders and on appeal was whether Rabbi Weintraub was occupying his council flat at 45a Forburg Road, London N16 6HP (the "Property") as his "only or principal home" at the time of his first and second applications to exercise his right to buy the Property. HHJ Saunders held that he was not and that the Appellant, Hackney London Borough Council (the "Council") was entitled to possession of the Property. On appeal, Zacaroli J held that the "tenant condition" was

met and accordingly, that Rabbi Weintraub was entitled to exercise the right to buy a lease of the Property.

Background

6. The essential facts are these. I take them from the decision of HHJ Saunders. On 4 November 2002, the Council granted Rabbi Weintraub and his late wife a secure tenancy of the Property. After his wife died in June 2008, Rabbi Weintraub continued to live in the Property. However, as he was nervous of being in the Property alone overnight, Rabbi Weintraub arranged for guests to stay with him. This arrangement came to an end at some time in 2017. From then on Rabbi Weintraub visited the Property, if not daily, at least for a considerable portion of the week. After having attended his local synagogue he would stay at the Property for several hours for the purposes of study before returning to the synagogue for evening prayers. He also bathed at the synagogue. The Rabbi's daughter provided him with a packed lunch each time he visited. He stayed at his daughter's house for the remainder of the time, sleeping there overnight except at weekends when there was often no room for him. On those occasions he stayed with other relatives and friends. This state of affairs had existed since 2017. See HHJ Saunders' judgment at [51], [52], [55], [57] and [60].

7. Also in or about 2017, Rabbi Weintraub discussed a plan with his family which would enable him to buy the lease of the Property and convert the basement into a separate flat in which a grandchild or someone else could live so that he would not be alone at night and would be able to return to the Property.

8. On 18 October 2017, Rabbi Weintraub applied to exercise the right to buy the Property. That application was admitted and the Council offered the Rabbi a 125 year lease of the Property at a ground rent of £9 per annum and a premium of £305,100. The offer was accepted on 29 March 2018. On 24 April 2018, however, the Council denied the Rabbi's right to buy the Property on the grounds that Rabbi Weintraub did not reside at the premises as his only or principal home. He made a second application on 23 May 2018 which was also rejected on the same grounds. On 18 February 2019, the Council served a notice to quit on the Rabbi on the grounds that he was no longer a secure tenant, since he ceased to satisfy the "tenant condition" under section 81 of the 1985 Act. On the same day, the Council issued a notice of seeking possession.

9. The Rabbi then sought a declaration that he has a right to buy the Property pursuant to Part V of the 1985 Act. Those proceedings were defended by the Council on the basis that Rabbi Weintraub did not occupy the Property as his only or principal home and the Council sought possession of the Property by way of counterclaim.

Decision of HHJ Saunders

10. As I have already mentioned, the matter came before HHJ Saunders who described the issues which he had to determine as straightforward. He identified them as: (i) whether Rabbi Weintraub fulfilled the "tenant condition" under section 81 of the 1985 Act as a result of occupying the Property as his only or principal home, at the time of either of his applications to buy the long lease of the Property; and (ii) if the Rabbi was unsuccessful in relation to (i), whether the Council had the right to possession of the Property.

11. Having considered the evidence HHJ Saunders stated as follows:

> "51. The generally agreed evidence is that, since in or about 2017, the Claimant [Rabbi Weintraub] visits the premises, if not daily as he claims, but at least for a considerable portion of the week, after having attended his local synagogue, staying several hours for the purposes of study before returning to the synagogue for evening prayers. The remainder of his time is spent out from the premises – staying at his daughter's house (sleeping overnight there) or visiting family or friends (and staying there as an alternative).
>
> 52. I find that his daughter prepares meals for him (in the form of a packed lunch) each time he visits – and that he is clearly there for several hours at a time. . . .
>
> 53. That is consistent with his position as a rabbi utilising the premises for the purposes of study. . . .
>
> . . .
>
> 55. So I have this picture of a Claimant who spends several hours each day, if not, most days, studying in the premises, who attends the synagogue twice a day for worship and bathing and who stays at night with his daughter and son in law, except at weekends when he stays with friends. It is said that there is an intention to return once the right to buy process has been completed. That I accept.
>
> 56. However, this is not a case of abandonment but one to determine whether the premises are used as the Claimant's only or principal home. In my view, the premises are used (or were used at least from 2017 onwards) mainly for study purposes - however laudable that is.
>
> 57. The Claimant does not sleep there. He does not entertain there, apart from the odd visit such as family or friends. Not unnaturally in view of his age, he is heavily reliant on his daughter and son in law and Mr Schiomoni (and indeed the local synagogue) for the remainder of his daily and, crucially, overnight living needs – but, in my view, that activity is largely centred around his daughter's home not the premises."

HHJ Saunders stated, at [60], that in his view, the situation had existed since 2017 and preceded the Rabbi's original application for a right to buy.

12. He went on to record the proposition that to examine the question of whether someone occupies a dwelling as their only or principal home there are two parts to the enquiry: whether the person occupies the dwelling as a home; and if they do, whether they occupy it as their only or principal home. See his judgment at [63]. In that context, he quoted from *Islington London Borough Council v Boyle & Anr* [2011] EWCA Civ

1450, upon which Rabbi Weintraub relied, noting at [64] that Etherton LJ addressed both questions at [55] of his judgment and that he was dealing with the second question at [65]. Having set out those passages from Etherton LJ's judgment, at [65] of his judgment, HHJ Saunders made what he described as the "repeated comment" that the Council did not allege that this was an abandonment case. He stated that in his view, *Boyle* was an abandonment case and that Etherton LJ had not been dealing with the issue of "only or principal home". He concluded at [66]:

> "The second question, and how Etherton LJ deals with that, is, I accept, more relevant to the issues in this case but the facts of that case are somewhat dissimilar. *Boyle* was a case where a possession claim was dismissed as the judge found that a Highbury flat was the principal home even though the Defendant was living at that time elsewhere in Suffolk. It was a case of identifying which of two houses was the principal home – which is not the case here."

13. HHJ Saunders considered *Havering London Borough Council v Dove & Anr* [2017] EWCA Civ 156, [2017] PTSR 1233 ("*Dove*") to be of more relevance and noted that the "two-stage question" approach in the *Boyle* case was approved in *Dove* at [17]. He stated that the question in *Dove* was not whether tenants who spent several days a week away from the property were using it as their home but whether it was their principal home. See his judgment at [68] and [69].

14. He went on to quote from *Dove* at [33] and [34] and stated in clear terms at [73] of his judgment that this was a "case of deciding whether the premises are the Claimant' s [the Rabbi's] only or principal home on an objective assessment of the facts."

15. Applying the rationale in *Dove* to the facts, HHJ Saunders stated that "the question of an intention to return to the premises simply does not arise. The Claimant's [Rabbi's] intention is to retain the secure tenancy enabling him to secure the right to buy. There is no evidence before me that the Claimant [the Rabbi] intends to return to his council tenancy." He went on at [76] to state that:

> "Accepting that certain bills and bank account statements in the Claimant's name are delivered to the premises, and that he at least has a presence there during the daytime, such that he treats the premises as his home, that is, in my view, insufficient for him to demonstrate (on an objective basis) that this is his only or principal home – in accordance with the principles set out in *Dove*."

He went on as follows:

> "77. The contrary evidence is compelling, He sleeps elsewhere every night – mainly at his daughter and son in law's. They care for him substantially. Whilst accepting that he is a man who requires little in the way of material possessions, the evidence demonstrates that the premises are used solely for study purposes akin to a library environment. The premises look practically empty and unused. He attends the synagogue each day on two

> occasions – and they along with his family and friends provide for him.
>
> 78. Mr Heath has suggested that his situation could be categorised as one akin to a sofa surfer and that it must follow that, as he has only one flat, that must be only or principal home. I cannot agree with that submission – the true test is an objective assessment of whether this is the case. From these findings and those that I have expressed at some length earlier in this judgment (and I refer to paragraphs 21 – 60), I cannot find this to be the case."

Accordingly, HHJ Saunders decided that the Property was not the Rabbi's only or principal home at the time of the two applications to buy the long lease and accordingly, he could not satisfy the tenant condition in section 81 of the 1985 Act and exercise the right to buy: see his judgment at [79]. As a result, he held that the tenancy condition had been breached over a number of years, that the tenancy was no longer secure and it must follow that the secure tenancy was terminated on 17 March 2019 and that the Council is entitled to possession [87].

Appeal to Zacaroli J

16. Rabbi Weintraub appealed on two grounds. They were: (i) that HHJ Saunders erred in law and/or in fact, when finding that the Property was not his principal or only home; and (ii) that he erred in law when holding that the Rabbi's intention to return to living exclusively at the Property was not relevant because he only intended to return as an owner rather than as a tenant.

17. In relation to the first ground of appeal Zacaroli J held that: (i) HHJ Saunders had only considered the second question posed in *Dove* (does the tenant occupy the property as his or her only or principal home?) and not the first question which is whether the dwelling is occupied as "a" home and that the second question is only relevant if it is either found or assumed that the Rabbi was occupying the Property at least as "a" home [20]; (ii) that in order to reach a conclusion that a dwelling house is not a principal or only home, it is necessary to conclude that some other property is the principal home [21]; (iii) that although HHJ Saunders did not say so in terms, he did reach the conclusion that Rabbi Weintraub's daughter's house was the Rabbi's principal home [22]; and concluded at [23], as follows:

> "It is true that at 66, the judge distinguished the *Boyle* case on the grounds that "it was a case of identifying which of two houses was the principal home – which is not the case here." Reading his judgment as a whole, however, that sentence must be an error. First, the immediately following paragraphs he referred to the *Dove* case as being more relevant, because it met the issues in this case, noting that it was a case where the question was whether the relevant premises were being occupied as the tenant's <u>principal home</u>. Second, in the section of his judgment under the heading "conclusions" he expressly addressed and determined (as I have already noted), the question

> whether the Property was Rabbi Weintraub's only or principal home."

18. In relation to the second ground of appeal, Zacaroli J held that:

(i) HHJ Saunders' reasoning for ignoring Rabbi Weintraub's intention to return to the Property was because there was no evidence that he intended to "return to his council tenancy": [24];

(ii) had HHJ Saunders been referred to *Tickner v Hearn* [1960] 1 WLR 1406, putting aside whether an intention to return as owner rather than as tenant is sufficient, "he could only have held that Rabbi Weintraub had a real hope to return, coupled with the practical possibility of its fulfilment within a reasonable time" [30];

(iii) accordingly, the fact that Rabbi Weintraub's intention to return was conditional or contingent was not in itself a reason to conclude that he did not remain in occupation for the purposes of the 1985 Act [31];

(iv) Lewison LJ's reference in the *Dove* case to the question of an intention to return being " in reality an intention to revert to a previous pattern of existence" related to the resumption of occupation as the principal or main home and "cannot be taken to have been imposing a further requirement, that the intended return to the premises must be as tenant, rather than as owner" [33], nor did he intend to exclude an intention to return once refurbishment work was carried out as demonstrated in *Thackray's* case [34] (*Robert Thackray's Estates Ltd v Kaye* (1989) 21 HLR 160); and

(iv) the Rabbi's intention to return to the Property as his only home, only once he had exercised his right to buy is sufficient to satisfy the tenant condition [37].

19. In particular, he reasoned at [36] as follows:

> ". . . As the cases I have referred to earlier make clear, it is not essential that a secured tenant is *currently* living in the premises as his or her only or principal home. An intention to return to such pattern of existence is sufficient. If for example, the secured tenant is spending a year working abroad, with the intention of returning to the premises thereafter, there is no reason why he or she could not exercise the right to buy at some point during that year of absence. The fact that the time of the intended return is not tied to a particular date, but to the completion of the right to buy process, so that necessary works can be undertaken to enable Rabbi Weintraub to resume spending his nights at the Property, does not in my judgment justify a difference in outcome. As for the label, it is the substance of the condition that matters, and that refers only to occupying the "dwelling-house" – i.e. the physical property – as the only or principal home."

The Appeal before us

20. The Council appeals to us on two grounds. The first is that the judge was wrong to make his own findings of fact at [2] of his judgment which were not open to him. The second

ground is that the judge was wrong to conclude that an intention to return to the Property as owner can satisfy the "tenant condition". In particular, it is said that: the judge was wrong to distinguish the *Dove* case which applies to all tenants and does not exclude those seeking to exercise a right to buy; the "tenant condition" is predicated on being a tenant and cannot be satisfied when acting in another capacity; and the judge was wrong not to apply the ratio in the *Thackray* case.

21. By a Respondent's Notice dated and sealed on 29 July 2024, Rabbi Weintraub seeks to uphold the judge's decision on an additional ground. It is contended that Zacaroli J erred in concluding that HHJ Saunders found implicitly that the Rabbi's daughter's house was a home for Rabbi Weintraub.

Ground 1 – finding of fact?

22. Before turning to the central question on this appeal, I will address the first ground of appeal. It was said that if, and to the extent that, the judge found that Rabbi Weintraub decided to apply to buy the property before he ceased to occupy it, he was wrong to do so and if he was seeking to summarise the findings of fact below his summary was inaccurate and wrong. This was barely mentioned in oral submissions and, in fact, Mr Paget, who appeared on behalf of the Council, stated that he no longer thought that Zacaroli J had made a finding of fact. Mr Heath, on behalf of Rabbi Weintraub, confirmed that he was not contending that there had been a finding.

23. For the sake of completeness and to avoid confusion, I will set out the passage at [2] of Zacaroli J's judgment and highlight the parts which were complained of in bold. It is and they are as follows:

> **"At the time that it became more problematical** to get people to stay overnight with him, Rabbi Weintraub, in discussion with his family, formulated a plan to buy the Property with the intention of converting the basement into a separate flat where someone else, such as a grandchild, could live. **As there was no-one who could stay in the Property with him overnight, he began to spend the nights elsewhere** – usually (approximately six nights out of every eight) at his daughter's house nearby, but on other nights (when his daughter had other guests staying) with friends. "

24. It now seems that it is accepted that this ground of appeal was unnecessary and is misconceived. There is nothing to suggest that the judge was finding primary facts. He heard no evidence and proceeded on the basis of the judgment below. His role was that of an appeal judge of which he was, no doubt, well aware. He was not asked to decide that the primary facts found by the trial judge were plainly wrong and did not purport to do so. At its highest, [2] of Zacaroli J's judgment contains a compacted and slightly misleading version of the facts taken from HHJ Saunders' judgment

25. In any event, as Mr Heath pointed out, this ground of appeal goes nowhere. It does not matter whether Rabbi Weintraub formed an intention to exercise the right to buy a lease of the Property before he ceased to sleep there or not as long as he did so before he sought to exercise his right to buy the lease. It is implicit that he must have done so

before he applied to exercise his right to buy as that was the whole purpose behind his application.

Ground 2 – the "tenant condition"

26. I shall now turn to the central issue in this appeal. Amongst other things, it is necessary to fulfil the "tenant condition" in order hold a secure tenancy and in turn, to be in a position to exercise the right to buy. There is no dispute that in order to satisfy that condition it is necessary to occupy the dwelling-house and to do so as one's only or principal home. Further, there is no dispute that there are well known cases which address the circumstances in which a tenant is to be regarded as continuing in occupation of a dwelling as a home even though they are not actually living there.

The authorities

27. This is illustrated by the *Thackray* case which was concerned with a statutory tenancy under the Rent Act 1977 but is equally applicable in relation to occupation of a dwelling-house, for the purposes of section 81 of the 1985 Act. Section 2(1)(a) of the Rent Act 1977 provides that after the termination of a protected tenancy of a dwelling-house the person who, immediate before that termination, was the protected tenant shall, if and so long as he occupies the dwelling-house as his residence, be the statutory tenant. The tenant had moved out whilst certain repairs were carried out. Those repairs were completed but the tenant intended to return only if certain additional works were carried out by her landlord.

28. As Slade LJ pointed out at 166, it was a long established principle that a non-occupying tenant prima facie forfeited his status as a statutory tenant. However, as he mentioned, Asquith LJ had pointed out in *Brown v Brash and Ambrose* [1948] 2 KB 247 at 254, "a tenant cannot automatically lose his status as a statutory tenant merely because he absents himself from the demised premises for however short a time or however necessary a purpose or with whatsoever intention as regards returning. The question must be one of fact and degree."

29. Slade LJ, with whom Hollings J agreed, decided at 169 that the contingencies attached to the tenant's intention to return were "far too remote to render it a sufficient animus revertendi to enable her to retain the protection of the Rent Acts as a statutory tenant . . ." He added that he could see no sufficient evidence of a real hope that the tenant's demands in relation to the work would ever be met or that the conditions attached to her intention would ever be fulfilled by the landlord within a reasonable time.

30. That test was also applied in *Tickner v Hearn* [1960] 1 WLR 1406 which was concerned with the protection afforded a statutory tenant protected under the Rent Restrictions Acts. The tenant had been admitted to a mental hospital and remained there for over five years. Although she had been re-categorised as a voluntary patient, the medical evidence was to the effect that it was most unlikely that she would ever leave hospital in the light of her mental state. The medical officer also stated that the patient had said on many occasions that she would like to go back to the property if she were better. The county court judge refused to make a possession order and the appeal was dismissed. All of the judges in the Court of Appeal stressed that the question was one of fact and degree. Ormerod LJ, however, stated at 1410 that:

> ". . . there must be evidence of something more than a vague wish to return. It must be a real hope coupled with the practical possibility of its fulfilment within a reasonable time."

31. The *Boyle* case which was referred to extensively in HHJ Saunders' judgment was concerned with a situation in which a secure tenant was living elsewhere. She and her daughters moved out of the property in relation to which she had a secure tenancy and into her ex-boyfriend's house. They took their personal belongings with them but left large pieces of furniture behind. The ex-boyfriend returned to the property to care for their son. The arrangement was intended initially to provide a six month respite but it became prolonged. Some three years later, the tenant and her ex-boyfriend wrote to the housing authority seeking permission for the ex-boyfriend to live in the property so that the son could continue to attend his special school. Permission to do so was refused and a notice to quit was served. Some months after the notice to quit had expired, the tenant moved back to her flat and her ex-boyfriend and their son moved back to the ex-boyfriend's house.

32. Possession was sought on the basis that the secure tenant did not satisfy the tenant condition in the sense that she had failed to occupy the flat as her sole or principal home at the material time. The claim was dismissed on the basis that at the expiry of the notice to quit, the tenant remained a secure tenant since given her intention to return, the fact that she left furniture there and her ex-partner and son were living there, she occupied the property as her principal home despite living elsewhere.

33. Etherton LJ with whom Patten and Mummery LJJ agreed, held that the judge had failed to consider whether the flat was Ms Boyle's principal home for the purposes of satisfying the tenant condition. The appeal was allowed, the judge's orders were set aside and the case was remitted for retrial.

34. Etherton LJ summarised the relevant principles to be applied in determining whether a tenant continues to occupy a dwelling as his or her home for the purposes of the 1985 Act, despite living elsewhere, in the following terms:

> "55. . . I would summarise as follows the relevant principles to be applied in determining whether a tenant continues to occupy a dwelling as his or her home, for the purposes of the 1985 Act, despite living elsewhere. First, absence by the tenant from the dwelling may be sufficiently continuous or lengthy or combined with other circumstances as to compel the inference that, on the face of it, the tenant has ceased to occupy the dwelling as his or her home. In every case, the question is one of fact and degree. Secondly, assuming the circumstances of absence are such as to give rise to that inference: (1) the onus is on the tenant to rebut the presumption that his or her occupation of the dwelling as a home has ceased; (2) in order to rebut the presumption the tenant must have an intention to return; (3) while there is no set limit to the length of absence and no requirement that the intention must be to return by a specific date or within a finite period, the tenant must be able to demonstrate a "practical possibility" or "a real possibility" of the fulfilment of the intention to return within a reasonable time; and (4) the tenant must also show that his or her

> inward intention is accompanied by some formal, outward and visible sign of the intention to return, which sign must be sufficiently substantial and permanent and otherwise such that in all the circumstances it is adequate to rebut the presumption that the tenant, by being physically absent from the premises, has ceased to be in occupation of it. Thirdly, two homes cases, that is to say where the tenant has another property in which he or she voluntarily takes up full-time residence, must be viewed with particular care in order to assess whether the tenant has ceased to occupy as a home the place where he or she formerly lived. Fourthly, whether or not a tenant has ceased to occupy premises as his or her home is a question of fact. In the absence of an error of law, the trial judge's findings of primary fact cannot be overturned on appeal unless they were perverse, in the sense that they exceeded the generous ambit within which reasonable disagreement about the conclusions to be drawn from the evidence is possible; but the appeal court may in an appropriate case substitute its own inferences drawn from those primary facts."

35. In addition, Etherton LJ summarised the principles which apply to the identification of which of two or more homes is or was the tenant's principal home, as follows:

> "65 . . . First, the length or other circumstances of the tenant's absence may raise the inference that the dwelling which is the subject of the proceedings ceased to be the tenant's principal home so as to cast on the tenant the burden of proving the contrary. Secondly, in order to rebut that presumption, it is not sufficient for the tenant to prove that at the material time it was his or her subjective intention and belief that the dwelling remained the principal home. The objective facts must bear out the reality of that belief and intention both in the sense that the intention and belief are or were genuinely held and also that the intention and belief themselves reflect reality. The reason for the absence, the length and other circumstances of the absence and (where relevant) the anticipated future duration of the absence, as well as statements and conduct of the tenant, will all be relevant to that objective assessment. Thirdly, the court's focus is on the enduring intention of the tenant, which, depending on the circumstances, may not be displaced by fleeting changes of mind. Fourthly, the issue is one of fact to be determined in the light of the evidence as a whole, and in respect of which the trial judge's findings of primary fact can only be overturned on appeal if they were perverse in the sense that I have mentioned earlier; but the appeal court may in an appropriate case substitute its own inferences drawn from those primary facts."

36. He also provided a helpful explanation of when the tenant condition must be satisfied, in the following form:

> "66. The next issue is the date at which the tenant condition must be satisfied. The position on that issue is clear. By virtue of the words "at any time" in section 79(1) of the 1985 Act, it is not necessary for the tenant to show that the tenant condition has been satisfied at all times since the grant of the tenancy. Occupiers may therefore pass in and out of secure tenant status, so that section 79(1) has (what has been described as) ambulatory effect: *Basingstoke and Deane Borough Council v Paice* (1995) 27HLR 433, 437. Where a notice to quit has been served to terminate the contractual tenancy, the tenant condition must be satisfied on the expiry of the notice to quit. What happened before the expiry of the notice to quit and what happened after it may, nevertheless, throw light on whether the tenant condition was satisfied at the date of expiry of the notice to quit. If, for example, the tenant moved to other premises on what was intended to be a temporary basis, but for one reason or another what was intended to be temporary became a settled existence for a prolonged period such that both subjectively and objectively those premises became the tenant's principal home, the tenant's assertion that, by the time of expiry of a subsequent notice to quit, the original premises had once again become the tenant's principal home, even though the tenant was still not living there, would require very close scrutiny."

37. Similar issues were addressed in the *Dove* case. Twin sisters were joint tenants of a council flat. Their landlord claimed possession on the grounds that at the time the notice to quit was served neither of them occupied the flat as the only or principal home and there were serious rent arrears which justified an order for possession. A possession order was made. Lewison LJ with whom Patten LJ agreed, dismissed the appeal on the basis that the judge had been entitled to conclude that neither tenant was occupying the flat as her principal home when the notice to quit was served.

38. At [17], Lewison LJ pointed out that there is a considerable body of learning on what amounts to occupation of a dwelling as an only or principal home and noted that there were two parts to the question: (a) does the person in question occupy the dwelling as a home; and (b) if so, does he or she occupy it as his or her only or principal home? He went on at [19] to note what Etherton LJ had said about an intention to return at [62] of the *Boyle* case. He had stated that:

> "Where the defendant is physically absent from the dwelling, in which the defendant formerly lived as his or her only or principal home, the defendant's intentions about living there again as the sole or principal home will be critical to the question whether the tenant condition is satisfied. Plainly, without that intention, the tenant condition cannot be satisfied. It is not sufficient, however, for the defendant merely to give oral evidence of his or her subjective belief and intention. The credibility of the defendant's evidence as to belief and intention must be assessed by reference to objectively ascertained facts."

Lewison LJ observed at [20] that "[I]t is important to note that this passage deals with a case in which the defendant asserts that there has been a change in his or her pattern of residence which will revert back to a former state of affairs. It does not deal with the situation in which there is no evidence that the pattern of residence is likely to change in the future."

39. Having quoted Etherton LJ's summary at [65] in the *Boyle* case which is set out above, Lewison LJ stated that in his judgment those principles applied not only where a tenant is absent from the property in the sense of not being present at all but also where they cease to occupy the property as their only or main home even if they continue to occupy it as "a" home. He gave the example of what had been the tenant's only home becoming no more than a weekend or holiday home. He added, also at [22] that " . . . the question of an intention to return . . . is in reality an intention to revert to a previous pattern of existence."

40. Lewison LJ made clear that the issue before the judge in that case was whether either of the tenants was occupying the premises as her principal home: [33]. He also noted that:

> "The issue before the judge was not of course whether either tenant was occupying the flat . . . as a home. On the basis of the judge's findings of fact one or other of them may or may not have been. It was whether either of them was occupying that flat as her *principal* home. . . . As I have said each of them had a settled way of life and there was no suggestion that it would change in the future. This is not, therefore, a case which turns on any intention to return or revert to a previous pattern of life. The question in cases which turn on an intention to return, as explained by Thorpe LJ in Goldenberg's case 28HLR 727, 733, is whether a period of absence breaks the continuity of residence. In a case such as the present where the pattern of residence has been the same throughout the period under consideration there has been no break in continuity. So the question is a different one: is the pattern of residence such that either tenant is occupying the flat at Highfield Tower as her principal home?"

Lewison LJ decided that on the facts that the judge had found, he was entitled to conclude that neither tenant was occupying the flat as her principal home when the notice to quit was served and took effect.

Submissions in summary

41. In summary, Mr Paget on behalf of the Council, submits that section 81 requires the tenant to be in occupation in that capacity. In his written submissions, Mr Paget emphasised both the title to the section and its content. He says that they both make clear that the condition can only be satisfied by occupiers who are tenants. He accepts, however, that in order to qualify as a "tenant" all that is necessary is that the person in question has been granted a contractual tenancy.

42. He submits that the effect of Zacaroli J's interpretation of section 81 is that a person with a tenancy of local authority accommodation may never live in the property in

question but would be able to say that they intend to do so as owner and exercise the right to buy. This, he says, is contrary to the section and contrary to the purpose of Part V of the 1985 Act which he says is to promote the occupation of local authority housing.

43. Furthermore, he says that the case law on temporary absences does not assist Rabbi Weintraub because he did not intend to return to his "previous pattern of existence". He says that Lewison LJ's reference in the *Dove* case to the resumption of a "previous pattern or existence" requires not only a resumption of using premises as one's only or principal home but also a resumption of the previous relationship of landlord and tenant. During oral submissions, however, Mr Paget accepted that Zacaroli J was right to state at [33] of his judgment that when Lewison LJ was referring to the resumption of a "previous pattern of existence" in the *Dove* case, he was not contemplating the situation in which the tenant wishes to return as owner.

44. Mr Paget also submits that the intention to return in this case was subject to a contingency which was too remote. The Rabbi intended to return to the Property only once he owned it, but he could never own it until he returned there as a tenant, something which he had no intention of doing.

45. In relation to the tenant condition, Mr Heath, on behalf of Rabbi Weintraub, emphasised that the Rabbi is a tenant and whilst a tenant formed the intention to return to the Property as his only or principal home. There is no further requirement. The tenant still "occupies" the premises even when he is not using it as a principal home but intends to return to doing so and "returning to a previous pattern of existence" means no more than returning to reside physically at the premises. Mr Heath pointed out that an intention to return did not arise on the facts in *Dove* at all. Neither of the joint tenants intended to change their pattern of behaviour. Furthermore, as Zacaroli J had pointed out, Lewison LJ was not considering the situation with which we are concerned.

46. Further, Mr Heath says that there is nothing in the case law or the statute which renders an intention to return once premises have been purchased and renovated insufficient for the purposes of being in occupation of the dwelling house in order to satisfy the tenant condition. Such an interpretation is not contrary to the purpose of the statute which is to enable contractual tenants to acquire a permanent right of occupation and would not lead to a floodgates situation. Lastly, Mr Heath submits that the Rabbi's intention to return to the Property is neither subject to a condition which is too remote nor is it contingent on the right to buy because the Rabbi is entitled to exercise that right in circumstances in which he satisfies all of the relevant conditions.

47. I should add that Mr Heath's primary submissions, both in his written argument and orally, related to the Respondent's Notice to which I shall refer below.

Discussion and conclusions

48. It seems to me that there is nothing in the wording of section 81, or its heading when read in context and adopting a purposive approach, which requires the tenant to intend to return to the property as tenant. In my judgment, the heading and the reference at the beginning of the section to "the tenant condition" are merely signposts to the description and nature of the requirement referred to in section 79(1). They carry no other connotation. Furthermore, there is nothing in the requirement itself which has that effect. The requirement has two parts. Under the first part, the tenant must be an

individual. Mr Paget accepted that in order to satisfy this element of the tenant condition, it is sufficient that the individual has a contractual tenancy of a dwelling house let as a separate dwelling house. Under the second part the tenant must "occupy" the dwelling house as his only or principal home. (There is a further explanation of how the parts operate where there is a joint tenancy.)

49. In effect, Mr Paget would have one read this second part as if "as tenant" were inserted at the end. It would read: the tenant . . . occupies the dwelling-house as his only or principal home *as tenant.* It seems to me that the additional words are not necessary in order properly to interpret the section. In fact, they alter the meaning. The natural and ordinary meaning of the words used in section 81 make clear that the tenant must occupy the dwelling-house, in the sense of the person who is the tenant must be in occupation, no more, no less.

50. In many cases, the tenant will actually be in physical occupation of the premises. In others, the tenant may be absent. In the case of absence, the question for the court is whether the period of absence breaks the continuity of residence for the purposes of determining whether the individual occupies the premises. Section 81 does not deal directly with that question. Not surprisingly, nor does it address the likely factors or indicia relevant to determining whether the requirement that the premises is occupied as the individual's principal home has been satisfied as a matter of fact. Still less does it deal expressly with the required quality of a tenant's intention to return or to use premises as a principal home.

51. The relevant principles have been explored in detail in the *Boyle* and *Dove* cases. As Etherton LJ explained in *Boyle* where the tenant is absent from the premises in which they formerly lived as their only or principal home, their intention to return is critical to the question of whether the tenant condition is fulfilled. Their belief that the premises is their only or principal home and their intention to return must be assessed by reference to objectively ascertained facts. As Etherton LJ put it in *Boyle* at [65], the tenant's intention and belief must be borne out in reality.

52. As Zacaroli J pointed out, however, none of the authorities addresses the question of whether the tenant must intend to return as a tenant. They were focussed on whether the secure tenant in each case had lost that status and could be evicted rather than the secure tenant's ability to exercise the right to buy. It is necessary, therefore, to return to basic principles. As I have already stated, I do not consider that there is anything in section 81 which requires the tenant, in the sense of the individual to whom the contractual tenancy has been granted, to intend to return to a property in the capacity of tenant, or to resume using the property as the principal home in that capacity. I agree with Zacaroli J that it is sufficient that they genuinely believe the dwelling house to be their principal or only home and intend to return to use it as such albeit once their right to buy has been exercised. They fulfil the tenant condition because at the relevant time they are the tenant and continue to occupy the dwelling-house as their only or principal home in the extended sense which has been understood in the case law since *Brown v Brash and Ambrose*, in 1948, if not before.

53. Nor do I consider that this is contrary to the purpose of Part V of the 1985 Act which was to enable those who satisfy the tenant condition and all of the other relevant requirements in Part V, to acquire the freehold or a long lease of their homes. If the tenant has an intention to return to a dwelling-house from which they have been absent,

or in the case of more than one premises, believes the dwelling-house in relation to which they claim to be a secure tenant to be their principal home and intends to return to using it as their sole or principal home albeit as owner and the belief and intention are genuinely held and reflect reality when assessed by reference to objectively ascertained facts, the tenant condition is satisfied.

54. As Zacaroli J pointed out at [36] of his judgment, if a secure tenant was spending a year abroad and intended to return to the premises thereafter, as long as on the facts, they were able to satisfy the tenant condition, there would be nothing to prevent them from exercising a right to buy during that year of absence. They would continue to be a tenant and to occupy the premises, albeit being temporarily absent. The fact that they did not intend to return until they had become an owner under the right to buy process is irrelevant. The tenant would be occupying the premises as their only or principal home. It would not be necessary for them to return home at the end of the year abroad and physically occupy the premises qua tenant for a nominal amount of time (or for that matter for a substantial period) before being able to seek to exercise the right to buy. That is the effect of Mr Paget's submissions.

55. It follows that I agree with Zacaroli J that Lewison LJ's reference in the *Dove* case to the resumption to a previous pattern of existence is a reference to the resumption of occupation of premises as the principal or main home. It does not import with it a further requirement that the occupation is resumed qua tenant. As Mr Paget accepted, Lewison LJ did not have the question of the quality or status of the tenant on the intended return, in mind. Furthermore, in the *Dove* case neither tenant intended to change their pattern of residence and Lewison LJ's observations were obiter.

56. Neither am I convinced by Mr Paget's floodgates argument. He says that this drives a coach and horses through the legislation and everyone will be seeking to exercise a right to buy even if they have never occupied the dwelling house of which they are a tenant. As Mr Heath pointed out there are a number of safeguards which would prevent such a result. It is necessary to prove a genuine intention to return and that intention has to have an outward manifestation reflected in reality and assessed by reference to objectively ascertained facts. All the facts in relation to occupation both before and after any notice to quit will be relevant. It seems to me that the scenario which Mr Paget described of tenants who have never lived in a property seeking to exercise a right to buy is unreal.

57. I also reject the submission that in this case, any return to the Property is too remote or is contingent on the grant of the lease pursuant to the right to buy which will not occur because the Rabbi does not intend to return to the Property as a tenant and intends to renovate the Property. It seems to me that the argument is circular. The contingency is only too remote if the Council is correct in its argument. Otherwise, the Rabbi has the right to exercise his right to buy and will return to the Property once the long lease is granted and the proposed works are carried out. Unlike the additional works in the *Thakray* case, those works are within the Rabbi's own control. Although they are prospective, on the facts as found they were neither contingent nor remote.

The Respondent's Notice

58. This brings me to the Respondent's Notice. In essence, Mr Heath submitted that HHJ Saunders ought to have approached this matter in the following way: is the Rabbi

occupying the Property as his home? Yes. Does the Rabbi occupy another premises as his home? No. Accordingly, the Rabbi occupied the Property as his only home and the enquiry is at an end. It is said that the Council conceded that the Rabbi was occupying the Property as his home (a concession which the Council disputes) and, in any event, did not plead that he was not occupying it as his home. He says that HHJ Saunders did not decide that the Rabbi's daughter's home was another home and Zacaroli J was wrong to hold otherwise. Mr Heath also says that Zacaroli J was wrong to decide at [23] that HHJ Saunders was in error in the last sentence of his [66] when he stated that *Boyle* was a case of identifying which of two houses was the principal home, "which [was] not the case here."

59. Before us, Mr Paget submitted that the Respondent's Notice is, in fact, a cross appeal for which no permission has been granted and therefore, the issues it raises were not before us. Mr Heath submitted that this was not the case. We were not taken to any authorities or to the White Book about the difference between a true cross appeal and additional bases for upholding the decision below, however.

60. In any event Mr Paget accepted that there was no need to consider the Respondent's Notice issues because the Council would either succeed and the appeal would be allowed on the basis that Rabbi Weintraub's intention to return was insufficient to satisfy the tenant condition or the appeal would be dismissed on the basis that the Rabbi's intention was sufficient for the purposes of the tenant condition.

61. Since the hearing, Mr Paget has emailed to say that he was wrong to say that what was the Respondent's ground 1 before Zacaroli J (whether the Property was a home) would not make a real difference to the appeal. Mr Heath sent an email in response seeking to clarify what he says was the nature of the concession made by the Council before HHJ Saunders. He says that it was conceded that the Property was the Rabbi's home. The relevance of this is that it is stated in the Respondent's Notice that Zacaroli J was wrong to decide that HHJ Saunders had found that the Rabbi's daughter's flat was a home for the Rabbi. If that was wrong and it was conceded that the Property was a home, Mr Heath submitted in his written submissions that inevitably, the Rabbi satisfied the tenant condition.

62. It seems to me that Mr Paget was right in the first place. In the light of the fact that I would dismiss the Council's appeal for the reasons set out above, it is unnecessary to consider whether the points raised in the Respondent's Notice are available to the Rabbi on appeal or to seek to untangle the question of whether a concession was made and to address the substantive issue raised in the Respondent's Notice.

63. In any event, for the sake of completeness, I should add that in my judgment the disagreement about whether a concession was made before HHJ Saunders, goes nowhere. Zacaroli J stated at [20] of his judgment that he disagreed that HHJ Saunders had found that the Rabbi was not using the Property as a home and gave reasons for that conclusion. That conclusion is not appealed.

64. Had it been necessary and had it been concluded that this issue was before the court, I would also have decided that Zacaroli J was correct to decide that HHJ Saunders had decided that Rabbi Weintraub's daughter's home was also a home to the Rabbi. Although HHJ Saunders' judgment is difficult to untangle at times, as Zacaroli J pointed out at [20] of his judgment, HHJ Saunders had stated at [56] that this was not a

case of abandonment but one in which it was necessary to decide whether the Property was the Rabbi's only or principal home and at [78] stated that the fact that the Rabbi treated the Property as his home was insufficient to demonstrate that it was his only or principal home. This is consistent with considering the second question as formulated in *Dove*.

65. I also agree with Zacaroli J that as a matter of logic, in order to render it necessary to decide whether a premises is the tenant's only or principal home, there must be somewhere else that is also their home and that it is implicit in HHJ Saunder's reasoning that he considered the Rabbi's daughter's home to be that of the Rabbi too. For example, at [57] HHJ Saunders compared the limited use of the Property with the Rabbi's other needs which were "centred around his daughter's home." He also rejected the submission that the Rabbi should be equated with a mere sofa surfer and that it must follow that, as he has only one flat, that must be his only or principal home [78].

66. Furthermore, HHJ Saunders identified the *Dove* case as most relevant because it was concerned with the question of whether premises were being occupied as the tenant's principal home. It seems to me, therefore, that Zacaroli J was correct to conclude that it was implicit in HHJ Saunders' approach that he accepted that the Property was "a" home and that Rabbi Weintraub's daughter's home was also a home for the Rabbi. He would not have addressed the question of only or principal home otherwise but would have concentrated solely on the question of an intention to return.

67. For all the reasons set out above, I would dismiss the appeal.

Lord Justice Males:

68. I agree with Lady Justice Asplin, for the reasons which she gives, that the appeal must be dismissed. In short, in order to satisfy the tenant condition in section 81 of the Housing Act 1985, a tenant who is temporarily absent from the property but who has a genuine and realistic intention to return within a reasonable time may continue to occupy the property and need not show that when he does return it will be in his capacity as a tenant.

69. In the course of the hearing Mr Paget for the local authority accepted unequivocally that, if this was so, the appeal should be dismissed. However, he resiled from that position in correspondence sent after the hearing. It is therefore necessary to consider the matter further. Unfortunately, such further consideration is hampered by a disagreement between counsel as to the extent of concessions made in the courts below.

70. Moreover, although the trial judge made clear findings of primary fact, his conclusions are not as clear as they might have been. Indeed, Mr Justice Zacaroli was driven to conclude that what the judge had said at [66], i.e. that it was not a case of identifying which of two houses was the principal home, must have been a mistake.

71. In the circumstances I consider that the best course is for us to focus on the trial judge's findings of primary fact. In summary, these were that the claimant had lived in the property for many years; after his wife died, he continued to live there on his own for nine years, arranging for people to stay overnight with him because he was afraid to sleep there by himself; when it became problematical to get people to stay overnight, he formulated a plan to buy the property with the genuine intention of converting the

basement into a separate flat where someone else, such as a grandchild, could live, so that he could continue to sleep in the property; in the meanwhile, he began to spend nights elsewhere, usually at his daughter's house nearby; however, when his daughter had other guests to stay, as she often did, he arranged to stay with friends. The regular pattern of the claimant's days was that he would attend the synagogue in the morning, would go on most days to the property in order to study his scripture, would attend the synagogue in the evening, and would sleep at his daughter's house or, if necessary, elsewhere. He would eat his meals at his daughter's house, except for a packed lunch which she would prepare for him to eat at the property. He would bathe at the synagogue where there were facilities available.

72. Although many of the cases cited to us were concerned with the question whether a tenant who is temporarily absent from the property nevertheless continues to occupy it as his only or principal home, this is not such a case. The claimant was not absent from the property. On the contrary, he went there every day or almost every day, precisely because it was his home. The trial judge described this as 'akin to a library environment', but in my judgment the judge's findings of primary fact do not justify this view. There is a qualitative difference between spending your days in a home where you have lived for many years, which can be regarded as your own personal space, and visiting a library.

73. I have no doubt that the property remained at all times the claimant's home. For my part, I am doubtful whether the claimant's daughter's house was also his home. It was a place where he stayed when a bed was available, which was usually but not always the case, but only because he was afraid to sleep in his own home on his own. Although in the event this arrangement has lasted for some years, largely because the council has disputed the claimant's right to buy, it was intended to be temporary. But in any event, I have no doubt on the trial judge's findings that the property remained at all times the claimant's principal home.

74. It is understandable, in view of the severe housing shortage in London, that local authorities should not wish to see council premises unoccupied. However, in my judgment this property has not been unoccupied. It is occupied by the claimant whose only or principal home it is.

Lord Justice Birss:

75. I agree with both judgments.