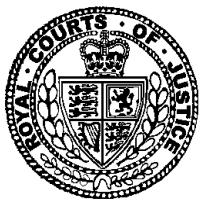

Neutral Citation Number: [2021] EWHC 2890 (QB)

Case No: QA-2020-000102

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

ON APPEAL FROM KING'S LYNN COUNTY COURT

HIS HONOUR DEPUTY CIRCUIT JUDGE HOLT

(Claim No. E00NR912)

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 08/11/2021

Before :

MR JUSTICE KERR

- -

Between :

CLARION HOUSING ASSOCIATION LIMITED **Appe**
Cla

- and -

LOUISE MARY CARTER (as personal representative of Agnes Monica Carter (deceased) and personally) **Respon**
Defe

- -

- -

Mr Andrew Lane (instructed by **Clarion Housing Group Limited**) for the **Claimant**

Ms Stephanie Lovegrove (instructed by **Illume Legal Limited**) for the **Defendant**

Hearing date: 20 October 2021

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

MR JUSTICE KERR

Mr Justice Kerr :

Introduction

1.
The appellant housing association (**Clarion**) appeals by permission of Stewart J against a decision of Deputy Circuit Judge Holt sitting in the County Court at King's Lynn from 9-11 March 2020. He gave judgment on 11 March 2020, dismissing Clarion's claim against the respondent (**Ms Carter**) for possession of a property occupied by her, 9 Station Road, Attlebridge, Norwich (**the property**).

2.
The judge decided that Ms Carter was entitled to stay on at the property where she had been living with her mother, the late Agnes Monica Carter (**Monica Carter**), the former assured tenant. He rejected Clarion's arguments that it was entitled to take back the property and reallocate it in accordance with its allocation policy. He decided, among other things, that Ms Carter became an assured tenant of the property in equity on her mother's death in June 2017.

3.
The first five grounds of appeal relate to the judge's decision that a notice to quit served by Clarion on Ms Carter after her mother's death was invalid and did not terminate the tenancy. The sixth challenges the finding that "ground 7" (one of the mandatory grounds for possession, in Part 1 of Schedule 2 to the Housing Act 1988 (**the 1988 Act**)) was not open to Clarion. The seventh was that the judge wrongly held that evicting Ms Carter would violate her rights under article 8 of the European Convention on Human Rights (**ECHR**).

4.
By a respondent's notice, Ms Carter contends that the judge's decision should be upheld on certain additional bases. First, she contends that by an exception to the common law doctrine of privity of contract, she was the beneficiary of a trust of the promise made by Clarion to Monica Carter not to terminate the tenancy where certain conditions in the tenancy agreement were met. She contended that they were met (or, if necessary, that if a time limit was missed time was not of the essence).

5.
Secondly, accepting that case law subsequent to the judge's decision makes it necessary to revisit his decision on one issue – whether a copy of the notice to quit was sent to the Public Trustee (the subject of Clarion's fourth ground of appeal) – Ms Carter argues that applying the approach ordained by the subsequent case law leads to the same conclusion as the judge's: that the notice to quit was not copied to the Public Trustee in time, i.e. during its currency.

Facts

6.
Monica Carter, a midwife by profession, became a secure tenant of the property in 1987. It is a three or four bedroom semi-detached house. The landlord was then Broadland District Council. In 1990, that district council made what is called a large scale voluntary stock transfer (**the LSVT**) of its properties to Wherry Housing Association (**Wherry**).

7.
It is agreed that, after the LSVT, Monica Carter was no longer a secure tenant of a local authority under the Housing Act 1985 (**the 1985 Act**). She became instead an assured tenant under the 1988 Act. The terms of her tenancy were modified, pursuant to the LSVT. They became the terms in the tenancy agreement the parties put before me at the hearing. I will return to those terms.

8.
At some point, Wherry transferred the freehold reversion of the property to Clarion's predecessor, Circle Thirty Three Housing Trust Limited (**Circle 33**), which, following amalgamation with Affinity Homes, became Clarion. That is how Clarion became Monica Carter's landlord under her assured tenancy.

9.
Ms Carter, her eldest daughter, is a specialist practitioner in inpatient recovery. She has eight siblings. Monica Carter, unfortunately, had serious health difficulties. In about October 2004, Ms Carter moved in with her. She moved out of a property she owned in Norwich and became her mother's carer, in addition to working full time. It is now undisputed that the property (i.e. 9 Station Road) has been Ms Carter's principal residence since late 2004.

10.
In April 2014, Clarion's predecessor, Circle 33, adopted a policy document called Succession for Lifetime Tenants (reviewed and adopted by Clarion in December 2015). It applied to assured tenancies and stated the policy where a tenant dies and a member of the deceased tenant's family wishes to succeed to the tenancy. The general approach was to allow only one succession for each tenancy (paragraph 3.2). I will return to other parts of the policy shortly.

11.
On 13 June 2017, Monica Carter died intestate. It is agreed that by then changes to the assured tenancy regime wrought by the Localism Act 2011 (from 1 April 2012) had come into force but did not assist Ms Carter to succeed to the assured tenancy as an occupying family member, because they did not apply to tenancy agreements entered into before 1 April 2012.

12.
Ms Carter's then solicitors wrote to Clarion on 14 June 2017, asking whether she could buy the property. Clarion was not willing to sell. Moreover, it took the view that Ms Carter should not be allowed to stay on, if it could be shown that the property was not her principal home. On 18 August 2017, Clarion served a notice to quit the property on the personal representatives of Monica Carter; but Clarion no longer relies on the effectiveness of that notice.

13.
On 24 August 2017, Ms Carter telephoned Clarion to say she wanted to succeed to the tenancy. She was asked to put her request in writing, which she did in a letter of 29 August. Clarion was still investigating whether the property was her main and principal home. They sought proof of this. Ms Carter provided it. But Clarion did not accept (though it now does) Ms Carter's documentary evidence (utility bills, etc) that the property was her main home.

14.
On 16 October 2017, Clarion wrote refusing the request to succeed to the tenancy on the ground that the property was not Ms Carter's main home. Any money paid would henceforth not be rent but money paid for occupation and use. Ms Carter's solicitors wrote at length on 30 October stating reasons for disagreeing with the decision, asserting her entitlement to succeed to the tenancy, by reference to its terms, in particular the landlord's covenants.

15.
Clarion wrote to Ms Carter two days later asking her to fill in a detailed form called application to succeed to a tenancy (non-tenant). Ms Carter did so, returning it on 7 November 2017. Clarion was

not persuaded. At the end of 12 December 2017, a period of six months since Monica Carter's death expired. Ms Carter, I was told, had yet to apply for letters of administration on her mother's intestacy.

16.
On 26 January 2018, Clarion wrote refusing Ms Carter's request, this time without giving any reason. The letter stated that Clarion had "served a Notice to Quit on the personal representatives and the Office of the Public Trustee, in accordance with the law. This will legally terminate your late mother [sic] tenancy". A copy of the notice to quit was enclosed. It required delivery up of possession on 26 February 2018:

"or the day on which a complete period of your tenancy expires next after the end of four weeks from service of this Notice".

17.
The tenancy agreement stated in clause 1 that it was an "assured weekly Tenancy" beginning on the date set out in the Schedule (which I do not have). Rent "is due in advance on the Monday of each week". There is no mention in the judgment below of the exact expiry date of the notice, by reference to the period of the tenancy. The four week period from 26 January 2018 (a Friday) ran until 23 February 2018, also a Friday.

18.
The following Monday was 26 February 2018, the date mentioned in the notice. The actual expiry date could in theory be later than 26 February, or earlier, but not earlier than 25 February. Since rent was due in advance on a Monday, however, it is very likely that the delivery up date and the termination date of the tenancy (if the notice was valid) was Monday 26 February 2018.

19.
On 29 January 2018, Ms Carter's new solicitors wrote to Clarion asking for "detailed reasons" for declining the application to succeed to the tenancy, and "if you are relying on any form of policy specific to you, please provide a copy and notify us of the relevant clauses". Clarion did not respond to that letter.

20.
Ms Carter did not deliver up possession. On 27 February 2018, as is clear from a letter from the Public Trustee dated 20 March 2018, the Public Trustee registered receipt of the copy notice to quit. The letter of 20 March confirmed that. The same day, Clarion wrote to Ms Carter's solicitors, denying that she enjoyed any succession rights and explaining the reasons in detail.

21.
Those reasons were, in essence, what was argued by Clarion before the judge and in this appeal: there was no right of statutory succession; Ms Carter did not fulfil the criteria for a succession under the terms of the tenancy; and even if she had done so, she could not rely on those terms because she was a stranger to the contract and it predated the effect of the Contracts (Rights of Third Parties) Act 1999. The letter ended with a request for the keys and vacant possession.

22.
That was followed up with a notice of seeking possession (**NOSP**), citing mandatory ground 7 in Schedule 2 to the 1988 Act; namely that the tenancy was a periodic tenancy "which has devolved under the will or intestacy of the former tenant and the proceedings … are begun not later than 12 months after the death of the former tenant …".

23.
The accompanying explanation relied on the second notice to quit and added that, without prejudice to its effect, “in so far as there has been any devolvement [sic] of said tenancy to you by way of will or intestacy, Clarion intend to commence proceedings for possession within twelve months of your mother’s death on this ground in the alternative”.

24.
On 21 May 2018, letters of administration were granted to Ms Carter in respect of Monica Carter’s intestacy. A week later there was an express assent of the tenancy to Ms Carter. For good measure, Clarion issued a third notice to quit and served it on the personal representatives and the Public Trustee. It then issued the predicted possession proceedings on 7 June 2018.

25.
Also on 7 June 2018, Ms Carter’s solicitors wrote to Clarion asking that in light of the assent of the tenancy to Ms Carter, “we would ask that you exercise your discretion in clause 4(2)(6)(d) [sic] [of the tenancy agreement] to allow further time for our client to have applied for letters of administration and have the tenancy vested in her”. There was no response to that request.

The Judgment Below

26.
The judge heard evidence. In his judgment, he summarised that evidence. Ms Carter gave evidence and called witnesses to prove that the property had been her main home since 2004. For Clarion, Ms Sally Greetham gave evidence, explaining that she regretted the way Clarion had handled the matter. She accepted that the tenancy agreement contained terms intended to secure succession for a family member such as Ms Carter.

27.
Ms Greetham’s evidence was to the effect that Clarion wanted the house back because allowing Ms Carter to stay there “would not be the best use of our housing stock”. She admitted that the policy document was not followed. After it was put to her she commented “[w]e got this case wrong”. There was “no note .. on the file as to how the decision was reached”. There was “nothing to show what was considered”.

28.
Ms Greetham said the decision had been made on legal advice. “I made the decision”, she told the judge. She accepted that Clarion was exercising a public function and would be expected to comply with its policies. She accepted that Ms Carter’s “rights” had not been communicated to her. I infer that she was referring to “rights” mentioned in the policy document and tenancy agreement.

29.
Ms Greetham was also asked about service of the notice to quit on the Public Trustee. But she could only point to the correspondence, to which she was taken. Ms Lorinda Leon, another employee who had left, had not provided a statement and was not called, had handled the correspondence with the Public Trustee.

30.
Ms Greetham’s evidence was that “[by] January we’d closed our minds to the defendant’s application. The only criteria we looked at was whether she would get an allocation rather than look at her rights under the tenancy”. She accepted that she did not consider the request from the solicitors in their

letter of 7 June 2018 for an extension of time and was “not aware of any decision in response to the request”. She did agree (unlike Clarion’s lawyers) that “we are bound by our policy and the contract”.

31.
The judge then turned to the issues. He held that on Monica Carter’s death, the legal title to her assured tenancy vested in the Public Trustee. It was held on trust for “any beneficiary … under the intestacy rules”. If the beneficiary was in occupation of the property, she became entitled to the tenancy in equity and became an assured tenant.

32.
He referred to statutory provisions and text book citation (to which I will return) for those propositions. He went on to find that Ms Carter had lived continuously in the property as her principal home, that the tenancy “has remained assured” and the notice to quit was “of no effect”.

33.
The judge also found, if it were necessary, that the notice to quit was “incorrectly served”. He did not accept the documentary evidence of service on the Public Trustee as sufficient without any statement or oral evidence from Ms Leon. The absence of a statement was:

“so suspicious that I conclude on the balance of probabilities that the claimants cannot prove when it was sent and, therefore, I cannot ascertain with reasonable certainty the quitting date. As a result, the notice to quit is invalid.”

34.
He rejected Clarion’s case under ground 7. He decided that Clarion had covenanted not to rely on it by the terms of the tenancy in certain circumstances. The question was whether they were present here. The issue was as to the sixth and final of six requirements. It was common ground that the first five were fulfilled. The sixth was that:

“within six months of the date of the death of the Tenant or such further time as the Association shall, upon written application and in its discretion allow, he/she applies for the grant of Probate and/or Letters of Administration and/or seeks to have the Tenancy vested in him/her under the will of the Tenant or on intestacy”.

35.
The judge went on to say that, while that was enough to dispose of the action, clause 5(8) of the tenancy agreement provided “special succession rights”. And, there was also a “public law defence”, which succeeded. He referred to the evidence of Ms Greetham and that she had “conceded her procedure was replete with error, both as to substance and procedure”.

36.
Ms Greetham, said the judge, had made a decision that was “wrong and not one she was authorised to make” I think he was there referring to Ms Greetham’s disregard of the policy document and the commitments in it to honour succession provisions in tenancy agreements and allow one succession per tenancy. I will return to the policy document shortly.

37.
The judge ended by saying he was:

“satisfied that if the decision had been properly made the outcome is highly likely to have been different, ie, there would have been no notice to quit and the claimant would have agreed to the

defendant's succession to her mother's tenancy. Accordingly, if it were necessary, I would quash the notice to quit and the decision to make the ground 7 application."

38.
His approved written judgment, which he also delivered orally on the day, ended there. He was then asked by Mr Andrew Lane, counsel for Clarion, to deal with the article 8 point. Mr Lane reminded him of the submissions on the issue. There is no approved transcript of what the judge then said but counsel agree that (in accordance with a note made at the time by Ms Stephanie Lovegrove, counsel for Ms Carter) he said words to the effect:

"In relation to the article 8 claim, I find in favour of the defendant on that point".

Issues, Reasoning and Conclusions

Did Ms Carter become the assured tenant of the property in equity immediately on her mother's death?

39.
The first question I ask myself is whether the judge was right to decide that on her mother's death, Ms Carter, being in occupation of the property, became an assured tenant of the property in equity under the law of intestacy.

40.
It is common ground that Ms Carter did not succeed to the tenancy under section 17 of the 1988 Act (as amended) because she was not a spouse or civil partner of the deceased; and that section 17(1A) by the 2011 Act (which would have enabled Ms Carter to succeed to the tenancy) cannot assist her because it does not apply to assured tenancies begun before 1 April 2012.

41.
The tenancy agreement provided, by clause 4(3):

"If pursuant to the provisions of the Housing Act 1988 or any statutory modifications thereof the Tenancy ceases to be an assured Tenancy, the Association may end the Tenancy by giving four weeks' notice in writing to the Tenant."

42.
For Clarion, Mr Lane submitted (on the first ground of appeal) that in the absence of any statutory succession, security of tenure was lost on Monica Carter's death, leaving Clarion free to serve a notice to quit and thereby end the tenancy four weeks later. He submitted (on the second ground) that the judge was wrong to find that Ms Carter became an assured tenant in place of her mother as beneficiary under a trust arising from the law of intestacy.

43.
By section 9 of the Administration of Estates Act 1925 (**the AEA 1925**), as substituted by the Law of Property (Miscellaneous Provisions) Act 1994 (**the LPMPA 1994**)

"(1) Where a person dies intestate, his real and personal estate shall vest in the Public Trustee until the grant of administration.

…

(3) The vesting of real or personal estate in the Public Trustee by virtue of this section does not confer on him any beneficial interest in, or impose on him any duty, obligation or liability in respect of, the property."

44.
By section 18(1) of the LPMPA 1994:

" **18.— Notices affecting land: service on personal representatives before filing of grant.**

(1) A notice affecting land which would have been authorised or required to be served on a person but for his death shall be sufficiently served before a grant of representation has been filed if—

(a) it is addressed to "The Personal Representatives of" the deceased (naming him) and left at or sent by post to his last known place of residence or business in the United Kingdom, and

(b) a copy of it, similarly addressed, is served on the Public Trustee."

45.
Mr Lane submitted that authority is against the proposition that the Public Trustee holds the intestate's property on trust for those entitled to inherit under intestacy rules. A trust only arises, he submitted, at the earliest on the grant of letters of administration to the personal representatives of the intestate deceased. The trustees are then the personal representatives, not the Public Trustee.

46.
He referred me to Sherrin and Bonehill on The Law and Practice of Intestate Succession, 3rd edition (2004), at 5-016 to 5-020 and to several of the cases there cited. He relied on the conclusion of Sherrin and Bonehill at 5-020:

"… it would seem that a beneficiary on intestacy has no more than a right to apply for a grant of letters of administration or a right to compel the personal representative to duly administer the estate."

47.
Mr Lane relied on Fred Long & Son Ltd v. Burgess [1950] 1 KB 115, CA, where the court was concerned directly with the interpretation of section 9 of the AEA 1925 (as then worded) in the context of a notice to quit served on the then equivalent of the Public Trustee (the President of the Probate, Divorce and Admiralty Division) before letters of administration were taken out. The court held that the later grant of letters of administration could not retrospectively impugn the validity of the notice to quit by the doctrine of "relation back".

48.
At 119-120, Bucknill LJ said this:

"I see no reason why in a case of necessity the President should not have legal power to give directions about the property. If he cannot do so, no one can. That is why the property is vested in him. If the President's position is such as I have indicated, I think he must have the legal capacity to receive a valid notice to quit, and such notice, after the proper lapse of time, has full legal effect. If no grant of administration has been made, there is no other person but the President to whom the notice to quit can validly be given. At any date subsequent to the death of the intestate, a grant of administration may be made. There is no time limit in this matter. If a grant made years after the death is to make invalid the notice to quit validly given to the President, confusion and uncertainty

will prevail and injustice may be done to those who have acted on the assumption that the notice to quit given to the President had full legal effect."

49.
Mr Lane also took me to Eastbourne Mutual Building Society v. Hastings Corporation [1965] 1 WLR 861, per Plowman J at 866-7 and 870 (founding his reasoning largely on the Privy Council's decision in Commissioners of Stamp Duties (Queensland) v. Livingston [1964] 3 WLR 963); Lall v. Lall [1965] 1 WLR 1249, per Buckley J at 1251; In re K, deceased [1986] 1 Ch 180, per Ackner LJ at 188; and Earnshaw v. Hartley [2000] Ch 155, CA, per Nourse LJ at 158.

50.
The clear conclusion from these authorities is, Mr Lane submitted, that Ms Carter did not become entitled to the benefit of the tenancy in equity until the deed of assent in her favour was executed in May 2018, after the grant of letters of administration. By then, he argued, the tenancy had already been validly terminated by the notice to quit, a copy of which was sent to the Public Trustee as required by section 18(1) of the LPMPA 1994.

51.
I was referred to the passage in the Encyclopaedia of Housing Law and Practice (also referred to by the judge below), at paragraph 1.2428.1:

'In contrast to the position for secure tenancies (see s.86A and 87, Housing Act 1985, above), there is no statutory right to succession for other family members [apart from a spouse or civil partner]. Many private registered providers, however, include contractual provision in their tenancy agreements permitting a family member to "succeed", provided that the family member was occupying the dwelling as his only or principal home at the time of the tenant's death and has resided with the tenant throughout the period of twelve months ending with the death. This is particularly common in agreements granted to former secure tenants where the landlord acquires a local authority's housing stock under a large scale voluntary transfer and the registered provider wishes to ensure that the tenant's rights are not reduced on the transfer. Such contractual "succession" cannot take effect by way of the tenancy vesting automatically in the contractual "successor" because as the tenancy must devolve under the tenant's will or the rules of intestacy. Where the family member is also the person who is entitled to the tenancy under the will or intestacy, there is no difficulty: the tenancy devolves to the family member and, as he is living in the dwelling as his only or principal home, the tenancy will remain assured: 1988 Act s.1. …'

52.
But on Mr Lane's case, that passage overlooks the period during which the Public Trustee is responsible for the estate of the intestate tenant and the effectiveness (on the authority of Fred Long & Son Ltd) of a notice to quit properly served and copied to the Public Trustee under section 18(1) of the LPMPA 1994 during that period.

53.
It follows, Mr Lane submitted, that the ground 7 basis for possession became available to Clarion only when the tenancy "devolved under the … intestacy of the former tenant". The tenancy had by then been terminated. Even were that not so, possession proceedings had been brought within a year of Monica Carter's death; the judge below was therefore bound to make the order for possession sought and wrong not to do so.

54.

For Ms Carter, Ms Stephanie Lovegrove submitted that this analysis was wrong. The statutory scheme treats the tenancy as continuing on the death of an assured tenant. A statutory trust arose in favour of Ms Carter on her mother's death because Ms Carter was in occupation and the tenancy was an ascertainable part of the residue of Monica Carter's estate. Alternatively, Ms Carter's right to call for administration of the estate was sufficient to make her a "tenant" within the definition in section 45(1) of the 1988 Act.

55.
Ms Lovegrove emphasised the following features of the housing legislation. The 1988 Act, unlike the 1985 Act, did not proceed on the basis that security of tenure ceases on the death of a tenant; see section 89 of the 1985 Act. By section 89(1)(a) of the 1985 Act, if a secure tenant dies and no person is qualified to succeed the tenant, the tenancy ceases to be secure (subject to immaterial exceptions) "when it is vested or otherwise disposed of in the course of the administration of the tenant's estate …".

56.
The 1988 Act created assured tenancies (section 1). Until the amendments applying to tenancies begun on or after 1 April 2012, the right of succession was limited to a spouse (and later a civil partner) but was automatic; on the death, the assured tenancy "vests … in the spouse or civil partner" provided that person was occupying the property as their main home. The tenancy "vests … in the spouse or civil partner (and … does not devolve under the tenant's will or intestacy)" (section 17(1) of the 1988 Act).

57.
Under the 1988 Act, ground 7 was introduced so that a person who inherits a tenancy where they are not entitled to succeed to it can be evicted on that mandatory ground. The ground 7 basis for possession had no forerunner or equivalent in the 1985 Act. It applies where there is no automatic (section 17) vesting of the assured tenancy in a spouse or civil partner but instead, the tenancy has "devolved under" a will or intestacy.

58.
Ms Lovegrove submitted that a tenancy can devolve "under" the intestacy where there is a statutory vesting of it in the Public Trustee at the moment of death; the devolution under the intestacy does not have to be to the persons entitled to administration of the estate. Under section 9(3) of the AEA 1925 (substituted by section 14(1) of the LPMPA 1994), the Public Trustee acquires no beneficial interest in the vested property and is not required to do anything other than hold the legal title to it pending grant of letters of administration.

59.
Ms Lovegrove then referred to the statutory trusts under the AEA 1925. The estate generally is held on trust for sale by personal representatives (section 33(1)). The residuary estate is held on the statutory trusts in accordance with section 46(1). If the intestate leaves issue but no spouse or civil partner, as in this case, it is held in trust for the "issue of the intestate", here Ms Carter and her siblings.

60.
During the period of limbo while the Public Trustee holds the legal title, Ms Lovegrove submitted, equity must contemplate that the person entitled on intestacy has a beneficial interest in the tenancy, provided that person meets the contractual conditions for succession, i.e. is a family member

occupying the dwelling as her home at the time of the tenant's death and has resided with the tenant throughout the period of twelve months ending with the death.

61.
Ms Lovegrove submits that the conditions for equity to recognise such a right are present: the property and the nature of the right are sufficiently certain and ascertained; and the person entitled to the equitable right is, likewise, identified and ascertained. The passage cited from the Encyclopaedia of Housing Law and Practice correctly explains the position and the judge was right to accept it.

62.
Ms Lovegrove said the authorities relied on by Clarion were decided under different statutory provisions; and that the Fred Long & Son Ltd case does not support the proposition that no beneficial interest "vested" in Ms Carter. The issue there was the validity of service on the Public Trustee, who holds only the legal title, not the equitable title. The decision does not exclude the possibility of another person having an equitable interest in the property concerned.

63.
The passage in Sherrin and Bonehill relied on by Clarion at 5-020 is followed up, Ms Lovegrove pointed out, with a more equivocal proposition:

"However, once the residuary estate of the intestate has been ascertained, it is arguable that the persons entitled on intestacy then have a beneficial interest in the estate."

64.
The footnotes to that passage indicate the view of the authors that whether the residuary estate has been ascertained "must be a matter of fact"; and the observation that in two of the cases, the statements of principle "are qualified by the phrase 'until the residue has been ascertained.'"

65.
Ms Lovegrove relied on a variation of trusts case, Bernstein v. Jacobson [2008] EWHC 3454 (Ch), per Blackburne J at [22]-[24] and [29]. The question was (at [18]) "whether the property held by the 11th defendant as executrix of Mr Bernstein's will is 'property held on trusts arising… under any will, settlement or other disposition' as those words are used in 1(1) [of the Variation of Trusts Act 1958]."

66.
In a passage full of negatives, the judge observed (on the wording of section 1 which is specific to variation of trusts cases, and in particular section 1(1)(d)), at [29]:

"… the fact that during the period of administration of an estate the beneficiaries, whether legatees or otherwise, have no legal or equitable interest in the assets comprised in the estate, but have no more than a right to require the deceased's estate to be duly administered, does not mean that even if it can be said that the property comprised in the estate is held on trusts arising under a will, settlement or other disposition, the legatees cannot establish an interest under those trusts so as to come within section 1(1)(a). It is clear that the reference to "interest" in that paragraph is not so confined. It is not in dispute that the 1958 Act authorises the court to give its approval on behalf of beneficiaries of a discretionary trust, notwithstanding that they have no fixed proprietary entitlement but only a right to be considered. …".

67.

Those citations, Ms Lovegrove contended, support her proposition that Ms Carter had a sufficient equitable interest on the facts here to succeed to the assured tenancy. She had an inchoate right to establish title to the tenancy pending her appointment as a personal representative. It was at that stage only a chose in action, but it sufficed to vest the assured tenancy in her in equity from the moment of death, thereby giving her the protection of its contractual terms.

68.
As an alternative, Ms Lovegrove submitted that even if that was wrong, her interest was sufficient to bring her within the wide definition of "tenant" in section 45(1) of the 1988 Act, which "includes a sub-tenant any person deriving title under the original tenant or sub-tenant"; while a "tenancy" "includes a sub-tenancy and an agreement for a tenancy or sub-tenancy".

69.
I have found this issue difficult. The point is moot, but in the end I am not quite persuaded by Ms Lovegrove's arguments, attractively though they were presented.

70.
I can see the force of the proposition that equity should recognise the reality of the situation, which must be quite common: a family member and carer who is not a spouse or partner lives with the tenant until the latter dies intestate and then succeeds to the tenancy without any concern about the hiatus while the Public Trustee bears responsibility for the intestate former tenant's estate.

71.
The difficulty only arises here because the tenancy predates the amendments made in the 2011 Act. The authors of the Encyclopaedia of Housing Law and Practice do not advert to the difficulty, perhaps because it is now in only a rare case such as this one that it will arise.

72.
In the end, I find myself unable to accept Ms Lovegrove's analysis because I think Ms Carter's interest, whether it is called an inchoate right or a chose in action or a putative or nascent equitable interest, is too weak to count as a tenancy in equity, either as a matter of analysis or applying the definitions of "tenant" and "tenancy" in the 1988 Act.

73.
The weight of authority, though not conclusive, is against Ms Lovegrove's analysis. The general rule that a person entitled on intestacy does not acquire an immediate equitable interest in the estate's property is settled and entrenched. While it is true that the relevant part of the estate here – the tenancy – and the only person eligible to succeed to it – Ms Carter - are both ascertained, it still took a statutory amendment under the 2011 Act, adding section 17(1A) to the 1988 Act, to secure the result that Ms Carter submits was already the position in equity.

74.
The tentative proposition in Sherrin and Bonehill (at the end of 5-020), the reasoning of Blackburne J in a different context in the Bernstein case, the passage in the Encyclopaedia and the wording of the definitions in section 45(1) of the 1988 Act are, taken together, not strong enough to overcome the weight of the Livingstone case and the other authorities leading up to and including those relied on by Mr Lane and mentioned above.

75.

I conclude by a narrow margin that I cannot agree with the statement of the judge below which he set out in his order, giving effect to his judgment: “the Defendant was, in her personal capacity, an assured tenant at the time of its receipt [i.e. receipt of the notice to quit] and expiry pursuant to sections 33 and 46 of the Administration of Estates Act 1925 …”.

Did Ms Carter become entitled on her mother’s death to enforce the contractual succession rights in the tenancy agreement?

76.
I ask myself, next, whether Ms Carter acquired a right enforceable against Clarion as beneficiary of a trust of the promise made by Clarion’s predecessor to Monica Carter that it would observe the terms of the tenancy agreement relating to succession after Monica Carter’s death. The judge did not consider this contention but it is before me by means of the respondent’s notice.

77.
Mr Lane submits, by his ground 3, that the judge was wrong to find that Ms Carter was entitled to benefit from the terms of a contract to which she was a stranger (res inter alios acta). As he points out, the Contracts (Rights of Third Parties) Act 1999 (**the 1999 Act**) could not assist her because it did not apply to this tenancy agreement as it was concluded before the 1999 Act entered into force and before the Act had effect from 11 May 2000 (see section 10).

78.
Mr Lane submitted, simply, that Clarion was not bound to honour the terms which were promised to the deceased and not to her daughter. It did not matter that this rendered the succession provisions in the tenancy agreement inoperable and devoid of practical force because they were owed only to a person unable to enforce them from beyond the grave.

79.
Clarion was therefore entitled to rely on the orthodox doctrine of privity of contract, Mr Lane argued. He added in oral argument that Monica Carter had retained power to alter the class of persons entitled to benefit; for example, by marrying. The terms of the tenancy were agreed in 1990 but Ms Carter was to move in only some 14 years later, in 2004.

80.
Ms Lovegrove countered that the benefit of Clarion’s promise was held on trust by the promisee, Monica Carter, for her daughter. The 1999 Act preserved the body of common law enabling that conclusion to be reached. The proposition in Ms Lovegrove’s skeleton argument was that:

“the Respondent is entitled to rely on the covenants in the tenancy agreement as a third party entitled to their benefit … [Monica Carter] was trustee of the Appellant’s promise to confer a benefit on a limited class of persons (being successors) of which the Respondent was the beneficiary”.

81.
She referred me to the passages in Chitty on Contracts in the 33rd edition at 18-080 to 18-088. These passages are now in the 34th edition at 20-080 to 20-089, which are to the same effect, citing the same cases. They are now read less often than they were before the 1999 Act, but they still govern old contracts made more than six months before it entered fully into force.

82.
As the learned editors of Chitty point out at 20-081, the cases do not speak with one voice. In some, the trust of a promise analysis is accepted; in others, it is not. “There is no point in trying to reconcile

all these cases". I respectfully agree, having re-read some of the cases referred to in the copious footnotes. Nevertheless, the editors helpfully "extract from the cases a number of principles which will serve as some guide …".

83.
The principles are, first, that as a general rule, there must be an intention to benefit the third party (20-082); second, that as a general rule, the intention must be irrevocable (20-083); and third, that an intention to benefit the third party, while necessary, is not sufficient since there must also be an intention to create a trust (20-084).

84.
Taking those factors in turn, I am satisfied, first, that Monica Carter must be taken to have agreed to the modified terms governing succession from 1990 onwards with the intention of conferring a benefit on a third party and not just for herself. That is because the succession terms were not capable of benefitting her; she would not be alive to enforce them.

85.
After the LVST, from 1990 onwards the modified terms were entered into as between Wherry and Monica Carter. She ceased to be a secure local authority tenant under the 1985 Act and became an assured tenant under the 1988 Act. The modified terms were "tenancy agreement type K (tenants previously holding tenancies with Broadland District Council)".

86.
The new succession terms in the "type K" tenancy agreement were plainly intended to preserve the succession regime applying to the tenancies of former secure council tenants such as Monica Carter. Clause 4(2), under the overall heading "Tenants' Rights" and the sub-heading "Security of Tenure", included a covenant that the landlord would "only … seek to recover possession … on one of the following grounds and in the following circumstances …".

87.
Within clause 4(2), clause 4(2)(vii) covered one such circumstance; the death of the assured tenant. In that event, where the tenancy had "devolved under the will or intestacy of the former Tenant" (clause 4(2)(vii)(a)), the landlord might seek possession relying on ground 7, but agreed that ground 7 would "not apply where there is an automatic vesting of the Tenancy in the spouse of the Tenant pursuant to Section 17(1) Housing Act 1988".

88.
Under clause 4(2)(vii)(b), the landlord could (where there was no automatic vesting under (a)), bring possession proceedings relying on ground 7, if it did so within 12 months (or a longer period allowed by the court) of the former tenant's death, as provided in ground 7. But this was subject to the covenant not to bring possession proceedings under ground 7 where six conditions are met, set out in clause 4(2)(vii)(d), under the Roman numerals (i)-(vi).

89.
Briefly, the first five are, (i) that the deceased former tenant must not herself have been a successor; only one succession is permitted; (ii) the successor must be a family member within section 113 of the 1985 Act, in occupation of the property as their only or principal home at the time of death; (iii) the successor must have lived with the deceased tenant for at least 12 months up to her death and continued to live there as her main home since the death; (iv) the landlord must be satisfied that the successor is entitled to have the tenancy vested in her under the tenant's will or intestacy; and (v) that

within three months of the tenant's death, the successor notifies the landlord in writing of "his/her claim to the benefit of these provisions…".

90.
I pause to note the striking reference in (v) to the successor's ability to "claim … the benefit of these provisions". This is the benefit Clarion says Ms Carter is unable to claim.

91.
It is in that context that I come to (vi): the sixth and final condition is that to avoid possession proceedings:

"within six months of the date of death of the Tenant or such further time as the Association shall, upon written application and in its discretion allow, he/she applies for the grant of Probate and/or Letters of Administration and/or seeks to have the Tenancy vested in him/her under the will of the Tenant or on intestacy".

92.
Clause 4(2)(vii)(e) then states that if at any time one or more of the conditions in (d) is not complied with, "the [landlord] Association may "determine the Tenancy in accordance with Ground 7 of Schedule 2 to the Housing Act 1988".

93.
I should also mention clause cl.5(8), also relied on by Ms Carter:

"By way of further rights, the Association agrees;-

….

(8) In the event that on the death of the Tenant who is not himself or herself a successor of a successor …. and there is no person who has the right to succeed under either of Clauses 4(2)(vii) or 4(4) [succession of a spouse] the Association agrees that if a person:

(i) Is a member of the Tenant's family (as that expression is defined in Section 113 of the Housing Act 1985);

(ii) Lawfully occupied the Premises as his or her only or principal home at the time of the Tenant's death and lawfully resided with the Tenant throughout the period of twelve months ending with the Tenant's death; and

(iii) Makes a claim in writing to the Association within three months of the Tenant's death or such longer time as the Association shall in its discretion allow;

the Association will use Ground 7 to determine this Tenancy and will enter into a new Tenancy with such person either of the Premises or at the discretion of the Association of other Premises that it considers to be more suitable and such Tenancy shall be upon such terms and conditions (having regard to the Tenant's Guarantee) as the Association considers appropriate…".

94.
Thus, a family member successor who is not an automatically qualifying spouse and who lived with the deceased tenant for a year or more at the property, as their only or main home, but who somehow does not qualify under clause 4(2)(vii), can apply within three months of the death and obtain a new tenancy of the property or of a different property considered suitable by the landlord.

95.
I am satisfied, as I have said, that those terms were entered into by Monica Carter with the intention of benefiting a third party, not herself, because by their nature they are not capable of benefiting her; they could only benefit a family member living on after her. The explicit reference in clause 4(2)(vii)(d)(v) to the successor being able to "claim … the benefit of these provisions" is the clearest possible indication of that.

96.
Next, the class of persons who could enjoy the particular benefit of succession was, at the time the terms were entered into in 1990, limited and has remained so since. The class was defined by the terms of the tenancy: only a spouse or civil partner, or a person entitled under a will or on intestacy who had actually lived with Monica Carter for upwards of a year before her death as that person's only or main home, could benefit.

97.
Next, I have to consider the principle that the intention to benefit the third party should not be revocable. "As a general rule, the intention to benefit the third party must be irrevocable; so that a contract will not normally give rise to a trust in favour of the third party if, under the terms of the contract, the promisee is entitled to deprive the third party of the benefit by diverting it to himself or to other beneficiaries not mentioned in the contract" (Chitty, 34th ed. at 10-083).

98.
Here, Monica Carter could not divert the benefit to herself; she would not be alive to enjoy it. She could determine which of the class could enjoy the benefit, but only in accordance with the terms of the contract. She could have married or entered into a civil partnership. She could have preferred as her co-resident one family member or another. She could have made a will. But she could not divert the benefit to "other beneficiaries not mentioned in the contract".

99.
I also consider that the circumstances here are such that I should infer the creation of a trust of the benefit of the promise made to Monica Carter by Wherry (and continued by Circle 33 and Clarion). The class of beneficiaries is readily ascertainable; it is defined in the terms of the tenancy agreement itself. The terms of the trust are clear. The benefit is a chose in action, namely the right to enforce the succession terms against the promisor, now Clarion.

100.
I conclude that the case is one where the equitable exception to the doctrine of privity of contract is made out. I reach that conclusion with no regrets or misgivings. The qualifying successors' equitable right to enforce the succession terms provides an antidote to what would otherwise be an unjust lacuna during the "limbo" period while the Public Trustee holds the legal title to the tenancy.

101.
I do not think Mr Lane's objection that Monica Carter could have altered the rights of the class of beneficiaries - by marrying, making a will, or choosing one co-resident rather than another - is a valid objection to the trust of a promise analysis. If she had taken such a step, she would indeed be altering the rights of the class of beneficiaries inter se, but she would be doing so within the four corners of the tenancy contract, not outside it.

102.

I am conscious that parliament later (too late for Ms Carter) intervened by amending section 17 of the 1988 Act, adding subsection (1A) which gives statutory force, by vesting on death and not by devolving under a will or intestacy, to the succession rights of a first successor who is not an occupying spouse or civil partner and whose succession is in accordance with “an express term of the tenancy” that makes provision for that person to succeed to it.

103.
I do not think that legislative intervention alters the analysis and conclusion, in this instance. The contractual succession rights entered into in 1990 were useless if not transmissible. An occupying spouse would enjoy statutory succession rights anyway, even without the contract terms. For an occupying non-spouse family member, neither section 17(1A) of the 1988 Act nor the 1999 Act could assist. The answer lies in equity and the common law.

104.
For those reasons, I conclude that Ms Carter was entitled to rely as against Clarion on the succession terms in the tenancy agreement. I propose to make a declaration to that effect. Whether she is entitled to succeed to the assured tenancy, or be granted a fresh assured tenancy, therefore depends on whether she has sufficiently complied with the contractual pre-conditions of entitlement, which I now consider.

Did Ms Carter comply with the contractual conditions necessary to succeed to the tenancy?

105.
These are found in clause 4(2)(vii)(d) or, if necessary, clause 5(8). The latter is only needed if there is no person entitled to succeed under clause 4(2)(vii).

106.
Mr Lane in his skeleton argument in this appeal attempted to put in issue whether Ms Carter had satisfied the condition in clause 4(2)(vii)(d)(iv), requiring the landlord to be satisfied that the successor is entitled to have the tenancy vested in her under the tenant’s will or intestacy. However, at paragraph 57 of his judgment, the judge referred to this as “common ground”.

107.
I agree with Ms Lovegrove that it is not now open to Clarion to resile from the concession that (iv) was satisfied. In any case, it seems highly likely that the concession was correctly made, for Ms Carter wrote to Ms Greetham on 9 September 2017 “regarding my application for succession to tenancy” and “sending you documentation as requested”.

108.
In the same letter she referred back to a telephone conversation with Ms Leon (who was not called). It is inconceivable that Clarion would have gone to such trouble to counter the proposition that the property was Ms Carter’s main home during the last year of her mother’s life, unless it were satisfied that Ms Carter was a person entitled under the will or intestacy of her mother. I dismiss Clarion’s attempt to withdraw its properly made concession.

109.
Was the judge entitled to find that Ms Carter satisfied the requirements of clause 4(2)(vii)(d)(vi)? This is a question partly of interpretation and partly of fact. As to the latter, in Henderson v Foxworth Investments Ltd [2014] 1 WLR 2600, Lord Reed JSC (as he then was) observed at [67] that “an

appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified".

110.
Mr Lane submitted (under ground 6 of his appeal) that letters of administration were not sought within six months of Monica Carter's death; Ms Carter's solicitors referred to the six requirements of clause 4(2)(vii)(d) in their letter of 30 October 2017 but did not seek an extension of time. Therefore, Mr Lane submitted, the judge could not find that Ms Carter complied with requirement (vi).

111.
Ms Lovegrove submitted that the judge was right; Ms Carter had complied with condition (vi) because she sought within the six month period to have the tenancy vested in her under the will or intestacy of Monica Carter. Ms Carter was notified by letter of 16 October 2017 that she was not entitled to succeed to the tenancy; when she queried this she was asked on 1 November to complete a succession form and did so, all within the six month period.

112.
In oral argument, Ms Lovegrove added that the concluding words of (vi) ("and/or seeks to have the Tenancy vested in him/her under the will of the Tenant or on intestacy") cannot require an application for probate or letters of administration; since that is covered in the preceding words ("he/she applies for the grant of Probate and/or Letters of Administration").

113.
In my judgment, there was ample material entitling the judge to find that Ms Carter satisfied the requirement at (vi). First, I am satisfied that the concluding words "seeks to have the Tenancy vested in him/her under the will of the Tenant or on intestacy" do not merely repeat the preceding option of applying for probate of letters of administration. Ms Lovegrove is right about that. The two options would be one and the same and the concluding words would be otiose.

114.
The meaning of "vested in him/her under the will … or on intestacy" is not technical. The phrase simply means that the person claiming entitlement to the provisions seeks to succeed to the tenancy as a person who qualifies for succession under requirements (i)-(iv), particularly (iv).

115.
The scheme of (i)-(vi) is that a qualifying successor must make the initial claim to entitlement to the benefit of the provisions within three months of the death (see (v)); and having done so, must then within six months of the death (or longer if the landlord grants an extension of time applied for in writing), make a positive request to succeed to the tenancy in accordance with those provisions.

116.
Furthermore, there is nothing in the wording of (vi) which requires a written application for an extension of time to be made within the period of six months of the death. As in the case of rules of court setting time limits, an extension of time may be sought and granted after time has expired (though it is generally better to apply before the time limit has expired).

117.
As already noted, Ms Carter wrote to Ms Greetham on 9 September 2017 "regarding my application for succession to tenancy" and "sending you documentation as requested". She thereby fulfilled

requirement (vi). The basis of her application as an inheritor under a will or intestacy was established by fulfilling condition (iv) which, it was rightly conceded, was met.

118.
The judge's decision that requirement (vi) was fulfilled is, I conclude, unassailable and correct. Ms Carter did not need an extension of time. However, if she had needed one, she applied for one by her new solicitors' letter of 7 June 2018, albeit after rather than before expiry of the six month period. It was not considered by Clarion, a point relevant to the so-called "public law defence" addressed below.

119.
It follows that Ms Carter does not need to rely on clause 5(8) of the tenancy agreement. It only comes into play if there is no person entitled to succeed under clause 4(2)(vii). Ms Carter was entitled to succeed under clause 4(2)(vii).

Was a copy of the notice to quit served on the Public Trustee before expiry of the notice?

120.
I consider next whether I should uphold the judge's decision that the service on the Public Trustee of a copy of the operative notice was not proved and that the date of receipt was unclear. This issue is diminished in importance by the reasoning above. Nevertheless I will address it briefly.

121.
The judge found at paragraph 56:

"There is no reliable way of establishing the date of service. Despite repeated requests en route to this hearing no certificate of service has been produced. The notice which was received by the Public Trustee was apparently sent by Lorinda Leon, but the claimants have chosen not to obtain a statement from her. Given the ease of obtaining a statement, its absence is highly suspicious. It is so suspicious that I conclude on the balance of probabilities that the claimants cannot prove when it was sent and, therefore, I cannot ascertain with reasonable certainty the quitting date. As a result, the notice to quit is invalid."

122.
After the decision below, the Court of Appeal decided Gateway Housing Association v Personal Representatives of Ali, deceased [2021] 1 WLR 289. At [53], Sir Terence Etherton MR addressed the requirement in section 18(1) of the LPMPA 1994 to send a copy of a notice to quit to the Public Trustee. The provision should, he said, be "interpreted to require service of the copy under section 18(1)(b) prior to expiry of the operative notice".

123.
Mr Lane submitted (on the fourth ground of his appeal), among his other points, that even without Ms Leon's evidence it was plain that if the judge had applied that test, the notice was properly copied to the Public Trustee and received before expiry of the notice. He also submitted that the judge had applied too high a standard of proof.

124.
Ms Lovegrove addressed this issue in her respondent's notice because of the supervening case law. She submitted that the notice was, in any event, defective because the date of expiry was not reasonably ascertainable; and that the judge had been entitled to find that it may not have been received by the Public Trustee before expiring on 26 February 2018.

125.
I reject the suggestion that the judge applied the wrong standard of proof. The requirement of "reasonable certainty" appears to have addressed the quitting date, not the issue as to when the notice was sent and whether it was received in time. The latter issue was considered on the balance of probabilities.

126.
However, I am satisfied that the notice expired on 26 February 2018 and that this was the clear and ascertainable quitting date. The Public Trustee's confirmation of receipt in its letter of 20 March 2018 and confirmation that the notice was registered on 27 February 2018 makes it highly unlikely that the notice was received by the Public Trustee on that very day, 27 February 2018.

127.
As a matter of common sense, it is much more likely that it was received on or before 26 February 2018 and registered on the day after it expired; and that it was therefore properly served prior to expiry of the notice. If it were necessary to do so, I would substitute for the judge's decision a finding to that effect.

Was the judge right to dismiss the claim on the basis that the notice to quit and decision to claim possession were unlawful on public law grounds?

128.
I will consider, next, whether the judge was right to decide that Ms Carter's "public law defence" succeeded. This issue would be of importance to the outcome only if she had failed in her argument that she was entitled to enforce and did effectively enforce, the contractual succession provisions in the tenancy agreement, contrary to my decisions above on those issues.

129.
The policy document, Succession for Lifetime Tenants, referred to the "succession rights" of a spouse, partner or family member (paragraph 2.2). It was important that the tenancy agreement be "carefully checked" (ibid.), obviously to ascertain what those rights are. At paragraph 4.1, the document referred to one kind of succession as "contractual succession".

130.
This was described as a person succeeding to a tenancy "through their tenancy agreement, without the need for our consent"; and was contrasted with "discretionary succession". Contractual succession was treated in more detail in section 8. A contractual succession "is where a succession right is granted in the tenancy agreement … where the tenancy agreement contains a clause allowing them to succeed as a right" (paragraph 8.1).

131.
Paragraph 8.2 explains that this is different to a discretionary succession; in a contractual succession, the right to succeed is "through a clause in the tenancy without the landlord having to consent … or being able to refuse it. They are not statutory rights but are treated in a similar way".

132.
Mr Lane submitted, on his fifth ground of appeal, not that the policy had been followed but that it was highly likely that the outcome would have been no different if it had been, a test he derived from Aldwyck Housing Group Ltd v Forward Ltd [2020] 1 WLR 584, per Longmore LJ at [25].

133.

In support of that proposition, he submitted that letters of administration were not granted until some 10 months after Monica Carter's death; that the operative notice to quit was served more than six months after her death, after ample time to obtain letters of administration; that Ms Carter owned another property; and that she would not qualify for housing under Clarion's allocation policy.

134.
Ms Lovegrove submitted, first, that whether the "highly likely" test in Aldwyck Housing Group Ltd is the correct test is the subject of a pending application for permission to appeal to the Supreme Court in Luton Community Housing Ltd v Durdana [2020] HLR 27. She reserved her position in that regard.

135.
Ms Lovegrove countered that the judge's findings were damning, based on Ms Greetham's admissions; that much of the delay arose from Clarion unreasonably refusing to accept that the property was Ms Carter's home and had been for many years, just because she owned another property. Clarion had clearly closed its mind, failed to apply its own policy, failed to consider the application to extend time and fixated on its irrelevant allocation policy.

136.
I am satisfied that the judge's reasoning and conclusions on this issue are correct, save that I would not have used the phrase "quash the notice to quit", as he did. More accurately, he should have said that he would treat the notice to quit and the decision to bring ground 7 possession proceedings as unlawful, tainted as they were by illegality and procedural unfairness; and that he would therefore dismiss the claim for possession.

137.
He was unquestionably right to decide, applying the "highly likely" test, that if the policy had been followed, the outcome would probably have been different. The factors relied on by Mr Lane are unpersuasive. They simply repeat and invoke some of the same errors as already made. The policy treats contractual succession rights as though they were statutory. If Clarion had done that, it would have recognised Ms Carter's right to succeed to the tenancy.

Was the judge right to find that granting possession of the property would violate Ms Carter's rights under article 8 of the ECHR?

138.
In his seventh and final ground of appeal, Mr Lane attacks the decision of the judge below to find in favour of Ms Carter on her defence based on article 8 of the ECHR. On this point, the reasoning of the judge was, with respect, non-existent. He merely stated his conclusion at the request of the parties after giving judgment on the other points.

139.
Consequently, I might have remitted the article 8 issue if it had been necessary to do so. It is not. For the reasons already given, the appeal must fail and the article 8 point need not be considered further. I strongly suspect it should not have succeeded as a free standing independent defence, separate from other defences, because an article 8 defence to a possession claim is wholly exceptional and Ms Carter is not especially frail or vulnerable.

Conclusion and disposal

140.

The appeal will be dismissed for the reasons given above. I am grateful to counsel for their lucid submissions in what has proved to be a complicated set of issues. I will hear counsel on any consequential issues and on the appropriate form of order, if it is not agreed.