Case No: B2/2005/2016

Neutral Citation Number: [2006] EWCA Civ 767

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM WANDSWORTH COUNTY COURT
HIS HONOUR JUDGE WALKER
4WT12506

Royal Courts of Justice
Strand, London, WC2A 2LL

14 6 2006

Before :

LORD JUSTICE WARD
LADY JUSTICE SMITH
and
MR JUSTICE CRESSWELL

- -

Between :

	THE CARPHONE WAREHOUSE UK LTD	**Appellant**
	- and -	
	CYRUS MALEKOUT	**Respondent**

- -

(Transcript of the Handed Down Judgment of
Smith Bernal Wordwave Limited, 190 Fleet Street
London EC4A 2AG
Tel No: 020 7404 1400, Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Mr Christopher Pymont QC & Mr Paul Clarke (instructed by **Clyde & Co**) for the **Appellant**
Mr Jan Luba QC & Mr Richard Alomo (instructed by **Collins**) for the **Respondent**

- -

Judgment**Lady Justice Smith :**

1. This is an appeal by Carphone Warehouse UK Ltd, brought by permission of Sir Martin Nourse, against that part of the judgment and order of His Honour Judge Walker dated 25th August 2005, whereby he refused the appellant's claim for possession of a maisonette, known as Flat 1, Central Mansions, Prentis Road, London SW16, of which premises the appellant is the landlord. The judge held that Dr Cyrus Malekout, the

respondent to this appeal, was entitled to statutory protection as the tenant of those premises. The issue which arises in this appeal is whether the judge was entitled to make that finding.

2. In 1985, Dr Malekout was granted a tenancy of the premises by the then landlord, the appellant's predecessors. The tenancy was protected by the provisions of the Rent Act 1977. In 1993, a fair rent of £ 160 per month was set by the rent officer, although there is some doubt as to whether proper notice of the increase was given. By 1997, the premises were in a poor state of repair. Possibly in 1997, but by December 1998 at the latest, the landlord terminated the contractual tenancy, allegedly for non-payment of rent. Pursuant to section 2 of the Rent Act 1977, the effect of that termination was that Dr Malekout retained the protection of the Rent Act, as a statutory tenant, 'if and so long as he occupied the premises as his residence'.

3. In March 1998, the landlord instituted proceedings for the recovery of rent arrears but those proceedings were later discontinued and no issue as to Dr Malekout's status as a statutory tenant arose at that time. From then onwards, the landlord and Dr Malekout were in dispute about the state of the premises. The premises became uninhabitable and from either 1998 or 1999 no one occupied them. In 2000, the appellant became the landlord by assignment. Still no one lived in the premises and no rent was paid. No repairs or improvements were carried out.

4. In May 2002, the appellant commenced an action claiming arrears of rent. This court has not seen the pleadings in that action. However, it is common ground, as the judge cited in his judgment in 2005, that the Particulars of Claim alleged that Dr Malekout 'has ceased to occupy the premises as his residence and that he has let his mother into occupation'. It was contended that the statutory tenancy had terminated. Dr Malekout defended the claim and asserted that the statutory tenancy continued. He alleged that rent was not payable on account of the condition of the premises and counterclaimed for breach of the implied covenant to repair. He also claimed for the charges which would be incurred for storing his possessions while the necessary repairs were carried out. On 7th May 2003, those proceedings were compromised and the terms were embodied in a Tomlin order as follows:

> "The Claimants and the Defendants having agreed to the terms set out in the Schedule hereto, IT IS ORDERED THAT:
>
> 1. All further proceedings in these claims be stayed except for the purposes of carrying such terms into effect. Liberty to apply to apply as to carrying such terms into effect.
>
> 2. There shall be no order as to costs, save that the publicly funded costs of Dr Malekout shall be the subject of a detailed assessment.

SCHEDULE

1. The Carphone Warehouse UK Limited agrees to carry out the works set out in "Schedule A" dated 5th December 2002 attached to this Order.

2. Upon the works being completed to the satisfaction of the independent expert (as set out below) Dr Malekout shall become liable for rent.

3. The Carphone Warehouse to indemnify Dr Malekout for reasonable storage charges incurred with Messrs Wates Limited.

4. The parties jointly apply in the format agreed (and attached) to the RICS [that is the Royal Institution of Chartered Surveyors] for an independent surveyor to be appointed to inspect the works.

5. Dr Malekout does grant the surveyor access to inspect.

6. Both sets of proceedings are discontinued and all claims therein settled in full and final settlement, no order as to costs."

5. This agreement was signed by the parties' representatives and approved by District Judge Walker. Schedule A comprised a list of 36 items of work to be carried out on the premises. It had been compiled by a surveyor named Mr Beg apparently for the purpose of the proceedings.

6. After this agreement, most of the works were carried out. The independent expert whose appointment had been agreed in the Tomlin order produced a report dated 18th July 2003 detailing the work that still required to be done. In October 2003 there was a site meeting at which outstanding works were discussed and an attempt made to reach agreement. It was agreed that item 27 on the schedule of works, which related to the condition of floorboards, should be undertaken by Dr Malekout's flooring contractor and that the work would be paid for by the appellant.

7. In December 2003, by which time the appellant considered that the work was as good as finished, it applied to the rent officer for the setting of a fair rent. A rent was set but the appellant appealed to the Rent Assessment Committee, which did not reach a final decision until December 2004. The rent was then set at £680.

8. Meanwhile, in late 2003 and early 2004, Dr Malekout was not satisfied with the works and still refused to pay rent. The premises remained unoccupied. In July 2004, the appellant issued proceedings for arrears of rent and possession. The claim for possession was pleaded on two alternative bases. First, it was said that the tenant was in arrears and

possession was claimed under Case 1 of Schedule 15 to the Rent Act 1997. That involved the implied assertion that Dr Malekout was entitled to the protection of the Rent Act and was therefore a statutory tenant. In the alternative, it was pleaded that Mr Malekout was no longer a statutory tenant because he had ceased to occupy the premises as his residence. Various particulars were given in support of that contention. It was said that Dr Malekout was living at 156 to 158 Mitcham Lane, Streatham, of which premises he and his wife were the owners.

9. A defence and counterclaim were served. Dr Malekout alleged that the premises were still not habitable; the appellant had failed to carry out all the repairs stipulated for in the schedule to the Tomlin order; in particular Dr Malekout contended that, in respect of item 27, his flooring contractor had been unable to complete the work because work remained to be done by the appellant. Rent was not payable. Dr Malekout also complained of problems with the electricity supply or wiring. In relation to the contention that he was not a statutory tenant, Dr Malekout contended that he was; he had only moved out of Central Mansions because the premises were not habitable and it had always been his intention to resume occupation once the works were complete. He agreed that he was living at 156 Mitcham Lane but said that it was subject to subsidence and he wished to live at Central Mansions.

10. The reply and defence to counterclaim alleged that the independent expert had certified that the works had been completed by the end of March 2004. Rent was payable from then or when a reasonable period had elapsed in which the flooring contractor could have completed item 27 of the works.

11. The action came on for hearing before Judge Walker in February 2005. After the first day's hearing, the judge was taken ill. A second day was fixed for 17th March. On the day before that, Dr Malekout took up residence in the flat. Due to a misunderstanding the hearing could not proceed on that day and the second day of the hearing took place in May. After the oral hearing, the parties were invited to put in written submissions on the issue of the statutory tenancy.

12. The judge gave judgment on 25th August. He identified two main issues. The first related to the dispute over the repairs and when the premises had become habitable. The second related to the claim for possession.

13. The judge found in favour of the appellant on all issues relating to the repairs. He held that the works were complete and the premises fit for habitation by the end of March 2004. Responsibility for item 27 lay with Dr Malekout. If instructed timeously, his flooring contractors could have completed the work by mid-April 2004. Rent was payable from 15th April. Pursuant to the agreement in the Tomlin order, the landlord

should pay the storage costs up to 15th April 2004.

14. On the issue of possession, it does not appear that the judge was asked to consider whether the landlord was entitled to possession under case 1 of schedule 15 to the Rent Act. That may have been because the amount of rent owing was small. Notice of the rent increase appeared not to have been served on Dr Malekout. When the storage charges were set off, the outstanding rent may even have been extinguished.

15. The issue of possession was argued and decided only on the basis of whether or not Dr Malekout was entitled to statutory protection under the Rent Act 1977. The test, correctly identified by the judge was whether at the date of commencement of proceedings he continued to occupy it as his residence. It was common ground that, where a tenant has not been living in the premises for some time, he might still be occupying the premises as his residence so as to preserve his status as a statutory tenant. In such circumstances, the burden lies on him to show that he is still in occupation. He might do this by demonstrating the reason for his absence coupled with an intention to return and usually also by demonstrating that intention, as for example by leaving his possessions in the property.

16. Dr Malekout gave evidence that he and his family had lived in the premises until they became uninhabitable in about 1998 and he had always intended to return to live in the premises once they were in proper order. In the meantime, he was living at 156 Mitcham Lane.

17. The appellant contended that Dr Malekout's settled home was 156 Mitcham Lane. It called evidence to show that, from about 1994 onwards, Dr Malekout had not lived at the flat; his elderly mother had lived there alone. The judge accepted that evidence, expressly rejecting, as dishonest, Dr Malekout's claim that he had remained in residence until 1998.

18. The appellant contended that because Dr Malekout had not lived at Central Mansions since about 1994, he had lost his statutory tenancy at some time in the mid-1990s. It could not therefore be said that he had an intention to return there. One cannot return to somewhere one has not occupied.

19. It was submitted on behalf of Dr Malekout that the judge could not take into account evidence that Mr Malekout had given up occupation in the 1990s. The issue of whether he was still a statutory tenant had been raised on the pleadings of the 2002 action. The 2002 action had been compromised and it was clear from the Tomlin order that the landlord's claim for possession had been abandoned and the parties had accepted that Dr Malekout would move into the premises when the works were finished. The only sensible inference from this was that Dr Malekout was a statutory tenant as at May 2003.

The appellant was estopped by the agreement forming part of the Tomlin order from contending that Dr Malekout had lost his statutory tenancy before May 2003.

20. In considering this submission, the judge cited a passage from *J Wright and H Wright v Newcastle Ltd and others* (unreported 25th May 2002) in which Waller LJ said that, where proceedings were compromised, one could not say that the issues settled were res judicata but nonetheless it would be an abuse of process to allow the same issues to be relitigated later. He said that, if in later proceedings a party raised an issue which had been raised in earlier proceedings, it was necessary to decide what issues had been settled in the first litigation. If proceedings were stayed pursuant to a Tomlin order, all issues arising in those proceedings were stayed.

21. The judge applied that approach to the present case. He held that the issue of the statutory tenancy had been raised in the 2002 proceedings and had therefore been settled and stayed under the Tomlin order. The judge said that, if he had been asked to decide the issue of whether Dr Malekout was a statutory tenant in the course of the 2002 proceedings, he would have held that he was not; he had lost that protection because he had ceased to occupy the premises as his residence in about 1994. However, that issue had not been judicially determined in the 2002 proceedings; instead the proceedings had been compromised on the terms set out in the Tomlin order. This order had not expressly mentioned the issue of the statutory tenancy but the only inference to be drawn from the order was that the point had been settled in Dr Malekout's favour as at 7th May 2003. It would therefore be an abuse of process for the landlord to contend that Dr Malekout had lost his statutory protection before May 2003. The judge observed that the appellant's application in December 2003 for the fixing of a fair rent was consistent only with that conclusion.

22. The judge expressed his concern that, because the effect of the Tomlin order had not been clearly raised on the pleadings in the current proceedings, he had been invited and allowed to hear evidence about the mother's sole occupation of the premises. Having accepted that evidence, he then found himself obliged as a matter of law to put aside his conclusions on that evidence and to start from the position that it had been agreed by both parties as at 7th May 2003 that Dr Malekout was a statutory tenant and would resume occupancy of the premises when the works were completed.

23. That being the position, the judge said that the question for him was whether, since 7th May 2003, Dr Malekout had ceased to occupy the premises as his residence. To find that he had ceased to do so, the judge would have to find that he had failed to return to occupation within a reasonable time after the works had been completed or ought reasonably to have been completed, if completion was in any way dependent on Dr Malekout's own actions. As he had found that the appellant had completed its share of the works by 29th March 2004 and Dr Malekout should have completed his part by mid-

April, at which date rent became payable, it was then

> "for Dr Malekout to show that he was preserving his status as a protected tenant and should then have resumed occupation or should at the very least have shown a genuine intention to return within a reasonable time after that date. What in fact happened was that Dr Malekout continued to argue the toss over what had been agreed about item 27 at the site meeting on 13th October 2003 and then the claimants issued the present proceedings claiming possession quite quickly, on 22nd July 2004. Dr Malekout delayed his actual return to occupy these premises until around 16th March 2005, but he does appear to have been intending to go into occupation once the dispute about item 27 had been resolved. And, as I have said, the [appellant] resorted to litigation quite rapidly. I am not saying it was unreasonable for them to do so on the issue of the liability for rent and to resolve the dispute over item 27, but in the context of the intention to occupy, or the lack of intention to occupy, this was a relatively short time given that, albeit wrongly, as I have found, Dr Malekout was asserting that he could not move back into occupation until the remainder of the item 27 work had been completed by the [appellant]. His behaviour is wholly consistent with that of a man who is frankly obstinate and obsessive on the subject, amongst other things, of the repairs, but that I cannot characterise as undermining an intention or negating an intention to resume occupation."

24. While expressing his dissatisfaction with the result, the judge said that he felt compelled to conclude that Mr Malekout retained the status of protected statutory tenant which had been recognised as his at the time of the Tomlin order. The appellant had to live with the agreement it had then made. Thus the claim for possession failed.

25. In this appeal, Mr Pymont QC for the appellant contended that the judge had erred in finding that Dr Malekout intended to return to the premises once the work was complete. He submitted that there was no or insufficient evidence to support this conclusion. It was perverse in that no reasonable tribunal could have so concluded. Further the judge had failed to take into account the fact that Dr Malekout had not lived at the premises since 1994 and had in fact lived at 156 Mitcham Lane throughout the intervening years.

26. Mr Pymont accepted that, as a matter of law, Dr Malekout must be taken as having been a statutory tenant at 7th May 2003 but did not accept that the judge was right to say that the question of whether he had subsequently lost that protection was to be determined

only by reference to events and conduct after that date. He submitted that there is no estoppel in respect of a changing situation. It was open to the appellant to show that, in the period after 7th May 2003, Dr Malekout had not had the requisite intention to return to the premises such as would support a finding that he remained a statutory tenant. Mr Pymont submitted that the judge was entitled and indeed obliged to take into account evidence of events before 7th May 2003. Given that he had rejected Dr Malekout's evidence that he had continued to live in the premises until they became uninhabitable in 1998/9, he should rationally have held that Dr Malekout could not have had the necessary intention to occupy the premises after 7th May 2003. He could not have the intention to return to premises which he had given up years before. For the judge so to hold was perverse. The judge recognised that his finding was unsatisfactory but seemed to think that he could do nothing about it. He could - and logically should - have made the appropriate findings of fact, relying on his rejection of Dr Malekout's evidence as dishonest.

27. In support of his submission that the judge was entitled and obliged to consider evidence of events and conduct before 7th May 2003, even if it tended to lead to a conclusion that was inconsistent with the agreement of that date, Mr Pymont relied upon the authority of *Mills v Cooper* [1967] 1QB 459. In that case, two sets of criminal proceedings were brought against the defendant for offences under section 127 of the Highways Act 1959 namely that of being a gypsy and, without lawful excuse, camping on a highway. The first proceedings were brought in respect of 22nd December 1965. Those proceedings were dismissed in February 1966 on the ground that the defendant was not a gypsy on that date. It appears that that decision was based upon a finding that the defendant was not of the Romany race. Ten weeks later, in the second proceedings, a similar allegation was made in respect of 13th March 1966. The defendant argued that there was an issue estoppel as to his status; he was not a gypsy. The Divisional Court (Lord Parker CJ, Diplock LJ and Ashworth J) held that there was no issue estoppel. Lord Parker said that, in the context of the Highways Act 1959, the word 'gypsy' did not mean a person of the Romany race but was to be given the colloquial meaning of a person leading a nomadic life with no fixed abode. Diplock LJ said that, once it was recognised that being a gypsy was not an unalterable status but depended on the way of life which the person was leading at a particular time, it was clear that the incorrectness of the assertion as to the defendant's status made in the first proceedings was not inconsistent with the correctness of the same assertion made in the second proceedings. The prosecution in the second proceedings were not estopped from asserting that the defendant was a gypsy on 13th March 1966 and from proving it if they could. Moreover, the prosecution was entitled to lead any evidence relevant to the issue of whether the defendant was a gypsy on 13th March 1966 and it mattered not that such evidence might also tend to show that he had also been a gypsy on 22nd December 1965. That was not an issue to which the justices had to address their minds.

28. Mr Pymont submitted that, because Dr Malekout's intention to return to the premises was not unalterable but was capable of changing with time, it followed that there was no issue estoppel arising from the Tomlin order as to his intention to return to the premises. Moreover, the judge was entitled and obliged to receive evidence relevant to his intention to return, even though that might tend to show that he had not had an intention to return as at 7th May 2003.

29. Mr Luba QC for Dr Malekout, contended that the effect of the Tomlin order was not to create an estoppel limited merely to the legal conclusion that Dr Malekout was a statutory tenant as at 7th May 2003; its effect was to create an estoppel as to the essential facts and circumstances underlying the agreement made at that time. If Dr Malekout was to be taken as a statutory tenant at that time, the necessary inference was that he had an intention to return to the premises to occupy them as his residence. That was so whatever might have been the situation in the mid-1990s. The judge had been right to take the presumed agreed factual situation of 7th May 2003 as his starting point. Mr Luba agreed with Mr Pymont that the judge was entitled to hear and take account of evidence about events and conduct both before and after May 2003. He was also entitled to hear evidence about events and conduct after the commencement of proceedings on 22nd July 2004. However, the issue the judge posed for himself, (correctly in Mr Luba's submission) was whether, during the period between 7th May 2003 and 22nd July 2004, Mr Malekout had lost his statutory protection by ceasing to occupy the premises as his residence. As he was not in actual occupation, the question was whether Dr Malekout could show (the burden being on him) that, during that time, he had always had an intention to return when the works were finished and the premises habitable. The judge's finding of fact leading to the conclusion that he had had the necessary intention was unimpeachable.

30. I for my part accept Mr Luba's submission. The appellant could have challenged Mr Malekout's status as a statutory tenant in the 2002 proceedings. Indeed, it did so on the pleadings but it did not take the issue to trial. Instead the issue was abandoned and agreement was reached on the basis that Mr Malekout was at that date a statutory tenant. That agreement cannot be treated as a bare statement of law. It must be clothed with the essential underlying facts. The agreement was predicated on the assumption that Dr Malekout had a statutory tenancy; that he was out of actual occupation but intended to go into actual occupation when the works were finished. It is clear that the appellant accepted that, as landlord, it was under an obligation to carry out the works listed in the schedule. Why would the appellant agree to carry out the works if there was no statutory tenancy? Examination of the schedule of works shows that several items were to be completed according to Dr Malekout's wishes and instructions; for example electric power sockets were to be sited as he requested. Why would Dr Malekout be interested in where the sockets were to go if he did not have an intention to return to live in the premises? Why, if Dr Malekout did not have an intention to return to the premises did the appellant agree to pay for the storage of Dr Malekout's furniture and effects (which

had apparently been within the premises) during the time when the works were to be carried out? Why would it be recorded that Dr Malekout would allow the independent surveyor to have access if he was not entitled (as tenant) to refuse access?

31. In my judgment it is clear that the agreement of May 2003 settled between the parties the issue of Dr Malekout's intention to return to actual occupation once the premises were habitable. In so far as the appellant had evidence that Dr Malekout had not occupied the premises as his residence since 1994 and had long since lost his status as a statutory tenancy, by the agreement, the appellant had waived its right to contend for that as a conclusion of law.

32. It was not disputed by Mr Luba that the appellant was entitled to call evidence that was relevant to the issue that the judge had to decide, even if that evidence related to events and conduct before 7th May 2003 and after 22nd July 2004. However, I would hold that the evidence relating to the sole occupation by Dr Malekout's mother between 1994 and 1998/9 was not relevant to the issue for the judge. That was, as the judge identified, whether Dr Malekout could show that, during the period between 7th May 2003 (the starting point about which there could be no dispute) and 22nd July 2004, (the end point which the judge correctly took as the date of commencement of proceedings,) Dr Malekout had always retained an intention to return to the property when it was habitable.

33. There was ample evidence from which the judge could infer that Dr Malekout had that intention. The very way in which he had acted in respect of the repairs was consistent with an intention to move back in. The judge found that Dr Malekout had been very difficult about the repairs and had made a lot of fuss. That he was difficult was consistent with his intention to move back in; he was insisting on things being done to his satisfaction. True it was that he had not moved back into the premises at the time when the judge held that they had become habitable. It would have been open to a judge to hold that that delay demonstrated that he had no intention to return. But the Judge did not draw that inference. He thought that Dr Malekout's delay in moving back in was because he did not agree that the repairs had been finished. He continued, as the judge put it, to argue the toss about the repairs. But, that did not mean that he had abandoned his intention to return. Moreover, by bringing proceedings as early as July 2004, the appellant had curtailed the period on which it might rely as demonstrating that Dr Malekout had no intention of returning. Had the proceedings not been issued until, say January 2005, (at which time Dr Malekout had still not returned), it would have been harder for Dr Malekout to persuade the judge of his intention to return and the judge might have been more ready to draw the inference that the statutory tenancy had been lost.

34. The appellant had sought to rely on evidence that Dr Malekout was in dispute with the

local authority over the payment of Council charge for the flat at Central Mansions. He was contending that he was not liable to pay because he was not living in the property. The premises were uninhabitable. In none of his letters did he assert that he had an intention to return once repairs had been carried out. The judge plainly took the view that this correspondence was not inconsistent with Dr Malekout's position and in my view he was right to do so. On Dr Malekout's argument with the Council, an intention to return was not relevant to liability for the charge; liability would only arise when he actually returned. So he had no reason to mention his intention.

35. In my judgment, *Mills v Cooper* does not assist the appellant. In *Mills* the court was concerned with two specific allegations of fact relating to the defendant's status as a gypsy at two different dates; there was no agreement as to his status on either date. Here, the court was concerned with an agreement as to Dr Malekout's status on 7th May 2003, reached between two parties of full age and capacity, both in receipt of legal advice. It is one thing to say that in the circumstances prevailing in *Mills,* there was no estoppel as to status and quite another to say that the appellant in this case was entitled to go behind the agreement as to status, freely entered into. As to the point Mr Pymont made about the admissibility of evidence, there was no dispute at the Bar. Evidence relevant to the issue before the judge was admissible, even though it might relate to events before or after the critical period. As I have said, in my view the evidence led about the mother's sole occupation in the 1990s was not relevant to the issue before the judge. I do not think he would have admitted it if he had realised at that stage how the case was going to be put on estoppel. As it was, he found himself in the unsatisfactory position of having heard the evidence and having been minded to accept that evidence. Then he was unable to act upon it.

36. For these reasons, I would dismiss this appeal.

Mr Justice Cresswell:

37. I agree.

Lord Justice Ward:

38. I also agree.