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Citation: Loveland, I. (2015). Analysing the doctrine of survivorship in joint tenancies of people's homes from a human rights perspective. Conveyancer and Property Lawyer, 2015(1), pp. 47-60.

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Survivorship-

Analysing the doctrine of survivorship in joint tenancies of people's homes from a human rights perspective

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The issue

The scenario is common on county court possession lists. The Claimant (C), a local authority or a housing association, qua landlord seeks possession of residential premises. There are two defendants, D1 and D2. Against D1, C claims that D1 succeeded qua joint assured or secure tenant of the premises through the doctrine of survivorship to a sole tenancy on the death of her/his ex-husband/wife (X) with whom he/she shared the joint tenancy. D1 had not occupied the premises for many years, and so on the death of her/his ex-husband/wife the tenancy immediately lost assured or secure status and has been determined by a valid notice to quit to D1. Against D2, who was X's partner at the time of his/her death and who has occupied the premises for several years as her/his home, C claims she/he is a trespasser.

A minor variation on these facts recently played out in *Solihull MBC v Hickin*.[1] In *Hickin,* D2 was the daughter of X and D1 was X's long separated ex-husband and joint tenant, who had left the family home many years earlier. X had never taken steps (under the Matrimonial Causes Act 1973) to become a sole tenant. But for the doctrine of survivorship D2 would have been an entitled successor to the secure tenancy under the scheme of the Housing Act 1985 on her mother's death. The Supreme Court divided 3-2[2] in *Hickin* in response to arguments for D2 to the effect that the text and purpose of the 1985 Act could be read in a fashion which disapplied the survivorship doctrine in circumstances where D1 was not occupying the premises as her/his only or principal home when X died.

This paper considers an argument not made in *Hickin*; namely that in the factual matrix which the case presented the doctrine of survivorship is per se incompatible with Art 8 of Sch. 1 of the Human Rights Act 1988. A similar argument can be made for assured tenancies, albeit that statutory succession rights in assured tenancies are limited to spouses of the deceased (joint) tenant.[3] The argument does not suggest that any action of

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[1] [2012] UKSC 39; [2012] 1 W.L.R. 2295.

[2] Lords Sumption, Hope and Walker formed the majority. Lords Mance and Clarke dissented.

[3] S.17(4)(a) of the Housing Act 1988 defines a spouse for these purpose as a person to whom one is married or "a person who was living with the tenant as his or her wife". For secure tenancies statutory rights of succession to family members now arise only under tenancies granted prior to the entry in force of

C is incompatible with Art 8; nor is suggested that it would be disproportionate for the court to make a possession order because of D2's personal circumstances. The defence is a '*Kay* Gateway A' defence; ie that the rule of law upon which C relies – the doctrine of survivorship *itself - is incompatible with Art 8*.[4] The argument has several discrete but inter-linked elements.

Art 8 HRA 1998 and Art 8 ECHR have the same meaning

One should stress immediately that the argued incompatibility is with Art 8 HRA 1998, not Art 8 ECHR. The contention is that a common law rule is incompatible with a provision of a United Kingdom statute, not with a term of an international law treaty. The point is in constitutional terms trite; common law rules are overridden by inconsistent statutory provisions.

In ascertaining the requirements of Art 8 HRA 1998, courts must necessarily look to judgments on the point given by domestic appellate courts. Further, per HRA 1998 s.2 domestic courts must in determining the meaning of Art 8 HRA 1998 take account of relevant judgments of the ECtHR as to the meaning of Art 8 ECHR. The approach currently taken to s.2 by the Supreme Court is that domestic courts should adopt a very strong presumption that the meanings of articles in Sch. 1 of the HRA 1998 and their textually identical counterparts in the ECHR are the same. This position is stated as a matter of general principle by the House of Lords/Supreme Court in *R (Ullah) v Special Adjudicator, Do v Immigration Appeal Tribunal*5 per Lord Bingham:

"20 In determining the present question, the House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court: R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295 , para 26. This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law…..". (Emphasis added).

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provisions of the Localism Act 2011 s.160 which restricts statutory succession rights to spouses and partners.

[4] Cf. Lord Nicholls in *Lambeth LBC v Kay* [2006] UKHL 10; [2006] 2 A.C. 465 at para 54: "... [I]nevitably there may be the exceedingly rare case where the legislative code or, indeed, the common law is impeachable on human rights grounds". See also Lord Scott at para 168.

[5] [2004] UKHL 26; [2004] 2 A.C. 323. See the helpful analyses of the point in E. Bjorge, 'The courts and the ECHR: a principled approach to the Strasbourg jurisprudence' (2013) *Cambridge LJ* 289. The degree to which *Ullah* properly reflects the 'original intent' of the framers of the HRA is perhaps best explored in Lord Irvine, 'A British interpretation of Convention rights' [2012] *Public Law* 237.

That general principle has been reiterated in the specific context of domestic housing law in *Manchester CC v Pinnock*.6

The principle is significant to this argument because it is perhaps more obvious in ECtHR authority than in domestic case law that the notion of 'respect' for the home and for family life contained in Art 8 goes beyond the mere issue of occupancy in the sense of (temporary) irremovability and embraces the legal quality of a person's occupancy. There is more to Art 8 in a possession proceedings context than simply asking a court to assess if it would be proportionate to make a possession order.

Art 8 is concerned with the legal quality of occupancy rights as well as with occupancy per se

Any challenge to the Art 8 compatibility of the survivorship doctrine rests partly on the premise that Art 8 is concerned with the legal details of occupancy entitlements as well as with mere occupancy. In a domestic context, *Ghaidan v Mendoza*7 illustrates the point perfectly. The effect of a successful Art 8 (and Art 14) defence in that case was that Mr Mendoza would live in his home as a protected tenant under the Rent Act 1977 rather than as assured tenant under the Housing Act 1988. The bundle of legal rights he derived from the 1977 Act was substantially more beneficial to him than those contained in the 1988 Act. His occupancy of his home was never under threat; what engaged Art 8 in that case was that the legal details of his occupancy were in issue.

Similarly, the successful pleading of an Art 8 defence against the service of a notice to quit goes beyond merely preserving a contingent entitlement to occupy.8 The effect of a successful defence is to restore a tenancy - and the rights it contained - that had prima facie been determined. For an introductory tenant the likely consequence of an effective Art 8 defence is that her/his introductory tenancy becomes transformed into a secure tenancy; a very different – and for the tenant much more valuable – set of legal rights than is provided by an introductory tenancy.

There is now a substantial body of ECtHR case law considering the significance of Art 8 in nuisance cases. That Art 8 goes to the quality of occupancy of one's home is axiomatic to these cases. So in *Moreno Gomez v Spain*9 the ECtHR observed:

53 Article 8 of the Convention protects the individual's right to respect for his private and family life, his home and his correspondence. A home will usually be the place, the physically defined area, where private

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[6] [2011] UKSC 6; [2011] 2 W.L.R. 220 at paras 46-49.

[7] [2004] UKHL 30; [2004] 2 A.C. 557.

[8] The point is of especial relevance to homeless persons who have been housed by a local authority per Part VII of the Housing Act 1996. Per Housing Act 1985 Sch. 1 para 4 such tenancies are not secure and so exist only at common law and can be determined by either party serving a notice to quit.

[9] (2005) 41 E.H.R.R. 40. See F. McManus, 'Noise and human rights: Gomez v Spain' (2006) *Environmental LR* 225. The point shades into the question of the extent to which Art 8 imposes positive obligations in the housing context; see P. Kenna, 'Housing rights: positive duties and enforceable rights at the European Court of Human Rights' (2008) *European Human Rights Law Review* 193.

and family life develops. The individual has a right to respect for his home, meaning not just the right to the actual physical area, but also to the quiet enjoyment of that area. Breaches of the right to respect of the home are not confined to concrete or physical breaches, such as unauthorised entry into a person's home, but also include those that are not concrete or physical, such as noise, emissions, smells or other forms of interference. A serious breach may result in the breach of a person's right to respect for his home if it prevents him from enjoying the amenities of his home.

In our hypothetical case, D2 is precluded entirely from enjoying the amenities of her home by the application of the doctrine of survivorship. And as one reads on into Moreno-Gomez one seems to find the ECtHR approving precisely what D2 would be asking the court to do:

55 Although the object of Art.8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it may involve the authorities' adopting measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. Whether the case is analysed in terms of a positive duty on the State to take reasonable and appropriate measures to secure the applicants' rights under para.1 of Art.8 or in terms of an interference by a public authority to be justified in accordance with para.2, the applicable principles are broadly similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole.

It might be suggested that the 'competing interests' at stake when this issue arises are also those of D1 and D2. In circumstances where the premises are also D1's home for Art 8 purposes that contention has obvious force, and one might doubt that there would be any legitimate role for Art 8 to play in determining how domestic law should order those competing interests. But in the hypothetical case outlined above, that competition does not arise.

The premises in issue in this case are D2's home. They have been D2's home for many years. They are where she lived with her partner. They are – giving rein to dramatic licence - where she watched him die. They are where she has for a considerable time made and conducted her family life. Her formal legal status (if the doctrine of survivorship is applicable) as a trespasser in her home belies the social reality of her presence in the premises.

The premises are not D1's home. They have not been D1's home for many years. None of her family life is there. Her formal legal status as a joint tenant with D2's deceased partner belied the social reality of her absence from the premises.

In short, D2 has a profound Art 8 interest in the premises, while D1 has no Art 8 interest in them at all.

D2's Art 8 interest is that the law shows 'respect' for her home and family life. When one searches for the meaning of words in Sch.1 of the HRA one must accord great weight to the meaning that the ECtHR has attached to those same words in the ECHR. But we might also remember that 'respect' in Art 8 of Sch. 1 of the HRA is an ordinary word in a statute and its meaning there is conditioned by its commonly accepted meaning in everyday parlance.10 And if we consult the Concise Oxford Dictionary's definition of respect we find, inter alia:

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[10] The point is perhaps so obvious it is often overlooked. On the relevance of dictionary definitions see *Mandla v Dowell-Lee* [1983] 2 A.C. 548 at 561-562 per Lord Fraser.

'1. regard with deference, esteem or honour. 2 a avoid interfering with, harming, degrading, insulting, injuring or interrupting. b treat with consideration…..'

But the doctrine of survivorship completely ignores D2's Art 8 home and family life interests in the premises. If affords them no weight at all. It sacrifices them entirely to a person who has no such interests. They are afforded not a scintilla of deference, esteem or honour. They receive not a jot of consideration. Nor is any role afforded to a court to assess the necessity in this case of all of D2's Art 8 interest in the premises being automatically vested in D2.There is no respect in the Art 8 sense here. The rule requires unbending legal formalism irrespective of empirical reality.

Art 8 compliant law cannot ignore 'biological and social realities'

Such formalism has long been regarded by the ECtHR as incompatible with Art 8's protection of respect for family life. The point is powerfully point in *Kroon v Netherlands*11:

40. In the Court's opinion, "respect" for "family life" requires that biological and social reality prevail over a legal presumption which, as in the present case, flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone. Accordingly, the Court concludes that, even having regard to the margin of appreciation left to the State, the Netherlands has failed to secure to the applicants the "respect" for their family life to which they are entitled under the Convention. There has accordingly been a violation of Article 8.

The point was reiterated in *Emonet v Switzerland*12

86 …..["R]espect" for the applicants' family life required that biological and social reality be taken into account to avoid the blind, mechanical application of the provisions of the law to this very particular situation for which they were clearly not intended. Failure to take such considerations into account flew in the face of the wishes of the persons concerned, without actually benefiting anybody.

The Claimant in our case might quite credibly be portrayed as seeking to avail itself of a "blind, mechanical application of the provisions of the law to this very particular situation for which they were clearly not intended". Such undiscerning legal formalism might be thought to be the very epitome of disrespect for a Convention Right.

The margin of appreciation should be narrow because the measure it requires the eviction of a person from her lawfully established home….

In framing its laws in the field of housing policy, a signatory State to the ECHR enjoys a margin of appreciation. But while the margin is broad in respect of macro-policy issues

[11] (1995) 19 E.H.R.R. 263.

[12] (2009) 49 E.H.R.R. 11.

such as land use planning or asset transfers,13 it is distinctly narrower when what is in issue is the removal of an individual from a lawfully established and entered home. The most recent ECtHR restatement of this issue in the housing law context is found in *Kay v United Kingdom*:14

66…. The margin afforded to national authorities will vary depending on the Convention right in issue and its importance for the individual in question. The Court set out its approach in Connors at [82], in which it stated:

"The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of intimate or key rights (see, for example, Dudgeon v. the United Kingdom, judgment of 22 October 1981 , Series A no. 45, p. 21, § 52; Gillow v. the United Kingdom, judgment of 24 November 1986 , Series A, no. 104, § 55). On the other hand, in spheres involving the application of social or economic policies, there is authority that the margin of appreciation is wide, as in the planning context where the Court has found that '[i]n so far as the exercise of discretion involving a multitude of local factors is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a wide margin of appreciation' (Buckley v. the United Kingdom…).

67 Further, it is clear from the case law of the Court that the requirement under art.8(2) that the interference be "necessary in a democratic society" raises a question of procedure as well as one of substance. The procedural safeguards available to the individual will be especially material in determining whether the respondent State has, when fixing the regulatory framework, remained within its margin of appreciation. In particular, the Court must examine whether the decision-making process leading to measures of interference was fair and such as to afford due respect to the interests safeguarded to the individual by art.8…. .

68 …[T]he loss of one's home is the most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal in light of the relevant principles under art.8 of the Convention…….

The 'measure' in issue here is the doctrine of survivorship. That is what deprives D2 of her otherwise clear entitlement to succeed to the tenancy of her home. The interference resulting from 'the measure' is 'extreme'. 'The measure' intrudes grotesquely 'into the personal sphere of the applicant'. The margin of appreciation should for this reason be narrow. And the margin should be narrowed further for the reason outlined below.

…and because Parliament has never considered the issue

It might be suggested that there cannot really be anything 'wrong' with the rule of survivorship since Parliament has taken no express steps to modify or abolish it. And - it might be added – Parliament has had obvious opportunities to do so in the many bits of housing legislation passed in the past fifty years. And if Parliament has chosen not to act,

[13] The obvious and most often cited example is *James v United Kingdom* (1986) 8 E.H.R.R , in which the court rejected a challenge to the compatibility of the Leasehold Reform Act 1967 with Art 14 and Art 1 of the First Protocol. But – and the point may be forgotten – *James* was not an Art 8 case. The petitioners' interest was in protecting their wealth, not their respective homes.

[14] (2012) 54 E.H.R.R. 30

it cannot be appropriate for the courts to do so. The argument is of course a prosaic restatement of the jurisprudential principle that the courts' use of the HRA should take a deferential approach to the choices made by Parliament.

At this juncture, one needs – as a housing lawyer - to view Art 8 of the HRA as a repository of general constitutional principles about the nature of law and lawmaking rather than simply a collection of micro-level rules. The general constitutional principle arising here is illustrated by perhaps the most well-known Art 8 judgment, that of the House of Lords in *Campbell v MGN*.15 .

Presumably the limitations of the tort of breach of confidence had been well known to successive cohorts of MPs and governments for years before the Daily Mirror decided furtively to record Ms Campbell's visits to her substance abuse clinics. The intrusion of tabloid journalists in 1990 into the intensive care room where the actor Gordon Kaye was recovering from serious injuries and the subsequent publication of a largely fabricated story about him prompted particularly extensive public discussion of our lack of a privacy law.16 But Parliament 'chose' not to introduce specific privacy legislation.

That the House of Lords in Campbell nonetheless felt re-evaluation and redefinition of the common law to remedy this legislative mission17 was appropriate might be explained in one of three ways. Either the court had jettisoned a constitutional orthodoxy that the common law be deferential to legislative inaction; or that the orthodoxy was never really an orthodoxy at all; or – and for conservative constitutional theorists this is the more attractive explanation – the previous orthodoxy had been displaced by Parliament in enacting the HRA itself whenever what is in issue is a common law rule which subsists without ever having been subject to rigorous judicial or legislative consideration of its compliance with a Convention Right.

That is the rationale which we see informing the ECtHR's understanding of the ECHR's generic 'necessary in a democratic society' principle. The most cogent illustration of the point is the Grand Chamber's judgment in the prisoners' voting rights case, *Hirst v United Kingdom*.18 While the Court accepted that on this issue States should enjoy a wide margin of appreciation, the breadth of that margin would diminish if a State could not demonstrate that its impugned law was the result of a properly informed and thorough lawmaking process (emphases added):

> 79 As to the weight to be attached to the position adopted by the legislature and judiciary in the United Kingdom, there is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of a blanket ban on the right of a convicted prisoner to vote. It is true that the question was considered by the multi-party Speaker's Conference on Electoral Law in 1968 which unanimously recommended that a convicted prisoner should not be entitled to vote. It is also true that the Working Party, which recommended the amendment to the law to allow unconvicted prisoners to vote, recorded that successive Governments had taken the view that convicted prisoners had lost the moral authority to vote

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[15] [2002] UKHL 22; [2004] 2 A.C. 457.

[16] See *Kaye v Robertson* [1991] F.S.R. 62 and the commentary by B. Markesenis, 'Our patchy law of privacy' (1990) *Modern LR* 802.

[17] See especially N. Moreham, 'Privacy in the common law: a doctrinal and theoretical analysis' (2005) 121 *LQR* 628.

[18] [2006] 42 E.H.R.R. 41.

and did not therefore argue for a change in the legislation. It may perhaps be said that, by voting the way they did to exempt unconvicted prisoners from the restriction on voting, Parliament implicitly affirmed the need for continued restrictions on the voting rights of convicted prisoners. Nonetheless it cannot be said that there was any substantive debate by members of the legislature on the continued justification in light of modern day penal policy and of current human rights standards for maintaining such a general restriction on the right of prisoners to vote.

There is no evidence that Parliament has ever sought to weigh the competing interests or to assess the proportionality of the rule of survivorship. The rule has never been subject to legislative consideration. We cannot find: 'any substantive debate by members of the legislature on the continued justification' for the rule. There is – legislatively speaking – nothing for the courts to consider and so nothing to defer to; (because, of course, nothing can come of nothing). The rule's legitimacy must lie solely in the rigour of the lawmaking process which produced it.

But that process has obvious flaws. The rule was formulated at common law many years prior to the enactment of Art 8. The point remains unconsidered by either the legislature or the higher courts. The effect of the HRA 1998 is that the courts should consider it now.

It is no longer contentious to assert that one effect of the HRA is a requirement that courts re-evaluate the defensibility of established rules and principles of the common law in the light of ECHR jurisprudence. The point was clearly stated by both Lord Nicholls and Lord Hope in *Campbell* when assessing if the tort of breach of confidence met the privacy requirements of Art 8. Lord Hope (at para 86) offered the following observation:

"The language has changed following the coming into operation of the Human Rights Act 1998 and the incorporation into domestic law of article 8 and article 10 of the Convention. We now talk about the right to respect for private life and the countervailing right to freedom of expression. The jurisprudence of the European Court offers important guidance as to how these competing rights ought to be approached and analysed. I doubt whether the result is that the centre of gravity, as my noble and learned friend, Lord Hoffmann, says, has shifted. It seems to me that the balancing exercise to which that guidance is directed is essentially the same exercise, although it is plainly now more carefully focussed and more penetrating. As Lord Woolf CJ said in A v B plc [2003] QB 195, 202, para 4, new breadth and strength is given to the action for breach of confidence by these articles." (Emphasis added).

Similarly, Lord Nicholls reasoned (at para 19):

"In applying this approach, and giving effect to the values protected by article 8, courts will often be aided by adopting the structure of article 8 in the same way as they now habitually apply the Strasbourg court's approach to article 10 when resolving questions concerning freedom of expression. Articles 8 and 10 call for a more explicit analysis of competing considerations than the three traditional requirements of the cause of action for breach of confidence…." (Emphasis added).

Campbell provides a methodological equivalent of the HRA s.3 requirement imposed on the courts in respect of statutory provisions when common law rules interfere with Convention Rights.19 There is no obvious basis for assuming that this approach is limited

[19] Cf the comments of Lord Phillips in *HRH Prince of Wales v Associated Newspapers Ltd* [2007] EWHC 522 (Ch); [2008] Ch 57:

25 ….. Section 3 of the Human Rights Act 1998 requires the court, so far as it is possible, to read and give effect to legislation in a manner which is compatible with the Convention rights. The English court has recognised that it should also, in so far as possible, develop the common law in such a way as to give effect

to the privacy element of Art 8. Rather we might sensibly assume that all rules of common law which impinge upon any Art 8 entitlement should be subject to "more explicit analysis of competing considerations" or a "more carefully focused and more penetrating" balancing exercise. The propriety of this approach was expressly approved by Lord Walker in the House of Lords in the context of possession proceedings in *Birmingham CC v Doherty*:20

"Public authorities are bound to take account of human rights. As our domestic human rights jurisprudence develops and becomes bedded down, this should be seen as a normal part of their functions, not an exotic introduction. I would echo a note by Anthony Lester QC and David Pannick QC 116 LQR 380, 383 to which I have already alluded:

'The central legislative purpose [of the 1998 Act] is that of bringing the Convention rights home, that is, of domesticating them so that they are not regarded as alien rights protected exclusively by a "foreign" European court. To change the metaphor yet again, Convention rights must be woven into the fabric of domestic law. In the absence of a written British constitution, it is especially important to weave the Convention rights into the principles of the common law and of equity so that they strengthen rather than undermine those principles, including the principle of legal certainty'.

The rule of survivorship cannot withstand 'more carefully focused and more penetrating' analysis

For the majority in Hickin, Lord Sumption (at para 3) rooted the doctrine in *Cunningham Reid v Public Trustee*.21 From an Art 8 perspective, this attribution is obviously problematic since *Cunningham-Reid* predates the HRA by some 50+ years. Nor was it a case concerned with a person's home; the premises in issue were commercial property. Indeed, it was not even a possession case, but an attempt by the surviving joint tenant to fix the deceased joint tenant's estate with liability for 50 % of the rent on the remaining term of the lease.

The only other authority cited by Lord Sunption is *Tennant v Hutton*, an unreported Court of Appeal judgment from 1996, invoked only to illustrate that on the death of one joint tenant there is strictu sensu no 'succession'; rather the 'tenant' – who was formerly two persons – has now become just one person.

The majority in *Hickin* offers no reason for the rule other than suggesting it avoids potentially capricious results in circumstances where the surviving joint secure tenant who wished to live in the premises and is not the spouse or a family member of the deceased tenant (and so not a statutory successor) would find his entitlement to do so overridden by the statutory succession entitlement of a qualified successor. Such caprice would be avoided if the rule was inapplicable only in circumstances where the surviving joint tenant had no Art 8 interest in the premises.

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to Convention rights. In this way horizontal effect is given to the Convention. This would seem to accord with the view of the European Court of Human Rights as to the duty of the court as a public authority: see *Von Hannover v Germany* (2004) 40 EHRR 1, paras 74 and 78.

[20] [2008] UKHL 57; [2009] 1 AC 367 at para 109.

[21] [1944] KB 602.

For present purposes, it is pertinent to note that no member of the majority made any reference to evidence indicating the policy which Parliament intended to pursue when enacting the succession provisions of the Housing Act 1985 vis a vis the doctrine of survivorship. This is because the point was not considered. Nor was it considered when the Housing Act 1988 was enacted.

The dissenting opinion of Lord Mance (impliedly) hits this Art 8 nail square on the head:

57 The majority's opinion is, however, to the contrary. It leads to what I regard as an unhappy discordance with both the Rent Act and the Scottish legal positions. The philosophy of the Housing Act 1985 is that one statutory succession to a secure tenancy should be available between a tenant and a qualified successor, each in turn enjoying occupation as secure tenant. The majority's opinion means that, on Mrs Hickin's death in 2007, no such statutory succession could occur as between Mrs Hickin and her otherwise qualified daughter who had lived together in the house from 1967. This is because of the notional and insecure legal interest which Mr Hickin, who departed the house and family up to 25 years before Mrs Hickin's death, is said to enjoy and on which the council only relies in order to serve notice to quit on him to terminate it. If this is the law, I would suggest that Parliament might appropriately take another look at it, and see whether similar protection should not be made available to persons in Miss Hickin's position to that made specific in Scotland

Had the Art 8 point been pleaded in Hickin, the court itself could have taken 'another look' at the rule. The closer one looks, the less satisfactory the rule seems to be in a *Hickin*-type scenario.

It is clearly very convenient for the claimant landlord that the succession rights of a potential occupant who would succeed as an assured/secure tenant are trumped by the interests of a person who has not lived in the house for years. It is very convenient because the absentee tenant has no defence to a valid notice to quit and all that can raised by way of defence by any occupier are the minimally effective public law and Art 8 proportionality arguments. The landlord can thus regain possession at minimal cost and expense and then – if it so wishes – re-let or sell the premises.

The Art 8 test is not however one of convenience. It is one of necessity. Is it necessary that:

(a) On the death of one joint tenant of a family, the entirety of the legal interests in that home must invariably vest in the other joint tenant even if the premises have not for many years been that tenant's home and he has neither performed nor accepted any of the obligations arises and there is another person whose home is in the premises and who satisfies the statutory succession criteria;

And is it necessary that:

(b) No court or independent tribunal can ever disapply or mitigate the rigours of this rule irrespective of the circumstances of the joint tenant and the other putative successor.

The issue is therefore whether this lack of respect can be justified per HRA Art 8(2). This raises the three familiar questions:

(a) Does the rule pursue a legitimate Art 8(2) interest ?

(b) Is the rule sufficiently precisely defined to be ‘in accordance with the law’ ?

(c) Is the rule necessary in a democratic society ?

It is obvious that the rule of survivorship is ‘in accordance with the law’. The rule is perfectly clear in its terms and entirely absolute in its effect. But it is those very qualities which render it so problematic in respect of points (a) and (c).

The only credible Art 8(2) interest that can be served by the rule is that it protects the rights and freedoms of others. The only such rights which are conceivably implicated in the commonplace scenario outlined above are those of D1 and of C. But D1 has no Art 8 interest in these premises. She will not assert any legal interest in the tenancy on Mr X’s death. She will not make any challenge to the notice to quit. Indeed, the effect of the doctrine in this scenario vis a vis D1 is to saddle her (albeit briefly) with an unwanted set of obligations until such time as ‘her tenancy’ was determined by the notice to quit.

C will usually be the freehold owner of the premises in cases of this type. But it owns the premises in order to rent them. And having rented them on an assured tenancy it has accepted that the use which it can make of them is controlled by the Housing Act 1985 or 1988, and that a tenant’s spouse can succeed to the tenancy (or another family member if the tenancy was secure) is a commonplace feature of the statutory schemes.

Had Mr X been a sole tenant (which one might think de facto he had been for many years) D2 would succeed. Had Mr X sought a property adjustment order per the Matrimonial Causes Act 1973 s.24 he would surely have been granted it and D2 would succeed (since a person who becomes a sole tenant through an MCA order is not a successor for assured or secure tenancy purposes). It is a nonsense to suggest that D2 becoming the tenant of her home would somehow be inimical to the schemes of the Housing Act 1985 or 1988.

Further, D2 would be a tenant subject to all of the obligations of the tenancy agreement. She would occupy on just the same terms as any other tenant. The incursion into C’s interests which would be made by disapplying the doctrine of survivorship in a case such as this is minimal

This would suggest that the interests to be weighed in the scales in opposition to D2’s continued occupancy of her home are too slight to make it necessary for the law to deny a court any role in assessing the propriety of applying the survivorship doctrine.

A question of horizontal effect ?

A further objection to the argument presented here is that one is seeking to give purely horizontal effect to Art 8. But it is now clear and uncontroversial that the HRA has spurred re-evaluation of common law rules which regulate the relationships of private parties is clear and uncontroversial. The point is bluntly made by Lord Nicholls in *Campbell:*

“17 The time has come to recognise that the values enshrined in articles 8 and 10 are now part of the cause of action for breach of confidence. As Lord Woolf CJ has said, the courts have been able to achieve this result by absorbing the rights protected by articles 8 and 10 into this cause of action: A v B plc [2003] QB 195, 202, para 4. Further, it should now be recognised that for this purpose these values are of general

application. The values embodied in articles 8 and 10 are as much applicable in disputes between individuals or between an individual and a non-governmental body such as a newspaper as they are in disputes between individuals and a public authority.".22

In the context of housing law, it is clear that HRA s.3 bites on disputes between private individuals. The analysis offered by Keene LJ in *Ghaidan v Mendoza* in the Court of Appeal was not questioned in the House of Lords:

"[37]… First, the concession made on behalf of the respondent that the appellant's rights under the European Convention on Human Rights are relevant to the construction of para 2 of Sch 1 to the Rent Act 1977, even though this is litigation between two private individuals, was a proper one. Section 6(1) of the Human Rights Act 1998 ('the 1998 Act') makes it unlawful for a public authority to act in a way which is incompatible with a Convention right, and by virtue of s 6(3)(a) this court is a public authority. It follows that this court cannot act incompatibly with a Convention right, unless (see s 6(2)) the court is acting to give effect to or enforce provisions of or made under primary legislation which cannot be read or given effect in a way which is compatible with such a right.

[38] That patently takes one to s 3 of the 1998 Act, with its obligation on the court to read and give effect to primary and secondary legislation in a way compatible with Convention rights 'so far as it is possible to do so'….".23

It is hard to resist the conclusion that if the challenge brought by a defendant under Art 8 is to the content of a rule of domestic law rather than the way in which a compatible rule is being used by a Claimant, then whether the Claimant is a public authority or private individual is irrelevant. What is under attack is the substantive law itself.

Conclusion

Assuming that argument to be correct, there are then two routes to take D2 to her desired destination. The first would simply – and bluntly – to conclude that Art 8 has the effect of disapplying the survivorship doctrine in a *Hickin* type scenario. That may appear as rather too strong doctrinal meat for constitutionally conservative members of the judiciary.
A second and perhaps more constitutionally palatable route is to return to minority judgments in *Hickin*. The core of the opinions offered by Lord Mance and Lord Clarke was that the relevant provisions of the Housing Act 1985 (and by analogy those of the Housing Act 1988 for assured tenants) could properly be read - without invoking s.3 of the HRA 1998 – as envisaging succession only to persons who occupied the premises as secure (or assured) tenants when the other joint tenant died. That construction of the 1985

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[22] The same point as to the 'horizontal' effect of the HRA on the common law is made in *HRH Prince of Wales v Associated Newspapers Ltd* [2007] EWHC 522 (Ch); [2008] Ch. 57 per Lord Phillips CJ (emphasis added):
"25 ….. Section 3 of the Human Rights Act 1998 requires the court, so far as it is possible, to read and give effect to legislation in a manner which is compatible with the Convention rights. *The English court has recognised that it should also, in so far as possible, develop the common law in such a way as to give effect to Convention rights. In this way horizontal effect is given to the Convention*. This would seem to accord with the view of the European Court of Human Rights as to the duty of the court as a public authority: see Von Hannover v Germany (2004) 40 EHRR 1, paras 74 and 78.

[23] [2003] Ch.380 at [37-38].

and 1988 Acts would of course remove the Art 8 incompatible effect of the survivorship doctrine. It would not seem extravagant to suggest that if two members of a five person Supreme Court bench have read the 1985 Act in this way it must be 'possible' per HRA s.3 to lend it that meaning. What D2 would essentially be asking the court to do is accept that the interpretive obligation arising under HRA 1998 s.3 is not limited simply to the construction of statutory provisions in isolation, but extends also adjusting the meaning of statutory provisions so that the provisions themselves have the effect to overriding or redefining Art 8 incompatible rules of common law which interlock with the statutory provisions concerned.

The proposition takes us back – albeit perhaps rather indirectly – to the trite constitutional maxim alluded to above: common law rules are overridden by inconsistent statutory provisions.