Neutral Citation Number: [2017] EWCA Civ 846

Case No: C3/2016/0394

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL (LANDS CHAMBER)
HHJ Huskinson and AJ Trott FRICS
LRA1412014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/06/2017

Before :

LADY JUSTICE ARDEN
LORD JUSTICE BRIGGS
and
LORD JUSTICE BEAN

- -

Between :

JOHN LYON'S CHARITY	**Appellant**
- and -	
LONDON SEPHARDI TRUST	**Respondent**

- -
- -

Nicholas Dowding QC asnd Mark Sefton (instructed by **Pemberton Greenish LLP**) for the **Appellant**
Philip Rainey QC (instructed by **Forsters LLP**) for the **Respondent**

Hearing date : 14 June 2017

- -

Approved Judgment

Lord Justice Briggs :

Introduction

1. This is an appeal from the decision of the Upper Tribunal (Lands Chamber) dated 19 November 2015. It raises a question of statutory construction in relation to the scheme for leasehold enfranchisement provided for by the Leasehold Reform Act 1967, as amended ("the 1967 Act").

2. The parties are respectively the landlord and the tenant of a house in Maida Vale, London. It is common ground that the tenant, the London Sephardi Trust ("LST") validly exercised its right to acquire the freehold interest in the property from the landlord John Lyon's Charity ("JLC") by notice under Section 8 of the 1967 Act on 14 October 2013, but they are at loggerheads about the price.

3. The statutory scheme requires the price to be ascertained by reference to the amount which, at the relevant time (that is the date of the giving of the Section 8 notice), the property might be expected to realise if sold on the open market by a willing seller, subject to stated assumptions. One of those assumptions is that the property is sold "subject to the tenancy". The original lease of this property which gave rise to a right to enfranchise was to expire in December 2016, but in the early 1980s the then tenants secured a 50 year extension to that lease by giving notice under section 14 of the 1967 Act so that, in fact, the lease will expire in 2066.

4. The expiry date of the tenancy to which the freehold interest is assumed to be subject has a major effect upon the statutory formula for determination of the price. In the present case the price for the freehold interest, on the assumption that the tenancy determines in 2066, is £1.748 million, whereas the price for the same interest, if the tenancy determined in 2016, is £2.866 million.

5. The issue for determination on this appeal turns on the construction of section 9 of the 1967 Act, as successively amended by section 118 of the Housing Act 1974 ("the 1974 Act"), section 23 of the Housing and Planning Act 1986 ("the 1986 Act") and section 143 of the Commonhold and Leasehold Reform Act 2002 ("the 2002 Act"), together with the Commonhold and Leasehold Reform Act 2002 (Commencement No 1, Savings and Transitional Provisions) (England) Order 2002 ("the Commencement Order"), and upon the effect upon the interpretation of those provisions brought about by section 17(2) of the Interpretation Act 1978 ("the Interpretation Act").

6. As Mr Nicholas Dowding QC for the appellant observed in opening, the point at issue is really quite a short one, but its brevity becomes apparent only after struggling through a thicket of original and amending legislation. By contrast, the relevant facts are mercifully simple and uncontested.

The Facts

7. JLC is and has at all relevant times been the freehold owner of the property. On 12 December 1935 JLC granted a long lease of the property at a ground rent of £25 per annum for a term expiring on 25 December 2016, to a Mr William Tweddle. I shall call it "the Original Lease". The Original Lease was subsequently acquired by LST's predecessors in title Mr and Mrs Gaesteoker. At a date unknown in the early 1980s

but, by common consent, before 4 March 1983 the defendants served notice under section 14 of the 1967 Act demanding an extended lease of the property. This was granted on 4 March 1983, for a term expiring on 25 December 2066, replacing the original lease. I shall refer to it as "the Extended Lease".

8. After acquiring the property from the Gaesteokers, LST exercised its right to purchase the freehold of the property by serving a section 8 notice under the 1967 Act on 14 October 2013. On 2 December 2013 JLC admitted LST's right to buy the freehold.

9. The issue as to the price for the purchase of the property was referred to the First tier Tribunal by JLC. By its decision dated 4 September 2014, the FTT determined that the tenancy to which the freehold interest was assumed to be subject was the Original Lease, expiring in 2016.

10. LST appealed that decision to the Upper Tribunal. By its decision dated 19 November 2015 the UT allowed LST's appeal on that issue, holding that the freehold interest was to be assumed to be subject to the Extended Lease, expiring in 2066. I have already described the substantial consequence of that decision in terms of the reduced price payable.

11. It was common ground before both tribunals that this question turned on statutory construction, and upon an issue about which there was no directly applicable authority. It was only before the UT that it was argued (in the event successfully) that the outcome turned on section 17 of the Interpretation Act. The UT granted permission to JLC to appeal that decision to this court, upon the ground (among others) that it disclosed an important point of statutory construction, with potentially large valuation consequences.

The Legislative Framework

12. From its inception, the 1967 Act conferred by section 1 rights upon qualifying tenants of leasehold houses both to enfranchise (that is to acquire the freehold) and to obtain an extended lease of the property. The right to acquire the freehold has always been a right to do so on fair terms, including as to price. The right to an extended lease obliged the tenant to pay no premium, although he might be obliged to pay an increased site rent, from the date of determination of the original lease.

13. The right to enfranchise was originally subject to a range of qualifying conditions. The main effect of most of the numerous subsequent amendments to the 1967 Act has been progressively to relax or remove those restrictions. They included a qualifying residence condition (see the original section 1(1)(b)), the requirement that the rateable value of the property be below relatively modest levels (see, originally, section 1(1)(a)), and a requirement that the tenant serve notice under section 8 before the expiry of the original lease: see section 16(1)(a) of the 1967 Act in its original form. Further, (and this has not changed) the right to an extended lease can only be exercised once: see section 16(1)(b).

14. In addition to removing or relaxing these conditions, the amendments to the 1967 Act with which this case is concerned also extended to the provisions for determining the price in section 9 of the 1967 Act. These amendments are of central importance to

this appeal and need to be set out in full. They are what Mr Dowding aptly describes as a thicket.

15. Section 9(1) in its original form provided (so far as is relevant) as follows:

> "**9. Purchase price and costs of enfranchisement, and tenant's right to withdraw**
>
> (1) Subject to subsection (2) below, the price payable for a house and premises on a conveyance under section 8 above shall be the amount which at the relevant time the house and premises, if sold in the open market by a willing seller, might be expected to realise on the following assumptions: -
>
> (a) on the assumption that the vendor was selling for an estate in fee simple, subject to the tenancy but on the assumption that this Part of this Act conferred no right to acquire the freehold, and if the tenancy has not been extended under this Part of this Act, on the assumption that (subject to the landlord's rights under section 17 below) it was to be so extended."

16. Section 37(1)(d) of the 1967 Act defines "relevant time" in section 9(1):

> ""relevant time" means, in relation to a person's claim to acquire the freehold or an extended lease under this Part of this Act, the time when he gives notice in accordance with this Act of his desire to have it".

17. It will be seen that, in its original form, section 9(1) provided that the tenancy to which the freehold interest was assumed to be subject was, in effect, the extended lease, whether or not the original lease in question had actually been extended.

18. The main effect of section 118 of the 1974 Act was to raise the rateable value limits below which a right to enfranchise arises, by appropriate amendments to section 1 of the 1967 Act. But by section 118(4) the 1974 Act also made amendments to the assumptions to be used for the purpose of determining the price of the freehold interest, by a series of amendments to section 9 of the 1967 Act. For present purposes the relevant amendment, applicable to those properties brought within the right to enfranchise by the raising of the rateable value limits, was the addition of a new section 9(1A), in the following terms:

> "(1A) Notwithstanding the foregoing subsection, the price payable for a house and premises, the rateable value of which is above £1,000 in Greater London and £500 elsewhere, on a conveyance under section 8 above, shall be the amount which at the relevant time the house and premises, if sold in the open market by a willing seller, might be expected to realise on the follows assumptions:-
>
> (a) on the assumption that the vendor was selling for an estate in fee simple, subject to the tenancy, but on the assumption that this Part of this Act conferred no right to acquire the freehold."

It was this increase in the rateable value ceiling which brought the property subject to this appeal within the scope of enfranchisement. Thus the first version of the price determination assumptions applicable to this property departed from section 9(1)(a) in its original form by removing the assumption that, if not extended, the original lease was deemed to have been extended.

19. That amendment left in a state of uncertainty the question whether, in relation to a property qualifying for the first time under the 1974 Act, an extension actually obtained was to be taken into account, so as to postpone the termination date by 50 years and therefore whether, if seeking to acquire the freehold, a tenant could at no capital cost reduce the price to be paid for it by first obtaining an extension of his lease by serving notice under section 14 of the 1967 Act.

20. This uncertainty was resolved in the affirmative by the Court of Appeal in *Mosley v Hickman* (1986) 52 P&CR 248, in a decision given on 5 March 1986. The court's reasoning was that, since the effect of obtaining an extended lease under the 1967 Act was entirely to replace the original lease, in a case where such an extension had been obtained, the only tenancy to which the freehold interest could be assumed to be subject within the meaning of section 9 (1A) must be the extended lease. Giving the leading judgment, Fox LJ acknowledged in passing that neither of the rival interpretations was free from anomaly, but that they could only be corrected by Parliament.

21. This invitation was quickly taken up, by means of section 23 of the 1986 Act, which received Royal Assent on 7 November 1986, and came into force on 7 January 1987. Parliament evidently sympathised with the anomaly complained about by the landlord in *Mosley v Hickman*, namely that a tenant seeking to enfranchise could, at no cost, reduce the price payable by first obtaining an extended lease, without any real wish to enjoy the benefit of an extended term. The anomaly was resolved by a further amendment to section 9 of the 1967 Act, as follows:

> "**23.– Determination of price for leasehold enfranchisement.**
>
> (1) In section 9(1A) of the Leasehold Reform Act 1967 (a determination of price payable for enfranchisement of higher value houses), in paragraph (a) (assumption that vendor is selling subject to existing tenancy) after "no right to acquire the freehold" insert "or an extended lease and, where the tenancy has been extended under this Part of this Act, that the tenancy will terminate on the original term date.".
>
> (2) …
>
> (3) The above amendments do not apply –
>
> (a) where the price for enfranchisement has been determined, by agreement or otherwise, before the commencement of this section; or

> (b) where the notice under section 8 of the Leasehold Reform Act 1967 (notice of desire to have the freehold) was given before the passing of this Act; or
>
> (c) where notice under section 14 of that Act (notice of desire to have extended lease) was given before 5th March 1986. "

22. A number of points need to be noted. First, these amendments were limited to enfranchisement of properties described as "higher value houses" i.e. to those first brought within the scope of enfranchisement by the 1974 Act. This is why the amendment was limited to section 9(1A). Secondly, the amendment achieved a complete reversal of the original assumption, in 1967, that the tenancy to which the freehold interest was assumed to be subject should also be assumed to have been extended even if it had not been, in favour of an assumption that no extended lease had been obtained, even if in fact it had been. Thirdly, and most importantly, this change was subjected to a saving (in section 23(3)(c)) sufficient to remove almost all of what otherwise have been its retroactive effect. It was not to be applied to any determination of an enfranchisement price where there had previously been served a section 14 notice, seeking an extended lease, prior to 5 March 1986. This was not the date of the coming into force, or even the passing, of the 1986 Act, but the slightly earlier date of the judgment in *Mosley v Hickman*.

23. For present purposes, the result is that the amendments to section 9 of the 1967 Act created by section 23 of the 1986 Act had no effect upon the price to be determined for the enfranchisement of the lease in the present case, because a section 14 notice seeking (and obtaining) an extended lease had been served on JLC some years prior to March 1986. A significant effect of the saving provision in section 23(3)(c) was to create a class of qualifying tenants of properties with a right to enfranchise at a price reduced by having obtained an extended lease, provided that the extension had been claimed before 5 March 1986. Since such rights effectively run with the lease, this was a valuable right capable of being assigned to any successor in title, and one which, as the termination date of the original lease drew nearer, would be likely to have an ever-increasing effect on the price payable for enfranchisement, and therefore the premium obtainable on an assignment of the lease. For convenience, I will call that class, of which the Gaesteokers were, and LST later became, members, "the *Mosley v Hickman* class", because they and they only would benefit from the Court of Appeal's decision in that case. It may reasonably be inferred that Parliament's choice of 5 March 1986 as the end-date for the saving provision in section 23(3)(c) was designed to avoid tenants joining that class upon learning of the advantages of doing so identified by the Court of Appeal in that case.

24. The issue on this appeal is whether the preferential rights of the *Mosley v Hickman* class were taken away by the further tranche of amendments to the 1967 Act brought about by the 2002 Act.

25. The 1967 Act in its original form made it a condition of the exercise of a right to acquire the freehold that the tenant serve a section 8 notice before the expiry of the term of the original lease, even if he had by then obtained an extended lease by serving notice under section 14: see section 16(1)(a). For present purposes the main objective of the amendments wrought by the 2002 Act was to remove this restriction.

This was mainly achieved by the simple repeal of section 16(1)(a) of the 1967 Act (see section 143(1)(a) of the 2002 Act).

26. Further amendments were at the same time made to section 9 of the 1967 Act, by section 143(4), and by repeals authorised by section 180 and contained in Schedule 14. The relevant repeal was in the following terms:

> "In subsection (1A)(a), the words "and, where the tenancy has been extended under this Part of this Act, that the tenancy will terminate on the original term date", and"

The insertions by way of amendment of section 9, by section 143(4) of the 2002 Act, consisted of the insertion of a new subsection (1AA) in the following terms:

> "(1AA) Where, in a case in which the price payable for a house and premises is to be determined in accordance with subsection (1A) above, the tenancy has been extended under this Part of this Act –
>
> (a) if the relevant time is on or before the original term date, the assumptions set out in that subsection apply as if the tenancy is to terminate on the original term date; and
>
> (b) if the relevant time is after the original term date, the assumptions et out in the paragraphs (a), (c) and (e) of that subsection apply as if the tenancy had terminated on the original term date and the assumption set out in paragraph (b) of that subsection applies as if the words "at the end of the tenancy" were omitted."

27. The effect of this repeal and insertion, in relation to cases in which (as had always been permitted) the section 8 enfranchisement notice was served before the termination date of the original lease was, despite insignificant differences in language, simply to re-enact the same requirement for a disregard of the extended term date for the purpose of the assumptions to be made about the tenancy to which the freehold interest was subject. The relevant deeming provision was simply removed from section 9(1A)(a) and reinserted, in part in the main body of the new subsection (1AA) and in part in the new subsection (1AA)(a). By contrast, new provision had to be, and was, made in the new subsection (1AA)(b) for cases, newly permitted, where the section 8 enfranchisement notice was served after the expiry of the term created by the original lease.

28. Section 181 of the 2002 Act made provision for commencement, transitional provisions and savings in connection with (inter alia) section 143 to be made by subordinate legislation. This was undertaken by the Commencement Order. It provided by paragraphs 1(2) and 2(b) that, subject to transitional provisions and savings in Schedule 2, section 143 of the 2002 Act was to come into force on 26 July 2002. Paragraph 5 of Schedule 2 provided as follows:

> "The amendments made to the 1967 Act by sections 138 to 141 and sections 143 to 147 and the repeals in Part 3 of Schedule 1 to this Order, shall not have effect in relation to an application for enfranchisement or an extended lease of a house in respect of which –
>
> (a) a notice was given under section 8 or 14 of the 1967 Act, or
>
> (b) an application was made under section 27 of that Act
>
> before the commencement date."

29. Neither section 143 of the 2002 Act nor the Commencement Order made any express reference to section 23 of the 1986 Act. Nonetheless the effect of the repeal by removal of part of section 9(1A)(a) of the 1967 Act was in substance to repeal section 23(1), and the effect of the reinsertion of the removed provisions into section 9(1AA) of the 1967 Act was to re-enact those provisions in a form which, despite slight changes in the arrangement of the language, was substantially identical, in relation to applications for enfranchisement made under section 8 before the expiry of the original lease. Nothing at all was said or done in the 2002 Act or in the Commencement Order about the saving provision, for the benefit of the *Mosley v Hickman* class, in section 23(3)(c) of the 1986 Act. It simply remained on the statute book.

The Interpretation Act

30. Under the heading "Words of enactment" Section 1 of the Interpretation Act 1978 provides as follows:

> "Every section of an Act takes effect as a substantive enactment without introductory words."

Section 17, headed "Repeal and re-enactment" provides as follows:

> "(1) Where an Act repeals a previous enactment and substitutes provisions for the enactment repealed, the repealed enactment remains in force until the substituted provisions come into force.
>
> (2) Where an Act repeals and re-enacts, with or without modification, a previous enactment then, unless the contrary intention appears, -
>
> (a) any reference in any other enactment to the enactment so repealed shall be construed as a reference to the provision re-enacted;
>
> (b) in so far as any subordinate legislation made or other thing done under the enactment so repealed, or having effect as if so made or done, could have been made or done under the provision re-enacted, it shall have effect as if made or done under that provision."

Analysis

31. The UT decided that the effect of section 17(2) of the Interpretation Act was that the saving for the *Mosley v Hickman* class constituted by section 23(3)(c) of the 1986 Act was fully applicable to the determination of the price for enfranchisement to be made after July 2002 under Section 9(1AA)(a) of the 1967 Act as amended, so that the class, including LST, continued as it had done between 1986 and 2002 to enjoy a right to enfranchisement at a price determined by reference to the much later determination date of their extended leases. This was because:

    i) The provision previously in section 9(1A)(a) which required an extended lease to be disregarded for the purposes of identifying the termination date was "a previous enactment" within the meaning of section 17(2).

    ii) This provision had been repealed and re-enacted by the 2002 Act so that it now appears in section 9(1AA) and (a) of the 1967 Act.

    iii) The saving provision in section 23(3)(c) of the 1986 Act was a "reference in any other enactment to the enactment so repealed" within the meaning of section 17(2)(a) of the Interpretation Act.

    iv) That there was no contrary intention to displace the result prescribed by section 17(2)(a), namely that the saving provision for the *Mosley v Hickman* class should be construed as a reference to the re-enacted provision about disregarding the termination of an extended lease now appearing in section 9(1AA) and (a) of the 1967 Act as amended.

32. Mr Dowding challenged that analysis on three distinct grounds in submissions which, having navigated the thicket, were admirably concise. First, he said that the 2002 Act should not be regarded as having repealed and re-enacted, with or without modification, the disregard of an extended lease for the purpose of identifying the termination date of the tenancy to which the freehold interest was subject, originally enacted in section 23(1) of the 1986 Act. Secondly he said that, in any event, section 23(3)(a) of the 1986 Act was not "any other enactment" within the meaning of section 17(2)(a) of the Interpretation Act. Rather it was part and parcel of the enactment in section 23(1), being merely a saving provision in respect of it. Thirdly he submitted that, taken together, the 2002 Act and, in particular, the Commencement Order, disclosed a sufficient contrary intention to displace the effect of section 17(2) of the Interpretation Act.

33. I will address each of these points in turn. But it is worth first standing back and looking at the issue in the round, before becoming immersed in the technical analysis of the specific requirements of section 17(2). The question is whether, on its true construction and in context, the 2002 Act took away from the *Mosley v Hickman* class of potential buyers of the freehold interest in their houses the price advantage which they had secured by serving a section 14 notice under the 1967 Act calling for an extended lease before March 1986, when that advantage had previously been expressly preserved for them by the 1986 Act, and had been a valuable aspect of their rights as tenants of their houses for the following sixteen years.

34. We heard interesting but to my mind inconclusive argument about whether these rights were to be regarded as vested, within the meaning of Lord Rodger's analysis in *Wilson v First County Trust (No.2)* [2004] 1 AC 816, at paras 188 to 197, so that they are presumed not to be taken away retroactively without clear express provision or necessary implication to that effect. On the one hand they had yet to crystallise into a presently enforceable obligation of their landlords, pending the service of a notice to enfranchise under section 8 of the 1967 Act. On the other hand the tenants had, using Lord Rodger's phrase, at para 196, already "done something" to establish their rights by the service of a section 14 notice demanding an extended lease, and Parliament had recognised the importance of what they had already done by providing that they, and only they, should in the future enjoy the price advantage which the 1986 Act otherwise took away.

35. That overview of the issue leaves me starting with the perception that rights of this kind would not lightly be taken away by a subsequent Act, even if to do so might not be retroactive legislation in the fullest sense. That perception is reinforced by reflecting that, apart from the alleged cutting-away of the special rights of the *Mosley v Hickman* class, the effect of the 2002 Act upon tenants of houses under long leases was uniformly beneficial to them. Quite apart from the implications of section 17(2), the context of the 2002 Act does not therefore create fertile ground for a conclusion that these rights were taken away, all the more so because the specific provision which preserved them, namely section 23(3)(c) of the 1986 Act, was left on the statute book.

36. Mr Dowding's first point was that the provision in section 9(1A)(a) (inserted by section 23(1)(a) of the 1986 Act) which required an assumption that the tenancy to which the freehold was subject to be deemed to end as at the termination of the original lease, even where there had been a lease extension, was not repealed and re-enacted by the 2002 Act within the meaning of section 17(2). He said that this was a question of substance rather than words, and that the UT had wrongly undertaken an excessively linguistic analysis of this issue. In substance, he submitted, the 2002 Act introduced an entirely new code for determination of the price, applicable both to cases where the section 8 notice preceded the expiry of the original lease and to those new cases where it did not.

37. In my view there was a repeal and a re-enactment, whether the matter is viewed as a matter of substance or of language. I have already described how the language formerly in section 9(1A)(a) migrated into the new section 9(1AA) and (a). Viewed from the perspective of a tenant serving a section 8 notice before the expiry of his original lease (which was all that with which the old section 9(1A)(a) was concerned before its partial repeal), the substantive effect of the reappearance of the same words and phrases in the new section 9(1AA) and (a) was precisely the same. Even if the tenant (or his predecessors) had obtained an extended lease, the tenancy to which the freehold was subject was to be assumed to expire on the expiry date of the original lease. The fact that the new section 9(1AA) also dealt with tenants serving their section 8 notice after that date is in my view neither here nor there.

38. The second point made for JLC was that section 23(3)(c) of the 1986 Act could not be treated as "any other enactment" within the meaning of section 17(2)(a) because, assuming that it referred to part of section 23(1)(a) before repeal, it was part of the same enactment. By this Mr Dowding did not mean part of the 1986 Act, treating the

whole Act as a single enactment. Rather he meant that, because section 23(3)(c) was a saving provision, carving an exception out of section 23(1)(a), it was inherently part of the same enactment as the provision to which it operated as an exception. He came near to submitting that a saving provision could never be a different enactment from the enactment from which it derogated, but abandoned such a rigorous position when invited by the court to test it by reference to examples.

39. It is clear (for example from section 1 of the Interpretation Act and *Wakefield and District Light Railways Co v Wakefield Corporation* [1906] 2 KB 140, at 145), that the concept of an enactment, as used in section 17, is not limited to whole Acts, parts or even sections of an Act. Any provision, long or short, which achieves a distinct objective may be an enactment. In my view Mr Dowding's attempt to combine saving provisions with the provisions to which they are an exception or derogation as indivisible enactments is simply wrong in principle. To do so would deprive section 17(2) of much of its force. It `applies to "any reference" in one enactment to another enactment. A reference by way of saving or exception is in my view squarely within that framework.

40. The final challenge to the UT's analysis is the submission that there is disclosed a contrary intention to the continued effect of section 23(3)(c) in preserving the rights of the *Mosley v Hickman* class. For this purpose Mr Dowding relied mainly on the Commencement Order, which applied the new section 9(1AA) to all price determinations arising from section 8 notices to enfranchise served after the commencement date of the 2002 Act, with no express exception for those served by tenants who (or whose predecessors in title) had demanded extended leases before March 1986.

41. The UT had concluded that a contrary intention could never be identified from a mere statutory instrument such as the Commencement Order, relying for that purpose on *DPP v Inegbu* [2009] 1 WLR 2327. I do not consider that this is the correct interpretation of that case, and *R v Secretary of State for Education* [1995] ELR 388 suggests, to the contrary, that there is no such rigid limit. A contrary intention may in principle be discerned from any material which is admissible for the purposes of statutory construction including, in an appropriate case, subordinate legislation, Hansard and travaux preparatoires.

42. But there will be many cases, and in my view the present case is one of them, where recourse to delegated legislation will be a most unreliable guide to parliamentary intention, all the more so if, as here, it is made later than the primary legislation to which it relates. Although the Commencement Order was made pursuant to power conferred on Government in the 2002 Act, and related to transitional provisions and savings, that power was conferred in the most general terms, and does not of itself disclose any intention, one way or the other, whether the rights of the *Mosley v Hickman class* were to be preserved. On that basis when on 1 May the 2002 Act was passed (and Parliament itself ceased to have any further active role in its formulation) the propensity for section 17(2) of the Interpretation Act to do just that (i..e. to preserve those rights) was unclouded by any contrary intention which might be gleaned from the Commencement Order once made, on 17 July 2002.

43. But I do not in any event discern any contrary intention from including the Commencement Order among the materials within which it might be found. All it did

was to bring the 2002 Act into force on a stated date, and to make a saving in relation to section 8 enfranchisement notices served before that date. It said nothing, one way or the other, about whether the rights of the *Mosley v Hickman* class were to be preserved. That was achieved by the operation of section 17(2) of the Interpretation Act, by making applicable to section 9(1AA) of the 1967 Act as amended the un-repealed provisions of section 23(3)(c) of the 1986 Act, unless something in the 2002 Act and the Commencement Order clearly provided otherwise, or created such an inconsistency with the continuing effect of section 23(3)(c) that it has to be taken as having been disapplied.

44. There was well-focussed argument about whether the fact that section 23(3)(c) of the 1986 Act remained on the statute book was a positive indicator of Parliament's intention to preserve the relevant rights beyond July 2002. For LST Mr Philip Rainey QC submitted that there was no other sensible purpose in retaining that provision. Mr Dowding said that it needed to be preserved, for the benefit of those tenants who had served their section 8 notices before the commencement date for the 2002 Act.

45. As with the debate about retroactivity, I found the argument on this point to be inconclusive. Both submissions went too far. Section 23(3)(c) could have been repealed but, like everything else in the 2002 Act, only with effect in relation to section 8 notices served after its commencement date. Alternatively it could just have been left there, so as only to apply to section 9(1A) but not (1AA). That is what the FtT probably thought, but they were not addressed, as was the UT, about the effect of the Interpretation Act.

46. For those reasons, which largely replicate those of the UT, I would dismiss this appeal.

Lord Justice Bean:

47. I agree.

Lady Justice Arden:

48. I also agree.