



Neutral Citation Number: [2024] EWCA Civ 1444

Case No: CA-2024-000737

IN THE COURT OF APPEAL (CIVIL DIVISION) ON APPEAL FROM THE COUNTY COURT AT WILLSDEN Deputy District Judge Watterson Case No. H01 W1262

Royal Courts of Justice Strand, London, WC2A 2LL

Date: 27 November 2024

Before :

LORD JUSTICE LEWISON

LADY JUSTICE ANDREWS

and

LORD JUSTICE ZACAROLI

Between :

JOHN HOWE

Respondent
/Claimant

- and -

BRENT LONDON BOROUGH COUNCIL

Appellant/
Defendant

Riccardo Calzavara (instructed by **Brent LBC Legal Services**) for the **Appellant**

Richard O’Sullivan (instructed by **GN Law**) for the **Respondent**

Hearing date: 20 November 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 27th November 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Andrews:

Introduction

1. This appeal was referred to the Court of Appeal by HH Judge Luba KC pursuant to CPR 52.23(a) after he gave permission to appeal. The important point of principle that we are asked to decide is whether a family member (B) of a secure tenant with a right to buy their home (A) is able to exercise a shared right to buy if A, whose right is established, dies *after* B's entitlement to share A's right to buy has been claimed by A, but *before* the landlord has accepted B's right or it has been established by the County Court? Deputy District Judge Watterson ("the judge") held that B was entitled to exercise the right to buy in those circumstances. The Appellant, Brent London Borough Council, the landlord in this case, ("the Council") challenges her decision.
2. For the reasons which are set out in more detail in this judgment, I consider that the judge was right for the reasons that she gave. The relevant statutory provisions are set out in Part V of the Housing Act 1985 ("the 1985 Act"). All references in this judgment to statutory provisions are to the provisions of that Act. If as a matter of fact, B met the requirements of section 123(1) at the time when A served a notice on the landlord under section 122(1) validly requiring that B share A's right to buy, B was deemed *from that time onwards* to be a joint secure tenant with A for the purposes of Part V and shared in the right to buy, even if B's qualifying status was not established until after A's death.

The relevant legal framework

3. By section 118, a secure tenant has a right to buy a dwelling-house¹ in England in the circumstances, and subject to the conditions, set out in the rest of Part V. Where there is only one secure tenant, they must have occupied the dwelling-house as their only or principal home for at least three years before they initiate the prescribed statutory procedure for claiming the right to buy: section 119 (A1), Schedule 4 and section 81. Where the secure tenancy is a joint tenancy, those conditions only need to be satisfied in respect of one of the joint tenants: section 119 (2).
4. By section 93, which is in Part IV of the 1985 Act, a secure tenant may allow any persons (including family members) to reside as lodgers in the dwelling-house, but may not sublet or part with possession of part of the dwelling-house without the landlord's consent.
5. Section 121 specifies the circumstances in which the right to buy cannot be exercised. In summary, these are where:
 - a) the tenant is subject to an order for possession,
 - b) the tenant or any other person to whom the right to buy belongs has an outstanding bankruptcy application, or an unresolved bankruptcy petition has been brought against them; or is an

¹ In certain specified circumstances (which are not relevant to anything we have to decide, as the property in this case was a house) that expression may include a flat.

undischarged bankrupt; or has made a composition or arrangement with their creditors the terms of which remain to be

fulfilled; or is subject to a moratorium period under a debt relief order under part 7A of the Insolvency Act 1986,

- c) an order for suspension of the right to buy made under section 121A is in force (e.g. because the tenant has engaged in antisocial behaviour).
6. The right will be lost if one of the circumstances specified in section 121(1) arises at any time before the property is conveyed to the secure tenant pursuant to section 138: *London Borough of Enfield v McKeon* [1986] 1 WLR 1007. It may be lost in certain other circumstances, in particular if the tenant ceases to be a secure tenant, or ceases to occupy the property as their sole or main residence at any time before the property is conveyed to them pursuant to section 138: *Muir Group Housing Association Ltd v Thornley* (1992) 25 HLR 89, ("*Muir Group*"). It will also be lost if the property is demolished.
7. The secure tenant may also withdraw a claim to exercise the right at any time before the property is conveyed to them (section 122(3)), and there are a number of provisions in Part V which deem the claim to be withdrawn in specified circumstances. The secure tenant may also be held to have abandoned a claim to exercise the right to buy, by doing nothing to pursue it for a very long time: see *Copping v Surrey County Council* [2005] EWCA Civ 1604, [2006] HLR 16 ("*Copping*").
8. Section 122 sets out the process by which the secure tenant initiates a claim to exercise the right to buy. It provides as follows:
- “(1) A secure tenant claims to exercise the right to buy by written notice to that effect served on the landlord.
 - (2) In this part “the relevant time”, in relation to an exercise of the right to buy, means the date on which that notice is served.
 - (3) The notice may be withdrawn at any time by notice in writing served on the landlord.”
9. Section 123 provides:
- “(1) A secure tenant may in his notice under section 122 require that not more than three members of his family who are not joint tenants but occupy the dwelling-house as their only or principal home should share the right to buy with him.
 - (2) He may validly do so in the case of any such member only if –
 - (a) That member is his spouse, is his civil partner, or has been residing with him throughout the period

of twelve months ending with the giving of the notice, or (b) The landlord consents.

- (3) Where by such a notice any members of the tenant's family are validly required to share the right to buy with the tenant, the right to buy belongs to the tenant and those members jointly and he and they shall be treated for the purposes of this Part as joint tenants."

It is to be noted that the 12-month residence requirement under section 123(2) only applies to family members other than spouses or civil partners.

10. By section 124(1), where a notice under section 122 has been served by the tenant and not withdrawn, the landlord shall serve a notice on the tenant within the period specified in section 124(2) (four or eight weeks, depending on the particular circumstances) either (a) admitting his right or (b) denying it and stating the reasons why, in the landlord's opinion, the tenant does not have the right to buy.

11. Section 125(1) provides:

"(1) Where a secure tenant has claimed to exercise the right to buy and that right has been established (whether by the landlord's admission or otherwise), the landlord shall

- (a) within eight weeks where the right is [a right to acquire the freehold]
- (b) within twelve weeks where the right is [to acquire a leasehold interest]

serve on the tenant a notice complying with this section."

12. Section 125(2) sets out certain information which that notice must contain. This includes the price at which the landlord considers the tenant is entitled to have the freehold conveyed to him or the lease granted to him (as the case may be), and an explanation of how it has been calculated, which must include the value as at the date on which the section 122 notice was served. Section 125(3) requires the landlord to include in the notice additional specified information about the effect of various other statutory provisions and rights given to the tenant, including the right to have the value of the dwelling-house determined by the district valuer.
13. On receipt of a section 125 notice, the tenant has a specified period (currently 12 weeks) in which to serve written notice on the landlord stating either that they intend to pursue the claim or that they have withdrawn it. If the tenant fails to serve such a notice within the prescribed period, the landlord can serve a further notice requiring the tenant to serve a response within 28 days, and if the tenant fails to do that, the claim is deemed to be withdrawn (section 125E(4)).
14. Section 129 provides that a person exercising the right to buy is entitled to a discount. The discount is applied to the value of the property on the date on which the tenant served the section 122 notice on the landlord. It is expressed as a percentage which

begins at 35% for a house and 50% for a flat, and will increase by 1% for each complete year by which the qualifying period specified in Schedule 4 exceeds five

years (up to a maximum of 60% for a house and 70% for a flat).² Where joint tenants exercise the right to buy, section 129(3) requires Schedule 4 to be construed as if for the secure tenant there were substituted that one of the joint tenants whose substitution will produce the largest discount.

15. Section 136 deals with the situation where, after a secure tenant has given a notice claiming the right to buy, another person (“the new tenant”) becomes the secure tenant under the same secure tenancy, (otherwise than by an assignment made by way of exchange pursuant to section 92) or under a periodic tenancy which arises on termination of a fixed term secure tenancy. The most common circumstance in which this will occur is succession. Section 136 (1) provides that the new tenant “shall be in the same position as if the [section 122] notice had been given by him and he had been the secure tenant at the time it was given.”
16. By virtue of this provision, a successor (typically a surviving spouse or civil partner) is put in the same position as the deceased secure tenant, even if they were not required to share in the right to buy at the time when the deceased served the section 122 notice (for example, if the marriage or civil partnership occurred thereafter).
17. Section 136 (6) provides that:

“The preceding provisions of this section do not confer any right on a person required in pursuance of section 123 (claim to share right to buy with members of family) to share the right to buy, unless he could have been validly so required had the notice claiming to exercise the right to buy been given by the new tenant.”

Although the language of this provision is somewhat opaque, the person “required in pursuance of section 123 to share the right to buy” would appear to be a family member of the former tenant who satisfied the requirements of section 123(2) at the time when the section 122 notice was served by the former tenant, and is therefore deemed to be a joint secure tenant for the purposes of Part V of the 1985 Act.

18. In their commentary on this subsection, the editors of the current edition of the Housing Encyclopaedia state that:

“There must also be a reassessment of the qualification of any added purchasers. The new secure tenant will usually be amongst those who might, in any event, have been added by the former secure tenant, but it does not follow that those who qualified in relation to the former secure tenant, will also qualify in relation to the new: s.123.”

² Limits on the available discount are prescribed by statutory instrument from time to time. In this case the applicable statutory instrument was the Housing (Right to Buy) (Limit on Discount) (England) Order 2014/1378, which has since been repealed by Housing (Right to Buy) (Limits on Discount) (England) Order 2024/1073.

19. Section 138 deals with the culmination of the statutory process. Section 138(1) provides that:

“(1) Where a secure tenant has claimed to exercise the right to buy and that right has been established, then, as soon as all matters

relating to the grant and to the amount to be left outstanding or advanced on the security of the dwelling-house have been agreed or determined, the landlord shall make to the tenant

- (a) if the dwelling-house is a house and the landlord owns the freehold, a grant of the dwelling-house for an estate in fee simple absolute, or
- (b) if the landlord does not own the freehold or if the dwelling-house is a flat (whether or not the landlord owns the freehold) a grant of a lease of the dwelling-house

in accordance with the following provisions of this Part.”

20. Section 181 sets out the jurisdiction of the County Court to entertain any proceedings brought under Part V and, under section 181(1)(b) to determine “any question arising under this Part” (subject to exceptions for certain matters pertaining to valuation, which are to be determined by the district valuer). Section 181(2) makes it clear that the court’s jurisdiction includes “jurisdiction to entertain proceedings on any such question as is mentioned in subsection 1(b) notwithstanding that no other relief is sought than a declaration”.

Factual Background

21. The late Mrs Laura Howe was the secure tenant of a council house in Wembley (“the property”). On 11 May 2020 Mrs Howe sent to the Council a section 122(1) notice (comprising a completed and signed “right to buy form”) claiming the right to buy the property jointly with the Respondent, her adult son John. The Council received the notice on 18 May. John Howe was not a joint tenant with his mother, but he had been living at the property as his main home for over 12 months before she sought to exercise the right to buy it.
22. On 21 May 2020 the Council served a section 124 notice in reply to the claim admitting Mrs Howe’s right to buy, but denying that John Howe was entitled to share that right with her, on the basis that it required documentary evidence to prove that he met the qualifying residence condition (specifically, bank statements for the past 12 months, and a copy of his passport). Sadly, on 25 May, shortly after the Council’s response was received, Mrs Howe died. In the interim, Mr Howe had sent some documents to the Council to evidence that he met the requirements of section 123(2).
23. On 2 June 2020, not yet knowing of Mrs Howe’s death, the Council sent a letter addressed to both the Howes stating that it had removed John Howe’s name from the

application because it remained of the view that he could not satisfy the residence requirement. After the Council became aware of Mrs Howe's death, it sent a further letter to Mr Howe on 20 July 2020 asserting that in consequence of her death, the right to buy claim was withdrawn.

24. Mr Howe brought proceedings in the County Court under section 181 seeking a finding of fact that he satisfied the residence condition at the time when his mother claimed her right, and "a determination that he may be added to and continue the right to buy application dated 11 May 2020". The Council defended the application.

The Judge's decision

25. The matter was heard by the judge on 20 July 2023. She held that on the evidence before her (which was more extensive than the evidence sent to the Council) Mr Howe did indeed satisfy the residence requirement. That finding is not challenged. The judge went on to conclude that, as a matter of construction of the relevant provisions of the 1985 Act, Mrs Howe had validly required that John Howe be allowed to share the right to buy with her, and therefore the right belonged to him jointly with her.
26. Although the judge accepted the general proposition that there must be a secure tenant at all stages throughout the right to buy process in order for the process to be completed, she found that since Mrs Howe had validly required her son to be permitted to share her right to buy, which was established before her death, he was deemed to be a secure tenant at all material times for the purposes of exercising that right.
27. After considering this Court's decision in *London Borough of Harrow v Tonge* (1993) 25 HLR 99, ("*Tonge*") in which the only factual difference was that the landlord had accepted the family member's right to buy in a section 124 notice sent before the secure tenant died, the judge said this at [48]:

"It strikes me that an interpretation of the law which has the effect [of] differentiating between two individuals such as Miss Tonge and Mr Howe who are in materially the same position, save for the point in the process at which their family member died, would introduce such a degree of arbitrariness into the application of the law that I should avoid that interpretation if that is possible in the light of the authorities. I do find it to be possible."

The judge applied the reasoning in *Tonge* to find that Mr Howe became the sole (deemed) secure tenant on his mother's death, and that he was entitled to continue to pursue the claim to enforce the right to buy which she had initiated.

The Appellant's arguments

28. On behalf of the Council, Mr Riccardo Calzavara took issue with the judge's interpretation of the relevant statutory provisions. Mr Calzavara pointed out that the process for claiming the right covers four stages, namely: making the claim by service of the section 122 notice (stage 1); the establishment of the right to buy, either by the landlord's admission in the section 124 notice or by a court ruling under section 181 (stage 2); the landlord's section 125 notice and the subsequent resolution of any issues

about valuation and price (stage 3); and the conveyance pursuant to section 138 (stage 4). The Court of Appeal has held that in order to exercise the right to buy, the tenant must be a secure tenant “not only at the time when the claim to buy is made, but also at the time when the grant comes to be made”, i.e. at all four stages: *Sutton LBC v Swann* (1986) 25 HLR 99.

29. Although *Swann* concerned the equivalent provisions of the Housing Act 1980, the same principle underlay the decision in *Muir Group* (supra) that the right is lost when the secure tenant leaves the property, even if their right has already been established at stage 2 of the process. The proposition that there must be a secure tenant throughout the process was also expressly endorsed by Nourse LJ in *Tonge* (at page 102 of the report). He said:

“If that were not so, the right to buy could be enforced by someone who had ceased to occupy the property as his only or principal home.”

30. In *Southwark London Borough Council v Francis* [2011] EWCA Civ 1418; [2012] PTSR 1248, (“*Francis*”) the Court of Appeal held that section 118 imposes no statutory duty on the landlord, but merely states a right, which is to be established by procedures under the Act, leading eventually to a duty to convey under section 138. Therefore it did not avail a secure tenant, whose claim had been (wrongly) denied by the landlord, to prove that he was a secure tenant after he had moved out and the property had been demolished. He had no remedy in damages for breach of statutory duty, as there was no such duty.
31. Mr Calzavara submitted that all these authorities underlined the importance of the requirement that there be a secure tenant living at the property at all material times up to the grant. They also indicate that the right to buy is not immutable, and that the service of the section 122 notice at stage 1 of the process gives rise to no obligation on the part of the landlord even in respect of the secure tenant. The landlord has no obligation to do anything under the statutory scheme unless and until those rights are “established” by one or other of the means envisaged in section 125(1). It can be inferred from this that the service of the claim by the secure tenant was not, by itself, intended to confer any immediate rights upon their family member. The service of a notice which validly required them to share in the secured tenant’s right to buy told one nothing about when the right to share in the secure tenant’s right to buy incepted.
32. Mr Calzavara drew a distinction between the rights of the secure tenant and those conferred upon resident spouses, civil partners or other family members. Whereas a secure tenant, or joint secure tenant, derives their right to buy directly from the statute itself under section 118(1) or (2), the right of a spouse, civil partner or family member acquired pursuant to the process set out in section 123 is parasitic upon the right of the secure tenant. It is a right to “share” the right given to the secure tenant. Mr Howe’s claim was parasitic upon his mother’s claim (as she was the only secure tenant) but by the time that Mr Howe’s claim came to be established, her claim no longer existed.
33. Mr Calzavara submitted that it is only when the landlord accepts the family member’s claim (or the County Court makes a declaration) that their parasitic right is established so as to trigger stage 3 of the process, and until the right is established there is no

deemed joint tenancy under section 123(3). The situation was no different from the situation in which, by the time the family member's claim came to be established, the secure tenant had ceased to live in the property and had lost their right to buy. Mr Calzavara submitted that, as in *Francis*, it would not matter that it was subsequently proved that the family member did indeed satisfy the residence requirement at the time when the secure tenant's claim was made. *Tonge* was distinguishable because the landlord had accepted the family member's claim *before* the secure tenant died and her claim ceased.

34. In Mr Calzavara's written submissions, and before the judge, *Copping* (supra) was cited in support of this analysis. In that case, the claimant (the alleged secure tenant) and his wife served a notice on the landlord (a local authority) in 1991 claiming the right to buy, which the authority denied on the basis that the claimant was not a secure tenant. No steps were taken following the service of the section 124 notice to have the husband's right established by the court. Ten years later, the couple served a second notice under section 122 claiming the right to buy. When the landlord again denied the husband's right, they began proceedings in the County Court under section 181 for a declaration that they were entitled to exercise the right to buy the house. They relied solely on the 2001 notice in support of that claim, which was successful. In subsequent proceedings, the issue which arose was whether the "relevant time" for valuing the property as defined in section 122(2) was the date of service of the 1991 notice or the date of service of the 2001 notice.
35. Perhaps unsurprisingly, the Court of Appeal held that the relevant time for valuing the house was the later date. Latham LJ gave the leading judgment, with which Carnwath and Mummery LJ agreed. He explained that the right to buy is subject to the conditions set out in Part V of the 1985 Act. He said, at [21]:

"Section 138, which is the section intended to give effect to the right granted by section 118, expressly requires the right to be established before the duty to convey arises. It follows that the procedural provisions of sections 122 and those following have to be complied with before the right can be effective. That includes in particular, the requirement that the right has been "established". Section 125(1) provides that this can be by way of a landlord's admission or "otherwise", which must mean, or at least include, by proceedings taken under section 181."

In that case, because the appellants' rights were established by the proceedings in the County Court, which were based solely on the claim made under the 2001 notice, "the procedure required by the Act accordingly flowed from that notice and no other" [22]. This made it inevitable that the "relevant time" for establishing the price was the date on which that notice was given to the landlord.

36. Latham LJ rejected the appellants' argument that the 1991 notice remained extant because of the "requirement" under section 122(3) that notice of withdrawal of the claim be given in writing. Their counsel had reinforced that argument by pointing out that when Parliament intended a notice to be deemed withdrawn, it specifically said so (e.g. in section 125E(4)). Latham LJ explained that those provisions served specific

purposes, but they said nothing about the continuing life of a notice which made a claim which has been denied, where no further steps have been taken and which a

landlord could sensibly take as meaning that the tenant had decided not to proceed [25]. (I would add that section 122(3) is couched in permissive, not mandatory, language).

37. Finally Latham LJ observed, obiter, at [26], that if he had come to a different conclusion as to the effect of the claim determined by the County Court, he would

have doubted how a notice could have been resurrected more than 12 years after it had been served.

38. Before the judge, and in his skeleton argument, Mr Calzavara submitted that the analysis in *Copping* (and in particular Latham LJ's observations at [21]) meant that it was necessary for Mr Howe's right to buy to have been established (by one or other means) before Mrs Howe's death. If that did not occur, what he described as Mr Howe's "inchoate" right was lost upon her death because there was no longer a secure tenant in occupation at the time when the grant would come to be made.

39. Whilst he did not abandon these submissions in his oral argument before us, Mr Calzavara made no further reference to the decision in *Copping*. Instead, he submitted that the drafter of section 123(3) had left open the temporal question of *when* the right to buy "belongs to the tenant and [the relevant family member] jointly" and *when* "he and they shall be treated for the purposes of this Part as joint tenants". He argued that Parliament must have intended that there be "a real world secure tenant at the time when the parasitic right is established".

40. Mr Calzavara accepted that the establishment in section 181 proceedings that the residence requirement was met at the time of service of the section 122 notice would operate so as to prove that, as at the time of service of the notice, the secure tenant had "validly required" the family member to share in their right to buy. However, he submitted that it did not follow from the use of the present tense in the second subclause of section 123(3) that the consequences described in that sub-clause were visited upon the secure tenant and the family member as at the date of the notice (or the date of its service), as opposed to the date when the family member's right was established, which would inevitably be later.

41. In support of that contention, Mr Calzavara sought to rely upon section 136(6), a provision to which he had neither referred in his skeleton argument nor in the lower court. He submitted that if the family member has already acquired a right to buy in consequence of the service of the section 122 notice requiring that he share in the secure tenant's right to buy, section 136(6) would make little sense.

42. Finally Mr Calzavara submitted that, rather than being an authority against the proposition for which he contended, on a proper reading of the decision *Tonge* supported it, or at least it did not contradict it. The Court of Appeal in that case did not decide the "temporal question" of when the statutory consequences of service of notice validly requiring a family member to share in the right to buy arose, because that was not in issue. The process in *Tonge* had in fact reached the stage where the duty to convey under section 138 had already arisen by the time that the secure tenant died. He pointed

out it was the date on which that duty arose which was the focus of submissions made on behalf of Miss Tonge, albeit on a different matter, a claim to have acquired a joint equitable interest in the property, which was rejected by the Court.

Discussion and conclusion

43. Despite the attractive manner in which the Council's arguments were presented by Mr Calzavara, I am unable to accept them. It is clear from the language of the provisions of Part V, in particular sections 118, 119, and 122(1), that the secure tenant's right to

buy arises by virtue of their status and their occupation of the property as their sole or main home, provided that the qualifying period has elapsed. Section 122(1) and the following sections are concerned with how that right is to be exercised. The family member's "parasitic" right to buy arises by virtue of *their* qualifying status at the time when the secure tenant requires them to share in their right to buy, and must be exercised in the same manner if it is to be effective.

44. Self-evidently a right cannot be exercised or enforced until it exists. However, regardless of the person to whom it belongs, the right to buy does not come into being when (or because) the landlord or a judge admits or declares its existence. "Established", in the context of the scheme, means agreed or proved. Section 124 is couched in terms of the landlord admitting or denying that someone has the right. The landlord is not the sole arbiter of whether the right exists: *Francis* (supra). As Lloyd LJ observed in that case at [29]:

"The landlord's service of a notice refusing to admit the tenant's right does not affect the tenant's rights as such in any way; it merely requires the tenant to prove that he has the right asserted."

Nor does the establishment of the existence of the right somehow perfect or crystallise a right which is otherwise inchoate. It is just a step towards the enforcement of the right. Put simply, unless the landlord accepts it, the person who has the right is required to prove that they have the right before they can enforce it, and before the landlord is required to do anything further to respond to the claim.

45. *Copping* was concerned with the status of a previous claim to exercise the right to buy which on any rational view appeared to have been given up after the landlord served a section 124 notice which rejected it. The right to buy undoubtedly existed in 1991, at which time the claimant was a secure tenant, but the prescribed statutory conditions for its exercise were not then met because the procedure was not followed through, and therefore the obligation on the landlord to convey the property under section 138 was not triggered. When Latham LJ referred to the right becoming "effective" he used that word in the sense of achieving a result. He was not suggesting that the right only crystallises when the landlord accepts or the court declares that it exists. On the contrary, his reasoning is based on the premise that the right to buy exists, but it cannot be exercised so as to bring about a conveyance of the property unless and until it is established (i.e. accepted or proved) and the prescribed statutory process is then followed.

46. Although in *Copping* the second claim was based on the same allegation as to the status of the tenant as the first, it was *that* claim to exercise the right to buy, not the earlier claim, which was established by and rendered effective by obtaining a declaration of his status from the County Court under section 181 and then following the prescribed statutory procedure for valuation and fixing the price. It was that process that ultimately triggered the obligation on the landlord to convey the property to the claimants. All that *Copping* decided was that the claimants could not treat the section 181 proceedings as relating back to their earlier abandoned claim to exercise the right to buy, and as making that claim effective (or as somehow reviving it). That situation is far removed from the present case.
47. In my judgment, *Copping* tells one nothing about how section 123(3) operates. It is certainly not authority for the proposition that the deemed joint tenancy under that section only arises after the family member has established that they met the criteria in sections 123(1) and (2) at the time when the section 122 notice was served.
48. Whereas *Copping* was not a case about the construction and effect of section 123(3), *Tonge* was. The leading judgment was delivered by Nourse LJ, with whom Farquharson and Evans LJ agreed. The Court of Appeal decided that whenever section 123(3) was operative, there would be two separate and distinct consequences, namely: (i) the right to buy would belong to the secure tenant and the family member jointly; and (ii) the secure tenant and the family member would be deemed to be joint secure tenants for the purposes of Part V of the 1985 Act (and in particular section 138, which was the relevant provision in that case because of the stage that the right to buy procedure had reached when the original secure tenant, Mrs Tonge, died). The key question is therefore whether section 123(3) applied to the facts of the present case.
49. Just as Mrs Tonge had done, Mrs Howe served a notice under section 122 which required that a member of her family who was not a joint tenant but who then occupied the dwelling house as their only or principal home should share the right to buy it with her. Did the notice she served on the Council “validly require” that the right to buy should be shared with her son? If it did, then, as was held in *Tonge*, the notice brought into operation the whole of section 123(3). The requirement in the notice is “valid” if the conditions specified in subsections 123(1) and (2) are met at the time when the notice is given.
50. Section 123(1) is concerned with where the family member is living at the date when the section 122 notice is given, and not at some future date; it cannot sensibly be construed in any other way. It required Mr Howe to be living in the dwelling house as his only or principal home *at that time*. Subsection (2) imposed the further requirement that he should have been residing there with his mother throughout the period of twelve months *ending with the giving of the notice*. On the facts found by the judge, both those conditions were met at the time when the relevant notice was given in May 2020.
51. It does not matter when those facts were established, or by what means, because, as the judge held, their existence was enough to make Mrs Howe’s requirement to share her existing right to buy valid at the time when her claim was notified to the Council. (Mr Calzavara accepted in his oral argument that this finding was correct.) The Council had already accepted in its section 124 notice that Mrs Howe had a right to buy at the time

she gave the section 122 notice. That meant that at that time she had a right which was capable of being shared with a member of the family who met the relevant conditions, as Mr Howe did.

52. The “separate and distinct” consequences of section 123(3) must have arisen as at the date on which the notice was given, as a matter of the straightforward and natural construction of the language used. That is plainly how the Court of Appeal interpreted section 123(3) in *Tonge* because it treated the consequences prescribed by the section as being the immediate result of the service of a notice which validly required the sharing of the right to buy. It is highly artificial to seek to carve out one sub-clause from a sentence in that section and treat it as being forward-looking, especially when

it is expressed in the present tense. The reasoning in *Tonge* had nothing to do with the fact that Miss Tonge’s right to buy had been accepted by the landlord before her mother died. As the judge recognised, the fact that the process was more advanced at the time of the original secure tenant’s death is not a valid ground for distinguishing between that case and this. The reasoning in that case applies equally to the present case.

53. Once it was established that Mr Howe met the requirements of section 123 at the time the section 122 notice was given and therefore his mother validly required that he should share in her right to buy, there was no reason to interpret the second sub-clause of section 123(3) as implicitly requiring something else to happen before the consequences specified would occur, namely, that Mr Howe acquired the right jointly with his mother and was deemed to be a statutory tenant (for the purposes of Part V only). There is no lacuna in section 123(3) which the drafter omitted to fill. It is clear that the service of a notice with a valid requirement to share the right is the mechanism by which those consequences are triggered.
54. There was nothing more that Mr Howe needed to do in order to be deemed to be a joint secure tenant of the property, and there is nothing in *Copping* which suggests that there was, or which affects the analysis in *Tonge*. In the same way as Miss Tonge, Mr Howe acquired the right to buy the property jointly with his mother when she validly required the Council to share her right with him. The Court of Appeal in *Tonge* (at page 103 of the report) rejected the submission that the right belonged to Mrs Tonge and her daughter together and not to one of them alone, because of the deeming provision at the end of section 123(3). It follows that upon Mrs Howe’s death, just like Miss Tonge, Mr Howe was deemed to be the sole surviving secure tenant. That was enough to meet the requirement that there be a secure tenant in possession throughout the process.
55. There is nothing in the 1985 Act which requires the deemed secure tenant in those circumstances to serve another section 122 notice; the notice already given by Mrs Howe was a claim made on behalf of each of them to exercise the right to buy. It follows that just as in *Tonge*, if the original secure tenant dies before the other’s right to buy has been established, the survivor remains entitled to establish and enforce their previously shared right, in the same way as if there were originally two secure tenants but the landlord disputed the status of one of them and the other then died. So long as the surviving deemed secure tenant still occupies the property as their sole or main home, and that remains the position up until completion, then once their right to buy has been established in section 181 proceedings brought in reliance on the deceased

secured tenant's section 122 notice, all the remaining consequences of Part V will follow, and the landlord will be obliged to serve a section 125 notice and follow the process through.

56. It is unnecessary to express a view about what would happen in this type of situation if instead of dying, the original secure tenant were to leave the premises, or lost their right to buy in a manner which would not necessarily deprive a secure joint tenant of their right. It is best for that scenario to be addressed in a case in which it arises. Suffice it to say that I do not wish to be taken as endorsing Mr Calzavara's submission that the situation in the present case was no different from the situation in which, by the time the family member's claim came to be established, the secure tenant had ceased to live in the property and had lost their right to buy.
57. I do not consider that section 136(6) adds any weight to Mr Calzavara's argument. But for section 136(1), on the death of the secure tenant, as in *Tonge*, the family member who is still deemed to be a secure tenant for the purposes of Part V would be the only person left who could pursue a right to buy the property (assuming that they were still living there). The effect of that subsection is to put the new secure tenant in the same position as the deceased secure tenant, provided that the new tenant is also living in the property as their sole or main residence. In consequence of section 136(1), there would still be a deemed joint secure tenancy under section 123(3) and, on the face of it, a joint right to buy, subject to section 136(6), which qualifies the position.
58. Section 136(6) appears to do no more than place limits on the consequences of keeping the (deemed) joint tenancy alive. It is only if the new secure tenant could have validly required the family member to share in the right to buy if the new tenant had served the original section 122 notice, that the latter can share the right to buy which the new tenant has acquired by reason of section 136(1). This could give rise to an argument (which it is unnecessary to decide for the purposes of the present case) that at least in theory, section 136(6) can cause a family member with a pre-existing right to buy and deemed status under section 123(3) to lose that right and that status, however far the process for enforcing the right has progressed. But even if that were so, it would be the case irrespective of whether or when the family member's right was established at the time of the succession. Section 136(6) sheds no light upon when the consequences of section 123(3) come into effect.
59. Whatever its meaning and effect, section 136(6) cannot detract from the clear language of section 123(3).
60. For those reasons, I would dismiss this appeal.

Lord Justice Zacaroli:

61. I agree.

Lord Justice Lewison:

62. I also agree.

