

## Tolerated Trespassers - the final nail in the coffin?

[Austin v London Borough of Southwark](#) [2010] UKSC 28 Published 23/06/10

Lord Browne-Wilkinson arguably mined pure gold in terms of lawyers' fees when he came up with the oxymoronic concept of the "tolerated trespasser" in his speech in *Burrows v Brent LBC* [1996] 1 WLR 1448. Roughly speaking, a "tolerated trespasser" came into being when a Secure Tenant broke the terms of their suspended possession order; or had innocently been given a suspended order that was worded in the unfortunate manner identified by Chadwick LJ in *Harlow DC v Hall* [2006] HLR 27, and which in fact operated to end the tenancy altogether. We all thought that the doctrine applied to Assured Tenants, until *Knowsley HT v White* [2009] HLR 17 was decided.

At one point, there were literally tens of thousands of "TTs" dotted around England and Wales, with most of them and their landlords unaware of their status, until litigation needed to be renewed for some reason, and the gruesome "truth" emerged. TTs could be evicted by the landlord just applying for a warrant: the rights of the TT or their possible successors to oppose this, or to enforce any rights of their own, were limited.

Although social and public landlords greeted the concept to begin with, it later became a bitter pill that caused, rather than cured, headaches for landlords, their tenants, and those who advise both. Since then, reams of case law have developed on the issue, and it was only in 2009 when the Housing and Regeneration Act 2008 came into force that the statutory provisions that allowed the creation of (most of) the doctrine of "tolerated trespass" were repealed. But this Supreme Court judgment should be the last time the higher courts have to deal with this matter.

The facts are that Barry Austin's late brother Alan was a Southwark secure tenant, who had a conventional suspended possession order made against him for rent arrears in 1987: he breached it soon after by missing some instalments, and instantly became a TT, although Southwark did not enforce the Order. Barry said he moved in with his by then seriously

unwell brother to care for him in 2003, but Alan died in 2005. Southwark began possession proceedings in January 2007: Barry then learnt that Alan had been a TT. His death predated the “repeal” of the concept by the 2008 Act, so was unaffected by it.

Barry applied to be appointed to represent Alan’s estate, and for an order under s.85(2)(b) of the Housing Act 1985 to postpone the date of possession, in order that Alan’s tenancy would have existed at the date of his death, thus enabling Barry to succeed to it. The application failed at first instance, and then lost on appeal both to the High Court and the Court of Appeal. Prime obstacle in Mr Austin’s path was the Court of Appeal’s decision in *Brent LBC v Knightley* (1997) 29 HLR 857: that stated unequivocally that the right to apply to postpone an order for possession was not an interest in land capable of passing on death. As a purely personal right, it ended with the death of the former tenant.

It was argued in the Supreme Court that *Burrows and Thompson v Elmbridge BC*, the 1985 decision on which *Burrows* was founded; and *Knightley* too were wrongly decided: in that no secure tenancy terminated until execution of a warrant; and that the death of the “tolerated trespasser” did not remove the s.85(2) power to postpone possession.

In its judgment, while the Supreme Court did consider that *Burrows and Thompson* were wrong, it decided not to depart from them because it felt bound by its 1966 Practice Statement on overturning its own decisions. There was insufficient reason to do so, given the effect of the 2008 Act. Even after exhaustive consultation, Parliament’s deliberate decision in that Act not to revive or retrospectively reinstate certain tenancies had to be respected, and its will would be undone if *Thompson* were declared to be wrong.

But the appeal was allowed anyway on the basis that *Knightley* was wrongly decided. Lord Hope (with whom Lords Browne and Kerr agreed) stated that if Parliament had intended the death of the tenant to deprive the court of the power to revive the tenancy under s.85(2), it would have said so. Elsewhere in the 1985 Act, it had made that point clear enough, such as in respect of the succession rights at ss.87-90. There was no reason why the deceased

former tenant's personal representatives should not be entitled to apply to postpone the possession order. The powers in s.85 are exercisable 'at any time before the execution of the order' – with no mention of death, whereas the succession provisions deal expressly with the death of the tenant but do not contain limit the application of s.85, as s.90(3) clearly envisaged the secure tenancy continuing after death.

Baroness Hale (with whom Lord Walker agreed) delivered the other substantive judgment. She strongly expressed her view that there was no reason to believe that Parliament intended that such an oxymoron or anomaly as a "tolerated trespasser" should arise from the legislation: and that the full implications of their decision were not apparent to the Court of Appeal when they decided *Thompson* back in 1985. The Lords in *Burrows* then assumed that that decision was correct, and no subsequent case in the Lords had addressed the issue full on and reached a reasoned conclusion about it.

In legal policy terms, the decision affirms what we now know to have been Parliament's intention – the width of the discretion of the court under section 85(2) to do what appears right in all the circumstances. Practically speaking, there are likely to be hundreds of TTs who have died, and whose would-be successors now have a chance to apply to postpone possession and thereby succeed to the tenancy. And perhaps the result also shows a willingness by the Supreme Court to bury, with the dignity of careful reasoning, the rushes to judgment of its predecessor as well as the Court of Appeal.

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