Neutral Citation No: 2018 EWHC 1873 (Ch)

Case No: HC-2017-001841 & 001842

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUSTS AND PROBATE LIST (ChD)

The High Court of Justice
Rolls Building
Fetter Lane
London EC4A 1NL

Date: 23 July 2018

Before:

Miss Joanna Smith QC sitting as a Deputy Judge of the High Court

- -

BETWEEN:

ROYAL BROMPTON & HAREFIELD HOSPITALS CHARITY

Claimant

- and -

(1) ANTHONY CHARLES ROUPELL
(2) MURRAY HEAD

Defendants

Mr Michael Paget (instructed by **Lee Bolton Monier-Williams**) for the Claimant
Mr Mark Sefton QC (instructed by **Withers LLP**) for the Defendants

Hearing dates: 10 and 11 July 2018

Miss Joanna Smith QC:

Introduction

1. By two separate claims commenced on the same day in June 2017, the Royal Brompton and Harefield Hospitals Charity seeks possession of two residential properties situated respectively at 14 and 14A Neville Street, London, SW7 3AS (together referred to as "**the Properties**"). The claim forms were accompanied by Certificates of Reasons which explained that they had been commenced in the High Court and satisfied Practice Direction 55A PD 1.3 because they dealt with the effect of historic leases granted over 30 years' ago, and the effect that the Landlord's status has on those leases and their ongoing occupation. In particular, it was asserted that section 13 of the Rent Act 1977 prevented the grant of any protected or regulated tenancy, that the court would need to consider the application of section 38 of the Housing Act 1988 and that these issues also affected a number of the Claimant's other tenants.

2. By consent on 21 August 2017, Master Clark ordered that the claims be heard together and the trial came before me over 2 days on 10 and 11 July 2018.

Background

3. The Claimant, a private charity, is the freehold owner of the Properties and is the successor landlord of the Defendants.

4. Mr Roupell, a gentleman of 69 years of age, is the tenant of 14 Neville Street. He was granted a 20 year lease on 21 October 1981 (the 20 years expiring in October 2001) and has lived there ever since.

5. Mr Head, a gentleman of 71 years of age, is the tenant of 14A Neville Street. Although the Claimant originally sought to put Mr Head to strict proof, it now appears to accept that Mr Head took an assignment of an existing fixed term tenancy of 7 years in 1970 (the fixed term expiring on 13 October 1973) and has also lived there ever since.

6. It is now common ground that until very recently, the Defendants have been treated, at all times during their occupation of the Properties, as if they were tenants under the Rent Acts, with the statutory protections that affords.

7. Notwithstanding their long tenure in the Properties, on 9 November 2016 the Claimant served notices on each Defendant purportedly pursuant to section 21 of the Housing Act 1988, seeking possession. The Claimant asserts that the Defendants are both now assured shorthold tenants and that accordingly it is entitled to possession. It is common ground that the rent to which both Properties are presently subject is very substantially below the market rent and the Claimant wishes to maximise the returns it is able to recover from its assets.

8. Mr Paget, acting on behalf of the Claimant, put its case for possession in the following way:

   (1) The terms of section 13 of the Rent Act 1977 (set out further below) exclude tenancies from having any protected status under that Act where the interest of the landlord under that tenancy (amongst other things) "*is held in trust for Her Majesty for the purposes of a government department*" such that it gains Crown immunity.

   (2) The Properties, which both formed part of the historic endowments of the Brompton Hospital (founded in 1841 as the Hospital for Consumption and Diseases of the Chest, and re-named from time to time, but referred to throughout this Judgment as "**the Brompton Hospital**"), were both "*held in trust for Her Majesty for the purposes of a government department*" by reason of (i) the provisions of the National Health Service Act 1946, in particular sections 7 and 13; alternatively (ii) the provisions of the National Health Service Reorganisation Act 1973 ("**the 1973 Act**"), the replacement from 1 April 1982 of the Board of Governors (until then responsible for managing the Brompton Hospital) by the Special Health Authority and the consequent transfer of assets to the Special Health Authority.

(3) Owing to the Crown immunity obtained in 1946, alternatively 1982, the Properties continued to "*belong to the Secretary of State*" as at the time of enactment of the National Health Service and Community Care Act 1990 such that the removal of Crown immunities provided for by section 60 of that Act was excluded in their case by virtue of the provisions of Schedule 8, paragraph 19. Thus, says the Claimant, the tenancies of the Properties continued to be governed by section 13 of the Rent Act 1977 at all material times after the 1990 Act.

(4) In 2015, the Claimant charity commenced its transition to an independent model and that transition was completed on 1 April 2015 when it became a fully independent charity by order of the Charity Commission. As from this date, the Claimant accepts that section 13 of the Rent Act 1977 ceased to apply. It maintains however, that at this point, by virtue of the provisions of section 38 of the Housing Act 1988 (which is concerned with the transfer of existing tenancies from the public to private sector), the tenancies became assured tenancies within the meaning of that Act and further, that because the tenancies had become assured tenancies after February 1997, they were in fact assured shorthold tenancies pursuant to section 19A of the Housing Act 1988.

(5) In all the circumstances, the Claimant asserts that the fixed term tenancies have expired and the entitlement to occupation under the assured shorthold tenancies has terminated.

9. The Defendants, represented by Mr Sefton QC, oppose the claims for possession on the grounds that Crown immunity never applied to these Properties and that at all times they have benefitted from the protection of the Rent Acts; alternatively, that the Claimant is estopped from treating the Defendants any differently from the way it would have been required to treat them had they benefitted from Rent Act protection. If their first two arguments are wrong and assuming that Crown immunity did apply until 1 April 2015 such that the Properties were then transferred from public into private ownership, the Defendants say that from that date they

became assured tenants pursuant to section 38 of the Housing Act 1988 but not assured shorthold tenants.

The Issues

10. Against the background set out above, the issues requiring determination by the court are threefold:

    (1) Was there Crown immunity, whether as at 1946 or 1982, which operated until 1 April 2015 to exclude the Properties from Rent Act protection?

    (2) If there was Crown immunity, is the Claimant nevertheless estopped from asserting that it may treat the Defendants differently to the way in which they would have been entitled to be treated had they benefitted from Rent Act protection; and

    (3) If there was Crown immunity until 1 April 2015 and there is no operable estoppel, what is the status of the Defendants after that date; are they assured tenants pursuant to section 38 of the Housing Act 1988 (in which case the Claimant is not entitled to an order for possession) or are they assured shorthold tenants (in which case there is nothing to preclude the court from making such an order)?

The Witnesses

11. Although the issues identified above turn to a significant extent on issues of law, the parties each relied on evidence of fact.

12. The Claimant relied on a witness statement and oral evidence from Mr Richard Hunting, the chairman of trustees and director of the Claimant since 2012. It became apparent during cross examination that Mr Hunting's statement contained a number of assertions in support of the Claimant's case which he could not properly make from his own knowledge. Furthermore, he had obtained much of his understanding as to the historical status of the Claimant's predecessors from conversations with the Claimant's property manager and its lawyers and had not sought to familiarise himself at all with many of the documents disclosed by the

Claimant. In the circumstances and to the extent (if at all) that Mr Hunting's evidence is in any way relevant to the live issues in the case, I am unassisted by it. I note that it was not relied upon by the Claimant in its closing submissions.

13. Mr Roupell and Mr Head both gave convincing oral evidence in support of their respective witness statements. Although they were both challenged on points of detail much of their evidence appears to be accepted by the Claimant and their evidence is in any event only relevant to the question of whether there is an estoppel.

The First Issue: Was there Crown Immunity

The Rent Act 1977

14. As I have already said, the claim to Crown immunity arises by reason of the provisions of the Rent Act 1977 (and in particular section 13). This was a consolidating statute and, given that it would not have applied to Mr Head in the early years of his occupation, I should record that there are no material differences between the Rent Act 1977 and its immediate predecessor, the Rent Act 1968.

15. Section 1 of the Rent Act 1977 characterised a tenancy under which a dwelling house is let as a separate dwelling as a "protected tenancy" during the contractual term of the initial letting. Thereafter, assuming continuing occupation, the occupier becomes a "statutory tenant" under section 2 and is entitled to the benefit of all the terms and conditions of the original contract of tenancy so far as they are consistent with the provisions of the Act (section 3).

16. Section 98 of the Rent Act 1977 provides that "*a court shall not make an order for possession of a dwelling-house which is for the time being let on a protected tenancy or subject to a statutory tenancy unless the court considers it reasonable to make such an order and either (a) the court is satisfied that suitable alternative accommodation is available for the tenant or will be available for him when the order in question takes effect, or (b) the circumstances are as specified in any of the Cases*

in Part 1 of Schedule 15 to this Act". It is not suggested by the Claimant that any of these criteria is met here.

17. Parts III and IV of the Act imposed a system of rent control, by which a landlord or a tenant could apply to have a rent registered for the property. Once registered, the rent was to be a "fair rent" and a protected or statutory tenant could not be charged any more by way of rent than that registered amount.

18. Historically, the Crown was not bound by the Rent Acts and this remained the position under section 13 of the Rent Act 1977 which, as originally enacted, was in the following terms:

"*Section 13: Landlord's interest belonging to Crown*

(1) A tenancy shall not be a protected tenancy at any time when the interest of the landlord under that tenancy belongs to Her Majesty in right of the Crown or of the Duchy of Lancaster or to the Duchy of Cornwall, or to a government department or is held in trust for Her Majesty for the purposes of a government department.

(2) A person shall not at any time be a statutory tenant of a dwelling-house if the interest of his immediate landlord would at that time belong or be held as mentioned in subsection (1) above."

19. The exemption in section 13 is a personal exemption which ceases to apply when the Crown transfers its landlord's interest under a residential tenancy to a purchaser who is capable of being the landlord under a Rent Act 1977 tenancy; subject to any other statutory criteria, the tenancy would then become a regulated tenancy (the umbrella term used to describe protected and statutory tenancies under the Rent Act 1977). The effect of section 13 is therefore suspensory not extinctive, or, to use a description adopted by Mr Paget, "ambulatory". A tenant may move in and out of status as a regulated tenant from time to time depending upon the identity of the Landlord and whether the Landlord's interest belongs to the Crown for the purposes of section 13 of the Act.

20. Whilst there are some slight differences between section 13 of the Rent Act 1977 and its equivalent section in the Rent Act 1968 (namely section 4), and indeed some slight differences between section 13 of the Rent Act 1977 and the version of section 13 that was then substituted by section 73(1) of the Housing Act 1980 (the version that remains in force today), none of these differences affects the question that the court has to decide in these proceedings, which (it is now agreed following answers by the Claimant to Part 18 requests posed on the point by the Defendants) is whether "*at any time*", the "*interest of the landlord under the tenancy…is held on trust for Her Majesty for the purposes of a government department*". If this cannot be established the Claimant does not contend that any of the other possible scenarios in section 13(1) is applicable.

21. The Claimant advances a primary and a secondary case as to the date on which a trust came to be imposed on the landlord's interest in the two Properties such that the beneficiary under that trust was Her Majesty for the purposes of a government department: 1946, alternatively 1982. It asserts that on either case, once the Properties became subject to Crown immunity, they continued to be so subject (such that they fell outside the protection of the Rent Acts) until 1 April 2015 when it is accepted that, whatever the position previously, the Properties came under private ownership such that Crown immunity could no longer apply.

22. Mr Paget accepts that if he is wrong in his primary and secondary case, then the Defendants would both be regulated tenants under the Rent Act 1977 and the terms of sections 38 and 19A of the Housing Act 1988 would provide no assistance. In that case, the Claimant would not be entitled to an order for possession.

23. I turn now to consider the Claimant's primary and secondary case on Crown immunity.

<u>The Primary Case: The National Health Service Act 1946</u>

24. The Claimant's primary case depends upon the interpretation of various sections of the National Health Service Act 1946 ("**the 1946 Act**") which provided for the establishment of a comprehensive health service for England and Wales. This

involved, amongst other things, the nationalisation of what the 1946 Act refers to as "*voluntary hospitals*", that were already in existence at the time of the creation of the NHS. These were hospitals not carried on for profit and not provided by local or public authorities (section 79(1)).

25. The voluntary hospitals in existence at the time included a number of teaching hospitals: hospitals or groups of hospitals which provided for university facilities for undergraduate or post-graduate clinical teaching. It is common ground that the Brompton Hospital, at that time known as The Hospital for Consumption and Diseases of the Chest, fell within this category and was designated as a teaching hospital by *The National Health Service (Designation of Teaching Hospitals (No 2)) Order 1948 (SI 1948 No. 979)* made pursuant to powers given to the Minister of Health under section 11(8) of the 1946 Act.

26. In what appears to have been a political compromise designed to secure the support of the teaching hospitals for the creation of the NHS, teaching hospitals were treated differently from voluntary hospitals under the 1946 Act, particularly when it came to their endowments, defined in section 7(10) of the 1946 Act as property "*held by the governing body of the hospital or by trustees solely for the purposes of that hospital*", including "*interests in or attaching to land*", other than interests in premises forming part of, or used for the purposes of a voluntary hospital, or other movable property used in or in connection with such premises. It is common ground that the Brompton Hospital's interests in the Properties (which were residential and not used for the purposes of a voluntary hospital) formed part of its endowments for the purposes of the 1946 Act.

27. Before looking at the Claimant's primary case, I need to set the scene by reference to some of the detailed provisions of the 1946 Act.

28. Section 1 placed the duty of promoting the establishment of a comprehensive health service in England and Wales on the shoulders of the Minister of Health, which office of state had been established by section 1 of the Ministry of Health Act 1919 (which

remained in force at the time of the 1946 Act but has since been repealed). Section 7 of the Ministry of Health Act 1919 provided as follows:

"7(1) The Minister may sue and be sued by the name of the Minister of Health and may for all purposes be described by that name….

(3) For the purpose of acquiring and holding land, the Minister for the time being shall be a corporation sole by the name of the Minister of Health, and all land vested in the Minister shall be held in trust for His Majesty for the purposes of the Ministry of Health".

Mr Sefton pointed out that the language used in this section echoed down into section 13 of the Rent Act 1977.

29. Section 6 of the 1946 Act provided for the transfer of voluntary hospitals to the Minister:

"(1) Subject to the provisions of this Act, there shall, on the appointed day, be transferred to and vest in the Minister by virtue of this Act all interests in or attaching to premises forming part of a voluntary hospital or used for the purposes of a voluntary hospital, and in equipment, furniture or other movable property used in or in connection with such premises, being interests held immediately before the appointed day by the governing body of the hospital or by trustees solely for the purposes of that hospital, and all rights and liabilities to which any such governing body or trustees were entitled or subject immediately before the appointed day, being rights and liabilities acquired or incurred solely for the purposes of managing any such premises or property as aforesaid or otherwise carrying on the business of the hospital or any part thereof, but not including any endowment within the meaning of the next following section or any rights or liabilities transferred under that section.

…

(4) All property transferred to the Minister under this section shall vest in him free of any trust existing immediately before the appointed day, and the Minister may use any such property for the purpose of any of his functions under this Act, but shall so far as practicable secure that the objects for which any such property was used immediately before the appointed day are not prejudiced by the provisions of this section" (emphasis added).

30. At this stage I simply note the express carve out of endowments in the final few lines of section 6(1) from the provisions for transfer and vesting in the Minister.

31. Section 7 made provision for endowments of voluntary hospitals, and in doing so, it distinguished between endowments held by teaching hospitals, which were to be transferred to a Board of Governors, and those held by other voluntary hospitals which were to be transferred to the Minister:

"(1) Where any voluntary hospital to which the last foregoing section applies is, before the appointed day, designated by the Minister under this Part of this Act as a teaching hospital or is one of a group of hospitals so designated, all endowments of the hospital held immediately before the appointed day shall on that day, by virtue of this Act, be transferred to and vest in the Board of Governors constituted under the following provisions of this Part of this Act for the teaching hospital.

(2) All such endowments shall vest in the Board free of any trust existing immediately before the appointed day and shall be held by the Board on trust for such purposes relating to hospital services or to the functions of the Board under this Part of this Act with respect to research as the Board think fit, and the Board may dispose of any property comprised in those endowments and hold the proceeds thereof on trust for any of the said purposes.

…

(4) All endowments of a voluntary hospital to which the last foregoing section applies, other than a hospital to which the foregoing provisions of this section apply, being endowments held immediately before the appointed day, shall on that day be transferred to and vest in the Minister by virtue of this Act free of any trust existing immediately before that day; and the Minister shall establish a fund, to be called the Hospital Endowments Fund, to which he shall transfer all such endowments …"

32. Section 7(5) provided that Regulations would provide for the control and management of the Hospital Endowments Fund by the Minister or any person authorised to act on his behalf and section 7(7), on which Mr Paget relies for the purposes of his argument, provided as follows:

"(7) Every Board of Governors and Hospital Management Committee shall, in the case of any endowments transferred to them under this section, and the Minister shall, in the case of any endowment transferred to him and the Hospital Endowments Fund under this section, secure, so far as is reasonably practicable, that the objects of the endowment and the observance of any conditions attaching thereto, including in particular conditions intended to preserve the memory of any person or class of persons, are not prejudiced by the provisions of this section."

33. In addition to making provision for the endowments of teaching hospitals to be transferred to a Board of Governors, the 1946 Act also imposed on Boards of Governors the duty "*to manage and control the hospital on behalf of the Minister*" (section 12(3)).

34. Section 13 was concerned with the legal status of, amongst others, a Board of Governors:

"(1) A Regional Hospital Board and the Board of Governors of a teaching hospital shall, notwithstanding that they are exercising

functions on behalf of the Minister, and a Hospital Management Committee shall, notwithstanding that they may be exercising functions on behalf of the Regional Hospital Board, be entitled to enforce any rights acquired, and shall be liable in respect of any liabilities incurred (including liabilities in tort), in the exercise of those functions, in all respects as if the Board or Committee were acting as a principal, and all proceedings for the enforcement of such rights or liabilities, shall be brought by or against the Board or Committee in their own name.

(2) A Regional Hospital Board, Board of Governors, or Hospital Management Committee shall not be entitled to claim in any proceedings any privilege of the Crown in respect of the discovery or production of documents, but this subsection shall be without prejudice to any right of the Crown to withhold or procure the withholding from production of any document on the ground that its disclosure would be contrary to the public interest" (emphasis added).

35. As to the constitution of Boards of Governors of teaching hospitals, the Third Schedule to the 1946 Act provided at Part III that "*The Board of Governors of a teaching hospital shall consist of a chairman appointed by the Minister and such number of other members so appointed as the Minister thinks fit*". In supplementary provisions at Part IV of the same Schedule, the 1946 Act made clear the status of Boards of Governors: "*Regional Hospital Boards and Boards of Governors of teaching hospitals and Hospital Management Committees shall be bodies corporate with perpetual succession and a common seal and power to hold land without licence in mortmain*".

Discussion

36. Mr Paget submitted that on a true interpretation of the 1946 Act and, in particular by reference to what he maintained was the combined effect of sections 7 and 13, Crown immunity attached to the Board of

Governors when it granted a tenancy or became a landlord of a tenancy. He said that this interpretation of the 1946 Act was clear and unambiguous, such that reference to parliamentary material as an aid to construction would be inadmissible.

37. His argument was as follows:

(1) When the National Health Service was created all property was transferred to the Minister of Health who had Crown immunity. That was either directly for hospital premises under section 6 of the 1946 Act or indirectly to endowment funds under section 7 of the 1946 Act. Those endowment funds were either general (the Hospital Endowment Fund) or specific (teaching hospital Board of Governor funds).

(2) Section 7(7) makes it clear that assets transferred to the Board of Governors and assets transferred to the Minister are to be treated "in the same way" and effectively implies that the Minister has control over the Board of Governors, who are acting on his behalf.

(3) The reference to the exercise of functions on behalf of the Minister in section 13 must be a reference, amongst other things, to the holding by the Board of Governors of endowment funds under section 7(1) and (2). Section 13 has a general application to all of the functions undertaken by the Board of Governors; it makes clear that Crown immunity attaches to each of the bodies referred to therein except as identified in section 13(2), which provides for limited exceptions.

(4) Whilst the Board of Governors was required by the provisions of the 1946 Act effectively "to wear two hats", the first in holding endowments under section 7(1) and the second in managing and controlling the hospital under section 12(1), nevertheless the

reference to the exercise of "*functions on behalf of the Minister*" in section 13(1) was a reference to both.

(5) This interpretation is supported by the provisions of Part III of the Third Schedule of the 1946 Act dealing with the constitution of Boards of Governors in teaching hospitals which evidences the control exercised by the Minister over such Boards, in particular, that the chairman and members of the Board of Governors are to be appointed by the Minister. This evidences an intention on the part of Parliament that the Boards of Governors were to be administered under the auspices of the Minister.

38. Mr Paget referred me to *Re Marjoribanks' Indenture: Frankland v Ministry of Health [1952] 1 All ER 191* but this does not assist the Claimant. It was concerned only with whether property fell within the meaning of section 6(1) of the 1946 Act.

39. In my judgment the interpretation for which the Claimant contends is neither clear nor unambiguous on the face of the 1946 Act and is, in fact, unsustainable. I say that for the following reasons – many of which adopt the written and oral submissions made by Mr Sefton:

(1) Section 6 provides for hospital property in the form of hospital premises and the like to be "*transferred to and vest in the Minister*". Pursuant to section 6(4), such transfer is to be "*free of any trust*" existing previously. Once transferred, property falling within section 6(1) would likely be subject to Crown immunity pursuant to the provisions of section 13 of the 1977 Act. However, section 6 makes it express that any such transfer excludes endowments within the meaning of section 7.

(2) By contrast, section 7 provides for endowments of teaching hospitals to be "*transferred to and vest in the Board of Governors*". I agree with Mr Sefton that the contrast between

these two provisions is striking, and only becomes clearer when one sees how endowments held by voluntary hospitals that are not teaching hospitals are dealt with in section 7(4): unlike the endowments of teaching hospitals, all other endowments to voluntary hospitals <u>are</u> to be "*transferred to and vest in the Minister*" free of any trust who is then to transfer those endowments into the Hospital Endowments Fund. There is express provision in relation to the Hospital Endowments Fund in section 7(5) for regulations to provide for its control and management by the Minister or a person on his behalf, but nothing similar in relation to the control and management of endowments transferred to a Board of Governors.

(3) Section 7(7) does not imply that the Minister has control over the Board of Governors and no such intention can naturally be attributed to Parliament from the words used. On the contrary, section 7(7) is plainly intended to provide that insofar as is reasonably practicable, the objects of any endowment transferred (whether to the Board of Governors, the Minister or otherwise) are not prejudiced by reason of the other provisions of section 7.

(4) Importantly in my judgment, Section 7 does not say that endowments to teaching hospitals are to be held on trust for Her Majesty for the purposes of a government department. On the contrary, it expressly provides for their transfer to the Board of Governors, free of any pre-existing trust, which is to hold them "*on trust for such purposes relating to hospital services or to the functions of the Board…as the Board thinks fit*". Discretion rests with the Board of Governors, a state of affairs which is entirely consistent with such endowments being held on trust for charitable objects and entirely inconsistent with them being held on trust for the Crown.

(5) Whilst the Minister has power under Part III of the Third Schedule of the 1946 Act to appoint the members of the Board, this did not make it publicly owned and could not have the effect of impressing the endowments with a trust in favour of the Crown. Denning LJ considered the status of a similar type of body in *Tamlin v Hannaford [1950] 1 KB 18*: following nationalisation of the railways, it was argued that the new British Transport Commission was a servant or agent of the Crown such that its property was Crown property and did not attract the Rent Restriction Acts. Having noted that the British Transport Commission was a statutory corporation of a kind relatively new to English law at that time, that it was without shareholders and that the Minister of Transport had been given powers over the Commission, including the power to appoint its directors and other powers (which go further than those given to the Minister of Health in relation to the Board of Governors) Denning LJ said this: "*These are great powers but still we cannot regard the corporation as being his agent, any more than a company is the agent of the shareholders, or even of a sole shareholder. In the eye of the law, the corporation is its own master and is answerable as fully as any other person or corporation. It is not the Crown and has none of the immunities or privileges of the Crown. Its servants are not civil servants and its property is not Crown property*" (page 24). I accept Mr Sefton's submission that, whilst analogies with differently constituted bodies which may be differently controlled and exist for different purposes may not ultimately be terribly helpful, nonetheless Denning LJ's reasoning appears to have resonance here. I reject Mr Paget's argument that the key distinction identified in that case is between public and commercial bodies and that the Board of Governors operating under the umbrella of the National Health Service

would fall into the former category and must therefore have Crown immunity.

(6) There is no basis whatsoever for the assertion in paragraph 23 of Mr Hunting's witness statement that Boards of Governors reported "directly to the Minister" and he was unable to support that assertion when cross examined about it. It is clear from part IV of the Third Schedule to the 1946 Act that a Board of Governors was a body corporate, but it had no shareholders and was not owned or controlled by anyone, least of all the Minister.

(7) In *Tamlin v Hannaford,* Denning LJ went on to say that "*When Parliament intends that a new corporation should act on behalf of the Crown, it as a rule says so expressly*". I accept Mr Sefton's submission that if Parliament had intended that endowments to teaching hospitals would be impressed with a trust in favour of the Crown, it would have said so.

(8) There is nothing in section 13 to change the position and I reject the proposition that the interaction between sections 7 and 13 somehow makes it clear that Crown immunity would apply to all endowment property, whether vested in the Minister or in Boards of Governors. Section 12 makes provision for teaching hospitals to be managed and controlled by the Board of Governors on behalf of the Minister, thereby giving the Board of Governors a second function, over and above its entitlement to hold endowments for such purposes relating to hospital services as it thinks fit. In exercising this second function, the Board of Governors is clearly intended to act as the Crown's agent. However, that does not mean that this intention can be assumed or inferred in relation to the holding of trust property, particularly in circumstances where the words of the 1946 Act say the contrary.

(9) Section 13 is concerned to provide that where various entities, including the Board of Governors, are exercising functions on behalf of the Minister (a clear reference back to section 12), it is nevertheless entitled to exercise "*those functions*" in all respects as if it were acting as principal. It is implicit in section 13(2) that the exercise of those functions will attract Crown immunity, save in the limited circumstances identified. There is nothing in this section to suggest that Crown immunity was intended to apply to the Board of Governors' other function under section 7, in respect of which it is not said to be acting on behalf of the Minister. I agree with Mr Sefton that one cannot extrapolate from the references to the Minister in sections 12 and 13 the proposition that there was an intention to hold the endowment funds of teaching hospitals on an express trust for the Crown contrary to the express provisions of section 7.

(10) If the Claimant's argument is right it would follow that, following the enactment of the 1946 Act, the Minister of Health could have called for the property in the endowments of teaching hospitals to be transferred to him from the Board of Governors in accordance with the trust. However, I can find nothing in the words of the 1946 Act to suggest that Parliament intended this result and it seems to me that it would in fact have been wholly contrary to its express provisions.

40. In all the circumstances, it is my judgment that the words of sections 7 and 13 of the 1946 Act are clear and unambiguous, but that they do not support the interpretation for which the Claimant contends. Instead they plainly operate to vest the teaching hospital endowments in the Board of Governors, for such purposes relating to hospital services as it thinks fit. The Board of Governors is not holding the teaching hospital endowments on behalf of the Crown and they are not impressed with a

trust in favour of the Crown. The tenancies of the Properties did not become subject to Crown immunity in 1946.

41. In light of my conclusion in the preceding paragraph, the Parliamentary material to which I was referred during the hearing (and which I looked at *de bene esse*) is inadmissible as an aid to construction and I disregard it.

The Secondary Case: The National Health Service Reorganisation Act 1973

42. The Claimant's secondary case (pleaded by a very late (12 June 2018) amendment to its response to a Part 18 Request) depends upon the interpretation of the 1973 Act, which came into force on 5 July 1973. However, the case was not fully or coherently articulated in the late amendment which said simply this: "*The Board of Governors was then classed as a preserved Board by section 15 National Health Service Reorganisation Act 1973. The Board was then abolished and became a Special Health Authority with its property transferred to the Secretary of State as if through a Hospital Management Committee by The National Health Service (Hospital Trust Property) Order 1982 and section 24 of the 1973 Act*".

43. Mr Sefton told me, and I accept, that the Defendants decided not to oppose this amendment owing to the considerable additional costs of so doing, but he made the point that the amendment does not adequately identify what the case is and that this failure to provide proper particulars is all the more surprising and unsatisfactory in circumstances where the Claimant is seeking to evict the Defendants from homes they have occupied for, respectively, 37 and 48 years.

44. During the course of his oral argument, Mr Paget did seek to put more flesh on the bones of the new secondary case and I shall turn to his arguments in a moment. However, first, in order properly to consider

the secondary case, I again need to deal in some detail with the relevant statutory provisions.

45. In 1973 it was decided to reorganise the National Health Service and pursuant to section 1 of the 1973 Act it was the duty of the Secretary of State to arrange for this reorganisation. New bodies were to be established which were to be called Regional Health Authorities and Area Health Authorities (section 5(1) of the 1973 Act). If the Secretary of State considered that a special body should be established for the purpose of performing any functions which he may direct that body to perform on his behalf, he could by order establish that body and it was to be called a special health authority (section 5(6) of the 1973 Act). Section 7 of the 1973 Act empowered the Secretary of State to direct a Regional Health Authority, an Area Health Authority or a special health authority "*to exercise on his behalf such of his functions relating to the health service as are specified in the directions…*".

46. Pursuant to section 14 of the 1973 Act, authorities that had previously managed the health service were abolished:

"(1) All Regional Hospital Boards, Hospital Management Committees and Executive Councils…and except as provided by the following section, all Boards of Governors shall cease to exist on the appointed day…".

47. However, as foreshadowed in section 14, certain Boards of Governors were preserved:

"*Section 15: Preservation of certain Boards of Governors*

(1) The Secretary of State may by order provide that the preceding section shall, while the order is in force, not apply to any body specified in the order which is the Board of Governors of a teaching hospital mentioned in Schedule 2 to this Act."

Schedule 2 identified the Brompton Hospital (at that time called The National Heart and Chest Hospitals) as one of the teaching hospitals in respect of which the Board of Governors might be preserved. Section 15(2)(c) empowered the Secretary of State to make an order after the appointed day in respect of a preserved Board for the purpose of securing that the Board continued to be a preserved Board for a further period and the *National Health Service (Preservation of Boards of Governors) Order 1974 (SI 1974 No. 281)* gave effect to this power. The remainder of section 15 made general provision for orders to be made by the Secretary of State in relation to the functions of a preserved Board. Section 15(6) provided that *"In this Act "preserved Board" means a Board of Governors to which by virtue of this section the preceding section does not for the time being apply; and any question whether a person, thing, right, liability or other matter whatsoever is for the purposes of this section connected with a Board of Governors or a hospital shall be determined by the Secretary of State"*.

48. Section 23 made provision for the winding up of the Hospital Endowment Funds, established under the 1946 Act to hold assets transferred to the Minister under section 6(1) of that Act. As for trust property held other than by the Minister, section 24 made provision for the transfer of trust property from abolished authorities as follows:

"(1) Subject to the following subsection, property held immediately before the appointed day on trust by a body specified in column 1 of the Table below (excluding a preserved Board) shall on the appointed day be transferred to and vest in the person specified in the relevant entry in column 2 of that Table.

Table

Existing trustees	*New trustees*
A regional hospital board in England.	*Such one or more of the Regional Health Authorities as may be specified by an order*

	made by the Secretary of State.
The Welsh Hospital Board	*Such one or more Area Health Authorities or special health authorities in Wales as may be specified by an order made by the Secretary of State.*
A Hospital Management Committee (other than a University Hospital Management Committee) holding any property on trust for one or more hospitals.	*The Area Health Authority or Authorities responsible for the administration of the hospitals.*
A University Hospital Management Committee.	*The Special Trustees appointed for the university hospital.*
A Board of Governors	*The Special Trustees appointed for the teaching hospital*

(2) If after the passing of this Act and before 31st October 1973 a University Hospital Management Committee or Board of Governors requests the Secretary of State in writing to secure that property held immediately before the appointed day by the Committee or Board is not transferred to and vested in Special Trustees by virtue of the preceding subsection, he may by an order made before the appointed day provide that the property shall be treated for the purposes of that subsection as if it were held immediately before that day by a Hospital Management Committee which is not a University Hospital Management Committee."

49. Thus at the time of the 1973 Act, it was envisaged that property held by Boards of Governors (excluding preserved Boards) would be transferred to Special Trustees, but provision was made for a Board of Governors wanting the transfer to be made to the Area Health Authority or the authority responsible for the administration of hospitals, instead of to the Special Trustees, to request that property held by them before the appointed day be treated as if it had been held by a Hospital Management Committee, thereby facilitating the desired transfer in

accordance with the provisions of the Table in section 24(1). As I shall come to in a moment, this Table was subsequently modified to provide that the New trustee in the third paragraph of the second column would also include a special health authority.

50. By section 26(1), the 1973 Act made provision for the Secretary of State, by order, to provide for the transfer of any trust property from any Health Authority or Special Trustees to any other Health Authority or Special Trustees and by section 27 provision was made for the application of trust property previously held for general hospital purposes. Section 27 applied to both property transferred following winding up of the Hospital Endowments Fund under section 23 and "*to property which is transferred under section 24 of this Act and which immediately before the appointed day was, in accordance with any provision contained in or made under section 7 of the principal Act, applicable for purposes relating to hospital services or relating to some form of research*".

51. Section 27(2), (3) and (4) provided as follows:

"(2) The person holding the property after the transfer or last transfer shall secure, so far as is reasonably practicable, that the objects of any original endowment and the observance of any conditions attached thereto, including in particular conditions intended to preserve the memory of any person or class of persons, are not prejudiced by the provisions of this Part of this Act. In this subsection "original endowment" means a hospital endowment which was transferred under section 7 of [the 1946 Act] and from which the property in question is derived.

(3) Subject to the preceding subsection, the property shall be held on trust for such purposes relating to hospital services (including research),

or to any other part of the health service associated with any hospital, as the person holding the property thinks fit.

(4) Where the person holding the property is a body of Special Trustees, the power conferred by the preceding subsection shall be exercised as respects the hospitals for which they are appointed".

52. The powers and status of Special Trustees for a university or teaching hospital were dealt with in section 29 of the 1973 Act:

"(1) The Secretary of State shall appoint bodies of trustees (in this Act referred to as Special Trustees) for the hospital or hospitals which, immediately before the appointed day, were controlled and managed by any University Hospital Management Committee or Board of Governors (excluding any body on whose request an order was made in pursuance of section 24(2) of this Act and any preserved Board), and those trustees shall hold and administer the property transferred to them under this Act.

(2) Special Trustees shall have power to accept, hold and administer any property on trust for all or any purposes relating to hospital services (including research), or to any other part of the health service associated with hospitals, being a trust which is wholly or mainly for hospitals for which the Special Trustees are appointed."

53. As a preserved Board, the Board of Governors of the Brompton Hospital was not affected by the 1973 Act at the time of its enactment and, as I shall come to in a moment, the Board of Governors continued as a preserved Board until 1982. However, in the meantime the government enacted yet further legislation in this field.

54. The National Health Service Act 1977 ("**the NHS Act 1977**") consolidated various provisions relating to the National Health Service and made various additional changes. Despite his stated position that

he relied only on the 1973 Act, Mr Paget took me to sections 8, 11 and 13, which largely repeat similar provisions in the 1973 Act. I was then taken to sections 90-96 dealing with "Trusts". Section 90 provides that a health authority "*has power to accept, hold and administer any property on trust for all or any purposes relating to the health service*". Section 92(1) provides that the Secretary of State may "*having regard to any change or proposed change in the arrangements for the administration of a hospital or in the area or functions of any health authority, by order provide for the transfer of any trust property from any health authority or special trustees to any other health authority or special trustees*". Before so acting, the Secretary of State was required by section 92(3) to consult the health authorities and special trustees concerned.

55. Section 93 of the NHS Act 1977 made provision for trust property previously held for general hospital purposes in almost exactly similar terms to section 27 of the 1973 Act as follows:

"(1) This section applies

…

(b) to property transferred under section 24 of [the 1973 Act]…which immediately before the day appointed for the purposes of that section was, in accordance with any provision contained in or made under section 7 of [the 1946 Act], applicable for purposes relating to hospital services or relating to some form of research…

(2) The person holding the property after the transfer or last transfer shall secure, so far as is reasonably practicable, that the objects of any original endowment and the observance of any conditions attached to that endowment…are not prejudiced by this Part of this Act or Part II of that Act of 1973.

In this subsection "original endowment" means a hospital endowment which was transferred under section 7 of [the 1946 Act] and from which the property in question is derived.

(3) Subject to subsection (2) above, the property shall be held on trust for such purposes relating to hospital services (including research) or to any other part of the health service associated with any hospital, as the person holding the property thinks fit.

(4) Where the person holding the property is a body of special trustees, the power conferred by subsection (3) above shall be exercised as respects the hospitals for which they are appointed."

56. Section 95 of the NHS Act 1977 dealt with the powers of Special Trustees but expressly referred to the exclusion of preserved Boards within the meaning of section 15(6) of the 1973 Act.

57. By the *National Health Service (Preservation of Boards of Governors) Order 1979 (SI 1979 No. 51)*, the Secretary of State effectively made provision for the status of preserved Boards to come to an end on 31 March 1982 (this date was subsequently amended by the *National Health Service (Preservation of Board Governors) Amendment Order 1982 (SI 1982 No. 244)* to 1 April 1982). The Brompton Hospital (then called the National Heart and Chest Hospitals) was identified in Schedule 1 to the 1979 Order as one of the preserved Boards which would cease to exist as at 1 April 1982. Thereafter, the default position under the 1973 Act was that trust property held by the Board of Governors would be transferred in accordance with the provisions of section 24 to Special Trustees.

58. The *National Health Service (Modifications of Enactments and Consequential Provisions) Order 1982 (SI 1982 No. 75)* modified the provisions that were to apply on abolition of preserved Boards of Governors. In particular it amended Table 2 to section 24 of the 1973

Act to insert the words "*or a special health authority*" in the third paragraph of column 2, thereby facilitating a transfer to a special health authority where the existing trustee was a Hospital Management Committee.

59. In 1982, the Boards of Governors of four teaching hospitals, including the Brompton Hospital (still called the National Heart and Chest Hospitals) requested the Secretary of State to exercise the powers conferred on him under section 24(2) of the 1973 Act, which he did by the *National Health Service (Hospital Trust Property) Order 1982 (SI 1982 No. 296)*. Article 2 of the Order provided that "*The trust property held by Boards of Governors of the Hospitals specified in the Schedule to this Order shall be treated for the purposes of section 24(1) of [the 1973 Act] as if it was held immediately before 1st April 1982 by a Hospital Management Committee which is not a University Hospital Management Committee*". The effect of this Order was to ensure that trust property held by (amongst others) the Board of Governors of the Brompton Hospital would (on 1 April 1982) transfer not to Special Trustees as originally intended, but instead to the health authority responsible for the Brompton Hospital.

60. By a yet further Order, the *Authorities for London Post-Graduate Teaching Hospitals (Establishment and Constitution) Order 1982 (SI 1982 No. 314)*, special health authorities were established to exercise management functions and "*such other functions as the Secretary of State may direct it to perform on his behalf*", in respect of identified hospitals, including the Brompton Hospital. Pursuant to Transitional Provisions in Schedule 3, any right or liability which was enforceable by or against a preserved Board immediately prior to its abolition in respect of any property "*shall be enforceable by or against the Authority which by virtue of this Order manages such property on 1st April 1982*".

61. In summary, my understanding of the effect of these somewhat labyrinthine provisions insofar as they affected the Board of Governors of the Brompton Hospital is as follows: at the time of the 1973 Act, the Board of Governors was a preserved Board and continued to exercise the functions and powers it had exercised by virtue of the 1946 Act. This situation did not change until the Board of Governors was abolished with effect from 1 April 1982, at which point its trust property was transferred to a special health authority established for the purpose of exercising management functions and such other functions as the Secretary of State might direct should be performed on his behalf.

62. By its secondary case, the Claimant contends that it was at the point of this transfer to the special health authority on 1 April 1982 that assets held on trust by the Board of Governors were transferred to be held on trust for the Crown for the purposes of a government department (always assuming for these purposes that this had not happened pursuant to the provisions of the 1946 Act).

Discussion

63. Mr Paget's submissions on this secondary case developed over the course of the hearing.

64. In his written skeleton he submitted that there was an important distinction between Boards of Governors replaced by virtue of section 24 of the 1973 Act by Special Trustees and Boards of Governors of other teaching hospitals (including the Brompton Hospital) that chose instead to transfer to a special health authority. In the case of the former, he accepted that trust assets were owned by the Special Trustees and that they were not assets of any health authority or of the NHS generally. However, in the case of the latter, he submitted that the effect of the transfer to a special health authority was that the assets previously

held by the Board of Governors would now be "*treated in the same way as the standard parts of the NHS*".

65. In his opening submissions, Mr Paget took me in detail through all of the provisions set out above. He argued that upon the transfer to a special health authority, section 7 of the 1973 Act meant that the functions of the special health authority would now be exercised on behalf of the Secretary of State. In his closing submissions, he refined this argument. He said that the effect of special health authorities being treated as if they were successors to Hospital Management Committees for the purposes of section 24(1) of the 1973 Act was that assets previously held on trust by the Board of Governors would now fall into the general pool of NHS assets. This he said was apparent from the provisions of section 27(1) and (3) of the 1973 Act, which were to be contrasted with section 27(4) of that Act which was concerned with assets held by Special Trustees. The effect of the various Orders in 1982 and these provisions of the 1973 Act was that all trust assets held by the Board of Governors prior to 1 April 1982, thereafter fell to be treated as if they had originally been part of the Hospital Endowment Fund, and as such they were impressed with a trust in favour of the Crown for the purposes of a government department.

66. Mr Paget accepted that the trust assets formerly held by the Board of Governors were held on trust for charitable purposes but he argued that they were nevertheless held by a body in the form of a special health authority which was acting on behalf of the Secretary of State. He said that this created an "*unusual and unique*" situation which involved a <u>qualified trust</u> in favour of a government department: the Secretary of State could not call for the assets for use in connection with, say, the defence budget but he or she could call for them to be redirected within the NHS.

67. I reject the Claimant's secondary case for the following reasons, which again adopt many of the arguments advanced by Mr Sefton on behalf of the Defendants:

(1) In my judgment there is nothing in the 1973 Act to suggest that, whereas previously the assets held by the Board of Governors had fallen outside the realms of Crown immunity, now those assets were to become impressed with a trust in favour of the Crown for the purposes of a government department. The state of the law prior to the 1973 Act is admissible background to the interpretation of that Act and it is of importance for these purposes that the endowments of the teaching hospitals had not been nationalised at the time of the 1946 Act, but instead held by the Board of Governors and impressed with a trust for charitable objects. I agree with Mr Sefton that this background means that I need to consider whether there is anything in the 1973 Act to suggest that it was intended to achieve that which had been expressly eschewed in the 1946 Act.

(2) The 1973 Act created new bodies for the purposes of exercising management functions within the NHS. However, these bodies were bodies corporate without shareholders. They were not owned by the Crown or by anyone else. Insofar as trust property was transferred to them, section 27 of the 1973 Act is in similar terms to section 7 of the 1946 Act. There is no express provision in the 1973 Act for such trust property to be held by or on behalf of the Crown. On the contrary, section 27(3) provides for it to be held on trust "*for such purposes relating to hospital services (including research) or to any other part of the health service associated with any hospital as the person holding the property thinks fit*". There is no suggestion that the Secretary of State is the person holding the property.

(3) Insofar as the 1973 Act provides for the new bodies to exercise functions on behalf of the Secretary of State or at his direction (pursuant to section 7), it is no different from section 12 of the 1946 Act in that it merely recognises that the new bodies wear two hats: insofar as they are managing the hospital they do so on behalf of the Secretary of State, but insofar as they hold assets on trust, they do so in accordance with the provisions of section 27. There is nothing in the 1973 Act to suggest that the Secretary of State's "functions" include the holding of teaching hospital endowments on trust and he can only direct the new bodies to exercise the functions that he has, not those that he does not have.

(4) The fact that section 23 of the 1973 Act winds up the Hospital Endowment Fund does not mean that the teaching hospital endowment funds thereby fell to be treated in a similar way.

(5) There is nothing in section 24(2) of the 1973 Act that gives the Secretary of State power effectively to transfer trust property held for charitable objects to himself. In circumstances where he had no power to make such a transfer, he certainly could not do so by executive Order. Thus, the Order in 1982 that the Board of Governor's assets were to be treated as if they had been held by a Hospital Management Committee does not have the effect of allowing the Secretary of State to transfer them to a Hospital Management Committee such that they thereby fell into the general pool of NHS assets. The point of treating the assets as if they were held by a Hospital Management Committee was purely so that the identity of the body to which they were to be transferred could be clear on the face of the Table in section 24(1). It did not have the far-reaching effect for which Mr Paget contends.

(6) The suggestion by Mr Paget that these assets were held both for charitable objects and in trust for the Crown for the purposes of a government department is unsustainable. If the assets were held on trust for charitable objects, that is wholly incompatible with them also being held on trust for the Crown or for the purposes of a government department.

(7) I accept Mr Sefton's submissions that all that was really going on in 1973 was a general reorganisation of the National Health Service. I can find nothing in the 1973 Act (or indeed in the NHS Act 1977) to suggest that Parliament intended to impress assets formerly held in trust for charitable objects by the Board of Governors with a trust in favour of the Crown for the purposes of a government department.

(8) Again, if that is what Parliament intended, it might have been expected to have said so.

68. The consequence of my findings on the Claimant's primary and secondary cases is that, at all material times, including immediately prior to the accepted transfer into private ownership on 1 April 2015 (the details of which I do not need to examine here), the Properties have been subject to Rent Act protection and the Defendants have been regulated tenants, giving them a "*status of irremovability*". It is accepted by both parties that in this case, the provisions of the Housing Act 1988 do not assist the Claimant and that no possession order can be made against them in the absence of grounds under section 98 of the Rent Act 1977. The Claimant has never suggested that there are any such grounds.

69. Mr Paget accepts that if he is wrong as to the effect of the 1946 Act and 1982 transfer, then his further submissions as to the effect of the

National Health Service and Community Care Act 1990 ("**the 1990 Act**") do not assist him.

70. As to that, I simply record that it is common ground that section 60 of the 1990 Act removed Crown immunity in relation to health service bodies, save insofar as Schedule 8 to the 1990 Act included certain exemptions. Schedule 8, paragraph 19 of the 1990 Act retained Crown immunity under section 13 of the Rent Act 1977 for existing tenancies of functional health service land (which it appears to be accepted would include the Properties) "*if and so long as the interest of the landlord under a tenancy to which this paragraph applies continues on or after the appointed day to belong in fact either to the Secretary of State or to an NHS Trust*".

71. Mr Paget was only able to rely on this provision to show that Crown immunity continued beyond 1990 in the case of the tenancies of the Properties if he could show that they belonged to the Secretary of State immediately prior to the appointed day (he accepted that he could not show continued ownership by an NHS Trust as there was no relevant NHS Trust in existence in 1990). In light of my judgment, this he cannot do.

72. In all the circumstances I dismiss the Claimant's claim for possession. However, in case I am wrong in my analysis as set out above, I need to go on to consider Issues 2 and 3.

The Second Issue: Estoppel

73. Although the Defendants identified a variety of forms of estoppel in their Defences, they only relied upon one form at trial. This was a special category of estoppel of the type identified by the Court of Appeal in *Daejan Properties Ltd v Mahoney (1995) 28 HLR 498*, where it was held that although "*a party cannot achieve by estoppel what he could not achieve by express agreement to the same effect*" (per sir

Thomas Bingham MR, with whose reasoning Saville LJ agreed) such that the landlord could not be estopped from denying that the appellant was in law a statutory tenant in circumstances where paragraph 13 of Part II of Schedule 1 to the Rent Act 1977 had not been complied with, nevertheless an estoppel could operate to preclude a denial that the appellant and her mother would be treated as if they were joint statutory tenants of a property in respect of which the Defendant's mother had a statutory tenancy prior to her death.

74. Mr Sefton submits that the Defendants' case is on all fours with this decision. It is common ground that the Claimant has treated them at all material times as if they were protected tenants under the Rent Act and they have relied on this to their detriment. Just as the appellant and her mother in *Daejan Properties* had passed up the opportunity of council accommodation in reliance on confirmation from the landlord's agent that they were joint tenants (thus both enjoying statutory protection), so in this case, each Defendant has arranged his life over several decades in reliance on the fact that he has a regulated tenancy and it would now be unconscionable for the Claimant to be able to obtain possession.

75. Mr Paget accepts that the Defendants have been treated throughout their occupation of the Properties as if they were Rent Act tenants (such that I do not need to deal in detail with the issue of whether there was a representation by the Claimant or its predecessors), but he seeks to distinguish the principle in *Daejan Properties* on the grounds that, in that case, if the clock had been wound back, it would have been legally possible to arrange matters so that the appellant became a statutory tenant; whereas in this case, assuming the existence of Crown immunity, it would never have been possible for the Defendants to have benefitted from the protection of the Rent Acts. Further, he submits that the Defendants did not act to their detriment in reliance

on the admitted representation as to their status and he says that there would be nothing unconscionable in the grant of a possession order.

76. Dealing first with the argument on *Daejan Properties*, I agree with Mr Sefton that the principle applied there is equally applicable to the facts of this case. I note, in particular, that one of the main grounds on which the landlord in that case sought to resist the estoppel argument was on the basis that there could never have been more than one statutory tenant (a similar argument to the one advanced here by Mr Paget). Sir Thomas Bingham MR was not persuaded that the Rent Act 1977 precluded the possibility that joint tenants could become statutory tenants on expiry of a contractual term, but he went on to say that he need not decide the point because "*even if there can under the existing legislation be no more than a single statutory tenant, that provides no reason why the landlords should not be bound by a representation that they would treat the appellant and her mother as if they were joint statutory tenants*" (page 506).

77. As to the question of detriment, I accept that Mr Roupell and Mr Head have both relied on their regulated status and that they have made decisions and taken steps in relation to their living accommodation based on that status which they would not otherwise have made and taken.

78. In the case of Mr Roupell:

(1) He moved into 14 Neville Street following an assurance from Brigadier Vernon, a representative of the Board of Governors, made in a letter dated 2 December 1980 that he would have "*security of tenure*". Mr Paget asserts that this was vague and ambiguous but, as I have already said, in circumstances where it is accepted that Mr Roupell has always been treated as if he had Rent Act protection, I do not need to decide that point. What is

clear is that there was no suggestion in that letter that the Board of Governors was claiming any special status. Mr Roupell and his wife looked at other properties at the time, including a large ground floor flat in The Boltons which they could have afforded to buy and would now be worth a very substantial sum. However, believing that they would have Rent Act protection for their lifetimes, they chose 14 Neville Street instead.

(2) Mr Roupell spent a substantial part of the £75,000 proceeds of sale of his previous property on renovations which took some 18 months or so to complete, during which he took a sabbatical. During the course of his evidence he referred to photographs taken at the time showing the extremely dilapidated state of the property prior to the works. Mr Paget relies on the fact that Mr Roupell received a 3 year rent rebate of £7,500 to compensate him for the cost of the renovations, but Mr Roupell was clear in his evidence that this had been designed to compensate him for the fact that the property was uninhabitable and was not intended to compensate him for the cost of the renovations. He would not have been prepared to carry out these renovations at considerable cost to himself had he not understood that he would have a protected status.

(3) Over the years, rent reviews were instigated by the Claimant's predecessors and these were always conducted on the basis that Mr Roupell had Rent Act protection. Mr Paget says that Mr Roupell has had the benefit of below market rent for many years and that in the circumstances he has suffered no detriment; however this is, in my judgment, to misunderstand the concept of detriment for these purposes.

(4) It was Mr Roupell's unchallenged evidence that he had always relied on the fact that he and his wife could remain in the

property for their lifetimes and that he had "*always made this assumption in organising our finances*". Mr Roupell firmly rejected the suggestion made in cross examination that he had accommodation available elsewhere and the suggestion was not pursued.

(5) It was also his unchallenged evidence that if he had wanted to live in the Property for, say, 20 years and then accept that he had to move, he would have done a deal which made sure that he could save and accumulate money in order to afford a deposit on an alternative house. This might have enabled him to get on to the property ladder, whereas house prices in the area are now at such a level that he cannot afford a deposit.

(6) Mr Roupell would suffer detriment if I were to order possession because he has been led to believe over very many years that he has protected status and he has (understandably) managed his affairs on that basis. If the court were now to order possession his evidence is that he would have no home and no capital to invest in a new one.

79. In the case of Mr Head:

(1) He was not aware of the Rent Acts when he was assigned the lease of 14A Neville Street by Mr Lea in 1970. However, on 7 September 1981 he received a letter from Chestertons advising that they wished to review the rent. There then followed a process lasting some three years designed to register a fair rent under the Rent Act 1977.

(2) In 1983, Mr Head was contacted by Mr Travis of the Board of Governors who came to visit Mr Head and suggested that a new lease might be granted to him. By a letter dated 15 November 1983, Mr Travis confirmed that Mr Head was a "*statutory tenant*"

with a right to remain in the property but he offered to pay Mr Head £6,000 to vacate the premises. This prompted Mr Head to investigate his legal status and he learnt (from his own investigations and from his lawyers) that he was a "*sitting tenant*". His unchallenged evidence was that he considered this to be of value to him because the rent was controlled and "*it was pointless to move elsewhere*". In the circumstances, Mr Head rejected the offer to move, telling Mr Travis that "*knowing I was a statutory tenant and could not be evicted, I would not be accepting the offer as the money was not enough to get a comparable home in the area*." Again, Mr Paget asserts that the letter from Mr Travis was vague and ambiguous and that it is not clear what the reference to a '*statutory tenant*' means. However, again where it is accepted that Mr Head has always been treated as if he had Rent Act protection, I do not need to decide that point.

(3) Mr Head has since relied on his protected status in the subsequent organisation of his affairs: prior to his divorce he purchased a large house for his wife and daughters rather than investing in a new property for himself and at the time of his divorce, Mr Head relied on the fact that he would always be able to '*survive*' because he had a statutory tenancy of the property for life. Accordingly, he was able to take a more generous approach to the divorce settlement than would otherwise have been the case.

(4) With some of the money left over from his divorce, Mr Head carried out various improvement works on the property to the value of in the region of £25,000. Mr Paget suggested in cross examination that Mr Head had in fact acted in breach of the terms of the lease in failing to maintain the property, which was subject to serious damp problems in the basement. However, in

circumstances where it appears from the terms of the lease that these problems might well have been the responsibility of the landlord, this was not a suggestion that was capable of bearing fruit and it was not pursued.

(5) Over the years, rent reviews were instigated by the Claimant's predecessors and these were always conducted on the basis that Mr Head had the advantage of being a regulated tenant under the Rent Acts. As with Mr Roupell, the fact that Mr Head has benefitted over the years from a reduced rent does not mean that he would suffer no detriment if I were to order possession.

(6) Mr Head would suffer detriment because he has been led to believe over very many years that he has protected status and he too has (understandably) managed his affairs on that basis. Mr Head's unchallenged evidence is that if he were to be evicted from the property as a result of these proceedings he does not have the funds and, given his age, would not be able to obtain a mortgage in order to acquire an equivalent property.

80. In his opening skeleton, Mr Paget maintained that there was no unconscionable conduct on the part of the Claimant to prevent possession being obtained and he said that the Claimant was willing to negotiate with the Defendants "*a reasonable period prior to enforcement*". Under cross examination, Mr Hunting was unable to confirm this commitment, saying that he needed to have a discussion with the Trustees and then decide what a reasonable period might be. In closing, Mr Paget told me that Mr Hunting had now recommended to the Board of the Claimant that any possession order made by the court be stayed for 12 months. Mr Paget maintained that this removed any unconscionability. However, further to questions from me, he accepted that Mr Hunting had only made a recommendation to that effect and that there could be no guarantee that the other trustees on the

Claimant's Board would accept that recommendation. I reject the suggestion that this recommendation to the Board should change the court's approach to this case and/or removes any unconscionability in the granting of an order for possession.

81. In all the circumstances, even if I had found that the tenancies of the Properties were subject to Crown immunity, I would not have been prepared to make an order for possession in circumstances where the Claimant is estopped from denying that it has treated the Defendants as if they had Rent Act protection and the Defendants would suffer detriment if the Claimant were permitted to resile from that position.

The Third Issue: status of the Defendants after 1 April 2015

82. Mr Paget accepts that this issue only arises if the Claimant is successful in establishing the existence of Crown immunity up to 1 April 2015 (at which point he accepts that Crown immunity ceased) and the absence of any operable estoppel. In such circumstances, he says that the Defendants are properly to be regarded as assured shorthold tenants under the Housing Act 1988 and the Claimant is entitled to possession.

83. Mr Paget points to section 38 of the Housing Act 1988 which provides for the transfer of existing tenancies from public to private sector. For the purposes of the section, the interest of a landlord under a tenancy is held by a public body at a time when, amongst other things, "*it belongs to Her Majesty in right of the Crown or to a government department or is held in trust for Her Majesty for the purposes of a government department*" (section 38(5)(d)).

84. Mr Paget relies in particular on section 38(1) and (3):

> *(1) The provisions of subsection (3) below apply in relation to a tenancy which was entered into before, or pursuant to a contract made before, the commencement of this Act if,*

(a) at that commencement or, if it is later, at the time it is entered into, the interest of the landlord is held by a public body (within the meaning of subsection (5) below); and

(b) at some time after that commencement, the interest of the landlord ceases to be so held.

…

(3) Subject to subsections (4), (4ZA), (4A), (4BA) and (4B), below on and after the time referred to in subsection (1)(b) or, as the case may be, subsection (2)(b) above—

(a) the tenancy shall not be capable of being a protected tenancy, a protected occupancy or a housing association tenancy;

(b) the tenancy shall not be capable of being a secure tenancy unless (and only at a time when) the interest of the landlord under the tenancy is (or is again) held by a public body; and

(c) paragraph 1 of Schedule 1 to this Act shall not apply in relation to it, and the question whether at any time thereafter it becomes (or remains) an assured tenancy shall be determined accordingly.

85. Assuming Crown immunity to 1 April 2015, Mr Paget submits (and Mr Sefton agrees) that pursuant to section 38, the Defendants do not have Rent Act tenancies. However, there is disagreement as to the status of the tenancies that remain: Mr Paget maintains that by reason of the operation of section 19A of the 1988 Act the "*default position*" is that the Defendants are left with an assured shorthold tenancy, whereas Mr Sefton says that they have an assured tenancy and that whilst that may have consequences for their rent, they cannot be subject to an order for possession except on one of the grounds set out in Schedule 2 to the Housing Act 1988 (none of which grounds applies here).

86. Section 19A concerns "assured shorthold tenancies: post Housing Act 1996 tenancies" and provides as follows:

"*An assured tenancy which—*

(a) is entered into on or after the day on which section 96 of the Housing Act 1996 comes into force (otherwise than pursuant to a contract made before that day), or

(b) comes into being by virtue of section 5 above on the coming to an end of an assured tenancy within paragraph (a) above,

is an assured shorthold tenancy unless it falls within any paragraph in Schedule 2A to this Act".

87. At first blush, Mr Paget's submission suffers from a serious problem, namely that section 19A appears to apply only to assured tenancies "*entered into on or after the day on which section 96 of the Housing Act 1996 comes into force*" (namely 28 February 1997), which would not apply to the tenancies with which the court is concerned in this case. However, he seeks to surmount this difficulty by submitting that these words are to be looked at through the prism of section 38 and that whilst section 38 is plainly looking at entry into the original tenancy, section 19A is intended to deal with the date on which the assured tenancy came into being – indeed with this in mind Mr Paget submits that it would have been preferable if the words in section 19A had said "is entered into or created". Accordingly, Mr Paget submits that the assured tenancies in this case were created after 1 April 2015 when the Properties ceased to attract Crown immunity and that section 19A applies.

88. I cannot accept this argument for the following reasons:

(1) As Mr Sefton rightly said, the Housing Act 1988 did not repeal the Rent Acts; it introduced a parallel and more limited scheme of

security for tenancies granted after it had come into force, and in so doing, it operated to prevent tenancies entered into after it came into force from being regulated tenancies. Thus section 34 of the Housing Act 1988 provides that a tenancy entered into on or after commencement cannot be a protected tenancy unless *"(a) it is entered into in pursuance of a contract made before the commencement of this Act*".

(2) An assured tenancy is a tenancy which complies with the requirements of section 1 of the Housing Act 1988. Section 1 has no time constraints – on its face any tenancy could be an assured tenancy under the Housing Act 1988 whether entered into before or after the Act. However, Schedule 1, paragraph 1 makes it clear that "*A tenancy which is entered into before, or pursuant to a contract made before, the commencement of this Act, cannot be an assured tenancy*".

(3) Thus, as Mr Sefton submits, the Housing Act 1988 provides for two mutually exclusive regimes: tenancies entered into on or after commencement of that Act could not be regulated tenancies under the Rent Act (subject to having been entered into pursuant to a contract made before the commencement of the Housing Act 1988) and tenancies entered into before the commencement of that Act could not be assured tenancies.

(4) Here, both Defendants entered into their tenancies long before the Housing Act 1988 came into force. Section 34 does not apply to them. However, when Crown immunity ceased to apply (assuming for these purposes that it did) on 1 April 2015, section 38 operated to provide that they were not capable of being protected tenants and that Schedule 1, paragraph 1 would not apply. The effect of this, it is agreed, is that the Defendants'

tenancies became assured tenancies which met the criteria set forth in section 1 of the Housing Act 1988.

(5) Section 19A is clear on its face: it stipulates that tenancies entered into after the Housing Act 1996 came into force are, by default, assured shorthold tenancies rather than assured tenancies. In so doing, it refers to the date of entry into an assured tenancy which must be on or after 28 February 1997.

(6) The Defendants did not enter into their tenancies in 2015, but long before the Housing Act 1996 came into force. Whilst the effect of section 38 is that the Defendants' tenancies <u>became</u> assured tenancies in 2015, they were not entered into at that time and it does not seem to me that one can safely attribute an intention to Parliament to refer in section 19A(a) to the date on which an assured tenancy was "created" or came into being, particularly given that section 19A(b) clearly uses the words "*came into being*" in contradistinction with the words "*entered into*" in section 19A(a).

(7) I agree with Mr Sefton that if the Defendants' tenancies fall within section 38 (as I find that they do for the purposes of this alternative case) because they were entered into before or pursuant to a contract made before the commencement of the Housing Act 1988, then they cannot simultaneously fall within section 19A.

89. In all the circumstances, if I am wrong as to the first and second issues, then in my judgment the Claimant is still not entitled to an order for possession because the Defendants are not assured shorthold tenants.

<u>Conclusion</u>

90. Accordingly, I dismiss the Claimant's claims against each Defendant. I am most grateful to both counsel for guiding me through the numerous statutory provisions relevant to the arguments in this case.